Nos. 06-16324-CC & 06-16325-CC

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

KATIE LOWERY, ET AL.,
Plaintiffs-Appellees,

v.

HANNA STEEL CORP., ET AL.,
Defendants-Appellants.

On Permissive Appeal Pursuant to 28 U.S. C. § 1453(c)(1)
from the United States District Court for the
Northern District of Alabama
Case No. 2:06-cv-01370-WMA
(The Honorable William M. Acker, Jr.)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF APPELLANTS' MOTION FOR REHEARING *EN BANC* OR ALTERNATIVELY FOR PANEL REHEARING

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae The Chamber of Commerce of the United States of America ("the Chamber') has no parent corporation and no company owns 10% or more of its stock. The Chamber submits that the following persons and entitles have an interest in the outcome of this matter:

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STATEMENT OF COUNSEL

1. I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States and the precedents of this Circuit and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court: *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n.13 (1978); *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1356-57 (11th Cir. 1996); *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1072 (11th Cir. 2000); *Sierminski v. Transouth Fin. Corp.*, 216 F.3d 945, 947, 949(11th Cir. 2000); *Williams v. Best Buy Co.*, 269 F.3d 1316, 1319 (11th Cir. 2001).

2. I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance, including: whether the panel decision is in direct conflict with the legislative intent of the United States Congress in passing the Class Action Fairness Act.

/s/ John H. Beisner

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INTEREST OF THE AMICUS CURIAE

The Chamber is the world's largest business federation, with an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber is well positioned to assist the Court in evaluating the parties' arguments because the Chamber regularly advances the interests of its members in courts throughout the country on issues of critical concern to the business community, and has participated as *amicus curiae* in numerous cases addressing jurisdictional issues, including *Kircher v. Putnam Funds Trust*, 547 U.S. ---, 126 S.Ct. 2145 (2006).

The Chamber's members are frequently defendants in individual cases and class actions in which the existence of federal diversity jurisdiction is at issue. In addition, the Chamber was involved – on behalf of its members – in organizing support for the much needed class action reforms reflected in the Class Action Fairness Act ("CAFA"). The Chamber and its members have a strong interest in seeking rehearing of the panel's April 11, 2007 opinion, because that opinion, if left undisturbed, will have the practical effect of allowing plaintiffs in the Eleventh Circuit to evade federal jurisdiction in diversity cases simply by failing to plead facts related to the monetary value of their claims. Such a result will have far-

reaching effects on companies that do business in the United States, many of which are members of the Chamber.

INTRODUCTION

The panel decision in this matter substantially raised the burden on defendants removing cases to federal court by: (1) holding that defendants must present "clear" evidence that federal jurisdiction exists in their removal papers or face remand; and (2) barring district courts from allowing parties to engage in jurisdictional discovery after removal of a case. These rulings are contrary to prior caselaw from this Court and courts around the country and would severely restrict the ability of defendants to remove cases to federal court and obtain a fair forum for the resolution of large interstate cases. Rehearing *en banc* is necessary to restore the intent of the Framers in establishing diversity jurisdiction more than 200 years ago and the more recent intent of Congress to broadly expand the parameters of federal diversity jurisdiction through the Class Action Fairness Act.

STATEMENT OF FACTS

In 2003, plaintiffs filed suit in Alabama circuit court against twelve corporations and 120 fictitious entities for allegedly discharging particulates and gases into the atmosphere and groundwater surrounding their properties. Plaintiffs claimed that this pollution had caused them personal injuries and loss of the use of their land. Between 2003 and 2006, plaintiffs amended their complaint multiple

times to add more than four hundred plaintiffs.

In July 2006, defendants filed a notice of removal under the "mass action" provision of the Class Action Fairness Act, 28 U.S.C. § 1332(d)(11), in the United States District Court for the Northern District of Alabama. Plaintiffs moved to remand the action to Alabama state court, asserting that defendants had failed to establish federal jurisdiction because nothing in the complaint or notice of removal indicated that plaintiffs' claims exceeded the requisite jurisdictional amount. Defendants petitioned the court for jurisdictional discovery to uncover facts relating to the value of plaintiffs' claims.

The district court reserved ruling on the motion for discovery but ordered plaintiffs to produce the names of all plaintiffs whose claims could be reasonably expected to meet the jurisdictional amount. Subsequently, the court granted plaintiffs' motion to remand on the ground that defendants had failed to prove that CAFA's jurisdictional amounts were satisfied. Defendants appealed to a panel of the Eleventh Circuit, which upheld the remand order.

