

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Pamela Curry, Individually and on Behalf	:	
of Those Similarly Situated,	:	Case No. 1:09CV505
	:	
Plaintiff,	:	Chief Judge Susan J. Dlott
	:	
v.	:	REDACTED ORDER GRANTING
	:	PLAINTIFF’S MOTION FOR
Applebee’s International, Inc., et al.,	:	REMAND
	:	
Defendants.	:	

This matter comes before the Court on Plaintiff Pamela Curry’s Motion for Remand. (Doc. 19.) The Court held a hearing on Plaintiff’s motion on October 27, 2009. For the reasons set forth below, the Court **GRANTS** Plaintiff’s motion.¹

I. BACKGROUND

Plaintiff Curry claims that Defendants Applebee’s International, Inc. (hereinafter “Applebee’s”), DineEquity, Inc., and Weight Watchers International, Inc. (hereinafter “Weight Watchers”) engaged in deceptive, fraudulent, and misleading acts and practices related to the advertising, labeling, marketing and sale of Weight Watchers menu items at Applebee’s restaurants across the state of Ohio. Plaintiff seeks to represent a class consisting of “[a]ll individuals who purchased a Weight Watchers menu item at an Applebee’s restaurant located in Ohio from September 4, 2004 until September 4, 2008.” (Doc. 12 at 1.)

This case is one of a number of class action suits currently pending against Defendants, in which the plaintiffs allege a variety of claims centered around statements Defendants made

¹ Redactions in this opinion are indicated as follows: *****.

about the fat, calorie, and fiber content and the Weight Watchers Points® value of Weight Watchers items on Applebee's menu. In addition to the instant case, those cases include: (1) Kramer et al. v. Applebee's International, Inc., et al., No. 2:09-cv-131 (E.D. KY., originally filed July 30, 2008 in the Boone County, Ky. Cir. Ct. and removed August 10, 2009); (2) Jones v DineEquity, Inc., No RG-08-391858 (Alameda County, CA Super. Ct., filed June 10, 2008); (3) Shepard v. DineEquity, Inc., et al., No. 08-cv-2416 KHV (D. Kan., filed September 9, 2008) (originally captioned Valiente et al. v. DineEquity, Inc., et al.); (4) Paskett v. DineEquity, Inc., No. 08-2-33950-5 (King County, Wash. Super. Ct., filed October 2, 2008); and (5) Jaramillo et al. v. DineEquity, Inc., et al., No. 09-cv-01983 (N.D. Ill., originally filed November 20, 2008 in the Cook County, Ill. Cir. Ct. and removed March 31, 2009).

On August 11, 2009, Defendants filed a motion before the Judicial Panel on Multidistrict Litigation ("MDL Panel") for coordinated and consolidated pretrial proceedings in the four federal actions – Curry, Kramer, Shepard, and Jaramillo. That same day, Defendants filed in the instant case a Motion to Stay All Proceedings Pending Decision of the Judicial Panel on Multidistrict Litigation. (Doc. 23.) This Court held a status conference on this case on August 12, 2009, during which the Court discussed Plaintiff's Motion for Remand and Defendants' Motion to Stay All Proceedings. The Court found the challenge raised in Plaintiff's Motion for Remand to be of primary concern and advised the parties that the Court would rule on that motion prior to determining whether the case should be stayed.

The Court learned during that status conference that counsel for Curry also represented the plaintiffs in the Kramer action, which presently is pending before Senior Judge William O. Bertelsman in the United States District Court for the Eastern District of Kentucky, and had filed

a similar motion for remand in that case. Due to the common facts and issues shared between this case and Kramer, Judge Bertelsman and this Court agreed to hold a joint hearing on the motions for remand in Curry and Kramer on October 27, 2009.

Having reviewed the parties' briefs and considered the oral arguments of counsel, this Court finds the following background information relevant to Plaintiff Curry's Motion for Remand. The instant case involves a number of Ohio law claims and proposes a class of individuals limited to those who purchased Weight Watchers menu items from Applebee's restaurants in Ohio during a certain time period. Specifically, Plaintiff alleges state law claims for fraud, breach of contract, promissory estoppel, negligent misrepresentation, violation of the Ohio Deceptive Trade Practices Act, Ohio Rev. Code § 4165.01 et seq., violation of the Ohio Consumer Sales Practices Act, Ohio Rev. Code § 1345.01 et seq., declaratory and injunctive relief, and civil conspiracy. (Complaint, Doc. 2.)

