UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTICT OF MICHIGAN
SOUTHERN DIVISION

GEORGE BADEEN, et al.,

Plaintiffs,

Case No. 19-10532
Honorable Victoria A. Roberts

v.

PAR, INC., d/b/a PAR North America, et al.,

Defendants.
_____/

**ORDER GRANTING PLAINTIFFS' MOTION TO REMAND [ECF No. 45] AND REMANDING THE CASE TO STATE COURT**

## I. INTRODUCTION

Plaintiffs filed this proposed class action in state court in April 2010. On February 21, 2019, three Defendants – PAR, Inc. ("PAR"), Remarketing Solutions, LLC, and Renovo Services, LLC – removed the case.

This removal was untimely. Plaintiffs' motion to remand [ECF No. 45] is **GRANTED.**

## II. BACKGROUND

This case involves the motor vehicle repossession business. The parties are various entities that intersect when vehicles are repossessed.

There are two groups of Defendants – the "Lender Defendants" and the "Forwarder Defendants."

The "Lender Defendants" are lending institutions who make secured automobile loans to individuals or businesses, or purchase the secured notes of other lenders; motor vehicles are the collateral for these secured loans.

The "Forwarder Defendants" are repossession forwarding servicers. They are large scale companies doing business on a national level.

Plaintiff George Badeen owns Plaintiff Midwest Recovery and Adjustments, Inc. ("Midwest"; collectively, "Plaintiffs"). Midwest is a licensed collection agency in Michigan with repossession powers.

Plaintiffs allege that the Lender Defendants historically hired Michigan debt collectors like Midwest to seize vehicle collateral within the State of Michigan, in the event of default, on a case by case basis. However, Plaintiffs allege the Forwarder Defendants routinely advertised and approached the Lender Defendants to solicit the accounts Plaintiffs historically managed. Plaintiffs say the Forwarder Defendants are not licensed to collect on such debt. Nonetheless, the Lender Defendants hired the Forwarder Defendants. The Forwarder Defendants – in turn – hired local, licensed repossession agents such as Midwest to carry out the

actual repossessions. And paid them less for their repossession services than the Lender Defendants paid them when they were hired directly.

In their second amended complaint, Plaintiffs allege: (1) the Forwarder Defendants operated as unlicensed collection and repossession agencies in violation of the Michigan Occupational Code and Michigan Regulation of Collection Practices Act; and (2) the Lender Defendants conspired with the Forwarder Defendants to violate the law by employing the Forwarder Defendants directly.

Plaintiffs seek to represent a class consisting of "every automobile repossession agency or owner who held a license as a debt collector in the State of Michigan during the last 6 years [– i.e., April 2004 to April 2010]." Plaintiffs say the class will represent approximately 150 agencies.

In Count VII of the second amended complaint, Plaintiffs allege that the Forwarder Defendants willfully violated the Michigan Occupation Code. Plaintiffs seek treble damages, costs, and attorney fees pursuant to Mich. Comp. Laws § 339.916. Under that statute, "[i]f the court finds that the method, act, or practice was a wil[l]ful violation, it may award a civil penalty of not less than 3 times the actual damages, or $150.00, whichever is greater and shall award reasonable attorney's fees and court costs incurred in connection with the action." Mich. Comp. Laws § 339.916(2).

## III. DISCUSSION

Defendants removed this case pursuant to the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d). Under CAFA, this Court has original jurisdiction to hear a class action if: (1) the class has at least 100 members, *see* § 1332(d)(5); (2) "any member of a class of plaintiffs is a citizen of a State different from any defendant," *see* § 1332(d)(2)(A); and (3) aggregating the claims of individual members of the proposed class, the matter in controversy exceeds $5,000,000, exclusive of interest and costs, *see* § 1332(d)(6). *See Graiser v. Visionworks of Am., Inc.*, 819 F.3d 277, 282 (6th Cir. 2016).

Although Plaintiffs filed the second amended complaint in September 2010, Defendants did not remove until February 21, 2019.

Plaintiffs move to remand to state court. They say Defendants' removal was untimely.

"Defendants removing under CAFA must comply with the time limits of the general removal statute, 28 U.S.C. § 1446, except that the one-year deadline for removing cases under diversity jurisdiction does not apply to cases removed under CAFA." *Graiser*, 819 F.3d at 282 (citing 28 U.S.C. § 1453).

Typically, a defendant has thirty days to file a notice of removal after receiving a copy of the complaint. 28 U.S.C. § 1446(b)(1). However, "if the case stated by the initial pleading is not removable," § 1446(b)(3) allows a defendant to file a notice of removal within 30 days after receiving 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." *Id.*; *Graiser*, 819 F.3d at 282.

