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**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

DENISE BEAUFORD,

Plaintiff,

v.

**E.W.H. GROUP INC. dba
BAKERSFIELD MITSUBISHI,
and DOES 1-50, inclusive,**

Defendants.

1: 09 - CV - 00066 - AWI - SMS

ORDER GRANTING PLAINTIFF
BEAUFORD'S MOTION FOR
REMAND AND REMANDING
ACTION TO KERN COUNTY
SUPERIOR COURT

Documents # 17 and # 9

BACKGROUND

This case arises on a motion to remand a class action suit, brought by plaintiff Denise Beauford ("Plaintiff") against defendant E.W.H. Group Inc. ("Defendant"), who operated a car dealership known as "Bakersfield Mitsubishi". The suit was originally filed on February 13, 2008, in the Kern County Superior Court. Plaintiff alleges violations of the California Tire Recycling Act, Cal. Pub. Res. Code § 42885, the Automobile Sales and Finance Act, Cal. Civ. Code § 2981 *et. seq.*, the Consumer Legal Remedies Act, Cal. Civ. Code § 1750 *et. seq.* and the California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200. All of Plaintiff's causes of action are brought pursuant to California State law. Defendant timely filed a motion for removal under 28 U.S.C. § 1446 on January 9, 2009, asserting diversity jurisdiction pursuant to the Class

1 Action Fairness Act of 2005 (“CAFA”), 28 U.S.C. §§ 1332(d) and 1453(b). Plaintiff filed a
2 motion to remand on May 15, 2009, pursuant to 28. U.S.C. § 1447.

3 **LEGAL STANDARD**

4 A civil action in state court may be removed by the defendant or defendants to a federal
5 district court if the district court has original jurisdiction over the matter. 28 U.S.C § 1441(a). In
6 enacting CAFA, Congress enlarged the original jurisdiction of the federal courts over class action
7 suits raising state law claims by providing for original jurisdiction for class actions that meet
8 certain specific requirements. CAFA states that for class actions with more than 100 class
9 members:

10 The district courts shall have original jurisdiction of any civil action in which the
11 matter in controversy exceeds the sum or value of \$5,000,000, exclusive of
12 interest and costs, and is a class action in which--(A) any member of a class of
13 plaintiffs is a citizen of a State different from any defendant; (B) any member of a
14 class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any
15 defendant is a citizen of a State; or (C) any member of a class of plaintiffs is a
16 citizen of a State and any defendant is a foreign state or a citizen or subject of a
17 foreign state.

18 28 U.S.C. §§ 1332(d)(2) and 1332(d)(5). CAFA, however, contains several exceptions to the
19 federal courts original jurisdiction over class actions. The “home state” exception provides that
20 “[a] district court shall decline to exercise jurisdiction under paragraph (2)” over a class action
21 where “two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and
22 the primary defendants, are citizens of the State in which the action was originally filed.” 28
23 U.S.C. § 1332(d)(4)(B). The “local controversy” exception states that a district court shall
24 decline to exercise jurisdiction where no other similar class action has been filed in the preceding
25 three years and:

26 (I) greater than two-thirds of the members of all proposed plaintiff classes in the
27 aggregate are citizens of the State in which the action was originally filed;

28 (II) at least 1 defendant is a defendant--(aa) from whom significant relief is sought
by members of the plaintiff class; (bb) whose alleged conduct forms a significant
basis for the claims asserted by the proposed plaintiff class; and (cc) who is a
citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of

1 each defendant were incurred in the State in which the action was originally filed;
2 28 U.S.C § 1332(d)(4)(A).

3 Once removed plaintiffs may move to remand their case to state court pursuant to 28
4 U.S.C § 1447(c), which provides:

5 A motion to remand the case on the basis of any defect other than lack of subject
6 matter jurisdiction must be made within 30 days after the filing of the notice of
7 removal under section 1446(a). If at any time before final judgment it appears that
8 the district court lacks subject matter jurisdiction, the case shall be remanded.

