No. 13-____

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**

## PETITION FOR WRIT OF CERTIORARI


MATTHEW J. SALZMAN
MOLLY E. WALSH
STINSON MORRISON HECKER LLP
1201 Walnut Street
Kansas City, MO 64106
(816) 691-2495
msalzman@stinson.com

DAVID E. BENGTSON
JORDAN E. KIEFFER
STINSON MORRISON HECKER LLP
1625 N. Waterfront Parkway
Suite 300
Wichita, KS 67206
(316) 268-7943
dbengtson@stinson.com

NOWELL D. BERRETH
*Counsel of Record*
BRIAN D. BOONE
ALSTON & BIRD LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424
(404) 881-4481
nowell.berreth@alston.com

*Counsel for Petitioners*



WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

## QUESTION PRESENTED

A defendant seeking removal of a case to federal court must file a notice of removal containing "a short and plain statement of the grounds for removal" and attach only the state court filings served on such defendant. 28 U.S.C. § 1446(a). Consistent with that statutory pleading requirement, the First, Fourth, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits require only that a notice of removal contain allegations of the jurisdictional facts supporting removal; those courts do not require the defendant to attach evidence supporting federal jurisdiction to the notice of removal. District courts in those Circuits may consider evidence supporting removal even if it comes later in response to a motion to remand.

Here, in a clean break from Section 1446(a)'s language and its sister Circuits' decisions, the Tenth Circuit let stand an order remanding a class action to state court based upon the district court's refusal to consider evidence establishing federal jurisdiction under the Class Action Fairness Act (CAFA) because that evidence was not attached to the notice of removal. (That evidence, which was not disputed, came later in response to the motion to remand.)

The question presented is:

> Whether a defendant seeking removal to federal court is required to include evidence supporting federal jurisdiction in the notice of removal, or is alleging the required "short and plain statement of the grounds for removal" enough?

## CORPORATE DISCLOSURE STATEMENT

Petitioner-Defendant Dart Cherokee Basin Operating Company, LLC is a limited liability company whose sole member is Dart Oil and Gas Corporation, which is a wholly-owned subsidiary of Dart Energy Corporation, both of which are Michigan corporations. None of these entities is publicly traded.

Petitioner-Defendant Cherokee Basin Pipeline, LLC is a limited liability company whose members are Dart Oil and Gas Corporation, a wholly-owned subsidiary of Dart Energy Corporation, and Gas Authority Supplies, LLC. Gas Authority Supplies, LLC's sole member is the Municipal Gas Authority of Georgia, a body corporate and public, a public corporation and an instrumentality of the State of Georgia created pursuant to an Act of the Georgia General Assembly. None of these entities is publicly traded.

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## PETITION FOR WRIT OF CERTIORARI

Petitioners Dart Cherokee Basin Operating Company, LLC and Cherokee Basin Pipeline, LLC petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit in *Dart Cherokee Basin Operating Company, LLC, and Cherokee Basin Pipeline Company, LLC v. Brandon W. Owens*, No. 13-603.

## OPINIONS BELOW

The Tenth Circuit's order denying rehearing *en banc* is at 730 F.3d 1234; *see also* App. 1. The Tenth Circuit's order denying permission to appeal is at App. 13. The district court's remand order is at 2013 WL 2237740; *see also* App. 15.

## JURISDICTION

The Tenth Circuit denied rehearing *en banc* on September 17, 2013, so this Court has jurisdiction under 28 U.S.C. § 1254(1). *See Hohn v. United States*, 524 U.S. 236, 242 (1998) (Supreme Court may grant certiorari after Court of Appeals denies permission to appeal); *see, e.g., Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013).

## RELEVANT STATUTORY PROVISIONS

The statute establishing the process for removing a case to federal court (28 U.S.C. § 1446) provides as follows:

> (a) Generally—A defendant or defendants desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice

of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

* * *

(c) Requirements; Removal Based on Diversity of Citizenship.—

* * *

(2) 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).

The Class Action Fairness Act of 2005 (28 U.S.C. § 1332(d)) provides as follows:

> (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, and is a class action in which—
>
> (A) any member of a class of plaintiffs is a citizen of a State different from any defendant;
>
> * * *
>
> (5) Paragraphs (2) through (4) shall not apply to any class action in which—
>
> * * *
>
> (B) the number of members of all proposal plaintiff classes in the aggregate is less than 100.
>
> * * *

The Class Action Fairness Act (28 U.S.C. § 1453) also provides as follows:

> (b) 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.

## STATEMENT OF THE CASE

This petition presents an issue affecting the rights of every defendant seeking access to the federal courts. Contrary to the opinions from at least *seven* other Circuits, the Tenth Circuit imposes a requirement that a defendant initiating removal must not only

come forward with *allegations* of the requisite jurisdictional facts, but also present *evidence* of such facts in the notice of removal. Here, this judicially-created requirement has resulted in denying a class action defendant access to the federal court even though it is undisputed that the case satisfies each of the substantive requirements for federal court jurisdiction established by Congress under the Class Action Fairness Action of 2005 ("CAFA").

Almost a quarter-century ago, Congress eliminated the requirement that a removing defendant initiate removal by filing a verified petition, thereby eliminating any evidentiary requirement. *See* H.R. Rep. No. 100-889, at 71-72 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6032 ("The proposed amendment [to 28 U.S.C. § 1446(a)] requires that the grounds for removal be stated in terms borrowed from the jurisdictional pleading requirement establish[ed] by civil rule 8(a)."). Instead, Congress required a defendant to initiate removal by filing "a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal," thereby mirroring the requirements placed on plaintiffs filing complaints in federal court under Rule 8. *See* 28 U.S.C. § 1446(a).

More recently, to address perceived abuses in state court class action litigation, Congress enacted the Class Action Fairness Act, which "enable[s] defendants to remove to federal court any sizable class action involving minimal diversity of citizenship." *Smith v. Bayer Corp*., 131 S.Ct. 2368, 2382 (2011). CAFA "is intended to expand substantially Federal court jurisdiction over class actions. Its provisions should be read broadly, with a strong preference that interstate class actions should be heard in a Federal court if

properly removed by any defendant." S. Rep. 108-14 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 2005 WL 627977.

Here, Respondent Brandon Owens filed a class action against Petitioners Dart Cherokee and Cherokee Basin in the district court in Wilson County, Kansas, seeking royalty payments under certain Kansas oil and gas leases. Owens did not specify a damages amount in his complaint. App. 15-16.

Under CAFA, a class action is removable to federal court if there is minimal diversity, at least 100 putative class members, and at least $5 million in controversy. *See* 28 U.S.C. § 1332(d); *see also Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1348, 1350 (2013) (Congress enacted CAFA to ensure "Federal court consideration of interstate cases of national importance") (internal quotation marks omitted). Owens's complaint satisfies all of CAFA's jurisdictional requirements, so Petitioners removed the case to federal court.

Petitioners filed a Notice of Removal containing the required "short and plain statement of the grounds for removal" (28 U.S.C. § 1446(a)): They alleged in the Notice that the putative class includes approximately 400 people; that the putative class members own royalty rights in approximately 700 oil and gas wells; that the class action involves a dispute about those wells' production from January 1, 2002 until now; that Owens seeks three types of royalty damages; and that, based on the nature of the claims asserted, the size of the putative class, and length of the proposed class period, Petitioners' calculation of the amount in controversy exceeds $8.2 million. App. 2, 4-5.

Owens moved to remand the case to state court. He did not dispute the jurisdictional facts alleged in the Notice of Removal but argued that the Notice was "deficient as a matter of law" because it contained no admissible *evidence* supporting Petitioners' jurisdictional allegations. App. 21.

In response to the remand motion, Petitioners offered a declaration from one of Dart's corporate officers. That declaration contained evidence supporting the jurisdictional facts alleged in the Notice of Removal—including updated damages calculations "based on limited informal discovery" and some evidence supporting federal jurisdiction that Petitioners discovered *after* removal (including Owens's own statement in a mediation brief that the amount in controversy was over $20 million including interest). App. 20-21.

Owens again did not dispute Petitioners' evidence but instead argued in his reply brief that the Notice of Removal could "not be cured" by attaching evidence in response to a motion to remand. App. 21.

The district court granted Owens's motion and remanded the case to state court. Believing that Petitioners were required to *prove* in their Notice of Removal that CAFA's jurisdictional requirements were met, the court concluded 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." App. 26. As important, the court refused to consider the evidence in Henderson's declaration—evidence that conclusively established federal jurisdiction under CAFA—simply because Petitioners had not

attached that evidence to their Notice of Removal. *Id.*[1] The district court felt constrained to ignore the declaration because, in its view, the "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.*

Petitioners sought review from the Tenth Circuit pursuant to 28 U.S.C. § 1453(c), but a divided Tenth Circuit panel denied their petition. App. 13. Petitioners then sought rehearing *en banc*, but the Tenth Circuit denied that petition in a split 4-to-4 vote. App. 1.

Judge Hartz (joined by Judges Kelly, Tymkovich, and Phillips) dissented from the denial of rehearing *en banc*. Judge Hartz began the dissent with this:

> This court owes a duty to the bench and bar to provide guidance regarding the procedural requirements of the Class Action Fairness Act of 2005 (CAFA). Yet it has let stand a district-court decision that will in effect impose in this circuit requirements for notices of removal that are even more onerous than the code pleading requirements that I had thought the federal courts abandoned long ago.

App. 2; *see also id*. at 3 ("It imposes an evidentiary burden on the notice of removal that is foreign to federal-court practice and, to my knowledge, has never been imposed by a federal appellate court").

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[1] The district court acknowledged only one possible exception to this rule—when a defendant "ha[s] no information from which to establish the amount of damages" and "request[s] leave to conduct discovery on the amount in controversy." App. 26-27.

Emphasizing that Section 1446(a) "parrots Rule 8," Judge Hartz stated that "there should be no dispute that Petitioners' notice of removal was adequate." App. 4. He pointed to this Court's recent decision in *Hertz Corp. v. Friend*, 559 U.S. 77 (2010), where the Court *assumed* that it was enough for a party seeking removal to federal court simply to *allege* the jurisdictional facts in their notice of removal. *Id.* at 96-97 ("When challenged on *allegations of jurisdictional facts*, the parties must support their allegations by competent proof.") (emphasis added).

Judge Hartz concluded with this:

> In short, I think it is important that this court inform the district courts and the bar of this circuit that a defendant seeking removal under CAFA need only allege the jurisdictional amount in its notice of removal and must prove that amount only if the plaintiff challenges the allegation.

App. 11.

## REASONS FOR GRANTING THE WRIT

A well-developed circuit split pits the Tenth Circuit alone against *seven* other Circuits. Those other Circuits have concluded that the notice of removal must satisfy only a notice-pleading standard or that district courts are allowed or required to consider post-notice of removal evidence when determining whether removal was proper. There is no statutory basis for the Tenth Circuit's double standard for plaintiffs and defendants seeking access to the federal courts by requiring defendants to satisfy both a notice pleading standard *and* an evidentiary burden in their initial federal court filing. The plain language of 28 U.S.C.

§ 1446(a) adopts the notice-pleading language from Rule 8 of the Federal Rules of Civil Procedure. Moreover, the Tenth Circuit approach thwarts the very purpose of CAFA by denying federal jurisdiction to cases such as this that are precisely the type of cases Congress intended to allow into the federal courts.

Petitioners' unrefuted evidence submitted in response to the motion to remand established that this case satisfies each of the CAFA jurisdictional requirements; the Notice of Removal contained sufficient allegations, but no admissible evidence. The appellate record in this case gives this Court the opportunity to provide the needed guidance to the bench and bar as to "when" a defendant seeking removal must satisfy its evidentiary burden.[2]

This case presents an important question of federal removal procedure and federal jurisdiction that affects all litigants and district courts involved in a removal proceeding. More than 30,000 cases are removed to federal court each year. *See* Judicial Business 2012, uscourts.gov/statistics/judicialbusiness/2012/statistical-tables-us-district-courts-civil.aspx (Table C-8, 2008-12). This Court should weigh in, clarify the pleading requirement, and resolve this split in the Circuits.

## I. THE TENTH CIRCUIT STANDS ALONE IN REQUIRING A DEFENDANT TO ATTACH EVIDENCE TO THE NOTICE OF REMOVAL.

All seven other Circuits that have considered the modern requirements of a notice of removal directly conflict with the Tenth Circuit, and two Circuits have

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[2] Petitioners submit that this case also is a candidate for summary disposition. *See* S. Ct. R. 16.

expressly considered and rejected the Tenth Circuit line of precedent. *Sierminski v. Transouth Fin. Corp.*, 216 F.3d 945, 948-49 (11th Cir. 2000); *Harmon v. OKI Sys.*, 115 F.3d 477, 479-80 (7th Cir.), *cert. denied*, 522 U.S. 966 (1997). While the Tenth Circuit now applies its precedent to *deny* federal jurisdiction under CAFA to class action defendants who satisfy their evidentiary burden in response to a motion to remand, other Circuits *grant* such defendants access to the federal courts. *See, e.g., Janis v. Health Net, Inc.*, 472 F.Appx. 533, 534-35 (9th Cir. 2012); *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 772-774 (11th Cir. 2010).

At least five Circuits have concluded that Section 1446(a) does *not* require the submission of any evidence with the notice of removal, but rather establishes a pleading requirement—one that is indistinguishable from notice pleading under Rule 8. *See Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 199-200 (4th Cir. 2008) (explaining that Section 1446(a)'s language is "deliberately parallel to the requirements for notice pleading found in Rule 8(a)" and holding that the district court erred in "requir[ing] a removing party's notice of removal to meet a higher pleading standard than the one imposed on a plaintiff in drafting an initial complaint"); *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 986 (7th Cir. 2008) (explaining that Section 1446(a) establishes a "pleading requirement, not a demand for proof"); *Hartis v. Chicago Title Ins. Co.*, 694 F.3d 935, 944-45 (8th Cir. 2012) (same); *Janis*, 472 F.Appx. at 534-35 (9th Cir.) (holding that "[n]othing in 28 U.S.C. § 1446 requires a removing defendant to attach evidence of the federal court's jurisdiction to its notice of removal. Section 1446(a) requires merely a 'short and plain statement of the grounds for removal.'"); *Lowery v. Al. Power Co.*, 483

F.3d 1184, 1217 n.73 (11th Cir. 2007) ("Section 1446(a)'s requirement of a 'short and plain statement of the grounds for removal' is consonant with the pleading requirements of Rule 8(a).").[3]

Moreover, contrary to the Tenth Circuit, six other Circuits allow or require district courts to consider evidence submitted in response to a motion to remand to determine whether removal was proper. *See Amoche v. Guarantee Trust Life Ins. Co.*, 556 F.3d 41, 46, 51-53 (1st Cir. 2009) (holding that "the entire record . . . must be evaluated" to determine whether the jurisdictional minimum amount in controversy under CAFA was satisfied); *Bartnikowski v. NVR, Inc.*,307 F.Appx. 730, 732-33, 735-37, 739 (4th Cir. 2009) (considering the declaration defendant proffered in response to a motion to remand in deciding whether defendant had established the $5 million jurisdictional minimum amount in controversy under CAFA by a preponderance of the evidence); *Gebbia v. Wal-Mart Stores, Inc.*, 233 F.3d 880, 883 (5th Cir. 2000) (concluding "post-removal affidavits may be considered in determining the amount in controversy at the time of removal" when "the basis for jurisdiction is ambiguous"); *Harmon*, 115 F.3d at 479-80 (7th Cir.) (asking "should a court really be barred from considering reliable evidence . . . merely because the evidence was not in the record on the date of removal? [And holding:] The test should simply be whether the evidence sheds light on the situation which existed when the case was removed."); *Janis*, 472 F.Appx. at 534-35 (9th Cir.) (granting federal jurisdiction under CAFA, in part, because the fact that "the evidence was

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[3] *See also Rachel v. Georgia*, 342 F.2d 336, 340 (5th Cir. 1965) (finding that "the rules of notice pleading apply with as much vigor to petitions for removal as they do to other pleadings").

from [the defendant]," and therefore available, but not submitted, at the time of removal, was *not* a "valid reason for ignoring [the] evidence"); *Pretka*, 608 F.3d at 772-774 (11th Cir.) (granting federal jurisdiction under CAFA, in part, because "the jurisdictional evidence that [the defendant] attached to its opposition to remand should not have been excluded merely because it was submitted in response to the plaintiff's motion to remand").[4]

Petitioners' removal petition would have turned out differently in the First, Fourth, Fifth, Seventh, Eighth, Ninth and Eleventh Circuits. Petitioners' Notice of Removal included detailed allegations of the jurisdictional facts supporting removal under CAFA. Those allegations satisfied Rule 8's pleading requirements. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face'") (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). And if that were not enough, the unchallenged declaration Petitioners offered in response to the motion to remand conclusively established the requirements for jurisdiction under CAFA. *See also* App. 2-3.

But in the Tenth Circuit, this class action now sits in state court for the simple fact that Petitioners did not attach evidence of the amount in controversy to the Notice of Removal. The upshot is that a defendant in the Tenth Circuit faces a much heavier initial burden than a similarly situated defendant in almost any

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[4] *See also Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 374, 376-77 (9th Cir. 1997); *Sierminski*, 216 F.3d at 947, 948-49 (11th Cir.) (holding that "there is no good reason to keep a district court from eliciting or reviewing evidence outside of the removal petition").

other Circuit. This Court should resolve this long-standing, well-developed, one-sided circuit split.[5]

## II. THE TENTH CIRCUIT PRECEDENT IS CONTRARY TO THE PLAIN LANGUAGE OF THE REMOVAL STATUTES, THE CLASS ACTION FAIRNESS ACT, AND THIS COURT'S PRECEDENT.

