**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS**
**COUNTY DEPARTMENT, COUNTY DIVISION**

BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO, LANGDON D. NEAL, RICHARD A. COWEN, and THERESA M. PETRONE,

Plaintiffs,

v.

HANS BERNHARD, LUZIUS A. BERNHARD, OSKAR OBEREDER, CHRISTOPH JOHANNES MUTTER, JAMES BAUMGARTNER and DOMAIN BANK, INC.,

Defendants.

No. 00 CE 31
Judge Michael J. Murphy



**DEFENDANT JAMES BAUMGARTNER'S COMBINED MOTIONS FOR, ALTERNATIVELY, DISMISSAL, JUDGMENT ON THE PLEADINGS, OR SUMMARY JUDGMENT**

Defendant James Baumgartner, by his attorneys, hereby moves this Court, pursuant to Section 2-615 of the Illinois Code of Civil Procedure (735 ILCS 5/2-615) to dismiss the Complaint or, in the alternative, for judgment on the pleadings. In the alternative, Baumgartner moves for involuntary dismissal of the Complaint pursuant to Section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619). Finally, Baumgartner alternatively moves, pursuant to Section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005), for summary judgment in his favor. Baumgartner brings these combined motions pursuant to Section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1). In support of this motion, Baumgartner states as follows:

1. This case concerns the Internet web site Voteauction.com, which purportedly solicited and allowed individuals to "sell" and individuals and groups to "bid" on votes to be cast in the November 2000 presidential election. Plaintiffs, the Board of Election Commissioners of the City of Chicago and three individual Commissioners, sought and obtained from the Circuit

Court of Cook County a preliminary injunction that prohibits defendants from operating Voteauction.com on the grounds that such operation violated numerous federal and state criminal and election laws. On October 31, Baumgartner removed the action to the United States District Court for the Northern District of Illinois. Plaintiffs then filed a motion to remand, which the District Court granted on February 6, 2001, thereby returning the case to this Court. By agreement, the parties extended Baumgartner's time to answer or otherwise plead until March 30, 2001.

**Section 2-615 Motion to Dismiss or for Judgment on the Pleadings**

2. The Complaint fails to state a claim upon which relief may be granted, requiring its dismissal under Section 2-615. The facts alleged in the Complaint do not support plaintiffs' allegations that any defendant, including James Baumgartner, intended to use or operate or actually used or operated Voteauction.com as a real auction site for the actual purchase or sale of votes in violation of any election or criminal law of Illinois or the United States. Rather, Exhibit A to the Complaint, which is incorporated therein expressly by the Complaint and by Section 2-606 of the Code of Civil Procedure, demonstrates that the challenged portions of Voteauction.com, viewed in context, were not illegal solicitations to buy or sell votes but rather integral parts of a political and artistic work of satire and parody. *See Perkaus v. Chicago Catholic High School Athletic League*, 140 Ill. App. 3d 127, 134, 488 N.E.2d 623, 627 (1st Dist. 1986) (for purposes of a motion to dismiss, where exhibit attached to complaint contradicts allegations of the complaint, the exhibit controls). *See also Jefferson v. Ambroz*, 90 F.3d 1291, 1296 (7th Cir. 1996) ("[I]f a plaintiff chooses to 'plead particulars, and they show he has no claim, then he is out of luck – he has pleaded himself out of court"), citing *Thomas v. Farley*, 31

F.3d 557, 558-59 (7th Cir. 1994); *Bennett v. Schmidt*, 153 F.3d 516, 519 (1998) (litigants may plead themselves out of court by alleging facts that establish defendants' entitlement to prevail).

3. Because political and artistic satire and parody is protected by the First Amendment to the Constitution of the United States, *see e.g., Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), the Complaint must be dismissed. *See Flip Side, Inc. v. Chicago Tribune Co.*, 206 Ill. App. 3d 641, 656, 564 N.E.2d 1244, 1254 (1st Dist. 1990) (where complained of materials published by newspaper could not reasonably be taken literally, they were not sufficient to state a cause of action for defamation as a matter of law, and complaint must be dismissed under section 2-615, noting, in addition, "[t]his is not merely an aphorism of Illinois law, it is part of the first amendment guarantee of free speech which we all enjoy as Americans").

4. In addition to Exhibit A to plaintiffs' Complaint, additional parts of Voteauction.com that were not included by plaintiffs in Exhibit A – namely, the comments of site visitors who registered on Voteauction.com and the actual messages posted to the message board – further demonstrate, in conjunction with Exhibit A, that Voteauction.com was satire and parody. The comments of the Illinois registrants and selections from the message board are attached to defendant Baumgartner's Answer and Counterclaim as Exhibits A and B, respectively. While normally the Court can consider only the allegations of the complaint upon deciding a motion to dismiss under section 2-615, under the circumstances presented here – where plaintiffs' exhibit does not reflect the complete work at issue, and defendant's exhibits provide the additional material -- the Court can consider defendant's exhibits as well. *See Flip Side, Inc.*, 206 Ill. App. 3d at 651, 564 N.E.2d at 1250-51 (court must view statements alleged to be actionable in their full context to decide whether complaint could withstand section 2-615 motion; where plaintiffs' exhibit showed only a portion of the full work from which the challenged statements were taken,

court will review exhibits submitted by defendants showing the entire work at issue). *Compare Green v. Wolin Levin Corp.*, 2000 WL 1499438 (N.D. Ill.) at *3 ("documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in plaintiffs' complaint and are central to her claim"), citing *Venture Associates Corp. v. Zenith Data Systems Corp.*, 987 F.2d 429, 431 (7th Cir. 1993); *Duferco Steel, Inc. v. M/V Kalisti*, 121 F.3d 321, 324 n.3 (7th Cir. 1997) (same).

5. In the alternative, Baumgartner is entitled to judgment on the pleadings in his favor. The pleadings on file – plaintiffs' Complaint, considered either alone or in conjunction with defendant Baumgartner's Answer and Counterclaim – show that there are no disputed, material facts between the parties. Rather, the pleadings establish that James Baumgartner did not use or operate Voteauction.com as a real auction site for the actual purchase or sale of votes and that Voteauction.com was political and social satire and parody. Plaintiffs have pleaded no non-conclusory facts to contradict this affirmative defense. Thus, Baumgartner is entitled to judgment in his favor as a matter of law. *See Sarno v. Akkeron*, 292 Ill. App. 3d 80, 84, 684 N.E.2d 964, 968 (1st Dist. 1997) (where an affirmative defense is apparent from the face of the complaint, it is a proper subject for a section 2-615 motion for judgment on the pleadings).

6. These grounds in support of dismissal or, in the alternative, judgment on the pleadings, pursuant to Section 2-615 are set forth in further detail in the attached Memorandum in Support of Combined Motions For, Alternatively, Dismissal, Judgment on the Pleadings, or Summary Judgment.

**Section 2-619 Motion for Involuntary Dismissal**

7. In the alternative, Baumgartner is entitled to dismissal of the Complaint pursuant to Section 2-619(a)(9) of the Code of Civil Procedure.

8. Even if the Court finds that it cannot consider Baumgartner's Exhibits A and B in deciding the Section 2-615 motion, the Court can surely consider them under Section 2-619(a)(9) as "other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9). *See Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 91-92, 672 N.E.2d 1207, 1216 (1996); *Perkaus*, 140 Ill. App. 3d at 134-35, 488 N.E.2d at 627-28. As noted above, these exhibits, together with Exhibit A to the Complaint, show that Voteauction.com, when viewed in its entirety, reasonably could not be interpreted as anything other than satire and parody.

9. In addition, Baumgartner has also filed an affidavit in support of his section 2-619 motion. Through his Answer and Counterclaim, exhibits filed thereto, and affidavit, he has established the following, undisputed material facts: that Voteauction.com was conceived of, created, and operated as a work of political and artistic satire and parody, that he did not intend to use and did not use Voteauction.com actually to buy or sell, or to conspire, solicit, or allow any individual or group of persons to buy or sell any vote, and that no vote was bought or sold, to his knowledge. These averments are not simply denials of allegations in plaintiffs' Complaint but constitute affirmative matter defeating the claim. *See Gilmore v. City of Zion*, 237 Ill. App. 3d 744, 753, 605 N.E.2d 110, 116 (2d Dist. 1992) (finding affidavit included affirmative matters in the nature of a defense which negated the plaintiff's cause of action). Plaintiffs do not allege any non-conclusory facts in their Complaint that contradict these assertions. Because Baumgartner has submitted uncontestable affirmative matter establishing that he did not violate any election or criminal law of Illinois or the United States, and in fact was engaging in protected expressive activity, the Complaint should be dismissed.

10. These grounds in support of dismissal pursuant to Section 2-619 are set forth in further detail in the attached Memorandum in Support of Combined Motions For, Alternatively, Dismissal, Judgment on the Pleadings, or Summary Judgment.

