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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JESSICA FULLER, et al.,

Plaintiffs,

vs.

BLOOM INSTITUTE OF TECHNOLOGY, et al.,

Defendants.

Case No. 3:23-CV-01440-AGT

PLAINTIFFS' REPLY IN SUPPORT OF THEIR SECOND MOTION TO REMAND OR IN THE ALTERNATIVE FOR LEAVE TO CONDUCT JURISDICTIONAL DISCOVERY

Date: June 16, 2023
Time: 10:00 a.m.
Dept: Courtroom A, 15th Floor
Judge: Magistrate Alex G. Tse

INTRODUCTION

In their Opposition, Defendants admit they have collected *just $1.9 million* pursuant to the income share agreements (ISAs) and retail installment contracts (RICs) at issue in this case. That is, of the $36.1 million in total possible payment obligations created by these agreements, which only require payments if students get qualifying tech jobs within a five-year window, Defendants have received only $1.9 million, or *5%* of that total. The miniscule payback rate all but proves Plaintiffs' primary allegation in this case—that Lambda School (n/k/a BloomTech)'s actual job placement rates were nowhere near what they touted—since the figure would be far higher if students were employed at the levels Defendants promised.

Setting aside the greater case context, the $1.9 million figure also demonstrates that Defendants *still* fail to establish CAFA jurisdiction. To stay in federal court, it is their burden to prove, by a preponderance of the evidence, that $5 million is at issue, and the $1.9 million in existing payments falls far short even when supplemented by a reasonable attorneys' fee. Even allowing Defendants to account for future hypothetical payments, which case law forecloses, Defendants present no proof that those payments will bridge the gap to $5 million during this action, in light of them collecting merely $1.9 million dating back to March 2020 when they started issuing these agreements.

Without that proof, this case is distinguishable from those on which Defendants rely, which merely include future-based *non-speculative* damages or fees in the amount in controversy. Here, Defendants' reliance on outstanding payments is purely speculative, particularly given their poor track record of placing candidates in qualifying positions and collecting payments to date. And even with that proof, Defendants' theory on including post-removal payments assumes, unlike in the cases they cite, that Defendants will continue to unlawfully collect payments on these agreements. Case law precludes baking such an unreasonable assumption into the amount in controversy.

Since these outstanding payments cannot be included as a matter of law, Defendants resort to including in the amount in controversy an additional preexisting $4.7 million in payments on agreements *other than* ISA/RICs. One problem: They fail to prove, or even *try* to prove, the agreements underlying these payments are at issue in this case and that the students who signed them are even class

members. And since, as described herein, Plaintiffs submit their own proof of an example non-ISA/RIC agreement that falls outside the class definition, the $4.7 million is not at issue based on the current record. The amount in controversy stands, at most, at $1.9 million, based on Defendants' own data, plus some fraction of that as attorneys' fees.

Defendants have now tried, and failed, to meet their burden of demonstrating this Court has subject matter jurisdiction three times: in their original notice of removal, in their amended notice of removal (ANOR), and now in their Opposition. Given the persisting legal and factual deficiencies underlying Defendants' basis for removal, the Court should simply grant Plaintiffs' Second Motion to Remand.

But even if the Court has reservations, Plaintiffs alternatively remain entitled to jurisdictional discovery, adjusted to address the new amount-in-controversy questions raised by Defendants' Opposition and supporting declaration, as described herein.[1] The Court should therefore either remand this case to state court or grant Plaintiffs' request for discovery regarding the amount in controversy.

