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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Because federal district courts are courts of limited jurisdiction, the party asserting federal jurisdiction carries the burden to prove original federal subject matter jurisdiction exists. This legal tenant holds particularly true where a party removes the action from the plaintiff's chosen state court forum. Recognizing that removal statutes are to be strictly construed and that the party asserting jurisdiction carries the burden of proof, was the district court correct in requiring Petitioners – which 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 specified 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 a naked assertion that the amount in controversy was satisfied and wait until months later, after Respondent Owens had filed his motion to remand, to file the evidence supporting the calculation of the amount in controversy necessary for the district court's subject matter jurisdiction?

CORPORATE DISCLOSURE STATEMENT

Brandon Owens is an individual and makes no corporate disclosure statement. He has no parent corporation and does not issue stock such that a public company could own 10% or more of it.

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INTRODUCTION

Dart removed Owens' class action petition alleging in its notice of removal that the federal district court had diversity jurisdiction under 28 U.S.C. §1332(d).[1] But Dart filed no evidence to support the allegations; and the district court concluded: "The jurisdictional facts alleged in the Petition and Notice of Removal do not show by a preponderance of the evidence that the amount in controversy exceeds $5 million. Guided by the strong presumption against removal, this case is remanded to state court for lack of subject matter jurisdiction." Pet. App. 28a. The Tenth Circuit denied Dart's petition for permission to appeal the remand order and denied Dart's petition for rehearing en banc. Pet. App. 1a, 13a. Dart seeks a writ of *certiorari* to rescue them from their failure of proof and to rewrite centuries of law requiring some evidence of jurisdictional facts.

Federal District Courts Have Limited 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). Congress conferred on the federal district courts two types of original jurisdiction: 1) federal question

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

jurisdiction under 28 U.S.C. §1331; and 2) diversity jurisdiction under 28 U.S.C. §1332. *Id.* "To ensure that diversity jurisdiction does not flood the federal courts with minor disputes, §1332(a) requires that the matter in controversy in a diversity case exceed a specified amount, currently $75,000." *Id.* And, in minimally diverse class actions having more than 100 members, §1332(d)(2) requires that specified amount exceed $5 million.

Congress enacted §1332(d) "to amend the procedures that apply to consideration of interstate class actions" and to place class actions of "national importance" in federal court. *Mississippi ex rel. Hood v. AU Optronics Corp.*, ___ U.S. ___, 134 S.Ct. 736, 739 (Jan. 14, 2014). But this class action is not of "national importance"; and neither Dart nor the Chamber attempt to argue that it is.[2] This putative class action is of local importance, involving approximately 400 royalty owners claiming underpayment of royalty for gas produced from approximately 700 wells, all of which are located in Kansas. Pet. App. 29a, 31a, 39a. Contrary to Dart's and the Chamber's view, this class action is not an "interstate class action" of "national importance" of the type that Congress intended to be in federal district court. And, once discovery is

[2] "Chamber" refers to the Chamber of Commerce of the United States of America which has filed a motion for leave to file a brief as *amicus curiae* in support of Dart. The Chamber's brief is virtually identical to Dart's Petition; and, this opposition addresses the arguments in both.

allowed, the local controversy or home state exceptions to federal jurisdiction are likely to apply because more than two-thirds or at least one-third of the royalty owners will be Kansas citizens. 28 U.S.C. §1332(d)(3) & (d)(4).

The Class Action Fairness Act of 2005 ("CAFA") amended the federal court's diversity jurisdiction over class actions in §1332. As Dart recognized in its petition for rehearing en banc, the amendments changed the substantive, but not procedural, requirements for removal. *Dart Cherokee Basin Operating Co., LLC, v. Owens*, No. 13-603 (10th Cir. July 5, 2013) (ECF Doc. #01019085396). Nonetheless Dart (and the Chamber) attempts to distract this Court with CAFA when the Petition presents no question involving CAFA. *See* Pet., p. (i) quoting 28 U.S.C. §1446(a), not 28 U.S.C. §1332(d) (CAFA); *cf.* Chamber Mot. ii (focused on CAFA).

Dart's petition presents a question about the "procedure for removal of civil actions" as codified at 28 U.S.C. §1446, which applies to class actions under §1453(b).[3] No one contests that §1446(a) requires the

[3] Section 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." Hence, all provisions of §1446 apply to class actions except 1446(c)(1). This means §1446(c)(2) applies to defendants removing class actions as well.

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defendant to file a notice of removal "containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon" it. But Dart ignores that the same statute also sets forth requirements for removal based on diversity of citizenship jurisdiction under §1332. 28 U.S.C. §1446(c). Those requirements include: (a) accepting the amount in controversy alleged in the initial pleading filed in state court; or, (b) if that pleading seeks non-monetary relief or an unspecified money judgment (as the petition here did because Owens, an individual royalty owner, could not know class size, i.e., the number of royalty owners, or the amount in controversy, i.e., the amount of royalty Dart has underpaid over the years at the pleading stage and without discovery) the amount stated in the notice of removal **and** "the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a)." §1446(c)(2)(A) & (B) (emphasis on "and" added).

