No. 16-3051

In the

United States Court of Appeals

for the

Fourth Circuit

MICHAEL A. SCOTT,

Plaintiff-Respondent,

– v. –

CRICKET COMMUNICATIONS, LLC,

Defendant-Petitioner.

REPLY IN SUPPORT OF PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1453(c)

From the August 19, 2016 Order of the United States District Court for the District of Maryland in Case Nos. 1:15-cv-03330-GLR and 1:15-cv-03759-GLR

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Scott's opposition confuses the very different burdens that must be borne by defendants seeking to establish federal jurisdiction under CAFA on the one hand, and plaintiffs who seek to remand a case to state court on the other. As the party invoking federal jurisdiction, Cricket had the modest burden to show, *by a preponderance of the evidence*, that at least $5 million is in dispute here. It plainly made that showing. By contrast, Scott then had the heavy burden of showing *to a legal certainty* that federal jurisdiction is absent—and he failed even to try to meet it. Because the district court's decision misapplied the governing standard—and because that error reflects wider confusion on a recurring matter of considerable importance to the administration of CAFA—this Court's review is warranted.

ARGUMENT

I. THE DISTRICT COURT'S REASONING WAS ERRONEOUS.

A. Cricket Met Its Burden To Demonstrate The Amount In Controversy By A Preponderance Of The Evidence.

To begin with, Scott's argument is directed almost entirely to the meaning of citizenship and how it is established, citing numerous decisions addressing that point. But that argument is a straw man. It was not the focus of the district court's decision, which instead below repeatedly criticized Cricket's presentation of "over-inclusive" evidence. *See* Ex. F at 9, 12, 15. Indeed, the court below never cited most of the appellate deci-

sions now invoked by Scott. Rather, it relied principally on district court decisions that turned on the purported inadequacy of "over-inclusive" evidence and that had nothing to do with class members' citizenship. *Id.* at 12-15. Scott makes no attempt to defend the district court's actual analysis, which is reason enough for this Court to grant review.

In fact, as we showed in the petition (at 9-12), that the defendant's evidence is "over-inclusive" is no reason to reject federal jurisdiction so long as, under the preponderance standard, the totality of the evidence "explain[s] plausibly how the stakes exceed $5 million." *Spivey v. Vertrue*, 528 F.3d 982, 986 (7th Cir. 2008). Under that standard, the defendant need not prove the disputed fact with precision, much less to a certainty; rather, it is enough that the court "'believe[s] that the existence of [that] fact is more probable than its nonexistence.'" *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1993) (citation omitted). Accordingly, "in making [the amount in controversy] calculation, a court may rely on evidence put forward by the removing defendant, as well as ***reasonable inferences and deductions drawn from that evidence***." *Dudley v. Eli Lilly & Co.*, 778 F.3d 909, 913 (11th Cir. 2014) (quotation marks and brackets omitted) (emphasis added).

Cricket easily met this burden below. Its evidence showed that the

amount in controversy here exceeds $5 million unless nearly *half* of its customers with Maryland addresses are not domiciled in the State. And although it can perhaps be assumed that not *every* customer with a Maryland address is a Maryland citizen, common sense tells us that well more than half of them *are*. There was no need for Cricket to prove the point conclusively: a defendant's showing of the amount in controversy "is not to be defeated by unrealistic assumptions that run counter to common sense." *S. Fla. Wellness, Inc. v. Allstate Ins. Co.*, 745 F.3d 1312, 1317 (11th Cir. 2014); *see also, e.g.*, *Robertson v. Exxon Mobil Corp.*, 814 F.3d 236, 240 (5th Cir. 2015) (removing party may ask the court "to make common-sense inferences about the amount put at stake by the injuries the plaintiffs claim."). Because it is "more probable" than not (*Concrete Pipe*, 508 U.S. at 622) that the amount in controversy exceeds $5 million—a point that Scott never denies—Cricket satisfied the preponderance standard.

B. The Authority Cited By Scott Is Inapposite.

In nevertheless arguing against jurisdiction, Scott invokes a handful of out-of-circuit decisions that, he maintains, stand for the proposition that "the party with the burden of proof must provide evidence of domicile."

Opp. 3; *see id.* 10-15.[1] But Scott fails to acknowledge that this case, and the decisions upon which he relies, arose in very different procedural postures. *This case* turns on the showing that must be made by the party seeking to establish federal jurisdiction in the first instance; the decisions invoked by Scott addressed the *very different* showing that must be made by a party seeking *remand* to state court *after* a prima facie showing of federal jurisdiction has been made. That distinction is crucial, and explains the outcome in the decisions Scott cites.

