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United States District Court,  
E.D. Tennessee,  
at Greeneville.

Erica Miller, et al., Plaintiffs,  
v.  
Draftkings, Inc., Defendant.

Case No. 2:16-cv-103

|  
Signed 06/30/2016

## **ORDER**

[HARRY S. MATTICE, JR.](#), UNITED STATES DISTRICT JUDGE

\*1 Before the Court is Plaintiff's Motion to Remand and for Award of Attorney's Fees and Costs (Doc. 12). For the reasons stated herein, Plaintiff's Motion will be **GRANTED in part and DENIED in part**, and this case will be **REMANDED** to the Chancery Court of Greene County, Tennessee.

### **I. BACKGROUND**

Plaintiff filed her Complaint on April 1, 2016 in the Chancery Court of Greene County, Tennessee. Therein, Plaintiff alleges that Defendant DraftKings, Inc. ("Defendant") operates a daily and weekly fantasy sports website that amounts to an unlawful gambling enterprise and/or lottery under [Tenn. Code. Ann. § 29-19-105](#). (Doc. 2-2 at 12–13). Her alleged damages arise from her husband's gambling addiction, which resulted in a net loss of \$46,440.00 between January 1, 2015 and April 6, 2015. (*Id.* at 11–12). In her prayer for relief, Plaintiff requests that the Court:

1. Issue service of process and serve the Defendant;
2. Empanel a jury to try this matter for all issues so triable;
3. Grant any reasonable request to Amend Plaintiff's Complaint to conform to the discovery and evidence obtained in this action;
4. Find that Defendant has violated [TENN. CODE ANN. § 29-19-105](#) and award Plaintiff compensatory damages, exclusive of interest and cost, in the total amount of \$46,440.00;
5. Award pre-and post-judgment interest in the amount of 10% per annum pursuant to [TENN. CODE ANN. § 47-14-123](#) in amount according to the proof at trial;
6. Award costs and expenses incurred in this action pursuant to Rule 54 of the Tennessee Rules of Civil Procedure; [and]
7. Grant the Plaintiff such further relief as the Court may deem just and proper.

(*Id.* at 14–15). Notably, nowhere in Plaintiff's Complaint does she request punitive damages or plead facts that would entitle her to such an award.

Defendant removed this action on April 29, 2016, claiming that this Court has subject matter jurisdiction pursuant to [28 U.S.C. § 1332](#). (Doc. 2 at 2). On May 17, 2016, Plaintiff filed a Motion to Remand and for Award of Attorney's Fees and Costs (Doc. 12). Therein, Plaintiff does not contest that the Parties are citizens of different states, but rather claims that the amount in controversy does not exceed the \$75,000.00 jurisdictional threshold. Specifically, Plaintiff argues that Defendant's claim that the Court should consider punitive damages in its amount-in-controversy analysis is misguided. She also requests that the Court award her attorney's fees and costs associated with her Motion to Remand pursuant to [28 U.S.C. § 1447\(c\)](#).

## II. ANALYSIS

### A. Remand

The sole issue with respect to the propriety of Defendant's removal is whether the amount in controversy in this action exceeds \$75,000.00. Typically, "[i]f 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." 28 U.S.C. § 1446(c)(2); see also *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938) ("If [plaintiff] does not desire to try his case in federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove."). In this case, Plaintiff's Complaint states that the amount in controversy is \$46,440.00.<sup>1</sup> (Doc. 2-2 at 14). If state law permits a plaintiff to recover damages in excess of the amount demanded, however, a defendant may assert a different amount in controversy in its notice of removal. See, e.g., *McPherson v. Air Evac EMS, Inc.*, 2014 WL 5461542 at \*2 (E.D. Tenn. Oct 27, 2014) ("However, the Court recognizes the concern that state counterparts to [Rule 54\(c\) of the Federal Rules of Civil Procedure](#) might enable a plaintiff to claim in his or her complaint an amount lower than the federal amount-in-controversy requirement in an attempt to defeat federal jurisdiction, while actually seeking and perhaps obtaining damages far in excess of the federal requirement.") (internal quotation marks and citation omitted).

