

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION**

**DOUGLAS E. ATWOOD,
Individually and as Plaintiff
Class Representative**

PLAINTIFF

V.

4:15CV00305

**STEPHEN J. PETERSON,
MICHELLE BROOKS,
WALGREEN CO.**

DEFENDANTS

ORDER

Pending is the Plaintiff's Motion to Remand and the Defendants' Motion to Dismiss. The Court has reviewed both motions. Argument on the motion to remand was heard on September 2, 2015. For the reasons set forth below, the motion to remand is DENIED. The motion to dismiss will be ruled upon by separate order.

Beginning in September 2012, Defendant Walgreen Co. ("Walgreens") began offering discounts to its customers who enroll in, and use, its Balance Rewards Card program. Customers who do not enroll in, or use, the Balance Rewards program are not eligible for the same discounts. Plaintiff, individually and on behalf of the putative class, alleges this is a violation of Ark. Code Ann. § 4-75-501(a)(2) which makes it unlawful for "a person, company, corporation or association engaged in the sale of any manufactured product . . . to "willfully refuse or fail to allow [purchasers of] manufactured product[s] ... all rebates and discounts which are granted by them to other purchasers, for cash, of like quantities of such manufactured product[s]. . . ." Ark. Code Ann. § 4-75-501(a)(2).

Defendants Stephen J. Petersen and Michelle Brooks (the "DMs"), both citizens of Arkansas, are district managers for Walgreens. Between the two of them, they manage all 43 of

the stores in Arkansas. Plaintiff contends that, along with Walgreens, Petersen and Brooks are personally liable for violation of the statute because they were “persons” engaged in the sale of a manufactured product, “had primary responsibility for the discharge of the duties to comply with [Ark. Code Ann. §4-75-501(a)(2)], and recklessly performed or omitted to perform those duties.” (Complaint, ECF No. 2 at p.10-11). Plaintiff contends that Petersen and Brooks are individually and severally liable for all sums payable for all violations of the Act, including statutory penalties of between \$200 and \$1,000 per transaction. *See* Ark. Code Ann. 4-75-501(b)(1).

This case was removed from Pulaski County Circuit Court on May 29, 2015 by Walgreens. Stephen J. Petersen, and Michelle Brooks did not object to the removal. (Complaint, ECF No. 1, p.2). The action was removed based upon (1) the Class Action Fairness Act, 28 U.S.C. § 1332(d) (“CAFA”) and (2) diversity of citizenship, 28 U.S.C.A. § 1332(a)(1). CAFA gives federal courts original jurisdiction of class actions where the matter in controversy exceeds \$5,000,000 and there is minimal diversity. 28 U.S.C. § 1332(d)(2)(A). Plaintiff is an Arkansas citizen and Walgreens is an Illinois corporation with its principal place of business in Illinois. (Notice of Removal, ECF. No. 1 at p.3).

Plaintiff seeks remand of the case back to circuit court arguing that the Complaint contains all four elements of the mandatory local controversy exception to CAFA jurisdiction. Walgreens concedes in its Notice of Removal that the elements of the mandatory exception have been met with the exception of the significant defendant element. Walgreens contends the local controversy exception to CAFA does not apply to this case because the DMs are not significant parties and that the DMs were fraudulently joined by the Plaintiff in order to defeat federal diversity jurisdiction. Walgreens attached the affidavits of Defendants Petersen, Brooks, and

corporate representative Melinda Heintskill to prove that the local controversy exception to CAFA jurisdiction does not apply to this case.

There is no dispute that Walgreens met the initial jurisdictional requirements of CAFA in its Notice of removal. Upon filing of the motion to remand, the burden shifted to the Plaintiff to establish that CAFA's local controversy exception applies to this case. *Westerfeld v. Indep. Processing, LLC*, 621 F.3d 819 (8th Cir. 2010). The Court must resolve all doubts about the applicability of CAFA's local controversy exception against the party seeking remand and the party who bears the burden of establishing that the exception, i.e., the Plaintiff. *Id.*

Under the local-controversy exception, a district court must decline to exercise jurisdiction over a class action in which (1) more than two-thirds of the class members in the aggregate are citizens of the state in which the action was originally filed, (2) at least one defendant 'from whom significant relief is sought by members of the plaintiff class' and 'whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class' is a citizen of the state in which the class action was originally filed, (3) the principal injuries were incurred in the state in which the action was filed, and (4) no other class action alleging similar facts was filed in the three years prior to the commencement of the current class action. 28 U.S.C. § 1332(d)(4)(A)); *Westerfeld, LLC*, 621 F.3d at 822.

[T]his is a narrow exception that was carefully drafted to ensure that it does not become a jurisdictional loophole. Thus, [] in assessing whether each of these criteria is satisfied by a particular case, a federal court should bear in mind that the purpose of each of these criteria is to identify a truly local controversy—a controversy that uniquely affects a particular locality to the exclusion of all others.

Stevens v. Diversicare Leasing Corp., No. 09-6008, 2009 WL 1212488, *5 (W.D.Ark. May 4, 2009) (quoting S.Rep. No. 109-14, at 38 (2005); see also, *Westerfeld*, 621 F.3d at 825.

