

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

In re:)	
)	
GENERAL MOTORS CORPORATION)	
DEX-COOL PRODUCTS LIABILITY)	
LITIGATION.)	CIVIL NO. MDL-03-1562-GPM
)	
This document pertains to:)	
)	
JASON BERTINO, et al., on behalf of)	
themselves and all others similarly situated,)	
)	
Plaintiffs,)	
)	
vs.)	CIVIL NO. 05-10008-GPM
)	
GENERAL MOTORS CORPORATION, a)	
Delaware corporation,)	
)	
Defendant.)	

MEMORANDUM AND ORDER

MURPHY, Chief District Judge:

This matter is before the Court on the request for remand to state court on grounds of lack of subject matter jurisdiction brought by Plaintiffs Jason Bertino, Esau Galindo, and Donald Hemans. For the following reasons, Plaintiffs’ request for remand is **GRANTED**.

INTRODUCTION

Plaintiffs Bertino and Hemans originally filed this action in the Superior Court of San Joaquin County, California, on February 17, 2005. Their complaint alleged claims against Defendant General Motors Corporation (“GMC”) for violations of the California Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750 *et seq.*, fraud, violations of the California unfair competition

statute, Cal. Bus. & Prof. Code §§ 17200 *et seq.*, breach of warranty, and unjust enrichment. The complaint sought certification of a class of California residents who own GMC vehicles equipped with allegedly defective intake manifold gaskets. On March 31, 2005, the complaint was amended to join Plaintiff Esau Galindo as a proposed class representative. On May 5, 2005, within thirty days after service of the amended complaint, GMC timely removed the case to the United States District Court for the Eastern District of California, asserting federal subject matter jurisdiction in diversity.

While the case was pending in federal court in California, Plaintiffs moved for remand of the case to state court for lack of subject matter jurisdiction. The motion was fully briefed and ripe for decision when the case was transferred to this Court by the Judicial Panel on Multidistrict Litigation for coordinated or consolidated pretrial proceedings. Plaintiffs now have renewed their request for remand. *See* Doc. 162.¹ Plaintiffs' request for remand presents two issues for resolution: whether federal subject matter jurisdiction in diversity is proper in this case under 28 U.S.C. § 1332, as amended by the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.) ("CAFA"), or, if not, whether this action involves an amount in controversy in excess of \$75,000, exclusive of interest and costs, as required under 28 U.S.C. § 1332(a).

1. Through inadvertence Plaintiffs' motion for remand was not docketed in the file of the lead case in this multidistrict litigation proceeding. The motion and related briefing by the parties can be found at Document 2 in the case file of *Bertino v. General Motors Corp.*, Civil No. 05-10008-GPM (S.D. Ill. filed Oct. 26, 2005); Plaintiffs' motion for remand is Part 12 of Document 2 in the *Bertino* file.

DISCUSSION

A. Legal Standard

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 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.” 28 U.S.C. § 1441(a). In other words, “[a] defendant may remove a case to federal court only if the federal district court would have original subject matter jurisdiction over the action.” *Disher v. Citigroup Global Mkts., Inc.*, 419 F.3d 649, 653 (7th Cir. 2005), *vacated on other grounds*, 126 S. Ct. 2964 (2006). The defendant has the burden of establishing that an action is removable, and doubts concerning removal must be resolved in favor of remand to the state court. *See Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005); *Boyd v. Phoenix Funding Corp.*, 366 F.3d 524, 529 (7th Cir. 2004); *Fiore v. First Am. Title Ins. Co.*, No. 05-CV-474-DRH, 2005 WL 3434074, at *2 (S.D. Ill. Dec. 13, 2005). *Cf. Werner v. KPMG LLP*, 415 F. Supp. 2d 688, 695 (S.D. Tex. 2006); *Ongstad v. Piper Jaffray & Co.*, 407 F. Supp. 2d 1085, 1088 (D.N.D. 2006); *Judy v. Pfizer, Inc.*, No. 4:05CV1208RWS, 2005 WL 2240088, at *1 (E.D. Mo. Sept. 14, 2005).

B. Plaintiffs’ Motion for Remand

1. Diversity Jurisdiction under CAFA

Under CAFA, federal courts have jurisdiction in diversity, with exceptions not at issue here, *see* 28 U.S.C. § 1332(d)(3), (d)(4), (d)(5), (d)(9), over class actions with one hundred or more class members, *see* 28 U.S.C. § 1332(d)(5)(B), in which any member of the plaintiff class is a citizen of a state different from that of any defendant, or any member of a plaintiff class or any defendant is

a foreign state or a citizen or subject of a foreign state. *See* 28 U.S.C. § 1332(d)(2). In a class action in which CAFA's requirement of minimal diversity is met, a federal court has jurisdiction if, after aggregating class members' claims, more than \$5 million, exclusive of interest and costs, is in controversy. *See* 28 U.S.C. § 1332(d)(2), (d)(6). Class actions filed in state court that satisfy the jurisdictional prerequisites of CAFA are subject to removal to federal court. *See* 28 U.S.C. § 1453(b), (c).

