IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

LORIE J. MARSHALL and DEBRA RAMIREZ, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
v.	)	**Case No. 08-CV-0591-MJR**
H&R BLOCK TAX SERVICES INC.,	)	
Defendant.	)	

MEMORANDUM AND ORDER

REAGAN, District Judge:

I. Introduction and Background

On August 18, 2008, Defendant H&R Block Tax Services, Inc. ("Block") removed this action from the Madison County, Illinois Circuit Court asserting federal subject matter jurisdiction on the basis of 28 U.S.C. § 1332, as amended by the Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.) (Doc. 2). This putative class action is based on Block's sale of the "Peace of Mind" ("POM") guarantee, which is an extended-warranty product under which consumers are paid additional taxes owed as a result of a tax-preparation error.

Plaintiffs have moved to remand, arguing that Block's removal was improper because the partial grant of Block's motion for decertification does not constitute the commencement of a new case under CAFA. Plaintiffs contend that the state court's August 5, 2008 decertification order narrowed the action from a multistate class to a thirteen-state class and decertified the defendant class. They assert that it did not create more liability for Block or commence a new action. Block

responds that the decertification order greatly increased its potential liability for POM sales with which it had no involvement, which commenced a new, removable cause of action.

The original complaint, filed January 18, 2002, alleges statutory fraud by omission in violation of the Illinois Consumer Fraud Act ("ICFA") and "the substantially similar statutes of specific sister states" and breach of fiduciary duty. The original complaint defined the proposed classes as:

> Plaintiff Class:
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> All persons who were charged a fee for the "Peace of Mind" guarantee by H&R Block or a defendant H&R Block class member.
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> Defendant Class:
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> All entities that (a) have done or are doing business in the United States as H&R Block, and (b) charge a fee for the "Peace of Mind" guarantee in connection with tax preparation services.

Complaint, ¶ 26. The First Amended Complaint, filed June 7, 2002, alleges statutory fraud - selling insurance without a license in violation of the ICFA and "the substantially similar statutes of specific sister states"; statutory fraud - unfair practice; statutory fraud by omission; statutory fraud - cramming; and breach of fiduciary duty. The definition of the proposed classes was unchanged in the First Amended Complaint.

Plaintiffs move to remand this action (Doc. 9). The matter is fully briefed and ready for disposition

II. Legal Standards

Removal of actions from state court to federal court is governed by 28 U.S.C. § 1441, which provides that "any civil action brought in a State court of which the district courts of the United States may have original jurisdiction, may be removed by defendant or the defendants, to the

district court of the United States for the district and division embracing the place where such action is pending." **28 U.S.C. § 1441(a)**. In cases to which the CAFA applies, it gives district courts original jurisdiction over a civil class action with an amount in controversy in excess of $5,000,000. **28 U.S.C. § 1332(d)**. As a result, class actions fitting the scope of CAFA are removable in accordance with 28 U.S.C. § 1446. ***See* 28 U.S.C. § 1453(b)**.

The defendant has the burden of establishing that an action is removable, and doubts concerning removal must be resolved in favor remand to the state court. ***See Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005)**. "The CAFA is not retroactive and therefore only applies to class actions which are 'commenced on or after the date of enactment' of the statute, February 18, 2005." ***Oshana v. Coca-Cola Co.*, 472 F.3d 506, 511 (7th Cir. 2006) (quoting Pub.L. 109-2, § 9, 119 Stat. 14)**. The Seventh Circuit has held numerous times that "creative lawyering will not be allowed to smudge the line drawn by [the CAFA]: class actions 'commenced' in state court on or before February 18, 2005, remain in state court." ***Schorsch v. Hewlett-Packard Co.*, 417 F.3d 748, 751 (7th Cir. 2005)**.

In general, a class action is commenced for purposes of removal under the CAFA on the date it originally was filed in state court. ***See Knudsen v. Liberty Mut. Ins. Co.*, 411 F.3d 805, 806 (7th Cir. 2005) ("*Knudsen I*")**. Under Illinois law, which the Court applies to the current proceeding, the filing of a complaint in a civil action "commences" a suit. ***Pfizer, Inc. v. Lott,* 417 F.3d 725, 726 (7th Cir. 2005); 735 ILCS 5/2-201; *Kohlhaas v. Morse,* 36 Ill.App.2d 158 (Ill.App. 1962)**. In some instances, an amendment to a complaint may commence a class action after the effective date of the CAFA so as to make the action removable under the statute. However, "[a]n amended complaint kicks off a new action only if, under the procedural law of the state in which the suit was filed, it does not 'relate back' to the original complaint." ***Santamarina v. Sears, Roebuck***

***& Co.*, 466 F.3d 570, 573 (7th Cir. 2006) (citations omitted)**.

III. Analysis

The amended class definitions at issue arose not - as they typically do - from a motion by Plaintiffs to amend or supplement their complaint, but from the state court's ruling on the defendants' November 22, 2006, motion to decertify the previously certified plaintiff and defendant classes. This is a matter of first impression for this Court, and Block has not submitted, nor has the Court located, any other action that was removed to federal court in this context. Even assuming that a case exists where the facts would support removal, that is not the case before this Court, where based on the record and the applicable caselaw, the Court finds that this matter must be remanded.

