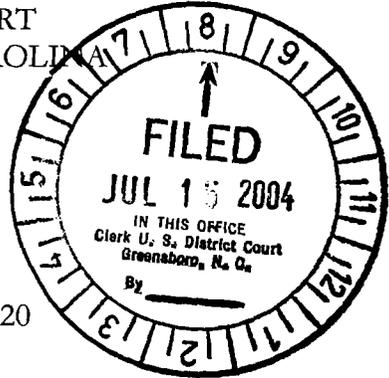


16.

D/LS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA



MARKET AMERICA, INC.,)
)
Plaintiff,)
)
v.)
)
JESSE TONG and EDA TONG,)
)
Defendants.)

1:03CV00420

MEMORANDUM OPINION

BEATY, District Judge.

I. INTRODUCTION

Plaintiff Market America, Inc. ("Market America") filed the present action in the Superior Court of Guilford County, North Carolina seeking injunctive relief against Defendants Jesse and Eda Tong ("the Tongs"). Defendants removed the matter to this Court on the basis of diversity jurisdiction pursuant to 28 U.S.C. § 1332. Plaintiff then filed a Motion to Remand the case to Guilford County Superior Court [Document #5] on May 23, 2003, and an Application to Compel Arbitration and Stay the Action [Document #10] on July 2, 2003. These motions are now before the Court.

II. FACTUAL BACKGROUND

Plaintiff Market America is a self-described "product brokerage company" with its headquarters in Greensboro, North Carolina. (Pl's. Br. at 1). Defendants, residents of Texas, were independent distributors of Market America products until December 2002, when the Tongs ended their relationship with Market America in order to begin distributing products for a competing company. During the course of Defendants' affiliation with Market America, the parties were

governed by an “Independent Distributor Agreement” which both parties signed at the inception of their relationship. The Independent Distributor Agreement included a non-compete clause and an arbitration clause, both of which Plaintiff now seeks to enforce.

In December 2002, Defendants notified Plaintiff that they did not wish to renew their relationship as independent distributors for Market America for 2003. On December 10, 2002, Market America replied to the Tongs that their distributorship was discontinued and reminded Defendants that their Independent Distributor Agreement prohibited them from taking certain competitive actions until June 4, 2003. Plaintiff alleges that the Tongs have subsequently engaged in acts prohibited by the Independent Distributor Agreement, including contacting other Market America independent distributors on behalf of another network marketing company.

In addition to Plaintiff’s Motion to Remand, Plaintiff now seeks to have the case submitted to an arbitrator, and to have this action stayed pending the arbitrator’s decision. As discussed more fully below, Defendants respond that the arbitration clause in the Independent Distributor Agreement is invalid, and bring a counterclaim alleging restraint of trade in violation of N.C. Gen. Stat. Chapter 75. Before making a determination as to whether the arbitration clause in the Independent Distributor Agreement should be enforced, an initial determination must be made of whether jurisdiction is proper in this Court.

III. DISCUSSION

A. Plaintiff’s Motion to Remand

Plaintiff has filed a Motion to Remand this case to Guilford County Superior Court [Document #5], alleging that the case was improperly removed because the minimum jurisdictional amount necessary to sustain diversity jurisdiction in federal court, \$75,000.00, is not present based

on the Complaint.

28 U.S.C. § 1441(a) provides, in pertinent part: “[e]xcept as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the 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.” In other words, if the case could have been properly filed in this Court by Plaintiff, then Defendants can properly remove the action to this Court. As both parties agree that there is no question of federal law at issue in the case, Defendants must show that diversity jurisdiction is proper pursuant to 28 U.S.C. § 1332 in order to sustain their removal pursuant to 28 U.S.C. § 1441(a). Diversity jurisdiction is proper, as dictated by 28 U.S.C. § 1332, “where the matter in controversy exceeds the sum or value of \$75,000.00, exclusive of interest and costs, and is between (1) citizens of different States” 28 U.S.C. § 1332(a). The parties agree that Plaintiff is from North Carolina and Defendants are from Texas, therefore the requirement of diversity of the parties is satisfied. However, Plaintiff contends that diversity jurisdiction is improper because the amount in controversy is less than \$75,000.00. Conversely, Defendants argue that the economic damage they will sustain if Plaintiff is granted the injunction prayed for is well above \$75,000.00, and therefore diversity jurisdiction is proper. In order to determine if Defendants’ removal of this matter to federal court can be sustained, the Court must determine whether the amount in controversy is more or less than \$75,000.00.