**Section 2-1005 Motion for Summary Judgment**

11. Summary judgment is appropriate where the pleadings, affidavits, and supporting materials on file establish that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005. As an alternative to dismissal or judgment on the pleadings under Section 2-615 and/or dismissal under section 2-619, Baumgartner is entitled to summary judgment in his favor on plaintiffs' claims.

12. Baumgartner's arguments in support of summary judgment pursuant to Section 2-1005 are set forth in detail in the attached Memorandum in Support of Combined Motions For, Alternatively, Dismissal, Judgment on the Pleadings, or Summary Judgment.

WHEREFORE, defendant James Baumgartner moves this Court to dismiss the Complaint or, in the alternative, to award judgment on the pleadings or summary judgment on the complaint in his favor.

Respectfully submitted,

By: 

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Dated: March 30, 2001

## CERTIFICATE OF SERVICE

David L. Ter Molen, an attorney, hereby certifies that he caused a true and correct copy of Defendant James Baumgartner's Combined Motions for, Alternatively, Dismissal, Judgment on the Pleadings, or Summary Judgment, and Memorandum in Support thereof, to be served upon all counsel of record by messenger delivery, as follows:

James M. Scanlon
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Phillip J. Robertson
Assistant Attorney General
Nursing Home Bureau
State of Illinois
Office of the Attorney General
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on this 30th day of March 2001.

David L. Ter Molen

# Cited Authorities Found Only on Electronic Database

Huntsman Chemical Corp. v Whitehore Technologies, Inc., 1997 WL 548043 (N.D. Ill. Sept. 2, 1997).

Ibrahim v. Old Kent Bank, 1999 WL 259944 (N.D. Ill. April 8, 1999).

International Test and Balance, Inc. v. Associated Air and Balance Council, 1998 WL 957332, (N.D. Ill. Dec. 23, 1998)

Poindexter v. National Mortgage Corp., 1991 WL 278454 (N.D. Ill. Dec. 23, 1991).

Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois.

HUNTSMAN CHEMICAL CORPORATION,
Plaintiff,
v.
WHITEHORSE TECHNOLOGIES, INC.,
Defendant.

No. 97 C 3842.

Sept. 2, 1997.

MEMORANDUM OPINION AND ORDER

COAR, District Judge.

*1 This matter is before the court on the motion of plaintiff, Huntsman Chemical Corporation ("Plaintiff" or "Huntsman"), to remand this matter to the Circuit Court of LaSalle County, Illinois. Defendant, Whitehorse Technologies, Inc. ("Defendant" or "Whitehorse") opposes the motion.

Background

On or about December 2, 1996, Plaintiff commenced the instant action in the Circuit Court for the 13th Judicial Circuit of LaSalle County, Illinois. The Complaint alleges property and consequential damages caused by an explosion involving a pentane-recovery system designed by Defendant and sold to Plaintiff. On April 18, 1997, Defendant filed a motion to dismiss in the Circuit Court of LaSalle County. The basis for seeking dismissal was Plaintiff's failure to attach to its complaint a certificate of merit as required by Illinois law in product liability actions. Plaintiff, acknowledging the defect, sought leave to amend its complaint and cure the omission. After a full round of briefing, on May 19, 1997, the motion to dismiss was denied and the motion for leave to amend granted. Defendant was ordered to answer or otherwise respond to the amended complaint within 28 days. Instead of complying with that order, Defendant filed a Notice of Removal on May 27, 1997 in the United States District Court for the Northern District of Illinois, Eastern Division, pursuant to 28 U.S.C. § 1446.

Plaintiff contends that Defendant's Notice of Removal, filed 166 days after receipt of Plaintiff's initial pleading, was filed too late. Defendant contends that the filing of the removal notice was timely because it was done within 30 days of receipt of Plaintiff's response to Defendant's request for admission acknowledging that the amount in controversy was in excess of $75,000, exclusive of interest and costs. To determine which party is correct requires review of a statute, a rule, and several cases.

The Statute

28 U.S.C. § 1446(b) provides:

> The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant ... of a copy of the initial pleading.... If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty 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....

Id.

The Positions of the Parties

In making its argument in support of timeliness, Defendant necessarily contends that "the case stated by the initial pleading" was not removable. Defendant asserts that neither the original nor the amended complaint alleged a specific damage amount. Indeed, as Defendant points out, under the pleading rules in Illinois courts, Plaintiff was prohibited from pleading a specific amount, except as necessary to establish the jurisdiction of the particular (state) court in which the action was brought. In Defendant's view, a case is removable under the first paragraph of section 1446(b) when, from a review of the initial pleading (only), "it may be ... ascertained that the case is one which is or has become removable...." Defendant looks to the second paragraph of section 1446(b) to explain the language of the first. Under this analysis, because the initial complaint failed to allege that the amount in controversy exceeded $75,000, the case was not removable and did not, indeed could not, become removable until Defendant received "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...." In Defendant's view, that did not happen until Defendant received Plaintiff's answer admitting the amount in controversy. Moreover, Defendant reads the second paragraph of section 1446(b) to require that the word

"paper" as used in that paragraph refers only to paper(s) received after the initial pleading.

*2 Plaintiff, on the other hand, reads section 1446(b) differently. Essentially, Plaintiff agrees that the test for determining whether receipt of the initial pleading begins the running of the thirty-day removal period is whether Defendant can ascertain whether the case is removable. Plaintiff disagrees, however, with the contention that the act of "ascertaining" is limited to merely reading the initial pleading. Plaintiff argues that in determining whether the case is removable for purposes of tolling the thirty- day period, a defendant must read the initial pleading in light of facts known to the defendant outside of the pleading. Thus, for example, where an initial pleading alleges complete diversity of citizenship, but fails to allege the requisite jurisdictional amount, receipt by the defendant of the initial pleading commences the running of the thirty-day removal period where the defendant knew (at the time of receipt of the pleading) that the amount in controversy was sufficient for federal jurisdiction.

Plaintiff's alternative theory is that the receipt by Defendant of "papers" claiming amounts in excess of $75,000 before the filing of the initial pleading, tolled the removal period under the second paragraph of section 1446(b) upon receipt by the Defendant of the initial pleading. Plaintiff also disagrees with Defendant's view that the word "papers" is confined to documents received subsequent to the initial pleading.

## DISCUSSION

The literal language of section 1446(b) compels neither the interpretation of the Defendant nor that of the Plaintiff. Defendant has not disputed the fact of pre-filing receipt of written communications indicating that Plaintiff's claim greatly exceeded the dollar amount required for federal jurisdiction.

How do you determine whether the case stated (in the initial pleading) is removable under section 1446(b)? One way is to focus only on the pleading itself. If all the predicates for the assertion of jurisdiction are not affirmatively pled, the case stated is not removable. But there is another construction: Look at not only the pleading but also at other information known by the defendant seeking removal. Under this latter view, if the parties are of the diverse citizenship but the complaint says nothing about the amount in controversy, the case stated may yet be removable if, on the basis of facts known to the defendant, there is a reasonable probability that the "amount in controversy" requirement is met. Where a defendant knows at the time of receipt of the initial pleading in a state court action that the requirements for federal diversity jurisdiction are met, does the thirty-day period for removing the case commence even though the initial complaint fails to set forth the existence of the jurisdictional requirements? Where a party has received written information as to the existence of a claim in excess of the amounts required for federal jurisdiction prior to the filing of a state action, does the thirty-day period for removal commence upon receipt of a pleading naming that party as a defendant but failing to allege a jurisdictional amount?

*3 It should be noted that the case law on these issues is muddled. The courts have combined two related, but different, issues: 1) when is it too soon or too late for a defendant to file a notice of removal, and 2) what quantum of proof is necessary to satisfy a defendant's burden of demonstrating that the jurisdiction requirements are met? Most of the cases cited by the parties are offered as authority in connection with the timing issue but actually involve the issue of proof. While the concerns addressed in both types of cases are related, they are not the same and care must be taken in reading too much into the "proof" cases.

In Chapman v. Powermatic, Inc., 969 F.2d 160 (5th Cir.1992) relied on by Whitehorse, the plaintiff sued the defendant in state court by way of a complaint that alleged complete diversity of citizenship but did not plead a specific amount of damages. The defendant did not file a notice of removal within thirty days of service of the complaint, even though the defendant had notice that the amount in controversy was in excess of the jurisdictional threshold by virtue of a letter from plaintiff's attorney setting forth damages. This letter was received by defendant prior to the filing of the complaint. The letter demanded compensation in an amount in excess of $800,000. More than thirty days after the filing of the complaint, defendant tendered an interrogatory to the plaintiff seeking the amount of claimed damages. Within thirty days after receipt of the interrogatory answer, defendant filed its notice of removal. Plaintiff filed a motion to remand arguing that the removal notice was untimely. The Court of Appeals for the Fifth Circuit read section 1446 as providing a two-step analysis for determining timeliness:

> The first paragraph provides that if the case stated by the initial pleading is removable, then notice of removal must be filed within thirty days from the

receipt of the initial pleading by the defendant; and the second paragraph provides, if the case stated by the initial pleading is not removable, then notice of removal must be filed within thirty days from the receipt of an amended pleading, motion, order or other paper from which the defendant can ascertain that the case is removable.

