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

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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 1309v. 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)

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