

proper under the Class Action Fairness Act (“CAFA”), Pub. L. No. 109-2, 119 Stat 4 (2005), codified at 28 U.S.C. §§ 1332, 1146, and 1453. On May 22, 2008, plaintiff moved to remand.

The Complaint

Plaintiff’s class action complaint contains two counts. Count One alleges violations of the TCPA. The TCPA is a statutory scheme concerned with nuisance telemarketing. See ErieNet, Inc. v. Velocity Net, Inc., 156 F.3d 513, 514 (3d Cir. 1998). Among other things, the TCPA prohibits the use of “pre-recorded voice” to deliver messages to residential numbers absent consent of the called party or a prior business relationship between the caller and the called party. 47 U.S.C. § 227(b)(1)(B)–(C)(i). Violations of the TCPA can be enforced through a private enforcement action with a recovery of \$500 for each violation, which can be trebled if the violation was willful. See 47 U.S.C. § 227(b)(3).¹ Count Two alleges common law invasion of privacy, which is generally recognized as a cause of action in New Jersey. See, e.g., Hennessey v. Coastal Eagle Point Oil Co., 129 N.J. 81, 99–100 (1992).

In his complaint, plaintiff alleges that he and the putative class received improper pre-recorded telephone calls intentionally initiated by defendant. (Compl. ¶ 9–10, 19–20.) Both of plaintiff’s claims are brought on behalf of class defined as:

All persons in the United States who (1) were the subscribers

¹ Because the TCPA allows for private enforcement suits to be brought “if permitted by the law or rules of court of a State, . . . in an appropriate court of that State,” 47 U.S.C. § 227(b)(3), suits brought under the TCPA cannot be filed in or removed to federal court based on federal question jurisdiction. See ErieNet, 156 F.3d at 517. The bar on federal question jurisdiction does not, however, foreclose federal diversity jurisdiction, including jurisdiction under the CAFA. See, e.g., U.S. Fax Law Center, Inc. v. iHire, Inc., 476 F.3d 1112, 1118 (10th Cir. 2007); Gottlieb v. Carnival Corp., 436 F.3d 335, 343 (2d Cir. 2006); Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 451 (7th Cir. 2005) (finding that private suit to enforce the TCPA could be removed under CAFA).

of a residential telephone line, and (2) were called on that residential telephone line on or after February 8, 2004 by or on behalf of Defendant using a pre-recorded voice to deliver a message promoting Defendant's vacation services, (3) did not provide Defendant with prior express consent to place the call, and (4) did not have an established business relationship.

Excluded from the class are members of the New Jersey judiciary, counsel for the plaintiff, and the officers, directors, and employees of Defendant.

(Compl. ¶ 15.)

The complaint demands the following forms of relief:

That the Court award a just and fair amount of damages for each violation pursuant to Count II; []

That the Court award costs and such further relief as the [C]ourt may deem just and proper, but in any event, not more than \$74,999.99 per individual class member, inclusive of all damages and fees;

That the Court award the sum of \$500.00 in damages for each violation pursuant to Count I and a just and fair amount of damages for each violation pursuant to Count II; and

That the Court award costs and such further relief as the court may deem just and proper, but in any event, not more than \$74,999.99 per individual class member, inclusive of all damages and fees.

(Compl. pp. 8-9.)

Plaintiff's Motion to Remand

Plaintiff contends that defendant has not established CAFA's \$5,000,000 aggregate amount in controversy requirement. He argues that his complaint alleges that defendant initiated improper telephone calls "to plaintiff and more than 39 other recipients," and that the complaint "alleges at most \$61,500 at issue (41 telephone calls times \$1,500)." (Pl.'s Br. 2.) He further argues that

defendant's assertion (contained in its notice of removal) that it placed more than 50,000 telephone calls using pre-recorded voice is "irrelevant because that number says nothing about the number of potential class members in this case." (Id.) Finally, in his reply brief, plaintiff contends that defendant "has the burden to prove to a legal certainty that plaintiff can recover the jurisdiction[al] amount." (Pl.'s Reply Br. 2) (scare quotes omitted).

