IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

CARLA GIBSON, et al — PLAINTIFFS

v. Case No. 1:16-cv-01035

CLEAN HARBORS ENVIRONMENTAL SERVICES, INC. — DEFENDANT/ THIRD-PARTY PLAINTIFF

v.

BIOLAB, INC., a/k/a BIO-LAB, INC., a/k/a BIO LAB, INC. — THIRD-PARTY DEFENDANT

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

Pending now before the Court is Plaintiffs' Motion to Remand. ECF No. 9. Plaintiffs filed this Motion on May 10, 2016. *Id.* Defendant Clean Harbors Environmental Services, Inc. ("Defendant") responded to this Motion on May 24, 2016. ECF No. 13. Plaintiffs filed a reply on May 26, 2016. ECF No. 14. This Motion is now ripe for consideration.

Pursuant to the provisions of 28 U.S.C. § 636(b)(1) and (3) (2009), the Honorable Susan O. Hickey referred this Motion to this Court for the purpose of making a report and recommendation. In accordance with that referral, this Court recommends Plaintiffs' Motion to Remand (ECF No. 9) be **GRANTED.**

1. Background

On January 4, 2013, Plaintiff filed this class action complaint in Union County Circuit Court. ECF No. 1, 3. Plaintiffs subsequently amended their complaint on February 4, 2013 to name the

proper Defendant, Clean Harbors Environmental Services, Inc. ECF No. 4. Defendant answered on February 6, 2013. ECF No. 5.

On May 9, 2016, Defendant filed a Notice of Removal with this Court and removed Plaintiffs' action to the United States District Court for the Western District of Arkansas, El Dorado Division. ECF No. 1. On May 10, 2016, Plaintiffs filed a Motion to Remand. ECF No. 9. With this Motion, Plaintiff claims remand to the Circuit Court of Union County, Arkansas is appropriate because procedural requirements for removal were not satisfied, specifically pursuant to 28 U.S.C. § 1446(b), Defendant's removal was untimely. *Id.*

On May 24, 2016, Defendant responded to Plaintiffs' Motion to Remand. ECF No. 13. Defendant argues this case should not be remanded because Defendant timely removed this matter from the Circuit Court of Union County, Arkansas within thirty (30) days of receiving "other paper" indicating Plaintiffs' purported class satisfied the criteria set forth in the Class Action Fairness Act ("CAFA"). *Id.*

2. Applicable Law

A defendant in state court may remove the case to federal court if the defendant can demonstrate the federal court has original jurisdiction over the case. 28 U.S.C. § 1441(a). Once a case is removed to federal court, a plaintiff may move to remand to state court if the federal court lacks subject matter jurisdiction or there is some other procedural defect in the removal. 28 U.S.C. § 1447(c). Removal cases are construed more narrowly than originally filed cases to protect the plaintiff's choice of forum and to protect the state courts from usurpation by federal courts. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-109 (1941); *Hurt v. Dow Chemical Co.*, 963 F.2d 1142, 1145 (8th Cir. 1992). The Court must strictly construe the federal removal statute and

resolve any ambiguities about federal jurisdiction in favor of remand. *Transit Cas. Co. v. Certain Underwriters at Lloyd's of London*, 119 F.3d 619, 625 (8th Cir. 1997).

CAFA provides the federal district courts with "original jurisdiction" to hear a "class action" if the class has more than 100 members, the parties are minimally diverse, and the "matter in controversy exceeds the sum or value of $5,000,000." 28 U.S.C. § 1332(d)(2), (d)(5)(B).

3. Discussion

This Court recommends this matter should be remanded because removal was untimely. Under CAFA, a defendant must file a notice of removal either (1) "within thirty days after the receipt by the defendant . . . of a copy of the initial pleading," or (2) "if the case stated by the initial pleading is not removable . . . within 30 days after receipt by the defendant . . . of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b)(1) and (3).

According to Plaintiff, at the latest, the 30 day time period began to run on March 11, 2016 when Defendant received a letter from Plaintiffs' counsel where Plaintiffs' counsel recommended a total payment of $6,500,000 to resolve the matter and indicated there were more than 6,000 potential claims. ECF No. 1-7. Plaintiff states this was 59 days prior to Defendant's removal.