Rather than sweeping removal of all class actions into federal court under CAFA as Dart and the Chamber would like to do, "[the] statutory procedures for removal are to be strictly construed." *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 32 (2002) (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941) (noting that the policy underlying

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See Chamber Br. 7, n.2 (no reason to demand more from CAFA defendant and no reason to demand less either.)

removal statutes "is one calling for the strict construction of such legislation")); *Healy v. Ratta*, 292 U.S. 263, 270 (1934) ("Due regard for the rightful independence of state governments . . . requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defined"); *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 233-34 (1922). Though certainly aware of this long-standing law, Congress did not change it in enacting CAFA. *Hall v. United States*, 566 U.S. ___, 132 S.Ct. 1882, 1889 (2012). Nor did Congress relieve class action defendants from the statutory requirements for diversity jurisdiction and say all class actions belong in federal court.[4] In CAFA, Congress gave class action defendants a tool, not a free pass, for removing class actions into federal court. Compliant use of the tool is necessary to make removal stick.

The Party Asserting Federal Jurisdiction Has the Burden to Prove It with Some Evidence and Cannot Merely Allege It.

The requirements that the notice of removal state the amount in controversy where the petition

[4] As authority for this proposition, the Chamber cites a case that was decided eleven years before CAFA's enactment. Clearly, the case cannot support "an expansive interpretation" of CAFA's removal provisions. Chamber Br. 15, n.4 (citing *Tex. E. Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 15 F.3d 1230, 1243 (3d Cir. 1994)).

does not *and* attach evidence from which the district court can find, by preponderance of the evidence, that the amount in controversy exceeds the jurisdictional minimum ensures that the defendant, who, in class actions, is often the party with the evidence of the amount in controversy, presents that evidence at the earliest opportunity. This permits the plaintiff and the district court to evaluate that evidence to determine whether plaintiff has a basis for a motion to remand that must be filed within thirty (30) days of the notice of removal under 28 U.S.C. §1447(c) and whether that evidence supports a finding that the jurisdictional amount is met. This procedure aligns with more than two centuries of this Court's precedent (dating back to 1799) holding that the party asserting federal jurisdiction must provide evidence of it in the court record. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 546-47 (1986) ("[The] court [must] deny its own jurisdiction . . . in all cases where such jurisdiction does not affirmatively appear in the record[.]"); *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884) ("The [removal] jurisdiction of the [federal] court fails, unless the necessary citizenship affirmatively appears in the pleadings or elsewhere in the record."); *Jackson v. Ashton*, 33 U.S. 148 (1834) (Marshall, C.J.) ("The bill and proceedings should state the citizenship of the parties, to give the court jurisdiction of the case."); *Capron v. Van Noorden*, 2 Cranch 126, 2 L.Ed. 229 (1804) ("The Courts of the U.S. have not jurisdiction unless the record shews [sic] that the parties are citizens of different states, or

that one is an alien, & c."); *Turner v. Bank of N.A.*, 4 Dall. 8, 1 L.Ed. 718 (1799) ("[I]t [is] necessary . . . to set forth upon the record . . . the facts or circumstances which give jurisdiction[.]").

To ensure an early determination and the proper exercise of the federal district courts' limited jurisdiction, the Tenth Circuit has long required that the removing defendant present some evidence to support the underlying jurisdictional facts with the notice of removal. *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995); *Martin v. Franklin Capital Corp.*, 251 F.3d 1284 (10th Cir. 2001); *Oklahoma Farm Bureau Mut. Ins. Co. v. JSSJ Corp.*, 149 F.Appx. 775 (10th Cir. 2005); *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). And, 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.[5] Even Dart's

[5] 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. Indeed, many of the removal notices cite *Laughlin* and *McPhail* as requiring evidence of the facts giving rise to the federal district court's jurisdiction to be filed with the notice of removal. *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.*

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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 *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). The *Arkalon* notice of removal was filed almost three years before the one in this case. *Compare* Doc. #1 in *Arkalon* (filed Dec. 11, 2009) *with* Pet. App. 42a (Dec. 5, 2012). So Dart's counsel knew or should have known the Tenth Circuit Rule and simply failed to follow it in this case. And, as a Hail Mary pass, Dart's new counsel hopes this Court will

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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-01330-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).

rescue Dart from the Kansas state court for this Kansas class action.[6]

Providing evidence of the amount in controversy with the notice of removal also comports with Rule 1 of the Federal Rules of Civil Procedure which urge construction "to secure the just, speedy, and inexpensive determination of every action and proceeding." 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 challenge it. And because removal occurs before the Fed. R. Civ. P. 26(f) conference and discovery, plaintiff cannot obtain discovery before having to file the motion to remand. So the Chamber's assertions of "gamesmanship" by plaintiff when plaintiff has no evidence is folly. Chamber Br. 16. Nor can the district court make a finding, under any evidentiary standard, on a "naked assertion" of the amount in controversy to ensure the statutory prerequisites for jurisdiction under §1332 are met and the district court can properly hear the case. *See* Pet. App. 37a.

The question Dart's petition presents is simply whether a mere allegation in a notice of removal, without any supporting evidence, that the statutorily prescribed amount in controversy is satisfied, carried

[6] 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.

Dart's burden to prove federal jurisdiction exists in order to divest Owens of his chosen state court forum. *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)). The Tenth Circuit and the district court concluded that a mere allegation in the notice of removal could not establish federal jurisdiction, especially where Dart had the evidence and could have presented that evidence with its notice of removal as decades of Tenth Circuit precedent requires. Indeed, the dissent to the order denying Dart's petition for rehearing en banc acknowledged that the question would not arise again because "any diligent attorney (and one can assume that an attorney representing a defendant in a case involving at least $5 million – the threshold for removal under CAFA – would have substantial incentive to be diligent) would submit to the evidentiary burden rather than take a chance on remand to state court." Pet. App. 3a; *Dart Cherokee Basin Operating Co., LLC v. Owens*, 730 F.2d 1234, 1235 (10th Cir. 2013). And, as noted earlier, many diligent attorneys, including Dart's former counsel, have carried the burden within the 30-day time frame for removal. *See* p. 6-7, n.5, *supra*.

