IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-11202
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
March 22, 2018
Lyle W. Cayce
Clerk

MARSHA CHAMBERS,

Plaintiff–Appellant,

versus

GREEN TREE SERVICING, L.L.C.,
and as a Subsidiary of Walter Investment Management Corporation;
Previously Known as Conseco Financial;
Currently Known as Ditech A. Walter Company and Any Unknown Parties that Had Financial Interest in the 1998 Loan,

Defendant–Appellee.

Appeals from the United States District Court
for the Northern District of Texas
No. 3:15-CV-1879

Before HIGGINBOTHAM, JONES, and SMITH, Circuit Judges.

PER CURIAM:*

Marsha Chambers, *pro se*, sued a loan servicer for alleged violation of

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Texas Business and Commerce Code § 27.01. She claimed that the defendant falsely represented that she would be allowed to assume a particular note if she made six monthly payments. The district court granted the defendant's motion for summary judgment, concluding that Chambers made no showing that the defendant had made a false statement and that, alternatively, the claim is barred by limitations. The district court certified a final judgment under Federal Rule of Civil Procedure 54(b), finding that there was no just reason for delay in severing that part of the claim. The Section 27.01 claim is the only matter before the court in this appeal.

Regarding the Section 27.01 claim, the district court accepted the findings, conclusions, and recommendation of the magistrate judge. The record reflects that there was no misrepresentation. The defendant told Chambers that she would need to make the six payments, but Chambers, in deposition, admitted that she missed the February payment. The defendant's refusal to permit her to assume the loan was not a misrepresentation, because she admitted that she had not satisfied the precondition. The magistrate judge properly reasoned as follows:

> According to both Plaintiff's allegations and testimony, Defendant represented that Plaintiff could assume the Verm Note if she complied with certain conditions, and one of the conditions for assuming the Verm Note was that she must make the first six months of payments timely. There is no summary judgment evidence to support a finding that either of those representations was false. Instead, the evidence shows that Plaintiff failed to comply with the conditions precedent to assuming the Verm Note—the timely tendering of the first six payments.

The magistrate judge advised, in the alternative, that the Section 27.01 claim was barred by the four-year statute of limitations of Texas Civil Practice and Remedies Code § 16.051:

> Plaintiff testified that, in August 2006, "I knew . . . I didn't owe

> them money [and] did not have to pay [the defendant] any money . . . . Plaintiff also testified that she was aware her name was not on the loan documentation and, therefore, she know or should have known that she had not been allowed to assume the loan. Accordingly, the statute of limitations began to run in August 2006 and her claim, which was brought in 2015, is barred. [Ellipses in original.]

That is a sufficient alternative ground on which to sustain the summary judgment.

The district court was correct to accept the recommendation of the magistrate judge and to dismiss the Section 27.01 claim with prejudice on summary judgment. The judgment is AFFIRMED, essentially for the reasons properly explained by the magistrate judge.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-11202

MARSHA CHAMBERS,

Plaintiff - Appellant

v.

GREEN TREE SERVICING, L.L.C., and as a Subsidiary of Walter Investment Management Corporation; previously known as Conseco Financial; currently known as Ditech A. Walter Company and any unknown parties that had financial interest in the 1998 loan,

Defendant - Appellee

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING

Before HIGGINBOTHAM, JONES, and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MARSHA CHAMBERS,	§	
	§	
Plaintiff,	§	
	§	
V.	§	No. 3:15-CV-1879-M-BN
	§	
GREEN TREE SERVICING LLC,	§	
	§	
Defendant.	§	

FINAL JUDGMENT AS TO TEX. BUS. & COMM. CODE § 27.01 CLAIM

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered,

It is ORDERED, ADJUDGED, and DECREED that:

1. Because there is no just reason for delay, *see* FED. R. CIV. P. 54(b), Plaintiff Marsha Chambers's claim for violation of Texas Business and Commerce Code § 27.01 is dismissed with prejudice.

2. The Clerk shall transmit a true copy of this Final Judgment as to Tex. Bus. & Comm. Code § 27.01 Claim and the Order Accepting in Part Findings and Recommendation of the United States Magistrate Judge to Plaintiff Marsha Chambers.

SIGNED this 20 day of June, 2017.

