Case No. 16-3051

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CRICKET COMMUNICATIONS, LLC,
Petitioner,

v.

MICHAEL A. SCOTT,
Respondent.

On Petition for Permission to Appeal 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, the Honorable George L. Russell III Presiding

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RESPONDENT'S ANSWER IN OPPOSITION TO PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1453(c)

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I. Introduction

The proposed appeal in this case is a frontal attack on settled law in this Circuit – it does not present an issue "that this Court has not yet addressed" as the Petitioner, Cricket Communications, LLC ("Cricket") represents. *See* Petition for Permission to Appeal (ECF#2-1) (the "Petition") at 1.[1] Instead, the issue Cricket seeks to appeal involves the basic question, answered by this Court time and again, of what evidence is required to prove citizenship of a particular state.

This Court has repeatedly ruled that citizenship cannot be inferred from residency. *See Dennison v. Carolina Payday Loans, Inc.*, 549 F.3d 941, 943 (4th Cir. 2008) (in a case removed under the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d)(2)(A) ("CAFA"), affirming order remanding class action for lack of jurisdiction where class definition was limited to citizens of a state, and holding that "an individual must be domiciled in a State in order to be a citizen of that State.");

[1] Cricket accompanied its Petition with several hundreds of pages of documents, including its briefing on Mr. Scott's remand motion and its briefing on a wholly irrelevant motion to compel arbitration – but remarkably chose to omit Mr. Scott's side of that briefing. Mr. Scott does not interpret F.R.A.P. 5(b)(E) to contemplate such documents, but if Cricket's briefing was "related… memorand[a]" under Rule 5(b)(E), then so was Mr. Scott's side of the briefing, and Cricket was required to file it. Either way, Cricket runs afoul of the rule. The material actually permitted by F.R.A.P. 5(b)(E) - the District Court's Opinion and Order - may be difficult to find among the hundreds of pages of extraneous material Cricket filed. Accordingly, for the convenience of the Court, it is attached to this Answer as Exhibit A. It will be referred to in this Answer as "Mem. Op."

Johnson v. Advance Am., 549 F.3d 932, 937 (4th Cir. 2008) (affirming remand of case removed under CAFA, holding that "residency is not sufficient to establish citizenship"); *Axel Johnson, Inc. v. Carroll Carolina Oil Co.*, 145 F.3d 660, 663 (4th Cir. 1998) ("the existence of [state] citizenship cannot be inferred from allegations of mere residence, standing alone.")

Yet the true issue in Cricket's proposed appeal is whether the District Court *must* infer citizenship from information relating only to residency. Here, the proposed class definition is expressly limited to Maryland citizens. Mem. Op. at 3. As Cricket recognizes, the District Court found that Cricket failed to carry its burden to show the amount in controversy by relying on "evidence related to Maryland *residents*" when the "class definition speaks in terms of Maryland *citizens*." Petition at 8 (emphasis by Cricket). By relying upon information which cannot prove citizenship in an attempt to prove the contours of a Maryland citizen-only class, Cricket asked the District Court to "speculate to determine the number of class members" and "the amount in controversy," Mem. Op. at 16, which would have contravened this Court's rulings in *Dennison*, *Johnson*, and *Axel Johnson, Inc.*, among others. Cricket has no basis for its request that the Court permit an appeal seeking to overturn the well-settled rule enunciated in those cases, which is neither new nor exclusive to CAFA – it applies across the board.

Nor is Cricket accurate in telling this Court that other U.S. Courts of Appeal "uniformly have rejected" the District Court's approach. *See* Petition at 9. The opposite is true. The U.S. Courts of Appeal who have spoken on the issue are unanimous, and in line with *Johnson* and *Dennison*. They hold that when CAFA jurisdiction depends upon evidence of the citizenship of class members, the party with the burden of proof must provide evidence of domicile and cannot rely on residency-based presumptions. *See*, *e.g.*, *In re Sprint Nextel Corporation*, 593 F.3d 669, 674 (7th Cir. 2010) ("*Sprint Nextel*") (holding that where citizenship must be shown in the context of a motion to remand under CAFA, evidence of domicile is required, and "a court may not draw conclusions about the citizenship of class members based on things like their phone numbers and mailing addresses"); *Hood v. Gilster-Mary Lee Corp.*, 785 F.3d 263, 266 (8th Cir. 2015) (same); *Reece v. AES Corporation*, 638 Fed. Appx. 755 (10th Cir. Feb. 9, 2016) (same).[2]

Finally, Cricket's complaint that an appeal should be allowed so it can argue that its burden is too difficult to shoulder, rings hollow. Numerous CAFA cases have identified how, in the appropriate case, to adduce evidence of citizenship of putative

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[2] These cases involved motions to remand under CAFA's "home state exception," where CAFA jurisdiction had been established and the plaintiffs bore the burden of proving an exception to it. In this case, where the existence of CAFA jurisdiction was disputed in the first instance, Cricket bears the burden of proof. *See Johnson*, 549 F.3d at 935; *Strawn v. AT&T Mobility, LLC*, 530 F.3d 293, 298 (4th Cir. 2008).

class members in a straightforward, practical manner. *See*, *e.g.*, *Sprint Nextel*, 593 F.3d at 675-676 ("the district court could have relied on evidence going to the citizenship of a representative sample" of the putative class); *Hood*, 785 F.3d at 266 (noting that "statistically significant surveys" could have provided evidence of citizenship). Cricket, however, chose to sit idle, and present nothing demonstrating anyone's citizenship. Cricket refused to even attempt to carry its burden because it "simply do[es] not keep track" of information relevant to domicile. Petition at 16. Yet none of the parties who failed to carry their burdens in *Sprint Nextel*, or *Hood*, or *Reece*, kept such information either. That did not permit them to ignore their burdens and rely on "guesswork" to demonstrate state citizenship. Cricket's decision to rely on guesswork does not support a discretionary appeal, either.

The District Court, under well-settled law from this Court, and consistent with the decisions of other Circuits, properly declined to permit Cricket to rely on guesswork and speculation to carry its burden to prove the existence of federal jurisdiction. The Petition should be denied.[3]

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[3] Cricket notes its intention to argue that federal question jurisdiction exists under the Magnuson Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq*. *See* Petition at 4 n.1. Cricket's intention to try to bootstrap in an appeal of remand for lack of ***federal question*** jurisdiction, an appeal generally not allowed (*see Noel v. McCain*, 538 F.2d 633, 635 (4th Cir.1976)), further undermines Cricket's claim that it is seeking a discretionary appeal to consider ***CAFA*** related questions.

