No. 13-719

In The Supreme Court of the United States

DART CHEROKEE BASIN OPERATING COMPANY, LLC, and CHEROKEE BASIN PIPELINE, LLC,

Petitioners,

v.

BRANDON W. OWENS, On behalf of himself and all others similarly situated,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

When the state court petition was "not removable" on its face because it stated no amount in controversy and Petitioners wanted to remove the case anyway, was the district court correct in requiring Petitioners – who admittedly possessed all of the evidence to prove the amount in controversy at the time of removal – to present at least some evidence that the statutorily required amount in controversy was met with its notice of removal, or could Petitioners invoke the federal court machinery (pleadings, scheduling, affirmative disclosures, protective orders, and discovery) with only a conclusory statement of the amount in controversy and offer evidence later?

CORPORATE DISCLOSURE STATEMENT

Brandon Owens is not a corporation.

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STATEMENT OF THE CASE

The state court class action petition did not state an amount in controversy because only Dart possessed the royalty owner paydecks and confidential third party gas contracts needed to calculate class-wide damages. Pet. App. 16a, 20a, 27a.[1] Dart removed, citing diversity jurisdiction under the Class Action Fairness Act of 2005 ("CAFA") as its ground for removal. *Id.* 38a. Its notice of removal included only a conclusory statement that the amount in controversy "is in excess of $8.2 million." *Id.* 40a. The notice of removal offered no evidence to support that naked allegation of the jurisdictional amount. Pet. App. 37a-42a. Dart answered and moved to dismiss, and within 10 days of removal, Owens moved to remand. Pet. App. 43a. Dart suggested mediation and the following month began providing some damages information to Owens. Months later, after the mediation failed, Dart filed an eleven-paragraph declaration that showed Dart had evidence of the amount in controversy available to it at the time of removal. Pet. App. 16a, 20a, 24a, 27a.

The district court remanded, concluding that "the general and conclusory allegations of the Petition and Notice of Removal do not establish by a preponderance of the evidence that the amount in controversy exceeds $5 million." *Id.* 26a. The Tenth Circuit denied Dart's petition for permission to appeal the remand

[1] "Dart" refers to both Petitioners Dart Cherokee Basin Operating Company, LLC, and Cherokee Basin Pipeline, LLC.

order and denied Dart's petition for rehearing en banc. Pet. App. 1a, 13a. Dart asks this Court to rescue them from their failure to timely offer any evidence of jurisdictional facts.

With its almost singular focus on 28 U.S.C. § 1446(a), Dart conveniently ignores subsection (c) of the same statute which specifies the procedural requirements for both alleging and proving the amount in controversy. Section 1446(a) requires the notice of removal contain "a short and plain statement of the grounds for removal." The grounds for removal are allegations of sufficient facts to show satisfaction of the jurisdictional statute, here, diversity jurisdiction under 28 U.S.C. § 1332. Alleging the grounds for removal is entirely different from satisfying the statutorily required amount in controversy under § 1446(c)(2) which applies to class actions per 28 U.S.C. § 1453(b).[2] Tellingly, Dart mentions (c)(2) on only two pages of its twenty-two page brief, Pet. Br. 7, 13; the amici mention (c)(2) merely in passing.[3] Subsection (c)(2) states:

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[2] 28 U.S.C. § 1453(b) provides: "A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(c)(1) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants."

[3] Brief of the Washington Legal Foundation ("WLF Br.") 8, 20, 21 (citing § 1446(c)(2) for "the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy."); Brief of DRI ("DRI Br.") 11, 18 (citing § 1446(c)(1) for the

(Continued on following page)

If removal of a civil action is sought on the basis of the jurisdiction conferred by section 1332(a), the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy, except that –

(A) the notice of removal may assert the amount in controversy if the initial pleading seeks –

(i) nonmonetary relief; or

(ii) a money judgment, but the State practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded; and

(B) removal of the action is proper on the basis of an amount in controversy asserted under subparagraph (A) if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a).

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elimination of the one-year limitation on removal of class actions and (c)(3)(A) for giving defendant the right to remove within 30 days of receiving an "other paper" showing the amount in controversy exceeds the amount required for federal jurisdiction if the initial pleading does not show the requisite amount in controversy); Brief of the Chamber of Commerce ("Chamber Br.") 7 (The Jurisdiction and Venue Clarification Act of 2011 ("JVCA") amended § 1446(c): to address issues relating to uncertainty of the amount in controversy when removal is sought."), 8 n.3 (removal burden should be the same in individual and class actions).

28 U.S.C. § 1446(c)(2).[4] Dart does not dispute that the removal statute requires evidentiary proof; it only disputes *when* that proof must be presented. For almost twenty years, the Tenth Circuit has held that the removing party must present evidence of the amount in controversy with the notice of removal. That approach is consistent with: (a) the removal statute, 28 U.S.C. § 1446; (b) the law of other circuits; (c) the procedure governing motions; (d) CAFA; (e) determining federal jurisdiction quickly and easily; and (f) avoiding jurisdictional disputes invited by the absence of any support for conclusory allegations by defendant.

SUMMARY OF THE ARGUMENT

1. *Dart did not comply with 28 U.S.C. § 1446(c)(2)(B).* As Dart had all the damages evidence, Plaintiff's state court petition could not and did not

[4] Section 1446(c)(2) provides that the sum demanded in the state court petition controls the determination of the amount in controversy unless the petition seeks nonmonetary relief or an unspecified money judgment. Here the petition fits § 1446(c)(2)(A)(ii) because Kansas law does not permit a demand for a specific sum. *See* K.S.A. § 60-208(a)(2); Pet. App. 29a. So while Dart had the right to assert the amount in controversy in its notice of removal under § 1446(c)(2)(A), it wholly ignored § 1446(c)(2)(B) which requires evidence upon which the district court can find, "by the preponderance of the evidence," that the amount in controversy exceeds the jurisdictional threshold, which in class action is $5 million. 28 U.S.C. §§ 1446(c)(2), 1332(d)(2).

allege an amount in controversy. Wanting to move to federal court, Dart had only two statutory options: (a) provide the damage information to Plaintiff in state court and wait for an "other paper" virtually admitting that the amount at issue exceeded the federal jurisdictional threshold; or (b) pursuant to (c)(2)(A) allege the amount Dart believed was in controversy *and* under (c)(2)(B) submit evidence backing up its allegation. Dart did neither, instead only alleging in conclusory terms the amount in controversy (which devoid of any facts would not have complied with *Bell Atlantic v. Twombly,* 550 U.S. 544, 556-57 (2007) anyway).[5]

2. *Dart asks to rewrite the removal statute to overcome its mistake*. Realizing its mistake, probably when Plaintiff moved to remand, Dart suggested mediation to stay the case. After mediation failed, Dart finally submitted the evidence of the amount in controversy that it had had all along. But that evidentiary submission was untimely, and the district court remanded, which the Tenth Circuit allowed to

[5] Section 1446(c)(2)(B) applies to class actions by resolution of the conflict between (i) § 1453(b) stating that only § 1446(c)(1) does not apply to class actions with (ii) the language in § 1446(c)(2 & 3) suggesting that they only apply to individual actions. If the conflict is resolved in favor of (ii) above, class actions have no statutorily authorized way at all to immediately remove a state court petition silent as to the amount in controversy. If the conflict is resolved in favor of (i), defendants facing a putative class action have the same rights as defendants facing individual cases.

stand. Dart now asks this Court to ignore the (c)(2)(B) removal statute by: (a) ignoring all of the removal statute after § 1446(a); and (b) rewriting § 1446(c)(2)(B) to only apply only after a plaintiff moves to remand. The Court should decline Dart's offer to judicially legislate and affirm the remand.

3. *Dart's "justifications" for changing the removal statute are not the law*. Dart tries to justify rewriting of (c)(2)(B) by arguing: (a) from out-of-context snippets from this Court regarding original jurisdiction filings that are not analogous to removal cases; (b) from removal cases in seven circuit courts which Dart claims "assumed" Dart's position which they did not;[6] (c) from a commentator that does not support it either; and (d) from a JVCA House Report or CAFA Senate Report which are not the law and do not support Dart's view when considered as a whole anyway. Congress was well aware of the Tenth Circuit Rule requiring evidence with the notice of removal citing to *McPhail v. Deere & Co.,* 529 F.3d 947 (10th Cir. 2008) in the House Report, and adopting it rather than rejecting it as Dart asks this Court to do. *See* H.R. Rep. No. 112-10, 2011 WL 484052, at *16.