Barbara M. G. Lynn

BARBARA M. G. LYNN
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MARSHA CHAMBERS,	§	
	§	
Plaintiff,	§	
	§	
V.	§	No. 3:15-CV-1879-M-BN
	§	
GREEN TREE SERVICING LLC,	§	
	§	
Defendant.	§	

ORDER ACCEPTING IN PART FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

After making an independent review of the pleadings, files, and records in this case, the Findings, Conclusions, and Recommendation of the United States Magistrate Judge dated May 11, 2017, *see* Dkt. No. 128, and Plaintiff Marsha Chambers's objections, *see* Dkt. No. 130, the Court sustains Plaintiff's objections in part and otherwise accepts the Findings, Conclusions, and Recommendation of the Magistrate Judge as explained below.

The Telephone Consumer Protection Act (the "TCPA") makes it unlawful for any person in the United States "to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(B). Texas Business and Commerce Code § 305.053 provides a cause of action for violations of the TCPA, 47 U.S.C. § 227. *See* TEX. BUS. & COM. CODE § 305.053.

Defendant Ditech Financial LLC f/k/a Green Tree Servicing LLC argues that Plaintiff cannot marshal evidence to support her Section 305.053 claim and, in

particular, her allegations that Defendant called her via "automated telephone equipment" and "without the prior express consent of the called party." The magistrate judge concluded that, where Plaintiff did not allege in her original petition that she asked Defendant not to contact her or that she revoked her consent to be contacted, Plaintiff's verified allegations that fail to mention revocation of consent in 2005 are admissible statements against interest. The magistrate judge also explained that Plaintiff has not produced competent summary judgment proof that Defendant used automated telephone equipment to contact her and that, while Plaintiff includes an unauthenticated call log in her summary judgment evidence, she fails to identify which, if any, of the calls were automated. The magistrate judge concluded that Plaintiff's self-serving and uncorroborated contention that she revoked consent is contradicted by the overwhelming evidence in the record and that Plaintiff has not raised a genuine dispute of material fact as to whether she revoked consent.

To begin with, the United States Court of Appeals for the Fifth Circuit recently decided to publish its decision in *Austin v. Kroger Texas, L.P.*, ___ F.3d ___, No. 16-10502, 2017 WL 1379453 (5th Cir. Apr. 14, 2017), in which the Court of Appeals reminds courts in a footnote that "a movant cannot support a motion for summary judgment with a conclusory assertion that the nonmovant has no evidence to support his *case*" but that "a movant may support a motion for summary judgment by pointing out that there is no evidence to support a *specific element* of the nonmovant's claim." 2017 WL 1379453, at *8 n.10 (emphasis in original). Defendant's Motion for Summary Judgment asserts that Plaintiff "lacks evidence for at least one element of" her Section

305.053 claim and then discusses only the element of lack of consent. Dkt. No. 109 at 5, 15-20. Defendant did not point to a lack of evidence to establish the "automated" element in its Motion for Summary Judgment but rather only, for the first time, in reply. *See* Dkt. No. 124 at 3. That is too late and does not provide a proper basis for granting summary judgment in Defendant's favor on Plaintiff's Section 305.053 claim.

Otherwise, in support of summary judgment on Plaintiff's Section 305.053 claim, Defendant primarily argued that Plaintiff's evidentiary admission against interest supports a conclusion that Defendant has established that there is no genuine dispute as to any material fact on the essential element of revocation of consent. The Court disagrees. In *Dewan v. M-I, L.L.C.*, ___ F.3d ___, No. 16-20182, 2017 WL 2324703 (5th Cir. May 30, 2017), in the related but distinct context of a defendant's moving for summary judgment on its own affirmative defense, the Fifth Circuit recently made clear that drawing inferences from facts is not what a court properly does when deciding a summary judgment motion and that a party's "self-serving" testimony is not to be discounted in deciding summary judgment. The Court determines that – when considering all evidence and viewing all facts and drawing all reasonable inferences in the light most favorable to Plaintiff and resolving all disputed factual controversies in her favor – Plaintiff's evidence that she revoked consent is sufficient to show a genuine issue for trial on the factual issue of whether Defendant called Plaintiff without her express consent. And, as noted above, that is the only element of Plaintiff's Section 305.053 claim that Defendant's Motion for Summary Judgment placed at issue.

