UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

ACME IRON & METAL COMPANY, a d/b/a of TXALLOY, INC., and MAYFIELD PAPER COMPANY, INC., Plaintiffs,	§	
v.	§	CIVIL ACTION NO.: 6:14-CV-00045-C
REPUBLIC WASTE SERVICES OF TEXAS, LTD., Defendant.	§	

PLAINTIFFS' REPLY TO REPUBLIC'S RESPONSE IN OPPOSITION TO MOTION TO REMAND FOR LACK OF SUBJECT MATTER JURISDICTION

TO THE HONORABLE JUDGE OF SAID COURT:

In removing Plaintiffs' action, Republic misinterpreted CAFA's jurisdictional requirements, under which an "unincorporated association" such as 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." 28 U.S.C. § 1332(d)(10). As required, Plaintiffs' counsel contacted Republic's counsel to confer as to whether a motion to remand would be opposed. After numerous discussions over an extended period, Republic's counsel represented that a substantive response would be made "early in the week" of June 15, 2015.

Instead of responding, on June 18, Republic filed its "Amended Statement of Jurisdiction in Support of Notice of Removal" (Doc. 8) asserting for the first time "traditional" diversity under 28 U.S.C. § 1332(a), and then informed Plaintiffs' counsel that Republic would oppose a motion to remand. Plaintiffs filed their remand motion later that day (Doc. 9).

As a threshold matter, Republic's amendment claiming a new basis for jurisdiction is substantively and procedurally defective, and Plaintiffs are separately filing a motion to strike that amendment. Even if the amendment were proper, however, Republic has failed to carry its

burden of showing the requisite amount in controversy for any individual plaintiff under § 1332(a). As for CAFA jurisdiction, while Republic refuses to admit its error, all relevant authorities are clear: Limited partnerships are "unincorporated associations" under CAFA, thus making Republic a Texas citizen.

After a 7-month delay, Republic has finally agreed to produce documents showing the identities of its commercial customers and potential class members. Plaintiffs anticipate that this information will show that this Court lacks subject matter jurisdiction under CAFA's "local controversy" and "home state" exceptions, and will supplement their pleadings as soon as practical after analysis of Republic's production.

I. Republic Has Not Shown the Requisite Amount in Controversy Under § 1332(a)

Republic's improper and ineffective[1] amended jurisdictional statement alleges that for purposes of "traditional" diversity under Section 1332(a), complete diversity exists between Republic and the named Plaintiffs individually, and the amount in controversy for the claims of one or both named Plaintiffs alone exceeds $75,000. While complete diversity as determined under Section 1332(a) does exist, Republic has not proven the requisite amount in controversy.

The removing party must establish federal jurisdiction. *DeAguilar v. Boeing Co.*, 47 F.3d 1404, 1408 (5th Cir. 1995). A "defendant seeking removal bears the burden of persuading the Court, based on a preponderance of the evidence, that the amount in controversy is at least $75,000." *Johnson v. DirecTV, Inc.*, 63 F.Supp.2d 768, 769 (S.D. Tex. 1999). A defendant invoking traditional diversity jurisdiction in a lawsuit pleaded as a class action must prove that the claims of an individually named plaintiff exceed $75,000; "[o]f course, the claims of several plaintiffs, suing as members of a class, cannot be aggregated for the purpose of satisfying this jurisdictional predicate." *Lindsey v. Alabama Tel. Co.*, 576 F.2d 593, 594 (5th Cir. 1978).

[1] See Plaintiffs' Motion to Strike Republic's Amended Jurisdictional Statement.

A defendant may prove amount in controversy one of two ways: if "(1) it is apparent from the face of the petition that the claims are likely to exceed $75,000, or, alternatively, (2) the defendant sets forth 'summary judgment type evidence' of facts in controversy that support a finding of the requisite amount." *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002). The face of Plaintiffs' petition does not show that any individual claim is likely to exceed $75,000. Nor has Republic set forth evidence showing the requisite amount.