As stated, Walgreens concedes that all of the elements of the exception have been met by Plaintiff except the second element. In order to prove that the local controversy exception applies and that the case should be remanded to state court, Plaintiff must prove by the preponderance of the evidence that significant relief is sought from Petersen or Brooks and that Petersen or Brooks's conduct forms a significant basis for his claims under § 4-75-501(a)(2). "CAFA itself does not describe the type or character of conduct that would form a 'significant basis' of plaintiffs' claims or define the term 'significant relief.'" *Rhodes v. Kroger Co.*, No. 5:15CV00312-JLH, 2015 WL 5006070 (E.D.Ark. 2015). However, we know from the language of the statute that the significance of the asserted basis and relief asserted against the local defendant must be analyzed in relation to the basis and relief asserted against all of the defendants.

The plain text of 28 U.S.C. § 1332(d)(A)(i)(II)(bb) relates the alleged conduct of the local defendant, on one hand, to all the claims asserted in the action, on the other. The provision does not require that the local defendant's alleged conduct form a basis of each claim asserted; it requires the alleged conduct to form a significant basis of all the claims asserted.

Opelousas Gen. Hosp. Auth. v. FairPay Solutions, Inc., 655 F.3d 358, 361 (5th Cir. 2011) (quoting *Kaufman v. Allstate New Jersey Insurance Company*, 561 F.3d 144, 156 (3rd Cir. 2009)).

Walgreens filed affidavits of the DMs and Heintskill to prove that the DMs were not only insignificant actors in the alleged illegal scheme but in fact had no control, authority, ability to implement or ability to discontinue the Balance Reward Card scheme in their stores. Plaintiff

argues that the Court should not consider evidence outside the Complaint. The Court disagrees.¹ See *Evan v. Walter Ind. Inc.*, 449 F.3d 1159 (11th Cir 2006); *Summerhill v. Terminix, Inc.*, No. 4:08CV00659 GTE, 2008 WL 4809448 (E.D. Ark. Oct. 30, 2008).

Although the Eighth Circuit has not decided whether extrinsic evidence may be considered when analyzing the local controversy exception to CAFA, the Court finds some guidance on the issue in *Westerfield v. Independent Processing*. In *Westerfield*, the Eighth Circuit Court of Appeals noted that the district court relied on evidence contained in an affidavit to determine that the local controversy exception applied. 621 F.3d at 824. The court vacated the judgment and remanded for further consideration because the district court had based its decision on the wrong burden of proof. The court did not, however, find that the district court should have excluded the extrinsic evidence or should exclude the extrinsic evidence on remand.

Plaintiff argues the court's analysis in *Westerfield* is inapposite to the analysis here because the *Westerfield* court "analyzed the mandatory exception factors while *assuming that the claims against in-state Defendants were valid.*" (Def's Brief, ECF No. 11 at p.5) (emphasis in original). In other words, Plaintiff contends that this Court cannot review the Walgreens affidavits because they tend to prove that Plaintiff has no claim against the local defendants, as opposed to affidavits which merely show a smaller number of claims against them. As the

¹ The Court acknowledges, however, that there is a difference of opinion in this circuit as to whether extrinsic evidence may be considered when analyzing the local controversy exception to CAFA. See *Rhodes v. Kroger Co.*, No. 5:15CV00312-JLH, 2015 WL 5006070 (E.D.Ark. 2015); *Johnson v. MFA Petroleum Co.*, No. 11-0981-CV-W-DGK, 2013 WL 3448075 (W.D.Mo. 2013); *Oliver v. Mona Vie, Inc.*, No. 4:11CV04125, 2012 WL 1965613, at *2 (W.D. Ark. 2012). But see *Summerhill v. Terminix, Inc.*, No. 4:08CV00659 GTE, 2008 WL 4809448 (E.D. Ark. Oct. 30, 2008); *Green v. SuperShuttle Int'l, Inc.*, No. 09-2129 ADM/JJG, 2010 WL 419964, at *3 (D. Minn. Jan. 29, 2010);

Eighth Circuit quoted in *Westerfeld*, “We cannot conceive that Congress intended this result-- particularly given its admonition that the local-controversy exception was ‘a narrow exception that was carefully drafted to ensure that it does not become a jurisdictional loophole.’”

Westerfeld, 621 F.3d at 825 (quoting S.Rep. No. 109-14, at 39, reprinted in 2005 U.S.C.C.A.N. 3, 38). The Court will consider the affidavits filed by Walgreens.

The Complaint alleges:

1. The DMs are and were in charge of and responsible for their Stores' discounting, rebating and compliance with Arkansas law including the laws cited in this Complaint.
2. The DMs are and were in charge of and responsible for directly and indirectly controlling their Stores' practices and procedures affecting sales, pricing, discounting, and rebating of manufactured products at the Arkansas Walgreens Stores they managed and which are the subject of this Complaint.
3. At all times relevant to the claims of this Complaint, the DMs were engaged in the sale of manufactured products individually and as agents of Walgreens while acting within the scope and course of their office, agency, and/or employment on behalf of Walgreens.
4. At all times relevant to the claims of this complaint, the DMs are independently and jointly and severally liable for all conduct violating Act 183 which they performed or directly or indirectly caused to be performed in the name of Walgreens.
5. The DMs are also personally liable for all sums payable pursuant to Act 183 in

keeping with Ark Code Ann. §§ 5-1-108(b) & 5-2-503.