ARGUMENT

I. It Is Defendants' Burden to Prove by a Preponderance of the Evidence that $5 Million is in Controversy.

Defendants spend much of their Opposition arguing that they *plausibly allege* CAFA's $5 million amount in controversy in their ANOR. This understates Defendants' burden now that Plaintiffs have contested removal in their Motion to Remand, and continue to do so, with respect to the amount in controversy. "Because Plaintiff[s] contested removal, [Defendants are] required to show the amount in controversy by a preponderance of the evidence." *Jauregui v. Roadrunner Transportation Servs., Inc.*, 28 F.4th 989, 994 (9th Cir. 2022) (citing *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 88 (2014)); *see also Ibarra v. Manheim Invs., Inc.*, 775 F.3d 1193, 1197–98 (9th Cir. 2015) (defendant can initially establish amount in controversy by "unchallenged, plausible assertion" in notice of removal until "the defendant's assertion of the amount in controversy is challenged by plaintiffs in a motion to remand").

[1] While Plaintiffs maintain they are entitled to individual contact information of putative class members to test the applicability of the CAFA exception in 28 U.S.C. § 1332(d)(3), they are willing to forego it in light of the residency data in the declaration supporting Defendants' Opposition.

Although Plaintiffs maintain that Defendants still fail to even plausibly allege CAFA's $5 million amount in controversy in the ANOR, Defendants' burden is a far taller order than plausibility. They must prove to this Court that it is more likely than not that the amount in controversy exceeds $5 million, and do so without resorting to "mere speculation and conjecture, with unreasonable assumptions." *Ibarra*, 775 F.3d at 1197. As described below, they cannot.

II. In Their Opposition, Defendants Double Down on Speculation and Unreasonable Assumptions, Failing to Prove CAFA's $5 Million Amount in Controversy by a Preponderance of the Evidence.

Unlike in their ANOR, Defendants now provide the math behind their amount-in-controversy calculation, which they break into three categories totaling $40,828,509:

$ 1,947,272 in ISA/RIC payments
34,166,138 in outstanding ISA/RIC balances
4,715,100 in non-ISA/RIC payments (paid up front or in installments)
$40,828,509

(Opp'n at 13-14.)

Defendants' Opposition founders because the latter two categories have no basis in law or the existing record. ***First***, case law forecloses including the $34.2 million in outstanding balances because doing so unreasonably presupposes continued unlawful collection by Defendants, unlike in the amount-in-controversy cases on which Defendants rely. ***Second***, even assuming they can include any portion of the $34.2 million in outstanding balances, the value of existing ISA/RIC payments, $1.9 million, is so low, collected over more than three years, that assuming Defendants will receive millions more to close the gap to $5 million is overly speculative. And ***third***, regarding the final $4.7 million, Defendants do not even attempt to show that those are payments made by putative class members. To the contrary, Plaintiffs submit an example agreement included in this category of payments that lacks the necessary arbitration language built into the class definition, meaning the current record requires *excluding* the $4.7 million. Defendants have failed to meet their burden and have only shown the amount in controversy to be, at most, $1.9 million plus attorneys' fees, far short of CAFA's $5 million requirement.

A. To inflate the amount in controversy with outstanding balances on ISAs/RICs, Defendants rely on distinguishable case law and unreasonably assume continued violations of California law.

The Ninth Circuit amount-in-controversy cases Defendants cite bear little on this case beyond generic rule statements. Plaintiffs do not disagree that the amount in controversy is the "amount at stake," *Greene v. Harley-Davidson, Inc.*, 965 F.3d 767, 772 (9th Cir. 2020), or "the maximum recovery the plaintiff could reasonably recover," *Arias v. Residence Inn by Marriott*, 936 F.3d 920, 927 (9th Cir. 2019), or "an estimate of the total amount in dispute," *id.*

But these cases do no more than beg the question, "what is the amount at stake?" because the issues faced there are not present here. *See Greene*, 965 F.3d at 772 (defendant properly included punitive damages in amount in controversy); *Arias*, 936 F.3d at 927 (defendant properly assumed rates for past wage and hour violations in amount in controversy). The same goes for *Castellucci v. JPMorgan Chase*, 2021 WL 1575233 (C.D. Cal. Apr. 22, 2021), holding that the amount in controversy in an action to prevent foreclosure was either the value of the property or the outstanding mortgage loan amount. The analogy between the mortgage loan in *Castellucci* to the ISAs/RICs at issue here is too rough to be of use. No collateral, such as a property, allows for a reasonable valuation of the ISAs/RICs, and unlike the mortgage loan signed in *Castelluci*, the ISA/RIC repayment obligations are not for a sum certain but are contingent on meeting certain employment conditions. As discussed in the following section, the idea that Defendants will eventually collect anywhere near the entire outstanding balance of these ISAs is fantasy given that Defendants have collected just 5% on them over the last three-plus years.

