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AMOUNT-IN-CONTROVERSY IN THE TENTH CIRCUIT: PROVIDING A CORPORATE DEFENDANT EVEN MORE POWER UNDER CAFA

Isaac Leon*

INTRODUCTION

The United States Constitution provides the starting point for diversity jurisdiction in the federal courts.¹ Pursuant to this constitutional authority, the first Congress granted federal courts jurisdiction over diversity cases in the Judiciary Act of 1789.² Congress conditioned that jurisdiction with an amount-in-controversy threshold.³ Since the Judiciary Act of 1789, the amount-in-controversy threshold has increased from \$2,000 in 1887,⁴ to \$3,000 in 1911,⁵ \$10,000 in 1958,⁶ \$50,000 in 1988,⁷ and \$75,000 in 1996,⁸ at which it remains to this day. This threshold is further limited by Supreme Court precedent requiring complete diversity between all plaintiffs and all defendants to gain access to a federal forum.⁹

Prior to the Class Action Fairness Act of 2005 (“CAFA”), the diversity jurisdiction statute was the main vehicle used by defendants to attempt to remove

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1. See U.S. CONST. art. III, § 2, cl. 1.

2. The Federal Judiciary Act of 1789 § 11.1 Stat. 79. First Congress. Sess. I. Ch. 20. Sec. 11 (1789) (establishing the first amount-in-controversy threshold in diversity cases to be \$500).

3. See Evan A. Creutz, *Two Sides to Every Story: Measuring the Jurisdictional Amount in Federal Courts*, 68 FORDHAM L. REV. 1719, at 1723 (2000) (stating that “[t]he original Congressional intent behind the amount-in-controversy requirement is not entirely clear from legislative history. Some scholars argue that the original purpose of the requirement was to protect defendants from having to travel long distances to defend relatively small claims. Today, that reasoning is less applicable in light of the increasing feasibility of interstate travel. A more modern justification for the jurisdictional amount, as evidenced by the number of successive increases in the amount by Congress, is to reduce the caseload in an already congested federal court system”) (internal citations omitted); see also *supra* note 2 and accompanying text.

4. Act of March 3, 1887, 24 Stat. 552.

5. Act of March 3, 1911, 36 Stat. 1091.

6. Act of July 25, 1958, 72 Stat. 415

7. Judicial Improvements and Access to Justice Act, 102 Stat. 4646.

8. Federal Courts Improvement Act of 1996, 110 Stat. 3850.

9. See *Strawbridge v. Curtiss*, 7 U.S. 267 (1806); See also *Lincoln Property Co. v. Roche*, 546 U.S. 81 (2005) (stating, “[W]e have read the statutory formulation ‘between . . . citizens of different States’ to require complete diversity between all plaintiffs and all defendants.”).

class action lawsuits under state law to federal court.¹⁰ CAFA altered, among other traditional diversity requirements,¹¹ the amount-in-controversy threshold to \$5,000,000 specifically for class action lawsuits.¹² This new amount-in-controversy threshold has been contentious among litigants in its relatively short lifetime.¹³ In *Hammond v. Stamps.com*,¹⁴ a jurisdictional dispute arose in the Tenth Circuit that allowed a corporate defendant to provide minimal data about who a putative class may eventually include. The Tenth Circuit interpreted CAFA to allow Stamps.com to over-inflate the potential amount-in-controversy,¹⁵ which gave corporate defendants even more power under legislation already criticized as a corporate power grab.¹⁶

Part I explores the general legislative history of CAFA and provides an overview of the arguments that supporters and critics have concerning the Act. Then it explains CAFA's general provisions and how the Supreme Court decided the evidentiary standard to apply when a defendant files a notice of removal.

Part II discusses how *Hammond v. Stamps.com* handled an amount-in-controversy dispute between a putative class and a corporate defendant in the Tenth Circuit. This section explores the factual background of the case, the reasoning of both the District Court and Tenth Circuit Court, and how the Tenth Circuit overruled the District Court's holding.

Part III critiques the Tenth Circuit's application of CAFA amount-in-controversy precedent. Under the minimal evidence provided, the Tenth Circuit should have affirmed the ruling below as correctly applying the Supreme Court's guidance on this type of amount-in-controversy dispute. This section then provides additional judicial policy reasons supporting why federal subject matter jurisdiction was not present. Acknowledging that the Tenth Circuit had minimal evidence to work with, a possible solution to amount-in-controversy disputes at this early stage of litigation is offered. A limited discovery approach balances the equities of the litigants and the limited federal judicial resources while still falling within Supreme Court precedent. This Note concludes that the limited discovery approach should

10. 28 U.S.C. § 1332 (a) (2011); *See Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005) (holding that the plaintiff class could invoke supplemental jurisdiction under 28 U.S.C. § 1367 (1990) if one class member satisfied the \$75,000 threshold allowing the rest of the class to tag along).

11. *See generally* 28 U.S.C. § 1332(d) (2011).

12. *Id.* § 1332(d)(2) (2011).

13. *See e.g.*, *Frederick v. Hartford Underwriters Ins. Co.*, 683 F.3d 1242, 1247-48 (10th Cir. 2012) (stating "punitive damages may be considered in determining the requisite jurisdictional amount. But this does not mean that a defendant's mere use of the words punitive damages automatically justifies the removal of a case on the theory that punitive damages in some unspecified amount may be possible"); *Keeling v. Esurance Ins. Co.*, 660 F.3d 273 (7th Cir. 2011) (including the cost of complying with an injunction by determining the present value of losing a certain "stream of profits"); *Lowdermilk v. U.S. Bank National Ass'n*, 479 F.3d 994 (9th Cir. 2007) (allowing attorneys' fees to be included in amount-in-controversy calculation when provided by statute); *Blockbuster, Inc. v. Galeno*, 472 F.3d 53 (2d Cir. 2006) (including statutory damages in amount-in-controversy calculation).

