No. ___

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Eagle US 2 LLC ("Eagle") has been sued by more than *1,700 plaintiffs*—hailing from more than a half-dozen States—nominally divided across 77 cases. These plaintiffs have invoked a Louisiana state procedural device known as "cumulation." Each purportedly separate case was filed by the same lawyers and includes materially identical claims seeking damages from chemical exposures plaintiffs plead were caused by a fire at an Eagle plant.

Pursuant to the Class Action Fairness Act ("CAFA"), Eagle removed these 77 cases, later consolidated for administrative purposes in the Fifth Circuit as *In re Eagle US 2 L.L.C.* The district court remanded to state court and the Fifth Circuit affirmed. The questions presented are:

1. Can the district court's application of a presumption against removal in CAFA cases in direct defiance of a decision of this Court be allowed to go uncorrected?

2. Do these "Louisiana cumulation" complaints comprise an action "similar" to a "class action" under 28 U.S.C. § 1332(d)(1)(B)?

3. Did the Fifth Circuit also err by rejecting Eagle's argument in the alternative that the purportedly separate complaints qualified as a CAFA "mass action" under 28 U.S.C. § 1332(d)(11)(B)(i) because those complaints together included "100 or more persons"?

PARTIES TO THE PROCEEDINGS

The parties are Eagle US 2 LLC ("Eagle"), its employee, David Ardoin, and the more than 1,700 individuals that have sued Eagle in connection with a plant fire. The plaintiffs in the lead Fifth Circuit case below were Eva D. Abraham; Sahibzada Ahmad; Herbert Albert; Dennis W. Allison; Ethel Anderson; Edward Anthony, Sr.; Francis Anthony, Claudie Augusta; Annita D. Auzenne; David L. Barnes; Pearl Barnes; Christopher Bartie, Sr.; Wyndell Bellard; Sherita Bernard; Laura Bias; Mary Bias; Rockel Bias; Claudine Bienvenue; Denise Bigelow; Felicia Bigelow; Tracy Bigelow; Debra Aclis; and Tomika Artis. The other 76 complaints include approximately 20-25 individual plaintiffs per complaint and were too numerous to set out in the Fifth Circuit pursuant to 5th Cir. R. 28.2.1. On August 26, 2015, the Fifth Circuit ordered the cases consolidated for administrative purposes to allow consideration of the identical CAFA issues involved across all of the cases in one appeal.

Should the Court wish to identify all plaintiffs involved, that information is contained in the dockets for both the district court and Fifth Circuit case numbers listed below.

The complete list of the case numbers involved in the Western District of Louisiana are: Civil Action Numbers 2:15-cv-00671; 2:15-cv-00672; 2:15-cv-00675; 2:15-cv-00676; 2:15-cv-00677; 2:15-cv-00678; 2:15-cv-00679; 2:15-cv-00680; 2:15-cv-00681; 2:15-cv-00682; 2:15-cv-00683; 2:15-cv-00684; 2:15-cv-00685; 2:15-cv-00686; 2:15-cv-00687; 2:15-cv-00688; 2:15-cv-00689; 2:15-cv-00690; 2:15-cv-00691; 2:15-cv-00692; 2:15-cv-00693; 2:15-cv-00694; 2:15-cv-00695; 2:15-cv-

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And the complete list of Fifth Circuit case numbers are: 15-90024; 15-90025; 15-90026; 15-90027; 15-90028; 15-90029; 15-90030; 15-90031; 15-90032; 15-90033; 15-90034; 15-90035; 15-90036; 15-90037; 15-90039; 15-90040; 15-90041; 15-90042; 15-90043; 15-90044; 15-90045; 15-90046; 15-90047; 15-90048; 15-90049; 15-90050; 15-90051; 15-90052; 15-90053; 15-90054; 15-90055; 15-90056; 15-90057; 15-90058; 15-90059; 15-90060; 15-90061; 15-90062; 15-90063; 15-90064; 15-90065; 15-90066; 15-90067; 15-90069; 15-90070; 15-90071; 15-90072; 15-90073; 15-90074; 15-90075; 15-90076; 15-90077; 15-90078; 15-90079; 15-90080; 15-90081; 15-90082; 15-90083; 15-90084; 15-90085; 15-90086; 15-90087; 15-90088; 15-90089; 15-90090; 15-90091; 15-90092; 15-90093; 15-90094; 15-90095; 15-90096; 15-90097; 15-90098; 15-90099; 15-90100; 15-90101; 15-90102.

CORPORATE DISCLOSURE

Eagle US 2 LLC is a wholly owned subsidiary of Eagle Spinco, Inc., which is itself a wholly owned subsidiary of Axiall Corporation.

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Eagle US 2 LLC ("Eagle") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The district court's opinion is unpublished (App4a-17a). The Fifth Circuit panel's opinion is unpublished (App1a-3a). The full Fifth Circuit denied en banc review accompanied by a supplemental opinion of the panel (to be reported at --- Fed. App'x ---, App18a-23a).

JURISDICTION

Eagle — a subsidiary of Axiall — removed the complaints at issue in this petition pursuant to the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1453. Eagle asserted that original jurisdiction existed in the Western District of Louisiana because the 77 complaints filed by 1,700+ plaintiffs against Eagle were the equivalent of a "class action" pursuant to 28 U.S.C. § 1332(d)(2) & (5)-(6). In the alternative, Eagle removed the 77 complaints as collectively constituting a CAFA "mass" action pursuant to 28 U.S.C. § 1332(d)(2) & 11(A).

The district court remanded the 77 complaints to Louisiana Parish court. App15a. The Fifth Circuit possessed jurisdiction to grant permission to appeal remand orders of this kind pursuant to 28 U.S.C. § 1453(c)(1); *see also* Fed. R. App. P. 5 (governing permissive appeals), though the Fifth Circuit denied that permission here. App2a-3a (Sept. 16, 2015). The Fifth Circuit also denied rehearing en banc on December 11, 2015. App18a.

This Court has jurisdiction under 28 U.S.C. § 1254(1). *Dart Cherokee Basin Operating Co. v.*

Owens, 135 S. Ct. 547, 555 (2014) (certiorari jurisdiction exists to review court of appeals action on a CAFA "leave-to-appeal application," including when such applications are denied); *see also Hohn v. United States*, 524 U.S. 236, 242 (1998) (Supreme Court may grant writs of certiorari after a court of appeals denies permission to appeal).

STATUTORY PROVISIONS INVOLVED

The key provisions of CAFA are codified in 28 U.S.C. §§ 1332(d) and 1453. These provisions are reproduced in the Appendix.

STATEMENT OF THE CASE

Clever plaintiff lawyers have taken a Louisiana state court procedural mechanism known as "cumulation" and finely honed it into the spitting image of a class-action. They did this to circumvent both CAFA's text and its intent, which classifies even state procedures that are merely "similar" to class actions as "class actions" for CAFA purposes. Plaintiffs' counsel got away with deploying this innovative use of state procedure to defeat CAFA removal by Eagle of a vast body of identically pleaded claims by *1,700*+ persons—all on the fiction that their claims would be tried individually, not on a *de facto* representative-plaintiff basis, as was the case the last time many of the *same plaintiffs* successfully employed the *same strategy* in Louisiana state court against an Axiall subsidiary, Georgia Gulf Lake Charles, LLC, to defeat removal. And they were even allowed to do this when the plaintiffs had explicitly referenced joint trial in their complaints.

The lower courts also adamantly refused to look at how similar class-action litigation dressed up as individual suits previously played out in state court. For this is not the first time that plaintiffs—including many of the same plaintiffs here—have end run CAFA and pursued thousands of claims in state court using class-action-like procedures. This case involves a 2013 fire at Eagle's chemical plant in Calcasieu Parish, Louisiana. But there were other, similar fires in 2006 and 2007 leading to comparable tort litigation in state court against Georgia Gulf Lake Charles, LLC. In that prior litigation, a small group of plaintiffs' claims were tried in 2012 and allowed to stand in to control the claims of other plaintiffs acting in close coordination.[1] App48a.

In the prior fire litigation, plaintiffs' counsel devised a novel strategy. Rather than filing a class action which (a) could be removed to federal court and as to which (b) defendants would be entitled to a jury trial, counsel opted to bring so-called "cumulation" suits under Louisiana law. This allows multiple plaintiffs to bring claims and resolve them together "employ[ing] the same form of procedure," La. C.C.P. art. 463(3), merely when it is alleged "[t]here is a community of interest between the parties joined," *id.* art. 463(1).[2]

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[1] If successful in running the same playbook for the second time now, the new fire litigation will function like a liability class, which typically leaves only damages to be resolved on an individual basis. *See, e.g., In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 844 (6th Cir. 2013) (describing federal liability class actions).

[2] In the earlier fire litigation, plaintiffs' counsel were even cloaked with sole authority to select which plaintiffs plucked

The number of plaintiffs per complaint was scrupulously managed. 28 U.S.C. § 1332(d)(5) (CAFA inapplicable if "the number of members of all proposed plaintiff classes in the aggregate is less than 100"). In this way, plaintiffs could litigate in the vein of a class action without ever having to worry about class-action removal. And, by having plaintiffs stipulate to capped damages, plaintiffs' counsel were also able to avoid both (i) a jury trial, *see* La. C.C.P. art. 1732(1) ("A trial by jury shall not be available . . . where the amount of no individual petitioner's cause of action exceeds fifty thousand dollars"), *and* (ii) mass-action removal, *see* 28 U.S.C. § 1332(d)(11)(B)(i) ("jurisdiction shall exist only over those plaintiffs whose claims" exceed $75,000). Instead, all claims would be conveniently decided by one—or at most a handful of state judges.

Putting that plan into effect, counsel began bringing "cumulation" suits in the wake of the 2006/2007 fires. This procedure resulted in findings in an initial action on common issues like causation that were then simply carried over to the subsequent cases. Indeed, plaintiffs were awarded money damages based on mere membership in a "community" that plaintiffs alleged *may have* been exposed to chemicals from the fires. In practice, it does not appear that any plaintiff independently controlled his or her litigation. Instead, they

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out of different complaints would have their cases tried together. This was done pursuant to La. C.C.P. art 1561, which allows consolidation for trial where "common issues of fact and law predominate"—an approach that obviously mirrors a key feature of class actions.

litigated as a tightly knit group directed by plaintiffs' counsel.

Unfortunately, these brazen tactics to slip the bonds of CAFA were allowed to succeed. The Fifth Circuit, in its first opinion, invoked textualism when it denied permission to appeal and affirmed the district court ruling remanding these removed cases to Parish court. App2a-3a (finding Louisiana's "cumulation" procedure not to be a "class action" procedure). The problem with the court's analysis was that it ignored the requirement in CAFA's text directing the federal courts to assess whether any given state court mechanism operates in a fashion "similar" to class actions. *See* 28 U.S.C. § 1332(d)(1)(B). Thus, in the *name of textualism*, the court perverted the precise words of the statute to shortcut the congressionally mandated analysis, ignoring the necessary inquiry into whether the cumulation process used here was "similar" to a class action. This allowed only actions specifically denominated as "class actions" to be removed under CAFA.

The end result of the Fifth Circuit's decision is that plaintiffs are now empowered to use Louisiana's "cumulation" procedure in a fashion that carries all the benefits of class treatment but none of the protections afforded to class/mass action defendants, while at the same time avoiding federal court.

After Eagle petitioned for rehearing en banc, the Fifth Circuit panel supplemented its original opinion since it had, in its first opinion, remained mum on Eagle's argument in the alternative that if this litigation were not a "class action," it was surely a "mass action" under CAFA. App20a-22a. The Fifth

Circuit's inquiry in this second opinion was once more outwardly textual. The court reasoned that since CAFA defines a "mass action" as one "in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claim involve common questions of law or fact," 28 U.S.C. § 1332(d)(11)(B), the plaintiffs must make a proposal for joint trial for "mass action" treatment to apply. *See* App21a-22a. So far so good.

But as it had done in its first opinion, the court impermissibly narrowed the text of the statute—in this instance by requiring that plaintiffs' *pleadings* must propose that their actions be tried jointly. *See id.* at 21a (pleadings cannot be pierced to assess requirement of proposing joint trial). Eagle's arguments were wholly ignored that plaintiffs were *otherwise* "proposing" to use the cumulation mechanism in state court. This is exactly what had happened in the 2006/2007 fire litigation, where a few plaintiffs advanced claims that would ostensibly be tried individually, but, in reality, once the outcomes obtained in the first few trials were in hand, those outcomes would be carried over in representative fashion to establish the liability of the defendant to *all* of the other plaintiffs.

Worse yet, the panel failed to notice that the complaints in this litigation *actually did propose* joint trials—*in express terms*. Each of the 77 complaints indicated that "the trial court can try the cases individually *or jointly*." *Id.* at 33a (complaint paragraph 23) (emphasis added).

These suits thus constitute exceptionally important and precedent-setting litigation that interprets CAFA as a paper tiger, easily sidestepped

(1) as long as class-action-qua-class-action procedure is not invoked *in haec verba*; and (2) as long as even a large grouping of cookie-cutter complaints spanning hundreds and hundreds of plaintiffs are careful enough never to place 100 or more plaintiffs into any single complaint. Of course, both evasive maneuvers are procedural child's play. The result is a CAFA removal right left in shambles.

With the Louisiana cumulation procedure at play here, plaintiffs in Louisiana state court have invented a process that looks like a class action, walks like a class action, and quacks like a class action—but which nevertheless can be used over and over again to defeat CAFA jurisdiction at will. *Hamilton v. Burlington N. Santa Fe Ry. Co.*, No. A-08-CA-132-SS, 2008 WL 8148619, at 5, n.1 (W.D. Tex. Aug. 8, 2008) ("In other words, if it looks like a duck, walks like a duck, and quacks like a duck, it surely is not six separate and distinct lawsuits.").

In contrast to the Fifth Circuit, other circuits recognize that for CAFA to function as Congress intended, it has to be shielded from attempts at circumvention. *See, e.g., Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 407 (6th Cir. 2008) ("If such pure structuring [breaking litigation into five identical suits seeking $4.9 million each will] permit[] class plaintiffs to avoid CAFA['s $5 million requirement], then Congress's obvious purpose in passing the statute—to allow defendants to defend large interstate class actions in federal court—can be avoided almost at will, as long as state law permits suits to be broken up on some basis."); *Bullard v. Burlington N. Santa Fe Ry. Co.,* 535 F.3d 759, 761 (7th Cir. 2008) ("Any statute governing class actions

must define that term carefully, or plaintiffs who want to litigate in state court will devise close substitutes that escape the statute's application."). *See also Taylor v. Sturgell*, 553 U.S. 880 (2008) (rejecting "virtual representation" because it would circumvent class action requirements and thus due process protections for class members by allowing "courts to create *de facto* class actions at will") (internal quotation marks omitted).

Other States desiring to preserve a healthy business climate will likely aim to avoid emulating Louisiana (though some States or localities may not be able to resist). But the idiosyncrasies of Louisiana's cumulation process as it is being applied in Calcasieu Parish only underscore why this Court should grant certiorari now to review the Fifth Circuit's CAFA rulings below. A CAFA removal dispute arising in another circuit is unlikely to ever replicate the precise, insidious use to which Louisiana's cumulation process has been deployed here, so as to create a pristine split in the circuits.

For that reason, granting review in this case would not be an exercise in mere error correction but instead a necessary measure to end an egregious CAFA circumvention technique being pioneered in Louisiana and thus which is inherently unique to the Fifth Circuit.

A. Factual Background

Eagle owns and operates a chemical plant in Calcasieu Parish, Louisiana. On December 20, 2013, there was a furnace fire at the plant. App26a (Eva Abraham, *et al.* "petition," *i.e.*, the complaint). Plaintiffs brought suit against Eagle and one of its employees, alleging that smoke from the fire

"travel[ed] upward and descend[ed] on areas laterally to the Eagle facility, as well as north from the Eagle facility over areas of Sulphur, Louisiana, Westlake, Louisiana, the Moss Bluff area of Lake Charles, Louisiana, and portions of Lake Charles, Louisiana." *See id.* at 29a (paragraph 14).

