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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (AUGUST 8, 2019)

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

DAVID EHRMAN, Individually and on Behalf of All Others Similarly Situated,

Plaintiff-Appellee,

v.

COX COMMUNICATIONS, INC.; COXCOM, LLC; COX COMMUNICATIONS CALIFORNIA, LLC, and DOES, 1 Through 25, Inclusive,

Defendants-Appellants.

No. 19-55658

D.C. No. 8:18-cv-01125-JVS-DFM

Appeal from the United States District Court for the Central District of California
James V. Selna, District Judge, Presiding

Before: Milan D. SMITH, JR., and Michelle T. FRIEDLAND, Circuit Judges, and Michael H. SIMON,* District Judge.

* The Honorable Michael H. Simon, United States District Judge for the District of Oregon, sitting by designation.

M. SMITH, Circuit Judge:

When a defendant removes a case to federal court pursuant to the Class Action Fairness Act of 2005 (CAFA), 28 U.S.C. § 1332(d), how much evidence of the parties' citizenships must it provide? If the defendant's citizenship allegations are unchallenged factually, the answer is none. In such cases, all a removing party must do is provide a short and plain statement of the grounds for removal. Because Defendants Cox Communications' (and related entities') notice of removal did just that, and because Plaintiff David Ehrman did not factually attack Cox's jurisdictional allegations, we reverse the district court's grant of Ehrman's motion to remand.

Factual and Procedural Background

Ehrman filed a class action complaint against Cox in Orange County Superior Court, alleging that Cox had engaged in unlawful business practices related to the advertisement and sale of residential internet services. Ehrman brought the case on behalf of himself and "all consumers in California who paid for [Cox's] residential Internet services within four years from the date this action was filed."

Cox removed the case to the district court pursuant to CAFA. Cox alleged in its notice of removal that Ehrman's suit met CAFA's removal requirements because it was a putative class action with more than 100 class members, that there was minimal diversity between the parties, and that the amount in controversy exceeded $5,000,000, exclusive of interest and costs. Cox, a purported citizen of Delaware and Georgia, asserted based on information and belief that Ehrman and all class members are citizens of California.

Ehrman then moved to remand the case to state court. Asserting a facial challenge to Cox's notice of removal, Ehrman argued that Cox had failed to adequately plead the existence of minimal diversity. He claimed that Cox's allegations of citizenship were insufficient because they relied "purely on an allegation of residency and [on] 'information and belief.'"

The district court granted Ehrman's motion to remand. It reasoned:

> In the absence of instruction from the Ninth Circuit . . . this Court declines to find that the complaint alone created a rebuttable residency-domicile presumption of removability. . . . [T]he Court finds that Cox's reliance on the residency allegation in the complaint [ ] amounted to mere sensible guesswork such that it is insufficient for establishing minimal diversity.

We granted Cox's motion for leave to appeal to provide guidance on what a defendant must allege, and what evidence it must provide when removing a case pursuant to CAFA.

Jurisdiction and Standard of Review

We have jurisdiction pursuant to 28 U.S.C. § 1453 (c)(1), which allows us to "accept [a timely] appeal from an order of a district court granting or denying a motion to remand a class action to the State court."

"We review *de novo* a district court's decision to remand a removed case and its determination that it lacks subject matter jurisdiction." *Lively v. Wild Oats Mkts., Inc.*, 456 F.3d 933, 938 (9th Cir. 2006).

Analysis

Congress enacted CAFA with the "intent . . . to strongly favor the exercise of federal diversity jurisdiction over class actions with interstate ramifications." S. Rep. No. 109-14, at 35 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 34. Because "a party bringing suit in its own State's courts might (seem to) enjoy . . . a home court advantage against outsiders," *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1751 (2019) (Alito, J., dissenting), federal diversity jurisdiction provides "'a neutral forum' for parties from different States," *id.* at 1746 (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005)). To this end, CAFA confers jurisdiction on federal district courts over class actions when, among other things, "any member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C. § 1332(d)(2)(A). Unlike the complete diversity of citizenship generally required by § 1332(a), therefore, CAFA requires only "minimal diversity." *Bush v. Cheaptickets, Inc.*, 425 F.3d 683, 684 (9th Cir. 2005).

Simply because a class action satisfies the requirements of CAFA, however, does not mean that it must be filed in federal court. Such cases may also be filed in state courts, which enjoy concurrent jurisdiction over such actions. *See Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). A defendant in state court who wishes to litigate in federal court may therefore remove a class action that satisfies CAFA's requirements. *See Home Depot*, 139 S. Ct. at 1746. At issue here is what that removing defendant must plead in its notice of removal.

As the removing party, Cox had the burden of pleading minimal diversity. *See Abrego Abrego v. Dow*

Chem. Co., 443 F.3d 676, 685 (9th Cir. 2006). Accordingly, Cox had to file in the district court a notice of removal "containing a short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a). "Congress, by borrowing the familiar 'short and plain statement' standard from Rule 8(a), intended to 'simplify the "pleading" requirements for removal' and to clarify that courts should 'apply the same liberal rules [to removal allegations] that are applied to other matters of pleading.'" *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 553 (2014) (alteration in original) (quoting H.R. Rep. No. 100-889, at 71 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5982, 6031–32). A party's allegation of minimal diversity may be based on "information and belief." *Carolina Cas. Ins. Co. v. Team Equip., Inc.*, 741 F.3d 1082, 1087 (9th Cir. 2014). The pleading "need not contain evidentiary submissions." *Dart Cherokee*, 135 S. Ct. at 551.

In its notice of removal, Cox alleged that it was a citizen of Delaware and Georgia. It also alleged:

> As admitted in the Complaint, [Ehrman] is a resident of California. [Cox] is informed and believes, and on that basis alleges, that [Ehrman] is a citizen of the state in which he resides, as alleged in the Complaint.
>
> [Cox] is informed and believes, and on that basis alleges, that all purported class members are citizens of California, as alleged in the Complaint.

Ehrman argues, and the district court agreed, that Cox's allegations of citizenship were insufficient because they relied on allegations that Ehrman or other class members reside in California.