Requiring Submission of Evidence with the Notice of Removal Is Sound and Administratively Simple.

The procedural rule requiring evidentiary support for the jurisdictional fact about the amount in

controversy is sound. If the removing defendant has the evidence, the defendant should present the evidence early, thereby permitting all parties and the district court the opportunity to assess it at the outset. 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. 28 U.S.C. §1453(b); *see* p. 3, n.3, *supra*. Or, in an individual case where the initial pleading is not removable, a defendant can remove within 30 days of an amended pleading or other paper from which federal jurisdiction can be first ascertained. 28 U.S.C. §1446(b)(3). So the 30-day time limit for removal is not nearly as ironclad as the Chamber makes it seem, and is no more onerous than the 30-day period for responding to discovery under the Federal Rules of Civil Procedure. Either way, evidence should be presented at the time of removal so the district court can make the requisite findings under §1446(c) for diversity jurisdiction.

This bright-line rule also has the virtue of simplicity. *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 Corp. v. Friend*, 559 U.S. 77, 94-95 (2010). Tellingly, and as Dart points out in its Petition, Judge Hartz's dissent in this case suggested Dart's notice of removal would have been adequate under *Hertz Corp.* Pet. 8;

Pet. App. 4a-7a; *see also* Chamber Br. 11. But in that case Hertz filed 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). Rather than being "novel," "wayward" or "renegade," the submission of evidence to establish jurisdictional facts alleged in the notice of removal is "proper removal practice" in the Tenth Circuit and elsewhere. *See* Chamber Br. at 4, 8, 17; *See* Section II, *infra* (demonstrating no circuit split).

As Dart recognizes, "[m]ore than 30,000 cases are removed to federal court each year." Pet. 9 (citation omitted). Yet, this issue about alleging or supporting with evidence the amount in controversy to establish the statutory prerequisites for federal jurisdiction rarely arises. *See* Chamber Br. 11. Indeed, all of the Tenth Circuit judges here either found the issue was not worth hearing or that the issue would not likely recur. Pet. App. 3a & 12a (noting that the issue in *Standard Fire Ins. Co. v. Knowles*, 133 S.Ct. 1345 (2013), "unlike the one here, was one that would continue to arise. . . ."). Without the likelihood of recurrence, no compelling reason exists to grant *certiorari*. Supreme Court Rule 10.

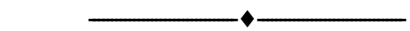
And Dart offers no compelling reason to change the well-established law. An unsupported conclusory allegation in the notice of removal that the amount in controversy is satisfied cannot substitute for evidence that Dart admittedly had at the time of removal. To

accept Dart's suggestion that providing evidence months after removal suffices to meet its burden at the time of removal would encourage sandbagging, rather than disclosing, jurisdictional evidence, would deprive plaintiff of any opportunity to timely move for remand, and would risk gearing up the federal district court machinery in cases where jurisdiction is lacking. This is not and should not be the law. Dart simply failed to present any evidence on the amount in controversy to support the federal court's diversity jurisdiction at the time of removal. This Court should not rescue Dart, one defendant, from its evidentiary failure. Dart's petition for *writ of certiorari* should be denied.

SALIENT FACTS

The state court class action petition made no allegation about the amount in controversy because only Dart possessed the royalty paydecks and gas contracts containing the data necessary to calculate class-wide damages. Pet. App. 16a, 20a, 27a. Dart timely removed but only alleged in the notice of removal that the amount in controversy was met. *Id.* 40a at ¶¶ 14-15. (stating: "DCBO has undertaken to quantify the amount of additional royalties that would be owed if all or substantially all of the adjustments to royalties advanced by Plaintiff were found to be required to be made. Based upon this calculation of Plaintiff's putative class claims, the amount of additional royalty sought is in excess of

$8.2 million.").[7] Dart offered no evidence of its calculation of jurisdictional facts with the notice of removal. Pet. App. 37a-42a. One hundred seventy-seven (177) days after the deadline for removal and after plaintiff Owens had moved for remand, Dart filed a declaration to support the allegations about the amount in controversy with its opposition to Owens' motion to remand. Pet. App. 16a, 20a. That declaration showed Dart had evidence of the amount in controversy available to it at the time of removal. *Id*. 24a, 27a.[8]



[7] 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. If such a naked allegation in a complaint is insufficient for a "plain statement" under Fed. R. Civ. P. 8(a)(2), it is likewise insufficient for a "plain statement" for removal under §1446(a). *Id.* at 557. *See* Pet. 10 (analogizing the pleading standards of Rule 8 and §1446(a)).

[8] Contrary to unfounded fear professed in the Chamber's Brief that "defendants sued in state court in the Tenth Circuit" would have to "amass voluminous evidence to support the filing of a notice of removal," Mot. ii, Brf. 2, 3, Dart would have only had to disclose in a declaration what it did to calculate the class-wide amount in controversy at the time of removal so plaintiff and the district court would have had "enough factual matter" to evaluate the evidence and whether it fully supported Dart's calculation of the amount in controversy. *See* p. 6, n.5, *supra.* The Chamber misunderstands the issue which is about Dart's failure to submit *any* evidence to support the amount in controversy allegation, not the sufficiency of the evidence. Brf. 3.