Defendant argues Plaintiffs' Motion to Remand should be denied as it was not until Plaintiffs provided their expert report on April 21, 2016 (ECF No. 1-4, Pgs 112-161) that Defendant could unambiguously conclude CAFA jurisdiction and ascertain the amount in controversy was in excess of $5,000,000, and as such, their Notice of Removal was timely.

The central issue is whether Plaintiffs' March 11, 2016 correspondence is considered an "other paper" by which Defendant could ascertain the CAFA requirements were met. As an initial

point, a post-complaint settlement demand can constitute an "other paper" under 28 U.S.C. § 1446(b) for purposes of CAFA removal. *See Romulus v. CVS Pharmacy, Inc.*, 770 F.3d 67, 78 (1st Cir. 2014); *Babasa v. LensCrafters, Inc.*, 498 F.3d 972, 975 (9th Cir. 2007).

The March 11, 2016 settlement correspondence provided Defendant significant detail which gave Defendant notice this case was removable, including the basis for the $6,500,000 demand, as follows:

> The area defined in plaintiffs' class certification motion contains an estimated 5,653 total residents. This does not account for those who were present in the impact area for work or other reasons. If we estimate another 500 class members for this latter group, we are dealing with over 6,000 potential claims. Defendant's expert has suggested the area of impact to be smaller than plaintiffs believe it is. However, given the number of contacts that were received from those present in the area of impact and the consistency of the experiences they related, we believe the number of valid claims will be closer to 6,000. If this many claims are presented, then the average amount paid would be right at $700 (after deduction for fees and costs). However, even if this estimate is high and there are 5,000 claims presented, the average amount paid per claim (again after deduction for fees and costs) in this case would be less than $850 per claim. Again, given the reaction people experienced from being exposed to a more severe irritant, we do not believe this amount to be excessive.

ECF No. 1-7.

The letter also contained a discussion of an earlier settlement against Defendant's predecessor arising out of a fire at a hazardous waste storage building at the same facility. That matter settled for $3,170,000 and involved more than 2,600 claims. *Id.* Plaintiffs' correspondence went on to explain why the current matter involved greater damages with more claimants. To put it simply, this letter was much more than a simple demand for $6,500,000 with no basis or justification for support of that figure.

Defendant's argument is April 2l, 2016 was the first date they had sufficient information to ascertain that the amount in controversy was in excess of $5,000,000. Defendant claims this date was the first time Plaintiffs provided scientific support for the number of potential class members

and amount in controversy through the expert report and affidavit of Michael R. Corn. ECF No. 1-4, Pg. 112. However, this Court disagrees and finds the March 11, 2016 correspondence provides the information needed for Defendant to determine the matter was removable.

Further, I note the Defendant, in its Notice of Removal, refers to the March 11, 2016 correspondence as support for the amount in controversy and the size the class. ECF No. 1, Pgs. 3-5.

Finally, Plaintiffs' seek an award of their costs and any actual expenses, including attorney fees upon remand of this case. Pursuant to 28 U.S.C. § 1447(c), a district court "may require payment of just costs and actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). "Absent unusual circumstances, courts may award attorneys' fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied." *Martin v. Franklin Capital Corp*., 546 U.S. 132, 141 (2005). Upon consideration of the issues presented in this case, this court does not recommend that an award of attorneys' fees and costs would be appropriate.

4. Conclusion

Based upon the foregoing, the Court recommends Plaintiffs' Motion to Remand (ECF No. 9) be **GRANTED.**[1] However, the Court does not recommend Plaintiffs receive an award of their costs and any actual expenses, including attorney fees upon remand of this case.

The parties have fourteen (14) days from receipt of this Report and Recommendation in which to file written objections pursuant to 28 U.S.C. § 636(b)(1). The failure to file timely objections may result in waiver of the right to appeal questions of fact. The parties are

[1]If the report and recommendation is adopted, a certified copy of that order and this report and recommendation should be mailed by the U.S. Clerk to the clerk of the Circuit Court of Union County, Arkansas pursuant to 28 U.S.C. § 1447(c). The Circuit Court of Union County, Arkansas may "thereupon proceed with such case." Id.

reminded that objections must be both timely and specific to trigger *de novo* review by the district court. *See Thompson v. Nix*, 897 F.2d 356, 357 (8th Cir. 1990).

ENTERED this 28th day of June 2016.

/s/ Barry A. Bryant
HON. BARRY A. BRYANT
U.S. MAGISTRATE JUDGE