Republic argues that the amount in controversy requirement is met because Plaintiffs claim Republic engaged in fraud dating back to 1989, and because they seek punitive damages and attorneys' fees. Amended Statement of Jurisdiction at 3. But the face of Plaintiffs' pleading does not attach any amount in controversy to those claims. Republic's improper charges that are the basis for Plaintiffs' claims were widespread and long-standing, but they did not amount to a large sum for any individual Plaintiff (one reason that this lawsuit is appropriate as a class action). Although precise calculations have yet to be made—Republic has not produced a single document despite Plaintiffs' requests served months ago—the individual actual damage claims for each Plaintiff are likely to be less than $2,000. Even with interest, exemplary damages, and proportionate attorneys' fees, the individual claims will be far less than $75,000.

Republic's conclusory assertion that Mayfield Paper's claims "easily satisfy" the $75,000 amount in controversy requirement is unfounded. Republic's own affidavit, which is the *only* evidence set forth by Republic, indicates that Republic has refunded Mayfield Paper $5,645.27 for ten years of overcharges—approximately $565 a year since 2004. Because Plaintiffs' petition seeks damages dating back to 2000 (*not* 1989, as asserted by Defendant, *see* Plaintiffs' Original Petition at ¶¶ 18, 41), Mayfield Paper's outstanding damages are for the four years of overcharges between 2000 and 2004 that have not already been refunded. Thus, based on the

very evidence set forth by Republic, Mayfield Paper's remaining damages may be estimated to be around $2,000. Republic's vague assertion that Mayfield Paper's actual damages claim falls "somewhere" between "the refund it received" ($5,645.27) and its "total charges" since 2000 ($55,000) is, at best, misleading. Even assuming that the $5,645.27 refund should still be counted toward the amount in controversy, neither Plaintiffs' pleading nor the scant evidence presented by Defendant shows that Mayfield Paper's actual damages claim exceeds $8,000. Republic's speculation as to some larger claim does not satisfy Republic's burden of proving the amount in controversy exceeds $75,000. *Cf. Shields v. Bridgestone/Firestone, Inc.*, 232 F. Supp. 2d 715, 719 (E.D. Tex. 2002) ("Other than conclusory statements that the amount in controversy requirement has been established, [Defendant] produces no evidence that a claim by a plaintiff exceeds $75,000."); *Wald v. C.M. Life Ins. Co.*, CIV. 3:00-CV-2520-H, 2001 WL 256179, at *3 (N.D. Tex. Mar. 8, 2001) ("It is insufficient for Defendant to make a blanket statement, as it does, that it is probable that Plaintiff's attorney fees will satisfy the jurisdictional amount.").

Lacking evidence that the actual damages sought by Mayfield Paper approach anything near $75,000, Republic appears to argue that *class-wide* attorneys' fees may be aggregated and attributed to Mayfield Paper. Amended Statement of Jurisdiction at 4; Br. in Support of Opposition to Motion to Remand at 9. This is incorrect. The Fifth Circuit case Republic cites was explicitly decided under Louisiana law, which allows for aggregation of attorneys' fees in class actions. *Manguno*, 276 F.3d at 723. *Manguno* relied on *In re Abbott Laboratories*, 51 F.3d 524 (5th Cir. 1995). But a subsequent Fifth Circuit case clarified that the *Abbott Laboratories* analysis is wholly inapplicable to class actions under Texas law:

> This court's decision in *In re Abbott Laboratories*, 51 F.3d 524 (5th Cir. 1995), holding that an award of attorney's fees in a class action was attributable to the named plaintiffs, rather than to the class as a whole, thus allowing the combination of the class attorney's fees and the claims of named plaintiffs to

> satisfy the amount in controversy requirement, is peculiar to a Louisiana statute and has no application here. ... ***Under Texas law, attorney's fees should not be attributed to the named class representative for jurisdictional purposes.***

Coghlan v. Wellcraft Marine Corp., 240 F.3d 449, 455 n.5 (5th Cir. 2001) (emphasis added).