In response, defendant argues that it placed at least 75,000 pre-recorded calls in the relevant time period. Given the number of calls placed, defendant contends that it is not legally certain that plaintiff and the putative class cannot recover in excess of \$5,000,000. In support of its arguments, defendant provides various calculations that show the amount in controversy exceeds \$5,000,000.

The parties do not expressly dispute that CAFA's other requirements are met (i.e., minimal diversity and minimum number of class members) and, given that plaintiff alleges a nationwide class, the Court finds that defendant's notice of removal establishes them by a preponderance of the evidence. (Notice of Removal ¶¶ 10–13, 17–18.) Therefore, the sole issue addressed in this Report is CAFA's amount in controversy requirement.

DISCUSSION

A. Standard

The appropriate analysis to be used in ascertaining the requisite amount in controversy is set forth in Federico v. Home Depot, 507 F.3d 188 (3d Cir. 2007). Federico discussed and clarified two previous Third Circuit opinions, Samuel-Bassett v. KIA Am., Inc., 357 F.3d 392 (3d Cir. 2004), and Morgan v. Gay, 471 F.3d 469 (3d Cir. 2006), which had produced inconsistent results in the district

courts.²

When the complaint does not specifically aver that the amount in controversy is less than the jurisdictional amount, Samuel-Bassett controls. In such instances, a court must first determine whether there are disputes over factual matters. See Frederico, 507 F.3d at 194. If so, the party asserting jurisdiction has the burden to justify jurisdictional facts by a preponderance of the evidence (i.e., more likely than not). Assuming the defendant meets this burden, or if the relevant facts are not disputed, the district court should adhere to the “legal certainty” test established by the Supreme Court in St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283 (1938). See Frederico, 507 F.3d at 194, 197; Samuel-Bassett, 357 F.3d at 398. Under the Red Cab legal certainty test, a case should be dismissed or remanded only when “the *challenger* to subject matter jurisdiction” can prove to a legal certainty that the amount in controversy “could *not* exceed the statutory threshold.” Frederico, 507 F.3d at 195 (second emphasis added).

A different standard applies when a plaintiff’s complaint avers that the amount sought is less than the statutory threshold. In the context of CAFA, to limit his or her claim, a plaintiff must “specifically (and not impliedly) and precisely (and not inferentially) state[] that the amount sought in a class action diversity complaint ‘for the class as a whole shall not exceed \$5 million in sum or value.’” Id. at 196 (quoting Morgan, 471 F.3d at 471). If the plaintiff’s complaint contains such an express stipulation, a defendant may still attempt to remove the case to federal court by proving “to a legal certainty that plaintiff *can* recover the jurisdictional amount.” Frederico, 507 F.3d at 197 (emphasis added).

² Prior to Frederico, district courts in this circuit disagreed on the appropriate quantum of proof needed to establish diversity jurisdiction. See Faltaous v. Johnson & Johnson, No. 07-1572, 2007 WL 3256833, at *3–5 (D.N.J. Nov. 5, 2007) (discussing confusion and collecting cases).

B. Proper Standard in this Case

The parties disagree on the standard that applies in this case. Plaintiff contends that, because his complaint specifically states that the amount sought is less than the “jurisdictional amount,” defendant has the burden to prove to a legal certainty that plaintiff can recover \$5,000,000. Conversely, defendant argues that plaintiff has not specifically pleaded an amount below CAFA’s monetary threshold, and thus remand is not warranted unless plaintiff can show that it is legally certain that the amount in controversy is less than \$5,000,000.

In cases removed to federal court, “determining the amount in controversy begins with a reading of the complaint filed in state court.” Samuel-Bassett, 357 F.3d at 398. Here, plaintiff’s complaint states that “plaintiff’s individual claims do not exceed \$74,999.99, inclusive of all forms of damages and fees.” (Compl. ¶ 14.) In addition to placing a cap on his own recovery, plaintiff purports to impose the same limitation on each individual class member. (Compl. p. 8.) Plaintiff’s complaint contains no statement or stipulation regarding CAFA’s \$5,000,000 requirement.