Plaintiffs claim three categories of damages over different spans of time: for (a) past physical pain and suffering; (b) past, present, and future mental pain and suffering, including fear of future injury or disease; and (c) past medical bills and expenses. *See id.* at 32a (paragraph 19). Despite this expansive litany, their complaints purport to uniformly disclaim damages in excess of $50,000 as to any and all plaintiffs. *See id.* at 33a (paragraph 20).

Counsel representing the same plaintiffs here also represented plaintiffs asserting similar injuries from furnace fires in 2006 and 2007 at a nearby facility owned by another Axiall subsidiary, Georgia Gulf Lake Charles, LLC ("GGLC"). Hundreds of plaintiffs asserting injuries from those fires are also among the plaintiffs now asserting claims arising from the 2013 fire against Eagle in carbon-copy complaints filed by the same plaintiffs' counsel here.

GGLC did manage to remove some of the prior round of suits on ordinary diversity grounds, else the total damages paid out would have been higher. *Griffin v. GGLC*, 562 F. Supp. 2d 775, 779-80 (W.D. La. 2008); *Hendrick v. GGLC*, 2008 WL 65264, at *1-2 & n.1 (W.D. La. Jan. 9, 2008); *Richard v. GGLC*, 2007 WL 2319804, at *8 (W.D. La. Aug. 10, 2007). Eventually, the great majority of claims were resolved through a class settlement in the amount of $5.3 million. Tellingly, after the district court denied

remand motions based on invalid damage stipulations that had been ventured by plaintiffs' counsel in an attempt to avoid removal in the prior fire litigation, it was plaintiffs' counsel themselves who moved to dismiss many of the cases with prejudice. And even removed claims that plaintiffs did not voluntarily dismiss were settled for pennies on the dollar when compared to the state-court claims. In other words, the actions that Axiall subsidiary GGLC could not remove expanded its financial exposure by orders of magnitude and drove up the cost of the state suits. The same will inevitably prove true in this newer fire litigation, if the remand of these 1,700+ plaintiffs spanning 77 complaints to state court were allowed to stand.

Plaintiffs, as in the prior GGLC fire litigation, seek to have their claims tried in state court. They do not want to litigate in federal court, nor do they want a jury trial. Indeed, plaintiffs—many of whom were also plaintiffs in the 2006 and 2007 fire-related litigation—have submitted affidavits purporting to limit damages in "the foregoing Petition" to less than $50,000.

But many of these affidavits (specifically referencing "the foregoing petition," *i.e.* complaint) were obtained only days after the 2013 fire—months *before* the complaints had been filed or likely even drafted. Moreover, counsel submitted virtually all of these hundreds of affidavits to one judge, who curiously accepted them *ex parte* and certified *final judgments* approving them—all before Eagle had even been served with the original petitions. Order, *Fontenot v. Eagle US 2 LLC*, No. 2014-5070 F (La. 14th Jud. Dist. Ct. Dec. 16, 2014). By the time Eagle

had been served, the appeal clock had already run on these "final judgments."[3]

The 77 nearly identical complaints that were filed do not facially invoke Louisiana's class action process but instead call for application of its cumulation rule, alleging that "Petitioners have a community of interest in maintaining the causes of action alleged herein, and all of Petitioners' actions are mutually consistent and employ the same form of procedure." App33a (paragraph 23). Under this state-law device, plaintiffs allege that "the trial court can try the cases individually *or jointly*." *Id.* (emphasis added).

B. Procedural Background

Plaintiffs filed the complaint of lead plaintiff Eva Abraham joined by 22 other plaintiffs on December 16, 2014 (later served Feb. 18, 2015). That complaint is one of 77 complaints filed by the same lawyers making identical claims on behalf of more than 1,700 plaintiffs residing in *more than a half-dozen States*.[4]

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[3] Eagle would eventually be served with a total of *over 100 complaints representing over 2,600 plaintiffs* arising out of the 2013 fire. Eagle's Opp. to Mot. to Remand at 2-3 & Ex. A, *Abraham v. Eagle US 2 LLC*, No. 15-cv-00671 (W.D. La. May 27, 2015), Dkt. #14 & #14.1. The other actions not at issue here were removed to federal court, which denied remand on traditional diversity grounds. The Western District of Louisiana Judges who denied remand in those other cases was a different one than the Judge who remanded the suits against Eagle to the court in Calcasieu Parish here (Judge Haik).

[4] Appendix B, "Actions filed by Baggett, McCall, Burgess, Watson & Gaughan, LLC; Vamvoras, Schwartzberg & Assoc.; and Sanders Law Firm L.L.C., Dkt. #14-2 *filed in Abraham v. Eagle* US 2 LLC, No. 2:15-cv-00671-RTH-KK (W.D. La. filed May 27, 2015).

On March 20, 2015, Eagle timely removed *Abraham* (and similarly removed the other 76 cases) to the Western District of Louisiana. *Abraham*, Dkt. #1 & #14-2 (W.D. La.). Eagle attached voluminous proof of the history of the prior fire litigation as support for CAFA removal jurisdiction under 28 U.S.C. §§ 1332(d) & 1453 and specifically to show that *Abraham* and the other 76 cases constitute a CAFA "class action" or in the alternative a CAFA "mass action. " *Abraham*, Dkt. #1 at 5-14 (W.D. La.).

In the removal notices, Eagle also averred that (1) the CAFA requirement of more than 100 class members is easily met here; (2) there is minimal diversity because Eagle is a Delaware LLC with its principal place of business in Georgia, whereas the plaintiffs allege that they were citizens of Louisiana and other States; and (3) the amount in controversy for the suits exceeds $5 million. *Abraham*, Dkt. #1 at 11-14 (W.D. La.). *Compare* 28 U.S.C. § 1332(d)(2) ($5 million or more in controversy), (d)(4)(A)(i)(II) (minimal diversity), and (d)(5)(B) (class of 100 or more members). The district court never disputed that these CAFA requirements were satisfied.

C. Rulings Below

1. On July 27, 2015, the district court remanded the cases to state court. After declaring that a presumption against removal applies, the court concluded that this is not a removable class action because the complaints make no "mention of Rule 23 of the Federal Rules of Civil Procedure or the Louisiana statutes related to pleading …. Rather, the petition is composed of the individual claims of Plaintiffs cumulated under La. Civ. Code Proc. arts. 463-465." App9a. According to the court, "no

amount of piercing the pleadings will change the statute or rule under which the case is filed …. [I]f this is a formalistic outcome, it is a formalism dictated by Congress." *Id.* at 11a (citations omitted).

The district court also rejected mass-action jurisdiction on the ground that there was not "at least one plaintiff whose claim exceeds $75,000." App12a-13a. The court gave two reasons for that conclusion: (1) The stipulations bound plaintiffs to seek less than $50,000; and (2) defendants failed to "establish[], either in their notice of removal or in response to the Motion to Remand, that the $75,000 threshold is satisfied by the claims made by any single plaintiff." *Id.* at 13a.

2. Eagle timely moved for leave to appeal pursuant to 28 U.S.C. § 1453(c). Without oral argument, the panel (Judges Clement, Elrod, and Southwick) denied Eagle's motion, stating it "agree[d] with the district court's analysis." App2a. As to class-action jurisdiction, the court's first opinion reasoned that "[a]n action brought in state court is . . . only a 'class action' if filed under a state provision authorizing representative actions." *Id.* at 3a. The Fifth Circuit initially said nothing about mass-action jurisdiction—as if, contrary to fact, Eagle had not made that part of its motion for permission to appeal.

3. Eagle thereupon timely petitioned for rehearing en banc. The panel filed a supplemental opinion noting that the full Fifth Circuit had treated the petition for rehearing as a "motion for reconsideration" and denied it. App20a. Nevertheless, the supplemental opinion also stated

that "the petition for rehearing en banc is DENIED." *Id.*

In its second opinion, the Fifth Circuit panel set out for the first time a rationale for its rejection of Eagle's alternative argument that these 77 "carbon copy"-style complaints constituted a "mass action." This rationale differed from the one offered by the district court, which mainly relied on the state court "stipulations" entered on an *ex parte* final-judgment basis before Eagle had even been served. The second panel decision opined that the "'100 or more persons' requirement cannot be satisfied by piercing the pleadings across multiple state court actions when the plaintiffs have not proposed that those actions be tried jointly or otherwise consolidated." *Id.* at 21a. According to the panel:

> Every other court of appeals confronted with this question has come to the same conclusion: that plaintiffs have the ability to avoid § 1332(d)(11)(B)(i) [mass action] jurisdiction by filing separate complaints naming less than 100 plaintiffs and by not moving for or otherwise proposing joint trial in the state court.

Id. at 21a-22a. But the panel did not grapple with the fact that the complaints here stated that "[u]nder LCCP art. 463, the trial court can try the cases individually *or jointly*." *Id.* at 33a (emphasis added). Indeed, joint trials of cumulated actions are the "default setting" under Louisiana procedure, unless the state court in its discretion decides to order separate trials. *See, e.g., Cooper v. Festiva Resorts, LLC*, 171 So. 3d 1058, 1062 n.8 (La. App. 4 Cir. 2015) ("The dictates of La. C.C.P. 464 and 465 provide that

the trial court is to order the separate trials, not have the parties do so themselves."); *see also* La. C.C.P. 465; *Warren v. Bergeron*, 599 So. 2d 369, 373 (La. App. 3 Cir. 1992).

Also, at no time did the Fifth Circuit address Eagle's repeated argument—at both the permission-to-appeal and en banc stages—that the district court had egregiously erred in applying a presumption against removal in violation of this Court's clear holding in *Dart Cherokee* that no such presumption can be used to derail CAFA removals. Such appellate inaction will leave the lasting impression throughout the Fifth Circuit that disobedience of *Dart Cherokee* is welcome there.

REASONS FOR GRANTING THE WRIT

This exceptionally significant mass-tort case affords an ideal vehicle for

- establishing that the Ninth and Eleventh Circuits (in contrast to the Fifth Circuit here) are correct that *Dart Cherokee*'s pronouncements prohibiting federal courts from applying a presumption against removal in CAFA cases and reading CAFA broadly with a strong preference for hearing interstate class actions in federal court mean exactly what they said;
- requiring *all aspects* of CAFA to be enforced—not just the CAFA provisions that permit the removal of suits explicitly labeled as "class actions," but of suits "similar" to class actions as well; and
- reversing what practically amounts to an *affirmative invitation* by the Fifth Circuit to

skirt CAFA "mass action" removals by chopping a profusion of plaintiffs advancing identical claims into arbitrary assemblages of fewer than 100 per complaint—especially on the stated rationale that joint trial of all of the plaintiffs' actions was *not* proposed in the pleadings, when such joint trial was, in fact, *specifically proposed* in those complaints.

I. THE FIFTH CIRCUIT LET STAND THE DISTRICT COURT'S DEFIANCE OF *DART CHEROKEE*—AN APPROACH THAT SIGNIFICANTLY DEPARTS FROM THE APPROACH OF THE NINTH AND ELEVENTH CIRCUITS.

Simply put, the Fifth Circuit here allowed (and, by one view, encouraged) the district court to ignore this Court's teachings. The Western District of Louisiana confidently avowed at the start of its analysis: "[A] suit is presumed to lie outside a federal court's jurisdiction" and "[r]emoval jurisdiction . . . is strictly construed." App7a-8a. It also stated that "a suit is presumed to lie outside a federal court's jurisdiction until the party invoking federal-court jurisdiction establishes otherwise." *Id.* at 8a. Two *pre-CAFA* decisions were cited as support: *Howery v. Allstate Ins. Co.*, 243 F.3d 912 (5th Cir. 2001), and *Acuna v. Brown & Root Inc.*, 200 F.3d 335 (5th Cir. 2000).

This was not harmless (or even subtle) error but foundational to the district court's legal analysis. Yet this Court had explained, well before the district court's decision remanding these cases, that "no antiremoval presumption attends cases invoking CAFA." *Dart Cherokee*, 135 S. Ct. at 554. Indeed,

"the Supreme Court left no doubt" on this score. *Jordan v. Nationstar Mortg. LLC*, 781 F.3d 1178, 1183-84 (9th Cir. 2015). If anything, this Court endorsed a presumption *in favor of* removal: "CAFA's 'provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed.'" 135 S. Ct. at 554 (quoting S. Rep. No. 109-14, at 43 (2005), 2005 U.S.C.C.A.N. 3, 41). This Court's *pro-removal* reading of CAFA could hardly have been more resounding. Eagle told the district court all of this, and yet these critical points fell on deaf ears.

Eagle requested the Fifth Circuit to correct the district court's glaring error not once but twice—at both the motion-to-appeal and en banc stages. And while the Fifth Circuit itself did not explicitly quote the district court's error, it seems telling that no targeted comment calling out the error was ever made. It would have been a simple matter for the Fifth Circuit to state that the district court erred in applying a presumption against removal in this CAFA case. Yet it opted not to do so. Indeed, remarkably, the Fifth Circuit went out of its way to "agree with the district court's analysis." *Id.* at 2a. *Dart Cherokee*'s "strong preference" for removal was thus turned on its head.

When an error blinking in such neon fashion is met with the very surprising reception of a pat on the back, it cannot help but send a loud signal to all of the district courts within the span of the Fifth Circuit's jurisdiction that CAFA cases can generally be approached with an improper thumb on the scale of sending them back to state court.

In contrast to the Fifth Circuit's approach, the Ninth and Eleventh Circuits have acknowledged that *Dart Cherokee* banned the presumption against removal from the field of CAFA jurisdictional analysis. *Jordan*, 781 F.3d at 1184 ("Congress and the Supreme Court have instructed us to interpret CAFA's provisions under section 1332 broadly in favor of removal, and we extend that liberal construction to section 1446. A case becomes 'removable' for purposes of section 1446 when the CAFA ground for removal is disclosed."); *Dudley v. Eli Lilly and Co.*, 778 F.3d 909, 912 (11th Cir. 2014) ("Applying this binding precedent from the Supreme Court, we may no longer rely on any presumption in favor of remand in deciding CAFA jurisdictional questions.").

The Eleventh Circuit was particularly candid in recognizing that *before Dart Cherokee*, it had been reading CAFA incorrectly:

> Prior to *Dart*, this Court had presumed that in enacting CAFA, Congress had not intended to deviate from "established principles of state and federal common law," *Miedema* [*v. Maytag Corp.*], 450 F.3d [1322] at 1328–29 [(11th Cir. 2006)] (quoting *United States v. Baxter Int'l, Inc.*, 345 F.3d 866, 900 (11th Cir. 2003)), which included "construing removal statutes strictly and resolving doubts in favor of remand," *id*. at 1328.

Dudley, 778 F.3d at 912.

The Fifth Circuit ruling here runs contrary to how those Circuits are faithfully dealing with *Dart Cherokee*'s instructions on removal presumptions.

Indeed, less than one month after the Fifth Circuit swept the district court's defiance of *Dart* here under the rug, this very same panel issued its decision in *Arbuckle Mountain Ranch of Tex., Inc. v. Chesapeake Energy Corp.*, 810 F.3d 335, 347 (5th Cir. 2016). In that case, Judge Southwick, joined by Judge Clement, did reverse a CAFA remand premised on the local controversy exception to CAFA. Judge Elrod dissented. But even there, the majority saw fit not to mention *Dart Cherokee*'s teachings that (1) there is no presumption *against* removal in CAFA cases; and, indeed, (2) CAFA's 'provisions should be *read broadly, with a strong preference that interstate class actions should be heard in a federal court* if properly removed.'" 135 S. Ct. at 554 (emphasis added).

Judge Elrod's dissent in *Arbuckle* offers important insights into the mindset of the same Fifth Circuit panel Eagle faced below here:

> The Supreme Court has recognized that "no antiremoval presumption attends cases invoking CAFA," *Dart Cherokee Basin Operating Co., LLC v. Owens*, —— U.S. ——, 135 S. Ct. 547, 554, 190 L.Ed.2d 495 (2014), but we should not go further and announce a pro-removal presumption, whether for CAFA as a whole or as to the local controversy exception .... [C]onsiderations of federalism and comity are not jettisoned entirely in the CAFA context. *See Hood ex rel. Mississippi v. JP Morgan Chase & Co.*, 737 F.3d 78, 84-85 (5th Cir. 2013) ….