II. Relevant Facts

Respondent, Mr. Scott, a former Cricket customer and a Maryland citizen, filed this case in Maryland state court in September, 2015. Mem. Op. at 2. The lawsuit arose from Mr. Scott's purchase of two Samsung Galaxy S4 mobile telephones from Cricket, each of which was locked so it could be used only on Cricket's "CDMA" network, each of which cost Mr. Scott hundreds of dollars, and each of which included an express statement that the telephones included "unsurpassed nationwide coverage." *Id.* However, unknown to Mr. Scott at the time of sale, but known to Cricket, the cellphones it sold were defective at the time of sale. *Id.* These telephones were not fit for the ordinary or particular purpose for which they were sold – making telephone calls and other mobile communications. *Id.*

In fact, at the time of sale, Cricket planned and intended to entirely cease providing the CDMA service required to operate those telephones, and yet it sold those telephones to Mr. Scott and other Class members and "locked" those telephones so that they would be guaranteed to never work following the shut-down of the CDMA service. *Id.*

Seeking relief from Cricket's sharp practices, Mr. Scott filed a lawsuit which alleged a Class limited to Maryland citizens, as follows:

> All Maryland citizens who, between July 12, 2013 and March 13, 2014, purchased a CDMA mobile telephone from Cricket which was locked for use only on Cricket's CDMA network.

Id. at 3.[4]

After Mr. Scott filed his lawsuit, Cricket immediately noticed the removal of the case. However, Cricket's notice of removal based its allegations that federal jurisdiction under CAFA was appropriate upon Cricket's unilateral re-definition of the Class to replace the "Maryland citizens" limitation with "Maryland residents." In fact, Cricket argued that it did not have information about the contours of the Class as defined in the Complaint. *See* Mem. Op. at 11 ("Cricket confirms that it does not possess any information relevant to the domiciles of customers"); *see also* Mem. Op. at 16 (noting Cricket's argument that providing evidence of citizenship is an "impossible burden of proof" and that "Cricket maintains '[i]t should be obvious that companies like Cricket do not keep track of customers' states of citizenship…") (emphasis by Cricket).

The District Court determined that Cricket's admitted failure to provide evidence tailored to the Maryland citizen-only Class actually pled in Mr. Scott's complaint was fatal to the removal:

> the Class includes only Maryland citizens, but Cricket's evidence pertains to all consumers who provided Maryland addresses. Residency is not tantamount to citizenship. See Johnson, 549 F.3d at 937 n.2. (4th Cir. 2008) … As a result, the Court would have to speculate to

[4] The Class excludes "those individuals who now are or have ever been Cricket executives and the spouses, parents, siblings and children of all such individuals." Complaint (Petition Exhibit B) at ¶ 52. Cricket never presented any evidence taking account of these limitations in the Class definition.

> determine the number of class members that purchased CDMA cellphones and the amount in controversy. The Court concludes, therefore, that Cricket fails to prove federal jurisdiction by a preponderance of the evidence … In sum, Cricket fails to prove federal jurisdiction by a preponderance of the evidence because Cricket does not tailor its evidence to Scott's narrowly defined Class.

Mem. Op. (Exhibit A) at 15, 16, 18.

III. Argument

A. The Petition Involves Only Cricket's Discomfort with a Well-Settled Standard for Determining State Citizenship, not an Important and Unsettled CAFA Related Question.

Although Cricket attempts to cast its proposed appeal as generally addressing whether CAFA jurisdiction may be proven with "over-inclusive" evidence, the specific question that an appeal here would answer is whether the District Court must have inferred citizenship from residency. This Court has answered that question, repeatedly, in the negative.

As the District Court held, based on this Court's prior decisions, "'residency is not sufficient to establish citizenship." Mem. Op. at 4 (quoting *Johnson*, 549 F.3d at 937 n.2).

> Rather, "[t]o be a citizen of a State, a person must be both a citizen of the United States and a domiciliary of that State." *Id.* (citing *Newman–Green, Inc. v. Alfonzo–Larrain*, 490 U.S. 826, 828 (1989)). "Domicile requires physical presence, coupled with an intent to make the State a home." *Id.* (citing *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989)). Factors relevant to determining an individual's domicile include "current residence; voting registration and voting practices; location of personal and real property; location of brokerage and bank accounts; membership in unions; fraternal organizations, churches,

> clubs, and other associations; place of employment or business; driver's license and automobile registration; payment of taxes; as well as several others." *Blake v. Arana*, No.WQQ-13-2551, 2014 WL 2002446, at *2 (D.Md. May 14, 2014) (quoting *Dyer v. Robinson*, 853 F.Supp. 169, 172 (D.Md. 1994)).

Mem. Op. at 4-5. As discussed in part I above, *Dennison*, *Johnson*, and *Axel Johnson, Inc*. all stand for the same proposition. As the Court held in *Johnson*, affidavits which indicate only residency do not demonstrate citizenship – they are "deficient" in addressing the question of citizenship. 549 F.3d at 937 n.2.

Cricket provided information which, at best, indicated only residency of certain persons and included no information about their domicile. The sum total of the information Cricket provided concerning this group of people was an affidavit stating that "between July 12, 2013 and March 13, 2014, Cricket customers who listed Maryland addresses on their accounts purchased at least 47,760 cellphones locked to Cricket's CDMA network." *See* Mem. Op. at 11. As a result, Cricket's information not only failed to address domicile of these people, but also concerned "Maryland addresses" in 2013 and 2014, more than a year before removal.

Cricket provided no information or even allegation which simply stated "between July 12, 2013 and March 13, 2014, [X] number of persons purchased [X] number of CDMA-only mobile telephones from Cricket which were locked for use on Cricket's network, and each of those persons was a Maryland citizen at the time of removal" or anything to the same effect.

For Cricket's information to be relevant, the class definition in the Complaint would have to be amended as follows, with the eliminated language stricken-though, and added language in all capitals:

> All ~~Maryland citizens who~~ CUSTOMERS, WHO LISTED ADDRESSES LOCATED IN MARYLAND ON THEIR CRICKET ACCOUNTS between July 12, 2013 and March 13, 2014, AND purchased a CDMA mobile telephone from Cricket which was locked for use only on Cricket's CDMA network.

Cricket did not provide information about a different class by accident – it was well aware that Mr. Scott's class was limited to Maryland citizens and chose not to address that group. Rather, in an attempt to excuse its failure to provide information relating to Mr. Scott's alleged Class, Cricket argued to the District Court that it does not know which of its customers is a Maryland citizen:

> It should be obvious that companies like Cricket do not keep track of their customers' state of citizenship, which would require asking every customer to divulge whether or not he or she "inten[ds] to make the State a home."

Mem. Op. at 16 [quoting Cricket's brief, emphasis by Cricket]. If Cricket did not have the information to support the removal of this case, however, it should never have filed a notice of removal – ignorance is not a basis for federal jurisdiction.

It was because Cricket failed to provide any information about the Class of Maryland citizens pled by Mr. Scott that the District Court remanded the case:

> the Class includes only Maryland citizens, but Cricket's evidence pertains to all consumers who provided Maryland addresses … Cricket

> fails to prove federal jurisdiction by a preponderance of the evidence because Cricket does not tailor its evidence to Scott's narrowly defined Class.

