IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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

PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO REMAND ACTION

INTRODUCTION

The removing Defendants do not dispute that more than two-thirds of the members of the proposed plaintiff class in this case are Maryland citizens. Nor do they dispute that the principal injuries suffered by the class as a result of the conduct alleged in the complaint were suffered in Maryland. It is also undisputed that the Defendant at the heart of this case — King Hagerstown Motors — is a Maryland citizen, and that its alleged conduct in electing to apply the Maryland Closed End Credit Provisions ("CLEC") to its auto sales, and by charging fees not authorized by the CLEC, forms the very foundation for the claims asserted in this action. Finally, the removing Defendants have not contested Plaintiff's contention that no class actions asserting the same or similar factual allegations have been filed against the Defendants within the past three years. Thus, the removing Defendants have conceded that all but one of the criteria for *mandatory* remand under 28 U.S.C. § 1332(d)(4)(A) is present in this case.

The sole element in dispute under subsection (d)(4)(A) of the Class Action Fairness Act ("CAFA") is whether Plaintiffs seek "significant relief" from King. HSBC and COAF, contend that they will be liable for the majority of damages sought by plaintiffs if plaintiffs prevail on the merits. This self-serving argument ignores the reality that these Defendants may be liable to class jointly and severally and that the ultimate payments may be disbursed in a variety of ways. Furthermore, because King drafted the RISAs at issue, chose to charge the fees complained of and retained the fee for itself, it is likely that HSBC, COAF and other creditors may turn on King and assert that King is ultimately liable to them for any damages Plaintiff's are awarded. Regardless, the potential liability of HSBC and COAF does not alter the fact that the complaint also asserts that King, as a credit grantor, remains fully liable under the CLEC for all finance charges and fees imposed on members of the plaintiff class. Importantly, King is the only Defendant connected to all class members. While HSBC and COAF may be liable to higher damages owed to the relatively few class members assigned to them, they will have no liability for other class members that had their credit agreements assigned to other credit companies. Because King is fully liable for all damages to the class including finance charges and interest, along with a number of various assignees, it necessarily has the largest potential liability simply due to its contacts with all class members. Moreover, even under the removing Defendants' convenient view of liability, King is potentially liable for tens of thousands of dollars in damages, which, together with the injunctive relief the plaintiffs seek against King, certainly constitutes "significant relief."

Because Plaintiffs seek significant relief against King, this Court has no choice but to remand under subsection (d)(4)(A) of CAFA, and it therefore need not reach the issue of whether King is the "primary" defendant under subsection (d)(4)(B) of CAFA. However, the removing

Defendants have failed to demonstrate the existence of CAFA jurisdiction on this ground as well, and their argument that CAFA relieves a removing defendant of the burden of establishing subject matter jurisdiction is also meritless.

ARGUMENT

1. The Burden of Proof Remains on the Removing Defendants to Demonstrate That Federal Jurisdiction Exists. —

HSBC acknowledges that well-settled case law, based on the fundamental precepts that federal courts have limited subject matter jurisdiction and that removal is disfavored, places the burden of demonstrating that there is subject matter jurisdiction on the party who invokes federal jurisdiction by removing an action. *See* HSBC Opp. 4. HSBC asserts that CAFA reversed the burden and turned the limited jurisdiction of the federal court system on its head. In support of this assertion, HSBC cites nothing in the statute, but relies only on the floor statement of a single member of the House of Representatives (made after the Senate had voted on the measure).[1] As the Fourth Circuit and the Supreme Court have admonished, "[t]he remarks of individual legislators, even sponsors of legislation, however, are not regarded as a reliable measure of congressional intent." *Roy v. County of Lexington, South Carolina*, 141 F.3d 533, 539 (4th Cir. 1998) (citing *West Va. Univ. Hosp. v. Casey*, 499 U.S. 83, 98-99 (1991)); *see also Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 306 (4th Cir. 2000), *aff'd*, *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002). Decades of case law cannot be overturned by "unenacted legislative intent"

[1] Even academic proponents of the use of legislative history acknowledge that history "produced after one house has finally voted on a bill" does not qualify for consideration. Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 Vand. L. Rev. 1457, 1522 (2000). Thus, although the defendants do not seek to rely upon it anyway, the Senate Report produced several weeks after President Bush signed CAFA is also irrelevant.

untethered to anything in the statute. *United States v. Morison*, 844 F.2d 1057, 1064 (4th Cir. 1988).