We agree that residency is not equivalent to citizenship. A "natural person's state citizenship is [] determined by her state of domicile, not her state of residence." *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001). "A person's domicile is her permanent home, where she resides with the intention to remain or to which she intends to return. A person residing in a given state is not necessarily domiciled there, and thus is not necessarily a citizen of that state." *Id.* (citations omitted).

Here, however, Cox did not merely allege residency. It alleged that Ehrman and all putative class members were citizens of California. That Cox's notice of removal mentioned Ehrman's residency is immaterial to our analysis. Cox did not have to explain why it believed Ehrman or the putative class members were citizens of California. As we explained above, a defendant's allegations of citizenship may be based solely on information and belief. *See Carolina Cas.*, 741 F.3d at 1087. Because Cox provided a short and plain statement alleging that Ehrman and the putative class members were citizens of California, its jurisdictional allegations were sufficient—at least in the absence of a factual or as-applied challenge.

The district court also erred by placing on Cox a burden to prove its jurisdictional allegations in response to Ehrman's facial challenge. "[A]t the pleading stage, allegations of jurisdictional fact need not be proven unless challenged." *NewGen, LLC v. Safe Cig, LLC*, 840 F.3d 606, 614 (9th Cir. 2016); *see also Dart Cherokee*, 135 S. Ct. at 553 ("[T]he defendant's amount-in-controversy allegation should be accepted when not contested by the plaintiff or questioned by the court."). Because "no antiremoval presumption attends cases invoking

CAFA," *Dart Cherokee*, 135 S. Ct. at 554, courts should be especially reluctant to *sua sponte* challenge a defendant's allegations of citizenship.

Ehrman did not factually challenge Cox's jurisdictional allegations. Instead, his motion to remand asserted a facial challenge to the legal adequacy of Cox's notice of removal. Such a challenge "accepts the truth of the [removing party's] allegations but asserts that they 'are insufficient on their face to invoke federal jurisdiction.'" *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (quoting *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004)).[1] Nor did the district court independently question Cox's allegations.[2] For these reasons, Cox should not have been required to present evidence in support of its allegation of minimal diversity. Accepting the truth of Cox's allegations, Ehrman "is a citizen of [California]," and "all purported class members are citizens of California."

In short, Cox alleged the parties' citizenships based on information and belief in its notice of removal. And, because Ehrman asserted a facial, rather than a factual or as-applied, challenge to the notice of removal, those allegations were sufficient. *See NewGen*, 840 F.3d at 614. No evidence was required.

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[1] We note that, had Ehrman challenged the truth of the jurisdictional allegations in Cox's notice of removal, the district court should have permitted jurisdictional discovery had Cox requested it. *See Laub v. U.S. Dep't. of the Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003) ("[D]iscovery should be granted when . . . the jurisdictional facts are contested or more facts are needed.").

[2] Indeed, the district court acknowledged that it would be "inconceivable" that neither Ehrman nor any of the 832,000 purported class members, all of whom subscribed to residential internet service in California, were citizens of California.

We conclude by clarifying the scope of our decision. Although the district court focused much of its analysis on the question of whether allegations of a party's residency constitutes prima facie evidence of that party's domicile, we need not address that issue today. *Cf. Mondragon v. Capital One Auto Fin.*, 736 F.3d 880, 886 (9th Cir. 2013) (noting that the Ninth Circuit has not yet addressed whether "a person's residence [is] prima facie evidence of the person's domicile"). Because Ehrman did not factually challenge Cox's jurisdictional allegations, Cox did not need to provide evidence of either Ehrman's or the purported class members' citizenship. We hold only that Cox's jurisdictional allegations, which provided a short and plain statement of the parties' citizenships based on information and belief, satisfied Cox's burden of pleading minimal diversity.

Conclusion

Congress enacted CAFA to "facilitate adjudication of certain class actions in federal court." *Dart Cherokee*, 135 S. Ct. at 554 (emphasis added). In keeping with that purpose, we require removing defendants to provide only a short and plain statement of the grounds for removal. And when a defendant's allegations of citizenship are unchallenged, nothing more is required.

By holding that Cox's jurisdictional allegations fell short, and by requiring Cox to support those allegations with evidence in response to only a facial—not a factual or as-applied—challenge, the district court misconstrued CAFA's pleading requirements. We therefore reverse the district court's grant of Ehrman's motion to remand.

REVERSED AND REMANDED.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (JUNE 10, 2019)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID EHRMAN, Individually and on Behalf of All Others Similarly Situated,

Plaintiff-Respondent,

v.

COX COMMUNICATIONS, INC.; ET AL.,

Defendants-Petitioners,

and

DOES, 1 Through 25, Inclusive,

Defendant.

No. 18-80195

D.C. No. 8:18-cv-01125-JVS-DFM
Central District of California, Santa Ana

Before: SILVERMAN and MURGUIA, Circuit Judges

The petition for permission to appeal pursuant to 28 U.S.C. § 1453(c) is granted. *See Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096, 1100 (9th Cir. 2010). Within 7 days after the filing date of this order, peti-

tioner shall perfect the appeal pursuant to Federal Rule of Appellate Procedure 5(d).

Pursuant to 28 U.S.C. § 1453(c)(2), the court shall complete all action on this appeal, including rendering judgment, not later than 60 days after the date on which the appeal was filed. *See also Bush v. Cheaptickets, Inc.*, 425 F.3d 683, 685 (9th Cir. 2005) (stating that 60-day time period begins to run when the court accepts the appeal). The parties shall submit, via electronic filing, simultaneous briefs and excerpts of record within 10 days after the filing date of this order. No reply briefs will be accepted.

Also, within 10 days after the filing date of this order, by 5:00 p.m. (Pacific time), the parties shall submit to the Clerk's Office in San Francisco 7 copies of the briefs and 4 copies of the excerpts of record in paper format, accompanied by certification that the briefs are identical to the versions submitted electronically.

Any motion to extend time to file the briefs shall strictly comply with the requirements set forth in 28 U.S.C. § 1453(c)(3).

The Clerk shall calendar this case during the week of July 8, 2019 in Pasadena, California.

