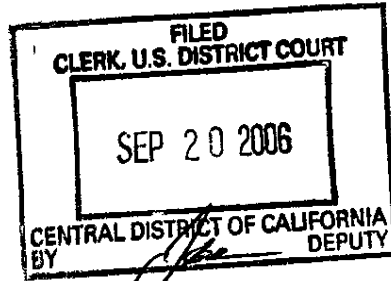


1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

S

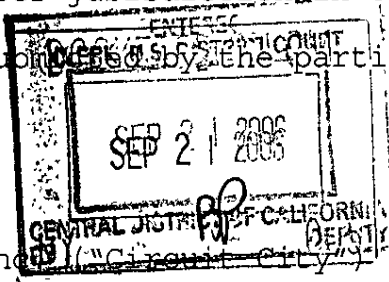


- Priority
- Send
- Clsd
- Enter
- NO 3865/JS-6
- JS-2/JS-3
- Scan Only

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

GARY DAVIS, an individual,	)	Case No. CV 06-04804 DDP (PJWx)
on behalf of himself, and as	)	
PRIVATE ATTORNEY GENERAL,	)	<b>ORDER FINDING REMOVAL PROPER</b>
and on behalf of all others	)	
similarly situated,	)	[Notice of removal filed on
	)	August 1, 2006]
Plaintiff,	)	
	)	
v.	)	
	)	
CHASE BANK U.S.A., N.A., a	)	
Delaware corporation;	)	
CIRCUIT CITY STORES, INC., a	)	
Virginia corporation,	)	
	)	
Defendants.	)	

This matter comes before the Court upon its own Order to Show Cause regarding subject matter jurisdiction in this removed case. Upon reviewing the papers submitted by the parties, the Court finds that removal was proper.



**I. BACKGROUND**

Circuit City Stores, Inc. ("Circuit City") offers a Chase Bank USA, N.A. ("Chase") credit card (the "Rewards Card") to California residents who use the card to make purchases at Circuit City Stores. Through the Rewards Card, Chase and Circuit City provide customers with certain benefits, such as rewards points redeemable at Circuit City Stores. Earlier this year, Chase and Circuit City also advertised that Rewards Card holders who made promotional

19

1 purchases within a specific time frame would pay no immediate  
2 interest on those purchases.

3 On March 3, 2006, Gary Davis ("Davis") purchased a television  
4 set from Circuit City, charging \$2,000 to his Rewards Card.  
5 Circuit City and Chase treated the item as a promotional purchase,  
6 and granted Davis a "term of no interest" from the date of purchase  
7 until January 2008.

8 Prior to Davis' purchase of the television, Chase billed Davis  
9 for other Rewards Card purchases made between January 14, 2006, and  
10 February 13, 2006. Davis alleges he paid this bill in full and on  
11 time, on March 10, 2006.

12 Sometime after March 13, 2006, Plaintiff received his monthly  
13 statement from Chase for the purchases he made between February 14,  
14 2006, and March 13, 2006. A \$77.25 finance charge appeared on this  
15 statement. Davis alleges that Chase and Circuit City improperly  
16 assessed the finance charge by applying the entire amount of his  
17 March 10 payment against his \$2,000 interest-free promotional  
18 purchase, when it should have been applied to his interest-accruing  
19 February balance. Davis further alleges that Chase and Circuit  
20 City assessed similar finance charges against thousands of other  
21 Rewards Card holders.

22 On June 26, 2006, Davis brought this class action against  
23 Chase and Circuit City, seeking, *inter alia*: (1) compensatory  
24 damages; (2) restitution and disgorgement; (3) punitive damages;  
25 (4) attorneys' fees; and (5) an injunction prohibiting Chase from  
26 prioritizing the application of payments to promotional purchases.  
27 On August 9, 2006, Chase and Circuit City jointly removed the case  
28 to this Court, alleging that the aggregate of the claims exceeds

1 \$5,000,000, and thus removal is proper under the Class Action  
2 Fairness Act of 2005 ("CAFA").

3 The Court issued an Order to Show Cause, requesting further  
4 briefing on whether the aggregate exceeds \$5,000,000. In his  
5 Return, Davis argued that, even if the aggregate exceeds the  
6 threshold amount, the securities exception to CAFA applies,  
7 requiring the Court to remand the case. The Court ordered further  
8 briefing on the securities exception.

9 Accordingly, the issues presented are: 1) whether the amount  
10 in controversy exceeds \$5,000,000; and, if it does; 2) whether the  
11 CAFA securities exception applies.