It is equally established that punitive damages "cannot be aggregated and attributed to each plaintiff to meet the jurisdictional requirement." *H&D Tire & Auto.-Hardware, Inc. v. Pitney Bowes Inc.*, 227 F.3d 326, 330 (5th Cir. 2000). Republic also appears, however, to dispute this well-established rule, relying solely on *Gilman v. Arthur J. Gallagher & Co.*, CIV. A. H-09-2355, 2009 WL 5195956, at *5 (S.D. Tex. Dec. 21, 2009), which, in dicta, cited *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1335 (5th Cir. 1995), for the proposition that "collective punitive damages" may be considered. But *Allen* is "confined to the unique circumstances of Mississippi law" and has no bearing here:

> [S]ince [*Allen*], the Fifth Circuit has reexamined the issue of aggregating punitive damages. *In H & D Tire and Automotive–Hardware, Inc. v. Pitney Bowes, Inc.*, 227 F.3d 326, 330 (5th Cir.2000) ("H & D Tire I"), the Fifth Circuit held that punitive damages claims of multiple plaintiffs could not be aggregated. *Id.* The court explained that it was bound to follow an earlier controlling opinion, *Lindsey v. Alabama Telephone Co.*, and not *Allen*. *See id.* at 329–30 (citing *Lindsey*, 576 F.2d 593 (5th Cir.1978)). In *Lindsey*, the Fifth Circuit held that the law does not aggregate the punitive damage claims across multiple plaintiffs to establish jurisdiction. 576 F.2d at 595. **To the extent *Allen* is still good law, it is now confined to the unique circumstances of Mississippi law.** *See H & D Tire & Automotive–Hardware, Inc. v. Pitney Bowes, Inc.*, 250 F.3d 302, 304–305 (5th Cir.2001) ("H & D Tire II") (denying request for a re-hearing).
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> Given *H & D Tire I* and *H & D Tire II*, **federal district courts in Texas have routinely held that the court does not aggregate punitive damages sought under Texas law.**

Rangel v. Leviton Mfg. Co., Inc., EP-12-CV-04-KC, 2012 WL 884909, at *5-*6 (W.D. Tex. Mar. 14, 2012) (emphases added) (citation omitted).

Republic argues that "the only enumeration of damages in Plaintiffs' Petition asserts that actual damages alone exceed $9,000,000." Amended Statement of Jurisdiction at 3. But, of

course, this is an allegation of *class-wide* damages that is entirely irrelevant to the determination of amount in controversy for individual claims. *Id.* at *4 ("[I]t is well established that the law does not aggregate the claims of multiple plaintiffs to determine the amount in controversy.").

The actual damages sought by Mayfield Paper, even when combined with a pro-rata distribution of attorney's fees and treble damages under the DTPA, does not come close to the $75,000 minimum. Republic has failed to carry its burden of proving—either based on the face of Plaintiffs' petition or based on "summary judgment type evidence"—the requisite amount in controversy for an individual plaintiff, even if its late-filed amended jurisdictional statement were proper (which it is not).

II. The Court Has No Jurisdiction Under CAFA

A. Limited Partnerships Are Unincorporated Associations

Plaintiffs demonstrated that because Republic's principal place of business is in Texas, Republic erred in characterizing itself as a non-Texas citizen for CAFA jurisdictional purposes. Republic now attempts to create new law out of whole cloth, asserting that "[l]imited partnerships are not unincorporated associations." Republic is wrong.

Time and time again, courts confronting this issue have held that, under CAFA, limited partnerships are unincorporated associations. *See Davis v. HSBC Bank Nevada, N.A.*, 557 F.3d 1026, 1032 n.13 (9th Cir. 2009) ("The Best Buy limited partnership is organized under the laws of Virginia. For qualifying class actions such as this one, CAFA abrogates the traditional rule that an unincorporated association shares the citizenship of each of its members for diversity purposes . . . ."); *Kruse v. GS Pep Tech. Fund 2000 LP*, 897 F. Supp. 2d 769, 772 (N.D. Ind. 2012) ("[U]nder the CAFA, an unincorporated association, such as a limited liability company and a limited partnership, is deemed a citizen of the state where it has its principal place of

business and the state under whose laws it is organized . . . ."); *Ventimiglia v. Tishman Speyer Archstone-Smith Westbury, L.P.*, 588 F. Supp. 2d 329, 336 (E.D.N.Y. 2008) (limited partnership is "unincorporated association" under CAFA).