Block contends that Plaintiffs' amended class definitions commenced a new action by expanding the scope of Block's potential liability to include the acts of entities merely affiliated with Block as well as independent franchisees. Plaintiffs argue that they did not amend their complaint and that the modifications of the classes occurred in connection with Block's motion for decertification. Block, in support of its contentions, refers the Court to the order of the state court judge, Hon. Ralph Mendelsohn, entered August 5, 2008. Doc. 2, Exhibit J.

Therein, Judge Mendelsohn stated that the matter was before him on Defendants' Motion to Decertify based on *Avery v. State Farm*.[1] *Id*. Judge Mendelsohn recited that he had, on August 27, 2003, entered an order granting Plaintiffs' motion for class certifications and certifying three Plaintiff Classes and a Defendant Class. *Id*., p. 2. He explained that the defendants moved to decertify the Plaintiff Classes and maintained that he had only three options available to him: (1)

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[1] In ***Avery***, the Illinois Supreme Court reversed a lower court's certification of a nationwide class of plaintiffs where Illinois law was applied to the claims of the entire class in disregard of the contrary law of other states. ***Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 824 (Ill. 2005)**.

decertify the Classes in their entirety; (2) limit the Classes to Illinois residents; or (3) deny the decertification motion and leave the Classes unchanged. *Id*., p. 16. Judge Mendelsohn then noted that Plaintiffs, in their response, contended that the court's options were not so limited and that the classes could be modified to promote manageability. *Id*. Judge Mendelsohn agreed with Plaintiffs and modified the Plaintiff Classes, narrowing the action from a multistate class to a thirteen-state class. *Id*., p. 17. As modified by Judge Mendelsohn, the Plaintiff Classes are as follows:

1. All persons who reside in Arizona, California, Colorado, Connecticut, Florida, Illinois, Massachusetts, Michigan, Missouri, New Jersey, New York, North Carolina and Pennsylvania who were charged a separate fee for "Peace of Mind" by H&R Block or any affiliated entity from January 1, 1997 to the date Class notice issues;
2. All persons who reside in Arizona, California, Colorado, Connecticut, Illinois, Massachusetts, New Jersey, New York, North Carolina and Pennsylvania and who were charged a separate fee for "Peace of Mind" by H&R Bock [sic] or any affiliated entity that was not licensed to sell insurance from January 1, 1997 to the date Class notice issues; and
3. All persons who had a charge for "Peace of Mind" posted to their bills by H&R Bock [sic] or any affiliated entity from January 1, 1997 to the date Class notice issues. Doc. 2, Exhibit J, p. 18.

Judge Mendelsohn reasoned that limiting the Plaintiff Classes to the residents of the listed states would "promote manageability and make the common legal issues more predominant because it [would] eliminate most, if not all, of the differences in state law upon which Defendants relied in opposing class certification[.]" *Id.*, p. 17. ***See Avery*, 835 N.E.2d at 853**.

Block contends that it did not create the basis for removal but provides no analogous caselaw or other relevant authority and very little argument on this salient point. Block's reliance on ***Greer v. City of Chicago*, 1996 WL 169414 (N.D.Ill. 1996)** is misplaced. ***Greer*** is not a class action so there is no issue of removal based on amending class definitions or class decertification. ***Greer*, 1996 WL 169414, 1**. In ***Greer***, the defendant filed a motion to dismiss whereupon the plaintiff amended his complaint adding Fourteenth Amendment claims. ***Id***. The defendant removed

the case - which then contained a federal constitutional claim - and the plaintiff did not seek to remand it to state court. ***Id***. ***Greer*** apparently stands for the less-than-novel proposition that a case can be removed if the plaintiff files an amended complaint adding a federal constitutional claim after the defendant moves to dismiss. It cannot be read as supporting Block's argument. Here, there is no motion to dismiss, no amended complaint and no addition of a federal claim that would support removal. In the context of the defendants' motion for decertification, the state court accepted proposed modifications couched within Plaintiffs' response to the defendants' motion. The Court finds no basis for concluding that a new action was commenced thereby.

