No. 15-___

IN THE

Supreme Court of the United States

LAYNE ENERGY, INC., LAYNE ENERGY RESOURCES, INC. AND LAYNE ENERGY OPERATING, LLC

Petitioners,

v.

RICHARD CATRON, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A long-standing divide exists among the circuit courts of appeals as to the authority of a district court to dismiss a removed action where neither federal nor state court has jurisdiction. Applying Tenth Circuit precedent, the district court concluded it did not have power to dismiss a class action removed under CAFA where the sole named class representative admitted that he did not have standing and, thus, had no right to initiate this case because he could not have been injured by the alleged conduct and was not a member of the putative class. The district court's remand under 28 U.S.C. § 1447(c) has resulted in protracted state court litigation over this CAFA class action. Under the law of the First, Fifth, and Ninth Circuits, Defendants would have been entitled to dismissal because, in light of Plaintiff's concession, the state court indisputably lacks jurisdiction and remand is futile. Other circuits, however, side with the Tenth Circuit in requiring remand.

The question presented is:

> Whether a district court may dismiss a removed action rather than remanding it to state court under 28 U.S.C. § 1447(c) after a dispositive finding by the district court that there is no federal jurisdiction and, for the same reason, there can be no state court jurisdiction.

PARTIES TO THE PROCEEDING

The parties to this proceeding are Petitioners (Defendants below) Layne Energy, Inc., Layne Energy Resources, Inc., and Layne Energy Operating, LLC; Defendant Colt Energy, Inc.; and Respondent (Plaintiff below) Richard Catron, individually and on behalf of others similarly situated.

CORPORATE DISCLOSURE STATEMENT

Petitioner-Defendant Layne Energy, Inc. states that Layne Christensen Company is its parent company and that Layne Christensen Company owns 10% or more of Layne Energy, Inc.'s stock.

Petitioner-Defendant Layne Energy Resources, Inc. states that its parent corporation is Layne Energy, Inc., and that no publicly held corporation owns 10% or more of its stock.

Petitioner-Defendant Layne Energy Operating, LLC states that its parent corporation is Layne Energy Resources, Inc. and that no publicly held corporation owns 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Layne Energy, Inc., Layne Energy Resources, Inc., and Layne Energy Operating, LLC petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit in *Colt Energy Inc., et al. v. Catron*, No. 15-604.

OPINIONS BELOW

The Tenth Circuit's order denying rehearing is at App. 1a-2a. The Tenth Circuit's order denying permission to appeal is at App. 3a-4a. The district court's remand order is at 2015 WL 3967007 and is reprinted in the Appendix at App. 5a-9a.

JURISDICTION

The Tenth Circuit denied Petitioners' timely-filed petition for permission to appeal on August 7, 2015. The Tenth Circuit denied Petitioners' timely-filed petition for rehearing *en banc*, construed as a petition for panel rehearing, on August 24, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1). *See Hohn v. United States,* 524 U.S. 236, 242 (1998); *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 555 (2014).

RELEVANT STATUTORY PROVISIONS

All of the relevant statutory provisions are in Title 28 of the United States Code.

28 U.S.C. § 1447(c) provides, in pertinent part:

> A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final

> judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. . . .

The subsequently enacted Class Action Fairness Act of 2005 (28 U.S.C. § 1332(d)) provides in pertinent part:

> (2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—
>
> > (A) any member of a class of plaintiffs is a citizen of a State different from any defendant;
> >
> > * * *
>
> (5) Paragraphs (2) through (4) shall not apply to any class action in which—
>
> > * * *
> >
> > (B) the number of members of all proposal plaintiff classes in the aggregate is less than 100.

The Class Action Fairness Act (28 U.S.C. § 1453) also provides:

> (b) In general.—A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(c)(1) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by

any defendant without the consent of all defendants.

STATEMENT OF THE CASE

This petition presents a recurring issue of federal jurisdiction affecting the rights of litigants seeking access to the federal courts, and particularly those litigants removing class actions under the Class Action Fairness Act of 2005 ("CAFA"). Contrary to the opinions of at least the First, Fifth, and Ninth Circuits (and probably the Second Circuit), which have recognized the authority of district courts to dismiss actions that would be futile to remand to state court, the Tenth Circuit has sided with the Third, Fourth, Sixth, Seventh, and Eleventh Circuits and condoned a rule requiring remand regardless of the futility of such action, forcing defendants with statutory rights to federal forums to relitigate previously-decided, dispositive issues in state court.

In 1988, Congress amended § 1447(c) of Title 28 to require remand of a removed action at any time the district court determines it lacks subject matter jurisdiction. More recently, by enacting CAFA in 2005, Congress amended the provisions of Title 28 and "enabled defendants to remove to federal court any sizable class action involving minimal diversity of citizenship" to address perceived abuses in state court class action litigation. *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2382 (2011). CAFA "is intended to expand substantially Federal court jurisdiction over class actions. Its provisions should be read broadly, with a strong preference that interstate class actions should be heard in a Federal court if properly removed by any defendant." S. Rep. 109-14 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 41, 2005 WL 627977.

On March 25, 2013, Plaintiff filed a Class Action Petition in Kansas state court against Defendant Colt for an alleged antitrust violation of the Kansas Restraint of Trade Act ("KRTA"). Before serving that petition, Plaintiff filed an Amended Class Action Petition on April 17, 2013. App. 10a. The amended petition added Petitioners and PostRock MidContinent Production, LLC[1] as defendants, and added a common-law trespass claim. Plaintiff alleged Defendants entered into an anticompetitive agreement to allocate the mineral leasing market, and sought to represent a class of "lessors and royalty owners who leased minerals to [Defendants] from January 1, 2004 to the present." App. 13a ¶ 12. Plaintiff sought, among other things, a statutory remedy known as "full consideration," which the Kansas legislature had previously repealed, but which repeal was not effective until April 18, 2013 (the day after Plaintiff filed the Amended Class Action Petition).[2]

Defendants properly removed the action on July 3, 2013 under CAFA, 28 U.S.C. § 1332(d)(2). Following Plaintiff's motion to remand, the district court found it had jurisdiction over the case under CAFA. Defendants moved to dismiss a subsequently-filed Second Amended Class Action Complaint. On December 17,

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[1] PostRock has since been dismissed.

[2] Before repeal of the statute effective April 18, 2013, Kan. Stat. Ann. § 50-115 provided, in relevant part, that "any person injured or damaged by any such arrangement, contract, agreement, trust or combination . . . may sue for and recover in any court of competent jurisdiction in this state, of any person, the full consideration or sum paid by such person for any goods, wares, merchandise and articles included in or advanced or controlled in price by such combination, or the full amount of money borrowed." Kan. Stat. Ann. § 50-115 (2006).

2014, the district court granted Defendants' motion in part and denied it in part, dismissing as a matter of law Plaintiff's trespass claim and certain of Plaintiff's damage theories for the alleged KRTA violation, including the full consideration remedy. App. 22a-25a.

On February 2, 2015, Defendants filed a motion to dismiss on the grounds that Plaintiff leased his minerals in 2001, well before the alleged anticompetitive agreement in 2004 or 2005, and therefore was not a member of the putative class, lacked standing, and failed to state a claim. After the parties fully briefed and submitted that motion, Plaintiff "reluctantly admit[ted]" that he lacked standing and argued that the district court was thus required to remand the action back to state court under 28 U.S.C. § 1447(c). On June 30, 2015, the district court found that Plaintiff is not a member of the putative class and lacks standing to bring the claims in this case. App. 6a. Though Plaintiff's admitted lack of standing makes remand futile because the Kansas state court also necessarily lacks jurisdiction, the district court relied on Tenth Circuit precedent to remand, rather than dismiss, this action under § 1447(c). App. 7a-9a.

Defendants sought review from the Tenth Circuit pursuant to 28 U.S.C. § 1453(c), but a Tenth Circuit panel denied their petition. App. 3a-4a. Defendants then sought rehearing *en banc*, but the Tenth Circuit panel, construing the petition as one for panel rehearing only, denied that petition as well. App. 1a.

