

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

BBDOVA, LLC d/b/a )  
WIRELESS ZONE, )  
 )  
Plaintiff, )  
 )  
v. ) Civ. No.04-1448-SLR  
 )  
AUTOMOTIVE )  
TECHNOLOGIES, INC., )  
 )  
Defendant. )

**MEMORANDUM ORDER**

At Wilmington this 25th day of February, 2005, having considered plaintiff's motion for remand and the papers submitted in connection therewith;

IT IS ORDERED that said motion to remand (D.I. 14) is denied, for the reasons that follow:<sup>1</sup>

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<sup>1</sup> As an preliminary matter, the court notes that on November 15, 2004, defendant removed the present action to this court on the basis of diversity jurisdiction. (D.I. 1) On December 7, 2004, plaintiff filed a motion to stay briefing related to, or extend time for plaintiff's answer to, defendant's motion to dismiss. (D.I. 5) In this motion plaintiff stated that 28 U.S.C § 1447(c) required plaintiff to file the present motion to remand by 4:30 p.m. on Monday, December 20, 2004. (D.I. 5 at 2-3) Plaintiff did not file the present motion until January 18, 2005. (D.I. 14)

Nevertheless, the court will entertain plaintiff's motion for remand for two reasons. First, 28 U.S.C § 1447(c) did not require plaintiff to file the present motion to remand by December 20th. 28 U.S.C § 1447(c) states:

A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within

1. Plaintiff BBDova, LLC is a New Jersey limited liability company having its principal place of business at 1121 Churchman's Road, Newark, DE 19713. Plaintiff is an authorized Delaware foreign corporation and may conduct business in the State of Delaware. (D.I. 15 at 7)

2. Defendant Automotive Technologies, Inc. ("ATI") is a Connecticut corporation with its principal place of business at 34 Industrial Park Place, Middletown, CT 06457. (Id.) Defendant is engaged in the business of franchising third parties to own and operate Wireless Zone retail stores.<sup>2</sup> (D.I. 3 at 2)

3. On August 11, 2003 plaintiff and defendant entered into ATI Franchise Agreement No. WZ-187 ("the Agreement") for the operation of a Wireless Zone retail store at 1121 Churchman's

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30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

As a result, if plaintiff's motion for remand was for any basis other than subject matter jurisdiction, it would have had to file the motion before December 20th. However, the present motion is for remand on the basis of lack of subject matter jurisdiction, namely lack of diversity jurisdiction. Consequently, 28 U.S.C § 1447(c) allows plaintiff to bring the present motion at any time before final judgment. Second, because the court finds that plaintiff's motion lacks substantive merit, the court will address plaintiff's arguments rather than dismiss the motion because of procedural deficiencies.

<sup>2</sup> A Wireless Zone retail store is a retail business specializing in wireless communication devices, services and accessories, which include, among other things, the sale, installation and repair of wireless telephones and other wireless telecommunication products and services. (D.I. 3 at 2)

Center, Newark, DE 19713. (Id. at 4; D.I. 15 at 7)

4. On September 24, 2003 an agent of defendant contacted one of plaintiff's principals, Ben Cordova ("Cordova"), for the purpose of amending the Agreement to remedy a typographical error ("the Amendment"). (D.I. 15 at 8) Defendant claims that the purpose of the Amendment was to amend the "Protected Territory" description set forth in Section 1.05 of the Agreement in a manner provided for under Section 17.03 of the Agreement. (D.I. 16 at 3; see also D.I. 1, ex. 3) Both parties agree that plaintiff's principal signed the Amendment. (D.I. 15 at 8; D.I. 16 at 3) Plaintiff alleges that at a later date, Cordova realized that the Amendment restructured the territory allotted to plaintiff by the Agreement. (D.I. 16 at 3)

5. On February 16, 2004 defendant entered into ATI Franchise Agreement No. WZ-223 for the operation of a Wireless Zone retail store at 404 Suburban Drive, Suburban Plaza Shopping Center, Newark, DE 19711. (Id.) Plaintiff complained to defendant about the competition created by this additional Wireless Zone store, and alleged that it unfairly impacted the territory protected by the Agreement. (Id. at 4)