14. 844 F.3d 909 (10th Cir. 2016).

15. *See id.*

16. *See generally* Senate Judiciary Committee Report on the Class Action Fairness Act of 2005, S. REP. No. 109-14, at 79-95 (2005).

have been used in *Hammond v. Stamps.com* as creating an effective and efficient approach that could have been used going forward in the Tenth Circuit.

PART I – BACKGROUND

I. CAFA’s contested legislative history.

CAFA is the result of a long battle in both houses of Congress with strong viewpoints either supporting or criticizing the new avenue for class action lawsuits into federal court.¹⁷ A CAFA bill was first introduced in 1997,¹⁸ but on multiple occasions was not able to pass the Senate.¹⁹ CAFA, as it stands today, was reintroduced by the 109th Congress and approved by the appropriate House and Senate Committees without amendment in 2005.²⁰

CAFA’s supporters contend that the Act balances free access to federal courts while preventing inconsistent state court rulings that often have national implications.²¹ Interstate class action lawsuits usually involve many plaintiffs, large amounts of money, and can significantly affect interstate commerce and national policy.²² Thus, CAFA sought to remedy a perceived threat to federalism – the idea that one state court’s decision in a nationwide class action could bind other state courts across the country.²³ CAFA has also been defended as minimizing certain abuses that took place in state courts such as judges certifying classes too easily and allowing plaintiffs’ attorneys to exclude class members with potential damages over \$75,000 to avoid federal court.²⁴

However, CAFA’s critics argue that the state court abuses were overstated and a federal trend to not certify class actions concerning multiple state laws may result in dismissal of meritorious claims on procedural grounds.²⁵ Nearly all state Attorney Generals showed concern that CAFA would limit their power to protect their state’s citizens by restricting their ability to file suit as class representatives for

17. *Id.* at 27.

18. Class Action Fairness Act of 1997, S. 254, 105th Cong. (1997).

19. 14A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3705.1 Aggregation of Claims – Shareholder Derivative Suits and Class Actions – Effects of the Supplemental Jurisdiction and the Class Action Fairness Acts at 2 (Thomas Reuters 4th ed. 2017).

20. *Id.*

21. See S. REP. NO. 109-14 (2005). See also *Preston v. Tenet Healthsystem Memorial Medical Center, Inc.*, 485 F.3d 793 (5th Cir. 2007) (stating CAFA’s purpose as to encourage federal jurisdiction over interstate class actions of national interest); *Genton v. Vestin Realty Mortg. II, Inc.*, 2007 WL 951838 (S.D. Cal. Mar. 9, 2007) (stating a strong preference that interstate class actions be heard in federal court if removed by defendant).

22. S. REP. NO. 109-14, at 27 (2005).

23. WRIGHT ET AL., *supra* note 19, § 3705 at 3.

24. *Id.*; see also *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1193 (11th Cir. 2007) (stating “Congress enacted CAFA to address inequitable state court treatment of class actions and to put an end to certain abusive practices by plaintiffs’ counsel); *Thompson v. Jiffy Lube Intern., Inc.*, 505 F. Supp. 2d 907 (D. Kan. 2007) (stating “CAFA . . . address[ed] the fact that ‘pre-CAFA class action laws led to abuses, including: class members received little or no benefit; state courts kept cases of national importance out of Federal Court; state courts demonstrated bias against out-of-state defendants; and state courts made judgments imposing their view of the law on other states”); S. REP. NO. 109-14, at 37 (2005).

25. See “Additional Views of Senator Patrick Leahy,” S. REP. NO. 109-14 (2005).

their state's consumers.²⁶ Further, certifying a class action is more difficult and time consuming in federal court leaving the injured class in limbo and inevitably increasing the cost of litigation.²⁷

II. CAFA's provisions.

CAFA gives federal district courts subject matter jurisdiction over class action lawsuits where the amount-in-controversy exceeds \$5,000,000, exclusive of interest and costs, and there is minimal diversity among the proposed class members and defendants.²⁸ CAFA also gives federal district courts discretion to decline to exercise jurisdiction when considering certain factors²⁹ and lists specific instances when federal district courts must decline jurisdiction.³⁰ The provisions allowing district courts to decline jurisdiction do not apply if the primary defendant is a State government, or the proposed class is less than one hundred members.³¹ The claims of the class members must be aggregated to determine if the amount-in-controversy threshold is met.³² The class members' citizenship is determined at the date the complaint is filed.³³ If an initial complaint was not subject to federal jurisdiction, then citizenship is determined at the date an amended complaint is filed.³⁴ These provisions apply before or after a class has been certified by a court.³⁵

CAFA also does not apply to claims under section 16(f)(3) of the Securities Act of 1933 and section 28(f)(5)(E) of the Securities Exchange Act of 1934, claims relating to internal affairs or governance of an organization, or claims relating to the rights, duties, and obligations relating to any security.³⁶ Whether an entity is incorporated or not, state citizenship is determined by either its principal place of

26. *See id.*

27. *See* S. REP. NO. 109-14, at 85, 88 (2005).

28. 28 U.S.C. § 1332(d) (2011).

29. *Id.* § 1332(d)(3). A district court may decline to exercise jurisdiction if greater than one third or less than two-thirds of the members of the proposed class are citizens of the State where the action was originally filed, while considering such factors as the claim is of national or interstate interest, whether the governing laws are of the State where the claim was filed or another State, whether the claim is plead in a way trying to avoid Federal jurisdiction, the State citizenship of members of the proposed class, and if one or more class actions alleging a similar claim has been filed.

