



1 member, and any recovery in excess of \$4,999,999 for all claims, Defendants argue the  
2 amount in controversy is in fact met.

3 The Motion requests an award of attorney's fees under 28 U.S.C. § 1447 because,  
4 Plaintiff argues, Defendants lacked an objectively reasonable basis for removal.

### 5 I. Legal Standards

6 The parties agree the Court should apply Ninth Circuit law in determining whether  
7 remand is required. The removal statute is strictly construed against removal jurisdiction,  
8 and any doubt must be resolved in favor of remand. *Durham v. Lockheed Martin Corp.*, 445  
9 F.3d 1247, 1252 (9th Cir. 2006). The removing party bears the burden of showing that this  
10 Court has jurisdiction, which includes showing the amount in controversy requirement is met.  
11 *Gaus v. Miles, Inc.*, 980 F.2d 564, 567 (9th Cir. 1992).

12 If Plaintiffs have pleaded an amount in controversy less than the \$5 million  
13 jurisdictional amount, Defendants must prove to a "legal certainty" that the amount in  
14 controversy exceeds that threshold. *Lowdermilk v. U.S. Bank Nat'l Ass'n*, 479 F.3d 994, 998  
15 (9th Cir. 2007). If the face of the complaint does not plead a lesser amount, Defendants  
16 must show by a preponderance of evidence that the threshold is met. *See Singer v. State*  
17 *Farm Mutual Auto Ins. Co.*, 116 F.3d 373, 375 (9th Cir. 1997); *Behrazfar v. Unisys*, 687 F.  
18 *Supp. 2d* 999, 1001 (C.D.Cal., 2009). If jurisdiction is lacking, the Court must immediately  
19 remand the case. *Strasser v. KLM Royal Dutch Airlines*, 631 F. *Supp.* 1254, 1258 (C.D.Cal.  
20 1986).

21 Under CAFA, this Court can have jurisdiction only if the amount in controversy  
22 exceeds \$5 million, exclusive of interest and costs. 28 U.S.C. § 1332(d)(2).<sup>1</sup>

### 23 II. Discussion

24 In his complaint, Plaintiff requests compensatory damages, interest, and declarations  
25 that Defendants have violated the law. In the "Jurisdiction and Venue" section of the  
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27 <sup>1</sup> Defendants have not argued the Court could exercise ordinary diversity jurisdiction  
28 in this case. Because the named Plaintiff's identified harm results from the allegedly inflated  
price of one electric guitar he bought, it is highly unlikely the jurisdictional threshold would  
be met as to him even if they were to do so.

1 complaint, Plaintiff also specifically and unambiguously disclaims recovery for any class  
2 member in excess of \$74,999 and any recovery for the class as a whole in excess of  
3 \$4,999,999:

4 The amount in controversy as to Plaintiff and each individual member of the  
5 Proposed Class does not exceed Seventy-Four Thousand Nine Hundred  
6 Ninety-Nine Dollars (\$74,999.00) each, exclusive of interest and costs; and  
7 Plaintiff disclaims compensatory damages, punitive damages, declaratory,  
8 injunctive, equitable or other relief greater than Seventy-Four Thousand Nine  
9 Hundred Ninety-Nine Dollars (\$74,999.00) per individual Class member.  
10 Further, Plaintiff and members of the Proposed Class limit their aggregate  
class-wide claims for relief to less than Four Million Nine Hundred Ninety-  
Nine Thousand Nine Hundred Ninety-Nine Dollars (\$4,999,999.00) and  
specifically disclaim compensatory damages, punitive damages,  
disgorgement, declaratory, injunctive, equitable or other relief greater than  
Four Million Nine Hundred Ninety-Nine Thousand Nine Hundred Ninety-Nine  
Dollars (\$4,999,999.00).

11 Complaint, ¶ 19. It is well established a Plaintiff may sue for less than the amount he is  
12 entitled to, in order to avoid federal jurisdiction and remain in state court. *Lowdermilk*, 479  
13 F.3d at 998–99.

14 Because Plaintiff has said he seeks less than the jurisdictional amount, *Lowdermilk*  
15 would ordinarily require Defendants to demonstrate to a legal certainty that the jurisdictional  
16 threshold is met. Defendants, however, argue the complaint’s allegations are ambiguous,  
17 and cite *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696 (9th Cir. 2007). Defendants read  
18 *Guglielmino* as holding that the “legal certainty” standard is not applied where allegations in  
19 the complaint appear to conflict with a disclaimer. Defendants argue the disclaimer is  
20 therefore ineffective, and urge the Court to apply the “preponderance” standard.

21 Defendants also point out that, as in *Guglielmino*, the disclaimer does not appear in  
22 the prayer for relief. This is an empty distinction, however.<sup>2</sup> *Guglielmino* does not stand for  
23 the proposition that a disclaimer to be effective must appear in the prayer for relief. Rather,  
24 it merely requires the complaint to be unambiguous as to the value of relief sought before

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26 <sup>2</sup> Defendants cite *Trahan v. U.S. Bank Nat’l Ass’n*, 2009 WL 4510140 (N.D.Cal., Nov.  
27 30, 2009) as reading *Guglielmino* to require the disclaimer to appear in the prayer for relief.  
28 *Trahan* does not stand for this principle, however, but agrees with *Guglielmino* that the  
disclaimer be unambiguous as to the value of all relief sought. Defendants also cite *Lyon*  
*v. W. W. Grainger, Inc.*, 2010 WL 1753194 (N.D.Cal., April 29, 2010) for the same principle,  
but *Lyon* by its terms has no application at all to cases removed under CAFA, *id.* at \*1–\*2,  
and does not deal with a disclaimer at all.

