IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Gayla Smith, et al., individually and on behalf of all others similarly situated,	*	
Plaintiffs,	*	**Case No.** 1:05-cv-01192 (WDQ)
v.	*	
King Hagerstown Motors, LLC, et al.,	*	
Defendants.	*	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO REMAND ACTION

INTRODUCTION

This action was filed in the Circuit Court of Washington County, Maryland, by a class of Maryland plaintiffs seeking relief under a Maryland consumer protection statue against a Maryland car dealership and two out-of-state defendants to whom the dealership assigned the plaintiffs' installment sales contracts. Because of the absence of complete diversity or a federal question, the action would not have qualified for removal before passage of the "Class Action Fairness Act," or "CAFA," Pub. L. No. 109-2 (2005). CAFA permits removal of class actions where diversity is incomplete, but only if the class contains 100 members or more and the amount in controversy exceeds $5,000,000. Moreover, CAFA provides that the federal courts do not have jurisdiction over class actions where more than two-

thirds of the plaintiffs are citizens of the forum state and certain other criteria are satisfied. Here, although two of the defendants have purported to rely upon CAFA in removing this action to federal court, CAFA's terms preclude assertion of subject matter jurisdiction over the case by a federal court. This Court must, therefore, remand the case to the Circuit Court of Washington County, Maryland.

FACTUAL BACKGROUND

The plaintiffs in this action are Gayla Smith and Joanne Marie Lavelle, citizens of Maryland. Both Ms. Smith and Ms. Lavelle purchased automobiles from defendant King Hagerstown Motors, LLC ("King"), a Ford dealership that is organized under the laws of Maryland and has its principal place of business in Hagerstown, Maryland. In buying their vehicles, Ms. Smith and Ms. Lavelle entered into Retail Installment Sales Agreements ("RISAs") that expressly elected to be governed by the Credit Grantors Closed End Credit Provisions of Maryland's commercial laws (Md. Code Ann., Com. Law §§ 12-1001 ff.). Plaintiffs Smith and Lavelle allege that their RISAs purported to require them to pay fees that are impermissible under the Closed End Credit Provisions. King subsequently assigned Ms. Smith's RISA to defendant HSBC Auto Finance ("HSBC") and Ms. Lavelle's RISA to Capital One Auto Finance ("COAF").

On March 23, 2005, Ms. Smith and Ms. Lavelle filed this action against King, HSBC, and COAF in the Circuit Court of Washington County, Maryland, on behalf of themselves and a proposed class of other persons who entered into RISAs with King that elected to be governed by the Maryland Closed End Credit Provisions, that included charges not permitted by those provisions, and that were assigned to one of the other defendants. The complaint seeks damages for the interest and finance charges on the plaintiffs' RISAs, declaratory and injunctive relief, and attorneys' fees against all the defendants, as authorized by the Closed End Credit Provisions.

The plaintiffs served King on March 30, 2005, and HSBC and COAF on March 31, 2005. On May 2, 2005, HSBC filed a notice of removal, and COAF joined in HSBC's removal the same day.[1] HSBC's removal notice invokes the newly added removal and jurisdictional provisions of CAFA, codified at 28 U.S.C. §§ 1453 and 1332(d).[2] Those provisions provide (with exceptions to be discussed further below) for federal jurisdiction over class actions in which there is diversity of citizenship between any member of a plaintiff class of 100 or more members and any defendant, and in which the amount in controversy exceeds $5,000,000. 28 U.S.C. §§ 1332(d)(2), 1332(d)(5)(B). HSBC alleges that it is incorporated in Delaware and has its principal place of business in California, and that COAF is incorporated in Delaware and has its principal place of business in Virginia. HSBC Notice ¶ 6, at 3. HSBC relies on the resulting diversity of citizenship between the named plaintiffs (Maryland) and itself (Delaware and California) to satisfy the less-than-complete diversity requirement of CAFA. *Id.* ¶ 7, at 3.