30. *Id.* § 1332(d)(4). A district court must decline jurisdiction if greater than two-thirds of the proposed class are citizens of the State the claim was filed; at least one of the defendants the class is seeking significant relief from, this defendant's alleged conduct is a significant basis of this claim, and this defendant is a citizen of the State the claim was filed; and the alleged harm occurred in the State the claim was filed, and no other claim alleging the same harm has been filed or two-thirds of more of the proposed class and the primary defendant are citizens of the State the claim was brought.

31. *Id.* § 1332(d)(5).

32. *Id.* § 1332(d)(6).

33. *Id.* § 1332(d)(7).

34. *Id.*

35. *Id.* § 1332(d)(8).

36. *Id.* § 1332(d)(9).

business or the State under whose laws it is organized.³⁷ Mass action lawsuits are also governed by CAFA if certain other provisions are met.³⁸

Removal of a class action is the same as any civil action with the exception that any defendant may remove without the consent of all defendants.³⁹ The procedure after removal has been granted is the same as any civil action except that a remand back to state court is appealable.⁴⁰ The same exceptions to CAFA relating to securities and internal governance of an organization do not apply to this removal section.⁴¹ CAFA also provides its own definitions section,⁴² governance of coupon settlements,⁴³ discretion in approving settlements that result in a net loss to the class because of an obligation to pay class counsel,⁴⁴ discretion in approving settlements that favor class members in one geographic location,⁴⁵ and the notification to the proper federal and state officials when a settlement is reached.⁴⁶

III. CAFA's application – Determining the amount-in-controversy.

Circuit courts throughout the nation consistently held that CAFA left intact the general rule that defendants, as the party seeking removal to federal court, have the burden of establishing federal jurisdiction.⁴⁷ However, the circuit courts were split on whether a defendant's notice of removal must contain evidence that the amount-in-controversy threshold is satisfied.⁴⁸

37. *Id.* § 1332(d)(10); WRIGHT ET AL., *supra* note 19, § 3705 at 4 (“The methods by which federal courts are to determine the citizenship of persons and corporations for the purpose of diversity jurisdiction are unchanged by the new law. However, subsection (d)(10) of the amended Section 1332 provides that for purposes of original and removal jurisdiction in class and mass actions, the citizenship of an unincorporated association shall be determined as if the unincorporated association were a corporation. Consequently, an unincorporated association will 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.”).

38. *See* 28 U.S.C. § 1332(11).

39. *Compare* 28 U.S.C. § 1453(b) (2011) (allowing removal without consent of all defendants in class actions) *with* 28 U.S.C. § 1446(b)(2)(A) (2011) (requiring consent of all defendants for removal in civil actions).

40. *Compare* 28 U.S.C. § 1453(c)(1) (2011) (granting appellate review of remand orders for class actions) *with* 28 U.S.C. § 1447(d) (2011) (denying appellate review of remand orders for civil actions).

41. 28 U.S.C. § 1453(d) (2011).

42. *Id.* § 1711.

43. *Id.* § 1712.

44. *Id.* § 1713.

45. *Id.* § 1714.

46. *Id.* § 1715.

47. *See* Appert v. Morgan Stanley Dean Witter, Inc., 673 F.3d 609, 618 (7th Cir. 2012) (stating “the removing party bears the burden of establishing the general requirements of CAFA jurisdiction”); *see also* Westerfeld v. Independent Processing, LLC, 621 F.3d 819, 822 (8th Cir. 2010) (stating “[a]lthough CAFA expanded federal jurisdiction over class actions, it did not alter the general rule that the party seeking to remove a case to federal court bears the burden of establishing federal jurisdiction”); *but see* S. REP. NO. 109-14, at 43 (2005) (stating “it is the intent of the Committee that the named plaintiff(s) should bear the burden of demonstrating that a case should be remanded to state court”).

48. *See* Martin v. Franklin Capital Corp., 251 F.3d 2001 (10th Cir. 2001) (holding that the amount-in-controversy must be established by a preponderance of the evidence and the complaint, on its face, did not satisfy this requirement.); *But see* Spivey v. Vertrue, Inc., 528 F.3d 982 (7th Cir. 2008) (stating that “[removal] is a pleading requirement, not a demand for proof.”), Hartis v. Chicago Title Ins. Co., 694 F.3d 935 (8th Cir. 2012) (stating that the notice of removal imposed only a pleading requirement).

In *Dart Cherokee Basin Operating Co., LLC v. Owens*,⁴⁹ the Supreme Court provided lower courts guidance on the standard of proof a removing defendant must meet to satisfy CAFA's amount-in-controversy requirement. The Court held that a notice of removal need only contain a plausible allegation that the amount-in-controversy threshold is met.⁵⁰ Evidence establishing this amount is required if the plaintiff contests this allegation or the court inquires further.⁵¹ Both sides submit proof and a preponderance of the evidence standard applies.⁵²

PART II – CAFA IN THE TENTH CIRCUIT

I. *Hammond v. Stamps.com* – The District Court⁵³

A denial of a remand order arose in the Tenth Circuit in *Hammond v. Stamps.com* concerning the \$5,000,000 amount-in-controversy threshold.⁵⁴ The district court correctly applied *Dart Cherokee's* holding and should have been affirmed.⁵⁵ The Tenth Circuit has allowed a corporate defendant to withhold data about whom the putative class may eventually include allowing it to inflate the amount-in-controversy at this early stage of litigation.