Arbuckle, 810 F.3d at 347 (Elrod, J., dissenting). *First*, notice that Judge Elrod argues that there is no

"pro-removal presumption," taking no account of *Dart Cherokee*'s pronouncement that CAFA is to be "read broadly" and "*with a strong preference that interstate class actions should be heard in a federal court*." *Dart Cherokee*, 135 S. Ct. at 554 (emphasis added). The dissent was thus willing to give some force to *Dart Cherokee*, just not full force. Perhaps more puzzling is the approach of the other two panel members, who, when given two prime opportunities to reference and apply *Dart Cherokee* in this case, neglected to do so.

Second, Judge Elrod's dissent suggests that the reason the *Arbuckle* majority may be unwilling to even acknowledge *Dart Cherokee*'s elimination of a presumption against removal is due to lingering "considerations of federalism." But Congress has decided in CAFA, as this Court has recognized, that the interests of protecting interstate commerce from abusive class actions must be seen as overriding the interests of the States insofar as a federal forum is guaranteed for the resolution of "class actions" and "mass actions." The Fifth Circuit is not free to substitute its view for that of Congress any more than it is free to disregard the will of this Court and go on to decide that state court interests should have been weighted more heavily in the balancing process than they actually were by the legislators.

This Court should grant certiorari and direct the Fifth Circuit to come into line with the approaches to the presumption against removal in CAFA cases that now govern in the Ninth and Eleventh Circuits. Moreover, even if the Fifth Circuit's approach did not differ from the one prevailing in those other circuits (and it surely does), this case represents a

sufficiently serious refusal to comport with *Dart Cherokee* that certiorari is warranted nonetheless.

In that vein, Eagle recognizes that this Court sparingly grants certiorari for error-correction purposes but even without the divergence of the Fifth Circuit from the Ninth and Eleventh Circuits in this case, this basis for certiorari applies as well. *Dart Cherokee* had been on the books for seven months before the district court decision, for nine months before the Fifth Circuit denied permission for review, and for a full year before that court denied en banc review. Yet the district court was allowed to favor state-court remand and thereby fly directly in the teeth of *Dart Cherokee*. Such treatment of this Court's legal pronouncements should not go unchecked.

II. THE FIFTH CIRCUIT WRONGLY REFUSED TO ANALYZE WHETHER THE LOUISIANA "CUMULATION" DEVICE WAS BEING USED AS A *DE FACTO* CLASS ACTION, AS BOTH THIS COURT AND CONGRESS REQUIRE.

This Court has made clear, long before CAFA (which involves a uniquely expansive exercise by Congress of its interstate-commerce powers) that removal analysis should focus on substance and not form and that the federal courts must be on the lookout for gamesmanship representing an effort to defeat congressionally defined removal rights. *Wecker v. National Enameling & Stamping Co.*, 204 U.S. 176, 185-86 (1907) ("Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, *and should be equally vigilant to protect the right to proceed in the Federal court* as to permit the state courts, in

proper cases, to retain their own jurisdiction.") (emphasis added).

Amplification of this anti-evasion principle was at the core of CAFA. On its face, the definition of a "class action" in CAFA defies a paint-by-numbers approach to removability: "[T]he term 'class action' means 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[.]" 28 U.S.C. § 1332(d)(1)(B) (emphasis added). *See* BLACK'S LAW DICTIONARY (6th ed. 1990) (principally defining "similar" as "[n]early corresponding; resembling in many respects; somewhat like; having a general likeness, although allowing for some degree of difference").

Likewise, this Court has declared that "'CAFA's primary objective' is to 'ensur[e] Federal court consideration of interstate cases of national importance.'" *Dart Cherokee*, 135 S. Ct. at 554 (brackets in original) (quoting *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013)); *see also* S. Rep. No. 109-14, at 10-12, 2005 U.S.C.C.A.N. at 11-13 (explaining that CAFA's purpose is to prevent plaintiffs from "gam[ing] the system"). It thus is irrelevant under what byline a state law procedural mechanism travels; what matters is whether the mode of litigation used in state court is "similar" to a class action.

The legislative history of CAFA further informs how the federal courts are expected to examine whether the great variety of potential state procedural devices, which might be invoked in lieu of

formal "class actions," should be treated, if they appear "similar" to class actions:

> [T]he Committee further notes that the definition of "class action" is to be interpreted *liberally*. *Its application should not be confined solely to lawsuits that are labeled "class actions"* by the named plaintiff or the state rulemaking authority. Generally speaking, *lawsuits that resemble a purported class actions should be considered class action* for the purpose of applying these provisions.

S. Rep. No. 109-14, at 35, 2005 U.S.C.C.A.N. at 34 (emphasis added). And for this very reason, this Court has cautioned that "exalt[ing] form over substance" "would squarely conflict with the statute's objectives." *Standard Fire*, 133 S. Ct. at 1350. *See also Pickman v. Am. Express Co.*, 2012 WL 258842, at *2 (N.D. Cal. Jan. 27, 2012) (removal is proper if claims are "substantially 'similar' to" class actions); *West Virginia ex rel. McGraw v. Comcast Corp.*, 705 F. Supp. 2d 441, 452 (E.D. Pa. 2010) (comparable).

In this case, Eagle mounted up for federal court consideration a mound of evidence demonstrating that these removed cases are, in fact, "similar" to a class action:

- *More than 1,700 plaintiffs*—spread across more than a half-dozen States ranging from Virginia to Nevada—are suing Eagle seeking damages for the 2013 fire. This easily meets a class action's numerosity requirement and CAFA's purpose to facilitate the removal of *interstate* class actions specifically.

- Louisiana law requires a "community of interest" in cumulation cases. La. C.C.P. art. 463(1). All plaintiffs filed complaints that in terms of their substantive allegations were identical—down to the word. The overlap with a class action's commonality and typicality analyses is obvious.

- Because the state courts litigate these cases in a seriatim fashion (*i.e.*, the state court tries the case of one plaintiff first—or a lead group of plaintiffs—and applies liability and causation findings to all other plaintiffs), early plaintiffs function as *de facto* class representatives. Moreover, plaintiffs' counsel unilaterally picks who those lead plaintiffs or groups are.

- The same lawyers represent all plaintiffs, and no plaintiff litigates independently. Certainly, the plaintiffs suing over the earlier fires in 2006/2007 appeared did not split from the herd. Hence, these cases are "virtually impossible to distinguish . . . from a class action." May 22, 2015 Expert Aff. of Professor Martin Redish ¶ 16 (filed in *Abraham* (W.D. La. record)).

When all of this is considered, it is impossible to say with a straight face that these suits are not at least "similar" to a class action. While cumulation under Louisiana law differs from Federal Rule 23 class actions, in practice, Louisiana cumulation cases embody representative litigation within the meaning of CAFA "similar" to a class action.

In fact, the only real difference between this litigation and a class action is that Eagle has *fewer rights*. For instance, should Eagle prevail in that first, seriatim trial, its victory likely would not apply

to bar other plaintiffs. *See, e.g., Sosebee v. Steadfast Ins. Co.*, 701 F.3d 1012, 1026 (5th Cir. 2012) (explaining issue preclusion's mutuality requirement). A class action, by contrast, at least binds all parties. In other words, plaintiffs seek the benefits of a class action, yet would provide Eagle none of the protections of a class action—including the right to remove to federal court. With such a settlement-forcing cudgel on hand, why would any rational plaintiff ever file a formal class action in Louisiana instead of a "cumulation" action? CAFA was intended to put an end to exactly this sort of abuse. "Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action 'blackmail settlements.' Henry J. Friendly, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973)." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995), *superseded by Fed. R. Civ. P. 23(f) on irrelevant grounds*; *see also* 1 MCLAUGHLIN ON CLASS ACTIONS § 1:3 (11th ed. 2014) ("The motivating force behind the expansion of federal jurisdiction in [CAFA] was disapproval of state court decisions 'readily certifying classes' that give plaintiffs 'unbounded leverage' to force ransom settlements.").

Despite all of this, the Fifth Circuit rejected removal because "[a]n action brought in state court is . . . only a 'class action' if filed under a state provision authorizing representative actions," and here, "each cumulated action retains its individual status and each plaintiff formally controls the presentation of his case." App3a. Nor did the Fifth Circuit examine whether, in the real world, any plaintiffs actually exercise such "control." Had that court reviewed the litigation surrounding the 2006 and 2007 fires

(again, suits filed by the *same lawyers*, representing many of the *same plaintiffs*), it would have seen that, in reality, these so-called "individual" plaintiffs are just along for the ride. Because these cases are so obviously lawyer-driven, it offends CAFA—to say nothing of common sense—to suppose that this is not "representative" litigation.[5]

III. THE FIFTH CIRCUIT'S "MASS ACTION" RULING IS IN GRAVE TENSION WITH THE LESS-CATEGORICAL APPROACHES EMPLOYED IN OTHER CIRCUITS AND, IN ANY EVENT, OVERLOOKS THAT THE COMPLAINTS HERE MET THE FIFTH CIRCUIT'S OWN TEST.

How Eagle's alternative ground for CAFA removal—the "mass action" ground—was handled in both the district court and the Fifth Circuit is also riddled with error.

A. The District Court's Rationale That Plaintiffs "Stipulated" Their Way Out Of Mass Action Status Cannot Stand.

Eagle asked both the district court and the Fifth Circuit to hold in the alternative that this is a mass action. The district court erred by rejecting Eagle's argument, but at least it considered this independent basis for removal. The Fifth Circuit, by contrast, tried in its first opinion to breeze past the "mass action" issue. It took the filing of an en banc petition

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[5] Professor Redish (famous for his class-action scholarship) explained below that modern class actions are characterized by plaintiff lawyers effectively driving the bus in federal and state trial courts by making all of the substantive decisions not just about litigation *means* but litigation *ends*. His expert testimony, however, went unheeded.

by Eagle to prod the Fifth Circuit to address the issue in some fashion.

The district court's core reasons for rejecting a "mass action"-based removal here were simple (albeit defective):

> [T]he plaintiffs have irrevocably bound themselves individually to an amount in damages less than $50,0000, exclusive of interest and costs, through affidavits attached to the petition and 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).

App13a. But *De Aguilar* actually held that a void stipulation cannot defeat removal. 47 F.3d at 1412; *see also St. Paul Reinsur. Co. v. Greenberg*, 134 F.3d 1250, 1254 n.18 (5th Cir. 1998) (urging vigilance to prevent jurisdictional "manipulation"). And the "stipulations" entered here were indeed nullities because they flunked the Fifth Circuit's "legal certainty" requirement in *De Aguilar*.

The district court's rubber stamping of the state court stipulations is not the law. For one thing, it is far from clear that these stipulations are irrevocable. *Compare Standard Fire*, 133 S. Ct. at 1348 ("Stipulations must be binding.") *with Degeyter v. Allstate Ins. Co.*, No. 10-00134, 2010 WL 3339425, at *1-2 (W.D. La. Aug. 23, 2010) (plaintiffs permitted to *revoke* a "*Binding* Pre-Removal Stipulation") (emphasis added); *House v. AGCO Corp.*, No. Civ.A. 05-1676, 2005 WL 3440834, at *3 (W.D. La. Dec. 14, 2005) ("Such a *unilateral stipulation* may or may not be sufficient in Louisiana; a compromise agreed to by

both parties might be required to make the statement irrevocable.") (emphasis added).

For another, these stipulations—including those on behalf of minors—were approved via *ex parte* "final judgments" before Eagle was even served. *But see* La. C.C.P. art. 2002(A) ("final judgment shall be annulled" if issued without such process). And the stipulations are flawed on their face; they were signed *months* before any claim was filed, yet refer to "the foregoing Petition." Plaintiffs cannot knowingly waive their rights to recover higher damages in light of a "foregoing Petition" that, at the time of signing, did not even exist. At a minimum, because these stipulations' validity is an open question, they cannot satisfy the "legal certainty" test the Fifth Circuit adopted in *De Aguilar* to comply with this Court's instructions in *Standard Fire*. *In re 1994 Exxon Chem. Fire,* 558 F.3d 378, 389-90 (5th Cir. 2009).

B. The Fifth Circuit's Rationale That Plaintiffs Did Not "Propose" Mass Action Treatment Is Even More Flawed.

Perhaps recognizing the many defects in the district court's mass action analysis, the Fifth Circuit deployed a new rationale: These 77 suits were not "proposed" to be tried jointly by the plaintiffs and thus did not meet the definition of a "mass action" in 28 U.S.C. § 1332(d)(11)(B)(i) ("the term 'mass action' means any civil action … in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact …."). *See* App22a (Fifth Circuit stating: "*Plaintiffs' counsel*

has not proposed to try any of the lawsuits jointly.'") (emphasis added).[6]

But this rationale is even more obviously erroneous than the main one offered up by the district court. In their complaints, plaintiffs uniformly pleaded: "Under LCCP art. 463, the trial court can try the cases individually *or jointly*. But each individual will be adjudicated separately under the law." App33a (paragraph 23) (emphasis added). Plaintiffs tried to hedge a bit by artfully pleading that each case would be "adjudicated separately" even as they were being tried "jointly" (something of an oxymoron in itself). But what they clearly meant by that is only that *damages* would be separately determined, as occurs routinely in a federally certified Rule 23 liability class action. The key to recognize, which the Fifth Circuit (and the district court in the footnote from its opinion) ignored, is that plaintiffs *did explicitly propose to try their cases jointly* especially given that under Louisiana procedure joint trial is the procedural baseline.

Neither the district court's chief rationale based on the void *unilateral "stipulations"* (yet another oxymoron) nor the Fifth Circuit's preference for the district court's attempt in a footnote to claim that plaintiffs had not proposed joint trial can withstand scrutiny. Undoubtedly, the Fifth Circuit's *own test* for mass actions was met here: Plaintiffs "proposed"

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[6] The Fifth Circuit was quoting the district court in this regard. App22a. But the district court had buried that alternative rationale in a footnote. *Id.* at 17a (district court's remand order n.7).

to try their actions jointly, and they did so in their pleadings no less.

C. The Fifth Circuit's Categorical Invitation To Plaintiffs To Go Ahead And Chop Their Mass Actions Into Multiple Complaints With Fewer Than 100 Plaintiffs To Evade CAFA Contrasts With The Non-Categorical Approach Of Other Circuits.

The most alarming part of the Fifth Circuit's second opinion in this case is that it offers what amounts to an invitation to plaintiffs to intentionally sub-divide their complaints, so as to avoid CAFA mass action removals:

> Every other court of appeals confronted with this question has come to the same conclusion: that plaintiffs have the ability to avoid § 1332(d)(11)(B)(i) jurisdiction by filing separate complaints naming less than 100 plaintiffs and by not moving for or otherwise proposing joint trial in the state court." *Parson v. Johnson & Johnson*, 749 F.3d 879, 886–87 (10th Cir. 2014) (quoting *Scimone v. Carnival Corp.*, 720 F.3d 876, 884 (11th Cir. 2013)); *accord Anderson v. Bayer Corp.*, 610 F.3d 390, 393–94 (7th Cir. 2010); *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 952–53 (9th Cir. 2009).

App22a. In this sweeping pronouncement, however, the Fifth Circuit overlooked two critical points. *First*, the analysis prevailing in other circuits on the issue of how to interpret and apply the 100-plaintiff mass action rule is considerably more nuanced and

protective of defendants than the Fifth Circuit's new and categorical prohibition on removal. And *second*, the Fifth Circuit ignored that several of the decisions it cited were pre-*Dart Cherokee* and that the presumption against removal infected those circuits' analysis of this issue, which fittingly links together this third and final basis for granting certiorari to the first ground stated above concerning the Fifth Circuit's flawed approach to *Dart Cherokee*. Part I, *supra*.

