

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

DALE E. CRAGGS, individually and on)
behalf of a class similarly situated individuals,)
)
Plaintiff,)
)
v.)
)
FAST LANE CAR WASH & LUBE, L.L.C.,)
d/b/a IN & OUT CARWASH,)
)
Defendant.)

Case No. 6:19-cv-3081

JURY TRIAL DEMANDED

DEFENDANT’S NOTICE OF REMOVAL

[28 U.S.C. §§ 1332(d), 1441, 1446, and 1453]

Defendant hereby removes to this Court the state court action described below, initiated by the filing of the petition contained in the state court file attached hereto as **Exhibit A**, and subsequently amended by the First Amended Class Action Petition, also included in **Exhibit A**. Removal is proper under the Class Action Fairness Act¹ ("CAFA") and 28 U.S.C. §§ 1332(d), 1441(a) and 1453, because this is a putative class action placing in controversy more than \$5,000,000 and because there is minimal diversity between the parties under § 1332(d). Defendant’s short and plain statement of the grounds for removal is as follows:²

NATURE OF THE CASE

1. Plaintiff filed a Class Action Petition on September 26, 2018, in the Circuit Court for the Greene County, Missouri's Thirty-First Judicial Circuit (the “State Court Action”).
2. On January 29, 2019, Plaintiff filed a First Amended Class Action Petition (the “FAC”). *See Exhibit A.*

¹ Pub.L. No. 109–2, 119 Stat. 4 (2005) (codified in various sections of 28 U.S.C.).

² Defendant reserves the right to supplement this notice with additional facts, affidavits, or memoranda if necessary to effectuate removal.

3. Plaintiff alleges that he, and “thousands of Defendant’s customers have not received the car washes for which they paid at Defendant’s carwash locations.” FAC, ¶ 26.

4. Plaintiff alleges that “components of Defendant’s carwashes fail to perform or are wholly inoperative on a regular basis, yet Defendant does not warn its customers prior to taking their money that the carwash is not fully functional or that they will not receive a ‘full wash’.” FAC, ¶ 22.

5. Plaintiff also alleges that “[a]dditional components of Defendant’s carwash that regularly do not function properly include, but are not limited to, the tire cleaning/shining components.” FAC, ¶ 23.

6. Plaintiff further alleges that Defendant’s car wash lasts about two minutes and 25 seconds instead of the full 3 minutes Defendant advertises. FAC, ¶ 23.

7. The First Amended Petition proposes two classes, each for over “5 years from the filing of this petition.” FAC, ¶¶ 28, 29.

8. Defendant is Fast Lane Car Wash & Lube, L.L.C. d/b/a In & Out Carwash (“In & Out Carwash”).

9. Defendant has three locations, including two in Joplin, Missouri, and one in Springfield, Missouri. *See Exhibit B*, ¶ 9 (R. Barks Declaration).

10. In the FAC, Plaintiff alleges that he

“seeks to represent is all customers of Defendant who, within the last 5 years from the filing of this petition:

- a. Purchased a car wash package for consumer or household purposes from Defendant during a time that component(s) of Defendant’s carwash normally used to complete the car wash were not functioning;
- b. Who were not warned that component(s) of Defendant’s carwash were not functioning; and

- c. Who did not receive a full car wash.
- d. The class shall not include any officers, directors, attorneys, agents or employees of Defendant.”

FAC, ¶ 28.

11. In the FAC, Plaintiff also alleges that he

“seeks to represent a second class of similarly situated individuals which is all customers of Defendant who, within the last 5 years from the filing of this petition:

- a. Purchased a car wash package for consumer or household purposes from Defendant during a time that Defendant advertised that its car washes lasted for three minutes; and
- b. Who did not receive a full three-minute car wash.
- c. The class shall not include any officers, directors, attorneys, agents or employees of Defendant.”

FAC, ¶ 29.

