IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

PATSY WINDOM, ET AL. — **PLAINTIFFS**

V. — **CAUSE NO. 3:13-CV-741-CWR-FKB**

BORGWARNER, INC.; DICKINSON WRIGHT, PLLC; FREESE & GOSS, PLLC; RICHARD A. FREESE; DENNIS C. SWEET, III; TIM GOSS; SHEILA M. BOSSIER; BOSSIER AND ASSOCIATES, PLLC; SWEET AND FREESE, PLLC; DENNIS C. SWEET, III, *doing business as* SWEET AND ASSOCIATES, PLLC; JOHN/JANE DOES, *Individually and/or as Entities, including any Finance Institutions* — **DEFENDANTS**

ORDER

Before the Court is the plaintiffs' motion to remand. Docket No. 21. The matter is fully briefed, *see* Docket Nos. 22, 40, 42, 43, 48, 50-1, and the Court is ready to rule.

I. Factual and Procedural History

Patsy Windom and 287 other plaintiffs filed this suit in state court claiming that they were wronged by a group of attorneys in a PCB contamination settlement gone awry. Docket No. 1-1. Their factual allegations are lengthy (containing 427 paragraphs and consuming 65 pages), but the gravamen of the complaint is that the defendants' secret deals, obfuscation, and misrepresentations enriched the defendants and deprived the plaintiffs of settlement funds. The plaintiffs' causes of action include conversion, conspiracy, breach of fiduciary duty, fraudulent inducement, and bad faith, among others.

The amount of money the plaintiffs seek from this suit is contested. The plaintiffs say they were not informed that the true value of their settlement was $8,070.11 per person. *Id.* at 42. If all 288 plaintiffs strictly wanted that sum, the amount of compensatory damages sought in this

suit would total approximately $2.3 million. The complaint, however, characterizes $8,070.11 per person as "the minimum" before costs, expenses, extra-contractual damages, and punitive damages.[1] *Id.* at 53, 63. An exact demand for compensatory damages is not provided.

The complaint also goes on to allege – among many other things – that the defendants took the $14 million total settlement, placed the funds into a bank which they controlled in Alabama, and wrongfully took their own payout before disbursing funds to their clients, thereby breaching their fiduciary duties. *Id.* at 44-45. Of particular significance is the defendants' $6.9 million payment to themselves, which was allegedly used in a variety of ways contrary to their duties to their clients. *Id.* at 46-47, 54-55, 58, 61. The complaint seeks a preliminary injunction forcing the defendants to return "all" settlement funds to a Mississippi bank for an accounting to be conducted and oversight by a court or the Mississippi Bar. *Id.* at 61-62.

Two final aspects of the complaint must be mentioned. One is the amount of the plaintiffs' demand for punitive damages: either more than $1 million or an amount to be determined by the finder of fact, they say. *Id.* at 65. The other is the plaintiffs' request seeking permission to contact John and Jane Does 1-2000 "for the purposes of informing said individuals of the instant lawsuit and allow them to determine their interest in joining as Plaintiffs in the instant civil action or take other action." *Id.* at 64.

The defendants removed the case to this Court, claiming that the Class Action Fairness Act (CAFA) vests federal jurisdiction over the matter because it is a class action and mass action as defined by that statute, with minimal diversity and sufficient amounts in controversy. Docket No. 1-1, at 2.

[1] At one point, the complaint suggests that the $8,070 per person would "includ[e]" all costs, expenses, extra contractual damages, and punitive damages. Docket No. 1-1, at 53. The ambiguity is relieved later, when it is made clear that the $8,070 is a minimum which does not include other damages. *Id.* at 63.

The plaintiffs disagree. Their motion to remand argues that the defendants failed to put forward any evidence showing that the aggregate amount in controversy exceeds $5 million, since 288 claims for $8,070.11 falls short of that sum. Docket No. 22, at 5-6. As they put it, "just mentioning that values over $5 million are involved in the facts of the instant civil action do[es] not meet the threshold requirement of proving that the claims of the Plaintiffs will exceed $5,000,000." *Id.* The defendants also failed to show that any of the plaintiffs' individual claims exceeds $75,000, the motion contends. *Id.* at 7-8. Finally, the plaintiffs argue that the defendants should be judicially estopped from proving minimal diversity, since they have taken inconsistent positions on this issue between this case and another currently pending in this Court but before a different judge. *Id.* at 8-10.

