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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

CLAUDIA APOLINAR and EMMANUEL PEREZ-PEREZ,

Plaintiffs,

v.

POLYMER80, INC., a Nevada corporation, and DOES ONE through FIFTY,

Defendants.

Case No. 2:21-cv-08401-PA-PVC

PLAINTIFFS' REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION TO REMAND

Judge: Hon. Percy Anderson
Date: December 20, 2021
Time: 1:30 p.m.
Crtrm.: 9A

Trial Date: Not yet assigned

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TABLE OF AUTHORITIES

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INTRODUCTION

Despite the length of Polymer80's opposition ("Opp."), very little about this motion is in dispute. There is broad agreement over the facts, *see* Opp. at 2, ECF No. 21, and there is no question that this Court would have had jurisdiction had Polymer80 timely removed the case, *cf. id.* at 5–6. All this Court needs to decide is whether diversity jurisdiction—and more precisely, an amount in controversy exceeding $75,000—is apparent from within the four corners of plaintiffs' complaint.

As described in plaintiffs' opening memorandum ("Mot."), the detailed allegations of plaintiffs' severe injuries—arising out of multiple gunshot wounds suffered by each plaintiff, including to the head, arms, and torso—and the recitation of the myriad harms for which plaintiffs seek to recover make plain that the amount in controversy in this case does exceed $75,000. *See* Mot. at 7–8, ECF No. 16-1. Polymer80 never really denies this; instead, its position is that plaintiffs' detailed allegations and claims are irrelevant, because the complaint failed to assign numerical dollar amounts to the thorough descriptions of plaintiffs' multiple surgical procedures, hospital stays, disfigurement, missed work, and severe emotional distress—not to mention the punitive damages and attorney's fees that plaintiffs are also seeking.

The only real support for Polymer80's argument, however, comes from a handful of district court decisions that are flatly contrary to the district court decisions cited in plaintiffs' opening memorandum—and which are in significant tension with recent decisions of this Court. And despite bearing the burden of proving that removal—which is disfavored—is nevertheless appropriate here, Polymer80 fails to identify anything in the Ninth Circuit's case law that supports its position over plaintiffs'.

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Because removability was apparent from the face of plaintiffs' complaint, Polymer80's removal was untimely, and this case should be remanded.[1]

ARGUMENT

A. Ninth Circuit precedent, and the decisions of this Court, indicate that remand is appropriate.

Both sides agree that the governing precedent in this area comes from *Harris v. Bankers Life & Casualty Co.*, 425 F.3d 689 (9th Cir. 2005), and *Kuxhausen v. BMW Financial Services NA LLC*, 707 F.3d 1136 (9th Cir. 2013). *See* Mot. at 6; Opp. at 7–8. In *Harris*, the Ninth Circuit held that "notice of removability under [28 U.S.C.] § 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." 425 F.3d at 694. And in *Kuxhausen*, the court of appeals added that § 1446(b) "requires a defendant to apply a reasonable amount of intelligence in ascertaining removability." 707 F.3d at 1140 (citation omitted).

Although plaintiffs have not shied away from this standard, *see, e.g.*, Mot. at 6 (quoting *Harris*, 425 F.3d at 694), Polymer80 nevertheless centers its opposition on the notion that its "subjective knowledge" is not at issue here. *See* Opp. at 2, 4 n.2, 10, 12, 15. And Polymer80 argues as well that it had no duty to *investigate* whether this case was removable. *See id.* at 1, 7. To be clear, plaintiffs agree. Plaintiffs' position is, and has been, that "the face of the initial complaint affirmatively reveal[ed] a basis for federal jurisdiction," Mot. at 6—no subjective knowledge or investigation required. This position is consistent with the Ninth Circuit's, and this Court's, prior decisions in this area. *See, e.g.*, *Gonzalez v. Ford*

[1] Remand would also serve judicial efficiency, since this case would then proceed before the same trial judge who is already hearing a related case against Polymer80 that raises a number of legal and factual questions also at issue in this case.

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Motor Co., No. CV 19-652 PA (ASx), 2019 U.S. Dist. LEXIS 50844, at *10 (C.D. Cal. Mar. 22, 2019) ("removability does not depend on [defendant's] subjective knowledge").

As plaintiffs have already explained, "[a] pleading need not identify a specific amount in controversy in order to trigger the thirty-day removal period under 28 U.S.C. § 1446(b)(1)." *Rodriguez v. Boeing Co.*, No. CV 14-04265-RSWL (AGRx), 2014 U.S. Dist. LEXIS 106798, at *9 (C.D. Cal. Aug. 1, 2014) (citing *Kroske v. US Bank Corp.*, 432 F.3d 976, 980 (9th Cir. 2005)); *accord Carter v. Fannie Mae*, No. SACV 14-01754-CJC(JCGx), 2014 U.S. Dist. LEXIS 177040, at *4 (C.D. Cal. Dec. 23, 2014). "[S]o long as the initial pleading enables the defendant to intelligently ascertain removability, the case is removable, and the thirty-day period begins at the time the defendant receives the complaint." *Rodriguez*, 2014 U.S. Dist. LEXIS 106798, at *9–10.

Accordingly, to determine whether a case is removable, the inquiry (and the Court's review of that inquiry) requires a defendant to intelligently examine the factual allegations and damages sought on the face of the complaint. *See, e.g.*, *Kuxhausen*, 707 F.3d at 1140–41. That has certainly been the practice of this Court. *See, e.g.*, *Cobb v. Subaru of Am.*, No. CV 20-5424 PA (SPx), 2020 U.S. Dist. LEXIS 126590, at *7–8 (C.D. Cal. July 16, 2020) (parsing and analyzing allegations in complaint to determine whether amount in controversy exceeded $75,000). And when a complaint describes "severe injuries, especially those requiring surgery, courts have found it facially apparent from the complaint that the amount in controversy was satisfied." *Hammarlund v. C.R. Bard, Inc.*, No. 2:15-cv-05506-SVW-JEM, 2015 U.S. Dist. LEXIS 134962, at *4 (C.D. Cal. Oct. 2, 2015). For the reasons set forth in plaintiffs' opening memorandum, plaintiffs' initial complaint in this action certainly fits that description. *See* Mot. at 2 (citing Compl. ¶¶ 2–6, 34–41, ECF No. 1-1).

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Polymer80 suggests that *Hammarlund* is inapt because, in that case, it was the defendants, rather than the plaintiffs, who were arguing that the complaint made apparent that the amount in controversy exceeded $75,000. Opp. at 15. But why should that matter? The ultimate legal inquiry is based on the same question, regardless of which side the plaintiff and defendant are on. *Compare Hammarlund*, 2015 U.S. Dist. LEXIS 134962, at *4 (analyzing whether removability was "facially apparent from the complaint"), *with Harris*, 425 F.3d at 690 (ruling that removability must be "apparent from the face of the initial pleading"). Indeed, because "[t]he removal statute is strictly construed, and any doubt about the right of removal requires resolution in favor of remand," *Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1244 (9th Cir. 2009), a decision to *deny* remand, such as *Hammarlund*, requires an even stronger basis than a decision *to* remand. *Cf. Hammarlund*, 2015 U.S. Dist. LEXIS 134962, at *2 ("Removal jurisdiction is disfavored."); *Smadja v. PetSmart, Inc.*, No. CV 17-654 DMG (PLAx), 2017 U.S. Dist. LEXIS 62008, at *7 (C.D. Cal. Apr. 21, 2017) (remanding due to untimely removal based in part on "the strong presumption against removal jurisdiction"). Cases like *Hammarlund* thus support plaintiffs' position here.[2]

[2] Polymer80 also observes, accurately, that it is "not required" to "submit evidence" from outside the pleadings. Opp. at 15 (quoting *Gonzalez*, 2019 U.S. Dist. LEXIS 50844, at *10). But, again, plaintiffs have never suggested otherwise. Plaintiffs' position is simply that a defendant that receives a complaint whose removability is *facially apparent*, as Polymer80 did, must remove the case, if at all, within thirty days. *See Harris*, 425 F.3d at 694 (citing § 1446(b)).

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B. The district court decisions cited by Polymer80 do not require denial of the motion.

1. CAFA decisions are not on point here.

Polymer80's opposition relies heavily on a series of decisions interpreting the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332(d).[3] *See* Opp. at 12–13 (citing *Trahan v. U.S. Bank NA*, No. C 09-3111 JSW, 2014 U.S. Dist. LEXIS 4019 (N.D. Cal. Jan. 13, 2014); then citing *Murphy v. Finish Line, Inc.*, No. 20-cv-05663-WHO, 2020 U.S. Dist. LEXIS 184461 (N.D. Cal. Oct. 5, 2020); then citing *Sheppard v. Staffmark Inv., LLC*, No. 20-cv-05443-BLF, 2020 U.S. Dist. LEXIS 171628 (N.D. Cal. Sept. 18, 2020); and then citing *Figueroa v. Delta Galil U.S.*, No. 18-cv-07796-RS, 2019 U.S. Dist. LEXIS 55998 (N.D. Cal. Apr. 1, 2019)). But the reasoning of such cases has limited applicability here, for two reasons.

First, the legal standard in a CAFA case is starkly different. As previously noted, in regular diversity cases, such as this one, "[t]he removal statute is strictly construed against removal jurisdiction, and the burden of establishing federal jurisdiction falls to the party invoking the statute." *Gonzalez*, 2019 U.S. Dist. LEXIS 50844, at *3 (quoting *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 838 (9th Cir. 2004)). In CAFA cases, however, "[t]his presumption against removal … does not apply." *Figueroa*, 2019 U.S. Dist. LEXIS 55998, at *4 (citing *Jordan v. Nationstar Mortg. LLC*, 781 F.3d 1178, 1183–84 (9th Cir. 2015)). Instead, the statute is "to be interpreted broadly in favor of removal." *Id.* (citing *Jordan*, 781 F.3d at 1183–84). Thus, if there is any doubt as to whether the amount in controversy was apparent from the complaint, such doubt would "require[]

[3] Under CAFA, federal courts have jurisdiction over certain class actions involving at least 100 plaintiffs and minimal diversity of parties, provided that the amount in controversy exceeds $5,000,000. *See* § 1332(d). By contrast, regular diversity jurisdiction requires complete diversity of parties, but an amount in controversy of only $75,000. *See* § 1332(a).

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resolution in favor of remand" here, *Moore-Thomas*, 553 F.3d at 1244, even though a CAFA case might come out differently.

Second, the amount-in-controversy question in a CAFA case is typically focused on the unknown injuries suffered by class members other than the named plaintiffs. *See, e.g.*, *Murphy*, 2020 U.S. Dist LEXIS 184461, at *7; *Sheppard*, 2020 U.S. Dist. LEXIS 171628, at *8; *Figueroa*, 2019 U.S. Dist. LEXIS 55998, at *5–6; *see also Kuxhausen*, 707 F.3d at 1140–41 ("Nowhere in the pleading does Kuxhausen allege the value, even as an approximation, of other class members' vehicle financing contracts."). Injuries to unnamed class members are understandably a source of substantial uncertainty in class-action cases, and as such the Ninth Circuit in *Kuxhausen* (itself a CAFA case) made clear that defendants faced with such uncertainty "need not make extrapolations or engage in guesswork." *Id.* at 1140.[4] No such extrapolations or guesswork are required here, where the injuries to both plaintiffs were exhaustively detailed in the complaint. *See* Compl. ¶¶ 1–6, 34–41.[5]

As part of its discussion of these CAFA cases, Polymer80 emphasizes that it could not have determined the amount in controversy here via a "mathematical calculation." Opp. at 13, 15. This misconstrues the origin and import of this language. In *Kuxhausen*, the defendant argued that it should *not* have to perform any

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[4] *Kuxhausen* built on *Harris* in the CAFA context but did not otherwise meaningfully change the governing law. Polymer80's objection that *some* of the decisions that plaintiffs rely on were issued before *Kuxhausen*, Opp. at 14 n.4, is thus irrelevant. And, of course, several other decisions relied on by plaintiffs postdate *Kuxhausen*. *E.g.*, *Rodriguez*, 2014 U.S. Dist. LEXIS 106798, at *17 (citing *Kuxhausen*, 707 F.3d at 1140).

[5] Additionally, *Trahan*, which Polymer80 describes at some length, *see* Opp. at 12, is distinguishable for an independent reason: In that case, the named plaintiff alleged, repeatedly, that the amount in controversy *did not* exceed $5,000,000. *See Trahan*, 2014 U.S. Dist. LEXIS 4019, at *3, *4. Yet after the defendant removed the case, the plaintiff argued that removability should have been nevertheless apparent. *Id.* at *9. Plaintiffs here, by contrast, have not engaged in any such doublespeak.

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"sort of mathematic calculation" to determine the amount in controversy. 707 F.3d at 1140. The Ninth Circuit quickly rejected this argument, observing that defendants have a duty to "apply a reasonable amount of intelligence in ascertaining removability." *Id.* (citation omitted). Multiplying numbers in a complaint, the court continued, was "*an aspect* of that duty." *Id.* (emphasis added). In other words, a defendant's duty to apply a reasonable amount of intelligence to the complaint *includes* performing basic math; but nothing in *Kuxhausen*, or any of the other cases cited by Polymer80, states that simple multiplication is *all* that is required of defendants. In fact, it would be even simpler than basic math to understand, when looking at a case involving multiple gunshot wounds suffered by two plaintiffs and the severe injuries and harms flowing from those injuries—and using "a reasonable amount of intelligence"—that the damages and amount in controversy (including punitive damages and attorney's fees) would clearly and easily exceed $75,000.