Furthermore, the amendments to the class definitions relate back to the amended complaint because they arose from the same transaction or occurrences. Under Illinois's relation-back law, in order for an amended pleading to relate back, "the cause of action set out in the amended pleading need not be substantially the same as that stated in the original pleading." ***In re Audi,*** **2006 WL 1543752, 3 (N.D.Ill. 2006) (citing *Cannon v. Bryant,* 554 N.E.2d 489, 491 (Ill.App.Ct. 1990))**. "The criterion of relation back is whether the original complaint gave the defendant enough notice of the nature and scope of the plaintiff's claim that he shouldn't have been surprised by the amplification of the allegations of the original complaint in the amended one." ***Santamarina,*** **466 F.3d at 573 (citations omitted)**. Under Illinois law, as under federal law, an amendment "relates back" when it arises out of "the same transaction or occurrence set up in the original pleading." **735 ILCS 5/2-616(b); *Chandler v. Illinois Central R.R.,* 798 N.E.2d 724, 732 (Ill. 2003); *see* FED. R. CIV. P. 15(c); *Schorsch,* 417 F. 3d at 751; *Delgado-Brunet v . Clark,* 93 F.3d 339, 343 (7th Cir. 1996)**. Illinois courts have also found that "an amendment relates back ... when the original complaint 'furnished to the defendant all the information necessary ... to prepare a defense to the claim subsequently asserted in the amended complaint.'" ***Boatmen's National***

***Bank of Belleville v. Direct Lines, Inc.*, 656 N.E.2d 1101, 1107 (Ill. 1995); *Pierce v. Joe Keim Builders, Inc*., 653 N.E.2d 928, 931(Ill.App.Ct. 1995) (citations omitted) ("Thus, an amended complaint relates back only when the original complaint supplies defendant with all of the information necessary to prepare the defense to the claim asserted in the amended pleading.")**. The focus is not on the nature of the cause of action pled but on the identity of the transaction, *i. e.*, "...if the defendant has been made aware of the occurrence or transaction which is the basis for the claim, he will be able to defend against the plaintiff's claim, whatever theory it may be predicated upon." ***Pierce*, 653 N.E.2d at 931 (citations omitted)**. "Moreover, courts repeatedly have emphasized that Illinois'[s] relation-back doctrine is to be applied liberally." ***In re Audi* 2006 WL 1543752 at 3 (citing *Maliszewski v. Human Rights Com'n*, 646 N.E.2d 625, 627-28 (Ill.App.Ct. 1995) (collecting cases)**.

It is evident that Judge Mendelsohn found that his modification of the definition of the Plaintiff Classes and decertification of the Defendant Class related back to Plaintiffs' amended complaint. ***See, e. g., Bemis v. Allied Property & Cas. Ins. Co.*, 2006 WL 1064067, 6 (S.D.Ill. 2006)**. Judge Mendelsohn expressly set forth his rationale for *limiting* the Plaintiff Classes to make the action more manageable and to eliminate from the action those states where applicable laws differed significantly. He also adopted Plaintiffs' view that a Defendant Class was "unnecessary and unwieldy." Mendelsohn Order, p. 16. Judge Mendelsohn clearly believed that he was eliminating *Avery*-barred claims and making the action more manageable rather than commencing a new suit.

Lastly, Block asserts that ***Knudsen v. Liberty Mut. Ins. Co.*, 435 F.3d 755 (7th Cir. 2006) ("*Knudsen II*")** supports its argument that the modifications of class definitions greatly

increased its liability, thus commencing a new suit. Block contends that Plaintiffs pursued a defendant class because each entity, *i. e.,* franchisees, subsidiaries, company-owned Block offices and other former defendants, was involved in some POM sales while no entity was involved in all sales. Now, according to Block, with the inclusion of the phrase "all affiliated entities" in the amended class definition, Plaintiffs seek "to hold *one* entity, Block Tax Services, liable for *all* POM sales." Doc. 15, p. 14.

Plaintiffs respond that the amended complaint adequately notified all defendants that each were individually liable for the conduct of dismissed entities. They contend that the amended complaint charges that the defendants acted in concert and were jointly and severally liable for the alleged deceptive and unfair practices. Plaintiffs argue that the only modifications to the amended complaint occurred through standard class certification litigation and that none of these changes significantly altered the facts which form the basis of the case.

Block's argument, based on ***Knudsen II***, fails to establish that this action is removable. ***Knudsen*** was a class action suit, filed long before the CAFA's enactment, in which the plaintiffs alleged that the defendant systematically underpaid claims for medical services. In the first round of this litigation, ***Knudsen I,*** the Seventh Circuit upheld the district court's remand of the action, holding that the change in the class definition to include individuals insured not only by the defendant, but also by one of the defendant's subsidiaries, did not commence a new suit under the CAFA. ***Knudsen I* at 808**. After the Seventh Circuit's decision, the plaintiffs again amended their complaint, seeking to hold the defendant liable for all policies issued by any of its subsidiaries or affiliates. ***Knudsen II* at 755**. In reversing the lower court's decision to remand, the Seventh Circuit explained that the prior complaint had not even hinted that the defendant might be

accountable for underpayments made by a company it had acquired on claims that had been adjusted as long as 15 years earlier under a distinct system. ***Id.* at 758**. Having found that an effort to recover on account of these policies was a distinct claim for relief, the Court held that "a novel claim tacked on to an existing case commences new litigation for purposes of the Class Action Fairness Act." ***Id***.

