

FILED

FEB 26 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GARY DAVIS, an individual on behalf of himself; GARY DAVIS, as Private Attorney General and on behalf of all others similarly situated,

Plaintiffs - Appellees,

v.

HSBC BANK NEVADA, N.A., a national bank; HSBC FINANCE CORPORATION, a Delaware corporation; BEST BUY CO., INC., a Minnesota corporation; BEST BUY STORES, L.P., a Virginia limited partnership,

Defendants - Appellants.

No. 08-57062

D.C. No. 2:08-CV-05692-GHK-JC

OPINION

Appeal from the United States District Court
for the Central District of California
George H. King, District Judge, Presiding

Argued and Submitted February 9, 2009
Pasadena, California

Filed February 26, 2009

Before: KLEINFELD, BEA, and IKUTA Circuit Judges.

Opinion by Judge Bea

BEA, Circuit Judge:

Defendants appeal the district court's order granting plaintiff Gary Davis's motion to remand Davis's putative class action to state court.¹ The only issue on appeal is whether Best Buy, a nationwide electronics retailer, has its principal place of business in the state of California. We reverse.

Plaintiff Gary Davis, as a private attorney general on behalf of himself and a putative class of similarly situated California consumers, sued HSBC Bank Nevada, N.A., HSBC Finance Corporation, Best Buy Company, and Best Buy Stores, L.P. in California Superior Court and alleged claims for unfair competition under Cal. Bus. & Prof. Code § 17200, false advertising under § 17500, and common law fraud in the nature of concealment. Davis's complaint alleges the defendants defrauded California customers by offering credit cards without adequately disclosing the annual fee the customers would be charged for use of the card.

The defendants removed the action to federal district court and based on the Class Action Fairness Act of 2005 ("CAFA"). Davis filed a motion to remand the

¹ We have jurisdiction over this interlocutory appeal under 28 U.S.C. § 1453(c)(1).

action to state court and contended that the local controversy exception, 28 U.S.C. § 1332 (d)(4),² barred the exercise of federal jurisdiction. The district court granted the motion to remand, and the defendants timely appealed.

The only issue on appeal is whether Best Buy Stores has its principal place of business in California. If not, Best Buy Stores is not a citizen of California, the local controversy exception does not apply, and federal jurisdiction under CAFA exists. We conclude Best Buy Stores does not have its principal place of business in California.

A limited partnership or a corporation is a citizen of (1) the state under whose laws it is organized or incorporated; and (2) the state of its “principal place of business.” 28 U.S.C. § 1332(c)(1). In this circuit, we apply two tests to determine the state of a corporation or partnership’s principal place of business. First we apply the “place of operations” test. Under that test, a corporation’s principal place of business is the state containing “a substantial predominance of

² The local controversy exception bars the exercise of federal jurisdiction when greater than two-thirds of the class members are citizens of the state in which the action was originally filed, the principal injuries about which the plaintiffs complain occurred in the state in which the action was originally filed, and at least one defendant, from whom significant relief is sought and whose conduct is forms a significant basis for the claims asserted, is a citizen of the state in which the action was originally filed. 28 U.S.C. § 1332 (d)(4).

corporate operations.’” *Tosco Corp. v. Communities for a Better Env't*, 236 F.3d 495, 500 (9th Cir. 2001) (per curiam) (quoting *Indus. Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092 (9th Cir. 1990)). If no state contains a “substantial predominance” of corporate operations, we apply the “nerve center” test, which locates the corporations principal place of business in the state where “the majority of its executive and administrative functions are performed.” *Id.*

Determining whether a “substantial predominance” of a corporation’s operations take place in a given state “plainly requires a comparison of that corporation’s business activity in the state at issue to its business activity in other individual states.”³ *Id.* We employ a number of factors to determine if a given state contains a substantial predominance of corporate activity, including: “the location of employees, tangible property, production activities, sources of income, and where sales take place.” *Id.* Substantial predominance does not require the majority of the corporation’s operations to occur in a single state, but the corporation’s activity in one state must be “substantially larger” than the corporation’s activity in any other state. *Id.*

³ Were we writing on a clean slate, we would find much in favor of the rule suggested by the concurrence. But we see ourselves as bound by the holding in *Tosco*.