6. On May 24, 2004, Cordova contacted defendant's Executive Vice President and General Manager, and offered to sell plaintiff's Wireless Zone retail store for \$150,000 as a remedy and in exchange for a release from any claims arising out of the

Amendment. (D.I. 1, ex. 5)

7. Plaintiff filed a declaratory judgment action in the Superior Court of the State of Delaware against defendant on October 13, 2004, seeking a declaration as to the legality of the Amendment. (D.I. 1, ex. 1) Plaintiff's motion for declaratory judgment did not state any value for the territory it allegedly lost as a result of the Amendment. (D.I. 1, ex. 1)

8. Defendant removed the case to this court on November 15, 2004, on the basis of diversity jurisdiction. (D.I. 1)

9. On January 18, 2005, plaintiff filed a motion to remand. (D.I. 14) Plaintiff claimed that it only sought relief in the form of a declaration that the Amendment is invalid for lack of consideration, and that it did not request monetary damages. (D.I. 15 at 12) Consequently, plaintiff argued that remand was necessary because the amount in controversy did not exceed \$75,000 and, therefore, there was no diversity jurisdiction. (Id.)

10. 28 U.S.C. § 1441 provides for the right of defendants in state court proceedings to remove cases to federal court if, based upon the face of the filed pleadings, subject matter jurisdiction would have existed in federal court for the plaintiff's claims. Where subject matter jurisdiction is claimed pursuant to the court's diversity jurisdiction, there must be both complete diversity of the parties and the requisite

jurisdictional amount of over \$75,000. 28 U.S.C. § 1332. On a motion to remand, it must “appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.” St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289 (1938). It is the general rule that the amount in controversy is determined from the complaint itself. See Horton v. Liberty Mutual Ins. Co., 367 U.S. 348, 353 (1961). Where the amount in controversy is ambiguous in the pleadings, the court must conduct its own independent appraisal of the allegations to determine whether the value of claims exceeds the jurisdictional amount. See Angus v. Shiley Inc., 989 F.2d 142, 146 (3d Cir. 1993). The amount in controversy is “not measured by the low end of an open-ended claim, but rather by a reasonable reading of the value of the rights being litigated.” Id. The party seeking removal, of course, has the burden of showing by a preponderance of the evidence that the amount in controversy exceeds the jurisdictional amount. See Penn v. Wal-Mart Stores, Inc., 116 F. Supp. 2d 557 (D. N.J. 2000). See also Gilman v. BHC Securities, 104 F.3d 1418, 1421 (2d Cir. 1997); De Aguilar v. Boing Co., 47 F.3d 1404, 1411-12 (5th Cir. 1995); Shaw v. Dow Brands, Inc., 994 F.2d 364, 366 (7th Cir. 1993). In other words, it must be more likely than not that the amount in controversy exceeds \$75,000.

11. Diversity of citizenship exists between the parties.

Plaintiff is a New Jersey limited liability company with its principal place of business in Newark, Delaware. Consequently, plaintiff is a citizen of both New Jersey and Delaware. 28 U.S.C. § 1332(c)(1). Defendant is a Connecticut corporation with its principal place of business in Middletown, Connecticut. Thus, defendant is a citizen of Connecticut. Id.

12. Furthermore, the amount in controversy in the present litigation exceeds \$75,000. As a general rule, the amount in controversy is determined from the complaint itself. See Horton, 367 U.S. at 353. However, the Supreme Court has decided that when a complaint does not explicitly quantify the value of the remedy sought, such as when declaratory or injunctive relief is requested, the court must look elsewhere to determine the "value of the object of the litigation." Hunt v. Walsh State Apple Adver. Comm'n, 432 U.S. 333, 347 (9177).<sup>3</sup> The value of the object of the litigation is the amount in controversy. Id. Where a plaintiff's complaint does not specify a particular

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<sup>3</sup> Plaintiff attempts to distinguish Hunt on the grounds that in Hunt, "the jurisdictional controversy involved a question of the legal uncertainty of accrued damages; it was not disputed that the uncertain damages that had accrued were, and would continue to be, the direct result of the relationship between the litigants." (D.I. 17 at 9) However, this argument does nothing to distinguish Hunt from the present matter. Just as in Hunt, the parties in this litigation have a relationship. Furthermore, it is undisputed that the alleged damages arose from this relationship. Consequently, the court should look to the "value of the object of the litigation" in order to determine the amount in controversy.

