

NO. 20-17377

**IN THE UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT**

ELIZABETH MAISEL,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SITUATED,

Plaintiff-Appellant,
v.

DEFENDANT-APPELLEE TOOTSIE ROLL INDUSTRIES, LLC,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA

**PLAINTIFF-APPELLANT'S RESPONSE TO
ORDER TO SHOW CAUSE**

Ryan J. Clarkson (257074)
Matthew T. Theriault (244037)
Bahar Sodaify (289730)
CLARKSON LAW FIRM, P.C.
9255 Sunset Blvd., Suite 804
Los Angeles, CA 90069
Tel. (213) 788-4050
Fax. (213) 788-4070

Attorneys for Plaintiff-Appellant Elizabeth Maisel

I. Introduction

Plaintiff-Appellant Elizabeth Maisel (“Plaintiff-Appellant”) submits this response to the Court’s December 28, 2020 Order to Show Cause (“OSC”), and respectfully requests that the Court discharge the OSC and allow Plaintiff-Appellant’s appeal of United States District Court, Northern District of California, Magistrate Judge Sallie Kim’s November 30, 2020 Order that resulted in the denial of Plaintiff-Appellant’s motion to remand and request for attorneys’ fees.

II. Facts

Plaintiff-Appellant filed a class action lawsuit in the Superior Court of California, County of Alameda, on May 29, 2020 alleging that Defendant-Appellee Tootsie Roll Industries, LLC (“Defendant-Appellee”) deceptively packaged its opaque theater box Junior Mints and Sugar Babies candy products (the “Products”) in oversized packages containing nonfunctional empty space, or “slack-fill,” in violation of California and federal consumer protection statutes and packaging laws.

On July 29, 2020, Defendant-Appellee removed to the Northern District of California, claiming that the amount in controversy meets CAFA’s \$5 million threshold because wholesale sales of the Products in California exceed \$6 million during the class period. However, Defendant-Appellee falsely claimed Plaintiff was seeking \$6 million. Plaintiff-Appellant argued that the amount in controversy

is \$1.6 million (or \$2.8 million retail), based on a conservative application of a 26% price premium, far below the required \$5 million to meet CAFA.

Accordingly, on August 28, 2020, Plaintiff-Appellant moved to remand, but the court denied Plaintiff-Appellant's motion because it ignored Plaintiff-Appellant's damages allegations which only included a partial refund based on a price premia analysis. On December 4, 2020, Plaintiff-Appellant timely filed a notice of appeal the court's order denying remand and attorneys' fees. On December 7, the appellate case number was assigned (Dkt. 1). A week later, Plaintiff-Appellant filed her mediation questionnaire (Dkt. 3).

On December 28, 2020, the Court issued an order stating that Plaintiff-Appellant failed to comply with Federal Rule of Appellate Procedure ("FRAP") 5 (Dkt. 5).

Plaintiff-Appellant submits this response to the Court's December 28, 2020 Order to Show Cause, and respectfully requests that the Court discharge the OSC and allow Plaintiff-Appellant's appeal to proceed.

III. Argument

A. Based On The Plain Language Of 28 U.S.C. § 1453, Plaintiff-Appellant's Appeal Was Proper and Timely

When determining the meaning of a statute, courts look to the plain language of the statute. *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) (the court's

analysis begins with the “plain language of the statute.”); *K Mart Corp. v. Cartier*, 486 U.S. 281, 291 (1988) (“In ascertaining the plain meaning of the statute, [a] court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.”); *United States v. Daas*, 198 F.3d 1167, 1174 (9th Cir. 1999) (“The plain meaning of the statute controls, and courts will look no further, unless its application leads to unreasonable or impracticable results. If the statute is ambiguous -- and only then -- courts may look to its legislative history for evidence of congressional intent.”); *E. & J. Gallo Winery v. Cantine Rallo, S.P.A.*, 430 F. Supp. 2d 1064, 1073-74 (E.D. Cal. 2005). The first step in ascertaining congressional intent is to look to the plain language of the statute. *Knapp v. Carmax Auto Superstores Cal., LLC*, 2014 U.S. Dist. LEXIS 159722 at *13 (C.D. Cal. 2014); *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal. 4th 1094, 1102 (Cal. 2007) (When interpreting a statute, courts must first look to its plain language “because [it] generally provide[s] the most reliable indicator of legislative intent.”)

The statute governing review of remand orders, 28 U.S.C. § 1453(c), states that “a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not more than 10 days after entry of the order.” 28 U.S.C. § 1453(c)(1). The plain language of the statute does not contain any language or indication that a plaintiff must first seek

permission from the court pursuant to FRAP 5 before appealing a remand order. In the seminal Ninth Circuit case of *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs.* (“*Amalgamated*”), 435 F.3d 1140, 1143 (9th Cir. 2006), the court acknowledged that, “Neither § 1453(c)(1) nor the rules of appellate procedure specifically state whether we should apply FRAP 5 to the initiation of an appeal under § 1453(c)(1).” *See also Murphy*, 40 Cal. 4th at 1102; *Jimenez*, 555 U.S. at 118. Accordingly, relying on the plain language of Section 1453, Plaintiff-Appellant properly and timely filed her notice of appeal on December 4, 2020.

B. The Court Should Exercise Its Authority Under FRAP 2 To Suspend The Requirements Of FRAP 5 In Order To Avoid Unfairness And Potential Violation Of Due Process

Under FRAP 2, the Court is authorized to allow the appeal to proceed for good cause, including, preserving judicial economy, avoiding unfairness, and preventing violation of due process. Fed. R. App. Proc. 2 (“On its own or a party’s motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs [.]”); *see Blausey v. United States Tr.*, 552 F.3d 1124, 1130-31 (9th Cir. 2009) (exercising discretion under Fed. R. App. Proc. 2 to suspend the requirements of Fed. R. App. Proc. 5 for good cause where Plaintiff filed the notice of appeal); *United States v. Henley*, 238 F.3d 1111, 1122 (9th Cir. 2001)

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.