"Nothing in 28 U.S.C. § 1446 requires a removing defendant to attach evidence of the federal court's jurisdiction to its notice of removal." *Janis*, 472 F.Appx. at 534. Congress eliminated any evidentiary requirement in 1988. Specifically, Congress repealed the requirement that defendants file a verified petition for removal and, instead, required only that a defendant file "a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal" thereby mirroring the requirements placed on plaintiffs filing complaints in federal court under Rule 8 of the Federal Rules of Civil Procedure. *See* H.R. Rep. No. 100-889, at 71-72 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5982-6032 ("The proposed amendment requires that the grounds for removal be stated in terms borrowed from the jurisdictional pleading requirement establish[ed] by civil rule 8(a).").

The plain language of Section 1446(a) establishes a notice-pleading standard for defendants' notices of

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[5] Because this case involves federal jurisdiction and will establish federal removal procedure, and because of the extremely one-sided nature of this circuit split, *certiorari* is appropriate under the Court's supervisory power. *See* Rule 10(a); *see also* Eugene Gressman, *et al.*, SUPREME COURT PRACTICE, at 273-74, 257 (9th ed. 2007).

removal. *See Hartis*, 694 F.3d at 944-45 (8th Cir.); *Spivey*, 528 F.3d at 986 (7th Cir.); *Ellenburg*, 519 F.3d at 194, 199-200 (4th Cir.). Instead of requiring the submission of evidence with the notice of removal, the statute requires defendants to submit only "a copy of all process, pleadings, and orders served upon such defendant" in the state court proceeding. 28 U.S.C. § 1446(a). Thus, the Tenth Circuit's double standard for access to the federal courts, which requires defendants to meet a standard "even more onerous than the code pleading requirements that . . . federal courts abandoned long ago," is directly contrary to the Congressional intent behind and the plain language of Section 1446(a). App. 2.

In 2011, Congress passed the Federal Courts Jurisdiction and Venue Clarification Act ("JVCA"), which amended 28 U.S.C. § 1446(c)(2) addressing removal in situations in which a plaintiff's complaint fails to specify an amount in controversy. In terms of a notice of removal, Subsection A requires only that the notice "may assert the amount in controversy," *not* that it must prove or provide evidence of the amount in controversy. The House Judiciary Committee report explains that "*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*." H.R. Rep. No. 112-10, at 16 (2011), *reprinted in* 2011 U.S.C.C.A.N. 576, 580 (emphasis added).

Subsection (B) of Section 1446(c)(2) then sets forth the preponderance of evidence standard to be applied by the district courts *after* a plaintiff has challenged a defendant's jurisdictional allegation to determine the

ultimate question of whether "removal of the action is proper on the basis of an amount in controversy asserted under subparagraph (A)." Thus, contrary to the Tenth Circuit precedent, this provision requires *neither* (a) that a removing defendant submit any evidence in its notice of removal, *nor* (b) that district courts must disregard post-notice of removal evidence proffered by defendants in response to a motion to remand.

The Tenth Circuit's requirement that defendants proffer their proof with their notice of removal, *before* their jurisdictional allegations could be challenged, also runs afoul of this Court's long-standing precedent. *See McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936). In *McNutt*, this Court held that, *if* "*allegations of jurisdictional facts are challenged* by his adversary in any appropriate manner, [the party seeking access to the federal courts] must support them by competent proof . . . [and] justify his allegations by a preponderance of evidence." *Id.* at 189 (emphasis added). This Court recently applied its holding in *McNutt* to removals under CAFA, and unanimously held that: "The burden of persuasion for establishing diversity jurisdiction, of course, remains on the party asserting it. *When challenged on allegations of jurisdictional facts*, the parties must support their allegations by competent proof." *Hertz Corp. v. Friend*, 559 U.S. 77, 96-97 (2010) (citing *McNutt*; emphasis added). *See* App. 6-7.

Congress passed the "Class Action *Fairness* Act" (emphasis added) to address several abuses occurring in state court that had "harmed class members with legitimate claims and defendants that ha[d] acted reasonably." Pub. L. No. 109-2, § 2(a), 119 Stat. 4, 4 (2005). CAFA was "intended to expand substantially

Federal court jurisdiction over class actions. Its provisions should be read broadly, with a strong preference that interstate class actions should be heard in a Federal court if properly removed by any defendant." S. Rep. 108-14 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 2005 WL 627977; *see also Smith v. Bayer Corp.* 131 S.Ct. 2368, 2382 (2011) (Congress enacted CAFA to "enable[] defendants to remove to federal court any sizable class action involving minimal diversity.").[6]

Under CAFA, class action litigants are entitled to have their cases decided in federal court when (1) "any member of a class of plaintiffs is a citizen of a State different from any defendant," (2) "the number of members of all proposed plaintiff classes in the aggregate is [at least] 100," and (3) "the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs." 28 U.S.C. § 1332(d)(2) and (5); *see Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1348 (2013); *see also* 151 Cong. Rec. H723, H727 (daily ed. Feb. 17, 2005) (statement of Rep, Jim Sensenbrenner) ("And if a Federal court is uncertain about whether the $5 million threshold is satisfied, the court should err in favor of exercising jurisdiction over the case.").

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[6] *See also Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1164 (11th Cir. 2006) ("The language and structure of CAFA itself indicates that Congress contemplated broad federal court jurisdiction."); *Amoche*, 556 F.3d at 47-48 (in addition to "extending federal subject matter jurisdiction to include most major interstate class actions, CAFA also made a federal forum more accessible to removing defendants by imposing only a minimal diversity requirement, eliminating the statutory one-year time limit to removal, and providing for interlocutory appeal of a federal district court's remand order").

Earlier this year, this Court recognized the broadening of federal court jurisdiction for class actions as the "primary objective" of CAFA, and this Court unanimously rejected the "form over substance" application of the removal requirements that would result in remand of a case that otherwise could satisfy the $5 million amount in controversy jurisdictional requirement. *Standard Fire*, 133 S. Ct. at 1350 (named plaintiff's stipulation in the complaint to only seek damages below $5 million was not binding on the putative class and could not defeat removal).[7]

Here, there is no dispute that this case satisfies each of the substantive jurisdictional requirements under CAFA, including the $5 million amount in controversy threshold, and, therefore, is precisely the type of case Congress intended to qualify for federal jurisdiction. Plaintiff does *not* deny that any of these requirements are, in fact, satisfied by this case. Instead, Plaintiff sought remand solely on the basis of a purported procedural defect claim that Defendants submitted their evidence in response to the motion to remand

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[7] This rejection of a form over substance approach to removal jurisdiction has long-since been a part of the Supreme Court removal jurisprudence and has manifested itself in several ways, including expressly considering affidavits submitted after a notice of removal. *See Willingham v. Morgan*, 395 U.S. 402, 408 n.3 (1969) ("for purposes of this review it is proper to treat the removal petition as if it had been amended to include the relevant information contained in the later-filed affidavits" submitted in support of a summary judgment motion). Certain Courts of Appeals have followed the Supreme Court's lead to consider later filed evidence as an amendment to the notice of removal, thereby avoiding directly addressing the issue now raised, but nonetheless resulting in decisions directly contrary to the Tenth Circuit's preclusion of such evidence. *See, e.g., USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 205 (3rd Cir. 2003).

rather than attaching it to their notice of removal—*i.e.*, a form over substance argument of the same ilk previously rejected by this Court.

As this Court explained long ago in upholding the fraudulent joinder doctrine, "the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction." *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907). The Tenth Circuit's imposition of a judicially-created barrier that has the practical effect of keeping cases out of federal court that are precisely the types of cases Congress intended to have access to the federal courts is contrary to the removal statutes, the enactment of the Class Action Fairness Act, and this Court's own precedent.

## CONCLUSION

This Court should grant the petition for writ of *certiorari,* resolve the circuit split, and provide the district courts and removal litigants the clear guidance they need on the proper standard.

Respectfully submitted,

MATTHEW J. SALZMAN
MOLLY E. WALSH
STINSON MORRISON HECKER LLP
1201 Walnut Street
Kansas City, MO 64106
(816) 691-2495
msalzman@stinson.com

DAVID E. BENGTSON
JORDAN E. KIEFFER
STINSON MORRISON HECKER LLP
1625 N. Waterfront Parkway
Suite 300
Wichita, KS 67206
(316) 268-7943
dbengtson@stinson.com

NOWELL D. BERRETH
*Counsel of Record*
BRIAN D. BOONE
ALSTON & BIRD LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424
(404) 881-4481
nowell.berreth@alston.com

*Counsel for Petitioners*

# APPENDIX

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed 9/17/13]

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No. 13-603
(D. Ct. No. 5:12-CV-04157-JAR-JPO)

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

*Petitioners,*

v.

BRANDON W. OWENS, individually
and on behalf of all others
similarly situated,

*Respondent*.

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Filed September 17, 2013

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ORDER

Before KELLY, LUCERO, HARTZ, TYMKOVICH, HOLMES, MATHESON, BACHARACH and PHILLIPS, Circuit Judges.*

This matter is before the court on the petitioners' *Petition for Rehearing En Banc*. We also have a response. Both pleadings were circulated to all the judges of the court who are in regular active service and who are not recused in this proceeding.

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* The Honorable Mary Beck Briscoe and the Honorable Neil M. Gorsuch are recused in this matter and did not participate in the court's en banc review.

Upon consideration, a poll was requested and the votes were evenly divided. Consequently, the poll did not carry and the en banc petition is denied. *See* Fed. R. App. P. 35(a)(noting a majority may direct en banc review).

Judges Kelly, Hartz, Tymkovich and Phillips would grant the petition, with Judge Hartz writing the attached formal dissent, in which Judges Kelly, Tymkovich and Phillips join.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER
Clerk of Court

* * * *

HARTZ, Circuit Judge, joined by KELLY, TYMKOVICH, PHILLIPS, Circuit Judges, dissenting:

This court owes a duty to the bench and bar to provide guidance regarding the procedural requirements of the Class Action Fairness Act of 2005 (CAFA). Yet it has let stand a district-court decision that will in effect impose in this circuit requirements for notices of removal that are even more onerous than the code pleading requirements that I had thought the federal courts abandoned long ago.

Petitioners removed this case to federal court under CAFA. The notice of removal alleged the amount in controversy to be over $8 million, comfortably above the jurisdictional requirement of $5 million, and explained how Petitioners arrived at that figure. After Owens moved to remand the case to state court, Petitioners submitted undisputed proof that the

amount in controversy exceeded $14 million. Nevertheless, the district court granted Owens's motion. It did so only because the notice of removal itself had failed to provide evidentiary support, "such as an economic analysis . . . or settlement estimates" for the $8 million figure. Mem. & Order at 10, *Owens v. Dart Cherokee Basin Operating Co., LLC*, No. 12-4157-JAR (D. Kan. May 21, 2013).

Petitioners requested permission to appeal to this court under 28 U.S.C. § 1453(c), but a divided panel denied permission. Petitioners then sought en banc review of the panel's decision. I respectfully dissent from this court's denial of that request by an equally divided vote.

The district court's decision, although not an unreasonable interpretation of language in some of this court's opinions, is contrary to fundamental principles regarding the purpose and function of pleadings in federal court and to Congress's apparent understanding when it recently codified the procedure by which a removing party can establish the amount in controversy. It imposes an evidentiary burden on the notice of removal that is foreign to federal-court practice and, to my knowledge, has never been imposed by a federal appellate court (Owens does not cite to any such case). Unfortunately, this may be the only opportunity for this court to correct the law in our circuit. After today's decision 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; if so, the issue will not arise again.

Under the procedural system that has been in effect for almost 80 years, all a party must do in initiating a case in federal court is to submit a pleading that "contain[s] . . . a short and plain statement of the grounds for the court's jurisdiction," Fed. R. Civ. P. 8(a)(1), and "a short and plain statement of the claim showing that the pleader is entitled to relief," *id*. at 8(a)(2). The party need not produce proof of an allegation in the pleading until the allegation is challenged by the opposing party or, perhaps, the court. Then the party must establish the alleged fact under the applicable burden of persuasion, ordinarily the preponderance of the evidence.

Until now, there has been no reason to believe that a different rule governs the jurisdictional allegations in a notice of removal. The applicable statute parrots Rule 8, requiring only that the notice "contain[] a short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a). Although the removing party must establish controverted jurisdictional allegations by a preponderance of the evidence, nothing in the removal statutes or Supreme Court decisions, or any holdings of this court, require submission of such evidence before the jurisdictional allegations are challenged.

Under this standard there should be no dispute that Petitioner's notice of removal was adequate, even if we apply *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), in this context to require that the notice raise a plausible claim that the amount in dispute is at least $5 million. The pertinent paragraphs state:

> 9. [Owens's] Petition does not state a specific amount as damages. It does, however, pray for payment of royalties and interest claimed to be due to royalty owners who were paid royalties with regard to gas produced from wells located in

> Kansas in which DCBO [one of the Petitioners] has owned any working interest, for the period from January 1, 2002 to the present.
>
> 10. This matter involves approximately 700 wells that [DCBO] currently operates in Kansas. The purported class consists of royalty owners that own an interest in the wells in which [DCBO] has a working interest in Kansas. There are approximately 400 royalty owners with interests in the 700 wells at issue.
>
> 12. [Owens] claims that [DCBO] owes additional royalties because, among other things, [DCBO] (a) pays royalties based upon a below market price; (b) improperly deducts charges from the sales price for costs associated with gathering, compression, dehydration, and/or treatment for computing royalties; and (c) improperly shifts a portion of the conservation fee to royalty owners.
>
> 13. [Owens] seeks to recover on behalf of a class of any royalty owner in any well located in Kansas in which [DCBO] has owned any working interest from January 1, 2002 to the present.
>
> 14. [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 [Owens] were found to be required to be made.
>
> 15. Based upon this calculation of [Owens's] putative class claims, the amount of additional royalties sought is in excess of $8.2 million.

Notice of Removal at 3-4, *Owens*, No. 12-4157-JAR-JPO (D. Kan. Dec. 5, 2012). Allegations of the amount in controversy are ordinarily much more abbreviated.

The Supreme Court has not imposed special burdens at the pleading stage with respect to jurisdictional issues. The sequence of pleading and proving jurisdiction is described in the discussion of standing in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992):

> The party invoking federal jurisdiction bears the burden of establishing [the] elements [of standing]. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation. *At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume the general allegations embrace those specific facts that are necessary to support the claim.* In response to a summary judgment motion, however, the plaintiff can no longer rest on such mere allegations but must set forth by affidavit or other evidence specific facts . . . .

(emphasis added) (citations, brackets, and internal quotation marks omitted).

Nor has the Court imposed special rules regarding the pleading of jurisdiction in the removal context. In a recent decision regarding CAFA jurisdiction, the Supreme Court unanimously stated: "The burden of persuasion for establishing diversity jurisdiction, of course, remains on the party asserting it. When challenged on allegations of jurisdictional facts, the parties must support their allegations by competent

proof." *Hertz Corp. v. Friend*, 559 U.S. 77, 96–97 (2010) (emphasis added) (citations omitted).

Here, Owens challenged the notice of removal and Petitioners responded with a declaration by an officer setting forth a calculation showing a potential liability far exceeding $5 million. See *Owens v. Dart Cherokee Basin Operating Co*., 2013 WL 2237740, at *2 (D. Kan. May 21, 2013). The district court did not find the declaration lacking. It simply held that it came too late. First, it ruled that the notice of removal was inadequate. It explained:

> Although [Petitioners] state[d] in the Notice of Removal that they have "undertaken to quantify the amount of additional royalties that would be owed," [Petitioners] fail[ed] to incorporate any evidence supporting this calculation in the Notice of Removal, such as an economic analysis of the amount in controversy or settlement estimates. Accordingly, in the absence of such evidence, 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*. at *4. It then stated, "Even assuming that [Petitioners] can now establish the amount in controversy exceeds $5 million, they were obligated to allege all necessary jurisdictional facts in the notice of removal." *Id*. at *5.

The burden imposed by the district court on Petitioners was excessive and unprecedented. The notice of removal adequately alleged jurisdiction, Petitioners' evidence of jurisdiction was more than adequate, and there was no basis for requiring Petitioners to submit that evidence before the

adequacy of the notice was challenged. In its response to Petitioners' petition for permission to appeal, Owens characterizes the issue before this court as follows:

> [Have Petitioners] met the criteria for interlocutory review of the district court's order granting remand where [Petitioners'] notice of removal offered no evidence to support its allegation that the amount in controversy was satisfied, even though [Petitioners] had evidence of the amount in controversy at the time of removal but did not offer that evidence until almost six months later?

Resp. to Pet. for Reh'g En Banc at 3-4, *Dart Cherokee Basin Operating Co., LLC v. Owens*, No. 13-603 (10th Cir. July 22, 2013). (I should note that the reason for Petitioners' delay in offering evidence is that all proceedings were stayed pending mediation. *See Owens*, 2013 WL 2237740, at *1.) I think the clear answer to the question is yes. Owens obviously reads the district court's decision as requiring the submission of evidence with a notice of removal. We have a duty to inform the bench and bar that the law imposes no such requirement.

The district court relied on our holding in *McPhail v. Deere & Co*., 529 F.3d 947 (10th Cir. 2008), that a defendant who removes a case to federal court under diversity jurisdiction must establish the amount in controversy (if the plaintiff did not allege a sufficiently high amount) by a "preponderance of the evidence," *id*. at 954 (internal quotation marks omitted). But the preponderance-of-the-evidence standard is the typical standard by which an allegation in a pleading must be proved for the pleading party to prevail. Applying that standard of proof does not change the typical

requirements for pleading, and *McPhail* did not change them. This court's opinion did not address the questions presented here—(1) how much needs to be alleged in the notice of removal; and (2) after the notice is challenged, in what circumstances, if any, can the removing party rely on supporting evidence not submitted with the notice of removal? The proposition that evidence is not required at the pleading stage is clear from the opinion of the Seventh Circuit in *Meridian Security Insurance Co. v. Sadowski*, 441 F.3d 536 (7th Cir. 2006), on which *McPhail* heavily relied. Noting that the preponderance-of-the-evidence standard ultimately derives from the Supreme Court's opinion in *McNutt v. General Motors Acceptance Corp*., 298 U.S. 178 (1936), the circuit court quoted the following sentence from that opinion, "*If [the] allegations* [by the party asserting jurisdiction] of jurisdictional facts *are challenged* by his adversary in any appropriate manner, *he must support them by competent proof*," *id*. at 189 (emphasis added). *See Sadowski*, 441 F.3d at 539–40.

Moreover, my view of the procedural requirements for establishing the amount in controversy for purposes of removal is apparently shared by the drafters of the Federal Courts Jurisdiction and Venue Clarification Act of 2011 (the JVCA), which amended 28 U.S.C. §1446(c)(2). That paragraph now reads:

> 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).

28 U.S.C. § 1446(c)(2) (emphasis added).

As is apparent from the statutory language, Congress adopted the same preponderance-of-the-evidence standard endorsed in our *McPhail* opinion and the Seventh Circuit's *Sadowski* opinion. Indeed, the report of the House Judiciary Committee, where the JVCA originated, stated that the proposed statutory language "adopting the preponderance standard . . . would follow the lead of recent cases," and cited two opinions: *McPhail* and *Sadowski*. H.R. Rep. No. 112–10, at *16 (2011), reprinted in 2011 U.S.C.C.A.N. 576, 580. Yet the procedure described by the report is not the procedure adopted by the district court in this case. Immediately after citing the two opinions, the report states as follows:

> 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.

*Id*. (emphasis added).

Interestingly, the JVCA, perhaps through inadvertence, explicitly applies to standard diversity removals but apparently does not apply to removals under CAFA. Section 1446(c)(2) states that it applies when "removal of a civil action is sought on the basis of the jurisdiction conferred by section 1332(a)." Removal under CAFA, however, is governed by § 1332(d). Nevertheless, as we stated in *Frederick v. Hartford Underwriters Insurance Co*., 683 F.3d 1242, 1247 (10th Cir. 2012), "[T]here is no logical reason why we should demand more from a CAFA defendant than other parties invoking federal jurisdiction." (internal quotation marks omitted).

In short, I think it is important that this court inform the district courts and the bar of this circuit that a defendant seeking removal under CAFA need only allege the jurisdictional amount in its notice of removal and must prove that amount only if the plaintiff challenges the allegation.

Finally, I would add a few words about our discretionary jurisdiction to review removals under CAFA. CAFA is a newcomer to the scene and its intricacies are unfamiliar to many of us. It will always be tempting for very busy judges to deny review of a knotty matter that requires a decision in short order. But we have an obligation to provide clarity in this important area of the law. A year before deciding to grant an appeal on the issue resolved in *Frederick* (whether CAFA removal can be avoided by a plaintiff seeking class certification if the plaintiff stipulates that the class would not seek damages at or above $5

million), we had refused to grant an appeal to review a district court's decision that was contrary to what we later decided in *Frederick*. Yet the same issue was deemed sufficiently worthy of attention by the Supreme Court that it granted certiorari on the issue and reviewed a circuit decision not to grant permission to appeal. *See Standard Fire Insurance Co. v. Knowles*, 133 S. Ct. 1345 (2013). And that issue, unlike the one here, was one that would continue to arise because defendants seeking to remove under CAFA could do nothing to avoid the problem. I hope we will be more willing in the future to grant requests for appeal.

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed 6/20/13]

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No. 13-603

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DART CHEROKEE BASIN OPERATING, CO., LLC;
CHEROKEE BASIN PIPELINE, LLC,

*Petitioners,*

v.

BRANDON W. OWENS, individually
and on behalf of all others
similarly situated,

*Respondent*.

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Filed June 20, 2013

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ORDER

Before LUCERO, O'BRIEN, and HOLMES, Circuit Judges.

This matter is before the court on the Petition for Permission to Appeal from the United States District Court for the District of Kansas 5:12-CV-04157-JAR-JPO – The Honorable Judge A. Robinson (the "Petition"). The Petition was filed by Defendants Dart Cherokee Basin Operating Company, LLC, and Cherokee Basin Pipeline, LLC. Plaintiff Brandon W. Owens filed a response opposing the Petition.

Upon careful consideration of the parties' submissions, as well as the applicable law, the Petition is denied.

Judge O'Brien would have granted the Petition.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

/s/ Lara Smith
by: Lara Smith
Counsel to the Clerk

**APPENDIX C**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

[Filed 5/21/13]

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Case No. 12-4157-JAR-JPO

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BRANDON W. OWENS, individually
and on behalf of all others
similarly situated,
*Plaintiffs*,

v.

DART CHEROKEE BASIN OPERATING CO. LLC,
AND CHEROKEE BASIN PIPELINE, LLC,
*Defendants*.

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MEMORANDUM AND ORDER

This putative royalty owners class action suit was removed by Defendants Dart Cherokee Basin Operating Company, LLC ("DCBO") and Cherokee Basin Pipeline, LLC ("CBPL") to this Court on December 5, 2012 (Doc. 1). This matter is before the Court on Plaintiff's Motion to Remand (Doc. 12). The matter is fully briefed and the Court is ready to make its decision. For the reasons explained in detail below, the Court grants Plaintiff's motion and remands the case to the District Court of Wilson County, Kansas.

I. Background

On October 30, 2012, Plaintiff Brandon W. Owens filed a class action Petition in the District Court of Wilson County, Kansas. In the state court Petition,

Plaintiff seeks to represent a class of royalty owners who were underpaid royalties from DCBO or CBPL working interest Kansas wells from January 1, 2002 to the date of the Class Notice. Plaintiff alleges breach of contract and unjust enrichment claims and seeks compensatory damages, costs, and such further relief as the court deems just and proper. The Petition does not state a specific amount as damages.

On December 5, 2012, Defendants removed the state court action to this Court, asserting jurisdiction pursuant to 28 U.S.C. § 1332(d), commonly known as the Class Action Fairness Act of 2005 ("CAFA"). As grounds for removal, Defendants contend the amount in controversy is in excess of $8.2 million. On January 2, 2013, prior to any response being filed to the motion to remand, all further proceedings in the case were stayed pending mediation between the parties; mediation held on April 4, 2013, was unsuccessful, and the Court directed the parties to resume briefing on the pending motion.[1]

II. Discussion

To establish federal jurisdiction under CAFA, three elements are required. First, minimal diversity of citizenship must exist between the parties, meaning at least one plaintiff and one defendant must be citizens of different states. Second, the proposed class must have at least one hundred members in the aggregate. And third, the amount in controversy must exceed $5 million, exclusive of interest and costs.[2] For removal to be proper, the defendant must

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[1] Doc. 20. The Court also denied without prejudice to renew Defendants' pending Motions to Dismiss.

[2] 28 U.S.C. § 1332(d).

set forth facts supporting the assertion that the amount in controversy is satisfied.[3] In making this showing, the defendant must support the amount in controversy with factual evidence rather than mere assumption or speculation.[4] The parties are in dispute only about the third element—the amount in controversy.

In determining the amount in controversy for an action removed pursuant to CAFA, the question is not how much the plaintiff will recover, but "an estimate of the amount that will be put at issue in the course of the litigation."[5] 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.[6] 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].'"[7] In other words, the amount in controversy must be affirmatively established on the face of either the petition or notice of removal.[8] The Court narrowly

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[3] *Frederick v. Hartford Underwriters Ins. Co.*, 683 F.3d 1242, 1247 (10th Cir. 2012).

[4] *Martin v. Franklin Capital Corp*., 251 F.3d 1284, 1290 (10th Cir. 2001).

[5] *Frederick*, 683 F.3d at 1245.

[6] *Martin,* 251 F.3d at 1290; *Laughlin v. Kmart Corp.,* 50 F.3d 871, 872 (10th Air. 1995).

[7] *Laughlin*, 50 F.3d at 873 (quotation omitted).

[8] *Id.*

construes removal statutes,[9] and all doubts must be resolved in favor of remand.[10]

In *McPhail v. Deere & Co.*,[11] the Tenth Circuit outlined several methods that a removing defendant may use to satisfy its burden of proving jurisdictional facts by a preponderance of the evidence. A plaintiff "cannot avoid removal merely by declining to allege the jurisdictional amount," but in the absence of an explicit demand for more than the jurisdictional amount, defendant must show how much is in controversy through other means.[12] In other words, "the defendant must affirmatively establish jurisdiction by proving jurisdictional facts that made it possible that $75,000 was in play."[13] A defendant may accomplish this through interrogatories obtained in state court prior to the removal, or affidavits or other evidence submitted to the federal court.[14] In *Frederick v. Hartford Underwriters Ins. Co.,* the Tenth Circuit reaffirmed *McPhail* and extended the rationale to

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[9] *Martin,* 251 F. 2d at 1289.

[10] *Fajen v. Found. Reserve Ins. Co.*, 683 F.2d 331, 333 (10th Air. 1982); *Ortiz v. Biscanin*, 190 F. Supp. 2d 1237, 1241 (D. Kan, 2002).

[11] 529 F.3d 947 (10th Air. 2008).

[12] *Id* at 955.

[13] *Id.*

[14] *Id.* at 956. *Accord Frederick v. Hartford Underwriters Ins. Co.,* 683 F.3d 1242, 1247 (10th Cir. 2012) (explaining defendants may meet their evidentiary burden to show the jurisdictional amount in controversy, "by contentions, interrogatories or admissions in state court; by calculation from the complaint's allegations[;] by reference to the plaintiff's informal estimates or settlement demands[;] or by introducing evidence, in the form of affidavits from the defendant's employees or experts, about how much it would cost to satisfy the plaintiff's demands")

class actions under CAFA.[15] In that case, the Tenth Circuit definitively joined a number of Circuits in holding that a defendant seeking to remove under CAFA must show that the amount in controversy exceeds $5 million by a preponderance of the evidence.[16]

Because the Petition does not make a specific monetary demand for damages, the Court looks to the Notice of Removal. Defendants set forth, in relevant part:

> 9. Plaintiff's Petition does not state a specific amount as damages. It does, however, pray for payment of royalties and interest claimed to be due to royalty owners who were paid royalties with regard to gas produced from wells located in Kansas in which DCBO has owned any working interest, for the period from January 1, 2002 to the present. 12
>
> 10. This matter involves approximately 700 wells that DCBO currently operates in Kansas. The purported class consists of royalty owners that own an interest in the wells in which DCBO has a working interest in Kansas. There are approximately 400 royalty owners with interests in the 700 wells at issue.
>
> 14. 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.

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[15] 683 F.3d 1242, 1246-47 (10thCir. 2012).

[16] *Id* at 1246-47.

> 15. Based upon this calculation of Plaintiff's putative class claims, the amount of additional royalty sought is in excess of $8.2 million.[17]

Defendants do not offer any documentation or affidavits explaining how they reached this calculation.

In their response to Plaintiff's motion to remand, Defendants offer the Declaration of Charles E. Henderson, Vice President of Legal Affairs and General Counsel for DCBO, and Manager of CBPL, which further outlines the calculations initially conducted, those that now exist based on limited informal discovery, and those performed by Plaintiff relating to the limited discovery.[18] According to Henderson, these calculations show that Plaintiff's claims for the entire class period far exceed the jurisdictional threshold. Henderson explains that, upon service of the Petition, which did not specify the amount in dispute, he undertook to quantify the damages at issue based on the allegations in the Petition, based on the claims, the class period and the number of leases. Assuming that the royalty paid to the Plaintiff class should have been calculated on 100% of the CBPL proceeds and not 75%, using a "back of the envelope" calculation, the class was underpaid by approximately $11 million. Using the same back of the envelope analysis, the claim for shrinkage is approximately $3.52 million. Subsequently, but before filing the Notice of Removal, DCBO located and analyzed the actual production and sales data for the period in question and ran a formal economic analysis of the potential damages, assuming the allegations in the Petition are correct.

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[17] Doc. 1.

[18] Doc. 23, Ex. 1.

Based on those assumptions, it was determined that the amount in controversy for the five year period prior to the filing of the Petition, which Defendants believe is the applicable period for Statute of Limitations purposes, was $8,224,798.62, and $11.86 million for the entire ten-year period claimed by Plaintiff class. Henderson attaches a spreadsheet setting forth this analysis.[19] Henderson also states that at the time of the mediation conducted April 4, 2013, Plaintiff's counsel and/or his expert witness had arrived at a damage figure in excess of $21.5 million, which included interest of $7.348 million. After deducting interest, the sum of the claims is over $14 million, almost three times the threshold jurisdictional amount.[20] Henderson notes that the $14 million figure is within 2% of the back of the envelope figures set forth above.

Plaintiff offers no affidavit, declaration or other evidence challenging Defendants' calculation, but instead argues that Defendants cannot meet their burden to show that it is more likely than not that the amount in controversy exceeds $5 million. Plaintiff asserts that Defendants submitted no evidence with their unsworn Notice of Removal, only a bare allegation that the amount in controversy exceeds the statutory requirement. Thus, Plaintiff argues, Defendants' Notice of Removal is deficient as a matter of law, and cannot be cured by attaching Henderson's Declaration to their response to Plaintiff's motion to remand. Plaintiff also takes issue with Defendants' use of the mediation to belatedly develop evidence to support its assertion of the amount in

[19] *Id.* at Ex. A.

[20] *Id.* at Ex. C.

controversy, and in fact, DCBO had the information at the time of removal, but failed to offer it to prove the amount in controversy.

The Court finds several CAFA cases decided after *Frederick* to be informative. On remand from the Tenth Circuit, the district court in *Frederick* held that the defendant insurance company met its evidentiary burden under CAFA by submitting with its Notice of Removal the affidavit of its Director for Business Compliance, who attested to having overseen the extraction of data concerning relevant insurance claims and using it to calculate the company's potential liability.[21] The district court held that the defendant had "provided sufficient evidence, in the form of an affidavit, that Plaintiff s alleged actual damages are $2,960,998, and that an equal amount of punitive damages is possible in this case."[22]

Likewise, in *Ezell v. Graco Children's Products Inc.,* the court held that defendants' affidavit detailing their calculation of the amount in controversy was sufficient to show by a preponderance of the evidence that the amount exceeded $5 million.[23] In that case, plaintiffs brought a class action against manufacturers for sale of defective child booster seats.[24] Defendants submitted an affidavit in support of their Notice of Removal showing that:

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[21] *Frederick,* No. 11-cv-2306-WJM-KLM, 2012 WL 4511242, at *2 (D. Colo. Oct. 1, 2012).

[22] *Id.* at *4.

[23] No. Civ-12-787-C, 2012 WL 4355966, at *1 (W.D. Okla. Sept. 24, 2012).

[24] *Id*.

> 15,452 people with Oklahoma addresses registered booster seats within the time frame set out in the state court Petition.
>
> Defendants further develop their proof by setting forth the number of booster seats sold, 12, 200,000 and the portion of that number registered, 1,600,000. Applying this same ratio of registration seats sold (13%), it is reasonable to infer that approximately 118,500 seats were sold in Oklahoma. Plaintiffs seek recovery of the replacement cost of the seat. The parties agree that a blended price is . . . $33.99.[25]

The court held that this evidence was sufficient to show that the compensatory damages could total over $3.9 million, which, when added to the potential punitive damages, would reach the necessary amount.[26]

And, in *Parks v. USAA*, plaintiffs brought a class action against defendant insurance companies alleging they violated Colorado law by arbitrarily reducing claims, improperly denying claims, conducting insufficient utilization reviews, and using incorrect schedules to calculate the value of claims.[27] In their Notice of Removal, the defendants offered as value of the contested claims the declaration of a Staff Claims Advisor asserting that during the three years prior to the filing of the complaint, there were over 500 individuals who would qualify for the plaintiff class with claims totaling over $2.5 million.[28] The

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[25] *Id.*

[26] *Id.*

[27] No. 12-cv-2016-PAB-MJW, 2012 WL 5290170, at *1 (D. Colo, Oct. 26, 2012).

[28] *Id.*

declaration states that the claims advisor has "knowledge and access to relevant corporate records and data systems" and that she has "undertaken an analysis of the business records and data systems" in order to arrive at the figures she provides.[29] Further, defendants offered several declarations asserting that the amount of attorney's fees will likely reach $1 million, and concludes that doubling the value of unpaid claims and adding interest and attorney's fees demonstrates that the amount in controversy exceeds $5 million, before the possibility of exemplary damages is taken into account.[30] The court held that, although the affidavit was not as detailed as those submitted in *Frederick* and *Ezell* in its description of the method used to derive the number of claimants and the value of the claims at issue, it was sufficient to meet defendant's evidentiary burden under CAFA, when plaintiff had not offered any facts showing that an award of $5 million or more is legally impossible.[31]

By contrast, in this case, Defendants do not submit any supporting documentation, affidavit or declaration as evidence of the amount of compensatory damages, even though they concede that they had the actual production and sales data at the time of the Notice of Removal, going so far as to run a "formal economic analysis of potential damages." Instead, Defendants argue, the amount in controversy can be demonstrated by the allegations in the Petition alone, and they have made their calculations from those allegations, along with additional facts. Defendants cite in support the Tenth Circuit's decision in *McPhail,*

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[29] *Id.*

[30] *Id.*

[31] *Id. at *3*

in which they contend the court held the allegations of the complaint alone was sufficient to find the amount in controversy exceeded the jurisdictional threshold for diversity jurisdiction.[32] Defendants' reliance on *McPhail* is misplaced. In that case, plaintiff brought a wrongful death action against defendant; her complaint cited to the Oklahoma wrongful death statute, and requested "all relief enumerated therein."[33] That statute provided recovery for several categories of compensatory damages alleged in the complaint, as well as punitive damages up to $100,000.[34] The court held that, "[Oven these allegations and the nature of the damages sought, the complaint on its face *may* be sufficient by itself to support removal."[35] The court declined to decide the question based on the complaint alone, however, because plaintiff had incorporated correspondence between counsel in the notice of removal that demonstrated her counsel believed the amount in controversy "very well may be" in excess of $75,000.