Accordingly, the Court determines that Defendant's Motion for Summary

Judgment [Dkt. No. 108] must be denied as to Plaintiff's Section 305.053 claim – but so, too, must Plaintiff's Motion for a Partial No-Evidence Summary Judgment or Alternatively a Partial Traditional Summary Judgment on Just the Finding of the Defendant's Liability to the Plaintiff as a Matter of Law on the Business and Commerce 27.01 and 305.053 Claims and Leaving the Amount of Damages Open for the Jury to Determine [Dkt. No. 111]. Plaintiff has come forward with sufficient evidence to defeat summary judgment against her on her Section 305.053 claim. But, when drawing all reasonable inferences in Defendant's favor in deciding Plaintiff's summary judgment motion, Plaintiff has not – as she must to be entitled to summary judgment in her favor on her own claim – demonstrated that there are no genuine and material fact disputes as to whether she revoked consent. *See, e.g., Martin v. Alamo Cmty. Coll. Dist.*, 353 F.3d 409, 412 (5th Cir. 2003).

The Court otherwise determines that the magistrate judge correctly concluded that, as to Plaintiff's Texas Business and Commerce Code § 27.01 claim, summary judgment should be granted in Defendant's favor and Plaintiff's summary judgment motion should be denied and that Plaintiff's Advisory to the Court that Plaintiff Seeks Leave to File a Motion and to Establish Right of Survivorship in This Pending Action [Dkt. No. 125] should be denied except insofar as, because Plaintiff's Section 353.053 claim has survived summary judgment, the Court will set this remaining claim for trial by a separate order.

IT IS, THEREFORE, ORDERED that the Findings, Conclusions, and Recommendation of the United States Magistrate Judge [Dkt. No. 128] are accepted in

part. Defendant Ditech Financial LLC f/k/a Green Tree Servicing LLC's Motion for Summary Judgment [Dkt. No. 108] is granted in part and denied in part; Plaintiff Marsha Chambers's Motion for a Partial No-Evidence Summary Judgment or Alternatively a Partial Traditional Summary Judgment on Just the Finding of the Defendant's Liability to the Plaintiff as a Matter of Law on the Business and Commerce 27.01 and 305.053 Claims and Leaving the Amount of Damages Open for the Jury to Determine [Dkt. No. 111] and Advisory to the Court that Plaintiff Seeks Leave to File a Motion and to Establish Right of Survivorship in This Pending Action [Dkt. No. 125] are denied, except insofar as the Court will set Plaintiff Marsha Chambers's remaining claim under Texas Business and Commerce Code § 305.053 for trial by a separate order; and Plaintiff Marsha Chambers's claim for violation of Texas Business and Commerce Code § 27.01 is dismissed with prejudice.

SO ORDERED this 20 day of June, 2017.

BARBARA M. G. LYNN
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MARSHA CHAMBERS,	§	
	§	
Plaintiff,	§	
	§	
V.	§	No. 3:15-cv-1879-M-BN
	§	
GREENTREE SERVICING, LLC,	§	
	§	
Defendant.	§	

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

This case has been referred to the undersigned United States magistrate judge for pretrial management pursuant to 28 U.S.C. § 636(b) and a standing order of reference from United States District Judge Barbara M. G. Lynn. Plaintiff Marsha Chambers filed a Motion to Remand ("Motion") this action to state court. *See* Dkt. Nos. 6 & 8. The undersigned now issues the following findings of fact, conclusions of law, and recommendation that the Motion should be denied.

Background

Plaintiff Marsha Chambers, proceeding *pro se*, filed this lawsuit in Texas state court against Defendant Greentree Servicing, LLC ("Defendant") on April 15, 2015. *See* Dkt. No. 1-2 at 1. Plaintiff alleges several claims, including common law fraud, money had and received, and violations of the Texas Deceptive Trade Practices Act, Tex. Bus. & Comm. Code § 17.46(b)(12), and of Texas Finance Code §§ 392.301(a)(7-8), 392.302(4), and 392.303(a)(2). *See id.* at 33. Defendant waived service and appeared

on April 30, 2015. *See* Dkt. No. 1 at 2. On May 29, 2015, Defendant removed the case based on diversity of citizenship. *See* Dkt. No. 1.

Plaintiff moves to remand, contending that Defendant's removal was not timely, that there is not complete diversity between the parties, and that the amount in controversy is below the federal threshold of $75,000 required by 28 U.S.C. § 1332(a)(1). *See* Dkt. Nos. 6 & 8. Defendant filed a response opposing remand, *see* Dkt. No. 9, and Plaintiff filed a reply, *see* Dkt. No. 11.

The undersigned now concludes that, because the removal was timely, there is complete diversity between the parties, and the amount in controversy is within the Court's jurisdiction, the Court has subject-matter jurisdiction, the Motion should be denied, and this action should proceed in this Court.

