NO. _____

In the
# Supreme Court of the United States

HOME DEPOT U.S.A., INC.,

PETITIONER,

v.

MICHAEL BAUER AND STACEY BAUER,

RESPONDENTS.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

S. STEWART HASKINS II
MERRITT E. MCALISTER
*Counsel of Record*
ZHEYAO LI
KING & SPALDING LLP
1180 Peachtree St., NE
Atlanta, GA 30309
(404) 572-4600
mmcalister@kslaw.com

*Counsel for Petitioner*

April 5, 2017

## QUESTION PRESENTED

To curb abuses of the class-action device in state courts, Congress enacted the Class Action Fairness Act of 2005 ("CAFA") to expand federal jurisdiction over class actions. Under CAFA, "[a] class action may be removed to a district court . . . in accordance with section 1446 . . ., without regard to whether any defendant is a citizen of the State in which the action is brought . . . ." 28 U.S.C. § 1453(b). This Court has recognized that CAFA's removal provision should be broadly construed because it reflects "a strong preference that interstate class actions should be heard in a federal court." *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 554 (2014).

In this case, however, the Seventh Circuit narrowly construed § 1453(b) to bar removal by a newly-added counterclaim defendant, simply because the counterclaim defendant was not an original defendant to the state-court action. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941). The question presented is:

Under CAFA, 28 U.S.C. § 1453(b), does a newly-added defendant to a counterclaim have the right to remove a class action that otherwise satisfies the jurisdictional requirements of CAFA and does not implicate any CAFA exception?

## CORPORATE DISCLOSURE STATEMENT

Petitioner-Defendant Home Depot U.S.A., Inc. ("Home Depot"), is wholly owned by The Home Depot, Inc., a publicly-traded company on the New York Stock Exchange. The Home Depot, Inc. has no parent corporation, and no publicly-traded corporation owns 10% or more of its stock.

## PARTIES TO THE PROCEEDING

Petitioner Home Depot U.S.A., Inc. was a Counter-Defendant in the District Court and a Counterclaim-Defendant–Appellant in the Seventh Circuit.

Michael Bauer and Stacey Bauer were Defendant–Counter-Plaintiffs in the District Court and Defendants–Counterclaim-Plaintiffs–Appellees in the Seventh Circuit.

Tri-State Water Treatment, Inc. was a Plaintiff–Counter-Defendant in the District Court and a Plaintiff–Counterclaim-Defendant in the Seventh Circuit.

Aquion, Inc. d/b/a Rainsoft was a Counter-Defendant in the District Court.

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## PETITION FOR A WRIT OF CERTIORARI

This petition involves "an important issue of statutory interpretation" and "an unfortunate loophole in the Class Action Fairness Act that only the Supreme Court can now rectify." *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 345 (4th Cir. 2008) (Neimeyer, J., dissenting from denial of rehearing *en banc*). The Seventh Circuit, joining a split decision from the Fourth Circuit and another from the Ninth, has narrowly construed CAFA's removal statute to forbid removal by a newly-added counterclaim defendant in an otherwise removable class action. CAFA's plain language does not compel that result, and the rule runs headlong into this Court's instruction to liberally construe CAFA consistent "with a strong preference that interstate class actions should be heard in a federal court." *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 554 (2014) (citation and internal quotation marks omitted). The Court's intervention is especially needed because this wayward rule will affect class action defendants in those jurisdictions that most frequently see frivolous and abusive class actions—including California, Illinois, and West Virginia.

This litigation began in small-claims court in Madison County, Illinois, which is one of the state-court jurisdictions Congress has recognized as a "'magnet' jurisdiction" for abusive class actions. S. Rep. No. 109-14, p. 13. It began as a collection dispute brought by Tri-State Water Treatment, Inc., the original plaintiff, against its customers, Respondents Michael and Stacey Bauer, the original

defendants. It became a multi-state putative class action involving thousands of potential class members and millions of dollars when the Bauers filed a counterclaim alleging that Tri-State committed fraud when it sold the Bauers their water-treatment system. Later, the Bauers amended their counterclaim to add Home Depot as a new defendant, alleging that Home Depot had also misled consumers into buying water-treatment systems. Home Depot sought to remove the case from Madison County state court to the Southern District of Illinois, because the action satisfied all of CAFA's jurisdictional requirements. *See* 28 U.S.C. § 1453(a); *id.* § 1332(d).

In a "somewhat counterintuitive" decision, the district court granted the Bauers' motion to remand, because Home Depot was not an "original defendant" with the right to remove. Pet. App. 31, 34. That "original defendant" requirement does not derive from CAFA itself. Rather, it was grafted from *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108–09 (1941), which interpreted the materially similar predecessor to the general removal statute, 28 U.S.C. § 1441(a), to bar removal by a counterclaim defendant who was also the original plaintiff. Because Congress had amended the general removal statute to eliminate the ability of "either party" to remove, the *Shamrock Oil* Court concluded that a plaintiff who becomes a counterclaim defendant may not remove a civil action to federal court. 313 U.S. at 108–09. That rule makes good sense in the context of *Shamrock Oil*—because the plaintiff there availed itself of the state-court forum and thereby consented to its jurisdiction. *See* Pet. App. 7. But it makes no

sense here, where Home Depot never consented to state-court jurisdiction because it was brought into the action by service of process eight months later as a newly-added defendant to a counterclaim.[1] *See Westwood Apex v. Contreras*, 644 F.3d 799, 808–09 (9th Cir. 2011) (Bybee, J., concurring).

Nevertheless, the Seventh Circuit held that *Shamrock Oil* governs, because removal under CAFA is "in accordance with section 1446," the procedural statute for removal, and both statutes use the common term "defendant." Pet. App. 8 (quoting 28 U.S.C. § 1453(b)). The court recognized that CAFA is susceptible to multiple constructions—principally because, unlike the general removal statute which uses a restrictive term ("the defendant"), CAFA uses the broad term "any defendant." Pet. App. 9–10. But the Seventh Circuit concluded the construction that "does the least damage" is the one that limits removal to the "original defendant." Pet. App. 11. Moreover, the only other circuits to squarely address the issue had agreed—albeit not without some disagreement from Judges Niemeyer and Bybee—that Congress limited removal under CAFA to original defendants, because of the long-standing nature of the *Shamrock Oil* rule. *See* Pet. App. 12 (citing *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 334–36 (4th Cir. 2008); *Westwood Apex v. Contreras*, 644 F.3d 799 (9th Cir. 2011)).

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[1] Although the Bauers' caption and the lower courts refer to Home Depot as a counterclaim defendant, that label is inaccurate. Home Depot is not a counterclaim defendant under Federal Rule of Civil Procedure 13 because it never asserted a claim against the Bauers. In reality, the only label that describes Home Depot is simply defendant.

The Seventh Circuit's decision, and the Fourth and Ninth Circuits' decisions before it, are pathmarking in the wrong direction. None affords CAFA the liberal construction it is due under *Dart Cherokee*. *See Palisades*, 552 F.3d at 333–34. Further, the Seventh Circuit's decision limits *Dart Cherokee* to its facts, in tension with decisions of three other Circuits, which have each recognized that *Dart Cherokee* undermines the reasoning of earlier decisions narrowly construing CAFA's removal provisions.

Counterclaim class actions have become increasingly prevalent; in fact, this is not the only such class action Home Depot is currently defending. Indeed, the counterclaim class action is one of the "new and creative tactics" class action plaintiffs can employ "to avoid" CAFA's reforms. Nathan A. Lennon, *Two Steps Forward, One Step Back: Congress Has Codified the* Tedford *Exception, but Will Inconsistent Applications of "Bad Faith" Swallow the Rule?*, 40 N. Ky. L. Rev. 233, 237–38 (2013).

This case is an ideal vehicle for addressing this important issue of statutory construction. There is no dispute that—but for the application of the "original defendant" rule—this case belongs in federal court. The Court should not wait for further percolation; the path has been set, and it is rife with opportunities for abuse. A lack of a clear circuit split should not caution against *certiorari* in these circumstances. Three of the leading federal circuits for class action litigation have weighed in, and they have narrowed CAFA significantly—and in a manner

at odds with congressional intent and *Dart Cherokee*. The Court should act now to close the loophole.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is published at 845 F.3d 350 and reproduced at Pet. App. 1. The district court's remand order is at 2016 WL 7971260 and is reproduced at Pet. App. 16.

## JURISDICTION

The court of appeals issued its opinion on January 5, 2017, *see* Pet. App. 1. Petitioner timely filed this petition on April 5, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1). *Cf. Dart Cherokee*, 135 S. Ct. at 554–58 (Court has authority to review denial of application to review CAFA remand order under 28 U.S.C. § 1453(c)(1)).

## RELEVANT STATUTORY PROVISIONS

The following statutory provisions are reproduced in the Appendix: Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4-5; 28 U.S.C. § 1332; 28 U.S.C. § 1441; 28 U.S.C. § 1446; and 28 U.S.C. § 1453. Pet. App. 48–69.

## STATEMENT OF THE CASE

### A. The Statutory Backdrop

In 2005, Congress enacted CAFA to address abuses in state-court class action litigation by "enabl[ing] defendants to remove to federal court any sizable class action involving minimal diversity of citizenship." *Smith v. Bayer Corp.*, 564 U.S. 299, 317

(2011). CAFA gives federal courts jurisdiction over certain class actions, defined by 28 U.S.C. § 1332(d)(1), if the class has more than 100 members, the parties are minimally diverse, and the amount in controversy exceeds $5 million. 28 U.S.C. § 1332(d)(2), (5)(B). There is no dispute that this case meets those requirements.

Under CAFA, "[a] *class action may be removed* to a district court of the United States in accordance with [28 U.S.C.] 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." 28 U.S.C. § 1453(b) (emphases added); *see also* Pet. App. 67.

By contrast, the general federal removal statute provides: "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, *may be removed by the defendant or defendants*, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a) (emphasis added); *see also* Pet. App. 59. Section 1446 of Title 28 details the procedure for such removals, including requirements for the notice of removal, § 1446(a); certain time limitations, § 1446(b); particular requirements for removal based on diversity jurisdiction, § 1446(c); and notice to adverse parties and the state court, § 1446(d). *See* Pet. App. 63–66.

Although CAFA removal is generally in accord with the ordinary procedures for removal of civil actions, CAFA expanded removal authority in three important ways. First, there is no one-year limitation on removal, as exists for cases removed pursuant to general diversity jurisdiction, § 1446(c)(1). Second, the home-state defendant rule, which bars removal by a defendant who is a citizen of the forum, does not apply, *see* 28 U.S.C. § 1441(b)(2). Finally, CAFA eliminated the requirement that all defendants consent to removal under § 1446(b)(2).

The question before the Court now is whether Congress also expanded removal authority in another way: whether a defendant who is not an original defendant may nevertheless remove a class action under CAFA. *See Shamrock Oil*, 313 U.S. at 108–09.

The so-called "original defendant" rule derives from *Shamrock Oil*, which held that a plaintiff, who becomes a counterclaim defendant, may not use the general removal statute, 28 U.S.C. § 1441(a). The reason was straightforward. Congress enacted a new removal statute in 1887—a materially similar predecessor to the modern one, 28 U.S.C. § 1441(a)—that substantially narrowed removal authority. Before that time, "either party or any one or more of the plaintiffs or defendants" could exercise removal authority. *Shamrock Oil*, 313 U.S. at 106 (internal quotation marks omitted). But the new statute "authorize[d] the removal of a suit subject to its provisions only 'by the defendant or defendants therein.'" *Id.* at 103. Congress had changed "either party" to "the defendant." *Id.* at 107–08. And the Court was obligated to give a "strict construction" to

acts "regulating the jurisdiction of federal courts." *Id.* at 108. Accordingly, the Court held that a plaintiff who later becomes a counterclaim defendant is not a "defendant" with removal authority under 28 U.S.C. § 1441(a). *Id.* at 108.

*Shamrock Oil*'s so-called "original defendant" rule has been a "near-canonical rule"—at least until CAFA in 2005. *Palisades*, 552 F.3d at 336. It is also something of a misnomer, because the limitation on removal in *Shamrock Oil* flowed from the counterclaim defendant's status as the original plaintiff, and not from the fact that the removing party was not an original defendant. *See Westwood*, 644 F.3d at 807 (Bybee, J., concurring). Nevertheless, the rule has been consistently applied to bar removal by *any* counterclaim defendant (whether an original plaintiff or not). *Id.*

The rule does not apply to *all* newly-added defendants, however. The Seventh Circuit agrees, for example, that newly-added defendants (who are not counterclaim defendants) have a right to remove class actions. *See Springman v. AIG Mktg., Inc.*, 523 F.3d 685, 690 (7th Cir. 2008) (affirming denial of remand in CAFA case because "the suit against [the new defendant] is deemed to have been commenced when it was added as a defendant"). Further, outside of the class context, the Fifth Circuit has recognized that a newly-joined counterclaim defendant could remove if the counterclaim was separate and independent of the original complaint under § 1441(c). *See Texas v. Walker*, 142 F.3d 813, 815–18 (5th Cir. 1998).

### B. Proceedings Below

Two years ago, Tri-State Water Treatment, Inc. filed a small-claims collection suit against the Bauers in the Circuit Court for the Third Judicial Circuit, Madison County, Illinois. *See* Pet. App. 38 ¶ 1. The Bauers answered Tri-State's complaint and asserted a multi-state class action counterclaim against Tri-State, alleging fraud in connection with the sale of a water-treatment system. *Id.* ¶ 2. Home Depot was not yet a party to the case. The Bauers later moved to transfer the case out of small-claims court, asserting that their alleged "class consists of *several thousand members*" from six different states. *Id.* ¶ 12.