Mem. Op. at 15, 18.

Accordingly, the question here is not whether the District Court should have considered generally "over-inclusive" evidence, but rather whether the District Court should have permitted Cricket to flout the rule laid down by this Court in *Dennison*, *Johnson*, and *Axel Johnson, Inc.* that citizenship – in the CAFA and non-CAFA contexts – must be proven with information demonstrating domicile, not residency. The District Court's decision to follow those rulings from this Court does not create an unsettled, uniquely CAFA-related question Cricket should be allowed to appeal.

B. Decisions from Other Circuits Also Support the Remand Order.

Multiple decisions from other Circuits also have found in the context of CAFA that, for the purposes of determining if remand is appropriate, citizenship must be proven with evidence of domicile. They have specifically rejected proving citizenship with the "mailing address" information provided by Cricket in this case. These decisions, from the same U.S. Courts of Appeal that Cricket claims are in a "split" with the District Court, show that no such "split" exists.

For example, in *Sprint Nextel*, the Seventh Circuit determined that information about mailing addresses for cell phone accounts was insufficient to carry the burden of proof to show citizenship in the context of a CAFA remand motion. 593 F.3d at

671-676. In that case, it was the plaintiffs who bore the burden of proof, because the defendant had already established federal jurisdiction, and the plaintiffs were seeking remand under CAFA's "home state exception." *Id.* at 673.[5] The Seventh Circuit identified what was necessary to prove citizenship of putative class members:

> the plaintiffs had to establish by a preponderance of the evidence that two-thirds of their proposed class members are Kansas citizens, that is, either individuals domiciled in Kansas or corporations organized there (or other business entities meeting the relevant tests).

Id. (citing 28 U.S.C. § 1332(a), (c); *Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc.*, 485 F.3d 804, 813-14 (5th Cir.2007)).

Just like Cricket in this case, the parties charged with proving citizenship in *Sprint Nextel* provided information regarding the mailing addresses of cell phone customers. The Seventh Circuit ruled that if the district court were to rely on that information, it would be engaging in impermissible "guesswork":

> The plaintiffs didn't submit any evidence about citizenship, but the district court thought that the class definition itself, keyed as it is to Kansas cell phone numbers and mailing addresses, made it more likely than not that two-thirds of the putative class members are Kansas citizens. This approach has some appeal. People with Kansas cell phones presumably have them because they lived or worked in the state at some time, and the current Kansas mailing addresses suggest that they still do. …
> ***But that's all guesswork.*** Sensible guesswork, based on a sense of how the world works, but guesswork nonetheless. There are any number of ways in which our assumptions about the citizenship of this

[5] Here, of course, Cricket is the party which bears the burden of proving, by a preponderance of the evidence, that federal jurisdiction exists in the first place. *See* fn. 2; *see also* Mem. Op. at 6 (citing 28 U.S.C. § 1446(c)(2)(B)).

> vast class might differ from reality. … Ultimately, we agree with the majority of district courts that ***a court may not draw conclusions about the citizenship of class members based on things like their phone numbers and mailing addresses.***

Sprint Nextel, 593 F.3d at 673–74 (emphasis added).

The Seventh and Tenth Circuits, among others, have reached the same result as *Sprint Nextel*, holding that in the context of determining whether to remand under CAFA, citizenship cannot be inferred from information relating to residency. *See Hood*, 785 F.3d at 265-266 (rejecting the district court's "reli[ance] on last-known addresses" as proof of citizenship); *Reece*, 638 F. App'x at 772 (In the context of determining whether to remand under CAFA, "[a] demonstration that the proposed class members are property owners or residents of that state will not suffice [to prove citizenship] in the absence of further evidence demonstrating citizenship.")

Yet Cricket's request that this Court entertain an appeal is largely predicated on its misguided claim that the Seventh, Eighth, and Tenth Circuits – the same Courts of Appeal that decided *Sprint Nextel*, *Hood* and *Reece* consistent with the District Court's decision here – are somehow in a "split" with the District Court. The cases from those Circuits discussed above are sufficient to refute Cricket's claim, but a review of the cases Cricket relies on shows how fundamentally distinct they are. Cricket's cases on "over-inclusive" evidence did not permit consideration of "over-inclusive" evidence which was not tailored to the class as pled.

For example, Cricket relies on *Raskas v. Johnson & Johnson*, 719 F.3d 884, 887

(8th Cir. 2013). *Raskas* involved class actions challenging sales practices in connection with certain types of medication in Missouri – that case, however, involved no limitation of class members to citizens of Missouri. Instead, the *Raskas* plaintiffs alleged a scheme in which the defendants "conspired with unknown third parties to deceive customers into throwing away medications after their expiration dates." *Id.* at 886. The defendants submitted affidavits showing that the total sales of these medications exceeded $17 million – well in excess of CAFA's $5 million threshold. *Id.* at 887. The district court had ordered remand on the basis that "none of the defendants presents … a formula or methodology for calculating the potential damages" resulting from the sale of those products." *Id.* at 886. The Eighth Circuit reversed, because "the question "'is not whether the damages are greater than the requisite amount, but whether a fact finder *might* legally conclude that they are.'" *Id.* at 887 (emphasis in *Raskas*). In *Raskas*, the court had allegations and evidence from which it could determine what damages a fact finder "*might*" award the class. As another court held, in distinguishing *Raskas*:

> The *Raskas* Court involved allegations that the Court construed as putting the defendants' entire sales figures as to certain products in controversy and the plaintiffs failed to rebut that hypothesis. None of those cases specifically addressed situations where the amount in controversy calculation does not attempt to conform to the specific, unambiguous allegations in the complaint.

All-S. Subcontractors, Inc. v. Sunbelt Rentals, Inc., 2015 WL 4255781, at *5 (M.D. Ga. July 14, 2015). Here, however, Cricket's "sales figures" were inapposite – because only

sales figures regarding Maryland citizens could be relevant to this case, and Cricket by its own admission did not present any information about Maryland citizens. *See* Mem. Op. Opp. at 16 (noting Cricket's argument that requiring evidence of citizenship "would create an impossible burden of proof"). Accordingly, because Cricket's amount in controversy calculation "does not attempt to conform to the specific, unambiguous allegations in the complaint," *All-S. Subcontractors, Inc.*, 2015 WL 4255781 at *5, *Raskas* is inapposite.

The District Court's decision is not in conflict with *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 986 (7th Cir. 2008), either. In *Spivey*, the court rejected the argument that a credit card company had to "concede that more than $5 million in charges was unauthorized" to show the CAFA amount in controversy - but the case challenged all of the charges the company made as being unauthorized, and the company provided an affidavit showing that all of those charges totaled $7 million. *Id.* at 985-86. The court expressly stated that the demonstration of federal jurisdiction "concerns what the plaintiff is claiming". *Id.* at 986 (quoting *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 449 (7th Cir. 2005)). Thus, in *Spivey*, the removing defendant provided facts which met the class definition. Here, in contrast, Cricket provided no plausible facts regarding the Maryland citizen-only class. *See also All-S. Subcontractors, Inc.*, 2015 WL 4255781, at *5 (distinguishing *Spivey* in similar circumstances).