## 12 **II. DISCUSSION**

### 13 **A. Legal Standard**

14 CAFA "vests the district court with 'original jurisdiction of  
15 any civil action in which the matter in controversy exceeds the sum  
16 or value of \$5,000,000, exclusive of interest and costs, and [the  
17 action] is a class action in which the parties satisfy, among other  
18 requirements, minimal diversity." Abrego Abrego v. The Dow  
19 Chemical Co., 443 F.3d 676, 680 (9th Cir. 2006) (quoting 28 U.S.C. §  
20 1332(d)). CAFA expressly requires that the claims of individual  
21 members shall be aggregated to determine the amount in controversy.  
22 28 U.S.C. § 1332(d)(6).

23 Where the complaint does not specify the amount of damages  
24 sought, the removing defendant must prove by a preponderance of the  
25 evidence that the amount in controversy requirement has been met.  
26 Abrego, 443 F.3d at 683. Under this standard, "the defendant must  
27 provide evidence that it is 'more likely than not' that the amount  
28 in controversy satisfies the federal diversity jurisdictional

1 amount requirement." Id. (quoting Sanchez v. Monumental Life Ins.  
2 Co., 102 F.3d 398, 404 (9th Cir. 1996). In its discretion, a  
3 district court may accept certain post-removal admissions as  
4 determinative of the amount in controversy. Id. at 690-91; see  
5 also Singer v. State Farm Mut. Automobile Ins. Co., 116 F.3d 373,  
6 376 (9th Cir. 1997).

7 However, even where the removing defendant demonstrates that  
8 the threshold requirements of CAFA are met, certain CAFA exceptions  
9 may still prevent removal:

10 [Section 1332(d)(2) ("CAFA")] shall not apply to any class  
11 action that solely involves a claim . . . [that] relates to  
12 the rights, duties (including fiduciary duties), and  
13 obligations relating to or created by or pursuant to any  
14 security (as defined under section 2(a)(1) of the Securities  
15 Act of 1933 and the regulations thereunder).

16 28 U.S.C. §§ 1332(d)(9)(A); 1332(d)(9)(C); (internal citations  
17 omitted).

18 This provision, the so-called "securities exception," turns on  
19 the definition of a "security" under the Securities Act of 1933.  
20 Section (2)(a)(1) of the Securities Act of 1933 defines "security"  
21 as follows:

22 The term "security" means any note, stock, treasury stock,  
23 security future, bond, debenture, *evidence of indebtedness*,  
24 certificate of interest or participation in any profit-sharing  
25 agreement, collateral-trust certificate, preorganization  
26 certificate or subscription, transferable share, investment  
27 contract, voting-trust certificate, certificate of deposit for  
28

1 a security, fractional undivided interest in oil, gas, or  
2 other mineral rights . . . .

3 15 U.S.C. § 77b(a) (1) (emphasis added).

4 In the broadest sense, a "security" is an instrument that  
5 "might be sold as an investment." Reves v. Ernst & Young, 494 U.S.  
6 56, 61 (1990). Under the 1933 Act, "evidence of indebtedness" is a  
7 term of art that usually connotes an original instrument that  
8 itself may be traded, not merely a reference to the existence of  
9 debt. Gilbert Family P'ship v. Nido Corp., 679 F.Supp. 679, 684  
10 (E.D. Mich. 1988).

11 B. Analysis

12 In deciding whether removal was proper, the Court must first  
13 determine whether this case meets the threshold requirements of  
14 CAFA. Davis is a California citizen, Chase is a Delaware citizen,  
15 Circuit City is a Virginia citizen; therefore, the "minimal  
16 diversity" requirement is met. If the amount in controversy  
17 exceeds \$5,000,000, CAFA jurisdiction will be proper, providing no  
18 exceptions apply.

19 Davis argues that, in their notice of removal, Chase and  
20 Circuit City did not provide evidence of the number of California  
21 residents who used Rewards Cards or the amount of finance charges  
22 assessed. However, in their Returns on the Order to Show Cause,  
23 Chase and Circuit City provide the missing evidence, and  
24 demonstrate that the aggregate of the claims will likely exceed  
25 \$20,000,000, an amount far above the threshold requirement. Davis  
26 provides no evidence that their calculations are incorrect, and,  
27 given the allegations, this amount seems a reasonable estimate.  
28 Thus, it is "more likely than not" that removal was proper.

1           Moreover, Davis' counsel admits in a post-removal letter that  
2 "plaintiff certainly alleges that the amount in controversy exceeds  
3 the threshold amount." (Declaration of David W. Moon in Support of  
4 Chase's Return to Order to Show Cause Regarding Subject Matter  
5 Jurisdiction, Ex. A, 1) A court may consider post-removal  
6 admissions contained in correspondence between counsel in  
7 determining the amount in controversy. Cohn v. Petsmart, Inc., 281  
8 F.3d 837, 840 (9th Cir. 2002). Here, Davis has admitted that it  
9 believes the amount in controversy exceeds \$5,000,000. Despite  
10 Davis' assertions to the contrary, no real dispute exists as to the  
11 amount in controversy, and defendants have satisfied their initial  
12 burden of removal under CAFA.