4. *As written, the removal statute is simple to apply and does not encourage wasteful jurisdictional litigation*. The removal statute preserves a defendant's right to dislodge a plaintiff's choice of forum

[6] The lone exception is a rarely cited unpublished opinion from the Ninth Circuit with no real analysis of the issues that should not be followed.

with a preponderance of evidence. Its language and intent is for jurisdictional discovery to take place in state court, not in federal court. Dart's proposal to allege first and put on evidence later guarantees the opposite result. *Hertz Corp. v. Friend,* 559 U.S. 77, 94 (2010) (jurisdictional discovery "eat[s] up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims . . . producing appeals and reversals, encourage[ing] gamesmanship . . . "); *Navaro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980) ([T]his Court "will not invite extensive threshold litigation over jurisdiction [because] litigation over whether the case is in the right court is essentially a waste of time and resources."); (JVCA) H.R. Rep. 112-10, 2011 WL 484052, at **1-2 ("Judges believe the current rules force them to waste time determining jurisdictional issues at the expense of adjudicating underlying litigation."); *id*. at **15-16 ("judicial resources may be wasted and the proceedings delayed when little or no objective information accompanies the notice to remove").

ARGUMENT

Although the question presented focuses on when evidence of the amount in controversy must be presented to establish diversity jurisdiction in a case removed from state court, Dart addresses the issue in only three pages of its opening brief, Dart Br. 14-16, and never addresses § 1446(c)(2)(B).

I. The Tenth Circuit, like Other Circuits, Requires Evidence Be Submitted with the Notice of Removal

A. The Tenth Circuit Rule

The Tenth Circuit Rule has been developed carefully over time to be a workable and consistent statutory removal procedure. *Laughlin v. Kmart Corp.,* 50 F.3d 871, 873 (10th Cir. 1995); *Martin v. Franklin Capital Corp*., 251 F.3d 1284 (10th Cir. 2001) (evidence first submitted in response to a motion to remand should not be considered); *Oklahoma Farm Bureau Mut. Ins. Co. v. JSSJ Corp*., 149 F. App'x 775 (10th Cir. 2005) (refusing to consider an affidavit because it was not attached to the Notice of Removal); *McPhail v. Deere & Co.,* 529 F.3d 947, 956 (10th Cir. 2008); *Frederick v. Hartford Underwriters Ins. Co*., 683 F.3d 1242, 1246 (10th Cir. 2012). The Rule requires a removing defendant "to set forth, in the notice of removal itself, the underlying facts supporting [the] assertion that the amount in controversy exceeds the jurisdictional minimum and to prove . . . [those] jurisdictional facts by a preponderance of the evidence." *Frederick,* 683 F.3d at 1245-46 (internal quotations omitted). Dart made a conclusory assertion, without factual allegations demonstrating plausibility and without evidence as support, at the time of removal. Pet. App. 20a. Construing the binding Tenth Circuit authority, the district court did not err in holding "the general and conclusory allegations of the Petition and Notice of Removal do not establish by a preponderance of the evidence that the amount

in controversy exceeds $5 million." *Id.* 26a. Nor did the district court err in finding "[t]he Tenth Circuit has consistently held that reference to factual allegations or evidence outside of the petition and notice of removal is not permitted to determine the amount in controversy." *Id.* For almost 20 years, the Tenth Circuit has required evidence to support jurisdictional facts at the time of removal without incident and without the travails Dart and amici suggest. So Dart asks this Court to overturn the venerable line of cases forming the Tenth Circuit Rule.[7]

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[7] Notably, this case is not about the submission of post-removal *supplemental* evidence on the amount in controversy. Dart presented no evidence with the notice of removal so there was no evidence to supplement. The Tenth Circuit Rule permits supplementation under limited circumstances not present here: (a) the notice of removal is deemed amended to include evidence presented within the 30-day time for removal such that the notice of removal is deemed amended with the evidence, Dart Br. 15, n.6, Pet. App. 10a n.8 (citing *Pepsi-Cola Bottling Co. v. Bottling Group, LLC*, No. 07-2315-JAR, 2007 WL 2954038, at **4, 7-8, 12 (D. Kan. Oct. 10, 2007)); (b) the removing defendant submits prima facie evidence with the notice of removal which plaintiff then disputes with its own evidence in which case federal jurisdictional discovery or supplemental evidence may be allowed, *see Public Employers Retirement of New Mexico v. Clearlend Securities,* 798 F. Supp. 2d 1265 (D.N.M. 2011); or, (c) plaintiff (not defendant) offers the evidence to clarify an ambiguous state court petition, but not to contradict or change it. Pet. App. 10a, n.8 (citing *Hehner v. Bay Transport, Inc.*, No. 09-2141-KHV, 2009 WL 1254442 at *1 (D. Kan. May 5, 2009)). Otherwise, post-removal evidence is not allowed. Pet. App. 10a n.8 (citations omitted).

As detailed in Sections II and V, *infra,* this bright-line Tenth Circuit Rule facilitates the application of the removal statutes and the case law construing them.

The Tenth Circuit Rule also pays homage to this Court's historical narrow view of removal jurisdiction. Federal district courts are courts of "limited jurisdiction" and "possess only that power authorized by Constitution and statute." *Exxon Mobil Corp. v. Allapattah Servs., Inc.,* 545 U.S. 546, 552 (2005).

Rather than respect federalism, amici WLF and DRI attack the narrow construction of removal statutes and the correlate presumption against removal. WLF Br. 2-19; DRI Br. 11-15. But parties cannot consent to federal jurisdiction; and a federal court must examine its subject matter jurisdiction and dismiss or remand the case if it is lacking. *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 701-02 (1982). "If a court lacks subject matter jurisdiction, all rulings are a nullity, lacking any force and effect." *Boeing Wichita Credit Union v. Wal-Mart Real Estate Business Trust,* 370 F. Supp. 2d 1128, 1129 (D. Kan. 2005) (citing *Hart v. Terminex Int'l*, 336 F.3d 541, 542 (7th Cir. 2003)); *see also Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938). For these reasons, a party seeking to have a case heard in federal court bears the "burden of persuasion" to establish federal subject matter jurisdiction. *Hertz*

Corp. v. Friend, 559 U.S. 77, 96-97 (2010).[8] That burden should be met when the case begins in federal court, i.e., in the federal complaint where the plaintiff selects the federal forum[9] or in the notice of removal where the defendant selects the federal forum. Because removal strips a state court of jurisdiction, federalism also dictates the strict construction of removal statutes. *Shamrock Oil & Gas Corp. v. Sheets,* 313 U.S. 100, 108-09 (1941).[10] Congress was

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[8] Dart complains that the Tenth Circuit Rule "places the burden on the defendant to marshal evidence supporting removal." Dart Br. 8. The removing defendant is the one making the removal request, so who else should provide the evidence? Besides, since Dart was the only one with the evidence, who else could present it?

[9] In addition to the federalism concerns noted in the above text, narrow construction of removal statutes is supported by recognition that plaintiff's choice of forum should not be easily overcome such that evidence is required. *See Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013) (noting plaintiff is the master of his complaint and has the right to choose his forum) (citing *St. Paul Mercury Indemnity Co. v. Red Cab Co.,* 303 U.S. 283, 294 (1938)). *See* Section II, *infra.*

[10] The amici urge this Court to jettison the strict construction of removal statutes and its correlate, the strong presumption against removal. WLF Br. 2-19; WLF Br. 6, 10 n.3 (noting that every regional federal appeals court except one has adopted a presumption against removal); DRI Br. 11-15; DRI Br. 11 (citing 16 James W. Moore, *Moore's Federal Practice* § 107.05, 107.06 (3d ed. 2013) (collecting cases from almost every circuit that apply presumption against removal because it vindicates federalism principles and "makes good sense" on policy grounds)). *See also* DRI Br. 13-14 (recognizing the constitutionally based federalism concern in *Shamrock*). DRI wrongly contends that the Tenth Circuit Rule uses the presumption against removal to rewrite the removal statute to require evidence with the notice

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well aware of this narrow construction and has never acted to change it. *Hall v. United States,* 566 U.S. ___, 132 S. Ct. 1882, 1889 (2012). Dart asks this Court to now reverse course so that federal jurisdiction can be obtained by a defendant's conclusory statement and the removal statutes are no longer narrowly construed. Dart Br. 9-15.