In determining the propriety of removal, the burden of demonstrating removal jurisdiction rests with the party seeking to keep the case in federal court, rather than the party moving for remand. Howard v. Food Lion, Inc., 232 F. Supp. 2d 585 (M.D.N.C. 2002). The standard by which Defendants must prove that diversity jurisdiction is proper in this Court, is by the preponderance

of the evidence. Wysong & Miles Co. v. Weller Mach., No. 1:01CV01005, 2002 WL 1602456, at *2 (M.D.N.C. June 5, 2002) (citing Candor Hosiery Mills v. Int'l Networking Group, 35 F. Supp. 2d 476, 479–80 (M.D.N.C. 1998)). Further, courts should resolve all doubts about the propriety of removal in favor of retained state court jurisdiction. Hartley v. CSX Transp., Inc., 187 F.3d 422, 425 (4th Cir. 1999). Therefore, the burden lies on the Tongs to demonstrate, by a preponderance of the evidence, that the required jurisdictional amount, \$75,000.00, is at stake in this matter.

Generally, courts look to the face of the complaint to determine whether the required jurisdictional amount has been alleged. Dash v. FirstPlus Home Loan Trust, 248 F. Supp. 2d 489, 499 (M.D.N.C. 2003). However, in this matter, Plaintiff has not prayed for monetary damages in its Complaint. Rather, Plaintiff requests only injunctive relief. Plaintiff requests only that Defendants be prevented from violating the terms of the non-compete clause contained in the Independent Distributor Agreement. As such, it is impossible to determine the amount in controversy from the face of the Complaint. The Supreme Court has decided that when a complaint does not explicitly determine the value of the remedy sought, such as when injunctive relief is requested, the Court must look elsewhere to determine the “value of the object of the litigation.” Hunt v. Wash. State Apple Adver. Com’n, 432 U.S. 333, 347, 97 S. Ct. 2434, 2443, 53 L. Ed. 2d 383 (1977); Wysong, 2002 WL 1602456, at *3. However, in determining the “value of the object of the litigation,” the parties naturally maintain different opinions on the value of the injunctive relief requested by Plaintiff.

Although a subject of significant discussion over the years, courts of this circuit have now adopted the “either-viewpoint” rule when considering how to properly measure the “value of the object of the litigation” in cases involving injunctions or declaratory relief. Gov’t Emp. Ins. Co. v. Lally, 327 F.2d 568, 569 (4th Cir. 1964); Candor, 35 F. Supp. 2d at 479 (recognizing that “[t]he Fourth Circuit adheres to the ‘either party’ rule when engaging in this analysis”); accord Gonzalez v. Fairgale Props Co., 241 F. Supp. 2d 512, 517 (D. Md. 2002) (stating “[t]he Fourth Circuit appears

to apply the ‘either-viewpoint’ rule in determining the value of the object of the litigation”); cf. Hoffman v. Vulcan Materials Co., 19 F. Supp. 2d 475, 479–482 (M.D.N.C. 1998) (advocating abandonment of the viewpoint-based tests in favor of a more “flexible approach”). The “either-viewpoint rule” dictates that in order to determine the value of the object of the litigation, the Court “must calculate the potential pecuniary impact of the judgment to either party.” Candor, 35 F. Supp. 2d at 479–80 (citing Lally, 327 F.2d at 569). In so doing, the Court may not weigh the merits of the case, St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 292, 58 S. Ct. 586, 592, 82 L. Ed. 845 (1938), but should consider all the evidence in the record, including the pleadings and the affidavits submitted by the parties. Dash, 248 F. Supp. 2d at 498 (holding that the court could consider both a removal petition and party’s affidavit); Lawson v. Tyco Elecs. Corp., 286 F. Supp. 2d 639 (M.D.N.C. 2003) (determining the amount in controversy on the basis of an affidavit of a party); accord McCoy v. Erie Ins. Co., 147 F. Supp. 2d 481 (S.D. W. Va. 2001). If proof is needed to support the allegation that the required jurisdictional amount is at stake in the matter, the removing party must supply the necessary evidence. In light of these standards, both parties have presented evidence to establish that the “potential pecuniary impact of the judgment” is either more or less than \$75,000.00.

