IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RICHARD R. BENTLEY, WAYNE WENDORF, JAMES HATCH and GARVER FEED & SUPPLY CO., INC., Individually and on behalf of all Others Similarly Situated,

Plaintiffs,

v.

WELLMAN, INC., DuPONT E.I. NEMOURS & CO., NAN YA PLASTICS CORP., NAN YA PLASTICS CORPORATION AMERICA, ARTEVA SPECIALTIES, KOCH INDUSTRIES and ARTEVA SPECIALITIES, LLC,

Defendants.

OPINION AND ORDER

03-C-16-C

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In this civil suit, plaintiffs allege that defendants fixed the price of polyester staple in violation of the Wisconsin antitrust law, Wis. Stat. § 133.03. Plaintiffs brought the action in the Circuit Court for Dane County, Wisconsin but defendants removed the case to this court pursuant to 28 U.S.C. § 1441, alleging the existence of federal jurisdiction under 28 U.S.C. § 1332(a)(1).

Under § 1332(a)(1), federal courts have subject matter jurisdiction to hear cases

between citizens of different states when the amount in controversy is greater than $75,000. In a suit brought as a class action, only the citizenship of the named plaintiffs is relevant in determining whether there is complete diversity of citizenship between the plaintiffs and defendants. F.& H.R. Farman-Farmaian Consulting Engineers Firm v. Harza Engineering Co., 882 F.2d 281, 284 (7th Cir. 1989). Furthermore, in this circuit, so long as one named plaintiff satisfies the jurisdictional minimum *independently*, the amount in controversy requirement is met. In re Brand Name Prescription Drugs Antitrust Litigation, 123 F.3d 599, 607 (7th Cir. 1997). Class members may not aggregate their claims to establish jurisdiction. Id.

Plaintiffs have filed a motion to remand this action to state court, arguing that the requirements of §1332(a)(1) have not been met. Although they agree with defendants that there is complete diversity, they argue that defendants have failed to show that the amount in controversy is more than $75,000.

It is well established that in determining the existence of jurisdiction, the burden of proof is on the proponent of the exercise of jurisdiction. FW/PBS, Inc. v. City of Dallas, 492 U.S. 215, 231 (1990); NLFC, Inc. v. Devcom Mid-America, Inc., 45 F.3d 231, 237 (7th Cir. 1995). In a removed case such as this one, defendants must show that removal is proper by a preponderance of the evidence and with "competent proof," that is, proof to a "reasonable probability" that jurisdiction exists. Chase v. Shop 'N Save Warehouse Foods, Inc., 110

F.3d 424, 427 (7th Cir. 1997); Shaw v. Dow Brands, Inc., 994 F.2d 364 (7th Cir. 1993); see also McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936) ("If [party's] allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof."). A case filed in state court is properly removed to federal court if the case could have been filed in federal court as an original matter. Grubbs v. General Electric Credit Corp., 405 U.S. 699, 702 (1972).

Defendants argue that jurisdiction is established from the face of plaintiffs' complaint. Under St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283 (1938), the sum claimed in good faith by the plaintiff in the complaint determines the amount in controversy unless it appears to a "legal certainty" that the claim is really for less than the jurisdictional amount. See also Freeman v. Sports Car Club of America, Inc., 51 F.3d 1358, 1362 (7th Cir. 1995). Thus, when the plaintiff alleges an amount that is greater than the jurisdictional amount, this is generally sufficient to satisfy the defendant's burden. Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992).

The problem with relying on the rule from St. Paul in this case is that plaintiffs have not pleaded a specific amount of damages. Rather, in their complaint, they state that they seek "to recover compensatory damages in amounts less than seventy-five thousand dollars ($75,000)." Defendants are correct that both punitive damages and attorney fees should be included in determining whether the amount in controversy exceeds the jurisdictional

minimum if they are allowed by state law. Sharp Electric Corp. v. Copy Plus, Inc., 939 F.2d 513, 515 (7th Cir. 1991) (punitive damages may be aggregated with actual damages); Gardynski-Leschuck v. Ford Motor Co., 142 F.3d 955, 958 (7th Cir. 1998) ("Legal fees may count toward the amount in controversy when the prevailing party is entitled to recover them as part of damages.") Because Wisconsin law automatically trebles a plaintiff's actual damages, Wis. Stat. § 133.18(1)(a), and awards attorney fees to a prevailing plaintiff, Wis. Stat. § 133.18(1), both should be included. (Because the parties agree that multiplying a damage award is included in the meaning of "punitive damages," I have assumed that it is.) However, the calculation of attorney fees is limited to those that have been incurred at the time of removal. Gardynski-Leschuck, 142 F.3d at 958-59. Furthermore, as a general rule, courts will not aggregate the attorney fees for all class members. Rather, they will prorate the fees across the class. 15 James Wm. Moore, Moore's Federal Practice, § 102.106[6][a] (3d ed. 2003). Thus, to establish federal jurisdiction, defendants must show by a preponderance of the evidence that at least one named plaintiff could recover more than $25,000 in actual damages and attorney fees.