B. The Law of Other Circuits Requires Evidence in or with the Removal Notice

> Many, if not a plurality of, federal courts have adopted a standard that requires the defendant to present facts in the notice of removal establishing the sufficiency of the jurisdictional amount by "a preponderance of the evidence" which must be based on more than conclusory or speculated assertions.

14AA Wright, Miller & Cooper, *Federal Practice and Procedure* § 3702.2 (4th ed. 2009) (footnote omitted citing extensive case law from almost every circuit).

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of removal. DRI Br. 11, 14. To the contrary, the evidentiary requirement is in § 1446(c)(2)(B), which DRI never cited and is surely required if removal is even to be allowed of a petition that is "not removable" prior to the receipt of a document that would allow satisfaction of the bright line removal test evident in 28 U.S.C. § 1446. While DRI might like to trample federalism and the plaintiff's choice of forum, neither § 1446(a) & (b) nor § 1446(c)(2)(B) can be ignored or rewritten by policy arguments about a presumption that Congress surely knew when it enacted, and reenacted, language that DRI ignores.

Consequently, Dart waffles when arguing that "seven circuits require a notice of removal to contain only *allegations* of the jurisdictional facts; [not] *evidence* supporting federal jurisdiction." Dart Br. (i) (emphasis in original). But in its Summary of the Argument Dart equivocates: "seven circuits have held *or assumed* as much." Dart Br. 6 (emphasis added). *See also* Dart Br. 11-12 ("seven circuits have held or assumed"); Chamber Br. 4 (citing the same cases as Dart but only for five circuits, omitting the Second and Fifth circuits).

But, upon review, none of the seven circuits support Dart's position. Dart Br. 12.[11] They follow the Tenth Circuit Rule while Dart cites, at best, dicta. *See Pretka v. Kolter City Plaza II, Inc*., 608 F.3d 744, 770 (11th Cir. 2010) ("notice of removal included the declaration" of the CFO declaring that the defendant had "collected more than $5 million in condominium unit purchase deposits . . . ");[12] *Ellenburg v. Spartan*

[11] Dart claimed in its Petition that the First Circuit also was in conflict with the Tenth. Pet. 11 (citing *Amoche v. Guarantee Trust Life Ins. Co*., 556 F.3d 41, 51-53 (1st Cir. 2009) (affirming the district court's remand order)). But Dart omits this case from its Brief, tacitly conceding it was wrong. Opp'n to Pet. 19-20.

[12] *Sierminski v. Transouth Fin. Corp*., 216 F.3d 945, 947-48 (11th Cir. 2000) (allowing declaration of the defendant's human resources director filed within the 30-day window for removal); *Lowery v. Alabama Power Co.,* 483 F.3d 1184, 1221 (11th Cir. 2007) ("defendants' notice of removal contained no document clearly indicating that the aggregate value of the plaintiffs' claims exceeds that amount and, as such, they are unable to establish federal jurisdiction by a preponderance of the evidence.");

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Motors Chassis, Inc., 519 F.3d 192, 194 (4th Cir. 2008) (the amount in controversy showed on the face of the state court complaint which sought both a refund of the 2003 American Eagle 40MS recreational vehicle [which both sides knew from the invoice retailed for more than $75,000], plus "punitive damages");[13] *Rachel v. Georgia*, 342 F.2d 336, 340 (5th Cir. 1965) (federal question civil rights case where removal was based on the language of the state court petition, so proof of the amount in controversy was not involved at all);[14] *Spivey v. Vertrue, Inc*., 528 F.3d 982, 985

South Florida Wellness, Inc. v. Allstate Ins. Co., 745 F.3d 1312, 1314-15 (11th Cir. 2014) (citing *McPhail* and noting that affidavit was filed with notice of removal).

[13] *See also Wickline v. Dutch Run-Mays Draft, LLC,* 606 F. Supp. 2d 633, 636-37 (S.D.W.V. 2009) (concluding "the Fourth Circuit [in *Ellenburg*] did not change the analysis used to rule on a motion to remand" and the acceptance of a naked allegation applies only "where a district court examines the sufficiency of the notice of removal *sua sponte* in search of a procedural defect" and remanding on record "entirely devoid of any evidence regarding the amount in controversy requirement" at the time of removal); *Lever v. Jackson Nat. Life Ins. Co.,* No. 3:12-cv-3108-MBS, 2013 WL 436210, at *4 (D.S.C. Feb. 5, 2013) (rejecting Dart's expansive reading of *Ellenburg* and remanding case because defendant failed to prove, "by any standard" satisfaction of the amount in controversy.) (unpub.); *Anthony Marano Co. v. Sherman*, 925 F. Supp. 2d 864, 866, n.1 (E.D. Mich. 2013) (same).

[14] Dart also abandons reliance on *Gebbia v. Wal-Mart Stores, Inc.,* 233 F.3d 880, 882 (5th Cir. 2000) because it was "facially apparent" from the state court petition that the claimed damages exceeded the jurisdictional amount of $75,000. *Id*. at 882-883; Pet. 11; Opp'n to Pet. 23-24.

(7th Cir. 2008) (Easterbrook, C.J.) (following Tenth Circuit Rule with an affidavit filed with the removal notice detailing the calculation. *Id*. at 985.);[15] *Hartis v. Chi. Title Ins. Co*., 694 F.3d 935, 940, 945-46 (8th Cir. 2012) (removing defendant submitted an affidavit with the notice of removal but the Eighth Circuit concluded the amount in controversy satisfied from the face of the original complaint); *Whitaker v. Am. Telecasting, Inc*., 261 F.3d 196, 205-06 (2d Cir. 2001) (the original state court complaint alleged more than the jurisdictional amount).

At least *Janis v. Healthnet, Inc.,* 472 F. App'x 533, 534-35 (9th Cir. 2012) (unpublished) appears contrary to the Tenth Circuit Rule, but it is a one-page unpublished memorandum opinion that does not directly address *McPhail*, the JVCA, or how the allegation only rule would work in practice. If this demonstrates a real conflict among circuits, the Ninth Circuit should not be followed.[16]

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[15] Again, Dart switches horses and no longer relies on *Harmon v. OKI Sys*., 115 F.3d 477, 478-79 (7th Cir. 1997). Pet. 10-11; Opp'n to Pet. 25.

[16] Practice in the Ninth Circuit appears to be like the Tenth Circuit where evidence supporting the amount in controversy is filed with the notice of removal. *See*, *e.g.*, *Friend v. Hertz Corp.,* No. 3:07-cv-5222-MMC (N.D.Cal. Oct. 11, 2007) (ECF Doc. # 2, Decl. of Krista Memmelaar).

II. Following the Tenth Circuit Rule, the Statute Governing the Procedure for Removal Requires Evidence with the Notice of Removal

A. Statutory Construction

This Court's purpose is to construe what Congress has written. *62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 596 (1951). "Congress expresses its purpose by words. It is for us to ascertain – neither to add nor subtract, neither to delete nor to distort." *Id.* Thus, Dart's request that "if challenged" be added to § 1446(c)(2)(B) or everything after § 1446(a) be deleted fails. Dart Br. 10 ("Court's analysis should start and stop with § 1446(a)'s plain language"); Dart Br. 12 ("This Court does not need to venture past [§ 1446(a)]."). No reading of older versions of the removal statute (even if relevant now which is doubtful), can change the words Congress used to set forth the "procedure for removal of civil actions" in 28 U.S.C. § 1446.

"A statute is to be read as a whole." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Read as a whole, the removal statute § 1446 provides: (a) properly allege the grounds for removal (satisfaction of the elements of either federal question or diversity under § 1331 or § 1332, respectively); (b) timeliness; and (c) amount in controversy controlled by the initial complaint or (A) if the initial complaint is silent or not controlling, then the amount in controversy can be sufficiently alleged by defendant, *and* (B) proven

by a preponderance of the evidence. Dart failed to do so even though it had the information needed to comply. Pet. App. 27a (Dart conceded that it was "aware of additional facts and data at the time [it] removed the case to federal court . . . ").