In the meantime, back in state court, Plaintiff sought to "cure" his lack of standing and foreclose future federal jurisdiction. On behalf of third parties, Plaintiff's counsel moved to intervene substitute class representatives, and Plaintiff moved to amend the

removed petition to, among other things, (i) retroactively confer standing upon himself by increasing the class period back in time from 2004 (when the alleged antitrust agreement occurred) to 2001 (when Plaintiff leased his minerals), (ii) join the proposed intervenors as class representatives, and (iii) prevent future removal to federal court by narrowing the geographical scope of the putative class to implicate the "local controversy" exception to CAFA jurisdiction. *See* 28 U.S.C. § 1332(d)(4)(A) & (B). Plaintiff's counsel is attempting to keep this case alive and out of federal court because, if the proposed intervenors or anyone who is actually a member of the putative class files a new case, the now long-since repealed full consideration remedy would not be available, and the district court has already ruled that the sought-after remedies do not apply to this case as a matter of law.

Defendants were forced to again move to dismiss based on Plaintiff's admission that he had no standing or right to initiate this case. Defendants argued that the state court must first consider their motion to dismiss as it is jurisdictional, and objected to the state court considering Plaintiff's and the proposed intervenors' motions. Over Defendants' objections, the state court scheduled oral argument on all pending motions. The state court also notified Defendants that it was not inclined to make a determination on Defendants' dispositive motion to dismiss while there remained a federal appeal over the district court's remand order. Faced with the state court's refusal to first decide the motion to dismiss, Petitioners notified the state court of their intent to continue the federal appeal with a petition to this Court, at which point the state court stayed the action pending resolution of these proceedings.

REASONS FOR GRANTING THE WRIT

Guidance from this Court is necessary to resolve the long-standing difference of opinion among the circuits as to a district court's authority to dismiss a removed action where remand would be futile. Under the status quo, the right of a removing defendant to have its case dismissed after a finding by the district court that results in neither it nor the state court having jurisdiction depends not on the merits of the case, but rather on where the case arises. The issue presented by this petition potentially affects the rights of all parties seeking a federal forum through removal, which rights are necessarily divested upon remand. More than 30,000 cases are removed to federal court each year. *See* Judicial Business 2014, http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables (Table C-8, 2010-2014). Moreover, because appellate review of a remand order is ordinarily foreclosed under § 1447(d), but permissible here due to CAFA's exception in § 1453(c)(1), this case is an excellent vehicle for providing guidance on this important question of federal jurisdiction. *See* S. Ct. R. 10(a).

I. THE CIRCUITS ARE SPLIT OVER THE EXISTENCE OF A FUTILITY EXCEPTION TO § 1447(c) PERMITTING DISMISSAL RATHER THAN REMAND.

Contrary to the Tenth Circuit's position in this case, the First, Fifth, and Ninth Circuits have all found (and the Second Circuit has expressed a willingness to so find) that district courts have the power to dismiss removed actions where the federal court lacks jurisdiction and remand would be futile. *See, e.g., Bell v. City of Kellogg*, 922 F.2d 1418, 1424-25 (9th Cir. 1990) (district court may dismiss removed action for lack of

standing where there is "absolute certainty that remand would prove futile" because Congress did not "inten[d] to ignore the interest of efficient use of judicial resources" and, unlike remand, dismissal "prevents any further waste of valuable judicial time and resources");[3] *Asarco, Inc. v. Glenara, Ltd.*, 912 F.2d 784, 787 (5th Cir. 1990) (affirming dismissal of removed action where remand would be "a futile gesture, wasteful of scarce judicial resources, an exercise in which we decline to engage");[4] *Hudson Sav. Bank v. Austin*, 479 F.3d 102, 109 n.5 (1st Cir. 2007) ("remand is mandatory unless the federal court can 'say with absolute certainty that remand would prove futile'") (quotation omitted);[5] *cf. Mignogna v. Sair*

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[3] *See also Deutsch v. Turner Corp.*, 324 F.3d 692, 718-719 & n.22 (9th Cir. 2003) (dismissing rather than remanding cases of uncertain federal jurisdiction where remand "would be futile, as the state court would simply dismiss the claims with prejudice"); *California ex rel. Service Disabled Veterans Telecom. v. MCI Telecom. Corp.*, 185 F.3d 868, 1999 WL 387034, at *1 (9th Cir. May 24, 1999) (unpublished) ("[t]his circuit recognizes the futility doctrine") (citing *Bell*, 922 F.2d at 1425).

[4] *See also Underhill v. Porter*, 35 F.3d 560, 1994 WL 499742, at *2 (5th Cir. Aug. 24, 1994) (unpublished *per curiam* opinion) (affirming dismissal of a removed action for lack of jurisdiction rather than remanding under § 1447(c) where the state court "could grant no relief to [plaintiff]" as a result of sovereign immunity); *In re Halo Wireless, Inc.*, 872 F. Supp. 2d 558, 563 (W.D. Tex. 2012) ("the Fifth Circuit embraces the futility-exception doctrine").

[5] *See also Haggert v. Hamlin*, 25 F.3d 1037, 1994 WL 251067, at *1 (1st Cir. June 10, 1994) (unpublished) (the court was "certain that the state court would promptly grant summary judgment for the appellees" and thus "remand would be unquestionably futile and is not required") (citing *Bell*, 922 F.2d at 1424-25); *cf. Mills v. Harmon Law Offices, P.C.*, 344 F.3d 42, 46 (1st Cir. 2003).

Aviation, Inc., 937 F.2d 37, 41 (2d Cir. 1991) ("remand might be improper if it would be futile, as it would be if the state court could not exercise jurisdiction over [the] claim against [defendant]").[6]

These circuits take a common sense approach to interpreting 28 U.S.C. § 1447(c), the second sentence of which states: "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." Where the state court would itself lack jurisdiction over the action, remand is a futile act and an unintended waste of scarce judicial resources. As a result, several courts implicitly or explicitly recognize a futility exception to the remand requirement. *See* 14C C. Wright, A. Miller, E. Cooper, J. Steinman, Federal Practice and Procedure § 3739, p. 841 (4th ed. 2009) (the futility exception to the remand requirement of § 1447(c) "allows a district court to dismiss an action rather than remand it to the state court when remand would be futile because the state court also would lack jurisdiction over the matter") (quotation omitted).

In *International Primate Protection League v. Admin. of Tulane Educ. Fund*, 500 U.S. 72 (1991), this Court considered a district court's dismissal of a removed action based upon futility of remand to state court. The Court noted "the literal words of § 1447(c), which, on their face, give . . . no discretion to dismiss rather than remand an action." *Id*. at 89. However, the Court *used* a futility analysis in determining whether remand was necessary under § 1447(c), concluding that, under the circumstances, the Court

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[6] The Second Circuit in *Mignogna* determined it could not conclude that a remand would be futile and, therefore, directed the district court to remand. 937 F.2d at 43.

could not find a remand would be futile. 500 U.S. at 88-89 ("Similar uncertainties in the case before us preclude a finding that a remand would be futile"). The Court's futility analysis in *International Primate* left open the possibility for federal courts to dismiss rather than remand under § 1447(c) where "anticipated barriers to suit in state court [are] sufficiently certain to render a remand futile." *Id*. at 88 (citing *Maine Ass'n of Interdependent Neighborhoods v. Comm'r, Maine Dep't of Human Servs*., 876 F.2d 1051, 1054-55 (1st Cir. 1989)).[7]

Several courts embracing a futility exception rely on the Court's analysis in *International Primate*, holding that this Court's opinion confirms or at least acknowledges the existence of the futility exception. *See, e.g., Mignogna*, 937 F.2d at 41 (the Supreme Court in *International Primate* "recognize[d] the possibility of a futility exception to the explicit remand rule of section 1447(c)");[8] *In re NSA Telecomms. Records Litig*., 483

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[7] This Court declined to address this recurring issue in *Blackwater Security Consulting, LLC v. Nordan*, 127 S.Ct. 1381, 1381 (2007) (denying petition for writ of certiorari). *See also* Petition for a Writ of Certiorari, *Blackwater Security Consulting, LLC v. Nordan*, No. 06-857, 2006 WL 3761778, at *13 (U.S. Dec. 20, 2006) (raising question of a district court's authority to dismiss removed action over which it lacks jurisdiction where state court would also lack jurisdiction). In *Blackwater*, the Fourth Circuit concluded it lacked jurisdiction to consider the appeal of the district court's remand order pursuant to 28 U.S.C. § 1447(d). 460 F.3d 576, 595 (4th Cir. 2006). Here, appellate jurisdiction exists pursuant to 28 U.S.C. § 1453(c)(1) and this case squarely presents for the Court's review the important jurisdictional question of the district court's ability to dismiss where the state court also lacks jurisdiction.

