

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

VALERIE SYLVESTER; DAVID) CIVIL NO. 07-00409 ACK-KSC
PANG; ANDREW GARCIA; RUTH)
CAMARGO; CHRIS HUBBARD;) FINDINGS AND
STACEY COLLINS; RANDALL) RECOMMENDATION TO GRANT
BANDMANN; KELLY ENGLE; PAM) PLAINTIFFS' MOTION TO
GOULD; ERIK CORAL-SANDS,) REMAND AND ORDER DENYING
) AS MOOT DEFENDANTS' MOTION
Plaintiffs,) TO STAY ALL PROCEEDINGS
)
vs.)
)
MENU FOODS, INC., a New)
Jersey corporation' MENU)
FOODS HOLDINGS, INC., a)
Delaware corporation; MENU)
FOODS INCOME FUND, an)
unincorporated Canadian)
business; DOE ENTITIES an)
INDIVIDUALS 1-100,)
)
Defendants.)
_____)

FINDINGS AND RECOMMENDATION TO GRANT PLAINTIFFS' MOTION
TO REMAND AND ORDER DENYING AS MOOT DEFENDANTS'
MOTION TO STAY ALL PROCEEDINGS

Before the Court is Plaintiffs Valerie
Sylvester, David Pang, Andrew Garcia, Ruth Camargo,
Chris Hubbard, Stacey Collins, Randall Bandmann, Kelly
Engle, Pam Gould, and Erik Coral-Sands' (collectively
"Plaintiffs") Motion to Remand, filed August 27, 2007.

Defendants Menu Foods, Inc. ("MF"), Menu Foods Holdings, Inc. ("MFH"), and Menu Foods Income Fund ("MFIF") (collectively "Defendants") filed their Opposition on September 13, 2007. Plaintiffs filed their Reply on September 20, 2007.

Also before the Court is Defendants' Motion to Stay All Proceedings, filed August 2, 2007. Plaintiffs filed their Opposition on August 26, 2007, and Defendants filed their Reply on August 30, 2007.

Both motions came on for hearing on October 1, 2007.¹ Emily Gardner, Esq., appeared on behalf of Plaintiffs. Chad Love, Esq., appeared, and Matthew Lepore, Esq., appeared pro hac vice on behalf of Defendants. After careful consideration of the motions, supporting and opposing memoranda, and the arguments of counsel, the Court FINDS and RECOMMENDS that the district court GRANT Plaintiffs' Motion to

¹ Since the hearing, the parties' have been working together to reach an agreement regarding mediation. At their request, the Court delayed issuance of the instant Findings and Recommendation and Order.

Remand and HEREBY DENIES Defendants' Motion to Stay as moot.

BACKGROUND

On May 11, 2007, Plaintiffs (8 total) filed a complaint in the First Circuit Court for the Circuit of Hawaii. A First Amended Complaint was filed on June 22, 2007, adding two plaintiffs. Plaintiffs served MFH on July 9, 2007, MF on August 1, 2007, and MFIF on September 10, 2007.² MF and MFH removed the case on July 27, 2007.

According to Defendants, there are over 100 actions related to their contaminated pet food. On June 19, 2007, the Judicial Panel on Multidistrict Litigation ("JPML") established the MDL In re Pet Food Products Liability Litigation, in the U.S. District Court for the District of New Jersey. Since then, a number of the pending cases across the country have been transferred to New Jersey. On August 20, 2007,

² By way of Stipulation, the parties agreed that the July 13, 2007 service on MFIF is deemed effective as of September 10, 2007.

the JPML issued a conditional transfer order for the instant action, to which Plaintiffs object.

DISCUSSION

I. Stays and Multidistrict Litigation

Defendants request that the Court, in the interest of judicial economy, either stay all proceedings or defer a determination of the Motion to Remand pending a decision by the JPML of whether this action will be transferred to New Jersey. Plaintiffs argue that the jurisdictional issues (i.e. Motion to Remand) should be addressed before the Motion to Stay.

Because this case is one of many brought against Defendants, multidistrict litigation is implicated. Coordination of multidistrict litigation is governed by 28 U.S.C. § 1407. Section 1407(a) provides, in pertinent part:

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon

its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. . . .

28 U.S.C. § 1407(a). The JPML Rules of Procedure provide that:

The pendency of a motion, order to show cause, conditional transfer order or conditional remand order before the Panel concerning transfer or remand of an action pursuant to 28 U.S.C. § 1407 does not affect or suspend orders and pretrial proceedings in the district court in which the action is pending and does not in any way limit the pretrial jurisdiction of that court. A transfer or remand pursuant to 28 U.S.C. § 1407 shall be effective when the transfer or remand order is filed in the office of the clerk of the district court of the transferee district.