“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.” *Schillinger v. 360Networks USA, Inc.*, Civil No. 06-138-GPM, 2006 WL 1388876, at *2 (S.D. Ill. May 18, 2006) (quoting Pub. L. 109-2, § 9, 119 Stat. 4). The question of when a lawsuit is initially “commenced” for purposes of removal under CAFA is determined by the law of the state where a class action initially was filed. *See Pfizer, Inc. v. Lott*, 417 F.3d 725, 726 (7th Cir. 2005); *Knudsen v. Liberty Mut. Ins. Co.*, 411 F.3d 805, 806 (7th Cir. 2005). *See also Braud v. Transport Serv. Co. of Ill.*, 445 F.3d 801, 803-04 (5th Cir. 2006); *Plubell v. Merck & Co.*, 434 F.3d 1070, 1071 (8th Cir. 2006); *Bush v. Cheaptickets, Inc.*, 425 F.3d 683, 687-88 (9th Cir. 2005); *Natale v. Pfizer, Inc.*, 424 F.3d 43, 44 (1st Cir. 2005); *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1094 (10th Cir. 2005). *Cf. Pace v. DiGuglielmo*, 544 U.S. 408, 415 (2005) (looking to state law to determine when a pleading has been “properly filed” for purposes of a federal statute of limitations); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 751 (1980) (state law determines when an action commences for statute of limitations purposes); *Herb v. Pitcairn*, 324 U.S. 117, 120 (1945) (“Whether any case is pending in the Illinois courts is a question to be determined by Illinois law[.]”). Under the law of California, where, as discussed, this case originally was brought, an action is commenced upon the filing of a complaint

in state court. *See* Cal. Code Civ. Proc. § 350 (“An action is commenced . . . when the complaint is filed.”). *See also* *Bush*, 425 F.3d at 687-88 (a consumer class action alleging that an online travel service had imposed illegitimate taxes and fees in violation of California law “commenced” for purposes of removal under CAFA on the date the action was filed in California state court, rather than on the date the action was removed to federal court, or on the date that service of process was perfected; California law determined when the action was initiated or commenced under CAFA, and California law provides that a lawsuit commences when it is filed); *Davalos v. Los Angeles County*, 190 Cal. Rptr. 711, 714 (Cal. Ct. App. 1983) (“[A]n action is commenced when the complaint is filed.”). This action, as discussed, was filed on February 17, 2005, one day before the effective date of CAFA and, thus, it commenced before the CAFA became effective.

As discussed, on March 31, 2005, the state-court complaint in this case was amended to join Esau Galindo as a party Plaintiff. Therefore, the Court must consider whether this amendment commenced the action after the effective date of CAFA so as to give rise to removal jurisdiction under the statute.² In some instances an amendment of a class-action complaint in state court after the effective date of CAFA may operate to commence (or perhaps more properly, recommence) the action for purposes of removal to federal court, even though the action originally was filed before the effective date of CAFA. In *Knudsen* the United States Court of Appeals for the Seventh Circuit

2. GMC in its notice of removal and its brief in opposition to Plaintiffs’ motion for remand frames the question of whether federal jurisdiction under CAFA exists in this case by virtue of the joinder of Galindo as an issue of supplemental jurisdiction. That is, GMC argues that because Galindo was joined after the effective date of CAFA, supplemental jurisdiction may be exercised over the claims of the other class representatives and the members of the proposed class. In light of controlling authority in this Circuit and persuasive authority from sister Circuits issued after the removal of this case, the Court believes that the correct analysis is whether the amendment of the complaint to join Galindo commenced the action after the effective date of CAFA.

addressed the amendment of class-action complaints in state court after the effective date of CAFA, observing that “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.” 411 F.3d at 807. *See also Schillinger v. Union Pac. R.R. Co.*, 425 F.3d 330, 333 (7th Cir. 2005) (quoting *Schorsch v. Hewlett-Packard Co.*, 417 F.3d 748, 749 (7th Cir. 2005)) (noting that “a defendant added after February 18 [2005] could remove because suit against it would have been commenced after the effective date” of CAFA) (emphasis omitted).

The accepted test of whether an amendment of a class-action complaint after the effective date of CAFA “commences” the action so as to permit removal under the statute is whether the amendment “relates back” to the filing date of the original complaint: if it does, then the case is not removable, but if it does not, the case is subject to removal under CAFA. *See Knudsen*, 411 F.3d at 807; *Schillinger*, 2006 WL 1388876, at *3; *In re General Motors Corp. Dex-Cool Prods. Liab. Litig.*, No. CIVMDL-03-1562GPM, Civ. 05-10007-GPM., 2006 WL 644793, at *2 (S.D. Ill. Mar. 9, 2006). In general courts apply the law of the state where a class action was filed to determine whether an amendment of a class-action complaint after the effective date of CAFA has commenced the action for purposes of removal under the statute. *See Phillips v. Ford Motor Co.*, 435 F.3d 785, 787-88 (7th Cir. 2006); *Plubell*, 434 F.3d at 1071-74; *Cuesta v. Ford Motor Co.*, No. CIV-06-61-S, 2006 WL 1207608, at **3-4 (E.D. Okla. May 1, 2006); *Whitehead v. Nautilus Group, Inc.*, 428 F. Supp. 2d 923, 926-28 (W.D. Ark. 2006); *Adams v. Insurance Co. of N. Am.*, 426 F. Supp. 2d 356, 372-77 (S.D.W.Va. 2006). *See also Prime Care of N.E. Kan., LLC v. Humana Ins. Co.*, 447 F.3d 1284, 1286 (10th Cir. 2006) (noting that courts “generally agree that whether an