2. Polymer80's authorities impose an overly rigid requirement that is unmoored from Ninth Circuit precedent.

To be sure, Polymer80 is correct that some district courts in this circuit have issued decisions requiring an explicit statement of the amount in controversy, as plaintiffs acknowledged in their opening memorandum. *See* Mot. at 11 n.4 (citing *Chavarria v. Mgmt. & Training Corp.*, No. 16-cv-617-H (RBB), 2016 U.S. Dist. LEXIS 197047, at *8 & n.2 (S.D. Cal. May 13, 2016)); *see also Thomason v. Walmart, Inc.*, No. 2:20-CV-480-RMP, 2021 U.S. Dist. LEXIS 22622, at *4 (E.D. Wash. Feb. 5, 2021). But these decisions are contrary to decisions from several other judges within this district. *See, e.g.*, *Hernandez v. Target Corp.*, No. CV 16-5808 DMG (AGRx), 2016 U.S. Dist. LEXIS 137922, at *3–4 (C.D. Cal. Oct. 4, 2016); *Carter*, 2014 U.S. Dist. LEXIS 177040, at *4–5; *Rodriguez*, 2014 U.S. Dist. LEXIS 106798, at *11–12. *See generally* Mot. at 6–7, 9.

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These decisions simply cannot all be reconciled.[6] A few require the amounts in controversy to be explicitly stated in numerical terms; many others do not. But as plaintiffs' opening memorandum explained, *see* Mot. at 10–11—and Polymer80's opposition failed to refute—the better and more persuasive reasoning, and the approach more consistent with the Ninth Circuit's precedent, is not to impose a rigid requirement that an amount in excess of $75,000 be expressly stated but instead to review the nature and details of the injuries alleged and damages claimed in light of *Kuxhausen*'s "reasonable amount of intelligence" standard. Applying that rule here to the plaintiffs' severe gunshot injuries, medical procedures, emotional distress, punitive damages, and attorney's fees can lead to only one conclusion: that the removability of this case was apparent from the face of the complaint.

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[6] Of course, not all the cases cited by Polymer80 are irreconcilable with plaintiffs' authorities. For example, in *Ibarra v. SMG Holdings Inc.*, No. CV 21-6959-RSWL-MARx, 2021 U.S. Dist. LEXIS 205256 (C.D. Cal. Oct. 22, 2021), the court found that the apparent amount in controversy did not exceed $75,000, distinguishing *Rodriguez* on the basis that the complaint in *Rodriguez* had sought "damages for emotional pain and suffering." *Id.* at *9. Plaintiffs here are seeking such damages. *See* Mot. at 3, 8. And in *Gonzalez v. Costco Wholesale Corp.*, No. EDCV 21-1140 JBG (KK), 2021 U.S. Dist. LEXIS 203413 (C.D. Cal. Oct. 21, 2021), the district court *agreed* that "a complaint may trigger the 30-day period for removal even without specifically pled damages." *Id.* at *6 (citing *Rodriguez*, 2014 U.S. Dist. LEXIS 106798, at *12). The court noted that such cases "typically" involve "sufficient objective facts on which to estimate the plaintiff's damages, like plaintiff's wages, statutory penalties, or specific contract damages." *Id.* at *7. Here, the detailed descriptions of plaintiffs' injuries contained within the complaint, *see* Compl. ¶¶ 1–6, 34–41, constituted "sufficient objective facts" for Polymer80 to determine that the amount in controversy was above $75,000.

Polymer80 suggests that plaintiffs rely too heavily on decisions involving employment disputes and that such cases are inapplicable here. Opp. at 14 n.5. But none of the reasoning in these cases has anything to do with employment law. And as it happens, many of Polymer80's authorities involve employment disputes as well. *E.g.*, *Ibarra*, 2021 U.S. Dist. LEXIS 205256, at *1–2; *Murphy*, 2020 U.S. Dist. LEXIS 184461, at *2; *Sheppard*, 2020 U.S. Dist. LEXIS 171628, at *2–3; *Figueroa*, 2019 U.S. Dist. LEXIS 55998, at *2; *Chavarria*, 2016 U.S. Dist. LEXIS 197047, at *2–3; *Trahan*, 2014 U.S. Dist. LEXIS 4019, at *1. A review of these cases makes plain that there is no separate body of removal law applicable only in the employment context.

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Accordingly, plaintiffs respectfully submit that this Court should do no more than what the Ninth Circuit has instructed, and what this Court has done before: restrict the scope of inquiry to the four corners of the plaintiffs' complaint, but analyze what the defendant could intelligently ascertain from the factual allegations and legal claims contained therein. *See, e.g.*, *Gonzalez*, 2019 U.S. Dist. LEXIS 50844, at *9–11. Under that proper and well-established mode of analysis, the removability of this case is—and always has been—apparent.

CONCLUSION

For the foregoing reasons, plaintiffs request that this Court remand this case to Los Angeles Superior Court for further proceedings.

Dated: December 6, 2021

WALKUP, MELODIA, KELLY & SCHOENBERGER

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