IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

ACME IRON & METAL COMPANY, a d/b/a of TXALLOY, INC., and MAYFIELD PAPER COMPANY, INC., on their own behalf and on behalf of those similarly situated,	)	
Plaintiffs,	)	
v.	)	
REPUBLIC WASTE SERVICES OF TEXAS, LTD., sometimes d/b/a TRASHAWAY SERVICES and DUNCAN DISPOSAL,	)	
Defendant.	)	Civil Action No. 6:14-CV-045-C

ORDER

On this date, the Court considered:

(1) Defendant's Notice of Removal, filed July 30, 2014;

(2) Plaintiffs' Motion to Remand for Lack of Subject Matter Jurisdiction, filed June 18, 2015;

(3) Plaintiffs' Amended Statement of Jurisdiction, filed June 18, 2015;

(4) Defendant's Response to Plaintiffs' Motion to Remand, filed July 9, 2015;

(5) Plaintiffs' Reply to Defendant's Response to Plaintiffs' Motion to Remand, filed July 23, 2015;

(6) Plaintiffs' Motion to Strike Defendant's Amended Statement of Jurisdiction, filed July 23, 2015; and

(7) Defendant's Opposition to [Plaintiffs'] Motion to Strike, filed August 13, 2015.

I. BACKGROUND

This lawsuit was filed in the 119th Judicial District Court of Tom Green County, Texas, by Plaintiffs and a putative class of similarly situated commercial businesses. The general premise of liability rests on allegations of overcharges by Defendant for waste collection, hauling, and disposal services under an exclusive franchise agreement between the City of San Angelo, Texas, and Defendant for such services. Plaintiffs bring claims for alleged breach of contract, violations of the Texas Deceptive Trade Practices Act, and fraud. The case was removed "pursuant to 28 U.S.C. §§ 1332, 1441, and 1446. . . ." (Notice of Removal 1.)

Defendant asserted in its Notice of Removal that "[t]his Court has jurisdiction over this action pursuant to the Class Action Fairness Act of 2005 because Republic is a Delaware citizen and the action meets all other requirements of 28 U.S.C. § 1332." (*Id.* at 1-2.) Defendant states that this Court has jurisdiction under 28 U.S.C. § 1332(d)(2), which specifies that a district court has jurisdiction over any class action in which the amount in controversy exceeds 5 million dollars and any member of a class is a citizen of a state different from any defendant. It is undisputed that Plaintiffs are Texas corporations with their principal places of business in Texas, and therefore they are Texas citizens for diversity purposes.

Plaintiffs seek remand, contending that under the Class Action Fairness Act of 2005 ("CAFA"), a limited partnership is a citizen, for diversity purposes, of (1) the State where it has its principal place of business, and (2) the State under whose laws it is organized. *See* 28 U.S.C. § 1332(d)(10). Plaintiffs further argue that Defendant's "principal place of business is in Texas, and because [Defendant] is organized under Texas limited partnership law, Republic is a Texas

citizen under CAFA – as are Plaintiffs." (Mot. Remand 1-2.) As such, Plaintiffs base their remand request upon the alleged absence of minimal diversity under CAFA, which Plaintiffs also contend is the only basis for removal in Defendant's Notice of Removal. Plaintiffs also argue that jurisdiction is lacking under the "home state" and "local controversy" jurisdiction exceptions of CAFA. (Mot. Remand 2, citing 28 U.S.C. § 1332(d)(4)(A)-(B)). Finally, Plaintiffs also argue that even though Defendant did not base removal upon traditional diversity when Defendant filed its Notice of Removal, Defendant has likewise failed to meet its burden of showing diversity and minimum amount in controversy for any one Defendant under traditional diversity, § 1332(a).

II. STANDARD

There is a presumption against subject matter jurisdiction that must be rebutted by the party bringing an action to federal court. *Coury v. Prot*, 85 F.3d 244, 248 (5th Cir. 1996). As such, the party removing a case to federal court has the burden to show that jurisdiction exists. *Getty Oil Corp., Div. of Texaco, Inc. v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1258-59 (5th Cir. 1988). "As 'the effect of removal is to deprive the state court of an action properly before it, removal raises significant federalism concerns . . . .' The removal statute is therefore to be strictly construed and any doubt as to the propriety of removal should be resolved in favor of remand." *In re Hot-Hed, Inc.*, 477 F.3d 320, 323 (5th Cir. 2007) (quoting *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 365-66 (5th Cir. 1995)).

III. DISCUSSION

Plaintiffs' argument can be summarized as requesting the Court to find remand to be proper because Defendant's sole stated basis for removal jurisdiction, CAFA, does not allow for this case to have been properly removed. After Plaintiffs raised these issues in the Motion to

Remand, Defendant filed its Amended Statement of Jurisdiction, asserting that jurisdiction was also proper at the time of removal under § 1332(a). Defendant states in its Amended Statement that it amends the jurisdictional allegations, pursuant to 28 U.S.C. § 1653, to include traditional diversity grounds found in § 1332(a).

Analysis

As argued by Plaintiffs, CAFA has been held to view limited partnerships as unincorporated associations. *See Davis v. HSBC Bank Nevada, N.A.*, 557 F.3d 1026, 1032 n. 13 (9th Cir. 2009); *Bond v. Veolia Water Indianapolis, LLC*, 571 F. Supp. 2d 905, 912 (S.D. Ind. 2008) (discussing CAFA's unincorporated association language found in § 1332(d)(10)). Republic is a limited partnership according to its own pleadings and its principal place of business is in Texas. Thus, Republic is a citizen of Texas under CAFA because it is organized under Texas limited partnership law and its principal place of business is in Texas.[1] 28 U.S.C. § 1332(d)(10). Plaintiffs further contend that Defendant has failed to allege or make a prima facie showing that any other putative class member is a citizen of a state other than Texas. Therefore, the Court finds that removal was improper because Defendant has failed to meet its burden of showing that minimal diversity existed.