Similarly distinguishable is *Lewis v. Verizon Commc'ns, Inc.*, 627 F.3d 395, 400

(9th Cir. 2010), which held that where a plaintiff challenged allegedly unauthorized charges, the defendant showed that more than $5 million in total charges had been assessed against members of the class, and the plaintiff offered no evidence that any part of those charges were authorized, the amount in controversy requirement was met. 627 F.3d at 399-400. Here, in stark contrast, Cricket provided no information about the amount in controversy for the subject Class, pled in Mr. Scott's Complaint. It instead provided purported information concerning some differently defined group. In fact, as discussed above, Cricket argued to the District Court that it does not know who is in the Class pled by Mr. Scott. *See also All-S. Subcontractors, Inc.*, 2015 WL 4255781, at *5 (distinguishing *Lewis* in similar circumstances).

The decisions in *Sprint Nextel*, *Hood* and *Reece*, along with the material distinctions between this case and the cases Cricket relies on from those courts, show that the Seventh, Eighth, and Tenth Circuits are not in the "split" with the District Court that Cricket claims supports an appeal here.

C. An Appeal Would Not Serve the Factors Identified in Other Circuits as Relevant to Deciding Whether to Accept Appeal of a CAFA Remand Order.

This Court has not articulated specific factors under which the discretion authorized by 28 U.S.C. § 1453(c)(1) is exercised, but the guideposts established outside this Circuit for determining whether to accept an appeal from a CAFA remand order do not support accepting Cricket's proposed appeal.

The Tenth Circuit identified the following factors as relevant in *BP Am., Inc. v. Oklahoma ex rel. Edmondson*, 613 F.3d 1029, 1034 (10th Cir. 2010):

> (1) "the presence of an important CAFA-related question"; (2) whether the question is "unsettled"; (3) "whether the question, at first glance, appears to be either incorrectly decided or at least fairly debatable"; (4) "whether the question is consequential to the resolution of the particular case"; (5) "whether the question is likely to evade effective review if left for consideration only after final judgment"; (6) whether the question is likely to recur; (7) "whether the application arises from a decision or order that is sufficiently final to position the case for intelligent review"; and (8) whether "the probable harm to the applicant should an immediate appeal be refused [outweighs] the probable harm to the other parties should an immediate appeal be entertained."

Id.

The first three factors are addressed above – first, Cricket's appeal is not particularly CAFA-related, but instead involves the broad standard applicable to every case for proof of citizenship. Second, the question is not "unsettled," but the subject of reported decisions from this Court in the CAFA and non-CAFA contexts. Third, the question resolved by the District Court was neither incorrectly decided nor fairly debatable. It is beyond question in this Circuit (among others) that citizenship requires evidence of domicile. Cricket admittedly provided no such evidence – thus failing to prove anything regarding the Maryland citizen-only class.

Fourth, the question is not consequential to the resolution of this case. Even if Cricket prevailed, and this Court reversed the long-standing rule that citizenship cannot be inferred from residency, Cricket would still fail in its burden. As noted

above, Cricket failed to provide even information about residency at the time of removal. At best, it provided some information relevant to residency more than a year prior to removal. *See* Mem. Op. at 11 (Cricket's information concerned Maryland addresses "between July 12, 2013 and March 13, 2014"). But jurisdiction here would have to be established based on citizenship at the time of removal – not a year and a half earlier. *See Johnson*, 549 F.3d at 938. Cricket also failed to take into account the exclusions in the Class definition, *see* fn. 4, *supra*.

Fifth, the question is not likely to evade effective review. As discussed above, it has been the subject of repeated review by this Court, and this Court's decisions have consistently held that citizenship cannot be inferred from residency.

While the remand order is final, that is true of all orders remanding cases to state court. But the balance of hardships does not weigh in favor of accepting Cricket's appeal – this case has been effectively stalled for an entire year because of Cricket's removal. The District Court, in a thoughtful, well-reasoned and well-supported opinion, determined that remand was proper. The longer this case is prevented from advancing in state court, the longer justice is deferred.[6] And the delay

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[6] Cricket's claim that it would face "hardship" because it says state court would interfere with its intention to force Mr. Scott into arbitration and effectively deny any relief for others harmed by its business practices both twists the meaning of the word "hardship" and conflicts with precedent from this Court. As the Court held in *Johnson*, CAFA did not alter "our federal system of dual sovereignty where we presume state courts to be competent." 549 F.3d at 938 (citing *Tafflin v. Levitt*, 493 U.S. 455, 458–59 (1990)). This Court also found state courts "more than capable"

would be for naught – this Court and other Circuits have already ruled on the issues that would be raised in Cricket's appeal.

D. Cricket Claims that Citizenship Is Too Hard to Prove, But It Did Not Even Try to Adduce the Proof Suggested by U.S. Courts of Appeal in Similar Situations.

Cricket claims that an appeal is warranted because requiring evidence of citizenship in the context of CAFA removal would undermine the statute – Petition at 16-18 – but that is contrary to the CAFA statute, this Court's decisions, and the decisions of other Circuits which have explained in the CAFA context how citizenship can be proven in a straightforward and practical way.

First, the CAFA statute itself expressly contemplates that citizenship "shall be determined" in connection with CAFA proceedings. 28 U.S.C. §1332(d)(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…"). It cannot undermine CAFA to require determination of citizenship, when CAFA itself prescribes, in mandatory language, how citizenship "shall be determined."

Second, as discussed above, this Court has already held, in the context of CAFA, that residency does not establish citizenship. *See Johnson*, 549 F.3d at 937 ("Advance America's affidavits only indicated that these persons 'resided' outside of

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of handing arbitration issues in *Owens-Illinois, Inc. v. Meade*, 186 F.3d 435, 442 (4th Cir. 1999).

South Carolina. For purposes of diversity jurisdiction, residency is not sufficient to establish citizenship.")

Moreover, other Circuits have identified how evidence of citizenship can be effectively presented in the CAFA context. *See, e.g.*, *Sprint Nextel*, 593 F.3d at 675–76; *Hood*, 785 F.3d at 266. Cricket chose not to even attempt to provide the District Court such proof, and that decision certainly does not support an appeal.