Id. at 161.

As to the first step, the Fifth Circuit held that the thirty-day time period begins to run

from the defendant's receipt of the initial pleading only when that pleading affirmatively reveals on its face that the plaintiff is seeking damages in excess of the minimum jurisdictional amount....

Id. at 163.

To its credit, the court did not suggest that its interpretation of the language was compelled by the literal language of the statute, but rather rested its view on what it considered the better policy result. Thus, the Fifth Circuit concludes that the interest in providing a bright line rule for defendants is more important than the interest in addressing the forum issue quickly.

*4 Whitehorse argues that Rule 3 of the Local General Rules of the United States 0District Court for the Northern District of Illinois ("Local Rule") supports its conclusion that removal was premature until it asked, and Huntsman answered, an interrogatory seeking to quantify the amount in controversy. Local Rule 3 provides as follows:

RULE 3 REMOVALS (Effective, January 17, 1997)
Where one or more defendants seek to remove an action from an Illinois state court based upon diversity of citizenship, and where the complaint does not contain an express ad damnum, as to at least one claim asserted by at least one plaintiff, in an amount exceeding $75,000 (exclusive of interest and costs) that is based on express allegations in that claim in conformity with that ad damnum, the notice of removal shall include in addition to any other matters required by law:
1. a statement by each of the defendants previously served in the state court action that it is his, her or its good faith belief that the amount in controversy exceeds $75.000; and
2. with respect to at least one plaintiff in the Illinois action, either:
(a) a response by such plaintiff to an interrogatory or interrogatories (see Ill.S.Ct. Rule 213) as to the amount in controversy, either (1) stating that the damages actually sought by that plaintiff exceed $75.000 or (2) declining to agree that the damage award to that plaintiff will in no event exceed $75.000; or
(b) an admission by such plaintiff in response to a request for admissions (see Ill.S.Ct. Rule 216(a)), or a showing as to the deemed admission by such plaintiff by reason of plaintiffs failure to serve a timely denial to such a request (see III.S.Ct. Rule 216(c)), in either event conforming to the statement or the declination to agree described in subparagraph 2(a) of this rule.
The receipt by the removing defendant or defendants of the response by a plaintiff referred to in subparagraph 2(a) or of the admission by a plaintiff referred to in paragraph 2(b), or the occurrence of the event giving rise to a deemed admission by a plaintiff referred to in subparagraph 2(b) shall constitute the receipt of a paper from which it may first be ascertained that the case is one which is or has become removable within the meaning of 28 U.S.C. § 1446(b). Where the defendant or defendants do not include the statement required by paragraph 1 of this rule, or do not comply with one of the alternatives described in paragraph 2 of this rule, the action will be subject to remand to the state court for failure to establish a basis of federal jurisdiction.

Local Rule 3 addresses generally the very limited problem faced by federal district courts in analyzing the jurisdictional basis of matters removed from Illinois state courts pursuant to section 1446(b). In particular, the rule addresses the problem of the jurisdictional amount. In substance. it requires that the notice of removal contain a statement by each defendant that the amount in controversy requirement has been met and as to at least one plaintiff, either an interrogatory answer or an admission acknowledging (or refusing to acknowledge) that the jurisdictional amount is met. If the notice of removal omits either of the two required statements, "the action will be subject to remand to the state court for failure to establish a basis of federal jurisdiction ."

*5 Whitehorse's reliance on the local rule is misplaced for two reasons, both arising out of the decision of the Seventh Circuit Court of Appeals in Shaw v. Dow Brands, Inc., 994 F.2d 364, 376 (7th Cir.1993). In that removed action, the question of subject matter jurisdiction was raised on appeal. One of the jurisdictional grounds raised by the defendant was diversity of citizenship. Judge Milton Shadur of

the United States District Court for the Northern District of Illinois was sitting on the panel by designation. Judge Shadur suggested (in dissent) a procedure that anticipated Local Rule 3: [FN1]

> FN1. It should be no surprise that Judge Shadur was the author of Local Rule 3. In Schneider v. American TransAir, Inc., No. 96C8402 1996 WL 74536 (N.D.Ill.Dec. 24, 1996), Judge Shadur said that Local Rule 3 is the equivalent of the procedure suggested in his dissent in Shaw. As we shall see, that is not quite accurate.

> Why not announce a prospective rule, to control the subject matter jurisdictional determinations in all such future cases, under which the removing diversity defendant must submit to the district court either (1) a showing of the plaintiff's dollar demand (something that in my experience happens in almost all cases before suit is filed) or (2) the result of a quantifying interrogatory to plaintiff--with either of the showings to serve as a precondition to the establishment of the amount in controversy and hence as a precondition to its removal.

Id. at 378. (dissenting, Shadur, J.)

Unfortunately for Whitehorse, the majority of the panel, while praising the procedure and recommending it to removing defendants thought it too limiting and rejected it as a jurisdictional requirement:

> We stop short, however, of declaring that this is the only means by which a defendant can establish to a reasonable probability that jurisdiction exists.

Id. at 367.

Whitehorse's reliance on the local rule is even more untenable because the procedure deemed too restrictive by the majority in Shaw, is more expansive than that described in the rule itself. [FN2] Remember that Judge Shadur's formulation in Shaw required either the result of it quantifying interrogatory (or request to admit), or some other "showing of plaintiff's dollar demand." Clearly, Judge Shadur contemplated that a copy of plaintiff's demand letter written before the comlaint was filed, was as effective as a post-filing interrogatory answer. Why the possibility of some "other showing" did not find its way into Local Rule 3 is unclear. What is clear, however, is that the local rule does not adopt the rationale of Chapman as the rule for this district.

> FN2. In retrospect, the last sentence of Local Rule 3 may be too forceful in light of the majority holding in Shaw. Unless "will be subject to remand" is read to mean "may be remanded unless the removing defendant establishes the jurisdictional amount by some other means," the rule is not a correct statement of the law.

In Mielke v. Allstate Ins. Co., 472 F.Supp. 851 (E.D.Mich.1979), the district count concluded that "there is no reason to allow a defendant additional time if the presence of grounds for removal are unambiguous in light of the defendant's knowledge and the claims made in the initial complaint." This court agrees. The purpose for the time limit in section 1446 is to resolve the issue of removal as soon as possible and to allow the case to proceed in whichever forum is appropriate without fear of uprooting the proceedings and transplanting them elsewhere. This case is an example of the wisdom of such a policy. Having failed at a counterattack utilizing a procedural device available in the state (but not the federal) forum, Whitehorse formally asked a question (by way of interrogatory), the answer to which it already knew--what is the amount in controversy? The Plaintiff answered giving Whitehorse a number consistent with the pre-filing demand. Having "discovered" this information, Whitehorse filed its notice of removal with all deliberate haste. Under these facts, the interrogatory was a charade designed to legitimate Whitehorse's blatant delay in seeking removal until it first tried to get the case dismissed in state court. Such a sham should not be countenanced even in the name of a bright-line test that would protect defendants confronted with ambiguous information concerning the amount in controversy.

***6** The section 1446(b) triggering event is the acquisition of information by the defendant that allows it to determine whether the case is removable. How that information is acquired is immaterial. The quality and quantum of information required is that sufficient to satisfy defendant's obligations under Rule 11. Certainty is not required--all that a conscientious defendant needs is a reasonable basis in fact to believe that diverse citizenship and the amount requirements are satisfied. Once the notice of removal is filed, the defendant may still be called upon to establish a reasonable probability that the requisite amount in controversy is involved. See Shaw, 994 F.2d at 366. Local Rule 3 establishes a procedure for establishing the amount in controversy, but it is not the exclusive way. Where, as here, the defendant is placed on

notice of the amount in controversy by a demand letter received prior to the filing of the complaint, he may not claim an inability to ascertain removability by the lack of an ad damnum clause in the complaint itself.

For the reasons stated above, this matter is remanded to the Circuit Court of LaSalle County.

END OF DOCUMENT

Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois, Eastern Division.

Nashat W. IBRAHIM, on behalf of himself and all others similarly situated,
Plaintiff,
v.
OLD KENT BANK, Defendant.

No. 99 C 999.

April 8, 1999.

MEMORANDUM OPINION AND ORDER

KOCORAS, District J.

*1 This matter comes before the court on the plaintiff's motion to remand. For the reasons set forth below, we deny the plaintiff's motion.