B. 2011 Amendment and *McPhail*

The Federal Courts Jurisdiction and Venue Clarification Act ("JVCA") and the House Judiciary Committee Report on the JVCA placed the burden on the removing defendant to either gather the evidence (or plaintiff's admission by "other paper") in state court or produce evidence the defendant already has to prove the amount in controversy so that federal judicial resources are not wasted. H.R. Rep. No. 112-10, 2011 WL 484052, at *16 ("judicial resources may be wasted and the proceedings delayed when little or no objective information accompanies the notice of removal."). Thus, a removing defendant should always have evidence of the amount in controversy to present with the notice of removal when the amount is not established on the face of the initial pleading. Nothing in the House Judiciary Committee Report suggests that a defendant can withhold its own evidence of the amount in controversy at the time of removal.[17]

[17] Of course, legislative intent from committee reports or speeches given by bill sponsors is dubious and they are not the "law." And, as this Court has said before, Congress's "authoritative

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Dart repeatedly argues that it must "present evidence supporting federal jurisdiction only after a challenge to the jurisdictional allegations in the notice of removal." Dart Br. 7. But no statute so states, not even by implication, despite Dart's argument that "recent additions to § 1446(c)(2) confirm that." *Id*. The removal statute is self-contained and comes before any motion to remand. It does not use any such language about evidence being presented "only after a challenge." If that were the case, the evidentiary language would be found in the remand statute § 1447, not the removal statute.

The language of § 1446(c)(2)(A)(i) & (ii) as well as (B) was added by the JVCA. H.R. Rep. 112-10, 2011 WL 484052, at *2. The purpose of the JVCA was stated: "Judges believe the current rules force them to waste time determining jurisdictional issues at the expense of adjudicating underlying litigation." *Id*. at **1-2. One of the "main stakeholder groups" was the "U.S. Chamber of Commerce." *Id*. at *2. Yet, the Chamber now asks this Court to legislate further on its behalf. Chamber Br. The Act also was vetted and promoted by the author of Moore's Federal Practice, *id*. at *2, relied on in part by Dart. Dart Br. 14. The removal changes are addressed in Sec. 103 of the Act,

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statement is the statutory text, not the legislative history." *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1980 (2011) (quoting *Exxon Mobil Corp. v. Allapattah Services, Inc.,* 545 U.S. at 568); *see also Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137, 149-150, n.4 (2002).

which modified only § 1441 and § 1446, not the remand statute in § 1447 (where Dart's "if challenged" theory would logically reside). *Id*. at *11.

The Act specifically addressed in § 1446(b), and reaffirmed, the 30-day removal period, *id*. at **13-14, that Dart still complains is too short. Dart Br. 7, 18-19.[18] Congress must have been aware of the simple Tenth Circuit solution to this problem (after all, the House Report later cites *McPhail*, one of the very cases Dart proposes be overruled, 2011 WL 484052 at *16), and implicitly adopted it.

> Second, many defendants faced with uncertainty regarding the amount in controversy remove immediately – rather than waiting until future developments provide needed clarification – out of a concern that waiting and removing later will result in the removal's being deemed untimely. In these cases, Federal judges often have difficulty ascertaining the true amount in controversy, particularly when removal is sought before discovery occurs. **As a result, judicial resources may be wasted and the proceedings delayed when little or no objective**

[18] But, in fact, Dart was not under a 30-day deadline to remove the initial pleading because, being silent as to the amount in controversy, that pleading was "not removable." Since Dart had no duty to investigate and could wait to remove until it received an "other paper" from Plaintiff showing more than $5 million at issue, Dart had plenty of time. *See*, Section V.D, 37, n.31, *infra*.

> **information accompanies the notice to remove.**

Id. at **15-16 (emphasis added). The problem here is that judicial resources have been wasted because "little or no objective information accompanie[d] [Dart's] notice to remove" even though Dart admits it had the information at the time of removal. Incredibly, what Dart did below (and now proposes be done nationwide) is exactly what Congress intended to (and did) remedy by adopting § 1446(c)(2)(A & B) – some evidence of federal jurisdiction must accompany the notice to remove.

The Act was also intended to address Dart's other supposed problem, that if a defendant did not have the evidence to remove, it would be forced to develop that jurisdictional evidence through state court discovery. Dart Br. 20. But, unlike Dart, Congress viewed state court discovery as the proper means of uncovering evidence needed to support removal:

> If the defendant lacks information with which to remove within the 30 days after the commencement of the action, the bill adds a new subparagraph 1446(c)(3)(A) to clarify that the defendant's right to **take discovery in the state court** can be used to help determine the amount in controversy. If a statement appears in response to discovery or information appears in the record of the state proceedings indicating that the amount in controversy exceeds the threshold amount, then proposed subparagraph 1446(c)(3)(A) deems it to be an "other paper" within the

> meaning of paragraph 1446(b)(3), thereby triggering a 30-day period in which to remove the action. **The district court must still find by a preponderance of the evidence that the jurisdictional threshold has been met.**

2011 WL 484052, at *16 (emphasis added). Moreover, if a defendant truly did not have evidence to remove, it should not claim to know the amount in controversy to start with, especially since it was not required to remove an initial pleading which specified no sum of damages. *See* 28 U.S.C. § 1446(b)(3). Again, Dart's concern was heard and Congress adopted the Tenth Circuit solution, not Dart's.

Finally, Dart quotes the House Report out of context. The broader context is below:

> **In adopting the preponderance standard, new paragraph 1446(c)(2) would follow the lead of recent cases. *See McPhail v. Deere & Co.*, 529 F.3d 947 (10th Cir. 2008)**; *Meridian Security Ins. Co. v. Sadowski*, 441 F.3d 536 (7th Cir. 2006). As those cases recognize, defendants do not need to prove to a legal certainty that the amount in controversy requirement has been met. Rather, defendants may simply allege or assert that the jurisdictional threshold has been met. Discovery may be taken with regard to that question. In case of a dispute, the district court must make findings of jurisdictional fact to which the preponderance standard applies. If the defendant establishes by a

> preponderance of the evidence that the amount exceeds $75,000, the defendant, as proponent of Federal jurisdiction, will have met the burden of establishing jurisdictional facts.

2011 WL 484052, at *16 (emphasis added). The JVCA "largely codified the holding of *McPhail*." *Butler v. Target Corp.*, No. 12-4092-SAC, 2012 WL 5362974, at *3 (D. Kan. 2012); Note, "Jurisdictional Remix, The Federal Courts Jurisdictional and Venue Clarification Act Presents New Challenges to Federal Litigation," 89 N.D. L. Rev. 163, 174 (2013) (same). If the House Report serves any purpose, it is to confirm that the JVCA adopted the *McPhail* Tenth Circuit Rule requiring both an allegation and preponderance of evidence proving the amount in controversy with the notice of removal. But despite Dart's wishful thinking, neither a provision for federal discovery nor the "in case of dispute" language made it into § 1446(c)(2) and cannot be squared with the adoption of *McPhail*.[19]

In context, the House Report adopts the entire Tenth Circuit *McPhail* solution: (a) a removing

[19] Although nothing in § 1446(c)(2) allows discovery, a federal court could allow discovery. But given the prohibition on a party seeking discovery before the Fed. R. Civ. P. 26(f) conference and the opposing party's ability to resist such discovery, conducting jurisdictional discovery before completion of the briefing on remand issues would require a federal court order and be virtually impossible before the 30-day remand period in 28 U.S.C. § 1447. Fed. R. Civ. P. 26(d)(1), 26(f). Hence, the removal statute's provision for discovery in the "State proceeding" accommodates this reality of federal practice. 28 U.S.C. § 1446(c)(3).

defendant must present some evidence with the removal notice; (b) that evidence must be proffered within 30 days of service of the complaint if defendant has the evidence in its records or 30 days after state (not federal) court discovery develops it; (c) if the removing defendant's evidence (not just allegations alone) is disputed, discovery may be allowed in federal court, *see Clearlend Sec.*, 798 F. Supp. 2d at 1271 (federal jurisdictional discovery allowed only if a prima facie showing made with the notice of removal) [but, of course, Dart needed no discovery because it had all of the evidence], and, (d) whether the amount in controversy is disputed with plaintiff's evidence (usually the class action plaintiff will have none), the removing defendant has the evidentiary burden of proof based on a preponderance of evidence standard.