In particular, the Defendants have each submitted affidavits detailing the losses they will incur if the injunction is granted. Jesse Tong states in his affidavit that, since leaving Market America, he has become a distributor for InnerLight, a rival network marketing company. He states that as a distributor for InnerLight, he made \$80,000 from January 1, 2003 to June 14, 2003, the date the affidavit was signed. Further, he states that he is “part of a rapidly growing team of InnerLight distributors” and that, without interference from Plaintiff, he expects to make \$300,000 by the end of 2003. However, Defendants provide no other additional proof to substantiate their claims of current or expected profits.

Defendant Eda Tong states in her affidavit that she believes the information in Jesse Tong’s affidavit is true and correct. She further states that she too stands to suffer more than \$75,000.00

if the injunction is granted. Eda Tong asserts in her affidavit that she has been engaged in the “private practice of naturopathy” for the past decade and has received numerous degrees and certifications relevant to her craft. As part of her practice, she recommends products to her patients from both Plaintiff and InnerLight, as well as other companies. Eda Tong claims that if she is prevented from discussing such products with her patients, she will lose, or be forced to refer elsewhere, many of her patients, resulting in a loss “far in excess of \$75,000.00.” Again, Defendants provide no further evidence in support of these claims of expected profit or loss.

Plaintiff argues that Defendants’ affidavits are speculative, and that Defendants have failed to provide records of past profits or sufficient evidence to bolster the veracity of their claims of lost profits. As such, Plaintiff argues that Defendants have failed to carry their burden to establish that the “value of the object of the litigation” meets the jurisdictional minimum of \$75,000.00. In support of its argument, Plaintiff offers the affidavit of Marc Ashley, chief operating officer of Market America. Mr. Ashley offers his opinion that the relief sought in Plaintiff’s Complaint, namely that Defendants not contact former customers or distributors of Market America for six months, should not be valued at \$75,000.00 to Defendants. However, Mr. Ashley’s affidavit does not indicate any familiarity on his part with the InnerLight program with which Defendants are now associated or with the potential for profits and losses associated with Eda Tong’s business. Therefore, while Mr. Ashley’s affidavit is some evidence that Plaintiff’s claims should not be valued at \$75,000.00 to the Defendants, it provides only a limited basis to discount the statements of Defendants.

The issue before the Court then becomes whether the affidavits of the Defendants, without further proof or substantial refutation, are sufficient to support a finding that the “value of the object of the litigation,” that is, the “potential pecuniary impact of the judgment” to Defendants under the either-party rule, is above the jurisdictional minimum of \$75,000.00. Candor, 35 F. Supp. 2d at 479–80 (citing Lally, 327 F.2d at 569). Guidance in answering this question is provided by the case of McCoy v. Erie Insurance Company, 147 F. Supp. 2d 481 (S.D.W. Va. 2001). In McCoy, the

plaintiff alleged that the defendant Erie, an insurance company, routinely failed to compensate its policyholders for the “diminished market value” of their policyholders’ vehicles that were structurally damaged and later repaired. *Id.* at 491. Plaintiff sought declaratory relief requiring Erie to disclose these actions, compensate their policyholders and establish a “claims administration process” for administering such relief. In attempting to show that the requested declaratory relief would satisfy the amount-in-controversy requirement of 28 U.S.C. § 1332, Erie submitted an affidavit from an assistant vice-president stating that the cost of compliance with such declaratory relief would “substantially exceed \$75,000” but apparently offered no additional evidence in support of this assertion. *Id.* at 493. In consideration of whether such proof was sufficient, the court stated: “Based on the [vice-president’s] affidavit, Erie has established by a preponderance of the evidence that the pecuniary result it would suffer as a result of a judgment in McCoy’s favor would well exceed the jurisdictional minimum.” *Id.* Thus, in *McCoy*, an affidavit from a party representative was sufficient to establish satisfaction of the jurisdictional minimum by a preponderance of the evidence. See also *Garcia v. Koch Oil Co.*, 351 F.3d 636 (5th Cir. 2003) (holding “defendants may support federal jurisdiction by setting forth the *facts*—[either] in the removal petition [or] by affidavit—that support a finding of the requisite amount” (internal quotations omitted)).

Much as in *McCoy*, in the case at bar, Defendants have submitted affidavits claiming that they would lose in excess of \$75,000.00 if the relief prayed for by Plaintiff is granted. However, as in *McCoy*, Defendants have offered little additional evidence to support the contents of their affidavits. Nevertheless, in light of the fact that the affidavits are largely unrefuted by any evidence presented by Plaintiff, such affidavits are sufficient to satisfy the Defendants’ burden of proof. Defendants’ affidavits establish, by a preponderance of the evidence, that the value of the object of the litigation, defined as the pecuniary damage they would suffer if a judgment in Plaintiff’s favor was granted, would exceed the jurisdictional minimum of \$75,000.00. Therefore, Defendants’ removal of this case is proper under 28 U.S.C. § 1441(a) and Plaintiff’s Motion to Remand [Document #5] is denied.

B. Plaintiff's Application to Compel Arbitration and Stay the Action

Having established that jurisdiction is proper in this Court, the Court now considers Plaintiff's Application to Compel Arbitration and Stay the Action [Document #10]. At the beginning of Defendants' affiliation with Market America in 1998, they signed a one-page "Independent Distributor Agreement" governing the parties' relationship. The reverse of the Independent Distributor Agreement contained thirty-two "Terms and Conditions" including an arbitration clause. The arbitration clause on the back of the Independent Distributor Agreement states, in pertinent part:

28. Any controversy or claim arising out of or relating to this agreement, or the breach thereof, shall ultimately be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules and judgement on the award rendered by the arbitrators may be entered in a court of competent jurisdiction. I understand that this arbitration provision means I am giving up the right to have any dispute I have regarding this agreement heard by a jury and determined in a court of law. The arbitration shall be heard by one arbitrator, and it shall take place in Greensboro, North Carolina. Either party may seek emergency or provisional relief in the General Court of Justice, Guilford County, North Carolina, prior to invoking the arbitration remedy. North Carolina law shall govern this agreement.

In addition to being printed on the back of the parties' one-page agreement, this arbitration clause was included in the "Market America Career Manual" provided to Defendants. The parties reaffirmed their relationship on December 3, 2001, when Jesse Tong signed the "Market America, Inc. Annual Renewal Form" on behalf of himself and Eda Tong. In the "Annual Renewal Form," Defendants agreed to "hereby renew [their] Independent Distributor Agreement with Market America, Inc. and . . . be bound by the terms and conditions of that agreement" until December 31, 2002. In December 2002, Defendants notified Plaintiff that they did not wish to renew their relationship as independent distributors for Market America for 2003. On December 10, 2002, Market America replied to the Tongs that their distributorship was discontinued and reminded Defendants that paragraph 26 of their Independent Distributor Agreement prohibited them from taking the described competitive actions until June 4, 2003. Plaintiff alleges that the Tongs have

subsequently engaged in acts prohibited by the Independent Distributor Agreement, providing the basis for this action. Plaintiff now seeks to enforce the arbitration clause and requests that the Court order the action stayed until the completion of arbitration.

Defendants do not deny that the signed agreements contain an arbitration clause, nor do they contend that they did not sign the agreements. Rather, Defendants contend that the provisions are unenforceable because (1) they are exempt from the Federal Arbitration Act, and (2) the arbitration clause is unconscionable in light of the small size of the print on the agreements they signed and the excessive number of documents provided to them. Defendants oppose the Plaintiff's Application to Compel Arbitration and Stay the Action on these grounds. The Court will address Defendants' arguments opposing Plaintiff's request for arbitration in turn.

Defendants' first argument is that they are exempted by the language of the Federal Arbitration Act ("FAA") and therefore are not bound by the arbitration clause in the Independent Distributor Agreement that they signed. The language upon which Defendants rely states, in pertinent part, "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. However, that phrase has been clearly interpreted by the Supreme Court to exempt only "contracts of employment of transportation workers" from the FAA. Circuit City Stores v. Adams, 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001) accord Adkins v. Labor Ready, Inc., 303 F.3d 496, 505 (4th Cir. 2002). As Defendants do not claim to be transportation workers, they are not exempted from the FAA by this clause. Therefore, they are not excused from compliance with the agreed upon arbitration clause.