\*2 Plaintiff argues at length that Tennessee law does not permit a plaintiff to recover a monetary award in excess of the amount specifically enumerated in her Complaint, (doc. 12-1 at 6–8), but this argument has been squarely rejected by both the United States Court of Appeals for the Sixth Circuit and the Tennessee Court of Appeals. *Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 871 (6th Cir. 2000) ("State counterparts to [Fed. R. Civ. P. 54\(c\)](#) might enable a plaintiff to claim in her complaint an amount lower than the federal amount in controversy but nevertheless seek and recover damages exceeding the amount prayed for. Tennessee has one such rule."); *Cardella v. Cardella*, 2008 WL 4367306 at \*6 (Tenn. Ct. App. Sept. 17, 2008) ("Both [rule 15.02](#) and [54.03 of the Tennessee Rules of Civil Procedure](#) permit relief beyond the pleading, if the issue is litigated and the opposing party has the opportunity to defend."). Plaintiff's first argument is accordingly without merit—but that does not end the Court's analysis.

The burden of establishing subject matter jurisdiction is on the party seeking removal. *Shupe v. Asplundh Tree Expert Co.*, 566 Fed.Appx. 476, 478 (6th Cir. 2014). As removal statutes are to be strictly construed, all doubts regarding the propriety of removal should be resolved in favor of remand. *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 493 (6th Cir. 1999). In order to establish this Court's jurisdiction under [28 U.S.C. § 1332](#), Defendant must "show by a preponderance of the evidence that the amount in controversy requirement has been met." *Hayes v. Equitable Energy Res. Co.*, 266 F.3d 560, 572 (6th Cir. 2001). Defendant presents four principal arguments supporting its theory that the amount in controversy in this case exceeds \$75,000.00. Each will be discussed in turn.

First, Defendant argues that Plaintiff's initial settlement offer is strong evidence that the amount in controversy exceeds \$75,000.00. While Plaintiff claims that this lawsuit is only worth \$46,440.00, Plaintiff offered to settle this case for \$74,000.00. (Doc. 19 at 8). Oftentimes, courts find that settlement offers so close to the jurisdictional threshold establish that the amount in controversy actually exceeds \$75,000.00. See, e.g., *Shupe*, 566 Fed.Appx. at 481 ("[T]he fact that Plaintiff attempted to settle the claim for less than the amount in controversy is not probative of the true amount because litigants often settle claims for less than the amount in controversy... [A]n offer falling just below the jurisdictional threshold tends to suggest that the amount in controversy exceeds this threshold, especially since parties routinely offer and accept settlement amounts significantly below the total amount placed into controversy.") (internal quotation marks and citations omitted).

\*3 This argument falls short of establishing that the amount in controversy exceeds \$75,000.00 for two reasons. First, while it is true that parties often settle for less than the amount in controversy, it is also true that plaintiffs often enter into settlement negotiations with demands in excess of the amount in controversy. See *Smith v. Phillips & Jordan, Inc.*, 2011 WL 250435 at \*2 (E.D. Ky. Jan. 24, 2011) ("There are, after all, two schools of thought with respect to settlement demands. The demand might be significantly more than the case is actually worth. As this Court said in *May*, high-balling the initial settlement demand is Negotiation 101.") (internal quotation marks and citations omitted). Second, and relatedly, Defendant has offered no evidence that Plaintiff's \$74,000.00 offer was an attempt to settle for less than the amount in controversy. In fact, the record reflects that Plaintiff was actually high-balling the initial settlement demand. In an email exchange between the Parties' counsel, Plaintiff's counsel described the \$74,000.00 settlement offer as follows:

I do want to get one thing clear—my client's initial demand of \$74,000 is not a demand based on the legal ability to obtain damages beyond the dollar figure demanded her complaint, such as attorney's fees or any other sort of damages. We understand that our complaint is limited to \$46,440.00 in damages ... and this is

the most my client may obtain in any favorable judgment. Instead, we simply believed that it should be worth our initial demand to your client to settle, given the case from your client's perspective of litigation costs and the prospect of collateral estoppel in the MDL. (Apparently, your client disagrees). So just to be clear, our initial demand does not somehow magically convert this matter to a controversy in excess of the diversity jurisdiction amount; instead, Mrs. Miller's complaint controls that aspect.