C. The Removal Statute Does Not Provide that Evidence Is Only Necessary After the Amount in Controversy Is Challenged

Dart's position is that a removing defendant never has to present any evidence of federal jurisdiction unless challenged. Of course, § 1446(c)(2)(B) says no such thing. Nowhere does the statute use the word "challenged" or describe anything like a challenge. It says: "removal of the action is proper on the basis of an amount in controversy asserted under subparagraph (A) [i.e., notice of removal may assert the amount in controversy] if the district court finds, by a preponderance of the evidence, that the amount in

controversy exceeds the amount specified in section 1332(a)" and 1332(d) per § 1453(b). *See* Sections I, *supra,* and III, *infra.* So the notice of removal may assert the amount in controversy where the state court petition does not, but that assertion must be backed up with evidence on which the district court can make the requisite finding whether plaintiff challenges that evidence or not. And, where defendant offers no evidence of the amount in controversy with the notice of removal, plaintiff has no information on which to base a challenge (and no need since the removal would not be "proper" under the statute).

It is unclear whether Dart contends that the requirement that evidence of the amount in controversy be offered with the removal notice: (a) never existed (since it cites the removal statute before 1988 as requiring evidence in the form of a "verified petition" but suggests that prior cases of this Court nonetheless support its position); (b) was eliminated by the 1988 amendment (since it repeatedly cites case law prior to 1988 as supporting its view); or, (c) was changed by the 2011 amendment (since it repeatedly cites cases before 2011 and snippets of the 2011 House Report trying to support its view).[20] Regardless, neither the 1988 nor the 2011 amendment made any such change as amply demonstrated by the clear

[20] The quantum of (prima facie) evidence required with the removal notice is not before this Court because Dart did not offer any.

Tenth Circuit law on the issue after both amendments. *Laughlin* (1995); *Martin* (2001); *Oklahoma Farm Bureau Mut. Ins. Co.* (2005); *McPhail* (2008); *Frederick* (2012).[21]

It is significant that the "preponderance of the evidence" requirement is embodied in the removal statute, not in the remand statute, § 1447, i.e., when removal is challenged. When the removal statute is read as a whole, it includes the requirement of evidence. That is in accord with the usual motion practice when a party seeking to achieve a result – in this case defendant seeking to achieve federal jurisdiction – the movant must submit the available proof at the time of the motion. Rarely if ever can a movant hide available facts from the Court and its adversary and spring them after the opposing party's opening brief. Yet that is precisely what Dart proposes. Not a single court has ever authorized that.

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[21] Dart only cites the now superseded 1988 Judicial Improvements and Access to Justice Act, for the change in § 1446(a), stating the grounds for removal, which is not at issue, Dart Br. 11, and never analyzes § 1446(c)(2), which controls the inquiry because it specifically addresses the amount in controversy. *Gozlon-Peretz v. United States*, 498 U.S. 395 (1991) (specific statute controls over more general provisions).

In 1991, § 1446(c)(4) was amended to read: "(4) The United States district court in which such notice is filed shall examine the notice promptly. If it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand." This shows that removal was to be self-contained with "exhibits annexed" so the district court could make a prompt jurisdictional review.

Congress provided the test for removal, and it required a preponderance of evidence for jurisdiction to be "proper." 28 U.S.C. § 1446(c)(2)(B). It did not provide that jurisdiction was proper until successfully challenged.

D. No Other Real Support for Dart's Novel Theory

Dart cites to five sources for its "remove first and worry about evidence later" standard. Dart Br. 14 (citing H. R. Rep. No. 112-10, at *16); 7; 15-16 (citing *Wilson v. Republic Iron & Steel Co*., 257 U.S. 92 (1921)); 16 (citing *McNutt v. General Motors Acceptance Corp*., 298 U.S. 178, 189 (1936); 16 (citing *Hertz Corp. v. Friend*, 559 U.S. 77, 96-97 (2010)); and 14 (citing 16 James W. Moore, *Moore's Federal Practice* § 107.30[2][a][i]). But, none of these hold up upon examination.

The House Report is not the law, and if it was, it literally adopts the tried-and-true Tenth Circuit Rule, even citing the Tenth Circuit *McPhail* case, not the novel approach advocated by Dart. *See*, Section II.B, *supra*.

Dart cites *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921) to argue that this Court long ago approved allegations, not proof, of amount in controversy removals. Dart Br. 7; 15-16. But when *Wilson* was issued in 1921, removal required a verified petition stating "facts", i.e., evidence akin to an affidavit

or declaration today. *Wilson*, 257 U.S. at 93-94 ("The petition was properly verified").

Dart also relies on a citation to *McNutt* within *Hertz Corp. v. Friend*, a removal case. Dart Br. 16 (citing *McNutt*, 298 U.S. at 189 as quoted in *Hertz,* 559 U.S. at 96-97). Dart claims *Hertz "assumed* that it was enough for a party seeking removal to allege (not prove) jurisdictional facts in the notice of removal." Dart Br. 5 (emphasis added). But *Hertz* held and assumed no such thing. *Hertz* quoted *McNutt* – which, again, was an original jurisdiction, not removal jurisdiction, case – "When challenged on allegations of jurisdictional facts, the parties must support their allegations by competent proof. *McNutt, supra,* at 189, 56 S. Ct. 780; 15 Moore's § 102.14, at 102-32 to 102-32.1." *Hertz,* 559 U.S. at 97. This was dicta since Hertz submitted with the removal notice an "unchallenged declaration." *Id*.[22]

The citation of *McNutt* in *Hertz* was to show that the party asserting federal jurisdiction had to prove it, not *when* the removing party had to prove it (plaintiff's original filing if challenged and defendant's notice upon removal). It was not to suggest that the

[22] Hertz filed a detailed declaration with its notice of removal to establish the amount in controversy necessary for federal court jurisdiction. *Friend v. Hertz Corp.,* No. 3:07-cv-05222-MMC (N.D.Cal. Oct. 11, 2007) (ECF Doc. # 2, Decl. of Krista Memmelaar).

removal notice must be challenged first. *Hertz,* 559 U.S. at 96-97. Courts have repeatedly rejected Dart's attempt to analogize plaintiff's initial federal pleading to establish jurisdiction and a notice of removal.

> The burden on a plaintiff seeking diversity jurisdiction is forgiving: if, in good faith, the plaintiff pleads more than the requisite amount in controversy, that pleading will be accepted unless it can be shown to a legal certainty that the plaintiff cannot collect that amount. Removing CAFA defendants have similarly sought a rule enabling them simply to allege that more than $5 million is in controversy. However, the courts have rejected the analogy.

Newberg on Class Actions § 6:16 (5th ed.) (footnotes 8-9 omitted). *See* 14C Wright, Miller & Cooper, *Federal Practice and Procedure* § 3725, at 95 (3d ed. 1998) (recognizing that "a greater burden [is imposed] on defendants in the removal situation than is imposed on plaintiffs who wish to litigate in federal court by invoking its original jurisdiction" to demonstrate the amount in controversy and "[t]his discrepancy in treatment of plaintiffs and defendants may be justified by the historical tradition that the plaintiff is the master of the forum and is empowered to choose the court system and venue in which litigation will proceed"). *See*, n.7, *supra*.[23]

[23] Other differences abound. An originally filed federal complaint (a) is a pleading that makes allegations; (b) is filed

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Besides, all three cases, *Wilson, McNutt,* and *Hertz,* predate the latest JVCA change to the removal statute that adopts the Tenth Circuit Rule requiring evidence with the removal notice. *See*, Section II.B, *supra.*

Third, Dart's suggestion that one commentator believes that evidence need be presented only after plaintiff challenges a removal is taken out of context. Dart Br. 14 (citing 16 *Moore's Federal Practice*, § 107.30[2][A][i]). When reviewed in context, the commentator recognizes removal has two components: allegations (first two sentences) and evidence (third sentence, emphasis added).

> The wiser course may be to allege jurisdictional facts more specifically.[24] At any rate, if the jurisdictional allegations are challenged, whether by a party or by the court, the removing party must demonstrate that removal jurisdiction is proper.[25] **A failure to**

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before it is served and a defendant is aware of the case; (c) shows plaintiff's choice of forum; and (d) is in the federal forum originally. The complaint is controlling unless the defendant challenges it. But a removal notice is none of these, so evidence must be submitted.

[24] The first sentence has no footnote or citation.

[25] The second sentence has a footnote citing only to *Ellenburg* (distinguished at 13-14, *supra*) and *Gaus v. Miles, Inc.*, 980 F.2d 564, 567 (9th Cir. 1992) (noting strong presumption against removal, removing defendant only alleged amount in controversy was "in the millions of dollars" with no factual support except in a reply brief for summary judgment, remanding to state court even though plaintiff did not challenge jurisdiction

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> **include the requisite jurisdictional facts in the removal petition cannot be cured by amendment after the 30-day removal period has expired.**[26]

Id. (emphasis added). The commentator, even without directly mentioning the JVCA amendments, supports the Tenth Circuit Rule.