In each of those decisions, the defendants properly removed class actions under CAFA. The plaintiffs then sought remand to state court under CAFA's home-state or local-controversy exceptions, both of which require plaintiffs to show that two-thirds of the members of the proposed class are citizens of the forum State. 28 U.S.C. § 1332(d)(4)(A)-(B). In each case, the

[1] Scott also briefly cites, in passing, three decisions of this Court that he argues stand for the proposition that "citizenship cannot be inferred from residency." Opp. 1; *see id.* at 2, 8. But these decisions are inapposite here. Insofar as they have bearing in this case at all, two of them—*Dennison v. Carolina Payday Loans, Inc.*, 549 F.3d 941 (4th Cir. 2008), and *Johnson v. Advance America*, 549 F.3d 932 (4th Cir. 2008)—stand only for the non-controversial proposition that legal domicile turns on more than physical residence. They say nothing about what proof is needed to estimate how many members of a putative class are domiciled in a State, which is the question here. That also is true of *Axel Johnson, Inc. v. Carroll Carolina Oil Co.*, 145 F.3d 660 (4th Cir. 1998), which held only that a plaintiff could not establish diversity jurisdiction over a natural-person defendant merely by pleading the defendant's residence.

court held that the plaintiffs had not met their burden of proving that the relevant exception applied because the available information showed only where putative class members resided, not where they were domiciled. *See Reece v. AES Corp.*, 638 F. App'x 755, 772 (10th Cir. 2016) ("the party moving for remand under the local-controversy exception bears the burden of demonstrating that more than two-thirds of its proposed class members are citizens of the state from whose courts the case was removed"); *Hood v. Gilster-Mary Lee Corp.*, 785 F.3d 263, 266 (8th Cir. 2015) ("[T]he employees did not meet their burden of proof that a CAFA exception . . . applies"); *In re Sprint Nextel Corp.*, 593 F.3d 669, 676 (7th Cir. 2010) ("[E]ven though satisfaction of the citizenship requirement may be a reasonable inference, it does not satisfy the plaintiff's burden of proof" for remand under local-controversy exception) (internal quotation marks omitted).

In the context of these *exceptions* to CAFA—exceptions that are not applicable here—these decisions found that evidence of residence was insufficient to *defeat* federal jurisdiction. Those holdings were unexceptional: It has long been black-letter law that, "[o]nce the proponent of federal jurisdiction has explained plausibly [why there is federal jurisdiction], then the case belongs in federal court unless it is legally impossible" for the jurisdictional requirements to be satisfied. *Spivey*, 528 U.S. at 986; *see also*

St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289 (1938) (dismissal for lack of jurisdiction precluded unless it "appear[s] to a legal certainty that the claim is really for less than the jurisdictional amount"). Plaintiffs seeking remand therefore must prove "legal[] impossib[ility]" "to a certainty" and may not rest on common sense. Consequently, because physical residence and citizenship (*i.e.*, legal domicile) have different elements, the plaintiffs in *Reece*, *Hood*, and *Sprint Nextel* could not rely on evidence of residence to show that it was "legally impossible" that federal jurisdiction was present—just as Scott cannot make that showing, which he must do to obtain a remand here.

There is, moreover, no reason to doubt that Congress intended to apply this same burden-shifting approach to CAFA removal. "There is no logical reason why we should demand more from a CAFA defendant than other parties invoking federal jurisdiction." *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 554 n.1 (2014) (citation and quotation marks omitted). On the contrary, "Congress enacted [CAFA] to facilitate adjudication of certain class actions in federal court." *Id.* at 554.

And Congress wanted it to be difficult for plaintiffs to obtain remand under the statutory exceptions once CAFA jurisdiction was established. The local-controversy exception, in particular, is a "narrow exception that

was carefully drafted to ensure that it does not become a jurisdictional loophole." S. Rep. 109-14, at 39 (2005). By contrast, Congress made clear its intent to facilitate removal of class actions generally, explaining 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.* at 43. Thus, courts rightly impose a greater burden on plaintiffs invoking one of the CAFA exceptions than they do on defendants at the removal stage. *Compare, e.g.*, *Dart Cherokee*, 135 S. Ct. at 554 ("[N]o antiremoval presumption attends cases invoking CAFA."), *with Hood*, 785 F.3d at 265 ("Any doubt about the applicability of the local-controversy exception is resolved against the party seeking remand.").[2]

It also made sense as a practical matter for the courts in *Reece*, *Hood*, and *Sprint Nextel* to hold the plaintiffs to a stringent evidentiary standard because the jurisdictional problems there were of the plaintiffs' own making. The plaintiffs in those cases could have avoided any dispute

[2] *Sprint Nextel* did purport to apply the preponderance standard in determining whether the home-state exception applied. 593 F.3d at 673. But in reality, it held the plaintiffs to a much higher standard. The court evidently believed that it was likelier than not that two-thirds of the class had Kansas citizenship: it stated that it was "inclined to think" that was so and called the alternative "hard to believe." 593 F.3d at 674. That should have satisfied the preponderance standard, showing that the standard applied in practice was far more stringent.

over federal jurisdiction by defining their classes in terms of state citizenship, yet did not because doing so "would have limited the pool of potential class members." *Sprint Nextel*, 593 F.3d at 676. By contrast, Cricket had no control over the class definition, and it should be held to no higher standard than any other party invoking federal jurisdiction.