STATEMENT OF THE ISSUES

1. Did the panel err in holding – in direct conflict with United States Supreme Court and Eleventh Circuit precedent – that (1) defendants must present "clear" evidence that federal jurisdiction exists in their removal papers or face remand, and (2) district courts do not have the discretion to allow post-removal

jurisdictional discovery before ruling on a remand motion?

2. Do the panel's findings present questions of exceptional importance and, thus, require review because they inappropriately limit the availability of federal jurisdiction in contravention of the legislative intent of CAFA to liberalize removal of cases to federal court and prevent plaintiffs from using manipulative pleadings to prevent removal?

ARGUMENT

I. THE PANEL'S RULING IS IN CONFLICT WITH BINDING ELEVENTH CIRCUIT AND SUPREME COURT PRECEDENT.

As set forth in more detail in Appellants' motion for rehearing, the panel's opinion conflicts substantially with Supreme Court and Eleventh Circuit precedent on two major issues: (1) the standard of proof required to establish federal jurisdiction under CAFA, and (2) the availability of post-removal discovery to establish federal jurisdiction. As a result, *en banc* review of the panel's opinion is warranted.

First, the panel decision conflicts with established Circuit precedent by requiring removing defendants to meet a different, much higher burden of proof in establishing federal jurisdiction than this Circuit has traditionally required. Despite recognizing that the Eleventh Circuit requires defendants seeking to remove a case to federal court to prove that federal jurisdiction exists by a "preponderance of the evidence" (*see* Slip. Op. at 49 (citing *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d

1353, 1356-57 (11th Cir. 1996); *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1072 (11th Cir. 2000)), the panel applied a much higher standard, holding that defendants must include "an unambiguous statement that clearly establishes federal jurisdiction" in their notice of removal. (Slip Op. at 69.) According to the opinion, "[i]f the jurisdictional amount is either stated ***clearly on the face*** of the documents before the court, or readily deductible from them, then the court has jurisdiction. If not, the court must remand." (Slip Op. at 54-55 (emphasis added).) *See also* Slip Op. at 58-59 (emphasis added) (court must "review the document received by the defendant from the plaintiff—be it the initial complaint or a later received paper—and determine[] whether that document and the notice of removal ***unambiguously establish*** federal jurisdiction").[1]

The panel's new "unambiguous statement" standard is, by its own admission, a much higher burden than that normally required in removal cases, (Slip. Op. at 55 (if a defendant can establish jurisdiction under this approach, "then the defendant could have satisfied a far higher burden than preponderance of the evidence")), and is in direct conflict with prior Eleventh Circuit holdings. *See, e.g., Sierminski v. Transouth Fin. Corp.*, 216 F.3d 945, 947, 949 (11th Cir. 2000)

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[1] In support of this theory, the panel cited *Bosky v. Kroger Texas, LP*, 288 F.3d 208, 211 (5th Cir. 2002), and *Huffman v. Saul Holdings, LP*, 194 F.3d 1072, 1078 (10th Cir. 1999), neither of which address the standard of proof applicable to removals. Instead, both cases address the ***timeliness*** removal under § 1446(b). As a result, these cases do not support the Court's holding.

(applying a "preponderance of the evidence" standard when considering whether a removing defendant had properly established amount in controversy).

Second, the panel's holding that district courts cannot permit post-removal discovery in diversity cases is directly contrary to prior Supreme Court and Eleventh Circuit precedent. (Slip Op. at 63-64 n.71; 68 n.76.) In its decision, the panel held that district courts do not have the discretion to allow post-removal discovery to determine whether the amount in controversy is large enough to trigger federal jurisdiction. However, the panel's restriction on post-removal jurisdictional discovery is inconsistent with prior Supreme Court and Eleventh Circuit precedent recognizing a district court's discretion to allow such discovery. As the Supreme Court unanimously held in *Oppenheimer Fund, Inc. v. Sanders*, "where issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues." 437 U.S. 340, 351 n.13 (1978). *See also Eaton v. Dorchester Development Corp.*, 692 F.2d 727, 729-30 (11th Cir. 1982) ("[i]t is now clear that federal courts have the power to order, at their discretion, the discovery of facts necessary to ascertain their competency to entertain the merits"); *Majd-Pour v. Georgiana Community Hosp.*, 724 F.2d 901, 903 (11th Cir. 1984) ("the plaintiff should be given the opportunity to discover facts that would support his allegations of jurisdiction").