ARGUMENT AND AUTHORITIES

I. The Tenth Circuit Rule Strictly Construes the Removal Statutes by Requiring the Removing Party to Present Evidence of the Amount in Controversy with the Filing of the Notice of Removal to Ensure the Federal District Court's Subject Matter Jurisdiction.

Dart did not meet its burden "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. To carry a burden a removing party must present evidence of "underlying facts" to "support" the "assertion" of the amount in controversy. Dart simply presented **no evidence** at the time of removal which, of course, cannot carry any burden of proof, no matter how light. *See Frederick*, 683 F.3d at 1245 ("In support of its amount-in-controversy calculation, Hartford attached an affidavit of the Hartford employee who calculated the sum."). *See also Laughlin*, 50 F.3d at 873; *Martin*, 251 F.3d 1284 (10th Cir. 2001) (suggesting that evidence submitted in response to a motion to remand should not be considered); *Oklahoma Farm Bureau Mut. Ins. Co. v. JSSJ Corp.*, 149 F.Appx. 775 (10th Cir. 2005) (refusing to consider an affidavit because it was not attached to the Notice of Removal); Pet. App. 3 (recognizing that the district court's decision here was "not an unreasonable interpretation of the language in some of this court's

opinions").[9] The Tenth Circuit has required evidence to support jurisdictional facts for more than a decade, without incident and without the travails Dart and the Chamber suggest.

As the district court acknowledged, post-removal evidence is allowed only in very limited circumstances – that do not exist here: (a) the evidence is presented within the 30-day time for removal and the notice of removal is deemed amended, 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 evidence is not in the defendant's possession at the time of removal and some discovery is necessary, Pet. 7 n.1 (noting the Tenth Circuit exception when a defendant has "no information from which to establish the amount of damages" and "request[s] leave to conduct discovery on the amount in controversy"); *See also Aranda v. Foamex International*, 884 F.Supp.2d 1186 (D.N.M. 2012); or, (c) plaintiff offers the evidence to clarify an ambiguous state court petition, but not to contradict or change it. Pet. App. 10a, n.8

[9] Dart's use of post-removal confidential mediation negotiations is likewise unavailing. The district court noted the Tenth Circuit permits evidence of settlement proposals and estimates to establish the amount in controversy only when those facts occur before the removal and are submitted with the notice of removal. *Owens v. Dart Cherokee Basin Operating Co., LLC*, No. 12-4157-JAR, 2013 WL 2237740, at *5 (D. Kan. May 21, 2013) (citing *McPhail v. Deere & Co.*, 529 F.3d 947, 956 (10th Cir. 2008)); Pet. App. 27a. That did not happen here.

(citing *Hebner v. Bay Transport, Inc*., No. 09-2141-KHV, 2009 WL 1254442 (D. Kan. May 5, 2009)). Otherwise, post-removal evidence is not allowed. Pet. App. 10a n.8 (citing *Coca-Cola Bottling of Emporia, Inc. v. South Beach Bev. Co.*, 198 F.Supp.2d 1280, 1283 (D. Kan. 2002) and *Lichfield v. Int'l Survivors Action Comm*., No. 2:05-CV-254-TC, 2005 WL 1484520, **3-4 (D. Utah June 22, 2005). *See also Herndon v. Am. Commerce Ins. Co*., 651 F.Supp.2d 1266, 1269-72 (N.D. Okla. 2009) (remanding UM motorist coverage claim where defendant did not provide an affidavit or "any economic analysis" with the removal notice)). This bright-line rule facilitates the application of the removal and remand statutes and the case law construing them.

II. The Tenth Circuit Rule Does Not Conflict with Rules in Other Circuits.

Contrary to Dart's argument urging construction of the removal statutes to allow the removing party to withhold evidence on the amount in controversy until months after removal, the Tenth Circuit's "show-it-if-you've-got-it" rule is *not* at odds with the other circuits. Pet. 10-12. Indeed, most of the cases Dart cites simply show that the district court may consider evidence submitted with the notice of removal or within the 30-day window for removal. *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 . . . "); *Sierminski v. Transouth Fin. Corp*.,

216 F.3d 945, 947-48 (11th Cir. 2000) (declaration of the defendant's human resources director filed within 15 days after filing the notice of removal and within the 30-day window for removal satisfied removing party's burden to establish removal jurisdiction by a preponderance of the evidence at the time of removal). Providing evidence to support jurisdictional facts within the 30-day removal window comports with the Tenth Circuit Rule and encourages early disclosure and evaluation of jurisdictional facts. For these reasons, among others, the same district judge who granted remand in this case denied remand in another case when she permitted amendment of the notice of removal within the 30-day removal window to "specify the facts providing a basis" for the district court's diversity jurisdiction. *Pepsi-Cola Bottling Co.*, 2007 WL 2954038, at **3-4. These cases show that, rather than being in conflict, the Tenth and Eleventh Circuits are in step with each other.[10]

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[10] *Lowery v. Alabama Power Co.*, 483 F.3d 1184 (11th Cir. 2007), mentioned once in a string cite in Dart's Petition at page 10, illustrates this point. *Lowery* granted remand because, like Dart, the defendant failed to present any evidence to sustain its burden on the amount in controversy. The court discussed the difficulty of applying the "preponderance of evidence" standard to "naked pleadings," including a notice of removal devoid of evidence. 483 F.3d at 1209-10. Like the Tenth Circuit, the Eleventh Circuit held that only removal documents are to be considered. *Id*. at 1213-14. This was true even though the removing defendant in *Lowery*, unlike Dart here, did not have the evidence on the amount in controversy. *Id*. at 1213 n.63. No case supports Dart's position that the removing defendant can

