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U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
2006 FEB 23 PM 2:09
LORETTA G. WHYTE
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JUNIOR CERDES

CIVIL ACTION NO.

06-0922

VERSUS

SECT. B MAG. 4

CUMMINS DIESEL SALES CORPORATION,
CUMMINS, INC. (OF INDIANA), FORMERLY
CUMMINS ENGINE COMPANY, INC.,
CUMMINS MID-SOUTH, INC., AND
CUMMINS MID-SOUTH, L.L.C

NOTICE OF REMOVAL

PLEASE TAKE NOTICE that pursuant to 28 U.S.C. § 1441, defendants Cummins Diesel Sales Corporation, Cummins Inc., (improperly named as Cummins, Inc. (of Indiana)), Cummins Mid-South, L.L.C., and Cummins Mid-South, Inc. (an inactive corporation) (collectively, "Defendants"), hereby file this Notice of Removal to the United States District Court for the Eastern District of Louisiana, and in support respectfully states as follows:

1. On January 27, 2006, an action was commenced against Defendants in the 24th Judicial District for the Parish of Jefferson, State of Louisiana, captioned Junior Cerdes versus Cummins Diesel Sales Corporation, Cummins, Inc. (of Indiana), formerly Cummins Engine Company, Inc., Cummins Mid-South, Inc., and Cummins Mid-South, L.L.C., No. 627-662 Div. "I" (Judge Jo Ellen Grant) (the "State Court Action").

2. Defendants Cummins Diesel Sales Corporation and Cummins Mid-South, L.L.C. were served with a copy of the Citation and Petition on February 7, 2006.

Fee \$250.00
Process _____
X Dktd _____
✓ CtRmDep _____
Doc. No. _____

3. Pursuant to 28 U.S.C. § 1446(a), Defendants attach as Exhibit A the Citation and Petition, together with the documents attached thereto. These documents constitute all “process, pleadings and orders” served upon Defendants in this action to date. There are no pending motions in the State Court Action.

4. This action is removable pursuant to 28 U.S.C. §§ 1441(a) and 1446. The basis for federal jurisdiction in 28 U.S.C. § 1332 (diversity of citizenship). Venue is proper in this district pursuant to 28 U.S.C. § 1391 et seq.

5. This action is a purported class action commenced by plaintiff Junior Cerdes (“Plaintiff”), who alleges that he is a resident of Louisiana. In the complaint, Plaintiff “appears on behalf of himself and on behalf of a putative class” that is defined as “[a]ll persons who purchased, in the State of Louisiana, one or more sea-water or marine aftercooler equipped engines manufactured by Cummins Diesel Sales Corporation and/or Cummins, Inc. (of Indiana) f/k/a/ Cummins Engine Company, Inc.”

6. As Plaintiff recognizes in paragraph III of the Petition, none of the Defendants are citizens of Louisiana. More particularly, defendant Cummins Diesel Sales Corporation is an Indiana corporation with its principal place of business in Columbia, Indiana. Defendant Cummins Inc., improperly named as Cummins, Inc. (of Indiana), and formerly known as Cummins Engine Company, Inc. is an Indiana corporation with its principal place of business in Columbus, Indiana. Defendant Cummins Mid-South, L.L.C. is a Tennessee limited liability corporation with its principal place of business in Memphis, Tennessee. Defendant Cummins Mid-South, Inc. was formerly a Tennessee corporation but ceased doing business and is no longer active.

7. Plaintiff alleges that in 2000, he purchased two 350 horsepower Cummins marine engines (model number 6CTA8.3-M2), each which was equipped with a sea water aftercooler, for use in his commercial shrimp boat. Petition at VI.

8. Plaintiff alleges the engines were manufactured by Cummins Diesel Sales Corporation and/or Cummins Inc., formerly known as Cummins Engine Company, Inc. (the alleged “Manufacturer Defendants”), and were sold to him by Cummins Mid-South, Inc. and/or Cummins Mid-South, L.L.C. (the alleged “Seller Defendants”). Petition at VII and III.

9. Plaintiff alleges that because of flaws in the design of the engines, the engines were not fit for ordinary use. More particularly, Plaintiff alleges that the alleged design defect caused water to be produced through condensation as the temperature was decreased in the aftercooler, and that the water was then blown through the intake air system into the engine, causing damage to the pistons, liners, bearing, and other components, resulting in excessive wear and premature engine failure. Petition at VIII. Plaintiff alleges this alleged defect is present in and caused similar manifestations in other Cummins engines equipped with the sea water aftercooler. Petition at X.

10. Plaintiff alleges that “[m]any hundreds, perhaps thousands, of these defective engines were sold in Louisiana.” Petition at XX.