Hammond filed her complaint for conversion, unjust enrichment, unfair practices and class action on June 8, 2015 against Stamps.com in New Mexico's First Judicial District Court.⁵⁶ In her complaint she includes various factual allegations of her desire to purchase stamps online, and her encounter with a not-so-user-friendly website.⁵⁷ After entering her financial information and creating an account,⁵⁸ Hammond decided not to purchase any goods or services from the website.⁵⁹ After viewing her next two monthly bank statements, she noticed two separate charges of \$15.99.⁶⁰ She contacted a customer service representative explaining how she felt deceived by the website and cancelled her subscription.⁶¹

Hammond sought to represent a class of "hundreds or thousands of persons residing throughout New Mexico and America"⁶² who had to also call Stamps.com to cancel their account after realizing they were still being charged money.⁶³ The

49. 135 S. Ct. 547 (2014).

50. *Id.* at 553 (establishing that a notice of removal need only contain a "short and plain statement of the grounds for removal . . . [b]y design, § 1446(a) tracks the general pleading requirements stated in Rule 8(a) of the Federal Rules of Civil Procedure"); see 28 U.S.C. § 1446(a) (2011); FED. R. CIV. P. 8(a).

51. *Dart Cherokee* 135 S. Ct. 547, 554.

52. *Id.*

53. A separate issue arose regarding whether or not Hammond and others similarly situated must pursue their claim through arbitration and whether an arbitration clause was enforceable. This issue is outside the scope of this paper.

54. 844 F.3d 909 (10th Cir. 2016).

55. *Hammond v. Stamps.com*, 2016 WL 8905293 (D.N.M. Dec. 20, 2016).

56. Complaint, *Hammond v. Stamps.com*, (D-101-CV-2015-01393).

57. See *id.* at ¶¶ 9, 11-18.

58. See *id.* at ¶ 19.

59. See *id.* at ¶¶ 20, 21.

60. See *id.* at ¶¶ 22, 23.

61. See *id.* at ¶¶ 26, 27.

62. *Id.* at ¶ 45.

63. *Id.* at ¶ 41.

complaint further alleges that “knowledge of the precise size of the class is within the Defendant’s control and will be determined through discovery.”⁶⁴ Hammond did not specify a final dollar amount in her complaint.⁶⁵

Stamps.com removed the case to federal court.⁶⁶ Stamps.com asserted that with respect to the Unfair Practices Act claim, the injured class would be entitled to treble damages in the amount of three hundred dollars.⁶⁷ Its records showed that in the past year over 20,000 customers contacted the company to cancel their subscription.⁶⁸ Stamps.com argued that multiplying 20,000 by the \$300 treble damages satisfied CAFA’s \$5,000,000 amount-in-controversy requirement.⁶⁹

Hammond moved for an order remanding the case to state court, claiming that Stamps.com failed to satisfy CAFA’s amount-in-controversy requirement.⁷⁰ Hammond argued that her individual claim was only worth \$31.98, or the value of a two-month subscription to Stamps.com.⁷¹ Hammond claimed that she alone was entitled to three hundred dollars in damages pursuant to the Unfair Practices Act, while the remainder of class members were limited to only the price they paid for a two-month subscription.⁷² Hammond also claimed the mere fact that 20,000 customers cancelled their subscriptions does not tell the court who would fall within the putative class.⁷³ The defendant retains the burden of proof, “and removal jurisdiction cannot be based on conjecture, surmise or guesswork.”⁷⁴

64. *Id.* at ¶ 46.

65. *See generally id.* at final paragraph. (The complaint asks “for entry of judgment as follows: for compensatory, restitutionary, economic and actual damages to Plaintiff; for punitive or exemplary damages to Plaintiff sufficient in amount to economically deter Defendant and others similarly situated from a similar course of conduct; alternatively for \$100 in damages under the New Mexico Unfair Practices Act plus treble damages; For such other and further relief as the court deems just, proper, and lawful; and for all pre-judgment and post judgment interest allowed by law. Plaintiff prays the court certify a class of Plaintiffs and enter judgment for each member of the class. Plaintiff requests an award of her attorney fees and costs.”).

66. Notice of Removal, *Hammond v. Stamps.com*, (D-101-CV-2015-01393).

67. *Id.* at ¶ 11(b).

68. *Id.* at ¶ 11(c).

69. *Id.*

70. Motion for Remand, *Hammond v. Stamps.com*, 2016 WL 8905293, (D.N.M. July 19, 2015) (D-101-CV-2015-01393).

71. *Id.* at 2, 3 (arguing that “[n]o reasonable plaintiff could fairly claim Stamps converted more than \$31.98 from them or was unjustly enriched in excess of that amount. This is because after 2 months of the charges a person should be on constructive if not actual notice of the charges.”).

72. *Id.* at 4. (noting that “NMSA 57-12-10(B) (2005) sets forth the private remedy provided by the UPA for an individual named Plaintiff: ‘an action to recover actual damages or the sum of one hundred dollars (\$100), whichever is greater. Where the trier of fact finds that the party charged with an unfair or deceptive trade practice or an unconscionable trade practice has willfully engaged in the trade practice, the court may award up to three times actual damages or three hundred dollars (\$300), whichever is greater.’”) (emphasis already added).

73. *Id.* at 8. However, Hammond conceded that if approximately 20,000 customers cancelled their service, “perhaps 10,000 would be legitimate members of the proposed class.” *Id.* Assuming 10,000 class members multiplied by \$31.98, and even if each member could receive \$100 for the conversion claim, the amount-in-controversy is only \$1,000,000. *Id.*

74. *Id.* at 8.

