

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ROBERT REIBSTEIN, on behalf of  
himself and all others similarly situated,

PLAINTIFF,

v.

CONTINENTAL TIRE NORTH  
AMERICA, INC. and CONTINENTAL  
AG,

DEFENDANTS.

CIVIL ACTION

No. 07-302

**MEMORANDUM/ORDER**

April 2, 2007

Plaintiff Robert Reibstein moves the Court to (1) remand this class action to the Court of Common Pleas for Philadelphia County and (2) award costs and fees for improper removal. Docket # 13. For the reasons given below, Reibstein's motion will be denied.

**I. Background**

In December of 2006, Reibstein filed an action in the Court of Common Pleas for Philadelphia County, requesting damages, injunctive, and declaratory relief on behalf of

himself and “all persons in the Commonwealth of Pennsylvania who purchased ContiSeal tires from 2004 to the present.” Compl. ¶ 1. Reibstein’s complaint asserts violations of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2310(d)(1), and Uniform Commercial Code § 2-725(b) (breach of express and implied warranty). Specifically, Reibstein alleges that defendants Continental Tire North America, Inc. and Continental AG<sup>1</sup> (1) “manufactured, supplied, promoted and sold” tires that were “prone premature, rapid, or abnormal wear,” *id.* at ¶ 2; (2) failed to disclose this fact to the public, *id.* at ¶ 3; and (3) “failed to honor both federally mandated and voluntarily offered warranties that would have required them to repair or replace, at no cost to the consuming public, the non-conforming and/or defective tires,” *id.* at ¶ 4.

In January of 2007, defendants removed Reibstein’s suit to this court pursuant to 28 U.S.C. § 1441 *et seq.* (removal) and the Class Action Fairness Act (“CAFA”), Pub L. No. 109-2, 119 Stat 4 (2005) (codified in scattered sections of 28 U.S.C.). Docket # 1. Plaintiff then filed a motion to remand. Docket # 13.

## **II. Discussion**

### **A. Federal Jurisdiction under CAFA**

A state court defendant may remove a civil action to federal court if the action might have been brought in federal court originally. 28 U.S.C. § 1441(a) (actions

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<sup>1</sup> Defendant Continental Tire North America, Inc. is a wholly owned subsidiary of defendant Continental AG.

removable). However, “[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.” 28 U.S.C.A. § 1447 (procedure after removal). CAFA grants federal courts original and removal jurisdiction over any class action where “the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs,” 28 U.S.C. § 1332(d)(2); any plaintiff is diverse from any defendant, *id.* at § 1332(d)(2)(A) & (C); and the number of class members is at least one hundred, *id.* at § 1332(d)(5)(B). In *Morgan v. Gay*, 471 F.3d 469, 473 (3d Cir. 2006), the Third Circuit determined that—in keeping with the “well-settled practice in removal actions”—the burden of establishing federal jurisdiction in CAFA cases “remains with the party seeking removal.” Where disputes over factual matters are involved, “the party alleging jurisdiction [must] justify his allegations by a preponderance of the evidence.” *Samuel-Bassett v. KIA Motors America, Inc.*, 357 F.3d 392, 397 (3d Cir. 2004) (quoting *McNutt v. General Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 189 (1936)). “[W]hen the relevant facts are not in dispute or findings have been made,” a defendant seeking to establish removability must “show to a legal certainty” that the jurisdictional requirements of CAFA have been met. *Id.*; *see also Morgan*, 471 F.3d at 474.

### **1. Amount in Controversy**

Reibstein contends that remand is proper because defendants have “fail[ed] to set forth any facts establishing to a legal certainty that the claims asserted by Plaintiff . . .

meet or exceed the \$5 million amount in controversy requirement necessary for subject matter jurisdiction under [the] CAFA.” Docket # 13 at ¶ 3. As the Third Circuit has noted:

The party wishing to establish subject matter jurisdiction has the burden to prove to a legal certainty that the amount in controversy exceeds the statutory threshold; . . . Even if a plaintiff states that her claims fall below the threshold, [courts] must look to see if the plaintiff's actual monetary demands in the aggregate exceed the threshold, irrespective of whether the plaintiff states that the demands do not.

*Morgan*, 471 F.3d at 474-75.

In their notice of removal, defendants allege that the “economic and compensatory damages” sought by Reibstein “could exceed the \$5 million amount in controversy [requirement], even without considering other damages.” Docket #1 at ¶ 16. In their response to Reibstein’s motion to remand, defendants assert that:

Based on information provided by R. L. Polk & Co., Inc., a company whose primary business is collecting and interpreting automotive data . . . as of October 1, 2006, a total of 9,656 model year 2005 to 2007 . . . automobiles, equipped with self-sealant optional Continental-brand, original equipment tires, were likely registered in the Commonwealth of Pennsylvania. *See* Affidavit of William Caldwell[, Exh. A, Docket # 18 at ¶ 8]. Considering that each vehicle is equipped with four tires, 38,624 . . . [ContiSeal] original equipment tires were potentially sold in Pennsylvania as of October 1, 2006.