Applying this standard, the district court concluded Best Buy Stores had a “substantial predominance” of its activities in California. Best Buy Stores has more stores in California than in any other state, more employees in California than in any other state, and more sales in California than in any other state. As the district court explained, “California has 15% more stores, 40% more employees, and 46% more sales than Texas, the second highest state.”

The substantial predominance test does not require that a majority of corporate operations occur in a single state. But the test requires a “substantial” predominance, not mere predominance. In *Tosco*, for example, we held that a gasoline manufacturer and retailer was a citizen of California when 21% of its employees, nearly 50% of its refining capacity, half its lubricant blending facilities, 35% of its retail locations, 15% of its convenience stores, and 35% of its inventories were located in California. 236 F.3d at 501–02. In that case, the defendant also had management operations in California and, in previous litigation, had maintained that it was a citizen of California. *Id.* at 502–03. *Tosco*’s operations reflected not only that it had more operations in California than in any other state, but that it had substantially more operations.

Accordingly, we have stated that when a corporation has operations spread across many states, the nerve center test is usually the correct approach. *Breitman*

v. May Co. Cal., 37 F.3d 562, 564 (9th Cir. 1994) (“May Company has corporate operations in over thirty states. Because no one state contains a substantial predominance of the corporation’s business activities, the place of operations test inappropriate.”). *Cf. Industrial Tectonics*, 912 F.3d at 1093 (“ITI’s operations are divided between only two states: California and Michigan. ITI’s operations are not so spread out that one must look to the corporate headquarters to find a principal place of business . . .”). When a corporation’s activities are spread over many states, it is much less likely operations in any one state will “substantially” predominate over operations in other states.

We have not previously given precise definition to the meaning of the term “substantially” in the substantial predominance test. We do not here adopt any hard and fast rule or percentage by which the operations in one state must exceed those in other states. But in determining whether a corporation’s operations “substantially” predominate, we must take into consideration both the nature of the corporation’s business activities and the purposes of the corporate citizenship statute. The purpose of diversity jurisdiction, and the citizenship determinations associated with it, is to avoid the effects of prejudice against outsiders. *Industrial Tectonics*, 912 F.2d at 1094. Thus, the term “substantially” must be defined with

an eye to ensuring that a corporation is a citizen of the place in which it is least likely to suffer prejudice. *See id.*

It is clear that Best Buy Stores’s California operations predominate over its operations in other states. But we cannot say that these operations “substantially” predominate over Best Buy Stores’s operations in other states. Best Buy Stores is a nationwide retailer with stores in 49 states, the District of Columbia, and Puerto Rico. At most, the statistics demonstrate that Best Buy Stores’s California retail activities roughly reflect California’s larger population. If a corporation may be deemed a citizen of California on this basis, nearly every national retailer—no matter how far flung its operations—will be deemed a citizen of California for diversity purposes. Such a result is untenable. With operations distributed widely across the country, Best Buy Stores is no more familiar to Californians than it is to Texans or Illinoisan, and hence no less likely to suffer prejudice in California than elsewhere.⁴

We do not require that courts apply a per capita approach to determining a corporation’s principal place of business in every case. However, we hold that a

⁴ Indeed, both of these states have more Best Buy stores per capita than does California. Best Buy has fewer stores in California per person than it does on average nationwide.

nationwide retailer with operations spread across many states will be a citizen of California only when a substantial predominance of its activities are located in California; it will not be a citizen of California merely because its operations in California cater to California's larger population.

Accordingly, we reverse the judgment of the district court and remand the case for further proceedings consistent with this opinion.

REVERSED and REMANDED

Counsel Listing

Stuart M. Richter and Gregory S. Korman, Katten Muchin Rosenman LLP; for the Defendants-Appellants.

Drew E. Pomerance and Erin M. LaBrache, Roxborough, Pomerance & Nye LLP; for the Plaintiffs-Appellees.