(Doc. 20-1 at 2). Accordingly, the Court finds that Plaintiff's settlement offer is at best very weak evidence that the amount in controversy exceeds \$75,000.00.

Second, Defendant argues that in addition to the \$46,440.00 in alleged compensatory damages, this Court must include the potential for punitive damages. Indeed, the Sixth Circuit has squarely held that "[w]hen determining the jurisdictional amount in controversy in diversity cases, punitive damages must be considered ... unless it is apparent to a legal certainty that such cannot be recovered." *Hayes*, 266 F.3d at 572. Defendant then cites several cases in which district courts properly considered punitive damages in their amount in controversy analyses. (Doc. 19 at 10). In all of the cases to which Defendant cites, however, the plaintiff expressly sought punitive damages in his or her complaint. *See, e.g., Pendergrass v. Time Ins. Co.*, 2010 WL 989154 at \*2 (W.D. Ky. Mar. 12, 2010) ("Pendergrass's Complaint alleges he is entitled to punitive damages."); *Hahn v. Auto-Owners Ins. Grp.*, 2006 WL 2796479 at \*1 (E.D. Tenn. Sept. 27, 2006) ("In her complaint, plaintiff seeks the following damages ... [c]ompensatory and/or punitive damages for defendant's breach of fiduciary duties to the Plaintiff and Class members.") (internal quotation marks omitted). In stark contrast, Plaintiff in this action has not sought punitive damages, and a fair reading of the complaint does not elicit facts that would entitle Plaintiff to such damages. *Shupe*, 566 Fed.Appx. at 478 ("A court must conduct a 'fair reading' of the allegations in the complaint to determine the amount in controversy.") (quoting *Hayes*, 266 F.3d at 573). Because Plaintiff is the master of her complaint, this Court will not, absent additional evidence that punitive damages are actually sought, allow Defendant to dictate Plaintiff's causes of action to conjure federal subject matter jurisdiction. *See Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 809 n.6 (1986) ("Jurisdiction may not be sustained on a theory that the plaintiff has not advanced."); *see also Ferrara v. 21st Century N. Am. Ins. Co.*, 2014 WL 3889470 at \*3 (D. Ariz. Aug. 7, 2014) ("Plaintiff does not seek monetary punitive damages ... Therefore, the Court will not include punitive damages and this argument falls short of establishing the requisite amount in controversy.").

\*4 In determining the amount in controversy, "a federal court should consider the plaintiff's motives; should look at prior lawsuits *between the parties*, if any; should look at awards in similar lawsuits between other parties; should consider any other evidence the defendant may have; and should exercise its common sense." *Hahn*, 2006 WL 2796479 at \*2 (emphasis added) (internal quotation marks and citations omitted). Considering these factors, Defendant only presents evidence of prior lawsuits to support its claim that Plaintiff actually seeks punitive damages. Defendant has identified another substantially similar class action suit ("the Walls litigation") filed in Tennessee by Plaintiff's counsel in which the plaintiffs sought punitive damages. (Doc. 19 at 4–5). Because Plaintiff's counsel sought punitive damages in that case, Defendant argues, it follows that the Court should consider punitive damages in its amount in controversy analysis in this case. (*Id.* at 10). Unfortunately for Defendant, Plaintiff is not a party in the Walls litigation. While this Court may consider prior lawsuits *between the parties* in evaluating the amount in controversy, the Court has found no authority enabling it to consider lawsuits filed by Plaintiff's counsel to which Plaintiff is not a party. Accordingly, the court does not find persuasive the argument that the Walls litigation imputes a punitive damages claim to Plaintiff's case.

In short, Defendant has failed to convince the Court that punitive damages should be included in its amount-in-controversy analysis because Defendant has offered nothing more than speculation that Plaintiff might seek such relief. *See Butler v. Rue 21, Inc.*, 2011 WL 882782 at \*7 (E.D. Tenn. Mar. 11, 2011). As previously noted by the Sixth Circuit, "[Plaintiff's] freedom to choose state law ... would be significantly undermined by a rule that granted defendants the freedom to safely second guess [Plaintiff's] decision and remove to federal court on the basis of claims that could have been pled, but were not." *Warthman v. Genoa Twp. Bd. of Trs.*, 549 F.3d 1055, 1063 (6th Cir. 2008).