amendment is distinct enough to give rise to a new commencement date is properly gauged by the forum state's law governing the relation-back of pleading amendments.”). *Cf. Pacific Employers Ins. Co. v. Sav-a-Lot of Winchester*, 291 F.3d 392, 400 (6th Cir. 2002) (in light of the rule that a forum state's relation-back law controls the timeliness of amended pleadings filed in state court before removal, holding that “it is the version of the relation-back doctrine embodied in the Kentucky Rules [of Civil Procedure], and not the version embodied in the Federal Rules, that governed the consequences of the filing of the amended complaint” in state court before removal); *Anderson v. Allstate Ins. Co.*, 630 F.2d 677, 682 (9th Cir. 1980) (state law governed whether the amended complaint related back “because the relevant amendments and service of process preceded removal to federal court.”).

In this instance it is clear that, under California law, the amendment of Plaintiffs' state-court complaint to join Esau Galindo as a party Plaintiff related back to the filing date of the original complaint, so that this action is not removable under CAFA. Under California law, “[t]he relation-back doctrine requires that the amended complaint must (1) rest on the same general set of facts, (2) involve the same injury, and (3) refer to the same instrumentality, as the original one.” *Norgart v. Upjohn Co.*, 981 P.2d 79, 96 (Cal. 1999) (emphasis omitted). *See also Klopstock v. Superior Court*, 108 P.2d 906, 910-11 (Cal. 1941) (a plaintiff is entitled to the benefit of relation back to substitute a proper party plaintiff as long as the cause of action against the defendant has not factually changed such that the amendment asserts a wholly distinct legal obligation); *Garrison v. Board of Dirs.*, 43 Cal. Rptr. 2d 214, 218 (Cal. Ct. App. 1995) (the relation-back doctrine applied to save a cause of action stated by a substituted plaintiff that was identical to the cause of action stated by the original plaintiff, since no new or different obligation was alleged by the amendment);

Pasadena Hosp. Ass'n, Ltd. v. Superior Court, 251 Cal. Rptr. 686, 687-89 (Cal. Ct. App. 1988) (the relation-back doctrine would apply where a plaintiff timely filed a complaint and later sought amendment to add his professional corporation as a plaintiff because both plaintiffs were asserting the same injury and damages and the substantive basis of the cause of action had not changed). In this case, the amendment of the state-court complaint to join Plaintiff Galindo rests on the same facts underlying the original complaint, involves the same injury alleged in the original complaint, and imposes no legal obligation upon GMC distinct from that sought to be imposed in the original complaint. The amended complaint added no new claims for relief, did not alter the scope of the proposed class, and created no new liability for GMC. The amendment clearly was a “routine” one that did not commence this action after the effective date of CAFA so as to make the action removable under the statute. *Phillips*, 435 F.3d at 786-88 (quoting *Schorsch*, 417 F.3d at 749) (post-CAFA amendments to complaints originally filed before the effective date of the statute to add or substitute named plaintiffs did not constitute “commencement” of new actions so as to permit removal under the statute). *See also Bemis v. Allied Prop. & Cas. Ins. Co.*, No. 05-CV-751-DRH, 2006 WL 1064067, at **4-7 (S.D. Ill. Apr. 20, 2006) (an amendment after the effective date of CAFA to join an unnamed class member who, upon amendment, became a class representative alleging the same claims already asserted against the defendants in the original class-action complaint did not permit removal under CAFA).

Although the Court has tested the issue of relation back under state law, the Court notes that the result would be the same under Rule 15(c) of the Federal Rules of Civil Procedure as well. Under federal law, in determining whether an amendment of a complaint to join a new plaintiff relates back, “[t]he emphasis is to be placed on the determination of whether the amended complaint

arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading.” *Staren v. American Nat’l Bank & Trust Co. of Chicago*, 529 F.2d 1257, 1263 (7th Cir. 1976). “The substitution of such parties after the applicable statute of limitations may have run is not significant when the change is merely formal and in no way alters the known facts and issues on which the action is based.” *Id.* See also *Hawkins v. Groot Indus., Inc.*, 210 F.R.D. 226, 232 (N.D. Ill. 2002) (the relation-back doctrine was applicable to claims of discrimination and harassment asserted by Hispanic employees proposed as additional plaintiffs in an amended complaint in an employment discrimination suit brought originally by African-American employees, as the new claims arose out of the same alleged conduct as found in the African-American plaintiffs’ original complaint, namely, a pattern and practice of harassment and discrimination against both black and Hispanic employees; moreover, the allegations in the original complaint were sufficient to put the defendants on fair notice of race and national-origin claims by the Hispanic plaintiffs). *Cf. Thomas v. Mitchell-Bradford Chem. Co.*, 582 F. Supp. 1373, 1376 (E.D.N.Y. 1984) (holding that an amendment of a complaint in a wrongful death action to substitute as plaintiff the decedent’s wife, the executrix of his estate, for the decedent’s daughter related back to the date of the filing of the original complaint for statute of limitations purposes, because the substitution did not alter the defendants’ ability to defend the action of which they had been on notice since its inception and the amended pleading did not alter the allegations set forth in the original complaint); *Stoppelman v. Owens*, 580 F. Supp. 944, 946-47 (D.D.C. 1983) (when the initial complaint was brought by certain limited partners, the amended complaint which added additional limited partners as plaintiffs whose claims arose out of the same conduct, transaction, or occurrence alleged in the original complaint related back to the date of the filing of the original complaint for limitations purposes). In this case,

as discussed, Plaintiff Galindo's claims are simply those of the class representatives and members of the proposed class in the original complaint, namely, that his GMC automobile is equipped with defective intake manifold gaskets. GMC was on notice of the nature of Galindo's claim, and his joinder as a party Plaintiff in no way prejudiced GMC or hindered its ability to defend this action. Thus, the amendment of the complaint relates back under federal law as well as state law.

Finally, although the issue has not been raised by the parties, the Court considers the matter of whether Plaintiffs' request to amend their complaint to join Parker Hannifin Corporation ("PHC") as a party Defendant (Doc. 104) commenced this action after the effective date of CAFA so as to make the case removable under the statute. As a general rule, where a plaintiff may not amend a complaint as of right, an amended pleading has no legal effect until such time as it is filed with leave of court. *See United States v. HealthSouth Corp.*, 332 F.3d 293, 295 (5th Cir. 2003). In *HealthSouth Corp.* the court said, "In general, if an amendment that cannot be made as of right is served without obtaining the court's leave or the opposing party's consent, it is without legal effect and any new matter it contains will not be considered unless the amendment is resubmitted for the court's approval." *Id.* (citation omitted). On the other hand, there is some authority for the view that the filing of a motion for leave to amend a complaint "commences" an action under California law. *See, e.g., Weiner v. Superior Court*, 130 Cal. Rptr. 61, 63-64 (Cal. Ct. App. 1976) (where, after filing a complaint alleging libel, the plaintiffs filed a motion for leave to amend their complaint, accompanied by a proposed pleading of a second and distinct cause of action not previously pleaded, which proposed pleading described a different utterance alleged to have a different defamatory meaning made at a different time for publication in a different newspaper, the action on the second alleged libel was "commenced" when notice of the motion was filed, thereby stopping the running

of the applicable one-year statute of limitations). However, the issue of commencement of an action in federal court is governed by federal law. *See HealthSouth Corp.*, 332 F.3d at 296. Also, the notice of removal in this case alleges only the amendment of the state-court complaint to join Plaintiff Galindo, not PHC, as a basis for federal subject matter jurisdiction under CAFA. “A notice of removal may be amended more than thirty days after the time to remove has expired ‘only to set out more specifically the grounds for removal that already have been stated, albeit imperfectly, in the original notice Completely new grounds for removal jurisdiction may not be added and missing allegations may not be furnished, however.’” *Alsup v. 3-Day Blinds, Inc.*, 435 F. Supp. 2d 838, 844 n.2 (S.D. Ill. 2006) (quoting 14C Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Joan E. Steinman, *Federal Practice & Procedure* § 3733 (3^d ed. 1998 & Supp. 2005)). *See also Brill*, 427 F.3d at 448 (CAFA is presumed not to alter traditional rules governing removal, save to the extent it does so explicitly); *Hangarter v. Paul Revere Life Ins. Co.*, No. C 05-04558 WHA, 2006 WL 213834, at *3 (N.D. Cal. Jan. 26, 2006) (same). The Court concludes that this action was commenced before the effective date of CAFA and is not subject to removal under the statute.