12. Plaintiff maintains that Defendant’s alleged conduct violates the Missouri Merchandising Practices Act, which prohibits "any 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." *See id.* ¶¶ 45-59; Mo. Ann. Stat§ 407.020.

13. Plaintiff also alleges claims of Breach of Contract (Count II), Unjust Enrichment (Count III), and Money Had and Received (Count IV).

14. A copy of all process and pleadings, orders and other documents currently on file in the State Court Action at the time of removal are attached hereto as **Exhibit A**.

BASES FOR REMOVAL

**THE STATE COURT ACTION
IS SUBJECT TO REMOVAL UNDER CAFA AND §§ 1332(d), 1453.**

15. Removal of this action is appropriate under the Class Action Fairness Act, and 28 U.S.C. § 1332(d), because this is a class action placing in excess of \$5 million in controversy and there is at least minimal diversity between the parties.

16. 28 U.S.C. § 1332(d), adopted pursuant to CAFA, provides that:

The district courts shall have original 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

17. Thus, CAFA provides for removal of any action that: (1) is a class action; (2) puts in controversy the "sum or value of \$5,000,000"; and (3) includes any class member whose citizenship is different from any defendant.

A. This is a Class Action.

18. This lawsuit is a class action as defined by CAFA under 28 U.S.C. § 1332. Section 1332(d)(1)(B) defines a "class action" as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." *Id.*

19. Plaintiff brings his petition "on behalf of himself and others similarly situated," *see* FAC, p. 1 (preamble in advance of ¶ 1 of the FAC).

20. Further, Plaintiff seeks certification of two classes, each of “which is all customers of Defendant who, within the last 5 years from the filing of this petition . . . ” FAC ¶¶ 28, 29; *supra*, ¶¶ 10-11 above.

21. Thus, this action is brought on behalf of a class as defined by CAFA.

B. Removal is Timely

22. Defendant was served no earlier than on January 22, 2019.

23. A copy of the summons and State Court Petition served no earlier than on January 22, 2019 are attached hereto as **Exhibit C**.

24. This Notice of Removal is filed within 30 days of January 22, 2019, as required by 28 U.S.C. § 1446(b); *see also Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 356 (1999) (holding that the thirty (30) day removal period does not begin to run until defendant is formally served); *Marano Enters. of Kansas v. Z-Teca Rests., L.P.*, 254 F.3d 753, 756-57 (8th Cir. 2001) (same).

C. There Are More Than 100 Putative Class Members

25. Plaintiff alleges that he, and “thousands of Defendant’s customers have not received the car washes for which they paid at Defendant’s carwash locations.” FAC, ¶ 26.

26. Plaintiff admits that the class he purports to represent consists of thousands of customers. *Id.*; *see also* FAC, ¶ 26; **Exhibit B**, ¶ 12 (R. Barks Declaration) (“Within the last five (5) years, In & Out Carwash has had over 1000 customers.”)

27. Therefore there are more than 100 Putative Class Members.

D. The Amount in Controversy Exceeds \$5,000,000.³

28. In the FAC, Plaintiff alleges that “components of Defendant’s carwashes fail to perform or are wholly inoperative on a regular basis, yet Defendant does not warn its customers prior to taking their money that the carwash is not fully functional or that they will not receive a ‘full wash’.” FAC, ¶ 22.

29. Plaintiff also alleges that “[a]dditional components of Defendant’s carwash that regularly do not function properly include, but are not limited to, the tire cleaning/shining components.” FAC, ¶ 23.

30. Plaintiff also alleges that “defendant’s car wash lasts about two minutes and 25 seconds instead of the full 3 minutes Defendant advertises.” FAC ¶ 24.

31. The FAC proposes two classes, each for over “5 years from the filing of this petition.” FAC, ¶¶ 28, 29.

32. The FAC includes claims for attorney fees and costs. FAC, ¶ 58.

33. The Missouri Merchandising Practices (“MMPA”) claim in the FAC includes claims for punitive damages. FAC, ¶ 59 (“Defendant’s actions described above were evil, wanton, willful and malicious justifying the imposition of punitive damages.”).