9 In reviewing a motion to remand, the removal statute must be strictly construed and “federal
10 jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance.”
11 Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992); see also Harris v. Bankers Life and Cas.
12 Co., 425 F.3d 689, 698 (9th Cir. 2005) (noting “the canon [of law] that instructs that removal
13 statutes should be construed narrowly in favor of remand to protect the jurisdiction of state
14 courts. . . . Our interpretation is consistent with the goal of the canon, which guards against
15 premature and protective removals and minimizes the potential for a cottage industry of removal
16 litigation.”)(citations omitted).

17 When removing a case to federal court under CAFA the Ninth Circuit has expressly held
18 that the burden to establish federal jurisdiction remains with the removing party. Abrego Abrego
19 v. The Dow Chemical Co., 443 F.3d 676, 682-683, 685 (9th Cir. 2006) (stating that “[i]n cases
20 removed from state court, the removing defendant has ‘always’ borne the burden of establishing
21 federal jurisdiction. . . .”)(citation omitted); 14C Charles Alan Wright, Arthur R. Miller &
22 Edward H. Cooper, Federal Practice & Procedure § 3739 at 423-24 (collecting cases).
23 Furthermore, if the jurisdictional facts of the party asserting jurisdiction are challenged, the
24 burden falls on the party asserting federal jurisdiction to provide competent proof. McNutt v.
25 General Motors Acceptance Corp. of Indiana, 298 U.S. 178, 189 (1936); Industrial Tectonics,
26 Inc. v. Aero Alloy, 912 F.2d 1090, 1092 (9th Cir. 1990); see also Pettis ex rel. U.S. v.
27 Morrison-Knudsen Co., Inc., 577 F.2d 668, 674 (9th Cir. 1979) (finding “that plaintiff has the
28 burden of establishing jurisdiction if it is properly controverted by the opposing party” and

1 a citizen of the State of California and that Defendant EWH Group Inc. is a corporation
2 incorporated under the laws of the State of California and has its principle place of business in
3 California at 5200 Gasoline Alley Drive, Bakersfield, California, 93313. In Defendant’s motion
4 for removal, Defendant alleges that “at least one member of the class of plaintiffs is a citizen of a
5 State different from at least one defendant” and that “a perfunctory review” of their sales records
6 revealed “two class members from the state of Texas”. See Notice of Removal ¶ 5. Defendant
7 further alleges that as “the class size easily exceeds two hundred” and Plaintiff’s requested
8 CTRA penalties of \$25,000 per class member make the amount in controversy exceed the sum of
9 \$5,000,000. Defendant, while admitting the exact number of plaintiffs is unknown to it, asserts
10 the class of plaintiffs substantially exceeds 100 members.

11 **DISCUSSION**

12 Due to the timing of Plaintiff’s motion to remand, Plaintiff can only challenge this court’s
13 subject matter jurisdiction. Defendant removed this action pursuant to this court’s original
14 jurisdiction over class actions provided for in CAFA. Congress’ purpose in enacting CAFA was
15 to broaden district court’s original jurisdiction over certain kinds of “mass actions.” Abrego
16 Abrego 443 F.3dat 684. The Ninth Circuit has noted CAFA’s somewhat clumsy wording and
17 construction, especially in Congress’ blurring of the line between original jurisdiction and
18 removal. Id. at 680-681 (specifically contrasting Congress’ conventional starting point of
19 creating original jurisdiction and its later use of “actions ‘removeable under paragraphs (2)
20 through (10).’”). However, the burden for establishing jurisdiction under CAFA remains with
21 the removing defendant. Id. at 684-85. In the current context, Defendant must establish the class
22 of plaintiffs contains 100 or more members, there exists minimal diversity—that at least one
23 plaintiff is a citizen of state different from any defendant, and that the amount in controversy in
24 the aggregate exceeds \$5,000,000. For the following reasons, the court finds that Defendant has
25 not met his burden of proof in establishing subject matter jurisdiction and therefore grants
26 Plaintiff’s motion to remand.