2. Diversity Jurisdiction under Pre-CAFA Law

Having found that this action is not subject to removal under CAFA, the Court turns to the question of whether the action is removable under pre-CAFA law governing federal diversity jurisdiction. In cases not subject to CAFA, removal based on diversity requires that the parties be of diverse state citizenship and that the amount in controversy exceed \$75,000, exclusive of interest and costs. *See Rubel v. Pfizer Inc.*, 361 F.3d 1016, 1017 (7th Cir. 2004). In this case the parties do not dispute that complete diversity of citizenship exists, and therefore the sole issue for resolution

is whether the jurisdictional amount is satisfied. In a pre-CAFA class action, this requires GMC to show that at least one of the named Plaintiffs has a claim worth more than \$75,000, exclusive of interest and costs, because, under the pre-CAFA precedent of the Supreme Court of the United States, the individual claims of class members cannot be aggregated to meet the jurisdictional amount, and instead each class member is required to have a jurisdictionally-sufficient claim. *See Zahn v. International Paper Co.*, 414 U.S. 291, 301 (1973); *Snyder v. Harris*, 394 U.S. 332, 336-37 (1969). *See also In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 607 (7th Cir. 1997) (explaining that, in evaluating the amount in controversy in a class action, “[t]he court cannot just add up the damages sought by each member of the class.”).

The problem here from the point of view of satisfying the jurisdictional amount is obvious. Class actions are, virtually by definition, devices for litigating a large number of very small claims in a single proceeding. In *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), the Court observed that “[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor.” *Id.* at 617. In fact, it is a prerequisite for the maintenance of a class action under Rule 23(b)(3) of the Federal Rules of Civil Procedure that the claims at issue be small. One of the requirements for maintaining a Rule 23(b)(3) class action is a showing that “a class action is superior to other available methods for the fair and efficient adjudication of the controversy,” and one of the considerations in evaluating superiority is “the interest of members of the class in individually controlling the prosecution or defense of separate actions.” FED. R. CIV. P. 23(b)(3). In a case involving large individual claims

of, for example, more than \$75,000, class members obviously have a substantial interest in bringing individual actions. *See Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 678 (7th Cir. 2001) (holding that “it is unnecessary to certify a nationwide class. Each [class member] has a substantial claim, of the sort that could be, and often is, pursued independently.”). *Cf. Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190-91 (9th Cir. 2001) (a pacemaker implantee failed to demonstrate that a class action was a superior method of resolving negligence, products liability, and medical monitoring claims against the manufacturer of a pacemaker lead when allegations of the minimum amount in controversy for each putative class member exceeded \$50,000); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 633 (3^d Cir. 1996) (quoting FED. R. CIV. P. 23 advisory committee’s note) (a class action was not a superior means for resolving personal injury claims against manufacturers of asbestos-containing products where “the amounts at stake for individuals” were not “so small that separate suits would be impracticable” and instead “[p]laintiffs have a substantial stake in making individual decisions on whether and when to settle.”); *Benner v. Becton Dickinson & Co.*, 214 F.R.D. 157, 173 (S.D.N.Y. 2003) (the superiority requirement for class certification was not satisfied with respect to issues of design defect and negligent design in a products liability suit; each class member’s alleged damages were in excess of \$75,000, and thus the value of the class members’ claims were not so nominal that a class action would be the most favorable way to adjudicate them).

Following the enactment in 1990 of 28 U.S.C. § 1367, governing the supplemental jurisdiction of the federal courts, a number of circuits, including the Seventh Circuit, concluded that the statute effectively overruled the principle that each member of a class must have a claim that satisfies the amount in controversy for diversity purposes. These circuits concluded that, so long as at least one named plaintiff in a class action has a jurisdictionally-sufficient claim, the claims of

unnamed class members can “piggyback” on that claim. *Brand Name*, 123 F.3d at 607 (citing *Stromberg Metal Works v. Press Mech., Inc.*, 77 F.3d 928, 930-33 (7th Cir. 1996)). See also *Olden v. LaFarge Corp.*, 383 F.3d 495, 501-02 (6th Cir. 2004); *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1253-54 (11th Cir. 2003); *Rosmer v. Pfizer, Inc.*, 263 F.3d 110, 114 (4th Cir. 2001); *Gibson v. Chrysler Corp.*, 261 F.3d 927, 934 (9th Cir. 2001); *In re Abbott Labs.*, 51 F.3d 524, 528-29 (5th Cir. 1995). But cf. *Trimble v. Asarco, Inc.*, 232 F.3d 946, 960-62 (8th Cir. 2000); *Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 221-22 (3^d Cir. 1999); *Leonhardt v. Western Sugar Co.*, 160 F.3d 631, 640-41 (10th Cir. 1998). The Supreme Court recently resolved the split in the circuits, holding that section 1367 abrogates the traditional *Zahn* rule prohibiting aggregation of class claims. See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2620-21 (2005). Of course, this does not overcome the problem that, as discussed, the claims of named plaintiffs in class actions tend to be small. In other words, a large number of class members with de minimis claims cannot piggyback into federal jurisdiction on the equally tiny claim of a class representative.