II. Applicable Law

CAFA vests federal jurisdiction over certain "class actions" and "mass actions." For purposes of the statute, "the term 'class action' means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B). In contrast, "the term 'mass action' means any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a)." *Id.* § 1332(d)(11)(B)(i).

The Supreme Court ruled on a CAFA issue earlier this year. It summarized the law's main requirements as follows:

> For class and mass actions, CAFA expanded diversity jurisdiction in two key ways. First, it replaced the ordinary requirement of complete diversity of

> citizenship among all plaintiffs and defendants, with a requirement of minimal diversity. Under that requirement, a federal court may exercise jurisdiction over a class action if any member of a class of plaintiffs is a citizen of a State different from any defendant. The same rule applies to mass actions. Second, whereas § 1332(a) ordinarily requires each plaintiff's claim to exceed the sum or value of $75,000, CAFA grants federal jurisdiction over class and mass actions in which the aggregate amount in controversy exceeds $5 million. Class and mass actions filed in state court that satisfy CAFA's requirements may be removed to federal court, but federal jurisdiction in a mass action, unlike a class action, shall exist only over those plaintiffs whose claims individually satisfy the $75,000 amount in controversy requirement.

Mississippi ex rel. Hood v. AU Optronics Corp., 134 S. Ct. 736, 740 (U.S. 2014) (quotation marks and citations omitted).

The removing party has the burden to prove minimal diversity and the amount in controversy requirements. *Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc.*, 485 F.3d 804, 810 (5th Cir. 2007). "[W]hen the quantity of damages is not alleged by the plaintiff class[,] [t]he removing defendant must prove by a preponderance of the evidence that the amount in controversy equals or exceeds the jurisdictional amount." *Berniard v. Dow Chem. Co.*, 481 Fed. App'x 859, 862 (5th Cir. 2010) (unpublished). "The party seeking remand, however, has the burden of proving the applicability of any exceptions to CAFA jurisdiction." *Rainbow Gun Club, Inc. v. Denbury Onshore, L.L.C.*, 760 F.3d 405, 409 n.3 (5th Cir. 2014) (citation omitted)

"In order to distinguish between CAFA's two amounts in controversy, we refer to the $5,000,000 requirement as the 'aggregate amount in controversy' and the $75,000 requirement from § 1332(a) as the 'individual amount in controversy.'" *Hood ex rel. Mississippi v. JP Morgan Chase & Co.*, 737 F.3d 78, 85 (5th Cir. 2013). "[T]he amount in controversy is measured by the value of the object of the litigation." *Id.* at 87 (quotation marks and citation omitted). In a putative mass action, if the removing party cannot show that even one plaintiff satisfies the individual amount in controversy requirement, remand is appropriate. *Id.* at 86.

When a motion to remand is filed, "a defendant seeking to sustain removal may follow either of two tracks: (1) Adduce summary judgment evidence of the amount in controversy, or (2) demonstrate that, from the class plaintiffs' pleadings alone, it is 'facially apparent' that CAFA's amount in controversy is met." *Berniard*, 481 Fed. App'x at 862 . Where the removing party chooses the latter method, its

> burden is to show not only what the stakes of the litigation *could be*, but also what they *are* given the plaintiff's actual demands. The demonstration concerns what the plaintiff is claiming (and thus the amount in controversy between the parties), not whether the plaintiff is likely to win or be awarded everything he seeks. Once the proponent of federal jurisdiction has explained plausibly how the stakes exceed $5 million, then the case belongs in federal court unless it is legally impossible for the plaintiff to recover that much.

Id. (citation and ellipses omitted).