Because the panel's rulings on both of these issues clearly conflict with binding precedent establishing a "preponderance" standard for jurisdictional proof and allowing jurisdictional discovery, the panel's opinion should be reheard by the Circuit *en banc*. *See* Fed. R. App. P. 35.

II. THE PANEL'S RULING PRESENTS QUESTIONS OF EXCEPTIONAL IMPORTANCE REGARDING THE AVAILABILITY OF DIVERSITY JURISDICTION.

En banc review is also warranted because the panel's decision presents questions of "exceptional importance" regarding the availability of a federal forum for diverse defendants in large, interstate litigation. *See* Fed. R. App. P. 35.

Since the founding of this country, diversity jurisdiction has existed to ensure that proceedings involving parties from different states and sufficiently large quantities of money were adjudicated in federal court. *See* S. Rep. No. 109-14, at 8 (2005). The Framers established the concept of federal diversity jurisdiction to ensure that local biases would not affect the outcome of disputes between in-state plaintiffs and out-of-state defendants.[2] The Framers reasoned that

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[2] *See Barrow S.S. Co. v. Kane,* 170 U.S. 100, 111 (1898) ("The object of the [diversity jurisdiction] provisions . . . conferring upon the [federal courts] ... jurisdiction [over] controversies between citizens of different States of the Union . . . was to secure a tribunal presumed to be more impartial than a court of the state in which one litigant[ ] resides."); *Pease v. Peck,* 59 U.S. (18 How.) 518, 520 (1856); *Martin v. Hunter's Lessee,* 14 U.S. (1 Wheat.) 304, 307 (1816). *See also* The Federalist No. 80, at 537-38 (Alexander Hamilton) (Jacob E. Cooke ed. 1961) ("[I]n order to [ensure] the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national

some state courts might discriminate against out-of-state businesses engaged in interstate commerce and that allowing these cases to be heard in federal court would ensure the availability of a fair, uniform and efficient forum for adjudicating interstate commercial disputes.[3] Thus, since the nation's inception, diversity jurisdiction has served to guarantee that parties of different state citizenship have a means of resolving their legal differences on a level playing field in a manner that nurtures interstate commerce.[4]

The panel's ruling undermines the long-standing constitutional right of defendants to litigate diverse cases in federal court in two ways. ***First***, the ruling will create a Hobson's choice that severely and unfairly restricts defendants' ability to invoke federal jurisdiction and, at the same time, enables plaintiffs to circumvent jurisdiction with vague pleadings. ***Second***, the practical effect of the panel's decision – *i.e.*, limiting defendants' ability to remove cases to federal court

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judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens.").

[3] John P. Frank, *Historical Bases of the Federal Judicial System,* 13 Law & Contemp. Probs. 3, 22-28 (1948); Henry J. Friendly, *The Historic Bases of Diversity Jurisdiction,* 41 Harv. L. Rev. 483 (1928).

[4] Constitutional scholars have argued that "[n]o power exercised under the Constitution . . . had greater influence in welding these United States into a single nation [than diversity jurisdiction]; nothing has done more to foster interstate commerce and communication and the uninterrupted flow of capital for investment into various parts of the Union, and nothing has been so potent in sustaining the public credit and the sanctity of private contracts." John J. Parker, *The Federal Constitution and Recent Attacks Upon It,* 18 A.B.A. J. 433, 437 (1932).

under CAFA – is directly contrary to Congress' efforts to expand federal jurisdiction so that defendants may have access to federal forums in class action and "mass action" cases.

A. The Panel's Decision Unfairly Restricts Defendants' Access To A Federal Forum In Diversity Cases.

First, the panel's ruling is directly contrary to the Framers' goals in establishing diversity jurisdiction because it will unfairly restrict diverse defendants from exercising their right to have their claims tried in federal court when plaintiffs do not specify an amount in controversy in their complaint.

Taken together, the panel's twin rulings regarding the standard of proof applicable to removals and the unavailability of post-removal discovery leave defendants with a Hobson's choice in such cases. If a defendant removes the case promptly – *i.e.*, within 30 days of service under 28 U.S.C. § 1446(b) – it faces the risk of remand on the ground that there was no clear and convincing evidence regarding the amount in controversy. The panel decision admits as much, noting that a "defendant in a diversity case, unlike the plaintiff, may have no actual knowledge of the value of the claims" but still has a "duty to show by fact, and not merely conclusory allegation, that federal jurisdiction exists." (Slip. Op. at 66.) Conversely, if a defendant decides to wait, conduct discovery in state court, and remove a case after the initial 30-day period under the "other paper" provision of 28 U.S.C. § 1446(b), it faces the risk that a court will find removal was apparent

from the complaint and remand the case for untimeliness.[5] The panel's decision thus creates an incentive for plaintiffs to game the system by drafting complaints that are vague enough to prevent removal under the panel's heightened standard but at the same time, provide enough general information about their claims that a later removal may be considered untimely.