In this instance, the actual damages of Plaintiffs and the proposed class obviously are very modest: as discussed, this case concerns allegedly defective intake manifold gaskets in GMC automobiles. See *Garbie v. DaimlerChrysler Corp.*, 211 F.3d 407, 409, 410 (7th Cir. 2000) (in a class action arising from allegedly defective paintjobs on Chrysler vehicles, noting that the damages of each of the named plaintiffs could only be “a fraction of [their] vehicle’s price” and that the removing defendant did not contend that any named plaintiff’s car was worth more than \$75,000, and holding that “[n]one of the plaintiffs is apt to recover anything close to \$75,000.”). GMC tries to overcome the familiar dilemmas of satisfying the amount in controversy for diversity purposes

under pre-CAFA law by invoking the so-called “either viewpoint” rule, according to which the value of equitable relief for purposes of the jurisdictional amount can be assessed either by the value of the relief to a plaintiff or its cost to a defendant. *See McCarty v. Amoco Pipeline Co.*, 595 F.2d 389, 391-95 (7th Cir. 1979) (even if the value to the plaintiff condemnees of the object in litigation was less than a federal court’s jurisdictional minimum amount, where the cost of removal of the condemnor’s pipeline as sought by the plaintiffs would exceed the jurisdictional amount, removal of the case from state to federal court by the condemnor was proper and the district court had jurisdiction to hear the case). The Seventh Circuit Court of Appeals, applying the either viewpoint rule in a class action, identified three situations in which the cost of equitable relief to a defendant might satisfy the jurisdictional minimum: (1) where the requested relief would require some alteration in the defendant’s business practices that would cost more than the jurisdictional minimum amount; (2) where the requested relief would force the defendant to forgo a benefit that is worth more than the jurisdictional minimum amount; or (3) where the requested relief would entail clerical or ministerial costs of compliance greater than the jurisdictional minimum amount. *See Brand Name*, 123 F.3d at 609-10.

There are very significant limitations on the “either viewpoint” rule that restrict its utility for parties trying to satisfy the amount in controversy for diversity purposes. Importantly, a defendant cannot bundle into the cost of equitable relief the value of illegal profits from the conduct complained of in a case. In *Brand Name* the Seventh Circuit explained that “while an injunction against price fixing might prevent a defendant from engaging in lucrative unlawful transactions, it would not deprive the defendant of a *legally protected* interest.” 123 F.3d at 610 (emphasis in original). In other words, “an injunction . . . [that] merely tells [the defendant] to stop doing

something illegal, such as conspiring to fix prices,” does not satisfy the jurisdictional amount under the either viewpoint rule. *Id.* Even more importantly, the either viewpoint rule must be construed in a manner consistent with the general rule against aggregation of claims. The *Brand Name* court held, “Whatever the form of relief sought, each plaintiff’s claim must be held separate from each other plaintiff’s claim from both the plaintiff’s and the defendant’s standpoint. The defendant in such a case is deemed to face multiple claims for injunctive relief, each of which must be separately evaluated.” *Id.* (citing *Snow v. Ford Motor Co.*, 561 F.2d 787, 790 (9th Cir. 1977)). “The test, we repeat, is the cost to each defendant of an injunction running in favor of one plaintiff; otherwise the nonaggregation rule would be violated.” *Id.*

Similarly, in *Uhl v. Thoroughbred Technology & Telecommunications*, 309 F.3d 978 (7th Cir. 2002), the court acknowledged that “it is established that the jurisdictional amount should be assessed looking at either the benefit to the plaintiff or the cost to the defendant of the requested relief” and that “the cost to a defendant of complying with an injunction sought by the plaintiff may properly be considered in determining the amount in controversy.” *Id.* at 983. However, the *Uhl* court stated further that it can be “difficult to make this assessment in the class action context,” and that the Seventh Circuit has chosen to resolve such difficulty “by looking separately at each named plaintiff’s claim and the cost to the defendant of complying with an injunction directed to that plaintiff.” *Id.* (citing *Brand Name*, 123 F.3d at 610). “In our view, that ensures that we are not undermining the nonaggregation rule that still applies to class actions where the named plaintiff’s claim does not satisfy the jurisdictional amount.” *Id.* See also *Del Vecchio v. Conseco, Inc.*, 230 F.3d 974, 977 (7th Cir. 2000) (in a proposed class action, holding that computing the jurisdictional amount for diversity purposes based on “[the] total unjust enrichment over which [the named

plaintiff] seeks the imposition of a constructive trust” would “amount[] to a complete end-run around” the rule against aggregation of claims to satisfy diversity).