Had this case been removed on the basis of traditional federal diversity jurisdiction under 28 U.S.C. § 1332(a), defendant would have to establish that at least one class member could recover in excess of the \$75,000. See Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 549, 559 (2005); Oshana v. Coca-Cola Co., 472 F.3d 506, 511 (7th Cir. 2006). However, defendant removed this case under CAFA. The CAFA does not require an individual plaintiff proffer a claim in excess of \$75,000; the claims of all class members may be aggregated to reach \$5,000,000. See 28 U.S.C. § 1332(d)(6); Blockbuster, Inc. v. Galeno, 472 F.3d 53, 59 (2d Cir. 2006). Plaintiff’s argument disregards this significant fact and his stipulation that no class member seeks to recover more than \$74,999.99 does not compel application of Morgan’s inverted legal certainty test. In order to place

the burden on defendant to establish the existence of jurisdiction to a legal certainty, plaintiff would have had to “specifically (and not impliedly) and precisely (and not inferentially) state[] that the amount sought in a class action diversity complaint for the class as a whole [does not] exceed \$5 million in sum or value.” Frederico, 507 F.3d at 196. Because it is clear that plaintiff’s complaint contains no such statement, the Court’s analysis tracks the framework established by Samuel–Bassett. See Frederico, 507 F.3d at 198.

C. Determining the Amount in Controversy

To determine the amount in controversy, the Court is free to consider the complaint, the notice of removal, and the submissions related to plaintiff’s motion to remand. See Faltaous v. Johnson & Johnson, No. 07-1572, 2007 WL 3256833, at *6 (D.N.J. Nov. 5, 2007) (citing USX Corp. v. Adriatic Ins. Co., 345 F.3d 190, 205 n.12 (3d Cir. 2003)); Korn v. Polo Ralph Lauren Corp., 536 F. Supp. 2d 1199, 1205 (E.D. Cal. 2008) (“A court may also consider supplemental evidence later proffered by the removing defendant, which was not originally included in the removal notice.” (citation omitted)). The ultimate determination regarding the amount in controversy requires a “reasonable reading of the value of the rights being litigated.” Angus v. Shiley, 989 F.2d 142, 146 (3d Cir. 1993). With this in mind, the Court considers the evidence.

The first inquiry is whether there are factual disputes. To the extent there are factual disputes in this case (which it is not clear that there are), defendant must establish the necessary jurisdictional facts by a preponderance of the evidence. See Frederico, 507 F.3d at 194. The Court finds that it has.

The underlying facts, that defendant placed telephone calls utilizing pre-recorded voice, are undisputed. In its notice of removal, defendant conceded that it placed more than 50,000 telephone calls using pre-recorded voice. In addition, in opposition to remand, defendant has presented the

affidavit of its Senior Marketing Manager—Ms. Julissa Romero—which states that during the relevant time period defendant placed 75,000 pre-recorded voice calls to residential lines in connection with certain marketing campaigns. (Romero Aff. ¶¶ 4–5.)

Plaintiff argues that this evidence is insufficient. According to plaintiff, this evidence is “irrelevant” because neither defendant’s notice of removal nor Ms. Romero’s affidavit identify the number of times defendant used a pre-recorded message “when the subscriber of the residential telephone line did not provide defendant with prior express consent to place the call, and did not have an established business relationship.” (Pl. ’s Br. 5.) To remedy this alleged deficiency, plaintiff would have defendant provide “evidence as to which telephone calls were expressly authorized and which telephone call recipients had an existing business relationship [with defendant].” (*Id.* at 6.) The argument goes as follows: Any telephone calls that were made to individuals who had provided consent or with whom there was a business relationship would not fall within the definition of the putative class, and therefore absent more information defendant’s evidence is insufficient to establish federal jurisdiction. This argument is not persuasive.