1 the “legal certainty” standard will be applied. In *Guglielmino*, the complaint disclaimed most  
2 types of relief in excess of the jurisdictional amount but was silent as to other relief including  
3 attorney’s fees and back payments of health benefits and taxes, which the plaintiff expressly  
4 sought. Because the court found the amount of relief sought ambiguous, it applied the  
5 “preponderance” standard.

6 Although Defendants argue the disclaimer is ambiguous and “delineates the relief to  
7 which it applies,” (Opp’n to Motion at 5 n.2), it in fact unambiguously applies to all relief  
8 sought. Plaintiff has claimed relief of less than \$75,000 per individual class member, and  
9 less than \$5 million, and this applies to all relief sought, of all types (“or other relief”). The  
10 disclaimer implicitly recognizes Plaintiff and the class members might be entitled to a greater  
11 recovery than they are in fact seeking, but intentionally foregoes such relief, as they are  
12 entitled to do. *Lowdermilk*, 479 F.3d at 498–99. There is therefore no genuine conflict  
13 between the disclaimer and other allegations in the complaint.

14 Defendants argue Plaintiff might also be awarded attorney’s fees as requested in the  
15 complaint, pushing the class’s recovery above the jurisdictional amount. Under CAFA,  
16 attorney’s fees may be counted if provided for by statute. *Lowdermilk*, 79 F.3d at 1000.  
17 Plaintiff points out the Tennessee Trade Practices Act, under which he is suing, does not  
18 provide for them. See Tenn. Code. Ann. § 47-25-106 (providing for remedies). And in any  
19 event an award of attorney’s fees appears to fall within the category of “other relief” in the  
20 disclaimer.

21 Furthermore, unlike the plaintiffs in several other cases Defendants have cited,  
22 Plaintiff has not only alleged the amount in controversy is less than the jurisdictional amount;  
23 he has actually disclaimed recovery at or above the jurisdictional amount. Even if Plaintiff  
24 can show he and other class members would ordinarily be entitled to recover more, the  
25 complaint specifically avoids seeking such relief. Defendants might have relied on Tenn. R.  
26 Civ. P. 54.03 to show that Plaintiff could recover more than he sought in damages. See  
27 *Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 871 (6th Cir. 2000). However, they have  
28 specifically avoided making this argument and made clear they are not intending to rely on

1 it. (Opp'n to Motion at 8 n.5 ("Guitar Center did not cite or rely on that argument in its Notice  
2 of Removal and does not advance it here.)) It may be that Defendants accept Plaintiff's  
3 argument that this application of Rule 54.03 has been discredited. See *Bennett v. K Mart*  
4 *Corp.*, 2008 WL 2511268 at \*2 (M.D.Tenn., June 19, 2008) (citing authority).

5 In short, this is not a case like *Guglielmino* where the plaintiff disclaimed recovery of  
6 certain forms of relief below the jurisdictional amount but then tacked on additional requests  
7 for relief that might have pushed the recovery above the threshold. While Plaintiff clearly  
8 could have sought more, the fact is he did not. Rather, as the complaint and Plaintiff's  
9 pleadings make clear, Plaintiff has disclaimed all recovery of any kind at or above the  
10 threshold level.

11 The Court therefore applies the "legal certainty" standard, but as noted finds no  
12 reason to believe Plaintiff and the class will recover the jurisdictional amount or more. In  
13 fact, barring the type of excessive recovery identified in *Rogers*, the Court finds it legally  
14 certain Plaintiff and the class will not recover any more than they have requested.

### 15 **III. Request for Attorney's Fees**

16 An award of attorney's fees under 28 U.S.C. § 1447(c) is discretionary. *Moore v.*  
17 *Permanent Med. Group, Inc.*, 981 F.2d 443, 446–47 (9th Cir. 1992). It is not punitive, but  
18 rather is intended to reimburse a plaintiff for unnecessary litigation costs. *Id.* Besides the  
19 request for attorney's fees in the complaint, Plaintiff in his motion for remand now seeks an  
20 award of fees for improper removal.<sup>3</sup>

21 While the Court rejects Defendants' reading of *Guglielmino*, other courts have  
22 emphasized the prayer for relief to a greater extent than this Court has. See, e.g., *Tompkins*  
23 *v. Basic Research, LLC*, 2008 WL 1808316 at \*3 (E.D.Cal., April 22, 2008) (reading  
24 *Guglielmino* as focusing specifically on the contents of the prayer for relief in ascertaining  
25 whether the complaint alleges any amount in damages). Defendants' belief that the Court

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28 <sup>3</sup> This request, which was made after removal and was not the object of Plaintiff's  
litigation, is not counted towards the jurisdictional amount.

1 might rule in their favor on this basis, while incorrect, was not in the Court's view so  
2 objectively unreasonable as to merit an award of fees.

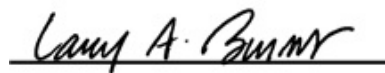
3 **IV. Conclusion and Order**

4 For these reasons, the Court finds Defendants have not met their burden of showing  
5 removal was proper. *Gaus*, 980 F.2d at 567. The Motion is therefore **GRANTED** and this  
6 action is **REMANDED** to the Chancery Court for Knox County, Tennessee. Plaintiff's request  
7 for attorney's fees is **DENIED**. The Clerk shall edit the docket of *In re: Musical Instruments*  
8 *and Equipment Antitrust Litigation*, 09md2121 to reflect this case's remand.

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**IT IS SO ORDERED.**

DATED: July 2, 2010



**HONORABLE LARRY ALAN BURNS**  
United States District Judge