As the Fourth Circuit has explained, CAFA's reference to "unincorporated associations" tracks the Supreme Court's long-standing characterization of all business entities other than corporations as "unincorporated associations":

> [T]he Supreme Court has often characterized any business entity that is not a corporation as an "unincorporated association." . . . [I]in enacting § 1332(d)(10) as a part of CAFA in 2005, Congress . . . modif[ied] the rule for business entities other than corporations to provide, for purposes of CAFA, that the citizenship of all "unincorporated association[s]" is determined by the State under whose laws the unincorporated association is organized and the State where it has its principal place of business.

Ferrell v. Express Check Advance of SC LLC, 591 F.3d 698, 702-04 (4th Cir. 2010); *see also Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077, 1080 (5th Cir. 2008) (referring to "limited partnerships and other unincorporated associations or entities"); *Bond v. Veolia Water Indianapolis, LLC*, 571 F. Supp. 2d 905, 910 (S.D. Ind. 2008) ("The foundation of first *Carden* and then *Cosgrove* is that artificial business entities other than corporations are all treated as unincorporated associations until Congress provides otherwise . . . .").

Republic fails to cite a single case (and Plaintiffs have found none) in which a federal court has held that a limited partnership is *not* an unincorporated association under CAFA or otherwise. With *every* case holding contrary to its theory, Republic engages in a lengthy discussion of the relationship between CAFA and *Carden*[2] in attempting to support its argument that limited partnerships are not "unincorporated associations." No court has accepted this. Further, Republic mischaracterizes *Carden* in an effort to prop up its meritless theory. As the

[2] *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195-96 (1990), which held that for "traditional" diversity purposes, limited partnerships are citizens of each state where its limited and general partners have citizenship.

court in *Ferrell* observed, "[e]ven though [*Carden*] referred to unincorporated associations as 'artificial entities other than corporations,' it intended no difference in meaning, and we have recognized . . . a categorical rule governing all 'unincorporated associations.'" *Ferrell*, 591 F.3d at 703. Indeed, the very passage Republic quotes (incompletely) from *Carden* describes unincorporated entities as "associations." *See Carden*, 494 U.S. at 195-96 ("[D]iversity jurisdiction in a suit by or against the entity depends on the citizenship of all the members, the several persons composing ***such association***, each of its members.") (emphasis added; internal quotation marks and citations omitted).

As for Republic's assertion that Congress did not intend subsection (d)(10) to alter the traditional rule regarding the citizenship of unincorporated associations, the legislative record speaks for itself:

> New subsection 1332(d)(10) . . . is added to ensure that unincorporated associations receive the same treatment as corporations for purposes of diversity jurisdiction. The U.S. Supreme Court has held that "[f]or purposes of diversity jurisdiction, the citizenship of an unincorporated association is the citizenship of the individual members of the association." *United Steelworkers of America v. R.H. Bouligny, Inc.*, 382 U.S. 145 (1965). This rule "has been frequently criticized because often an unincorporated association is, as a practical matter, indistinguishable from a corporation in the same business." . . . New subsection 1332(d)(10) corrects this anomaly.

S. Rep. 109-14, at 45-46 (2005). Republic cites *Frazier v. Pioneer Americas LLC*, 455 F.3d 542, 547 (5th Cir. 2006), but *Frazier* has nothing to do with the meaning of "unincorporated association" under CAFA, and the same section of the congressional record cited in *Frazier* directly contradicts Republic's theory:

> [Under CAFA,] a corporation will continue to be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business. However, the bill provides that for purposes of this new section, and section 1453 of title 28, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it organized. This provision is added to ensure that unincorporated

> associations receive the same treatment as corporations for purposes of diversity jurisdiction. New subsection 1332(d)(10) corrects this anomaly.