In arguing that the Court should include hypothetical post-removal ISA/RIC payments in the amount in controversy, Defendants rely on *Chavez v. JPMorgan Chase & Co.*, 888 F.3d 413 (9th Cir. 2018), which explains that the "futurity of certain classes of damages" does not preclude their inclusion in the amount in controversy. Again, Plaintiffs do not disagree. Potential post-removal payments on the ISAs/RICs should not be excluded simply because they are in the future, but because they are *speculative*. Courts have included some classes of damages or fees, despite their futurity, when they can make reasonable assumptions about their inclusion. Thus, even though a future punitive damages award

is uncertain, it is not speculative to include it in the amount in controversy if grounded in case law guideposts. *See Greene*, 965 F.3d at 772 (punitive damages ratio reasonable in light of four cases cited by defendant). The same goes for future attorneys' fees, which are uncertain, but reasonably included when guided by evidence and precedent. *See id.* at 774 n.4 (25% attorneys' fee assumption reasonable based on defendant's evidence that plaintiff's counsel sought 35% in similar case). And in *Chavez* itself, the inclusion of front pay in the amount in controversy was reasonable, despite its futurity, because the plaintiff testified to her salary and the number of years she intended to continue working had she not been unlawfully terminated as she alleged. 888 F.3d at 416-17. Unlike in those cases, Defendants do not even try to ground future payments in actual evidence, as discussed below.

Regardless, even if such payments were a certainty, case law accounting for *Chavez's* directive on futurity still forecloses including the outstanding, post-removal balances at issue because it unreasonably assumes Defendants will continue to violate the law:

> [A]lthough the Ninth Circuit has recognized that "the mere futurity of certain classes of damages does not preclude them from being part of the amount in controversy," such damages must be "*presently* in controversy." *Chavez v. JPMorgan Chase & Co.*, 888 F.3d 413, 417 (9th Cir. 2018) (emphasis in original). But future damages that rely on the assumption that the defendant "will continue to violate the law to the same degree even after the filing of the complaint" do not qualify. *Hughes v. McDonald's Corp.*, No. C 14-1700 PJH, 2014 WL 3797488, at *2 (N.D. Cal. July 31, 2014) (internal quotations and citation omitted). …
>
> [Defendant] cites no cases, and the Court has found none, in which courts have estimated the time to complete class certification, assumed continued wrongdoing, and included such future damages in the amount-in-controversy calculation. To the contrary, the authorities of which the Court is aware have declined to take this approach.

Aseltine v. Panera, LLC, 2021 WL 8267421, at *2 (N.D. Cal. Dec. 13, 2021) (cleaned up). Here, Plaintiffs allege that any continued collection on payments violates California's Consumer Legal Remedies Act, Unfair Competition Law, and False Advertising Law. (*See generally* Verified Compl. at ¶¶ 158–76, Prayer for Relief.) As *Aseltine* explains, including hypothetical post-removal payments in the amount in controversy necessarily assumes continued violations, an unreasonable, speculative assumption as a matter of law. Thus, Defendants cannot include the entirety of the $34.2 million in outstanding ISA/RIC balances.

B. Even if case law did not foreclose including outstanding ISA/RIC amounts, Defendants' own data show the unreasonability of assuming that future payments will bridge the gap between the existing $1.9 million in ISA/RIC payments and $5 million.

Even assuming that outstanding payments can be included in the amount in controversy, which they cannot, including anything more than a sliver of the outstanding balance requires unreasonable assumptions for several reasons.