With respect to the amount in controversy, HSBC asserts that the $5 million threshold is met solely on the basis of the complaint's request for damages in "an amount *not more than* $74,999." *Id.* ¶ 8, at 3-4 (emphasis added). HSBC states that, upon "information and belief," King has assigned more than 100 RISAs to HSBC and COAF, *id.* at 3, and it asserts that the amount in controversy exceeds $5 million simply because multiplying $74,999 by 100 yields a figure in excess of $5 million. *Id.* at 4. HSBC does not assert, let alone provide evidence, that the interest and charges on the RISAs for each plaintiff class member actually approach $74,999.

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[1] The thirtieth day following service of HSBC and COAF was April 30, 2005, a Saturday. May 2 was the first Monday after that date. *See* Fed. R. Civ. P. 6(a).

[2] COAF's joinder notice adopts the grounds for removal asserted by HSBC and supplies no additional analysis.

HSBC recognizes that CAFA precludes assertion of subject matter jurisdiction over a class action in which more than two-thirds of the plaintiff class members are citizens of the forum state and either "the primary defendants" are citizens of the same state, or "at least 1 defendant … from whom significant relief is sought" is a citizen of the same state. 28 U.S.C. § 1332(d)(4). In the latter case, federal jurisdiction is barred only if the in-state defendant's alleged conduct "forms a significant basis for the claims asserted," the "principal injuries" resulting from the defendants' conduct were incurred in the forum state, and no other class actions asserting the same or similar factual allegations have been filed against the defendants in the previous three years. 28 U.S.C. § 1332(d)(4)(A).

HSBC acknowledges that significantly more than two-thirds of the plaintiff class members here are citizens of Maryland, HSBC Notice ¶ 10, at 4, and that one of the defendants, King, is also a citizen of Maryland. HSBC does not assert that the principal injuries suffered by the class were not incurred in Maryland, nor does it assert that any class actions involving similar factual allegations have been filed against any of the defendants during the past three years. Instead, HSBC contends that King is not the primary defendant, and is not even a defendant from whom significant relief is sought. *Id.* ¶ 12, at 5. HSBC asserts that because it and COAF have assumed the class members' RISAs, the relief sought in this action will come from them, and no significant relief will be sought from King. (HSBC admits, however, that it will likely seek indemnification from King if liability is imposed on it. *Id.* at 5 n. 2.)

ARGUMENT

THIS ACTION MUST BE REMANDED BECAUSE THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER IT UNDER CAFA.

The removal provisions of CAFA, 28 U.S.C. § 1453, read together with the existing grant of removal jurisdiction under 28 U.S.C. § 1441(a), permit removal of class actions over which the federal

courts have subject matter jurisdiction under newly added 28 U.S.C. § 1332(d).[3] Class actions over which § 1332(d) does not grant subject matter jurisdiction, however, may not be removed under CAFA, and must be remanded for lack of subject matter jurisdiction if a defendant attempts removal. Under the established law of this circuit (which is not altered by anything in the text of the new statute), removal statutes are strictly construed, and the removing party must establish the presence of subject matter jurisdiction:

> The burden of demonstrating jurisdiction resides with "the party seeking removal." *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir.1994). We are obliged to construe removal jurisdiction strictly because of the "significant federalism concerns" implicated. *Id*. Therefore, "[i]f federal jurisdiction is doubtful, a remand [to state court] is necessary." *Id*.

Dixon v. Coburg Dairy, Inc., 369 F.3d 811, 816 (4th Cir. 2004); *see also Mattingly v. Hughes Electronics Corp.*, 107 F.Supp.2d 694, 696 (D. Md. 2000).

Here, remand for lack of subject matter jurisdiction is necessary. First, this case falls within CAFA's provision barring assertion of subject-matter jurisdiction over class actions where more than two-thirds of the plaintiffs and a significant defendant are citizens of the forum state. King is, at least, a significant defendant, and the removing codefendants have not alleged — let alone carried the burden of demonstrating — that any of the conditions that permit assertion of federal jurisdiction in such cases (i.e., principal injuries suffered outside the state, or similar class actions filed against the same defendants within three years) is applicable. *See* 28 U.S.C. § 1332(d)(4)(A). Indeed, King's centrality

[3] The procedures for removal are those set forth in 28 U.S.C. § 1446, except to the extent those are modified by new § 1453. The modifications pertinent here are that any defendant may remove without regard to its own citizenship, and without obtaining the consent or joinder of other defendants. 28 U.S.C. § 1453(b).

in this case is enough to render it the only "primary defendant," thus precluding the assertion of jurisdiction under 28 U.S.C. § 1332(d)(4)(B).