The panel's restriction on post-removal jurisdictional discovery would similarly deprive defendants of their constitutional right to remove diversity cases to federal court. Absent the opportunity to discover facts relating to the amount in controversy in a plaintiff's complaint, a defendant's ability to remove the case would be limited to the four-corners of the plaintiff's complaint. Notably, Congress made it clear in enacting CAFA that jurisdictional discovery is sometimes essential to a fair determination of whether federal courts have diversity jurisdiction over an action. According to the Senate Report, "in assessing the various criteria established in all of these new jurisdictional provisions, a federal court may have to engage in some fact-finding," and "limited discovery may be necessary to make these determinations." S. Rep. No. 109-14, at 44 (2005) (internal footnotes omitted); *see also id.* at 69 ("the process of assessing whether a

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[5] Moreover, because cases that are not subject to CAFA – *i.e.* non-class action or mass action cases – ***must*** be removed within one year, *see* 28 U.S.C. § 1446(b), plaintiffs may be able to block removal altogether by delaying the plaintiff-specific discovery necessary to establish federal jurisdiction until the one-year period is over.

class action complies with the current jurisdictional amount requirement is also often 'an expensive and time consuming process,' requiring discovery on the nature and value of the named plaintiffs' claims"). Accordingly, Congress intended that limited discovery, such as the factual stipulations, answers to interrogatories or depositions requested by Appellants in this case, "should be used in creating a record upon which the jurisdictional determinations can be made." *Id.* at 44.[6]

These concerns about the impact of the panel's ruling are not theoretical. At least one federal district court within this Circuit has already interpreted the panel's decision as an effective bar to diversity jurisdiction where the plaintiff has not specifically alleged damages over the jurisdictional amount. In *Constant v. I.H.O.P., Inc.*, No. 07-AR-0072-S (N.D. Ala. Apr. 30, 2007) (Appendix at 1), the Northern District of Alabama held that established Eleventh Circuit law with regard to diversity jurisdiction "came to an end on April 11, 2007" when the panel issued its opinion in this case. Specifically, the court held that – in light of the panel's decision – defendants should not remove cases to district courts in the

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[6] Moreover, Congress has acknowledged that such discovery is most appropriately conducted in federal court after removal. Specifically, the Senate Report notes that discovery is more efficient in federal courts where "federal court judges usually can delegate aspects of their cases (e.g. discovery issues) to magistrate judges or special masters" while "state court judges typically lack such resources." *Id.* at 52.

Eleventh Circuit on the basis of diversity jurisdiction, "except in the few cases which begin with a state court complaint with an *ad damnum* clause praying for more than $75,000." *Id.* at 1.

In short, by requiring defendants to present what is essentially "clear and convincing" evidence of federal jurisdiction in notices of removal and foreclosing all jurisdictional discovery, the panel's ruling will prohibit removal in every case in which the plaintiff does not specifically allege claims exceeding the jurisdictional amount. Moreover, the panel's opinion would encourage plaintiffs to be evasive about the relief sought in a case in order to evade federal jurisdiction. Such a result is directly contrary to the purpose of diversity jurisdiction – *i.e.*, to provide a federal forum for defendants in large, interstate matters where they might experience local bias in state court.

B. The Panel's Ruling Undermines Congress' Intent To Expand Federal Jurisdiction under CAFA.

The panel's decision also presents questions of exceptional importance because the action at issue here – a mass joinder action involving hundreds of plaintiffs and multiple defendants in various states – is a paradigmatic example of the type of case for which Congress intended to ***expand*** federal jurisdiction under CAFA. If the panel's errors are allowed to stand, Congress's intent in enacting the statute would be wholly subverted.

CAFA was enacted in 2005 to extend federal jurisdiction to certain class actions and mass actions. The "mass action" provision states that in cases where (1) there are more than 100 plaintiffs; (2) at least one proposed plaintiff is diverse from at least one defendant; and (3) the aggregate amount in controversy exceeds $5 million, federal jurisdiction exists as to all of the plaintiffs included in that case whose individual claims exceed $75,000. *See* 28 U.S.C. § 1332(d)(11). CAFA's text, specifically its legislative findings and stated purposes, clearly demonstrate that Congress sought to develop a new jurisdictional regime that would "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance." Class Action Fairness Act of 2005, Pub. L. No. 109-2, §§ 2(a)(4)(A), 2(b)(2), 119 Stat. 4 (2005).