In sum, even where the “either viewpoint” rule is used to value the amount in controversy in a class action, the cost of equitable relief to a defendant nonetheless must be apportioned pro rata among the members of the proposed class. *See Hernandez v. American Family Mut. Ins. Co.*, No. 00-CV-0681-DRH, 2000 WL 1863367, at *2 (S.D. Ill. Dec. 14, 2000) (“[T]he amount in controversy from a defendant’s point of view is the amount the defendant risks paying the named plaintiff, not the amount the defendant may have to pay the entire class.”); *Shemwell v. Mid-Century Ins. Co.*, No. 00-CV-0477-DRH, 2000 WL 33301960, at *2 (S.D. Ill. Dec. 14, 2000) (quoting *Del Vecchio*, 230 F.3d at 978) (holding that “in class actions ‘[w]hatever the form of relief sought, each plaintiff’s claim must be held separate from each other plaintiff’s claim from both the plaintiff’s and the defendant’s standpoint.”) (emphasis omitted); *Littleton v. Shelter Ins. Co.*, No. 99-912-GPM, 2000 WL 356408, at *2 (S.D. Ill. Mar. 9, 2000) (holding that the defendant’s claimed cost of complying with the requested injunctive relief of \$802,755, when divided by the approximately 541,947 members of the proposed class, yielded a pro rata cost to the defendant of injunctive relief in favor of the named plaintiff and each of the absent class members of about \$1.50, far less than the jurisdictional requirement); *Nicholson v. Marine Corps W. Fed. Credit Union*, 953 F. Supp. 1012, 1017 n.3 (N.D. Ill. 1997) (quoting *Packard v. Provident Nat’l Bank*, 994 F.2d 1039, 1050 (3^d Cir. 1993)) (holding that “[i]n a diversity-based class action seeking primarily money damages . . . allowing the amount in controversy to be measured by the defendant’s cost would eviscerate [the rule] that the claims of class members may not be aggregated in order to meet the jurisdictional threshold” unless “the court . . . examine[s] the value of the injunctive relief to

individual plaintiffs rather than the overall cost to the defendants.”). *See also Melnick v. Microsoft Corp.*, No. CIV. 99-377-P-H, 2000 WL 761013, at *1 n.1 (D. Me. Mar. 8, 2000) (citing *Brand Name*, 123 F.3d at 609-10) (“[I]f the defendant’s cost is considered [in evaluating the amount in controversy in a proposed class action], it must then essentially be divided by the number of potential plaintiffs.”); *Sherwood v. Microsoft Corp.*, 91 F. Supp. 2d 1196, 1203 (M.D. Tenn. 2000) (holding that the defendant’s estimate of the cost of providing the injunctive relief sought by the plaintiffs, \$58.5 million, when divided by anything more than 710 class members, would “bring the apportionment of that total cost among each class member to less than \$75,000 per class member,” so that the jurisdictional amount for diversity purposes was not met).

In this case, it is not at all clear that the cost of the equitable relief sought by the proposed class is not in fact the cost to GMC of foregoing illegal profits and complying with the law by equipping GMC vehicles with working, non-defective intake manifold gaskets, as Plaintiffs allege GMC has failed to do in the past. Moreover, GMC, which has the burden of putting forward competent evidence showing by a preponderance of the evidence that the amount in controversy is satisfied, *see Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536, 541-42 (7th Cir. 2006), simply has not adduced any evidence as to what the cost of the equitable relief sought by the class might be. Although, as has been discussed, GMC contends that the amount in controversy in this case exceeds \$5 million, this clearly does not satisfy the amount in controversy in light of the allegations in Plaintiffs’ operative complaint that the proposed class includes thousands of persons. Even assuming for the sake of argument that the equitable relief sought by the proposed class, if granted, would cost GMC an amount geometrically larger than \$5 million – and, at this juncture, as noted, the Court is required to give Plaintiffs, not GMC, the benefit of the doubt – it is apparent that the

cost of the relief, apportioned pro rata among the named Plaintiffs and members of the proposed class, would not satisfy the amount in controversy, given the small actual damages at issue and the size of the proposed class. The Court concludes that the “either viewpoint” rule does not permit the exercise of federal jurisdiction in this case.

In addition to relying upon the cost of equitable relief to satisfy the amount in controversy, GMC contends also that a statutory award of attorney’s fees to Plaintiffs under California law will permit their claims to exceed the jurisdictional minimum. The Court disagrees. The settled rule in this Circuit is that, although attorney’s fees may properly be reckoned into the jurisdictional amount for diversity purposes, in a case removed from state court to federal court only those fees incurred before removal may properly be so considered. *See Smith v. American Gen. Life & Accident Ins. Co.*, 337 F.3d 888, 896-97 (7th Cir. 2003); *Hart v. Schering-Plough Corp.*, 253 F.3d 272, 274 (7th Cir. 2001); *Gardynski-Leschuck v. Ford Motor Co.*, 142 F.3d 955, 958-59 (7th Cir. 1998); *Lott v. Pfizer, Inc.*, No. 05-CV-0230-MJR, 2005 WL 3618027, at **2-3 (S.D. Ill. May 26, 2005); *Meyers v. Bayer AG*, 143 F. Supp. 2d 1044, 1050 (E.D. Wis. 2001); *West Bend Elevator, Inc. v. Rhone-Poulenc S.A.*, 140 F. Supp. 2d 963, 969 (E.D. Wis. 2000); *Godfrey v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, No. 98 C 2956, 1999 WL 104245, at *1 (N.D. Ill. Feb. 24, 1999); *McNair v. McGrath Lexus-Colosimo, Ltd.*, 11 F. Supp. 2d 990, 993 & n.5 (N.D. Ill. 1998). Also, even assuming for the sake of argument that attorney’s fees in this case exceeded \$75,000 when this case was removed, a dubious proposition in support of which GMC has adduced no evidence, attorney’s fees are subject to the general rule against aggregation of claims to satisfy the jurisdictional amount. *See Brand Name*, 123 F.3d at 608-09; *Anthony v. Security Pac. Fin. Servs.*, 75 F.3d 311, 314 (7th Cir. 1996); *Garbie v. Chrysler Corp.*, 8 F. Supp. 2d 814, 819-20 (N.D. Ill.