Defendants note that if one plaintiff recovered just under $75,000 in actual damages, this amount would be trebeled to just under $225,000. That amount would easily satisfy the jurisdictional minimum. The flaw in defendants' example is that plaintiffs have not alleged that they will recover this much, but rather some *unspecified* amount below $75,000,

which could be less than $25,000. Thus, defendants cannot rely on that allegation in the complaint to meet their burden. See Tapscott v. MS Dealer Service Corp., 77 F.3d 1353, 1357 (11th Cir. 1996) (when amount in complaint is unspecified, defendant must satisfy burden with other competent proof).

Defendants also rely on plaintiffs' allegations that there was a "massive and long-running" conspiracy, that the proposed class members bought defendants' products over a 10-year period and that "the conspiracy has affected millions of dollars of commerce." Thus, defendants argue that "there is little question that among the millions of putative class members there are very large purchasers of polyester staple." Dfts.' Br., dkt. #18, at 5.

There are at least two problems with defendants' argument. First, whether one of the "millions" of potential class members independently satisfies the jurisdictional minimum is not the question. Rather, as noted above, "[a]t least one *named* plaintiff must satisfy the jurisdictional minimum." Brand Name, 123 F.3d at 607 (emphasis added). Second, defendants point to no evidence to support their assertion. As they say, there may be millions of members in the proposed class. Thus, simply because plaintiffs alleged that "the conspiracy affected millions of dollars of commerce" does not support an inference that one of the plaintiffs lost more than $25,000. Furthermore, plaintiffs alleged in their complaint that products containing polyester staple, such as bedding and clothing, are relatively low in cost and that polyester staple itself constitutes only a fraction of the of the total cost of

the product. Defendants have not disputed these allegations. There are no allegations in the complaint suggesting that any of the named plaintiffs are mass consumers of polyester staple to the extent that they have been overcharged almost $25,000 by defendants. Thus, from the allegations in the complaint, I cannot conclude that there is a "reasonable probability" that one of the named plaintiffs satisfies the jurisdictional minimum.

The only other evidence that defendants point to is a press release from "Cargill," announcing that it has acquired named plaintiff Garver Feed & Supply Co. It is unclear what this press release is intended to show. Simply because a larger entity acquired one of the named plaintiffs does not mean that the plaintiff's purchases of defendants' products increased. The press release does not indicate the amount of polyester staple that either Cargill or plaintiff Garver purchased. Therefore, the press release is not "competent proof" that the jurisdictional minimum has been satisfied.

Relying on West Bend Elevator, Inc. v. Rhone-Poulenc S.A., 140 F. Supp. 2d 963 (E.D. Wis. 2000), defendants argue that because plaintiff may be entitled to punitive damages, the burden shifts to plaintiffs to show that it is a "legal certainty" that they will not recover more than $75,000. In West Bend, 140 F. Supp. 2d at 968, the court stated: "[T]he governing legal principle is that where a plaintiff seeks punitive damages a federal court has subject matter jurisdiction unless it is clear beyond a legal certainty that plaintiff will not be able to recover the jurisdictional amount." The court cited Anthony v. Security Pacific

Financial Services, Inc., 75 F.3d 311, 315 (7th Cir. 1996), to support this proposition.

I respectfully disagree with the conclusion in West Bend. Although Anthony is not completely clear, the court of appeals suggested that the "legal certainty" standard applies only if the amount in controversy is uncontested, or at least only when *the plaintiff* has alleged that the amount of punitive damages will be greater than the jurisdictional minimum, similar to the rule of St. Paul. Id. at 315. This interpretation would make sense. The Supreme Court has not indicated that the "legal certainty" standard applies except when the plaintiff alleges in good faith an amount of damages that exceeds the jurisdictional minimum. In fact, the court of appeals has made it clear that the "legal certainty" standard articulated in St. Paul "should not be confused . . . with what a defendant must prove to invoke jurisdiction in a removal action." Shaw, 994 F.2d at 366 n.2. Furthermore, in Anthony the court did not explain why the burden of proof would shift simply because a claim of punitive damages was involved. This would be a curious omission if Anthony actually stands for the principle stated in West Bend, particularly in light of the well-established rule that all doubt regarding removal should be resolved in favor of remand. Doe v. Allied Signal Inc., 985 F.2d 908, 911 (7th Cir. 1993).

I recognize that when punitive damages are available, it is more likely that the amount in controversy will exceed the jurisdictional minimum. It does not follow, however, that the possibility of punitive damages relieves defendants of the need to produce

"competent proof" that the requirements of 28 U.S.C. § 1332 are satisfied. As the court of appeals noted in Brand Name, 123 F.3d at 607, a case decided after Anthony, "the defendants cannot simply wave the statute [providing for punitive damages] in our faces." Rather, "they must present *evidence* of federal jurisdiction once the existence of that jurisdiction is fairly cast into doubt." Id.; see also 15 Moore's Federal Practice § 102.107[3], at 102-188 ("The preponderance burden forces the defendant to do more than point to a state law that might allow the plaintiff to recover more than what is pleaded.")

In this case, plaintiffs' complaint does not show that there is a reasonable probability that the amount in controversy requirement has been satisfied. Thus, defendants were required to come forward with additional evidence demonstrating that at least one of the named plaintiffs could recover more than $75,000. Defendants have failed to do this. As a result, I cannot exercise jurisdiction to hear this case.

ORDER

IT IS ORDERED that plaintiffs' motion to remand this case to state court is GRANTED. The clerk of court is directed to return the record in case no. 03-C-16-C to the

Circuit Court for Dane County, Wisconsin.

Entered this 16th day of April, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge