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 OPPOSITION TO PETITIONER'S MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1453(c)

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Respondent, Michael Scott ("Mr. Scott") opposes the Motion for Leave to File Reply in Support of Petition for Permission to Appeal Pursuant to 28 U.S.C. § 1453(c) (the "Motion") filed by Petitioner Cricket Communications, LLC ("Cricket").

I. Introduction

Cricket's Motion asks this Court to permit it to file a reply (the "Reply") in support of its petition for permission to appeal. The Motion should be denied and the Reply should not be allowed because both are based on demonstrably inaccurate statements. In particular:

- Cricket argues that it should be allowed a Reply because Mr. Scott attempts to "recharacterize the issue on appeal" to concern "whether residency in a state is equivalent to citizenship" – Motion at ¶2 – but Cricket's own proposed Reply admits that "the question here" is "what proof is needed to estimate how many members of a putative class are domiciled in a State." Reply at 4 n.1.Those questions are materially the ***same***. *See* part II, *infra*.
- Cricket claims that it must be allowed to respond to cases cited in Mr. Scott's Answer, from the U.S. Courts of Appeal whose decisions Cricket relied upon in its Petition – but its Reply relies upon a fundamental misunderstanding of those cases. It claims that the cases are

distinguishable because they required a more stringent burden of proof than the one applicable here, but those cases expressly applied the ***same standard or something less***. *See* part III, *infra*.

- Cricket asserts that Mr. Scott did not raise below the fact that Cricket failed to address citizenship at the time of removal – Motion at ¶5, Reply at 10 n.3 – but that issue was specifically raised in Mr. Scott's briefing, which Cricket chose to omit from the more than 500 pages of briefing it attached to the Petition. In fact, it is Cricket which seeks to raise an issue not raised below – that Mr. Scott was purportedly required to prove the absence of federal jurisdiction "*to a legal certainty*." Reply at 1, 5-6 (emphasis by Cricket). That issue was not only not raised or preserved, but is without merit. *See* part IV, *infra*.
- Cricket even mischaracterizes the cases it cites for the basic proposition that a Reply has been allowed by this Court before in section 1453(c) petitions. *See* part VI, *infra*.

Cricket's Motion should be denied, because both the Motion and the Reply it seeks to file are improper, unfair, and do not advance these proceedings.

II. Cricket's Own Proposed Reply Shows that Mr. Scott Does Not Attempt to "Recharacterize" the Issue on Appeal, so a Reply Is Not Necessary for Cricket to Respond to this Non-Issue.

Cricket claims that a Reply should be allowed because Mr. Scott "attempts to recharacterize the issue on appeal" as "whether residency in a State is equivalent to citizenship," and argues that a different question is presented here. Motion at ¶ 4.[1] But then, in the body of its proposed Reply, Cricket contradicts itself and agrees that "the question here" is "what proof is needed to estimate how many members of a putative class are domiciled in a State." Reply at 4 n.1.

Indeed, Cricket's admitted failure to adduce proof regarding the Maryland citizen-only Class, and decision to instead provide information relating (at best) to residency, was the express basis of the District Court's remand order:

> 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 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

[1] Cricket's phrasing of the issue claims that an appeal is warranted because the District Court simply "erred" – Motion at ¶ 4 – but the standard for review of a District Court's determination of jurisdictional facts gives deference to the District Court, and is for "clear error." *See Sligh v. Doe*, 596 F.2d 1169, 1171 n. 9 (4th Cir.1979) ("It is plain that the 'clearly erroneous' rule applies to jurisdictional ... determinations."). As the U.S. Supreme Court has held, "[t]his standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985).

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

Mem. Op. (Exhibit A to Mr. Scott's Answer) at 15, 16, 18.[2]

The fact that Cricket's failure to show evidence relating to domicile for Class members was the basis of the District Court's Order necessarily means that Cricket's proposed appeal is about this issue.

Although Cricket repeatedly and vaguely claims that the issue is just about "over-inclusive" evidence, Motion at ¶ 4, the "over-inclusive" nature of the evidence in this case is that it dealt, at best, with Maryland residents – not citizens, as the Class is defined. For Cricket to claim (sometimes) that the standard required to prove citizenship is not at the heart of its proposed appeal is baffling. Indeed, Cricket's own briefing in the District Court, attached to its Petition, reveals that what Cricket calls "overinclusive" is evidence of residency which is used to guess at citizenship:

> It should be obvious that companies like Cricket do not keep track of their customers' state of ***citizenship***…Buying a cell phone does not require a recitation of one's life story. It would be equally ineffective for Scott to contend that Cricket's evidence is inadequate simply because the use of Maryland customer addresses might make Cricket's estimates slightly overinclusive.

Petition Exhibit D at 12-13 (emphasis by Cricket).[3]

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[2] This passage, among others from the District Court's opinion, was quoted and discussed in Respondent's Answer. Cricket's statement that Respondent "makes no attempt to defend the district court's actual analysis," Reply at 2, is patently inaccurate.

[3] Notably, Cricket itself concedes that it is a "non-controversial proposition that

And even Cricket's Petition states that it provided information to the District Court relating to residency, not the citizenship required by the Class definition:

> the evidence related to Maryland *residents*, whereas Scott's class definition speaks in terms of Maryland *citizens*.

Petition at 8 (emphasis by Cricket).

Mr. Scott does not attempt to re-characterize the issue – instead, he described the issue that any appeal of the District Court's remand order would necessarily have to address. Cricket's agreement that an appeal would turn on the proof necessary to show citizenship (Reply at 4 n.1) reveals 1) that no Reply is necessary to address a purportedly "recharacterized" issue; and, 2) that Cricket's proposed appeal seeks to attack the settled law in this Circuit (and elsewhere) that in CAFA and non-CAFA cases alike, proof of domicile is required to show citizenship.

III. Cricket's Proposed Reply Fundamentally Misconstrues the Cases that Refute Its Claim that the District Court Is in a "Split" with Other Circuits.

In response to Cricket's claim in its Petition that the District Court was in a "split" with the Seventh, Eighth, and Tenth Circuits, Mr. Scott cited cases from each

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legal domicile turns on more than physical residence." Reply at 4 n.1. Accordingly, because Cricket acknowledges that it did not provide evidence to address domicile, the question presented here is "non-controversial" under Cricket's own standard. This provides further evidence that a discretionary appeal under CAFA is not warranted, and permitting Cricket to further paper its petition to appeal with the Reply would not advance the interests of the parties or the Court.

of those U.S. Courts of Appeal which held, in the context of CAFA remand motions, that citizenship must be proven with evidence of domicile, not residence. Motion at ¶ 5 (citing *Reece v. AES Co*rp., 638 F. App'x 755 (10th Cir. 2016); *Hood v. Gilster-Mary Lee Corp*., 785 F.3d 263, 266 (8th Cir. 2015); and *In re Sprint Nextel Corp*., 593 F.3d 669, 674 (7th Cir. 2010) ("*Sprint Nextel*"). Cricket argues that it should be allowed to file a Reply to address those cases – Motion at ¶ 5, Reply at 3-8 – but Cricket misstates what those cases say.

Cricket claims that those cases:

> addressed the *very different* showing that must be made by a party seeking remand to state court *after* a prima facie showing of federal jurisdiction has been made. That distinction is crucial, and explains the outcome in the decisions Scott cites.

Reply at 4 (emphasis by Cricket).

This "crucial" distinction does not exist. As the 10th Circuit stated in *Reece*, the burden to show citizenship borne by a plaintiff seeking remand based on a statutory exception to CAFA jurisdiction is the preponderance of the evidence standard or something ***less***:

> Several of our sister circuits have required plaintiffs to establish the elements of a CAFA jurisdictional exception by a preponderance of the evidence. *See, e.g., Mondragon v. Capital One Auto Fin*., 736 F.3d 880, 884 (9th Cir.2013); *Vodenichar v. Halcon Energy Props., Inc*., 733 F.3d 497, 503 (3d Cir.2013); *Hollinger v. Home State Mut. Ins. Co*., 654 F.3d 564, 570 (5th Cir.2011); *In re Sprint Nextel Corp*., 593 F.3d 669, 673 (7th Cir.2010). Some district courts, however, have required less proof, embracing a reasonable-probability standard or something akin to it.

638 Fed. App'x at 768. *See also Sprint Nextel*, 593 F.3d at 673[4]. Here, however, there is no question that the burden of proof Cricket had on removal was ***no*** less than a preponderance of the evidence – Cricket admits as much. *See* Reply at 1. As a result, the burden applied to prove citizenship in the cases cited by Mr. Scott is exactly the same as Cricket's burden, or "less." *Reece*, 638 Fed. App'x at 768. Those cases, applying the same or a less stringent burden than Cricket bears, found that mailing addresses – the same evidence Cricket relies on in this case – cannot prove citizenship by a preponderance of the evidence or something "less." *See id*.

A purported difference in the applicable standard could not explain away the results in *Reece*, *Sprint Nextel*, or *Hood* in Cricket's favor. Cricket bears *at least* the same burden on removal as the parties seeking to prove citizenship in those cases. Because the purported existence of a more demanding standard in those cases is "crucial" to Cricket's argument, but no more demanding standard actually exists, there is no point in allowing Cricket a Reply to make these unfounded arguments.

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[4] Cricket grudgingly admits in a footnote that the *Sprint Nextel* decision applied the preponderance of the evidence standard – but, straining to distinguish the case, it argues that the Seventh Circuit mischaracterized the standard it was applying. Reply at 7 n.2. It does not make such a claim about *Reece*, perhaps recognizing that accusing two U.S. Courts of Appeal of mischaracterizing the standard applied would be a road too far. As shown above, however, the 10th Circuit did not agree with Cricket's assessment, and believed the 7th Circuit meant what it said. *See* 638 Fed. App'x at 768 (citing *Sprint Nextel* as applying the preponderance of the evidence standard.)

IV. The Papers Cricket Omitted from Its Petition Show that Mr. Scott Raised the Very Issue Cricket Claims He Did Not.

Cricket claims that Mr. Scott never before raised the point that Cricket failed to present evidence relating to the proposed Class at the time of removal, instead of a year before removal. *See* Motion at ¶ 6, Reply at 10. Cricket is wrong. Mr. Scott raised this precise issue in the District Court:

> there is not a single passage in Cricket's Notice of Removal, or in its Opposition, which simply states "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***.

See Exhibit A, Reply in Support of Motion to Remand at 9 (emphasis added).[5]

Permitting Cricket to file a Reply to make the baseless argument that this point was not raised below would not benefit the Court or the parties.[6]

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[5] As noted in Mr. Scott's Answer at 1 n.1, Cricket attached only its side of the briefing in the District Court to its Petition. Under F.R.A.P 5, either all of the briefing (including Mr. Scott's) should have been attached to the Petition, or none of it should have been. In any event, the Reply is relevant to this Opposition, to show that Mr. Scott did indeed raise this issue below.

[6] It is Cricket which is seeking to raise an issue not raised below, not Mr. Scott. Specifically, Cricket now claims that Mr. Scott was required to prove the absence of federal jurisdiction "*to a legal certainty*," and to show that it was "'legally impossible' for the jurisdictional requirements to be satisfied." Reply at 1, 5-6 (emphasis by Cricket).

This purported issue was ***never mentioned*** by Cricket below. *See*, generally, Petition Exhibit D (Cricket's briefing below). Perhaps that is because the argument is entirely without merit. According to Cricket's own case citation, such a standard applies only after the removing defendant has carried its own burden of proof to show by a preponderance of the evidence that the case belongs in federal court. *See*

V. Cricket Misstates the Nature of the Cases It Cites as Permitting a Reply in Section 1453(c) Petitions.

Cricket cites a number of cases from this Court for the proposition that the Court "has often granted petitioners in Section 1453(c) cases leave to file replies." Motion at 3. While this Court may have permitted replies in Section 1453(c) cases before, the bulk of the cases ***Cricket*** cites had nothing to do with Section 1453(c). *See*, *e.g.*, *DISH Network, LLC v. Krakauer*, No. 15-303 (4th Cir.) (proceedings under Fed. R. Civ. P. 23(f)); *Huntington Nat'l Bank v. Powell*, No. 15-178 (4th Cir.) (proceedings under 28 U.S.C. § 1292(b)); *Experian Info. Solutions v. Dreher*, No. 14-491 (4th Cir.) (proceedings under 28 U.S.C. § 1292(b)).[7] These mis-citations are unfortunately consistent with the larger pattern discussed above, and once again reflect that the citations in Cricket's Motion, and proposed Reply, are at best unreliable.

Spivey v. Vertrue, 528 F.3d 982, 986 (7th Cir. 2008). And according to that same court, Cricket's burden to prove citizenship by a preponderance of the evidence ***cannot be shown by addresses of cell phone customers***. *See Sprint Nextel*, 593 F.3d at 673-674. But Cricket relied on addresses of cell phone customers, only.

[7] In the sole class action case Cricket cites on this issue which involved section 1453(c), this Court denied a petition to appeal where the petitioner argued, as Cricket does here, that the Court should take the appeal because of a purported conflict between the district court's decision and the decisions in *Lewis v. Verizon Commc'ns, Inc.*, 627 F.3d 395 (9th Cir. 2010) and *Spivey v. Vertrue, Inc.*, 528 F.3d 982 (7th Cir. 2008). *See 7-Eleven, Inc. v. Chamberlain*, No. 15-354 at ECF#1, pp. 15, 16, 20. The other case Cricket cites was not a class action removable under CAFA or reviewable under section 1453(c), but instead a *parens patriae* case. *See State of West Virginia, ex rel. Morrisey v. Pfizer, Inc.*, No. 13-255.

VI. Conclusion

For the reasons set forth above, Respondent, Mr. Scott, respectfully requests that the Motion be denied.

Respectfully submitted,

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Certificate of Service

I hereby certify, this 21st 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
(Northern Division)

Michael Scott, *Plaintiff,* v. Cricket Communications, LLC *Defendant.*	Case No. 1:15–cv–03330–GLR

Plaintiff's Reply in Support of Motion to Remand

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As detailed in Plaintiff's Motion to Remand (ECF#15) ("the Motion"), Cricket improperly removed this case, purportedly under the Class Action Fairness Act, 28 U.S.C. § 1332(d) ("CAFA").[1] Among other things, Cricket predicated removal jurisdiction on allegations about a class not at issue in this case. *See* Plaintiff's Memorandum in Support of the Motion (ECF#15-1) ("Plaintiff's Memo" or "Pl. Memo") at, *inter alia*, 1-7. But a removing defendant cannot broaden or re-define the class defined in a complaint in order to support removal. *See id.* at 14-21.

Instead, Cricket is bound to allege and prove plausible facts demonstrating that the Class, as pled, satisfies the requirements for strictly construed federal removal jurisdiction. If Cricket fails to carry this burden, or there is any doubt that federal jurisdiction exists, remand is required. The U.S. Supreme Court recently reaffirmed in *Dart Cherokee Basin Operating Co. v. Owens*, 135 S.Ct. 547, 553-554 (2015) the fundamental, and rigorous, pleading standards which a removing defendant must meet. *See* part II, *infra*.

Cricket does not come close to carrying its burden. Cricket's Opposition (ECF#18) ("Opp."), does not even seriously attempt to reconcile the Class pled in Mr. Scott's Complaint with the one it used as the basis for removal in its Notice of Removal. Instead, Cricket confirms that the class definition used in its Notice of Removal was not the Class defined in Plaintiff's Complaint. In fact, although the Class definition includes only Maryland citizens, ***Cricket admits it provides no factual allegations or evidence that Maryland citizen-only transactions meet CAFA's jurisdictional***

[1] Cricket originally suggested that this Court may also have federal question jurisdiction, a contention which runs contrary to the text of the MMWA and numerous decisions, as discussed in Plaintiff's Motion at pp. 22-27. However, Cricket has abandoned that argument and acknowledges now that federal question jurisdiction is not present over this case. *See* Opposition to Motion to Remand (ECF#18) at 15 (conceding that "the MMWA itself limits federal jurisdiction over class actions in which 'the number of named plaintiffs is less than one hundred' (15 U.S.C. § 2310(d)(3)(C))"); 17 (acknowledging that "Congress imposed limits on federal question jurisdiction under the MMWA").

requirements. *See* Opp. at 12. And although the Class is also limited to only persons who purchased "locked" CDMA telephones, Cricket also admits that its Notice of Removal did not allege that these "locked" phone transactions met CAFA's requirements. *See* Pl. Memo at IV.A.2; see also Opp. at 8 n.2 (acknowledging that "the declaration submitted with Cricket's notice did not specify whether the over 50,000 CDMA phones activated in Maryland were "locked"... for use on Cricket's CDMA network.") In fact, Cricket's own statements demonstrate that there is a difference between a group limited to transactions with "locked" phones and those without – previously, Cricket claimed that 50,000 phones were activated in Maryland, and now Cricket claims that "over 47,000 phones sold to Cricket's Maryland customers were 'locked' as the term is used in Scott's complaint." *Id.*

The Class in Mr. Scott's Complaint is carefully defined to include only specific transactions which meet exacting factual requirements. *See* Complaint ¶ 51. All of Cricket's arguments in support of removal depend upon eliminating the bulk of this Class definition. For the Class to be comprehended as Cricket suggests, the class definition in Mr. Scott's Complaint would have to be amended as follows, with the eliminated language stricken-though, and added language in all capitals:

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

Cricket's arguments require re-writing Mr. Scott's defined Class, and amending the language in Mr. Scott's Complaint which carefully defines and limits the Class definition.

Although Cricket complains that it is too hard to remove Mr. Scott's Class as defined, because it would have to prove citizenship (Opp. at 12), limiting a Class to include only citizens of a particular state has been upheld as proper by the Fourth Circuit. *See, e.g., Johnson v. Advance*

Am., 549 F.3d 932, 937 (4th Cir. 2008). Indeed, determining the citizenship of putative class members in the course of determining whether jurisdiction is appropriate under CAFA is expressly contemplated by the CAFA statute, as follows:

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

See 28 U.S.C. §1332(d)(7).

And while Cricket suggests that this Court should ignore strictly construed federal jurisdiction, and simply fudge the determination of whether a sufficient number of the transactions Cricket identifies concerned Maryland citizens, Fourth Circuit precedent demands the opposite result. As the Fourth Circuit determined in *Johnson*, determining citizenship of putative class members in a CAFA case is a fact-intensive inquiry that cannot be satisfied even through affidavits establishing residency:

> ***Advance America's affidavits only indicated that these persons "resided" outside of South Carolina.*** For purposes of diversity jurisdiction, residency is not sufficient to establish citizenship. *See Axel Johnson, Inc. v. Carroll Carolina Oil Co.*, 145 F.3d 660, 663 (4th Cir.1998). To be a citizen of a State, a person must be both a citizen of the United States and a domiciliary of that State. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 828, 109 S.Ct. 2218, 104 L.Ed.2d 893 (1989). ***Domicile requires physical presence, coupled with an intent to make the State a home.*** *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989); *Jahed v. Acri*, 468 F.3d 230, 236 (4th Cir.2006); *Webb v. Nolan*, 484 F.2d 1049, 1051 (4th Cir.1973) ("The law seems clear that to effect a change of citizenship from one state to another there must be residence in the new domicile and an intention to remain there permanently or indefinitely"). ***Advance America's affidavits are in this manner deficient in demonstrating that the 19 persons are "citizens" of a State different from South Carolina.***

549 F.3d at 937 (emphasis added). The Fourth Circuit further advised that circumscribing a class definition to avoid federal jurisdiction, by limiting it to citizens of a particular state, was a plaintiff's prerogative:

> To be sure, the plaintiffs in this case have taken care to restrict the scope of their allegations so as to avoid federal jurisdiction under CAFA. Yet the plaintiffs, as masters of their complaint, can choose to circumscribe their class definition in this way.

Johnson, 549 F.3d at 937. Because the defendants in *Johnson* provided evidence only of residency, and not the requisite evidence concerning the ***citizenship*** of the plaintiff class members – e.g., evidence concerning physical presence, coupled with an intent to make the State a home – the Fourth Circuit held that remand was appropriate. *Id.* at 938. Here, however, Cricket has not even ***alleged*** that any Maryland citizens other than Mr. Scott are in the putative Class – just that a number of phones were activated in Maryland. *See* Notice of Removal at ¶ 4.[2] It certainly has not provided any evidence of anyone's citizenship.

Cricket attempts to excuse its re-definition of the Class by insisting that Mr. Scott himself expanded the Class definition. Cricket disingenuously claims that Mr. Scott alleged in paragraphs 18 and 24 of the Complaint that Cricket "uniformly and systematically" sold "locked" CDMA phones. Yet again, however, Cricket's argument relies upon re-writing and ignoring the plain and material text of Mr. Scott's Complaint – this time, paragraphs 18 and 24 would have to be amended as follows:

> This is an action against Cricket resulting from its uniform and consistent sale of mobile telephones ~~to Plaintiff and other Class members~~ which are obsolete, and which Cricket knew were obsolete at the time of sale, due to Cricket's intentional and permanent shut-down of its CDMA network, which is required to operate these telephones.
> ...

[2] Indeed, in a converse circumstance, courts have determined that class definitions which include all "residents" of a particular state are not limited to citizens of that state. *See McMorris v. TJX Companies, Inc.*, 493 F.Supp.2d 158, 162-63 (D.Mass.2007) (finding, "by definition," class of "residents of Massachusetts" who engaged in transactions in defendant's stores "may include foreign citizens who resided in Massachusetts during the defined period"; holding "[t]his suffices to support the assertion of federal jurisdiction"); *Larsen v. Pioneer Hi-Bred Int'l, Inc.*, 2007 WL 3341698 at *5 (S.D.Iowa 2007) (finding class of "[a]ll persons and entities in the state of Iowa" who purchased certain seed products was not limited to citizens of Iowa).

> As part of its regular business practices, Cricket systematically and regularly sold obsolete CDMA-only mobile telephones ~~to Plaintiff and other members of the Class~~ after July 12, 2013, knowing that these phones were defective because they would not be usable on anything but the CDMA network Cricket was in the process of shutting down.

ECF#2 at ¶¶ 18, 24. The phrases stricken through above are critical to the understanding of the allegations in those paragraphs. The language obviously limits "uniformly and systematically" to describe the manner in which Cricket acted toward the Class as defined. Cricket never discusses, or even mentions the phrases stricken out. Ignoring the critical limiting phrases is, however, a fundamental basis of Cricket's argument that the Class should be expanded. Indeed, this Court recently rejected another removing defendant's attempt to do precisely the same thing in *James v. Santander*, 2015 WL 4770924 at * 3 (D.Md. Aug. 12, 2015). In particular, Judge Motz found in *James* as follows:

> Santander defines a different class by taking the phrase "uniformly and systemically" out of context. The entire phrase Santander relies on states: "Santander uniformly and systematically failed to comply with the statutory requirements for providing notice ***in connection with the repossession and sale of the vehicles of Named Plaintiff and the Class.***"(ECF No. 2 at ¶ 3). Santander argues that this must mean that all persons whose vehicles it repossessed under CLEC contracts are included in this class. But this is defied by the text of the complaint. ***This sentence, when read in full, indicates only that Santander violated the law with respect to class members as defined by James***—all people who did not receive the proper pre- and post-sale notifications.

Id. (emphasis added). Because Cricket, like the defendant in *James*, must re-write Mr. Scott's Complaint in order to make its removal arguments hold water, and because Cricket is not allowed to do that, removal was improper. *See* part III, *infra*.

Finally, the only claim Mr. Scott makes is under the Magnuson-Moss Warranty Act (the "MMWA"), and - as Cricket acknowledges – the plain text of the MMWA bars federal jurisdiction over this case. That text, along with the legislative history and policy of the MMWA should be given effect. There is no federal jurisdiction over Mr. Scott's MMWA claims. See part IV, *infra*.

For all of these reasons, discussed more fully below, and the reasons set forth in Mr. Scott's Motion to Remand and Memo, this case should be remanded.

II. Cricket's Statement of the Legal Standard is Misleading.

Cricket suggests that the Supreme Court's decision in *Dart Cherokee Basin Operating Co., LLC*, 135 S.Ct. at 551-554, re-wrote the standards of federalism under which federal removal jurisdiction has always been strictly construed. *See* Opp. at e.g., 6. Not so.

In fact, this Court, and numerous courts in this Circuit, have discussed the strict construction which continues to be applied to federal removal jurisdiction post-*Dart Cherokee*, and when discussing *Dart Cherokee*. For example, in *Osia v. Rent-a-Ctr., Inc.*, No. CIV.A. DKC 15-1200, 2015 WL 3932416, at *5 (D. Md. June 25, 2015), Judge Chasanow reviewed *Dart Cherokee*, and also applied the familiar strict construction of federal removal jurisdiction:

> "A court is to presume, therefore, that a case lies outside its limited jurisdiction unless and until jurisdiction has been shown to be proper." *United States v. Poole*, 531 F.3d 263, 274 (4th Cir.2008); *Md. Stadium Auth. v. Ellerbe Becket, Inc.* ., 407 F.3d 255, 260 (4th Cir.2005) (noting that because removal raises "significant federalism concerns," the removal statutes must be strictly construed, and all doubts must be resolved in favor of remanding the case to state court).

Osia, 2015 WL 3932416, at *5.

Even more recently, Judge Bredar discussed the strict construction applied to federal removal jurisdiction just before discussing *Dart Cherokee*:

> Because federal courts are courts of limited jurisdiction, a cause of action is presumed to lie outside of that limited jurisdiction, and the burden of establishing otherwise rests upon the party asserting jurisdiction. *Wheeling Hosp., Inc. v. Health Plan of the Upper Ohio Valley, Inc.*, 683 F.3d 577, 583-84 (4th Cir. 2012). In particular, removal statutes are to be strictly construed, and doubts regarding the propriety of removal should be resolved in favor of remanding the case to state court. *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir 1994).

Brennan v. Stevenson, No. CV JKB-15-2931, 2015 WL 7454109, at *2 (D. Md. Nov. 24, 2015). *See also McDanell v. Precision Pipeline, LLC*, No. 5:15CV4, 2015 WL 1588149, at *2 (N.D.W.

Va. Apr. 9, 2015) (discussing *Dart Cherokee*, and also holding that "[r]emoval jurisdiction is strictly construed, and if federal jurisdiction is doubtful, the federal court must remand.") (citing *Hartley v. CSX Transp., Inc.*, 187 F.3d 422 (4th Cir.1999)); *Donley v. Sallie Mae, Inc.*, No. 5:14CV165, 2015 WL 1650097, at *3 (N.D.W. Va. Apr. 14, 2015) (same); *Rouse v. State Farm Mut. Auto. Ins. Co.*, No. 1:14-CV-690, 2015 WL 3849648, at *5 (M.D.N.C. June 22, 2015) (discussing Dart Cherokee, and also holding that "courts 'are obliged to construe removal jurisdiction strictly," and "if federal jurisdiction is doubtful, a remand to state court is necessary.'")(quoting *Palisades Collections LLC v. Shorts,* 552 F.3d 327, 333–34 (4th Cir.2008)).

Moreover, *Dart Cherokee* confirmed that a notice of removal under CAFA is subject to the very same pleading requirements as any other notice of removal or pleading – a finding which cannot be squared with Cricket's position, and which cannot support Cricket's removal of this case. *See Dart Cherokee Basin Operating Co.*, 135 S.Ct. at 553-554 (repeatedly stating that the notice of removal in that CAFA case is subject to the pleading requirements of 28 U.S.C. § 1446(a) and Rule 8(a)). This is because the Rule 8(a) pleading standards, enunciated by *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009), require plausible allegations of ***facts*** which would support removal jurisdiction – not just conclusory statements. *See also Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 199 (4th Cir. 2008) (notices of removal must satisfy *Twombly*). Accordingly, and contrary to Cricket's suggestions, a notice of removal in a CAFA case is subject to a "rigorous" standard. *See Macronix Int'l Co. v. Spansion Inc.*, 4 F. Supp. 3d 797, 803 (E.D. Va. 2014) (*Twombly* contemplates a "rigorous application of Rule 8(a)"). The only allegations in a notice of removal that can be "plausible" and sufficient are "well-pleaded ***factual*** allegations." *Iqbal*, 556 U.S. at 679 (emphasis added). A removing defendant is "in the same position as a plaintiff in an original action facing a motion to

dismiss." *Council of Unit Owners of Fireside Condo. v. Bank of N.Y. Mellon*, 2013 WL 2370515 at *5-6 (D. Md. May 29, 2013).

Here, whether Cricket has the information supporting removal jurisdiction or not, it bears the burden to allege and prove that the Class alleged in Plaintiff's Complaint meets each of CAFA's requirements.[3] It has done neither.

III. Cricket Continues to Base Removal Upon a Class Different from the One Set Forth in Plaintiff's Complaint.

Viewing Cricket's removal allegations under the rigorous legal standard set forth above – even with Cricket's out-of-time changes (*see* part III.C, *infra*) – shows that Cricket removed this case improperly.

Mr. Scott's Motion to Remand papers discussed at length how his Complaint alleged a Class with specific factual parameters, and how Cricket noticed the removal of a different class, with different factual parameters. *See* Pl. Memo at II.A – C, IV.A -C.

Cricket's Opposition only confirms that it removed based upon different class allegations, and submits more evidence concerning a class far broader than the one defined in the Complaint. Cricket's ***re-defined class*** – a re-definition upon which all of Cricket's factual allegations about class membership and the amount in controversy were improperly predicated (*see* Notice of Removal at ¶¶ 6, 11) - provides no basis for concluding that CAFA's mandatory requirements for federal jurisdiction are met ***with regard to the Class defined by Mr. Scott.***

Cricket has not demonstrated federal jurisdiction. Remand is appropriate.

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[3] Cricket attempts to shift its heavy burden to Mr. Scott, stating that "***he has failed to rebut Cricket's allegations with any evidence or calculations of his own.***" ECF#18-1 at 9. Mr. Scott does not need to provide any evidence – the burden is Cricket's, and Cricket failed to meet it. Cricket's suggestion that Mr. Scott "failed to actually dispute the accuracy of Cricket's jurisdictional allegations," Opp. at 10, is remarkable – Mr. Scott filed a 27 page legal memorandum detailing the failings of Cricket's jurisdictional allegations. *See* ECF# 15-1.