R. Proc. Jud. Panel Multi. Litig. 1.5. The district court is therefore not obligated to automatically stay a case during the pendency of matters before the MDL Panel. Instead, it is within the court's discretion to grant a stay when it is in the interest of judicial economy and efficiency. See Rivers v. Walt Disney Co., 980 F. Supp. 1358, 1360 (C.D. Cal. 1997).

When considering a motion to stay, district

courts consider the following factors: "(1) potential prejudice to the non-moving party; (2) hardship and inequity to the moving party if the action is not stayed; and (3) the judicial resources that would be saved by avoiding duplicative litigation if the cases are in fact consolidated." Id. (citing Am. Seafood, Inc. v. Magnolia Processing, Inc., Civ. A. Nos. 92-1030, 92-1086, 1992 WL 102762, at *1-2 (E.D. Penn. May 7, 1992)).

II. Order of Determining Motions to Remand and Motions to Stay

In this case, not only is the issue of whether to grant a stay before this Court, but also the issue of whether to remand the action to state court. Courts have held that when jurisdictional issues are in dispute, a motion to remand should be resolved prior to the determination of whether a stay is appropriate. Smith v. Mail Boxes, Etc., 191 F. Supp. 2d 1155, 1157 (E.D. Cal. 2002) (citing Good v. Prudential Ins. Co. of Am., 5 F. Supp. 2d 804, 809 (N.D. Cal. 1998) (granting stay pending MDL transfer decision after considering

jurisdictional issues in remand motion); Tortola Rest., L.P. v. Kimberly-Clark Corp., 987 F. Supp. 1186, 1188-89 (N.D. Cal. 1997) (denying stay motion and addressing merits of motion to remand); Kohl v. Am. Home Products Corp., 78 F. Supp. 2d 885, 888 (W.D. Ark. 1999) (granting stay following determination that removal was proper and denial of remand was warranted); Aetna U.S. Healthcare, Inc. v. Hoechst Aktiengesellschaft, 54 F. Supp. 2d 1042, 1047 (D. Kan. 1999) (reasoning that preliminary jurisdictional issue should be determined on motion to remand before court considers staying the action)). "However, the calculus changes somewhat when deference to a MDL court will further 'the uniformity, consistency, and predictability in litigation that underlies the MDL system.'" McClelland v. Merck & Co., CIV. No. 06-00543 JMS/BMK, 2007 WL 178293, *2 (D. Haw. Jan. 19, 2007) (quoting Leeson v. Merck & Co., Inc., No. S-05-2240 WBS PAN, 2006 WL 3230047 (E.D. Ca. Jan. 27, 2006)) (citation omitted).

When considering simultaneous motions to remand and motions to stay the proceedings, district courts employ a three-step methodology. First, "a court should . . . give preliminary scrutiny to the merits of the motion to remand. If this preliminary assessment suggests that removal was improper, the court should promptly complete its consideration and remand the case to state court." Id. (quoting Meyers v. Bayer AG, 143 F. Supp. 2d 1044, 1049 (E.D. Wis. 2001)); Conroy v. Fresh Del Monte Produce, Inc., 325 F. Supp. 2d 1049, 1053 (N.D. Cal. 2004). However, if "the jurisdictional issue appears factually or legally difficult, the court's second step should be to determine whether identical or similar jurisdictional issues have been raised in other cases that have been or may be transferred to the MDL proceeding."³ Id. (quoting Meyer, 143 F. Supp. 2d at 1049); Conroy, 325 F. Supp.

³ This is because it is only for the purpose of furthering judicial economy and consistency that the transferee court should decide the jurisdictional issue. Meyer, 143 F. Supp. 2d at 1049.

2d at 1053. A court should only proceed to the third step and consider the motion to stay "if the jurisdictional issue is both difficult and similar or identical to those in cases transferred or likely to be transferred." Meyer, 143 F. Supp. 2d at 1049; McClelland, 2007 WL 178293, at *2; Conroy, 325 F. Supp. 2d at 1053.

