

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

BRUCE LEVITT :  
 :  
v. : Civil No. WMN-05-949  
 :  
FAX.COM et al. :

MEMORANDUM

This suit arises out of three facsimile transmissions sent to Plaintiff Bruce Levitt in January and February of 2001.<sup>1</sup> Levitt alleges that these transmissions, which advertised various vacation packages, were sent to him unsolicited and in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (TCPA). This suit was originally filed in the Circuit Court for Baltimore City where it was certified as a class action. It was later removed to this Court under the provisions of the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d) and 1453 (CAFA). On October 12, 2005, this Court denied Plaintiff's motion to remand, concluding that the case was properly removed under CAFA. On May 25, 2007, this Court issued a Memorandum and Order decertifying the class.<sup>2</sup>

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<sup>1</sup> A more complete factual and procedural history of this action is presented in prior decisions of this court and of the Maryland Court of Appeals. See Levitt v. Fax.com, 857 A.2d 1089 (Md. 2004); and in this action, Paper Nos. 31 (Mem. of Dec. 01, 2005), 49 (Mem. of May 25, 2007), and 81 (Mem. of July 16, 2007).

<sup>2</sup> When this case was certified in the state court, Fax.com, the actual transmitter of the facsimiles in question, was an

In decertifying the class, this Court specifically rejected Plaintiff's argument that the class should remain certified because decertification would divest this Court of jurisdiction.

This Court reasoned:

In the context of post-removal reduction of the amount in controversy under the general diversity jurisdiction statute, courts have uniformly held that "diversity jurisdiction is determined at the time the action commences, and a federal court is not divested of jurisdiction . . . if the amount in controversy subsequently drops below the minimum jurisdictional level." Hill v. Blind Indus. & Serv. of Md., 179 F.3d 754, 757 (9<sup>th</sup> Cir. 1991). Because of the recentness of CAFA's enactment, few courts have considered the effect of post-removal certification or decertification decisions on continued federal jurisdiction. In the one decision of which this Court is aware that reached the issue, Davis v. Homecomings Financial, Civ. No. 05-1466, 2007 WL 905939 (W.D. Wash. March 22, 2007), the court held that a similar "time of removal" principle would apply.

In Davis, the plaintiff proposed a nation-wide class. After removal to federal court, the class was certified as state-wide class only which brought the amount in controversy under CAFA's requisite \$5 million threshold. Nonetheless, following the principle that the amount in controversy is determined as of the time of the removal, the court concluded that it could retain jurisdiction over the now diminished class action. The court reasoned that Congress is presumed to be aware of the legal context in

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active participant in this litigation. By the time the motion to decertify the class was filed, Fax.com had gone out of business and was no longer available to participate in this action. It was the absence of Fax.com and the resulting unavailability of the information that it might have possessed that this Court viewed as compelling decertification. See this Court's May 25, 2007 Mem.

which it is legislating and, despite this presumed knowledge, "there is no indication that Congress intended to alter the established authority regarding subsequent changes to the amount in controversy." Id. at \* 1. This Court agrees with that reasoning and concludes that decertification of the class will not divest this Court of jurisdiction over Plaintiff's now lone claim.

May 25, 2007, Memorandum at 17-18.

After the Court decertified the class, Plaintiff Levitt did nothing in this action for nine months. In response to a request from the Court for a status report, Plaintiff eventually filed several pleadings with the goal of adding new plaintiffs and eventually re-certifying a class. On July 16, 2007, the Court denied those motions, concluding that this case would proceed on Mr. Levitt's claims alone. Trial is currently scheduled for November 13, 2008.

Plaintiff has now filed a renewed motion to remand. Paper No. 83. The motion is ripe for decision. The Court will deny the motion, for reasons similar to those expressed in its May 25, 2007, Memorandum.

