No. 15-1135

In The
Supreme Court of the United States

EAGLE US 2, L.L.C.,

Petitioner,

v.

EVA D. ABRAHAM, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

MICHAEL H. SCHWARTZBERG
Counsel of Record
GLEN D. VAMVORAS
VAMVORAS, SCHWARTZBERG & ASSOCIATES LLC
1111 Ryan Street
Lake Charles, LA 70601
(337) 433-1621
mike@vslaw.com

PERRY R. SANDERS, JR.
SANDERS LAW FIRM LLC
400 Broad Street
Lake Charles, LA 70601
(337) 436-0031

WELLS T. WATSON
ROGER G. BURGESS
BAGGETT, MCCALL, BURGESS, WATSON & GAUGHAN, LLC
P.O. Box 7820
Lake Charles, LA 70606
(337) 478-8888

Counsel for Respondents

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

The Plaintiffs-Respondents take issue with the first "Question Presented" as "1.", regarding whether a presumption had anything to do with the rulings in the courts below. The Petitioner/Eagle's argument that a presumption was relied upon or central to any decision in the District Court, or the United States Court of Appeals for the Fifth Circuit, is simply not accurate. Therefore, Eagle's Question "1." is fallacy. The issues decided below adversely to Eagle were simple and clear. This case was not a "Class Action" or "Mass Action" within the meaning or requirements of 28 U.S.C.A. § 1332(d)(1)(2), and/or (11). The same is true for the other 77 cases which were remanded.

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INTRODUCTION

The attempt to seek *certiorari* by the Petitioner, Eagle US 2 L.L.C. ("Eagle"), premised upon this case coming within CAFA jurisdiction (28 U.S.C.A. § 1332(d)(1)(2), and/or (11)) as a "Class Action," or "Mass Action," is a figment of Eagle's imagination. There is simply no reference or semblance of "representative" litigation involved in the instant case, thus not a "Class Action." Nor is there any attempt by the Plaintiffs to try their separately filed cases together as required by a "Mass Action." Since the facts and pleadings provided no basis for CAFA jurisdiction, as was readily noticed by the District Court and then the Court of Appeals for the Fifth Circuit, Eagle has argued that past litigation, in 2006 which involved another one of its chemical releases from a fire, resembled class action litigation or was "similar," thus somehow removal was warranted herein. The amount of misstatements and misrepresentations by Eagle regarding the past litigation, as well as the present case(s), has been significant throughout the course of this contested removal process. The lower courts recognized that there was virtually no factual or legal substance to anything that Eagle argued, because the cases it cited were clearly not applicable, and the facts of the past and present litigation, as shown by Eagle's own filings, contradicted all of Eagle's arguments. This Court should deny the writ as there is no CAFA jurisdiction on the face of the pleadings or otherwise, and there is no error in the courts below.

STATEMENT OF THE CASE

The instant case was filed on December 16, 2014 in the 14th Judicial District Court in Calcasieu Parish, State of Louisiana. This case contains the claims of 23 persons who each have their own individual claims as a result of chemical exposure that took place on December 20, 2013 which emanated from a plant in Westlake, Louisiana. These claims were cumulated pursuant to Louisiana Code of Civil Procedure ("LCCP") articles 463-465 which provide for plaintiffs to file claims together, but each plaintiff's claim maintains its individual status. Under the cumulation standard in Louisiana, parties can cumulate their cases under one captioned lawsuit if "there is a community of interest between the parties joined." See LCCP art. 463. All Plaintiffs are Louisiana residents except for 1, who is a Texas resident.

The Petitioner/Defendant is the owner of the plant, Eagle US 2 L.L.C. ("Eagle"), and an additional defendant is an employee of Eagle by the name of David L. Ardoin.

This case is one of 78 petitions for damages filed in Louisiana State Court by the undersigned pertaining to the December 20, 2013 accident and release at Eagle's Westlake, Louisiana plant. The first case was filed in state court on July 14, 2014 and captioned *Boyer, et al. v. Eagle US 2 L.L.C.*, 2014-2778, 14th Judicial District Court, State of Louisiana, Division "D." That petition contained 11 plaintiffs, all Louisiana residents, and was not removed by Eagle. The number

of Plaintiffs in the different suits filed by the undersigned counsel ranged from four to thirty-two, and all of the cases were individual claims – none as representative of any proposed class or group. This Petition contained an allegation as provided in the Louisiana Code of Civil Procedure article 893, that:

> "There is not diversity jurisdiction in Federal Court because the value of each Petitioner's individual case does not exceed $75,000.00. See attached and incorporated Affidavits, which are referenced as copied herein *in extenso*." (Petition par. 21)

Additionally, the Petition in this case, as well as all of the other cases filed by the undersigned, had attached to them at the time of filing in state court, irrevocable and binding affidavits which limited each Plaintiff's claim to $50,000.00 or less, exclusive of interest and costs. In all cases, the irrevocable and binding stipulation for each plaintiff which has limited their damages to $50,000.00 or less, exclusive of interest, was accepted by the Louisiana State Court by a final judgment, and Plaintiffs have no recourse to seek damages in excess of that amount. In fact, the United States District Court Judge, Judge Haik, determined as a fact that the affidavits were binding and irrevocable in his Memorandum Ruling which ordered remand to state court.

The number of Plaintiffs from Louisiana in all of the cases are 1654, and there are a few plaintiffs, only 56, who are residents from other states (most are from the neighboring State of Texas). This hardly

presents litigation of an "interstate," "Class Action," or of "national importance"[1] flavor as represented by Eagle.