Docket # 18 at 3. Defendants also cite Reibstein’s claim that defendants’ agent—in violation of defendants’ promise to provide “a free replacement set of tires,” Compl. ¶ 29—required Reibstein to purchase “a full set of replacement ContiSeal tires” for \$568, “purportedly representing a discount of 33% on the manufacturer’s suggested retail price for purchase of the ContiSeal tires,” *id.* at 30. As defendants state:

Using plaintiff's claimed discounted retail sales price of a single ContiSeal tire (\$142.00), and the number of original equipment ContiSeal tires reasonably likely to have been sold in Pennsylvania as of October 1, 2006 [(38,624)], plaintiff's amount in controversy, based on these figures alone, totals \$5,484,608. Significantly, this figure does not include any vehicles registered in Pennsylvania from October 1, 2006 to the present, since the requisite data has not yet been collected by R. L. Polk & Co. Nor does this figure include any estimate for *replacement* (as opposed to original equipment) ContiSeal tires sold from 2004 to the present . . . .

Docket # 18 at 3. Reibstein has not offered any evidence tending to rebut defendants' statistics or calculations.

**Defendants have, by means of the above submissions,** provided this court with "all the information available to make . . . a determination . . . that the plaintiff's claim in all likelihood exceeds \$5 million." *Morgan*, 471 F.3d at 475. Accordingly, I conclude that defendants have met their burden of showing "to a legal certainty" that CAFA's amount in controversy requirements have been met. *Cf. id.* at 475-76 (concluding that "the defendants did not carry their burden to show, to a legal certainty, that the amount in controversy exceeds the statutory minimum" where defendants were relying upon "at least three inconclusive assumptions . . . to meet this burden").

## **2. Size of Putative Class**

Reibstein also seems to suggest that defendant has not demonstrated that the instant action meets CAFA's requirement that there be at least 100 members in the putative class. Defendants' allegation that this action meets CAFA's class size requirements was initially based on plaintiff's claim that "the Class consists of hundreds

of persons . . . [t]he exact number of [which] is presently unknown to Plaintiff, but can easily be ascertained from the sales and warranty claim records of Defendants.” Docket # 1 (notice of removal); Compl. ¶ 4. After reviewing data from R. L. Polk & Co., defendants offered the more specific allegation that “9,656 . . . automobiles, equipped with self-sealant optional Continental-brand, original equipment tires, [were] registered in the Commonwealth of Pennsylvania as of October 1, 2006. *See* Exh. A[, Docket # 18] at ¶ 18. Each of these vehicle owners is potentially a class member.” Docket # 16 at 2.

**Defendants’ evidence** supplies the court with sufficient information to make a determination that the putative size of the plaintiff class is not “less than 100.” 28 U.S.C. § 1332(d)(5)(B).<sup>2</sup> Thus, I conclude that defendants have met their burden of showing “to a legal certainty” that CAFA’s class size requirements have been met.

### **3. Diversity**

CAFA’s final requirement is that any plaintiff be diverse from any defendant. 28 U.S.C. § 1332(d)(2)(A) & (C). Defendants’ notice of removal alleges that (1) the plaintiff class consists only of residents of Pennsylvania, Docket # 1 at ¶¶ 6-7; (2) Continental Tire North America, Inc. is an Ohio corporation with corporate headquarters

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<sup>2</sup> Defendants’ argument that this court lacks jurisdiction over Reibstein’s Magnuson-Moss Act claims (Docket # 16) is not inconsistent with their submission that federal jurisdiction exists under CAFA. This is because the Magnuson-Moss Act requires at least 100 “*named* plaintiffs” for an action to be brought in federal court, 15 U.S.C. § 2310(d)(3) (emphasis added), while CAFA requires only that “the number of members of all proposed plaintiff classes in the aggregate” exceeds 100, 28 U.S.C. § 1332(d)(5)(B). Thus, an action with one named plaintiff and at least ninety-nine unnamed plaintiffs meets the requirements of CAFA but not of the Magnuson-Moss Act.

in North Carolina, *id.* at ¶ 8; (3) Continental AG is a corporation existing under the laws of Germany, *id.* at ¶ 9. Plaintiff does not dispute these allegations. Therefore, I conclude that defendants have met their burden of showing “to a legal certainty” that CAFA’s diversity requirement has been met.

## **B. Costs and Fees**

In his motion for remand, Reibstein also moves this court for an order “awarding costs and fees against Defendant for improper removal pursuant to 28 U.S.C. § 1447(c) and 1927.” Docket # 13 at 1. Section 1447(c) provides that “If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.” Section 1927 provides that “[a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.”

Based on the record before me, I see no basis for Reibstein’s assertion that “Defendant has removed this matter for purposes of improper delay and has needlessly and unreasonably multiplied the proceedings in violation of 28 U.S.C. § 1447(c) and 1927.” Docket # 13 at ¶ 7. Indeed, as stated above, I conclude that defendants have

succeeded in establishing “to a legal certainty” that all three of CAFA’s requirements for federal jurisdictional have been met. Thus, I will deny Reibstein’s motion for costs and fees incurred as a result of removal.

### **Conclusion**

And now, upon consideration of plaintiff Robert Reibstein’s motion for remand of this action and for fees and costs incurred as a result of removal (Docket # 13), it is hereby **ORDERED** that plaintiff’s motion is **DENIED**.

BY THE COURT:

/s/ Louis H. Pollak

Pollak, J.