First, it bears repeating, *Defendants have collected just $1.9 million* pursuant to ISAs/RICs dating back all the way to March 2020. Defendants fail to prove, or even try to prove, the likelihood that it will receive payments to close the gap between $1.9 million and $5 million during the pendency of the action. Even if the case continues for years, the fact that the ISAs/RICs have a maximum term of five years indicates that agreements will eventually lapse, rather than result in payment of the outstanding balances. (*See* Verified Compl. Exs. A, B, C, D at 1.)

Second, Defendants fail to present any evidence of the distribution of outstanding payments, despite this information being exclusively in their control. If pre-existing payments are concentrated among a small portion of students who have already paid the maximum on their ISAs/RICs after getting qualifying tech jobs, and outstanding balances are concentrated among students who have yet to get a qualifying job, it is unreasonable to assume that future payments will sum to the amount in controversy.

Third, Defendants fail to present any evidence—again, as only they can without granting Plaintiffs discovery—as to the timing of the ISAs/RICs. If, as the data in Defendants' supporting declaration suggests, Defendants have phased out ISAs/RICs in recent years in favor of non-ISAs/RICs—which would appear to make some business sense given the paltry returns on the ISAs/RICs—it is unreasonable to assume any acceleration in future ISA/RIC payments because of the dearth of new students signing these agreements. Similarly, if the outstanding balance is concentrated among students who enrolled earlier in the relevant time period, it is far more likely that these ISA/RICs will reach their five-year maximum term without the outstanding balance being paid.

Finally, Defendants persist in arguing that the $30,000 maximum ISA/RIC amount is relevant, suggesting the amount-in-controversy calculation is as simple as multiplying $30,000 by some number of students in the thousands. (Opp'n at 7–8, 12.) In support, they cite various Complaint passages

pertaining to the possible size of the class, including an exhibit of Mr. Allred saying Lambda planned to enroll *10,000* students in 2020 alone. (*See id.*) The argument is as bizarre as it is erroneous given that Defendants' own declarant attests that the total number of students dating back to March 2020 is just shy of 2,000 (surely including non-class members, as discussed below). (*See* Will Decl., Ex. A.)

But Defendants' decision to highlight Mr. Allred's penchant for valuing hype over truth aside, some simple math on Defendants' data conclusively establishes the irrelevance of the $30,000 figure. Defendants' declarant attests that the maximum hypothetical value of the ISAs/RICs is $36,113,410, distributed among the agreements of 1,549 students. (*Id.* at ¶ 5.) Dividing the two, the average maximum ISA/RIC value is $23,314, far below the $30,000 in each of the named Plaintiffs' agreements. The reason for this discrepancy is, again, known only to Defendants. While Plaintiffs maintain, for all the above reasons, that this $23,000 figure has no place in the amount-in-controversy calculation either, the limited evidence proffered by Defendants demonstrate that their reliance on the $30,000 figure was misplaced from the get-go, and continues to be.

C. Defendants fail to establish that their amount-in-controversy calculation is limited to putative class members.

Defendants rely on the declaration of Steven Will, Bloom's Data Science and Analytics Manager, to calculate the amount in controversy. Because Mr. Will by his own declaration can only speculate about who is a member of the putative class, Defendants' calculations are likewise built on unreasonable assumptions. Defendants' deficient analysis on this point eliminates at least the entirety of the $4.7 million in non-ISA/RIC payments from its amount-in-controversy calculation, and possibly some of the $1.9 million in ISA/RIC payments as well.