2. Because Plaintiffs Seek Significant Relief from King, a Maryland Citizen, 28 U.S.C. § 1332(d)(4)(A) Requires this Court to Remand. — The criteria for mandatory remand under 28 U.S.C. § 1332(d)(4)(A) are: (1) that more than two-thirds of the proposed class are citizens of the forum state (§ 1332(d)(4)(A)(i)(I)); (2) that at least one defendant is also a citizen of the forum state (§ 1332(d)(4)(A)(i)(II)(cc)); (3) that the plaintiff class seeks significant relief from that defendant (§ 1332(d)(4)(A)(i)(II)(aa)); (4) that that defendant's conduct forms a significant basis for the claims of the class (§ 1332(d)(4)(A)(i)(II)(bb)); (5) that the principal injuries resulting from the defendants' conduct were suffered in the forum state (§ 1332(d)(4)(A)(i)(III)); and (6) that no other class action based on the same or similar factual allegations has been filed within the past three years (§ 1332(d)(4)(A)(ii)). The defendants do not challenge the showing Plaintiff made in her opening memorandum as to five of these six criteria. They argue in response only that the plaintiffs do not seek "significant relief" from the in-state defendant, King Hagerstown Motors.

Even as to that element, the removing Defendants' argument is half-hearted: They devote their principal efforts to contending that King is not the "primary" defendant (HSBC Opp. 5-7; COAF Opp. 4-6). Under subsection (d)(4)(A), however, remand does not depend on whether King is the "primary defendant," but only whether Plaintiff seeks "significant relief" from it.

On that issue, the removing Defendants contend that as assignees, their potential liability under the CLEC is greater than King's and that they are the "deep pockets" against whom plaintiffs "truly seek damages." COAF Opp. 5. Although, as credit grantors the removing

defendants are fully liable to Plaintiffs for all fees and finance charges on the contracts assigned to them, Defendants overlook the fact that Plaintiffs also allege that King is equally liable. Not only is King liable on the contracts assigned to HSBC and COAF, but it is also liable on all other credit agreements assigned to credit companies other than HSBC and COAF. Nothing in the complaint substantiates the removing Defendants' self-serving argument that Plaintiffs seek less monetary recovery from King than from assignees. Indeed, the opposite is true: Plaintiffs allege that King is fully liable to all members of the class, while COAF and HSBC are each liable only to those class members whose contracts were assigned to them. Each subset of customers assigned to each credit company is only a small portion of the class to which King is liable. Nor is there any substance to Defendants' contention that because the removing Defendants have "deeper pockets" than King, plaintiffs are not seeking to recover against King. It may well be true that HSBC and COAF have greater resources than King, but King itself is a substantial and successful business, and plaintiffs have no doubt that it would be able to satisfy their claims against it fully. Further, if Defendants' argument is taken to its logical conclusion, than any class action involving claims against a wealthy company would automatically be subject to removal under CAFA, regardless of the extent of that defendant's liability. This is not what the statute was referencing by referencing "significant relief."

The "significant relief" language was inserted into the CAFA in large part because of fraudulent joinder issues. For example, there is a pharmacy in Mississippi that was joined as a defendant in thousands of individual drug cases in Mississippi in order to avoid complete diversity. The plaintiffs in those cases did not allege that the pharmacy acted improperly and

they did not seek a significant amount of damages from the pharmacy.[2] Indeed, its sole purpose in the lawsuit was to avoid removal to federal court. In order to combat such conduct, congress included language in the statute intended to make certain that "significant relief" was being sought from the in-state Defendant, as opposed to simply joining the in-state defendant to avoid removal. When viewed from this standpoint, Defendants' argument is wholly misplaced as Plaintiff's clearly seek substantial relief from the car dealer that caused the violations at issue.