13           The only remaining issue is whether the class action "solely"  
14 involves a "claim concerning a security." Davis argues that every  
15 cause of action in the Complaint arises from Chase and Circuit  
16 City's practice of unlawfully assessing finance charges pursuant to  
17 the Rewards Card Agreement (the "Agreement"). Under the Agreement,  
18 the Rewards Card holder is deemed to grant Chase a "purchase money  
19 security interest under the Uniform Commercial Code in each item of  
20 merchandise purchased." (Declaration of Gary Davis Filed in  
21 Support of his Memorandum of Points and Authorities Regarding the  
22 Order to Show Cause, §2, Ex. A.) Davis argues that the Agreement  
23 itself, as "evidence of indebtedness," constitutes a "security."  
24 Davis further concludes that because the credit issued by Chase  
25 constitutes an agreement to loan money to Davis, in return for  
26 Davis' agreement to pay the money back within a certain time frame,  
27 it constitutes a "security" pursuant to 15 U.S.C. §77(b)(a)(1).

28

1           However, as Chase argues, credit card agreements and billing  
2 statements cannot be considered "securities" under the 1933 Act.  
3 Reviewing the definition of "security" under the Act, it is clear  
4 that credit card agreements, billing statements, and finance  
5 charges are not what Congress had in mind when it provided examples  
6 of "securities". Nor do they function as securities in the  
7 traditional sense of the word. They are not sold or marketed as  
8 investments. They are subject to alternate regulatory schemes,  
9 such as the Truth in Lending Act, the Fair Credit Billing Act, and  
10 the Fair Credit Reporting Act. Given these differences, the Court  
11 concludes that they cannot be deemed "securities" under 15 U.S.C.  
12 §77(b)(a)(1).

13           Additionally, the claims in this case do not "solely" involve  
14 a claim relating to the rights, duties, and obligations relating to  
15 or created by or pursuant to any security. The Complaint alleges  
16 breaches of the California Consumer Legal Remedies Act, the  
17 California Unfair Competition Business Law, and the California  
18 Business and Professions Code. Plaintiffs' claims are those of  
19 consumer fraud, not securities fraud. Characterizing this case as  
20 "securities litigation" would be disingenuous at best.

21           Davis reads much into the term "evidence of indebtedness," and  
22 urges the Court to construe this term in the broadest sense  
23 possible. However, even reading the term liberally, the Court  
24 would be hard pressed to find that claims regarding finance charges  
25 on credit cards constitute the type of "evidence of indebtedness"  
26 Congress intended to connote a "security." Therefore, the Court  
27 finds that this case does not fall under the securities exception  
28 to CAFA.

1 Circuit City also argues that, in spite of the general rule  
2 that the removing party bears the burden of proof with regard to  
3 establishing federal court jurisdiction, Davis, the plaintiff,  
4 should bear the burden of proof with regards to CAFA exceptions.  
5 Analogizing to cases in the Fifth and Eleventh Circuits involving  
6 other exceptions to CAFA jurisdiction, Circuit City contends that,  
7 should the Court find itself unpersuaded by the arguments offered  
8 by either party, Davis, as the bearer of the burden, must lose on  
9 this issue.

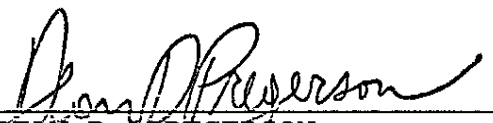
10 CAFA has been in effect for less than two years. No court has  
11 dealt specifically with the 1332(d)(9)(C) securities exception, and  
12 the Ninth Circuit has not yet ruled on whether the non-removing  
13 party bears the burden on CAFA exceptions. A Ninth Circuit  
14 decision to follow the reasoning of the Fifth and Eleventh Circuits  
15 would likely play an important role in CAFA litigation. However,  
16 the Court need not make that decision here. Even presuming Chase  
17 and Circuit City bear the burden of proof on the securities  
18 exception, as detailed above, they have met that burden. Thus,  
19 under traditional removal analysis, the Court has subject matter  
20 jurisdiction over this case.

21 **III. CONCLUSION**

22 For the foregoing reasons, the Court finds that removal was  
23 proper.

24  
25 IT IS SO ORDERED.

26  
27 Dated: 9-20-06

  
28 DEAN D. FERGUSON  
United States District Judge