Congress's purpose in enacting CAFA cannot be seriously disputed. The text and structure of the statute and CAFA's legislative history, all clearly demonstrate that the purpose of CAFA was to create a new set of jurisdictional rules for class actions that would provide for federal jurisdiction over large-scale interstate mass actions and ensure that defendants facing such large-scale interstate suits could remove such proceedings to federal court. As this Court has previously recognized, "CAFA's language favors federal jurisdiction over class actions" and the "language and structure of CAFA itself indicates that Congress contemplated

broad federal court jurisdiction." *See Evans v. Walter Indus.*, 449 F.3d 1159, 1163-64 (11th Cir. 2006).

Consistent with the overall intent of the legislation, Congress made clear that doubts regarding removal should be resolved ***in favor*** of federal jurisdiction. According to the Senate Report, "[t]he Committee believes that the federal courts are the appropriate forum to decide most interstate class actions because these cases usually involve large amounts of money and many plaintiffs, and have significant implications for interstate commerce and national policy." S. Rep. 109-14, at 27 (2005). Moreover, in a colloquy that took place on the House floor moments before passage, one of the bill's key sponsors, then-House Judiciary Committee chairman F. James Sensenbrenner, stated: "if a Federal court is uncertain about whether a case puts $5 million or more in controversy, the court should favor exercising jurisdiction over the case." *See* 151 Cong. Rec. H730 (Feb. 17, 2005); S. Rep. 109-14, at 35 (the intent of CAFA "is to strongly favor the exercise of federal diversity jurisdiction over class actions with interstate ramifications.").[7]

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[7] This colloquy among key House sponsors of the legislation is entitled to particular deference because it reflects the intentions of the bill drafters and because of its proximity to the House vote. *See North Haven Board of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982) ("Although the statements of one legislator made during debate may not be controlling . . . Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction.") (internal citation omitted); *Rogers v. Frito-Lay, Inc.*, 611

Nonetheless, despite this overwhelming evidence that CAFA was intended to liberalize removal requirements for class actions and mass actions, reduce the hurdles defendants face in removing cases to federal court and prevent manipulative pleadings intended to evade jurisdiction, the panel's decision would make it more difficult for defendants to remove such cases to federal court. Indeed, as discussed *supra*, the panel's finding that defendants must establish federal jurisdiction through a "clear statement" in their removal papers – without the opportunity for any jurisdictional discovery – essentially allows plaintiffs to evade federal jurisdiction by filing vague pleadings. In this way, the panel's ruling turns CAFA on its head – substantially raising the standard for removing cases to federal court instead of relaxing it.

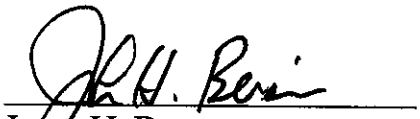
Because the panel's decision would make removal of class actions and mass actions more difficult – in the face of a statute designed to do the precise opposite – the panel's ruling is directly contrary to Congressional intent in enacting CAFA and should be reconsidered for this reason as well.

CONCLUSION

For the foregoing reasons and those set forth in appellants' motion, the panel's decision should be reviewed *en banc.*

F.2d 1074, 1080 (5th Cir. 1980) ("In trying to learn Congressional intent by examining the legislative history of a statute, we look to the purpose the original enactment served . . . and the remarks in debate preceding passage.").

Respectfully submitted,



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I hereby certify that the Brief of The Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Appellants was filed with the clerk in accordance with Rule 25(a)(2)(B) via Federal Express, overnight delivery on May 9, 2007. Additionally, the following counsel were served via Federal Express, overnight delivery on May 9, 2007:

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CHERYL CONSTANT, Plaintiff, v. INTERNATIONAL HOUSE OF PANCAKES, INC., Defendant.	}	CIVIL ACTION NO. 07-AR-0072-S

MEMORANDUM OPINION

If this court turns out to be right when, by separate order, it grants the motion to remand filed by plaintiff, Cheryl Constant ("Constant"), the court will have come close to proving that the day of the knee-jerk removal of diversity tort cases from state to federal court within the three states comprising the Eleventh Circuit came to an end on April 11, 2007, when *Lowery v. Alabama Power Company*, ____ F.3d ____, 2007 WL 1062769 (11th Cir., Apr. 11, 2007), was decided. "Circumspection" and "compunction" will be the future watchwords for diversity removing defendants in the Eleventh Circuit, except in the few cases which begin with a state court complaint with an *ad damnum* clause praying for more than $75,000.