1998); *Karpowicz v. General Motors Corp.*, No. 97 C 1390, 1997 WL 156542, at **3-4 (N.D. Ill. Mar. 28, 1997); *In re Amino Acid Lysine Antitrust Litig.*, Nos. 95 C 7679, 96 C 1354, 1996 WL 164434, at **1-2 (N.D. Ill. Apr. 2, 1996); *Poindexter v. National Mortgage Corp.*, No. 91 C 4223, 1991 WL 278454, at **2-3 (N.D. Ill. Dec. 23, 1991); *Hayes v. Fireman's Fund Mortgage Corp.*, No. 91 C 4544, 1991 WL 255529, at *3 (N.D. Ill. Nov. 25, 1991). In light of the size of the proposed class and the modest actual damages at issue in this case, only a truly astronomical amount of pre-removal attorney's fees, for which GMC has adduced no evidence, would permit any class representative's pro rata share of those fees to exceed \$75,000, exclusive of interest and costs.

Finally, the Court considers as misplaced GMC's reliance upon the decision of the United States Court of Appeals for the Fifth Circuit in *In re Abbott Laboratories*, in which the court held that under a Louisiana statute governing awards of attorney's fees in class actions, all attorney's fees recoverable in a class action could be attributed to the named plaintiffs in that action for purposes of the jurisdictional amount. *See* 51 F.3d at 526-27. As discussed, the general rule in this Circuit is that, in the context of removed cases, only attorney's fees incurred before removal are considered in evaluating the amount in controversy, and the Court finds it highly unlikely that attorney's fees in this case exceeded \$75,000 when the case was removed. In any event, courts in this Circuit generally have restricted the holding of *Abbott Laboratories* to the context of the particular Louisiana statute at issue in that case. *See, e.g., Estrella v. Boots Co.*, No. 96 C 3291, 1996 WL 490721, at *2 (N.D. Ill. Aug. 26, 1996) (distinguishing the statute at issue in *Abbott Laboratories* from the Illinois consumer fraud statute, and holding that an award of attorney's fees under the latter cannot be aggregated for diversity purposes); *Hasek v. Chrysler Corp.*, No. 95 C 579, 1996 WL 48602, at *5 (N.D. Ill. Feb. 5, 1996) (same). In fact, in *Gibson v. Chrysler Corp.* the

United States Court of Appeals for the Ninth Circuit specifically held that the California statute governing awards of attorney's fees in class actions does not mandate the award of such fees solely to class representatives and thus does not authorize aggregation of attorney's fees to satisfy the jurisdictional amount under the reasoning of *Abbott Laboratories*. See *Gibson*, 261 F.3d at 942 (citing Cal. Code Civ. Proc. § 1021.5). The Court regards *Gibson* as an authoritative interpretation of California law on this issue. See *United States v. Maness*, 23 F.3d 1006, 1008-09 (6th Cir. 1994); *Mellon Bank, N.A. v. Ternisky*, 999 F.2d 791, 796 (4th Cir. 1993); *Abex Corp. v. Maryland Cas. Co.*, 790 F.2d 119, 125 (D.C. Cir. 1986); *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 283 (2^d Cir. 1981); *Jones Truck Lines v. Transport Ins.*, No. Civ. A.88-5723, 1989 WL 49517, at *5 (E.D. Pa. May 10, 1989); *Hammermill Paper Co. v. Pipe Sys., Inc.*, 581 F. Supp. 1189, 1193 (W.D. Pa. 1984). The Court concludes that GMC has failed to show that, under pre-CAFA law governing diversity jurisdiction, the jurisdictional amount in controversy is satisfied in this case.

CONCLUSION

For the foregoing reasons, this action is **REMANDED** to the Superior Court of San Joaquin County, California, pursuant to 28 U.S.C. § 1447(c) for lack of subject matter jurisdiction. Document 104, Document 107, Document 112, Document 118, Document 119, and Document 161 in the file of the lead case in this proceeding, *In re: General Motors Corp. Dex-Cool Products Liability Litigation*, Civil No. MDL-03-1562-GPM (S.D. Ill. filed Nov. 17, 2003), are **DENIED as moot**. The Clerk of Court is **DIRECTED** to mail a certified copy of this Order to the Clerk of the Superior Court of San Joaquin County, California, and to close the file in *Bertino v. General*

Motors Corp., Civil No. 05-10008-GPM.

IT IS SO ORDERED.

DATED: 09/27/06

s/ G. Patrick Murphy _____
G. PATRICK MURPHY
Chief United States District Judge