[8] *But see Barbara v. New York Stock Exch*., 99 F.3d 49, 56 n.4 (2d Cir. 1996) ("Although we have indicated that we might be willing to entertain the futility exception, . . . it should be noted

F. Supp. 2d 934, 945-46 (N.D. Cal. 2007) ("the Supreme Court confirmed the narrowness of the futility excepion" in *International Primate* and "the Ninth Circuit has reaffirmed the doctrine's vitality"); *Straus v. Straus*, 987 F. Supp. 52, 56 (D. Mass. 1997) (in *International Primate*, the Supreme Court "acknowledged an exception to remand under § 1447(c) where the futility of a remand is a certainty"). Leading treatises on federal practice similarly interpret *International Primate* as potentially authorizing district courts to dismiss rather than remand where the federal and state courts lack jurisdiction. James Wm. Moore et al., Moore's Federal Practice § 107.151[1](e)(iii)(E) (3d ed. 2015) (discussing the circuit split and stating that *International Primate* "discussed the futility doctrine but did not reject it"); Wright, Miller, Cooper & Steinman, *supra*, § 3739, p. 841.

Other circuits, however, have rejected a futility exception, including the Third, Fourth, Sixth, Seventh, and Eleventh Circuits. *See Bromwell v. Mich. Mut. Ins. Co.*, 115 F.3d 208, 213-14 (3d Cir. 1997); *Roach v. W. Va. Reg'l Jail & Corr. Fac. Auth.*, 74 F.3d 46, 49 (4th Cir. 1996); *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 496 (6th Cir. 1999); *Smith v. Wis. Dep't of Agric.*, 23 F.3d 1134, 1139, 1142 (7th Cir. 1994); *Univ. of South Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 410 (11th Cir. 1999). Nevertheless, three of these five circuits have also applied a futility exception, affirming dismissals in situations where remand would be futile because the state court would also lack jurisdiction. *See Wujick v. Dale & Dale, Inc.*, 43 F.3d 790, 794 (3d Cir. 1994) (refusing to remand to state court where the

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that the Supreme Court . . . took 'note . . . of the literal words of § 1447(c), which, on their face, give . . . no discretion to dismiss rather than to remand an action.'").

district court lacked jurisdiction because plaintiffs did not exhaust their administrative remedies; "[s]ince the state court also lacked subject matter jurisdiction for the same reason, a remand by the district court would be a vacuous act");[9] *Davis v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.* (UAW), 392 F.3d 834, 839-40 (6th Cir. 2004) (reversing district court's remand of state law claims preempted by federal law and ordering district court to dismiss the claims for lack of jurisdiction), *overruled on other grounds by Blackburn v. Oaktree Capital Mgmt.*, 511 F.3d 633 (6th Cir. 2008); *Edwards v. United States Dept. of Justice*, 43 F.3d 312, 316-17 (7th Cir. 1994) (affirming district court's dismissal of removed action where state court lacked jurisdiction to order the requested relief as a matter of federal law); *see also* Wright, Miller, Cooper & Steinman, *supra,* § 3739, pp. 842-43 & n. 80.[10]

The Tenth Circuit also falls within this group of circuits with varying decisions that incongruously both reject and yet apply a futility exception. In *Hill v. Vanderbilt Capital Advisors, LLC*, 702 F.3d 1220,

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[9] *See also Tellado v. IndyMac Mortg. Servs.*, 707 F.3d 275, 282 (3d Cir. 2013) (holding that the district court lacked jurisdiction over a removed case under the Financial Institutions Reform, Recovery, and Enforcement Act, for failure of the plaintiff to exhaust administrative remedies, and reversing district court's orders, but not remanding to state court).

[10] As evidenced by the dates of the opinions, this is a long-standing, reoccurring federal jurisdictional issue that has received inconsistent treatment for decades. Despite the inconsistent opinions *within* individual circuits (in addition to the conflicting decisions *among* the circuits), respectfully, it is time to resolve the issue and establish uniformity concerning litigants' rights to have their cases resolved and dismissed in federal forums.

1226 (10th Cir. 2012), the Tenth Circuit indicated that the "shall remand" language in § 1447(c) permits no exceptions.[11] However, in *Wolff v. United States*, 76 F. App'x 867, 870 (10th Cir. 2003), the Tenth Circuit refused to remand a removed action under § 1447(c) where the both the federal and state courts lacked jurisdiction. The Tenth Circuit applied a futility exception stating: "[w]e decline to waste further judicial resources by requiring the district court to remand Mr. Wolff's case to the Wyoming state court, which would inevitably dismiss the matter for lack of jurisdiction." *Id*. at 870 (citing *International Primate*).[12]

Here, the district court distinguished *Wolff* because the Tenth Circuit's use of the futility exception was in the context of sovereign immunity. However, nothing in the language of § 1447(c) creates or justifies such a distinction. In the sovereign immunity cases, the district court made a dispositive finding that it (and necessarily the state court) lacked jurisdiction. Similarly, the district court below made a dispositive finding that it (and necessarily the state court) lacked jurisdiction because Plaintiff admitted he had no standing and could not have been injured by the alleged conduct. Just as the lack of both federal and state jurisdiction in *Wolff* justified allowing dismissal rather than remand, so too should it have done so in this case.

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[11] *See also Jepsen v. Texaco*, 68 F.3d 483, 1995 WL 607630, at *3 (10th Oct. 16, 1995) (unpublished opinion) (district court erred by dismissing, rather than remanding, a putative class action where the plaintiff admitted that he had no valid claim against Texaco).

[12] *See also Fent v. Okla. Water Res. Bd*., 235 F.3d 553, 557 (10th Cir. 2000) (affirming dismissal of claims against federal defendants in a removed action over which the district court lacked jurisdiction and remand of claims against state defendants).

Here, Plaintiff leased his minerals *years before* the alleged anticompetitive agreement about which he complained. Therefore, he was not involved in, much less injured by, the alleged conduct, was not a member of the putative class he tried to represent, and had no standing or right to initiate this case. Plaintiff *admitted* his lack of standing in federal court as a means to try to get the case sent back to state court. Unequivocally, he does not have standing under either federal or state law. *Ternes v. Galichia*, 305 P.3d 617, 620 (Kan. 2013) (the standing inquiry under Kansas law is the same as under federal law—to establish standing, "a party must present an injury that is concrete, particularized, and actual or imminent; the injury must be fairly traceable to the opposing party's challenged action; and the injury must be redressable by a favorable ruling."). Plaintiff's admitted lack of standing deprives the Kansas court of jurisdiction. *Id*. ("Standing is a component of subject matter jurisdiction. As a jurisdictional question, standing requires a court to determine whether a party has alleged a sufficient personal stake in the outcome of the controversy to invoke jurisdiction and to justify the court exercising its remedial powers on the party's behalf."); *Lightner v. Lightner*, 266 P.3d 539, 544 (Kan. Ct. App. 2011) ("It is clear that if a party does not have standing to challenge an action or to request a particular type of relief, then there is no justiciable case or controversy and the suit must be dismissed.") (citation omitted).

Had this case been brought in the First, Fifth, or Ninth Circuits, this action would have been dismissed rather than remanded, and Defendants would not be forced to relitigate in state court a dispositive finding, which they already obtained from the district court, that Plaintiff had no standing or right to bring this

lawsuit.[13] This Court's review and direction is necessary to resolve the division among the courts of appeals regarding the question left open in *International Primate*. The Court should accept the opportunity to resolve the circuit split, acknowledge the existence of a futility exception, and confirm the authority of federal district courts to dismiss removed actions in circumstances where both the federal and state courts lack jurisdiction.

II. RECOGNIZING A DISTRICT COURT'S AUTHORITY TO DISMISS A CAFA CLASS ACTION IS NECESSARY TO HARMONIZE THE STATUTES AND FULFILL CONGRESSIONAL INTENT.