Here, a preliminary assessment of the motion to remand, which is not factually or legally difficult, suggests that removal was improper.⁴ An action should not be transferred if a court lacks subject matter jurisdiction.⁵ The Court should therefore address the

⁴ Even if the remand issue was difficult, it would not serve judicial economy for the transferee court to determine the motion to remand because of the 93 cases currently transferred, only eight involved removal, and none of those eight present motions to remand. Moreover, a determination by the transferee court of multiple motions to remand would be inefficient, as each case would present varying amounts in controversy as well as varying numbers of plaintiffs.

⁵ Indeed, 28 U.S.C. § 1404(a) "limits transfer of a civil action to 'any other district or division where it might have been brought'. . . [i]n other words, because a court may only transfer a case to a venue where the case could have been brought originally,

motion to remand.

A. Remand

Plaintiffs seek remand because 1) Defendants failed to prove the amount in controversy with "legal certainty" and 2) the Notice of Removal ("Notice") is defective. Plaintiffs note that Defendants rely almost entirely on Plaintiffs' request to exempt from court annexed arbitration program to establish the amount in controversy.

Defendants counter that they have proven, with legal certainty, that the amount in controversy for one plaintiff exceeds \$75,000. Based on Defendants' calculations of damages and attorneys' fees, the amount in controversy for at least one plaintiff ranges from \$84,250 to \$94,750. Defendants additionally maintain that their Notice was not defective because MF could join in the Notice even if it was not served and MFIF was not required to join because it had yet to be

questions regarding subject matter jurisdiction must be resolved before any such transfer." Conroy, 325 F. Supp. 2d at 1053.

properly served.

MF and MFH removed the instant case pursuant to 28 U.S.C. §§ 1441(b), 1332, and 1446.⁶ Notice of Removal at 4. Section 1441 provides, in pertinent part:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the

⁶ Section 1446(b) of Title 28 of the U.S. Code provides, in pertinent 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.

28 U.S.C. § 1446(b). Plaintiffs served MFH and MF on July 9, 2007 and August 7, 2007, respectively. MFH and MF filed the Notice on July 27, 2007. Accordingly, the Court finds that MFH and MF timely filed the Notice.

place where such action is pending. . . .

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. . . .

28 U.S.C. § 1441 (a), (b). Section 1441 is strictly construed against removal and courts resolve any doubts about the propriety of removal in favor of remanding the case to state court. See Durham v. Lockheed Martin Corp., 445 F.3d 1247, 1252 (9th Cir. 2006).

As an initial matter, the Court will address Plaintiffs' charge that the Notice is defective due to MF's premature joinder and MFIF's failure to join. Although it appears that MF indeed joined in the removal before service was effected, this does not render the Notice defective. 14C Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, Pocket Part by The Late Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, Joan E. Steinman, Federal Practice and Procedure § 3732 ("Removal will not be denied by the

federal court simply because the notice of removal is too early"). As for MFIF, the parties stipulated that service is deemed effective as of September 10, 2007, so MFIF was not required to join in the Notice at the time it was filed. However, to satisfy the unanimity requirement, MFIF must now consent to removal. It is clear that by opposing remand, MFIF joins in the removal. The Court therefore construes the Opposition as MFIF's consent to removal.

1. Diversity of Citizenship

Defendants claim that complete diversity exists because they are incorporated in Delaware and New Jersey, respectively, with principal executive offices located outside of Hawaii;⁷ Plaintiffs are citizens of Hawaii; and the amount in controversy respecting at least one Plaintiff exceeds \$75,000. Notice of Removal at 11. It is well-established that the "burden of

⁷ See 28 U.S.C. § 1332(c)(1) ("[A] corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.").

establishing removal jurisdiction remains, as before, on the proponent of federal jurisdiction.'" Lowdermilk v. U.S. Bank Nat'l Ass'n, 479 F.3d 994, 997 (9th Cir. 2007) (quoting Abrego Abrego v. Dow Chemical Co., 443 F.3d 676, 685 (9th Cir. 2006)).⁸ The parties do not dispute the existence of diversity and Defendants have established that diversity exists.