(Continued on following page)

The First Circuit also is not in conflict. Pet. 11 (citing *Amoche v. Guarantee Trust Life Inc. Co*., 556 F.3d 41, 51-53 (1st Cir. 2009) (affirming the district court's remand order)). In *Amoche*, the removing defendant filed its evidence at the time of removal. *Id.* at 45. In opposition to plaintiff 's motion to remand, defendant added post-removal evidence estimating damages, which plaintiff did not oppose as untimely, but did oppose on substance. *Id*. at 46-47 (arguing that defendant inflated the number of class members by including people who did not meet the class definition and who were outside the geographic scope of the action).[11] On the evidence, the *Amoche*

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withhold the evidence it had at the time of removal and rely on a naked notice of removal to sustain its burden of proof on facts necessary to the district court's jurisdiction. And certainly *Lowery* does not. *Id*. at 1221 ("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."). This holding is consistent with the Tenth Circuit Rule.

[11] This demonstrates another reason why a "naked" notice of removal is insufficient to establish the amount in controversy. Without evidence, the plaintiff has no way of knowing the facts the removing party is relying on to establish the amount in controversy. In *Amoche*, plaintiff argued and the district court found the defendant's evidence inflated the class size to achieve the requisite amount in controversy for jurisdiction. The *Amoche* court also rejected the "notice pleading" standard that Dart suggests. Pet. 13. Accepting naked allegations that the jurisdictional threshold was met would conflict with the right of plaintiff to choose his forum. *Amoche*, 556 F.3d at 49-50.

court found defendant did not carry its burden on the amount in controversy and noted a consideration is which party has better access to the relevant information. *Id.* at 51. Here, while Dart had access to all of the information about the amount in controversy, it simply chose not to present it at the time of removal. *Amoche* is entirely consistent with Tenth Circuit law and does not support Dart's withholding evidence for months after filing the notice of removal.

The unpublished Fourth Circuit case Dart cites also affirmed remand because defendant relied on a "wholly unsupported assumption that members of the plaintiff class will claim to have worked an average of five hours of overtime pay per week." Pet. 11 (citing *Bartnikowski v. NVR, Inc.*, 307 F.Appx. 730, 732, 735-37 (4th Cir. 2009) (unpub.)). The case does not show that plaintiff objected to defendant's submission of post-removal evidence. Perhaps that is because the evidence was subject to easy attack and the district court granted remand anyway.

Dart also cites *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192 (4th Cir. 2008) in which the district court *sua sponte* remanded the case six days after the notice of removal was filed. *Id.* at 192, 195. Because the remand order was based on a pleading defect not raised by the plaintiff in a motion to remand or in any other motion, the Fourth Circuit reversed and remanded the case to the district court to actually determine whether it had subject matter jurisdiction. *Id.* at 197-99. Moreover, the state court complaint sought "actual, incidental, consequential,

and punitive damages" arising from plaintiff's purchase in August 2003 of a 2003 American Eagle 40MS recreational vehicle and "replacement of the vehicle or refund of the purchase price" which, although not stated in the complaint, was known to both the plaintiff and to the defendant who sold plaintiff the vehicle to greatly exceed the requisite $75,000 amount in controversy. *Id.* at 194. Indeed, upon remand from the Fourth Circuit, the case remained in federal district court. *Ellenburg v. Tom Johnson Camping Center, Inc.*, No. 8:06-cv-01606-HFF (D.S.C., Anderson Div.) (ECF docket sheet).

Without following the statutory removal and remand procedure and litigants having the opportunity to brief the issues, it is unsurprising the Fourth Circuit reversed the district court and remanded the case. But, in this case, Owens did timely raise the procedural defect in his motion to remand and, rather than a *sua sponte* order, the district court remanded this case "for lack of subject matter jurisdiction," not for any procedural defect, after evaluating Dart's notice of removal and the substantial remand briefing. Pet. App. 28a.

As for the one paragraph of dicta in *Ellenburg* that suggests a naked allegation in a notice of removal may be sufficient, there was no substantial analysis of the issue, and the record below contained no

briefing on the issue. 519 F.3d at 199.[12] Dart then cites to the same legislative history which Owens addresses in the next section. The only other citations are to *Twombly* which Owens addresses at p. 12, n.7, *supra*, and *In re Blackwater Security Consulting, LLC*, 460 F.3d 576, 583 (4th Cir. 2006), for the common proposition that "[t]he party seeking removal bears the burden of demonstrating that removal jurisdiction is proper." Notably, *Blackwater* addressed removal for federal question jurisdiction and not diversity jurisdiction so it does not address the amount in controversy requirement for diversity jurisdiction which is at issue in this case.