1. A Non-Categorical Approach Applies In the Seventh and Eleventh Circuits.

Parsons was a case that involved 702 plaintiffs split across 12 complaints filed in the same state court before the same judge advancing transvaginal mesh medical-device tort claims. In its decision, the Eleventh Circuit recognized that proposals for joint trial can be "implicit;" they do not have to be "explicit." *Parsons*, 749 F.3d at 888.[7]

Parsons simply rejected that a tacit proposal for joint trial had been made on the facts of that case. Most importantly, the plaintiffs in *Parsons* had disowned the prospect of joint trial. *Id.* ("Far from 'proposing' a joint trial, plaintiffs here have explicitly disclaimed such an intention in their complaints.").

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[7] Here, plaintiff proposals for joint trial were "explicit." Moreover, joint trial is the default under Louisiana's cumulation rules. La. C.C.P. art. 465 ("When the court is of the opinion that it would simplify the proceedings, would permit a more orderly disposition of the case, or would otherwise be in the interest of justice, at any time prior to trial, it may order a separate trial of cumulated actions, even if the cumulation is proper.").

Moreover, in *Parsons*, the Eleventh Circuit noted that the plaintiffs had not proposed using a trial with "exemplary plaintiffs, to be followed by the application of issue or claim preclusion to more than 100 claims." *Id.* at 888 n.4.

But in this case, the track record of the state court sitting in Calcasieu Parish is that it *will use exemplary plaintiff actions* to drive judicial determinations against an Axiall subsidiary like Eagle. In the prior fire litigation, the state judges made findings on common issues like causation in an initial action that were then simply carried over to the subsequent cases. *Abraham*, Dkt. #1 at 10 (W.D. La.). Even worse, plaintiffs did not even seek to prove their claims by submitting individualized evidence of actual injury. The opposite occurred: they were awarded money based on membership in a population—specifically in an overall "community" that plaintiffs alleged had *only potentially* been exposed. *See*, *e.g., Abraham*, Dkt. #14-3, Ex. 19 at 27 (W.D. La.) (plaintiffs referencing the alleged exposures of "other persons similarly situated in the community"). This constitutionally dubious tactic proved successful. *See, e.g.*, *Abraham*, Dkt. #14-3, Ex. 25 at 64:11-12, 64:26-27 (W.D. La.) (quoting state judge: "I'm going to allow *the unrelated medical records*…. [I]t's probative of what was happening in the community…") (emphasis added).

In *Scimone*, the Eleventh Circuit dealt with a mass tort situation arising from a cruise ship running aground and noted that "subsequent litigation *conduct*" can amount, in some situations, to a proposal for joint trial. 720 F.3d at 883 (emphasis added). Additionally, there was no real evidence of

gamesmanship in *Scimone*. There, a single state suit involving only 39 passengers was initially filed but then voluntarily dismissed and refiled as two separate suits, one of which named 48 passengers and where the other named 56 passengers. Here, 77 complaints were filed roughly simultaneously spanning more than 1,700 plaintiffs.[8]

Next, in *Anderson*, the Seventh Circuit was particularly cautious *not* to adopt a categorical or formalistic approach to assessing whether 100 or more plaintiffs were involved for mass action purposes. The Court explained:

> In *Bullard*, we specifically described as removable a hypothetical set of "15 suits" with "10 plaintiffs each" that are proposed to be tried together. *Id.* We also noted that § 1332(d)(11) extended to a situation where only a few representative plaintiffs would actually go to trial, with claim or issue preclusion to be used to dispose of the remaining claims without trial. *Id.*

In other words, the Seventh Circuit certainly did *not*, as the Fifth Circuit has done here, invite plaintiffs to openly game the number of individuals per complaint as a rock-solid path to dodging CAFA mass-action removals. And like *Parsons*, the Seventh Circuit recognized that the use of exemplary

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[8] Indeed, the inherent assumption, which the Fifth Circuit never challenged, that 1,700+ plaintiffs' cases would ever be tried "individually, not "jointly" is dubious at best. Evening imagining each such "trial" could be conducted in one day, trying that number of cases would consume *over six years*.

resolutions for a handful of plaintiffs to carry over to a larger body of plaintiffs would also trigger mass action treatment. The Fifth Circuit's approach in this litigation is devoid of either safeguard. This violates congressional intent. S. Rep. No. 109-14 at 4, 2005 U.S.C.C.A.N. at 5-6 ("[C]urrent law enables 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.").

There can be no doubt that the Fifth Circuit has adopted a sharp-edged approach to assessing the 100-plaintiff requirement for mass action removals that is decidedly not the same, careful-sifting approach that prevails in the Seventh or Eleventh Circuits. Nor is it an approach consistent with what Congress was trying to accomplish in CAFA's legal reforms.

2. The Genesis Of The Supposedly Unshakable Rule That The Fifth Circuit Asserted Exists in Other Circuits Is Largely Premised On The Now-Defunct Presumption Against Removal.

The progenitor of the purportedly unanimous rule of the circuits concerning complaint subdivision in mass-action analysis that the Fifth Circuit chose to follow in this case is the Ninth Circuit's *Tanoh* decision:

> In this case [involving the tort claims of 664 banana plantation workers spread across complaints of fewer than 100 plaintiffs], concluding that plaintiffs' claims fall outside CAFA's removal provisions is not absurd, but

> rather is consistent with both the well-established rule that plaintiffs, as masters of their complaint, may choose their forum by selecting state over federal court *and with the equally well-established presumption against federal removal jurisdiction*. *See Lowdermilk v. U.S. Bank Nat'l Ass'n*, 479 F.3d 994, 998-99 (9th Cir. 2007). We therefore hold that CAFA's "mass action" provisions do not permit a defendant to remove to federal court separate state court actions, each involving the monetary claims of fewer than one hundred plaintiffs.

Tanoh, 561 F.3d at 953 (emphasis added).

But *Tanoh* was decided *both before Dart Cherokee and before* the Ninth Circuit's own recognition that its pre-*Dart Cherokee* precedent was wrong. The Fifth Circuit simply ignored all of that, just as it ignored that two of the other circuit cases it relied on (*Parson*, 749 F.3d at 887, and *Scimone*, 720 F.3d at 882) had also invoked the now-dead presumption against removal in a CAFA case. *Cf. also Anderson*, 610 F.3d at 393 (citing cousin principle to the presumption against removal that the plaintiff is master of his own complaint).

In some instances, the courts of appeals can be prone to follow-the-leader rulings. Unfortunately, the kick-off case other circuits have been following on mass-action removals has turned out to be *Tanoh*. But as we now know, *Tanoh* rests on invalid legal reasoning rooted in the premise of starting all removal analysis with a presumption against removal. Both to correct that error and to overturn the Fifth Circuit's having turned a blind eye to the

district court's defiance of *Dart Cherokee*, review of this case should be granted on the merits.

CONCLUSION

The petition for certiorari should be granted.

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Respectfully submitted,

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Appendix A

In The United States Court Of Appeals
For The Fifth Circuit

No. 15-90024

Consolidated with Cases: 15-90025; 15-90026; 15-90027; 15-90028; 15- 90029; 15- 90030; 15- 90031; 15- 90032; 15- 90033; 15- 90034; 15- 90035; 15-90036; 15- 90037; 15- 90039; 15- 90040; 15- 90041; 15- 90042; 15- 90043; 15- 90044; 15- 90045; 15-90046; 15- 90047; 15- 90048; 15- 90049; 15- 90050; 15- 90051; 15- 90052; 15- 90053; 15- 90054; 15-90055; 15- 90056; 15- 90057; 15- 90058; 15- 90059; 15- 90060; 15- 90061; 15- 90062; 15- 90063; 15-90064; 15- 90065; 15- 90066; 15- 90067; 15- 90069; 15- 90070; 15- 90071; 15- 90072; 15- 90073; 15-90074; 15- 90075; 15- 90076; 15- 90077; 15- 90078; 15- 90079; 15- 90080; 15- 90081; 15- 90082; 15-90083; 15- 90084; 15- 90085; 15- 90086; 15- 90087; 15- 90088; 15- 90089; 15- 90090; 15- 90091; 15-90092; 15- 90093; 15- 90094; 15- 90095; 15- 90096; 15- 90097; 15- 90098; 15- 90099; 15- 90100; 15-90101; 15- 90102.

EAGLE US 2 LLC,

Defendant-Petitioner,

v.

EVA D. ABRAHAM, et al.,

Plaintiffs-Respondents.

Motions for Leave to Appeal
Pursuant to 28 U.S.C. § 1453

[September 16, 2015]

Before CLEMENT, ELROD, and SOUTHWICK, Circuit Judges. PER CURIAM:

Pending before the Court is a motion under 28 U.S.C. § 1453 for leave to appeal the order of the district court remanding Plaintiffs-Respondents' cases back to Louisiana state court (Parish of St. Landry) after they were removed under the Class Action Fairness Act ("CAFA"). The district court determined that the claims did not meet CAFA's jurisdictional requirements either as a "class action" under 28 U.S.C. § 1332(d)(2), or as a "mass action" under 28 U.S.C. § 1332(d)(11), and ordered remand accordingly.

Defendant-Petitioner Eagle US 2 LLC asks this Court to review the remand order, attempting to invoke our jurisdiction under 28 U.S.C. § 1453(c)(1), which provides that "a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed." Our appellate jurisdiction—like the district court's original jurisdiction under § 1332(d)(2)¬ turns on whether the removed actions were a "class action." We agree with the district court's analysis and conclude that they were not.

The term "class action" in § 1453(c)(1) has a statutory definition: "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." § 1332(d)(1)(B); see also § 1453(a). An action brought in state court is thus only a "class action" if filed under a state provision authorizing representative actions. Plaintiffs-Respondents cumulated their claims under Louisiana Code of Civil Procedure Article 463, which authorizes the cumulation of claims by multiple plaintiffs against the same defendant where "[t]here is a community of interest between the parties joined." La. C.C.P. art. 463(1). Louisiana's cumulation procedures are not "representative"; each cumulated action retains its individual status and each plaintiff formally controls the presentation of his case. Accordingly, the actions remanded by the district court were not a "class action" under § 1453(c)(1), and we have no jurisdiction to review the remand order. Therefore, the Defendant-Petitioner's opposed motions for leave to appeal under 28 U.S.C. § 1453 are DENIED.

IT IS FURTHER ORDERED that the Defendant-Petitioner's opposed motions for leave to file replies to the responses are GRANTED.

Appendix B

2015 WL 4623649

United States District Court,
W.D. Louisiana, Lake Charles Division.

In re EAGLE U.S. 2 LLC, et al.

Civil Action Nos. 2:15–cv–00671, 2:15–cv–00672, 2:15–cv–00675, 2:15–cv–00676, 2:15–cv–00677, 2:15–cv–00678, 2:15–cv–00679, 2:15–cv–00680, 2:15–cv–00681, 2:15–cv–00682, 2:15–cv–00683, 2:15–cv–00684, 2:15–cv–00685, 2:15–cv–00686, 2:15–cv–00687, 2:15–cv–00688, 2:15–cv–00689, 2:15–cv–00690, 2:15–cv–00691, 2:15–cv–00692, 2:15–cv–00693, 2:15–cv–00694, 2:15–cv–00695, 2:15–cv–00696, 2:15–cv–00697, 2:15–cv–00698, 2:15–cv–00700, 2:15–cv–00701, 2:15–cv–00702, 2:15–cv–00703, 2:15–cv–00704, 2:15–cv–00705, 2:15–cv–00706, 2:15–cv–00707, 2:15–cv–00708, 2:15–cv–00709, 2:15–cv–00710, 2:15–cv–00711, 2:15–cv–00712, 2:15–cv–00713, 2:15–cv–00714, 2:15–cv–00715, 2:15–cv–00716, 2:15–cv–00717, 2:15–cv–00718, 2:15–cv–00719, 2:15–cv–00720, 2:15–cv–00721, 2:15–cv–00722, 2:15–cv–00723, 2:15–cv–00724, 2:15–cv–00725, 2:15–cv–00726, 2:15–cv–00727, 2:15–cv–00728, 2:15–cv–00729, 2:15–cv–00730, 2:15–cv–00731, 2:15–cv–00732, 2:15–cv–00733, 2:15–cv–00734, 2:15–cv–00735, 2:15–cv–00736, 2:15–cv–00737, 2:15–cv–00738, 2:15–cv–00739, 2:15–cv–00740, 2:15–cv–00741, 2:15–cv–00742, 2:15–cv–00743, 2:15–cv–00744, 2:15–cv–00746, 2:15–cv–00747, 2:15–cv–00748, 2:15–cv–00749, 2:15–cv–00750, 2:15–cv–01506.

Signed July 27, 2015.

Filed July 29, 2015.

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MEMORANDUM RULING

RICHARD T. HAIK, District Judge.

***1** Before the Court is a Motion To Remand filed by Plaintiffs, a Memorandum in Opposition filed by Defendants Eagle U.S. 2 LLC ("Eagle") and David L. Ardoin ("Ardoin"), Plaintiffs' Reply and Defendants' Sur–Reply. For the reasons that follow, the Court will grant Plaintiffs' motion to remand.

I. Background

This action arises from an explosion and resulting fire on December 20, 2013, at the Eagle chemical manufacturing facility in Calcasieu Parish,

Louisiana. The incident allegedly caused the release of toxic chemicals, gases and smoke into the air, affecting the facility and surrounding area. Plaintiffs are Louisiana residents who assert they were exposed to the toxic release which caused them to sustain various injuries. Plaintiffs cumulated their individual claims pursuant to Louisiana Code of Civil Procedure articles 463–465 which provide for plaintiffs to file their claims together while each plaintiff maintains its individual status.[1] Plaintiffs filed their cumulated petition in the Fourteenth Judicial District Court, Calcasieu Parish, Louisiana, alleging negligence and seeking damages against Eagle, the owner of the chemical manufacturing facility, as well as Ardoin, an employee/ operator at the Eagle facility. Plaintiffs alleged "[t]he release caused respiratory and mucous membrane injuries ... eye irritation, shortness of breath, nose bleeds, cough, headaches, nausea epigastric symptoms, rhinorrhea and wheezing." Petition. While they pray for damages including past pain and suffering and related past and future medical expenses, Plaintiffs further alleged, pursuant to the Louisiana Code of Civil Procedure article 893,[2] that:

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[1] Under the cumulation standard in Louisiana, parties can cumulate their actions under one captioned lawsuit if "there is a community of interest between the parties joined. La.C.C.P. art. 463.

[2] Louisiana Code of Civil Procedure Article 893(A)(1) states that "if a specific amount of damages is necessary to establish ... the lack of jurisdiction of federal courts due to insufficiency of damages, ... a general allegation that the claim exceeds or is less than the requisite amount is required."

> "[t]here is not diversity jurisdiction for Federal Court because the value of each Petitioner's individual case does not exceed $75,000.00." *Id.*
>
> Also, Plaintiffs attached individual affidavits to the Petition which state, "I irrevocably stipulate that my damages ... do not exceed Fifty thousand Dollars ($50,000.00), exclusive of judicial interest and costs. *Id., Affidavits*.

Defendants removed the suit to this forum, alleging jurisdiction under the Class Action Fairness Act ("CAFA"). Defendants contend that federal jurisdiction exists in this case under CAFA. They maintain that counsel representing the plaintiffs in this action have made identical claims on behalf of other plaintiffs, thus creating "collectivist litigation." While Plaintiffs' "complaints do not expressly invoke the class action rule," Defendants assert "the claims here are 'similar' to class action claims and thus CAFA jurisdiction is appropriate." *Notice of Removal*. They further assert that even though Plaintiffs have not sought to comply with the "rigid requirements for class certification," "courts have characterized" litigation such as this as a "quasi-class action."[3]

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[3] In support of their "quasi-class action" position, Defendants cite three cases involving "hundreds of Plaintiffs joined in a single lawsuit," each asserting claims that arose out of damage to property caused by Hurricane Katrina. The court sua sponte severed the claims. In finding that the claims did not constitute a class action, the court commented without any jurisdictional support, that the claims could be described as a "quasi-class action." The Court finds the cases cited are wholly inapposite and distinguishable from this case and Defendants' "quasi-class action" argument is without merit. *See i.e., Bradley v.*

In response to the Removal Notice, Plaintiffs filed this motion to remand. Plaintiffs argue that removal was improper and this case should be remanded to state court because the suit does not meet the definition of a class action under CAFA. Plaintiffs further argue there are no allegations that this case is a class action or that any Plaintiff is acting in a representative capacity on behalf of any class. Rather, theirs is one of 76 properly cumulated petitions pertaining to the release at issue, composed of only individual claims for the Plaintiffs, each of whom maintains his or her separate identity.