More than eight months after filing their original counterclaim, the Bauers filed an Amended Class Action Counterclaim, naming Home Depot and Aquion, Inc. for the first time as additional defendants to the counterclaim. Home Depot timely filed a notice of removal, invoking federal jurisdiction under CAFA. The Bauers moved to remand. Pet. App. 3. They did not dispute that this case involves minimal diversity, at least 100 putative class members, and at least $5 million in controversy. The Bauers' sole argument for remand was that only a defendant to the original complaint can remove under CAFA. Pet. App. 3. In this case, that meant only the Bauers had removal authority.

The district court granted the motion to remand, holding that, although a qualifying class action "may be removed by any defendant," 28 U.S.C. § 1453(b), a third-party or counterclaim defendant does not qualify as "any defendant." The district court relied

largely on dicta from *First Bank v. DJL Props., LLC*, 598 F.3d 915 (7th Cir. 2010), a case involving removal by the original plaintiff, not a new defendant added for the first time on a counterclaim. Because only so-called "original defendants" may remove under the general removal statute, the Seventh Circuit held the same was true for CAFA. *Id.* at 916–17 (citing 28 U.S.C. §§ 1441, 1446, 1453).

The district court noted "that the outcome of this case is somewhat counterintuitive. Home Depot was not a party to the original small claims action, and as such, did not submit voluntarily to the jurisdiction of the state action." Pet. App. 34. Indeed, had this case not begun as a small-claims action against the homeowners, removal "would have been acceptable and ordinary." *Id.* Nevertheless, the court accepted this counterintuitive result, holding that the Seventh Circuit's reasoning in *First Bank* compelled courts to bar Home Depot from removing the action in these circumstances.

### C. The Court Of Appeals' Decision

Petitioners sought review from the Seventh Circuit pursuant to 28 U.S.C. § 1453(c), which allows for permissive appeals from CAFA remand orders. After briefing and oral argument, the Seventh Circuit agreed with the district court that CAFA "does not support treating an original counterclaim-defendant differently from a new one." Pet. App. 2. Because the Seventh Circuit had previously held in *First Bank* that a counterclaim defendant who was also the original plaintiff was not entitled to remove under CAFA, it extended that holding to a newly-added counterclaim defendant. *Id.* The Seventh

Circuit based its decision in part on a presumption that by employing "defendant" in § 1453(b), Congress intended to follow the long-standing *Shamrock Oil* "original defendant" rule. Pet. App. 8. At the same time, however, it recognized that *Shamrock Oil* established only that the original plaintiff cannot remove and said nothing about new counterclaim defendants. Pet. App. 9.

The Seventh Circuit acknowledged three possible readings of § 1453(b): (1) a new counterclaim defendant can remove the entire case, (2) the entire case is removed, but after removal the court must sever the nonremovable claims and remand those claims to the state court, and (3) a new counterclaim defendant has no right of removal. Pet. App. 9. The court viewed the second option as the worst because it would create parallel actions proceeding simultaneously in state and federal court: "one giant class action counterclaim proceeding in state court [because Tri-State, the original plaintiff, could not remove], and a parallel class action counterclaim proceeding in federal court." Pet. App. 11. The court also rejected the first option, because it believed such an interpretation would give the original plaintiff a right of removal that the statute, in its view, did not provide. *Id.* Ultimately, the Seventh Circuit selected the third option—"the simple and efficient solution," in its view—because it followed the well-established "original defendant" rule. *Id.*

In support of its decision, the Seventh Circuit cited the two other circuit courts that have squarely addressed the issue: The Fourth Circuit in *Palisades*

*Collections LLC v. Shorts*, 552 F.3d 327, and the Ninth Circuit in *Westwood Apex v. Contreras*, 644 F.3d 799. *Palisades* was a split decision with a dissent from Judge Niemeyer, while *Westwood* contained a concurrence from Judge Bybee lamenting the absurdity of the result.

Finally, the Seventh Circuit rejected the notion that *Dart Cherokee* has any bearing on the outcome here, because that case was about the amount-in-controversy requirement. Pet. App. 12. The court below further stated that, since it had never expressly applied an anti-removal presumption in CAFA cases, *Dart Cherokee* changes nothing in the Seventh Circuit. Pet. App. 12–13.

## REASONS FOR GRANTING THE PETITION

The Court should grant the petition to resolve an "important issue of statutory interpretation" under one of the most significant, recent jurisdictional statutes, the Class Action Fairness Act. *See Palisades*, 552 F.3d at 345 (Niemeyer, J., dissenting from denial of rehearing *en banc*). While creating tension among the lower courts, the Seventh Circuit has expanded the "loophole" the Fourth and Ninth Circuits created. *Id.* This petition is an ideal vehicle for closing it.

### I. The Seventh Circuit's Decision Misapplies CAFA's Plain Language And This Court's Precedent.

Contravening this Court's and the congressional directive to read CAFA "broadly" and "with a strong preference" for exercising federal jurisdiction, the

Seventh Circuit adopted a narrow construction of CAFA not compelled by, and actually contradictory to, its text. *Dart Cherokee*, 135 S. Ct. at 554. As the Seventh Circuit recognized, its reading was not the only permissible reading the statute could bear. Pet. App. 10. Under *Dart Cherokee*, if CAFA's text is susceptible to competing interpretations, the court should prefer the one most favorable toward exercising federal jurisdiction. *See Dart Cherokee*, 135 S. Ct. at 554 (quoting S. Rep. No. 109-14, p. 43 (2005)). This Court should grant the petition to correct "a clear misreading by the lower courts of [this] . . . important federal statute." *Stevens v. Department of Treasury*, 500 U.S. 1, 5 (1991).

### A. CAFA's Plain Language Is Naturally Read To Permit Removal By A Counterclaim Defendant.

Statutory interpretation begins with the "plain meaning of the language as Congress enacted it." *Dunn v. CFTC*, 519 U.S. 465, 470, 474 (1997); *see also Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). Congress provided that "[a] *class action may be removed* to a district court of the United States . . . 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." 28 U.S.C. § 1453(b) (emphasis added). Under a plain reading of § 1453(b), Congress intended to expand, and not contract, removal authority.

1. In enacting § 1453(b), Congress did not limit removal authority to "the defendant or the defendants," as it did in § 1441(a). Indeed, the first

clause of § 1453(b) does not restrict removal authority to any particular actor, which could indicate congressional directive to overrule the *Shamrock Oil* rule itself. *See* 28 U.S.C. § 1453(b) ("[a] class action *may be removed to a district court*" (emphasis added)). The Court need not go so far, however, to read § 1453(b) to permit removal by a newly-added counterclaim defendant like Home Depot. Where Congress did specify an actor in § 1453(b), it gave "*any* defendant" removal authority.

As Judge Niemeyer explained in his *Palisades* dissent, the difference between "*the* defendant" and "*any* defendant" is an important one. *Palisades*, 552 F.3d at 338. "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976)); *see also Rush Beverage Co. v. S. Beach Beverage Co.*, 2002 WL 31749188, at *8 (N.D. Ill. Dec. 6, 2002) ("'Any' can be defined as 'one, no matter what one[;] every.'" (citation omitted, alteration in original)). The definite article "the," on the other hand, has a well-settled, restrictive meaning, that differs from the expansive "any." *See Am. Bus Ass'n v. Slater*, 231 F.3d 1, 4–5 (D.C. Cir. 2000). The phrase "the defendant or the defendants" in the general removal statute, § 1441(a), therefore, is narrower than "any defendant" in CAFA.

A newly-added counterclaim defendant is plainly a "defendant" within the meaning of the Federal Rules. *See* Fed. R. Civ. P. 13(h); Fed. R. Civ. P. 20; *see also Chevron U.S.A. Inc. v. M & M Petroleum*

*Servs., Inc.*, 658 F.3d 948, 952 (9th Cir. 2011). Indeed, a newly-added defendant to an original claim (not a counterclaim) readily has the right to remove under CAFA. *See Springman*, 523 F.3d at 690. But such "defendant" is arguably not "the defendant" within the meaning of *Shamrock Oil* and 28 U.S.C. § 1441(a). *But see Cent. of Ga. Ry. Co. v. Riegel Textile Corp.*, 426 F.2d 935, 938 (5th Cir. 1970) (holding that a third-party defendant may remove under § 1441(a) and limiting *Shamrock Oil* to "removal by plaintiffs defending counterclaims").

The *Shamrock Oil* Court, however, did not construe "any defendant." 313 U.S. at 104. Moreover, *Shamrock Oil* compared "the defendant or defendants" with the previous iteration of the general removal statute, which had authorized removal by "either party." *Shamrock Oil*'s holding that the original plaintiff could not remove thus relied on Congress's deliberate replacement of "either party" with "the defendant or defendants." *Shamrock Oil*, 313 U.S. at 107. Proper construction of § 1441(a) must therefore account for the change from "the defendant or defendants" to "any defendant," while keeping CAFA's goal of expanding federal jurisdiction in mind. *See Palisades*, 552 F.3d at 344 (Niemeyer, J., dissenting) ("[W]hen new statutory language, added by CAFA, modifies preexisting language, the new language must control."); *see also Deutsche Bank Nat. Trust Co. v. Weickert*, 638 F. Supp. 2d 826, 828–29 (N.D. Ohio 2009).

Reading § 1453(b) by its own terms, Congress intended for "*any* defendant"—including, as here, a counterclaim defendant—to have the right to remove

a qualifying class action. Otherwise, there would have been no need to use "any" and no reason to leave the removal power open-ended in the first clause of § 1453(b). Sections 1453(b) and 1441(a) contain significant textual differences, which make § 1453(b) readily susceptible to Home Depot's reading, which is the only reading faithful to the congressional aim to *expand* federal jurisdiction over class actions.

2. Despite the undeniable breadth of "any defendant," the Seventh Circuit "limited" that phrase "to the elimination of the unanimity requirement." Pet. App. 8. There are several problems with the court's reasoning. The first is that the unanimity requirement—the requirement that all defendants consent to removal—derives from the same "the defendant or defendants" language that gave birth to *Shamrock Oil*. *See Chicago, Rock Island & Pac. Ry. v. Martin*, 178 U.S. 245 (1900). "It seems implausible at best that the § 1453(b) language abolished the *Martin* rule [requiring unanimity] while leaving untouched the *Shamrock Oil* rule, especially when both rules depended on the same language." *Palisades*, 552 F.3d at 339 (Niemeyer, J., dissenting).

The second problem is that § 1453(b) expressly eliminates the unanimity requirement, leaving no work for the addition of "any" to do. *Cf. United States v. Butler*, 297 U.S. 1, 65 (1936) ("These words cannot be meaningless, else they would not have been used."). The phrase "without the consent of all defendants" in the "except that" clause of § 1453(b) is alone sufficient to negate the *Martin* rule. Had Congress intended to restrict the category of

defendants who can remove under CAFA to those who can remove under § 1441(a), and abolish only the *Martin* rule while leaving the *Shamrock Oil* rule intact, Congress could have again used the term "the defendant" or even "any of the defendants."

3. The Seventh Circuit's insistence that "defendant" must have the same meaning throughout §§ 1453, 1441, and 1446 is also misguided. The court lost sight of the fact that CAFA's § 1453 is a different Act of Congress from §§ 1441 and 1446, enacted at a different time, serving a different purpose. Regardless, it is not the word "defendant" that has changed. The words that precede "defendant" have changed: "any" versus "the," and an open-ended removal authority versus a more limited one. "[R]eading 'defendant' consistently does not mean we must read '*any* defendant' in § 1453(b) the same as '*the* defendant or *the* defendants' in § 1441(a)." *Palisades*, 552 F.3d at 340 (Niemeyer, dissenting). Congress changed the context of how it employed "defendant" across these different jurisdictional provisions, not the meaning of the word. *See Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007); *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 697–98 (2003). It is the Seventh Circuit that changed the meaning of the word "defendant," by adding "original" to § 1453(b).

The internal cross-references to other removal statutes does not change the plain meaning of § 1453(b). By stating that removal shall be "in accordance with section 1446" (except insofar as § 1453(b) provides otherwise), § 1453(b) directs the reader to § 1446 for the *procedure* to effectuate

removal, *e.g.*, when the notice of removal must be filed and what papers must be filed with it. "Section 1446 does not separately provide jurisdiction." *Allen v. Christenberry*, 327 F.3d 1290, 1296 n.3 (11th Cir. 2003); *accord Palisades*, 552 F.3d 327, 339 n.1 (Niemeyer, J., dissenting). In other words, § 1446 details the mechanical process by which a defendant who otherwise has the right to remove may actually execute the removal. The *right* to remove, however, is derived from separate jurisdictional statutes such as § 1441 or § 1453. It does not "make hash of Chapter 89," Pet. App. 8, to construe § 1446 as simply providing the procedure to be followed by either *the* defendants entitled to remove under § 1441(a) (if that statute applies) or *any* defendant entitled to remove under CAFA (if that statute applies).

The Seventh Circuit's preference for a "simple and efficient solution" to the question of who may remove was anything but. Pet. App. 11. Permitting removal by "*any* defendant" is just as simple and efficient, and it is in keeping with CAFA's purpose. Forcing newly-added counterclaim defendants to litigate large class actions in unpredictable state systems is the inefficient outcome that Congress enacted CAFA to avoid. *See* S. Rep. No. 109-14, p. 61.

### B. The Seventh Circuit's Construction of § 1453(b) Contravenes This Court's Directive and Creates Tension with Other Circuits.

The Seventh Circuit's reasoning, and the Fourth and Ninth Circuit's reasoning before it, were based

on a now-rejected "antiremoval presumption." *Dart Cherokee*, 135 S. Ct. at 554. The Seventh Circuit dismissed *Dart Cherokee* as irrelevant because it had not "taken a dim view of removal in CAFA cases," and *Dart Cherokee*, in any event, "does not address the [counterclaim defendant removal] issue." Pet. App. 13. But the Seventh Circuit failed to recognize that the "original defendant" rule itself derives from an "antiremoval presumption." The refusal to rethink precedent, including *First Bank*, in light of *Dart Cherokee*'s directive puts the Seventh Circuit at odds with other courts that have applied *Dart Cherokee* beyond its facts.