Eagle has argued in the first two sections of its application that this case "resembles" or is "similar" to a class, and should be treated as "representative" litigation on the basis of past litigation. Not only has Eagle misrepresented the facts of the past litigation, its argument that cumulated claims by plaintiffs are "novel," possess some type of "idiosyncrasies," or unique to Louisiana is simply untrue,[2] and another one of a series of misrepresentations.

Eagle's assertion that only "a handful" of state court Judges decided the claims of the prior 2006 litigation, and that common issues were "carried over" to other cases was incorrect, and ignored the fact that in those state court proceedings Eagle was a proponent of the manner in which the cases were handled. Further, there were only individual claims in which

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[1] *Standard Fire Ins. Co. v. Knowles*, ___ U.S. ___, 133 S. Ct. 1345, 1350, 185 L. Ed. 2d 439 (2013).

[2] Many States allow for plaintiffs to cumulate their claims as does Louisiana. See *Abrego Abrego, et al. v. The Dow Chemical Company, et al.*, 443 F.3d 676 (9th Cir. 2006); *Tanoh, et al. v. Dow Chemical Company*, 561 F.3d 945 (9th Cir. 2009); *Scimone v. Carnival Corp.*, 720 F.3d 876 (11th Cir. 2013); *Rodriguez v. Monsanto Co.*, 2011 WL 5245251 (E.D. Mo. 2011); *Anderson v. Bayer Corporation*, 610 F.3d 390 (7th Cir. 2010); *Barria v. Dole Food Co., Inc.*, 2009 WL 689903 (C.D. Cal. 2009); *Obregon v. Dole Food Co., Inc.*, 2009 WL 249881 (C.D. Cal. 2009); *Hampton v. Monsanto Co.*, 2011 WL 5307835 (E.D. Mo. 2011).

individual awards were made to the Plaintiffs, and each Plaintiff's credibility was assessed in each case as reflected in the state court rulings. The awards ranged from $750.00 to $50,000.00, and these facts were apparent from Eagle's own Exhibit 12[3] attached to the Notice of Removal, which Eagle chose to ignore in its briefs. Eagle's further misrepresentation and insinuation to this Court, that the instant cases were somehow relegated to "select" state court judges is false, as the 78 petitions are spread throughout all six (6) different divisions of the state court of the Louisiana 14th Judicial District that have the requisite civil jurisdiction.

Eagle's "carried over" statement with regard to certain findings in the 2006 litigation is entirely false in the first instance, because each case was tried and decided individually, as stated above, and as verified by Eagle's own filings. The entirely non-class like treatment of the prior litigation in state court, is further exemplified by the facts stated in the state court of appeals' decisions.[4] The first appeal, the *Brown* decision, involved only nine plaintiffs from the 2006 Georgia Gulf fire whose case had been tried. The latter case, *Anthony*, *supra*, involved judgments from

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[3] All of the exhibits referenced in this opposition are to the federal district court filings in the record.

[4] *Anthony, et al. v. Georgia Gulf Lake Charles, LLC*, 13-236 (La. App. 3d Cir. 5/21/14), 146 So.3d 235, *writ denied*, 2014-2102 (La. 11/26/14), 153 So.3d 425; *Brown, et al. v. Georgia Gulf Lake Charles, LLC*, 12-635 (La. App. 3d Cir. 12/5/12), 104 So.3d 730.

three different divisions of the state court. In those cases, on the only issue (damages) that Georgia Gulf appealed, the Court stated:

> "At issue are forty-one (41) separate awards of damages to forty-one (41) separate plaintiffs." (*Anthony*, 146 So.3d at 251)

Causation and exposure were individually litigated for each plaintiff and clearly, these separate awards are the antithesis of any "resemblance" or similarity to a class as argued by Eagle. Thus, Eagle's statement that awards were based on a person who "may have been exposed" is patently false. Individual factual findings and awards were individually made in the 2006 litigation.

It must be noted that contrary to Eagle's representations, the cases which were tried in state court in 2006 were tried as individual claims. As to Eagle's reference to the cases being largely resolved through a settlement class (Eagle's application pg. 9), this is a "red herring." The settlement class originated in federal court; however, the cases handled by plaintiff's co-counsel herein that opted out of the settlement class, were the cases tried and appealed individually in state court. There is simply no basis upon which Eagle can represent to this Court that the litigation was similar to a "Class Action."

Eagle was a *proponent* of that method for resolution as to the liability issues as well as damage issues as shown on Eagle's own exhibit in the Federal District Court. (Eagle's Exh. 11 in District Court.) The

insinuation by Eagle that the claims *were brought or litigated* as a "Class Action" is contradicted by the several references in Eagle's own Exh. 10 filed by Eagle in the Federal District Court, which contained the restrictive provisions that a "settlement class" was for settlement only, and that the certification could not be used for trial. (Exh. 10 pg. 3 bottom.) Even further, Georgia Gulf reserved its right to object to any attempt to certify the class for litigation purposes. (*Id.*) Thus, Eagle's proposition that the prior fire litigation entailed litigation which acted as a "litigation class" (see Eagles n. 1), or "settlement class," is disingenuous at best, and knowingly false at worst.

Perhaps one of the more egregious falsehoods propagated by Eagle in its criticism of the lower federal courts, was when it stated that the Plaintiffs herein " . . . *actually did propose* joint trials – in *express terms*." (Eagle's brief pg. 6, 11, 14) This misstatement, which can only be intentional, was an effort to support an otherwise unsupportable argument that Plaintiffs sought joint trials for its 78 separately filed cases, thus a "Mass Action" under 28 U.S.C.A. § 1332(d)(11). In fact, the language misquoted and taken out of context by Eagle[5] appeared in this State

[5] " . . . the trial court can try the cases individually or jointly" is an option allowed under LCCP art. 465 where the trial court can have a single trial at one time for the 23 Plaintiffs in this case or have 23 trials at different times, whichever method the trial court chooses to " . . . be in the interest of justice. . . ."

Court Petition, La. Docket no. 5045 Div. "B" (the "Abraham" suit), as well as all others remanded by the lower federal courts, which language was from the statutory language of the Louisiana cumulation procedure article, LCCP art. 465. That article, and language, references that the 23 individually cumulated claims in this individual suit, Docket no. 5045, may be tried together or separately. The language has no reference or relevance to/for any other separately filed suit to be tried jointly with the "Abraham" suit. While Eagle had previously argued to the lower federal courts that they should have "pierced" the pleadings to conclude Plaintiffs have sought joint trials, which of course Plaintiffs did not, Eagle had not made such an intentional misstatement of both law and fact as it has here, i.e., that Plaintiffs have "expressly" asked for joint trials. In fact, the only manner in which any of these separately filed suits may be tried together would be if the Plaintiffs, or Defendants file a motion(s) to *consolidate*[6] the 78 different suits, which Plaintiffs have not done and have no intention of doing. Consolidation is a totally different procedure which Eagle must know is different than cumulation, yet has tried to confuse in its filings to this Court.

Typical of Eagle's method of citing cases which have no similarity in their facts or application of the law to the instant matter, Eagle suggests that this

[6] See LCCP art. 1561.

case and others remanded, have all of the attributes of a Class Action and that Plaintiffs are "gaming" the system. *Hamilton, et al. v. Burlington Northern Santa Fe Railway Company, et al.*, 2008 WL 8148619 (W.D. Tex. 2008); *Bullard v. Burlington N. Santa Fe Ry. Co.* 535 F.3d 759 (7th Cir. 2008); and *Freeman v. Blue Ridge Paper Products, Inc.*, 551 F.3d 405 (6th Cir. 2008) are cited as Eagle's authority. None have even remote analogy or any similarity to the instant case.

In *Hamilton*, a class action was originally filed in the Western District of Texas in October 2006 by 600 plaintiffs for personal injuries and property damage stemming from the defendants "wood treatment activities over a 100 year period." *Id.* at *1 (The "Davis" suit). The district court did not certify the class, but allowed the case to continue as a "mass tort," if the plaintiffs filed individual claims and answered certain interrogatories. The plaintiffs dismissed the claims without prejudice. Within the next year, the plaintiffs filed nine different suits on the same claims, some of which were class actions and some "Mass Actions," in three different states (Texas, Illinois, and Pennsylvania), the last being in Texas, and which mirrored the "Davis" suit. The Defendants removed the case based upon 28 U.S.C.A. § 1332(d)(11)(B), the "Mass Action" provision of CAFA. Plaintiffs sought to remand the cases arguing that no case contained the 100 person component necessary for the "Mass Action" provision of CAFA. The remand was denied.

The district court cited *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418 (5th Cir. 2008) as

authority to consider that: "Plaintiff is ordinarily the master of the complaint, but there are limits to a Plaintiff's ability to evade removal jurisdiction through artful pleading." What was most convincing to the court as to why the case should be a mass action in federal court, was that the plaintiffs had filed claims for exposure to the "Defendants' chemicals at different times,[7] claimed different injuries, and are subject to different limitations and other defenses such that trying their claims jointly would lead to exactly the confusion CAFA's mass action provisions are designed to prevent." *Id.* at *6.

The first difference from the instant matter is that the *Hamilton*, *supra*, removal involved the "Mass Action" provision of CAFA, not the "Class Action" provision of 28 U.S.C.A. § 1332(d)(A) and (B) which Eagle has initially relied upon.

Also different in the instant case from *Hamilton*, *supra*, is that there have not been multiple *class actions* filed by these plaintiffs in numerous courts, dismissed, and then refiled in different variations. Also different than *Hamilton*, *supra*, this case involves a single accident, an uncontrolled release event which took place on December 20, 2013, not a series of releases over a one-hundred-year time period. And still further in *Hamilton*, *supra*, there were different defendants which owned and operated the facility during the one-hundred-year time period

[7] The "Davis" action spanned a time period of 100 years.

for which the plaintiffs were suing, different plaintiffs resided in the area at different times, and there was a myriad of different " . . . acts of negligence and intentional wrongdoing alleged by the Plaintiffs. . . ." *Id.* at *13. Clearly, Eagle's single incident release, the subject of the instant lawsuit, contains none of the "Mass Action" concerns which were relied upon by the district court in *Hamilton*, *supra* in retaining the jurisdiction of the case.

Bullard v. Burlington N. Santa Fe Ry. Co., 535 F.3d 759 (7th Cir. 2008) was a case where 144 plaintiffs filed claims against four different defendants for damage caused by chemicals which leaked from a nearby wood processing plant. The removal was based upon the "Mass Action" provisions of 28 U.S.C.A. § 1332(d)(11), not the "Class Action" provisions of 28 U.S.C.A. § 1332d(1) and (2). These are separate provisions and Eagle has attempted to incorrectly meld the two provisions into one to confuse and obfuscate its meritless position. Several court decisions distinguish and caution against mixing or interchanging discussions between the "Class Action" portions, and the "Mass Action" portions of CAFA.[8] There is simply

[8] See *Rodriguez*, *supra* at *3 discussing *Freeman*, *supra*, and *Anderson, et al. v. Bayer Corporation, et al.*, 610 F.3d 390, 394-395 (7th Cir. 2010); *Tanoh*, *supra.* In arguing for removal under CAFA's "Mass Action" provision in *Rodriguez*, Monsanto cited *Freeman*, *supra*, and another 8th Circuit decision but the district court judge in *Rodriguez*, *supra* wrote: "However, those cases address CAFA's class action provision and not its mass action provisions."

no merit to Eagle's arguments and the cases are inapposite as clearly stated by Judge Haik in his District Court opinion.

It is respectfully submitted that there is no "gamesmanship" here as exhibited by *Freeman v. Blue Ridge Paper Products, Inc.*, 551 F.3d 405 (6th Cir. 2008) where the plaintiffs, who originally sought class certification, divided their claims against the same defendants into separate suits based upon different six month time periods in order to frustrate CAFA. In other words, the plaintiffs attempted to retain the *advantag*e of being able to sue for all of their damages, which would have satisfied CAFA removal, but at the same time avoid the removal to federal court. This method of "gamesmanship" in *Freeman*, *supra*, as well as in *Profitt v. Abbott Laboratories*, 2008 WL 4401367 (E.D. Tenn. Sept. 23, 2008) was thoroughly explained in *Tanoh, et al. v. Dow Chemical Company*, 561 F.3d 945 (9th Cir. 2009):

> "Both *Freeman v. Blue Ridge Paper Products, Inc.*, 551 F.3d 405 (6th Cir. 2008), and *Profitt v. Abbott Laboratories*, 2008 WL 4401367 (E.D. Tenn. Sept. 23, 2008), involved plaintiffs who attempted to split their claims into multiple suits covering discrete time periods so as to expand their recovery without triggering CAFA's $5 million amount in controversy requirement. In *Freeman*, for example, plaintiffs divided their nuisance *class action* against a paper mill into 'five separate suits covering distinct six-month time periods, with plaintiffs limiting the total damages for

each suit to less than CAFA's $5 million threshold.' . . . . each of the eleven complaints included a disclaimer limiting damages for the covered time period to $4,999,000. (emphasis added)

In both cases, the court rejected plaintiff's creative attempts to avoid CAFA's amount in controversy requirement, holding that removal was proper because the time divisions were "completely arbitrary," as there was no colorable reason for breaking up the lawsuits in this fashion, other than to avoid federal jurisdiction (citation omitted). Central to the court's holdings, however, was the fact that both sets of plaintiffs split their claims in an effort to seek well over $5 million in total damages without triggering federal removal jurisdiction. As the Sixth Circuit explained, plaintiffs are generally allowed to plead around federal jurisdiction at a cost: they must limit the damages they seek to less than CAFA's $5 million threshold. . . . "

"The concerns animating *Freeman* and *Profitt* simply are not present in this case, as none of the seven groups of plaintiffs has divided its claims into separate lawsuits to expand recovery. To the contrary, each of the seven state court actions was brought on behalf of a *different* set of plaintiffs, meaning that none of the plaintiff groups stands to recover in excess of CAFA's $5 million

threshold between the seven suits." *Tanoh, et al. supra* at 956-957.

As pointed out in *Tanoh*, *supra*, there actually is no "gamesmanship" in the pleading of the instant state court case, as stated by numerous federal courts,[9] the least of which is this Court's pronouncements in *Standard Fire Ins. Co. v. Knowles*, ___ U.S. ___, 133 S. Ct. 1345, 1351, 185 L. Ed. 2d 439 (2013), where this Court reaffirmed that plaintiffs are entitled to plead their cases in a certain fashion to avoid federal jurisdiction. The fact that Plaintiffs' counsel "scrupulously managed" their pleadings in every fashion to avoid federal jurisdiction, is not a basis upon which somehow federal question jurisdiction arises; a nonsensical argument dismissed by the Federal District Court, Judge Haik. One ponders

[9] Other decisions which distinguish and recognize the limited nature of *Freeman* as not being applicable to the instant separate suits filed by the undersigned are *Scimone v. Carnival Corp.*, 720 F.3d 876 (11th Cir. 2013); *Rodriguez v. Monsanto Co.*, 2011 WL 5245251 (E.D. Mo. 2011); *Anderson v. Bayer*, 610 F.3d 390 (7 Cir. 2010); *Barria v. Dole Food Co., Inc.*, 2009 WL 689903 (C.D. Cal. 2009); *Obregon v. Dole Food Co., Inc.*, 2009 WL 249881 (C.D. Cal. 2009); *Hampton v. Monsanto Co.*, 2011 WL 5307835 (E.D. Mo. 2011). Many of these cases hold that *Freeman* is not applicable to a "Mass Action" under 28 U.S.C.A. § 1332(d)(11), and that is so, but it is equally compelling and clear that in addition to the instant suit not coming within the definition of a "class action," defendants, pursuant to *Freeman*, cannot seek to consolidate and combine these separately filed suits by different plaintiffs who have chosen to file individual actions in state court, in order to create a "class action" as defined in 28 U.S.C.A. § 1332(d)(1)(A) and (B).

whether Eagle suggests it is "wrong-headed" to be scrupulous as opposed to being "sloppy." The Plaintiffs have done exactly what *Knowles*, and *De Aguilar, et al. v. Boeing Company, et al.*, 47 F.3d 1404 (5th Cir. 1995) allow and support, and Plaintiffs have done so herein without any of the antics and contortions of the cases cited by Eagle and which are clearly distinguished above.

Further, the relevance of Eagle's argument, that it paid higher settlements in state court in the 2006 litigation than in the federal court cases, to CAFA jurisdiction is not readily apparent to the undersigned. This seems to be an emotional plea for creating jurisdiction when clearly there is none, as found by the lower federal courts.

Finally, as will be shown below and plain from the lower court decisions, this case did not, and does not involve any "close calls" or "judgment calls" on whether there was CAFA jurisdiction. The "presumption" issue raise by Eagle, as an error, actually had no part in the reasoning of either the District Court, or the Court of Appeals, was simply "boiler plate language" in the District Court Opinion with regards to remand issues, and Eagle's reliance in this regard is misplaced and no basis upon which the Court should entertain this writ application. In fact, consistent with the litany of misstatements and citations which

have no relevance, the cases cited by Eagle[10] which have been rendered since *Dart Cherokee Basin Operating Co., LLC v. Owens*, ___ U.S. ___, 135 S. Ct. 547 (2014) as Eagle's authority for its argument on this point, were all filed as *class actions*. Eagle has simply ignored this distinction, that neither this case nor any other filed against Eagle, is a "Class Action," or "Mass Action" in relation to the statutory language of 28 U.S.C.A. § 1332(d)(1) and (2) ["Class Action"], or (11) ["Mass Action"]. Neither does this, or any other case, have any resemblance or similarity to "representative" litigation. This is set forth in "black and white" in the pleadings, and Eagle cannot change that fact no matter how feverish its entreats become. The lack of any colorable basis for removal jurisdiction under CAFA was why Eagle's removal was easily disposed of by the District Court, and why the Court of Appeals denied Eagle's appeal. The same should follow in this Court.

REASONS FOR DENYING THE WRIT

Eagle's attempt to create a controversy or conflict between the Court of Appeals for the Fifth Circuit and other Circuits by its "presumption" argument is misplaced. The lower courts here did not employ any

[10] *Dudley on behalf of herself and others similarly situated v. Eli Lilly and Company*, 778 F.3d 909 (11th Cir. 2014); *Arbuckle Mountain Ranch of Texas, Incorporated v. Chesapeake Energy Corporation*, 810 F.3d 335 (5th Cir. 2016).

"presumption" in deciding that remand was appropriate due to the lack of CAFA jurisdiction, and the word "presumption" was not even mentioned in the Court of Appeals' decision. There was no basis for CAFA jurisdiction in this case from inception, whether "broadly" interpreted or otherwise, and there exists no conflict between the lower court decisions herein and the decisions by other Circuit Courts of Appeals or this Court. Under Supreme Court Rule 10, there is simply no criteria which could justify an exercise of the U.S. Supreme Court's supervisory powers.

I. The Fifth Circuit's Decision to Deny an Appeal had Nothing to do with *Dart*, *supra* or any Presumption

Eagle has argued that the district court and Court of Appeals for the Fifth Circuit relied on a presumption against removal to find that there was no CAFA jurisdiction. Nothing could be further from the truth. The perceived "defiance" to the Supreme Court that Eagle argues about would qualify for a "tempest in a tea pot" if Eagle's arguments had some semblance of accuracy.

First, the district court's opinion did mention the usual language regarding federal courts being courts of limited jurisdiction, but the analysis of the Motion to Remand had nothing to do with any presumption. Clearly, the district court, as did the Court of Appeals, determined that the term "Class Action" has a statutory definition. The definition is:

> " . . . any civil action filed under rule 23 of the federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." See Fifth Circuit Opinion citing 28 U.S.C.A. § 1332(d)(1)(B), Eagle's Appendix A, pg. 3a.

As stated by the Court of Appeals, and recognized by the district court, " . . . An action brought in state court is thus only a "Class Action" if filed under a state provision authorizing representative actions."[11] Both the lower and intermediate Federal Courts found that Louisiana's cumulative procedures are not "representative," as each action maintains its individual status. Judge Haik's decision in the District Court found that Eagle's "similar" to "Class Action" argument completely ignored the statutory requirements, and cited other district court decisions in accord with his assessment that Eagle was simply wrong in all respects.[12]

There is no mention of any presumption in the Fifth Circuit's Opinion. Eagle's argument, that the Fifth Circuit perpetuated some error because the panel agreed " . . . with the district court's analysis," ignores that the analysis never mentioned nor employed any

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[11] See Fifth Circuit Opinion Eagle's Appendix A, pg. 3a.

[12] See *Armstead v. Multi-Chem Group, LLC*, 2012 WL 1866862, 3 (W.D. La. 2012); *In re Vioxx Products Liability*, 843 F.Supp.2d 654, 663-664 (E.D. La. 2012).

presumption at any stage. It was clear that the removed case(s) had no pleadings in a representative capacity, that CAFA jurisdiction required such, and that no amount of "piercing" could create CAFA jurisdiction.

The holding of *Dart*, *supra*, dealt with the pleading requirement of the jurisdictional amount in a notice of removal under CAFA when the jurisdictional amount *is not contested or questioned by the plaintiff or the court.* Under those limited circumstances, the party filing the removal need " . . . include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold." *Dart*, *supra* at *555. Since the jurisdictional amount was clearly contested by the Plaintiffs herein, *Dart*, *supra* has no application to this or any of the cases remanded by the District Court's Order.

Eagle's argument that pursuant to *Dart*, *supra*, "interstate Class Actions" should be removed under CAFA, misses the point that there is nothing in the instant case which could be considered "representative" litigation as a "Class Action," or that it was filed pursuant to a state statute or rule "similar" to a "Class Action." Neither is there any indication of a significant "interstate" connection to the case. While Eagle has argued that the cumulation of claims is the same as a "Class Action," that is entirely unsupported by any law, fact, or pleading in this case. It is not supported by any jurisprudence, as the authorities cited by Eagle in support are entirely inapplicable, as was recognized by Judge Haik. It is clear that the

District Court and Court of Appeal accordingly did not agree with Eagle, and even a Louisiana Circuit Appellate Court has stated the two procedures, cumulation of claims and a "Class Action," are totally different from one another and " . . . do not overlap."[13]

Eagle's argument that the lower court decisions herein were inconsistent with *Dart*, *supra* is without merit, and Eagle's application should be denied.

II. Should the Fifth Circuit have Analyzed Louisiana's Cumulation Device and Determined the Case is a *De Facto* Class Action?

Eagle has largely repackaged its prior arguments to suggest that public policy, congressional hearings, and the 2006 litigation require a determination that the current case is a "Class Action" in disguise. At the outset, Eagle's argument that it only needs to show that the instant suit was filed pursuant to a state statute that is "similar" to a "Class Action," again ignores the underlying premise that the procedure must be "representative" in nature. There is no such characteristic procedure in the instant case. Each of the 23 cumulated claims in this suit retains its individual capacity, and indeed each case may be tried individually.

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[13] *Garrison, et al. v. St. Charles General Hospital, et al.* 2002-1430, 1431, 1446, 1454, 1460 (La. App. 4th Cir. 9/17/2003), 857 So.2d 1092, 1095-1096.

Citing *Pickman v. American Express Co.*, 2012 WL 258842 (N.D. Cal. 1/27/12), and *McGraw, Jr. v. Comcast Corp., et al.*, 705 F.Supp.2d 441, 452 (E.D. Pa. 3/31/10), Eagle urges that these are cases which resemble the instant case and support CAFA jurisdiction. This argument is without any merit as each case is again inapposite and has no application to the instant case. *McGraw*, *supra* was a *parens patriae* action in which the Court cited *Caldwell v. Allstate Ins. Co.*, 536 F.3d 418 (5th Cir. 2008), and found that the real parties at interest were "Comcast's premium subscribers" who were going to try to collect treble damages. *McGraw*, *supra* at *448. The *Pickman*, *supra* (filed under the California Consumer Legal Remedies Act and on behalf of other consumers) case was filed as a "Class Action" and thus was "representative" litigation within the definition of a "Class Action" as expressed in 28 U.S.C.A. § 1332(d)(1)(A) and (B). Eagle's reliance on these cases is mystifying, as there is no "real party at interest" issue in the instant case which Judge Haik remanded herein, and there is no claim being made on behalf of others not named as Plaintiffs, as was the case in *Pickman*, *supra* and *McGraw*, *supra.*

Next, Eagle has presumptively argued that the numerosity, commonality, and typicality requirements of a class are "obvious," because "early plaintiffs" function as a *de facto* class. Since the basis for cumulation of claims and the requirements for the establishment of a "Class Action" are demonstratively different, even as recognized by the Louisiana

courts,[14] Eagle's presumptions have no legal or factual basis. Second, there is no evidence that the instant claims will be tried in any way other than on an individual basis as they have been set forth in the pleadings. Third, if one presumes that Eagle's statements are premised on the 2006 litigation, Eagle has misstated and misrepresented the events of that litigation in the first instance as demonstrated above, and even if there were some truth to Eagle's arguments there is no legal basis upon which to somehow link litigation that took place eight years ago to the present litigation which started in 2014, in order to create CAFA jurisdiction.

Ironically, as these filings appear in this Court, Eagle has taken a completely contradictory position than that posed herein, in the Louisiana state court proceedings, objecting to the cumulation of these claims and seeking to have each individual plaintiff's claim severed.[15]

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[14] *Garrison*, *supra*.

[15] Eagle's State Court Reply in Support of Dilatory Exception of Improper Cumulation at Page 5 – "The resolution of the claims before the court depends fundamentally on the particular facts of each plaintiff's claim. To determine liability and damages, the Court must consider the particularized facts of each plaintiff's exposure, the facts of each plaintiff's particular injury, and facts of each plaintiff's particular damages. The petitions filed by plaintiffs here are vague and lacking in any relevant specificity on the crucial issues of exposure and damages. Each petition filed before the Court is identical in its vague allegations." Also at Page 8 – "The plaintiffs' attempt at cumulation

(Continued on following page)

The district court's conclusion that it could not disregard the statutory definition and parameters of a "Class Action" as per 28 U.S.C.A. § 1332(d)(1) and (2), and that the Plaintiffs' suit was not a "representative" action " . . . filed under Federal Rule of Civil Procedure 23 or its state law equivalent" was correct.

The Fifth Circuit's determination that the instant suit was not "representative" litigation, and did not meet the definition of a "Class Action" under CAFA in any respect was correct. There was no evidence of a *de facto* class action; Eagle's arguments have no merit; and Eagle's writ application should be denied.

III. The Instant Case is Not a "Mass Action" Under 28 U.S.C.A. § 1332(d)(11)

A. Plaintiff's Binding Stipulations

Eagle has first argued that the affidavits submitted with the Plaintiffs' state court petition were not binding, a nullity, and also suggests that such stipulations are not even possible under any circumstances unless agreed to by the Defendants. Eagle is wrong on all counts.

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is therefore improper, and Eagle respectfully requests that the claims be severed into individual actions. Because plaintiffs in this action do not have a community of interest between them, Article 933 read in conjunction with Article 464 dictates that the Court should order plaintiffs to elect which actions/plaintiffs they will proceed with and delete those which they elect to discontinue."

In its determination that CAFA's "Mass Action" provision did not apply to the case, the district court found Plaintiff's affidavits proper and binding:

> "The petition specifically states that there is no jurisdiction because the value of each petitioner's individual case does not exceed $75,000.00, as provided in the Louisiana code of Civil procedure article 893. Moreover, *the plaintiffs have irrevocably bound themselves individually to an amount in damages less than $50,000.00, exclusive of interest and costs, through affidavits attached to the petition and made judgment of the state court under La.C.C.P. art. 1915(B)(1). De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1412 (5th Cir. 1995) ("[l]itigants who want to prevent removal must file a binding stipulation or affidavit with their complaints."); [emphasis added] *see also Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. at 1350." Eagle's Appendix A, pg. 14a.

Since one of the threshold requirements for CAFA "Mass Action" jurisdiction is proof of at least one plaintiff's claim exceeding $75,000.00,[16] and Eagle had no evidence or basis upon which to contradict the binding and irrevocable affidavits, the district court

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[16] *Armstead v. Multi-Chem Group, LLC*, 2012 WL 1866862, 3 (W.D. La. 2012), citing *Abrego Abrego, et al. v. The Dow Chemical Co.*, 443 F.3d 676, 689 (9th Cir. 2006); also see *Hood ex rel. Mississippi v. JP Morgan Chase & Co.*, 737 F.3d 78, 87 (5th Cir. 2013); *Lowery v. Alabama Power*, 483 F.3d 1184, 1206-07 (11th Cir. 2007).

reasoned that there was no "Mass Action" CAFA jurisdiction.

Eagle's proposition that the affidavits do not satisfy *De Aguilar*, *supra* are meritless as the language is unequivocal and irreversible. That is why the district court and Court of Appeals dismissed the argument. The affidavits in this case are clear that the stipulation is irrevocable, i.e., "I irrevocably stipulate that my damages. . . ." Next, the affidavits precisely stated that the claimant's damages " . . . do not exceed Fifty Thousand Dollars ($50,000.00), exclusive of judicial interest and costs." Third, the affidavits clearly stated that the plaintiffs irrevocably renounced the right to enforce a judgment if it exceeds Fifty Thousand Dollars ($50,000.00), exclusive of judicial interest and costs; "I irrevocably renounce the right to enforce a judgment to the extent it exceeds Fifty Thousand Dollars ($50,000.00), exclusive of judicial interest and costs."

In addition to the affidavits being filed with the Petition in state court, as directed by *De Aguilar*, *supra*, a Motion and Order was submitted to the state court to accept the stipulations and recognize the authority of the person who executed the affidavit to limit the amount of damages for his/her claim. The judgment was signed by the court, and the limitations became a judgment of the court. The state court judgment recognized the authority of those signing on their own behalf, as well as those persons signing on

behalf of a minor, to limit their damages. The judgment also stated that the Plaintiffs' cases were to be judge trials in conformance with LCCP art. 1732(1), and that the judgment was a final judgment in conformance with LCCP art. 1915(B)(1).

The affidavits in the instant case are even more sound and in compliance with *De Aguilar*, *supra*, and *Standard Fire*, *supra*, than any reported case argued by Eagle or otherwise from the standpoint of specifically renouncing the right to collect any judgment in excess of $50,0000.00, and also the fact that the irrevocable stipulation and renouncement was made a final judgment of the state court. There is thus absolute "legal certainty" as to the binding and irrevocable nature of these affidavits and that the Plaintiffs' claims are $50,000.00 or less.

In a "parting shot," Eagle has criticized Plaintiffs' counsel in having the individual plaintiffs execute their affidavits prior to filing the state court suits. (See Writ Application pg. 28.) Initially, it should be pointed out that Eagle's criticism is sheer speculation as to when counsel drafted the petitions. In any event, the affidavits were accepted by the state district court at the time of the filing of the state court petition by a final judgment, which irrevocably bound the plaintiffs to a limited recovery. The United States District Court herein accepted the affidavits as binding in conformance with *Standard Fire Ins. Co. v. Knowles*, *supra*, and *De Aguilar, et al. v. Boeing Company*, *supra.*

Since the *De Aguilar*, *supra* decision required that " . . . litigants who want to prevent removal must file a binding stipulation or affidavit *with* their complaints . . . ," it defies reason as to when Eagle suggests the affidavits should be executed other than prior to the filing of the petition and filed concurrently, as was done herein. The contradictory nature of this complaint by Eagle, compared to what the law requires, is truly baffling, but telling as to the lack of merit of Eagle's position.

None of the cases cited by Eagle regarding problematic affidavits are even remotely applicable, as recognized by the lower federal courts. Thus, Eagle's criticism of the lower courts' acceptance of the affidavits is without merit and no basis upon which to grant *certiorari*.

B. Plaintiffs Have Not Proposed Joint Trials of 100 or More Persons, Thus Not a "Mass Action" Under 28 U.S.C.A. § 1332(d)(11)

The Fifth Circuit stated that the case was not a "Mass Action" because the requirement that "100 or more persons" claims "are proposed to be tried jointly" by the Plaintiffs was not satisfied. The Fifth Circuit, like the several other circuit appellate courts it cited, concluded that the federal court is not free to unilaterally pierce " . . . pleadings across multiple

state court actions when the plaintiffs have not proposed that those actions be tried jointly or otherwise consolidated." (See Eagle's Appendix A, pg. 22a.) Thus, the case clearly was not a "Mass Action" and there was no CAFA jurisdiction for a discretionary appeal under 28 U.S.C.A. § 1453(c)(1).

Eagle has argued that the cases can be tried " . . . individually *or jointly*" therefore the Plaintiffs have "explicitly" sought to try the separately filed cases together to come within "CAFA."

This is perhaps the most egregious of the misrepresentations by Eagle. Eagle knows that within this individual suit, which involves 23 plaintiffs, the trial court is able to decide under La.C.C.P. art. 465 whether there is to be one trial or separate trials for these 23 plaintiffs. In fact, as shown by the excerpt appearing in ft. 15 herein, Eagle's current state court filings have sought to have separate trials for each plaintiff. There is simply no basis for Eagle to argue that Plaintiffs have sought to try the instant matter with any other separately filed case. Eagle's false statement is a fallacious basis upon which it has tried to advance a completely untenable argument.

Next, Eagle has reiterated its "liability" and "damage" class action arguments, again without any rational basis. There is simply no "representative" litigation in this case or any other one filed by undersigned counsel.

The district court and Court of Appeals clearly and properly applied the law, and there was no basis

for CAFA jurisdiction and a discretionary appeal under 28 U.S.C.A. § 1453(c)(1).

C. Eagle's Argument that Other Circuit Decisions Are Contrary to the Fifth Circuit's Decision Is Incorrect

In this portion of its brief, Eagle has cited *Parson v. Johnson & Johnson*, 749 F.3d 879 (10th Cir. 2014), for the proposition that somehow that case supports a conclusion that the Plaintiffs here have "explicitly" sought joint trials. In addition to being factually false, *Parson*, *supra* was a case where the several different Plaintiffs' cases of less than 100 were remanded to the Oklahoma state court because the Tenth Circuit found that the plaintiffs asking for consolidation for discovery purposes was not the same as asking for the cases to be tried jointly. *Parsons* is diametrically opposed to Eagle's argument.

Next, Eagle has argued that the instant case *will* be tried using "exemplary" plaintiffs and thus the case comes within CAFA's "Mass Action" provision. Eagle references the 2006 litigation in this respect, and those misrepresentations have been outlined above. There is simply nothing to support Eagle's statements but conjecture and unsupported assumptions. Plaintiffs have not proposed anything but a trial for this case. When other cases are ready after discovery has been had, each will be tried separately or as ordered by the court in the judicial division to which the case has been assigned.

In essence, Eagle's argument that the Fifth Circuit was too rigid in its approach is fantasy, and Plaintiffs have simply followed this Court's and other courts' decisions regarding CAFA's contours and boundaries in filing their state court action. Eagle's wish, that the Fifth Circuit erred in that it should have shared Eagle's fantasy of unfounded assumptions and hyperbole regarding the 2006 litigation, and accepted Eagle's abject conjecture as to how this case will be tried, is an argument without any basis, and an argument which ignores both the facts and the law.

Lastly, in closing, Eagle returned to its argument regarding the lower courts relying on a presumption against removal and the *Dart*, *supra* decision. Since the instant case involved very straightforward statutory interpretations of the clear requirements of 28 U.S.C.A. § 1332(d)(1) and (2), and (d)(11), and did not involve the District Court or Court of Appeals invoking any presumption, Eagle's central premise is entirely misplaced.

CONCLUSION

The Plaintiffs-Respondents' case was not filed as and is not a "Class Action," or "Mass Action" under Federal Rule of Civil Procedure 23, or any " . . . similar State or rule of judicial procedure authorizing . . . " representative litigation as a "Class Action." The same is true for all of the other suits which were remanded by District Court Judge Haik. The Order of

Remand by the District Court was correct, and the United States Court of Appeals for the Fifth Circuit properly denied Eagle's Motion for Appeal. This Honorable Court should reject Eagle's application for *certiorari* since it has no merit.

Respectfully submitted,

MICHAEL H. SCHWARTZBERG
GLEN D. VAMVORAS
VAMVORAS, SCHWARTZBERG
& ASSOCIATES, LLC
1111 Ryan Street
Lake Charles, LA 70601
Telephone: (337) 433-1621
Facsimile: (337) 433-1622

and

WELLS T. WATSON
ROGER G. BURGESS
BAGGETT, MCCALL, BURGESS,
WATSON & GAUGHAN, LLC
P.O. Box 7820
Lake Charles, LA 70606
Telephone: (337) 478-8888
Facsimile: (337) 478-8946

and

PERRY R. SANDERS, JR.
SANDERS LAW FIRM, LLC
400 Broad Street
Lake Charles, LA 70601
Telephone: (337) 436-0031
Facsimile: (337) 439-6230

Counsel for Respondents