As Hammond has now contested Stamps.com's removal to federal court, evidence is necessary to determine the validity of the removal allegation.⁷⁵ Stamps.com provided a declaration of the Corporate Controller as evidence that the amount-in-controversy was satisfied.⁷⁶ He stated that in addition to the 20,000 cancellations in the past year, more than 312,680 customers cancelled their subscription in the four years prior to the complaint yielding more than \$5,000,000 in revenue.⁷⁷ Hammond remained adamant that without Stamps.com revealing how many customers cancelled their subscription for the same reason as her, the 312,680 total cancellations can be misleading as they may not be part of the injured class.⁷⁸

The United States District Court for the District of New Mexico concluded that Stamps.com had not shown that CAFA's jurisdictional prerequisites had been met.⁷⁹ The Court reasoned that the preponderance of the evidence standard looks to what a fact finder might legally conclude the damages are.⁸⁰ Thus, the Court first sought to determine the amount-in-controversy per putative class member.⁸¹ The Court concluded that Hammond lacked authority to bind the other putative members to an amount less than what she alleged to be entitled to.⁸² Therefore, three hundred dollars per putative class member was in controversy.⁸³

Next, the Court looked to the number of members in the putative class.⁸⁴ Hammond characterized the putative class as "all residents of the United States of America who were required to telephone the Defendant to cancel their account after discovering the Defendant was taking money from them."⁸⁵ Thus, the Court reasoned that the putative class did not include former customers who canceled their accounts for other reasons, such as not liking the service, no longer needing the service, or the cost was too expensive.⁸⁶ Despite Stamps.com's Corporate Controller's declaration about all cancellations leading up to the complaint, the number of those who cancelled that fit the putative class's description is unknown.⁸⁷ Stamps.com has sole

75. See *Dart Cherokee*, 135 S. Ct. at 554.

76. Declaration of James Treganza in Support of Defendant's Opposition to Remand Motion at 1, *Hammond v. Stamps.com*, 2016 WL 8905293, (D.N.M. Aug. 5, 2015), (D-101-CV-2015-01393).

77. *Id.* at 2 (Four years is the applicable statute of limitations for the Unfair Practices Act).

78. See Reply to Defendant's Opposition to Motion for Remand, at 3, *Hammond v. Stamps.com*, 2016 WL 8905293, (D.N.M. Aug. 13, 2015) (D-101-CV-2015-01393).

79. *Hammond*, 2016 WL 8905293 at *1 (D.N.M. Sept. 23, 2016).

80. *Id.* (citing *Hartis v. Chicago Title Ins. Co.*, 694 F.3d 935, 944 (8th Cir. 2012)).

81. *Id.* at *6.

82. *Id.* at *6; see *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1349 (2013) (reasoning that a precertification stipulation only binds the sole representative and does not reduce the value of the putative class members' claims).

83. *Hammond*, 2016 WL 8905293 at *6.

84. *Id.* at *7.

85. *Id.* (citing Complaint at ¶ 41).

86. *Id.* at *7.

87. *Id.* at *8.

access to this data.⁸⁸ Stamps.com, as the party seeking removal to the federal forum,⁸⁹ had the burden of proof to demonstrate the requisite amount-in-controversy. A perfunctory affidavit by the Corporate Controller was not enough to meet that burden.

As having the burden of proof, Stamps.com needed to present this evidence and failed to do so.⁹⁰ The evidence presented does not prove if the putative class would contain 1,000 members or 100,000 members with each being equally probable.⁹¹ The Court reasoned that equal probability of who the putative class entails does not satisfy the preponderance of the evidence standard.⁹² Because Stamps.com retained the burden of proof, the evidence lay within its control, and it failed to provide the necessary evidence to support a class size showing a satisfied amount-in-controversy, the case was remanded.⁹³

II. *Hammond v. Stamps.com* – The Tenth Circuit.

The Tenth Circuit vacated the district court’s remand order.⁹⁴ The Court was not convinced by the District Court’s reasoning that without removing who cancelled their subscription for the same reason as Hammond, the amount-in-controversy requirement was not satisfied.⁹⁵ The Tenth Circuit reasoned that the party seeking removal only needs to show that “a fact finder *might* legally conclude” the damages to exceed the jurisdictional limit.⁹⁶ The Court cites Supreme Court precedent that “it must appear to a legal certainty that the claim is really for less than the jurisdictional amount.”⁹⁷ Congress did not provide any reason to not interpret the phrase “amount-in-controversy” in a manner different than its traditional understanding.⁹⁸

88. *Id.* (stating “[p]resumably those representatives ask the customers why they wish to cancel so that the representative can attempt to persuade them to maintain his or her account. It defies common sense that a large company like Stamps.com, whose life blood appears to be monthly subscription fees, would not keep data regarding the reasons for customer cancellations in an effort to achieve greater retention.”).

89. *Supra* note 47 and accompanying text.

90. *Hammond*, 2016 WL 8905293 at *9.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Hammond v. Stamps.com*, 844 F3d 909, 914 (10th Cir. 2016).

95. *Id.* at 911.

96. *Id.* at 912 (emphasis in original).

97. *Id.* (citing *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938)).

98. *Id.* (“As historically used, the term ‘in controversy’ has never required a party seeking to invoke federal jurisdiction to show that damages ‘are greater’ or will *likely* prove greater ‘than the requisite amount’ specified by statute. Instead, the term has required a party seeking federal jurisdiction to show only and much more modestly that a ‘fact finder *might* legally conclude’ that damages exceed the statutory amount. As the Supreme Court has explained, to justify dismissal under this standard ‘it must appear to a legal certainty that the claim is really for less than the jurisdictional amount.’ And this court has repeatedly ‘cautioned counsel and courts’ against pursuing any other understanding or test. Of course, all these expositions about the meaning of the term ‘in controversy’ have come in the course of interpreting earlier federal jurisdictional statutes and it is at least conceivable Congress could have meant something different in CAFA. Our presumption of consistent usage is just that, a presumption. But we cannot think of—and the parties do not even attempt to give us—any reason to suppose that in using the term ‘in controversy’