In Brill v. Country Wide Home Loans, Inc., the Seventh Circuit Court of Appeals reversed a district court’s order remanding to state court a TCPA case removed under the CAFA. 427 F.3d 446, 447, 452 (7th Cir. 2005). In so doing, the court expressly considered what a removing defendant must do in order to “discharge its burden” in the context of removal, *id.* at 448, and found that the defendant “did all that was necessary by admitting that one of its employees sent at least 3,800 fax ads,” and that “[f]rom this and the statutory text, one can determine that the controversy exceeds \$5 million.” *Id.* at 449. In reaching its conclusion, the court noted that the defendant “did not have to confess liability in order to show the controversy exceeds the threshold.” *Id.*

The same logic controls here. As the Third Circuit has noted, “[a] pretrial ruling on jurisdictional facts should not be made if it constitutes a decision on the merits.” Samuel– Bassett, 357 F.3d at 398 n.3. Defendant admitted that it placed 75,000 telephone calls using pre-recorded voice to residential lines. This is all that is required to meet its burden. To require defendant to provide further information, e.g., whether the calls were placed to individuals who provided consent or were engaged in a business relationship, would require defendant to concede aspects of the claim against it. On the most fundamental level, the absence of consent and the absence of a business relationship are the facts generating liability under the TCPA. Under plaintiff’s argument, defendant would be required to concede that it actually violated the TCPA in order to remove the case, which would prove plaintiff’s case and leave to this Court the task of simply assessing damages. This is not proper. See id. Defendant has established the existence of the necessary jurisdictional facts.

At this stage, jurisdictional facts have been established by a preponderance of the evidence. It is now incumbent upon the party opposing jurisdiction to show that the amount in controversy “could not exceed the statutory threshold.” Frederico, 507 F.3d at 195 (emphasis omitted). Having concluded that defendant has satisfied its initial burden, it makes little difference for present purposes whether defendant placed 50,000 or 75,000 telephone calls, given that there need not be more than 3,334 telephone calls to satisfy CAFA’s monetary requirement, a fact plaintiff concedes. (Pl.’s Br. 5.) Plaintiff’s complaint alleges that defendant knew or should have known that it was violating the TCPA. (Compl. ¶ 19.) Taking this allegation as true as the Court must, see Steel Valley Auth. v. Signal Union Switch & Signal Div., 809 F.2d 1006, 1010 (3d Cir. 1987), defendant has shown that it faces potential exposure of \$1,500 per violation. See 47 U.S.C. § 227(b)(3). From there, it is clear that plaintiff has not shown, to a legal certainty, that \$5,000,000 is not in controversy.

Application of the relevant arithmetic to the Red Cab legal certainty test compels the denial of plaintiff's motion. It takes no more than 3,334 phone calls at \$1,500 per violation to reach \$5,000,000 ($3,334 \times \$1,500 = \$5,001,000$). Altering the calculation to meet defendant's actual proofs underscores the point: 50,000 phone calls at \$500 or \$1,500 per violation greatly exceeds \$5,000,000 ($50,000 \times \$500 = \$25,000,000$; $50,000 \times \$1,500 = \$75,000,000$), and 75,000 phone calls at either \$500 or \$1,500 per violation exceeds even thirty million dollars ($75,000 \times \$500 = \$37,500,000$; $75,000 \times \$1,500 = \$112,500,000$).

In sum, defendant has done all that is required of it to establish jurisdiction. In response, plaintiff has failed to carry his burden of establishing that it is legally certain that he cannot recover \$5,000,000. As such, this case was properly removed to federal court.

CONCLUSION

For the foregoing reasons, it is respectfully recommended that plaintiff's motion to remand be **denied**.

Dated: June 30, 2008

S/ Mark Falk
MARK FALK
United States Magistrate Judge

Orig.: Clerk of the Court
cc: Hon. William J. Martini, U.S.D.J.
All Parties