A. The Class Pled in the Complaint and the Class Upon Which Cricket's Removal Arguments Are Based Are Not the Same.

Cricket's alleged class is far broader than the Class alleged by Mr. Scott. Even taking Cricket's allegations about its expansively defined class as true does not provide this Court with any information from which the Court can conclude that the requirements of CAFA are met with respect to the Class Mr. Scott alleged.

As illustrated in part I, *supra*, the changes to Mr. Scott's Class which would be required to square it with the class Cricket relies on for federal jurisdiction would materially change Mr. Scott's Class definition – and would require the Court to, among other things, read out of that Class definition Mr. Scott's express limitation of the Class to Maryland citizens only. All of the information in Cricket's Notice of Removal and its Opposition is mis-information which expressly concerns Cricket's broader class. It is not information limited to those transactions which would fall within the restrictive, Maryland citizen only class definition Mr. Scott pled. Accordingly, it cannot support removal of that more restricted class.

In particular, in its Opposition, Cricket asserts that "between July 12, 2013 and March 13, 2014, Cricket customers who listed addresses located in Maryland on their Cricket accounts during that period purchased at least 47,760 CDMA handsets that were "locked" to Cricket's CDMA network." *See* ECF#18-1 (Declaration of Rick Cochran) at ¶ 6. That is the sum total of what Cricket submits as proof that federal jurisdiction exists here. Yet this fails to even ***allege*** facts regarding the limited, Maryland citizen-only Class in Mr. Scott's Complaint. Indeed, there is not a single passage in Cricket's Notice of Removal, or in its Opposition, which simply states "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.

Cricket goes out of its way to avoid stating the number of putative Class members are, or are not, Maryland citizens.

To the contrary, Cricket actually argues that it should be "obvious" that ***does not know*** that any of the transactions on which it based removal involved 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."

Opp. at 12 [emphasis by Cricket]. If Cricket does not have the information to support the removal of the Class pled in this case, however, ***it should never have filed a notice of removal***. As this Court stated previously, a defendant removing a case must be prepared to show – or at the very least allege – that the removal was proper:

> 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. Thus, ***a defendant that files a notice of removal prior to receiving clear evidence that the action satisfies the jurisdictional requirements, and then later faces a motion to remand, is in the same position as a plaintiff in an original action facing a motion to dismiss***.

Council of Unit Owners of Fireside Condo., 2013 WL 2370515, at *6, 2013 U.S. Dist. LEXIS 75677 *14-15 (emphasis added) (quoting *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1217 (11th Cir.2007)). Where, as here, the removing defendant ***admits*** that it does not have the evidence to support federal jurisdiction, remand is the only appropriate course.

And Cricket's complaint that it is too hard for it to satisfy its burden to identify Maryland citizens asks this Court to ignore both the strict construction of removal jurisdiction as well as the Fourth Circuit precedent. That precedent 1) expressly approves of class actions limited to the citizens of a particular state as a means of avoiding removal; and 2) establishes that even "residency is not sufficient to establish citizenship" but that alleging and proving citizenship requires allegations and proof of "physical presence, coupled with an intent to make the State a home."

Johnson, 549 F.3d at 937 at n.2 (also holding, 549 F.3d at 937, that "plaintiffs, as masters of their complaint, can choose to circumscribe their class definition" to avoid federal jurisdiction under CAFA); *see also Bartnikowski v. NVR, Inc.*, 307 Fed. Appx. 730, 737 (4th Cir. 2009) ("CAFA does not change the proposition that the plaintiff is the master of her own claim" and "a removing defendant can't make the plaintiff's claim for him.") (quoting *Morgan v. Gay*, 471 F.3d 469, 474 (3rd Cir. 2006) and *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 449 (7th Cir. 2005)).[4]. Cricket has not even ***alleged*** physical presence and intent to make Maryland a home with respect to ***any*** putative class member, and claims it cannot. It therefore cannot allege or prove any facts concerning Mr. Scott's Class, as pled in his Complaint. As a result, Cricket provides no information from which this Court can determine that federal CAFA jurisdiction exists. Cricket has not carried its burden to demonstrate federal jurisdiction over this Maryland citizen-only case, so remand is required. *See Johnson*, 549 F.3d at 934 (remanding case, finding that "Advance America ***cannot carry its burden of demonstrating*** that any member of the plaintiffs' class is a citizen of a State "different from" Advance America...") (emphasis added); *Caufield v. EMC Mortgage Corp.*, 803 F. Supp. 2d 519, 526-28 (S.D.W. Va. 2011).

Indeed, the sister court in *Caufield* rejected very similar arguments to those raised by Cricket, holding that a removing defendant must provide evidence that the class, ***as defined***, satisfies the requirements of CAFA:

> Reading the complaint as a whole, the proposed class can only consist of persons in West Virginia whose loans were serviced by EMC ***in violation of these WVCCPA provisions.*** The complaint very specifically describes ***the manner in which the***

[4] Not even a plaintiff – who is master of the complaint – can amend a complaint post-removal to affect diversity jurisdiction (and CAFA is a species of diversity jurisdiction). *See Ross v. Mayor & City Council of Baltimore*, No. CIV.A. ELH-14-369, 2014 WL 2860580, at *6 (D. Md. June 20, 2014) ("a court determines the existence of diversity jurisdiction 'at the time the action is filed,' regardless of later changes in originally crucial facts such as the parties' citizenship or the amount in controversy")(quoting *Gardner v. AMF Bowling Centers, Inc.*, 271 F.Supp.2d 732, 733 (D.Md.2003)). Nevertheless, that is what Cricket – the defendant – attempts to do here.

> ***plaintiff alleges that EMC illegally serviced his, and other loans.*** (Compl., ¶¶ 17, 40, 42–44, 46.) A borrower whose loan was not serviced by EMC in the manner alleged in the Complaint cannot be a member of the class. Accordingly, EMC's assertion that each and every West Virginia citizen whose loan was serviced by EMC is a member of the proposed class is unfounded. There is no evidence in the record from which the court can determine whether the proposed class consists of ten members, a hundred members, or several hundred members. Accordingly, I FIND that the defendant has failed to meet its burden of demonstrating that the proposed class consists of 100 or more members.
> ...
> ***The defendant argues that it is not required to prove its own liability by identifying which loans were illegally serviced.*** ... As noted above, even assuming that $13,467.90 is the amount sought by the plaintiff in statutory penalties for the putative class counts alone, there is no evidence before the court to support the defendant's premise that all of the West Virginia loans it has serviced were serviced in the same manner as the named plaintiff's loan. Although this action was brought on behalf of "West Virginia borrowers with loans serviced by the defendant" (Compl. ¶ 1.), ***the class may only consist of the borrowers whose loans were illegally serviced in the manner alleged in this complaint.*** Merely multiplying the number of West Virginia loans that the defendant has serviced by the amount the named plaintiff may recover cannot constitute a sufficient basis for removal jurisdiction under CAFA.

Caufield, 803 F. Supp. 2d at 526-28 (emphasis added). Similarly here, Cricket's failure to limit its allegations and evidence to only those transactions in the Class as pled – and its failure to take account of the exclusions in the Class definition[5] – means that this Court does not have the evidence to support CAFA jurisdiction.[6]

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[5] Cricket nowhere accounts for the exclusions in the Class definition, which remove from the Class any "individuals who now are or have ever been Cricket executives and the spouses, parents, siblings and children of all such individuals." Cricket's failure to explain how many persons are subject to these exclusions is yet another example of how Cricket is asking this Court to speculate about the number of Class members and the amount in controversy, and another reason why Cricket fails to carry its burden.

