IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BRUCE LEVITT, et al.	:	
	:	
v.	:	Civil No. WMN-05-949
	:	
FAX.COM, et al.	:	
	:	

MEMORANDUM

Before the Court is Plaintiffs' Motion to Remand. Paper No. 17. Defendant Matthew Buecler and Jeanette Bunn filed oppositions to the motion,[1] but Plaintiffs did not reply. Upon a review of the pleadings and the applicable case law, the Court determines that no hearing is necessary (Local Rule 105.6) and that the motion will be denied.

This suit arises out of allegations of "fax blasting," the practice of broadly sending out unsolicited advertisements by facsimile transmission. Plaintiff filed the original complaint in this action in the Circuit Court for Baltimore City on May 7, 2001. On December 24, 2002, this suit was certified by the Baltimore City Circuit Court as a class action. Shortly thereafter, that court granted a motion for summary judgment in favor of all defendants and dismissed the case. This dismissal was subsequently reversed by the Maryland Court of Appeals.

[1] These same defendants filed motions to dismiss that are also pending. Paper Nos. 9 (Bunn's) and 14 (Buecler's). The Court stayed briefing of these motions, however, pending resolution of the motion to remand. Consistent with this Court's previous ruling, oppositions to the motions to dismiss must be filed within 15 days of the date of this memorandum and order.

Levitt v. Fax.com, Inc., 857 A.2d 1089 (Md. 2004). After the case was remanded to the Circuit Court, Plaintiff filed a "Second Amended Class Action Complaint" on February 23, 2005. This pleading added several new defendants, including Bunn and Beucler, and also added new allegations specific to those defendants. Defendant Bunn then removed the action to this Court on April 7, 2005, pursuant to provisions of the recently enacted "Class Action Fairness Act of 2005" (CAFA).

Subject to other limitations not relevant here, CAFA generally grants district courts original jurisdiction over any class action where the aggregate amount in controversy exceeds $5,000,000, any member of the class of plaintiffs is a citizen of a state different from any defendant, and the plaintiff class is 100 or more in number. See 28 U.S.C. 1332(d). There is no dispute that the instant suit satisfies these jurisdictional criteria. Plaintiff moves to remand the action on the ground that CAFA is not applicable to this suit as it was "commenced" prior to CAFA's enactment.

CAFA, by its express terms, only applies to civil actions "commenced on or after the date of enactment of this Act." Pub.L. 109-2, § 9, Feb. 18, 2005, 119 Stat. 14. CAFA was enacted on February 18, 2005, well after the filing of the original complaint but well before the filing of the amended complaint that added Defendants Buecler and Bunn. The question before this Court, therefore, is whether adding new defendants to a class action can be considered the "commencement" of a civil action for

purposes of CAFA.

Before reaching that question, however, the Court must reiterate the legal standard under which a motion to remand is decided. There is a long-standing rule that the removing party has the burden to establish the removability of an action to federal court. See Mulcahey v. Columbia Organic Chemicals Co., Inc., 29 F.3d 148, 151 (4th Cir. 1994) ("The burden of establishing federal jurisdiction is placed upon the party seeking removal.") (citing Wilson v. Republic Iron & Steel Co., 257 U.S. 92 (1921)). Looking to portions of the legislative history of CAFA, some courts have concluded that, for class actions removed under CAFA, Congress has shifted this burden to the party seeking remand. See, e.g., Natale v. Pfizer, Inc., 379 F. Supp. 2d 161, 168 (D. Mass. 2005). Defendants urge this Court to adopt a similar approach.

Notwithstanding language in the Congressional hearings that reflects a view on the part of some legislators that CAFA should be read broadly and with a strong preference for opening up federal forums for class action suits, Congress failed to include language in the statute effecting that view. As one court has aptly observed, "[h]ad Congress intended to make a change in the law with respect to the burden of proof, it would have done so expressly in the statute. . . . It is beyond our province to rescue Congress from its drafting errors . . . ." Schartz v. Comcast Corp., Civil Action No. 05-2340, 2005 WL 1799414 at *7

(E.D. Pa. July 28, 2005). See also Judy v. Pfizer, Inc., 4:05CV1208RWS, 2005 WL 2240088 at *2 (E.D. Mo. Sept. 14, 2005) ("The omission of a burden of proof standard in the CAFA does not create an ambiguity inviting courts to scour its legislative history to decide the point."). Finding nothing in the statute to shift the burden, this Court concludes that the burden remains on the party opposing remand.

Turning back to the question at hand, the Court concludes that, in this instance, Defendants have met their burden.