1. In *Dart Cherokee*, this Court held that CAFA does not require the removing party to submit evidence of the amount in controversy with its notice of removal. In so doing, the Court repudiated Tenth Circuit precedent that had employed "a presumption against removal jurisdiction." *Dart Cherokee*, 135 S. Ct. at 554. This Court's rejection of the antiremoval presumption should have counseled against extending *Shamrock Oil* to bar Home Depot's removal.

Here, the Seventh Circuit's decision below and its precedent in *First Bank* both relied on the Fourth Circuit's decision in *Palisades*, which explicitly invoked a similar "duty to construe removal jurisdiction strictly and resolve doubts in favor of remand." *Palisades*, 552 F.3d at 336. This is the same duty the Court invoked in *Shamrock Oil* to justify its narrow interpretation of the Act of 1887. *Shamrock Oil*, 313 U.S. at 108 ("Not only does the language of the Act of 1887 evidence the

Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation.").

The pivotal role of the presumption against removal in *Palisades* is evident when comparing the majority opinion to the dissent. The *Palisades* majority relied heavily on *Shamrock Oil* and its call for "strict construction" of removal statutes. *Palisades*, 552 F.3d at 332. In particular, the *Palisades* majority cited their "duty to construe removal jurisdiction strictly and resolve doubts in favor of remand" to justify their conclusion that the word "any" in § 1453(b) cannot influence the definition of "defendant." *Id.* at 335–36. Indeed, *Palisades* expressly rejected the argument that "this federalism-based canon of strict construction, which favors adjudication in state court, has no place in the interpretation of CAFA." *Id.* at 336 n.5.

On the other hand, the dissent by Judge Niemeyer (who had testified before the Senate Judiciary Committee when it first began to consider CAFA, *see* S. Rep. No. 109-14, p. 2) anticipated *Dart Cherokee*'s rejection of the presumption against removal in CAFA cases. *Palisades*, 552 F.3d at 341 (Niemeyer, J., dissenting). As Judge Niemeyer wrote, the Congressional goal of "expanding federal jurisdiction and liberalizing removal in the CAFA context is part of the statutory text, and federal courts surely have an obligation to heed it." *Id.* at 342 (citing CAFA § 2(b)(2), Pub. L. No. 109–2, 119 Stat. 4-5 (2005)).

The Seventh Circuit's reliance on the Ninth Circuit's interpretation of "any defendant" in *Westwood* is similarly problematic. *See* Pet. App. 12. In *Westwood*, the Ninth Circuit relied on *Shamrock Oil* and the extension of *Shamrock Oil* into the CAFA context by *Palisades*, by *First Bank*, and by the Ninth Circuit in two earlier cases: *Progressive W. Ins. Co. v. Preciado*, 479 F.3d 1014 (9th Cir. 2007), and *Abrego Abrego v. Dow Chemical Co.*, 443 F.3d 676 (9th Cir. 2006). *See Westwood*, 644 F.3d at 803–06 ("Since *Shamrock Oil*, the law has been settled that a counterclaim defendant who is also a plaintiff to the original state action may not remove the case to federal court".) (quoting *Progressive,* 479 F.3d at 1018). As with *Palisades*, both *Abrego* and *Progressive* suffer from the misapplication of a "strong presumption against removal jurisdiction." *Abrego*, 443 F.3d at 689; *see also Progressive*, 479 F.3d at 1018 (citing *Abrego* and declining "invitation to read CAFA liberally").

In addition, the Seventh Circuit noted the agreement of the Sixth Circuit in *In re Mortgage Elec. Registration Sys., Inc.*, 680 F.3d 849 (6th Cir. 2012), which held that a third-party defendant cannot remove under CAFA. *See* Pet. App. 11. *In re Mortgage* relied on *Westwood*, *First Bank*, and *Palisades* and explained that "[t]he term 'defendant' in removal statutes is narrowly construed." *In re Mortgage*, 680 F.3d at 853–54.

Thus, *Dart Cherokee* forces a reevaluation of these decisions—*Palisades*, *Westwood*, *In re Mortgage*, and *First Bank*—all of which were shaped by the unwarranted extension of the *Shamrock Oil*

rule to CAFA cases involving non-plaintiff counterclaim defendants, an extension rooted in an improper and since-rejected "federalism-based canon of strict construction, which favors adjudication in state court." *Palisades*, 552 F.3d at 336 n.5.

2. The Seventh Circuit's refusal to rethink the application of *Shamrock Oil* following *Dart Cherokee* also puts the court in tension with other circuits that have read *Dart Cherokee* to require precisely that sort of reevaluation. Unlike the Seventh Circuit, three other courts of appeals—the Sixth, Ninth, and Eleventh Circuits—have held that *Dart Cherokee* overruled earlier circuit precedents applying the rule of strict construction to CAFA cases.

In *Jordan v. Nationstar Mortg. LLC*, 781 F.3d 1178 (9th Cir. 2015), the Ninth Circuit stated that it is no longer bound by *Progressive* and other Ninth Circuit decisions that "strictly construed" the requirements of removal. *Id.* at 1182–83 (citing *Progressive*, 479 F.3d at 1018). Indeed, *Jordan* calls into question whether the Ninth Circuit would continue to follow *Westwood* itself. In *Jordan*, the Ninth Circuit instead held that CAFA claims are, post-*Dart Cherokee*, "an exception to the strict construction of removal statutes." *Id.* at 1183. Simply put, *Progressive* and all other Ninth Circuit precedent applying an antiremoval presumption in CAFA cases are no longer good law "because the Supreme Court's decision in *Dart Cherokee* 'undercut[s] the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable.'" *Jordan*, 781 F.3d at 1183

n.2 (quoting *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (*en banc*)).

Even though *Jordan* dealt with a question regarding timeliness of removal, whereas *Dart Cherokee* dealt with the amount-in-controversy requirement, the Ninth Circuit (unlike the Seventh Circuit here) did not seek to confine *Dart Cherokee* to its facts. That is because "the issues decided by the higher court need not be identical in order to be controlling." *Miller*, 335 F.3d at 900. Rather, it is the "theory or reasoning" that is important. *Id.*

The Sixth Circuit has also held that *Dart Cherokee* invalidates earlier cases where CAFA is concerned. In *Graiser v. Visionworks of America, Inc.*, 819 F.3d 277 (6th Cir. 2016), the Sixth Circuit confronted a question concerning timeliness of removal. Like the Ninth Circuit and unlike the Seventh Circuit, the Sixth Circuit did not confine *Dart Cherokee* to its facts. Instead, the court acknowledged that *Dart Cherokee* "recently clarified" CAFA's interpretive rules as a general matter. *Graiser*, 819 F.3d at 283. That clarification, that "no antiremoval presumption attends cases invoking CAFA," meant that "the reasoning underlying" a Sixth Circuit precedent employing an antiremoval presumption did not apply. *Id.* (citation and internal quotation marks omitted). The result is that the Sixth Circuit now recognizes a categorical separation between CAFA cases and precedents that "did not involve removal under CAFA." *Id.* That is precisely the opposite approach of what the Seventh Circuit did below in extending *Shamrock Oil* to the CAFA context.

The Eleventh Circuit has also indicated that the reach of *Dart Cherokee* is greater than what the Seventh Circuit credits. Before *Dart Cherokee*, the Eleventh Circuit "had presumed that in enacting CAFA, Congress had not intended to deviate from 'established principles of state and federal common law,' which included 'construing removal statutes strictly and resolving doubts in favor of remand." *Dudley v. Eli Lilly & Co.*, 778 F.3d 909, 912 (11th Cir. 2014) (citation omitted). The Eleventh Circuit held that, under *Dart Cherokee*, the opposite is true: Congress intended that "CAFA's '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.'" *Id.* Accordingly, "we may no longer rely on any presumption in favor of remand in deciding CAFA jurisdictional questions." *Id.*

Put simply, the Seventh Circuit "fail[ed] to notice that [*Dart Cherokee*] changes the interpretive regime." Aaron-Andrew P. Bruhl, *Communicating the Canons: How Lower Courts React When the Supreme Court Changes the Rules of Statutory Interpretation*, 100 Minn. L. Rev. 481, 536 (2015) (citing cases).

## II. The Lower Courts Have Created A Problematic "Loophole" In An Important Federal Statute, And This Petition Is An Excellent Vehicle For Fixing It.

Under the approach of the Fourth, Seventh, and Ninth Circuits, this multi-million dollar, multi-state class action and others like it must be litigated in

Madison County state court due to the "happenstance" of having been brought as a counterclaim. *See Westwood*, 644 F.3d at 809 (Bybee, J., concurring). As the district court acknowledged, "the outcome of this case is somewhat counterintuitive" because "Home Depot was not a party" originally and never voluntarily submitted to the state court's jurisdiction. Pet. App. 34. The "original debt" on which the original plaintiff sued has become a "sideshow," yet the main event is not removable simply by virtue of how this litigation began. *See Westwood*, 644 F.3d at 807 (Bybee, J., concurring). The outcome here is not just counterintuitive, it creates a "loophole" that undermines congressional intent to expand jurisdiction over interstate class actions. *Palisades*, 552 F.3d at 344–45.

Counterclaim class actions have sprung to life following CAFA's enactment—and they are not particularly unusual.[2] Home Depot is currently

[2] In addition to *Westwood* and *Palisades*, CAFA's enactment in 2005 appeared to spur a number of counterclaim class actions. *See, e.g.*, *Williamsburg Plantation, Inc. v. Bluegreen Corp.*, 478 F. Supp. 2d 861 (E.D. Va. 2006); *Ford Motor Credit Co. v. Jones*, 2007 WL 2236618 (N.D. Ohio July 31, 2007); *CitiFinancial, Inc. v. Lightner*, 2007 WL 1655225 (N.D. W. Va. June 6, 2007); *Unifund CCR Partners v. Wallis*, 2006 WL 908755 (D.S.C. Apr. 7, 2006). The trend has continued. *See, e.g.*, *Unifund CCR Partners v. Harrell*, 509 S.W.3d 25 (Ky. 2017); *Midland Funding LLC v. Hilliker*, 68 N.E.3d 542 (Ill. App. 2016); *Cach, LLC v. Echols*, 506 S.W.3d 217 (Ark. 2016); *Portfolio Recovery Associates, LLC v. Dixon*, 366 P.3d 245 (Kan. App. 2016); *Citibank, N.A. v. Perry*, 2016 WL 6677944 (W.Va. 2016); *Taylor v. First Resolution Invest. Corp.*, 2016 WL 3345269 (Ohio 2016).

defending *two*. *See Citibank, N.A. v. Jackson*, 2017 WL 1091367 (W.D.N.C. Mar. 21, 2017) (granting on similar grounds counterclaim plaintiff's motion to remand action removed by Home Depot). And there is every reason to think the numbers of such actions will continue to rise, as class-action plaintiffs' attorneys continue to look for "new and creative tactics to avoid [CAFA's] reforms." Lennon, *supra*, at 237.

1. Without correction, applying the "original defendant" rule to CAFA will invite abuse and gamesmanship that Congress intended to stop.

Congress enacted CAFA "to ensur[e] Federal court consideration of interstate cases of national importance." *Dart Cherokee*, 135 S. Ct. at 554. As more fully explained in the legislative record:

> Federal courts are the appropriate forum to decide interstate class actions involving large amounts of money, many plaintiffs and interstate commerce disputes, and these matters of interstate comity are more appropriately handled by federal judges appointed by the President and confirmed by the Senate.

S. Rep. No. 109-14, p. 61.

Congress in particular recognized Madison County, Illinois (where this case originated), "a mostly rural county that covers 725 square miles and is home to less than one percent of the U.S. population" as a "'magnet' jurisdiction" for class action litigation. S. Rep. No. 109-14, p. 13. And President Bush singled out Madison County when he

signed CAFA, noting that "juries [there] have earned a reputation for awarding large verdicts." President's Remarks on Signing the Class Action Fairness Act of 2005, 41 W.C.P.D. 265, 266 (Feb. 18, 2005).

The Seventh Circuit believed that concerns about abuses of counterclaim class actions in state courts are unfounded because "the state courts have all the tools they need to manage abusive amendments to pleadings." Pet. App. 14. The liberal joinder rules that permitted the Bauers to transform this small-claims collection action into a multi-million dollar, multi-defendant class action suggest otherwise. And, as Congress recognized when it enacted CAFA, it is not the tools available, but how state courts are willing (or unwilling) to use them that creates concern. *See* S. Rep. No. 109-14, p. 13–14 ("[T]he rules governing the decision whether cases may proceed as class actions are basically the same in federal and state courts … [but] some state court judges are less careful than their federal court counterparts about applying the procedural requirements that govern class actions.").

Rather than interpret § 1453(b) consistently with Congress's avowed purpose, the Seventh Circuit provides a roadmap for circumventing it. CAFA was intended to reduce the risk that "plaintiffs' lawyers who prefer to litigate in state courts" might "'game the system' and avoid removal of large interstate class actions to federal court." S. Rep. No. 109-14, p. 10. Under the Fourth, Seventh, and Ninth Circuit's counter-textual extension of *Shamrock Oil*, however, enterprising plaintiffs' lawyers wishing to remain in state court have every incentive to use debt collection

proceedings or other small-claims litigation as a platform to launch a counterclaim class action. Indeed, plaintiffs' lawyers could even invite an initial proceeding by encouraging a potential counterclaim plaintiff not to pay certain bills. Such a result is inconsistent with both the purpose of CAFA and with the statutory text.

