IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

TONYA KELLY, on behalf of herself And all others similarly situated,	)	
Plaintiff,	)	
v.	)	Case No. 18-0146-CV-W-FJG
CAMERON'S COFFEE AND DISTRIBUTION COMPANY,	)	
Defendant.	)	

ORDER

Before the Court are (1) Plaintiff's Motion to Remand (Doc. No. 11); and (2) Defendant's Motion for Leave to Amend Notice of Removal (Doc. No. 14). As an initial matter, defendant's request for oral argument (Doc. No. 13) is **DENIED.**

I. BACKGROUND

Plaintiff filed the state court action on January 4, 2018, and served defendant on January 23, 2018. Defendant timely removed this action on February 22, 2018. Plaintiff is a Missouri citizen; defendant is a Minnesota citizen. Although plaintiff does not allege a specific amount of damages in the petition, defendant asserts in its notice of removal (Doc. No. 1) that the amount in controversy in this putative class action exceeds $5,000,000, making this action subject to removal under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d)(2).

Plaintiff's Class Action Petition (Doc. No. 1-1) asserts that defendant deceptively marketed its Cameron's Coffee BetterBrew Eco Coffee Pods ("Cameron's Coffee Pods) as 100% compostable and environmentally friendly, when in fact the product is only

compostable in commercial composting facilities that are not generally available in Missouri. Doc. No. 1-1, p. 2, ¶ 1. Because of this allegedly deceptive marketing, plaintiff asserts that she and members of the class have paid more for the product than what it was worth. Id. ¶ 3. Plaintiff asserts that defendant's conduct violates that Missouri Merchandising Practices Act ("MMPA"), R.S.Mo. § 407.010 et seq., which prohibits "deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise . . . ." R.S.Mo. § 407.020.1; Doc. No. 1-1, p. 3. ¶ 4. Plaintiff seeks to bring this class action "on behalf of all consumers who have purchased Cameron's Coffee Pods in the State of Missouri for personal, family or household purposes at any time from January 4, 2013, to the present." Doc. No. 1-1, p. 14, ¶ 27. Excluded from the class are defendant and its subsidiaries, etc., governmental entities, and judicial officers presiding over this action. Prior to removal of this action, plaintiff's counsel entered into a stipulation that counsel would not seek any attorneys' fee award that would cause the amount in controversy to exceed the sum of $5 million. Doc. No. 1-1, ¶ 40, and Ex. B.

In its notice of removal (Doc. No. 1), defendant asserts that between January 4, 2013 and February 22, 2018 (the date of the removal), it had sold approximately $17,203,798 of Cameron's Coffee Pods in Missouri. By the time of trial, defendant estimated it would sell an additional $1,774,683 to $3,784,656 worth of Cameron's Coffee Pods in Missouri. Defendant also estimated that there are at least $5,732,599 in attorneys' fees in controversy. Doc. No. 1, pp. 2-3. Defendant argues that the amount

in controversy is therefore met. Plaintiff has moved to remand, arguing that defendant has overestimated the amount of damages by (1) including sales of all of defendant's products in the state of Missouri instead of limiting the amount of sales to only the "Eco" coffee pods; and (2) utilizing an improper measure of calculating damages, as benefit of the bargain damages are what plaintiff would be entitled to receive, not the full purchase price of the Eco Coffee Pods. In partial response to these concerns, defendant has moved to amend its notice of removal, to include only the amount of sales of Eco Coffee Pods in the state of Missouri.