Plaintiff's complaint does not specify any amount of damages, but seeks the following relief: (1) that this action be certified as a class action under Rule 23 of the Ohio Rules of Civil Procedure; (2) compensatory damages for Plaintiff and members of the class in an amount to be determined at trial; (3) punitive damages; (4) interest, costs and attorneys fees; (5) declaratory and injunctive relief enjoining Defendants from engaging in unfair, deceptive and misleading acts and practices related to the Weight Watchers menu items; and (6) such other relief this Court deems appropriate. (Complaint at 24-25.)

Plaintiff originally filed this action in the Clermont County, Ohio Court of Common Pleas on September 2, 2008. While the case was still pending in state court, the parties engaged in discovery and filed a number of motions. Discovery included the exchange of interrogatories

and production of documents. Additionally, Plaintiff took at least four depositions and provided written responses to Defendants' requests for admissions.

In October 2008, the parties engaged in a mediation in San Francisco, California. During that mediation, Defendants' counsel provided Plaintiff's counsel with the Ohio sales figures for Weight Watchers menu items sold at Applebee's restaurants during the proposed class period.

The figures Defendants' counsel provided listed total sales per year as follows:

2004:	*****
2005:	*****
2006:	*****
2007:	*****
2008:	*****

(See Doc. 19 Ex. A.) The grand total of sales of Weight Watchers menu items during that period exceeds *****.

Approximately three months later, on January 31, 2009, Plaintiff sent a written settlement demand to Defendants. The letter proposed a global settlement of both the instant case and Kramer and the demand included a monetary and injunctive component. (See Doc. 19 Ex. B.)

With regard to the monetary component, Plaintiff proposed the following:

- issue relief of up to ***** worth of vouchers. Number of vouchers and number of dollars of each voucher subject to continued negotiation and agreement. Agreement by Defendants that \$1 voucher not sufficient. ***** based upon 5% of number of Weight Watcher'[sic]s items sold in Ohio and Kentucky during class period at average cost of \$7.00 per item.
- vouchers redeemable for 12 weeks, voucher program to run 16 weeks
- if not all vouchers redeemed, remainder goes to Ohio and Kentucky charities focused on child and adult obesity

(Id.) The requested injunctive relief included employee training related to the Weight Watchers menu items, increased testing of those items at Ohio and Kentucky Applebee's restaurants, publication of the test data on Applebee's website, and the placement of an enhanced disclaimer

on each page of the Applebee's menu that lists or advertises any Weight Watchers items. In addition to the monetary and injunctive relief, Plaintiff also requested attorney's fees in an unspecified amount "subject to application of court." (Id.)

The parties were unable to reach a settlement at that time. As a result, they proceeded with discovery. On April 7, 2009 Defendants served interrogatories on Plaintiff, two of which sought clarification of Curry's claimed damages:

INTERROGATORY NO. 25:

. . . [P]lease state the dollar amount of damages, injury, or harm YOU claim to have suffered both in the aggregate and for each visit [to Applebee's].

INTERROGATORY NO. 26:

Please state the dollar amount of damages, injury, or harm YOU claim the purported class in this case suffered.

(Doc. 29 Ex. 1, Norris Decl. Ex. B at 10.) In her June 22, 2009 response to Defendants' discovery request, Plaintiff objected to Interrogatory No. 25 on the grounds that it was overly broad, unduly burdensome, and called for a legal conclusions. Subject to those objections, Plaintiff responded as follows:

[W]hile Plaintiff does not know the exact value of the food items she purchased and consumed, she ate the Weight Watcher'[sic]s menu items more than a dozen times at the Blue Ash or Milford Applebee's restaurants. Plaintiff believes the aggregate amount spent on these items is in excess of \$75.00. Plaintiff will supplement this response as discovery proceeds.