II. Motion to Remand Standard

***2** The party removing to federal court has the burden of establishing jurisdiction. *Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc.*, 485 F.3d 793, 797 (5th Cir.2007). Removal jurisdiction "raises significant federalism concerns" and is strictly construed. *Willy v. Coastal Corp.,* 855 F.2d 1160, 1164 (5th Cir.1988). Doubts regarding jurisdiction should be resolved against exercising jurisdiction. Acuna v. Brown & Root, Inc., 200 F.3d 335, 339 (5th Cir.2000). In addressing a motion to remand for lack of diversity jurisdiction, a court looks to the claims in the state court complaint at the time of removal to assess diversity jurisdiction. *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F .3d 720, 723 (5th Cir.2002).

Nationwide Mut. Ins. Co., 2006 WL 2594548, 1 (S.D.Miss.,2006).

III. Analysis

Federal courts are courts of limited jurisdiction. *Howery v. Allstate Ins. Co.,* 243 F.3d 912, 916 (5th Cir.2001). For that reason, a suit is presumed to lie outside a federal court's jurisdiction until the party invoking federal-court jurisdiction establishes otherwise. Id. Any doubts regarding whether removal jurisdiction is proper should be resolved against federal-court jurisdiction. *Acuna*, 200 F.3d at 339. The burden of establishing federal jurisdiction rests on the party seeking the federal forum. *Clayton v. ConocoPhillips Co.*, 722 F.3d 279, 290 (5th Cir.2013).

CAFA Jurisdiction

CAFA grants federal courts original jurisdiction to hear interstate class actions where: (1) the proposed class contains more than 100 members; (2) minimal diversity exits between the parties (i .e., at least one plaintiff and one defendant are from different states); (3) the amount in controversy exceeds $5,000,000; and (4) the primary defendants are not states, state officials, or other governmental entities. 28 U.S.C. § 1332(d)(2), (d)(5).

CAFA defines the term "class action" as "any civil action filed under [Federal Rule of Civil Procedure] Rule 23 or similar State statute or rule of judicial procedure authorizing an action to be brought by one or more representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B). In passing CAFA, Congress emphasized that the term "class action" should be defined broadly to prevent "jurisdictional gamesmanship." *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 424 (5th Cir.2008). In determining whether there is jurisdiction, federal

courts look to the substance of the action and not only at the labels that the parties may attach. *Id.* Nevertheless, the definitive aspect of a CAFA-removable "class action" under 1332(d)(2) is that the action be a representative action *authorized by a statute or rule of procedure that authorizes a class action.*

While Defendants assert jurisdiction under CAFA based on the theory that this case is "similar" to a class action, they ignore the statutory requirements of CAFA. Plaintiff's petition is not a proposed class action and does not contain more than 100 plaintiffs. The petition makes no allegation that any claim was brought in a representative capacity on behalf of any class. Nor does it make any mention of Rule 23 of the Federal Rules of Civil Procedure or the Louisiana statutes related to pleading and establishing a class action, La. C.C.P. arts. 591 and 592. Rather, the petition is composed of the individual claims of Plaintiffs cumulated under La. Civ. Code Proc. arts. 463–465.[4]

***3** By a plain reading of 28 U.S.C. § 1332(d)(A) and (B), Plaintiffs' action does not meet the statutory definition of a "class action." This Court cannot stretch the definition of "class action" beyond the limits set by Congress which tied the scope of CAFA "class actions" to representative actions filed under Federal Rule of Civil Procedure 23 or its state law equivalent. *See Armstead v. Multi–Chem Group,*

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[4] Article 465 of the Louisiana Code of Civil Procedure specifically provides that the individual actions of such cumulated claims may be tried separately. LSA–C.C.P. Art. 465.

LLC., 2012 WL 1866862, 3 (W.D.La.,2012) (citing *In re Vioxx Products Liability Litigation*, 843 F.Supp.2d 654, 663–64 (E.D.La.,2012) and the cases cited therein).

Defendants argue the Court should consolidate this case with the other petitions filed by Plaintiffs' counsel in state court, as well as with any other suits pertaining to the December 20, 2013 accident, in order to create a "class action" under CAFA. In essence, Defendants' contend the Court should ignore the purely state law allegations and binding stipulations in the petition as well as the plain wording of CAFA, pierce the pleadings and essentially create federal question jurisdiction under 28 U.S.C. 1332.

Generally, federal question jurisdiction exists if a federal issue appears on the face plaintiff's state-court complaint. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). The plaintiff is the master of the complaint and may avoid removal to federal court, and obtain a remand to state court, by choosing to rely exclusively on state law claims, *Id.* at 398–99, and/or "by stipulating to amounts at issue that fall below the federal jurisdictional requirement," *Standard Fire Ins. Co. v. Knowles*, 133 S.Ct. 1345, 1350 (2013)[5] (citing *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938) ("If [a plaintiff] does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and

[5] In *Knowles*, the Supreme Court held that a plaintiff who fdes a proposed class action cannot legally bind members of the proposed class before the class is certified. *Id.*

though he would be justly entitled to more, the defendant cannot remove").

In *Caldwell v. Bristol Myers Squibb Sanofi Pharmaceuticals Holding Partnership*, 2012 WL 3862454, 4 (W.D.La.,2012), the court addressed whether or not federal jurisdiction existed when only state claims were being asserted. In particular, the court addressed the issue in the context of CAFA. Initially, the court stated, "the plain language of the statute requires that, in order for an action to be a class action under CAFA, it must be pleaded as a class action under a state or federal class action statute." Quoting *In re Vioxx Products Liability Litigation*, 843 F.Supp.2d 654, 664 (E.D.La.,2012), the court further stated:

> Congress chose to define 'class action' not in terms of joinder of individual claims or by representative relief in general, but in terms of the statute or rule the case is filed under.... This is a statutory requirement; no amount of piercing the pleadings will change the statute or rule under which the case is filed.

Caldwell at 4 (quoting *In re Vioxx*, 843 F.Supp.2d at 664). Just as in *Vioxx*, the court stated that because no class action statute was implicated, "[t]he plain reading of the statutory definition of 'class action' necessarily excludes this case." *Id*. The court further stated, "if this is a formalistic outcome, it is a formalism dictated by Congress. Moreover, it is an understandable bright-line rule." *Id*. Based on the aforesaid language in *Vioxx*,[6] the court held "this

[6] The court in *Caldwell* also examined cases in several circuits other than the Fifth Circuit.

lawsuit does not satisfy CAFA's definition of a class action." *Caldwell* at 4.

CAFA—Mass Action

***4** Defendants also contend that jurisdiction exists under CAFA's "mass action" prong "because plaintiffs have pleaded their claims in a manner that would require a handful of state court judges in Calcasieu Parish to try multiple cases involving hundreds of plaintiffs." Plaintiff argue that their claims are not subject to CAFA's "mass action" provisions because Defendants have failed to establish that each plaintiff asserts claims worth more than $75,000 in damages, citing the stipulation set forth in their petition and the affidavits attached thereto.

CAFA also authorizes removal of a "mass action." A "mass action" must satisfy the same three threshold jurisdictional requirements applicable to "class actions": (1) the aggregate value of the claims exceeds $5,000,000; (2) there are at least 100 class members; and (3) there is minimal diversity, that is, where at least one plaintiff and one defendant are from different states. 28 U.S.C. § 1332(d)(11)(A); 28 U.S.C. § 1332(d)(2); *Armstead v. Multi–Chem Group, LLC.*, 2012 WL 1866862, *4 (W.D.La.,2012). However, in addition to these threshold requirements, § 1332(d)(11)(B)(i) further requires that jurisdiction extends only to those plaintiffs who seek recovery in excess of $75,000. 28 U.S.C. § 1332(d)(11)(B) (I); *Armstead*, 2012 WL 1866862 at * 4.

In *Armstead*, the Court found that "to demonstrate the existence of jurisdiction under § 1332(d)(11) is to show that there is at least one

plaintiff whose claim exceeds $75,000." *Armstead*, 2012 WL 1866862 at * 5 (citing *Abrego Abrego v. Dow Chemical Company*, 443 F.3d 676, 689 (9th Cir.2006) ("Dow [the removing defendant] has not established that even one plaintiff satisfies the $75,000 jurisdictional amount requirement of § 1332(a), applicable to mass actions by virtue of § 1332(d)(11)(B)(i)" accordingly, remand was required)).

The petition specifically states there is no diversity 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 $50,0000, 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."); *see also Standard Fire Ins. Co. v. Knowles*, 133 S.Ct. at 1350.

Nor have Defendants established, either in their notice of removal or in response to the Motion to Remand, that the $75,000 threshold is satisfied by the claims made by any single plaintiff. Plaintiffs have affirmatively alleged the amount in controversy is below the jurisdictional minimum for diversity jurisdiction. Defendants submit no evidence to support a finding by a preponderance of the evidence that the amount in controversy for any plaintiff's claim in this action exceeds $75,000. Rather,

Defendants assert that the $75,000 threshold is facially apparent because the types of damages sought to be recovered by the plaintiffs in this case are similar to the categories of damages sought to be recovered by the plaintiffs in *Griffin v. Georgia Gulf Lake Charles, LLC*, 562 F.Supp.2d 775, 778–79 (W.D.La.2008). The type of damages sought to be recovered, however, does not determine whether the $75,000 amount in controversy requirement has been satisfied, the amount of damages sought to be recovered governs the inquiry, and the defendants have presented no evidence to establish that amount. Consequently, Plaintiffs' claims remain presumptively correct as Defendants have failed to show by a preponderance of the evidence that the amount in controversy is greater than the jurisdictional amount. *DeAguilar* at 1412. Defendants' contention that it is "facially apparent" from the petition that the $75,000.00 amount in controversy requirement is satisfied, is without merit and the amount in controversy for a mass action under CAFA is not met.

***5** Based on the factual allegations of the release at issue as pleaded in the state court petition, the Court finds that this lawsuit is not a mass action as that term is defined in CAFA.[7] As such, it is not necessary for the Court to consider whether or not

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[7] As there has been no attempt to consolidate this lawsuit with any other separately filed lawsuit(s) and Plaintiffs' counsel has not proposed to try any of the lawsuits jointly, the jurisprudence cited by Defendants is inapposite. *See i.e. Hamilton, et al v. Burlington Northern Sanata Fe Pailway Company et al*, 2008 WL 814819 (W.D.Tex.2008).

the "event or occurrence" exclusion to "mass action" removal applies in this case.[8]

Request for Costs, Expenses and Attorney's Fees

Plaintiffs also move the Court to award costs, expenses and attorney's fees against Defendants for improper removal of this case. The Court retains the discretion to award to the nonmoving party "payment of just costs and any actual expenses, including attorneys' fees, incurred as a result of the removal." 28 U.S.C. 1447(c). To award attorneys' fees and costs, however, the Court must find that Defendants "lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). Conversely, when an objectively reasonable basis exists, fees should be denied." *Martin*, 126 S.Ct. at 711 (citing *Hornbuckle v. State Farm Lloyds*, 385 F.3d 538, 541 (5th Cir.2004)). Under the legal and factual circumstances presented in this case, the undersigned cannot find that the removal in this case was objectively unreasonable. Accordingly, Plaintiffs' request for costs, expenses and attorney fees will be denied.

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[8] Under the "event or occurrence" exclusion, term "mass action" excludes any civil action in which "all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State...." 28 U.S.C. § 1332(d)(11)(B)(ii)(I). Courts have found that a facility explosion and release such as in this case encompasses CAFA's mass action exception. *See Armstead*, 2012 WL 1866862, * 8–9.

IV. Conclusion

For the foregoing reasons, the Court finds that Defendants have failed to meet their burden to establish this action was properly removed to this Court under CAFA, 28 U.S.C. § 1332(d). The Court will therefore grant Plaintiffs' Motion To Remand.

IT IS ORDERED that Motion To Remand filed by Plaintiffs is **GRANTED**, and this matter is hereby **REMANDED** to the 14th Judicial District Court, Parish of St. Landry, State of Louisiana from which it was removed.

Appendix C

2015 WL 8730066

United States Court of Appeals,

Fifth Circuit.

EAGLE U.S. 2, L.L.C., Defendant–Petitioner

v.

Eva D. ABRAHAM, et al., Plaintiffs–Respondents.

No. 15–90024, 15–90025, 15–90026, 15–90027, 15–90028, 15–90029, 15–90030, 15–90031, 15–90032, 15–90033, 15–90034, 15–90035, 15–90036, 15–90037, 15–90039, 15–90040, 15–90041, 15–90042, 15–90043, 15–90044, 15–90045, 15–90046, 15–90047, 15–90048, 15–90049, 15–90050, 15–90051, 15–90052, 15–90053, 15–90054, 15–90055, 15–90056, 15–90057, 15–90058, 15–90059, 15–90060, 15–90061, 15–90062, 15–90063, 15–90064, 15–90065, 15–90066, 15–90067, 15–90069, 15–90070, 15–90071, 15–90072, 15–90073, 15–90074, 15–90075, 15–90076, 15–90077, 15–90078, 15–90079, 15–90080, 15–90081, 15–90082, 15–90083, 15–90084, 15–90085, 15–90086, 15–90087, 15–90088, 15–90089, 15–90090, 15–90091, 15–90092, 15–90093, 15–90094, 15–90095, 15–90096, 15–90097, 15–90098, 15–90099, 15–90100, 15–90101, 15–90102.

Dec. 11, 2015.

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Motions for Leave to Appeal, Pursuant to 28 U.S.C. § 1453.

Before CLEMENT, ELROD, and SOUTHWICK, Circuit Judges.

ON PETITION FOR REHEARING EN BANC

PER CURIAM: *

*1 Treating the petition for rehearing en banc as a motion for reconsideration, the motion for reconsideration is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on rehearing en banc, FED R. APP. P. 35; 5th CIR. R. 35, the petition for rehearing en banc is DENIED.

Defendant–Petitioner Eagle U.S. 2 L.L.C. (Eagle) removed this case to federal district court, arguing that removal jurisdiction existed under 28 U.S.C. § 1332(d)(2) (governing "class actions") and in the alternative under § 1332(d)(11) (governing "mass actions"). Rejecting both arguments, the district court remanded the case back to Louisiana state court. Eagle sought discretionary review before this court under 28 U.S.C. § 1453(c)(1), which provides that "a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed." We declined review for lack of appellate jurisdiction because § 1453(c)(1) allows review only of an order remanding "a class action," and this case is not a class action as defined in § 1332(d)(1)(B). We reasoned that § 1332(d)(1)(B)'s definition of a "class action" does not encompass this case because the Louisiana cumulation procedure employed by Plaintiffs–Respondents does not

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

authorize "representative" litigation. Eagle now seeks rehearing, arguing that we did not address whether this case is a "mass action." Even assuming arguendo that § 1453(c)(1) allows review of orders remanding mass actions as well as class actions,[10]1 review is nevertheless foreclosed because this case is not a mass action.

CAFA defines a "mass action" as "any civil action ... in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." § 1332(d)(11)(B)(i). In remanding the case to state court for lack of removal jurisdiction, the district court determined "that this lawsuit is not a mass action as that term is defined in CAFA." (citing a portion of Eagle's notice of removal that argued the 100–person requirement was met). Because this case does not involve "100 or more persons," we come to the same conclusion.