ORDER GRANTING PLAINTIFF'S MOTION TO REMAND TO ORANGE COUNTY SUPERIOR COURT [11] AND DENYING AS MOOT DEFENDANT'S MOTION TO COMPEL ARBITRATION [15] AND MOTION TO DISMISS [16] (DECEMBER 13, 2018)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DAVID EHRMAN

v.

COX COMMUNICATIONS, INC. ET AL

No. SACV 18-01125 JVS (DFMx)

Before: James V. SELNA, District Judge.

CIVIL MINUTES–GENERAL

Plaintiff David Ehrman ("Ehrman") filed this action in Orange County Superior Court on May 9, 2018. (Not., Docket No. 1-1, Ex. A.) Defendant Cox Communications, Inc. ("Cox") filed a Notice of Removal on June 22, 2018. The Court has two motions before it.[1]

[1] Cox also filed an alternative motion to dismiss in the even that the motion to compel arbitration was denied. (Mot., Docket No. 16.) On August 10, 2018, Ehrman filed a second amended complaint. (SAC, Docket No. 17.) Thus, the Court need not reach the merits of the motion to dismiss.

First, Ehrman filed a motion to remand the case to Orange County Superior Court. (Mot., Docket No. 12.) Cox filed an opposition. (Opp'n, Docket No. 18.) Ehrman replied. (Reply, Docket No. 22.) Cox also included a Notice of Recent Decision to which Ehrman responded. (Not., Docket No. 29; Response, Docket No. 34.)

Second, Cox filed a motion to compel arbitration. (Mot., Docket No. 15.) Ehrman filed an opposition. (Opp'n, Docket No. 19.) Cox replied. (Reply, Docket No. 23.)

For the following reasons, the Court grants Ehrman's motion to remand and denies as moot Cox's motion to compel arbitration.

I. Background

This putative class action arises from Cox's provision of Internet services to Ehrman and other consumers in California. (Not., Docket No. 1-5, ¶ 4.) Ehrman is a resident of California who alleges that Cox, a citizen of Delaware and Georgia, offers consumers a variety of high-speed plans, charging prices based on different "tiers" of Internet connection speed. (*Id.* ¶¶ 3, 8; Not., Docket No. 1 ¶ 14.) Cox's advertisements allegedly typically identify an Internet connection speed up to that which a subscriber may expect to receive service. (Not., Docket No. 1-5 ¶ 10.) Ehrman alleges that Cox misled him and other similarly-situated consumers by promising to deliver residential Internet service at speeds that consumers could rarely —if ever—achieve. (*Id.* ¶ 7.)

Ehrman pleads claims for fraud, violation of the False Advertising Law ("FLA") (Cal. Bus. & Prof. Code

§ 17500 *et seq.*), violation of the Consumers Legal Remedies Act ("CLRA") (Cal. Civ. Code § 1750 *et seq.*), violation of the Unfair Competition Law ("UCL") (Cal. Bus & Prof. Code § 17200 *et seq.*), restitution, and unjust enrichment. (Not., Docket No. 1-1, Ex. A ¶¶ 27-62.) Ehrman brings these claims on behalf of himself and a purported class of consumers in California who paid for Defendants' residential Internet services within four years from May 9, 2018, the day this action was filed. (*Id.* ¶ 16.) After filing the present suit, Ehrman attempted to opt-out of the arbitration provision. (Ehrman Decl., ¶ 9, Ex. 4.)

Cox's Notice of Removal identified two bases for removal to federal court: (1) diversity jurisdiction and (2) jurisdiction under the Class Action Fairness Act ("CAFA"). (Not., Docket No. 1 at 2.)

II. Legal Standard

A. Remand

Under 28 U.S.C. § 1441(a), a defendant may remove a civil action from state court to federal court so long as original jurisdiction would lie in the court to which the action is removed. *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 163 (1997). According to the Ninth Circuit, courts should generally "strictly construe the removal statute against removal jurisdiction." *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). This "'strong presumption' against removal jurisdiction means that the defendant always has the burden of establishing that removal is proper." *Id.* (quoting *Nishimoto v. Federman-Bachrach & Assocs.*, 903 F.2d 709, 712 n.3 (9th Cir. 1990)).

However, "no antiremoval presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court." *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 554 (2014). CAFA provides district courts with original jurisdiction over any class action in which (1) the amount in controversy exceeds $5,000,000, exclusive of interest and costs, (2) any plaintiff class member is a citizen of a state different from any defendant, (3) the primary defendants are not states, state officials, or other government entities against whom the district court may be foreclosed from ordering relief, and (4) the number of plaintiffs in the class is at least 100. 28 U.S.C. §§ 1332(d)(2), (d)(5).

B. Compelling Arbitration

The FAA creates a "national policy favoring arbitration." *Nitro-Lift Techs, LLC v. Howard*, 568 U.S. 17, 20 (2012). "The 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.'" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) citing *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989). The FAA states that a written agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "By its terms, the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470

U.S. 213, 218, 105 S. Ct. 1238, 1241, 84 L. Ed. 2d 158 (1985).

III. Discussion

A. Motion to Remand

Ehrman filed a motion to remand arguing that Cox's removal was improper for three reasons. First, Ehrman states that Cox's removal papers fail to establish any facts showing that diversity of citizenship exists among the parties. (Mot., Docket No. 12 at 1.) Second, Ehrman contends that even if the removal papers set forth a prima facie case that diversity existed at some point in time, Cox failed to establish that it existed on May 9, 2018 or June 22, 2018, the dates on which the Complaint and the Notice of Removal were filed respectively. (*Id.* at 3.) Third, Ehrman argues that the removal papers do not show that Ehrman's individual claims placed the amount in controversy above $75,000. (*Id.*)

To establish citizenship for diversity purposes, a natural person must be a citizen of the United States and be domiciled in a particular state. *Kanto v. Wellesley Galleries, Ltd.*, 704 F.2d 1088, 1090 (9th Cir. 1983). While Ehrman's Complaint states that he is a resident of California, Ehrman disputes that Cox can remove the case on the basis of diversity because residency and citizenship are not the same. (Mot., Docket No. 12 at 5.)