Finally, when disputes about CAFA's requirements arise, this Court's "analysis begins with the statutory text." *AU Optronics*, 124 S. Ct. at 741. Every attempt should be made to reconcile the plain language of the statute with "commonsense" notions of judicial economy, so as to avoid "unwieldy inquiries" and prevent "an administrative nightmare that Congress could not possibly have intended." *Id.* at 743-44. "[W]hen judges must decide jurisdictional matters, simplicity is a virtue." *Id.* at 744 (quotation marks and citation omitted).

III. Discussion

A. Minimal Diversity

The parties do not dispute that minimal diversity is satisfied in this case. The plaintiffs nevertheless argue that the defendants should be judicially estopped from establishing minimal diversity because they have taken inconsistent positions before different Judges in this District. Specifically, while the defendants claim in this case that jurisdiction is appropriate because minimal diversity is satisfied, they claimed in a related case (involving identical counsel) that

jurisdiction was inappropriate because complete diversity was lacking. *See Dixon et al. v. Freese et al.*, No. 3:13-CV-236, Docket No. 81 (S.D. Miss. April 14, 2014) (granting, in plaintiffs' putative class action, defendants' motion to dismiss for lack of subject matter jurisdiction, upon finding no complete diversity) (Guirola, C.J.).

The plaintiffs' argument is not well-taken. Although the two cases are related, a brief review suggests that they involve different plaintiffs, facts, and requested relief, and ultimately arise under different mechanisms for federal jurisdiction. Here, the defendants claim federal jurisdiction under CAFA, which requires only minimal diversity. 28 U.S.C. § 1332(d)(2)(A). In *Dixon*, though, the plaintiffs claimed federal diversity jurisdiction, which requires that the parties be completely diverse. *Id.* § 1332(a)(1). Because the different arguments appear to be driven by different parties and facts, not by inconsistent positions, judicial estoppel is not warranted.

B. Class Action

This case was not filed under Federal Rule of Civil Procedure 23 or any analogous state statute or rule; indeed, Mississippi has no class action rule. It follows that this case is not a CAFA class action. *Accord Mississippi ex rel. Hood v. AU Optronics Corp.*, 876 F. Supp. 2d 758, 769-71 (S.D. Miss. 2012) (collecting cases). This conclusion is so plain that the defendants' response brief does not attempt to defend removal as a class action, notwithstanding their repeated use of the word "class" in their notice of removal. *See* Docket No. 1.

C. Mass Action

Certainly there are more than 100 persons joined in this action who seek a joint trial on claims involving common questions of law or fact. The question is whether the defendants have shown that the case satisfies CAFA's amount in controversy requirements.

1. Aggregate Amount in Controversy

The plaintiffs' complaint does not specify the amount of compensatory damages they seek. It is plain enough that they see $8,000 per plaintiff as a starting point, to be obtained in addition to further damages for the defendants' various acts of (alleged) wrongdoing. It is a long way from $8,000 per person to $5 million, though. And the defendants cannot count the John Doe plaintiffs to get them closer to $5 million; unnamed plaintiffs do not count toward the total, since "Congress chose not to use the phrase 'named or unnamed' [plaintiffs] in CAFA's mass action provision." *AU Optronics Corp.*, 134 S. Ct. at 742.

And yet, a fair reading of the complaint *does* show that more than $5 million is at stake. The plaintiffs' claim for wrongful conversion explains that the defendants took $6.9 million of the settlement funds and then misspent millions of it, to the plaintiffs' detriment. Docket No. 1-1, at 58-59. The plaintiffs' request for preliminary injunction asks this Court to freeze "all" settlement monies, move them to Mississippi, and place them under supervision.[2] *Id.* at 62. Finally, the prayer for relief asks for disgorgement of "all" the defendants' fees, gains, and profits, which earlier paragraphs suggested was $6.9 million. *Id.* at 64.

By seeking judicial control over "all" of a $6.9 million sum, the complaint shows that the total sum at stake in this suit exceeds $5 million.