Congress enacted the Class Action Fairness Act to ensure that large class action lawsuits and mass actions are addressed in the federal courts. See 151 Cong. Rec. H723-01, 2005 WL 387992. CAFA was "intended to expand substantially Federal court jurisdiction over class actions. Its provisions should be read broadly, with a strong preference that interstate class actions should be heard in a Federal court if properly removed by any defendant." S. Rep. 109-14 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 41, 2005 WL 627977; *see also Dart Cherokee Basin Operating Co., LLC v. Owens,* 135 S. Ct 54, 554 (2014); *Smith v. Bayer Corp*. 131 S. Ct. 2368, 2382 (2011) (Congress enacted CAFA to "enable[] defendants to remove to

[13] *See also Williams v. Purdue Pharma Co*., 297 F.Supp.2d 171, 177-78 (D.D.C. 2003) (dismissing class action that had been removed to federal court because plaintiffs could not demonstrate they suffered an injury in fact).

federal court any sizable class action involving minimal diversity of citizenship.").[14]

In enacting CAFA and providing class action defendants a federal forum, Congress sought to eliminate significant abuses taking place in state court in class action litigation. Congress noted, for example, that state court class action practices were "enabl[ing] lawyers to 'game' the procedural rules and keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests." S. Rep. No. 109-14 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 5-6, 13-27 (describing abuses in class action litigation).

Under CAFA, class action litigants are entitled to have their cases decided in federal court when (1) "any member of a class of plaintiffs is a citizen of a State different from any defendant," (2) "the number of members of all proposed plaintiff classes in the aggregate is [at least] 100," and (3) "the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs." 28 U.S.C. § 1332(d)(2) & (5); *see Dart Cherokee Basin,* 135 S. Ct. at 552-53; *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1348 (2013).

Here, the district court determined that the case satisfied all statutory requirements for federal jurisdiction under CAFA at the time of removal. Subsequently, the

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[14] *See also Evans v. Walter Indus., Inc*., 449 F.3d 1159, 1164 (11th Cir. 2006) ("The language and structure of CAFA itself indicates that Congress contemplated broad federal court jurisdiction."); *Amoche v. Guar. Trust Life Ins. Co.*, 556 F.3d 41, 47-48 (1st Cir. 2009) ("CAFA also made a federal forum more accessible to removing defendants . . . and providing for interlocutory appeal of a federal district court's remand orders").

district court ruled that the primary damages sought by Plaintiff were unavailable as a matter of law. Then Petitioners learned that Plaintiff was not, in fact, a member of the class he purported to represent or injured by the alleged conduct, and moved to dismiss the case on that basis. Eventually, Plaintiff admitted he is not a member of the putative class, and the district court conclusively determined Plaintiff lacks standing. Relying on Tenth Circuit precedent, the district court remanded under § 1447(c), rather than dismissing, even though the state court also indisputably lacks jurisdiction.

The remand ruling in this case (and all other similar CAFA cases) thwarts Congressional intent to have a federal forum for CAFA class actions and deprives Defendants of their rights to have this case decided by a federal court. Recognizing the district court's authority to dismiss rather than remand in situations like this, is the only way to effectuate the unmistakable Congressional intent behind CAFA to have cases of this type—*i.e.*, at least $5 million at issue, more than 100 putative class members, and minimal diversity at the time of removal—decided in federal courts. *See* 28 U.S.C. § 1332(d)(2) & (5); *see Dart Cherokee Basin*, 135 S. Ct. at 552-53; *Standard Fire*, 133 S. Ct. at 1348. When a district court makes a dispositive finding in a CAFA class action as it did here, it should be able to dispose of the case.

Recognizing a district court's authority to dismiss where both the federal and state courts lack jurisdiction also prevents the sort of class action gamesmanship Congress sought to eliminate in enacting CAFA. Here, for example, after Plaitiff conceded to the federal court his lack of standing in order to secure a remand back to state court, Plaintiff's counsel immediately

sought to cure the lack of standing by moving to amend the removed petition to confer standing upon Plaintiff retroactively and to substitute class representatives. Plaintiff's counsel also immediately sought to foreclose federal jurisdiction by proposing a narrowed class definition to implicate CAFA's "local controversy" exception. Consequently, under the Third, Fourth, Sixth, Seventh, Eleventh, and now Tenth Circuits' approach, the Defendants' "reward" for establishing in federal court that Plaintiff had no right to initiate the CAFA class action is that Defendants must now face the threat of protracted state-court litigation over the type of action Congress has declared belongs in federal court. This is precisely the sort of gamesmanship Congress sought to preclude by providing class action defendants a federal forum under CAFA.

Moreover, where both state and federal courts lack jurisdiction over the action, remand does not advance any state interest. *See Bell*, 922 F.2d at 1425 ("no comity concerns are involved" where the federal court is certain the party lacks standing). This Court should avoid interpreting §1447(c) in a manner that does not advance any state interest, but instead wastes resources and negates litigants' rights to have their CAFA class actions resolved in a federal forum.

Instead, the Court should adopt an interpretation of § 1447(c) that harmonizes its text with other provisions in Title 28. Recognizing a futility exception under § 1447(c) avoids unnecessary conflict between that section and Congress's jurisdictional grant for CAFA class actions in § 1332(d). *See, e.g., Hohn v. United States*, 524 U.S. 236, 245 (1998) (adopting construction of 28 U.S.C. § 2253 that recognized the jurisdiction of a court of appeals, as a court, to grant certificates of appealability, which maintained consistency among

§ 2253, the Federal Rules of Civil Procedure and the uniform practice of the courts of appeals); *Smith v. United States*, 507 U.S. 197, 201-03 (1993) (rejecting interpretation of 28 U.S.C. § 2680(k) contradicted by other provisions of the Federal Tort Claims Act); *Examining Bd. of Eng'r, Architects & Surveyors v. Flores De Otero*, 426 U.S. 572, 583-84 (1976) (adopting interpretation of 28 U.S.C. § 1343(3) that complements, rather than conflicts with, 42 U.S.C. § 1983).

An interpretation of § 1447(c) that forbids any exception to remand should be rejected because it would thwart Congressional intent and conflict with CAFA and its later-enacted jurisdictional provisions of Title 28. *See, e.g., Osborn v. Haley*, 549 U.S. 225, 243-44 (2007) (reading Westfall Act as creating an implicit exception to 28 U.S.C. § 1447(d) where application of § 1447(d) created conflict with a provision of the "later enacted" and more specific Westfall Act); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007) (where statutory provisions are inconsistent, "normally the specific governs the general"); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992).

The Court has already recognized exceptions to 28 U.S.C. § 1447 to effectuate Congressional intent. For example, § 1447(d), which generally prohibits a court of appeals from reviewing a remand order, is subject to several judicially-crafted exceptions, including: (1) § 1447(d) does not prohibit review unless the order of remand is based on grounds specified in § 1447(c); (2) § 1447(d) does not prohibit review of a collateral decision that is severable from the remand order; (3) § 1447(d) does not prohibit review of a remand order if the order exceeds the scope of the district court's authority; and (4) § 1447(d) does not bar review of a remand order in a Westfall Act case removed under 28

U.S.C. § 2679(d)(2). *See Osborn*, 549 U.S. at 243-44; *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711-12 (1996); *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 351 (1976); *Waco v. U.S. Fid. & Guar. Co.*, 293 U.S. 140, 143 (1934).

Moreover, nothing in the legislative history of § 1447(c) indicates that Congress intended the second sentence of § 1447(c) to apply to a standing defect where the case satisfies the statutory requirements for federal jurisdiction under a provision of Title 28 (*e.g.*, diversity, federal question, or CAFA jurisdiction), but the plaintiff has not suffered any injury as a result of the alleged acts of the defendant(s). The example provided in the commentary to the statute for remand under §1447(c) is a situation where the jurisdictional defect arises from a failure to meet the statutory requirements for diversity under 28 U.S.C. § 1332.[15] Standing, on the other hand, is a judicial construct, not a statutory requirement set forth in Title 28. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992)) (describing the history of the standing doctrine). Thus, there is no basis to conclude that Congress intended the second sentence of § 1447(c) to apply where the statutory requirements for federal jurisdiction are met but the plaintiff is not the appropriate party to bring the action.