BACKGROUND

On or about January 21, 1999, the plaintiff, Nashit W. Ibrahim ("Ibrahim"), filed a two-count complaint in the Circuit Court of Cook County, Illinois, County Department, Chancery Division, alleging the defendant Old Kent Bank ("Old Kent") violated the Illinois Motor Vehicle Retail Installment Sales Act ("MVRISA"), 815 ILCS 375, et seq., the Illinois Consumer Fraud and Deceptive Business Practices Act ("the Consumer Fraud Act"), 815 ILCS 505/1, et seq., and the Illinois Sales Finance Agency Act ("the Sales Finance Act"), 205 ILCS 660/1, et seq., through its practice of collecting money from persons who signed vehicle retail installment contracts as buyers or co-buyers without first determining whether such buyers took possession of the vehicle.

Ibrahim's complaint seeks: (1) compensatory damages; (2) punitive damages under the Consumer Fraud Act and the Sales Finance Act; (3) injunctive relief; and (4) attorney's fees and costs. Ibrahim purports to bring his complaint on behalf of two classes of individuals: Class A and Class B. Each class consists of individuals with the following characteristics: (1) they signed a vehicle retail installment sales contract as a buyer, co-buyer or co-signer; (2) they did not actually receive the vehicle; (3) Old Kent sought to collect money from them; and (4) they are not the parents or spouse of the co-applicant that was assigned to Old Kent. [FN1] The only apparent difference between Class A and Class B is the date the purported class member signed the contract: individuals who signed before January 1, 1997 are members of Class A, while individuals who signed after January 1, 1997 are members of Class B.

FN1. In Lee v. Nationwide Cassel, L.P., 174 Ill.2d 540, 675 N.E.2d 599, 601-602 (1996), the Illinois Supreme Court held that MVRISA § 18 prohibits a person from being held primarily liable under a motor vehicle retail installment contract if that person does not actually receive the vehicle and is not the spouse or parent of a person who actually receives the vehicle, even if that person is named as an owner on the vehicle's title.

On February 16, 1999, Old Kent filed its timely notice of removal, pursuant to 28 U.S.C. § 1441, based upon diversity jurisdiction. Ibrahim thereafter filed the present motion to remand. Stripping away the vernacular, Ibrahim essentially argues that we should grant his motion to remand because Old Kent failed to satisfy the requirements of Local Civil Rule 3 when it filed its Notice of Removal. Local Civil Rule 3 requires, inter alia, that where a defendant seeks to remove an action from an Illinois court based solely on diversity of citizenship, and where the complaint does not contain an express ad dammum in excess of $75,000, a defendant's notice of removal must:

i. include a statement that it is the defendant's good faith belief that the amount in controversy exceeds $75,000, and

ii. include (a) a response from at least one plaintiff to either an interrogatory or request to admit that the damages plaintiff actually seeks exceed $75,000 or (b) plaintiff's refusal to agree that plaintiff's damage award will in no event exceed $75,000.

Local Civil Rule 3 applies in the present matter: the sole basis for Old Kent's removal of this action is diversity of citizenship and Ibrahim's complaint does not contain an express ad damnum seeking in excess of $75,000. It is undisputed that Old Kent did not propound either an interrogatory or request to admit on Ibrahim as Local Civil Rule 3 requires. For these reasons, and these reasons alone, Ibrahim argues, we should grant his motion to remand.

*2 Before we address the merits of Ibrahim's motion, we set forth the legal standard that guides our analysis.

## LEGAL STANDARD

Under 28 U.S.C. § 1441, a defendant may remove an action from state court to federal court if the federal court would have had jurisdiction over the lawsuit as originally filed by the plaintiff. Under 28 U.S.C. § 1447(c), however, the action may be remanded to state court if it appears that the district court lacks subject matter jurisdiction. The burden of establishing federal jurisdiction rests on the party seeking to preserve removal. Shaw v. Dow Brands, Inc., 994 F.2d 364, 366 (7th Cir.1993). Courts should interpret the removal statute narrowly and presume that the plaintiff may choose his or her forum. Doe v. Allied-Signal, Inc., 985 F.2d 908, 911 (7th Cir.1993). Any doubts regarding jurisdiction should be resolved in favor of remanding the action to state court. Jones v. General Tire & Rubber Co., 541 F.2d 660, 664 (7th Cir.1976). With these principles in mind, we turn to Ibrahim's motion to remand.

## DISCUSSION

We first note that Ibrahim presents no real substantive argument in support of his motion to remand. Rather, he argues that because Old Kent failed to satisfy the procedural requirements of Local Civil Rule 3, we should remand this action back to state court. As set forth more fully below, we find Old Kent properly removed this matter and sufficiently established subject matter jurisdiction in this court. For this reason, we deny Ibrahim's motion to remand, notwithstanding Old Kent's apparent failure to comply with Local Civil Rule 3.

Old Kent removed this action based upon diversity of citizenship. Although it is unclear that all class members are citizens of Illinois, Ibrahim does not challenge Old Kent's assertion that complete diversity exists between the parties. The only question is whether the $75,000 amount-in-controversy requirement of 28 U.S.C. § 1332 is satisfied. The Seventh Circuit has held that § 1332's amount-in-controversy requirement is satisfied if the class representative meets the jurisdictional amount; the claims of the non- representative class members may fail to meet the jurisdictional amount while still falling within the court's supplemental jurisdiction. See Stromberg Metal Works, Inc. v. Press Mechanical, Inc., 77 F.3d 928, 930-31 (7th Cir.1996) (interpreting 28 U.S.C. § 1367). The question we must answer is whether the amount-in-controversy applicable to Ibrahim exceeds the $75,000 threshold amount. We think it does.

As noted above, Ibrahim seeks compensatory damages, punitive damages, injunctive relief and attorney's fees. In analyzing the jurisdictional threshold question, we are allowed to aggregate: (1) the amount Ibrahim seeks as compensatory damages; (2) Ibrahim's proportionate share of punitive damages; (3) the value of Ibrahim's proportionate share of injunctive relief; and (4) Ibrahim's proportionate share of attorney's fees. Karpowicz v. General Motors Corp., 1997 WL 156542 (N.D.Ill.1997) (Kocoras, J.) (court found jurisdictional threshold satisfied in purported class action alleging violations of the Illinois Consumer Fraud Act). We examine each of these elements separately.

*3 In his complaint, Ibrahim seeks compensatory damages for, inter alia, (1) sums he allegedly paid in violation of the relevant Illinois statutes; (2) his purported obligation on a contract that is not legally enforceable against him; (3) damage to his credit; and (4) the time, effort and money he expended defending himself against Old Kent's collection efforts. Ibrahim gives no indication of the amounts he has paid on the vehicle retail installment contract applicable to him, although we note that the amount to be paid for the car under the contract is $16,146. More importantly, we need not identify a specific amount of compensatory damages at issue; we simply recognize that compensatory damages are but one factor we consider in deciding the amount-in- controversy question. See Karpowicz, 1997 WL 156542 at *4 ("The plaintiff has indicated that his compensatory damages will probably amount to less than $10,000.").

We next turn to the pro rata values to Ibrahim of the injunctive relief sought and attorney's fees. Unlike the Karpowicz case, where we held the value of injunctive relief to the purported class representative was "negligible," we think injunctive relief in the present matter would have some value to Ibrahim. In Karpowicz, the plaintiff alleged the defendant violated the Illinois Consumer Fraud Act by selling cars on which the paint peeled off of horizontal surfaces, telling consumers it would correct the problem and failing to do so. The Karpowicz plaintiff would have gained very little from a court order barring the defendant from continuing the alleged practice. In the present matter, however, Ibrahim complains that Old Kent repeatedly sends him requests to pay on the underlying vehicle contract. If we order Old Kent to cease this practice, we think Ibrahim would gain something of value, particularly where he claims

losses from his efforts to stop Old Kent's practice. Turning to Ibrahim's pro rata value of attorney's fees, we have no opinion on the value of this relief, where Ibrahim gives no indication of the potential size of the class. See Karpowicz, 1997 WL 156542 at *4 ("The pro rata share of an attorneys fees award would also probably be quite small, given the plaintiffs' assertion that the class will consist of "hundreds" of Illinois consumers.").

The final factor for our analysis is Ibrahim's proportionate share of punitive damages. In Karpowicz, we held:

> Where punitive damages are required to satisfy the jurisdictional amount in a diversity case, a two-part inquiry is necessary. The first question is whether punitive damages are recoverable as a matter of state law. If the answer is yes, the court has subject matter jurisdiction unless it is clear "beyond a legal certainty that the plaintiff would under no circumstances be entitled to recovery the jurisdictional amount." Cadek v. Great Lakes Dragway, Inc., 58 F.3d 1209, 1211-12 (7th Cir.1995) (quoting Risse v. Woodard, 491 F.2d 1170, 1173 (7th Cir.1974)).

*4 Karpowicz, 1997 WL 156542 at*4.