34. In MMPA cases, punitive damage awards can be substantial. *See, e.g.:*

- *Kerr v. Ace Cash Experts, Inc.*, No. 4:10 CV 1645 DDN, 2010 WL 5177977, at *2 (E.D. Mo. Dec. 14, 2010) (considering the possibility of more than \$4.4 million in attorneys’ fees and punitive damages based upon allegations of \$594,000 in actual damages);

³ Defendant neither confesses any liability nor admits the appropriate amount of damages if found liable for any part of Plaintiff’s claims. Defendant is only stating what the stakes of the litigation could be.

- *Bass v. Carmax Auto Superstores, Inc.*, No. 07-0883-CV-W-ODS, 2008 WL 441962, at *2 (W.D. Mo. Feb. 14, 2008) (noting that if class members had total actual damages of \$658,431, the “total of punitive damages and attorney fees could easily (and legally) be sufficient to bring the total amount in controversy over the [\$5 million] jurisdictional requirement”) (cited with approval by *Harrington Enter., Inc. v. Safety-Kleen Sys., Inc.* 42 F.Supp.3d 1197, 1200 (W.D. Mo. 2013)).

35. The FAC also seeks damages incurred as a result of Defendant’s alleged breach of contracts. FAC, ¶ 63 (and subsequent “Wherefore” clause).

36. The FAC also seeks an award for “Plaintiff and class members” including a “refund of the money they paid to Defendant,” *See* FAC, p. 13 (“Wherefore” Paragraph at conclusion of Count III, “Unjust Enrichment”).

37. The FAC also seeks an award for Plaintiff and class members including “the total sum Plaintiff and class members paid to Defendant for car wash packages at a time when Defendant’s carwashes were not fully functional.” FAC, p. 13 (“Wherefore” Paragraph at conclusion of Count IV, “Money Had and Received”).

38. The FAC was filed on January 29, 2019.

39. During the five (5) year period prior to the filing of the FAC, January 29, 2014 through January 29, 2019, Defendant sold customers in excess of \$5 million in car washes. *See Exhibit B*, ¶ 22 (R. Barks Declaration).

40. Plaintiff previously filed a Class Action Petition (the original petition) in the same action on September 26, 2018.

41. During the five (5) year period prior to the filing of the Class Action Petition, September 26, 2013 through September 26, 2018, Defendant sold customers in excess of \$5 million in car washes. *See Exhibit B*, ¶ 24 (R. Barks Declaration).

42. Addressing the amount-in-controversy requirement, the Supreme Court recently clarified that “a defendant’s notice of removal need include only a plausible allegation” that the jurisdictional requirements are met. *Dart Cherokee Basin Operating Co., LLC v. Owens*, — U.S. —, 135 S.Ct. 547, 554, (2014); *see also Pudlowski v. The St. Louis Rams, LLC*, 829 F.3d 963, 964 (8th Cir. 2016).

43. Plaintiff’s claimed damages therefore plainly exceed \$5,000,000, satisfying the jurisdictional minimum for CAFA removal.

44. And when potential punitive damages and attorneys’ fees are added to the equation, the claimed amount in controversy further exceeds \$5,000,000, satisfying the jurisdictional minimum for CAFA removal.

E. Minimal Diversity Exists Between the Parties.

45. At the time this lawsuit was filed and as of the date of this Notice of Removal, minimal diversity exists.

46. Plaintiff alleges that he is a citizen of Missouri. FAC, ¶ 1.

47. But the putative Plaintiff class also includes natural persons with non-Missouri citizenship. *See Exhibit B*, ¶¶ 13-14, and attachments A, B, and C thereto (R. Barks Declaration with attached Declarations of B. Ramos, C. Glaser, and K. Gool.).