In short, the remand requirement of § 1447(c) was intended to apply when there is a case or controversy between the parties that properly belongs in state, rather than federal, court because, for example, the

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[15] The example provided is "where a case was removed on the basis of diversity of citizenship and it turns out that complete diversity is lacking." 28 U.S.C. § 1447 (West Supp. 1991), Cmt. on 1988 Revision of Section 1447 (Siegel, David D.).

dispute is lacking one or more of the requirements for diversity, federal question, or CAFA jurisdiction, but the parties nonetheless have standing to assert the claims. Section 1447(c) was not intended to and does not properly apply to situations where the plaintiff's allegations present a case or controversy of the type Congress has identified as properly being adjudicated in federal court (like here, where all the requirements of jurisdiction under CAFA were satisfied), but there is no valid dispute in the first place because the plaintiff had no standing or right to initiate the action.

CONCLUSION

This Court should grant the petition for writ of certiorari, resolve the circuit split, and provide the courts of appeals and district courts clear guidance as to their authority to dismiss class actions properly removed under CAFA but which were brought by named plaintiffs without standing where remand would be futile because the state courts would also lack jurisdiction.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed 08/24/2015]

No. 15-604
(D.C. No. 5:13-CV-04073-CM-KGG)
(D. Kan.)

COLT ENERGY, INC., *et al.,*

Petitioners,

v.

RICHARD CATRON, individually, and
on behalf of those similarly situated,

Respondent.

ORDER

Before KELLY, MATHESON, and BACHARACH, *Circuit Judges*.

This matter is before the court on the petitioners' *Petition for Rehearing En Banc on Defendants' Petition for Permission to Appeal*. At the outset, we note that pursuant to 10th Circuit Rule 35.7, the court does not generally consider *en banc* orders regarding "leave to appeal from a nonfinal order." While we may in our discretion suspend this rule, we decline to do so here. *See* 10th Cir. R. 2.1. As a result, we have treated the petitioners' submission as a request for panel rehearing only. *See id.* at R. 35.7. Upon consideration, the request for panel rehearing is denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
Elisabeth A. Shumaker, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed: 08/07/2015]

No. 15-604
(D.C. No. 5:13-CV-04073-CM-KGG)
(D. Kan.)

COLT ENERGY, INC.; LAYNE ENERGY, INC.; LAYNE ENERGY OPERATING, LLC; LAYNE ENERGY RESOURCES, INC.,

Petitioners,

v.

RICHARD CATRON, individually, and on behalf of those similarly situated,

Respondent.

ORDER

Before KELLY, MATHESON, and BACHARACH, *Circuit Judges*.

This matter is before the court on defendants' Petition for Permission to Appeal. *See* Fed. R. App. P. 5; 28 U.S.C. § 1453(c)(1). The plaintiff filed a response on July 27, 2015. We also have before us the defendants' Motion for Leave to File Proposed Reply in Support of Petition for Permission to Appeal. The motion for leave to file the reply is GRANTED. Upon careful consideration of all the materials filed in this

matter, including the reply, the petition for permission is DENIED.

Entered for the Court

/s/ Elisabeth A. Shumaker
Elisabeth A. Shumaker, Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

[Filed 06/30/15]

Case No. 13-4073-CM

RICHARD CATRON, individually, and
on behalf of those similarly situated,

Plaintiff,

v.

COLT ENERGY, INC., *et al.*,

Defendants.

MEMORANDUM AND ORDER

Plaintiff Richard Catron filed this case in the District Court of Wilson County, Kansas, individually and on behalf of those similarly situated. Plaintiff claims that defendants Colt Energy, Inc.; Layne Energy Resources, Inc.; and Layne Energy Operating, LLC violated law prohibiting restraint of trade in leasing minerals in Southeast Kansas. Defendants removed the case to federal court, basing removal on the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d)(2). Upon a motion to dismiss filed by defendants, this court rejected some of plaintiff's damages theories and dismissed one of plaintiff's claims. The case is now before the court on three interrelated motions: Defendants' Motion to Dismiss (Doc. 74); Motion to Intervene as Named Plaintiffs by Steven B. Friess Irrevocable Trust and Steven B.

Friess Living Trust (Doc. 84); and Plaintiff's Motion to Join Steven B. Friess Irrevocable Trust and Steven B. Friess Living Trust as Named Plaintiffs and for Leave to File "Third Amended Complaint – Class Action" (Doc. 87). Because defendant's motion to dismiss calls into question this court's jurisdiction, the court must address that motion first.

Defendants claim that the named plaintiff—Richard Catron—lacks standing to pursue the remaining cause of action. The court agrees. The complaint alleges that defendants entered into an agreement to divide the market for leases in 2004 or 2005. But plaintiff Catron entered into his contract on July 3, 2001, taking him out of the putative class. He lacks standing to bring this action, which deprives the court of subject matter jurisdiction. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541–42 (1986) (considering standing a question of subject matter jurisdiction). The court must therefore decide whether to remand the action to state court or dismiss it.[1]

The statute governing procedures after removal addresses remands based on lack of subject matter jurisdiction: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C.

[1] Plaintiff raised the argument that the case should be remanded (rather than dismissed) in his reply brief to his motions to intervene and join—not in response to defendants' motion to dismiss. In this same reply brief, plaintiff conceded that he lacks standing, although this was not his position in plaintiff's response to defendants' motion to dismiss. The court does not condone this method of "cross-briefing," but believes that under the circumstances of this case, any prejudice to defendants has been effectively cured. The court allowed defendants to file a surreply to the motions to intervene and join in order to have full briefing on the remand/dismissal question.

§ 1447(c). This command is mandatory. *See Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 89 (1991) ("[T]he literal words of § 1447(c) . . . on their face, give no discretion to dismiss rather than remand an action. The statute declares that, where subject matter jurisdiction is lacking, the removed case shall be remanded." (internal quotation marks, citation, and ellipses omitted)); *Hill v. Vanderbilt Capital Advisors, LLC*, 702 F.3d 1220, 1226 (10th Cir. 2012) ("The plain language of § 1447(c) gives no discretion to dismiss rather than remand an action removed from state court over which the court lacks subject-matter jurisdiction." (citation and internal quotation marks omitted)).

Defendants ask the court to apply a futility exception to this mandatory rule. In support, defendants cite several cases from other circuits and other districts. *See, e.g., Bell v. City of Kellogg*, 922 F.2d 1418, 1425 (9th Cir. 1990) ("Because we are certain that a remand to state court would be futile . . . [t]he district court correctly denied the motion to remand and dismissed the state claims."); *Mignogna v. Sair Aviation, Inc.*, 937 F.2d 37, 41 (2d Cir. 1991) ("[R]emand might be improper if it would be futile, as it would be if the state court could not exercise jurisdiction over [the] claim against [defendant]." (internal citation omitted)); *Asarco, Inc. v. Glenara, Ltd.*, 912 F.2d 784, 787 (5th Cir. 1990) ("A remand thus would be a futile gesture, wasteful of scarce judicial resources, an exercise in which we decline to engage"). The Tenth Circuit also essentially applied the futility exception in *Wolff v. United States*, 76 F. App'x 867, 870 (10th Cir. 2003), determining that dismissal—not remand—was appropriate. *Wolff* did not specifically refer to its application of the concept as the "futility exception," but the court used the same

rationale. It stated: "We decline to waste further judicial resources by requiring the district court to remand Mr. Wolff's case to the Wyoming state court, which would inevitably dismiss the matter for lack of jurisdiction." *Id.* at 870. This decision, however, was based on the sovereign immunity of the United States to suit in state court. *Id.* at 869–70.

The rationale in these cases has some appeal. But it also contradicts the plain language of § 1447(c) and the Tenth Circuit's language in *Hill v. Vanderbilt Capital Advisors, LLC*. The court understands that *Hill*'s language is dicta, but finds it persuasive and representative of the better approach. It is also supported by language in two other Tenth Circuit cases, *Fent v. Oklahoma Water Resources Board* and *Jepsen v. Texaco*. *Fent* noted that "the courts generally recognize that 'there is no implicit futility exception hidden behind the plain language of § 1447(c).'" 235 F.3d 553, 557 (10th Cir. 2000) (quoting *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 496 (6th Cir. 1999)). And *Jepsen* (an unpublished case) held that "[l]ack of standing divests the court of subject matter jurisdiction, and therefore, upon determining that Mr. Jepsen lacked standing to bring suit, the court should have remanded the matter to state court pursuant to 1447(c)." No. 94-6429, 1995 WL 607630, at *2 (10th Cir. Oct. 16, 1995). Finally, as noted above, the Tenth Circuit case that affirmed an order of dismissal rather than remand—*Wolff*—involved sovereign immunity, which distinguishes it from the case now before the court.