Legal Standards

A defendant may remove an action filed in state court to federal court if the action is one that could have originally been filed in federal court. *See* 28 U.S.C. § 1441(a). The federal courts' jurisdiction is limited, and federal courts generally may only hear a case of this nature if it involves a question of federal law or where diversity of citizenship exists between the parties. *See* 28 U.S.C. §§ 1331, 1332; *cf. Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583-84 (1999) (federal courts have independent duty to examine their own subject matter jurisdiction). "As a general rule, absent diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 6 (2003).

The removing party bears the burden of establishing jurisdiction. *See Miller v.*

Diamond Shamrock Co., 275 F.3d 414, 417 (5th Cir. 2001). "[T]he basis upon which jurisdiction depends must be alleged affirmatively and distinctly and cannot be established argumentatively or by mere inference." *Getty Oil Corp. v. Ins. Co. of N.A.*, 841 F.2d 1254, 1259 (5th Cir. 1988) (citing *Ill. Cent. Gulf R. Co. v. Pargas, Inc.*, 706 F.2d 633, 636 & n.2 (5th Cir. 1983)). "If 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. § 1447(c).

Notice of removal must be filed by the removing party within 30 days of defendant's receipt of service of the initial state-court pleading. *See* 28 U.S.C. § 1446(b). This thirty-day period to remove a case from state court does not begin to run until simultaneous service of the summons and complaint, or receipt of the complaint, through service or otherwise, after and apart from service of the summons, but, absent waiver of service, not by mere receipt of the complaint unattended by any formal service. *See Murphy Bros. v. Michetti Pipe Stringing*, 526 U.S. 344, 348-51 (1999).

Under Texas Rule of Civil Procedure 106, acceptable service is accomplished by "delivering to the defendant, in person, a true copy of the citation" or "mailing to the defendant by registered or certified mail ... a true copy of the citation." TEX. R. CIV. P. 106. The citation, unless directed otherwise by the court, must be delivered in person or by certified or registered mail. *See id.*; *see also Cross v. Grand Prairie*, No. 3:96-cv-446-P, 1998 WL 133143, at *6 (N.D. Tex. Mar. 17, 1998). While a court does not have power over a party named as defendant in the absence of service, the defendant can waive service. *See Murphy Bros., Inc.*, 526 U.S. at 350-51 ("In the absence of service of

process (or waiver of service by the defendant), a court ordinarily may not exercise power over a party the complaint names as defendant. .... Unless a named defendant agrees to waive service, the summons continues to function as the *sine qua non* directing an individual or entity to participate in a civil action or forgo procedural or substantive rights." (citations omitted)).

For a federal court to have jurisdiction over a state action based on diversity, each plaintiff's citizenship must be diverse from each defendant's citizenship, and the amount in controversy must exceed $75,000. *See* 28 U.S.C. §§ 1332(a), (b).

For a case to be removed based on diversity jurisdiction, "'all persons on one side of the controversy [must] be citizens of different states than all persons on the other side.'" *Harvey v. Grey Wolf Drilling Co,* 542 F.3d 1077, 1079 (5th Cir. 2008) (quoting *McLaughlin v. Miss. Power Co.,* 376 F.3d 344, 353 (5th Cir. 2004) (per curiam)). Individuals are citizens of the states where they are domiciled, as "for purposes of federal diversity jurisdiction, 'citizenship' and 'domicile' are synonymous." *Hendry v. Masonite Corp,* 455 F.2d 955, 955 (5th Cir. 1972). For diversity jurisdiction purposes, "a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business." 28 U.S.C. § 1332(c)(1). The citizenship of a limited liability company is determined by the citizenship of all its members. *See Tewari De-Ox Sys, Inc. v. Mountain States/Rosen Liab. Corp.,* 757 F.3d 481, 483 (5th Cir. 2014); *Harvey,* 542 F.3d at 1080.

The amount in controversy is the "value of the object of the litigation." *Leininger*

v. Leininger, 705 F.2d 727, 729 (5th Cir. 1983). "Unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith." *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1408-09 (5th Cir. 1995) (internal quotation marks omitted).

If no amount of damages has been alleged in the state-court petition, the defendant must prove by a preponderance of the evidence that the amount in controversy exceeds the jurisdictional minimum. *See De Aguilar v. Boeing Co.*, 11 F.3d 55, 58 (5th Cir. 1993). This requirement can be satisfied if the defendant shows that "(1) it is apparent from the face of the petition that the claims are likely to exceed $75,000, or, alternatively, (2) the defendant sets forth 'summary judgment type evidence' of facts in controversy that support a finding of the requisite amount." *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002).