Since the passage of CAFA, numerous courts have addressed the issue of whether the filing of an amended complaint after February 18, 2005, in an action that was originally filed prior to February 18, 2005, can be considered the commencement of a civil action. In one of the leading decisions, Judge Easterbrook considered the contention that an amendment to a class action that causes a "substantial change" in the class definition "commences" a new case. Knudsen v. Liberty Mut. Ins. Co., 411 F.3d 805, 806 (7th Cir. 2005). Judge Easterbrook ultimately rejected that contention but, in so doing, opined that the addition of "a new claim for relief (a new "cause of action" in state practice), the addition of a new defendant, or any other step sufficiently distinct that courts would treat it as independent for limitations purposes, could well commence a new piece of litigation for federal purposes even if it bears an old

docket number for state purposes. Removal practice recognizes this point: an amendment to the pleadings that adds a claim under federal law . . . or adds a new defendant, opens a new window of removal." 411 F.3d at 807 (emphasis added). Judge Easterbrook reiterated this opinion two months later in Schorsch v. Hewlett-Packard Co., 417 F.3d 748, 749 (7th Cir. 2005) (characterizing Knudsen as holding that while "routine amendment to the complaint does not commence a new suit . . . a defendant added after February 18 could remove because suit against it would have been commenced after the effective date").

Adams v. Federal Materials Co., Inc., Civ. A. 5:05CV-90-R, 2005 WL 1862378 (W.D. Ky. July 28, 2005), is the first decision of which this Court is aware that directly addressed the removal of a class action based upon the addition of a new defendant after the enactment of CAFA. In Adams, the original complaint was filed in March of 2004. In response to the filing of a third-party complaint by one of the defendants, the plaintiffs amended their complaint on April 1, 2005, to add the third-party defendant as a defendant. The third-party defendant, now a defendant, joined with the other defendants and removed the case to federal court pursuant to the provisions of CAFA. Plaintiff moved to remand arguing, as do Plaintiffs here, that the action commenced when the original complaint was filed in March 0f 2004.

In denying the motion to remand, the Adams court relied in

part on the above-quoted language in Knudsen. The court also drew an analogy from the rules designating the commencement of an action for statute of limitation purposes. The court noted that "a party brought into court by an amendment, and who has, for the first time, an opportunity to make a defense to the action, has a right to treat the proceeding, as to him, as commenced by the process which brings him into court." Id. at *3.[2] This Court finds the reasoning of Knudsen and Adams persuasive.

The only case cited by Plaintiff in support of remand is

[2] This analogy to the "commencement" of actions for statute of limitation purposes also implicates the "relation back" principles of Rule 15(c). Under these principles as applied in the context of the removability of a class action, a defendant added post-enactment of CAFA would not be able to remove if: 1) the claim asserted in the amended pleading arose out of the same conduct as the original pleading; 2) the added party had such notice prior to February 18, 2005, of the institution of the action so "that the party would not be prejudiced in maintaining a defense on the merits," and 3) the added party "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party." Fed. R. Civ. P 15(c). Several courts have looked to Rule 15(c) for guidance as to whether the filing of an amended complaint "commences" an action for purposes of CAFA. See, e.g., New Century Health Quality Alliance, Inc., No. 05-055-CVWSOW, 2005 WL 2219827 (W.D. Mo. Sept. 13, 2005) (remanding case after concluding that amended complaint adding new defendant related back to filing of original complaint because the amendment merely corrected a misnomer); Senterfitt v. Suntrust Mort., Inc., CV 105-059, 2005 WL 2100594 (S.D. Ga. August 31, 2005) (denying motion to remand after concluding that amended complaint defining significantly larger class of plaintiffs cannot relate back). Here, although Plaintiffs mention that Defendant Bunn was the President of one of the pre-enactment defendants, they make no argument that the newly added defendants had adequate notice that they were intended as defendants in the original complaint.

Prichett v. Office Depot, Inc., 404 F.3d 1232 (10th Cir. 2005).[3] Prichett is inapposite as it addressed an issue not raised here. The removing defendants in Prichett contended that when a preexisting state action is removed to federal court, it is "commenced" in federal court as of the date of removal. 420 F.3d at 1094. The Tenth Circuit rejected that contention, observing generally that "a cause of action is commenced when it is first brought in an appropriate court, which here was when it was brought in state court." 420 F.3d at 1094. While holding that the act of removal does not commence an action for the purpose of CAFA, the decision provides no guidance as to whether an amendment to the previously filed complaint might do so. See Plummer v. Farmers Group, Inc., CIV-05-242-WH, 2005 WL 2292174 at *2 (E.D. Okla. Sept. 15, 2005) (rejecting similar argument to that raised here by noting that Pritchett court was not faced with question as to whether amendment of complaint should be "deemed to commence a lawsuit").

For all of the above-stated reasons, the Court concludes that Plaintiffs Motion to Remand must be denied. A separate order consistent with this memorandum will issue.

[3] This decision cited by Plaintiffs was amended and superceded by Prichett v. Office Depot, Inc., 420 F.3d 1090 (10th Cir. 2005). The changes in the superceding opinion are immaterial to this case.

/s/

William M. Nickerson
Senior United States District Judge

Dated: October 12, 2005