This court recognizes the appeal of preserving judicial resources. But the court also believes that the plain language of § 1447(c) controls. Because plaintiff Catron lacks standing, the court lacks subject matter

jurisdiction over his claims. The court therefore must remand the case to state court.

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss (Doc. 74) is denied.

IT IS FURTHER ORDERED that the case is remanded to the District Court of Wilson County, Kansas.

IT IS FURTHER ORDERED that the court makes no ruling on the other pending motions (Docs. 84 and 87).

Dated this 29th day of June, 2014, at Kansas City, Kansas.

/s/ Carlos Murguia
Carlos Murguia
United States District Judge

APPENDIX D

IN THE DISTRICT COURT
OF WILSON COUNTY, KANSAS

[Filed 04/17/13]

Case No. 2013-CV-13

RICHARD CATRON, individually, and
on behalf of those similarly situated,

Plaintiffs,

v.

COLT ENERGY, INC., LAYNE ENERGY, INC.; LAYNE ENERGY RESOURCES, INC.; LAYNE ENERGY OPERATING, LLC; POSTROCK MIDCONTINENT PRODUCTION, LLC, successor by merger to QUEST CHEROKEE, LLC
(and their parents and affiliates)

Defendants.

(Pursuant to Chapter 60)

AMENDED CLASS ACTION PETITION

Plaintiff brings this civil action for damages on his own behalf and on behalf of all Kansas citizen indirect purchasers (the "Class") against Colt Energy, Inc. ("Colt"), Layne Energy, Inc, Layne Energy Resources, Inc., Layne Energy Operating, LLC (collectively "Layne"), and PostRock Midcontinent Production LLC, successor by merger to Quest Cherokee, LLC ("Quest") for restraint of trade in leasing minerals in Southeast Kansas and alleges as follows:

INTRODUCTION

1. Plaintiff Richard Catron brings this class action pursuant to Kansas' Unfair Trade and Consumer Protection Laws, K.S.A. 50-112 *et seq*., (Kansas Restraint of Trade Act, or KRTA) for antitrust injuries against Defendants.

2. This case arises out of Colt, Layne, and Quest's agreement in Southeast Kansas to restrain oil and gas leasing of minerals by allocating markets instead of competing which caused damages to Plaintiff and the Class.

JURISDICTION AND VENUE

3. This Court has jurisdiction because Plaintiff asserts civil claims pursuant to the KRTA.

4. Venue in Wilson County is appropriate because, among other reasons, a substantial part of the restraint of trade and commerce occurred in said County.

5. Plaintiff, and the putative Class, assert no federal cause of action, and expressly disclaim any federal claim. Only state law claims under Kansas law are asserted.

PARTIES

Plaintiff

6. Plaintiff Richard Catron is a Kansas citizen, has directly leased to Colt, and was injured by the antitrust acts alleged in this Petition.

Defendants

7. Defendant Colt Energy, Inc, is a Kansas corporation with its principal place of business in Kansas. Colt is authorized to do business in Kansas

and is doing business in Kansas, and can be served through its resident agent, James G. Flaherty, 216 S Hickory St PO Box 17, Ottawa, KS 66067.

8. Defendant PostRock MidContinent Production, LLC, a wholly owned subsidiary of PostRock Energy Services Corporation, is a Delaware limited liability company with its principal place of business in Oklahoma and by reorganization and merger is the legal successor in interest to Quest Cherokee, LLC, which was a Delaware limited liability company with its principal place of business in Oklahoma and, duly qualified to do business in the State of Kansas (hereafter referred to as "Quest"). Quest can be served by serving its registered agent at The Corporation Company, Inc,, 112 SW 7th Street, Suite 3C, Topeka, KS 66603.

9. Defendants Layne Energy, Inc., Layne Energy Resources, Inc., and Layne Energy Operating, LLC (collectively, "Layne") are believed to be Delaware entities that can be served by serving its registered agent at The Corporation Company, Inc., 112 SW 7th Street, Suite 3C, Topeka, KS 66603.

BACKGROUND

8. In the early 2000s, Defendants began leasing thousands of mineral acres in Southeast Kansas, producing oil and gas, paying royalties, and keeping approximately 7/8ths of the production for itself and other working interest owners.

9. At the same time, other lessees were leasing minerals in and around the same area, but instead of competing for the leases, Defendants, who were the largest lessees in the area, allocated the mineral leasing market so they did not compete with each other.

10. As a direct and proximate result of the unlawful conduct of Defendants, Plaintiff and other members of the Class have been injured in that they leased minerals in an uncompetitive market.

CLASS ACTION ALLEGATIONS

11. This action is brought by Plaintiff individually and on behalf of all other similarly situated persons, and pursuant to K.S.A. 60-223, as a representative of a class (the "Class"). In particular, Plaintiff asserts that a class action is appropriate under K.S.A. 60-223.

12. The Class is defined as:

> All lessors and royalty owners who leased minerals to Colt, Layne, or Quest from January 1, 2004 to the present.
>
> Excluded from the class are employees of Colt, Layne, and Quest.

13. Plaintiff reserves the right to expand, modify or alter the class definition, including the time period, in response to information learned during discovery.

14. Plaintiff does not presently possess information identifying the exact size of the Class. Based upon the nature of the trade and commerce involved, Plaintiff believes the total number of class members is sufficiently numerous such that joinder of all Class members would be impracticable.

15. Numerous questions of law or fact arise from Defendants' anticompetitive conduct which are common to the class. Among the questions of law or fact common to the class are:

a. whether Defendants (or any of them) engaged in the market allocation for leasing minerals in Kansas;

b. if so, the duration of the market allocation;

c. whether the conduct of Defendants (or any of them) caused antitrust injury to Plaintiff and the Class; and,

d. if so, the appropriate class-wide measure of damages.

16. These common questions of law or fact are common to the Class, and predominate over any other questions affecting only individual class members.

17. Plaintiff in this proposed class action asserts claims typical of those of the individual members of the proposed Class. Plaintiff has no interests antagonistic to those of the Class, and Defendants have no defenses unique to Plaintiff.

18. Plaintiff will fairly and adequately represent and protect the interests of the members of the Class and has no interests antagonistic to the Class. Plaintiff has suffered the same harm as the members of the Class and has, and will continue to, zealously pursue claims against Defendants. Plaintiff has retained counsel competent and experienced in the prosecution of complex class actions, and in particular, counsel has broad experience in complex antitrust litigation similar in size, scope, and complexity to the present case.

19. A class action is superior to the alternatives, if any, for the fair and efficient adjudication of this controversy. Even if the Class members themselves could afford such individual litigation, the judicial system could not. Individualized litigation presents a potential for inconsistent or contradictory judgments. Individualized litigation increases the delay and expense to all parties and the judicial system due to

the complex legal and factual issues presented by this case. By contrast, the class action device presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

COUNT I
(Violation of Antitrust Law)

20. Plaintiff hereby adopts and incorporates by this reference each of the preceding paragraphs as if fully set forth herein.

21. During the Class Period, Defendants restrained trade in mineral leasing and thereby artificially decreased the overall prices that would have been paid to Plaintiff and the Class by a competitive lessee.

22. This restraint of trade for Kansas mineral leases in Southeast Kansas under the KRTA renders the entire leasing transaction "void" for leases taken during the Class Period, such that Defendants were trespassers to the minerals thereafter produced by Defendants.

23. As a result, Plaintiff and other members of the Class have sustained damages in an amount of all revenues taken from the Class Leases unless previously released, such as the release of royalty claims against Quest in *Hugo Spieker, et al. v. PostRock MidContinent Production, LLC, successor by merger to Quest Cherokee, LLC,* Case No. 07-CV-1225-EFM (D. Kan.) (Settlement Agreement signed Nov. 25, 2011 and approved by the Court), and royalty claims against Layne in *Friess v. Layne*, *et al.*, Case No. 11-CV-57 (Wilson County District Court, Kansas) where a Settlement Agreement has been agreed to in principle (but only if it is finally approved by the court).