48. Plaintiff’s class definition also creates diversity, and therefore supports CAFA removal, for several reasons.

49. First, customers of Defendant are citizens of states other than Missouri. *See, supra*, ¶ 44. *See Exhibit B*, ¶¶ 13-14, and attachments A, B, and C thereto (R. Barks Declaration with attached Declarations of B. Ramos, C. Glaser, and K. Gool.).

50. Defendant is a Missouri limited liability company with its principle place of business in Missouri, and its sole member is a resident and citizen of the state of Missouri, *see Exhibit D; Exhibit B*, ¶¶ 5-7 (R. Barks Declaration), therefore establishing diversity for purposes of 28 U.S.C. § 1332(d). While other federal diversity rules (including those applicable to removal based on § 1332(a)) measure the citizenship of unincorporated associations - such as limited liability companies and partnerships - by reference to the citizenship of their members, CAFA departs from that rule. A limited liability company, such as Defendant, is properly considered “an unincorporated association” within the meaning of 28 U.S.C. § 1332(d)(10), and thus is “deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.” 28 U.S.C. § 1332(d)(10); *see Ferrell v. Express Check Advance of SC LLC*, 591 F.3d 698, 700 (4th Cir.2010).

51. Unlike § 1332(a), which requires "complete diversity," *see Strawbridge v. Curtiss*, 7 U.S. 267, 267 (1806), § 1332(d) provides that removal is appropriate where "any member of [the] class of plaintiffs is a citizen of a State different from any defendant[.]"

52. Further, a “class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(c)(1) shall not apply), **without regard to whether any defendant is a citizen of the State in which the action is brought**, except that such action may be removed by any defendant without the consent of all defendants.” 28 U.S.C. § 1453(b) (emphasis added).

53. As a result, for purposes of 18 U.S.C. § 1332(d) there is "minimum diversity" sufficient for CAFA removal.

54. Further, without waiving any defenses, and expressly reserving same, Defendant states that Tri-State Truck Center, Inc. is customer of Defendant. *See Exhibit B*, ¶ 15. Tri-State Truck Center, Inc. is a Tennessee Corporation with its principle place of business in Tennessee. *See Exhibit E*, Foreign Corporation Registration with the Missouri Secretary of State. As such, Tri-State Truck Center, Inc. is diverse from Defendant, the named Plaintiff, and is diverse from each of the natural person customers identified in the attachments to **Exhibit B**.

Foreign Plaintiffs Create Diversity Sufficient for CAFA Removal.

55. Second, Plaintiff does not define his class by reference to the Missouri citizenship. Instead, Plaintiff seeks to represent “all **customers** of Defendant . . .” *See* FAC, ¶ 28, 29.

56. Because the putative class is not limited to citizens of Missouri, the class as alleged is defined to include numerous non-citizen residents, including not only the declarants cited in Attachments A through C of the R. Barks Declaration, but also members of the military, students from other states, and resident foreign nationals, all of whom retain their former citizenship unless manifesting an intent to remain in Missouri indefinitely. *See McMorris v. TJX Cos.*, 493 F. Supp. 2d 158, 164-65 (D. Mass. 2007) (noting a "reasonable probability" that a class of Massachusetts residents had at least one non-citizen); Wright & Miller, 13E Fed. Prac. & Proc. Juris. §§ 3617; 3619 (3d ed.) (“Service personnel are presumed not to acquire a new domicile when they are stationed in a place pursuant to orders; they retain the domicile they had at the time of entry into the service.”) (“Out-of-state students generally have been viewed as

temporary residents who are located in the state where their school is located only for the duration and for the purpose of their studies.”).

57. Each such non-citizen Missouri resident is a citizen of another state (or foreign country) and each therefore is of diverse citizenship as compared to Defendant.

58. Each such non-citizen Missouri resident is a citizen of another state (or foreign country) and each therefore is also of diverse citizenship as compared to the named Plaintiff Dale E. Craggs. *See* FAC, ¶ 1.