For example, in *Sprint Nextel*, the Seventh Circuit described precisely how citizenship could be proven in the CAFA context:

> Given that there are probably hundreds of thousands of putative class members, if not more, it would be infeasible to document each class member's citizenship individually, but the district court could have relied on evidence going to the citizenship of a representative sample. This evidence might have included affidavits or survey responses in which putative class members reveal whether they intend to remain in Kansas indefinitely, or, if they are businesses, their citizenship under the relevant test. Given those results and the size of the sample and the estimated size of the proposed class, the district court could then have used statistical principles to reach a conclusion as to the likelihood that two-thirds or more of the proposed class members are citizens of Kansas. Statisticians and scientists usually want at least 95 percent certainty, but any number greater than 50 percent would have allowed the district court to conclude that the plaintiffs had established the citizenship requirement by a preponderance of the evidence.

Sprint Nextel, 593 F.3d at 675–76 (citations omitted); *see also Hood*, 785 F.3d at 266 (suggesting similar evidence as a means of proving citizenship).

Cricket did none of this. It presented ***no*** evidence to the District Court on the Maryland citizen-only class.

The District Court's remand, which was in line with the decisions of this Court, and the decisions of other U.S. Courts of Appeal, is not the proper subject of a discretionary appeal.

IV. Conclusion

For the reasons set forth above, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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Certificate of Service

I hereby certify, this 12th day of September, 2016, that the foregoing document was served on counsel of record for all parties through the CM/ECF system.

/s/Benjamin H. Carney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MICHAEL A. SCOTT, :

Plaintiff, :

v. : Civil Action No. GLR-15-3330

CRICKET COMMUNICATIONS, LLC, :

Defendant. :

MICHAEL A. SCOTT, :

Plaintiff, :

v. : Civil Action No. GLR-15-3759

CRICKET COMMUNICATIONS, LLC, :

Defendant. :

MEMORANDUM OPINION

THIS MATTER is before the Court on several motions related to Plaintiff Michael A. Scott's putative class action alleging Defendant Cricket Communications, LLC ("Cricket") violated the Magnuson-Moss Warranty Act ("MMWA"), 15 U.S.C. §§ 2301 et seq. (2012). Scott filed Motions to Remand (ECF No. 15, GLR-15-3330; ECF No. 18, GLR-15-3759) and a Motion to Strike New Materials and Arguments or for Leave to File a Surreply Addressing Them (ECF No. 30, GLR-15-3330). Cricket filed a Motion to Compel Arbitration (ECF No. 20, GLR-15-3330), Motion to Dismiss or, in the Alternative, to Stay (ECF No. 16, GLR-15-3759), and Motion

to Relate Case (ECF No. 16, GLR-15-3330). All Motions are ripe for disposition.

Having reviewed the Motions and supporting documents, the Court finds no hearing necessary. See Local Rule 105.6 (D.Md. 2016). For the reasons outlined below, the Court will grant the Motions to Remand and deny all other Motions as moot.

I. BACKGROUND

Sometime between July 2013 and March 2014, Scott purchased two Samsung Galaxy S4 cellphones from Cricket that cost "hundreds of dollars each." (Class Action Compl. ¶¶ 26, 27, ECF No. 2, GLR-15-3330). The paperwork accompanying the cellphones expressly stated that Cricket's Code Division Multiple Access ("CDMA") network provided "unsurpassed nationwide coverage." (Id. ¶ 28). Unbeknownst to Scott, however, at least as early as July 2013, AT&T had acquired Cricket and intended to shut down Cricket's CDMA network and switch previous Cricket customers to AT&T's Global Systems for Mobile ("GSM") network. (Id. ¶ 5). Though Cricket knew the CDMA network would be shut down, Cricket "locked" Scott's cellphones for use exclusively on Cricket's CDMA network. (Id. ¶ 7). This rendered Scott's cellphones "useless and worthless" and "obsolete." (Id. ¶¶ 1, 7, 8).

Scott filed a putative Class Action Complaint on September 24, 2015 in the Circuit Court for Baltimore City, Maryland ("Scott I"). (ECF No. 2, GLR-15-3330). Scott defines the class

as "[a]ll Maryland citizens who, between July 12, 2013 and March 13, 2014, purchased a CDMA mobile telephone from Cricket which was locked for use only on Cricket's CDMA network." (Class Action Compl. ¶ 51). Scott raises a single claim for violation of the MMWA stemming from alleged breaches of express warranties and the implied warranties of merchantability and fitness for a particular purpose. (Id. ¶¶ 60–66).

On October 30, 2015, Cricket removed Scott I to this Court. (ECF No. 1, GLR-15-3330). On November 10, 2015, Scott filed a Complaint Petitioning to Stay Threatened Arbitration in the Circuit Court for Baltimore County, Maryland ("Scott II"). (ECF No. 2, GLR-15-3759). On December 9, 2015, Cricket removed Scott II to this Court. (ECF No. 1, GLR-15-3759). On November 23, 2015, Scott filed a Motion to Remand Scott I. (ECF No. 15, GLR-15-3330). On December 2, 2015, Cricket filed a Motion to Relate Scott I to Bond v. Cricket Communications, LLC, No. WDQ-15-923 (D.Md. stayed Jan. 12, 2016). (ECF No. 16, GLR-15-3330). On December 16, 2015, Cricket filed a Motion to Compel Arbitration (ECF No. 20, GLR-15-3330) and Motion to Dismiss or, in the Alternative, to Stay (ECF No. 16, GLR-15-3759). On December 21, 2015, Scott filed a Motion to Remand Scott II. (ECF No. 18, GLR-15-3759). Finally, on February 26, 2016, Scott filed a Motion to Strike New Materials and Arguments or for Leave to

File a Surreply Addressing Them (ECF No. 30, GLR-15-3330). All Motions are opposed.

II. DISCUSSION

A. Motions to Remand

1. Scott I

a. Legal Standard

Federal courts are courts of limited jurisdiction and "may not exercise jurisdiction absent a statutory basis." Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 552 (2005). Under the Class Action Fairness Act ("CAFA"), federal courts have jurisdiction over a class action when there is: (1) minimal diversity, 28 U.S.C. § 1332(d)(2)(A); (2) an aggregate amount in controversy exceeding $5 million, exclusive of interest and costs, § 1332(d)(2); and (3) a class size greater than 100 persons, § 1332(d)(5)(B).

There is minimal diversity under CAFA when "any member of the class is a citizen of a state different from the defendant." 28 U.S.C. § 1332(d)(2)(A). In this context, "residency is not sufficient to establish citizenship." Johnson v. Advance Am., 549 F.3d 932, 937 n.2 (4th Cir. 2008). Rather, "[t]o be a citizen of a State, a person must be both a citizen of the United States and a domiciliary of that State." Id. (citing Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 828 (1989)). "Domicile requires physical presence, coupled with an

intent to make the State a home." Id. (citing Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 48 (1989)). Factors relevant to determining an individual's domicile include "current residence; voting registration and voting practices; location of personal and real property; location of brokerage and bank accounts; membership in unions; fraternal organizations, churches, clubs, and other associations; place of employment or business; driver's license and automobile registration; payment of taxes; as well as several others." Blake v. Arana, No. WQQ-13-2551, 2014 WL 2002446, at *2 (D.Md. May 14, 2014) (quoting Dyer v. Robinson, 853 F.Supp. 169, 172 (D.Md. 1994)).