This case was initially filed in Louisiana state court as a cumulated action involving twenty-three named plaintiffs. Eagle asserts that the complaint in

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[1] 28 U.S.C. § 1332(d)(11)(A) provides: "For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs." We assume without deciding that that language brings mass actions within not only § 1453's *removal* provision, § 1453(b), but also its review provision, § 1453(c). We have previously invoked § 1453(c) to review orders remanding mass actions to state court but have not addressed this issue. *See, e.g., Rainbow Gun Club, Inc. v. Denbury Onshore, L.L.C.*, 760 F.3d 405, 408 (5th Cir.2014).

this case "is one of 77 complaints filed by the same lawyers making identical claims on behalf of more than ***1,700*** plaintiffs." (emphasis in original). In its notice of removal, Eagle argued that the '100– or–more–persons' requirement is satisfied because "[t]he fact that plaintiffs' counsel broke up their client base into multiple suits making identical allegations is not a tactic that prevents the assertion of jurisdiction under CAFA."

We disagree. The "mass action" definition requires "100 or more persons" whose claims "are proposed to be tried jointly." § 1332(d)(11)(B)(i). The "100–or–more–persons" requirement cannot be satisfied by piercing the pleadings across multiple state court actions when the plaintiffs have not proposed that those actions be tried jointly or otherwise consolidated. "Every other court of appeals confronted with this question has come to the same conclusion: that plaintiffs have the ability to avoid § 1332(d)(11)(B)(i) jurisdiction by filing separate complaints naming less than 100 plaintiffs and by not moving for or otherwise proposing joint trial in the state court." *Parson v. Johnson & Johnson*, 749 F.3d 879, 886–87 (10th Cir.2014) (quoting *Scimone v. Carnival Corp.*, 720 F.3d 876, 884 (11th Cir.2013)); accord *Anderson v. Bayer Corp.*, 610 F.3d 390, 393–94 (7th Cir.2010); *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 952–53 (9th Cir.2009). As the district court in this case noted, "there has been no attempt to consolidate this lawsuit with any other separately filed lawsuit(s) and Plaintiffs' counsel has not proposed to try any of the lawsuits jointly."

*2 Because this case does not involve "100 or more persons," it is not a "mass action" and we have no appellate jurisdiction under § 1453(c)(1), regardless of whether that provision allows review of district court orders remanding mass actions.

Appendix D

EVA D. ABRAHAM, SAHIBZADA AHMAD, HERBERT ALBERT, DENNIS W. ALLISON, ETHEL ANDERSON, EDWARD ANTHONY, SR., FRANCIS ANTHONY, CLAUDIE AUGUSTA, ANNITA D. AUZENNE, DAVID L. BARNES, PEARL BARNES, CHRISTOPHER BARTIE, SR., WYNDELL BELLARD, SHERITA BERNARD, LAURA BIAS, MARY BIAS, ROCKEL BIAS, CLAUDINE BIENVENUE, DENISE BIGELOW, FELICIA BIGELOW, TRACY BIGELOW, DEBRA ACLIS, AND TOMIKA ARTIS		14th JUDICIAL DISTRICT COURT
VS NO.: 2014-5045 B	:	PARISH OF CALCASIEU

EAGLE US 2 LLC AND : STATE OF LOUISIANA

DAVID L. ARDOIN

FILED: Dec. 16, 2014

Deputy Clerk

PETITION FOR DAMAGES

NOW INTO COURT, through undersigned counsel, come petitioners, Eva D. Abraham, Sahibzada Ahmad, Herbert Albert, Dennis W. Allison, Ethel Anderson, Edward Anthony, Sr., Francis Anthony, Claudie Augusta, Annita D. Auzenne, David L. Barnes, Pearl Barnes, Christopher Bartle, Sr., Wyndell Bellard, Sherita Bernard, Laura Bias, Mary Bias, Rockel Bias, Claudine Bienvenue, Denise Bigelow, Felicia Bigelow, and Tracy Bigelow, persons of the age of majority and domiciled in Calcasieu Parish, State of Louisiana, Debra Aclis, a person of the age of majority and domiciled in. Allen Parish, State of Louisiana, and Tomika Artis, a person of the age of majority and domiciled in Harris County, State of Texas, who each bring their own individual claim as follows:

1.

Made Defendants herein are:

EAGLE US 2 LLC (hereinafter referred to as "Eagle"), a foreign limited liability company formed under the laws of the State of Delaware, and whose principal business establishment in Louisiana is 1300 PPG Drive, Westlake, Louisiana, and who may be

served through its registered agent for service of process, Corporation Service Company, 320 Somerulos Street, Baton Rouge, La. 70802-6129.

DAVID L. ARDOIN, an individual who is a resident of Calcasieu Parish and a Louisiana domiciliary who may be served at his residence, 1320 West Sale Road, Lake Charles, LA 70605.

Exhibit A

2.

Eagle is the owner and operator of a chemical manufacturing facility in Calcasieu Parish, State of Louisiana, which manufactures and handles hazardous substances and chemicals, as those terms are used in Louisiana law.

3.

Eagle's chemical manufacturing facility in Calcasieu Parish, located at 1300 PPG Drive, Westlake, Louisiana, was the site of a pipe rupture, fire, and uncontrolled release of harmful chemicals on December 20, 2013.

4.

Jurisdiction and venue exist over the defendant, Eagle, in Calcasieu Parish due to its negligent conduct within Calcasieu Parish causing an accident and injuries to the Petitioners in Calcasieu Parish, as a result of the unlawful release of chemicals.

5.

Defendant, David L. Ardoin, is an individual residing in Calcasieu Parish and is a Louisiana domiciliary. At all pertinent times herein, including

December 20, 2013, he was an employee of Eagle US 2 LLC. In the course and scope of his employment with Eagle, he was an operator at Eagle's Vinyl Chloride Unit. (This Defendant is hereinafter sometimes referred to as "Ardoin.")

6.

Eagle's plant contains a No. 2 Vinyl Chloride Cracking Furnace (the "Cracking Furnace") which is involved in the manufacture of Vinyl Chloride (VCM) through the cracking (heating) of Ethylene Dichloride (EDC). Eagle refers to the changing of EDC to VCM as conversion. The furnace consists of a series of tubes through which EDC is fed. The tubes are heated by burners. The burners are powered by a natural gas feed.

7.

On December 20, 2013, the cracking furnace had "tripped" and was being restarted.

8.

Ardoin was the operator who had the specific and personal job duty to restart the cracking furnace on December 20, 2013, along with other technicians.

9.

On December 20, 2013, as part of his personal duties, Ardoin controlled the amount of natural gas that was used to restart the cracking furnace. The natural gas input has a No. 1 input and a No. 2 input, which are controlled by separate valves. The furnace has three sections that are lighted and powered by the natural gas. The middle section is lighted and powered by both the No. 1 and No. 2

input. The No. 1 input controls one side section and he No. 2 input controls the other.

10.

At the time of the restart of the Cracking Furnace on December 20, 2013, the EDC feed to the furnace was at low levels in an effort to get it warmed up. The lower EDC feed to the furnace is typical in all start-up situations.

11.

Because some of the burners would not light on the December 20, 2013 restart, Ardoin increased the natural gas input on one of the feeds. He did this through a manual valve he solely controlled. Ardoin manually opened the gas valve such that the gas pressure was 38 psig, well above the 21 psig that was controlled prior to the furnace trip. Thus, Ardoin increased the natural gas beyond appropriate levels, resulting in too much heat for the process. A review of the temperature data showed that the temperature rise in the cracking furnace was not being controlled. Ardoin's focus was improperly on maintaining gas pressure instead of controlling temperatures. The ratio of the natural gas input to the EDC feed is a good indicator of the degree of appropriate temperatures. During the restart, Ardoin received the overall gas liquid ratio alarm early in the event but did not respond. At that point, the furnace was being over-fired with the No. 2 input at a firing rate greater than the No. 1 input. This unreasonable degree of over-firing caused very rapid increases in furnace temperatures. This had a direct result in the EDC reaching one hundred percent (100%) conversion, way beyond targeted and appropriate levels. In addition to the heat provided

by the burners, the one hundred percent (100%) conversion resulted in further heat. Eventually the unreasonable amount of heat exposed the piping to temperatures well above design capability, causing the pipe to weaken, rupture, and release chemicals.

12.

On December 20, 2013, at approximately 1:41 p.m., the pipe leading from the Cracking Furnace ruptured due to excessive internal pressure and heat, caused by Ardoin's multiple errors during a "vinyl furnace restart," setting ablaze equipment and chemical compounds at the Cracking Furnace.

13.

The chemical release and subsequent fire at the Cracking Furnace caused the release into the community of hazardous quantities of Hydrochloric Acid (HCL), Ethylene Dichloride (EDC), and Vinyl Chloride Monomer (VCM). Moreover, combustion caused the release of other hazardous chemicals.

14.

The release and fire caused clouds of thick black smoke to travel upward and descend on areas laterally to the Eagle facility, as well as north from the Eagle facility over areas of Sulphur, Louisiana, Westlake, Louisiana, the Moss Bluff area of Lake Charles, Louisiana, and portions of Lake Charles, Louisiana.

15.

The negligence of Ardoin was a factual and legal cause of the December 20, 2013 chemical release and resulting damages to plaintiffs as alleged herein as follows:

a) Ardoin had a specific and personal duty to control the amount of natural gas released into the furnace on the restart of the Cracking Furnace on December 20, 2013;

b) Ardoin had the specific and personal job responsibility to ensure that the furnace was started safely and that he reasonably and appropriately controlled the amount of natural gas feed to the furnace on start-up;

c) The amount of natural gas released to the Cracking Furnace on December 20, 2013 which eventually caused the release was under the exclusive and personal control of Ardoin through his opening and closing the two valves involved;

d) Through Ardoin causing one of the feeds of natural gas to exceed reasonable quantities, the furnace got too hot for the limited amount of EDC, and the EDC reached one hundred percent (100%) conversion. Ardoin negligently focused solely on gas pressure instead of temperature, failing to recognize the known effects of excessive natural gas pressure. Ardoin also negligently failed to heed the alarm early in the event, alerting him of the imbalance in the gas/liquid ratio. The added heat from the burners coupled with the heat produced by the one hundred percent (100%) conversion caused the pipe to weaken and rupture, releasing hazardous chemicals;

e) Ardoin was the only Eagle employee to be reprimanded as a result of the December 20, 2013 release;

f) Ardoin knew or should have known that the increased gas compared to the liquid EDC feed

would cause an unreasonable amount of heat for the cracking process, creating an unsafe condition;

g) But for the negligence on the part of Ardoin, the pipe would not have ruptured and the December 20, 2013 release from the Eagle facility would not have occurred; and

h) Ardoin failed to exercise the degree of care required by ordinary prudence under the same or similar circumstances. Despite numerous restarts, no prior operator had increased the gas feed to such an extent as Ardoin did on December 20, 2013 to cause the excessive heat problem and resulting pipe rupture. Thus, defendant, Ardoin, is individually liable for his negligence which was the factual and legal cause of the December 20, 2013 release and resulting injuries alleged herein.

16.

Defendant, Eagle, is liable for the negligence of Ardoin under respondeat superior. At all pertinent times, Ardoin was in the course and scope of his employment with Eagle on December 20, 2013.

17.

The defendant, Eagle, had a duty to act prudently and responsibly with respect to the operations of its chemical manufacturing facility and was negligent in its conduct below the standard of care. Eagle's negligence was a factual and legal cause of the December 20, 2013 release and resulting damages alleged herein as follows:

a) Eagle failed to take appropriate actions and safeguards in the start-up of its Cracking Furnace;

b) Eagle failed to have appropriate safeguards to ensure that the amount of EDC used in start-up and the amount of gas used to fuel the furnace burners was a regulated ratio so as to ensure that one hundred percent (100%) conversion would not take place;

c) Eagle failed to install automated shutdown and safeguards to prevent the excessive heat problem caused by operator error that ruptured the piping; and

d) In addition, after the release, Eagle failed in its duty to warn and protect the public. Although a shelter-in-place was called, it was lifted before Eagle determined that there were no levels of hazardous chemicals in the community.

18.

The release caused respiratory and mucous membrane injuries to Petitioner(s). Petitioner(s) suffered eye irritation, shortness of breath, nose bleeds, cough, headaches, nausea, epigastric symptoms, rhinorrhea, and wheezing.

19.

Each Petitioner suffered the following individual damages in amounts reasonable in the premises:

a) Past physical pain and suffering;

b) Past, present, and future mental pain and suffering, including fear of future injury or disease; and

c) Past medical bills and expenses.

20.

The damages of each Petitioner individually do not exceed $50,000.00, exclusive of interest and costs. As such, Plaintiffs are entitled to a judge trial under Louisiana law.

21.

There is not diversity jurisdiction for 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*.

22.

In addition, there is not diversity jurisdiction for Federal Court because defendant, Ardoin, is individually liable herein and is a Louisiana domiciliary.

23.

Under Louisiana Code of Civil Procedure Art. 463, Petitioners are entitled to cumulate their individual causes of action and proceed against Defendants in this single lawsuit. Petitioners have a community of interest in maintaining the causes of action alleged herein, and all of Petitioners' actions are mutually consistent and employ the same form of procedure. However, cumulation is simply a form of procedure to file individual cases together; each petitioner maintains their own individual and distinct claim. Under LCCP art. 463, the trial court can try the cases individually or jointly. But each individual will be adjudicated separately under the law.

24.

Petitioner(s) bring this lawsuit solely under Louisiana state law.

WHEREFORE, petitioners, Eva D. Abraham, Sahibzada Ahmad, Herbert Albert, Dennis W. Allison, Ethel Anderson, Edward Anthony, Sr., Francis Anthony, Claudie Augusta, Annita D. Auzenne, David L. Barnes, Pearl Barnes, Christopher Bartle, Sr., Wyndell Bellard, Sherita Bernard, Laura Bias, Mary Bias, Rockel Bias, Claudine Bienvenue, Denise Bigelow, Felicia Bigelow, Tracy Bigelow, Debra Aclis, and Tomika Artis, pray that defendants, Eagle US 2 LLC and David L. Ardoin, be served with a copy of this Petition and be cited to answer same, and after due proceedings had, there be judgment in favor of each individual petitioner named as follows, Eva D. Abraham, Sahibzada Ahmad, Herbert Albert, Dennis W. Allison, Ethel Anderson, Edward Anthony, Sr., Francis Anthony, Claudie Augusta, Annita D. Auzenne, David L. Barnes, Pearl Barnes, Christopher Bartle, Sr., Wyndell Bellard, Sherita Bernard, Laura Bias, Mary Bias, Rockel Bias, Claudine Bienvenue, Denise Bigelow, Felicia Bigelow, Tracy Bigelow, Debra Aclis, and Tomika Artis, and against the defendants, Eagle US 2 LLC and David L. Ardoin, for their own individual and distinct damages, in such amounts as are reasonable in the premises, not to exceed $50,000.00 individually, together with legal interest from the date of judicial demand until paid, and for all costs of these proceedings.

Respectfully submitted,

WELLS WATSON (#20406)
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Attorneys for Petitioners

NOTE TO THE CLERK
PLEASE SERVE

EAGLE US 2 LLC

Through their agent for service
of process:
Corporation Service Company,
320 Somerulos Street,
Baton Rouge, LA 70802-6129

DAVID L. ARDOIN
Through his agent for service of
process:
Benjamin J. Guilbeau, Jr.,
Stockwell, Sievert, Viccellio,
Clements & Shaddock,
One Lakeside Plaza,
127 West Broad Street,
Lake Charles, LA 70601

Appendix E

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

EVA D. ABRAHAM,	*	Civil Action No. __
SAHIBZADA AHMAD,		
HERBERT ALBERT,	*	
DENNIS W. ALLISON,		
ETHEL ANDERSON,	*	JUDGE_____
EDWARD ANTHONY, SR.,	*	
FRANCIS ANTHONY,		
CLAUDIE AUGUSTA,	*	MAGISTRATE___
ANNITA D. AUZENNE,	*	
DAVID L. BARNES,		
PEARL BARNES,	*	
CHRISTOPHER BARTIE,	*	
SR., WYNDELL BELLARD,		
SHERITA BERNARD,	*	
LAURA BIAS, MARY BIAS,	*	
ROCKEL BIAS, CLAUDINE	*	
BIENVENUE, DENISE	*	
BIGELOW,		
FELICIA BIGELOW,	*	
TRACY BIGELOW,		
DEBRA ACLIS, AND	*	
TOMIKA ARTIS		
PLAINTIFFS	*	

VERSUS *

EAGLE US 2 LLC AND *
DAVID L. ARDOIN
DEFENDANTS *

NOTICE OF REMOVAL

TO: Plaintiffs, through their counsel of record,

Wells T. Watson
Roger G. Burgess

BAGGETT, McCALL, BURGESS,
WATSON & GAUGHAN, LLC
3006 Country Club Rd.
P.O. Drawer 7820
Lake Charles, LA 70606-7820

Michael H. Schwartzberg
Glen D. Vamvoras
VAMVORAS, SCHWARTZBERG & HINCH
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Lake Charles, LA 70601

Perry R. Sanders, Jr.
SANDERS LAW FIRM, L.L.C. P.O. Box 6388
Lake Charles, LA 70606

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. §§ 1332(d), 1453 and 1446, defendant Eagle US 2 LLC ("Eagle"), by and through undersigned counsel, hereby removes the civil action captioned "*Eve D. Abraham, et al. v. Eagle US 2 LLC, et al.*," Case No. 2014-5045, Division "B", filed in the Fourteenth Judicial District Court for the Parish of Calcasieu, State of Louisiana (the "state court

action") to the United States District Court for the Western District of Louisiana, Lake Charles Division.