1 I. Minimal Diversity

2 To establish minimal diversity jurisdiction Defendant must allege that at least one
3 plaintiff and one defendant are citizens of different states. The Ninth Circuit, citing the reasoning
4 of the Third and Fifth Circuits, has held that “absent unusual circumstances, a party seeking to
5 invoke diversity jurisdiction should be able to allege affirmatively the actual citizenship of the
6 relevant parties.” Kanter v. Warner-Lambert Co. 265 F.3d 853, 857 (9th Cir. 2001); Whitmire v.
7 Victus Ltd. 212 F.3d 885, 887 (5th Cir. 2000); Chemical Leaman Tank Lines, Inc. v. Aetna
8 Casualty and Surety Co., 177 F.3d 210, 222 n. 13 (3d Cir. 1999).

9 In Kanter the Ninth Circuit clearly stated the requirements for citizenship:

10 To be a citizen of a state, a natural person must first be a citizen of the United
11 States. The natural person's state citizenship is then determined by her state of
12 domicile, not her state of residence. A person's domicile is her permanent home,
13 where she resides with the intention to remain or to which she intends to return.
14 A person residing in a given state is not necessarily domiciled there, and thus is
15 not necessarily a citizen of that state.

16 Kanter, 265 F.3d at 857 (citations omitted). The distinction between a resident and a citizen has
17 been well established in the law of this country for 200 years, as the Fourth Circuit ably
18 illustrates in its survey of the Supreme Court’s consistent application of this distinction from
19 1798 through today. Axel Johnson, Inc. V. Carroll Carolina Oil Co.,145 F.3d 660, 663 (4th Cir.
20 1998); see e.g., Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 828 (1989); Bingham v.
21 Cabot, 3 U.S. (3 Dall.) 382, 1 L.Ed. 646 (1798). In the context of challenges to removal
22 jurisdiction the determination of citizenship, and thus domicile, “require an inquiry into the
23 circumstances at the time the notice of removal is filed.” Spencer v. U.S. Dist. Court for
24 Northern Dist. of Ca.,393 F.3d 867, 871 (9th Cir. 2004).

25 Here Defendant has failed to meet its burden to be able to “affirmatively allege” and
26 provide “competent proof” supporting minimal diversity. Defendant alleges in its notice of
27 removal that:
28

1 5. This court has jurisdiction over this class action under the provisions of 28
U.S.C. § 1332(d) because:

2 a. Plaintiff Denise Beauford is a citizen of the State of California
3 b. Defendant EWH Group Inc. is a corporation incorporated under the laws of the
State of California and has its principal place of business at 5200 Gasoline Alley
Drive, Bakersfield, California, 93313

4 c. In the relevant time period covered by the class action claims, Defendant has
5 sold many vehicles, some to persons who have since taken up citizenship in states
6 other than California. **At least one member of the class of plaintiffs is a citizen
of a State different from at least one defendant within the meaning of 28
U.S.C § 1332(d)(2)(A). A perfunctory review of the many sales made in the
7 statutory period yielded two class members from the state of Texas.**

8 Defendant believes that when a thorough review of the sales history is made,
additional diverse class members will be ascertained.

9 See Notice of Removal ¶ 5 (emphasis added). Defendant in its memorandum in opposition to
10 Plaintiff's motion to remand directs the court to the declaration of Defendant's custodian of
11 records as its only support for the proposition that "EWH Group has shown by a preponderance
12 minimal diversity in its notice of removal". Def. Opp. to Motion to Remand at 2. Defendant
13 asserts it "cannot and must not release the private information of its customer [sic] to salsify [sic]
14 Plaintiff's inquiries." Id. The declaration by Defendant's custodian of records, Mo Hosseini,
15 states that following a partial review of Defendant's records he found two contracts with
16 potentially diverse class members. Mr. Hosseini's declaration states in relevant sections:

17 5. The practice and procedure of E.W.H. Group, Inc. when creating a contract with
a vehicle purchaser is to create a contract with the buyers name and full address as
it appears on the buyer's drivers license.