In the present matter, it is undisputed that punitive damages may be available, in particular situations, under both the Consumer Fraud Act, see 815 ILCS 505/10a(a), and the Sales Finance Act, see 205 ILCS 660/16. We think it significant that Ibrahim alleges Old Kent continues to send him collection notices even after he repeatedly notified the bank that he never possessed the vehicle in question. Whether such conduct may give rise to punitive damages is not for us to decide today. Simply, we cannot say beyond a legal certainty that punitive damages, should they be awarded, combined with Ibrahim's compensatory damages, attorney's fees and the value of injunctive relief, will not exceed the $75,000 threshold. For this reason, we must find the amount-in-controversy requirement is satisfied. Cadek, 58 F.3d at 1211- 12.

We briefly address Ibrahim's argument with respect to Local Civil Rule 3. We recognize that Old Kent failed to satisfy the requirements of Local Civil Rule 3. We have previously stated, however, that "the purpose of [Local Civil Rule 3] is to clarify the parties' position as to [the] amount-in-controversy." Karpowicz, 1997 WL 156542 at *4 (allowing for removal of action even where defendant failed to satisfy the requirements of Local Civil Rule 3). Other courts in our circuit have similarly refused to remand an otherwise removable action simply because a defendant failed to satisfy Local Civil Rule 3's requirements. See International Test and Balance, Inc. v. Associated Air and Balance Council, 1998 WL 957332 at *4 ("Local Civil Rule 3 was enacted so the laborious task of evaluating the amount in controversy could be avoided. Nonetheless, as the Local Civil Rule 3's 'subject to' language implies, application of the rule is not mandatory."). Because we have already engaged in the analysis of the amount-in-controversy question, and we find the $75,000 jurisdictional threshold satisfied, we refuse to remand this matter solely because Old Kent failed to satisfy the requirements of Local Civil Rule 3.

## CONCLUSION

For the reasons set forth above, we deny Ibrahim's motion to remand.

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Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois, Eastern Division.

INTERNATIONAL TEST AND BALANCE, INC., Plaintiff,
v.
ASSOCIATED AIR AND BALANCE COUNCIL, and Certain Members Thereof, Whose Identities Presently are Unknown, Defendants.

No. 98 C 2553.

Dec. 23, 1998.

OPINION and ORDER

NORGLE, J.

*1 Before the court are Plaintiff's Motion to Remand and Motion to Reconsider. For the following reasons, both motions are denied.

I. BACKGROUND

The facts and further procedural background of this case are recited in the court's Opinion and Order of July 15, 1998. See International Test and Balance, Inc. v. Associated Air Balance Council, 14 F.Supp.2d 1033 (N.D.Ill.1998). A brief summary follows.

On March 27, 1998, International Test and Balance, Inc. ("International") filed a three-count complaint against its former trade association, Associated Air Balance Council ("AABC"), and certain unknown members of AABC, in the Circuit Court of Cook County, Illinois. The origin of the dispute is International's disagreement over progressive discipline that AABC imposed upon it after AABC received complaints that International was failing to comply with AABC standards. That discipline eventually resulted in International's expulsion from AABC.

The gravamina of International's complaint are Counts I and II, which allege conspiracy in restraint of trade and an unlawful monopoly, respectively, in violation of the Illinois Antitrust Act, 740 ILCS 10/3. International's complaint also includes a claim for common law intentional interference with contract. In its prayer for relief, International seeks treble damages under the Illinois Antitrust Act and an injunction that would reinstate its membership in AABC.

On April 27, 1998, AABC removed the case to federal court, claiming diversity of citizenship under 28 U.S.C. § 1332. International subsequently added a "wrongful expulsion" claim and moved for a preliminary injunction based on Count I. The court denied the motion, holding that International failed to show a reasonable likelihood of success on the merits. 14 F.Supp.2d at 1046. Additionally, the court expressed reservations as to whether it had subject matter jurisdiction under the diversity statute. See id. at 1035 n. 1; see generally Wisc. Dept. of Corrections v. Schacht, 118 S.Ct. 2047, 2052 (1998) (where court notices potential defect in assertion of diversity jurisdiction, it must raise the issue sua sponte). The court's remarks are excerpted here:

> Because "federal courts are courts of limited jurisdiction," Matter of County Collector, 96 F.3d 890, 895 (7th Cir.1996), the court has a "nondelegable duty to police the limits of federal jurisdiction with meticulous care." Market Street Assocs. Ltd v. Frey, 941 F.2d 588, 590 (7th Cir.1991); see also Krueger v. Cartwright, 996 F.2d 928, 930 (7th Cir.1993); Fed.R.Civ.P. 12(h)(3). It does not escape the court's attention that there are jurisdictional issues in this case. First, because International's complaint includes allegations against "unknown members" of AABC, the citizenship of those members is unknown. Nonetheless, "naming a John Doe defendant will not defeat the named defendants' right to remove a diversity case if their citizenship is diverse from that of the plaintiffs." Howell v. Tribune Entertain. Co., 106 F.3d 215, 218 (7th Cir.1997); see also Salztein v. Bekins Van Lines, Inc., 747 F.Supp. 1281, 1283 n. 4 (N.D.Ill.1990). The named party here, AABC, is, standing alone, of diverse citizenship. However, certain membership organizations "take the citizenship of each member." Indiana Gas Co., Inc., v. Home Ins. Co., 141 F.3d 314, 316 (7th Cir.1998) ; Nat'l Assoc. of Realtors v. Nat'l Real Estate Assoc., 894 F.2d 937, 940 (7th Cir.1990) (citizenship of incorporated trade association was that of its members because the members were the real parties in interest); Nat'l Assoc. of Realtors, 699 F.Supp. 678, 679 n. 3 (N.D.Ill.1988). On the other hand, "for purposes of diversity jurisdiction[,] a corporation is a corporation is a corporation." Cote v. Wadel, 796 F.2d 981, 983 (7th Cir.1986). If AABC assumes the citizenship of its members, then jurisdiction may be absent because AABC has

admitted in its later pleadings that it has one member in Illinois (citizenship unknown) (see Def.'s Mem. in Opp'n at 7.), the state where International is a citizen. With an abundance of caution, the court proceeds under Cote, and concludes that diversity jurisdiction exists because the citizenship of International is diverse from the citizenship of AABC. See Nat'l Assoc. of Realtors, 894 F.2d at 939-40 (concluding that for diversity purposes, the inquiry into the relevant citizenship of an incorporated trade association depends upon whether the members or the association are the real parties in interest).

*2 14 F.Supp.2d at 1035 n. 1.

Although the court proceeded to deny International's motion, it ordered the parties to submit briefs addressing the issue of subject matter jurisdiction. The parties complied with the court's order, and International filed two additional motions: (1) a motion to reconsider; and (2) a motion to remand. Because the issue of jurisdiction must be resolved conclusively, the court addresses International's motion to remand forthright.

## II. DISCUSSION

### A. Removal and Subject Matter Jurisdiction

A defendant seeking to remove any civil action from a state court must file "a short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a). This statement must include a basis for federal jurisdiction, as removal from state court to a federal court is appropriate only where the federal court would have original jurisdiction over a suit. 28 U.S.C. § 1441(a); Davis v. Rodriquez, 106 F.3d 206, 208 (7th Cir.1997) ; Doe v. Allied-Signal, Inc., 985 F.2d 908, 911 (7th Cir.1993). In its Notice of Removal, AABC asserted federal jurisdiction under the diversity statute, 28 U.S.C. § 1332.

Two requirements must be satisfied for diversity jurisdiction under § 1332. First, under the rule of complete diversity, there must be diversity of citizenship "between all plaintiffs on the one hand and all the defendants on the other." Barbers v. Bishop, 962 F.Supp. 124, 125 (N.D.Ill.1997), vacated on other grounds, 132 F.3d 1203 (7th Cir.1997); see also Howell v. Tribune Entertainment Co., 106 F.3d 215, 217 (7th Cir.1997). Second, the amount in controversy must exceed $75,000, exclusive of interest and costs. See § 1332(a)(1).

International argues that AABC's notice is defective because there is neither diversity of citizenship nor the requisite amount in controversy in this case. First, International argues that the individual members of AABC are the real parties in interest here, and thus that one AABC member is apparently a citizen of Illinois destroys diversity of citizenship. Second, International argues that AABC fails to show that the amount in controversy requirement is met because International does not claim damages in an amount in excess of $75,000. International asserts that the primary relief it seeks is non-monetary, in the form of an injunction ordering that its membership in AABC be reinstated.

A plaintiff's choice of forum is presumed proper and valid. Accordingly, the removal statute should be read narrowly, and "[a]ny doubts regarding jurisdiction should be resolved in favor of remanding the action to state court." Bristol Oaks, L.P., v. Chapman, Ill, 95 C 7145, 1996 WL 73654, at * 1 (citing Jones v. General Tire & Rubber Co., 541 F.2d 660, 664 (7th Cir.1976)). The party seeking to preserve removal bears the burden of establishing federal jurisdiction, and so it "must present evidence of federal jurisdiction once the existence of that jurisdiction is fairly cast into doubt." In Re Brand Name Prescription Drugs, 123 F.3d 599, 607 (7th Cir.1997). "[F]or purposes of removal jurisdiction, [federal courts] are to look at the case as of the time it was filed in state court--prior to the time the defendants filed their answer in federal court." Schacht, 118 S.Ct. at 2053; see also Cook v. Winfrey, 141 F.3d 322, 326 (7th Cir.1998). The court may review evidence not included in the record at the time of removal if that evidence "sheds light on the situation which existed when the case was removed." Harmon v. Oki Systems, 115 F.3d 477, 480 (7th Cir.1997).