24. If Defendants are found to be good faith trespassers, they will be entitled to recover reasonable costs for the revenue generated from Class Leases, but otherwise they will not recover such reasonable expenses,

25. The entire revenue derived from the Class Leases should be returned to the Class, minus only (a) royalties paid including settlement amounts in Layne and Quest class action lawsuits; and, (b) reasonable costs for generating the revenue but only if Defendants are found to be good faith trespassers

PRAYER

WHEREFORE, Plaintiff prays for judgment against Defendants, and respectfully requests the Court:

1. Certify this action to proceed as a class action pursuant to K.S.A. 60-223, appoint Plaintiff as Class Representative, and Plaintiff's counsel as Class Counsel, and direct that reasonable notice be given to members of the Class;
2. Adjudge and decree that Defendants engaged in an unlawful conduct in restraint of trade or commerce, in violation of K.S.A. 50-112 *et seq*. causing antitrust injuries, and that the Court award Plaintiff and the Class: (1) all revenues taken from the void leases, without reduction for reasonable expenses; (ii) treble such damages under the KRTA; (iii) prejudgment and post-judgment interest; and, (iv) such other relief as allowed by law or equity,
3. Grant such other and further relief as the Court deems just and proper.

JURY DEMAND

Plaintiff demands a trial by jury.

ATTOURNEYS' LIEN CLAIMED

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

[Filed 12/17/14]

———

Case No. 13-4073-CM

———

RICHARD CATRON, individually, and
on behalf of those similarly situated,

Plaintiff,

v.

COLT ENERGY, INC., *et al.*,

Defendants.

———

MEMORANDUM AND ORDER

Plaintiff Richard Catron filed this case in the District Court of Wilson County, Kansas, individually and on behalf of those similarly situated. Plaintiff claims that defendants Colt Energy, Inc.; Layne Energy Resources, Inc.; and Layne Energy Operating, LLC violated law prohibiting restraint of trade in leasing minerals in Southeast Kansas. Specifically, plaintiff claims that defendants allocated markets instead of competing. Defendants removed the case to federal court, basing removal on the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d)(2). The case is now before the court on Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint (Doc. 50).

Defendants argue that they are entitled to dismissal of this case (or some claims) for five reasons: (1) plaintiff fails to show a plausible violation of the Kansas Restraint of Trade Act ("KRTA") under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); (2) plaintiff is not entitled to the damages he seeks; (3) plaintiff is not entitled to any relief for his trespass claim; (4) defendants are exempt from liability because their business is under the supervision and control of the Kansas Corporation Commission ("KCC"); and (5) to the extent that plaintiff may pursue any claims, those claims are limited by the statute of limitations. The court addresses each of these arguments in turn.

I. Standard of Review

The court will grant a 12(b)(6) motion to dismiss only when the factual allegations fail to "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Although the factual allegations need not be detailed, the claims must set forth entitlement to relief "through more than labels, conclusions and a formulaic recitation of the elements of a cause of action." *In re Motor Fuel Temperature Sales Practices Litig.*, 534 F. Supp. 2d 1214, 1216 (D. Kan. 2008). The allegations must contain facts sufficient to state a claim that is plausible, rather than merely conceivable. *Id.*

"All well-pleaded facts, as distinguished from conclusory allegations, must be taken as true." *Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir. 1984); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The court construes any reasonable inferences from these facts in favor of the plaintiff. *Tal v. Hogan*, 453 F.3d 1244, 1252 (10th Cir. 2006). In reviewing the sufficiency of a complaint, the court determines whether the plaintiff is entitled to offer evidence to

support his claims—not whether the plaintiff will ultimately prevail. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds by Davis v. Scherer*, 468 U.S. 183 (1984).

II. Factual Allegations

The following facts are taken from plaintiff's Second Amended Complaint and viewed in the light most favorable to plaintiff.

Defendants began leasing mineral acres in southeast Kansas in the early- or mid-2000s. They produced oil and gas and paid royalties to land owners. But instead of competing for leases, defendants allocated the mineral leasing market. Around 2004 or 2005, defendants entered into an express agreement (an Area of Mutual Interest agreement, or "AMI agreement") to divide the southeast Kansas markets geographically. Each defendant would seek leases in a specific area, and they agreed that they would not compete for leases in the other's area. Further, each defendant transferred wells to each other that were located in the other's area.

Plaintiff alleges that defendants entered into the AMI agreement for these purposes: "to create or carry out restrictions on trade or commerce, or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by Kansas law." (Doc. 47 at 5.) This damaged plaintiff and other putative class members because they leased minerals in an uncompetitive market.

According to plaintiff, defendants' restraint of trade renders all leasing transactions void. Defendants therefore had no right to take minerals and were trespassers. Plaintiff seeks damages for all revenue

taken from the leases. Plaintiff also seeks damages for trespass.

Finally, plaintiff alleges that the statute of limitations is tolled because defendants concealed their AMI agreement and the arrangement not to compete. Plaintiff and other putative class members could not have known of their cause of action.

III. Discussion

A. Plausibility of Claims

Defendants first contend that the court must dismiss plaintiff's claims because they do not meet the *Twombly* standard for antitrust pleading. Defendants argue that plaintiff offers only conclusory allegations and antitrust labels and buzzwords. Specifically, plaintiff fails to offer facts that plausibly suggest the "'purpose' of any alleged restraint or that [d]efendants' alleged 'market allocation' was 'designed to' or 'tend[ed] to' achieve an anticompetitive effect." (Doc. 51 at 7.) Because plaintiff also alleges that other lessees were leasing minerals in the same area, defendants maintain, plaintiff's own allegations contradict a claim of anticompetitive effect.

Plaintiff alleges liability under two Kansas statutes: Kan. Stat. Ann. §§ 50-101 and 50-112.[1] Under § 50-101, plaintiff must show "a combination of capital, skill or acts" for the purpose of "creat[ing] or carry[ing] out restrictions in trade or commerce" or "carry[ing] out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state." And Kan. Stat. Ann. § 50-112 declares "against

[1] Note that § 50-112 has been amended, effective April 18, 2013. Other statutes related to this case were amended with the same effective date.

public policy, unlawful and void" any agreements "made with a view or which tend to prevent full and free competition" or which are "designed or which tend to advance, reduce or control the price or the cost to the producer or the consumer of any such products or articles . . . ."

Plaintiff's allegations are sufficient to survive defendants' motion to dismiss. From plaintiff's complaint, the court can make reasonable inferences that would support a plausible claim. Put simply, plaintiff alleges that defendants agreed to split up the land in southeast Kansas so they would not have to compete with each other for mineral leases. The impact was that plaintiff (and others) received less favorable lease terms than he could have received in a competitive market. And although there were other lessees in the area, defendants were the largest lessees. Plaintiffs allege that defendants' agreement not to compete prevented or tended to prevent full and fair competition.

Plaintiff's allegation that the area contained other lessees does not necessarily contradict his allegation that defendants' actions were intended to restrain trade and tended to result in an anticompetitive effect. Whether this "admission" is fatal to plaintiff's claim is an issue for a factfinder—not for the court at the motion-to-dismiss stage. The court determines that plaintiff has sufficiently pleaded claims under the KRTA.

B. Damages

Next, defendants argue that plaintiff is not entitled to the damages he seeks. Defendants' specific arguments are: (1) plaintiff cannot get a return of all revenue because the leases themselves are not void

under Kan. Stat. Ann. § 50-112; and (2) according to the plain text of Kan. Stat. Ann. § 50-115, plaintiff cannot get "full consideration" damages.

1. Void Leases

As noted above, the agreement that plaintiff claims violates § 50-112 is the AMI agreement. According to plaintiff, this agreement is unlawful and void. By extension, then, plaintiff claims that because the AMI agreement is unlawful, the leases entered with putative class members must be voided. But plaintiff expands the reach of the statute too far. Plaintiff makes no allegations that the leases themselves contain anticompetitive provisions. Even if the AMI agreement is ultimately held unlawful, § 50-112 does not also require that the leases entered with plaintiff and other parties be voided.