"A defendant's failure to comply with the thirty-day limitation set forth in Section 1446(b) is an absolute bar to removal regardless of whether the removal would have been proper if timely filed." *Groesbeck Investments, Inc. v. Smith*, 224 F. Supp. 2d 1144, 1148 (E.D. Mich. 2002). The burden is on Defendants to show that they complied with procedural requirements for removal. *Id.*

Defendants say removal was timely under 28 U.S.C. § 1446(b)(3), because Plaintiffs disclosed their damages theory for the first time in discovery responses signed January 24, 2019. Defendants claim that they were unable to ascertain that the amount in controversy exceeded $5,000,000 before then. Plaintiffs' discovery response stated:

> Discovery as to total repossessions done by Forwarders is still ongoing. As an individual, George Badeen would be entitled to $175 per motor vehicle, or $50.00 per motor vehicle tripled under the statute, MCL 339.916, plus attorney's fees and costs.

> As to the unnamed class members, damages would be the total number of repossessions times $175 net proceeds per repossession.

[ECF No. 1-4, PageID.256].

*Graiser* sets forth the Sixth Circuit's standard for determining when the 30-day period under § 1446(b)(3) begins:

> [I]n CAFA cases, the thirty-day clocks of § 1446(b) begin to run only when the defendant receives a document *from the plaintiff* from which the defendant can unambiguously ascertain CAFA jurisdiction. Under this bright-line rule, a defendant is not required to search its own business records or "perform an independent investigation into a plaintiff's indeterminate allegations to determine removability." We agree with the Second Circuit, however, that a defendant *does* have a duty to "apply a reasonable amount of intelligence to its reading of a plaintiff's complaint" or other document. For example, a defendant cannot prevent the beginning of the thirty-day window by refusing to "multiply figures clearly stated in a complaint." But "if removability is not apparent from the allegations of an initial pleading or subsequent document" sent from the plaintiff, the thirty-day clocks of § 1446(b) do not begin.

*Graiser*, 819 F.3d at 285 (internal citations and brackets omitted; emphasis in original).

Defendants say that they were unable to "unambiguously ascertain CAFA jurisdiction" until they received Plaintiffs' discovery response. However, Plaintiffs say they provided Defendants with documents over four years ago which would have allowed them to unambiguously ascertain that the amount in controversy exceeded $5,000,000. As support, Plaintiffs rely

upon the combination of: (1) their second amended complaint, which includes the number of class members as well as their claim for treble damages under Mich. Comp. Laws § 339.916; (2) an open letter sent by Plaintiffs to licensed Michigan "recovery agencies" – including PAR – on July 25, 2014; and (3) their class certification brief filed twice in state court on unspecified dates, which stated that "[t]he damages in this case will total in the millions."

The class certification brief does not help Plaintiffs.

However, the Court finds that the 30-day clock under § 1446(b)(3) began to run when PAR received Plaintiffs' July 25, 2014 open letter; by then, PAR could have unambiguously ascertained CAFA jurisdiction by reading the July 25, 2014 open letter in conjunction with the second amended complaint.

PAR received the July 25, 2014 open letter. PAR was a licensed recovery agency at that time, [*see* ECF No. 53, PageID.883-84]. And – on July 30, 2014, through its attorneys – PAR sent Plaintiffs a cease and desist letter responding to the July 25 open letter; this cease and desist letter referenced the open letter and attached a copy of it for reference.

Plaintiffs' July 25 open letter discusses an opinion from the Michigan Supreme Court from an earlier appeal in this case and states that "these . .

. Forwarders" – meaning the Forwarder Defendants – were responsible for "approximate[ly] 1.8 million misdemeanor violations[] ([i.e.,] the estimated number of vehicles repossessed via these unlicensed Forwarders)." [ECF No. 45-3, PageID.744-45].

Defendants claim that Plaintiffs retracted the open letter and say the Court should disregard it. This is incorrect; Plaintiffs never retracted the letter or their allegation that the Forwarder Defendants were responsible for 1.8 million repossessions/violations.

Defendants argue that the letter does not unambiguously establish that the amount in controversy exceeds $5,000,000 because it: (1) does not state how many of the alleged repossessions are attributable to the Forwarder Defendants; and (2) provides no time frame for when the alleged repossessions occurred.

The Court disagrees. The letter discusses Plaintiffs' case against Defendants; then, it refers to "these Forwarders." It is clear that Plaintiffs refer to the Forwarder Defendants.