2. Amount in Controversy; "Legal Certainty" Test

The issue before the Court is whether the amount in controversy exceeds \$75,000. In the Complaint, Plaintiffs represent that "the amount in controversy for each individual Plaintiff is believed to be less than \$75,000." Ex. A to Notice of Removal at ¶ 52. Where, as here, a plaintiff avers damages below the threshold for federal jurisdiction, a court "need not look beyond the four corners of the complaint

⁸ Although Lowdermilk involves the Class Action Fairness Act, its application is not limited to class actions. Roe v. Teletech Customer Care Mgmt, LLC, No. C07-5149 RBL, 2007 WL 1655172, *1, *3 n.1 (W.D. Wash. June 6, 2007).

to determine whether the . . . jurisdictional amount is met." Lowdermilk, 479 F.3d at 998. Given that Plaintiffs specifically disclaim damages in excess of \$75,000 per Plaintiff, it is Defendants' burden to prove with legal certainty that the amount in controversy exceeds \$75,000. Id. at 1000. This is because Plaintiff "is 'master of her complaint' and can plead to avoid federal jurisdiction." Id. at 998-99 (citations omitted). As explained by the Lowdermilk court:

subject to a "good faith" requirement in a pleading, a plaintiff may sue for less than that amount she may be entitled to if she wishes to avoid federal jurisdiction and remain in state court. Where the plaintiff has alleged her facts and pled her damages, and there is no evidence of bad faith, the defendant must not only contradict the plaintiff's own assessment of damages, but must overcome the presumption against federal jurisdiction.

Id. at 999 (citations omitted).

Defendants rely solely on Plaintiffs' request to exempt to establish the amount in controversy. However, the request to exempt does not support

Defendants' assertion that they have proved, with legal certainty, that the amount in controversy for at least one Plaintiff exceeds \$75,000. Moreover, each Plaintiff submitted a declaration stating that their damages, including attorneys' fees, do not exceed \$75,000. See Declarations to Pls.' Reply.

a. general/special damages

In the request to exempt, Plaintiffs state that they "believe that the probable jury award, not reduced by the issue of liability, and exclusive of attorney's fees, interests and costs will be in excess of \$150,000." Ex. C to Opp'n at ¶ 33. Defendants contend that \$150,000 divided by the eight Plaintiffs named in the original complaint totals \$18,750 per Plaintiff in general/special damages. This cuts directly against Defendants' assertion that "[t]he damages sought by Plaintiffs, not the damages (if any) they ultimately will recover, determine whether their allegations satisfy the amount-in-controversy required for federal jurisdiction." Notice of Removal at 5 (citing Lao v.

Wickes Furniture Co., 455 F. Supp. 2d 1045, 1049 (C.D. Ca. 2006)); Opp'n at 7-8. Indeed, Plaintiffs' estimation of the *probable jury award* is not a request for damages, but a prediction of the amount that they might ultimately recover, which is neither relevant to the amount in controversy inquiry nor supportive of Defendants' position that the amount in controversy exceeds \$75,000. Defendants' reliance on the \$150,000 amount in the request for exemption is therefore misplaced.

Defendants further argue that because there are ten categories for compensatory and consequential damages, at least some Plaintiffs seek damages in excess of \$6,000. In support of this point, Defendants rely solely on a case cited by Plaintiffs where \$6,400 in compensatory damages were awarded for the destruction of a dog. This falls well-short of the Lowdermilk requirement that the defendants must offer "concrete evidence" to establish the amount in controversy. See Lowdermilk, 479 F.3d at 1001. Again,

Defendants ask the Court to consider figures based on *recovery*, which is not the standard for assessing the amount in controversy. Moreover, the case cited by Plaintiffs has no bearing on the amount in controversy here. Even if it did, there are undoubtedly countless other cases where the compensatory damages awarded would vary.⁹ Because Defendants' allegations are poorly supported, if at all, the Court is unable to determine the general/special damages in controversy. Accordingly, the Court finds that Defendants have not proved with legal certainty the amount of special or general damages in controversy.

b. punitive damages

Plaintiffs noted in the request to exempt that if they "were permitted to pray for a specific amount of punitive damages, [they] would seek over \$500,000." Ex. C to Opp'n at ¶ 34. Defendants construe this statement as an admission by Plaintiffs that they seek

⁹ In fact, Plaintiffs also cited a case where only \$2,000 was awarded for compensatory damages.

more than \$500,000 in punitive damages. Defendants divide this number by the eight Plaintiffs named in the original complaint to arrive at a figure of \$62,500 in punitive damages per Plaintiff. Plaintiffs contend that the damages must be divided by the number of plaintiffs named at the time of removal, which was ten. The Court agrees.