Second, the removing parties have not shown that the $5 million amount in controversy is met. Plaintiffs have not claimed damages of $74,999 for each class member, but have simply requested damages *not exceeding* that amount. Because the damages in this case consist of finance charges for purchases of automobiles for family or personal use, it is evident that the damages for most class members will be well below that amount, and HSBC has not shown that the actual finance charges and the actual number of class members yield an amount in controversy anywhere near $5 million.

Third, the removing parties have not shown that there are 100 or more class members. Even though the defendants are in a position to know exactly how many RISAs have been assigned them by King, they have not affirmatively alleged, let alone demonstrated, that the number is 100 or more; rather, they have only alleged the number of class members "on information and belief." That does not satisfy their burden.

I.
SECTION 1332(d)(4) PRECLUDES ASSERTION OF SUBJECT MATTER JURISDICTION OVER THIS ACTION.

A. Because Plaintiffs Seek Significant Relief from King, § 1332(d)(4)(A) Bars Assertion of Federal Subject Matter Jurisdiction.

Newly added 28 U.S.C. § 1332(d)(4)(A) precludes a federal court from exercising jurisdiction:

(A)(i) over a class action in which—

> (I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;
>
> (II) at least 1 defendant is a defendant—
>
> (aa) from whom significant relief is sought by members of the plaintiff class;

> (bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and
>
> (cc) who is a citizen of the State in which the action was originally filed; and
>
> (III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and
>
> (ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons[.]

Here, far more than two-thirds of the members of the plaintiff class are citizens of Maryland. The class consists exclusively of persons who purchased automobiles from King in Hagerstown, and whose contracts elected to be governed by Maryland's Closed End Credit Provisions. HSBC's removal notice itself alleges that "significantly more than two-thirds of the alleged plaintiff class may be citizens of Maryland." HSBC Notice ¶ 10, at 4. Given this concession and the plaintiffs' factual allegations, the class satisfies the two-thirds criterion.

Second, King is a citizen of Maryland and is a "significant" defendant within the meaning of § 1332(d)(4)(A)(i)(II). King's conduct in entering into RISAs with the plaintiffs with terms violating Maryland law forms a significant, if not the only, basis for the claims asserted in this action. Moreover, contrary to HSBC's assertions, the plaintiffs seek significant relief from King. King is a credit grantor under the Closed End Credit Provisions, *see* Md. Code. Ann., Com. Law § 12-1001, and, as such, it is fully liable for the monetary relief sought by the plaintiffs. That HSBC and COAF may *also* be liable does not detract from the significance of the relief sought from King. In addition, the action seeks significant declaratory and injunctive relief concerning the lawfulness of King's ongoing business practices. Thus, both the lawfulness of King's conduct and the remedies available against King will be

central to this action. Indeed, HSBC itself recognizes as much by acknowledging the likelihood that it will seek indemnification against King if it is held liable. HSBC Notice, ¶ 12, at 5 n.2.

Third, the principal injuries resulting from the conduct of all the defendants were incurred in Maryland. The injuries alleged in this case consist of the payment by Maryland citizens of fees unauthorized by Maryland law. Those unauthorized charges hit the pocketbooks of members of the plaintiff class in Maryland. Indeed, HSBC's removal notice does not even suggest that the injuries of class members were not suffered in Maryland.

Fourth, plaintiffs are not aware of any other class actions that have been brought against the defendants based on similar factual allegations within the past three years. Nor do the removing parties identify any prior class actions brought against them or King involving allegations concerning King's entry into RISAs incorporating charges not authorized under the Closed End Credit Provisions. Indeed, the removing defendants do not even suggest that they have been the subject of similar class actions; their only argument that § 1332(d)(4)(A) does not preclude jurisdiction here is their incorrect assertion that plaintiffs do not seek "significant" relief against King.