2. Individual Amount in Controversy

In a mass action such as this, federal jurisdiction exists "only over those plaintiffs whose claims *individually* satisfy the $75,000 amount in controversy requirement." *AU Optronics*, 134 S. Ct. at 740 (emphasis added). The plaintiffs argue that no such evidence exists, while the

[2] Whether that is $6.9 million or $14 million is unclear, although the briefing suggests that the parties have converged on the $6.9 million figure.

defendants contend that the $1 million demand for punitive damages must be assessed against each plaintiff individually.

The defendants' argument is based on a 1995 Fifth Circuit decision which held that "the unique nature of [punitive damages] awards requires, at least in Mississippi, that the full amount of alleged damages be counted against each plaintiff in determining the jurisdictional amount." *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1333 (5th Cir. 1995). The problem is that, as this Court has previously concluded, "*Allen* was determined to conflict with a previous panel decision and therefore is no longer good law as to that point." *Mississippi ex rel. Hood v. AU Optronics Corp.*, 876 F. Supp. 2d 758, 775 (S.D. Miss. 2012) (citing *H&D Tire & Auto.-Hardware, Inc. v. Pitney Bowes Inc.*, 227 F.3d 326, 330 (5th Cir. 2000)).[3]

Five years after *Allen*, the Fifth Circuit clarified that under an even earlier decision, *Lindsey v. Alabama Tel. Co.*, 576 F.2d 593 (5th Cir. 1978), "the punitive damages claims of the putative class *cannot* be aggregated and attributed to each plaintiff to meet the jurisdictional requirement." *H&D*, 227 F.3d at 330 (emphasis added).[4] This was true regardless of which substantive state law applied: "*Lindsey*'s reasoning did not rely on a characterization of punitive damages under Alabama law, but was instead based on the principle that 'the claims of several plaintiffs, suing as members of a class, cannot be aggregated for the purpose of satisfying the jurisdictional predicate.'" *Id.* at 329 (quoting *Lindsey*, 576 F.2d at 594) (brackets omitted). In other words, a federal court evaluating an individual amount in controversy requirement must "first consider whether the plaintiffs' individual actual damages plus *individual* punitive damages exceed[s]" the jurisdictional threshold. *Id.* at 328-29 (emphasis added).

[3] This Court's finding was not disturbed on appeal by the Fifth Circuit or the Supreme Court.
[4] The fact that this is a mass action is irrelevant to this conclusion; the *H&D* court knew *Allen* arose out of a mass joinder and still found it preempted by the previous panel decision.

The defendants nevertheless claim that imputing collective punitive damages to every plaintiff is appropriate, and the Fifth Circuit's clarification meaningless, because in 2003 Judge Davidson found that *Allen* still applies in Mississippi. Docket No. 40, at 6 n.2 (citing *Amos v. CitiFinancial Corp.*, 243 F. Supp. 2d 587, 590 (N.D. Miss. 2003)).[5] As already explained, though, this argument is foreclosed by *H&D* and *Lindsey*.[6] The defendants have not explained why these cases are not binding. Their response brief, in fact, does not cite *H&D* or *Lindsey*.

The defendants' second and final argument on this issue contends that because the plaintiffs have a conversion claim for $6.9 million and seek to enjoin that sum, and because $6.9 million "far exceeds $75,000," that the individual amount of controversy requirement is satisfied. Docket No. 40, at 7.

The argument conflates the aggregate and individual amount in controversy requirements. If the aggregate amount of controversy could be imputed to each plaintiff, then CAFA's individual amount of controversy would be rendered meaningless. The Court cannot