(Doc. 29 Ex. 1, Norris Decl. Ex. D at 12.) Plaintiff raised similar objections to Interrogatory No. 26 and, subject to her objections, stated that "she is not aware at this time of the exact amount of damages suffered by the proposed class in this matter." (Id. at 13.) On July 2, 2009, Defendants requested clarification of her responses to those interrogatories. The parties held a phone

conference on July 15, 2009 to discuss Defendant's request for clarification. At that time, according to Defendants, Plaintiff's counsel advised counsel for Defendants that they believe Curry and all of the potential class members are entitled to a refund of the money they paid for Weight Watchers menu items during the class period.²

On July 20, 2009, approximately ten and a half months after Plaintiff filed her Complaint, Defendants removed the action to this Court pursuant to 28 U.S.C. §§ 1332(d), 1441, and 1446.³ On July 29, 2009, Plaintiff filed a motion to remand this case to the Clermont County Court of Common Pleas. Defendant contends that this Court has jurisdiction over this matter because the proposed class is comprised of more than 100 members, the amount in controversy exceeds \$5,000,000, and minimal diversity is met. Plaintiff does not dispute that those jurisdictional requirements are met. Rather, Plaintiff contends that Defendants failed to remove this case in a timely manner pursuant to the time limits set forth under 28 U.S.C. § 1446.

II. LEGAL STANDARD

Under 28 U.S.C. § 1447(c), a party may bring a motion to remand to challenge removal of an action from state court to federal court. A state court defendant's removal of an action to federal court is proper under 28 U.S.C. § 1441(a) as long as the action could have originally been filed in federal court. In the instant case, Defendants based jurisdiction on the Class Action Fairness Act ("CAFA"), Pub.L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.). CAFA provides in relevant part that "[t]he district courts shall have original

² Plaintiff subsequently memorialized that position in writing. (Doc. 29 Ex. 1, Norris Decl. Ex. F.)

³ At the time of removal, a number of motions were pending, including Plaintiff's motion for class certification and two defense motions for judgment on the pleadings, one of which had been fully briefed and argued before the court.

jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which [] any member of a class of plaintiffs is a citizen of a State different from any defendant . . .” 28 U.S.C. § 1332(d)(2)(A). The proposed class must also include at least 100 members. 28 U.S.C. § 1332(d)(5)(B).

The time limit for removal of civil cases is governed by 28 U.S.C. § 1446, which provides in part:

The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable . . .

28 U.S.C. § 1446(b). “[T]he statutory procedures for removal [set forth in section 1446] are to be strictly construed, and any doubts concerning jurisdiction should be resolved in favor of remand.” Deutsche Bank Nat. Trust v. Mitchell, NO. CIV. A. 3:08-08-DCR, 2008 WL 2812018, (E.D. Ky. July 18, 2008); see also Brierly v. Alusuisse Flexible Packaging, Inc., 184 F.3d 527, 534 (6th Cir. 1999); Seaton v. Jabe, 992 F.2d 79, 81 (6th Cir. 1993) (quoting Northern Illinois Gas Co. v. Airco Indus. Gases, 676 F.2d 270, 273 (7th Cir. 1982)) (“The strict time requirement for removal in civil cases is not jurisdictional; rather, ‘it is a strictly applied rule of procedure and untimeliness is a ground for remand so long as the timeliness defect has not been waived.’”); Campbell v. EPI Healthcare, LLC, 2009 WL 395498, at *3 (E.D. Ky. Feb. 18, 2009); Aslani v.

State Farm Mut. Auto. Ins. Co., NO. 06-15018, 2007 WL 734987, at *3 (E.D. Mich. Mar. 8, 2007); Praisler v. Ryder Integrated Logistics, Inc., 417 F. Supp. 2d 917, 919 (N.D. Ohio 2006). “The party removing an action bears the burden of establishing that the notice of removal was filed in a timely manner.” Washington v. Jefferson Tp. Local School Dist. School Bd., No. 3:04CV336, 2005 WL 2277419, at *1 (S.D. Ohio Sept. 19, 2005) (Rice, J.).

III. ANALYSIS

As stated above, Plaintiff seeks remand on the sole ground that Defendants’ removal of this case was untimely. Plaintiff does not argue that the amount in controversy was apparent from the Complaint. Instead, Plaintiff focuses on the second paragraph of 28 U.S.C.A. § 1446(b), which provides that the thirty-day removal period in a case not initially removable commences when the defendant receives an amended pleading, motion, order, or other paper indicating for the first time that the case is removable. In other words, the thirty-day removal period begins to run when the defendant receives evidence or information sufficient to satisfy the defendant’s burden of proof with regard to the removal requirements.