[6] Cricket claims that *Caufield* is an "outlier" and suggests that it cannot survive *Dart Cherokee*. However, this Court relied on *Caufield* in remanding *James*, where *Dart Cherokee* was discussed extensively by the parties, and the Court in *James* rejected a similar argument that *Caufield* was an "outlier," and instead cited *Caufield* as ***support*** for remand. *See James*, 2015 WL 4770924, at *3 n. 4 (stating that "[m] y reasoning tracks that of" *Caufield*.)

Indeed, yet another court in this Circuit relied on *Caufield* to find that where a class is defined to include only certain individuals, a removing defendant must provide information about that class, or face remand:

> As evidenced by these specific allegations, the plaintiffs' proposed class can consist only of those borrowers whose loans were unlawfully assessed attorneys' fees by PNC. *See Caufield*, 803 F.Supp.2d at 526 ("A borrower whose loan was not serviced in the manner alleged in the complaint cannot be a member of the class."); *Krivonyak* [*v. Fifth Third Bank*, 2009 WL 2392092, at *5 n. 1 (S.D.W.Va. Aug. 4, 2009)]("[T]he class cannot include members who do not share the same injury, that is, if someone was not charged the fees at issue in this case then they simply cannot be a part of the class."). Accordingly, ***the defendant's broad characterization of the putative class finds no support when the class definition is read in the context of the complaint as a whole.***

Pirillo v. PNC Mortgage Corp., 2012 WL 761607 at *2 (N.D.W.Va. Mar. 7, 2012) (emphasis added).

The cases Cricket cites to argue that it can freely disregard the class pled in Mr. Scott's Complaint are either easily distinguishable or actually support Plaintiff. For example, *S.Fla Wellness, Inc. v. Allstate Ins. Co.*, 745 F.3d 1312, 1317 (11th Cir. 2014) did not involve a court approving of a defendant's removal of a class action based on a class broader than the one pled in the complaint. Instead, it involved the Eleventh Circuit's unremarkable determination that declaratory judgment actions could satisfy CAFA's amount in controversy requirements, if the declaratory judgment involved an amount in excess of CAFA's $5 million threshold. The argument against CAFA jurisdiction in that case was that the class members, who could potentially obtain a declaratory judgment that they were entitled to more than $68 million, might not seek to collect all that they were owed. Not surprisingly, the Eleventh Circuit rejected that strained argument:

> Given the large number of medical bills at issue and the significant amount of money at stake, we find it unlikely that most insureds and medical care providers, who may be collectively owed $68,176,817.69, would leave the vast majority of that money on the table if a federal court declared that they were entitled to it.

745 F.3d at 1317. But there was no contention in that case that CAFA requirements were not satisfied because the class which the defendant removed was broader than the class pled. That is a critical distinction from this case.

And while Cricket claims that *Vasquez v. Blue Shield of California*, 2015 WL 2084592 (C.D. Cal. May 5, 2015) stands for the proposition that "courts may draw 'reasonable deductions, reasonable inferences, or other reasonable extrapolations' from the defendant's allegations and evidence," ***Cricket has provided no allegations or evidence about the Class actually pled in this case***. It has instead provided information about a different class which it defined, and which is ***not limited to Maryland citizens***. And while *Vasquez* found that the defendant's allegation that 991 persons in the Class resided in California but lived permanently in another state was sufficient to allege minimal diversity (i.e. that ***one person*** in the proposed class lived outside of California), ***that supports remand***. After all, *Vasquez* recognized that residency does not equal citizenship, and that a person could be a citizen of another state while residing in California. Indeed, because 991 people "permanently resided" in a state other than California, they were ***all*** citizens of the other state – at least under Fourth Circuit precedent. *See Johnson*, 549 F.3d at 937 ("The law seems clear that to effect a change of citizenship from one state to another there must be residence in the new domicile and an intention to remain there permanently or indefinitely"). Notably, however, the class in *Vasquez* was not limited to citizens of a particular state. In this case, Cricket cannot satisfy its CAFA burden – as the *Vasquez* defendant could - by showing that one person is a citizen of the state of Maryland. It must allege and prove that more than 100 people who otherwise meet the Class definition are citizens of the state of Maryland, and that the amount in controversy in their transactions exceeds $5,000,000.00. It simply cannot do that without allegations and proof regarding the citizenship of each person.

And Cricket's complaint that it is "impossible" to prove the citizenship of Class members, Opp. at 12, is another conclusive admission that Cricket has not met its burden here. Although Cricket cites *Standard Fire Ins. Co. v. Knowles*, 133 S.Ct. 1345, 1350 (2013) as purported support for this argument, *Knowles* actually supports remand. There, the Supreme Court held that "CAFA... permits the federal court to consider ***only the complaint that the plaintiff has filed***, i.e., this complaint, not a new, modified (or amended) complaint that might eventually emerge." *Id.* at 1350 (emphasis added). Here, however, Cricket asks the Court to consider a complaint with Cricket's preferred amendments to the Class definition. *Knowles* also recognized that a plaintiff may plead his case so as to avoid federal jurisdiction:

> Knowles also points out that federal courts permit individual plaintiffs, who are the masters of their complaints, to avoid removal to federal court, and to obtain a remand to state court, by stipulating to amounts at issue that fall below the federal jurisdictional requirement. That is so.

Id. The sole basis that the Supreme Court found that remand was unwarranted in *Knowles* was that the plaintiff could not bind absent class members, before any class was certified, with a stipulation that the damages in the case would not exceed CAFA's $5 million threshold. As the Court stated:

> The question presented concerns a class-action plaintiff who stipulates, prior to certification of the class, that he, and the class he seeks to represent, will not seek damages that exceed $5 million in total. Does that stipulation remove the case from CAFA's scope? In our view, it does not.

Id. at 1347. No such stipulation is at issue here. *Knowles* supports remand, not retaining federal jurisdiction.

Cricket also misplaces its reliance 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 original). 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, Mr. Scott has shown why Cricket's "sales figures" are inapposite – because only sales figures regarding Maryland citizens could be relevant to this case, and Cricket admits that it ***has not presented any information about Maryland citizens***. *See* Opp. at 12 (arguing that it "should be obvious" that requiring identification of Class members' citizenship "would create an impossible burden of proof"). Accordingly, 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.

Cricket's reliance on *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 986 (7th Cir. 2008) is also misplaced. In that case, 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*, 427 F.3d at 449, emphasis added). Thus, in *Spivey*, the removing defendant provided facts which met the class definition. Here, in contrast, Cricket has not provided any allegations, let alone plausible facts, concerning the amounts in controversy for ***the Class Plaintiff claims, and pled***. *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 has provided no information about the amount in controversy for the subject Class, pled in Mr. Scott's Complaint. It has instead provided purported information concerning some other class. In fact, as discussed above, Cricket admits 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).

Cricket presents no case suggesting that a defendant may re-write a class definition in order to lessen its burden of pleading and proof on removal. All of the case law holds the contrary.

B. Mr. Scott's Allegation that Cricket Acted Uniformly and Systematically Toward Persons in the Defined Class Does Not, and Cannot, Expand the Class Definition Itself.

Cricket's argument that Mr. Scott broadened the Class beyond the class definition in ¶ 51 of his Complaint by alleging, without qualification, that Cricket "uniformly and systematically" sold

CDMA-only mobile telephones, Opp. at 8 n.2 (citing Complaint ¶¶ 18, 24), misrepresents the allegations of the Complaint. Plaintiff never made such an allegation. Plaintiff instead alleged that Cricket "uniformly and systematically" perpetrated its illegal actions against people ***in the Class as defined***. *See* Complaint ¶¶ 18, 24. This description of Cricket's "uniform[] and systematic[]" activity, expressly limited to a description of Cricket's actions toward people ***already in the Class definition***, could not possibly expand the Class. This Court rejected the identical argument in *James*, 2015 WL 4770924, at *3, and should reject it again.