[5] Other courts hold fast to the proposition that Mississippi law requires the aggregation and attribution of punitive damages claims across multiple plaintiffs, reasoning that *Allen* remains the law for cases in which punitive damages are sought under Mississippi law. *See, e.g.*, *Judd v. Fountainbleau Mgt. Servs. Inc.*, No. 1:10-CV-289, 2011 WL 2654239, at *3 n.1 (N.D. Miss. July 6, 2011) (Aycock, J.); *Amos v. CitiFinancial Corp.*, 243 F. Supp. 2d 587, 590 (N.D. Miss. 2003) (Davidson, C.J.); *Agnew v. Comm. Credit Corp.*, No 4:02-CV-47, 2002 WL 1628537, at *2, *3 n.2 (S.D. Miss. 2002) (Lee, J.) ("*Allen* remains the law for cases in which punitive damages are sought under Mississippi law."); *Johnson v. Am. Gen. Finance, Inc.*, No. 4:02-CV-62, 2003 WL 21749565, at *2 n.2 (S.D. Miss. July 22, 2003) (Lee, J.); *Beichler v. Citigroup, Inc.*, 241 F. Supp. 2d 696, 700 n.5 (S.D. Miss. 2003) (Barbour, J.); *Ivory v. Freese & Goss, PLLC*, No. 3:13-CV-740, Docket No. 23, slip op. at 4-5 (S.D. Miss. Aug. 6, 2014) (Wingate, J.); *see also In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, MDL No. 07-1873, 2012 WL 1204734, at *5 (E.D. La. Apr. 11, 2012) (construing Mississippi law); *cf. Rangel v. Leviton Mfg. Co.*, No. EP-12-CV-04-KC, 2012 WL 884909, at *5 (W.D. Tex. Mar. 14, 2012) (explaining that the Fifth Circuit has reexamined the issue of aggregating punitive damages since *Allen* and concluding that "[t]o the extent *Allen* is still good law, it is now confined to the unique circumstances of Mississippi law.").

[6] As one court has explained, "[t]he Fifth Circuit adheres strictly to the rule that it is bound by panel precedent in the absence of an intervening Supreme Court decision, legislative change or *en banc* reconsideration of the issue." *Hill v. Hom/Ade Foods, Inc.*, 136 F. Supp. 2d 605, 609 (W.D. La. 2000) (citations omitted); *see also Clark v. Kellogg Brown & Root L.L.C.*, 414 Fed. App'x 623, 626 (5th Cir. 2011). Where panel opinions conflict, the earlier decision controls and is binding in the circuit. *Shami v. C.I.R.*, 741 F.3d 560, 569 (5th Cir. 2014); *cf. Mississippi ex rel. Hood v. AU Optronics Corp.*, 701 F.3d 796, 803, 808 (5th Cir. 2012) (Elrod, J., concurring), *rev'd* 134 S. Ct. 736 (2014) (concurring in the judgment, which was later reversed by the Supreme Court, because the majority opinion was a fair application of the circuit's binding precedent, but simultaneously calling on the *en banc* court to "correct our course in this area of the law" and "reconsider that precedent and adopt a different approach"). And of course, "[t]his Court is bound by Fifth Circuit decisions and must follow the law set forth in the Fifth Circuit cases." *Williams v. Univ. Med. Ctr.*, 846 F. Supp. 508, 510 (S.D. Miss. 1994).

read § 1332(d)(11)(B)(i) out of existence. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.").

The propriety of remand comes down to math. Taking the complaint at face value, if the aggregate amount of controversy is $6.9 million, the per-plaintiff amount of compensatory damages at stake is just under $24,000. Considering the plaintiff's demand for $1 million in punitive damages places the per-plaintiff punitive damages amount at stake just under $3,500. Combined, the demand is approximately $27,500 per plaintiff. That is obviously less than $75,000.[7]

Because the removing party has not shown that it is facially apparent that any single plaintiff's individual amount in controversy exceeds $75,000, and because the removing party has not submitted any summary judgment-type evidence to show that any single plaintiff's individual amount in controversy exceeds $75,000, this Court lacks jurisdiction to hear this suit.

IV. Conclusion

The motion to remand is granted. The Clerk of Court shall send a certified copy of this Order to the Circuit Court of Copiah County, Mississippi.

SO ORDERED, this the 17th day of October, 2014.

s/ Carlton W. Reeves
UNITED STATES DISTRICT JUDGE

[7] This conclusion would not change even if the aggregate amount in controversy was determined to be $14 million.