Though the Court typically construes removal jurisdiction strictly, see Md. Stadium Auth. v. Ellerbe Becket Inc., 407 F.3d 255, 260 (4th Cir. 2005), there is no presumption in favor of remand when cases are removed under CAFA, Dart Cherokee Basin Operating Co., LLC v. Owens, 135 S.Ct. 547, 554 (2014). The "primary objective" of CAFA is to "ensur[e] '[f]ederal court consideration of interstate cases of national importance." Standard Fire Ins. Co. v. Knowles, 133 S.Ct. 1345, 1350 (2013) (citation omitted). "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."

Dart Cherokee, 135 S.Ct. at 554 (quoting S.Rep. No. 109-14, p. 43 (2005)).

To remove a class action under CAFA, "the party seeking to invoke federal jurisdiction must allege it in his notice of removal and, when challenged, demonstrate the basis for federal jurisdiction." Strawn v. AT & T Mobility LLC, 530 F.3d 293, 298 (4th Cir. 2008); accord Dart Cherokee, 135 S.Ct. at 554. A removing party must demonstrate federal jurisdiction by a preponderance of the evidence. 28 U.S.C. § 1446(c)(2)(B).

A notice of removal is not required "to meet a higher pleading standard than the one imposed on a plaintiff in drafting an initial complaint." Ellenburg v. Spartan Motors Chassis, Inc., 519 F.3d 192, 200 (4th Cir. 2008). Under 28 U.S.C. § 1446(a), the removing party must provide only "a short and plain statement of the grounds for removal." Although a notice of removal is not a "pleading" as defined in Federal Rule of Civil Procedure 7(a), the standard articulated in §1446(a) is "deliberately parallel" to the notice pleading standard of Rule 8(a). Ellenburg, 519 F.3d at 199 (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 553-55 (2007)).

b. Analysis

Scott presents three primary arguments for why the Court should grant his Motion to Remand. First, Cricket does not sufficiently allege the number of class members and amount in

controversy required for CAFA jurisdiction because Cricket's Notice of Removal addresses a class that Cricket defined, not the far more narrow class that Scott defined in his Complaint (the "Class"). Scott discusses several Fourth Circuit cases he reads as concluding that remand is warranted when a removing party redefines and broadens the class defined in the complaint. Second, even assuming Cricket met its preliminary burden of sufficiently alleging federal jurisdiction, Cricket failed to present facts demonstrating federal jurisdiction because Cricket's facts, like its allegations, are broader than the Class. Third, Scott is the only named plaintiff in the putative MMWA class action and the MMWA expressly prohibits federal jurisdiction over MMWA class actions with fewer than 100 named plaintiffs.

In response, Cricket maintains that Scott's principal argument for seeking remand is that Cricket did not sufficiently prove federal jurisdiction in its Notice of Removal. Cricket argues Scott misunderstands and overstates Cricket's burden on removal because in Dart Cherokee, the Supreme Court of the United States held that before federal jurisdiction is challenged, the removing party carries a burden of only plausibly alleging that CAFA's jurisdictional prerequisites are satisfied. Cricket contends that not only does its Notice of Removal sufficiently allege federal jurisdiction, but also the

evidence it presented with its Notice of Removal and in response to Scott's Motion to Remand proves federal jurisdiction by a preponderance of the evidence. Finally, Cricket argues that notwithstanding the MMWA's express prohibition of MMWA class actions with less than 100 named plaintiffs, Congress enacted CAFA long after it enacted the MMWA and many courts have held that MMWA class action with less than 100 named plaintiffs are permissible.

i. Whether Cricket Sufficiently Alleges Federal Jurisdiction

In its Notice of Removal, Cricket alleges the Class is greater than 100 persons because "Cricket's sales indicate that Cricket sold at least 50,000 CDMA mobile telephones that were shipped to and activated in Maryland between July 12, 2013 and March 13, 2014." (Notice of Removal ¶ 4, ECF No. 1, GLR-15-3330). To calculate the amount in controversy, Cricket relied on Scott's allegations that he paid "hundreds of dollars" for his cellphones to assume that each class member was harmed by a maximum of $200 per cellphone purchase. (Id. ¶ 10). Cricket then multiplied 50,000 by $200 to allege that the amount in controversy is no less than $10 million—double the statutory requirement. (Id.).

Scott argues Cricket does not sufficiently allege the requisite number of class members and amount in controversy

because Cricket does not state how many of the approximately 50,000 CDMA cellphones Cricket shipped to and activated in Maryland were purchased by Maryland citizens and locked for use only on Cricket's CDMA network. There is no question that Cricket's allegations are over-inclusive. Cricket alleges the entire population of CDMA cellphones shipped to and activated in Maryland and asks the Court to Court to infer that a subset of this population—cellphones locked for use only on the CDMA network and sold to Maryland citizens—satisfies CAFA's jurisdictional prerequisites. In all of the CAFA cases Scott cites in which the courts examined over-inclusive notices of removal, the courts analyzed whether the defendants had proved federal jurisdiction, not whether they had alleged it. Thus, none of the cases Scott cites is helpful to determining whether Cricket's over-inclusive allegations pass muster.

The only CAFA case Scott cites that addresses whether a defendant has sufficiently alleged federal jurisdiction is Covert v. Auto. Credit Corp., 968 F.Supp.2d 746 (D.Md. 2013). In that case, this Court concluded the defendant failed to sufficiently allege federal jurisdiction because it "completely omit[ted] to allege the size of the putative class." Covert, 968 F.Supp.2d at 751. Indeed, "[n]owhere in the notice of removal [did] Defendant allege that the size of the putative class [was] greater than 100 persons." Id. at 749. This Court

concluded the complete failure to allege a jurisdictional fact rendered the notice of removal defective. Id.

This case is distinguishable from Covert because Cricket did not completely fail to allege the requisite number of class members or amount in controversy. Cricket alleged "the total amount in controversy is, at a minimum, $10,000,000," (Notice of Removal ¶ 10), and "the aggregate number of putative class members is greater than 100 persons," (id. ¶ 4). The only shortcoming in Cricket's allegations, if any, is that they are not tailored to the Class. Scott's allegations, however, include "a short and plain statement of the grounds for removal," 28 U.S.C. § 1446(a), and they give Scott fair notice of the grounds upon which federal jurisdiction purportedly rests, see Twombly, 550 U.S. at 555 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). Accordingly, the Court concludes Cricket sufficiently alleges federal jurisdiction under CAFA.

ii. Whether Cricket Proves Federal Jurisdiction by a Preponderance of the Evidence

Because Scott challenges the basis for federal jurisdiction, Cricket must present facts proving federal jurisdiction. See Strawn, 530 F.3d at 298. By strategically defining the Class as including only Maryland citizens, Scott places Cricket in somewhat of a predicament: Scott can't prove there is at least $5 million in controversy without extensive

discovery of facts related to the domiciles of potentially tens of thousands of Cricket customers. Cricket confirms that it does not possess any information relevant to the domiciles of customers who purchased and activated CDMA cellphones in Maryland during the relevant period because "[b]uying a cell phone does not require a recitation of one's life story." (Def.'s Opp. Mot. Remand at 13, ECF No. 18, GLR-15-3330).