Basic rules of reading undermine Cricket's argument, which requires cherry-picking bits of a statement, and obscuring a material limiting phrase. Cricket quotes the Complaint as follows:

> Scott alleges, however, that "[a]s part of its regular business practices, Cricket systematically and regularly sold...CDMA-only mobile telephones ... [that] would not be usable on anything by [sic] the CDMA network." Compl. ¶ 24; see also id. ¶ 18 (alleging that Cricket engaged in the "uniform and consistent sale of mobile telephones" that were locked for use on the CDMA network).

Opp. at 8 n.2. Cricket's ellipses and parenthetical summary affirmatively conceal the material allegations, made in connection with each of the quoted allegations, and which confine the "uniform and systematic" allegation to sales made "***to Plaintiff and other Class members***" (Complaint ¶ 18) or "***to Plaintiff and other members of the Class***" (Complaint, ¶ 24) (emphasis added). This critical qualification, which is completely ignored in Cricket's Opposition, expressly confines the "uniform[] and systematic[]" allegation to a description of the transactions ***already in the Class***. The Class, in turn, is defined to include only specific transactions. *See* Complaint ¶ 51; *see also* part III.A, *supra*. Cricket cannot use the "uniform[] and systematic[]" allegation to ***expand*** the Class, when that allegation is clearly ***confined*** to the Class as defined.

This is a straightforward grammatical proposition. A limiting phrase must be given effect. "When a limiting phrase exists, the Court does not ignore that phrase but will give it its clear meaning." *Degani v. Cmty. Hosp.*, 2005 WL 2591902, at *6 (N.D. Ind. Oct. 12, 2005). Giving the

limiting phrase in paragraph 3 of the Complaint its "clear meaning" can only occur if the "uniformly and systematically" description is confined to what occurred in the transactions of "Named Plaintiff and the Class."

If the "uniformly and systematically" description is not confined to a description of the transactions of Named Plaintiff and the Class, the limiting phrase must be ignored. However, the court does not ignore context when interpreting a class definition. Instead, the "class definition is read in the context of the complaint as a whole." *Pirillo*, 2012 WL 761607 at *2. Here, the context of the Complaint as a whole does not support expanding the Class beyond the definition set forth in paragraph 51. Instead, each allegation in the Complaint concerning Cricket's unlawful activity is specifically limited to alleging unlawful activity toward the persons in the capital "C" "Class," defined in paragraph 51 of the Complaint. *See* Complaint at, *inter alia*, ¶¶ 18, 24 (discussed above); 1 (similarly alleging Cricket perpetrated unlawful activity specifically against "Plaintiff and other Class members"); 2 (same); 12 (same); 42 (same); 55 (same); 38 (similarly alleging sales to "Plaintiff and Class members"); 39 (same); 40 (same); 41 (same); 44 (same); 45 (same); 46 (same). Nothing in the Complaint can be reasonably read to expand the Class described in paragraph 51.

As noted above, Judge Motz rejected the identical argument in *James*:

> The class in James' complaint is explicitly stated—it is only to include those individuals whose cars were repossessed by Santander under CLEC contracts who did not receive proper pre- and post-sale notifications. (ECF No. 2 at ¶ 31). James alleges that this includes "many" individuals, but does not state how many individuals it is. *Id.* at ¶ 5. James also does not allege a total amount of damages sought by the class, only that the damages sought in the aggregate exceed $75,000. *Id.* at ¶ 80. At no point in his complaint does James assert that the class includes all customers with CLEC contracts whose cars were repossessed by Santander.
> ***Santander defines a different class by taking the phrase "uniformly and systemically" out of context.*** The entire phrase Santander relies on states: "Santander uniformly and systematically failed to comply with the statutory requirements for providing notice in connection with the repossession and sale of the vehicles of Named Plaintiff and the Class." (ECF No. 2 at ¶ 3). Santander argues that this must mean that *all persons* whose vehicles it repossessed under CLEC contracts are included in this class. But this is defied by the text of the

> complaint. This sentence, when read in full, indicates only that Santander violated the law with respect to class members as defined by James—all people who did not receive the proper pre- and post-sale notifications.

James, 2015 WL 4770924, at *3 (emphasis added). Cricket's attempt to resurrect an argument this Court has already rejected should fail.[7]

C. Cricket's Failure to Allege Facts Concerning "Locked" Phone Transactions Cannot Be Cured Now.

Although Cricket insists that it may ignore the Maryland citizenship limitation in Mr. Scott's Class definition, in spite of *Johnson* 549 F.3d at 937, Cricket acknowledges another material requirement of Class membership which was absent from Cricket's original removal allegations. Cricket tries to cure that failure, but it is too late.

Specifically, Mr. Scott's Class definition is limited, *inter alia*, to transactions in which Cricket sold a phone "'locked' (see Compl. ¶ 22) for use on Cricket's CDMA network." Opp. at 8 n.2. Cricket's Notice of Removal did not allege anything about "locked" telephones, and thus did not allege that transactions involving "locked" telephones were sufficiently numerous and involved the requisite amount in controversy for CAFA. *See* Pl. Memo at II.C, IV.A.2 (discussing, *inter alia*, Cricket's failure to allege facts concerning "locked" telephones). Instead, Cricket's allegations were not limited to transactions involving "locked" telephones (among other failings).

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[7] *James* also distinguished another case that Cricket relies on here, *Swan v. Santander Consumer USA,* 2015 WL 1242767 (D.Md. Mar.17, 2015). As Judge Motz noted:

> My conclusion reaches the opposite result as a recent opinion by one of my colleagues involving Santander. *See Swan v. Santander Consumer USA,* Civ. PJM 14–1906, 2015 WL 1242767 (D.Md. Mar.17, 2015). In that case, however, the dispute over removal jurisdiction centered over the calculation of the amount in controversy. *Id.* at ---- 3, 4. Santander did not, as here, redefine the class as pled in the complaint.

James, 2015 WL 4770924, at *3. The same rationale distinguishes *Swan* from this case – where Cricket redefines the class as pled in the Complaint in an attempt to find federal jurisdiction.

Now, Cricket acknowledges that Mr. Scott's Class is limited to include persons with "locked" telephones. *See* Opp. at 8 n. 2 (acknowledging Class is limited, at least, to persons with a "locked" telephone). In addition, Cricket ***admits that it did not make allegations in its Notice of Removal which concerned a Class with this limitation*** – and then provides the Court with ***a lower number of subject transactions when taking account of that limitation***. *See id.*

Cricket's attempt to change its allegations demonstrates that Cricket's notice of removal did not allege facts concerning Mr. Scott's limited Class. Its attempt to change its factual removal allegations in its Opposition, far beyond the time for doing so, is improper and supports remand.[8] As discussed in Mr. Scott' Motion, in order to support federal jurisdiction, a Notice of Removal must contain plausible factual allegations which, taken as true, support federal jurisdiction. *See* Pl. Memo at part III (citing and discussing *Dart Cherokee Basin Operating Co., LLC*, 135 S. Ct. 547; *Ellenburg*, 519 F.3d at 199; *Twombly*, 127 S.Ct. at 1964-65; and *Iqbal*, 556 U.S. at 677-78).