In sum, this action falls squarely within § 1332(d)(4)(A)'s bar on assertion of federal jurisdiction over cases where predominantly in-state classes seek significant relief against an in-state defendant (and where the injuries were suffered in-state and other class actions involving similar factual allegations have not been filed against the defendants within the past three years). The removing parties have not come close to carrying their burden of establishing that this case falls outside subsection (d)(4)(A)'s criteria. The court must therefore remand this action based on lack of subject matter jurisdiction.

B. Because King Is the Only "Primary Defendant," Jurisdiction Is Foreclosed by § 1332(d)(4)(B).

Though this Court need not reach the issue because of the applicability of § 1332(d)(4)(A), jurisdiction is also barred by § 1332(d)(4)(B). Section 1332(d)(4)(B) provides that a federal court may not exercise jurisdiction under CAFA over a class action if "two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed." Unlike (d)(4)(A), subsection (d)(4)(B) precludes jurisdiction without regard to the location of the principal injuries or the existence of other similar class actions, as long as every "primary defendant" and two-thirds of the plaintiff class are citizens of the forum state.

CAFA does not define the term "primary defendants." Ordinary dictionary definitions of "primary," however, establish that the "primary" defendants must be the "[f]irst; principal; chief; leading" defendants. Black's Law Dictionary 1071 (5th ed. 1979). Similarly, the most relevant definition in Webster's is "of first rank, importance, or value; PRINCIPAL." Webster's New Collegiate Dictionary 913 (1977).

Here, King is *the* primary defendant, and the removing defendants play a secondary role. King's entry into RISAs that violate Maryland law is the primary conduct that is at the heart of plaintiffs' allegations. Moreover, King is the only defendant that is liable to the entire class. The removing defendants, by contrast, are liable as assignees, and each of them is liable only to those members of the class whose contracts they were assigned. While the removing defendants are fully liable for finance charges and fees under the contracts they have been assigned, their role in this action is secondary to that of King, which originated the unlawful RISAs and remains fully liable to all members of the class.

II.
THE CASE DOES NOT MEET THE $5 MILLION AMOUNT-IN-CONTROVERSY THRESHOLD.

A federal court may assert subject matter jurisdiction over a class action under CAFA only if the aggregate amount in controversy exceeds $5 million. 28 U.S.C. §§ 1332(d)(2), 1332(d)(6). Moreover, under long-established principles of removal jurisdiction, "[w]hen … the plaintiff's complaint does not specify a particular amount of damages, the removing defendant must prove by a preponderance of the evidence that plaintiff's claims meet the amount in controversy requirement." *Mattingly*, 107 F. Supp.2d at 696.

Here, the plaintiffs' complaint does not specify a particular amount of damages per plaintiff, but only specifies that the damages sought *do not exceed* $74,999 per plaintiff. Hence, it is incumbent on the removing parties to demonstrate by a preponderance that the amounts placed in issue by the plaintiffs' allegations actually exceed $5 million. The defendants have not carried this burden. Instead, they have simply assumed, incorrectly, that the *ceiling* the complaint places on the damages claim is the actual amount claimed for each member of the plaintiff class. Then, relying on their "information and belief" that the class has at least 100 members, they have multiplied that amount by 100, yielding an amount in controversy of $7,499,900.

Even leaving aside the inadequacy of defendants' unsupported "information and belief" allegation to demonstrate the actual size of the class, their assumption that each class members has a claim of $74,999 is not only unsupported by the complaint, but has no basis in any evidence, or even any assertion by the removing parties, that the finance charges the plaintiffs seek for the automobile RISAs at issue come close to $74,999 per plaintiff. In fact, the finance charges and fees associated with each RISA, which plaintiffs seek to recover through this action, are generally much, much lower than

$74,999. The total finance charges and fees for plaintiff Smith's RISA, for example, were only $4,145.95. Based on that figure, which plaintiffs expect would be fairly typical, the $5 million threshold would not be reached unless the size of the class significantly exceeded 1,000 members. The removing parties do not allege that the class approaches that size.