The Tenth Circuit noted that while it is unlikely all 312,680 members cancelled their subscription for the same reason as Hammond, no one identified any legal impediment precluding a jury from finding all 312,680 persons entitled to relief.⁹⁹ Even if it is highly improbable the plaintiffs will be awarded the amount alleged, this does not meet the legally impossible standard.¹⁰⁰

The Court noted that a more aggressive inquiry into the likelihood of success will expend resources more appropriate for adjudicating the merits.¹⁰¹ It dismisses the idea of waiting until the class is certified and allowing the case to proceed in state court before deciding if removal is proper.¹⁰² The Court reasons that allowing a mini-trial for likely success on the merits was not enacted into the statute, while it could have been if Congress wished.¹⁰³

Thus, the Tenth Circuit held that once the party seeking federal jurisdiction gives a plausible explanation of how the amount-in-controversy exceeds \$5,000,000, the case belongs in federal court unless it is legally impossible for the plaintiff to recover that amount.¹⁰⁴ The remand order back to state court was vacated and federal court was deemed the proper forum.¹⁰⁵

PART III – ANALYSIS

I. The Tenth Circuit applied the wrong jurisdictional analysis and the District Court should have been upheld.

Dart Cherokee established the steps a district court must take when facing a jurisdictional dispute such as in *Hammond v. Stamps.com*.¹⁰⁶ The first prong of *Dart Cherokee*'s holding was not problematic. Here, Stamps.com's notice of removal contained a plausible allegation that the amount-in-controversy requirement was met, therefore satisfying the first prong of *Dart Cherokee*'s holding.¹⁰⁷

Congress in CAFA meant anything at odds with our traditional understanding.”) (emphasis in original) (internal citations omitted).

99. *Id.*

100. *Id.* (citing *Raskas v. Johnson & Johnson*, 719 F.3d 884,888 (8th Cir. 2013)). Prior to *Dart Cherokee*, several circuits imposed the legal impossibility standard. This standard provides that once a removing defendant explains plausibly the amount-in-controversy to be satisfied, federal jurisdiction is proper unless it is legally impossible for the plaintiff to recover the amount. *See generally*, *Raskas*, 719 F.3d 884; *Frederick v. Hartford Underwriters Ins. Co.*, 683 F.3d 1242 (10th Cir. 2012); *Hartis v. Chicago Title Ins. Co.*, 656 F.3d 778 (8th Cir. 2009); *Spivey v. Vertrue, Inc.*, 528 F.3d 982 (7th Cir. 2008); *Blomberg v. Service Corp., Intern.*, 639 F.3d 761 (7th Cir. 2011); *Keeling v. Esurance Ins., Co.*, 660 F.3d 273 (7th Cir. 2011).

101. *Hammond*, 844 F.3d at 913.

102. *Id.*

103. *Id.* (“Congress didn’t say that a federal forum should await class certification or trial or some mini-trial concerning likely success on the merits (something Congress certainly could have done if it wished: consider the preliminary injunction context.)”).

104. *Id.* at 914 (citing *Spivey*, 528 F.3d at 986); *see also supra* note 100 and accompanying text.

105. *See id.*

106. *See Dart Cherokee*, 135 S. Ct. 547; *see also Hammond*, 844 F.3d 909.

107. *See Dart Cherokee*, 135 S. Ct. 547; *see also supra* note 50 and accompanying text.

The Tenth Circuit misconstrued who retains the burden of proof when determining the amount-in-controversy threshold for a class action.¹⁰⁸ If the plaintiff contests the notice of removal, *Dart Cherokee*'s second prong requires evidence that the removal is valid.¹⁰⁹ The proper evidentiary standard is the preponderance of the evidence.¹¹⁰

Here, Hammond contested Stamps.com's notice of removal when she filed a motion to remand back to state court.¹¹¹ As evidence, Stamps.com provided the Corporate Controller's statement regarding the number of cancellations in the past four years.¹¹² However, instead of requiring Stamps.com to show by a preponderance of the evidence why the 312,680 cancellations satisfied the jurisdictional threshold, the Tenth Circuit required Hammond to show it was legally impossible that the amount-in-controversy was met.¹¹³ This was the incorrect standard to apply and is not consistent with *Dart Cherokee*.

- a. *The 10th Circuit required Hammond to prove the amount-in-controversy couldn't be satisfied by a legal certainty, when actually it is the defendant's burden to satisfy this requirement by a preponderance of the evidence.*

This is problematic for two main reasons. First, *Dart Cherokee* does not speak of the legal impossibility standard nor hold that it is the plaintiff's burden to thwart federal jurisdiction.¹¹⁴ The second prong of *Dart Cherokee*'s holding specifically calls for the preponderance of the evidence standard to apply.¹¹⁵ As the proponent of federal jurisdiction, the defendant must also come forward with such evidence to satisfy the amount-in-controversy.¹¹⁶

By misconstruing who retains the burden of proof and the proper evidentiary standard, the Tenth Circuit allowed Stamps.com to retain data about who may be in the putative class. As the District Court noted, Stamps.com has sole access to this data.¹¹⁷ At this point in litigation, Hammond has no idea who may be in the injured class. The putative class may include enough members to satisfy the amount-in-controversy or not – the evidence provided shows there is an equal chance of either outcome and only Stamps.com could provide the answer. Hammond would never be able prove that it is legally impossible that the amount-in-controversy threshold is not satisfied if she cannot access this information.¹¹⁸ If the *Hammond*

108. See *Dart Cherokee*, 135 S. Ct. 547.

109. See *id.*

110. *Id.*

111. *Supra* note 70.

112. *Supra* note 76.