The court looks "only to the face of the complaint" and asks "whether the amount in controversy exceeds the jurisdictional limit." *Ervin v. Sprint Commc'ns Co. LP*, 364 F. App'x 114, 117 (5th Cir. 2010) (internal quotation marks omitted); *see also Allen v. R&H Oil & Gas Co.*, 63 F.3d 1326, 1336 (5th Cir. 1995). Jurisdictional facts are determined "as of the time the complaint is filed; subsequent events cannot serve to deprive the court of jurisdiction once it has attached." *St. Paul Reinsurance Co. v. Greenberg*, 134 F.3d 1250, 1253-54 (5th Cir. 1998). Only if the amount in controversy is not readily apparent from the state-court petition may the Court consider other evidence to determine the amount in controversy at the time of removal. *See S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 492 (5th Cir. 1996). For instance, post-removal

declarations are generally not a part of determining an amount in controversy. *See Ford v. United Parcel Serv., Inc. (Ohio),* No 3:14-cv-1872-D, 2014 WL 4105965, at *4 (N.D. Tex. Aug 21, 2014). They can only be considered if the jurisdictional amount was ambiguous on the face of the state petition or at the time of removal. *See Gebbia v. Wal-Mart Stores, Inc.,* 233 F.3d 880,883 (5th Cir. 2000); *St. Paul Reinsurance Co.,* 134 F.3d at 1254 n.18. If the state-court petition on its face satisfies the amount-in-controversy requirement, a plaintiff's later attempt to "clarify the amount in controversy cannot divest jurisdiction." *Robinson v. Wal Mart Stores Texas, LLC.,* 561 F. App'x 417, 418 (5th Cir. 2014).

Analysis

Timely Removal

Defendant timely removed this case.

A defendant must remove an action within thirty days of its receipt, through service or otherwise, of the initial pleading or summons. *See* 28 U.S.C. § 1446(b). Texas litigants must serve their citations – either in person or by certified or registered mail – to the opposing party, its registered agent, or its attorney of record. *See* TEX. R. CIV. P. 106. While Plaintiff attempted to serve Defendant by certified mail, the mail was sent to an incorrect address, *see* Dkt. No. 1 at 2, and returned to her, *see* Dkt. No. 8 at 3. But Defendant waived service and appeared on April 30, 2015. *See* Dkt. No. 1 at 2.

Plaintiff contends that she mailed copies of the lawsuit to at least one of Defendant's out-of-state addresses prior to April 30, 2015, *see* Dkt. No. 8 at 3, but these mailings were not by certified or registered mail and therefore were not proper service,

see TEX. R. CIV. P. 106. Neither party alleges that Defendant otherwise received the pleading or summons.

Plaintiff's allegation that Defendant knew or should have known about the lawsuit prior to its April 30, 2015 waiver of service, *see* Dkt. No. 8 at 3, is irrelevant because Defendant had no obligation to remove prior to its receipt or waiver of service, *see Murphy Bros.*, 526 U.S. at 347-48, 350-51; *Scoggins v. Best Indus. Unif. Supply Co.*, 899 S.W.2d 276, 278 (Tex. App. – Houston [14th Dist.] 1995, no writ) ("However, a defendant's 'knowledge' of a lawsuit does not place any duty on the defendant to answer absent service or waiver of citation. Any knowledge that appellant may have had of this amended petition did not constitute 'service of process.'" (citation and emphasis in original omitted)).

Defendant had thirty days from the date on which it waived service in which to remove, which was May 30, 2015. *See* 28 U.S.C. § 1446(b); *George-Baunchand v. Wells Fargo Home Mortg., Inc.*, Civ. A. No. H-10-3828, 2010 WL 5173004, at *4 (S.D. Tex. Dec. 14, 2010). Defendant removed this case on May 29, 2015, *see* Dkt. No. 1, and therefore Defendant's removal was timely.

Complete Diversity

Plaintiff's argument that there is not complete diversity also fails.

There is no dispute that Plaintiff is a Texas citizen. *See* Dkt. No. 1 at 3; Dkt. No. 1-2 at 2; Dkt. No. 6; Dkt. No. 8. Defendant is a limited liability company, the members of which are incorporated in Maryland and Delaware, with principle places of business in Florida and Minnesota. *See* Dkt. No. 1 at 3-4. The citizenship of an LLC is

determined by the citizenship of all of its members. *See Harvey,* 542 F.3d at 1080. No member of Defendant is a citizen of, incorporated in, or has its primary place of business in Texas. *See* Dkt. No. 1 at 5. The parties are therefore completely diverse.