Lacking information relevant to domicile, Cricket presents evidence that is broader than the Class. Cricket offers the declaration of Rich Cochran, Strategic Business Systems and Operations Professional, who states that between July 12, 2013 and March 13, 2014, Cricket customers who listed Maryland addresses on their accounts purchased at least 47,760 cellphones locked to Cricket's CDMA network. (Cochran Decl. ¶ 6, ECF No. 18-1). Assuming $200 in damages per phone, Cricket estimates the amount in controversy is $9,552,000.

Cricket implicitly asks the court to infer that out of the 47,760 CDMA cellphones shipped to and activated by Maryland residents during the relevant period, Cricket sold at least 25,000 of these phones to Maryland citizens.[1] Cricket maintains "there is no conceivable possibility that the number of putative class members and the amount in controversy could fall below the

[1] 25,000 Maryland citizens multiplied by $200 in damages per cellphone equals $5 million in controversy.

CAFA floor." (Def.'s Opp'n Mot. Remand at 11). Cricket further contends it is an "absurd proposition" that nearly half of the Maryland residents who purchased CDMA cellphones during the relevant period were domiciled in a state other than Maryland. (Id.).

Cricket relies on three cases outside the Fourth Circuit to argue Cricket's over-inclusive evidence is sufficient to prove federal jurisdiction.[2] As Scott highlights, however, courts in the Fourth Circuit have consistently remanded putative class actions when defendants present evidence that is broader than the class defined in the complaint. Scott identifies at least three examples from the United States District Court for the Southern District of West Virginia.

First, in Krivonyak v. Fifth Third Bank, No. 2:09-CV-00549, 2009 WL 2392092, at *2 (S.D.W.Va. Aug. 4, 2009), the plaintiffs defined the class as those borrowers whose loans Fifth Third Bank ("Fifth Third") serviced and who Fifth Third charged multiple late fees for the same late payment or did not credit for full or partial payments. Fifth Third presented evidence that they serviced 2,201 total loans to West Virginia consumers and estimated that because the plaintiffs were each seeking

[2] See Raskas v. Johnson & Johnson, 719 F.3d 884 (8th Cir. 2013), Lewis v. Verizon Commc'ns, Inc., 627 F.3d 395 (9th Cir. 2010), and Spivey v. Vertrue, Inc., 528 F.3d 982, 983 (7th Cir. 2008).

$4,400 in civil penalties, the total amount in controversy was approximately $9.6 million. Krivonyak, 2009 WL 2392092, at *2. Fifth Third failed, however, to present any evidence regarding how many of the 2,201 total borrowers were charged multiple late fees or not credited for full or partial payments. Id. at *5. In other words, Fifth Third failed to prove how many borrowers were in the plaintiffs' narrowly tailored class. Without evidence of the number of class members, the Court concluded Fifth Third failed to prove federal jurisdiction because the amount in controversy was merely speculative. Id. at 5—7.

Second, in Caufield v. EMC Mortgage Corp., 803 F.Supp.2d 519, 526 (S.D.W.Va. 2011), the plaintiffs defined the class as those borrowers whose loans defendant EMC Mortgage Corp. ("EMC Mortgage") serviced and who EMC Mortgage charged specific fees in violation of West Virginia statutory law. EMC Mortgage offered evidence that it was servicing approximately 700 West Virginia loans, which is the number it used to attempt to demonstrate there was more than $5 million in controversy. Id. at 527. EMC Mortgage, however, presented no evidence of how many of the total West Virginia loans EMC Mortgage subjected to the late fees specified in the plaintiffs' class definition. Id. at 526—27. As such, the Court concluded EMC Mortgage failed to demonstrate the requisite number of class members or

amount in controversy, specifically finding the defendant relied on nothing more than "conjecture." Id.

Third, in Pauley v. Hertz Glob. Holdings, Inc., No. 3:13-31273, 2014 WL 2112920, at *1 (S.D.W.Va. May 19, 2014), the plaintiffs defined the class as customers who rented cars from defendants Hertz Corporation ("Hertz") and Dollar Thrifty Automotive Group, Inc. ("Dollar Thrifty") and after receiving and paying parking citations issued during the rental period were nevertheless charged administrative fees by Hertz and Dollar Thrifty. Hertz attempted to prove CAFA's amount in controversy requirement by offering a declaration that Hertz collected $5.6 million in administrative fees associated with parking citations. Id. at *2. Because Hertz presented no evidence regarding how much of the $5.6 million Hertz collected from customers who were charged administrative fees after paying the underlying parking citations, the court concluded Hertz failed to demonstrate there was at least $5 million in controversy. Id. at *5.

The Court rejects Cricket's assertion that the foregoing cases are "outliers." (See Def.'s Opp'n Mot. to Remand at 14 n.4). Just last year, in James v. Santander Consumer USA, Inc., JFM-15-654, 2015 WL 4770924, at *5 (D.Md. Aug. 12, 2015), this Court also concluded that defendants fail to demonstrate federal jurisdiction under CAFA when they present evidence that is

broader than the class defined in the complaint. In James, the plaintiff defined the class to include only those individuals whose cars were repossessed by defendant Santander Consumer USA, Inc. ("Santander") under closed end credit contracts ("CLECs") and who did not receive proper pre- and post-sale notifications. Id. at *3. Santander attempted to demonstrate the requisite number of class members and amount in controversy by offering evidence of the total number of vehicles Santander repossessed and sold under CLECs. Id. at *2. Santander, however, did not present any evidence regarding how many of the repossessions Santander conducted without sending the proper pre- and post-sale notifications. Id. Consequently, this Court concluded Santander failed to prove federal jurisdiction under CAFA and remanded the case. Id. at *3.

Here, Cricket, like the defendants in Krivonyak, Caufield, Pauley, and James, presents evidence that is over-inclusive—the Class includes only Maryland citizens, but Cricket's evidence pertains to all consumers who provided Maryland addresses. Residency is not tantamount to citizenship. See Johnson, 549 F.3d at 937 n.2 (4th Cir. 2008). Assuming $200 in controversy per class member, Cricket must prove at least 25,000 consumers who purchased locked CDMA cellphones during the relevant period are domiciled in Maryland. See id. (citing Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 828 (1989)) (explaining that

"[t]o be a citizen of a State, a person must be both a citizen of the United States and a domiciliary of that State"). But, Cricket presents no evidence of any of the factors relevant to domicile, such as where the consumers are registered to vote, where they pay taxes, or where they are employed. See Blake, 2014 WL 2002446, at *2 (quoting Dyer, 853 F.Supp. at 172) (listing factors relevant to determining domicile). As a result, the Court would have to speculate to determine the number of class members that purchased CDMA cellphones and the amount in controversy. The Court concludes, therefore, that Cricket fails to prove federal jurisdiction by a preponderance of the evidence.