113. See *Hammond*, 844 F.3d 909.

114. See *Dart Cherokee*, 135 S. Ct. 547. It should also be noted that *Hammond v. Stamps.com*, 844 F.3d 909 (10th Cir. 2016) does not cite *Dart Cherokee* at any point in the opinion.

115. See 135 S. Ct. 547.

116. See *id.*; see also *supra* note 47 and accompanying text.

117. See *Hammond*, 2016 WL 8905293 at *8.

118. See Complaint at ¶ 46, *Hammond v. Stamps.com*, (2d Jud. Dist. N.M.) (D-101-CV-2015-01393) (alleging that Stamps.com had sole access to this data and it would be accessed through the discovery process).

Court properly applied *Dart Cherokee*, then Stamps.com should have been compelled to bring this information forward to show that the amount-in-controversy is satisfied as it retains the burden of proof.

Second, the Tenth Circuit fails to confront that there is an *equal probability* that either Hammond is the sole member of the putative class or that all 312,680 customers who canceled their memberships are members of the putative class. Equal probability that the amount-in-controversy is either met or not fails to satisfy the preponderance of the evidence standard. The problem with the Tenth Circuit's holding is *not* that it is more or less likely that a fact finder *might* legally conclude the amount-in-controversy threshold is satisfied. The problem is that based on the evidence showing all cancellations, a fact finder *must* legally conclude it is *equally* likely the threshold limit is met or not.

b. Various judicial policy reasons should have tipped the scale in favor of upholding the district court's decision.

The amount-in-controversy requirement has been justified as keeping small claims out of federal court, while also not being too high as to keep federal court unattainable.¹¹⁹ Despite CAFA creating an avenue for class actions into federal court, there is a general presumption against granting federal jurisdiction.¹²⁰ To balance against this presumption,¹²¹ CAFA's stated purpose is to apply to claims that are of national importance.¹²² The Tenth Circuit made no inquiry into the possible national ramifications of this class action.¹²³ It simply could not make this inquiry if more specialized data about the 312,680 cancellations was not available to the Court. This general tradition of denying federal jurisdiction should have tipped the scale in favor of granting a remand at this stage in litigation.

The Tenth Circuit expresses concern about courts becoming bogged down with mini-trials over jurisdictional disputes.¹²⁴ The Court reasons that the resources spent on "mini-trials" are better spent on adjudicating the merits of the claim, as opposed to deciding which forum the case proceeds in.¹²⁵ Calling this requirement a "mini-trial" is a mischaracterization. Stamps.com has already provided an affidavit as to the total number of cancellations.¹²⁶ Providing data in an affidavit that shows the individuals that would be included in the putative class is not an extra step for the Court to take, but for the Defendant. This would actually ensure that federal court is the proper forum by giving better insight as to the amount-in-controversy. It would be a greater waste of resources for this case to proceed in federal court only to

119. WRIGHT ET AL., *supra* note 19, § 3701 Jurisdictional Amount – The Statutory Bases at 1.

120. See ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.3, at 249 (2d ed. 1994).

121. One can also view CAFA in a light that it failed to consider this general presumption. For example, for district courts to decline jurisdiction either at their discretion or in mandatory situations, they must make certain factual findings. This burden inherently increases the federal district court's workload for the mere possibility of declining jurisdiction. See *infra* note 130.

122. See S. REP. NO. 109-14 (2005).

123. See *Hammond*, 844 F.3d 909.

124. See *id.*

125. See *id.*

126. *Supra* note 76.

discover at a later time that Congress has deemed such a case not appropriate for the federal forum.

CAFA contains certain provisions that give federal district courts discretion to decline jurisdiction, and instances when they must decline jurisdiction.¹²⁷ Allowing corporate defendants to withhold data concerning certain characteristics of the putative class makes these provisions hollow. The putative class has a statutory right to ensure that the case belongs in a federal forum. The decision in *Hammond v. Stamps.com* took this right away from a putative class when it allowed a corporate defendant to withhold data concerning similarly situated members and their geographic locations.

II. The District Court should have allowed limited discovery to handle the jurisdictional dispute in a way that is consistent with *Dart Cherokee*.

The Tenth Circuit notices that with 312,680 possible class members and three hundred dollars per claim, there is a possibility of around \$93 million in-controversy.¹²⁸ While based on the Corporate Controller's statement showing an equal probability that Hammond is the sole member of the putative class, a possible \$93 million in-controversy easily skews one's perception in favor of federal jurisdiction. It is not difficult to conclude that with such a high *possible* amount-in-controversy, the \$5,000,000 threshold is *probably* met. On its face, this is not necessarily an unreasonable conclusion. The problem this case presents is an evidentiary one.

a. *The Tenth Circuit should have remanded the case to the District Court for limited discovery on the amount-in-controversy issue.*

In *Handforth v. Stenotype Inst. of Jacksonville, Inc.*, the district court allowed limited discovery on whether CAFA jurisdiction was proper.¹²⁹ The limited discovery approach should be employed after the plaintiff has filed its motion to remand back to state court. At that point, the plaintiff has challenged the notice of removal, thereby triggering the defendant's burden to produce evidentiary support under *Dart Cherokee*'s second prong.¹³⁰ Limited discovery should be narrowly tailored to the specific issue between the parties to avoid as many potential disputes as possible.

127. *Supra* notes 29, 30.

128. *See Hammond*, 844 F.3d 909.