The removing parties therefore have not, and cannot, bear their burden of establishing the requisite amount in controversy.[4] This failing, too, requires that this Court remand the action for lack of subject matter jurisdiction.

III.
THE DEFENDANTS HAVE NOT ESTABLISHED THAT THE CLASS INCLUDES AT LEAST 100 MEMBERS.

CAFA does not permit a federal court to assert subject matter jurisdiction over a class action under 28 U.S.C. § 1332(d) "if the number of members of all proposed plaintiff classes in the aggregate is less than 100." 28 U.S.C. § 1332(d)(5)(B). Here, plaintiffs do not know whether this criterion is met, and their complaint alleges only that the number of class members exceeds 50 (Complaint ¶ 26) and that the class "includes tens if not hundreds of individuals." Complaint ¶ 27. The removing defendants, despite having access to the business records from which the actual size of the class could be determined, have not affirmatively stated that their records show that the class has 100 or more members, nor have they pointed to any evidence to substantiate any such assertion. Instead, they have only alleged on "information and belief" that there are at least 100 King customers whose RISAs were assigned to HSBC and COAF. HSBC Notice ¶ 8, at 3.

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[4] Any attempt by the defendants to establish that the amount in controversy was in fact satisfied, under these circumstances, would necessitate discovery into both the actual size of the class (which should be ascertainable from the defendants' records) as well as the amounts of finance charges and fees associated with the RISAs of the class members (information that the defendants also control).

As noted above, removing parties generally bear the burden of establishing that a case comes within federal jurisdiction. Moreover, the law generally allocates a burden of going forward (if not always the burden of proof) with respect to a particular fact to a party that is in exclusive possession of the evidence bearing on that fact. *See United States v. Crowthers*, 456 F.2d 1074, 1078 (4th Cir. 1972) ("It is neither novel nor unfair to require the party in possession of the facts to disclose them."). Here, if the removing defendants wish to assert that this case satisfies the jurisdictional requirement that the class consist of at least 100 members, it is incumbent upon them to come forward with the evidence in their possession demonstrating that to be so. Absent such a showing, this case must be remanded for lack of subject matter jurisdiction on this ground as well.[5]

CONCLUSION

CAFA imposes definite limits on the scope of its expanded subject matter jurisdiction to keep localized controversies, as well as class actions involving relatively small classes and small amounts of money, out of the federal courts. Here, a class overwhelmingly if not exclusively composed of Maryland citizens seeks significant relief against a Maryland defendant based on conduct of that defendant that occurred in Maryland and violated Maryland law. Under CAFA, such an action must be remanded unless the same or similar factual allegations have recently been the subject of other class actions against the same defendants. That is not the case here. Moreover, the removing parties have not shown that the action meets either CAFA's amount in controversy threshold or its minimum class size requirement. For all these reasons, the action must be remanded for lack of subject matter jurisdiction.

[5] Again, if defendants persist in contending that there are at least 100 members in the class, discovery of their records bearing on that issue may be a necessary prerequisite to decision of the jurisdictional question.

Respectfully submitted,

__/s/_____
Scott C. Borison
Bar No. 22576
Legg Law Firm, LLC.
5500 Buckeystown Pike
Frederick MD 21703
Borison@legglaw.com
(301) 620-1016
(301) 620-1018 fax

Brian W. Warwick
Admitted Pro Hac Vice
VARNELL & WARWICK, P.A.
20 La Grande Boulevard
The Villages, Florida 32159
Phone: (352) 753-8600
Fax: (352) 753-8606

Attorney for Plaintiffs

OF COUNSEL:

Scott L. Nelson
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, DC 20009
(202) 588-1000
(202) 588-7795 fax

Dated: May 31, 2005

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was electronically served on the defendants' counsel in this action through the ECF/CM system on May 31, 2005.

_/s/_____
Scott C. Borison