Ehrman accepts for purposes of the motion for remand that (1) Cox is a citizen of Georgia, where it has its principal place of business, and Delaware, where it is incorporated; (2) there are over 800,000 members of the proposed class; and (3) that tens of

millions of dollars are in controversy. (Mot., Docket No. 12 at 7–8; Not., Docket No. 1 ¶ 14.) Thus, the only issue is whether Plaintiff or other putative class members are citizens of California (or any other state other than Georgia and Delaware) such that minimal diversity exists. (Mot., Docket No. 12 at 8.) The Notice of Removal states:

> As admitted in the Complaint, Plaintiff is a resident of California. Defendant is informed and believes, and on that basis alleges, that Plaintiff is a citizen of the state in which he resides, as alleged in the Complaint.

(Not., Docket No. 1 ¶ 12.)

Ehrman argues that since an individual is not automatically domiciled in the location where he resides, Cox has not met its burden of establishing that Ehrman is a citizen of both the United States and California such that minimal diversity exists between the parties. (Mot., Docket No. 12 at 8.) *See Paris v. Michael Aram, Inc.*, 2018 WL 501560, at *1–*2 (C.D. Cal. Jan 22, 2018) (finding that diversity was not established when notice of removal simply alleged that plaintiff was residing and working in California during the relevant time period). Similarly, Ehrman indicates that the Notice of Removal failed to identify any consumer within the class who was a citizen of a state other than Georgia and Delaware on the relevant dates in question. (Mot., Docket No. 12 at 10.) Ehrman urges the Court not to allow Cox to "guess its way into federal court" through a "remove first, inquire later" approach. (Reply, Docket No 22 at 1–2.) Rather, Ehrman suggests that Cox could have taken jurisdictional discovery in state court or conducted an investigation into the jurisdictional facts before removing

the case in order to meet the low burden of establishing that at least one putative class member is diverse from Cox. (*Id.* at 3.)

Ehrman cites *Harris v. Bankers Life & Cas. Co.*, 425 F.3d 689 (9th Cir. 2005) for the proposition that the thirty-day removal clock does not begin ticking based simply on an allegation of the plaintiff's *residence* because such an allegation does not reveal whether diversity of *citizenship* exists. (Reply, Docket No. 22 at 2.) In *Harris*, the Ninth Circuit decided the question of whether "the burden lies with the defendant to investigate the necessary jurisdictional facts within the first thirty days of receiving an indeterminate complaint, or whether the determination be limited to the face of the initial pleading." 425 F.3d at 693. There, the plaintiff's state court complaint alleged the plaintiff's past residence—not his current citizenship. *Id.* The court stated:

> We now conclude that notice of removability under § 1446(b) is determined through examination of the four corners of the applicable pleadings, not through subjective knowledge or a duty to make further inquiry. Thus, the first thirty-day requirement is triggered by defendant's receipt of an "initial pleading" that reveals a basis for removal. If no ground for removal is evident in that pleading, the case is "not removable" at that stage. In such case, the notice of removal may be filed within thirty days after the defendant receives "an amended pleading, motion, order or other paper" from which it can be ascertained from the face of the document that removal is proper.

Id. at 694 (citing 28 U.S.C. § 1446(b)). Applying this standard, the court distinguished between the residence pleaded in the complaint and citizenship, determining that the initial complaint did not trigger removability. *Id.* at 695. In so holding, the Ninth Circuit emphasized, "If we were to flip the burden and interpret the first paragraph of 28 U.S.C. § 1446(b) (the first thirty-day window) to apply to all initial pleadings unless they clearly reveal that the case is not removable, defendants would be faced with an unreasonable and unrealistic burden to determine removability within thirty days of receiving the initial pleading." *Id.* at 694.

At oral argument, counsel for Ehrman urged the court not to find that the initial complaint's allegation of Ehrman's California residence is synonymous with United States and California citizenship because a rebuttable residency-domicile presumption would have the effect of burdening many defendants who would be forced to scramble to remove within thirty days of receiving the initial pleading. He further emphasized that finding a rebuttable presumption of citizenship based on residence here would effectively create two separate standards for examining pleadings as they relate to removability based on diversity of citizenship for CAFA cases and non-CAFA cases.

Cox instead urges the Court to find that removal is proper because Ehrman alleged his own residence and "home" in California such that there is sufficient evidence to deem him a citizen of California. (Opp'n, Docket No. 18 at 1.) Ehrman alleges that he and his family use the Internet service in California, his Venue Affidavit submitted with the Complaint states: "For years, continuing to the present day, I have

purchased Internet Services from Cox. . . . and received Internet services at my home in Orange County, California," and a number of Ehrman's bills establish that he received Cox services at the same California address from 2015-2018. (Not., Docket No. 1-1 at 20 ¶3; Wilson Decl., Docket Nos. 15-6, 15-7, 15-9, 15-10, 15-12, 15-14.) Cox indicates that in the absence of evidence to the contrary, Ehrman should be treated as a citizen of his state of residence for federal diversity purposes, particularly in light of the extensive billing records that show Ehrman has received Internet services at the California address he considers "home" for years. (Opp'n, Docket No. 18 at 9.) *See NewGen, LLC v. Safe Cig, LLC*, 840 F.3d 606, 614 (9th Cir. 2016) ("[T]he place where a person lives is taken to be his domicile until facts adduced establish the contrary.") (citing *Anderson v. Watts*, 138 U.S. 694, 706 (1891)); *Zavala v. Deutsche Bank Tr. Co. Americas*, No. C 13-1040 LB, 2013 WL 3474760, at *3 (N.D. Cal. July 10, 2013) ("[T]he complaint indicates that [plaintiff] resides in California. A party's residence is 'prima facie' evidence of domicile. In the absence of evidence to the contrary, [plaintiff] is a California citizen for diversity purposes.") (*citing State Farm Mut. Auto Ins. Co. v. Dyer*, 19 F.3d 514, 520 (10th Cir.1994)).

Cox acknowledges that courts are split as to whether residence can establish domicile or citizenship. "While the Ninth Circuit has not squarely addressed the issue of whether residence equates to domicile, other courts have treated a person's residence as prima facie evidence of his domicile." *Ervin v. Ballard Marine Constr., Inc.*, No. 16-CV-02931-WHO, 2016 WL 4239710, at *3 (N.D. Cal. Aug. 11, 2016). The Ninth Circuit has stated that it rejects the Seventh Circuit's

position that "evidence of residency can never establish citizenship." *Mondragon v. Capital One Auto Fin.*, 736 F.3d 880, 886 (9th Cir. 2013). Nonetheless, the Ninth Circuit also instructs, "A person's state of citizenship is established by domicile, not simply residence, and a residential address in California does not guarantee that the person's legal domicile was in California." *King v. Great American Chicken Corp., Inc.,* 903 F.3d 875, 879 (2018). *See Mondragon*, 736 F.3d at 884 ("That a purchaser may have a residential address in California does not mean that person is a citizen of California.") (emphasis added).

In *Mondragon*, the Ninth Circuit examined whether a plaintiff seeking remand based on the "local controversy exception" of CAFA met his evidentiary burden to prove the exception applied. *Id.* at 883. The court rejected the plaintiff's argument that allegations that a class of people with residential addresses in California—without more—provided a proper inference of domicile in California for more than two-thirds of the class such that the local controversy exception would apply. *Id.* at 881–82. The court acknowledged that their "holding may result in some degree of inefficiency by requiring evidentiary proof of propositions that appear likely on their face" because it appeared likely that the vast majority of a class of consumers who purchased and registered cars in California were California citizens. *Id.* at 883–84. Despite this potential for inefficiency, the Ninth Circuit asserted that "[a] jurisdictional finding of fact should be based on more than guesswork," even if that guesswork may be "sensible." *Id.* at 884. *See King* 903 F.3d at 880 (rejecting a reasonable impression that greater than two-thirds of employees with last-

known residences in California identified as class members were California citizens because in the absence of evidence to support that factual finding, the impression was based on "guesswork").

Ehrman contends that since the Ninth Circuit was unwilling to adopt the residency-domicile presumption for purposes of a CAFA exception, which involves an evidentiary burden, it would be even less willing to adopt such that rebuttable presumption with respect to a CAFA removal, which involves a jurisdictional question. (Reply, Docket No. 22 at 8.) *Cf. Mason v. Lockwood, Andrews & Newnam, P.C.*, 842 F.3d 383, 392–93 (6th Cir. 2016), *cert. denied sub nom. Lockwood, Andrews & Newman, P.C. v. Mason*, 137 S. Ct. 2242, 198 L. Ed. 2d 678 (2017) (finding the residency-domicile presumption appropriate in the non-jurisdictional context of remand for CAFA local controversy exception, but not in the context of diversity jurisdiction removals because removal relates to federal courts' limited jurisdiction).

Cox has provided the Court with a Notice of Recent Decision regarding *Jimenez v. Charter Commc'ns Inc.*, No. CV186480DOCRAOX, 2018 WL 5118492 (C.D. Cal. Oct. 19, 2018), which Ehrman agrees "concern[s] the same issues regarding jurisdiction and remand," and which reaches a contrary result.[2] (Not., Docket No. 29; Response, Docket No. 34.) In *Jimenez*, which contained nearly identical factual allegations in the underlying complaint, the court stated:

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[2] Ehrman's response to the Notice of Recent Decision informs the Court that plaintiffs in Jimenez have filed a petition to appeal with the Ninth Circuit, which currently remains pending. (Response, Docket No. 34.)

> The Court adopts this position [that a person's residence is prima facie evidence of the person's domicile] where, as here, Plaintiff has admitted she is a California resident and is bringing claims on behalf of a putative class of California consumers. In the absence of evidence to the contrary, Plaintiff is considered a citizen of California for federal diversity purposes. Accordingly, based on Plaintiff's own admissions, Defendants properly removed the class action under CAFA.

Id. at *8–*9. Ehrman disputes this outcome, stating that "Ehrman has no obligation to admit or deny facts in connection with a facial attack on Cox's inadequate removal pleading" and indicating that a rebuttable presumption of continuing domicile should only come into play after the domicile has already been definitively established. (Reply, Docket No. 22 at 6.) *See Mondragon*, 736 F.3d at 885.

The court in *Jimenez* cites *Harris* for the proposition that there is a general presumption against removal. 2018 WL 5118492 at *2 (citing Harris, 425 F.3d at 698). The decision then states that this anti-removal presumption does not apply in CAFA cases. *Id.* (citing *Dart*, 135 S. Ct. at 554). While the *Jimenez* court does not further discuss *Harris*, the citation suggests that perhaps courts should not be concerned about creating separate standards for removal for CAFA and non-CAFA cases since differing presumptions already exist. In the absence of instruction from the Ninth Circuit, however, this Court declines to find that the complaint alone created a rebuttable residency-domicile presumption of removability. While both parties at oral argument acknowledged the like-

lihood minimal diversity exists in this case—even going so far as to consider it "inconceivable" that there would not be diversity between the parties—the Court finds that Cox's reliance on the residency allegation in the complaint still amounted to mere sensible guesswork such that it is insufficient for establishing minimal diversity. Although Cox has a low burden of proving that just one of the putative class members is a citizen of a state other than Delaware or Georgia, it is nonetheless a burden that has not been met. Accordingly, the Court grants Ehrman's motion to remand.

B. Motion to Compel Arbitration

Because the Court grants the motion to remand, the Court denies as moot the motion to compel arbitration.

IV. Conclusion

For the foregoing reasons, the Court grants Ehrman's motion to remand for lack of subject matter jurisdiction and denies as moot Cox's motion to compel arbitration.

IT IS SO ORDERED.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR PANEL REHEARING (SEPTEMBER 17, 2019)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID EHRMAN, Individually and on Behalf of All Others Similarly Situated,

Plaintiff-Appellee,

v.

COX COMMUNICATIONS, INC.; COXCOM, LLC; COX COMMUNICATIONS CALIFORNIA, LLC, and DOES, 1 Through 25, Inclusive,

Defendants-Appellants.

No. 19-55658

D.C. No. 8:18-cv-01125-JVS-DFM
Central District of California, Santa Ana

Before: M. SMITH and FRIEDLAND, Circuit Judges, and SIMON,* District Judge.

The panel unanimously votes to deny the petition for panel rehearing. Judge M. Smith and Judge Fried-

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* The Honorable Michael H. Simon, United States District Judge for the District of Oregon, sitting by designation.

land vote to deny the petition for rehearing *en banc*, and Judge Simon so recommends. The full court has been advised of the petition for rehearing *en banc*, and no judge of the court has requested a vote on it. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing *en banc* are DENIED.

RELEVANT STATUTORY PROVISIONS AND JUDICIAL RULES

STATUTORY PROVISIONS

28 U.S.C. § 1332.—Diversity of Citizenship; Amount in Controversy; Costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which

the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) 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, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of—

(A) every State and foreign state of which the insured is a citizen;

(B) every State and foreign state by which the insurer has been incorporated; and

(C) the State or foreign state where the insurer has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d)

(1) In this subsection—

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means 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;

(C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) 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;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of—

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar

claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2)—

(A)

(i) over a class action in which—

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant—

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of

the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

(5) Paragraphs (2) through (4) shall not apply to any class action in which—

(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, 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.

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

(8) This subsection shall apply to any class action before or after the entry of a class certifi-

cation order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim—

(A) concerning a covered security as defined under 16(f)(3)[1] of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)[2]) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453, an unincorporated association shall be 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.

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1 So in original. Reference to "16(f)(3)" probably should be preceded by "section".

2 So in original. Probably should be "77p(f)(3)".

(11)

(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B)

(i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which—

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general

public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C)

(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

(ii) This subparagraph will not apply—

(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

(e) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C. § 1446—
Procedure for Removal of Civil Actions

(a) Generally.—A defendant or defendants desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) Requirements; generally.—

(1) The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

(2)

(A) When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action.

(B) Each defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons described in paragraph (1) to file the notice of removal.

(C) If defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal.

(3) Except as provided in subsection (c), if the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c) Requirements; removal based on diversity of citizenship.—

(1) A case may not be removed under subsection (b)(3) on the basis of jurisdiction conferred by section 1332 more than 1 year after commencement of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.

(2) If removal of a civil action is sought on the basis of the jurisdiction conferred by section 1332 (a), the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy, except that-

(A) the notice of removal may assert the amount in controversy if the initial pleading seeks—

(i) nonmonetary relief; or

(ii) a money judgment, but the State practice either does not permit demand for a spe-

cific sum or permits recovery of damages in excess of the amount demanded; and

(B) removal of the action is proper on the basis of an amount in controversy asserted under subparagraph (A) if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a).

(3)

(A) If the case stated by the initial pleading is not removable solely because the amount in controversy does not exceed the amount specified in section 1332(a), information relating to the amount in controversy in the record of the State proceeding, or in responses to discovery, shall be treated as an "other paper" under subsection (b)(3).

(B) If the notice of removal is filed more than 1 year after commencement of the action and the district court finds that the plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal, that finding shall be deemed bad faith under paragraph (1).

(d) Notice to adverse parties and State court.—Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(e) Counterclaim in 337 proceeding.—With respect to any counterclaim removed to a district court pursuant to section 337(c) of the Tariff Act of 1930, the district court shall resolve such counterclaim in the same manner as an original complaint under the Federal Rules of Civil Procedure, except that the payment of a filing fee shall not be required in such cases and the counterclaim shall relate back to the date of the original complaint in the proceeding before the International Trade Commission under section 337 of that Act.

[(f) Redesignated (e)]

(g) Where the civil action or criminal prosecution that is removable under section 1442(a) is a proceeding in which a judicial order for testimony or documents is sought or issued or sought to be enforced, the 30-day requirement of subsection (b) of this section and paragraph (1) of section 1455(b) is satisfied if the person or entity desiring to remove the proceeding files the notice of removal not later than 30 days after receiving, through service, notice of any such proceeding.

28 U.S.C. § 1453—Removal of Class Actions

(a) Definitions.—In this section, the terms "class", "class action", "class certification order", and "class member" shall have the meanings given such terms under section 1332(d)(1).

(b) In general.—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.

(c) Review of remand orders.—

(1) In general.—Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not more than 10 days after entry of the order.

(2) Time period for judgment.—If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3).

(3) Extension of time period.—The court of appeals may grant an extension of the 60-day period described in paragraph (2) if—

(A) all parties to the proceeding agree to such extension, for any period of time; or

(B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.

(4) Denial of appeal.-If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2),

including any extension under paragraph (3), the appeal shall be denied.

(d) Exception.—This section shall not apply to any class action that solely involves—

(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f) (3)[1]) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

JUDICIAL RULES

Federal Rules of Civil Procedure Rule 8.— General Rules of Pleading

(a) Claim for Relief. A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court

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[1] So in original. Probably should be "77p(f)(3)".

already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

(b) Defenses; Admissions and Denials.

(1) In General. In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party.

(2) Denials—Responding to the Substance. A denial must fairly respond to the substance of the allegation.

(3) General and Specific Denials. A party that intends in good faith to deny all the allegations of a pleading-including the jurisdictional grounds—may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.

(4) Denying Part of an Allegation. A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.

(5) Lacking Knowledge or Information. A party that lacks knowledge or information sufficient to

form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.

(6) Effect of Failing to Deny. An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

(c) Affirmative Defenses.

(1) In General. In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- duress;
- estoppel;
- failure of consideration;
- fraud;
- illegality;
- injury by fellow servant;
- laches;
- license; payment;
- release;
- res judicata;

- statute of frauds;
- statute of limitations;
- and waiver.

(2) Mistaken Designation. If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

(d) Pleading to Be Concise and Direct; Alternative Statements; Inconsistency.

(1) In General. Each allegation must be simple, concise, and direct. No technical form is required.

(2) Alternative Statements of a Claim or Defense. A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) Inconsistent Claims or Defenses. A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) Construing Pleadings. Pleadings must be construed so as to do justice.

Federal Rules of Civil Procedure Rule 11—
Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions.

(1) In General. If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) Motion for Sanctions. A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) On the Court's Initiative. On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) Nature of a Sanction. A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable

conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) Limitations on Monetary Sanctions. The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) Requirements for an Order. An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

NOTICE OF REMOVAL OF DEFENDANT COX COMMUNICATIONS, INC. (JUNE 22, 2018)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DAVID EHRMAN, Individually and on Behalf of All Others Similarly Situated,

Plaintiff,

v.

COX COMMUNICATIONS, INC. and DOES 1 Through 25, Inclusive,

Defendants.

Superior Court Case No. 30-2018-00992300-CU-MC-CXC

TO THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA:

Defendant Cox Communications, Inc. ("Defendant"), together with Cox Communications California, LLC (Plaintiff's actual service provider) (collectively "Cox")[1] file this Notice of Removal of this action from

[1] Plaintiff names Cox Communications, Inc. as the defendant in this action. However, Cox Communications California, LLC is

Orange County Superior Court to the United States District Court for the Central District of California pursuant to 28 U.S.C. §§ 1332(a), 1332(d)(2)(A), 1441 and 1446.

Introduction

1. On or about May 9, 2018, Plaintiff David Ehrman filed a putative class action in the California Superior Court for the County of Orange, Case No. 30-2018-00992300-CU-MC-CXC (the "state court action"). A true and correct copy of Plaintiff's original complaint in the state court action (the "Complaint") is attached as Exhibit A.

2. On May 25, 2018, Defendant was personally served through its registered agent for service of process with copies of the Complaint, summons, and other case initiating documents filed in the state court action. True and correct copies of all process and pleadings served upon Defendant are attached as Exhibits A-C.

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the corporate entity that provides Cox services to Plaintiff and other subscribers in California. Because the claims raised by Plaintiff arise from or relate to Internet services offered or provided to subscribers in California (and because the purported class consists of California subscribers), Defendant believes that Cox Communications California, LLC is the proper defendant in this action, and that the Complaint should be amended to replace Cox Communications, Inc. with Cox Communications California, LLC. In any event, the replacement and addition of Cox Communications California, LLC is irrelevant to issues pertaining to removal of the action and, where applicable, facts relevant to removal for both entities are addressed herein.

3. Defendant has filed this notice of removal within the 30-day time period required by 28 U.S.C. § 1446(b).[2]

4. Jurisdiction. As explained below, this is a civil putative class action over which this Court has original jurisdiction under 28 U.S.C. § 1332(a) and/or the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332 (d)(2). All of the requirements for diversity jurisdiction under CAFA are satisfied in this case: (1) the putative class consists of at least 100 members; (2) the citizenship of at least one proposed class member is different from that of at least one Defendant; and (3) the aggregated amount in controversy exceeds $5 million, exclusive of interest and costs. Additionally, because all proposed class members are citizens of California, and the Cox entities are citizens of Delaware and Georgia, there is complete diversity, such that jurisdiction is independently proper under § 1332(a).

5. In accordance with 28 U.S.C. § 1446(d), Defendant is filing with the Orange County Superior Court, and serving on Plaintiff, a Notice of Filing of Removal of Action. A true and correct copy of that notice is attached hereto as Exhibit E.

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[2] On June 19, 2018, Defendant was served with a First Amended Class Action Complaint ("FAC") filed in the state court action. A true and correct copy of the FAC is attached hereto as Exhibit D. Because this action is removable based on the allegations of the original Complaint, this Notice of Removal is made within the time period for removal based on service of the original Complaint and is based on the allegations set forth in the original Complaint. The allegations of the FAC do not alter any grounds for removal contained in the original Complaint.

I. Allegations of the Complaint

6. In the Complaint, Plaintiff alleges as follows:[3] Defendant provides, among other things, residential Internet services to Plaintiff and other consumers in California. (Exhibit A, ¶ 4.) Defendant allegedly offers consumers a variety of Internet speed plans, charging prices based on different "tiers" of Internet connection speed. (*Id.*, ¶ 8.) Defendant's advertisements allegedly typically, but not always, identify an Internet connection speed "up to" that which a subscriber may expect to receive service. (*Id.*, ¶ 10.) Defendant allegedly misled Plaintiff and similarly situated consumers by promising to deliver residential Internet service at speeds consumers could rarely, if ever, achieve. (*Id.*, ¶ 7.)

7. Based on the foregoing, Plaintiff alleges causes of action for fraud; violation of the False Advertising Law (Cal. Bus. & Prof. Code § 17500 *et seq.*); violation of the Consumers Legal Remedies Act (Cal. Civ. Code § 1750 *et seq.*); violation of the Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 *et seq.*); and restitution and unjust enrichment. (Exhibit A, ¶¶ 27-62.)[4]

8. Plaintiff brings these claims on behalf of himself and a purported class of "all consumers in California who paid for Defendants' residential Internet services within four years from the date this action

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[3] Any allegation recited by Cox herein is not intended to be, and should not be construed as, an admission of the truth of any allegation in the Complaint.

[4] The FAC adds an additional cause of action for "Declaratory and Injunctive Relief" based on the same alleged conduct giving rise to Plaintiff's other causes of action. (Ex. F at 15, ¶¶ 63-67.)

was filed [May 9, 2014–May 9, 2018]." (Exhibit A, ¶ 16.)

9. In his Prayer for Relief, Plaintiff seeks, among other things, injunctive and declaratory relief, restitution and disgorgement, an award of "actual and punitive damages," and litigation costs and attorneys' fees. (Exhibit A, 15: 4-11.)

II. There Are More than 100 Putative Class Members

10. Plaintiff admits that "there are at least tens of thousands of putative class members." (*Id.*, ¶ 17.)

11. According to Cox's business records, as of May 9, 2018, Cox had over 832,000 residential Internet subscribers in California. (Declaration of Yvonne Hayes In Support of Defendant's Notice of Removal, filed concurrently herewith ("Hayes Decl.") ¶ 5.)

III. Minimal Diversity Exists Between the Parties

12. As admitted in the Complaint, Plaintiff is a resident of California. (Exhibit A, ¶ 3.) Defendant is informed and believes, and on that basis alleges, that Plaintiff is a citizen of the state in which he resides, as alleged in the Complaint.

13. Defendant is informed and believes, and on that basis alleges, that all purported class members are citizens of California, as alleged in the Complaint. (Exhibit A, ¶ 16.)

14. At the time this action was filed, and at the time of the filing of this Notice, Defendant Cox Communications, Inc. was and still is a corporation organized and existing under the laws of the State of Delaware, and its principal place of business was and still is Atlanta, Georgia. (Hayes Decl. ¶ 2.) Accordingly,

pursuant to 28 U.S.C. § 1332(c)(1), Cox Communications Inc. is a citizen of Delaware and Georgia.

15. At the time this action was filed, and at the time of the filing of this Notice, Cox Communications California, LLC was and still is a limited liability company organized and existing under the laws of the State of Delaware, and its principal place of business was and still is Atlanta, Georgia. (Hayes Decl. ¶ 2.) For purposes of diversity jurisdiction, the citizenship of a limited liability company is that of each of its members. *Johnson v. Columbia Properties Anchorage, LP,* 437 F.3d 894, 899 (9th Cir. 2000). The sole member of Cox Communications California, LLC is CoxCom, LLC, which, at the time the action was filed, and at the time of the filing of this Notice, was and is a limited liability company organized and existing under the laws of Delaware with its principal place of business in Atlanta Georgia. (Hayes Decl. ¶ 2.) The sole member of CoxCom, LLC is Defendant Cox Communications, Inc. (*Id.*) Accordingly, Cox Communications California, LLC is a citizen of Delaware and Georgia.[5]

16. Under 28 U.S.C. § 1332(d)(2)(A), a class action is subject to removal where "any member of a class of plaintiffs is a citizen of a State different from any defendant."

17. Based on the foregoing, there is complete, and also minimal, diversity between the parties.

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[5] Some courts, including the Fourth Circuit, analyze citizenship of an LLC for purposes of CAFA like that of a corporation, by assessing its principal place of business and place of incorporation. *Ferrell v. Express Check Advance of S.C., LLC,* 591 F.3d 698, 705 (4th Cir. 2010). Under this test, Cox Communications California, LLC is a citizen of Delaware and Georgia.

IV. The Amount in Controversy Exceeds $5 Million in the Aggregate

18. Under 28 U.S.C. § 1332(d)(2), an action is removable under CAFA only where "the matter in controversy exceeds the sum or value of $5,000,000. . . ." The "amount in controversy" for a class action being removed under CAFA is based on the aggregated claims of the entire class or classes, exclusive of interest and costs. 28 U.S.C. § 1332(d)(6). Where no specific amount is stated, the Court "must assume that the allegations of the complaint are true, and that a jury will return a verdict for the plaintiff on all claims made in the complaint." *Korn v. Polo Ralph Lauren*, 536 F. Supp. 2d 1199, 1205 (E.D. Cal. 2008). "The ultimate inquiry is what amount is put 'in controversy' by the plaintiff's complaint, not what a defendant will actually owe." *Id.*, citing *Rippee v. Boston Mkt. Corp.*, 408 F.Supp. 2d 982, 986 (S.D. Cal. 2005).

19. When it is unclear from the face of a state court complaint whether the requisite amount in controversy is pled, the removing defendant only needs to make a "plausible allegation" that the amount in controversy exceeds $5 million. *Dart Cherokee Operating Basin Co., LLC v. Owens*, 135 S. Ct. 547, 554 (2014). A removing defendant need not submit any evidence with the notice of removal in support of those allegations. *Id.* While Cox does not admit or accept the truth of the claims alleged in the Complaint, and denies that Plaintiff—or any putative class members—are entitled to any monetary (or other) relief, the amount in controversy according to the allegations of the Complaint satisfies the jurisdictional threshold under 28 U.S.C. § 1332(d)(2). Although the Complaint

does not specify the total amount in controversy, assuming for purposes of this Notice of Removal that the allegations of the Complaint are true, it is clear that more than $5 million has been put in controversy.

20. For his statutory causes of action (two, three, and four), and the purported cause of action for restitution and unjust enrichment (five), Plaintiff seeks "restitution that will restore the full amount of their [purported class members'] money or property; [and] disgorgement of Defendants' relevant profits and proceeds." (*Id.*, ¶¶ 39, 45, 56, 62.)

21. The Complaint describes a number of Internet speed packages offered by Cox, the lowest of which is "'Essential 30,' which promises speeds of up to 30 mpbs [megabits per second]." (*Id.*, ¶ 8.)

22. In May 2018, the monthly fee for the "Essential 30" package was $63.99, while the monthly fee for that package in May 2014 was $47.99. (Hayes Decl. ¶¶ 6-7.) The lowest speed package offered by Cox during the relevant time period was the "Starter" package. (*Id.*) In May 2018, the monthly fee for the "Starter" package was $42.99, while the monthly fee for that package in May 2014 was $32.99. (*Id.*)

23. Multiplying 832,000 California residential Internet subscribers by the lowest price offered for the lowest speed package during the relevant time period for even a single month ($32.99) results in a claimed restitution amount of over $27 million. Given that many subscribers, including Plaintiff, may have purchased packages with higher monthly fees and for more than one month, the amount in controversy is likely higher.

24. Moreover, in addition to restitution, Plaintiff also seeks disgorgement of profits, attorneys' fees, and punitive damages. Because Plaintiff has prayed for these additional forms of relief, the amount in controversy calculated above actually understates the amount in controversy. *Rippee*, 408 F. Supp. 2d at 984 (calculation of the amount in controversy takes into account claims for punitive damages and attorneys' fees if possibly recoverable as a matter of law).

Conclusion

Because this case is removable pursuant to 28 U.S.C. §§ 1332(a) and (d), further proceedings in the action in the Superior Court for Orange County should be discontinued, and the action should be removed to the United States District Court for the Central District of California.

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By: /s/ Richard R. Patch
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Cox Communications, Inc.

Dated: June 22, 2018