First, the instant action differs from both ***Knudsen I*** and ***II*** because, as explained above, changes to class definitions and certification occurred not as a result of Plaintiffs' amending their complaint but because Block moved for decertification. Second, even if the emendations to the class definition were done at Plaintiff's behest, they are insufficient under Seventh Circuit caselaw to commence a new suit. ***Knudsen I*, 411 F.3d at 807; *Schorsch*, 417 F.3d at 750 (changing a class's definition or membership does not commence new suit under CAFA)**.

At first glance, it might appear that Block's liability, like that of the defendant in ***Knudsen II***, increased after the state court's action. However, the instant action is more analogous to ***Knudsen I*** where a change in the class definition to include individuals insured not only by the defendant, but also by one of the defendant's subsidiaries, did not commence a new suit. The changes in class definitions herein do not represent "a novel claim." Rather, they "simply clarify or amplify prior allegations, but do not shift the direction of the suit," which is insufficient to "sweep the case within the removal provisions, even if new legal theories of recovery [were] added." ***Santamarina*, 466 F.3d at 573**.

At the hearing before Judge Mendelsohn on August 14, 2003, Plaintiffs described "a concerted action," by which franchises or other Block entities participated in selling POM as "part of a scheme, a part of a series of activities orchestrated by H&R Block Tax Services, Inc." Doc. 20,

Exhibit A. In a deposition taken on March 14, 2007, Matthew Kerr, a witness for Block, stated that Block required its tax preparers to mention POM towards the end of their tax preparation session. Doc. 20, Exhibit B, Kerr Deposition 122:18-22. At the end of the preparation session, a screen automatically came up that described POM, and all tax preparers were working off the same script to offer POM at Block's direction. *Id*. 122:11-123-5. The "Peace of Mind Sales Process" is governed by a carefully laid out script, also called the "POM Sales Pitch," in which the tax preparer recommends POM and, depending on the client's response, follows a series of screens to arrive at final processing and 1099 reporting. Doc. 20, Exhibit C.

No new or different POM transactions have been added to this case, and it appears that Block, as the parent company and franchiser, established and imposed the policies and procedures for POM transactions. The action as it now stands certainly does not fall within the ambit of "sufficiently independent of the original contentions that it must be treated as fresh litigation." ***Knudsen I*, at 807**. As the Seventh Circuit stated in ***Schorsch,*** "workaday changes routine in class suits" do not "kick off wholly distinct claims." **417 F.3d at 751**. Block has identified no basis for the Court to conclude that the state court's modification of the classes commenced a new, removable action.

Attorney's fees

Pursuant to 28 U.S.C. § 1447(c), Plaintiffs seek an award of attorney's fees and costs incurred as a result of this removal. Plaintiffs contend that Block's removal action clearly lacks merit, and, because of Block's action, Plaintiffs had to bear unnecessary costs in moving for remand. Block argues that removal was objectively reasonable because the substantive changes in the class definitions commenced a new action and because Block satisfied the CAFA jurisdictional

requirements.

In ***Martin v. Franklin Capital Corporation*, 546 U.S. 132 (2005)**, the Supreme Court held that a district court may award attorney's fees under 28 U.S.C. § 1447(c) only where the removing party "lacked an objectively reasonable basis for seeking removal." **546 U.S. at 136; *Lott v. Pfizer, Inc.*, 492 F.3d 789, 791 (7th Cir. 2007)**. The Court explained that, as a policy matter,"[i]f fee shifting were automatic, defendants might choose to exercise this right only in cases where the right to remove was obvious." ***Id.*; *Lott*, 492 F.3d at 792**. The Court finds that Block's removal was not objectively unreasonable and, consequently, denies Plaintiffs' motion for costs and attorney's fees.

IV. Conclusion

The Court finds that this case was not properly removed. Because it lacks subject matter jurisdiction, the Court **GRANTS** Plaintiffs' motion to remand (Doc. 10) and **REMANDS** this case to the Circuit Court of Madison County, Illinois. The Court **DENIES** Plaintiffs' request for fees and costs of removal under 28 U.S.C. § 1447, since Block had an objectively reasonable basis for removal.

IT IS SO ORDERED.

DATED this 17th day of December, 2008

s/Michael J. Reagan
MICHAEL J. REAGAN
United States District Judge