Third, Defendant argues that "[n]othing in [Plaintiff's] complaint specifically disclaims seeking punitive damages or attorneys' fees, nor has she filed any stipulation to that effect." (Doc. 19 at 14). This argument ignores the relevant standard. It is well-established that it is Defendant's burden to show by a preponderance of the evidence that removal was proper. *Hayes*, 266 F.3d at 572. Absent controlling authority to the contrary, the Court refuses to hold that Plaintiff's failure to stipulate that damages do not exceed \$75,000.00 establishes federal subject matter jurisdiction.

Finally, Defendant argues that more than \$75,000.00 is in controversy because Plaintiff's complaint requests that the Court "[g]rant the Plaintiff such further relief as the Court may deem just and proper," and "[g]rant any reasonable request to Amend Plaintiff's Complaint to conform to the discovery and evidence obtained in this action." (Doc. 2-2 at 14–15). Both requests for relief, however, are insufficient to establish that the amount in controversy exceeds the jurisdictional threshold. First, the Court

will not assume that Plaintiff seeks more than \$75,000.00 based on the ubiquitous boilerplate request that the Court grant any relief it may deem just and proper. To do so would allow a defendant in any case in which diversity of citizenship exists to automatically prove that more than \$75,000.00 is in controversy, thus enabling it to remove the case to federal court. Such a result is beyond the limited scope of the removal statute. *Butler*, 2011 WL 882782 at \*5 (“The removal statute is construed strictly and narrowly against removal in order to avoid encroachment on state court jurisdiction.”). Second, that Plaintiff may at some point amend her Complaint to include a punitive damages claim is not a proper consideration at this juncture. *Hayes*, 266 F.3d at 573 (“Thus, when determining whether [Defendant] has met its burden of showing, by a preponderance, that more than \$75,000 is in controversy, we review the damages sought by Plaintiffs at the time of removal—i.e., the damages sought by Plaintiffs *in their original complaint*.”) (emphasis added). If, as Defendant fears, Plaintiff ultimately amends her Complaint, the proper time to remove is not now, but rather is within thirty days of Defendant’s receipt of such an amendment. 28 U.S.C. 1446(b)(3).

\*5 The Court thus finds that Defendant has failed to show by a preponderance of the evidence that the amount in controversy exceeds \$75,000.00. Accordingly, this Court lacks subject matter jurisdiction under 28 U.S.C. § 1332, and the case must be **REMANDED** to the Chancery Court of Greene County, Tennessee.

### **B. Attorney’s Fees and Costs**

Finally, Plaintiff petitions the Court to award her attorney’s fees and costs pursuant to 28 U.S.C. § 1447(c). “Absent unusual circumstances, courts may award attorney’s fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal ... In applying this rule, district courts retain discretion to consider whether unusual circumstances warrant a departure from [this] rule.” *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). Had Defendant relied solely on its punitive damages argument, the Court would be inclined to award attorney’s fees. Defendant, however, presented the Court with case law supporting the proposition that a settlement offer just below the jurisdictional threshold is compelling evidence that the amount in controversy exceeds \$75,000.00. See *Shupe*, 566 Fed.Appx. at 481. Given that Plaintiff’s initial settlement offer was for \$74,000.00, the Court cannot conclude that Defendant lacked an objectively reasonable basis for seeking removal. Accordingly, Plaintiff’s motion for attorney’s fees and costs will be **DENIED**.

### **III. CONCLUSION**

For the reasons stated herein, Plaintiff’s Motion to Remand and for Attorney’s Fees and Costs (Doc. 12) is **GRANTED** to the extent it seeks a remand to state court, and **DENIED** to the extent it seeks attorney’s fees and costs associated with its motion. Accordingly, this case is hereby **REMANDED** to the Chancery Court of Green County, Tennessee.

**SO ORDERED** this 30th day of June, 2016.

#### Footnotes

<sup>1</sup> Defendant does not argue that Plaintiff’s claim was made in bad faith, but does argue that the net sum paid by Plaintiff’s husband to enter Defendant’s fantasy sports contests was \$57,046.80. (Doc. 19 at 3 n.1). As will be made clear *infra*, the difference between compensatory damages of \$46,440.00 and \$57,046.80 is immaterial to the Court’s analysis.