C. The Decision Below Conflicts With The Rulings Of Other Circuits On The Relevance Of "Overinclusive" Evidence.

In addition to proffering his own distinguishable authorities, Scott argues that *Raskas v. Johnson & Johnson*, 719 F.3d 884 (8th Cir. 2013), *Lewis v. Verizon Communications, Inc.*, 627 F.3d 395 (9th Cir. 2010), and *Spivey v. Vertrue, Inc.*, 528 F.3d 982 (7th Cir. 2008), are "fundamentally distinct" from this case (Opp. 12), even though the district court evidently viewed those decisions as on point. *See* Ex. F at 12. Scott is incorrect.

In *Raskas*, for example, the Eighth Circuit held that it was sufficient for the defendants to point to evidence of their total sales to establish the amount in controversy, even though the claims of proposed class members extended only to a (nonquantified) subset of those sales—*i.e.*, products that class members allegedly had been deceived into discarding and replacing. The Eighth Circuit held that it is enough to provide evidence from which the trier of fact "*might* legally conclude," in light of total sales figures, that the requisite $5 million amount was in controversy. *Raskas*, 719 F.3d at

887 (citation omitted). Contrary to Scott's assertion (Opp. 13), there is *no* indication in *Raskas* (either in the Eighth Circuit or the district court) that "the court had allegations and evidence from which it could determine what damages a fact finder 'might' award the class" beyond the total sales figures. *Id*. Indeed, if anything, the evidence here—Cricket customers' billing addresses—is *more* closely tailored to establishing the amount in controversy than was anything before the court in *Raskas*.

The same was true in *Spivey* and *Lewis*, where, although the defendants pointed to evidence of total charges, only an unquantified subset of unauthorized charges was in dispute. In each case, the court found that a fact-finder reasonably could rely on this evidence—evidence of the sort that the district court in this case labeled "over-inclusive"—to find that the amount-in-controversy requirement had been satisfied.

D. Cricket Is Not Required To Present Statistical Evidence.

Finally, Scott criticizes Cricket for not "attempt[ing]" to present evidence of the citizenship of a representative sample of potential class members, as *Sprint Nextel* suggested. Opp. 19. Again, Scott gets the law backwards. Those courts held that *plaintiffs* ought to be required to produce statistical evidence to satisfy their burden of proving to a certainty that a case should be remanded under an exception to CAFA. Scott's argument

that statistical evidence is required whenever a *defendant* seeks to remove a lawsuit where the class is defined in terms of citizenship lacks any support and would turn the law on its head.

II. PERMISSION TO APPEAL IS WARRANTED.

Scott also argues that review is not warranted under the multifactor test that some courts of appeals use to decide whether to accept a CAFA appeal. But that argument turns on his assertion that this appeal is about "the broad standard applicable to every case for proof of citizenship." Opp. 16. That contention is wrong: the issue here is *not* whether residency equates to citizenship, but whether a district court may disregard a defendant's evidence of CAFA jurisdiction simply because the evidence is "over-inclusive." *That* issue is clearly CAFA-related and fairly debatable, is the source of confusion, and should be settled by this Court.[3]

CONCLUSION

The petition for permission to appeal should be granted, and the district court's order should be reversed.

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[3] Scott also argues—for the first time—that Cricket's evidence is insufficient because it pertains to the putative class period rather than to "citizenship at the time of removal." Opp. 17. But this Court "generally do[es] not consider arguments raised for the first time on appeal." *Amaya v. Power Design, Inc.*, --- F.3d ---, 2016 WL 4269801, at *7 (4th Cir. Aug. 15, 2016). In any event, in positing that numerous class members may have changed their domicile between the class period and when the complaint was filed, it is Scott who "rel[ies] on guesswork." Opp. 4.

Respectfully submitted,

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Dated: September 20, 2016

CERTIFICATE OF COMPLIANCE

The undersigned counsel for Defendant-Petitioner Cricket Communications, LLC certifies that this brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: September 20, 2016 /s/ *Archis A. Parasharami*

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September, 2016, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

Dated: September 20, 2016 /s/ *Archis A. Parasharami*