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[1]Defendant does not dispute that it is organized under Texas limited partnership law. Rather, Defendant alleges in its Notice of Removal that its general partner is a Delaware corporation with its principal place of business in Arizona and its limited partner is also a Delaware corporation with "a" principal place of business in Arizona. (Notice Removal 3-4.) Defendant relied upon precedence interpreting a limited partnership's citizenship as being that of each of its partners. (*Id.*) However, as discussed above, CAFA's explicit language regarding citizenship for jurisdictional determinations modified that longstanding rule and imposed the same rule as for corporations.

Alternatively, Plaintiffs also argue that the exclusion found in 28 U.S.C. § 1332(d)(4) applies because the dispute centers on services provided within the jurisdiction of the City of San Angelo, Texas, and the class thereby consists of Texas citizens—to which Defendant has not alleged or made a prima facie showing that less than two-thirds of the putative class are not Texas citizens. *See* 28 U.S.C. § 1332(d)(4) (a court must decline jurisdiction when two-thirds of the members of all proposed plaintiffs are citizens of the same state in which the action was filed). The Court agrees with Plaintiffs' contentions on this point. The "home-state exception" prevents this Court from having jurisdiction under CAFA, and the Court finds that Plaintiffs have met their burden of showing the exception would apply. *See Hollinger v. Home State Mut. Ins. Co.*, 654 F.3d 564, 570 (5th Cir. 2011). Here, it is not in dispute that the controversy involves billing charges for Defendant's services within a local municipality in which customers of the services were allegedly overcharged. The controversy is therefore local, and it cannot reasonably be argued that at least two-thirds of the putative class members are not citizens of the state of Texas.[2] As has already been discussed above, Defendant is a citizen of the state of Texas under CAFA. Thus, the Court finds that Plaintiffs, the parties objecting to CAFA jurisdiction, have met their burden.

Finally, Defendant contends that the Court should look to traditional diversity under § 1332(a) and find that complete diversity and minimum amount in controversy existed under this provision of the removal statute at the time of removal. However, the Court declines to so find. As argued by the Plaintiffs, Defendant has failed to meet its prima facie burden of showing

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[2]The only named Plaintiffs at this point in the litigation are clearly Texas citizens, as is the only named Defendant under CAFA's unincorporated association provision.

that the amount in controversy at the time of removal exceeded $75,000.00, exclusive of interests and costs. Plaintiffs set forth a detailed argument of the amount in controversy for the alleged over-billing in their Reply. (Pls.' Reply 3-6.) The Court finds the argument persuasive. Defendant's conclusory arguments notwithstanding, the Court cannot find that the minimum amount in controversy has been met. Class-wide attorneys' fees will not suffice to bring the amount above the minimum threshold for one particular plaintiff. *Coghlan v. Wellcraft Marine Corp.*, 240 F.3d 449, 455 n.5 (5th Cir. 2001).[3]

Moreover, the Court cannot say that an amendment to the jurisdictional pleadings contained in the notice of removal should relate back to the time before a defendant has voluntarily refunded a large portion of the overall alleged overcharges made to the putative class, as is the case here. It is not disputed that after removing this action, Defendant later refunded over 5 million dollars of the alleged total class actual damage amount of 9 million dollars. Although the Court is cognizant of the requirement to look at the basis for removal at the time of removal and ignore subsequent changes to diversity and amount in controversy, Defendant's attempt to bring a new ground for removal over 10 months after filing a notice of removal, and yet rely upon the facts (amount in controversy) as they existed under the originally pleaded ground for removal, does not comport with the procedural grounds set for removing an action to federal court. *See, e.g., Geisman v. Aestheticare, LLC*, 622 F. Supp. 2d 1091, 1098-99 (D. Kan. 2008) (CAFA and traditional diversity are separate jurisdictional grounds and a party cannot merely amend a notice of removal after the 30-day deadline has passed to cure a jurisdictional

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[3]Likewise, the United States Court of Appeals for the Fifth Circuit has held that punitive damages cannot be aggregated across a class to meet the amount-in-controversy requirement. *H&D Tire & Auto.-Hardware, Inc. v. Pitney Bowes, Inc.*, 227 F.3d 326, 329-30 (5th Cir. 2000).

pleading insufficiency); *Victoriano v. Classic Residence Mgmt., LP*, 2015 WL 3751984, *5 (S.D. Cal. June 15, 2015) (same). The Court finds, as argued by the Plaintiffs in their Motion to Remand, that Defendant has failed to meet its burden of showing the minimum amount is met as to any particular plaintiff.

Although Plaintiffs request attorneys' fees, the Court finds that this is not an instance in which attorneys' fees should be awarded for improvident removal. The issues are complex in relation to the removal question, and the Court cannot say that Defendant did not have an objectively reasonable basis for removal or that removal was taken in bad faith. *See Valdes v. Wal-Mart Stores, Inc.*, 199 F.3d 290, 292 (5th Cir. 2000).

IV. CONCLUSION

The Court finds that for the reasons stated herein, as well as those argued by the Plaintiffs, the Court lacks subject matter jurisdiction, *see* 28 U.S.C. § 1447(c), and the Motion to Remand is **GRANTED**. Plaintiffs' Motion to Strike is **DENIED AS MOOT**. The Clerk of the Court shall mail a certified copy of this Order to the District Clerk of Tom Green County, Texas.

SO ORDERED

Dated this 26th day of August, 2015.

SAM R. CUMMINGS
SENIOR UNITED STATES DISTRICT JUDGE