Since this Court issued its memorandum and order decertifying the class, numerous district courts have considered the issue of whether post-filing or post-removal changes in the certification status of an action filed or removed under CAFA can divest a court of jurisdiction. Unfortunately, the district

courts have split on the resolution of that issue.<sup>3</sup> Although no federal appellate court has directly addressed the effect of decertification or denial of certification on remandability of a CAFA action, the Seventh Circuit just recently addressed a similar question. Bullard v. Burlington Northern Santa Fe

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<sup>3</sup> For cases holding that post-filing or post-removal changes cannot divest a court of jurisdiction, see Cooper v. R. J. Reynolds Tobacco, Co., No. 308-153-J-32HTS, 2008 WL 4093715 at \*5-6 (M.D. Fla. August 29, 2008) (in case removed under CAFA's "mass action" provision, following "general rule that postremoval events do not deprive federal courts of subject-matter jurisdiction"); Genenbacher v. Centurytel Fiber Co. II, LLC, 500 F. Supp. 2d 1014 (C.D. Ill. 2007) (retaining jurisdiction after denial of class certification); In re Welding Fume Prods. Liab. Litig., 245 F.R.D. 279, 317 & n.195 (N.D. Ohio 2007) (suggesting that jurisdiction continues but allowing further briefing); Colomar v. Mercy Hosp., Inc., No. 05-22409-CIV, 2007 WL 2083562 (S.D. Fla. July 20, 2007) (retaining jurisdiction after summary judgment in favor of a defendant permitted "home state controversy" exception to be invoked); and Garcia v. Boyar & Miller, P.C., 2007 WL 1556961 at \*5 (N.D. Tex. May 30, 2007) (holding that federal jurisdiction remains, even if the plaintiffs withdraw their motion for class certification).

For cases holding that federal courts can be divested of jurisdiction, see Clausnitzer v. Federal Exp. Corp., No. 06-21457, 2008 WL 4194837 (S.D. Fla. Jun 18, 2008); Falcon v. Philips Elec. N. Am. Corp., 489 F. Supp. 2d 367 (S.D.N.Y. 2007) (dismissing case for lack of jurisdiction after proposed class representative found inadequate); Hoffer v. Cooper Wiring Devices, Inc., No. 1:06CV763, 2007 WL 2891401 (N.D. Ohio Sept. 28, 2007) (dismissing case but refraining from "announcing a general rule"); Arabian v. Sony Elecs. Inc., No. 05-1741, 2007 WL 2701340 (S.D. Cal. Sept. 13, 2007) (finding no jurisdiction); Gonzalez v. Pepsico, Inc., No. 06-2163-KHV, 2007 WL 1100204 (D. Kan. Apr. 11, 2007) (declining to stay merits-based discovery until after class certification is decided for efficiency purposes, stating in dictum that court would lose jurisdiction if certification were denied); McGaughey v. Treistman, No. 05 Civ. 7069(HB), 2007 WL 24935 (S.D.N.Y. Jan. 4, 2007) (denying class certification and dismissing for lack of jurisdiction).

See also Good v. Ameriprise Fin., Inc., No. 06-CV-1027, 2008 WL 185714 (D. Minn. Jan. 18, 2008) (reviewing split of authority and ordering further briefing).

Railway Co., 535 F.3d 759 (7th Cir. Aug. 1, 2008). In response to the plaintiffs' suggestion after removal that they might consider stipulating to a trial covering fewer than the 100 plaintiffs required under CAFA for an action to be deemed a "mass action,"<sup>4</sup> Judge Easterbrook opined that "he doubt[ed] that anything filed after a notice of removal can affect federal jurisdiction," citing Saint Paul Mercury Idemnity v. Red Cab Co., 303 U.S. 283, 289-90 (1938). Bullard, 535 F.3d at 762; see also Powerex Corp. v. Reliant Energy Servs., Inc., 127 S. Ct. 2411, 2417 n.1 (2007) (reaffirming "the general rule that postremoval events do not deprive federal courts of subject matter jurisdiction").

This Court notes that, of those decisions admitting the possibility of divestiture of jurisdiction, most conclude that the decertification or denial of a motion to certify does not necessarily divest the federal court of jurisdiction. See Falcon, Hoffer, Arabian, and Clausnitzer. For example, in Falcon, the court opined that "if class certification is [] denied on a basis that precludes even the reasonably foreseeable possibility of subsequent class certification in the future, the Court may lose jurisdiction at that point." 489 F. Supp. 2d at

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<sup>4</sup> CAFA defines "class action" to include any "mass action", which per § 1332(d)(11)(B)(i) is a suit "in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that plaintiffs' claims involve common questions of law or fact". 28 U.S.C. § 1332(d)(11)(A).

368. In contrast, if certification is denied on some ground that is "inherently tentative," that decision would not deprive the court of jurisdiction under CAFA. Id. at 369. The Falcon court reasoned that, because CAFA defines "class action" simply as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure," then class certification cannot be considered a "prerequisite to federal jurisdiction." Id. (quoting 28 U.S.C. § 1332(d)(1)(B), emphasis added in Falcon).

This Court finds no reasoned basis for the distinction drawn in Falcon (and the cases following Falcon) between the jurisdictional impact of certification decisions that are "inherently tentative," and those that are seen as foreclosing the "reasonably foreseeable possibility" of subsequent certification. As Falcon acknowledges, CAFA defines a class action as an action filed as a class action. Whether an action has been certified or is potentially certifiable does not alter the fact that it was filed as a class action and thus, falls within CAFA.

Beyond a lack of support for this distinction in the language of the statute, this Court finds significant pragmatic difficulties in the application of such a rule. Assessing at what point the potential for certification falls outside of a "reasonably foreseeable possibility" seems a nebulous standard

for determining a court's subject matter jurisdiction. That standard also permits the jurisdiction of a federal court to be maintained or destroyed by decisions of that court for which there is considerable discretion. For example, in Falcon, the court held that the named plaintiff would not be an adequate representative of the putative class. 489 F. Supp. 2d at 369. This decision, the court opined, was "inherently tentative" and thus, did not, by itself, deprive the court of jurisdiction. Id. The court went on, however, to deny the plaintiff the opportunity to take further discovery to find an adequate class representative, concluding that she already had ample opportunity to conduct discovery and that giving her more time would be unfair to the defendant. It was this decision denying discovery that, in the Falcon court's view, rendered a class not certifiable in the foreseeable future and, thus, eliminated the court's jurisdiction over the action.

Similarly, Plaintiff identifies this Court's recent denial of his request for additional discovery and to allow new plaintiffs to intervene as the point at which the instant action became one with no "reasonably foreseeable possibility of subsequent class certification in the future." Mot. at 4. As the Court explained in its memorandum, the decision to allow intervention is "wholly discretionary." It would be an odd result if that kind of discretionary decision made years after a case was removed to this Court could suddenly divest the Court of jurisdiction.

This Court also notes that several of those decisions finding the potential for divestiture of jurisdiction point to Rule 12(h)(3) of the Federal Rules of Civil Procedure as support for that conclusion. See, e.g., Arabian v. Sony Elecs. Inc., 2007 WL 2701340 at \*5. That provision, contained in a subsection distinguishing defenses that are waived if omitted from a party's motion to dismiss from those that cannot be waived, states that "[if the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3). This Court finds nothing in this rule to compel dismissal as the Court has not determined that it lacks subject matter jurisdiction, for the reasons stated above.

In sum, this Court concludes that the better reasoned cases are those following the longstanding general rule that jurisdiction over a removed action is determined at the time of removal. This Court found that the case was properly removed under CAFA when it denied Plaintiff's first motion to remand. Accordingly, the renewed motion to remand will also be denied. A separate order will issue.

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William M. Nickerson  
Senior United States District Judge

Dated: October 6, 2008.