III. CAFA Requires Evidence that the Amount in Controversy Is, as Opposed to "Is Alleged to Be," $5 Million

Although erroneously relying on § 1446(c)(2) for its removal without evidence, Dart Br. 7, Dart and the Chamber, in footnotes, suggest that (c)(2) which identifies the general diversity statute, § 1332(a), may not apply in a CAFA context for diversity jurisdiction. Dart Br. 13 n.4; Chamber Br. 8 n.3.[27] But

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because the "allegation . . . neither overcomes the 'strong presumption' against removal jurisdiction, nor satisfies [defendant's] burden of setting forth, in the removal petition itself, the *underlying facts*, remanding to state court and rendering entire federal case including summary judgment a wasted nullity).

[26] The last sentence regarding evidence being submitted in the removal petition is supported by the Second, Third, Fourth, and Sixth Circuits, as well as the Tenth Circuit.

[27] Without § 1446(c)(2), CAFA defendants would have no statutory authority at all to remove until plaintiff provides in the state court an "other paper" virtually admitting the amount in controversy exceeds $5 million. Dart's removal was premature. This construction is consistent with the right given to a CAFA defendant to remove a class action without regard to the one-year limitation of § 1446(c)(1) for other civil actions. The

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that argument overlooks § 1453(b) which provides that all of § 1446 applies to class actions "except that the 1-year limitation under section 1446(c)(1) shall not apply" and the unanimous consent of all defendants to removal shall not apply. *See supra* n.2. This means § 1446(c)(2)(B) applies to defendants removing class actions as well. *See* Chamber Br. 8, n.3 (no reason to demand more from CAFA defendant and no reason to demand less either.). To the extent that the reference in § 1446(c)(2) & (3) that refers to § 1332(a) is in conflict with § 1453(b), the conflict should be resolved in favor of a unified removal procedure and against the absurd result that all of § 1446(c)(1-3) is read out for class actions instead of just (c)(1) and unanimous consent as § 1453(b) plainly states. *See supra* n.2. To do otherwise would leave class actions without a removal procedure at all when defendant wants to use its own evidence to prove jurisdiction. CAFA does not eliminate the "preponderance of the evidence" standard for removal as Dart suggests based on the comment of one Congressman. Pet. 16 (citing only the Statement of Rep. Jim Sensenbrenner in 151 Cong. Rec. H723, H727 (daily ed.) Feb. 17, 2005). And, Congress would have been aware that

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better construction is to apply (c)(2) in CAFA removals by resolving the conflict between the § 1332(a) language, perhaps inadvertently left in § 1446(c), and the limited exclusions intentionally placed in § 1453(b).

preponderance of the evidence was the usual test for threshold matters. *See*, *e.g.*, *Hall,* 132 S. Ct. at 1889.

Paradoxically, Dart admits that there is no reason to treat individual and class case removals different procedurally. Dart Br. 13, n.4. Yet Dart cites the CAFA substantive changes as somehow supporting its across-the-board procedural change. Dart Br. 8. How is not explained. Nor is this supposed CAFA procedural change squared with Dart's argument that the procedural change had already occurred in 1988 (so it was unnecessary in 2005) or would be clarified in 2011 (such that it really was not done). The answer is as Dart originally argued in its petition for rehearing en banc below: CAFA was a substantive change, not procedural. *Dart Cherokee Basin Operating Co., LLC v. Owens,* No. 13-603 (10th Cir. July 5, 2013) (ECF Doc. # 01019085396).

If § 1446(c)(2) is construed to be inapplicable to class actions, CAFA still requires a case that exceeds $5 million for removal, not just a case that is *alleged* to exceed $5 million. 28 U.S.C. § 1332(d)(2) ("The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs . . . "). A controversy that "may exceed" or is "alleged to exceed" will not satisfy § 1332(d)(2) CAFA diversity jurisdiction. Dart cites out-of-context language from *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2382 (2011), for the substantive change that CAFA allows removal of "any sizeable class action involving minimal diversity." Dart Br. 3.

But CAFA defines sizeable as $5 million or more. Anything less than $5 million is not sizeable enough to be removed to federal court, even if defendant "alleges" the amount in controversy is more. *See* § 1332(d)(2). Dart's mere allegation of an amount of over $5 million does not establish federal court jurisdiction under CAFA which requires an evidentiary showing that the amount in controversy exceeds $5 million even if § 1446(c)(2)(B) does not apply to class actions.

Moreover, this action is not the type of interstate class action of "national importance" that Congress intended to be in federal court under § 1332(d). *See Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 739 (2014). This putative class action is of local importance, involving solely state law and approximately 400 royalty owners claiming underpayment of royalties for gas produced from approximately 700 wells, all of which are located in Kansas. Pet. App. 29a, 31a, 39a.

Dart argues that the Senate Report and *Standard Fire Insurance Company v. Knowles* prevents plaintiff's lawyers from gaming the system to remain in state court. Dart Br. 8. Its apparent alternative is that defendants game the system to remove to federal court and sort out jurisdiction later. CAFA gave no such procedural gamesmanship authorization to either side – evidence is the great objective equalizer.

IV. Allegation of the Amount in Controversy Is Not Enough

A. Dart's Misdirection on § 1446(a)

Dart devotes almost its entire opening brief to a non-issue: what "allegations" are required about the "grounds" for removal (federal question or diversity). Dart Br. 1-13, 17-23. But, no one ever questioned Dart's *allegations* about the diversity CAFA "grounds" for jurisdiction – not about when, what, or how the allegations were made. Thus, Dart's argument about § 1446(a) being modeled after the Rule 8 pleading standard is irrelevant. Dart Br. 2, 10; Fed. R. Civ. P. 8.

B. Fed. R. Civ. P. 8 Pleading Standard Applies to the Irrelevant § 1446(a), Not the Relevant § 1446(c)(2)(B), and Was Not Complied with in Any Event.

Section 1446(c)(2) specifically addresses the amount in controversy: (c)(2)(A)(i-ii) covers the *allegation* of the amount in controversy; whereas, (c)(2)(B) covers the *evidentiary proof* of the amount in controversy. Both (A) and (B) must be satisfied – (A) and (B) are joined with the conjunctive "and." *See Shutts v. Phillips Petroleum Co*., 235 Kan. 195, 212, 679 P.2d 1159, 1175 (1984) (distinguishing between conjunctive and disjunctive). Indeed, if (B) is not satisfied, removal is not "proper" under § 1446(c)(2)(B).

Dart's suggestion that its "allegation" of the amount in controversy required under § 1446(c)(2)(A) was sufficient was incorrect. Dart Br. 3. The district

judge specifically found that simply stating the amount in controversy was $8.2 million was "conclusory." The district court below found federal jurisdiction lacking for two reasons (1) the "preponderance of the evidence" test was not met because Dart "fail[ed] to incorporate *any* evidence"; and, (2) the "general and *conclusory* allegations of the petition and notice of removal" were not sufficient to show the amount in controversy exceeds $5 million. Pet. App. 25a-26a (emphasis added). Like the "naked assertion" of an impermissible conspiratorial agreement in *Bell Atlantic v. Twombly,* 550 U.S. 544, 556-57 (2007), Dart's "naked assertion" that the amount in controversy is $8.2 million is conclusory and devoid of "enough factual matter", indeed "any factual matter", to back it up. Thus, Dart's removal failed under § 1446(c)(2)(A); and, even if it only had to plead the amount in controversy, its mere statement of an amount, devoid of supporting allegations demonstrating any plausibility, failed even under its own test.

Dart is doubly wrong, wrong on law, and wrong that its conclusory statement would pass muster under a "1446(a) only" standard. Either way, the district court should be affirmed.

Dart claims, without citing any case law, that allegations of the amount in controversy can be more abbreviated. Dart Br. 3. But that confuses allegations in a plaintiff's federal court original pleading with allegations in a removal notice. The former promotes both plaintiff's choice of forum and an unbiased federal forum without removal, but the latter destroys

plaintiff's choice so more (namely evidence) is required.[28] Dart's position of more abbreviated allegations under § 1446(c)(2)(A) might have some merit if Dart had buttressed its allegations with proof as required by § 1446(c)(2)(B). But that did not happen at the time of removal. The core issue here is when (if ever) does the amount in controversy evidence required under § 1446(c)(2)(B) have to be submitted. The Tenth Circuit has held for almost 20 years that the evidence must be submitted with the removal notice.