amount of damages, the court must determine the amount in controversy by a preponderance of the evidence. Chase v. Shop 'N Save Warehouse Foods, Inc., 110 F.3d 424, 427-28 (7th Cir. 1997); Gilman v. BHC Sec., Inc., 104 F.3d 1418, 1428 (2d Cir.); Sanchez v. Monumental Life Ins. Co., 102 F.3d 398, 404 (9th Cir. 1996); Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1356-57 (11th Cir. 1996) overruled on other grounds by Office Depot v. Cohen, 204 F.3d 1069 (11th Cir. 2000); DeAguilar v. Boeing Co., 47 F.3d 1404, 1409 (5th Cir. 1995); Gafford v. General Electric Co., 997 F.2d 150, 158 (6th Cir. 1993).

13. The purpose of this declaratory judgment action is to determine who possesses the rights to a certain piece of franchised territory. This territory has a value. Regardless of what the parties intend to do with the territory, the ultimate ruling in this case will distribute the disputed territory to a party. Thus, in order to determine whether the amount in controversy exceeds \$75,000, the court must determine, by a preponderance of the evidence, the value of the disputed territory.

14. Defendant produced evidence that on May 24, 2004, Cordova sent an email to defendant's Executive Vice President and General Manager, offering to sell plaintiff's Wireless Zone store and release defendant from "any and all damages" arising from

this dispute for \$150,000.<sup>4</sup> (D.I. 1, ex. 5) Furthermore, defendant produced the declaration of Susan E. Suhr, which stated, "As reflected in my analysis above, [defendant] assesses the reasonable value of the franchise territorial and other rights in controversy and to be litigated under the Complaint at \$150,000.00." (D.I. 1, ex. A) Finally, plaintiff states that "[t]here is no doubt that the third-party litigation will far exceed the jurisdictional amount in controversy . . . ." (D.I. 17 at 11) The third-party litigation plaintiff refers to is a subsequent dispute that might arise between defendant and a third

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<sup>4</sup> Plaintiff argues that the court should not consider this email in determining the value of the object of this litigation because its was an "off-the-cuff email" that was sent by a "distraught" Cordova at a time when plaintiff was not represented by an attorney. (D.I. 17 at 12) However, plaintiff fails to point to, and the court has been unable to find, any precedent holding that statements should be excluded when they are "off-the-cuff", or were made while distraught, or made by unrepresented persons. The court must determine the amount in controversy by a preponderance of the evidence. The email from plaintiff's principal constitutes evidence, and will be considered by the court. Nevertheless, the court will consider the factors identified by plaintiff in determining the weight it assigns to the email.

Perhaps more importantly, the court notes that Cordova's email not only offered to sell the disputed territory, but also plaintiff's entire franchise rights, along with all inventory and fixtures and a release from any and all damages arising out of the dispute. (D.I. 1, ex. 5) In other words, the \$150,000 offered by Cordova was for more than just the disputed territory, the object of this litigation. However, the email also indicates that the inventory was only worth \$10,000. Furthermore, plaintiff only operated one store, meaning the fixtures were of little value. The court concludes that this email indicates that the disputed territory together with the release from any and all damages incurred amounted to more than \$75,000.

party regarding the disputed territory if plaintiff is deemed to have the rights to that property. Nevertheless, plaintiff's motion to remand and its reply fail to point to any evidence suggesting that the amount in controversy is \$75,000 or less. As a result, the court concludes that the amount in controversy exceeds \$75,000.

15. Because the court has denied plaintiff's motion for remand, the court also denies plaintiff's petition for costs and attorney's fees.

16. The court finds that there is complete diversity between the plaintiff and defendant. Furthermore, the amount in controversy in this case exceeds \$75,000. Accordingly, the court holds that it does have subject matter jurisdiction over the present matter, and plaintiff's motion for remand (D.I. 14) is denied.

Sue L. Robinson  
United States District Judge