2. The question presented is undeniably important. *Palisades*, 552 F.3d at 344 (Niemeyer, J., dissenting from the denial of rehearing). CAFA has been described as "the most significant legislative reform of complex litigation in American history," Lonny Sheinkopf Hoffman, *Burdens of Jurisdictional Proof*, 59 Ala. L. Rev. 409, 410 (2008), and "arguably the most important tort reform in recent years," Anthony J. Sebok, *What Do We Talk About When We Talk About Mass Torts?*, 106 Mich. L. Rev. 1213, 1216 n.14 (2008). At the very least, it is "probably the most significant recent jurisdictional statute." Bruhl, *supra*, at 536.

Further, this Court has recognized that continued litigation devoted solely to which court system has authority over a matter is neither desirable nor efficient. It "is essentially a waste of time and resources." *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980); *see also Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 549 (1995) (Thomas, J., concurring in the judgment) (noting that a "clear, bright-line" jurisdictional rule "ensures that judges and litigants will not waste their resources in determining the extent of federal subject-matter jurisdiction").

3. Finally, this petition presents an ideal vehicle for closing the problematic "loophole" that lower courts have created. There is no dispute that all the jurisdictional requirements of CAFA are satisfied, and that no CAFA exception applies. The parties and the courts below agree that had this counterclaim class action been filed separately in federal court, jurisdiction would be proper. There is also no dispute that had this class action been filed separately in state court, removal would have been normal. The only question is whether this class action must remain in state court solely because it was brought as a counterclaim.

After *Dart Cherokee*, the courts below could and should have avoided a "construction of the statute [that] would defeat its purpose." *Browder v. Director, Dep't of Corr.*, 434 U.S. 257, 264 (1978); *see also Dunn*, 519 U.S. at 470 (statutory interpretation should not "frustrate Congress's clear intention") (citation omitted). The Court should grant this petition to restore the class action safeguards Congress enacted.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

S. STEWART HASKINS II
MERRITT E. MCALISTER
*Counsel of Record*
ZHEYAO LI
KING & SPALDING LLP
1180 Peachtree St., NE
Atlanta, GA 30309
(404) 572-4600
mmcalister@kslaw.com

*Counsel for Petitioner*

# APPENDIX

## TABLE OF APPENDICES

*Appendix A*

In the

United States Court of Appeals

For the Seventh Circuit

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No. 16-3938

TRI-STATE WATER TREATMENT, INC.,
*Plaintiff/Counterclaim-Defendant,*

*v.*

MICHAEL BAUER and STACEY BAUER,
*Defendants/Counterclaim-Plaintiffs/Appellees,*

*v.*

HOME DEPOT U.S.A., INC.,
*Counterclaim-Defendant, Appellant.*

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Appeal from the United States District Court for the Southern District of Illinois.

No. 16-cv-0419-MJR-RJD
**Michael J. Reagan**, *Chief Judge.*

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ARGUED DEC. 1, 2016 — DECIDED JAN. 5, 2017

Before WOOD, *Chief Judge*, and FLAUM and ROVNER, *Circuit Judges*.

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WOOD, Chief Judge. In First Bank v. DJL Properties, LLC, 598 F.3d 915 (7th Cir. 2010), we held that a counterclaim-defend- ant is not entitled to remove a case from state court to federal court under the provisions of the Class Action Fairness Act (CAFA), 28 U.S.C. § 1453(b). Today's case presents a related question: whether, even though the original counterclaim-defendant is barred from removing, an additional counterclaim- defendant may nevertheless do so. We conclude that the statute does not support treating an original counterclaim-defendant differently from a new one, and so we affirm the district court's order remanding this case to state court.

I

This case began as a simple collection action brought in the Small Claims Court of Madison County, Illinois, by Tri-State Water Treatment, Inc., against Stacey and Michael Bauer. Tri- State alleged that the Bauers failed to pay for a water treatment system it had installed at their house following a free, in-home assessment of their water. The Bauers responded on June 5, 2015, by answering the complaint and filing a counter- claim against Tri-State. See 735 ILCS 5/2-608. But it was not just any counterclaim: it asserted a multi-state class action against Tri-State for fraud in connection with the sale of its water-treatment system. See 735 ILCS 5/2-801. For purposes of the counterclaim, the Bauers were counterclaim-plaintiffs and Tri-State was the sole counterclaim-defendant.

Matters became more complicated when, on February 26, 2016, the Bauers filed an amended class-action counterclaim in which they added Home Depot U.S.A., Inc., and Aquion, Inc., as counterclaim-defendants. See 735 ILCS 5/2-616(a) (permitting amendments that "introduc[e] any party who ought to have been joined as plaintiff or defendant"). The

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Bauers served the amended counterclaim on Home Depot on March 15, 2016.

The amended counterclaim defines the class as consumers who purchased a water treatment system from Tri-State, Rainsoft, and Home Depot, following an in-home water test. It asserts that the counterclaim-defendants conducted in- home water tests that did nothing but identify mineral con- tent, rather than contaminants, and thereby misled consumers into buying their water treatment systems.

Home Depot filed a timely notice of removal on April 14, 2016. See 28 U.S.C. §§ 1446(b)(1), 1453(b). It argued that even though it was not an original "defendant" in the underlying case, its status as an *additional* counterclaim-defendant in an action meeting CAFA's criteria entitled it to take this step. The Bauers filed a motion to remand pursuant to 28 U.S.C. § 1447(c). They argued that the general removal statute (§ 1446), as modified by CAFA, does not permit any kind of counterclaim-defendant (original or additional) to remove, and thus that the case had to be returned to the state court.

In an order issued on September 29, 2016, the district court agreed with the Bauers' position. It concluded that CAFA did not disturb the longstanding rule that only original defend- ants can remove cases to federal court. The court relied in particular on *First Bank v. DJL Properties, LLC, supra*, which it read as a broad statement that only the original defendants are entitled to remove, not any of the hyphenated defendants, whether initial counterclaim-defendants, new counterclaim-defendants, third-party defendants, or anything else in that general family.

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On October 11, 2016, Home Depot petitioned this court for permission to appeal the remand order pursuant to 28 U.S.C. § 1453(c). We granted that request on November 16, 2016, in order to resolve the unsettled question whether CAFA permits an additional counterclaim-defendant to remove an action. See 28 U.S.C. § 1453(c)(2); *Hart v. FedEx Ground Package Sys., Inc.*, 457 F.3d 675, 679 (7th Cir. 2006).

II

As the party seeking removal, Home Depot bears the bur- den of establishing federal jurisdiction. *In re Safeco Ins. Co. of Am.*, 585 F.3d 326, 329–30 (7th Cir. 2009); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 447–48 (7th Cir. 2005). It argues that Congress granted parties in its position the power to re- move actions from state court in § 1453(b), which provides:

> A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(c)(1) shall not apply), without regard to whether *any defendant* is a citizen of the State in which the action is brought, except that such action may be removed by *any defendant* without the consent of all defendants.

28 U.S.C. § 1453(b) (emphasis added).

Home Depot argues that the second time the term "any defendant" appears in this section, it has two distinct functions: first, it eliminates the requirement that the defendants act unanimously when they remove, and second, it broadens the type of defendants who can remove to include any party that is brought into the case through service of process. Noting that nothing in the language of CAFA spells out anything

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like the latter purpose, the Bauers take issue with Home Depot's second point. Instead, they argue, CAFA simply eliminates two ordinary restrictions on removal: it erases the nor- mal ban on removal by an in-state defendant in a diversity case, 28 U.S.C. § 1441(b)(2); and it abolishes the normal requirement that *all* defendants must join in a removal notice, 28 U.S.C. § 1446(b)(2)(A).

No one disputes the fact that suits qualifying under CAFA, 28 U.S.C. § 1332(d)(2), are subject to at least the two changes that the Bauers identify: they are exempt from the normal rule barring removal by in-state defendants, and even a single defendant is

entitled to remove "the action." 28 U.S.C. § 1453(b). We addressed the latter point in *First Bank*, 598 F.3d at 917, where we observed that "[t]he function of the second 'any' [in § 1453(b)] is to establish that a single defendant's preference for a federal forum prevails, notwithstanding [*Chi., Rock Island & Pac. Ry. Co. v. Martin*, 178 U.S. 245 (1900)]."

This leaves as the only point in contention Home Depot's argument that the second time the term "any defendant" is used in § 1453(b) it means not just any one "defendant," but also any *type* of defendant. Home Depot proposes a rule un- der which anyone who joins the case through service of process should be regarded as a defendant for purposes of removal under CAFA. Such a rule, we note, would even exclude original defendants, if they appeared by consent rather than through service. As we now explain, that is just one among several problems with its position.

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A

Long before 2005, when CAFA was enacted, the Supreme Court held that a plaintiff who files suit in state court is precluded from removing a case to federal court, even if that per- son is later named as a counterclaim-defendant. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941). *Shamrock Oil* interpreted the general federal removal statute in place at the time against the backdrop of prior versions of the legislation. (In one form or another, removal is a device that has existed since the creation of the federal judiciary; it appeared in the

First Judiciary Act of 1789, 1 Stat. 73, c. 20, § 12.) The Court in *Shamrock Oil* noted that from 1875 to 1887, the general removal statute conferred the privilege of removal on "either party." 313 U.S. at 105. At all other times, the Court stressed, "the statutes governing removals have in terms given the privilege of removal to 'defendants' alone … ." *Id*. In the earlier case of *West v. Aurora City*, 73 U.S. (6 Wall.) 139 (1867), the Court had held that "[t]he right of removal is given only to a defendant who has not submitted himself to that jurisdiction; not to an original plaintiff in a State court who, by resorting to that jurisdiction, has become liable under the State laws to a cross-action." *Id*. at 141. At that time, however, the rules governing counter- claims, cross-claims, and third-party claims were significantly different from those that now appear in the Federal Rules of Civil Procedure, and so there is no reason to believe that the Court was speaking one way or the other to the situation that confronts us here. All we know from *Shamrock Oil* is that removal is not available for a plaintiff who is a counterclaim-defendant. 313 U.S. at 108–09. Both the Supreme Court and Congress have left *Shamrock Oil* undisturbed during the ensuing 75 years.

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As we noted earlier, CAFA made some changes to the removal rules for large, state-law based class actions. In *First Bank*, we considered one aspect of those changes: whether an original plaintiff who also is a class-action counterclaim-defendant has the right to remove a case to federal court under 28 U.S.C. § 1453(b). First Bank, the original plaintiff and

counterclaim-defendant, was fighting remand to the state court. It argued (just as Home Depot does here) that the word "defendant" as used in § 1453(b) includes original plaintiffs be- cause "defendant" is modified by the term "any." *First Bank*, 598 F.3d at 917.

We rejected First Bank's interpretation of the statute, concluding that CAFA's use of "time-tested legal language" required us to adhere to the *Shamrock Oil* rule prohibiting removal by an original plaintiff. *Id*. We commented that "the word 'defendant' has an established meaning in legal practice, and it is vital to maintain consistent usage in order to ensure that Members of Congress (and those who advise them) know what proposed language will do, and people can understand the meaning of statutes." *Id*. The purpose of the modifier "any," we concluded, was limited to the elimination of the unanimity requirement. *Id*.

We also were influenced by the instruction in § 1453(b) to conduct a CAFA removal "in accordance with section 1446." Sections 1441 and 1446 use the *Shamrock Oil* definition of the word "defendant." Adopting First Bank's view, we said, "would make hash of Chapter 89, because § 1453(b) refers to § 1446; unless the word 'defendant' means the same thing in both sections, the removal provisions are incoherent." *Id*. at 917. Interpreting § 1453(b) in this way kept consistent the

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meaning of the term "defendant" as used in Chapter 89. *Id*. at 917–18.

As this discussion shows, *First Bank* does much of the work that is necessary to resolve the present appeal. But it does not do everything, because it dealt only with the situation of an original plaintiff who becomes a counterclaim-defendant, and our case involves a new party. We thus are faced with the distinct issue of a party that is not an original defend- ant, but also not one who voluntarily chose the state court. Different concerns, however, persuade us that CAFA does not extend the right of removal to such a party.

B

Just as the counterclaim-defendant in *First Bank* did, Home Depot argues that the term "any defendant" in § 1453(b) grants the right to remove to defendants of any stripe, regardless of how they came into the case. It insists that the word "defendant" means something different, and more expansive, when it appears in § 1453(b) than it does when it is used in §§ 1441 and 1446. As we have suggested, this position is in some tension with *First Bank*, in which we rejected a comparable argument. We noted that Congress drafted § 1453(b) in the context of established precedent interpreting the term "defendant" as the original defendant in the case, not a party in the position of a defendant because of additional counter-, cross-, or third-party claims. Congress is presumed to be aware of judicial interpretations of its acts. See *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S.Ct. 736, 742 (2014); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). Courts also presume that the same meaning attaches to a term used multiple times in the same statute,

unless there is powerful evidence to the contrary. *AU Optronics*, 134 S.Ct. at 742.

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Logically, there are only a limited number of possibilities for removal in CAFA cases, as the following simplified scenario illustrates. Suppose that A sues B in state court, and B makes no effort to remove the case for more than a year. With the state court's permission, B amends its answer to raise a CAFA-qualified counterclaim against A and adds C as an additional defendant to the counterclaim under a state rule analogous to FED. R. CIV. P. 13(h). We know from *Shamrock Oil* and *First Bank* that A is not entitled to remove the case to federal court, even though the counterclaim meets CAFA's standards (minimal diversity, more than $5,000,000 in controversy, etc.). What should be done with C? Home Depot proposes that a party in C's position (itself) can remove because it was brought into the suit involuntarily, by service of process, and CAFA permits removal by a single defendant. But that is just one of three possible ways of resolving the situation. The options include finding that (1) the entire "case" is removed, even though this would mean that the original plaintiff, A, would win a right to remove that was not in the statute; (2) the entire "case" is removed pursuant to § 1441(c)(1), but after removal, as § 1441(c)(2) specifies, the court must sever the nonremovable case against A and remand just that part to the state court, thereby splitting the litigation into two duplicative proceedings; or (3) the new counterclaim-defendant, C, has no right of removal, because only an original defendant can

remove—thus avoiding an end-run around *Shamrock Oil* for A and avoiding the inefficient splintering of the litigation.