In Defendants' second argument, they contend that the arbitration clause is unconscionable and should not be enforced. Defendants argue this arbitration clause was "too small to be conspicuous, read or understood" in that it was "about one-half the size of regular 12 point font print." Aff. of Jessie Tong ¶ 3; Ex. A. As a result, Defendants claim they never read the arbitration clause and were not aware of it. They therefore claim that it would be unconscionable to enforce

it against them.

In response to a similar argument to that made by Defendants, the Fourth Circuit Court of Appeals stated in Sydnor v. Conseco Financial Servicing Corp., 252 F.3d 302, 306 (4th Cir. 2001), that “[u]nconscionability is a narrow doctrine whereby the challenged contract must be one which no reasonable person would enter into, and the ‘inequality must be so gross as to shock the conscience.’” Further, “an elementary principle of contract law is that a party signing a written contract has a duty to inform himself of its contents before executing it . . . and in the absence of fraud or overreaching he will not be allowed to impeach the effect of the instrument by showing that he was ignorant of its contents or failed to read it.” Id. “That the appellees did not make themselves aware of the arbitration clause and disclosure is irrelevant.” Id.

Defendants do not claim that they were tricked or coerced into signing the above-described agreements containing the arbitration clause. In fact, they do not contend that Plaintiff engaged in fraud or overreaching in any manner. Furthermore, Defendants do not contend that the arbitration agreement itself is unreasonable or “so gross as to shock the conscience.” Defendants merely contend that the arbitration clause should not be enforced because it was written in a print that was half of normal-size print. Because of this, Defendants contend that they did not read the arbitration clause.

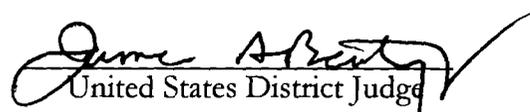
The evidence presented to the Court indicates that Defendants had ample opportunity to make themselves aware of the terms of the arbitration provision. The clause was one of only thirty-two printed on the reverse side of the one-page Independent Distributor Agreement signed by Defendants when agreeing to become distributors for Plaintiff. The same language was included in the “Market America Career Manual” given to Defendants at that time. Finally, the terms and conditions of the parties’ original agreement were explicitly incorporated into the one-page Annual Renewal Form signed by Mr. Tong on December 3, 2001. As stated above, “a party signing a written contract has a duty to inform himself of its contents before executing it . . . and in the absence of fraud or overreaching he will not be allowed to impeach the effect of the instrument by

showing that he was ignorant of its contents or failed to read it.” Sydnor, 252 F.3d at 306. It is apparent that the failure of Defendants to make themselves aware of the existence and legal effect of the arbitration provision is not the result of the fraud or overreaching of Plaintiff. Therefore, Defendants’ argument that the arbitration clause is unenforceable and should not be enforced must fail.¹ Therefore, Plaintiff’s Application to Compel Arbitration and Stay the Action [Document #10] is granted.

IV. CONCLUSION

In summary, the amount in controversy is defined in this case as the “value of the object of the litigation” or the “potential pecuniary impact of the judgment” to either party. In light of the lack of evidence presented by Plaintiff, Defendants’ affidavits establish by a preponderance of the evidence that the jurisdictional minimum of \$75,000.00 is at issue. Thus, Plaintiff’s Motion to Remand the case to Guilford County Superior Court [Document #5] is denied. Further, the Court finds that Defendants were not induced to enter the Independent Distributor Agreement with Plaintiff as a result of fraud or overreaching on the part of Plaintiff. Therefore, Defendants’ failure to read the terms of the agreement does not render enforcement of the arbitration clause contained therein unconscionable. Plaintiff’s Application to Compel Arbitration and Stay the Action [Document #10] is therefore granted. An Order consistent with this Memorandum Opinion shall be filed contemporaneously herewith.

This, the 15th day of July, 2004.


United States District Judge

¹ The Court notes that although not argued by the parties in their briefs to the Court, the language of the arbitration clause indicates that “North Carolina law shall govern this agreement.” However, North Carolina case law dictates the same result as the Court has reached here. Massey v. Duke University, 130 N.C. App. 461, 464-65, 503 S.E.2d 155, 158 (1998).