The most recent opinion from the United States District Court for the District of South Carolina to address the amount in controversy requirement for diversity jurisdiction on a motion to remand limits *Ellenburg* to "situations where a district court remands a case based on a procedural defect in the notice of removal" and "does not prevent a court from remanding a case based on substantive jurisdictional grounds." *Lever v. Jackson Nat. Life Ins. Co.*, No. 3:12-CV-03108-MBS, 2013 WL 436210, *4 (D.S.C. Feb. 5, 2013) (remanding case because defendant failed to prove, "by any standard" satisfaction of the

[12] Relying on more than two centuries of this Court's precedent, one district court recently and cogently rejected *Ellenburg* reasoning and granted remand where the defendant failed to place jurisdictional facts in the record. *Anthony Marano Co. v. Sherman*, 925 F.Supp.2d 864, 866, n.1 (E.D. Mich. 2013).

amount in controversy.) (unpub.); *accord Wickline v. Dutch Run-Mays Draft, LLC*, 606 F.Supp.2d 633, 636 (S.D.W. Va. 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."). Although a removing defendant has "sufficiently *pled* jurisdiction, [d]efendant is nevertheless required to show by a preponderance of the evidence that [federal] jurisdiction is proper." *Id.* at 636-37 (emphasis in original) (granting remand on record "entirely devoid of any evidence regarding the amount in controversy requirement" at the time of removal). The unique circumstances of *Ellenburg* do not demonstrate a conflict in removal procedure with the Tenth Circuit Rule. Indeed, as this Court has held since at least 1799, the Tenth Circuit Rule facilitates an early and evidence-based determination of the federal court's subject matter jurisdiction.

Nor is the Fifth Circuit different as Dart contends. *Gebbia v. Wal-Mart Stores, Inc.*, 233 F.3d 880, 882 (5th Cir. 2000) ("district court denied the motion to remand . . . because Plaintiff 's petition at the time of removal alleged injuries that exceeded the $75,000 requirement," any reference to post-removal or even contemporaneous removal evidence would have been irrelevant). In *Gebbia*, the Fifth Circuit described the "clear analytical framework for resolving disputes concerning the amount in controversy" where the

initial pleading cannot state an amount for the claimed damages: "the removing defendant must prove by a preponderance of the evidence that the amount in controversy exceeds $75,000. [Citation omitted]. The defendant may prove that amount either by demonstrating that the claims are likely above $75,000 in sum or value, or by setting forth the facts in controversy that support a finding of the requisite amount." *Id.* at 882-83 (citing other Fifth Circuit cases). But, because it was "facially apparent" from the state court petition that the claimed damages exceeded the jurisdictional amount of $75,000, the Fifth Circuit affirmed the district court's denial of plaintiff 's motion to remand filed almost two years after removal. *Id.* at 882-83.

The district court here recited a framework similar to the Fifth Circuit's:

> The amount in controversy is ordinarily determined by the allegations of the complaint, or, where they are not dispositive, by the allegations in the notice of removal. If the jurisdictional amount is not shown by the allegations of the complaint, "[t]he burden is on the party requesting removal to set forth, in the notice of removal itself, the 'underlying facts supporting [the] assertion that the amount in controversy exceeds [$75,000]. In other words, the amount in controversy must be affirmatively established on the face of either the petition or the notice of removal. The Court narrowly

> construes removal statutes and all doubts must be resolved in favor of remand.

Pet. App. 17a-18a. Here, the district court found that it is not "facially apparent" from the state court petition that the amount in controversy exceeds $5 million. Pet. App. 25a, 29a. The district court found Dart, as the removing party, had the burden to put on some evidence at the time of removal showing the amount in controversy exceeded $5 million. This Dart did not do. Pet. App. 26a. The Fifth Circuit is not in conflict with the Tenth Circuit Rule requiring the removing party to demonstrate by a preponderance of evidence that the prerequisites for the federal court's jurisdiction are satisfied.

Nor is the Seventh Circuit at odds with the Tenth Circuit. *Harmon v. OKI Sys*., 115 F.3d 477, 478-79 (7th Cir. 1997) (denying remand which was not made until two years after removal, after two years of discovery in federal court, and on the eve of summary judgment which was granted, and noting that the removal notice "was no model to emulate" and that defendant Crown "did not know the exact amount in controversy when the case started"), *cert. denied*, 522 U.S. 966 (1997). In *Harmon*, unlike here, defendant could not present evidence of the amount in controversy at the time of removal; discovery was necessary, was not objected to, and the same outcome would result under the Tenth Circuit Rule.

The Ninth Circuit may not be at odds with the Tenth Circuit Rule either. Pet. 10-12 (citing *Singer v.*

State Farm Mut. Auto, Inc., 116 F.3d 373, 376-77 (9th Cir. 1997) and *Janis v. Healthnet, Inc.*, 472 F.Appx. 533, 534-35 (9th Cir. 2012) (unpub)). Below, Dart also cited *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 690-91 (9th Cir. 2006), but apparently shies away from *Abrego* now because it supports the Tenth Circuit Rule. *Dart Cherokee Basin Operating Co., LLC v. Owens*, No. 13-603 (10th Cir. July 5, 2013) (ECF Doc. #01019085396). Properly read, *Abrego* allowed post-removal discovery (admissions or stipulations) from the plaintiff who had the jurisdictional evidence, the same as the Tenth Circuit allows. 443 F.3d at 690-91. *Singer* is to the same effect. 116 F.3d at 376. That is not this case. While *Janis* appears contrary to the Tenth Circuit rule, it is a one page unpublished memorandum opinion that has never been cited again by any court, not even in the Ninth Circuit. This is hardly the basis for a one circuit conflict. Also the practice in the Ninth Circuit appears to be like the Tenth Circuit where evidence is filed with the notice of removal. *See*, e.g., *Friend v. Hertz Corp.*, No. 3:07-cv-05222-MMC (N.D. Cal. Oct. 11, 2007) (ECF Doc. #2, Decl. of Krista Memmelaar).