While Dart makes much of the argument that § 1446(a) is parallel to the notice pleading language found in Rule 8(a), Dart Br. 2, 10, the extra removal evidentiary requirement in § 1446(c)(2)(B) is not parallel to a pleading standard. If a notice of removal was intended to be a pleading, it could have been included in the list of pleadings, but it was not. *See* Fed. R. Civ. P. 8. If the removal was to be "proper" based on allegations alone, there would have been no need for (c)(2)(B), but the statute was passed by Congress and signed by the President. What other members of Congress said or reports written that were not adopted by Congress and not signed by the President are irrelevant.

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[28] Diversity removal is premised on providing an out-of-state defendant access to an unbiased federal forum if certain procedural hurdles can be cleared. One such hurdle is evidence that the amount in controversy exceeds the federal threshold. 28 U.S.C. § 1446(c)(2)(B).

V. The Long-standing and Better Rule Is to Require Party Alleging Jurisdiction to Prove It at the Time of Removal

By twisting dicta in both circuit and Supreme Court rulings and by relying on plaintiff pleading standards, which are not applicable to a removal motion, Dart cobbles together a proposed standard that condones hiding jurisdictional evidence from the district court, wasting federal court time, and playing games with what should be a fundamental and early determination of jurisdiction.

A. Follow the Statute and Minimize Gaming

DRI Br. 9 quotes part of the House Judiciary Committee Report to the JVCA that defendants need not prove to a legal certainty the amount in controversy, and that allegations of the jurisdictional threshold are allowed. Congress in the JVCA had three options to consider on removal: (1) no evidence (allegations only); (2) preponderance of the evidence; or (3) legal certainty evidence. Defendants favored (1) and plaintiffs favored (3). Congress weighed the benefits and chose the middle ground. The federal district courts would probably prefer that removal jurisdiction be decided simply, easily, and fast, but "it is not [a court's] task to assess the consequences of each approach and adopt the one that produces the least mischief." *Lewis v. City of Chicago*, 560 U.S. 205, 217 (2010). Instead, "this Court's charge is to

give effect to the law Congress enacted." *Id*. That law is the Tenth Circuit Rule.

B. Achieve Early Determination on Jurisdiction to Avoid Waste of Judicial and Litigant Resources

The federal district court under the Tenth Circuit Rule adopted by the JVCA leaves almost no questions about federal jurisdiction upon removal. It is either: (a) evident on the face of the initial or amended complaint or "other paper" coming from state court after state court jurisdictional discovery if needed; or (b) prima facie evidence is submitted with the notice of removal.[29] The cards are on the table for the judge to consider. In the former, the plaintiff has virtually admitted the amount in controversy has been exceeded. In the latter, the plaintiff generally has no evidence to dispute so it is a question of the sufficiency of the evidence submitted by the defendant. *See Freebird, Inc. v. Merit Energy Co.,* 597 F. Supp. 2d 1245 (D. Kan. 2009) (evidence defendant submitted was insufficient and case remanded). This achieves

[29] If the defendant does not have the evidence, the defendant can seek discovery in the state court and then remove to federal court when it has the evidence, because, for class actions, there is no one (1) year limitation on removal, §1453(b), and for individual cases, one (1) year is long enough to develop the damage evidence (and that time is extended if the evidence is hidden in bad faith). Apparently not happy with the Congressional legislation, Dart characterizes this state court discovery as a "significant burden" as well. Dart Br. 7.

the early determination and avoids the waste of judicial and litigant resources over jurisdiction so that the focus can be on the merits. *See Navaro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980) (this Court "will not invite extensive threshold litigation over jurisdiction [because] litigation over whether the case is in the right court is essentially a waste of time and resources."). It is only Dart's proposal that will cause jurisdictional discovery "eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims . . . producing appeals and reversals, encourage[ing] gamesmanship . . . " *Hertz,* 559 U.S. at 94. *See* Section V.F, *infra*.

The Tenth Circuit Rule comports with Rule 1 of the Federal Rules of Civil Procedure which urges construction "to secure the just, speedy, and inexpensive determination of every action and proceeding." Dart's approach would do just the opposite. Indeed, if only a mere conclusory statement is enough, the incentive will be for plaintiff to challenge and require evidence so that the plaintiff can understand the facts relied upon by defendant, obtain discoverable evidence, and understand if the defendant's view of the case and calculation methodology for damage is different than plaintiff's. In any event, it is almost a certainty that a mere conclusory allegation would force a challenge. No such incentive results when evidence is disclosed in the notice of removal; then, there is a remand motion likely only if the plaintiff has contrary evidence (unlikely) or the evidence is so

lacking in veracity or contrary to the alleged damages theory that the plaintiff has a basis for contest, also not the usual case.

C. Simpler Is Better

Simpler is better. *See Mississippi ex rel. Hood,* 134 S. Ct. at 744 ("Our decision thus comports with the commonsense observation that 'when judges must decide jurisdictional matters, simplicity is a virtue.'") (citing *Standard Fire Ins. Co.,* 133 S. Ct. at 1350); *see also Hertz,* 559 U.S. at 94-95. What could be simpler and more commonsensical than submitting available evidence with the notice removing the case from the plaintiff's chosen forum?

Dart argues that the Tenth Circuit approach "unnecessarily complicates" the removal process because it "can lead to sprawling evidentiary submissions on jurisdictional allegations." Dart Br. 8. This case shows just the opposite. Pet. App. 75a. A short declaration is what is generally done, just as it could have been done timely in this case.

D. The Tenth Circuit Rule Has Proven Workable for Almost Two Decades

While Dart bases its argument on assumptions from circuit courts and dicta from this Court, and posits that its "remove first, prove later" approach will work, the Tenth Circuit Rule has been a fully functional and working model for almost two decades.

It has a proven track record, and one which Congress embraced.

Contrary to the Chamber's cry, counsel representing defendants who remove cases from state to federal court have followed this law by filing evidence with the notice of removal without complaints of undue burden or difficulty for years.[30] Even Dart's

[30] Owens' counsel filed the listed actions in state court. All of them were removed to federal court and attached a declaration to support the amount in controversy. *Eatinger v. BP Am. Prod. Co.,* No. 07-1266-JTM (D. Kan. Sept. 7, 2007) (Notice of Removal ("NOR"), doc. # 1 and declarations in support, doc. ## 1-5, 1-6); *Hershey v. ExxonMobil Oil Corp.,* No. 07-1300-JTM (D. Kan. Sept. 26, 2007) (NOR, doc. # 1 and declaration on amount in controversy in support, doc. # 1-4); *Freebird, Inc. v. Merit Energy Co.,* No. 08-1305-WEB (D. Kan. Oct. 14, 2008) (NOR, doc. # 1 and affidavit in support, doc. # 1-3); *Wallace B. Roderick Rev. Living Trust v. XTO Energy, Inc.,* No. 08-CV-1330-JTM (D. Kan. Oct. 24, 2008) (NOR, doc. # 1 and plaintiff's demands for more than $5 million, doc. ## 1-7, 1-8, 1-9); *Freebird, Inc. v. Merit Energy Co.,* No. 10-1154-KHV (D. Kan. May 18, 2010) (NOR, doc. # 1 and affidavit in support, doc. # 1-2); *Hitch Enterprises, Inc. v. Cimarex Energy Co.,* No. CIV-11-13-W (W.D. Okla. Jan. 6, 2011) (NOR, doc. # 1 and declaration in support, doc. # 1-5); *Carlile v. Murfin, Inc.,* No. 11-CV-1186-JWL (D. Kan. July 15, 2011) (NOR, doc. # 1 with declaration in support attached as Exhibit B to doc. # 1); *Wallace B. Roderick Rev. Living Trust v. OXY USA, Inc.,* No. 12-CV-1215-RDR (D. Kan. June 14, 2012) (NOR, doc. # 1 and expert report establishing plaintiff demanded more than $5 million, doc. # 1-7); *Dreitz v. Linn Operating, Inc., et al.,* No. 13-1179-EFM (D. Kan. May 9, 2013) (NOR, doc. # 1 and affidavits in support, doc. ## 1-5 and 1-6); *Hitch Enterprises, Inc. v. OXY USA, Inc.,* No. CIV-13-543-M (D. Kan. May 28, 2013) (NOR, doc. # 1 and affidavit in support, doc. # 1-3); *Catron v. Colt Energy, Inc., et al.,* No. 13-4073-CM (D. Kan. July 3, 2013) (NOR, doc. # 1 and affidavit in support, doc. # 1-1).

former counsel at the time of removal in this case, Morris Laing, filed a declaration with its notice of removal to provide evidence of the amount in controversy in a similar class case. *Arkalon Grazing Ass'n v. Chesapeake Operating, Inc.,* No. 09-1394-CM (D. Kan. Dec. 11, 2009) (notice of removal, doc. # 1 and declaration in support, doc. # 1-4). There is no hardship or undue burden in doing so, and the Tenth Circuit rule has worked well.[31] There is simply no evidence in the record of any hardship or undue burden because experience has shown no such supposed problem exists in the real world.