II. STANDARD OF REVIEW

An action may be removed by the defendant to federal district court if the case falls within the original jurisdiction of the district court. 28 U.S.C. § 1441(a). If the case is not within the original jurisdiction of the district court, the court must remand the case to the state court from which it was removed. 28 U.S.C. § 1447(c). Defendant argues that this Court has jurisdiction pursuant to 28 U.S.C. § 1332(d)(2), which states:

> The district courts shall have jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which –
> (A) any member of a class of plaintiffs is a citizen of a State different from any defendant;
> (B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or
> (C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

When an action is removed and the defendant argues that the federal district court has jurisdiction pursuant to § 1332(d)(2), the defendant must prove, by a preponderance of

the evidence that the elements of § 1332(d)(2) are satisfied. Bell v. Hershey Co., 557 F.3d 953, 959 (8th Cir. 2009). See also Waters v. Ferrara Candy Co., 873 F.3d 633, 636 (8th Cir. 2017). "'Under the preponderance standard, the jurisdictional fact is not whether the [requirements are, in fact, met], but whether a fact finder *might* legally conclude that they are." Bell, 557 F.3d at 959 (quoting Kopp v. Kopp, 280 F.3d 883, 885 (8th Cir. 2002)). Once a defendant fulfills this burden, "remand is appropriate only if [the plaintiff] can establish that it is legally impossible" to meet all of the elements of § 1332(d)(2). Id. The Eighth Circuit recognizes that "the amount in controversy is not established by a preponderance of the evidence if a court must resort to conjecture, speculation, or star gazing." Waters, 873 F.3d at 636 (internal quotation omitted).

III. DISCUSSION

In its motion to remand (Doc. No. 11), plaintiff asserts that the $5 million amount in controversy is not satisfied, as the value of compensatory damages has not been plausibly alleged in the notice of removal, and the value of a potential attorneys' fee award is not sufficient to otherwise satisfy the amount in controversy. Plaintiff notes that instead of using a plausible measure of damages in its notice of removal, defendant merely alleges its total amount of coffee pod sales during the last five years. It further does not separate the amount of sales of the BetterBrew Eco Coffee Pods at issue in this case from its other coffee pod products, nor does defendant account for plaintiff's alleged measure of damages seeking only a portion of the inflated sales price for misrepresenting the BetterBrew Eco Coffee Pods as "green" products under a benefit of the bargain theory. Moreover, plaintiff argues that defendant's calculation of attorneys' fees is also

flawed, as defendant merely asserts fees which amount to 33 1/3% of defendant's flawed and inflated compensatory damages theory. In addition, plaintiff notes that her investigation has shown that defendant did not sell the Eco Coffee Pods until April 22, 2016. See Doc. No. 12, p. 6. Thus, plaintiff argues that defendant has not shown by a preponderance of the evidence that the value of this case exceeds $5 million.

In response (Doc. No. 13), defendant indicates that "[d]ue to an administrative error," it mistakenly included products other than the BetterBrew Eco Coffee Pods in its sales figures in the original notice of removal. Id., Doc. No.13, p. 8, n. 1. Defendant further moves to amend its notice of removal to account for this different theory. See Defendant's Motion for Leave to Amend Notice of Removal, Doc. No. 14; Defendant's Suggestions in Support re same, Doc. No. 15. Defendant now argues that there is at least $4,193,750 in controversy here due to its sales figures for the Eco Coffee Pods, noting that other Eighth Circuit cases have used total product sales as an appropriate method to calculate the amount in controversy for purposes of removal. Raskas v. Johnson & Johnson, 719 F.3d 884, 887-88 (8th Cir. 2013) (finding, where plaintiffs alleged that defendant medication manufacturers conspired to deceive customers into throwing away medications after listed expiration dates, knowing that the medication would remain effective after those dates, the amount in controversy requirement was met through total sales ($14 million for one defendant, $3.3 million for a second defendant, and $19 million from a third defendant), as well as through plaintiff's request for punitive damages, which could be five times the net amount of judgment); Faltermeier v. FCA US LLC, No. 4:15-CV-00491-DGK, 2016 WL 10879705, at *3 (W.D. Mo. May 26, 2016) (finding, where

plaintiffs alleged a potentially "lethal" defect in Jeep Vehicles, a jury could find the actual value of each Jeep to be almost nothing, therefore establishing that purchase price of the vehicle could be an accepted measure of damages).