Each of these possibilities has its pluses and minuses, but in the end we think that the one that does the least damage to both the jurisdictional statutes providing for removal and litigation efficiency is the third. We understand the *Shamrock Oil* ban against an original plaintiff's removal to be rooted in the

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jurisdictional choices Congress made in the removal statutes. It would be reduced to a minor formality if any party added to a counterclaim could remove: recall, in this connection, that the party adding the new counterclaim-defendant would not have to be the counterclaim-plaintiff (B, in our example); in any state following the model of the federal rules (and in most that do not), the original counterclaim-defendant, A, would also be entitled to add the new party, which could be any per- son or entity that meets the criteria of either Rule 19 or Rule 20. See FED. R. CIV. P. 13(h). This problem would be avoided if we were to adopt the case-splitting solution of the second option, following § 1441(c), but that would run squarely counter to CAFA's purpose of consolidating mass class actions in one and only one court. It would leave us with the worst of both worlds: one giant class action counterclaim proceeding in state court, and a parallel class action counterclaim proceeding in federal court. Option 3, in contrast, offers the simple and efficient solution of permitting only the original defend- ant to remove.

That is a clear rule that reduces to a minimum satellite litigation over *which* court should hear a case and paves the way to resolution on the merits.

Nothing in *First Bank* is inconsistent with this outcome. We are further reinforced in our conclusion by the fact that no circuit has adopted Home Depot's view. The only two circuits that have squarely addressed this issue agree with us. *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 334–36 (4th Cir. 2008); *Westwood Apex v. Contreras*, 644 F.3d 799 (9th Cir. 2011). Indeed, *First Bank* cited *Palisades* with approval. 598 F.3d at 916–17.

*Palisades* is directly on point, as it rejected an additional counterclaim-defendant's argument for removal under

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§ 1453(b). 552 F.3d at 334–36. The Fourth Circuit reasoned that the word "any" did not change the well-established meaning of "defendant." *Id*. at 335. The Ninth Circuit agreed. *Westwood*, 644 F.3d at 804–05. *Westwood* also reasoned that the removal argument of the additional counterclaim-defendants there— the same one advanced by Home Depot here—would render meaningless the phrase "without the consent of all defend- ants," which immediately follows "any defendant" in § 1453(b). *Id*. at 804. See also *In re Mortg. Elec. Registration Sys., Inc.* 680 F.3d 849, 851, 854 (holding that a third-party defendant cannot remove action under § 1453(b)).

C

The final arrow in Home Depot's quiver is the Supreme Court's relatively recent decision in *Dart*

*Cherokee Basin Operating Co., LLC v. Owens*, 135 S.Ct. 547 (2014). This is slightly surprising because *Dart Cherokee* does not address the issue before us. *Dart Cherokee* held that a defendant does not need to provide evidence showing that CAFA's $5 million amount- in-controversy requirement has been met in order to remove an action. 135 S.Ct. at 553. But in the course of reaching that conclusion, the Court went out of its way to emphasize that there is "no antiremoval presumption … [in] cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court." *Id*. at 554.

That might be telling if this court had taken a dim view of removal in CAFA cases. But as Home Depot recognized during oral argument, we have never applied or endorsed such an anti-removal presumption. See *Johnson v. Pushpin Holdings, LLC*, 748 F.3d 769, 773 (7th Cir. 2014); see also *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 986 (7th Cir. 2008). *Dart Cherokee* ratified our

[pg. 12]

understanding of the statute. We add that there is not a whisper in *Dart Cherokee* of any move to overrule *Shamrock Oil*. If that is where the Supreme Court is going, it will have to get there on its own; it is not for us to anticipate such a move.

D

Home Depot argues that absurd results would arise if we were to hold that additional counterclaim-defendants cannot remove actions under CAFA. It fears that doing so would "reward[ ] gamesmanship,"

because lawyers would be able to use small-claims litigation as springboards for counterclaim class actions that would be stuck in state court. This, it predicts, would re-introduce the forum-shopping CAFA was de- signed to eliminate.

We are not convinced that this will come to pass. First, the state courts have all the tools they need to manage abusive amendments to pleadings. Second, we see nothing "absurd" about keeping some cases in state court. *Shamrock Oil* implicitly allows this outcome when the removal-seeking defendant is an original plaintiff. In the 75 years since that case was decided, Congress has not seen fit to amend the general removal statute to allow such plaintiffs to remove. It is also worth noting that CAFA only *selectively* increased federal jurisdiction over multi-state class actions. It did not roll out the welcome mat for all multi-state class actions. Instead, it established restrictions on what class actions the federal courts could and could not entertain. These restrictions include amount-in-controversy and numerosity requirements, as well as the "local controversy" and "home state" exceptions, contained in 28 U.S.C. § 1332(d).

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III

If Congress wishes to fine-tune the removal rules for CAFA actions, it is free to do so. For now, however, we will apply the law as it stands, adopt the approach that is most consistent with the removal statutes, adhere to our own ruling in *First Bank*, and maintain consistency with our sister circuits.

Because an additional counterclaim-defendant, like all other counterclaim-defendants, is not entitled to remove a CAFA class action under § 1453(b), we AFFIRM the district court's or- der remanding this case to state court.

*Appendix B*
Filed Sept. 29, 2016

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

| | | |
|---|---|---|
| TRI-STATE WATER TREATMENT, INC., Plaintiff–Counter-Defendant, | ) | |
| MICHAEL BAUER and STACY BAUER, Defendant–Counter-Plaintiffs, | ) | Case No. 16-cv-0419 MJR-RJD |
| vs. | ) | |
| HOME DEPOT U.S.A., INC, and AQUION, INC. d/b/a RAINSOFT, Counter-Defendants. | ) | |

MEMORANDUM AND ORDER

REAGAN, Chief Judge:

In March 2013, Michael and Stacy Bauer (collectively, the "Bauers") received a free in-home "water evaluation," purportedly aimed at determining if their home tap water had any contaminants. Based upon the results of the evaluation, documentation, and a sales presentation, the Bauers purchased a water treatment system through Tri- State Water Treatment, Inc. ("Tri-State"), Home Depot, and Aquion. According to the Bauers, the water tests of the sort conducted in their home do nothing to adequately determine whether a

homeowner needs a water treatment system, but merely test for

[pg. 2]

the mineral content of the home's tap water. Further, despite the promises that the installed water treatment systems provide a water supply that is "totally safe," the Bauers argue that no water treatment system can honestly make such a claim, and claims of that sort are fraudulent.

It appears that the Bauers never paid for their installed system. In May 2015, Tri- State filed an action in Madison County, Illinois, seeking reimbursement. On June 5, 2015, the Bauers filed a counterclaim against Tri-State. The counterclaim, a multi-state class action, was later amended on February 26, 2016, to include Home Depot and Aquion as parties that sell the Rainsoft water treatment system which the Bauers purchased (Doc. 1-1). The Bauers clearly wanted the case to stay in state court and, in an exceptionally prescient move, cited several federal appellate cases in their amended complaint, arguing that "[c]ounterclaim class actions have repeatedly been held to be not removable, either under Section 1441 or the Class Action Fairness Act of 2005" (*Id*. at 3).

Home Depot was served with the counterclaim on March 15, 2016 (Doc. 1-2) and on April 14, 2016, removed the case to this Court (Doc. 1). In the notice of removal, Home Depot argued that the Court has original jurisdiction over the matter due to the Class Action Fairness Act of 2005 ("CAFA"). ***See* 28 U.S.C. § 1332(d)**. Home Depot noted that, as it was never a plaintiff to the action, but was instead brought into

the action as a counterclaim defendant, CAFA allows for the action's removal to federal

[pg. 3]

court (Doc. 1 at 3). Home Depot also argued that the cases cited by the Bauers were either inapposite, pre-date CAFA, or otherwise non-controlling (*Id*. at 4, n.1).

On May 16, 2016, the Bauers filed a motion to remand, arguing the single point that a counterclaim defendant does not have the power to remove a matter to federal court (Doc. 21 at 2). Home Depot filed its response in opposition (Doc. 24), to which the Bauer's replied (Doc. 25). Home Depot then moved to strike the Bauer's reply, arguing that it violated Local Rule 7.1(g)—reply briefs should be filed only in exceptional circumstances (Doc. 28). The Bauer's responded, arguing that Home Depot's motion was a "Sur-Reply Brief poorly disguised as a Motion to Strike (Doc. 31 at 1). Both the motion to remand and the motion to strike are ripe for adjudication.

The removal of class actions is governed by 28 U.S.C. § 1453. Specifically:

> 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.

**28 U.S.C. § 1453(b) (emphasis added)**. It is the above-italicized term "any defendant" which is the narrow issue in this case. Can a class action counterclaim defendant remove the case to federal court?

Here, Home Depot unequivocally says "yes." As the removing party, Home Depot "has the burden of establishing federal jurisdiction," ***Schur v. L.A. Weight Loss Ctrs.***, **577 F.3d 752, 758 (7th Cir. 2009)**, a fact unchanged by CAFA. ***Brill v.***

[pg. 4]

***Countrywide Home Loans, Inc.***, **427 F.3d 446, 447–49 (7th Cir. 2005)**. Thus, the Court will analyze its argument first. However, the Court notes that Home Depot's burden is substantial. The Seventh Circuit has cautioned that "[c]ourts should interpret the removal statute narrowly," ***Id***., and resolve any doubts regarding removal in favor the plaintiff's choice of forum in state court. ***Morris v. Nuzzo***, **718 F.3d 660, 668 (7th Cir. 2013)**. This admonition is specific to § 1441, as the Seventh Circuit has also made clear that the provisions of CAFA should be read broadly with narrow exceptions, in keeping with legislative intent to allow interstate class actions to be heard in federal court. ***Appert v. Morgan Stanley Dean Witter, Inc.*, 673 F.3d 609, 621 (7th Cir. 2012)**, ***citing*** **S. Rep. No. 109-14 at 43 (2005)**.

Additionally, Home Depot has the task of distinguishing seventy-five years of precedent. The Supreme Court in 1941 made clear that an original plaintiff who is also a counterclaim defendant cannot remove a case to federal court under § 1441.

***Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941)**. Over time, the conclusions in Shamrock Oil have been construed to allow removal under § 1441 *only* by original defendants, which would not include a counterclaim defendant. ***See, e.g., Dartmouth Plan, Inc. v. Delgado*, 736 F. Supp. 1489 (N.D. Ill. 1990)**.

However, Home Depot correctly notes that both ***Shamrock*** and opinions like ***Dartmouth Plan*** predate CAFA. They argue that the more expansive language of CAFA allows defendants to class-action counterclaims to remove state actions to federal

[pg. 5]

court, even if they are not original defendants. In making this argument, Home Depot relies in considerable part on a single ruling in a Northern District of Ohio case from 2009. ***See Deutsche Bank Nat. Trust Co. v. Weickert*, 638 F. Supp. 2d 826 (N.D. Ohio 2009) (Zouhary, J)**. In ***Deutsche Bank***, the bank brought a foreclosure action against the Weickerts. ***Id.* at 827**. As in the case currently at bar, the Weickerts then brought several class action counterclaims, both against the bank and other parties. ***Id***. And, as in the case at bar, the new parties, class action counterclaim defendants, removed the case to federal court, citing the right under § 1453 for "any defendant" to remove a class action. ***Id***. In a detailed analysis of CAFA, §§ 1441, 1446, and 1453, Judge Zouhary concluded that Congress' intent in passing CAFA was to "open the federal courts to qualifying class actions; this clear intent eliminates the federalism concerns which animated the rule of construction that removal

statutes be read narrowly." ***Deutsche Bank*, 638 F. Supp. 2d at 830**, **citing *Shamrock Oil*, 313 U.S. at 108-109**. He stated that the use of the term "any defendant" in CAFA allowed for broader authority than the basic removal statute, sufficient to allow counterclaim defendants (so long as they were not original plaintiffs) to remove cases to federal court. ***Id.* at 830**.

Judge Zouhary's argument has not received much (if any) traction, even within his district. See ***HSBC Bank USA, Nat'l Assoc. v. Arnett*, 767 F. Supp. 2d 827 (N.D. Ohio 2011)** ("defendant" as used by CAFA does not include counterclaim defendant); ***U.S. Bank Nat'l Assoc. v. Adams*, 727 F. Supp. 2d 640 (N.D. Ohio 2010) (same)**; ***Capital***

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***One Bank (USA) N.A. v. Jones*, 710 F. Supp. 2d 630 (N.D. Ohio 2010) (same)**; ***Am. Gen. Fin. Serv. v. Griffin*, 685 F. Supp. 2d 729 (N.D. Ohio 2010) (same)**. In denying review of the remand order in ***Jones***[1], the Sixth Circuit noted:

> The district court's ruling is consistent with the decision of our sister circuit holding that CAFA does not authorize removal by an additional counterclaim defendant. *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 334–37 (4th Cir. 2008), *cert. denied*, 129 S.Ct. 2826 (2009); see also *First Bank v. DJL Props., LLC*, 598 F.3d 915, 917–18 (7th Cir. 2010) (CAFA does not

[1] Though remand orders are typically not appealable, **28 U.S.C. § 1447(d)**, an exception exists for CAFA cases, **28 U.S.C. § 1453(c)(1)**.