151 Cong. Rec. H723, 729 (Rep. Sensenbrenner). In other words, CAFA does not alter the law with respect to a corporation's citizenship, but it *does* provide that all unincorporated entities—including limited partnerships—shall be treated like corporations for citizenship purposes.

B. The Home State and Local Controversy Exceptions Apply

Republic alleges that a single member of the plaintiff class, Wells Fargo Bank, N.A., is a citizen of a state other than Texas. Republic does not, however, deny that over two-thirds of the class members are Texas citizens in satisfaction of the "home state" and "local controversy" exceptions. Instead, Republic claims that Plaintiffs have somehow "waived" their ability to prove that two-thirds of the class members are Texas citizens by allegedly failing to timely acquire evidence of the members' citizenship.

Republic neglects to mention at least three salient facts. First, the discovery period does not close until March 28, 2016—more than eight months from now. Plaintiffs have "waived" nothing. Second, much of the "delay" cited by Republic was due to good-faith efforts to confer regarding Plaintiffs' challenge to subject matter jurisdiction, as described above. Third, Plaintiffs have not acquired evidence of the class members' citizenship because Republic has refused for the past 7 months to produce a single document identifying class members—information that Plaintiffs requested on November 24, 2014. Only on July 17, 2015, after Plaintiffs threatened to seek a court order compelling production, did Republic finally agree to produce documents identifying the class members; those documents are due to be produced within days, and after they are analyzed, Plaintiffs will supplement their motion to remand (based on lack of subject matter jurisdiction, which of course cannot be waived).

C. The Merits of Plaintiffs' Claims Are Irrelevant to This Court's Jurisdiction

Finally, in an effort to evade Plaintiffs' Motion to Remand altogether, Republic argues that Plaintiffs have somehow "forfeited" their right to a remand by not filing a motion for class certification before the Court rules on Plaintiffs' jurisdictional challenge. Republic's Br. at 17. But Republic's argument, which attacks the merits of Plaintiffs' underlying class-action claim, ignores the well-settled rule that "[a] court simply does not have the authority to decide claims on the merits if it lacks subject matter jurisdiction. This principle of law is so well-established that no cite to authority is even necessary." *Kirby v. SBC Services, Inc.*, 391 F. Supp. 2d 445, 451-52 (N.D. Tex. 2005); *see also U.S. Bank Nat. Ass'n. v. Davis*, A-13-CV-1090-LY-ML, 2015 WL 3443473, at *3 (W.D. Tex. May 28, 2015) ("For purposes of the motion to dismiss for lack of subject matter jurisdiction, the question of whether a claim has merit is entirely separate from whether a court has jurisdiction over it.").[3]

It would be a waste of time and resources for Plaintiffs to seek class certification before the Court determines whether it has jurisdiction. If the Court were to deny Plaintiffs' Motion to Remand, Plaintiffs would seek an extension of time under Local Rule 23.2 to file their motion for class certification promptly – likely within 30 days, if not less – after the Court's denial. Such an extension would be appropriate in light of the significant jurisdictional issues identified by Plaintiffs, as well as other events that had the potential of substantially affecting Plaintiffs' class action claims, including Republic's post-removal refund of over $6 million in overcharges.

[3] Republic's suggestion that its partial refund to commercial customers renders Plaintiffs' lawsuit "a matter of sour grapes" is also irrelevant to the Court's jurisdiction. Nonetheless, it is worth correcting this mischaracterization. In their original petition, Plaintiffs claimed $9 million in damages for overcharges billed between 2000 and 2014. In an apparent attempt to meet CAFA's $5 million amount in controversy requirement, Republic waited until after removal of Plaintiffs' action before refunding its commercial customers over $6 million for overcharges collected between 2004 and 2014. Republic's partial refund clearly has not satisfied Plaintiffs' $9 million claim, as it did not cover overcharges billed between 2000 and 2004.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document was served on counsel of record for Defendant via the Court's CM/ECF system on this 23rd day of July, 2015 as follows:

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