#### 1. Diversity of Citizenship

*3 AABC meets its burden with respect to diversity of citizenship. Where a corporation is a party, it "is deemed to be a citizen of any state in which it has been incorporated and of the state where it has its principal place of business." Krueger v. Cartwright, 996 F.2d 928, 931 (7th Cir.1993); see also 28 U.S.C. § 1332(c)(1). Diversity of citizenship is present here because on the one hand, AABC is incorporated in California and its principal place of business is Washington, D.C., while on the other, International has dual citizenship in Illinois. [FN1] To this end, the court rejects International's assertion that the apparent Illinois citizenship of an AABC member destroys

diversity. As the court concluded in its initial opinion, "for purposes of diversity jurisdiction[,] a corporation is a corporation is a corporation." Cote v. Wadel, 796 F.2d 981, 983 (7th Cir.1986); see also Nat'l Assoc, of Realtors v. Nat'l Real Estate Assoc., 894 F.2d 937, 939 (7th Cir.1990) (stating that there is generally no distinction between a membership corporation and a shareholder corporation for purposes of determining corporate citizenship).

> FN1. As already noted, the citizenships of the unidentified AABC members that International names separately as defendants are not relevant to the court's jurisdictional inquiry. See Howell, 106 F.3d at 218 ("[N]aming a John Doe defendant will not defeat the named defendants' right to remove a diversity case if their citizenship is diverse from that of the plaintiffs.").

Moreover, AABC, rather than its members, is the real party in interest here (as for the claims against AABC); the court finds no reason to conclude otherwise. To determine whether diversity of citizenship exists, the court must disregard nominal or formal parties and instead determine whether the real parties in interest are of diverse citizenship. See Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 460 (1980) ; Security Center, Inc. v. AT & T, 94 C 6707, 1995 WL 307267, at *3 (N.D.Ill. May 16, 1995). "A real party in interest is the person who, under governing substantive law, possesses the right sought to be enforced." Garbie v. Chrysler Corp., 8 F.Supp.2d 814, 818 (N.D.Ill.1998). Conversely, the person whom a right is sought to be enforced against, i.e., the person who is to be enjoined, is also a real party in interest. See Security Center, Inc., 1995 WL 307267, at *3.

Here, the origin of the dispute is AABC's expulsion of International based on International's failure to comply with AABC membership rules. Consequently, International seeks to enforce its rights under Illinois law against AABC, primarily by seeking an injunction that would reinstate its membership in the association. Thus, AABC members are not on the "front line" in this litigation, and though they would ultimately bear the costs, any effect on them would merely be "trickled down." See Nat'l Assoc. of Realtors, 894 F.2d at 939. Indeed, "the law does not lift the corporate veil in search of the ultimate incidence of the corporation's transactions; the tracing out of the incidence is too complicated a process to make it a feasible preliminary to establish federal jurisdiction." Id. This case essentially involves a membership compliance dispute between an association and one of its members; AABC is therefore the real party in interest. Cf. id. (trade association would be the real party in interest if it brought a breach of contract action).

2. Amount in Controversy

*4 As a preliminary matter, the court notes that neither party addresses whether Local Civil Rule 3 should apply. See N.D. ILL. CIVIL R. 3. Local Civil Rule 3 provides the proper procedure a defendant must follow upon filing a notice of removal. In relevant part, Local Civil Rule 3 requires that the notice of removal include: (1) a good-faith statement by each defendant that the amount in controversy requirement has been met; and (2) as to at least one plaintiff, either (2)(a) an interrogatory answer or (2)(b) an admission or deemed admission, that acknowledges (or refuses to acknowledge) that the jurisdictional amount is met. See id.; see also Sawisch v. Circuit City Stores, Inc., 960 F.Supp. 154, 154-55 (N.D.Ill.1997); Huntsman Chemical Corp. v. Whitehorse Tech, Inc., 97 C 3842, 1997 WL 548043, at *4 (N.D.Ill. Sept. 2, 1997). If a defendant fails to satisfy either of these requirements, "the action will be subject to remand to the state court for failure to establish a basis for federal jurisdiction." N .D. ILL. CIVIL R. 3.

Local Civil Rule 3 was enacted so the laborious task of evaluating the amount in controversy could be avoided. Nonetheless, as the Local Civil Rule 3's "subject to" language implies, application of the rule is not mandatory. See Huntsman Chemical Corp., 1997 WL 548043, at *6 ("Local Rule 3 establishes a procedure for establishing the amount in controversy, but it is not the exclusive way."). Because this case has progressed with this court and the parties have already briefed the issue of jurisdiction, the court, in the interest of judicial economy, declines to apply Local Civil Rule 3 to the instant case. See Karpowisz v. General Motors Corp., 97 C 1390, 1997 WL 156542, at *4 (N.D.Ill. March 28, 1997) ("[W]here the parties have fully briefed the removal ... we think that strict adherence to the rule is unnecessary.").

"[W]hen deciding whether a claim meets the minimum amount in controversy, the plaintiff's evaluation of the stakes must be respected." Barbers v. Bishop, 132 F.3d 1203, 1205 (7th Cir.1997). "A plaintiff can always stay under the minimum amount in controversy by waiving the right to more," Brand Name, 123 F.3d at 607, yet once a case is properly

removed, a plaintiff cannot destroy diversity jurisdiction by amending its complaint to plead an amount under the jurisdictional minimum. See Schacht, 118 S.Ct. at 2053; Barbers, 132 F.3d at 1205; Chase v. Shop 'N Save Warehouse, 110 F.3d 424, 429 (7th Cir.1997). If the amount in controversy is uncontested, the court "will accept the plaintiff's good faith allegation of the amount in controversy unless it 'appear[s] to a legal certainty that the claim is really for less than the jurisdictional amount." ' Rexford Rand Corp. v. Ancel, 58 F.3d 1215, 1218 (7th Cir.1995) (quoting St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 289 (1938)); see also Herremans v. Carrera Designs, Inc., 157 F.3d 1118, 1121 (7th Cir.1998).

*5 However, where the amount in controversy is challenged, the party asserting jurisdiction is required to submit "competent proof" that the amount in controversy exceeds $75,000. See Target Mkt. Publishing, Inc. v. ADVO, Inc., 136 F.3d 1139, 1142 (7th Cir.1998); Rexford Rand Corp., 58 F.3d at 1218; Garbie, 8 F.Supp.2d at 820. "Competent proof means proof to a reasonable probability that jurisdiction exists." Rexford Rand Corp., 58 F . 3d at 1218 (internal quotations and citation omitted); see also Chase, 110 F.3d at 427; Schlessinger v. Salimes, 100 F.3d 519, 521 (7th Cir.1996). Thus, "[t]he correct test ... in a removal case ... is whether a defendant can show to a reasonable probability that more than the required amount is in controversy." Garbie, 8 F.Supp.2d at 820. [FN2]

FN2. For a discussion on the various burdens of proof that federal courts apply when determining whether the amount in controversy is satisfied, see Watterson v. GMRI, Inc., 14 F.Supp.2d 844, 847-50 (W.D.Va.1997).

Because this is a commercial case, as opposed to a personal injury action, Illinois law did not preclude International from pleading a specific amount of damages in its complaint. See Barbers, 132 F.3d at 1205 (citing 735 ILCS 5/2-604). Nonetheless, International's complaint lacks any mention of a specific amount of monetary damages that the company seeks to recover. The only reference to damages is in International's prayer for relief, where it asks "to be awarded the costs of this action, reasonable attorney's fees, and damages in an amount to be determined at trial, which damages shall be trebled in accordance with the provisions of the Illinois Antitrust Act, 740 ILCS 10/7(2)." (Compl. at 9.) AABC, of course, refers to the availability of treble damages under the Illinois Antitrust Act [FN3] as support that the amount in controversy is satisfied. According to AABC, International's claim to treble damages, along with its tortious interference claim and prayer for injunctive relief, "implied that [International's] damages exceeded $75,000." (AABC Resp. at 3.) (AABC correctly omits any reference to alleged damages from International's wrongful expulsion claim because International added that claim post-removal.)

FN3. The court assumes for the limited purpose of this jurisdictional inquiry that AABC is subject to liability under the Illinois Antitrust Act. As the court noted in its initial opinion, the Illinois Antitrust Act "was intended to apply only to conduct relating to for-profit enterprises." O'Regan v. Arbitration Forums, Inc., 121 F.3d 1060, 1065 (citing 740 ILCS 10/2).