In this case, Plaintiff's Petition does not include a claim based on statutory liability or a claim for punitive damages, and the jurisdictional amount is not readily apparent from the face of the Petition. Nor does Plaintiff attempt to limit the amount in controversy to less than the jurisdictional amount. Although Defendants state in the Notice of Removal that they have "undertaken to quantify the amount of additional royalties that would be owed," Defendants fail to incorporate any evidence supporting this

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[32] 529 F.3d at 957.

[33] *Id.*

[34] *Id.*

[35] *Id.* (emphasis added).

calculation in the Notice of Removal, such as an economic analysis of the amount in controversy or settlement estimates. Accordingly, in the absence of such evidence, 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.[36]

Thus, the Court turns to whether Defendants can rely on factual allegations not contained in the Notice of Removal, subsequently submitted with their response as "additional support" in an attempt to meet their jurisdictional burden. The 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.[37] Defendants are correct that in *McPhail*, the Circuit appears to have carved out a limited exception to this rule, by holding that a party may seek limited discovery to determine the amount in controversy.[38] The Circuit did not give any guidance on when it is appropriate to grant or deny a request, however, and in that case, the court appears to have contemplated a situation in which the defendant had

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[36] *See Freebird, Inc. v. Merit Energy Co.*, 597 F. Supp. 2d 1245, 1249 (D. Kan. 2009) (citing *Coca-Cola Bottling of Emporia*, *Inc. v. South Beach Bev. Co., Inc.*, 198 F. Supp. 2d 1280, 1285-86 (D. Kan. 2002)) (holding that an affidavit including no underlying data, facts, figures or calculations in support" of blanket statement was insufficient to satisfy the removing defendant's burden of proving the amount in controversy).

[37] *See, e.g., Laughlin*, 50 F.3d at 873; *Martin*, 251 F.3d at 1291, n.4; *Okla. Farm Bureau Mut. Ins. Co. v. JSSJ Corp.,* 149 F. App'x 775 (10th Cir. 2005).

[38] 529 F.3d at 954.

no information from which to establish the amount of damages.[39]

Here, Defendant has not requested leave to conduct discovery on the amount in controversy. Indeed, such discovery is not justified, as Defendants concede in their response and Henderson's Declaration that they were aware of additional facts and data at the time they removed the case to federal court, but did not allege all of these facts in the Notice of Removal. And, although the *McPhail* court indicated that evidence of settlement proposals and estimates is permitted as a basis for establishing the amount in controversy, it is so only when those facts were incorporated in the notice of removal.[40] Although Plaintiff's Petition is silent on the jurisdictional amount, it has enough detail regarding the basis of the claims regarding the underpayment of royalties to enable Defendants to use their data to calculate an amount in controversy, albeit data and/or evidence they did not include in their Notice of Removal. Even assuming that Defendants can now establish the amount in controversy exceeds $5 million, they were obligated to allege all necessary jurisdictional facts in the notice of removal.[41]

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[39] *Id*. at 953; *HeIvey v. Am. Nat*. *Life Ins. Co of Tex.*, No. 12-1109-MLB, 2012 WL 2149676, at 3, n.1 (D. Kan. June 13, 2012) (citing *McPhail,* 529 F.3d at 954) (granting removing party's request for limited discovery on past and future medical bills and attorney fees).

[40] *McPhail,* 529 F.3d at 956 (permitting district courts to consider settlement offers in assessing the jurisdictional amount and concluding that, "[t]o this end, documents that demonstrate plaintiff's own estimation of its claim are a proper means of supporting the allegation in the notice of removal").

[41] *See Freebird*, 597 F. Supp. 2d at 1249; *Benefits Tech., LLC v. Stanley,* No. 10-CV-0561-CVE-FHM, 2010 WL 4736297, at *5 (W.D. Okla. Nov. 16, 2010). Although Defendants do not move to

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.

IT IS THEREFORE ORDERED that Plaintiffs Motion to Remand (Doc. 12) is GRANTED. The Clerk of the Court is directed to remand this case to the District Court of Wilson County, Kansas.

IT IS SO ORDERED.

Dated: May 21, 2013

/s/ Julie A. Robinson
JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE

---

amend their Notice of Removal, it does not appear that the Tenth Circuit would permit such amendment to provide art economic analysis of the amount in controversy that was absent in the notice of removal. *Id.* (citing cases).

**APPENDIX D**

THE DISTRICT COURT OF WILSON COUNTY,
KANSAS SITTING IN FREDONIA

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Case No. 2012-CV-68

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BRANDON W. OWENS, individually
and on behalf of all others
similarly situated,
*Plaintiffs*,

v.

DART CHEROKEE BASIN. OPERATING CO, LLC,
AND CHEROKEE BASIN PIPELINE, LLC,
*Defendants*.

---

CLASS ACTION PETITION PURSUANT TO
K.S.A. CHAPTER 60

COMES NOW Plaintiff, Brandon W, Owens, on behalf, of himself and all other similarly situated royalty owners, sues Defendants Dart Cherokee Basin Operating Co., LLC, and Cherokee Basin Pipeline, LLC for underpayment of royalties and alleges as follows:

1. This action is brought pursuant to Chapter 60 of the Kansas Statutes Annotated.

PARTIES

2. Plaintiff Brandon W. Owens is a citizen and resident of the Slate of Kansas, residing at 2334 Co. Rd. 2800, Independence, Kansas 67301. Plaintiff is a royalty owner of Dart Cherokee Basin Operating Co„ LLC who operated or paid royalty from working interest production in wells known as the Owens 2-30 and Melander-Owens 2 wells.

3. Defendant Dart Cherokee Basin Operating Co., LLC ("Dart") is believed to be a Delaware corporation with its principal place of business In Michigan. Dart conducts regular and systematic business throughout the State of Kansas, as well as in Wilson County and Montgomery County, Kansas.

4. Cherokee Basin Pipeline, LAC ("Cherokee Pipeline") is believed to be a Delaware corporation with its principal place of business in Kansas. Cherokee Pipeline is a wholly owned subsidiary of Dart, and the entity through which Dart pays royalties to Plaintiff and the Class of royalty owners defined herein. At all times relevant, and for all relevant purposes. Cherokee Pipeline acted as an agent for Dart.

## JURISDICTION AND VENUE

5. This Court has jurisdiction over this claim pursuant to K.S.A. § 60-308(b)(A), (c), (E), and/or (F), because Defendants' acts giving rise to this suit were committed in the State of Kansas as more fully described above and below.

6. Venue is proper in this Court pursuant to K.S.A. §§ 60-603 and 60-604 because the cause of action arose in this County and Defendants conduct regular and systematic business in this County.

## FACTS COMMON TO ALL ACCOUNTS

7. Defendants underpaid royalty owners by taking numerous deductions (via fees or volumetric) before the gas products were in marketable condition.

8. The above referenced deductions include, but are not limited to gathering, compression, dehydration, and/ or treatment deductions.

9. These deductions were hidden from. royalty owners, including the Plaintiff and Class, in that they were not revealed on their check stubs, and the deduction information arises from confidential gas contracts and accounting processes.

10. Defendants also deducted from payments to Plaintiff and the Class a conservation fee deduction. Such deductions were improper. Indeed, although they were not a tax, conservation fee deductions were deceptively lumped in as "taxes" on the cheek stubs of Plaintiff and the Class.

11. As a direct and proximate result of Defendants acts and/or omissions, Plaintiff and the Class have been injured/damaged.

CLASS ACTION ALLEGATIONS

12. Plaintiff brings this class action lawsuit on behalf of himself and the following similarly situated Class:

> All royalty owners who were paid royalties from Dart Cherokee Basin Operating Co., LLC or Cherokee Basin Pipeline, LLC working interest Kansas wells from January 1.2t}02 to the date of Class Notice.
>
> Excluded from the Class arc: (1) the Mineral Management Service (Indian tribes and the - United States); (2) Defendants, their affiliates, predecessors, and employees, officers, and directors; and (3) any NYSE or NASDAQ listed company (and its subsidiaries) engaged in oil and gas exploration, gathering, processing, or marketing.

13. This lawsuit is brought pursuant to K.S.A. § 60-223.

14. The prerequisites of K.S.A. § 60-223, including numerosity, commonality, typicality, adequacy, predominance and/or superiority are satisfied.

15. Members of the Class are so numerous that joinder of all members is impracticable. Defendants operate over 500 wells in Kansas with one or more royalty owners for each well.

16. There are questions of law and fact common to the Class which predominate over questions affecting only individual members. These questions include, but are not limited to, the following:

a. Whether Plaintiff and the Class members are the beneficiaries of an implied covenant obligating Defendants to place the gas from class wells into marketable condition;

b. Whether Defendants are solely responsible for all costs necessary to render commercially marketable the gas produced under the oil and gas leases;

c. Determining the point at which the gas that Defendants produce becomes commercially marketable;

d. Whether Defendants deducted or allowed third parties to deduct (in cash or in kind) amounts for placing the gas into marketable condition before paying royalty to Plaintiff and the Class members;

e. Whether Defendants paid royalty to Plaintiff and the Class members based on a starting price below what Defendants received in arm's-length sales transactions for products in marketable condition;

f. Whether Defendants calculated the royalty paid to Plaintiff and the Class according to the internal accounting, royalty payment formulas, and record-keeping operations of Defendants which are not known or knowable by the members of the Class;

g. Whether the check stubs Defendants used in paying royalty to Plaintiff and the Class members misrepresented or fraudulently concealed, by omission, commission or both, the true facts about Defendants' calculation of royalty owed;

h. Whether Defendants' payment of royalty to Plaintiff and the Class members on a monthly basis is an open account; and

i. Whether Defendants deducted a conservation fee from Plaintiff and the Class members that it was not legally entitled to deduct.

17. The claims of the named Plaintiff are typical of the claims of the Class. All royalty owners faced the same type of accounting deductions and sales starting point regardless of lease types or gas composition from their wells.

18. Plaintiffs will fairly and adequately protect the interests of the Class. They have already retained Class counsel who are experienced and qualified in prosecuting class actions and other forms of complex civil litigation.

19. A class action under § 60-223 is superior to other available methods for the fair and efficient adjudication of this controversy because:

a. Plaintiff has the same interests as other members of the Class, is financially able to,

and will, vigorously prosecute this action on behalf of the Class;

b. It is desirable to concentrate the litigation involving claims of Kansas residents in this one forum because the expense and burden of the individual litigation make it impracticable for individual Class members to pursue separate litigation; and

c. No difficulties are likely to be encountered in the management of this litigation as a class action.

COUNT I

(Breach of Lease and Implied Covenant to Market)

20. Plaintiff incorporates all preceding paragraphs as if fully set forth herein.

21. As a result of the above-referenced conduct, Defendants have breached the lease, including the implied covenant to market imposed on each lease, to each member of the Class to produce and market at its sole cost the gas by placing the gas in a marketable condition.

22. Defendants have caused damages to Plaintiff and the Class in the amount of the improper deductions.

WHEREFORE, Plaintiff and the Class pray for judgment in their favor and against Defendants in a fair and reasonable amount to compensate them for damages they have suffered and will suffer up to the time of trial, for their costs in this action, and for such other and further relief as this Court deems just and proper.

COUNT II

(Unjust Enrichment)

23. Plaintiff incorporates all preceding paragraphs as if fully set forth herein.

24. Plaintiff and the Class are royalty owners of certain oil/gas wells.

25. Defendants were to pay Plaintiff and the Class royalties for the oil/gas retained by Defendants from the Plaintiff's and the Class' wells, such as fuel and lost and unaccounted for gas ("FL&U").

26. Defendants retained significant sums of money from Plaintiff and the Class through the above-referenced fees and deductions.

27. The above-referenced fees and deductions were unlawful, inequitable, and unauthorized by Plaintiff and the Class.

28. As a direct result of the misconduct alleged herein, Defendants have been unjustly enriched and have obtained a substantial monetary benefit which, in fairness and equity, Defendants were not entitled to receive or retain.

29. It would be unfair and inequitable to allow Defendants to retain the benefit derived from the above-referenced fees and deductions retained from Plaintiff and the Class and, therefore, Plaintiff and Class members are entitled to be paid and to receive those benefits.

WHEREFORE, Plaintiff prays for judgment in their favor and against Defendants in a fair and reasonable amount to compensate them for damages they have suffered and will suffer up to the time of trial, for their

costs, and for such other and further relief as this Court deems just and proper.

Respectfully submitted,

/s/ John F. Edgar
JOHN F. EDGAR KS# 18080
EDGAR LAW FIRM LLC
1032 Pennsylvania Ave.
Kansas City, MO 64105
Telephone: (816) 531-0033
Facsimile: (816) 531.3322
Email: jfe@edgarlawfirm.com

REX A. SHARP KS# 12350
BARBARA C. FRANKLAND KS# 14198
GUNDERSON, SHARP & WELKE, LLP
5301 W. 75th Street
Prairie Village, KS 66208
Telephone: (913) 901-0500
Facsimile: (913) 901-0419
Email: rsharp@midwest

GRADY YOUNG KS# 9000
714 Walnut
Coffeyville, KS 67337
Telephone: (620) 251-9000
Email: seklaw@seklaw.org

*Attorneys for Plaintiffs*

**APPENDIX E**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

[Filed 12/5/12]

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USDC Case No: 12-4157-JAR

Wilson County District Court
Case No. 2012-CV-68

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BRANDON W. OWENS, individually
and on behalf of all others
similarly situated,
*Plaintiffs*,

v.

DART CHEROKEE BASIN OPERATING CO., LLC
AND CHEROKEE BASIN PIPELINE, LLC,
*Defendants*,

---

NOTICE OF REMOVAL

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. §§1441(a) and 1446 and D.Kan. Rule 81.1, Defendants Dart Cherokee Basin Operating, Company LLC ("DCBO") and Cherokee Basin Pipeline, LLC ("CBPL") hereby remove to this Court the state court action described below.

1. On October 30, 2012, an action was commenced in the Thirty-First Judicial District, the District Court of Wilson County, Kansas, at

Fredonia, captioned *Brandon w. Owens, Individually and on Behalf of all Others Similarly Situated v. Dart Cherokee Basin Operating, Co. LLC and Cherokee Basin Pipeline, LLC,* bearing Case No. 2012-CV-68.

2. On November 5, 2012, DCBO was served with Summons and a copy of Plaintiff's Petition by process server on The Corporation Company, Inc., its agent for service of process, 112 S.W. 7th Street, Suite 3C, Topeka, KS 66603. A copy of the Petition served upon Corporation Service Company in the state court action and a copy of the summons filed therein are attached hereto as Exhibit A.

3. On November 5, 2012, CBPL was also served with Summons and a copy of Plaintiff's Petition by process server on The Corporation Company, Inc., its agent for service of process, 112 S.W. 7th Street, Suite 3C, Topeka, KS 66603. A copy of the Petition served upon Corporation Service Company in the state court action and a copy of the summons filed therein are attached hereto as Exhibit B.

4. The Clerk of the District Court of Wilson County, Kansas, has entered an Order extending the time within which Defendants may answer or otherwise plead to the Petition. A copy of said Order is attached hereto as Exhibit C.

5. This is a civil action of which this Court has original jurisdiction under 28 U.S.C. §1332(d), and it is one which may be removed to this Court by Defendants pursuant to the provisions of 28 U.S.C, §1441.

6. Plaintiff Brandon W. Owens is a citizen and resident of the State of Kansas. Petition, ¶ 2.

7. Defendant DCBO is a limited liability company organized under the laws of the state of Delaware, with its principal place of business in Michigan. DCBO's sole member is Dart Oil & Gas Corporation, a Michigan corporation with its principal office in Michigan.

8. Defendant CBPL is a limited liability company organized under the laws of the state of Delaware, with its principal place of business in Michigan. CBPL has two members: Dart Oil & Gas Corporation, a Michigan corporation with its principal office in Michigan and Gas Authority Supplies LLC (GAS), a Georgia limited liability company. GAS's sole member is the Municipal Gas Authority of Georgia, a Georgia Public Corporation created pursuant to act of the Georgia General Assembly. Both GAS and MGAG have their principal places of business in Georgia.

9. Plaintiffs Petition does not state a specific amount as damages. It does, however, pray for payment of royalties and interest claimed to be due to royalty owners who were paid royalties with regard to gas produced from wells located in Kansas in which DCBO has owned any working interest, for the period from January 1, 2002 to the present.

10. This matter involves approximately 700 wells that DCBO currently operates in Kansas. The purported class consists of royalty owners that own an interest in the wells in which DCBO has a working interest in Kansas. There are approximately 400 royalty owners with interests in the 700 wells at issue.