Plaintiff's allegation that Defendant owns property in Texas is irrelevant, *see* Dkt. No. 8 at 3-4, because any such ownership is not the foundation for determining citizenship for the purposes of jurisdiction, *see, e.g.*, 28 U.S.C. § 1332.

The complete-diversity requirement is satisfied.

Amount in Controversy

The sum named in the plaintiff's state-court petition is the foundation for determining the amount in controversy. *See* 28 U.S.C. § 1446(c)(2). While the property in question may be worth only $18,660, *see* Dkt. No. 11 at 2, that is not the basis for determining amount in controversy, because Plaintiff's claims are not limited to a claim seeking the property, *see Leininger,* 705 F.2d at 729.

Rather, Plaintiff has pled some of her claims together and some of her claims in the alternative. *See* Dkt. No. 1-2 at 1. Most importantly, Plaintiff explicitly stated in her original petition that "Plaintiff estimates her actual damages ... to be approximately $55,000 - $65,000." Dkt. No. 1-2 at 37. Plaintiff also seeks damages for "special mental anguish [and] emotional distress." *Id.* Finally, Plaintiff seeks exemplary damages "approximately three times the amount of the actual damages." *Id.* "The amount in controversy may include punitive damages if they are recoverable as a matter of state law." *Celestine v. TransWood, Inc.*, 467 F. App'x 317, 319 (5th Cir. 2012). Plaintiff alleges claims for fraud, and Texas law permits exemplary or punitive

damages awards upon a showing of fraud or malice. *See* TEX. CIV. PRAC. & REM. CODE § 41.003(a).

Plaintiff therefore stated in her original petition that she was seeking damages of $165,000 to $195,000, because she named her actual damages as above $55,000 and claimed her exemplary damages were three times the actual damages. *See* Dkt. No. 1-2 at 37. This is above the $75,000 threshold for diversity jurisdiction cases. *See* 28 U.S.C. §§ 1332(a), (b).

The undersigned recognizes that Plaintiff asserts a different accounting of damages in her reply. *See* Dkt. No. 11 at 14. But the face of the petition provides the sole basis for determining the amount of damages claimed, unless the amount is not "readily apparent." *S.W.S.*, 72 F.3d at 492. Plaintiff's petition clearly stated the amount of her damages and that she was entitled to exemplary damages. *See* Dkt. No. 1-2 at 37. Thus, Plaintiff pleaded her claims as within this Court's jurisdiction, and the Court cannot now deny jurisdiction based on subsequent events. *See St. Paul Reinsurance Co. v. Greenberg*, 134 F.3d 1250, 1253-54 (5th Cir. 1998). Under these circumstances, Plaintiff's allegation in a reply in support of a motion to remand cannot alter the amount in controversy when the "proper procedure is to look only at the face of the complaint." *Allen*, 63 F.3d at 1336.

Likewise, any additional information Plaintiff later submitted to the Court, such as the "Affidavit of Marsha Chambers Concerning Value of Property" [Dkt. No. 12], is irrelevant, because jurisdictional facts are established "as of the time the complaint is filed," not later. *St. Paul Reinsurance Co.*, 134 F.3d at 1253. And post-removal

affidavits are relevant only when the original complaint is ambiguous. *See Gebbia,* 233 F.3d at 883. Plaintiff's amount-in-controversy allegations in her petition, as discussed above, were not ambiguous, and Plaintiff's "attempt to modify her petition post-removal to 'clarify' the amount of damages cannot divest the court of subject-matter jurisdiction." *Robinson*, 561 F. App'x at 418; *see also Ford*, 2014 WL 4105965, at *4.

Finally, this case was removed exclusively on the basis of diversity jurisdiction, so Plaintiff's arguments in her motion to remand regarding the lack of a federal question are irrelevant. *Compare* Dkt. No. 1, *with* Dkt. No. 6 at 3; Dkt. No. 8 at 5.

Recommendation

The undersigned concludes that the removal of this action was timely, that there is complete diversity between the parties, that the amount in controversy exceeds $75,000, and that this Court has subject-matter jurisdiction over this action under 28 U.S.C. § 1332. Accordingly, the Court should deny Plaintiff's motion to remand [Dkt. Nos. 6 & 8].

A copy of these findings, conclusions, and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions, and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions, and recommendation

where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: July 17, 2015

DAVID L. HORAN
UNITED STATES MAGISTRATE JUDGE

Additional material from this filing is available in the Clerk's Office.