Also as discussed in Mr. Scott's Motion, Cricket's failure to allege facts supporting the removal of the Class actually defined by Mr. Scott cannot be remedied at this time. *See* Pl. Memo at pp. 19-21(citing *Covert v. Auto Credit Corp.*, 968 F. Supp. 2d 746, 749-51 (D.Md. 2013) (failure to allege facts supporting CAFA removal rendered notice of removal "incurably defective"); and *Cooper v. United Auto Credit Corp.*, 2009 WL 1010554 (D.Md. Apr. 14, 2009) ("missing allegations may not be furnished" belatedly)).[9]

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[8] Mr. Scott anticipated that Cricket would make such an attempt in his Motion to Remand, and cited the law which prohibits such amendment. See Pl. Mem. at pp. 19-21. Cricket attempts to re-characterize the information concerning "locked" telephones as "evidence to demonstrate that CAFA jurisdiction is satisfied." Opp. at 2. That is not, however, what Cricket is doing. What Cricket ***cannot*** do, but is attempting to do, is to change the factual ***allegations*** in its notice of removal (which mentioned nothing about a class limited to persons with "locked" telephones), and to submit evidence concerning those new allegations.

[9] Cricket does not dispute that the time to amend the Notice of Removal expired on October 31, 2015. *See* Pl. Memo at 21.

As Cricket now acknowledges, its Notice of Removal did not include information about 1) Maryland citizenship of any of the persons whose transactions it used as purported support for removal (because Cricket claims that providing such information would be impossible), Opp. at 12; and 2) whether the phones of any of the persons whose transactions it used as purported support for removal were "locked." Opp. at 8 n. 2.

Partly because of Cricket's removal of a class not limited to include only persons with "locked" telephones, the factual allegations in Cricket's Notice of Removal fail to plausibly show that federal jurisdiction exists over this case.[10] And, as discussed in part III.C, *supra*, even Cricket now belatedly acknowledges that Mr. Scott's Class is limited to only locked phone transactions.

Now, however, Cricket attempts to change its allegations purportedly supporting removal, and to materially change the number of phones at issue. *See* Opp. at 8 n.2 (acknowledging locked phone-only limitation in class definition and changing number of phones it claims are at issue); *see also* Declaration of Rick Cochran (ECF#18-1) (new facts about locked phone transactions).

As this Court held in *Covert* and *Cooper*, factual allegations supporting removal cannot be added once the time for removal has expired. Accordingly, Cricket cannot salvage its removal by alleging new facts now. Cricket's reliance on these new facts shows that removal was improper.

IV. The MMWA Precludes Federal Jurisdiction Over This Case.

As discussed in Mr. Scott's Motion, the MMWA precludes federal jurisdiction over this case, because Mr. Scott's only claim is under the MMWA, and the MMWA expressly forbids federal jurisdiction over a MMWA class action where the number of named plaintiffs is fewer than

[10] As discussed above, there are many other material distinctions between the class Cricket discusses in its removal papers and its Opposition and the Class defined by Mr. Scott. Accordingly, Cricket's belated amendments are not only ineffective, but are for naught - Cricket's removal fails even if its new facts about the overbroad class are considered. *See* part III.A, *supra*.

100. Cricket does not dispute that the number of named plaintiffs in this case is fewer than 100 – so the plain text of the MMWA supports remand. *See* Pl. Memo at part IV.D.

Indeed, Cricket does not even attempt to make an argument that the plain text of the MMWA could be squared with a remand. It cannot. The MMWA states as follows:

> **No claim shall be cognizable in a suit brought [in federal court] ... if the action is brought as a class action, and the number of named plaintiffs is less than one hundred.**

See 15 U.S.C. § 2310(d)(3)(C) (emphasis added). Indeed, Cricket admitted in its Notice of Removal that under "a literal reading" of the MMWA, "in putative class actions, 'the number of named plaintiffs' must not be 'less than one hundred,' 15 U.S.C. § 2310(d)(3)(C), for a putative class action to proceed in federal court." Notice of Removal at ¶ 11. As discussed in Mr. Scott's Motion, because the plain text is clear, the inquiry is over – particularly under the Fourth Circuit precedent of *In re Lowe*, 102 F.3d 731, 733, 735 (4th Cir. 1996) that federal courts must hew closely to their statutory jurisdiction – particularly in a case removed from state court. *See id.* (holding "[t]hat a court operate solely within its statutory jurisdiction is one of the most fundamental premises of our judicial system. ... Removal in diversity cases, to the prejudice of state court jurisdiction, is a privilege to be strictly construed.") [11]

Cricket also refuses to respond to the ample legislative history which demonstrates that the MMWA means what it says. As discussed in Mr. Scott's Motion, the Congressional Report on the

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[11] This factor distinguishes Cricket's citation of *Chambers v. King Buick GMC, LLC*, 43 F. Supp. 3d 575, 614 (D.Md. 2014). *Chambers* involved a case filed in federal court, where the "strictly construed" federal removal standard was not in play. Moreover, the *Chambers* court exercised supplemental jurisdiction over an MMWA claim because a RICO claim was properly pled. *Id.* Supplemental jurisdiction is available to "piggy back" ***any*** "claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." 28 U.S.C.A. § 1367. Supplemental jurisdiction, however, is not possible here – the MMWA claim is the only claim Mr. Scott makes.

Bill which eventually became the MMWA discussed in detail the provisions which prohibited federal jurisdiction over all but a subset of MMWA cases. *See* Pl. Mem. at 24(citing 4 U.S.Code Cong. & Admin.News 7759 (1974), re effect of House provisions. 488 F. Supp. at 1236-37 (emphasis added)). That Report evidences that Congress specifically intended to avoid having class actions under the MMWA proceed in federal court if the MMWA jurisdictional requirements were not met. *See also Watts v. Volkswagen Artiengesellschaft*, 488 F. Supp. 1233, 1236-37 (W.D. Ark. 1980). Cricket's argument that CAFA is "more specific" than the MMWA on federal jurisdiction over MMWA class actions cannot be reconciled with the text of the statute or this legislative history – the MMWA could not be more specific in prohibiting federal court jurisdiction over a "class action" unless the particular prerequisites of the statute are met.

And although Cricket originally cited *O'Keefe v. Mercedes-Benz USA, LLC*, 2002 WL 377122, at *3 (E.D. Pa. Jan. 31, 2002) as purported support for removal, it made no response to Mr. Scott's observation that the case ***dismissed*** an MMWA count for ***lack of federal jurisdiction***, because there were not 100 named plaintiffs, stating that:

> we believe that we lack power to hear this claim. However unfair the dismissal may be, ***it would be much more unfair and inequitable for this Court to attempt to create subject matter jurisdiction in the face of a clear Congressional mandate to deprive the federal courts of jurisdiction in cases such as this.***

Id. (emphasis added).

Nor does Cricket even respond to the Fourth Circuit authority, cited in Mr. Scott's Motion, that "the polic[y] behind § 2310(d)... is to restrict access to federal courts." *Saval v. BL Ltd.*, 710 F.2d 1027, 1032 (4th Cir. 1983); *see also Donahue v. Bill Page Toyota, Inc.*, 164 F. Supp. 2d 778, 782 (E.D. Va. 2001) (recognizing the MMWA's "scheme of *limited* federal jurisdiction")(emphasis

in *Donahue*).[12] Cricket's citation of out-of-circuit cases does not address the Fourth Circuit's interpretation of the MMWA's policy to restrict access to federal courts. That policy should be given effect. Accordingly, remand is appropriate.

V. Conclusion

For the reasons set forth above, and in Mr. Scott's Motion, Mr. Scott respectfully requests that this Court remand this case to the Circuit Court for Baltimore City, and for such other relief as the Court deems appropriate.

Respectfully submitted,

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[12] For all the reasons discussed above, CAFA jurisdiction does not exist even aside from the MMWA's prohibition on federal jurisdiction here – and Cricket has abandoned any argument that the MMWA somehow could provide federal question jurisdiction.