The court finds the rationale in *In re Universal Services Fund Telephone Billing Practices Litigation*, No. 02-MD-1468, 2003 WL 21254765 (D. Kan. May 27, 2003), analogous and persuasive. In that case, Judge Lungstrum held that "a contract that is legal on its face and does not call for unlawful conduct in its performance is not voidable or unenforceable simply because it resulted from an antitrust conspiracy." *Id*. at *3 (citing *Kelly v. Kosuga*, 358 U.S. 526, 520–21 (1982)). The court has reviewed the New Mexico case cited by plaintiff—*United Nuclear Corp. v. General Atomic Co.*, 629 P.2d 231 (N.M. 1980)—but finds the case both distinguishable and unpersuasive.

In contrast to the instant case, the contracts in *United Nuclear* were executory. 629 P.2d at 277. The plaintiff in *United Nuclear* was not seeking to avoid its obligation to deliver a product, yet still get paid for it. *Id.* The New Mexico court therefore found it

significant that the potential of unjust enrichment was not involved. *Id.* This same justification does not apply in the instant case.

This court also disagrees that the New Mexico court's reading of its own pre-1979 statute should apply to the Kansas statute involved here. Plaintiff has cited no Kansas case that looks to New Mexico courts for guidance. And applying the logic in *United Nuclear* would conflict with the rationale in *In re Universal Services Fund Telephone Billing Practices Litigation*. It could result in voiding a contract that is not on its face illegal—a result that Kansas law does not contemplate. Even if the court were to assume that the AMI agreement violated antitrust law, such violation does not void the lease between defendants and plaintiff.

2. Full Consideration Damages

As related to plaintiff's request for full consideration damages, Kan. Stat. Ann. § 50-115 provides:

> Except as provided in K.S.A. 12-205, and amendments thereto, any person injured or damaged by any such arrangement, contract, agreement, trust or combination, described in K.S.A. 50-112 and 50-113, and amendments thereto, may sue for and recover in any court of competent jurisdiction in this state, of any person, the full consideration or sum paid by such person for any goods, wares, merchandise and articles included in or advanced or controlled in price by such combination, or the full amount of money borrowed.

The plain language of this statute indicates that the full consideration damages remedy belongs to *buyers*. The statute refers to "the full consideration or sum

paid" by a person for "goods, wares, merchandise and articles." Kan. Stat. Ann. § 50-115. Plaintiff, in contrast, was a lessor. He did not make payments to defendants; rather, they paid him for the use of his land. (*See* Doc. 47 at 8 (alleging that defendants' actions "did in fact restrain trade in mineral leasing and thereby artificially decreased the overall prices that would have been paid to [p]laintiff and the [c]lass by a competitive lessee.").) The statute authorizing full consideration damages does not apply to this situation.

3. Other Damage Requests

Defendants only move for dismissal of plaintiff's claims for damages on the two grounds identified above. According to plaintiff's response brief, plaintiff also seeks: (1) general antitrust damages under Kan. Stat. Ann. § 50-108; (2) general antitrust damages under Kan. Stat. Ann. § 50-161(b); and (3) trespass damages. The first two remedy theories remain valid.[2] The third is addressed below.

C. Trespass Claim

Plaintiff's claim for trespass is founded in the theory that the leases are void. Because the court has found that the leases are not voided by any anticompetitive conduct, there is no basis for plaintiff's trespass claim. The court dismisses Count II.

D. KCC Exemption

Defendants next contend that they are exempt from the KRTA's antitrust provisions. Kan. Stat. Ann. § 50-148 provides: "The provisions of this act shall not

[2] These two theories are mentioned in the complaint only by statute. (Doc. 47 at 9.) But plaintiff more explicitly identifies the theories in his response brief. (Doc. 57 at 6 n.8.)

apply to persons whose business is under the supervision and control of the state corporation commission . . . .” Further, Kan. Stat. Ann. § 74- 623(a) provides that “[t]he state corporation commission shall have the exclusive jurisdiction and authority to regulate oil and gas activities.” And defendants provide an extensive list of oil and gas operation activities that are regulated by the KCC. (*See* Doc. 51 at 15–16.)

While it is true that the KCC regulates a host of oil and gas activities, none of the activities listed include acquiring mineral leases. “The Commission has a limited jurisdiction. It possesses no powers not given it by the statute.” *Bennett v. Corp. Comm’n*, 142 P.2d 810, 815 (1943). Defendants have not shown that the KCC has the statutory authority to supervise or control the leasing of minerals. They have not met their burden for dismissal on this basis.

E. Statute of Limitations

Finally, defendants contend that plaintiff’s claims accruing before March 25, 2010, are barred by the three-year statute of limitations. *See* Kan. Stat. Ann. § 60-512(2). Plaintiff alleges that defendants concealed their conspiracy and the terms of the AMI agreement. Because of these actions, plaintiff contends, all claims are timely under alternative theories of fraudulent concealment, equitable estoppel, the discovery rule, or another similar doctrine.

Specifically, plaintiff makes the following allegations suggesting that the statute of limitations should be tolled:

> Defendants concealed their AMI and the arrangement not to compete in the leasing of minerals in Southeast Kansas. Indeed, on

> information and belief, the AMI will recite on its face that it is confidential. In any event, Defendants kept their AMI, combination, trust, conspiracy, agreement and/or arrangement secret. In leasing, Defendants uniformly purported to act, and represented that they were acting, unilaterally and independently; and Defendants did not disclose that they had actually agreed with competitors to divide the market geographically in order to avoid the competition that should have existed and to reduce the overall consideration that would be required to obtain leases. Indeed, the leases themselves are entered into or acquired by individual Defendants, not by the Defendants as a group; and, the leases make no reference to the AMI or the arrangement to geographic[ally] allocate mineral leasing in Southeast Kansas. Given the self-concealing nature of Defendants' wrongful conspiracy, arrangement, agreement, trust, and/or combination, Class members did not know, and could not have reasonably known, of the illegal agreement, trust, combination, arrangement or conspiracy that had the effect of reducing the amount that would otherwise have been received had there been a competitive market for leases instead of an illegal restraint.

(Doc. 47 at 11.)

Defendants complain that these allegations lack the required specificity that a claim of fraudulent concealment must have. "To toll the statute of limitations based on fraudulent concealment,

plaintiff[] must show defendants' use of fraudulent means, successful concealment from plaintiff[], and the fact that plaintiff[] did not know or could not have known by due diligence of their cause of action." *In Re: Urethane Antitrust Litig.*, 663 F. Supp. 2d 1067, 1078 (D. Kan. 2009) (citing *Ballen v. Prud. Bache Sec.*, 23 F.3d 335, 337 (10th Cir. 1994)). As defendants point out, fraudulent concealment requires a higher standard of pleading specificity. A plaintiff must plead it with particularity under Fed. R. Civ. P. 9(b). *Id.*

Although the court would prefer to see more factual detail supporting a claim of fraudulent concealment, this does not mean that the statute of limitations automatically bars claims older than three years. Plaintiff has pleaded other theories of tolling for which a heightened pleading standard is not required. *See Arkalon Grazing Ass'n v. Chesapeake Operating, Inc.*, No. 09-1394-EFM, 2010 WL 4622441, at *2 (D. Kan. Nov. 4, 2010). Based on these allegations, the court cannot find as a matter of law that claims accruing more than three years before the filing of this case are barred.

III. Conclusion

The parties made a number of arguments in their briefs that are either addressed only briefly above, or are not mentioned at all. This does not indicate that the court overlooked the argument. The court fully considered the content of all briefs, even if not discussed within this Memorandum and Order.

For the above-stated reasons, the court dismisses plaintiff's trespass claim. Plaintiff may not seek damages on his "voided lease" theory or full consideration damages, but he may seek damages for violations of the KRTA under Kan. Stat. Ann. §§ 50-

108 and 50-161(b). At this time, the court makes no determination on whether some of plaintiff's claims will be barred by the statute of limitations.

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint (Doc. 50) is granted in part and denied in part. The parties should contact the magistrate judge to set a scheduling conference.

Dated this 17th day of December, 2014, at Kansas City, Kansas.

/s/ Carlos Murguia
Carlos Murguia
United States District Judge