Defendant specifically argues in its opposition that, according to the affidavit attached to defendant's response, it has sold $1,498,723 in Eco Coffee Pods in Missouri in the time period between June 1, 2016 and January 4, 2018. Defendant projects that 2018 Missouri sales of the Eco Coffee Pods will be $1,334,824; for the year 2019, defendant projects another $1,390,203 in Missouri sales. Defendant also argues that benefit of the bargain damages are not appropriate in this case because it never charged more for its Eco Coffee Pods than for its non-compostable coffee pods.[1] Additionally, to the extent that plaintiff has argued that future sales projections are speculative, defendant argues that its sales projections are based on reasonable market data and sales growth it has experienced, and therefore its projected future damages should be considered in the amount in controversy.

With respect to attorneys' fees, defendant argues that it has established that a court could award the putative class at least $806,250 in fees (reaching the $5 million threshold), which represents 19.23% of what defendant now deems the compensatory damages amount in controversy. Additionally, with respect to counsel's pre-removal stipulation limiting its attorneys' fees award to an amount that would not cause the amount

[1] As noted by plaintiff in her reply, this argument actually works in favor of plaintiff's position that the amount in controversy is less than $5 million. In other words, if defendant charged no more for its Eco Pods than for its non-recyclable coffee pods, plaintiff's damages under a benefit of the bargain theory might be closer to zero.

in controversy to exceed the sum or value of $5 million (Doc. No. 12, at p 9 and n.4), defendant argues that plaintiff's counsel has no authority to limit the amount of a fee award that does not belong to him, but rather to the class, as the MMPA awards attorneys' fees to the party, not the attorney. See R.S.Mo. § 407.025(1) ("The court may . . . award to the prevailing party attorney's fees . . . .")

Plaintiff, in her reply suggestions (Doc. No. 19), argues that it is apparent that at the time of removal, total sales were just $1,498,723, and this figure does not represent the true amount in controversy because Missouri law permits only a fraction of the purchase price paid under the benefit of the bargain rule. Plaintiff further argues that 2/3 of the alleged compensatory damages amount in defendant's proposed amended notice of removal comes from future product sales, which are speculative and ought not count toward the amount in controversy judged at the time of removal. Plaintiff further notes that under the 8th Circuit's holding in Rolwing v. Nestle Holdings, Inc., 666 F.3d 1069, 1072 (8th Cir. 2012), fee-limiting stipulations by counsel are enforceable under Missouri law and may be used to defeat federal jurisdiction.

This Court agrees with plaintiff; the defendant has not demonstrated by a preponderance of the evidence that the amount in controversy for CAFA jurisdiction has been met. Even if the Court allowed defendant to file an amended notice of removal, the total sales of defendant's product in Missouri at the time of removal were just $1,498,723. With speculative annual sales projections for the next two years added in, the total amount of projected sales is less than $5 million. The Court further finds that annual sales are not a sufficient proxy for damages in this case, as plaintiff has pled in her state court

petition that damages in this matter are "benefit of the bargain" damages – in other words, the plaintiffs paid more for the product than what it was worth. Plaintiff has not pled that the product was worth nothing. Furthermore, even if the Court accepted defendant's theory of damages, the $5 million threshold would not be reached unless the Court added in attorneys' fees. Plaintiff's counsel has stipulated that counsel will not seek a fee award that would cause the amount in controversy to exceed $5 million. See Doc. No. 1-1, ¶ 40 (stipulating "in no event will his firm request or accept an award of attorneys' fees that would cause the amount in controversy to exceed the . . . aggregate sum or value of $5,000,000 on the class claims, exclusive of interest and costs.") Rolwing's holding regarding attorneys' fees stipulations remains binding on this Court and must be followed.

IV. CONCLUSION

For the above stated reasons, the Court **GRANTS** Plaintiff's motion to remand (Doc. No. 11). The above captioned case is **REMANDED** to the Circuit Court of Jackson County, Missouri, at Kansas City. All remaining pending motions are **DENIED** as **MOOT**.

IT IS SO ORDERED.

Date: July 26, 2018
Kansas City, Missouri

S/ FERNANDO J. GAITAN, JR.
Fernando J. Gaitan, Jr.
United States District Judge