The Sixth Circuit has held that in cases such as this, where the complaint seeks an unspecified amount of damages, the removing defendant has the burden of demonstrating, by a preponderance of the evidence, that the amount in controversy requirement has been met.⁴ Gafford v. Gen’l Elec. Co., 997 F.2d 150, 158 (6th Cir. 1993); see also Hayes v. Equitable Energy Resources Co., 266 F.3d 560, 572 (6th Cir. 2001); Brown v. Jackson Hewitt, Inc., 2007

⁴ The Sixth Circuit also has held that CAFA does not alter that burden. Smith v. Nationwide Property and Cas. Ins. Co., 505 F.3d 401, 404 (6th Cir. 2007) (“CAFA does not alter the fact that the removing defendant has the burden of demonstrating, by a preponderance of the evidence, that the amount in controversy requirement has been met.” (internal quotation marks omitted)).

WL 642011 (N.D. Ohio 2007) (considering the amount in controversy in case removed pursuant to CAFA). In Gafford, 997 F.2d at 159, the Sixth Circuit explained that the defendant need not “research, state and prove the plaintiff’s claim for damages” in order to satisfy the preponderance of the evidence burden. Nonetheless, Defendant must do more than show the “amount in controversy ‘may’ or ‘could’ exceed the [jurisdictional] requirement.” Id.; see also McCraw v. Lyons, 863 F. Supp. 430, 434 (W.D. Ky. 1994) (noting that the “preponderance standard is a moderate burden . . . that requires that Defendant allege facts sufficient to establish that Plaintiff would more likely than not recover more than the jurisdictional amount, assuming the failure of Defendant’s affirmative defenses”).

“It is generally agreed that the amount in controversy should be determined ‘from the perspective of the plaintiff, with a focus on the economic value of the rights he seeks to protect.’” Williamson v. Aetna Life Ins. Co., 481 F.3d 369, 376 (6th Cir. 2007) (quoting Buckeye Recyclers v. CHEP USA, 228 F. Supp. 2d 818, 821 (S.D. Ohio 2002)). In calculating the amount in controversy, courts may consider compensatory damages, punitive damages, statutorily authorized attorneys’ fees, and economic value of the rights the plaintiff seeks to protect through injunctive relief. See Williamson v. Aetna Life Ins. Co., 481 F.3d 369, 376 (6th Cir. 2007) (“As a general rule, attorneys’ fees are excludable in determining the amount in controversy for purposes of diversity, unless the fees are provided for by contract or where a statute mandates or expressly allows the payment of such fees.”); Smith v. Nationwide Property and Cas. Ins. Co., 505 F.3d 401, 407 (6th Cir. 2007) (value of injunctive relief based on economic value of rights the plaintiff seeks to protect); Buckeye Recyclers v. CHEP USA, 228 F. Supp. 2d 818, 822 (S.D. Ohio 2002) (injunctive relief); Brown v. Jackson Hewitt, Inc., No.

1:06-cv-2632, 2007 WL 642011, at *3 (N.D. Ohio Feb. 27, 2007) (citing Hayes v. Equitable Energy Resources Co., 266 F.3d 560, 572 (6th Cir. 2001) (punitive damages); Clark v. Nat'l Travelers Life Ins. Co., 518 F.2d 1167, 1168 (6th Cir. 1975) (attorneys' fees); Pennsylvania R.R. Co. v. Girard, 210 F.2d 437, 439 (6th Cir. 1954) (injunctive relief)).

With regard to the amount in controversy in the instant case, Plaintiff contends that Defendants were in possession of “other papers” indicating the case is removable at least as of January 31, 2009. Specifically, Plaintiff contends that those “other papers” include Defendants’ own sales records, produced during the October 2008 mediation, and the January 31, 2009 settlement letter Plaintiff sent to Defendants. Courts have previously considered such documents in determining whether the amount in controversy is sufficient for removal. See Brown v. Jackson Hewitt, Inc., No. 1:06-cv-2632, 2007 WL 642011, at *5 (N.D. Ohio Feb. 27, 2007) (“[C]ommon sense also counsels that a sophisticated corporate party such as Defendant would present demand letters, similar verdicts or other evidence to support federal jurisdiction if such evidence existed.”); McClendon v. Challenge Financial Investors Corp., No. 1:08CV1189, 2009 WL 589245, at *4-5 (N.D. Ohio March 09, 2009) (holding that records prepared in the course of regularly conducted business may be used to establish the amount in controversy); Storball v. Atlantic Recording Corp., 989 F. Supp. 845, 847 (E.D. Mich. 1997) (finding that a mediation summary submitted by the plaintiff constituted an “other paper”). Accordingly, the Court must decide whether, under the particular circumstances of this case, the sales records and settlement letter contained sufficient information from which Defendants could “ascertain” that the amount in controversy in this case more likely than not exceeds \$5,000,000. See 28 U.S.C.A. § 1446(b).