Dart argues that the Tenth Circuit Rule of being forthcoming with evidence "significantly burdens removing defendants [because it] might require the defendant to search its own records." Dart Br. 7. But Dart made no showing that this was a "significant" burden in this case or in any other case. Indeed, it has been accomplished in the Tenth Circuit without problem for almost two decades, as well as by defense counsel in this case.

Second, Dart repeatedly complains that it may only have a "30-day removal window" to do this investigation. Dart Br. 7. That is not evidence of a

[31] Notably, Dart was able to prepare and file a single eleven paragraph declaration in support of its response to Owen's motion to remand without any difficulty. Pet. App. 75a. It would not have been onerous for Dart to have done the same with its notice of removal.

"significant burden", but an argument that the 30-day window imposed by Congress in § 1446(b) is too short. Again, there is no evidence to suggest that it was too short in this case or in any other case. Moreover, the 30-day window is consistent with the 30 days to respond to requests for production and interrogatories. The 30-day window has also been the test imposed under § 1446(b) for decades, would be easier and faster to gather the information now in the electronic age than then. Besides, Congress reconfirmed the 30-day window a few years ago under the JVCA. Finally, if the search is too burdensome in 30 days, a removing defendant can wait and engage in state court discovery or a mediation and remove when plaintiff proffers the "other paper" (in this case when Dart eventually provided its own amount in controversy evidence to Plaintiff). The 30-day search is entirely self-imposed and not a product of the Tenth Circuit Rule.

The Tenth Circuit Rule removes even the specter of uncertainty that Dart complains about with a clear-cut rule. The 30-day removal clock is only triggered when the right to remove is "unequivocal" which means to "learn with certainty" that removal can be done. *DeBry v. Transamerica Corp.,* 601 F.2d 480, 489 (10th Cir. 1979). There is no duty for defendant "to investigate and determine removability when the initial pleading merely indicates that the right to remove *may* exist." *Akin v. Ashland Chem. Co.*, 156 F.3d 1030, 1036 (10th Cir. 1998) (emphasis in original). Instead, the Tenth Circuit "requires clear

and unequivocal notice from the pleading itself, or a subsequent 'other paper' such as an answer to interrogatory." *Id.* Thus, the Tenth Circuit Rule is both workable and addresses even Dart's supposed concerns.[32]

Finally, instead of arguing that it is a significant burden to search its own records or conduct state court jurisdictional discovery, Dart argues that gathering evidence in either way might be a waste of defendant's time if the amount in controversy is never disputed. Dart Br. 7. But in this case, and almost every case, the damages, which is the amount in controversy, is almost always in dispute. Likewise, in most class actions and in this case, plaintiff has no idea how much the amount in controversy or damages are, but defendant does. And, there will be discovery about the damages and how they are computed in every damage case. It is discovery that will be required and certainly will not be a waste of time for the defendant to gather early. Finally, it cannot be a waste of time for defendant to gather the evidence that Congress requires to support a removal. After all, it is defendant that wants the case removed to federal court and should not be viewed as a waste of

[32] *See also* 16 James W. Moore, *Moore's Federal Practice*, § 107.30[3][f], 107-190.35 (noting that the better rule is that there is no duty to investigate) (citing Second, Fifth, Eighth, Ninth, Tenth and Eleventh Circuits, and only citing old cases from the Fourth and Seventh Circuits as contra).

time for defendant to prove its own motion for removal is valid. Finally, allowing conclusory statements from defendant will virtually insure that plaintiffs will challenge that statement (which is after all unsupported by evidence).

E. Transparency Is Better than Hiding Evidence

This case is a perfect illustration of why this Court should not let Dart off the hook for its procedural error. Dart's proposal would make every state case immediately removable based on defendant's allegations alone (subject to Rule 11 of the Federal Rules of Civil Procedure – which we know from practically every summary judgment motion and trial is no substitute for evidence). Plaintiff and the district court, being without any evidence on the amount in controversy, would have no choice but to question it – otherwise plaintiff may litigate a case for a long time only to be rendered a nullity and the district court may do the same. *Boeing Wichita Credit Union,* 370 F. Supp. 2d at 1129 ("If a court lacks subject matter jurisdiction, all rulings are a nullity, lacking any force and effect."). All that will follow because the defendant does not want to be forthcoming with its evidence of the amount in controversy in order to sustain the motion it makes to change the jurisdiction of the case from state to federal court. By doing so, the burden of jurisdictional discovery and motion practice is foisted on plaintiff and the federal district

court, instead of on the party that has the evidence and wants to use it for its own benefit.

F. Problems with Dart's Proposed Construction

With only an allegation about the amount in controversy in the notice of removal, plaintiff has no evidence as to how defendant calculated the amount such that he can meaningfully challenge it or confidently assent to it. And because removal occurs before the Rule 26(f) conference and discovery, plaintiff cannot obtain discovery before the 30-day limit in 28 U.S.C. § 1447 on motions to remand.[33] So with no other options, and with every incentive to obtain prompt discovery that might otherwise take a long time to get, plaintiff will almost certainly move to remand and may also move for jurisdictional discovery. Nor can the district court make an evidentiary finding by a preponderance on a "naked assertion" of the amount in controversy. Under Dart's proposal, jurisdictional discovery is virtually assured and just what the JVCA was enacted to avoid.

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[33] *See* Fed. R. Civ. P. 16(b)(2)(the district court's scheduling order, which sets forth the timing for disclosures, may be issued as late as ninety days after the defendant makes an appearance); Fed R. Civ. P. 26(f)(1) (the parties must meet to plan for discovery, at the latest, twenty-one days before the district court's order under Rule 16(b)(2) is due); Fed. R. Civ. P. 26(d)(1)(no discovery allowed until after the Rule 26(f) conference); Fed. R. Civ. P. 33(b)(2), 34(b)(2)(A), and then another 30-day wait for objections to discovery).

What Dart proposes is a mess. Federal courts will be embroiled in federal jurisdiction battles including discovery (which can only be invoked after a Rule 26 conference and scheduling order, and likely a motion to dismiss, and protective order – all of which will be eventually rendered a nullity if there was no federal jurisdiction in the first place).

CONCLUSION – AFFIRM DISTRICT COURT'S ORDER GRANTING REMAND TO STATE COURT

The Tenth Circuit properly considered the removal statute as a whole, including the evidentiary requirement in § 1446(c)(2)(B). No other circuit has truly addressed or assumed that no evidence should be submitted with the notice of removal, especially after the JVCA adopted *McPhail*. The Tenth Circuit's construction has stood the test of time, is consistent with the usual motion practice in federal court, promotes transparency, and conforms to the Congressional standard that federal jurisdiction be easy to determine from evidence presented by the defendant from its own records or from state court discovery. The Tenth Circuit Rule requires no change. It follows the removal statute, this Court's precedent, Rule 1's instruction, common sense, and has a track record of working. This Court should affirm this reasoned approach to make express what the circuits do implicitly already.

The rule is simple and easy to apply. Plaintiff chooses the forum for his lawsuit unless the defendant produces a preponderance of evidence of the amount in controversy to establish federal diversity jurisdiction. Only in this way may a defendant override plaintiff's choice of forum. An allegation or a conclusory assertion, without evidence, does not suffice to carry the removing party's burden to establish federal subject matter jurisdiction at the time of removal. Owens asks this Court to affirm the district court's order granting remand.

Respectfully submitted,

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