Even if it were true, as HSBC asserts without any legal support, that Plaintiffs could recover only $20-$25 each against King, that would not render the relief they seek against King (which also includes injunctive relief) "insignificant." "Significant" is generally defined as "having meaning," or "important." Webster's New Collegiate Dictionary 1079 (1977). Even several thousand dollars of damages, combined with the attorneys' fees Plaintiffs seek, and the injunctive relief that would significantly change King's ongoing business practices, would be meaningful to both King and to the class. COAF's assertion that injunctive relief would not be significant to the class because it would not benefit class members who have already done business with King overlooks the obvious fact that car buyers often are loyal to particular manufacturers (such as Ford, whose vehicles King sells) and hence return repeatedly to their local dealer to make new purchases. In fact, Plaintiff Lavelle bought two cars from King.

Finally, assuming the legislative history HSBC cites as to the meaning of subsection (d)(4)(A) were relevant, this is a "truly local controversy" in which the in-state defendant is "*a primary focus of the plaintiffs' claims* — not just a peripheral defendant." HSBC Opp. 8 (quoting 151 Cong. Rec. H728 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner) (emphasis added by HSBC)). The central focus of the complaint is on the business practices of a

[2] The widow of the owner of the pharmacy testified before congress in support of CAFA.

local Maryland car dealership, which affect predominantly Maryland residents, by violating a Maryland consumer protection statute. King is by no means peripheral: The claim of a violation of the CLEC rests entirely on its conduct, and monetary, injunctive, and declaratory relief are sought from it. The simple fact that such relief is also sought from out-of-state Defendants neither renders the relief sought against King insignificant, nor does it alter the predominantly local focus of this case.

In short, to paraphrase HSBC, this lawsuit is precisely the sort of litigation Congress sought to keep out of the federal courts when it enacted CAFA's mandatory remand provision for actions that seek significant relief from in-state defendants. Indeed, because the applicability of § 1332(d)(4)(A) is apparent without regard to burden of proof, the Court need not resolve whether, as the removing defendants assert, Representative Sensenbrenner's floor statements trump the case law imposing the burden of establishing jurisdiction on the removing party.

3. Because King is the Primary Defendant, Subsection (d)(4)(B) Also Requires Remand. — The court must go no further than § 1332(d)(4)(A) to conclude that CAFA requires remand of this action. But, if there were any need to reach the issue, subsection (d)(4)(B) would also require remand, because King is not only a defendant from whom "significant relief" is sought, but it is also the primary defendant in this action.[3]

The removing defendants acknowledge that CAFA does not define the term "primary defendant" (*see* HSBC Opp. 5), but they criticize plaintiffs for using common dictionary decisions to shed light on the term and caricature the plaintiffs' argument as being that King is

[3] The issue would only have to be reached if the defendants had shown that the plaintiffs suffered their principal injuries outside Maryland or that similar class actions had been filed against them within the past three years, because those factors, if present, would bar a remand under (d)(4)(A), but not under (d)(4)(B).

the primary defendant merely because it is named first in the complaint. *Id.* Of course, plaintiffs have never made that argument. Rather, Plaintiffs contend that King is the primary defendant because the case focuses on its conduct and because they allege that it, unlike the moving Defendants, is fully liable to the entire class. Indeed, even HSBC acknowledges that liability to the "vast majority" of the class is a powerful indication that a defendant is the "primary defendant". HSBC Opp. 6.

The removing Defendants' argument, in the end, boils down to their unsupported assertion that King will not be fully liable to the Plaintiffs for fees and finance charges, while the removing Defendants will be. Once that argument is rightfully set aside, for the reasons we have already stated, their position that they are the primary Defendants collapses as well. This is the local type of action that was not intended to be subject to removal under CAFA.

CONCLUSION

For the foregoing reasons, together with those set forth in our opening memorandum, the Court should remand this action to the Circuit Court of Washington, County, Maryland.

Respectfully submitted,
__/s/_____
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Dated: June 27, 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 June 27, 2005.

_/s/_____
Scott C. Borison