18 7. I reviewed some of the recent sales contracts entered into during the alleged
19 class claim period and found the contracts for two vehicle buyers, both citizens of
Texas.

20 8. One contract, dated September 1, 2007, for vehicle with VIN number ending in
134 was made to potential class member Gavino. C, a resident of San Benito,
Texas.

21 9. A second contract, dated Decmenber 10, 2007, for vehicle with VIN number
22 ending in 929 was made to potential class member Arnold. C, a resident of San
Antonio, Texas.

23 Decl. of M. Hosseini at 2.

24 Even under highly deferential standards the court is "not bound to accept as true a legal
25 conclusion couched as a factual allegation". Bell Atlantic Corp. v. Twombly 550 U.S. 554, 555-
26 56 (2007) (quoting Papasan v. Allain, 478 U.S. 265, 286 (1986)); see also Ashcroft v. Iqbal 129

1 S.Ct.1937, 1950-51 (2009) (affirming and applying the first prong of the Twombly analysis–
2 identifying legal conclusions that do not merit deference). Defendant’s legal conclusion that
3 potential class plaintiffs Gavino, C. and Arnold, C. are citizens of Texas is not borne out by the
4 evidence Defendant has presented to this court. Defendant’s conclusion that Gavino, C. and
5 Arnold, C. are citizens of Texas rests solely on the declaration by Defendant’s custodian of
6 records. Despite Defendant’s legal conclusion to the contrary, it is clear that at best the evidence
7 Defendant has provided establishes that two potential class members had Texas drivers licenses,
8 implying they were Texas residents a year to a year and a half before the time in question–the
9 date of Defendant’s notice of removal– January 8, 2009. Domicile, not residency, is the central
10 question in determining citizenship for diversity, and Defendant has not produced competent
11 evidence establishing the permanent homes and intentions of potential class members Gavino, C.
12 and Arnold, C. at the time of removal. Allegations of residency are insufficient to support
13 diversity jurisdiction. See Shaw v. Quincy Mining Co., 145 U.S. 444, 447 (1892) (“It was held
14 by this court from the beginning that an averment that a party resided within the State or the
15 district in which the suit was brought was not sufficient to support the [diversity] jurisdiction,
16 because in the common use of words a resident might not be a citizen, and therefore it was not
17 stated expressly and beyond ambiguity that he was a citizen of the State . . . The same rule has
18 been maintained to the present day. . . .”); see also Snell v. Cleveland, Inc., 316 F.3d 822, 824
19 (9th Cir. 2002)(paraphrasing parenthetically Mantin v. Broad. Music, Inc., 244 F.2d 204, 206
20 (9th Cir. 1957), for the proposition that “an allegation of residency cannot be regarded as an
21 allegation of citizenship for the purpose of diversity jurisdiction”). The court therefore
22 concludes that Defendant has failed to meet its burden to provide competent proof of Gavino, C.
23 and Arnold, C.’s citizenship, and as such, Defendant is not able to affirmatively allege minimal
24 diversity of citizenship.¹ Because diversity of citizenship is absent, this court lacks subject

25
26 ¹The court recognizes that the court has discretion to grant Defendant leave to amend the
27 notice of removal. See Barrow Develop. Co. v. Fulton Ins. Co., 418 F.2d 316, 317 (9th Cir.
1969) (reviewing a request for leave to amend and expressly holding 28 U.S.C. § 1653 applies to

1 matter jurisdiction and remand is required.

2 **CONCLUSION AND ORDER**

3 Accordingly, the Court ORDERS that the Plaintiff’s motion for remand is hereby
4 GRANTED. Defendant’s motion to dismiss is DENIED as MOOT. The Clerk of the Court is
5 DIRECTED to REMAND this case to the Kern County Superior Court.

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7 IT IS SO ORDERED.

8 **Dated: June 23, 2009**

/s/ Anthony W. Ishii
CHIEF UNITED STATES DISTRICT JUDGE

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_____ notices of removal). The court declines to exercise this discretion because Defendant neither asks for leave to amend nor provides additional evidence to establish diversity of citizenship.