11. Plaintiff is a citizen of Kansas, Defendants are citizens of Delaware, Michigan, and/or Georgia for

diversity purposes. The class includes hundreds of citizens of Kansas and citizens of states other than Delaware, Michigan, and Georgia, There is the minimal diversity of citizenship required under 28 U.S.C. 1332(d).

12. Plaintiff claims that DCBO owes additional royalties because, among other things, DCBO (a) pays royalties based upon a below market price; (b) improperly deducts charges from the sales price for costs associated with gathering, compression, dehydration, and/or treatment before computing royalties; and (c) improperly shifts a portion of the conservation fee to royalty owners.

13. Plaintiff seeks to recover on behalf of a class of any royalty owner in any well located in Kansas in which DCBO has owned any working interest from January 1, 2002 to the present.

14. 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.

15. Based upon this calculation of Plaintiff's putative class claims, the amount of additional royalty sought is in excess of $8.2 million.

16. Defendants first received a copy of this Petition on November 5, 2012, when each was received by Defendants' statutory agents for service of process. This Notice is filed within 30 days of that date.

17. According to 28 U.S.C. § 1446(d), copies of this Notice have been served on counsel for plaintiff and filed with the Clerk of the District Court Wilson

County, Kansas. In addition, according to Local Rule 81.1, a copy of all pleadings filed in the State Court action are filed herewith.

WHEREFORE, Defendants pray that this action be removed to the United States District Court for the District of Kansas.

DESIGNATION OF TRIAL

COME NOW Defendants and designate the place of trial as Wichita, Kansas.

Date: December 5, 2012

Respectfully submitted by:

Morris, Laing, Evans, Brock & Kennedy, Chtd.

/s/ Julia Gilmore Gaughan
Jeffery L. Carmichael, KS #11085
Will B. Wohlford, KS #21773
300 N. Mead, Suite 200
Wichita, KS 67202
(316) 262-2671
jcarmichael@morrislaing.com
wwohlford@morrislaing.com

and

Julia Gilmore Gaughan, KS #23919
800 SW Jackson St., Suite 1310
Topeka, KS 66612-1216
(785) 232-2662 Fax: (785) 232-9983
jgaughan@morrislaing.com

*Attorneys for Dart Cherokee Basin Operating Co., LLC and Cherokee Basin Pipeline, LLC*

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of December 2012, I electronically filed the foregoing Notice of Removal with the Clerk of the Court by using the CM/ECF system, which will send notice of electronic filing to all counsel who have registered for receipt of documents filed in this matter,

I Further hereby certify that a true and correct copy of the above and foregoing was mailed this 5th day of December, 2012, via United States mail, postage prepaid, to:

John F. Edgar
Edgar law Firm, LLC
1032 Pennsylvania Ave.
Kansas City, MO 64105

Rex A. Sharp
Barbara C, Frankland
Gunderson, Sharp & Walke, LLP
5301 W. 75th St.
Prairie Village, KS 66208

Grady Young
714 Walnut
Coffeyville, KS 67337

Attorneys for Plaintiffs

/s/ Julia Gilmore Gaughan
Julia Gilmore Gaughan

**APPENDIX F**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

[Filed 12/19/12]

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Case No. 12-CV-04157

---

BRANDON W. OWENS, individually
and on behalf of all others
similarly situated,
*Plaintiffs*,

v.

DART CHEROKEE BASIN OPERATING CO. LLC,
AND CHEROKEE BASIN PIPELINE, LLC,
*Defendants*.

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PLAINTIFF'S MOTION TO REMAND

Plaintiff Brandon W. Owens, individually and on behalf of the proposed plaintiff class, moves to remand this royalty owners class action for underpayment of royalties to state court. The Defendants removed the case from state court claiming diversity jurisdiction under Class Action Fairness Act, 28 U.S.C. §1332(d), and under the procedures governing removal in 28 U.S.C. §1441. But Defendants have failed to demonstrate by competent evidence that the required amount in controversy has been met. Absent a showing in accordance with the law, this case should be remanded to state court.

Plaintiff incorporates his contemporaneously filed memorandum in support of this motion.

Respectfully submitted,

/s/ Rex A. Sharp
Rex A. Sharp KS#12350
Barbara C. Frankland, KS#14198
Gunderson, Sharp & Walke, L.L.P.
5301 W. 75th Street
Prairie Village, KS 66208
(913) 901-0500
(913) 901-0419 fax

David E. Sharp KS #10624
Gunderson Sharp & Walke, LLP
712 Main Street, Suite 1400
Houston, TX 77002
(713) 490-3822
(713) 583-5448 fax
dsharp@midwest-law.com

John F. Edgar KS#18080
Edgar Law Firm LLC
1032 Pennsylvania Ave.
Kansas City, MO 64105
(816) 531-0033
(816) 531-3322 fax
jfe@edgarlawfirm.com

Grady Young KS#9000
714 Walnut
Coffeyville, KS 67337
(620) 251-9000
seklaw@seklaw.org

*Attorneys for plaintiffs*

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send notice of electronic filing to all counsel who have registered for receipt of the documents filed in this matter.

/s/ Rex A. Sharp

**APPENDIX G**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

[Filed 12/19/12]

---

Case No. 12-CV-04157

---

BRANDON W. OWENS, individually
and on behalf of all others
similarly situated,
*Plaintiffs*,

v.

DART CHEROKEE BASIN OPERATING CO. LLC,
AND CHEROKEE BASIN PIPELINE, LLC,
*Defendants*.

---

MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION TO REMAND

This royalty owners class action was filed in state court and removed by the Defendants claiming diversity jurisdiction under the Class Action Fairness Act ("CAFA"). 28 U.S.C. § 1332(d). That statute requires, *inter alia*, that the amount in controversy exceed $5,000,000 exclusive of interests and costs. The state court petition is silent as to the amount in controversy. The Defendants have alleged, without any supporting proof whatsoever, that more than $5,000,000 is at issue. But, the burden is on Defendants, as the party asserting federal court jurisdiction, to establish the requirements for jurisdiction by a preponderance of the evidence. Because Defendants offered no evidence to support their assertion that the amount in controversy meets or exceeds the statutory threshold

of $5,000,000, Plaintiff moves to remand for lack of subject matter jurisdiction.

I. Background Facts

1. This case was filed as a class action in state court and removed by Defendants to this Court. Dkts. 1 & 1-1 at pp. 4-11.

2. The Notice of Removal claims jurisdiction "under 28 U.S.C. §1332(d)." Dkt. 1 at 2 ¶ 5.

3. Removal under that statute requires the amount in controversy be in excess of "$5,000,000, exclusive of interest and costs." 28 U.S.C. § 1332(d) ("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, and is a class action").

4. There is no allegation of an amount in controversy in the state court petition. Dkt 1-1 at pp 4-11.

5. Without disclosing who calculated the amount in controversy, the data selected, the source of that data, or the method used, Defendants' Notice of Removal conclusorily states "the amount of additional royalty sought is in excess of $8.2 million." *See*, Doc. 1 at p. 4.[1]

6. Plaintiff denies that Defendants Notice of Removal demonstrates subject matter jurisdiction in accordance with the law.

---

[1] "14. 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." Dkt. 1 at p. 4 ¶¶ 14-15.

II. Issue Presented

Does Defendants' bare allegation of the amount in controversy satisfy, by preponderance of the evidence, the amount necessary to establish federal subject matter jurisdiction in this Court? If not, the case must be remanded to state court.

III. Argument

The Tenth Circuit has held that the party invoking federal jurisdiction bears the burden of proving that jurisdiction exists. *Martin v. Franklin Capital Corp.*, 251 F.3d. 1284, 1290-91 (10th Cir. 2001). Moreover, "removal statutes are construed narrowly; where the plaintiff and defendant clash about jurisdiction, uncertainties are resolved in favor of remand." *Id.*

The settled Tenth Circuit law is that the "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 [is met]." *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995) (emphasis in original). Indeed, "the rationale of *Laughlin* contemplates that the removing party will undertake to perform an economic analysis of the alleged damages supported by the underlying facts." *Archem v. Kelly,* 271 F. Supp. 2d 1320, 1322 (N.D. Okla. 2003); *Standard Liquor Corp. v. King Estate Winery Inc.*, No. 97-1503-JTM, 1997 WL 752643 at *1-.3 (D. Kan. 1997).

Additionally, the Tenth Circuit has been equally clear about the type of showing that is required in the notice of removal. Summary judgment type evidence is required to meet the amount in controversy burden of proof. *McPhail v. Deere & Co.*, 529 F.3d 947, 956 (10th Cir. 2008) (citing a Fifth Circuit case that "summary-judgment-type evidence" is required).

*McPhail* emphasized that a defendant might attach documents supporting an affidavit or introduce evidence from experts. *Id. See also Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1335-36 (5th Cir.1995) (removal "require[s] parties to submit summary-judgment-type evidence relevant to the amount in controversy at the time of removal"); *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th Cir. 1997); *Evans v. Yum Brands, Inc.*, 326 F.Supp.2d 214, 220 (D.N.H. 2004).

Here, Defendants submitted no evidence, only a bare allegation that the amount in controversy exceeds the statutory requirement:

> 6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

28 U.S.C. § 1332(d)(6). But a bare allegation is insufficient to make a showing under the statute: "[t]he party with the burden of proof cannot rely on conclusory allegations in an affidavit." *Fair v. Swanson,* 753 F.Supp. 875, 877 (D. Colo. 1991). This Court has previously applied this rule in granting a motion to remand in *Coca-Cola Bottling of Emporia*, *Inc. v. South Beach Beverage Co., Inc.,* 198 F.Supp.2d 1280, U82-84 (D. Kan. 2002). *Coca-Cola Bottling* specifically held that, under a preponderance of the evidence standard, a conclusory affidavit was insufficient to satisfy a defendant's burden of proving the amount in controversy needed to establish diversity jurisdiction:

> SoBe also attached to its response the affidavit of Richard MacLean, Senior Vice President of

> Business Affairs of SoBe, stating that lost profits would be greater than $75,000. *The affidavit includes no underlying data, facts, figures or calculations in support of this blanket statement* . . . .
>
> The additional assertions and facts proffered in SoBe's later filed response to Coca-Cola's motion to remand are untimely; SoBe should have addressed the underlying facts and should have attached any supporting affidavits to its Notice of Removal. Even if the Court considered the additional information proffered in SoBe's response to Coca-Cola's motion to remand, the Court would conclude that SoBe failed its burden of proving that the amount in controversy exceeds $75,000. *SoBe did not provide any facts, figures, data or calculations supporting the blanket assertions* that Coca-Cola's minimum volume would result in profits exceeding $75,000 . . . *SoBe's affiant, Richard MacLean, failed to support his blanket statement about lost profits with any underlying data, facts, figures or calculations*.

*Id.* at 1282-84 (emphasis added). If a bare allegation in a sworn affidavit is insufficient, a bare allegation in an unsworn notice of removal must also be insufficient to establish subject matter jurisdiction.[2]

---

[2] Subject matter jurisdiction is a critical threshold issue:

> [F]ederal courts are courts of limited jurisdiction, and the parties cannot confer jurisdiction where it is lacking. If the court lacks subject matter jurisdiction, all rulings are a nullity, lacking any force and effect. . . . at some point the court will issue a ruling on the merits. That ruling will necessarily be adverse to one of the parties. At that point, losing counsel will be obligated to inform his or her client

This Court has recently so held in granting remand in *Butler v. Target Corp.*, No. 124092- SAC, 2012 WL 5362974 (D. Kan. Oct. 31, 2012) (slip op.). "Removal is proper on the basis of an amount in controversy asserted in the notice of removal if the district finds, by a preponderance of the evidence, that the amount in controversy exceeds the amount specified in" the governing statute. *Id.* at *3 (internal quotations omitted). In construing the recently enacted Federal Courts Jurisdiction and Venue Clarification Act of 2011 ("JVCA") and the Tenth Circuit's recent opinion in *Frederick v. Hartford Underwriters Ins. Co.*, 683 F.3d 1242 (10th Cir. 2012) (recognizing the JVCA "largely codified the holding of *McPhail")*[3], Judge Crow concluded Target's "conclusory allegations on the amount in controversy" in its notice of removal were insufficient under the JVCA and under Tenth Circuit law to meet its burden to establish jurisdictional facts by a preponderance of the evidence. *Butler*, 2012 WL 5362974, at *3 ("The defendant offers nothing from which the court would infer that these injuries, the expected medical treatment, the associated emotional distress and lost wages are of such seriousness that the total amount of money damages would be likely to exceed $75,000.00 . . . The

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> that a basis for appeal exists based on lack of subject matter jurisdiction.

*Boeing Wichita Credit Union v. Wal-Mart Real Estate Business Trust*, 370 F.Supp.2d 1128, 1129 (D. Kan 2005) (emphasis added).

[3] By its terms, the JVCA addresses diversity jurisdiction under 28 U.S.C. § 1332(a), not § 1332(d). But *Frederick* addresses CAFA diversity jurisdiction under 28 U.S.C. § 1332(d). Nothing suggests the two sections should be construed differently with respect to the legal analysis of the showing necessary to satisfy the statutorily prescribed amounts in controversy.

defendant must do more than point to the theoretical availability of certain categories of damages . . .”). The *Butler* court also found Target lacked an objectively reasonable basis for filing the notice of removal and stated it would award plaintiff fees and costs under 28 U.S.C. § 1447(c). *Id.* at 4-5. So it is here. Dart Cherokee's bare allegation that the amount in controversy exceeds the jurisdictional threshold in its notice of removal is insufficient to establish this Court's subject matter jurisdiction.

Nor can Defendants attempt to cure the insufficiency now.

> [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, and the Tenth Circuit reaffirmed this rule in *McPhail. McPhail*, 529 F.3d 947, 957 (10th Cir.2008); *Oklahoma Farm Bureau Mut. Ins. Co. v. JSSJ Corp.,* 149 Fed. Appx. 775 (10th Cir. Sep. 8, 2005); *Laughlin*, 50 F.3d at 873. In fact, the Tenth Circuit has expressly rejected the argument that a defendant may provide a post-removal economic analysis of the amount in controversy using facts outside of the petition or notice of removal. *Martin,* 251 F.3d at 1291 n. 4. . . . There are no cases suggesting that the Tenth Circuit would permit a defendant to amend its notice of removal to provide an economic analysis of the amount in controversy that was absent in the notice of removal, especially when the request to amend the notice of removal is made after the plaintiff files a motion to remand.”).

*Benefits Technologies*, *LLC v. Stanley*, *10-CV-0561-CVE-FHM*, 2010 WL 4736297 (N.D. Okla. Nov. 16, 2010).

IV. Conclusion

Defendants' notice of removal proves no jurisdictional facts, is deficient as a matter of law, and cannot be cured. Having failed to establish subject matter jurisdiction, Plaintiffs motion for remand must be granted.

Respectfully submitted,

/s/ Rex A. Sharp
Rex A. Sharp KS#12350
Barbara C. Frankland, KS#14198
Gunderson, Sharp & Walke, L.L.P.
5301 W. 75th Street
Prairie Village, KS 66208
(913) 901-0500
(913) 901-0419 fax

David E. Sharp KS #10624
Gunderson Sharp & Walke, LLP
712 Main Street, Suite 1400
Houston, TX 77002
(713) 490-3822
(713) 583-5448 fax
dsharp@midwest-law.com

John F. Edgar KS#18080
Edgar Law Firm LLC
1032 Pennsylvania Ave.
Kansas City, MO 64105
(816) 531-0033
(816) 531-3322 fax
jfe@edgarlawfirm.com

Grady Young KS#9000
714 Walnut
Coffeyville, KS 67337
(620) 251-9000
seklaw@seklaw.org

*Attorneys for plaintiffs*

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send notice of electronic filing to all counsel who have registered for receipt of the documents filed in this matter.

/s/ Rex A. Sharp

**APPENDIX H**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

[Filed 05/01/13]

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Case No. 12-CV-04157

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BRANDON W. OWENS, individually
and on behalf of all others
similarly situated,

*Plaintiffs*,

v.

DART CHEROKEE BASIN OPERATING CO. LLC,
AND CHEROKEE BASIN PIPELINE, LLC,

*Defendants*.

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DEFENDANTS' MEMORANDUM IN OPPOSITION
TO PLAINTIFF'S MOTION TO REMAND

Defendants Dart Cherokee Basin Operating Company, LLC ("DCBO") and Cherokee Basin Pipeline, LLC ("CBPL") submit this memorandum in opposition to Plaintiff Brandon W. Owens's Motion to Remand (Doc. 12). Defendants have established through the Notice of Removal (Doc. 1) and Plaintiffs Complaint that diversity jurisdiction exists pursuant to 28 U.S.C. § 1332(d) and, accordingly, this matter should remain in the United States District Court for the District of Kansas. In support, Defendants state the following:

## INTRODUCTION

Plaintiff is a royalty owner alleging that he is being underpaid for royalties from DCBO. Plaintiff is a Kansas citizen. Both defendants are citizens of other states. The Complaint alleges that, "Defendants operate over 500 wells in Kansas with one or more royalty owners for each well." *Complaint*, ¶ 15. In addition to himself, Plaintiff seeks to represent a class of similarly situated individuals. This class, as defined in the Complaint, would include "All royalty owners who were paid royalties from Dart Cherokee Basin Operating CO., LLC or Cherokee Basin Pipeline, LLC working interest Kansas wells from January 1, 2002 to the date of the Class Notice." *Complaint,* ¶ 12. Plaintiff did not include any information or allegation as to a total amount of damages sought nor did Plaintiff attempt to limit the damages sought. *See generally, Complaint.*

In the Notice of Removal (Doc. 1), Defendants set forth the parties' diverse citizenship and facts regarding the unstated amount in controversy based on the facts of Plaintiff's Complaint. Defendants set forth with specificity: the class period (over ten years), the number of wells (at least 700), the allegations regarding the alleged additional royalties owed arising from purportedly improper deductions, and that DCBO had undertaken initial efforts to quantify what additional royalties would be owed if the relief sought by Plaintiff was granted. These calculations, as set forth in the Notice of Removal, demonstrated that the relief sought would exceed $8.2 million. *Notice of Removal,* ¶¶ 9, 10, 12, 13, 14, and 15. This conservative figure even took into account the likelihood that the class would be unable to recover for the entire class period despite Plaintiff's allegations to the

contrary. *See Declaration of Charles E. Henderson*, attached hereto as Exhibit A, ¶ 7.

In his Motion to Remand, Plaintiff does not state that he is seeking less than the jurisdictional amount. Indeed, Plaintiff does not actually address Defendants' statements about the amount in controversy but half-heartedly categorizes Defendants' statements as "a bare allegation." As set forth more fully below, Defendants demonstrated with the Notice of Removal that the amount in controversy exceeds $5 million and no other basis exists for remand.

In additional support, Defendants attach the Declaration of Charles E. Henderson, *Exhibit A*, which further outlines the calculations initially conducted, those that now exist based on limited informal discovery, and the calculations performed by Plaintiff relating to the limited discovery. This additional information—all of which may be reviewed by the Court—further demonstrate that the amount in controversy exceeds $5 million. *See generally*, *Exhibit A.*

The calculations derived from the limited discovery are especially telling as the information produced was directly responsive to Plaintiff's requests. These calculations show that Plaintiff's claims for the entire class period far exceed the jurisdictional threshold. Plaintiff calculates damages of $21.5 million, which includes interest of $7.348 million. Plaintiff specifically claims underpaid royalty for the putative class in the amount of $10,427,969.01, a claim to improperly paid conservation fees totaling $97,816.33, and a claim for unpaid royalties due to shrinkage in the amount of $3,703,674.13. Without interest, Plaintiff's claims total $14,229,459, almost three times the jurisdictional threshold. *Exhibit A,* at ¶ 10. Moreover, the parties confirmed to the Court during a status

conference on April 30, 2013, that Plaintiff's settlement demands did not dip below the $5 million jurisdictional threshold during the course of mediation.

Plaintiff's motion to remand should be denied because Defendants have established, through the Notice of Removal, the face of the Complaint, and through limited discovery, that the amount in controversy exceeds $5 million.

## ARGUMENTS AND AUTHORITIES

### I. Standard of Review

Defendants removed this action pursuant to 28 U.S.C. § 1441 and 28 U.S.C. § 1332(d). Plaintiff alleges that the only defect in the removal lies with the amount in controversy. In reviewing a motion to remand, the removing party bears the burden in demonstrating that removal is appropriate. *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995). Refusing to set forth a monetary demand for damages is insufficient to prove that the amount in controversy cannot be met. *McPhail v. Deere & Co.,* 529 F.3d 947, 955 (10th Cir. 2008).

### II. Defendants Have Established that the Amount In Controversy Exceeds $5 Million Based on the Notice of Removal and the Face of the Complaint.

In determining the amount in controversy for an action removed pursuant to the Class Action Fairness Act ("CAFA," found in 28 U.S.C. § 1332(d)), the question is not how much the plaintiff will recover, but "an estimate of the amount that will be put at issue in the course of the litigation." *Frederick v. Hartford Underwriters Ins. Co.*, 683 F.3d 1242, 1245 (10th Cir. 2012). When, as here, the plaintiff does not seek to recover a specified amount of damages, it is

appropriate for the removing party to assert the amount in controversy. 28 U.S.C. § 1446(c)(2). It is also appropriate for the Court to evaluate the amount in controversy based on the face of the Complaint. *McPhail v. Deere & Co.*, 529 F.3d 947, 955-56 (10th Cir. 2008)

In *Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536, 541-42 (7th Cir. 2006), the court set out what a removing defendant can do to establish the amount in controversy: "We have suggested several ways in which this may be done—by contentions, interrogatories or admissions in state court; by calculation from the complaint's allegations; by reference to the plaintiffs informal estimates or settlement demands; or by introducing evidence, in the form of affidavits from the defendant's employees or experts, about how much it would cost to satisfy the plaintiffs demands." (internal citations omitted).

The Federal Courts Jurisdiction and Venue Clarification Act of 2011 ("JVCA") amended 28 U.S.C. § 1446 regarding the procedure for removal and, as set forth above, specifically addresses removal based on diversity jurisdiction. Section 1446(c)(2) states:

> 2) 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).

In *Frederick vs. Hartford Underwriters Ins. Co.*, 683 F3d. 1242, (10th Cir. 2012) the Court of Appeals for the Tenth Circuit reaffirmed *McPhail* and extended the rationale to class actions under CAFA stating:

> We join the latter set of courts, and hold that a defendant seeking to remove under CAFA must show that the amount in controversy exceeds $5,000,000 by a preponderance of the evidence. In doing so, we extend our precedent in *McPhail* to the CAFA context and align ourselves with the majority of other circuits which have adopted the preponderance standard. *See generally, McPhail*, 529 F.3d at 954-55 (explaining the rationale behind the preponderance standard). Specifically, we agree that there is "no logical reason why we should demand more from a CAFA defendant" than other parties invoking federal jurisdiction. *Bell*, 557 F.3d at 957. This is especially so in light of the recently passed JVCA, which largely codified the holding *of McPhail. See* Pub. L. No. 112-63, 125 Stat. 758 (2011). By adopting the preponderance standard, we ensure that defendants seeking removal face the same burden regardless of whether they are invoking simple diversity jurisdiction or CAFA jurisdiction.

*Id.* at 1246-47.

In the instant case, the Petition filed in state court contained no allegation as to the amount in controversy or any claim as to the amount of damages being claimed. Under the JVCA therefore Defendants were entitled to assert the amount in controversy as part of their Notice of Removal which they did. The amount so asserted, as can be seen from the facts asserted in the Notice of Removal and herein will either be uncontested or is, at a minimum, sufficient to establish the operative jurisdictional facts by a preponderance of the evidence. *Id.* at 1248.

Defendant relies on inapplicable cases. In *Laughlin*, the removing defendant did not set forth an amount in controversy but incorporated by reference the plaintiff's demand for relief: "in excess of $10,000 for each of two claims." *Laughlin*, 50 F.3d at 873. Without more in the notice of removal, the defendant could not establish that the amount in controversy requirement had been met. *Id.* Similarly, in *Butler v. Target Corp.*, 2012 WL 5362974 (D. Kan. Oct. 31, 2012), the defendant failed to establish *an* amount in controversy because the defendant did not set forth any allegations that the amount in controversy exceeded the sixty-thousand dollar demand in the plaintiff's complaint when 28 U.S.C. 1446(c)(2) states that "the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy . . . ."

The allegations of the complaints alone in both *McPhail* and in *Luckett v. Delta Airlines*, *Inc.*, 171 F.3d 295 (5th Cir. 1999) were sufficient for the courts to find that the amount in controversy exceeded the jurisdictional threshold for diversity jurisdiction. In *McPhail*, the plaintiff alleged in the complaint that she was seeking to recover for her husband's "'severe

bodily injuries' which in turn led to 'permanent and progressive injury' and his 'wrongful death.'" *Luckett*, 171 F.3d at 957. The plaintiff also incorporated the applicable wrongful death statute and any relief available under that statute. *Id.* The statute provided for recovery of "medical and burial expenses, the loss of consortium and the grief of the surviving spouse, the mental pain and anguish suffered by the decedent, pecuniary loss based on earning capacity, and grief and loss of companionship; it also permits an award of punitive damages." *Id.* The court determined that from the complaint alone, that the amount in controversy exceeded the jurisdictional amount despite the absence of an allegation as to the amount of recoverable damages. *Id.*

In *Luckett*, the complaint included a demand for damages for "property, travel expenses, an emergency ambulance trip, a six day stay in the hospital, pain and suffering, humiliation, and her temporary inability to do housework after the hospitalization." *Luckett*, 171 F.3d at 298. Without more, this alone was sufficient to establish that the amount in controversy threshold had been met. *Id.*

Here, because Plaintiff made no monetary demand for damages in the initial Petition, Defendants set forth in the Notice of Removal the amount of damages they determined were placed in dispute and claimed by the Plaintiff class, based on the complaint's allegations and provided the Court with additional facts supporting their assertion that the amount in controversy exceeds $5 million. Defendants provided sufficient information in the Notice of Removal, whether under *Meridian*, *McPhail* or the JVCA to demonstrate that the amount in controversy requirement has been met.

When evaluating the face of Plaintiff's complaint alone, it is also apparent that the amount in controversy requirement has been met. Plaintiff alleged class-wide damage for over a decade for over 500 wells from which royalties for natural gas were underpaid. Similar cases have been brought with frequency (by Plaintiff's counsel) in the state and federal courts of Kansas, with settlements confirmed in amounts frequently exceeding $5 million. *See e.g.*, *Eatinger v. BP America Production Co.*, Case No. 07-1266-EFM-KMH pending in the United States District Court for the District of Kansas, wherein a class settlement was approved that included a cash payment of $19 million; *Hershey v. ExxonMobil Oil Corp.*, Case No. 07-1300- JTM-KMH pending in the United States District Court for the District of Kansas, wherein a class settlement was approved that included a cash payment of $54 million. The amount in controversy has been met as demonstrated by the face of Plaintiffs complaint alone and Plaintiff's counsel has not and cannot in good faith deny that fact to the Court.

III. Defendants' Supplemental Information May Be Considered by the Court and Further Demonstrates that the Jurisdictional Amount Has Been Met.

Plaintiff states in his Motion to Remand that any attempt to supplement the Notice of Removal would be moot, citing an unpublished district court opinion from Oklahoma. This is simply not the law. Since filing the original motion to remand, both parties have had an opportunity to more fully evaluate the amount at issue for the putative class.

In *McPhail*, the court highlighted the difficulty a defendant faces when a plaintiff fails to demand a set

amount of relief but defendants have an immovable deadline for the time to remove a matter to federal court. Citing *Meridian Security Ins. Co. v. Sadowski*, 441 F.3d 536, 540-43 (7th Cir. 2006), the *McPhail* court identified that in addition to any calculations based on the complaint's allegations, a party may reference the plaintiffs non-numerical allegations and settlement demands or request use of the discovery process prior to a court ruling on a motion to remand so that limited discovery may be completed for the purposes of establishing the amount in controversy. *McPhail*, 529 F.3d at 954. ("We also note that to the extent that a defendant must rely on the federal discovery process to produce this evidence . . . he may ask the court to wait to rule on the remand motion until limited discovery has been completed . . ."). Here, the parties received a stay of this case while engaging in early settlement negotiations, which included limited discovery. This discovery supports the information outlined in the declaration attached hereto, which confirms that the amount in controversy exceeds $5 million.

*McPhail* also elaborates on the use of information from settlement discussions for the limited purposes of establishing the amount in controversy:

> Furthermore, a plaintiffs proposed settlement amount "is relevant evidence of the amount in controversy if it appears to reflect a reasonable estimate of the plaintiffs claim." *Cohn v. Petsmart, Inc.,* 281 F.3d 837, 840 (9th Cir.2002). Acknowledging that the use of a settlement offer would not be permissible at trial as evidence to establish "'liability for or invalidity of the claim or its amount,'" the Ninth Circuit has held that it is permissible for a district court to consider

> settlement offers when deciding the jurisdictional question. *Id.* at n. 3 (quoting Fed.R.Evid. 408). We agree. The amount in controversy is not proof of the amount the plaintiff will recover. Rather, it is an estimate of the amount that will be put at issue in the course of the litigation. To this end, documents that demonstrate plaintiffs own estimation of its claim are a proper means of supporting the allegations in the notice of removal, even though they cannot be used to support the ultimate amount of liability.

*McPhail,* 529 F.3d at 956.

Indeed, here, as outlined in the attached Declaration, the calculations prepared by Plaintiff's counsel, based on the information requested by Plaintiff to prepare for mediation and from which Plaintiffs settlement demands were formulated, show that the amount in controversy greatly exceeds the jurisdictional threshold. *See Exhibit A,* ¶¶ 9-10. As part of the mediation process DCBO agreed to and did provide Plaintiff's counsel with documentation necessary for Plaintiffs counsel to fully analyze the liability and damage issues involved. Plaintiff's counsel and/or his expert arrived at a damage figure in excess of $21.5 million, including interest. The methodology and spreadsheets setting forth this information laid out Plaintiffs calculation of damages, including their claim for underpaid royalty of $10,427,969.01 (plus interest of $5,362,997.22), their Conservation fee claim of $97,816.33 (plus interest of $42,354.30) and their shrinkage claim of $3,703,674.13 (plus interest of $1,942,726.45). *See Declaration of Charles E. Henderson, Exhibit A).* The sum of the claims of the Plaintiff class as computed by Plaintiff's counsel,

without interest, is $14,229,459, which is within 2% of the back of the envelope figure stated above.

While these calculations are not proof of what Plaintiff might recover through the course of this litigation, it does demonstrate Plaintiff's own estimation of his claims in light of the discovery that has occurred about the nature and amount of Plaintiffs claims. Plaintiff estimates damages of nearly $15 million without interest, three times the jurisdictional requirement. Counsel confirmed to the Court during status conference that settlement demands at mediation did not dip below the jurisdictional threshold for CAFA. The amount in controversy in this case exceeds $5 million. The parties are diverse. This case meets the requirements for this Court to exercise jurisdiction pursuant to 28 U.S.C. § 1332(d). Should any remaining doubt exist, the Court can conduct a hearing under Rule 12(b)(1) at which point the parties can present evidence regarding the amount in controversy and jurisdiction. *See McPhail*, 529 F.3d at 954.

IV. The Court Should Reject Plaintiff's Unfounded Attempts to Avoid Federal Jurisdiction.

After setting out in the Notice of Removal the amount in controversy along with the underlying facts to support this amount, and upon review of the face of the Complaint, it is clear that the amount in controversy has been met. In *McPhail v. Deere & Co.*, 529 F.3d 947, 955 (10th Cir. 2008), the court explained that "a plaintiff cannot avoid removal merely by declining to allege the jurisdictional amount." Declining to allege the jurisdictional amount or otherwise blurring the jurisdictional amount for the purpose of forum shopping has repeatedly been rejected by the courts when a plaintiff seeks remand.

Plaintiffs are not permitted to avoid federal jurisdiction while still seeking to recover more than the jurisdictional threshold for diversity jurisdiction — they simply cannot have it both ways.

Let there be no doubt - that is exactly what Plaintiff's counsel in this case is trying to do. This is not Plaintiff's counsel's first royalty-owner class action lawsuit. In fact Plaintiff's counsel has made somewhat of a cottage industry of bringing class action claims on behalf of oil and gas royalty interest owners, and has consistently sought to avoid Federal courts. To do so, Plaintiff's counsel has set forth contingent damage demands or, as here, refused to set forth any amount as a demand. In one such instance Plaintiff's counsel filed two separate class action lawsuits in the same Kansas state court against the same defendants alleging different breaches of the same oil and gas leases on behalf of the same class of royalty owners. In *"Eatinger I" (Eatinger v. BP America Production Co.,* 524 F. Supp. 2d 1342 (D. Kan. 2007)), the class claims involved an alleged underpayment of royalties due to "self-dealing", the use of affiliate pricing to determine royalties. *Id.* at 1343. In *Eatinger I* the Plaintiff's state court petition stated with respect to the amount in controversy that:

> Plaintiff does not claim individually any damages in excess of $75,000 (including any damages or attorneys fees, prorated), and do not make a claim under any federal law. The entire class-wide damages may be less than $ 5 million.

*Id.* at 1348.

BP subsequently removed *Eatinger I* to Federal Court under the Class Action Fairness Act and

diversity jurisdiction. Notwithstanding the above allegation in the Petition, BP did its own calculation of the damages being sought by the class, based on the claims in the Petition and indicated in the Notice of Removal that:

> [B]ased on plaintiff Eatinger's proposed class definition, [BP] has calculated the minimum [3] amount of total royalty payments alleged to be in controversy to be at least $ 693,000,000. Therefore, unless plaintiff Eatinger is claiming less than a .7215009% underpayment of royalty on behalf of the proposed class, the amount in controversy exceeds $ 5,000,000.

*Id.* at 1344.

In attempting to remand *Eatinger I,* plaintiff's counsel "simply pled that the claims `may' be less than the required amount amount-in-controversy." *Id.* at 1348. He did not concretely claim less than the jurisdictional amount and he refused to stipulate to an amount in controversy below the jurisdictional threshold for the named Plaintiff or for the putative class. *Id.* at 1343. In finding remand was improper in *Eatinger I,* the court noted:

> [I]t appears that plaintiff is now attempting to have it both ways, in that it would like to remain in state court by pleading an amount below the requisite amount in controversy individually, while leaving the door open for the class to seek damages above the jurisdictional amount. This indecisive and ambiguous language is not sufficient to close the door to the federal courts.

*Id* at 1348.

Some four months after *Eatinger I* was filed, and while the motion to remand in *Eatinger I* was pending, the same counsel who filed *Eatinger I* (and this case) filed a second class action claim *("Eatinger II")* in the same Kansas state court on behalf of the same Plaintiff and Plaintiff class and against the same defendants. *Eatinger v. BP America Production Co.,* 2008 WL 4163250 (D. Kan. Aug. 26, 2008). *Eatinger II* involved claims that BP had breached its oil and gas leases by taking improper deductions, as opposed to the use of affiliate pricing. The Petition in *Eatinger II* replicated the claim in *Eatinger I* "that class-wide damages for unpaid royalties "may be less than $5 million." *Id.* After the Federal court issued an order denying the Motion to Remand in *Eatinger I* Plaintiff's counsel filed a First Amended Petition in *Eatinger.* The Court identified that the only difference between the original and first amended petition was that:

> Eatinger replaced the "may be less than $5 million" language with:
>
> Class-wide, Plaintiff does not seek or claim, based on presently available information, any right to recover in excess of $5 million. Should that information change, Plaintiff, on behalf of the class, will move for leave to amend to seek in excess of $5 million and consent to removal of this class action under the Class Action Fairness Act (since there is no 1 year removal time limit on CAFA diversity removal).

*Id.* at *1. Defendant BP removed the second action (as amended) to Federal court and then moved to consolidate the cases. Plaintiff's counsel again sought remand. The Plaintiff's attempts to work around federal jurisdiction were similarly inadequate. *Id.* Merely stating that the plaintiff does not presently

seek an amount in excess of the jurisdictional threshold, but will amend should it decide to do so is not a waiver of any right to recovery nor sufficient to provide the court with information that the amount in controversy is less than the jurisdictional amount. *Id.* at *2. In ruling on the motion to consolidate, the court also noted that the two cases, though they did contain minor differences, were clearly "closely related, triggering the application of the single-action rule, which is designed to 'protect the defendant from the necessity of litigating similar claims in separate actions.'" *Id.* at *3 (citing *Oxbow Energy v. Koch Industr.*, 686 F. Supp. 278, 282 (D. Kan. 1988)). The only rationale the court could discern for bringing two separate actions initially was the Plaintiff's "desire to evade both the single-action requirement and the jurisdictional standards of CAFA." *Id.* Indeed, despite Plaintiff's counsel's protestations that the amounts in controversy in both of the *Eatinger* cases "may" be less than the jurisdictional amount, the matter settled with a $19 million cash payment.

Plaintiff's counsel knows exactly how to plead his claim if he wants to preclude removal to Federal Court and avoid diversity jurisdiction and CAFA, as anyone who reads *Eatinger I* and *Eatinger II* knows. Notwithstanding that, Plaintiff's counsel did not state in the Petition filed in this matter that the claims involved were less than the jurisdictional threshold for diversity and CAFA, or even that the claims "may be" less than that amount. As the Court noted in *Eatinger II:*

> Certainly, as Eatinger stresses, the plaintiff is the "master" of his complaint. *Brill v. Countrywide Home Loans, Inc.,* 427 F.3d 446, 449 (7th Cir. 2005). But, where he uses that mastery to

> create mere ambiguity and evasion, he cannot be heard to complain too loudly. The court has previously noted, in *Eatinger I,* that the plaintiffs "indecisive and ambiguous language is not sufficient to close the door to the federal courts."

*Id.* at *2.

Here, Plaintiff's counsel has simply refused to state the amount in controversy in the Petition in an effort to avoid federal jurisdiction, and then in response to the Removal Notice has not attempted to stipulate or state that the damages sought by the Plaintiff class are below the jurisdictional threshold, or to provide any calculation to the Court to establish that his damage claim is in fact below the jurisdictional limit, but rather he has only argued that Defendants have not done enough to establish the amount in controversy.

As set forth above, the Notice of Removal and the face of the Complaint demonstrate that the amount in controversy exceeds $5 million. Faced with a Petition that contained no damage amount the Defendants were placed in a position of trying to determine what Plaintiff was seeking to recover. Based upon the allegations of the Petition it was possible to come up with a preliminary, "back of the envelope" damage analysis using total royalties paid, adjusting for the applicable contract rate, and further adjusting for the lost shrinkage amount. That analysis generated a damage figure of more than $14.5 million. *See Declaration of Charles E. Henderson, Exhibit A,* ¶¶-5-6. Defendants continued to gather data and did a formal economic analysis of the damage claim. This analysis *(id.* at Exhibit A thereto) determined that the damages claimed by Plaintiff class amounted to $11,866,260.25. If those "damages" which occurred

outside of the five-year period before the date of the filing of the Plaintiffs Petition are excluded the total damages claimed by Plaintiff class would be $8,224,798.62. *Id.* In the Notice of Removal, Defendants alleged that the damages claimed were "at least $8.2 million". This was not a number that was pulled out of thin air, it was in fact a very conservative number based on the analysis shown above.

The Notice of Removal and the statement contained therein that the amount in controversy is "at least $8.2 million" alone clearly satisfies the requirement for removal jurisdiction. In *McPhail,* the 10th Circuit acknowledged that a defendant may "rely on an estimate of the potential damages from the allegations in the complaint" alone to establish federal jurisdiction. *McPhail*, 529 F.3d at 956.

As noted in Section III, *supra*, the amount in controversy requirement can also be satisfied "by reference to plaintiff's informal estimates or settlement demands." *Id.* at 954. Such a rule is consistent with not allowing Plaintiff's counsel to "have it both ways" as the judge noted in *Eatinger I.* 524 F. Supp. 2d at 1348. Here Plaintiff's counsel's own damage calculations show in reality the amount in dispute is almost $15 million.

## CONCLUSION

The initial notice of removal and a review of the face of the Complaint, coupled with the discovery conducted since the start of this suit, are more than sufficient to meet the removal requirements. As the *McPhail* court stated, once the facts supporting federal jurisdiction are presented the case will remain in federal court unless it is legally certain that less than the jurisdictional amount is in controversy. 529 F.3d

at 954. Plaintiffs counsel's attempts to avoid federal jurisdiction should be rejected. The facts set forth herein and the attachments hereto clearly meet the requirements of *McPhail*. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332(d) and Plaintiff's motion to remand should be denied.

Defendants properly removed this matter to federal court pursuant to this Court's ability to exercise jurisdiction under 28 U.S.C. § 1332(d). Accordingly, this Court should deny Plaintiffs Motion to Remand.

Submitted this 1st day of May, 2013.

Respectfully submitted by:

Morris, Laing, Evans, Brock & Kennedy, Chtd.

/s/ Julia Gilmore Gaughan
Jeffery L. Carmichael, KS #11085
Will B. Wohlford, KS #21773
300 N. Mead, Suite 200
Wichita, KS 67202
(316) 262-2671
jcarmichael@morrislaing.com
wwohlford@morrislaing.com

and

Julia Gilmore Gaughan, KS #23919
800 SW Jackson St., Suite 1310
Topeka, KS 66612-1216
(785) 232-2662 Fax: (785) 232-9983
jgaughan@morrislaing.com

*Attorneys for Dart Cherokee Basin Operating Co., LLC and Cherokee Basin Pipeline, LLC*

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of May, 2013, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send notice of electronic filing to all counsel who have registered for receipt of the documents filed in this matter.

/s/ Julia Gilmore Gaughan

**APPENDIX I**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

[Filed 5/1/13]

———

Case No. 12-CV-04157

———

BRANDON W. OWENS, individually
and on behalf of all others
similarly situated,

*Plaintiffs*,

v.

DART CHEROKEE BASIN OPERATING CO. LLC,
AND CHEROKEE BASIN PIPELINE, LLC,

*Defendants.*

———

DECLARATION OF CHARLES E. HENDERSON

The undersigned, of lawful age deposes and states as follows:

1. My name is Charles E. Henderson and I am the Vice President of Legal Affairs and General Counsel for Dart Oil. & Gas Corporation, which is the sole member of Dart Cherokee Basin Operating Company, LLC ("DCBO") and the Manager of Cherokee Basin Pipeline, LLC ("CBPL"), the defendants in this matter. I have held that position since July, 1999.

2. As set forth in the Notice of Removal, upon service of the Complaint in this Matter the undersigned commenced a determination as to whether this matter was eligible for removal to

Federal Court. Because the Complaint did not specify. the amount in dispute DCBO undertook to quantify the amount of damages at issue in this case based on the allegations of the Complaint, including but not limited to the allegations that DCVO (a) pays royalties based upon a below market price; (b) improperly deducts charges from the sales price for costs associated with gathering, compression, dehydration, and/or treatment before computing royalties; and (c) improperly shifts a portion of the conservation fee to royalty owners.

3. The Complaint alleges that the Plaintiff class is entitled to damages for the period from "from January 1, 2002 to the date of the Class Notice" (see Complaint paragraph 12). This is a period of almost 11 years as of the tiling of the Complaint and continues to increase as the litigation continues. DCBO in computing the amount put in dispute by Plaintiff's complaint calculated damages from June 1, 2002, to the present. DCBO did not have an interest in the leases at issue until June 1, 2002 so it has no records and paid no royalties prior to that date.

4. In calculating the damages claimed by Plaintiff class, DCBO initially identified over 700 leases that were included within the proposed class, although continued review subsequently determined that 744 leases were at issue.

5. CBPL, pays DCBO a purchase price based on 75% of the price CBPL receives when it resells the gas to another purchaser. DCBO in tarn pays royalties to the Plaintiff class based upon the amount it receives from CBPL. The Plaintiff class had received royalties for the period June

1, 2002 to June 1, 2012 in the amount of $33,115,144.88 (see spreadsheet attached as Exhibit A). Assuming, as Plaintiff alleges, that the royalty paid to the Plaintiff class should have been calculated on 100% of the CBPL proceeds and not 75%, using a "back of the envelope" calculation, the Plaintiff class was underpaid by approximately $11 million [$33,115,144.88 divided by 75%= $44,153,525-$33,115,144= $11,038,381].

6. An additional component of the Plaintiff class' underpayment of royalty claim is for the "shrinkage" (primarily the amount of raw gas that is used to run compressors and treatment equipment between the point of purchase by CBPL and resale that is not available for re-sale by CBPL) that was allegedly improperly deducted from or not paid as part of the royalty payments to the Plaintiff class. Shrinkage has averaged just over 8% over the claim period. Using the same back of the envelope analysis the claim for shrinkage is approximately $3,520,000 [$44,153,525 x 8%= $3,52.0,000]. When combined with the prior underpaid royalty amount the amount of the Plaintiff class' claim, based on the allegations of the Compliant, was - estimated at $14,520,000 for purposes of the amount in controversy analysis.

7. After doing the back of the envelope analysis, but before the filing of the Notice of Removal, DCBO was able to locate and analyze actual production and sales data for the period in question and to run a formal economic analysis of the potential damages being claimed by the Plaintiff class, assuming for purposes of the analysis that all

allegations of the Complaint are correct. Based on those assumptions it was determined that the amount in controversy for the five year period prior to the filing of Plaintiffs' Petition, which Defendant's believe is the applicable period for Statute of Limitation purposes, was $8,224,798,62 and $11,866,260.25 would have been due for the entire 10 year-period claimed by Plaintiff class (computed through June 2012 production and payment records, the most recent figures then available. (see spreadsheet attached as Exhibit A). The actual amount through the date of filing would be greater in both instances).

8. The Complaint claims entitlement to damages for a period of almost eleven years prior to the filing of the Complaint as well as for prospective damages. The Defendants believe that at most Plaintiff would be able to recover for the five-year period prior to filing suit to present due to the five-year statute of limitations applicable to any claims of Plaintiff class herein. A motion dismiss Plaintiffs claims for damages accruing more than five years prior to the filing of the Complaint was filed (Document No. 9) and will be re-filed once jurisdiction is resolved. In the Notice of Removal (Document No. 1) the amount in controversy was stated to be "in excess of $8.2 million" (Document No. 1, paragraph 16). This figure was based upon the Defendant's estimate of the damages claimed by the Plaintiff class for only the five year period prior to the filing of the complaint, a very conservative approach, rather than the ten year period the Plaintiff class is actually claiming. Had the entire period been used in the Notice of Removal, the amount in controversy; as

calculated at that time, would have been $11,866,260.25 (as shown in Exhibit A).

9. A short time after removal the parties agreed to pursue early settlement negotiations by means of a facilitative mediation. To make this mediation meaningful DCBO agreed to provide Plaintiff's counsel with documentation he felt would be necessary to allow him to be in a position to fully analyze the liability and damage issues involved. Plaintiff's counsel was in fact provided with all of the information he requested (see his request attached as Exhibit B) and based on that information would have been and apparently was able to compute the damages being claimed by the Plaintiff class.

10. By the time of the mediation (April 4, 2013) Plaintiff's counsel and/or his expert had in fact arrived at a damage figure which was in excess of $21,5 million, which figure included interest of $7.348 million (calculated at 10% per year over the 10 year period), and from which a settlement demand was derived. The methodology for arriving at this number was explained in "Exhibit E Part 4" of materials supplied by Plaintiff's counsel (See Exhibit C). The three spreadsheets also provided as part of Plaintiff's mediation statement (Parts 1,2, and 3 to Exhibit E to the Mediation Statement), laid out Plaintiff's calculation of damages, including the claim for underpaid royalty of $10,427,969.01 (plus interest of $5,362,997.22), the Conservation fee claim of $97,816.33 (plus interest of $42,354.30) and the shrinkage claim of $3,703,674,13 (plus interest of $1,942,726.45). Copies of the last page of Parts 1, 2 and 3 of

Exhibit E (each of which are 70,000+ line long spreadsheets) are attached as Exhibits D, F. and F respectively. The sum of the claims of the Plaintiff class, without interest, is $14,229,459, which is within 2% of the back of the envelope figure stated above. These figures are both almost three times the $5 million jurisdictional limit without even considering interest.

11. I declare under penalty of perjury that the above and foregoing is true and correct.

Further affiant sayeth not.

Date: April 30, 2013

/s/ Charles E. Henderson
Charles E. Henderson

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Dart/Cherokee

After reviewing the documents and spreadsheet provided, the following steps were taken to calculate various deductions made to the royalty owners' revenue.

LOST, FUEL & UNACCOUNTED for gas (LF&U)

1. The data from files Bates stamped DART 000542 through DART 000552 were combined into one database.
2. The Gas Sales Volume Allocations were then subtracted from the Integrated Prod Gas Volumes to obtain the LF&U volumes for each well for each month. The resulting volumes are contained in Column F of the attached file titled DART LF&U Calculation.
3. The Southern Star Index price was used to value the gas. During the handful of months that no price was available for Southern Star, PEPL Index price was used.
4. The LF&U volume was the multiplied by the Index price and by an assumed royalty percentage of 12.5%. The results are the monetized value of the royalty owners' share of the LF&U. This data is in Column H of the attached file. Interest calculated at 10% simple is in Column L.

SALES VOLUME RETAINAGE

1. After reviewing the contracts supplied, I have concluded that most if not all of the gas produced and sold by Dart/Cherokee was on the basis of 70% of the WASP for the volume left after FL&U before November 1, 2003 and 75% of the WASP

for the volume left after LF&U after November 1, 2003.

2. Data from the above mentioned files were combined and organized into a file that contains the gas sales allocated volumes for each well for each month. This data is shown in Column D of the attached file titled DART RETAINAGE Calculation.

3. The Southern Star Index price was used to value the gas. During the handful of months that no price was available for Southern Star, PEPL Index price was used.

4. The gas sales volume was multiplied by the Index price and by the retainage percentage and by an assumed royalty percentage of 12.5%. The results are the monetized value of the royalty owners' share of the volume and value retained by the gatherer/purchaser for the services provided. This data is in Column F of the attached file. Interest calculated at 10% simple is in Column J.

CONSERVATION FEE

1. Data from the above mentioned files were combined and organized into a file that contains the gas sales allocated volumes for each well for each month. This data is shown in Column D of the attached file titled CONSERVATION FEE Calculation.

2. The Kansas Conservation fee of $0.00913 per mcf prior to January 1, 2007, and $0.0129 per mcf after January 1, 2007, was entered into Column E.

3. The gas sales volume was multiplied by the conservation fee and then by an assumed royalty rate of 12.5%. The results are the conservation fee deducted from the royalty owners for each well by month. This calculation is in Column F of the attached file. Interest calculated at 10% simple is in Column J.

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**APPENDIX J**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

[Filed 05/13/13]

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Case No. 12-CV-04157

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BRANDON W. OWENS, individually
and on behalf of all others
similarly situated,

*Plaintiffs*,

v.

DART CHEROKEE BASIN OPERATING CO. LLC,
AND CHEROKEE BASIN PIPELINE, LLC,

*Defendants*.

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PLAINTIFF'S REPLY IN SUPPORT OF
REMAND TO STATE COURT

Defendants' Notice of Removal submitted no evidence to prove its assertion that $5 million or more was in controversy, a prerequisite to federal subject matter jurisdiction under 28 U.S.C. § 1332(d). Acknowledging this fatal deficiency, Dart[1] attempts to cure it by filing, with its response to plaintiff's motion to remand (Dkt. 23), the Declaration of Charles E. Henderson ("Henderson Decl.", Dkt, 23-1). Dart euphemistically characterizes the Henderson Declaration as "additional support" for its removal

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

(Dkt. 23 at 2-3) when the Declaration is the *only* evidence submitted in support. But, as this Court has found, Tenth Circuit law is clear that such belated attempts to bolster a deficient notice of removal are insufficient. *See* Pl. Mem., Dkt. 13 at 6.

1. Tenth Circuit law requires remand.

Dart cites not one case that permits late submission of evidence to cure a deficient Notice of Removal filed five months earlier. *See* Dkt. 23 (filed May 1, 2013) and Dkt. 1 (filed Dec. 5, 2012). This is because Tenth Circuit authority prohibits consideration of "factual allegations or evidence outside of the petition and notice of removal" to "determine the amount in controversy." *Benefits Technologies, LLC v. Stanley*, 10-CV05610-CVE, 2010 WL 4736297 (N.D. Okla. Nov. 16, 2010) (citing *McPhail v. Deere Co*., 529 F.3d 947, 953 (10th Cir. 2008)[2]; *Oklahoma Farm Bureau Mut. Ins. Co. v. JSSJ Corp*., 149 Fed. Appx. 775 (10th Cir. Sept. 8, 2005); *Laughlin v. Kmart Corp.,* 50 F.3d 871 (10th Cir. 1995); and *Martin v. Franklin Capital Corp.*, 251 F.3d 1284 (10th Cir. 2001)). Dart's attempt to dismiss this authority as "an unpublished district court opinion" from Oklahoma, Dkt. 23 at 8, disregards

[2] Dart quotes the Federal Courts Jurisdiction and Venue Clarification Act of 2011 ("JVCA") which codified the holding in *McPhail* that jurisdictional facts must be proven by a preponderance of the evidence. Dkt. 23 at 5. The JVCA specifies that "the notice of removal may assert the amount in controversy" and says removal is proper "if the district court finds, by preponderance of the evidence, that the amount in controversy exceeds" the jurisdictional minimum. The JVCA does not say that post-removal evidence can be considered in determining whether the removing party met its burden to prove jurisdictional facts at the time of removal.

the controlling Tenth Circuit authority on which the opinion relies.

Add to this body of Tenth Circuit law the recently decided *Frederick v. Hartford Underwriters Ins. Co.*, 683 F.3d 1242 (10th Cir. 2012), which Dart cites at Dkt. 23 at 4-5, and which further supports remand in this case.

> In analyzing the propriety of removal, we have held that "[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 [the jurisdictional minimum]." *Laughlin v. Kmart Corp.,* 50 F.3d 871, 873 (10th Cir.1995) (quotation omitted).

*Frederick,* 683 F.3d at 1245 (emphasis added). In *Frederick,* the Tenth Circuit "squarely" held that the removing party "must show by a preponderance of the evidence that the amount in controversy exceeds the amount in § 1332(d)—currently $5,000,000." *Id.* at 1244. Where "plaintiff requests undefined damages or damages below the jurisdictional minimum", "the defendant must 'prove...jurisdictional facts by a preponderance of the evidence' to remain in federal court." *Id.* at 1245-46. In *Frederick,* the removing party Hartford attempted to satisfy its burden by submitting *with the notice of removal itself* the affidavit of a Hartford employee who calculated the amount in controversy to be over $5,000,000. *Id.* at 1245. The Tenth Circuit reversed the order granting remand because the district court treated Frederick's complaint for $4,999,999.99 as dispositive without evaluating Hartford's "notice of removal or the evidence submitted supporting jurisdiction." *Id.* at 1248. It remanded the case for reevaluation of the

Hartford affidavit in light of *Frederick*. Here, unlike Hartford, Dart submitted no evidence to prove jurisdictional facts with its Notice of Removal. Under *Frederick,* the most recent Tenth Circuit authority and the body of Tenth Circuit law on which it is premised, Dart failed to meet its burden to establish jurisdictional facts; and the case must be remanded for lack of jurisdiction.

2. Neither the petition nor the notice of removal prove jurisdiction.

To avoid remand, Dart claims the Court can piece together from allegations in the petition and in its Notice of Removal that more than $5 million was in controversy at the time of removal. Dkt. 23 at 2 (identifying the class period, the number of wells, allegations about the underpayment of royalties, and its conclusion that more than $5 million was in controversy). But the only documents filed with Dart's Notice of Removal were copies of the summonses and class action petitions served on each of the respective defendants and the 14 Day Clerk's Order extending Dart's time in which to answer or otherwise plead. Dkts. 1, 1-1, 1-2 & 1-3. From these documents, Dart asks the Court to presume the truthfulness of its assertion in the Notice of Removal that "the amount of additional royalty sought is in excess of $8.2 million", Dkt. 1, ¶15 (no citation to evidence). But, as *Frederick* held, the removing party must prove jurisdictional facts where, as here, the petition is silent as to the amount in controversy. Dkt. 13 at 2, ¶ 4; Dkt. 23 at 5 ("In the instant case, the Petition filed in state court contained no allegation as to the amount in controversy or any claim as to the amount of damages being claimed."). The record shows Dart offered no evidence of underlying facts with the Notice of

Removal to support its assertion that more than $5 million was in controversy. Dart cannot meet an evidentiary burden when it provided no evidence in the Notice of Removal itself.

This Court so found in *Coca-Cola Bottling of Emporia, Inc. v. South Beach Bev. Co.*, 198 F.Supp.2d 1280, 1285-86 (D. Kan. 2002). Despite the block quotation from *Coca-Cola Bottling* in Plaintiffs motion to remand, Dkt. 13 at 4, Dart completely ignores the case in its response. Dkt. 23. This is because *Coca-Cola Bottling,* decided by Your Honor, disposes of the issue of whether Dart's belated declaration can remedy its fatally deficient Notice of Removal. "[A]s the Tenth Circuit noted in *Laughlin v. Kmart Corp.,* because jurisdiction is determined at the time of the notice of removal, *the movant must meet its burden in the notice of removal, not in some later pleading." Coca-Cola Bottling,* 198 F.Supp.2d at 1283 (declining to consider an affidavit submitted with the response to the motion to remand) (emphasis added).

The Tenth Circuit cited *Coca-Cola Bottling* in *Oklahoma Farm Bureau Mut. Ins. Co. v. JSSJ Corp*., 149 Fed. Appx. 775 (10th Cir. 2005) which reviewed the district court's award of attorneys' fees for wrongful removal under 28 U.S.C. § 1447(c). In affirming the fee award, the Tenth Circuit found no error in the district court's refusal to consider an "after-the-fact affidavit" or post-removal discussions about a stipulation as to the amount in controversy as "irrelevant".

> Neither Farm Bureau's petition nor JSSJ's notice of removal establishes the requisite jurisdictional amount in this case. As noted above, the petition complies with Oklahoma pleading requirements and, by requesting damages in excess of $10,000

> plus attorney fees, simply recites the necessary amount in controversy to invoke state district court jurisdiction. *See* Okla. Stat. tit. 12 § 2008 (A)(2). JSSJ's notice of removal states only that federal subject matter jurisdiction is available because Farm Bureau is seeking relief under MMWA and Farm Bureau's claim seeks "more than $1,000,000 in relief." Aplt.App. at 4. Neither of these two statements establish the assertion that the amount in controversy of the MMWA claim exceeds $50,000. [Footnote omitted] Because the allegations in the petition are not diapositive, it was up to JSSJ, "in the notice of removal itself, [to set forth] the *underlying facts* supporting [the] assertion that the amount in controversy exceeds $50,000." *Laughlin,* 50 F.3d at 873 (quotation omitted). This they failed to do. *Any additional matters in the record, including Mr. Capron's after-the-fact affidavit, Aplt.App. at 79-80, and Farm Bureau's attempt to formally stipulate to a $50,000 amount in controversy in its brief in support of its motion to remand, id. at 16, are inadequate to cure these deficiencies*. *See Martin v. Franklin Capital Corp.,* 251 F.3d 1284, 1291 n. 4 (10th Cir.2001) *(Martin I).*

*Oklahoma Farm Bureau,* 149 Fed. Appx. at 778 (emphasis added). Like JSSJ's notice of removal in *Oklahoma Farm Bureau* that asserted Farm Bureau's claim seeks "more than $1,000,000 in relief, Dart's Notice of Removal asserts that "the amount of additional royalty sought is in excess of $8.2 million". Dkt. 1, ¶ 15. No underlying facts are provided. Like JSSJ's notice of removal, this bare allegation is insufficient to prove the jurisdictional fact of the amount in controversy. Like JSSJ, Dart failed to meet its burden to prove this Court's jurisdiction on

December 5, 2012, when the Notice of Removal was filed; and the Henderson Declaration filed five months later on May 1, 2013, cannot change that. Nor can the post-removal settlement calculations or Plaintiff's Counsel's other royalty class action settlements be used to cure Dart's deficient Notice of Removal. This case should be remanded.

Realizing its predicament, Dart makes two arguments: I) Plaintiff does not now contest that the amount in controversy is more than $5 million; and 2) Plaintiff now knows the amount in controversy is more than $5 million so the Court should excuse Dart's evidentiary failure and find jurisdiction anyway. Both arguments are easily disposed of.

3. Dart, not Plaintiff, bears the burden to prove jurisdictional facts.

Dart strains to shift the burden to Plaintiff to contest the amount in controversy. Dkt. 23 at 2 (Plaintiff's motion to remand does not state he is seeking less than the jurisdictional amount), 8 (since filing of remand, parties have had time to more fully evaluate the amount in controversy), 13-14 (Plaintiff's counsel knows how to plead his claim to prevent removal). But, as shown above, the Tenth Circuit law places the burden to prove jurisdictional facts on the removing party. Dkt. 13 at 2-3, 13-14. Here, Dart, not Plaintiff, has the burden to show by a preponderance of the evidence the case involves more than $5 million in controversy. Its Notice of Removal did not do this which is why Dart belatedly filed the Henderson Declaration to try to avoid remand. But as in *Coca-Cola Bottling* and in *Oklahoma Farm Bureau,* "after-the-fact" developments are irrelevant because jurisdiction is determined at the time of removal.

4. Jurisdiction is determined at the time of removal so post-removal evidence is irrelevant.

Dart tries to excuse its deficient Notice of Removal with calculations provided in anticipation of the parties' confidential mediation session in early April 2013, long after any removal, and evidence in support, was due. Dkt. 23 at 3. Setting aside whether calculations provided as part of confidential settlement negotiations are admissible, Dkt. 23-1, ¶¶ 9, 10, Dart cannot use the mediation to belatedly develop evidence to support its assertion of the amount in controversy. It is simply too late. Defendant filed its Notice of Removal on December 5, 2012. Dkt. 1. Plaintiff filed its motion to remand on December 19, 2012, stating Dart failed to support its Notice of Removal with evidence of the amount in controversy. Thereafter, the parties agreed to mediation and moved to stay the case. Dkt. 14 (Dec. 21, 2012). The Court ordered the case stayed. Dkt. 16 (Jan. 16, 2013) (staying all pretrial proceedings including discovery). Dart then provided documentation to Plaintiff's counsel to permit analysis of the liability and damages issues involved. Dkt. 23-1, ¶¶ 9, 10. Thereafter, Dart used Plaintiff's calculations in its response to Plaintiff's motion to remand in trying to cure or disguise the deficiency in its Notice of Removal. Dart's response to the motion to remand was filed about one month after the April 4th mediation, on May 1, 2013. While intriguing, all of this is irrelevant because it all occurred long after Dart's removal of the case on December 5, 2012. *Coca-Cola Bottling,* 198 F.Supp.2d at 1283 ("because jurisdiction is determined at the time of the notice of removal, the movant must meet its burden in the notice of removal, not in some later pleading."); *see also, Oklahoma Farm Bureau,* 149 Fed. Appx. at 778. Dart

cannot use Plaintiffs settlement calculations created months after Dart filed its Notice of Removal to meet its burden to prove jurisdictional facts at the time of removal.

Dart cites *McPhail* and *Meridian Security Inc. Co. v. Sadowski*, 441 F.3d 536 (7th Cir. 2006) to justify its use of the calculations provided in anticipation of mediation to support removal. Dkt. 23 at 8. While the cases permit such use for jurisdictional purposes, the calculations or documents supporting plaintiff's proposed settlement amount still must be included with the Notice of Removal. The *McPhail* excerpt that Dart cites affirms "documents that demonstrate plaintiff's own estimation of its claim are a proper means of supporting the *allegations in the notice of removal."* Dkt. 23 at 9 citing *McPhail,* 529 F.3d at 956 (notice of removal incorporated emails and letters showing plaintiff attorney's valuation of the claim) (italics added). In *Meridian,* the Seventh Circuit merely suggests "plaintiff's informal estimates or settlement demands" as one way in which a defendant might satisfy its burden to prove jurisdictional facts. *Meridian,* 441 F.3d at 542. Nothing in either *McPhail* or *Meridian* supports the filing of a declaration five months after the filing of the notice of removal to provide, for the first time, evidence of the underlying facts supporting the removing party's calculation of the amount in controversy. In fact *Coca-Cola Bottling* and *Oklahoma Farm Bureau* hold to the contrary. *See* p. 4, *supra.* Nor does *McPhail* or *Meridian* require an evidentiary hearing under Rule 12(b)(1), as Dart suggests, to provide the removing party *another* opportunity to provide evidence it already had but did not submit with the Notice of Removal.

5. Dart cannot cure its legally deficient Notice of Removal with post-removal evidence about the amount in controversy.

Indeed, the Henderson Declaration shows Dart had the information at the time of the Notice of Removal but failed to offer it to prove the jurisdictional fact of the amount in controversy. Dkt. 23-1 at 1, ¶2, ¶4 ("initially identified over 700 wells"), ¶5 (gas from all 700 wells paid under same arrangement, royalties calculated the same way, class-wide damages can be proven), ¶6 (class-wide damages can be proven for shrinkage), ¶7 (Dart had actual production and sales data at the time of the notice of removal and ran a "formal economic analysis of potential damages"), ¶8 (accounting for statute of limitations affirmative defense done at time of removal to arrive at $8.2 million figure used in the Notice of Removal). So, although Dart suggests, by its citation to *McPhail,* that it had difficulty determining the amount in controversy because plaintiff did not specify the amount in his petition, that is just not so in this case as the Henderson Declaration demonstrates. Dkt. 23 at 8 (defendant faces difficulty when petition contains no statement of the amount in controversy), 14 (Dart had to determine damages Plaintiff was seeking to recover). Dart had the underlying facts but failed to submit evidence of them with its Notice of Removal; it cannot cure that deficiency now.

Taking a somewhat inconsistent tack, Dart suggests its belated filing of the Henderson Declaration results from the parties' further evaluation information and data it provided after removal and before the mediation. Dkt. 23 at 8. But again, "because jurisdiction is determined at the time of the notice of removal, *the movant must meet its burden in the notice of removal,*

*not in some later pleading." Coca-Cola Bottling,* 198 F.Supp.2d at 1283. So this post-removal conduct is irrelevant to Plaintiff's motion to remand.

Also irrelevant is Dart's use of Plaintiff counsel's settlements in other royalty underpayment class actions, *see* Dkt. 23 at 7.[3] These settlements are irrelevant to the question of whether Dart's unsupported statement that "$8.2 million" was in controversy in its Notice of Removal satisfied its burden to prove by a preponderance of evidence the amount in controversy. Under the case law cited above, it does not.

Similarly, Dart's recitation of the procedural history in *Eatinger v. BP America Production Company* at 11-13 is irrelevant. Remand in BP was denied because BP's calculation of damages appeared in its Notice of Removal. Dkt. 23 at 11. BP complied with the law by submitting evidence to prove the amount in controversy. BP did not rest solely on the allegations in the petition or one sentence in its Notice of Removal without citation to evidence. It proved the jurisdictional fact so that case stayed in

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[3] Plaintiff's counsel has also settled royalty underpayment cases in state court for less than the federal jurisdictional amount in controversy. *See Freebird, Inc. v. Cimarex Energy Corp.*, 264 P.3d 500, 503 (Kan.App. Oct. 7, 2011) *rev. denied* (Kan. June 13, 2012) ($3.45 million settlement). So Dart's suggestion that all royalty underpayment class actions satisfy the amount in controversy based on the class period, number of wells, and royalty underpayment allegations is inaccurate. Dkt. 23 at 7, 10.

Interestingly, Judge Belot, relying in part on *Coca-Cola Bottling,* remanded *Freebird* to state court because Cimarex failed to prove the amount in controversy. The affidavit Cimarex filed with its notice of removal failed to support the amount in controversy assertion with underlying data. *Freebird, Inc. v. Cimarex Energy Co.*, 599 F.Supp.2d 1283, 1286-87 (D. Kan. 2008).

federal court. Dart failed to prove the jurisdictional fact of the amount in controversy with evidence in its Notice of Removal. This case must be remanded to state court.

## CONCLUSION

Dart asks this Court to disregard the Tenth Circuit authority requiring jurisdictional facts be proven in Notice of Removal itself, to consider its belated submission of the Henderson Declaration, and to excuse its deficient Notice of Removal because Plaintiff knows or does not contest this case puts more than $5 million in controversy. But none of these excuses satisfy the clear legal standard — the removing party must prove jurisdictional facts in its Notice of Removal, not a subsequent pleading. Dart's Notice of Removal fails to prove the requisite amount in controversy by a preponderance of the evidence. This Court lacks subject matter jurisdiction. The case must be remanded to state court. Plaintiff's motion to remand (Dkt. 12) should be granted.

Respectfully submitted,

/s/ Rex A. Sharp
Rex A. Sharp KS#12350
Barbara C. Frankland, KS#14198
Gunderson, Sharp & Walke, L.L.P.
5301 W. 75th Street
Prairie Village, KS 66208
(913) 901-0500
(913) 901-0419 fax

David E. Sharp KS #10624
Gunderson Sharp & Walke, LLP
712 Main Street, Suite 1400
Houston, TX 77002
(713) 490-3822
(713) 583-5448 fax
dsharp@midwest-law.com

John F. Edgar KS#18080
Edgar Law Firm LLC
1032 Pennsylvania Ave.
Kansas City, MO 64105
(816) 531-0033
(816) 531-3322 fax
jfe@edgarlawfirm.com

Grady Young KS#9000
714 Walnut
Coffeyville, KS 67337
(620) 251-9000
seklaw@seklaw.org

*Attorneys for plaintiffs*

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of May, 2013, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send notice of electronic filing to all counsel who have registered for receipt of the documents filed in this matter.

/s/ Rex A. Sharp