129. No. 09-cv-361, 2010 WL 55578 (M.D. Fla. Jan 4, 2010); *see also Dart Cherokee*, 135 S. Ct. at 553–54 (citing the House Committee Judiciary Report on the Federal Courts Jurisdiction and Venue Clarification Act of 2011 (“JVCA”) as guidance on the evidentiary issue. While the JVCA added 28 U.S.C § 1446(c)(2)(B), which provides requirements for removal in regular diversity cases, the analysis is helpful in the class action context. The cited portion of the House Judiciary Committee Report on the JVCA in *Dart Cherokee* includes, “[D]efendants do not need to prove to a legal certainty that the amount in controversy requirement has been met. Rather, defendants may simply allege or assert that the jurisdictional threshold has been met. *Discovery may be taken with regard to that question*. In case of a dispute, the district court must make factual findings of jurisdictional fact to which the preponderance standard applies.”) (emphasis added) (internal citations omitted).

130. *See Dart Cherokee*, 135 S. Ct. 547.

Here, the Tenth Circuit should have taken the opportunity in *Hammond v. Stamps.com* to make limited discovery the normal procedure when dealing with similar amount-in-controversy issues. The specific issue here was who should be included in the putative class. Without knowing this information, Stamps.com was able to inflate the possible amount-in-controversy. The limited discovery approach is the most equitable solution for both parties and the Court while also remaining loyal to *Dart Cherokee's* holding. This is true for three main reasons.

First, the limited discovery approach allows the putative class to gain an understanding of how many class members they may end up with. Simultaneously, this allows the defendant to narrow the class to a certain characteristic that they will eventually have to defend against. The unique aspect that inevitably arises in amount-in-controversy disputes is that plaintiffs argue for a smaller possible reward while defendants a larger possible liability.¹³¹ This unique aspect to amount-in-controversy disputes would help keep both parties honest under the limited discovery approach. The broader class characteristic yields a higher amount-in-controversy, while the narrower class characteristic yields a smaller amount-in-controversy. Thus, the plaintiff cannot maintain the class characteristic so broad as to gain more class members at the expense of having to litigate in federal court. And the defendant also cannot argue for a class characteristic so narrow as to minimize potential liability at the expense of losing the federal forum.

Second, this approach allows the defendant to retain the burden of proof.¹³² Once the class characteristic has been sufficiently defined and both parties are aware of the total number of class members, this evidence may be brought to the Court's attention. Now that the defendant has produced the data showing the number of individuals potentially in the putative class, there is no longer a motive to retain this information. As it is the defendant's burden of proof, it will have to present the calculation to the Court arguing the amount-in-controversy to be satisfied.

The general rules and procedure of discovery will help to guard against the Tenth Circuit's mini-trial concerns. As discovery takes its normal course, parties are generally able to resolve disputes among themselves.¹³³ Only when the parties cannot reach common ground will a court become involved. In this type of amount-in-controversy dispute, the plaintiff would motion the court to compel the defendant to produce the number of members in the putative class consistent with the defined characteristic.¹³⁴ This does not result in the plaintiff receiving an inequitable power grab. The plaintiff, as the party motioning the court, would have to convince the court that their class characterization is reasonable and they are entitled to this information.

131. See generally WRIGHT ET AL., *supra* note 19, § 3702.2 The Allocation of Burdens in Determining the Amount-In-Controversy.

132. *Supra* note 47.

133. See FED. R. CIV. P. 26(b)(1) (stating “[u]nless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, *the amount in controversy*, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expenses of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.”) (emphasis added).

134. See FED. R. CIV. P. 37.

An unreasonable plaintiff runs the risk of losing their motion to compel, resulting in the defendant retaining control over the putative class data.

Third, the limited discovery approach allows the CAFA provisions for a district court to deny jurisdiction to come back into play.¹³⁵ By delegating onto the parties the burden of producing the characteristics of who may be in the putative class, the court is now aware of the geographic location of these individuals. This allows the Court to decide if this is a case of national importance, thus appropriate for a federal forum, or if this case is of a local nature making state court appropriate.¹³⁶ For these types of amount-in-controversy disputes, this is also the most efficient and effective approach. The court knows at an early point in the litigation if the case is appropriate for federal court. Without this approach, the court runs the risk of adjudicating a case from start to finish in federal court that yields less than \$5,000,000 in liability. Or, the court notices at a later time that the case is too small and then relinquishes jurisdiction. Either way, there is a waste of judicial resources and had the court obtained the putative class's information at an earlier time, it could have made an informed decision to retain jurisdiction or not.

In *Hammond v. Stamps.com*, the limited discovery approach would have balanced the equities of everyone involved. Had the Tenth Circuit remanded to the district court to engage in limited discovery, the parties would have had a better idea of who would be a member of the putative class. The District Court had already found that three hundred dollars were in-controversy per class member.¹³⁷ Thus, the only missing information to accurately determine the amount-in-controversy was the size of the putative class. After the limited discovery, the District Court could have found or denied jurisdiction based on the amount-in-controversy, or denied jurisdiction based on CAFA's geographic provisions.

CONCLUSION

The Tenth Circuit had the opportunity to create a precedent going forward that helps to handle these types of controversies. One cannot underestimate the importance of which forum a case will be heard in. As the highly contested legislative history of CAFA shows, federal subject matter jurisdiction can be crucial in a class action context.¹³⁸ *Stamps.com* was allowed to withhold data about who a putative class includes, and then *Hammond* was required to prove to a *legal certainty* federal subject matter jurisdiction did not exist. Not only does this ignore *Dart Cherokee's* instructions, but it is an almost impossible standard to defeat given the circumstances. CAFA already provides relatively easy access to a federal forum. *Hammond v. Stamps.com* made this even easier in the Tenth Circuit. Therefore, allowing limited discovery is the most equitable solution for the parties, the most effective and efficient approach for the court, and also maintains loyalty to *Dart Cherokee's* holding.

135. *Supra* notes 29, 30.

136. *See* S. REP. NO. 109-14 (2005).

137. *Hammond*, 2016 WL 8905293 at *6.

138. *See generally* S. REP. NO. 109-14 (2005).