Defendant argues that they did not have sufficient facts or evidence to satisfy their

burden on removal until the July 15, 2009 phone conference, during which Plaintiff's counsel indicated that they would seek the full value of the Weight Watchers menu items sold in Ohio as damages. Prior to that phone conference, Defendants argue, the sales records and July 31, 2009 settlement letter shed no light on the amount of damages Plaintiff seeks because Plaintiff made no statement regarding the percentage of the total sales that Plaintiff sought to recover.

Defendants point out that Plaintiff alleges in the Complaint that she and other class members were misled with respect to the calories, fat contents, and Weight Watchers Points® values of the Weight Watchers menu items, but that Plaintiff does not state that she and the class members did not receive the menu items or that the menu items had no value. On that basis, Defendants argue that the amount in controversy is limited to the amount that Plaintiffs contend is attributable to the alleged misrepresentation, and not the full value of the menu items.

Defendants rely on a number of cases in support of their position, beginning with Arales v. Fur By Weiss, Inc., 8th Dist. No. 81603, 2003-Ohio-3344, 2003 WL 21469131, at *1 (Ohio App. June 26, 2003), in which the buyer of a fur coat sued the retailer, claiming that the retailer had altered the original lining of the coat without informing her of the alterations prior to sale. The plaintiff alleged a claim under the Ohio Consumer Sales Practices Act and a claim of fraudulent concealment. Id. at *3-5. With respect to the fraud claim, the court found that "the measure of damages for fraud inducing the purchase or exchange of property is the difference between the property as it was represented to be and its actual value at the time of the purchase or exchange." Id. at *6 (internal quotation omitted). Defendants cite two other Ohio cases applying a similar damages calculation. See Duty v. Ricart Props., 10th Dist. Nos. 02AP-1142, 02AP-1206, 2003-Ohio-3330, 2003 WL 21470368, at *6 (Ohio App. June 26, 2003) (holding

that, in an action for fraud and violations of the Ohio Consumer Sales Practices Act, the buyer of a new car was not entitled to the value of the new car as damages based on dealership's fraud in giving her inaccurate information about financing and her possession of the car because giving the buyer the full value of the new car would place her in a better position than she would have been in had the dealership provided accurate information); Yurchak v. Boiman Constr., 3 Ohio App.3d 15, 17 n.3, 443 N.E.2d 526, 529 n.3 (Ohio App. 1981) (noting in dicta that in a breach of contract action, the plaintiff's restitution must be offset by any benefit received by the plaintiff).

The cases Defendants rely upon are readily distinguishable from the instant suit. First, Plaintiffs Complaint is not limited to claims of fraud, breach of contract, and violations of the Ohio Consumer Sales Practices Act. Rather, she alleges a variety of additional state law claims, including promissory estoppel, negligent misrepresentation, and violation of the Ohio Deceptive Trade Practices Act.

Second, it is much more difficult, if not impossible, to parse the value attributable to the misrepresentation from a \$7.00 meal than it is from a vehicle, a contract for services, or an appliance such as an air conditioner. Instead, common sense dictates that in a case such as this, the full value of the menu items sold would be sought as damages. Indeed, in Arales, upon which Defendants rely, the court recognized that in some cases, products may have no actual value to the plaintiff due to the misrepresentations made about the products in order to induce a sale. Under those circumstances, the full value of the product is recoverable. Arales, 2003 WL 21469131, at *6-7. For example, the Court found in Arales, that even though the plaintiff had continued possession of the fur coat and the coat had been appraised at a higher value than the purchase price, the plaintiff was still entitled to damages because she testified that "she would

not have bought it if she had known it had been sold to someone else and subsequently altered to hide that purchaser's monogram; in other words, that the coat was essentially worthless to her because of the concealed alteration." Id. at *7. In the instant case, Plaintiff chose to purchase the meals in question due to the reduced calories and fat content. In the absence of those attributes, the meal may have had little to no value to Plaintiff or any of the other class members. Therefore, to the extent that Plaintiff prevails on her fraud claim, she and the class members more likely than not would be entitled to the full value of the meals purchased.