> authorize removal by a counterclaim defendant); *Progressive W. Ins. Co. v. Preciado*, 479 F.3d 1014, 1017–18 (9th Cir. 2007) (same). In addition, the ruling is consistent with the body of law providing that the term "defendant" in the removal statutes is narrowly construed. See, e.g., *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941); *First Nat'l Bank of Pulaski v. Curry*, 301 F.3d 456, 462 (6th Cir. 2002).

***In re Morgan & Pottinger, P.S.C.*, No. 10–0309, slip op. at 1-2 (6th Cir. June 16, 2010)**. In fact, even within his ruling in ***Deutsche Bank***, Judge Zouhary notes at least one contemporaneous and contrary ruling within his district. **638 F. Supp. 2d at 827**, *citing* ***Wells Fargo Bank v. Gilleland*, 621 F. Supp. 2d 545 (N.D. Ohio 2009) (Katz, J.) (counterclaim defendant cannot remove under CAFA)**. In disagreeing with Judge Zouhary's finding, Judge Katz argued that though CAFA did expand federal jurisdiction over CAFA, "this expansion was achieved, not by allowing removal by third-party defendants, crossclaim defendants, or counterclaim defendants, but by 'doing away with the nonaggregation rule and providing for minimal diversity.' " ***Id.* at 549**, ***quoting Ford Motor Credit Co. v. Jones*, No. 1:07CV728, 2007 WL 2236618 at *2.**

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**(N.D. Ohio Jul. 31, 2007)**; ***Palisades Collections LLC v. Shorts*, 552 F.3d 327, 332–336 (4th Cir. 2008)**.

In contrast, the Bauers cite to the Seventh Circuit's ruling in ***First Bank v. DJL Properties,***

***LLC***, **598 F.3d 915 (7th Cir.), *cert. denied*, 562 U.S. 1003 (2010)**. In ***First Bank***, the bank sued DJL Properties, who responded by filing class action counterclaims. ***Id***. **at 916**. In separate rulings by this Court and the Honorable J. Phil Gilbert relying on Shamrock and Palisades, the cases were remanded on the grounds that a plaintiff wh0 chooses a state court forum cannot later remove after becoming a counterclaim defendant. ***Id***., ***citing* 2010 U.S. Dist. LEXIS 7204 (S.D. Ill. Jan. 27, 2010) (Gilbert, J.)**; **2010 U.S. Dist. LEXIS 7700 (S.D. Ill. Jan. 29, 2010) (Reagan, J.)** On appeal, the Seventh Circuit affirmed, stating:

> a litigant who files suit in state court is a 'plaintiff' and cannot remove the case, even if the defendant files a counterclaim and the original plaintiff then wears two hats, one as plaintiff and one as defendant—and even if the counterclaim is distinct from the original claim and could have been a separate piece of litigation.

***First Bank*, 598 F.3d at 916, *citing Shamrock Oil*, 313 U.S. 100 (1941)**.

Home Depot argues that ***First Bank*** is inapposite, as the counterclaim defendant there was the original plaintiff, whereas in the instant case, Home Depot was never a plaintiff, and thus the rulings in ***Shamrock Oil*** and ***First Bank***, do not apply. In fact, had the Seventh Circuit stopped with the pronouncement above, the Court might concur, agree that the question was still open in this Circuit, and that ***First Bank***,

though instructive, did not go far enough to settle the issue. But Judge Easterbrook's opinion does not conclude at the bottom of page 916 by affirming Judge Gilbert's and this Court's ruling as to original plaintiffs.

What follows instead is a pithy analysis of the removal statutes for class actions and actions in general, thoroughly undercutting Home Depot's argument in this Circuit. As noted above, § 1453 states that removal must be "in accordance with section 1446." And, though § 1453 does use the phrase "any defendant," § 1446 describes the procedure for removal, limiting removal to being initiated by "defendants."[2] That section in turn refers to § 1441 which also uses the unmodified term "defendants."[3] As a result, the word "defendant" must mean the same thing in each section, else "the removal provisions are incoherent." ***First Bank***, **598 F.3d at 917**. To view it otherwise would, in Judge Easterbrook's words, make "hash" out of the statutory language. Id. Further, since the word "'defendant' has an established meaning in legal practice," it is impractical to believe that CAFA uses the term "in a novel way":

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[2] "A defendant or defendants desiring to remove any civil action . . . ." **28 U.S.C. § 1446(a)**.

[3] "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defend-ant or the defendants . . . ." **28 U.S.C. § 1441(a)**

> If the drafters of the 2005 Act wanted to negate *Shamrock Oil*, they could have written "defendant (including a *counterclaim defendant*)" or "any party" (the phrase in 28 U.S.C. § 1452(a) for removal in bankruptcy proceedings). But they chose the unadorned word "defendant," a word with a settled meaning.
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> [pg. 9]

***First Bank*, 598 F.3d at 917 (emphasis added)**. Thus, though it is true that First Bank deals directly with the issue of an original plaintiff/counterclaim defendant removing a case to federal court under CAFA, Judge Easterbrook's opinion makes it clear that CAFA's language, as modified by §§ 1441 and 1446, still limits removal to *original defendants* as mandated by Shamrock Oil and its progeny. Stated another way, though the passage of CAFA made it easier to remove class action suits to federal court, its language did not imply that "[c]ourts may allow removal whenever the case involves a large, multi-state class action." ***Id.* at 918**.

Prior to CAFA, sections 1441 and 1446 limited removal in a few key ways. First, removal was not possible if a defendant was a citizen of the state in which the action is brought—the so called "forum defendant" or "home defendant" rule. **28 U.S.C. § 1441(b)**. See ***Thornton v. M7 Aerospace LP*, 796 F.3d 757, 764 (7th Cir. 2015)**. Second, section 1446 requires unanimity of action by all defendants joined and served at the time of removal. **28 U.S.C. § 1446(b)(2)(A)**.

CAFA undid both of these requirements as two of several measures to expand access of class actions into the federal courts. However, to affect that change, it required the use of the key word "any." Though Home Depot would argue that the use of the word "any" demonstrated an expansion of the sort of defendant who could remove a case, Judge Easterbrook sees it differently:

> The function of the first "any" in § 1453(b) is to establish that § 1441(b), which provides that a home-state defendant can't remove a diversity suit,
>
> [pg. 10]
>
> does not apply. (The context is: "without regard to whether any defendant is a citizen of the State in which the action is brought".) The function of the second "any" is to establish that a single defendant's preference for a federal forum prevails, notwithstanding *Martin*. (The context is: "except that such action may be removed by any defendant without the consent of all defendants".) Neither instance of the word "any" implies that "defendant" means something different in § 1441(b) and § 1453(b).

***First Bank*, 598 F.3d at 917, citing *Chicago, Rock Island & Pacific Ry. v. Martin*, 178 U.S. 245 (1900) (prior to CAFA, defendants must unite to remove to federal court)**. By the use of the word "any," Congress demonstrably expanded the domain of cases which could be removed to federal court (and made the process decidedly easier), but did not expand the type of defendants who could remove the cases. Though the Court could argue that the

language used by Congress was imprecise (as the present litigation demonstrates), the effect is clear.

Both the Ninth and the Fourth circuits have addressed these issues and have reached similar conclusions. ***See, e.g., Westwood Apex v. Contreras*, 644 F.3d 799, 803-07 (9th Cir. 2011)**; ***Palisades Collections, LLC v. Shorts*, 552 F.3d 327, 333-37 (4th Cir. 2008)**; ***Progressive West Insurance Co. v. Preciado*, 479 F.3d 1014, 1017-18 (9th Cir. 2007)**.[4] The Court would argue that the Sixth Circuit decision in Morgan & Pottinger, discussed above, echoes this conclusion sub silentio. The Sixth Circuit was decidedly

[pg. 11]

less silent in 2012 when, citing ***Westwood, Palisades*** and ***First Bank***, they denied a third-party defendant's right to remove under CAFA:

> The majority of courts that have considered the issue have relied on the context of the Act to conclude that the language of section 1453(b) does not change the prior rule that counterclaim or third-party defendants do not have the right of removal.

***In re Mortgage Elec. Registration Systems, Inc.*, 680 F.3d 849, 854 (6th Cir. 2012) (emphasis added)**. In so ruling, the Sixth Circuit, mirroring the

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[4] *See also U.S. Bank, N.A. v. Ernst*, No. CIV-13-0215-HE, 2013 WL 3353989, at *2 (W.D. Okla. July 3, 2013) (third-party defendants cannot remove under CAFA); *Deutsche Bank Nat. Trust Co. v. Collins*, No. 4:11-CV- 04092-SOH, 2012 WL 768206, at *1 (W.D. Ark. Mar. 7, 2012) (counterclaim defendants cannot remove under CAFA).

opinion in ***First Bank***, made clear that the word "any" modifies the rule that all defendants must consent to removal, rather than deviating from the long-standing rule and allowing "any defendant," including third-party and counterclaim defendants to remove actions. ***Id***.

It could be argued that ***First Bank*** (removal by original plaintiff/counterclaim defendant) and ***In re Mortgage*** (removal by third-party defendant) are not precisely on point with Home Depot's posture (removal by a counterclaim defendant). Home Depot makes this argument, but cannot escape the pronouncements by the Ninth Circuit in ***Westwood***:

> While CAFA eliminated several important roadblocks to removal of class actions commenced in state court, we hold that 28 U.S.C. § 1453(b) did not change the longstanding rule that *a party who is joined to such an action as a defendant to a counterclaim* or as a third-party defendant may not remove the case to federal court.

**644 F.3d at 807 (emphasis added)**, or the Fourth Circuit in ***Palisades Collections***:

> Under both § 1441(a) and § 1453(b), *a counter-defendant may not remove a class action counterclaim to federal court*. Congress is presumed to know the current legal landscape against which it legislates, and we are merely

> applying those pre-existing established legal rules. If Congress wants to overturn such precedent, it should do so expressly.

**552 F.3d at 337 (emphasis added)**. These rulings are likewise on point as to the use of the word "any" in § 1453. **See, e.g., *Westwood*, 644 F.3d at 803-04 (use of the word "any" in § 1453 eliminates the so-called 'home-state defendant' restriction on removal found in § 1441(b)" and "provides that 'any defendant' is allowed to remove an action without obtaining the consent of 'all defendants.'"), *citing Palisades Collections*, 552 F.3d at 335**. In short, opinions in the Fourth, Sixth, Ninth, and most importantly, the Seventh Circuits addressing precisely the issue currently before this Court, have found Home Depot's argument wanting.

Despite the above appellate rulings, Home Depot continues, arguing that a recent decision by the Supreme Court renders them obsolete. In ***Dart Cherokee Basin Operating Co., LLC v. Owens***, the Supreme Court examined the question of whether a notice of removal in a CAFA action need only plausibly demonstrate the amount in controversy, or whether evidence of the amount in controversy must be expressly provided in the removal notice. **135 S.Ct. 547, 551 (2014)**. In a 5-4 decision, the Supreme Court found that only a "short and plain" statement is necessary in the notice of removal, and that additional evidence as to the amount in controversy is not necessary at that juncture of the proceedings. ***Id***. It is worth noting that the case before the Supreme Court involved a

class action filed by Owens in state court and removed by the defendants to federal court. ***Id***.

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In her opinion, Justice Ginsburg noted that trial court in Kansas, in deciding to remand the case "relied, in part, on a purported 'presumption' against removal." **135 S.Ct. at 554**. She stated:

> We need not here decide whether such a presumption is proper in mine- run diversity cases. It suffices to point out *that no antiremoval presumption attends cases invoking CAFA*, which Congress enacted to facilitate adjudication of certain class actions in federal court.

**135 S.Ct. at 554 (emphasis added)**. It is this language which Home Depot relies upon for repudiating post-CAFA/pre-***Dart Cherokee*** rulings like ***Westwood, First Bank, and Palisades Collections***.

Put simply, Home Depot reads far too much into ***Dart Cherokee***. The Court agrees that one of the goals of CAFA was to expand the number of class action cases which could receive federal court scrutiny. ***In re Sprint Nextel Corp.*****, 593 F.3d 669, 673 (7th Cir. 2010) (one goal of CAFA was to ensure "national controversies" are decided in federal court)**. As Justice Ginsburg noted, there is a strong preference for these actions to be heard in federal court "if properly removed." ***Dart Cherokee*****, 135 S.Ct. at 554, *citing* S. Rep. No. 109–14, at 43 (2005) (CAFA's "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.")**. In ***Dart Cherokee***, the defendants properly removed the plaintiff's class action. There was not a question of whether the defendants were proper defendants under §§ 1441, 1446, and 1453—they were the only defendants—original defendants—and ***Dart Cherokee*** is precisely the sort

[pg. 14]

of case that CAFA was designed to bring to the federal court's doorstep. Once a case is "properly removed," ***Dart Cherokee's*** admonition should kick in—the provisions of CAFA should be broadly interpreted to maximize the chances that the case can remain in federal court, including requiring a short, plain statement that plausibly lists damages in excess of the amount in controversy threshold.

Nowhere in ***Dart Cherokee*** does the Supreme Court suggest that the language of CAFA or Congress' intent in passing it somehow overrules the plain language of the removal statutes of §§ 1441 and 1446. Nor does it claim that the well-reasoned opinions in ***Westwood***, ***First Bank***, and ***Palisades Collections***, or the logic employed in those opinions, are wrong. No reference at all is made to removal by original plaintiffs, third- party defendants, or counterclaim defendants. In their argument, Home Depot has conflated the concept of *who* can "properly remove" an action, with *whether* that action, once properly removed, can and should stay in federal court. Home Depot argues that ***Dart Cherokee*** expands who can remove a case, when instead it merely states that a case, "if properly removed," has

a strong bias in favor (or more exactly, there is not a strong bias against) being maintained in federal court. **135 S.Ct. at 554**. The proper removal of the case remains a condition precedent, as demonstrated by the conditional word "*if*." If a case is not properly removed, then ***Dart Cherokee*** has no bearing on whether it should be remanded, which is the situation before the Court. Home Depot's reliance on ***Dart Cherokee*** is misplaced and in no way improves its argument.