6. The DMs performed or caused to be performed all of their Stores' violations of Act 183 which are the subject of this Complaint.
7. The DMs willfully refused or failed to allow or caused the willful refusal or failure to allow Plaintiffs all rebates and discounts which they and their Stores granted to BRC purchasers, for cash, of like quantities of such manufactured products.
8. The DMs had primary responsibility for the discharge of the duties to comply with Act 183 and recklessly performed or omitted to perform those duties.

(Complaint, ECF No. 2).

Melinda Heintskill, Vice President, Loyalty and Personalized Marketing for Walgreens states in her affidavit:

1. Among my responsibilities is overseeing the Balance Rewards program for Walgreens.
2. The decision to create the Balance Rewards program was made by Walgreens corporate headquarters. District managers, such as Stephen Peterson and Michelle Brooks, were not involved in Walgreens' decision to create the Balance Rewards program.
3. Walgreens makes its decisions on what products to offer in the Balance Rewards program, and the amounts of the discounts to offer on such products, at the corporate level. District managers are not involved in these decisions and have no discretion to vary either the bundle of products offered in the Balance Rewards

program, or the amounts of the discounts offered on such products, in their stores.

4. The conditions for membership in the Balance Rewards program were also set by Walgreens at the corporate level. Again, district managers were not involved in setting the membership policy for the Balance Rewards program.

(Heintskill aff., ECF No. 1, p.80-81).

Defendants Petersen and Brooks each state in their affidavits:

1. Among the decisions made by Walgreens corporate headquarters was the decision to create the Balance Rewards program. As a District Manager in Arkansas, I had no role in the decision to create the Balance Rewards program. The Balance Rewards program was a program implemented by Walgreens on a nationwide basis.
2. As a District Manager, I had no role in determining what products are offered as part of the Balance Rewards program. Nor do I have any such role in my current position. Walgreens corporate headquarters determines what products will be offered as part of the Balance Rewards program.
3. Similarly, I have not played any role in determining the amounts of the discounts that are offered under the Balance Rewards program. The amounts of the Balance Rewards discounts are decided at Walgreens corporate headquarters. Each store receives pricing information directly from Walgreens corporate headquarters each week that lists the products to be included in the Balance Rewards program and the prices at which those products are to be offered. As a District Manager, and in my current role, I have had no discretion to alter either the products or the pricing

discounts to be offered in the Balance Rewards program.

4. I also have not played any role in setting policy regarding membership in the Balance Rewards program.

5. To the best of my knowledge, I have never met Mr. Atwood. I have also reviewed my records, and I was not present in any of [the Walgreens] locations at the time of Mr. Atwood's purchases. I had no role in any of the sales alleged by Mr. Atwood in his complaint.

(ECF No. 1, p.82-87).

These affidavits directly contradict Plaintiff's allegations against the DMs in the Complaint. Further, Plaintiff has not provided any evidence to support his burden of proof that these Defendants are 'significant' enough to satisfy the local controversy exception.

Accordingly, the Court finds that the conduct of the DMs does not form a significant basis for Plaintiff's claims and the DMs do not provide a significant source of relief to the Plaintiff.

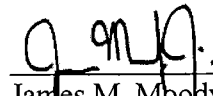
Plaintiff has failed to prove that the local controversy exception may be applied to deprive this Court of jurisdiction.

Moreover, Walgreens contends that the DMs were fraudulently joined to defeat federal jurisdiction. "A party has been fraudulently joined when there exists no reasonable basis in fact and law to support a claim against it." *Hubbard v. Federated Mut. Ins. Co.*, No. 14-3210, 2015 WL 5203375, at *2 (8th Cir. Sept. 8, 2015) (quoting *Thompson v. R.J. Reynolds Tobacco Co.*, 760 F.3d 913, 915 (8th Cir.2014)). For fraudulent joinder analysis, district courts are allowed to review extrinsic evidence. *Block v. Toyota Motor Co.*, 2010 WL 5422555 (8th Cir. 2010). After review of evidence, the Court finds that there is no reasonable basis in fact or law to support

Plaintiff's claim that Petersen and Brooks "willfully refused" or "failed" to give customers who were not Balance Reward Card members the same discounts as they gave to the Balance Reward Card members in violation of Ark. Code Ann. § 4-75-501(a)(2).

For these reasons, the Court has jurisdiction pursuant to 28 U.S.C. § 1332(d) and 28 U.S.C. § 1332(a)(1). Plaintiff's motion to remand (ECF No. 10) is DENIED.

IT IS SO ORDERED this 10th day of September, 2015.



James M. Moody Jr.
United States District Judge