Mr. Will initially states that he "understand[s] that the Complaint purports to define the class as consisting of students who were subject to the particular arbitration provision identified by Plaintiffs in their Complaint." (Will Decl. at ¶ 3.) The Complaint in turn is clear about who is in the putative class: all students with uncancelled agreements that either lack an arbitration clause or include an arbitration clause with an equitable remedy carveout. (*See* Verified Compl. at ¶ 142.) Despite this clarity, Mr. Will goes on to include agreements in his calculations based purely on conclusory "assumption[s]" and

"appear[ances]." (*See* Will Decl. at ¶¶ 3, 6.) With regard to the $4.7 million in non-ISA/RIC agreements in particular, because he "do[es] *not specifically know* when that [arbitration] provision was incorporated" Mr. Will merely "*assumed* it was []incorporated in or around March 2020, which I understand to be a fair *assumption*." (*Id.* at ¶ 3 (emphasis added).) He continues, that these agreements "*appear* to be included in the putative class …." (*Id.* at ¶ 6 (emphasis added).)

This language is cagey to the point of obfuscation. There is no justification for Defendants or their declarant calculating the amount in controversy based on "assumptions" and "appearances" about the contents of *their own agreements*. Read literally, the declaration does not even say that the non-ISA/RIC agreements have language that would place them within the class, let alone explain why the *assumption* that such language exists is "fair."

To the contrary, Plaintiffs submit an example of a non-ISA/RIC agreement showing that its signatory is *not* part of the putative class. That is, the agreement was signed in January 2022, and contains an arbitration clause *without* an equitable remedy carveout. (*See* Bahena Decl. at ¶ 2, Ex. A at 5–6.) The agreement calls into question the credibility of Mr. Will's analysis, and Defendants' adoption of it in their calculation. As it stands, Defendants fail to demonstrate that *any* of the non-ISA/RIC agreements making up the $4.7 million are part of the class.[2]

In sum, since Defendants make no showing beyond speculation that the $4.7 million in non-ISA/RIC agreements were signed by class members, or as to the likelihood that any portion of the $34.2 million in outstanding ISA/RIC balances is at issue, they fail to prove by a preponderance of the evidence that the amount in controversy exceeds $5 million.

III. Alternatively, Plaintiffs Remain Entitled to Jurisdictional Discovery Tailored to Amount-in-Controversy Questions Raised by Defendants' Opposition, Supporting Declaration, and Data.

Even if the Court is not prepared to remand this case at this time, Plaintiffs are entitled to discovery targeted to answering the many new questions begged by Defendants' Opposition, Mr. Will's

[2] Defendants must likewise demonstrate that all ISAs/RICs included in their amount-in-controversy calculation ($1.9 million paid, $34.2 million outstanding) fit the class definition, although Plaintiffs are not aware of an ISA/RIC from March 2020 and thereafter lacking a qualifying arbitration clause with an equitable remedy carveout.

declaration, and the supporting data. *See Ibarra*, 775 F.3d at 1198 (allowing Plaintiffs to submit proof after contesting the amount in controversy). Specifically, given Defendants' and Mr. Will's obfuscation regarding which agreements satisfy the class definition, Plaintiffs would first request information or documents showing all forms of financing agreements Defendants or their third-party servicers have used with students since March 2020, the entirety of the arbitration clause of each, and total payment amounts pursuant to each form. Next, although Plaintiffs have shown that case law forecloses including *any* outstanding ISA/RIC payments, to the extent the Court disagrees or has doubts, Plaintiffs would also request information and documents indicating the number of ISAs/RICs entered into each month since March 2020, the amount outstanding on agreements entered into each month, and, for each month, the percentage of agreements from which Defendants have received no payments. This request would address the distribution and timing unknowns Plaintiffs discuss in Section II.B., *supra*, to inform *reasonable* assumptions about the likelihood that future payments would bridge the gap between the $1.9 million in existing payments and $5 million. Plaintiffs also do not rule out deposition discovery, depending on the results of the above documentary discovery. This discovery would replace Plaintiffs' original request, which was tailored to both the amount in controversy and CAFA exceptions.

CONCLUSION

For the foregoing reasons, the Court should either grant this Motion and remand, or alternatively, grant Plaintiffs leave to conduct jurisdictional discovery as to the amount in controversy.

Dated: May 24, 2023

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