TIMELINESS OF REMOVAL

1.

On December 16, 2014, the original Petition for Damages (the "Petition") was filed in the state court action against Eagle. Service of Process on Eagle's registered agent was made on February 18, 2015. This Notice of Removal is being filed within thirty (30) days after Eagle's receipt through service thereof of a copy of the Petition filed in the state court action.

2.

Pursuant to 28 U.S.C. § 1446(a), attached to this notice as Exhibit A is a copy of the process, pleadings, and orders that have been served upon Eagle, incorporated herein by reference. This Exhibit is exempt from the redaction requirement pursuant to Fed. R. Civ. Proc. 5.2(b).

VENUE

3.

Pursuant to 28 U.S.C. § 1441(a), the United States District Court for the Western District of Louisiana, Lake Charles Division, is the district and division within which the state court action is pending.

BACKGROUND

4.

The claims before the court are among a series of complaints alleging damages as a result of a fire at

Eagle's facilities on December 20, 2013. To date, over 100 complaints representing over 2,600 plaintiffs have been filed, all arising from the virtually the same allegations. The instant complaint is one in a set of 81 complaints by the same plaintiffs' counsel. Plaintiffs allege that the "chemical release and fire at the Cracking Furnace caused the release into the community of hazardous quantities of Hydrochloric Acid (HCL), Ethylene Dichloride (EDC), and Vinyl Chloride Monomer (VCM). Moreover, combustion caused the release of other hazardous chemicals." (Compl. ¶ 13). Plaintiffs further allege "[t]he fire and release caused clouds of thick black smoke to travel upward and descent on areas laterally to the Eagle facility, as well as north from the Eagle facility over areas of Sulphur, Louisiana, Westlake, Louisiana, the Moss Bluff area of Lake Charles, Louisiana, and portions of Lake Charles, Louisiana." (Compl. ¶ 14). Plaintiffs allege that "[t]he release caused respiratory and mucous membrane injuries to Petitioner(s). Petitioner(s) suffered eye irritation, shortness of breath, nose bleeds, cough, headaches, nausea, epigastric symptoms, rhinorrhea, and wheezing." (Compl. ¶ 18). As a result, plaintiffs allege that they are entitled to damages itemized as follows: "a) Past physical pain and suffering; b) Past, present, and future mental pain and suffering, including fear of future injury or disease; and c) Past medical bills and expenses." (Compl. ¶ 19). Plaintiffs plead that "[u]nder Louisiana Code of Civil Procedure Art. 463, Petitioners are entitled to cumulate their individual cause of actions and proceed against Defendants in this single lawsuit. Petitioners have a community of interest in maintaining the causes of action alleged herein, and

all of the Petitioners' actions are mutually consistent and employ the same form of procedure." (Compl. ¶ 23).

Counsel representing the plaintiffs herein also represented plaintiffs and/or class settlement claimants asserting similar injuries as a result of fires in 2006 or 2007 at another facility in Lake Charles owned by Georgia Gulf Lake Charles, LLC.[1] Hundreds of plaintiffs asserting similar injuries as a result of the 2006 or 2007 Fires at Georgia Gulf Lake Charles, LLC are among the plaintiffs asserting claims against Eagle. A number of those prior cases were removed to federal court, and this Court issued a series of orders denying plaintiffs' motions to remand. See Anderson v. Gulf Lake Charles, LLC, 342 F. App'x. (5th Cir. 2009), aff'g, Report and Recommendation, Anderson v. Georgia Gulf Lake Charles, LLC, No. 2:07 cv 1378 LEAD, at 16 (W.D. La. 6/20/2008) (R. Doc. No. 77) (denying remand motions in consolidated cases, holding that removal was proper based on diversity and CAFA minimal diversity); Order Adopting Report and Recommendation, Anderson v. Georgia Gulf Lake Charles, LLC, No. 2:07 cv 1378 LEAD (W.D. La. 6/20/2008) (R. Doc. No. 87); Minutes of Court Oral Argument, In re Georgia Gulf Fire Litig. Cases, No. 09-MD-01 (W.D. La. 3/19/2009) (R. Doc. No. 8); Minutes of Oral Argument, Baker v. Georgia Gulf Lake Charles, LLC, No. 2:08-cv-1790 (W.D. La. 3/17/2009) (R. Doc. No. 18); Minutes of Court Oral

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[1] Eagle US 2 LLC and Georgia Gulf Lake Charles, LLC are both subsidiaries of Axiall Corporation, which is also named as defendant in the cases removed to this Court.

Argument, Combs v. Georgia Gulf Lake Charles, LLC, No. 2:08-cv-0398 (W.D. La. 10/20/2009) (R. Doc. No. 20).

Following this Court's determinations confirming removal jurisdiction, counsel for the plaintiffs moved to voluntarily dismiss with prejudice many of the plaintiffs' claims in federal court. See, e.g., Mot. to Dismiss With Prejudice and Order Granting Mot. to Dismiss, Andrepont et. al. v. Georgia Gulf Lake Charles, LLC, 2:08-cv-1789 (W.D. La. 7/9/2010) (R. Doc. Nos. 28, 33). Other claims were resolved through summary judgment and directed verdicts. See Bushnell, et al. v. Georgia Gulf Lake Charles, LLC, et al., No. 07-cv-3000 (W.D. La.), aff'd sub nom. Harmon v. Georgia Gulf Lake Charles, LLC, 2012 WL 1623573 (5th Cir. 5/9/2012), and Guidry v. Georgia Gulf Lake Charles, LLC, et al., No. 08-cv-3000, aff'd, 2012 WL 2735332 (5th Cir. 7/9/2012). With the exception of certain opt out claimants, the actions removed to this Court arising out of the 2006 and 2007 Fires along with cases remaining in state court were resolved through a class settlement. See Certification Order and other Related Orders, Withers v. Georgia Gulf Lake Charles, LLC, No. 2007-4351, at 1 (La. 14th Judicial Dist. Ct. 2/17/2010).

GROUNDS FOR REMOVAL – CLASS ACTION FAIRNESS ACT

5.

Jurisdiction over this matter exists under 28 U.S.C. §§ 1332(d) & 1453 pursuant to provisions incorporated therein by the Class Action Fairness Act (CAFA). Congress passed CAFA to expand the jurisdiction of the federal courts and to prevent

plaintiffs from "gam[ing] the system" to remain in "lawsuit-friendly" state courts, S. Rep. No. 109-14, at 10-12 (2005), a practice that Congress determined harmed plaintiffs "with legitimate claims and defendants that have acted responsibly" and "undermined public respect for our judicial system." Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(2)(A), 2(a)(2)(C) & 2(a)(4), 119 Stat 4 (2005). See also S. Rep. No. 109-14, at 13 (noting "[t]he ability of plaintiffs' lawyers to evade federal diversity jurisdiction," which had "helped spur a dramatic increase" in the number of state court suits," which in turn was "stretching the resources of the state court systems"). By passage of CAFA, Congress enabled defendants to remove to federal court any sizable class action involving minimal diversity of citizenship.

In particular, Congress believed that some courts had applied the "diversity and removal standards" in ways that "thwart[ed] the underlying purpose of the constitutional requirement of diversity jurisdiction" to allow cases to remain in state courts. S. Rep. No. 109-14, at 6, reprinted in 2005 U.S.C.C.A.N. at 7; 151 Cong. Rec. S1225, S1235 (daily ed. 2/10/2005) (statement of Sen. Sessions) (CAFA is consistent with the Founders' views that out-of state defendants should be protected from the "home cooking" of state courts). It observed that "the two most common tactics employed by plaintiffs' attorneys in order to guarantee a state court tribunal are: adding parties to destroy diversity and shaving off parties with claims for more than $75,000." 2005 U.S.C.C.A.N. at 26-27 (footnotes omitted).

Accordingly, Congress implemented provisions to relax these requirements and expand federal court jurisdiction for multi-plaintiff "class action" and "mass action" cases. See 28 U.S.C. § 1332(d). CAFA was enacted to facilitate federal courts' adjudication of class actions. *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 554 (2014). Thus, "no antiremoval presumption attends cases invoking CAFA." *Id.* These amendments were designed to "prevent plaintiffs from evading federal jurisdiction by hiding the true nature of their case." 2005 U.S.C.C.A.N. at 10. "CAFA was clearly designed to prevent plaintiffs from artificially structuring their suits to avoid federal jurisdiction." *Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 407 (6th Cir. 2008). Plaintiffs' attempts to avoid federal jurisdiction here run afoul of Section 1332's CAFA provisions.

A. CAFA Class Action

CAFA provides that a "class action" may be removed in accordance with 28 U.S.C. § 1446 if: (a) the purported class includes at least 100 members; (b) any purported class member is a citizen of a state that is different from any defendant; and (c) the aggregate amount in controversy exceeds $5,000,000. See 28 U.S.C. §§ 1332(d) & 1453(b). In implementing this provision, Congress relaxed the traditional rules for diversity jurisdiction, requiring only "minimal" diversity among the parties and allowing aggregation of the jurisdictional amount-in-controversy. *See Frazier v. Pioneer Am. LLC*, 455 F.3d 542, 545 (5th Cir. 2006) ("Unlike § 1332(a), CAFA explicitly allows aggregation of each class member's claim. 28 U.S.C. § 1332(d)(6).").

i. This case qualifies as a CAFA "class action"

The Fifth Circuit has recognized that "[i]n passing CAFA, Congress emphasized that the term 'class action' should be defined broadly to prevent 'jurisdictional gamesmanship ... .'" *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 424 (5th Cir. 2008). Under Section 1332(d), "the term 'class action' means 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." 28 U.S.C. § 1332(d)(1)(B) (emphasis added). Accordingly, plaintiffs need not plead class allegations in order for a case to qualify as a CAFA "class action." As the Fifth Circuit observed in *Caldwell*, citing the legislative history, "[T]he definition of 'class action' is to be interpreted liberally. Its application should not be confined solely to lawsuits that are labeled 'class actions' by the named plaintiff or the state rulemaking authority. Generally speaking, **lawsuits that resemble a purported class action** should be considered class action for the purpose of applying these provisions.' S. Rep. No. 109–14, at 35 (2005), U.S. Code Cong. & Admin. News 2005, p. 3." 536 F.3d at 424 (emphasis added).

It is well-established that in determining whether there is jurisdiction, federal courts look to the substance of the action and not only at the labels that the parties may attach. See *Grassi v. Ciba–Geigy, Ltd.*, 894 F.2d 181, 185 (5th Cir.1990) ("[J]urisdictional rules may not be used to perpetrate a fraud or ill-practice upon the court by either improperly creating or destroying diversity

jurisdiction. Were that to occur, we would not elevate form over substance but would accomplish whatever piercing and adjustments considered necessary to protect the court's jurisdiction." (internal quotation marks and citation omitted)); see also *Wecker v. National Enameling & Stamping Co.*, 204 U.S. 176, 185–86, 27 S. Ct. 184, 51 L. Ed. 430 (1907) ("Federal courts should not sanction devices intended to prevent a removal to Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction."); *Caldwell*, 536 F.3d at 424 ("It is well-established that in determining whether there is jurisdiction, federal courts look to the substance of the action and not only at the labels that the parties may attach."); *Evans v. Walter Indus., Inc.*, 449 F.3d 1149, 1164 (11th Cir. 2006) ("The language and structure of CAFA itself indicates that Congress contemplated broad federal court jurisdiction ... with only narrow exceptions....").

Plaintiffs' complaint here satisfies this requirement. Looking at this litigation as a whole, it is plain that plaintiffs are "artificially structuring their suits" in attempt "to avoid federal jurisdiction." *Freeman*, 551 F.3d at 407. This litigation involves 100 complaints on behalf of over 2,600 plaintiffs. The instant action, like nearly every other action seeking damages against the defendant, seeks to invoke Louisiana's cumulation rule to join multiple plaintiffs in a single suit, all of whom share a "community of interest" according to the express allegations made in the state court petitions. La. Code Civ. Proc. Art. 463. Four complaints naming at least 785 plaintiffs allege injuries as a result of the

fire are expressly filed on behalf not only of the named plaintiffs, but also "on behalf of all others similarly situated," including presumably plaintiffs here. *See, e.g.*, Civil Action Nos. 15-cv-00295, 15-cv-00298, 15-cv-00299 & 15-cv-00300 (W.D. La.). While the complaints do not expressly invoke the class action rule, they make clear that the claims here are "similar" to class action claims and thus CAFA jurisdiction is appropriate. *See First Guar. Bank v. Carter*, 563 So. 2d 1240 (La. App. 1st Cir. 1990) ("The term 'community of interest' retains the same meaning assigned to it and to 'common interest' in *Gill v. City of Lake Charles*, 119 La. 17, 43 So. 879 (1907), and subsequent cases based thereon, namely, actions arising out of the same facts, or presenting the same factual and legal issues.").

The history prior referenced litigation further demonstrates that this and the other actions are "similar to" "class actions." Indeed, many of the claims in the prior fire litigation brought by many of these same plaintiffs' counsel were resolved through a class-wide settlement. See Certification Order and other Related Orders, *Withers v. Georgia Gulf Lake Charles*, LLC, No. 2007-4351, at 1 (La. 14th Judicial Dist. Ct. 2/17/2010) ("the Class as Defined is certified for settlement purposes only" and "consists of all persons and entities who claim, claimed, and/or could claim that they sustained, or may in the future sustain, bodily and/or personal injury, loss, property damage, and/or other damage under any theory of recovery and/or are entitled to injunctive or declaratory relief, as the result of and/or in any way Related to the Episodes" at the Gulf Lake facility); *id*. at 2 ("In so holding, the Court finds that the prerequisites of articles 591 and 592 of the Louisiana

Code of Civil Procedure are satisfied and that the class may be certified for settlement purposes only.").

While most of the plaintiffs there like plaintiffs here purported to bring what they called "individual" actions (even though they consolidated claims by multiple plaintiffs pursuant to Louisiana's cumulation rule), they were either settled on a class-wide basis or, to the extent plaintiffs opted out and their claims were tried, the trials resembled adjudications of class-wide issues under Fed. R. Civ. P. 23(c)(4). Plaintiffs here, as in the prior litigation, seek to have their claims tried by state court judges, rather than by a jury by, among other things, specifically pleading that the claims fall below the $50,000 threshold for a jury trial under Louisiana rules of procedure. *See* La. Code Civ. Proc. art. 1732. As a result, the same factfinder would be presiding over claims brought by multiple plaintiffs and, as a practical matter, at least certain issues common to the claims may be tried only once. This was the case in the prior litigation, where courts made findings in an initial action that they then simply adopted in subsequent cases. *See, e.g.*, Ruling on Damages dated May 30, 2014, *Alnedia v. Anthony et. al. vs. GGLC, LLC*, No. 2007-5073 (Ritchie, J.) ("Further, this Court previously heard testimony and viewed evidence during the trial of 11 other Plaintiffs in April of 2012, wherein testimony and exhibits concerning the magnitude and details of the September 17, 2006 Georgia Gulf explosion where introduced into the record. The Court made factual findings in a written ruling and the parties hereto agreed that there would be no need to reintroduce that same evidence in this second trial. Therefore,

this weeklong trial focused on damages only for the 45 plaintiffs named herein.").