Cricket further argues that from a practical perspective, requiring defendants to prove state citizenship when a plaintiff challenges CAFA removal would completely prohibit CAFA removal because that would be an "impossible burden of proof." (Def.'s Opp'n Mot. to Remand at 12). Cricket maintains "[i]t should be obvious that companies like Cricket do not keep track of customers' state of citizenship, which would require asking every customer to divulge whether or not he or she 'intends to make the State a home.'" (Id.) (citation omitted). Cricket also contends that prohibiting CAFA removal by requiring companies to prove state citizenship would belie CAFA's "'primary objective' of 'ensuring Federal court consideration of

interstate cases of national importance.'" (Id.) (quoting Standard Fire, 133 S. Ct. at 1350). This Court is not persuaded for several reasons.

First, Scott, as the plaintiff, is the master of his complaint, and he can choose to circumscribe his class definition to avoid federal jurisdiction under CAFA. Johnson v. Advance Am., 549 F.3d 932, 937 (4th Cir. 2008); see Morgan v. Gay, 471 F.3d 469, 474 (3d Cir. 2006) ("The Supreme Court has long held that plaintiffs may limit their claims to avoid federal subject matter jurisdiction. . . . CAFA does not change the proposition that the plaintiff is the master of her own claim."). Second, Cricket maintains that it should be excused from tailoring its evidence to the Class because Cricket does not obtain information relevant to the domiciles of its customers as part of its normal business practices. In Pauley, Hertz's normal business practices did not entail learning precisely when its customers paid their parking citations because there is no evidence Hertz required its customers to provide this information. Nevertheless, the district court granted the plaintiffs' motion to remand because Hertz did not prove the amount of administrative fees it charged its customers after the customers paid their parking citations. Pauley, 2014 WL 2112920, at *5.

Third, the Court disagrees that requiring defendants to prove state citizenship when a plaintiff challenges CAFA removal would contravene CAFA's objective of preserving federal jurisdiction over interstate cases of national importance. Limiting a class to citizens of only one state creates an action that is inherently intrastate. And, as the United States Court of Appeals explained in Johnson, in enacting CAFA, "Congress did not give federal courts jurisdiction over all class actions;" rather, it "specifically exclude[ed] [class actions] consisting of 'primarily local matters.'" 549 F.3d at 938.

In sum, Cricket fails to prove federal jurisdiction by a preponderance of the evidence because Cricket does not tailor its evidence to Scott's narrowly defined Class. Furthermore, granting Scott's Motion to Remand comports with the discretion afforded plaintiffs in drafting their complaints and Congress's intent in passing CAFA. Accordingly, the Court will grant Scott's Motion to Remand.[3]

2. Scott II

Cricket argues the Court should not remand Scott II because federal jurisdiction exists under the look-through doctrine discussed in Vaden v. Discover Bank, 556 U.S. 49 (2009). Scott

[3] The MMWA does not save Cricket's Notice of Removal because it provides that MMWA class actions must name at least 100 plaintiffs, see 15 U.S.C. § 2310(d)(3)(C) (2012), and Scott is the only plaintiff named in his Complaint, (see ECF No. 2, GLR-15-3330).

contends that even assuming the look-through doctrine applies, remand is warranted because Cricket's Notice of Removal is based entirely on the look-through doctrine and the Court does not have CAFA or federal-question jurisdiction over Scott I. The Court agrees with Scott.

Section 4 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 4 (2012), authorizes a district court to entertain a petition to compel arbitration if the court would have jurisdiction, "save for [the arbitration] agreement," over "a suit arising out of the controversy between the parties." Vaden v. Discover Bank, 556 U.S. 49, 52 (2009). In Vaden, the Supreme Court held that in a stand-alone action to compel arbitration pursuant to Section 4 of the FAA, a federal court may "look through" the petition and grant the requested relief if the court would have federal-question jurisdiction over the underlying controversy. Id. at 62.

Relying on Vaden, Cricket asks the Court to look through Scott II and conclude that the Court has subject matter jurisdiction over Scott II because the Court has federal-question and CAFA jurisdiction over the underlying controversy—Scott I. As the Court explained above, however, the Court has neither subject-matter nor CAFA jurisdiction over Scott I. Accordingly, Vaden provides no basis for the Court's

jurisdiction over Scott II, and the Court will grant Scott's Motion to Remand.

III. CONCLUSION

Based on the foregoing reasons, the Court will GRANT Scott's Motions to Remand (ECF No. 15, GLR-15-3330; ECF No. 18, GLR-15-3759) and DENY as moot Scott's Motion to Strike New Materials and Arguments or for Leave to File a Surreply Addressing Them (ECF No. 30, GLR-15-3330) and Cricket's Motion to Compel Arbitration (ECF No. 20, GLR-15-3330), Motion to Dismiss or, in the Alternative, to Stay (ECF No. 16, GLR-15-3759), and Motion to Relate Case (ECF No. 16, GLR-15-3330). A separate Order follows.

Entered this 19th day of August, 2016

/s/

George L. Russell, III
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MICHAEL A. SCOTT, :

Plaintiff, :

v. : Civil Action No. GLR-15-3330

CRICKET COMMUNICATIONS, LLC, :

Defendant. :

MICHAEL A. SCOTT, :

Plaintiff, :

v. : Civil Action No. GLR-15-3759

CRICKET COMMUNICATIONS, LLC, :

Defendant. :

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is this 19th day of August 2016, hereby:

ORDERED that Scott's Motions to Remand (ECF No. 15, GLR-15-3330; ECF No. 18, GLR-15-3759) are GRANTED;

IT IS FURTHER ORDERED that cases Scott v. Cricket Communications, LLC, No. GLR-15-3330 (D.Md. removed Oct. 30, 2015) and Scott v. Cricket Communications, LLC, No. GLR-15-3759 (D.Md. removed Dec. 9, 2015) are REMANDED;

IT IS FURTHER ORDERED that Scott's Motion to Strike New Materials and Arguments or for Leave to File a Surreply Addressing Them (ECF No. 30, GLR-15-3330) and Cricket's Motion

to Compel Arbitration (ECF No. 20, GLR-15-3330), Motion to Dismiss or, in the Alternative, to Stay (ECF No. 16, GLR-15-3759), and Motion to Relate Case (ECF No. 16, GLR-15-3330) are DENIED AS MOOT; and

IT IS FURTHER ORDERED that the Court shall CLOSE these cases.

/s/

George L. Russell, III
United States District Judge