11. Plaintiff alleges that the alleged “Manufacturer Defendants” had actual knowledge of the alleged defect prior to and at the time of sale, and as manufacturers, are deemed to know of the redhibitory defect in the engines. Petition at XIV.

12. Plaintiff alleges that he tendered the engines for repair in mid-February, 2005, more than four (4) years after the sale of the engines to Plaintiff. Petition at XVI.

13. Pursuant to Louisiana Civil Code article 2545, Plaintiff seeks on his behalf, and on behalf of each member of the putative class, the “return of the purchase price of the engines, with interest from the date of sale, . . . reimbursement of the reasonable expenses occasioned by the sale, repair expenses, and those expenses incurred for the preservation of the engines,” as well as “incidental expenses, costs, expert fees and reasonable attorney’s fees.” Petition at XVIII.

14. Consistent with Louisiana law, Plaintiff does not pray for a dollar amount of damages, but for “compensatory damages as alleged herein and as might be proved at trial.”

Federal Jurisdiction is Proper Pursuant to 28 U.S.C. § 1332

14. This Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1332 because there is complete diversity of citizenship between Plaintiff, the sole alleged class representative, and Defendants, and the amount in controversy exceeds \$75,000.00, exclusive of interest and costs.

There is Complete Diversity of Citizenship

15. There is complete diversity between Plaintiff and Defendants. In the Petition, Plaintiff alleges that he is a resident of Louisiana. Because this action is brought as a putative class action, in evaluating whether there is diversity, only the citizenship of the named plaintiff is considered in determining diversity, and the citizenship of unnamed class members is irrelevant. *See Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 366 (1921); *Grant v. Chevron Phillips Chemical Co. L.P.*, 309 F.3d 864, 866 n. 1 (5th Cir. 2002); *Ren-Dan Farms, Inc. v. Monsanto Co.*, 952 F. Supp. 370, 374 (W.D. La. 1997).

16. As Plaintiff acknowledges in the Petition, each of the Defendants is a foreign corporation with its principal place of business outside of Louisiana. Petition at III. Defendant Cummins Diesel Sales Corporation is an Indiana corporation with its principal place of business in Columbus, Indiana. Defendant Cummins Inc., improperly named as Cummins, Inc. (of Indiana), and formerly known as Cummins Engine Company, Inc. is an Indiana corporation with its principal place of business in Columbus, Indiana. Defendant Cummins Mid-South, L.L.C. is a Tennessee limited liability corporation with its principal place of business in Memphis, Tennessee. Defendant Cummins Mid-South, Inc. was formerly a Tennessee corporation but ceased doing business and is no longer active.

17. Complete diversity exists between Plaintiff and Defendants because the Defendants are citizens of different states from Plaintiff, a Louisiana resident.

The Amount in Controversy Exceeds \$75,000.00

18. In the Petition, as required by Louisiana law, Plaintiff does not pray for a specific dollar amount, and instead simply prays for “compensatory damages as alleged herein, and as might be proved at trial.” See La. Code Civ. Proc. Art. 893(A)(1).

19. Because a plaintiff in a Louisiana action cannot demand a specific dollar amount of damages, in determining the amount in controversy, the party seeking to maintain federal jurisdiction may do so by establishing by a preponderance of the evidence that the amount in controversy exceeds \$75,000.00 (1) by demonstrating that it is “facially apparent” from the petition that the claim likely exceeds \$75,000.00, or (2) “by setting forth the facts in controversy – preferably in the removal petition, but sometimes by affidavit – that support a finding of the

requisite amount.” *Allen v. R & H Oil & Gas. Co.*, 63 F.3d 1326, 1335 (5th Cir. 1995). *See also Manguno v. Prudential Property and Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002).

20. Thus, “if a defendant in a Louisiana suit can produce evidence sufficient to constitute a preponderance showing that, regardless of the style or wording of the demand, the amount in controversy exceeds § 1332’s jurisdictional threshold, that Louisiana case will then resemble any other amount-in-controversy case, bringing into play the foundational rule of removal jurisdiction: The plaintiff can defeat diversity jurisdiction only by showing to a ‘legal certainty’ that the amount in controversy does not exceed \$75,000.00.” *Grant v. Chevron Phillips Chemical Co.*, 309 F.3d 864, 869 (5th Cir. 2002).

21. In *In re Abbott Laboratories*, 51 F.3d 524, 526-27 (5th Cir. 1995), the Fifth Circuit held that in calculating the amount in controversy, all awardable attorney’s fees must be attributable to the class representatives to the exclusion of the other members of the class.