The value of damages recoverable under breach of contract may similarly include the full value paid by the innocent party under the contract. In Yurchak, the third case relied upon by Defendants, the Court described the right to restitution as follows:

The right to restitution from a party who has substantially failed to perform his part of the bargain is firmly established. Once it is determined that a substantial breach has occurred, the non-breaching party has several options about what measures of recovery to pursue. He may pursue his expectancy interest and sue for damages or, if it is easier for him to show his restitution measure, then so be it, for that measure will certainly not be an unfair one to the defendant in the usual case. When a contract is breached, the innocent party may recover either his expectancy or the benefits he has conferred upon the breaching party by his performance under the contract.

Yurchak, 3 Ohio App.3d at 16, 443 N.E.2d at 528 (emphasis added) (internal citations and quotations omitted). Even if it is the case that restitution must be reduced by any benefit Plaintiff received by eating the Weight Watchers menu items, Plaintiff may succeed in showing that she received no true benefit due to the increased caloric and fat values of the meals.

In addition to relying on the cases discussed above, Defendants also contend that Plaintiff's responses to Defendants' interrogatories indicating that she could not provide a full calculation of damages demonstrates that Defendants also had no way of determining the amount

in controversy exceeded \$5,000,000. According to Defendants, if Plaintiff planned to seek the full value of those sales, she could have calculated the total amount of damages based on the sales figures Defendants provided and stated that amount in response to the interrogatories. The Court is not swayed by this argument. First, Defendants' argument requires this Court to assume that the only monetary damages available to Plaintiff and the potential class is the value of meals purchased by the potential class members. In the absence of any case law or other support, the Court will not make that assumption.

Second, Plaintiff's failure to state a total dollar amount of damages in response to Defendants' interrogatories does not alter the fact that Defendants previously had information showing that Plaintiff was basing monetary damages, at least in part, on the sales of Weight Watchers menu items during the class period. Though Plaintiff's complaint does not request a specific amount of monetary damages, the Complaint does state that:

[t]he question of monetary damages sustained by members of the Class does not create an obstacle to the certification of the Class. Defendants can likely identify all customers who purchased the Skewers, Tilapia, or other Weight Watcher' [sic]s Menu Items. Accordingly, Class Members can be identified and damages calculated objectively and easily by electronic data.

(Complaint ¶28.) The electronic data to which Plaintiff refers was under the control and in the possession of Defendants. Indeed, such data includes the sales figures Defendants produced at the October 2008 mediation, which show that Applebee's sold over ***** of Weight Watchers menu items in its Ohio restaurants during the proposed class period.

Plaintiff's January 31, 2009 settlement letter further reinforces a total amount in controversy greater than \$5,000,000. Defendants argue that the settlement letter did not put them on notice of damages exceeding \$5,000,000 because Plaintiff requested only

*****), representing 5% of total sales, and did not affirmatively state that if settlement could not be reached Plaintiff would seek the full value of the sales. The Court finds, to the contrary, that Plaintiff's offer to settle the case for a specific percentage of the total sales shows that Plaintiff was using the total sales as a baseline for potentially recoverable damages. Defendants would have to ignore that formula in order to claim they had no evidence that the full value of the menu items was in controversy.

The Court therefore finds that at least as of receipt of the January 31, 2009 settlement letter⁵ Defendants were aware of sufficient evidence that the amount in controversy was more than likely greater than \$5,000,000. As a result, the removal period had long since passed by the time Defendants' removed this case. The Court therefore finds that the removal was untimely and remands this case to the Clermont County, Ohio Court of Common Pleas.

V. CONCLUSION

For the reasons stated above, the Court **GRANTS** Plaintiff's Motion for Remand.

IT IS SO ORDERED.

s/Susan J. Dlott
Chief Judge Susan J. Dlott
United States District Court

⁵ Though Plaintiffs did not take the position that the case was removable upon receipt of the Complaint by Defendants, the Court finds that Defendants' independent knowledge of the total sales figures may have rendered this case removable as early as the date they received the Complaint. See Johnson v. Hartford Fire Ins. Co., No. 4:08-cv-74, 2008 WL 3850482, at *3 (W.D. Ky. Aug. 15, 2008) (“[W]here a fair reading of the complaint, informed by a defendant's knowledge about the case and the nature of the claims asserted, would enable the defendant to conclude that it was more likely than not that the minimum jurisdictional amount is met, removal must occur within 30 days of the filing of the complaint.”).