Defendants' time frame argument is a merits issue which they can raise in defense of Plaintiffs' *allegations*. The amount in controversy is determined based on Plaintiffs' allegations; here, Plaintiffs allege that the number of violations (i.e., repossessions) the Forwarder Defendants

committed under Mich. Comp. Laws § 339.916 is 1.8 million. Thus, the relevant number of repossessions/violations for determining the amount in controversy is 1.8 million.

Considering Plaintiffs' allegation of 1.8 million repossessions together with their request for treble damages under Mich. Comp. Laws § 339.916, it is unambiguously ascertainable that the amount in controversy exceeds $5,000,000. In fact, multiplying the trebled damages available under § 339.916 by the alleged 1.8 million repossessions/violations, the amount in controversy is at least $270,000,000 (i.e., 1.8 million * $150). *See* Mich. Comp. Laws § 339.916(2) (if it is a willful violation, the Court "may award a civil penalty of not less than 3 times the actual damages, **or $150.00**, **whichever is greater** . . ." (emphasis added)).

This statute – along with Plaintiffs' allegation that the Forwarder Defendants' violations were willful and Plaintiffs' request for treble damages – are clearly expressed in the second amended complaint. Thus, once Plaintiffs' sent PAR the July 25, 2014 open letter indicating that they were alleging that Forwarder Defendants were responsible for 1.8 million repossessions/violations as part of this case, all that was required to ascertain CAFA jurisdiction was to "apply a reasonable amount of intelligence" and "multiply figures clearly stated" in the second amended

complaint and open letter. *See Graiser*, 819 F.3d at 285. Accordingly, the 30-day clock under § 1446(b)(3) began to run no later than July 30, 2014 – i.e., the date of PAR's cease and desist letter. Removal was untimely. *See id.*

Defendants argue that the statutory damages under Mich. Comp. Laws § 339.916 – $150 per willful violation – are irrelevant for purposes of determining the amount in controversy; they say that, because this is a class action, Plaintiffs and the putative class members can only recover actual damages and are not entitled to statutory damages pursuant to Michigan Court Rule 3.501(A)(5).

While this may be true in state court, "federal procedural rules . . . govern cases in federal courts, not their state counterparts." *Martin v. Trott Law, P.C.*, 265 F. Supp. 3d 731, 750 (E.D. Mich. 2017) (rejecting defendant's argument to apply Mich. Ct. R. 3.501(A)(5) to preclude plaintiffs from proceeding with a class action claim for statutory damages under the Regulation of Collection Practices Act). *See also Am. Copper & Brass, Inc. v. Lake City Indus. Prod., Inc.*, 757 F.3d 540, 546 (6th Cir. 2014) (rejecting defendant's argument to apply Mich. Ct. R. 3.501(A)(5) to dismiss class action claims and noting that "the Supreme Court recently held in a case involving a conflict between Rule 23 and a New York procedural rule

prohibiting class actions in cases involving a statutory penalty [that] a 'Federal Rule governing procedure is valid whether or not it alters the outcome of the case in a way that induces forum shopping'" (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 416 (2010))).

Because federal procedural rules would allow Plaintiffs and the proposed class members to recover statutory damages, and any removed case would be governed by federal procedural rules, the statutory damages recoverable under Mich. Comp. Laws § 339.916(2) are relevant for purposes of determining the amount in controversy. *See id.*

However, even disregarding statutory damages, CAFA jurisdiction was still unambiguously ascertainable based on the open letter and the second amended complaint. Assuming only actual damages were recoverable in this Court, the amount in controversy exceeds $5,000,000 even if Plaintiffs were only alleging $1 in actual damages per repossession – which is an amount below what any reasonable person could believe Plaintiffs were seeking for actual damages per repossession.

Using $1 in actual damages per repossession, the amount in controversy would be no less than $5,400,000 – considering Plaintiffs' allegation that Lender Defendants' violations were willful and Mich. Comp.

Laws § 339.916(2) provides for an award of "not less than 3 times the actual damages" for willful violations. Thus, trebling the hypothetical $1 in actual damages, Plaintiffs could recover $3 for each of the 1.8 million repossessions/violations they allege, such that the amount in controversy for Count VII of the second amended complaint would be at least $5,400,000 (i.e., 1.8 million * $3).

Defendants untimely removed under 28 U.S.C. § 1446(b)(3).

## IV. CONCLUSION

The Court **GRANTS** Plaintiffs' motion to remand [ECF No. 45].

The Court **REMANDS** this case to the Third Judicial Circuit Court in Wayne County, Michigan.

**IT IS ORDERED**.

s/ Victoria A. Roberts
Victoria A. Roberts
United States District Judge

Dated: March 31, 2020