AABC's mere reference to an implied amount of damages is arguably insufficient to carry its burden. However, AABC also asserts that under the "either viewpoint" rule, the value of an injunction reinstating International's membership exceeds the requisite amount in controversy. Under the "either viewpoint" rule, the party asserting jurisdiction in a case involving injunctive relief chooses between two alternative inquiries to establish the amount in controversy: (1) whether the value of the injunction to the plaintiff exceeds the statutory minimum; or (2) whether, from the defendant's perspective, "the injunction sought by the plaintiffs would require some alteration in the defendant's method of doing business that would cost the defendant at least the statutory minimum amount." Brand Name, 123 F.3d at 609. Here, AABC submits the affidavit of its Executive Director, Kenneth M. Sufka, to support its assertion that the value of an injunction to International exceeds $75,000. Sufka states that "the amount of balancing work directly attributable to AABC membership is approximately $300,000 per year per member." (AABC Resp., Ex. 2, ¶ 6.) Based on this contention, along with International's prayer for treble damages, the court concludes that AABC has shown to a reasonable probability that the amount in controversy exceeds $75,000. [FN4] Because AABC has met its burden of establishing jurisdiction under the diversity statute, International's motion to remand is denied.

FN4. Because AABC has established the requisite amount in controversy on these grounds, the court need not address AABC's two other assertions in support of the requisite amount in controversy: (1) that AABC's cost of compliance with an injunction

reinstating International's membership would be in excess of $100,000 (AABC Resp ., Ex. 2, ¶ 11.); and (2) that the amount of alleged damages stemming from International's claim of tortious interference is reflected in a related action for breach of contract that International filed in the District of Utah. In that diversity action, International seeks damages in the amount of $217,299 against Western Sheet Metal, Inc., a contractor on the project that led to International's expulsion from AABC.

*6 As a postscript, the court notes the apparent inconsistency in International's steadfast refusal to concede that the amount in controversy exceeds $75,000 and its claim that AABC membership is crucial for survival in the test and balancing industry. (Of course, subject matter jurisdiction is not dictated by the parties' consent.) Having said that, the court's denial of International's motion for a preliminary injunction is not necessarily subject to the same inconsistency. A primary basis for the court's denial of International's motion for preliminary injunction was that International failed to meet its burden to establish that AABC had market power. 14 F.Supp.2d at 1042. That membership in AABC may be valuable to some degree does not necessarily equate with the existence of market power and the ability to unlawfully hinder competition. [FN5] International will have the opportunity to prove otherwise at trial. But the limited question here is a jurisdictional inquiry as to whether AABC has shown the requisite amount in controversy to a reasonable probability.

FN5. The court notes that the National Environmental Balancing Bureau is another national association which represents the air balance industry. (See AABC Resp., Ex. 2, ¶ 4.)

B. Motion to Reconsider

Having concluded that it has jurisdiction over this action, the court turns to International's motion to reconsider the denial of its motion for a preliminary injunction. Before addressing the merits of International's motion, the court recites the applicable standards for a motion to reconsider.

There is no "Motion for Reconsideration" codified in the Federal Rules of Civil Procedure. There are, however, Rules 59(e) ("Motion to Alter or Amend Judgment") and 60(b) ("Relief From Judgment or Order" based upon "Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc."). Though International neglects to explicitly cite any rule as the basis for its motion, the fact that it challenges the merits of the court's decision means that it must fall under either Rule 59(e) or Rule 60(b). See United States v. Deutsch, 981 F.2d 299, 300 (7th Cir.1992). Further, because International filed its motion to reconsider within ten days of entry of judgment as computed by Fed.R.Civ.P. 6(a), the court will review the motion under Rule 59(e). See Britton v. Swift Trans. Co., Inc., 127 F.3d 616, 618 (7th Cir.1997) ( "[T]he key factor in determining whether a 'substantive motion' is cognizable under Rule 59 or Rule 60 is its timing.").

"The only grounds for a Rule 59(e) motion ... are newly discovered evidence, an intervening change in the controlling law, and manifest error of law." Cosgrove v. Bartolotta, 150 F.3d 729, 732 (7th Cir.1998). Rule 59(e) "is not appropriately used to advance arguments or theories that could and should have been made before the district court rendered a judgment [citation], or to present evidence that was available earlier." LB Credit Corp. v. Resolution Trust Corp., 49 F.3d 1263, 1267 (7th Cir.1995); see also Moro v. Shell Oil Co., 91 F.3d 872, 876 (7th Cir.1996). "The rule essentially enables a district court to correct its own errors, sparing the parties and the appellate courts the burden of unnecessary appellate proceedings." Russell v. Delco Remy Div. of Gen. Motors Corp., 51 F.3d 746, 749 (7th Cir.1995). Whether to grant or deny a Rule 59(e) motion "is entrusted to the sound judgment of the district court." Matter of Prince, 85 F.3d 314, 324 (7th Cir.1996).

*7 In its initial opinion, the court denied International's motion for a preliminary injunction because International failed to establish the "threshold consideration" for the issuance of such a motion: the plaintiff's ability to show a reasonable likelihood of success on the merits. See Platinum Home Mortg. Corp. v. Platinum Financial Grp., 149 F.3d 722, 726 (7th Cir.1998). International rested its motion for a preliminary injunction on its alleged ability to prevail on Count I, i.e., to show that its expulsion was an unlawful restraint of trade in violation of the Illinois Antitrust Act, 720 ILCS 10/3. 14 F.Supp.2d at 1039. The court concluded that International failed to carry its burden in several respects: (1) International appeared to confuse the antitrust theory applicable to its asserted facts (see id. at 1041); (2) International did not attempt to define the relevant market (see id. at 1042); (3) International failed to show that AABC membership allows the exercise of market power or

that it provides exclusive access to a necessary business element (see id.); (4) International failed to show that its expulsion had an adverse impact on competition (see id. at 1046); and (5) International relied on distinguishable cases (see id. at 1042-46).

Because International simply rehashes its earlier arguments, the court finds no reason to disturb its ruling. For instance, International argues that the court "did not consider sufficiently the relative harm that is presented here if the requested relief is not granted." (Int'l Mem. in Supp. at 4.) The court, however, was not required to reach the comparative harm analysis because International failed to demonstrate a reasonable likelihood of success on the merits. See Adams v. City of Chicago, 135 F.3d 1150, 1154 (7th Cir.1998); see also Green River Bottling Co. v. Green River Corp., 997 F.2d 359, 361 (7th Cir.1993); Abbot Lab. v. Mead Johnson & Co., 971 F.2d 6, 12 (7th Cir.1992). And as the court noted in its initial opinion, International failed to submit adequate arguments in support of the well-established elements for a preliminary injunction. See 14 F.Supp.2d at 1039.

Next, International attacks the court's primary reason for denying its motion, i.e., International's failure to define the relevant market and present at least some evidence of market power. Yet International concedes that it is still unwilling to attempt to define the relevant market and instead attempts to switch that burden to AABC. (Int'l Mem. in Supp. at 6.) Contrary to International's assertion, a mere conclusory allegation of the relevant market does not suffice for purposes of meeting its burden at the preliminary injunction stage. (Though International's mere allegation would likely survive a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6)). In any event, International still fails to submit any evidence indicating that AABC has market power. A sample of International's empty references to factual evidence on market power is the self-serving question it asks: "If there were no substantial market advantages for Plaintiff in being a member of AABC, then why would Plaintiff be so concerned about being unfairly and anticompetitively excluded from membership?" (Int'l Mem. in Supp. at 7.)

*8 In sum, the court previously held that International failed to carry its burden for the "extraordinary and drastic remedy" of a preliminary injunction. Boucher v. School Bd. of Greenfield, 134 F.3d 821, 823 (7th Cir.1998). It is well established that a court's opinions are not "mere first drafts, subject to revision and reconsideration at a litigant's pleasure." See Quaker Alloy Casting Co. v. Gulfco Indus., Inc., 123 F.R.D. 282, 288 (N.D.Ill.1988). International presents no reasons under Rule 59(e) that persuade the court to reconsider its earlier holding. International's motion to reconsider is hence denied.

### C. AABC's Exemption Under the Illinois Antitrust Act

The court's discussion is not complete, however. As noted in the court's initial opinion, the Illinois Antitrust Act "was intended to apply only to conduct relating to for-profit enterprises." O'Regan v. Arbitration Forums, Inc., 121 F.3d 1060, 1065 (7th Cir.1997) (citing 740 ILCS 10/2). It is therefore quite surprising that International seeks reconsideration given that the court already expressed serious doubts as to whether AABC, as a non-profit organization, is subject to liability under the Illinois Antitrust Act. Indeed, regardless of the court's prior analysis, the application of 740 ILCS 10/2 leaves International's likelihood of success at nil. In its initial opinion, the court noted that it would leave that issue for another day because the parties had not raised the issue; that day has come. Because AABC, as a non- profit organization, is exempt under the Illinois Antitrust Act, Counts I and II of International's complaint are hereby dismissed. [FN6]

FN6. Although International's now-dismissed claims under the Illinois Antitrust Act provided the basis for the requisite amount in controversy, the court will retain jurisdiction over the remaining counts. See generally Herremans, 157 F.3d at 1121 (expressing doubt that upon dismissal of counts that provide the requisite amount in controversy, that a court could decline jurisdiction under 28 U.S.C. § 1367 over surviving supplementary state counts).