III. The Tenth Circuit Precedent Is Consistent with the Plain Language of the Removal Statutes, the Class Action Fairness Act (Which Is Irrelevant on the Issue), and this Court's Precedent.

Dart erroneously focuses on 28 U.S.C. §1446(a) requiring the notice of removal to contain a "short

and plain statement of the grounds for removal," which Dart reads to mean only allegations, not evidence. Pet. 13-14. But that was never at issue. Instead, below and still, Dart ignores §1446(c)(2)(B) which requires the district court to find by a preponderance of evidence the amount in controversy requirement for subject matter diversity jurisdiction met.[13] The problem was not the allegation under §1446(a), but the total lack of "evidence" submitted with the notice of removal to satisfy §1446(c). The Tenth Circuit precedent simply holds that the removing defendant that has evidence of the amount in controversy must submit that evidence to provide at least some factual basis for the amount in controversy with the notice of removal. Nothing in §1446 suggests to the contrary. And, CAFA comports with that "present the evidence on removal" position because if a defendant in a class action lacks evidence of the amount in controversy initially, it can conduct discovery in the state court action and then remove the action upon receipt of evidence showing the amount in controversy is satisfied – generally an admission from plaintiff in response to interrogatories, requests

[13] Dart admits that the "preponderance of evidence" standard applies in class action removals, arguing instead that the standard should not be applied until some undetermined time later in the federal court litigation. Thus, whether §1446(c)(2)(B) and the Federal Courts Jurisdiction and Venue Clarification Act of 2011 applies to class actions or not, it is undisputed that the "preponderance of evidence" standard applies in this case.

for admission, requests for production, or a settlement demand. 28 U.S.C. §1453(b) (exempting class actions from 1-year limit on removal under §1446(c)(1) that applies to all other civil actions). So, contrary to the Chamber's lamentations, a defendant in a class action need not rush to remove a class action until it has evidence that the prerequisites for federal subject matter jurisdiction are satisfied.

Dart notes that §1446 was amended in 2011 (effective January 6, 2012) by the Federal Courts Jurisdiction and Venue Clarification Act ("JVCA"). Pet. 14-15. However, Dart fails to mention that the JVCA only applies to §1332(a) removals, not to §1332(d) class action removals even though the dissent to the order denying Dart's petition for rehearing en banc stated as much. Pet. App. 11a ("Interestingly, the JVCA, perhaps through inadvertence, explicitly applies to standard diversity removals but apparently does not apply to removals under CAFA.").

The opposite is true in non-class action removals based on diversity jurisdiction under §1332(a), which is the type of removal addressed by the JVCA. In non-class action removals, plaintiff often has evidence of the amount in controversy. *See*, e.g., *Ellenburg*, 519 F.3d 192 (purchase price of motorhome). The House Judiciary Committee Report on the JVCA reflects this dichotomy of placing the burden of producing evidence at the earliest opportunity on the party most likely to have that evidence. H.R. Rep. No. 112-10, at 16 (2011), *reprinted in* 2011 U.S.C.C.A.N. 576, 580 ("judicial resources may be wasted and the

proceedings delayed when little or no objective information accompanies the notice of removal."). So a defendant possessing evidence of the amount in controversy should present it on removal and a defendant without such evidence can conduct jurisdictional discovery to get the evidence from plaintiff and then remove a class action. Pet. 14.[14] Nothing in the House Judiciary Committee Report suggests that defendants can withhold evidence on the amount in controversy at the time of removal and put that evidence in the record months after removing the case and months after plaintiff has filed the motion to remand. Thus, the House Judiciary Committee Report provides no aid to Dart's argument.

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[14] *Lowery* holds that conducting jurisdictional discovery in federal court before the amount in controversy is proven is improper. *See* 483 F.3d at 1216 (also denying jurisdictional discovery to defendant in an effort to prove the amount in controversy). Nothing in the text of the JVCA suggests *Lowery* is wrong even though it is inconsistent with the House Report. That is why determining 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 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. 546, 568 (2005)); *see also Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 149-50, n.4 (2002). Accordingly, Dart's and the Chamber's reliance on legislative history does not advance its desire to reverse centuries of federal law that jurisdictional facts must be supported in the court record at the time of removal. *See* 19, n.13, *supra*.

Both before and after the JVCA, in the removal of individual cases based on standard diversity jurisdiction under §1332(a) (cases to which the JVCA actually does apply), district courts in the Tenth Circuit have held pursuant to longstanding Tenth Circuit precedent that conclusory allegations about the amount in controversy are not enough to establish federal court subject matter jurisdiction. *See Coca-Cola Bottling of Emporia, Inc. v. South Beach Beverage Co., Inc.*, 198 F.Supp.2d 1280, 1282-84 (D. Kan. 2002); and *Butler v. Target Corp.*, No. 12-4092-SAC, 2012 WL 5362974, *3 (D. Kan. Oct. 31, 2012) (recognizing the JVCA "largely codified the holding of *McPhail*"). Dart's naked allegations do not satisfy its burden to prove satisfaction of the amount in controversy to establish federal subject matter jurisdiction under §1332(d). It must present evidence to enable the district court to find "by a preponderance of the evidence" that the amount in controversy is satisfied.