"[J]urisdiction must be analyzed on the basis of the pleadings filed at the time of removal without reference to subsequent amendments." Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers, Inc., 159 F.3d 1209, 1213 (9th Cir. 1998); Spencer v. U.S. D. for the N.D. of Cal., 393 F.3d 867, 871 (9th Cir. 2004) ("Challenges to removal jurisdiction require an inquiry into the circumstances at the time the notice of removal is filed."). At the time MFH and MF filed their Notice of Removal, Plaintiffs had filed a First Amended Complaint, which included all ten of them. The damages must accordingly be divided by ten people. While the Court agrees with Defendants' rationale that

an increase in the number of plaintiffs would naturally increase the collective punitive damages claim, the Court finds that Defendants have not established with legal certainty the additional damages above and beyond \$500,000. Defendants' unsupported allegations leave the Court to speculate about the punitive damages total for each Plaintiff. Furthermore, it is of note that Plaintiffs did not amend their request to exempt after they filed the First Amended Complaint. Defendants consider illogical Plaintiffs' argument that even though the number of Plaintiffs increased from eight to ten, the damages total has remained the same. However, it would not be in Plaintiffs' interest to claim less damages than are actually in controversy. Nor are Plaintiffs "obligated to overstate their damages to satisfy [Defendants'] interest in a federal forum." Lowdermilk, 479 F.3d at 1003. Given that the only amount that has been established with any certainty is \$500,000, the Court so bases its calculations. Five-hundred thousand dollars divided by ten Plaintiffs

totals \$50,000 in punitive damages per Plaintiff, well below the jurisdictional minimum.

c. attorneys' fees

In the First Amended Complaint, Plaintiffs pray for attorneys' fees pursuant to Hawaii Revised Statutes Chapter 480, or as otherwise permitted by law.

"[W]here an underlying statute authorizes an award of attorneys' fees, either with mandatory or discretionary language, such fees may be included in the amount in controversy." Lowdermilk, 479 F.3d at 1000 (quoting Galt G/S v. JSS Scandinavia, 142 F.3d 1150, 1155-56 (9th Cir. 1998)) (quotations omitted). Hawaii Revised Statutes § 480-13(b) provides that "if the judgment is for the plaintiff, the plaintiff shall be awarded . . . reasonable attorney's fees together with the costs of suit." Haw. Rev. Stat. § 480-13(b)(1); see also id. § 480-13(b)(2). Defendants estimate that a reasonable hourly rate for Emily Gardner, Plaintiffs' counsel, is \$135. They also expect that she would expend 50 to 100 hours per Plaintiff over the course of litigation, for

a total of \$6,750 to \$13,500 per Plaintiff. Notice of Removal at 8-9. Although Plaintiffs note that the range of 50 to 100 hours is a wide margin, they apply Defendants' figures to demonstrate that even attorneys' fees totaling \$13,500, when added to the \$50,000 in damages per Plaintiff, would not satisfy the over \$75,000 required for jurisdiction.

Defendants cite orders from this district to arrive at the \$135 hourly rate. This rate appears to be reasonable. However, the number of hours that Ms. Garner will likely expend on this case is far less certain. Defendants' estimation that the hours will range from 50 to 100 is inadequate and does not assist the Court in determining with certainty the amount of attorneys' fees at stake. The top end of the range is double the low end. Other than their bare assertion, Defendants have failed to provide any concrete evidence to establish the number of hours that Ms. Garner will expend per Plaintiff. The Court is thus left to speculate about the amount of attorneys' fees and

cannot determine with certainty the amount in controversy. Even if the Court were to accept the \$13,500 proposed by Defendants, the jurisdictional amount would still not exceed \$75,000.

For these reasons, the Court finds that Defendants have not proved, with legal certainty, that the amount in controversy for any of the ten named Plaintiffs exceeds \$75,000. Consequently, the Court is without jurisdiction and recommends that the district court remand the case to the First Circuit Court.

B. Stay

Given that the Court is recommending remand, the Motion to Stay is mooted and is HEREBY DENIED.

CONCLUSION

Based on the foregoing, the Court FINDS that Defendants have not proved with legal certainty that the amount in controversy respecting any Plaintiff exceeds \$75,000. Accordingly, the Court RECOMMENDS that the district court remand the case to the First Circuit Court. The Court additionally DENIES as moot

Defendants' Motion to Stay.

IT IS SO FOUND AND RECOMMENDED AND SO ORDERED.

DATED: Honolulu, Hawaii, October 30, 2007





Kevin S.C. Chang
United States Magistrate Judge

CV 07-00409 ACK/KSC; SYLVESTER, ET AL. V. MENU FOODS, INC., ET AL.; FINDINGS AND RECOMMENDATION TO GRANT PLAINTIFFS' MOTION TO REMAND AND ORDER DENYING AS MOOT DEFENDANTS' MOTION TO STAY ALL PROCEEDINGS