## III. CONCLUSION

For the foregoing reasons, the court denies International's Motion to Remand and its Motion to Reconsider. Additionally, International's claims against AABC under the Illinois Antitrust Act are hereby dismissed.

IT IS SO ORDERED.

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Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois, Eastern Division.

Howard POINDEXTER, Plaintiff,
v.
NATIONAL MORTGAGE CORPORATION, Defendant.

No. 91 C 4223.

Dec. 23, 1991.

MEMORANDUM OPINION AND ORDER

LEINENWEBER, District Judge.

*1 Defendant, National Mortgage Corporation ("National"), removed this consumer class action to federal court under 28 U.S.C. § 1441(b). The parties are now before the court on the motion of plaintiff, Howard Poindexter ("Poindexter"), to remand this action to the Circuit Court of Cook County. Plaintiff argues that because the amount-in-controversy requirement has not been satisfied the court is deprived of subject matter jurisdiction.

BACKGROUND

Plaintiff originally brought this action in the Circuit Court of Cook County on behalf of himself and two classes of persons who 1) were obligated on a mortgage owned by defendant or 2) had their escrow deposits computed by National in the same manner as plaintiff.

According to plaintiff, National "systematically imposed late charges on veterans and their families in excess of those authorized under their mortgages ... [and] required the class members to deposit into their accounts amounts in excess of those their mortgages provided for." Cmplt. at 1. Poindexter brought the class action in order to secure a declaratory judgment as to the legality of National's practices, an injunction against their continuance, an order requiring National to recompute the affected mortgages and credit the excessive charges and profits to principal, as well as attorneys fees and other relief.

On July 8, 1991, National filed a notice of removal with this court. National contends this court has jurisdiction pursuant to 28 U.S.C. §§ 1332 and 2201. No federal claims are alleged.

DISCUSSION

A class action is not within the diversity jurisdiction of the federal courts unless the jurisdictional amount requirement is satisfied with respect to the claims of each named plaintiff and each class member. See Snyder v. Harris, 394 U.S. 332, 335 (1969); Zahn v. Int'l. Paper Co., 414 U.S. 291, 301 (1974). The jurisdictional amount requirement must be satisfied in removal actions to the same extent as in original actions. Goldberg v. C.P.C. Int'l., Inc., 678 F.2d 1365, 1367 (4th Cir.1982). Where the defendant petitions for removal to federal court, it has the burden of proving that removal is proper. Ortiz v. GMAC, 583 F.Supp. 526, 530 (N.D.Ill.1984).

1. Aggregation

National does not allege that the compensatory damages sought by plaintiff meet the jurisdictional amount requirement as to each plaintiff and class member. Instead, it argues that, if aggregated, the cost of its compliance with the injunctive and declaratory relief sought would far exceed the total sum of $50,000. Defendant asks the court to determine the amount in controversy from the "defendant's viewpoint" and find that it has satisfied the jurisdictional amount requirement.

In arguing that its aggregate costs satisfy the jurisdictional amount requirement, National relies on McCarty v. Amoco Pipeline, 595 F.2d 389, 395 (7th Cir.1979). In McCarty, the plaintiffs sought to enjoin Amoco from operating a pipeline located upon an easement they had previously held. The action was removed to federal court by Amoco. In denying the plaintiff's motion for remand, the Seventh Circuit explained that the determination of jurisdictional amount may be made by examining the value of the case from the viewpoint of either the plaintiff or the defendant. Since the cost to the defendant of implementing the injunction would exceed $10,000, the court found that removal was proper. 595 F.2d at 395. [FN1]

*2 In McCarty, however, no class was alleged, let alone certified. Thus, defendant's reliance on McCarthy is misplaced. McCarthy simply stands for the proposition that the court may consider the "defendant's viewpoint" when determining jurisdictional amount. With only one plaintiff seeking relief, $10,000 was sufficient to satisfy the

jurisdictional amount requirement. However, a court applying the "McCarty" rule in a class action setting must pro rate the defendant's cost among the class members. Any interpretation of McCarty which fails to require a pro rata calculation violates the rule against non-aggregation spelled out in Zahn, 414 U.S. at 301, and Snyder, 394 U.S. at 335.

According to Poindexter, the most he or any individual class plaintiff could receive by way of damages is $7,920. Defendant does not dispute that, under the general rule of non-aggregation, this alleged damage estimate fails to satisfy the jurisdictional amount requirement. Rather, defendant argues that plaintiff's claims for injunctive and declaratory relief constitute a "common and undivided interest" of all class members. Therefore, defendant argues, plaintiff's claims may be aggregated in order to satisfy the jurisdictional amount requirement.

Defendant, however, has misunderstood the test for "common and undivided interest." An interest is "common and undivided" where only the class as a whole is entitled to the relief requested. See Griffith v. Sealtite Corp., 903 F.2d 495, 498 (7th Cir.1990); O'Brien v. Continental Ill. Nat'l. Bank, 443 F.Supp. 1131, 1138 (N.D.Ill.1975). Where named plaintiffs and class members are attempting to obtain individual payments from the defendant, or other relief to which any single one of them would be entitled, their rights are "separate." See Nat'l. Org. for Women, et al. v. Mutual of Omaha Ins. Co., 612 F.Supp. 100 (D.D.C.1985). In Nat'l. Org. for Women, the court explained that the "issue is whether the plaintiffs possess a common interest that belongs exclusively to the group." 612 F.Supp. at 105. Where relief is sought for the breach of separately negotiated instruments, it is difficult, if not impossible, to imagine how the interest to be vindicated could be characterized as a common interest belonging to the group alone rather than to the individual plaintiffs.

Here, the class is definitely not asserting a "common and undivided" interest. Each class member has a separate mortgage contract and note, each class member could in theory bring an individual action for National's overcharges and for an order enjoining any future breach. Therefore, plaintiff's claims may not be aggregated to satisfy the jurisdictional amount requirement.

2. Aggregation of Punitive Damages and Attorney's fees

Defendant also argues that the potential attorney's fees and punitive damages should be attributed to the class as a whole and treated as a "common fund" in order to meet the jurisdiction amount requirement. While the Seventh Circuit has not yet had the opportunity to address the question, the court believes that punitive damages and attorney's fees are attributed to each plaintiff and class member on a pro rata basis where the claims are "separate" and "independent." The rule against aggregation cannot be circumvented simply because a plaintiff seeks punitive damages and attorney's fees. See Goldin v. American Airlines, Inc., 1990 WL 77630 (N.D.Ill.1990); See also Goldberg, 678 F.2d at 1367.

***3** From the face of plaintiff's complaint, it is clear that a pro rata calculation of the cost of injunctive relief, coupled with a pro rata award of attorney's fees and punitive damages, will not exceed $50,000. Indeed, National does not attempt to argue that the jurisdictional amount requirement is satisfied under a pro rata calculation.

3. Award of Attorney's fees

The removal statute provides that "an order remanding a case may require payment of just costs and any actual expenses, including attorney's fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). In order to receive an award of attorney's fees, the plaintiff need only show that the action was removed improvidently. See Locklear v. State Farm Mutual Auto Ins. Co., 742 F.Supp. 679, 681 (S.D.Ga.1989); Schmidt v. Nat'l. Org. for Women, 562 F.Supp. 210, 215 (N.D.Fla.1983).

Here, it is clear that the potential damage award to which plaintiffs are entitled does not approach $50,000 per class member. If it did, defendants would not have spilled so much ink asking the court to consider defendant's cost of compliance in the aggregate. In light of the existing case law prohibiting aggregation, this court believes that the action was removed improvidently. Plaintiffs are, therefore, awarded attorney's fees incurred in litigating their motion to remand.

CONCLUSION

As the party seeking removal, National must show that this court possesses subject matter jurisdiction over the present action. National has failed to carry its burden. Plaintiff's motion to remand is therefore granted. The case is remanded to the Circuit Court

of Cook County.

IT IS SO ORDERED.

FN1. At the time McCarty was decided, the jurisdictional amount requirement was only $10,000.

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## CERTIFICATE OF SERVICE

David L. Ter Molen, an attorney, hereby certifies that he caused a copy of the foregoing Notice of Removal to be served by messenger upon the following counsel:

James M. Scanlon
James M. Scanlon & Associates
70 W. Madison Street, Suite 3600
Chicago, IL 60602

on this 28th day of November, 2000.

David L. Ter Molen