59. For example, Joplin, Missouri is the home of Missouri Southern University. Any student which got her or his car washed at an In & Out Car Wash in Joplin, Missouri, and who was not a Missouri citizen prior to entering school, would be presumed to be domiciled elsewhere. The In & Out Car Wash in Springfield, Missouri is similarly situated near major universities, including Missouri State, which have significant populations of students who are not citizens of Missouri.⁴

60. **Third**, Plaintiffs' class purports to include “all customers,” including customers that are former residents who have moved to other states (and whom have established foreign citizenship). Plaintiffs’ allegations are not limited to citizens of Missouri.

61. In particular, Plaintiff seeks to represent a class of all customers going back “**5 years** from the filing of this petition” irrespective of the customer’s citizenship at the time of the purchase, or now. FAC, ¶¶ 28, 29 (emphasis added). *See Altimore v. Mount Mercy Coll.*, 420

⁴ Springfield is home to Missouri State University, Drury University, Evangel University, and Ozarks Technical College. For Missouri State University alone, in 2017 there were 1,296 students which were from 81 different foreign countries, and 2,482 students from 49 states as well as the territories of Puerto Rico, Military-Pacific, the Trust Territories and the Virgin Island. *See* Bear Stats, fall 2017, *available at* <https://www.missouristate.edu/assets/oir/BearStats2017web.pdf> (last accessed February 21, 2019).

F.3d 763, 768 (8th Cir. 2005) ("Whether diversity of citizenship exists is determined at the time the suit is filed-not when the cause of action arose.").

F. Plaintiffs Have The Burden of Proving a CAFA Exception.

62. Because Defendant has demonstrated that the requirements of 28 U.S.C. § 1332(d), have been met, removal is appropriate. Plaintiffs now have the burden of demonstrating that a CAFA exception applies in the event they seek remand of this action to the state court. *See Westerfeld v. Indep. Processing, LLC*, 621F.3d819, 822 (8th Cir. 2010) ("Once CAFA's initial jurisdictional requirements have been established by the party seeking removal, however, the burden shifts to the party seeking remand to establish that one of CAFA's express jurisdictional exceptions applies."); *accord Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1024 (9th Cir. 2007) ("Consistent with the plain language of the statute and this well-established rule, we conclude that although the removing party bears the initial burden of establishing federal jurisdiction under § 1332(d)(2), once federal jurisdiction has been established under that provision, the objecting party bears the burden of proof as to the applicability of any express statutory exception under §§ 1332(d)(4)(A) and (B).").

G. Further Compliance

63. Copies of all documents received by Defendant in the State Court Action are being filed with this Notice of Removal.

64. This Notice of Removal is filed within 30 days of the service on Defendant of the pleadings setting forth the claim for relief upon which the State Court Action is based.

65. Defendant will promptly provide written notice of the removal of the State Court Action to Plaintiff, through her attorneys of record and to the Circuit Court for Green County, Missouri.

66. Defendant reserves the right to amend or supplement this Notice of Removal.

CONCLUSION

For all the foregoing reasons, Defendant respectfully requests that the Court exercise jurisdiction over this action, as mandated by 28 U.S.C. §§ 1332(d), 1441(a), and 1453.

Defendant intends and makes no admission of liability by this Notice and/or exhibits hereto and expressly reserves all defenses, motions, and pleas, including without limitation objections to the sufficiency of Plaintiffs' pleadings and to the propriety of class certification, whether by rule, statute, or any other basis.

WHEREFORE, Defendant gives notice of the removal of this action from the Circuit Court for Greene County, Missouri, to the United States District Court for the Western District of Missouri.

DATED: February 21, 2019

Respectfully submitted,

By: /s/ Christopher F. Weiss

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***Attorneys for Defendant Fast Lane Car Wash & Lube,
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CERTIFICATE OF SERVICE

I certify that on this 21st day of February 2019, the foregoing was filed electronically with the Clerk of the Court by using the CM/ECF system. I further certify that a true and correct copy was served upon the following counsel via U.S. mail to:

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