Constant filed her complaint against International House of Pancakes, Inc. ("IHOP") in the Circuit Court of Jefferson County, Alabama, claiming that she sustained severe injuries in a fall caused by IHOP's negligence. Constant's complaint contains no *ad damnum* clause. There is no requirement that it do so. The absence

of an *ad damnum* is routine in Alabama, especially in cases where complete diversity of citizenship invites removal to federal court under 28 U.S.C. §§1441 and 1332(a). In her complaint, Constant simply "demands judgment of the Defendants [sic] in such character and quantity as allowed by law", and "claims compensatory and punitive damages in such amounts as are appropriate to this case". Alabama not only allows a plaintiff to avoid any mention of the amount of damages she seeks, but a plaintiff who inadvertently or deliberately includes an *ad damnum* can recover more than that amount. If a plaintiff demands precisely $75,000, the jury is permitted to award $1,000,000 if the evidence justifies it. *See Fuller v. Preferred Risk Life Ins. Co.*, 577 So.2d 878 (Ala. 1991).

Prior to April 11, 2007, Alabama personal injury cases and wrongful death cases with no *ad damnum*, but in which diversity of citizenship existed, were regularly removed to federal court upon defendant's filing of a notice of removal that simply asserted the existence of the more than $75,000 in controversy required by 28 U.S.C. §1332(a), and proved that amount by citing jury awards in excess of $75,000 in similar Alabama tort cases. District courts, including this court, have, without hesitation, allowed such removals unless the plaintiff resolved the ambiguity that she herself deliberately created by conceding that she will forever forego any claim above $75,000, in which event her case, pre-*Lowery*, was remanded.

In its notice of removal, IHOP alleges, *inter alia*: "The amount in controversy in this action exceeds the sum or value of $75,000, exclusive of interest and costs, notwithstanding the fact that Plaintiff's Complaint does not set forth a **specific** amount of damages claimed". (emphasis in original). The notice then provides several eye-popping examples of jury verdicts in Alabama in amounts far exceeding $75,000 in slip-and-fall cases. IHOP then makes the following argument in support of diversity jurisdiction:

> It is well settled that an indeterminate complaint "does not show that the case is not removable; it simply does not comment on federal jurisdiction" *Robinson v. Quality Ins. Co.*, 633 F.Supp. 572, 574 (S.D. Ala. 1986). In such cases, the court has the "duty to independently determine the propriety of jurisdiction". *Id.* at 575. With that said, it is clear that, if the allegations of the Complaint in the case at hand are well-founded, the amount in controversy requirement of $75,000 would be satisfied.

IHOP's notice of removal contains not only what have previously been the typical allegations in similar removals, but IHOP gilds the lily by attaching to its notice of removal a letter it received from Constant's lawyer approximately two months before the suit was filed. In that letter, the lawyer describes Constant's prospective case as one in which liability is clear, in which Constant's medical expenses to date reach a total of $16,988.78, in which Constant is described as having "experienced excruciating, continuous pain", and in which the lawyer concludes with these words:

> On the basis of clear liability, lack of contributory negligence, medical bills, future medical care, and pain and suffering, we hereby request a settlement in the amount of Seventy Five Thousand Dollars ($75,000). A reasonable jury, in our opinion, would have little difficulty in awarding that amount and possibly more.

On April 11, 2007, in *Lowery*, the Eleventh Circuit affirmed this court's order remanding a case that had been removed to it from a state court under the Class Action Fairness Act of 2005 ("CAFA"). Although the jurisdictional amount there being looked at was the $5,000,000 required for the removal of a "mass action" under CAFA and not the $75,000 required by §§1441 and 1332(a), the principles of law and the legal analysis are the same in both cases. The Eleventh Circuit reached the following conclusions in *Lowery*, all applicable to the case here under consideration:

> We have held that, in the removal context where damages are unspecified, the removing party bears the burden of establishing the jurisdictional amount by a preponderance of the evidence. *See Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1356-57 (11th Cir. 1996) (adopting the "preponderance of the evidence" standard after examining the various burdens of proof in different factual contexts), *overruled on other grounds, Cohan v. Office Depot, Inc.*, 204 F.3d 1069, 1072 (11th Cir. 2000) . . .
>
> * * *
>
> We are bound to adhere to circuit precedent. Defendants must establish the jurisdictional amount by a preponderance of the evidence. We note, however, that in situations like the present one - where damages are unspecified and only the bare pleadings are available - we are at a loss as to how to apply the preponderance burden meaningfully. We have no evidence before us by which to make an informed assessment of the amount in controversy. All we have are the representations relating to jurisdiction in the notice of removal and the allegations of the plaintiffs' third amended complaint.