[pg. 15]

Home Depot makes one final attempt at relying on the ruling in ***Dart Cherokee***. In its motion to strike (Doc. 28), Home Depot claims that the Ninth Circuit (among others)[5] has recently stated, in light of ***Dart Cherokee***, that it is "no longer bound" by prior opinions that "strictly construed" the requirements of removal, including ***Progressive West Insurance Co. v. Preciado*, 479 F.3d 1014, 1017-18 (9th Cir. 2007). *See Jordan v. Nationstar Mortg. LLC*, 781 F.3d 1178, 1183 (9th Cir. 2015)**.

Home Depot had an opportunity to raise these arguments in its response. It did not. Though framed as a motion to strike, the document is more accurately described as a sur-reply, raising new issues only after the Bauer's reply. The Court will construe it as such. Under Local Rule 7.1(c), sur-replies are not accepted in this District, and the Court sees no basis for deviating from that rule. The Court shall **STRIKE** the "motion." The arguments

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[5] ***See Graiser v. Visionworks of Am., Inc.*, 819 F.3d 277, 283 (6th Cir. 2016); *Dudley v. Eli Lilly & Co.*, 778 F.3d 909, 912 (11th Cir. 2014)**

presented within it will have no effect on the ruling on the underlying motion to remand.

However, assuming arguendo that Home Depot had presented ***Jordan*** to the Court in its earlier response, the outcome would not have changed. The Ninth Circuit's pronouncement in ***Jordan*** accurately reflects that of ***Dart Cherokee***—a strong presumption for maintaining properly removed CAFA actions in federal court. **781 F.3d at 1182**. Like ***Dart Cherokee***, the underlying action in ***Jordan*** involved a class action filed in state court removed to federal court and later remanded. ***Id***. **at 1180**.

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Both remands were premised on on procedural questions about the amount in controversy and the trial court's strict evaluation of CAFA's removal provisions. Specifically, ***Jordan*** turned on the timeline for removal of a CAFA action based upon later knowledge that the amount in controversy exceeded the $5,000,000.00 threshold. ***Id***.

But Home Depot's argument that ***Jordan*** has somehow abrogated ***Progressive West's*** "outdated arguments" in a way meaningful to the instant case presumes that the Supreme Court's decision ***Dart Cherokee*** provided a means for granting counterclaim defendants the right to remove CAFA actions to federal court. The Court has amply demonstrated that a denial of a remand still requires that the underlying case was properly removed, something which counterclaim defendants cannot do.

Nothing in ***Dart Cherokee*** eliminates the barrier. This is perhaps best illustrated by the fact that, though ***Jordan*** mentions cases like ***Progressive West***, it makes no mention of ***Westwood***—the leading Ninth Circuit case which explicitly addresses the barrier to removal by counterclaim defendants, but which makes no reference to the outdated presumption against removal. Were ***Jordan*** on point to Home Depot's issue, the Ninth Circuit would certainly have referenced its lead case on the subject as being "undercut" by the Supreme Court's decision. **781 F.3d at 1183, n.2.** ***Jordan*** stands for a separate issue and offers no solace to Home Depot's specific issue.

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In closing, the Court notes that the outcome of this case is somewhat counterintuitive. Home Depot was not a party to the original small claims action, and as such, did not submit voluntarily to the jurisdiction of the state action. ***See, e.g., Ford Motor Credit Co., Inc. v. Aaron-Lincoln Mercury, Inc.*****, 563 F. Supp. 1108, 1113 (N.D. Ill. 1983)**. Had the underlying action not existed, and the Bauers had instead filed a CAFA action in Madison County against Tri-State, Home Depot, and Aquion, removal would have been acceptable and ordinary—the precise sort of suit that CAFA was intended to serve. However, that counterfactual is not before the Court today. As Judge Bybee stated in his concurrence in ***Westwood***:

> Given that Congress expressly intended CAFA to expand federal diversity jurisdiction over class

> actions, it seems strange that Congress would have wanted to funnel class actions filed by means of an original complaint into federal court but keep those filed by means of a counterclaim in state court. But as the court correctly concludes, CAFA achieves this particular result, and if Congress does not like it, Congress should rethink the rule.

**644 F.3d. at 809 (Bybee, J., concurring)**. The Court agrees with Judge Bybee—the outcome seems strange, but it is an outcome that is mandated by the language of sections 1441, 1446, and 1453, as interpreted by four separate circuits, including controlling language in this circuit. It is not undermined by unpersuasive out-of-circuit opinions which have been largely overruled, nor by Supreme Court rulings which address CAFA issues wholly separate from those at issue here. Counterintuitive though it may be, it is not this Court's role to provide a judicial reinterpretation of the relevant statutes.

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Home Depot has the burden of establishing this Court's jurisdiction in this removed action, but it cannot overcome the weight of authority to the contrary. The Court finds that Home Depot has not met its burden. Accordingly, the Court **GRANTS** the motion to remand (Doc. 21) and **REMANDS** the case back to the Third Judicial Circuit, Madison County, Illinois. Home Depot's motion to strike (Doc. 28) is construed as an unacceptable sur-reply and is **STRICKEN**. The Clerk of Court is **DIRECTED** to transmit a certified copy of this Order to the clerk of the state court, and thereafter **CLOSE** this case.

**IT IS SO ORDERED.**

DATED: **September 29, 2016**

***s/ Michael J. Reagan***
MICHAEL J. REAGAN
Chief Judge
United States District Court

*Appendix C*
Filed April 14, 2016

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS DIVISION

| | |
|---|---|
| TRI-STATE WATER TREATMENT, INC., Plaintiff–Counter-Defendant, | Case No. 16-cv-0419 |
| MICHAEL BAUER and STACY BAUER, Defendant–Counter-Plaintiffs, | Case No. 15-SC-1407, Removed from the Circuit Court for the Third Judicial Circuit, Madison County, Illinois |
| vs. | |
| HOME DEPOT U.S.A., INC, and AQUION, INC. d/b/a RAINSOFT, Counter-Defendants. | |

**NOTICE OF REMOVAL**

Counter-Defendant Home Depot U.S.A., Inc. ("Home Depot") hereby files this Notice of Removal of this action from the Circuit Court for the Third Judicial Circuit, Madison County, Illinois, to the United States District Court for the Southern District of Illinois. This Notice of Removal is filed pursuant to 28 U.S.C. §§ 1332, 1441, 1446, and 1453 on the basis of the following facts, which show that this case may be properly removed to this Court:

1. Home Depot has been sued in a civil action entitled *Tri-State Water Treatment, Inc. v. Michael Bauer and Stacey Bauer, individually and on behalf of others similarly situated*, Case No. 15-SC-1407, in the Circuit Court for the Third Judicial Circuit, Madison County, Illinois (the "State Court Action").

2. Counter-Plaintiffs Michael Bauer and Stacey Bauer ("Plaintiffs"), filed their First

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Amended Class Action Counterclaim (the "Complaint"), naming Home Depot for the first time, on February 26, 2016. In addition to Home Depot, the Complaint names as Counter-Defendants Tri-State Water Treatment, Inc., and Aquion, Inc., d/b/a Rainsoft (collectively with Home Depot, "Defendants"). Home Depot was previously not a party in this case.

3. Plaintiffs purported to serve the Complaint on Home Depot via its registered agent Illinois Corporation Service on March 15, 2016.

4. As set forth more fully below, this case is properly removed to this Court pursuant to 28 U.S.C. § 1441 because Home Depot has satisfied the procedural requirements for removal, and this Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(d).

## I. HOME DEPOT HAS SATISFIED THE PROCEDURAL REQUIREMENTS FOR REMOVAL.

5. Plaintiffs purported to serve Home Depot with the Complaint on March 15, 2016. (*See* Exhibit A.) Accordingly, this Notice of Removal is timely under 28 U.S.C. § 1446(b) because it was filed within thirty days after receipt by Home Depot, through service or otherwise, of a copy of the "initial pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b).

6. As of the date of this removal, Home Depot has not filed a responsive pleading to the Complaint. Home Depot reserves all rights to assert any and all defenses or otherwise respond to the Complaint. Home Depot further reserves the right to amend or supplement this Notice of Removal.

7. Venue lies in the United States District Court for the Southern District of Illinois, East St. Louis Division, pursuant to 28 U.S.C. § 1441(a), because the original action was filed in a state court located within the Southern District of Illinois. The Circuit Court for the Third



Judicial Circuit, Madison County, Illinois, is located within the East St. Louis Division of the Southern District of Illinois. Venue, therefore, is proper in this Court because it is the "district and division embracing the place where such action is pending." *See* 28 U.S.C. § 1441(a).

8. Pursuant to 28 U.S.C. § 1446(a), true and exact copies of all process, pleadings, and orders served on Home Depot in this matter are attached as Exhibit A. Pursuant to 28 U.S.C. § 1446(d), a copy of this Notice of Removal is being served upon counsel for Plaintiffs, and a copy is being filed with the clerk of the Circuit Court for the Third Judicial Circuit, Madison County, Illinois.

## II. **REMOVAL** IS PROPER BECAUSE THE COURT HAS SUBJECT MATTER JURISDICTION PURSUANT TO 28 U.S.C. § 1332.

9. The Court has original jurisdiction over this action, and the action may be removed to this Court, under the Class Action Fairness Act of 2005 ("CAFA"). Pub. L. No. 109- 2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

10. As set forth below, this is a putative class action in which: (1) there are more than 100 members in the putative class proposed by Plaintiffs; (2) at least one member of the proposed class is a citizen of a different state than at least one Defendant; and (3) based upon the allegations in the Complaint, the claims of the putative class members exceed the sum or value of $5 million in the aggregate, exclusive of interest and costs. Thus, this Court has original jurisdiction over this action, and the action may be removed to this Court pursuant to 28 U.S.C. § 1332(d)(2).

11. Home Depot has never been a plaintiff in the State Court Action. Because Home Depot was brought into this case for the first time as a counterclaim defendant, it may remove the case

under CAFA. *See Deutsche Bank Nat. Trust Co. v. Weickert*, 638 F. Supp. 2d 826, 829 (N.D. Ohio 2009) ("CAFA expanded removal authority to include parties added as counterclaim

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defendants to a class action by authorizing removal by '*any* defendant,' rather than '*the* defendant.' Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.') (emphasis in original; internal quotes omitted) (citing *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008)).[1]

**A. Plaintiffs' Proposed Class Consists of More Than 100 Members.**

12. Plaintiffs purport to bring this case as a class action on behalf of "all persons who purchased a water treatment system from Tri-State, Rainsoft and Home Depot" in "Illinois, Missouri, Kentucky, Arkansas, Louisiana and Texas." (Compl. ¶¶ 29, 31.) Plaintiffs further allege that "at a minimum, the

[1] The only Seventh Circuit case cited in the Complaint in support of Plaintiffs' assertion that this case is not removable, *First Bank v. DJL Props., LLC*, 598 F.3d 915 (7th Cir. 2010), is inapposite. In *First Bank*, the court held only that CAFA did not permit removal by an original plaintiff—which itself initially chose to litigate in state court—after it became a counterclaim defendant. And the only case the Complaint cites from an Illinois federal district court, *Dartmouth Plan, Inc. v. Delgado*, 736 F. Supp. 1489 (N.D. Ill. 1990), predates CAFA. The other, out-of-circuit cases cited in the Complaint are not controlling, nor are they more persuasive than *Deutsche Bank*, 638 F. Supp. 2d 826.

class consists of several thousand members." (*Id.* ¶ 31.)

13. Accordingly, based on the allegations in the Complaint, the aggregate number of members of the putative class is greater than 100 for purposes of 28 U.S.C. § 1332(d)(5)(B).

**B. Minimal Diversity Exists.**

14. This Court has original jurisdiction under CAFA when the parties in a class action are minimally diverse. *See* 28 U.S.C. § 1332(d)(2)(A) ("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*. . . . ) (emphasis added).

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15. Home Depot is, and was at the time it was served with the Complaint, a corporation duly organized and validly existing under the laws of the State of Delaware, which maintains its principal place of business in Georgia. (Compl. ¶ 6.) Home Depot, therefore, is a citizen of Delaware and Georgia.

16. Plaintiffs Michael and Stacey Bauer allege that they are citizens of Illinois. (Compl. ¶ 5.) They also purport to represent class members from six states that are not Delaware or Georgia. (Compl. ¶ 31.)

17. Because at least one member of the putative class is diverse from at least one defendant,

the requirements for minimal diversity under 28 U.S.C. § 1332(d)(2)(A) are satisfied.

### C. The Amount in Controversy Exceeds $5 Million.

18. The amount in controversy is determined "long before 'evidence' or 'proof' have been adduced." *Brill v. Countrywide Home Loans*, Inc., 427 F.3d 446, 448 (7th Cir. 2005). Thus, "[t]he question is not what damages the plaintiff will recover, but what amount is 'in controversy' between the parties. That the plaintiff may fail in its proof, and the judgment be less than the threshold (indeed, a good chance that the plaintiff will fail and the judgment will be zero) does not prevent removal." *Id*. At the appropriate time, Home Depot will demonstrate that Plaintiffs are not entitled to any of the relief sought in the Complaint, but for purposes of the removal analysis, the allegations in the Complaint demonstrate that the amount in controversy exceeds $5 million.

19. This action arises out of alleged misrepresentations made by counterclaim defendant Tri-State in connection with the sale of water treatment systems manufactured by RainSoft. The Complaint generally alleges that Plaintiffs and the purported class have suffered

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injury "because they paid for a product that was devoid of any efficacy, and thus did not perform as intended and uniformly represented by Defendant." (Compl. ¶ 44.)

20. Plaintiffs seek "an award of all compensable damages, and attorneys' fees, costs and expenses to be assessed against Defendant," as well as a laundry list of other remedies, including "restitution to Plaintiff and the other members [of the purported class]," disgorgement of "all revenues obtained as a result of Defendant's violations of Illinois law, or any other state law," "statutory damages in the maximum amount provided by law," "monetary damages, including, but not limited to, any compensatory, incidental, or consequential damages," "punitive damages," and "attorneys' fees" (Compl. ¶ 45, Prayer for Relief at D(f), D(g), E, F, H, J.)

21. The Complaint alleges that "[t]he cost of each water treatment system typically exceeds $5,000.00." (Compl. ¶ 6.)

22. As noted above, Plaintiffs seek to represent a class of "at a minimum . . . several thousand members." (Compl. ¶ 31.)

23. Based upon the allegations in the Complaint that each member of the putative class allegedly paid at least $5,000 for a water treatment system, and assuming a class of 2,000 members (the lowest conceivable number that might qualify as "several thousand"), the amount in controversy in this case based solely on this speculative element of the putative class members' alleged harm is at least $10,000,000.

24. Moreover, as noted above, in addition to disgorgement, Plaintiffs seek: (a) statutory damages; (b) compensatory, incidental, or consequential damages; (c) punitive damages; and (d) attorneys' fees. (See Compl., Prayer for Relief at E, F, H, J.)

Plaintiffs' request for these additional remedies reinforces the conclusion that the amount in controversy far exceeds $5 million.

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25. For example, a successful claim for punitive damages under the Illinois Consumer Fraud and Deceptive Business Practices Act could "amount to a multiplier of five." *Keeling v. Esurance Ins. Co.*, 660 F.3d 273, 275 (7th Cir. 2011) (finding CAFA amount-in-controversy requirement satisfied where recovery of punitive damages was "[i]mprobable, perhaps, but not impossible").

26. Plaintiffs' request for an award of attorneys' fees must also be considered in determining the amount in controversy. *See The Home Depot, Inc. v. Rickher*, No. 06-8006, 2006 WL 1727749, at *1 (7th Cir. May 22, 2006) ("The amount in controversy includes monetary damages, attorney's fees and 'the cost a defendant incurs in complying with injunctive relief.'") (citation omitted).

27. Courts have assumed attorneys' fees of 30% in calculating the amount in controversy for jurisdictional purposes. See, e.g, *Keeling v. Esurance Ins. Co.*, No. 10-0835- DRH, 2011 WL 3030942, at *3 n.7 (S.D. Ill. July 25, 2011) (estimating attorneys' fees at "30% of the damages"), *rev'd on other grounds*, 660 F.3d 273 (7th Cir. 2011). Based on disgorgement of $10,000,000 in revenues, and assuming a 30% contingency fee, the purported class theoretically could seek to recover attorneys' fees of $3,000,000.

28. Based on these facts, the amount in controversy of this putative class action far exceeds $5 million.

## III. CONCLUSION

29. While Home Depot believes Plaintiffs' claims fail on the merits and class certification is not appropriate in this action, based on Plaintiffs' allegations, the amount in controversy in this matter (including, but not limited to, the requested disgorgement, punitive



damages, and attorneys' fees) exceeds the jurisdictional threshold of $5 million set forth in 28 U.S.C. § 1332(d).

30. For all the reasons stated above, this action is removable to this Court pursuant to 28 U.S.C. §§ 1441, 1446 and 1453, and this Court may exercise jurisdiction over this matter pursuant to 28 U.S.C. § 1332(d).

31. Promptly after the filing of this Notice of Removal, in accordance with 28 U.S.C. § 1446(d), Home Depot will give written notice of the Notice of Removal to Plaintiffs and will file a copy of this Notice of Removal with the Circuit Court for the Third Judicial Circuit, Madison County, Illinois.

WHEREFORE, this action is hereby removed from the Circuit Court for the Third Judicial Circuit, Madison County, Illinois, to the United States District Court for the Southern District of Illinois, East St. Louis Division, pursuant to 28 U.S.C. §§ 1332(d), 1441 and 1453(b).

Respectfully submitted this 14th day of April, 2016.

/s/ Russell K. Scott

Russell K. Scott IL Bar No. 02533642
GREENSFELDER, HEMKER & GALE, P.C.
12 Wolf Creek Drive, Suite 100
Belleville, Illinois 62226
Tel: 618.257.7308
Dir: 618.239.3612
Fax: 618.257.7353
rks@greensfelder.com

*Counsel for Defendant Home Depot U.S.A., Inc.*

*Appendix D*

PUBLIC LAW 109–2—FEB. 18, 2005

Class Action Fairness Act of 2005.

**SEC. 2. FINDINGS AND PURPOSES.**

(a) FINDINGS.—Congress finds the following:

(1) Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.

(2) Over the past decade, there have been abuses of the class action device that have—

(A) harmed class members with legitimate claims and defendants that have acted responsibly;

(B) adversely affected interstate commerce; and

(C) undermined public respect for our judicial system.

(3) Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where—

(A) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value;

(B) unjustified awards are made to certain plaintiffs at the expense of other class members; and

(C) confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights.

(4) Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are—

(A) keeping cases of national importance out of Federal court;

(B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and

(C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

(b) PURPOSES.—The purposes of this Act are to—

(1) assure fair and prompt recoveries for class members with legitimate claims;

(2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and

(3) benefit society by encouraging innovation and lowering consumer prices.

28 U.S.C. § 1332

**§ 1332. Diversity of citizenship; amount in controversy; costs**

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court

may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of—

(A) every State and foreign state of which the insured is a citizen;

(B) every State and foreign state by which the insurer has been incorporated; and

(C) the State or foreign state where the insurer has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) (1) In this subsection—

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State

statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

(C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(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;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all

proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of—

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2)—

(A) (i) over a class action in which—

I. greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

II. at least 1 defendant is a defendant—

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

III. principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

(5) Paragraphs (2) through (4) shall not apply to any class action in which—

(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(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.

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim—

(A) concerning a covered security as defined under 16(f)(3)[1] of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)[2]) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(B) that relates to the internal affairs or governance of a corporation or other form of

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[1] So in original. Probably should be preceded by "section".

[2] So in original. Probably should be "77p(f)(3)".

business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

(11) (A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B) (i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which—

I. all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

II. the claims are joined upon motion of a defendant;

III. all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

IV. the claims have been consolidated or coordinated solely for pretrial proceedings.

(C) (i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

(ii) This subparagraph will not apply—

I. to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

II. if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

(D) The limitations periods on any claims asserted in a mass action that is removed to

Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

(E) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

(June 25, 1948, ch. 646, 62 Stat. 930; July 26, 1956, ch. 740, 70 Stat. 658; Pub. L. 85–554, § 2, July 25, 1958, 72 Stat. 415; Pub. L. 88–439, § 1, Aug. 14, 1964, 78 Stat. 445; Pub. L. 94–583, § 3, Oct. 21, 1976, 90 Stat. 2891; Pub. L. 100–702, title II, §§ 201(a), 202(a), 203(a), Nov. 19, 1988, 102 Stat. 4646; Pub. L. 104–317, title II, § 205(a), Oct. 19, 1996, 110 Stat. 3850; Pub. L. 109–2, § 4(a), Feb. 18, 2005, 119 Stat. 9; Pub. L. 112–63, title I, §§ 101, 102, Dec. 7, 2011, 125 Stat. 758.)

28 U.S.C. § 1441

**§ 1441. Removal of civil actions**

(a) GENERALLY.—Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) REMOVAL BASED ON DIVERSITY OF CITIZENSHIP.—(1) In determining whether a civil action is removable on the basis of the jurisdiction under section 1332(a) of this title, the citizenship of defendants sued under fictitious names shall be disregarded.

(2) A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) JOINDER OF FEDERAL LAW CLAIMS AND STATE LAW CLAIMS.—(1) If a civil action includes—

(A) a claim arising under the Constitution, laws, or treaties of the United States (within the meaning of section 1331 of this title), and a claim not within the original or supplemental jurisdiction of the district court or a claim that has been made nonremovable by statute,

the entire action may be removed if the action would be removable without the inclusion of the claim described in subparagraph (B).

(2) Upon removal of an action described in paragraph (1), the district court shall sever from the action all claims described in paragraph (1)(B) and shall remand the severed claims to the State court from which the action was removed. Only defendants against whom a claim described in paragraph (1)(A) has been asserted are required to join in or consent to the removal under paragraph (1).

(d) ACTIONS AGAINST FOREIGN STATES.— Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) MULTIPARTY, MULTIFORUM JURISDICTION.— (1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if—

(A) the action could have been brought in a United States district court under section 1369 of this title; or

(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be

removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) 1 has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand

has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) DERIVATIVE REMOVAL JURISDICTION.—The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

(June 25, 1948, ch. 646, 62 Stat. 937; Pub. L. 94–583, § 6, Oct. 21, 1976, 90 Stat. 2898; Pub. L. 99–336, § 3(a), June 19, 1986, 100 Stat. 637; Pub. L. 100–702, title X, § 1016(a), Nov. 19, 1988, 102 Stat. 4669; Pub. L. 101–650, title III, § 312, Dec. 1, 1990, 104 Stat. 5114; Pub. L. 102–198, § 4, Dec. 9, 1991, 105 Stat. 1623; Pub. L. 107–273, div. C, title I, § 11020(b)(3), Nov. 2, 2002, 116 Stat. 1827; Pub. L. 112–63, title I, § 103(a), Dec. 7, 2011, 125 Stat. 759.)

28 U.S.C. § 1446

**§ 1446. Procedure for removal of civil actions**

(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.

(b) REQUIREMENTS; GENERALLY.—(1) The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

(2)(A) When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action.

(B) Each defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons described in paragraph (1) to file the notice of removal.

(C) If defendants are served at different times, and a later-served defendant files a notice of removal, any

earlier-served defendant may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal.

(3) Except as provided in subsection (c), if the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c) REQUIREMENTS; REMOVAL BASED ON DIVERSITY OF CITIZENSHIP.—(1) A case may not be removed under subsection (b)(3) on the basis of jurisdiction conferred by section 1332 more than 1 year after commencement of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.

(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—

nonmonetary relief; or

(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).

(3)(A) If the case stated by the initial pleading is not removable solely because the amount in controversy does not exceed the amount specified in section 1332(a), information relating to the amount in controversy in the record of the State proceeding, or in responses to discovery, shall be treated as an "other paper" under subsection (b)(3).

(B) If the notice of removal is filed more than 1 year after commencement of the action and the district court finds that the plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal, that finding shall be deemed bad faith under paragraph (1).

(d) NOTICE TO ADVERSE PARTIES AND STATE COURT.—Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(e) COUNTERCLAIM IN 337 PROCEEDING.—With respect to any counterclaim removed to a district court pursuant to section 337(c) of the Tariff

Act of 1930, the district court shall resolve such counterclaim in the same manner as an original complaint under the Federal Rules of Civil Procedure, except that the payment of a filing fee shall not be required in such cases and the counterclaim shall relate back to the date of the original complaint in the proceeding before the International Trade Commission under section 337 of that Act.

(g)[1] Where the civil action or criminal prosecution that is removable under section 1442(a) is a proceeding in which a judicial order for testimony or documents is sought or issued or sought to be enforced, the 30-day requirement of subsection (b) of this section and paragraph (1) of section 1455(b) is satisfied if the person or entity desiring to remove the proceeding files the notice of removal not later than 30 days after receiving, through service, notice of any such proceeding.

(June 25, 1948, ch. 646, 62 Stat. 939; May 24, 1949, ch. 139, § 83, 63 Stat. 101; Pub. L. 89–215, Sept. 29, 1965, 79 Stat. 887; Pub. L. 95–78, § 3, July 30, 1977, 91 Stat. 321; Pub. L. 100–702, title X, § 1016(b), Nov. 19, 1988, 102 Stat. 4669; Pub. L. 102–198, § 10(a), Dec. 9, 1991, 105 Stat. 1626; Pub. L. 103–465, title III, § 321(b)(2), Dec. 8, 1994, 108 Stat. 4946; Pub. L. 104–317, title VI, § 603, Oct. 19, 1996, 110 Stat. 3857; Pub. L. 112–51, § 2(c), Nov. 9, 2011, 125 Stat. 545; Pub. L. 112–63, title I, §§ 103(b), 104, Dec. 7, 2011, 125 Stat. 760, 762.)

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[1] So in original. Section does not contain a subsec. (f).

28 U.S.C. § 1453

**§ 1453. Removal of class actions**

(a) DEFINITIONS.—In this section, the terms "class", "class action", "class certification order", and "class member" shall have the meanings given such terms under section 1332(d)(1).

(b) IN GENERAL.—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.

(c) REVIEW OF REMAND ORDERS.—

(1) IN GENERAL.—Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not more than 10 days after entry of the order.

(2) TIME PERIOD FOR JUDGMENT.—If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such

appeal was filed, unless an extension is granted

under paragraph (3).

(3) EXTENSION OF TIME PERIOD.—The court of appeals may grant an extension of the 60-day period described in paragraph (2) if—

(A) all parties to the proceeding agree to such extension, for any period of time; or

(B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.

(4) DENIAL OF APPEAL.—If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied.

(d) EXCEPTION.—This section shall not apply to any class action that solely involves—

(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)[1]) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

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[1] So in original. Probably should be "77p(f)(3)".

(Added Pub. L. 109–2, § 5(a), Feb. 18, 2005, 119 Stat. 12; amended Pub. L. 111–16, § 6(2), May 7, 2009, 123 Stat. 1608; Pub. L. 112–63, title I, § 103(d)(2), Dec. 7, 2011, 125 Stat. 762.)