CAFA says nothing about the "preponderance of evidence" standard in 28 U.S.C. §1446(c)(2)(B). But §1453(b) says §1446 applies to the removal of class actions except for the 1-year limitation under §1446(c)(1). All other provisions of §1446, including the preponderance of the evidence standard in §1446(c)(2)(B), apply to class actions by operation of §1453(b). CAFA does not eliminate the "preponderance of the evidence" standard for removal as Dart suggests. Pet. 16 (citing only the Statement of Rep. Jim Sensenbrenner in 151 Cong. Rec. H723, H727 (daily ed.) February 17, 2005). Dart tacitly

acknowledges that "pre-CAFA precedent" is still good law by repeatedly citing to it. App. to Resp. 5a-6a. Nothing suggests that the removal procedure is or should be any different after CAFA's enactment in 2005.

This Court did not hold or suggest in *McNutt* or in *Hertz* that a removing defendant can withhold evidence and establish jurisdiction with only naked allegations. Dart relies on *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936), which found that a plaintiff could allege jurisdictional facts in his complaint, but if defendant contested those facts with evidence, a preponderance of evidence determination would have to be made. *McNutt* was not a removal case, however. And, courts have repeatedly rejected Dart's attempt to analogize removal to pleading allegations in a complaint. Dart's argument overlooks the obvious differences between an initial pleading to establish jurisdiction and a notice of removal to replace state court general jurisdiction with federal court limited jurisdiction.

> 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). Second, as previously stated, the removing party bears the burden of proof to show jurisdictional facts at the time of removal before stripping plaintiff of his chosen state court forum. *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 but that "[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").

Dart's citation to dicta taken out of context from *Hertz Corp. v. Friend*, 559 U.S. at 96-97, illustrates Dart's desperation to equate the "plaintiff allegation" language in *McNutt* with a "removing defendant allegation." Pet. 15. But *Hertz* does not say that. In fact, *Hertz* filed the referenced declaration to provide evidence of the jurisdictional facts asserted in its notice of removal. *Friend v. Hertz Corp.*, No. 3:07-cv-05222-MMC (N.D. Cal.) (ECF Doc. #2, Declaration of Krista Memmelaar). So factually, Hertz submitted evidence to sustain its burden of proof on jurisdiction at the earliest opportunity and plaintiff did not challenge that declaration. *Hertz*, 559 U.S. at 97.

Legally, the authority cited in *Hertz* also supports Owens' position that the removing party must

present evidence of facts necessary for the federal district court to find subject matter jurisdiction with its notice of removal. *Hertz* generally cites to *McNutt* and to 15 Moore's §102.14, at 102-32 to 102-32.1 (citing in n.5, *United Food Local 919 v. Centermark Props*., 30 F.3d 298, 301 (2d Cir. 1994); *Janzen v. Goos*, 302 F.2d 421, 424 (8th Cir. 1962) and *Trimble v. Asarco, Inc*., 232 F.3d 946, 959 (8th Cir. 2000)). *United Food* was a removal case, which stated:

> Applying these principles, we must determine from the record before us whether the defendants can establish a basis for either diversity or federal question jurisdiction. *See* 14A Wright & Miller § 3723, at 311-12 (***usual rule is that removability is determined from the record as of the time the petition for removal is filed*** but where basis of removal is diversity then diversity of citizenship must exist at time action was filed in state court as well as at time of removal).

United Food, 30 F.3d at 301 (emphasis added). *Janzen* and *Trimble* were not removal cases. In short, *Hertz* and *McNutt* do not address the issue here.

Finally, while Dart properly notes that this Court unanimously rejected the "form over substance" stipulation of less than $5 million by plaintiff in *Standard Fire*, Dart then proffers their own "form over substance" argument – that a removing defendant who bears the burden to establish federal jurisdiction can withhold evidence of jurisdictional facts in

its possession and simply allege satisfaction unless plaintiff, the party who does not bear the burden of proof and who may lose the chosen state court forum for his dispute, challenges that naked allegation. In the class action context and at the pleading stage, plaintiff has no evidence of the amount in controversy with which to challenge a naked allegation in a notice of removal which is why the statutory removal procedure in §§1446 and 1453 and the long-standing Tenth Circuit law require the removing defendant to provide evidence of jurisdictional facts in the notice of removal and at the time of removal. This Court should reject Dart's form (allegation only) over substance (evidence) argument and hold true to centuries of its precedent that the party asserting federal jurisdiction bears the burden to prove it. *See* p. 19, n.13, *supra*. When the removing defendant has the substance (evidence of jurisdictional facts) to provide to the Court at the time of the removal, simplicity and common sense direct defendant to do so, in order that plaintiff can evaluate that evidence and challenge it if there is a basis to do so by seeking remand.

CONCLUSION

The Tenth Circuit Rule requires no change. It works as it is supposed to. The party with the evidence must present it at the first opportunity – a removing defendant with the notice of removal or a remanding plaintiff with the motion to remand. The only exception for both is if they do not have the

evidence. Then they must move for discovery to get the evidence needed. The rule is simple and easy to apply. Plaintiff chooses the forum for his lawsuit unless the defendant produces evidence showing federal jurisdiction which then overrides plaintiff's choice. The applicable burden of proof varies among circuits, but the burden of proof is not before the Court here because Dart submitted no evidence timely. An allegation or an assertion, without evidence, of federal jurisdiction does not suffice to carry the removing party's burden to establish federal jurisdiction at the time of removal. That has been the law for centuries and should remain as the law. Dart's petition for *writ of certiorari* should be denied.

Respectfully submitted,

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