In the state court actions filed by the plaintiffs' counsel herein, a class-wide determination has already been made – before Eagle was even served with process – all at the request of plaintiffs' counsel Mr. Wells Watson – to prevent these actions from being heard by a jury. With uniform requests on behalf of all plaintiffs with a pleaded community of interest, the state court granted class-wide relief to all litigants against Eagle, entering an *ex parte* order denoted as a final judgment that requires each and every case to proceed as a non-jury trial, before service of process had been requested or accomplished.

It is just such proceedings similar to class actions that CAFA's broad definition was designed to encompass. *See, e.g., Caldwell*, 536 F.3d at 424 ("[L]awsuits that resemble a purported class action should be considered class action for the purpose of applying these [CAFA] provisions..."); *Pickman v. American Express Co.*, 2012 WL 258842 (N.D. Cal. 2012) (claims brought under California's Consumers Legal Remedies Act are "similar" to class action and thus provide basis for CAFA jurisdiction); *Bullard v. Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759, 762-62 (7th Cir. 2008) (Affirming denial of remand under CAFA when "Plaintiffs' lawyers, who want to avoid federal court, have designed a class-action substitute.").

ii. The Class Includes at Least 100 Members

100 complaints that have already been filed naming over 2,600 plaintiffs demonstrate that the requirement that a potential class have more than

100 members is easily satisfied. The fact that plaintiffs' counsel broke up their client base into multiple suits making identical allegations is not a tactic that prevents the assertion of jurisdiction under CAFA. *See Hamilton v. Burlington N. Santa Fe Ry. Co.*, 2008 WL 8148619, at p. 5, n. 1 (W.D. Tex. 8/8/2008) ("In other words, if it looks like a duck, walks like a duck, and quacks like a duck, it surely is not six separate and distinct lawsuits.").

iii. There is Minimal Diversity

Likewise, minimal diversity is apparent from the face of the complaint. Minimal diversity exists when (1) any plaintiff is a citizen of a different state from any defendant or (2) any plaintiff is a citizen of a foreign state and any defendant is a citizen is a state (or vice versa). 28 U.S.C. § 1332(d)(2). Here, Eagle US 2 LLC is a Delaware limited liability compnay with its principal place of business in the State of Georgia, while plaintiffs allege that they are citizens of Louisiana and Texas.

iv. The Amount in Controversy Exceeds $5,000,000

According to the Supreme Court's recent decision in *Dart Cherokee Basin Operating Co., LLC v. Owens*, No. 13 719, 574 U.S. ___, 135 S. Ct. 547, 2014 WL 7010692, at *6 (12/15/2014), "as specified in §1446(a), a defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold." The claims that have already been filed by the approximately 2,600 named plaintiffs demonstrate that the amount-in-controversy requirement is satisfied. This Court has previously held that traditional diversity amount-in-controversy of

$75,000, per plaintiff, was facially apparent for the same type claims.

Moreover, the Supreme Court has held that plaintiffs may not stipulate as to the amount in controversy in order to avoid federal jurisdiction. *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013). Under Louisiana law, something more than a "unilateral" stipulation is necessary to create an irrevocable judicial confession/stipulation. *House v. Agco Corp.*, 2005 WL 3440834, at *3 (W.D. La. 12/14/2005); *Davenport v. BellSouth Corp*. 2007 WL 2572317, at *5 (W.D. La. 8/20/2007). Indeed, judicial confessions in the form of unilateral stipulations under Louisiana law are revocable and, thus, do not satisfy the "legal certainty" standard from *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1411 (5th Cir. 1995), *cert. denied*, 516 U.S. 865, 116 S. Ct. 180, 133 L. Ed. 2d 119 (1995), which necessarily means that the plaintiffs' judicial confessions/stipulations concerning the amount in controversy do not defeat removal. Article 1853 of the Louisiana Civil Code—formerly Article 2291—is the Louisiana statute that provides for the concept of a "judicial confession." In its present iteration, the statute provides: "A judicial confession is a declaration made by a party in a judicial proceeding. That confession constitutes full proof against the party who made it. A judicial confession is indivisible and it **may be revoked** only on the ground of error of fact." *House v. Agco Corp.*, 2005 WL 3440834, at *3 (W.D. La. 12/14/2005); *Davenport v. BellSouth Corp.* 2007 WL 2572317, at *5 (W.D. La. 8/20/2007). In *House v. Agco Corp*. and *Davenport v. BellSouth Corp.*, the Court recognized that "a **unilateral** stipulation may or may not be sufficient in Louisiana; a compromise agreed to by

both parties might be required to make the statement irrevocable." *House*, 2005 WL 3440834, at *3; *Davenport*, 2007 WL 2572317, at *5 (emphasis added). Similarly, in *Price v. Smart Professional Photo Copy Corp.*—the Eastern District of Louisiana case referenced by the Western District for the aforementioned proposition—the plaintiffs submitted "a **stipulation between the parties** as to the amount in controversy"—not a unilateral stipulation of the sort plaintiffs offer here. 2003 WL 203083, at *2 (E.D. La. 2003) (citing *St. Paul Reinsurance Company, Ltd. v. Greenberg*, 134 F.3d 1250, 1254 n. 18 (5th Cir. 1998; La. Code Civ. P. art. 5; *Bullock v. Graham*, 681 So .2d 1248, 1250 (La. 1996)) (emphasis added).[2] A stipulation between the parties would be analogous to a contractual relationship, or compromise, between the parties, which would hold binding effect between them, in contrast to the unilateral stipulation offered by the plaintiffs herein. The genuine possibility of

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[2] Indeed, there have been a number of instances in which Louisiana courts allowed plaintiffs to revoke purportedly "irrevocable" stipulations executed to avoid federal jurisdiction or the right to a jury trial. *See, e.g., Eddy v. State Farm Fire & Cas. Co.*, 2010 WL 1424374, at *3 (La. App. 1st Cir. 4/9/10) (plaintiff would "not necessarily be barred from amending or supplementing his petition to add claims" despite allegedly "irrevocable stipulation"); *Nunez v. Commercial Union Ins. Co.*, 774 So. 2d 208 (La. App. 3 Cir. 8/23/00) (court allowed plaintiff to revoke stipulation to damages limit of $50,000 after jury awarded a sum in excess of that amount); *Degeyter v. Allstate Ins. Co.*, 2010 WL 3339425 (W.D. La. 2010) (plaintiffs attempted to capitalize on the revocable nature of such stipulations to avoid federal jurisdiction by executing a "Binding Pre-Removal Stipulation" that the state court thereafter allowed them to revoke).

revocation of a limiting stipulation in Louisiana state court causes plaintiffs' stipulations to fall short of the *De Aguilar* "irrevocably binding" standard.

Irrespective of whether the unilateral stipulations are considered or not, Eagle contends that the aggregate amount in controversy for the claims of 2,600 named plaintiffs exceeds the $5,000,000 jurisdictional minimum. To reach the required minimum total of $5,000,000 in controversy, each plaintiff's claims would need to worth only $1,923 per plaintiff. In view of the foregoing facts in controversy and based on the application of Louisiana law as to the value of the claims asserted by plaintiffs, this Court has original jurisdiction and this matter is properly removed because the jurisdictional amount set forth in 28 U.S.C. § 1332(d) is satisfied as it is "'facially apparent' that at least $5 million is in controversy, in the aggregate." *Frazier v. Pioneer Am. LLC*, 455 F.3d 542, 545 (5th Cir. 2006) (citing 28 U.S.C. §§ 1332(d)(6) & 2108 and *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1335 (5th Cir. 1995)).

6.

Alternatively, Eagle pleads that the litigation also qualifies as a CAFA "mass action." CAFA gives federal district courts subject matter jurisdiction over "mass actions" where four requirements are met: (1) the aggregate amount in controversy is more than $5,000,000, with at least one plaintiff having an amount in controversy exceeding $75,000; (2) there is minimal diversity; (3) the action involves claims of 100 or more plaintiffs; and (4) plaintiffs' claims involve common questions of law or fact proposed to be tried jointly. *Atwell v. Boston Sci. Corp.,* 740 F.3d

1160, 1165–66 (8th Cir. 2013); *In re Abbott Labs., Inc.*, 698 F.3d 568, 573 (7th Cir. 2012); *Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 689 (9th Cir. 2006); *Hamilton v. Burlington N. Santa Fe Ry. Co.*, 2008 WL 8148619 (W.D. Tex. 8/8/2008).

7.

Based on the above, this action is properly removable to this Court pursuant to the provisions of 28 U.S.C. § 1441, *et seq*.

8.

CAFA does not require unanimous consent of defendants as a precondition to removal under 28 U.S.C. § 1453(b). Moreover, the rule of unanimity regarding the consent to removal by all defendants applies only to properly served and joined defendants. See *Getty Oil Corp. v. Insurance Co. of N. Am.*, 847 F.2d 1254, 1261-62 (5th Cir. 1988). Improperly joined defendants, like Mr. Ardoin, are not required to consent to removal in any event. See *Jernigan v. Ashland Oil Inc.*, 989 F.2d 812, 815 (5th Cir. 1993); *Rico v. Flores*, 481 F.3d 234, 239 (5th Cir. 2007).

9.

Eagle will provide the Court with anything further that it requires pursuant to 28 U.S.C. § 1446(a) and/or 28 U.S.C. § 1447(b).

10.

Eagle will give written notice of the filing of this Notice of Removal and file a copy with the Clerk of the Fourteenth Judicial District Court for the Parish of Calcasieu, State of Louisiana, as required by 28 U.S.C. § 1446(d). A true and correct copy of the

written Notice of Filing of the Notice of Removal to Federal Court is attached hereto as **Exhibit B**. In accordance with 28 U.S.C. § 1446(d), Eagle will give written notice to plaintiffs by contemporaneously serving this Notice of Removal on plaintiffs.

11.

If any question arises as to the propriety of the removal of this state court action, Eagle respectfully requests the opportunity to fully brief and submit oral argument in support of the position that this case is removable.

12.

By filing this Notice of Removal, Eagle does not waive and hereby expressly reserves the right to assert any defense or motion available in this action pursuant to state or federal law after removal to this Court, including, but not limited to, objections regarding jurisdiction, venue, sufficiency of process or service of process, and the service of discovery.

13.

Eagle reserves the right to amend or supplement this Notice of Removal.

WHEREFORE, Eagle US 2 LLC prays that this Notice of Removal be accepted by this Honorable Court as good and sufficient and that this Court will enter such orders as may be proper in the premises.

Respectfully submitted
By attorneys,

/s Luis A. Leitzelar
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Counsel for Defendant Eagle US 2 LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was electronically filed with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent by operation of the Court's electronic filing system to counsel for Plaintiffs to the extent they are registered with the Court's CM/ECF system. I certify that the foregoing Notice of Removal was served on all counsel of record via U.S. Mail, prepaid and properly addressed, as follows:

Wells T. Watson
Roger G. Burgess
BAGGETT, McCALL,
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Michael H. Schwartzberg
Glen D. Vamvoras
VAMVORAS,
SCHWARTZBERG
& HINCH
1111 Ryan St.
Lake Charles, LA 70601

Baton Rouge, Louisiana, this 20th day of March, 2015.

s/Luis A. Leitzelar
LUIS A. LEITZELAR

Appendix F

MOTION AND ORDER FOR ADOPTION OF STIPULATION ON DAMAGES

NOW INTO COURT, through undersigned counsel, come Plaintiffs who move as follows:

I.

Plaintiffs filed binding stipulations that their damages do not exceed $50,000.00 exclusive of interest and costs. It is the intent of Plaintiffs to limit the amount in controversy to $50,000.00 exclusive of interest and costs. Some of the Plaintiffs have filed individually, and some Plaintiffs may have filed on behalf of minor children. In the case of minor children, if needed, the appropriate documentation concerning authority of the parent(s)/guardian(s) is attached.

II.

Plaintiffs move for an Order that accepts the stipulation and recognizes the authority of each individual Plaintiff and recognizes the authority of the parent(s)/guardian(s) that have signed on behalf of the minor children to file said binding stipulation.

WHEREFORE, Plaintiffs pray that this Motion be granted and the Order entered.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading has been served upon counsel for all parties by mailing the same to each, properly addressed and postage prepaid on this 15 day of December, 2014.

_____

Wells T. Watson

EVA D. ABRAHAM, SAHIBZADA AHMAD, HERBERT ALBERT, DENNIS W. ALLISON, ETHEL ANDERSON, EDWARD ANTHONY, SR., FRANCIS ANTHONY, CLAUDIE AUGUSTA, ANNITA D. AUZENNE, DAVID L. BARNES, PEARL BARNES, CHRISTOPHER BARTIE, SR., WYNDELL BELLARD, SHERITA BERNARD, LAURA BIAS, MARY BIAS, ROCKEL BIAS, CLAUDINE BIENVENUE, DENISE BIGELOW, FELICIA BIGELOW, TRACY BIGELOW, DEBRA ACLIS, AND TOMIKA ARTIS		14th JUDICIAL DISTRICT COURT
VS NO.: 2014-5045	:	PARISH OF CALCASIEU
EAGLE US 2 LLC AND DAVID L. ARDOIN	:	STATE OF LOUISIANA

FILED: Dec. 16, 2014

Deputy Clerk

ORDER

CONSIDERING THE FOREGOING Motion for Adoption of Stipulation:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that each individual Plaintiff in this lawsuit has limited their damages, recovery and amount in controversy to $50,000.00 exclusive of interest and costs, and the Court specifically recognizes the authority of each individual Plaintiff to make such stipulation and the authority of all those signing on behalf of minor children to make such stipulation on the minor's behalf. To the extent necessary, the Court hereby appoints, after viewing the appropriate documentation, the signing party on behalf of the minor children to stipulate to damages herein.

Based on this Stipulation, the Court hereby designates the case of each individual Plaintiff as a judge trial under L.C.C.P. art. 1732 (1).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Order is expressly designated and entered as a Final Judgment pursuant to Louisiana Code of Civil Procedure Article 1915 (B)(1) as the Court Ands is no ju reason for delay.

THUS DONE AND SIGNED on this 16th day of December 2014, in Lake Charles, Louisiana.

_____

DISTRICT COURT JUDGE
Judge Sharon Wilson, Div. F

Appendix G

United States Code

Title 28. Judiciary and Judicial Procedure
Part IV. Jurisdiction and Venue
Chapter 85. District Courts; Jurisdiction
28 U.S.C. § 1332

§ 1332. Diversity of citizenship; amount in controversy; costs

* * *

(d)(1) In this subsection--

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means 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;

(C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(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;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of--

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2)--

(A)(i) over a class action in which--

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant--

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

(5) Paragraphs (2) through (4) shall not apply to any class action in which--

(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

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

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim--

(A) concerning a covered security as defined under 16(f)(3)1 of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)2) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

(11)(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B)(i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which--

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C)(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

(ii) This subparagraph will not apply--

(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

(e) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

Appendix H

United States Code

Title 28. Judiciary and Judicial Procedure

Part IV. Jurisdiction and Venue

Chapter 89. District Courts; Removal of Cases from State Courts

28 U.S.C. § 1453

§ 1453. Removal of class actions

(a) Definitions.--In this section, the terms "class", "class action", "class certification order", and "class member" shall have the meanings given such terms under section 1332(d)(1).

(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.

(c) Review of remand orders.--

(1) In general.--Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not more than 10 days after entry of the order.

(2) Time period for judgment.--If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3).

(3) Extension of time period.--The court of appeals may grant an extension of the 60-day period described in paragraph (2) if--

(A) all parties to the proceeding agree to such extension, for any period of time; or

(B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.

(4) Denial of appeal.--If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied.

(d) Exception.--This section shall not apply to any class action that solely involves--

(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)1) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).