As such, any attempt to engage in a preponderance of the evidence assessment at this juncture would necessarily amount to unabashed guesswork, and such speculation is frowned upon. *See Lindsey v. Ala. Tel. Co.*, 576 F.2d 593, 595 (5th Cir. 1978) (noting, in a removed class action, that "it was not open for defendants to attempt to show" the requisite amount in controversy per capita where the complaint made insufficient allegations, "[n]or was it open to the district court to speculate" on whether the jurisdictional facts existed).

* * *

[W]e conclude that the removal-remand scheme set forth in 28 U.S.C. §§ 1446(b) and 1447(c) requires that a court review the propriety of the removal on the basis of the removing documents. If the jurisdictional amount is either stated clearly on the face of the documents before the court, or readily deducible from them, then the court has jurisdiction. If not, the court must remand. Under this approach, jurisdiction is either evident from the removing documents or remand is appropriate.

* * *

[U]nder § 1446(b), in assessing the propriety of removal, the court considers the documents received by the defendant from the plaintiff - be it the initial complaint or a later received paper - and determines whether that document and the notice of removal unambiguously establish federal jurisdiction. This inquiry is at the heart of a case, such as the one before us, in which the plaintiffs challenge removal by filing a timely motion to remand under § 1447(c).

* * *

[T]here are some exceptions to the rule that the court is limited to considering the removing documents. A defendant would be free to introduce evidence regarding damages arising from a source such as a contract provision whether or not the defendant received the contract from the plaintiff. In such situations, the underlying substantive law provides a rule that allows the court to determine the amount of damages. For example, in contract law, the default measure of damages is expectation damages; a court may look to the contract and determine what those damages would be. By contrast,

"[w]here the law gives no rule, the demand of the plaintiff must furnish one." *McNutt*, 298 U.S. at 182, 56 S. Ct. at 782. When a plaintiff seeks unliquidated damages and does not make a specific demand, therefore, the factual information establishing the jurisdictional amount must come from the plaintiff.

* * *

The absence of factual allegations pertinent to the existence of jurisdiction is dispositive and, in such absence, the existence of jurisdiction should not be divined by looking to the stars.

* * *

Allowing such speculation in the notice of removal with regard to the existence of jurisdiction would inevitably erode the "reasonable inquiry" standard of Rule 11 generally. If the court asserts jurisdiction on the basis of the defendant's speculative assertions, it implicitly accepts rank speculation as reasonable inquiry. This could undermine the requirement of reasonable inquiry not only in removal situations, but also in other contexts.

* * *

Though the defendant in a diversity case, unlike the plaintiff, may have no actual knowledge of the value of the claims, the defendant is not excused from the duty to show by fact, and not mere conclusory allegation, that federal jurisdiction exists. Indeed, the defendant, by removing the action, has represented to the court that the case belongs before it. Having made this representation, the defendant is no less subject to Rule 11 than a plaintiff who files a claim originally.

* * *

Because jurisdiction was challenged within thirty days of removal, and remand was promptly granted, we are limited in our review to determining whether the pleadings or "other paper" included with the notice of removal provide an unambiguous statement that clearly establishes federal jurisdiction over this action.

* * *

> The additional "evidence" contained in the supplement [to the notice of removal] likewise fails to support the defendants' contention that the district court had jurisdiction over this action. First, we note that this evidence regarding the value of other tort claims was not received from the plaintiffs, but rather was gathered from outside sources. As such, the evidence is not of the sort contemplated by § 1446(b). Even if the defendants had received the evidence of other suits from the plaintiffs, we question whether such general evidence is ever of much use in establishing the value of claims in any one particular suit. Looking only to this evidence and the complaint, the facts regarding other cases tell us nothing about the value of the claims in this lawsuit. Even were we to look to evidence beyond that contained within the notice of removal, in the present dispute - with a record bereft of detail - we cannot possibly ascertain how similar the current action is to those the defendants cite. Absent specific detail about the present action, the supplement in no way clarifies the aggregate value of the claims here. The defendants, therefore, have failed to meet their burden.