22. In *Grant*, the Fifth Circuit held “on the authority of [Louisiana Code of Civ. Pro. art. 595(A)], that when, in connection with a Louisiana class action suit that asserts a cause of action or causes of action for which there is no separate attorney’s fees provision under Louisiana law, attorney’s fees are nevertheless (1) allowable to the class representatives, and (2) attributable to the class representatives for purposes of the court’s calculation of the amount in controversy.” *Grant*, 309 F.3d at 876.

23. Here, as part of the claimed damages, Plaintiff seeks attorney’s fees pursuant to Louisiana Code of Civ. Pro. Art. 2545. Under *Abbott Labs* and *Grant*, the Court must attribute to Plaintiff attorney’s fees in calculating the amount in controversy.

24. Recognizing that the cost of litigating a class action lawsuit will invariably be substantial, the Court in *Kemp v. Metabolife International, Inc.*, 2003 U.S. Dist. LEXIS 17769 (E.D. La. October 1, 2003), citing *Grant*, stated that “since article 595(A) of the Louisiana Code of Civil Procedure entitles the class representative to recover attorney’s fees, class actions filed in Louisiana State Court will virtually always be removable.”

25. Under settled Louisiana law, it is apparent that Defendants have established that the jurisdictional minimum of at least \$75,000.00 is in controversy. According to Plaintiff, the size of the class is “so numerous that joinder of all members is impracticable” and Plaintiff estimates that “[m]any hundreds, perhaps thousands, of these defective engines were sold in Louisiana. Petition at XX.

26. Plaintiff seeks, as part of the claimed damages, the “return of the purchase price of the engines, with interest from the date of sale.” Petition at XVIII. Attached to the Petition are invoices allegedly for Plaintiff’s purchase of the two engines which totaled \$49,526.00. A class that consists of only a handful of class members seeking as damages the return of the purchase price of the engines that they purchased would be sufficient to meet the jurisdictional minimum of \$75,000.00.

27. If the cost of repair is used to estimate the amount in controversy, a fair estimate of that cost for each potential class member would be the cost of the repairs performed on Plaintiff’s two engines. According to invoices attached to the Petition, the two repairs allegedly cost approximately \$5,000 and \$5,300, respectfully. Assuming for purposes of this analysis that the lower figure is the best approximation of the cost of repair, it would take a class of only 15 or

persons to meet the jurisdictional minimum of \$75,000.00. Here, Plaintiff estimates that the potential class size is “[m]any hundreds, perhaps thousands.” Petition at XX.

28. When attorney’s fees are added to the potential amount in controversy, as they must, under *Abbott Labs* and *Grant* it is clear that the jurisdictional minimum of \$75,000 is met in this case.

Conclusion

29. In conclusion, this Court has subject matter jurisdiction over this purported class action pursuant to 28 U.S.C. § 1332 because: (1) there is complete diversity of citizenship between Plaintiff, the only named class representative, and Defendants, and (2) the amount in controversy exceeds \$75,000.00, exclusive of interest and costs. Removal of this action is thus proper pursuant to 28 U.S.C. § 1441.

30. This Notice of Removal is timely filed pursuant to 28 U.S.C. § 1446(b) because it was filed with thirty (30) days after service of a copy of the Citation and Petition on defendants Cummins Diesel Sales Corporation and Cummins Mid-South, L.L.C. on February 7, 2006.

31. As required by 28 U.S.C. § 1446(b), copies of all pleadings served on Defendants as of the date of this filing are attached.


32. Written notice of the filing of this Notice of Removal will be promptly given to counsel for Plaintiff, and together with a copy of the Notice of Removal, will be filed with the Clerk of the Court for the Twenty-Fourth Judicial District Court, Parish of Jefferson, Louisiana, as provided by 28 U.S.C. § 1446(d).

33. Defendants expressly reserve any and all defenses which may be available to them in this action.

WHEREFORE, Defendants respectfully request that this action be removed from the 24th Judicial District Court for the Parish of Jefferson, to this Court.

By Attorneys,

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ATTORNEYS FOR CUMMINS DIESEL SALES CORPORATION, CUMMINS, INC. (improperly named as Cummins, Inc. (of Indiana)), CUMMINS MID-SOUTH LLC and CUMMINS MID-SOUTH, INC.

CERTIFICATE OF SERVICE

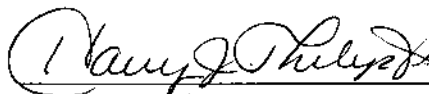
I certify that a copy of the foregoing was this day mailed, via Federal Express, to:

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Jennifer N. Willis
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And
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Baton Rouge, Louisiana, this 22 day of February, 2006.



Harry J. Philips, Jr.