

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION**

BEULAH PREWITT,	:	
	:	Case No.
Plaintiff,	:	
	:	
v.	:	Judge
	:	
GERBER LIFE INSURANCE COMPANY,	:	
	:	
Defendant.	:	
	:	

NOTICE OF REMOVAL

Pursuant to 28 U.S.C. §§ 1332, 1441, 1446 and 1453, Defendant Gerber Life Insurance Company (“Gerber”) hereby gives notice of removal of this action from the Laurel County Circuit Court to the United States District Court for the Eastern District of Kentucky, London Division. In support of this Notice of Removal, Gerber states as follows:

Background

1. Beulah Prewitt, the Plaintiff and putative class representative (“Prewitt” or “Plaintiff”), holds life insurance policies with Gerber.
2. On January 6, 2020, Prewitt filed a purported class action lawsuit against Gerber captioned *Beulah Prewitt v. Gerber Life Insurance Company*, Case No. 20-CI-00011, in the Circuit Court for Laurel County, Kentucky. A copy of the Complaint and Summons served on Gerber is attached as Exhibit A. A docket sheet with remaining documents, including Courtesy Financial Transaction Report and Summons Return of Service are attached as Exhibit C.

3. Prewitt filed this putative class action lawsuit against Gerber seeking monetary damages, restitution, and injunctive and declaratory relief. In her Complaint, Prewitt claims a violation of KRS 304.12 and fraud in the inducement. (Ex. A [Compl.] at ¶¶ 80-93, 94-101.)

4. Prewitt's lawsuit is based on her allegation that two of the life insurance policies offered by Gerber—namely, the Grow Up Plan and Gerber Life College Plan—are deceptively named and marketed. Prewitt seeks to represent a class of all consumers in the state of Kentucky who purchased a Gerber Life College Plan or Grow Up Plan. (*Id.* at ¶ 80.)

Grounds for Removal

5. This case is properly removed because this Court has subject matter jurisdiction over the case pursuant to the Class Action Fairness Act (“CAFA”), 28 U.S.C. § 1332(d), *et seq.*

6. Gerber was served with the Summons and Complaint on January 14, 2020. (*See* Declaration of Luci A. Moore (“Moore Decl.”), ¶ 3 (attached as Exhibit B).) Accordingly, pursuant to 28 U.S.C. § 1446(b)(1), Gerber's Notice of Removal is timely because it is being filed within 30 days of the date on which Gerber was served.

7. Prewitt purports to bring this action as a class action, on behalf of the following putative class:

All consumers in the state of Kentucky who, within the applicable statute of limitations preceding the filing of this action to the date of class certification, purchased a Gerber [Life] College Plan or Grow Up Plan.

(Ex. A [Compl.] at ¶ 80.)

8. This Court has original subject matter jurisdiction over this removed action pursuant to CAFA, 28 U.S.C. § 1332(d). The removed action is brought as a putative class action and, thus meets the requirements under 28 U.S.C. §§ 1332(d)(1)(B) and 1453(a). Further, the removed action meets the other jurisdictional requirements of Sections 1332(d) and 1453, as

demonstrated below. In particular, this Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(d)(2) because (a) the putative class would include 100 or more members, (b) at least one member of the putative plaintiff class is a citizen of a state different from Gerber, and (c) the aggregate amount-in-controversy exceeds \$5,000,000.

Size of the Putative Class

9. The putative class significantly exceeds CAFA’s requirement of 100 or more members. (*See* 28 U.S.C. § 1332(d)(5)(B).) Prewitt alleges that this action is brought for the benefit of herself and “thousands” of Class members, and that the Class is so numerous that joinder is impracticable. (Ex. A [Compl.] at ¶ 84.)

10. Gerber has issued a variety of Grow Up Plans and Gerber Life College Plans to Kentucky consumers. (Ex. B [Moore Decl.] at ¶ 4.)

11. As of January 22, 2020, Gerber has thousands of policyholders in Kentucky who hold a Grow Up Plan and/or Gerber Life College Plan policy—far more than the minimum number of class members required under CAFA. (Ex. B [Moore Decl.] at ¶ 5.) Indeed, Prewitt herself alleges that “hundreds of individual lawsuits” would be required if this matter did not proceed as a class action and that “[t]he Class consists of thousands of members.” (Ex. A [Compl.] at ¶¶ 84, 90.) Thus, far more than 100 life insurance policyholders meet Prewitt’s putative class definition. (*See id.*) CAFA’s numerosity requirement is therefore satisfied.

Diversity of Citizenship

12. For purposes of CAFA removal jurisdiction, there need only be minimal diversity of citizenship—that is, only one member of the putative plaintiff class needs to be a citizen of a state different from the Defendant. (*See* 28 U.S.C. § 1332(d)(2)(A).)

13. Gerber Life Insurance Company is a New York corporation that has its principal place of business in White Plains, New York. (Ex. B [Moore Decl.] at ¶ 6; *see also* Ex. A. [Compl.] at ¶ 7 (alleging that Gerber is a New York citizen).)

14. The requirement of minimal diversity is satisfied because Gerber is incorporated under the laws of New York and, thus, is a citizen of New York and the putative class is limited to citizens of Kentucky. (Ex. A. [Compl.] at ¶ 80; Ex. B [Moore Decl.] at ¶ 6.) As such, members of the putative class are citizens of states different from Gerber, within the meaning of 28 U.S.C. § 1332(d)(2)(A).

Amount-In-Controversy

15. Prewitt does not specify the amount of damages she seeks on behalf of herself or the putative class as a whole. (Ex. A. [Compl.] at p. 27, Prayer for Relief.) When a plaintiff seeks to recover an unspecified amount that is not self-evidently greater or less than the amount-in-controversy requirement, the defendant seeking removal must demonstrate that the matter in controversy “more likely than not” exceeds the jurisdictional amount. (*Heyman v. Lincoln Natl. Life Ins. Co.*, 781 F.App'x 463, 470 (6th Cir.2019); *see also Williamson v. Aetna Life Ins. Co.*, 481 F.3d 369, 377 (6th Cir. 2007) (explaining that “the object of the litigation[] cannot be determined without reference to the potential cost of the state claim to the insurance company.”))

16. Under CAFA, “the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of \$5,000,000 exclusive of interest and costs.” (28 U.S.C. § 1332(d)(6).)

17. Although Prewitt does not specify the amount of class-wide damages she seeks on her claims, Gerber submits that the claims asserted by Prewitt, the scope of the class defined by Prewitt, and the period for which Prewitt seeks damages demonstrate by a preponderance of the

evidence that the aggregate “matter in controversy” exceeds the “sum or value of \$5,000,000.” (28 U.S.C. §§ 1332(d)(2), 1332(d)(6); (*See also* (Ex. B [Moore Decl.] at ¶¶ 7, 8).)

18. As noted above, Prewitt alleges that the class includes “thousands” of Class members (Ex. A. [Compl.] at ¶ 84), and that the lawsuit seeks damages that include a disgorgement of all policy premiums paid by Kentucky consumers for any Grow Up Plan or Gerber Life College Plan, restitution of those and any other amounts paid, and additional, unspecified “compensatory damages” incurred as a result of Gerber’s alleged actions. (*Id.* at p. 27, Prayer for Relief, ¶¶ (c)-(d); *see also id.* at ¶ 2.) Prewitt also seeks declaratory and injunctive relief, punitive damages and attorney fees. (*Id.* at ¶¶ (a)-(b), (e)-(f).)

19. Prewitt further alleges that the class consists of “[a]ll consumers in the state of Kentucky who, *within the applicable statute of limitations* preceding the filing of this action to the date of class certification, purchased a Gerber [Life] College Plan or Grow Up Plan.” (Ex. A [Compl.] at ¶ 81 (emphasis added).)

20. The statute of limitations for Prewitt’s first claim—for violation of KRS 304.12—is likely five years under Kentucky law. (*See* Ex. A [Compl.] at ¶ 80; *see also Sanderson v. Reassure Am. Life Ins. Co.*, Civil Action No. 97-276, 1997 U.S. Dist. LEXIS 18250, at *12-13 (E.D.Ky. Oct. 31, 1997) (finding KRS 413.120(2) and KRS 446.070 “do not contain specific statutory periods of limitation, but the parties agree that an action upon a liability created by such statutes shall be commenced within five years after the cause of action accrued”).) The statute of limitations for Prewitt’s second claim—for fraudulent inducement—is also likely to be five years (*i.e.*, back to January 2015). (*See Newbold v. Cent. Bank*, App. Nos. 2007-CA-002544-MR, 2008-CA-000003-MR, 2010 Ky. App. Unpub. LEXIS 97, at *10 (Jan. 29, 2010) (finding fraud in the inducement is “subject to the limitations period set out in KRS 413.120 [and] [t]he claims

enumerated under KRS 413.120 must be brought within five (5) years after the cause of action accrued”).)

21. Prewitt seeks damages that include a disgorgement of all policy premiums paid by Kentucky consumers for any Grow Up Plan or Gerber Life College Plan. The premiums paid by Kentucky-resident policyholders on Grow Up Plan and Gerber Life College Plan policies in the last five years exceed \$4,500,000. (Ex. B [Moore Decl.] at ¶ 7.)

22. In addition to this amount, Prewitt also seeks an unspecified amount of punitive damages. (Ex. A. [Compl.], Prayer for Relief, at ¶ (e).) “When punitive damages are unknown, as they are here, a ratio multiplier may be applied to determine the amount-in controversy for jurisdictional purposes.” (*Knoppe v. Lincoln Natl. Life Ins. Co.*, Civil Action No. 3:18-CV-264-RGJ, 2020 U.S. Dist. LEXIS 3612, at *12-13 (W.D.Ky. Jan. 9, 2020) (finding the CAFA amount-in-controversy threshold met where the putative class alleged \$4,300,000 in actual damages and also sought punitive damages.) If accounting only for punitive damages and applying the minimum ratio multiplier of 1:1, the amount-in-controversy would exceed \$9,000,000.

23. If declaratory and injunctive relief, as well as attorneys’ fees, are also taken into account, it becomes even clearer that the amount in controversy is easily exceeded. (*See Mathes v. Burns*, No. 3:19-cv-00751, 2019 U.S. Dist. LEXIS 182602, at *11 (M.D.Tenn. Oct. 22, 2019), fn. 4 (finding that attorney’s fees and punitive damages should be taken into account in calculating the amount in controversy.) As part of the injunctive relief sought, Prewitt seeks to prevent Gerber from using the policy titles of “Gerber Life College Plan” and “Grow Up Plan,” as well as prevent Gerber from using its current advertising and marketing. (Ex. A [Compl.], at ¶¶ 83, 84, Prayer for Relief at ¶ (a).) In order to comply with such an injunction, Gerber presumably would be required

to rename its policies, revise its marketing and reissue policies with the new name, the cost of which would be at least hundreds of thousands of dollars. (*See* Ex. B [Moore Decl.] at ¶ 8.)

24. The total costs to Gerber—to implement these changes, and to repay all premiums on the Grow-Up Plan and Gerber Life College Plan that were paid by Kentucky policyholders in the last five years—would exceed \$5,000,000. (*See* Ex. B [Moore Decl.] at ¶¶ 7, 8.)

25. Accordingly, the amount in controversy exceeds the \$5,000,000 threshold established by 28 U.S.C. §§ 1332(d)(2) and 1332(d)(6).

Venue

26. Venue is proper in this district and in this division pursuant to 28 U.S.C. § 1441(a) and L.R. 3.2 because the Laurel County Circuit Court from which the removal is sought is within the London Division of the Eastern District of Kentucky.

Notice

27. Gerber represents that this Notice of Removal will be served on Plaintiff's counsel, and that a copy will be filed with the Clerk of the Laurel County Circuit Court. (28 U.S.C. § 1446(d).)

28. By filing this Notice of Removal, Gerber does not waive any defenses to the claims asserted by Prewitt that may be available to it, or concede that Prewitt has pleaded any claim upon which relief can be granted. Further, Gerber does not concede that Prewitt has adequately defined a class for certification purposes, that any members of such an alleged class are entitled to any relief, that any damages are properly awardable to any plaintiff or would in the aggregate exceed \$5,000,000, or that the Complaint states a cause of action. Gerber disputes Prewitt's individual and putative class claims, denies that it has acted improperly in its relations with consumers or failed to abide by applicable law and contends only that the nature and extent of Prewitt's putative

class claims demonstrate that this Court has jurisdiction under CAFA, 28 U.S.C. § 1332(d), and that removal is proper under 28 U.S.C. § 1453.

WHEREFORE, Gerber gives notice that the above-described action in the Laurel County Circuit Court is removed to this Court.

Respectfully submitted,

/s/ Eric W. Richardson

Eric W. Richardson (KBA 86738)

Joseph M. Brunner (pro hac vice forthcoming)

Petra G. Bergman (pro hac vice forthcoming)

Vorys, Sater, Seymour and Pease LLP

Suite 3500, Great American Tower

301 East Fourth Street

Cincinnati, Ohio 45202

Telephone: (513) 723-4019

Facsimile: (513) 852-7885

Email: ewrichardson@vorys.com

jmbrunner@vorys.com

pgbergman@vorys.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 3rd day of February 2020, a copy of the foregoing was served via U.S. Postal Service upon the following:

David O'Brien Suetholz, Esq.
BRANSTETTER, STRANCH & JENNINGS, PLLC
515 Park Avenue
Louisville, KY 40208
Phone: 502-636-4333
Email: davids@bjsfirm.com

J. Gerard Stranch, IV, Esq.
BRANSTETTER, STRANCH & JENNINGS, PLLC
223 Rosa L. Parks Avenue, Suite 200
Nashville, TN 37203
Phone: 615-254-8801
Email: gerards@bjsfirm.com

Jeffrey D. Kaliel, Esq.
KALIEL PLLC
1875 Connecticut Avenue, NW, 10th Floor
Washington, D.C. 20009
Phone: 202-350-4783
Email: jkaliel@kalielpllc.com
sgold@kalielpllc.com

Lynn A. Toops, Esq.
COHEN & MALAD, LLP
One Indiana Square, Suite 1400
Indianapolis, IN 46204
Phone: 317-636-6481
Email: ltoops@cohenandmalad.com

Attorneys for Plaintiff and the Putative Class

/s/ Eric W. Richardson
Eric. W. Richardson