IHOP's only possible means of escaping the firm embrace of *Lowery* is Constant's demand letter. Does the demand do what the enigmatic complaint does not do, namely, provide a logical basis for concluding that the value of Constant's claim exceeds $75,000? The letter asked for $75,000 in settlement, while saying, just as the law of Alabama allows, that a jury possibly could give more. Constant's lawyer was as careful not to demand more than $75,000 in the letter as he was two months later to leave out an *ad damnum* clause in the complaint. The question to be answered as this court applies *Lowery* to the present scenario is: Can the court clearly deduce from the letter that Constant's claim exceeds $75,000 in value, or is IHOP engaged in wishful thinking of the kind flatly

rejected by the Eleventh Circuit in *Lowery*? At first blush, it would seem reasonable to believe that someone who demands $75,000 in settlement is offering to compromise, meaning that any compromise would be between something lesser and something larger than the settlement offer. This "logic" fails, and becomes mere conjecture as to value, when this court subscribes, as it does, to the reasoning of the Eastern District of Missouri on precisely the same subject. Judge Shaw there persuasively responded to IHOP's "logic" in *Corlew v. Denny's Restaurant, Inc.*, by saying:

> The Court recognizes that defendant, with some justification, is frustrated by plaintiff's careful limitation of her claim to the jurisdictional limit, as amended and as it previously existed. Defendant's removal is based solely on plaintiff's settlement demand of $75,000.00. This is insufficient to establish the jurisdictional amount for two reasons. First, the mere existence of a settlement demand is not dispositive of the issue of the jurisdictional amount. *See e.g., King v. Wal-mart Stores, Inc.*, 940 F.Supp. 213, 217 n. 1 (S.D. Ind. 1996); *Saunders v. Rider*, 805 F.Supp. 17, 18-19 (E.D. La. 1992).
>
> Second, for diversity jurisdiction to attach, the amount in controversy must **exceed** the value of $75,000.00. 28 U.S.C. § 1332(a); *see Larkin v. Brown*, 41 F.3d 387, 389 (8th Cir. 1994) (holding under former jurisdictional limit that diversity jurisdiction did not exist where plaintiff sought damages of exactly $50,000.00). Assuming *arguendo* that plaintiff's case is worth $75,000.00, the jurisdictional requirement is not met because the sum does not exceed $75,000.00. Further, because the Court must strictly construe the amount in controversy requirement of diversity jurisdiction, it is not free to disbelieve plaintiff's valuation of her case, even under the circumstances presented.

983 F.Supp. 878, 879-80 (E.D. Mo. 1997) (emphasis in original).

This court is persuaded by *Corlew* as an addendum to the comprehensive and powerful language above quoted from *Lowery*.

Even if this court should overlook the pointed words in *Lowery* that expressly limit the jurisdictional examination to what appears in the state-court complaint and in any other materials **furnished by plaintiff after that complaint was filed**, and should consider Constant's **pre-filing** letter as evidence, Constant has, even in her demand letter, conscientiously stayed under the jurisdictional amount. Who is to say that Constant's lawyer was not giving his honest assessment of the value of his client's case? This court is unwilling possibly to misjudge Constant's intent, especially under the constraints of *Lowery* and the overarching principle of limited federal jurisdiction. The court is not a mind reader. As explained in *Lowery*, it cannot indulge in speculation. It is, of course, not always easy to draw the line between deduction and speculation. Juries are routinely instructed that they are obligated to make this distinction. Deduction is allowed, even encouraged. Speculation is unreliable, even dangerous. Constant's demand letter was like any unsuccessful sales pitch. It did not obtain the result it sought, namely, IHOP's acceptance of the $75,000 offer, by which IHOP would have agreed with Constant that her claim is worth $75,000, which is less than the jurisdictional amount. If the court were going to speculate, it could just as easily speculate that IHOP believes Constant's claim to be worth

less than $75,000 as to speculate that Constant believes it to be worth **more** than $75,000. The court is left with speculation as the only means by which it could conclude that the amount in controversy exceeds $75,000 in value.

Conclusion

Applying *Lowery* to the procedural facts presented by IHOP, the case must be remanded. IHOP has simply not met its burden of proving by a preponderance of the "evidence" that the value of this claim exceeds $75,000, exclusive of interest and costs.

Because *Lowery* had not been decided when IHOP filed its notice of removal, and did only what everybody else was doing at the time, this court will deny the request that accompanied Constant's notice of removal for "attorney's fees and costs incurred as a result of the improper removal of the case". Because defendants are now aware of *Lowery*, they will no longer be protected from costs and attorneys fees, and possibly from Rule 11 sanctions, in diversity removal cases like this one when they ask the federal court to speculate.

An appropriate separate order will be entered.

DONE this 30th day of April, 2007.

WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE