No. 17-1471

IN THE

Supreme Court of the United States

HOME DEPOT U.S.A., INC.,

Petitioner,

v.

GEORGE W. JACKSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR REHEARING

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RULE 29.6 STATEMENT

Petitioner Home Depot U.S.A., Inc. states that there are no changes to its Rule 29.6 Statement previously made in this case.

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PETITION FOR REHEARING

Pursuant to Rule 44, Petitioner Home Depot U.S.A., Inc. hereby respectfully petitions for rehearing of this case because the Court's Opinion is based on two fundamental, conceptual legal errors and is inconsistent with the plain language of the applicable removal statutes and Federal Rules of Civil Procedure.

I. The Original Plaintiff's Complaint Is Not The Final Arbiter Of The Diversity Jurisdiction Inquiry.

The Court's reliance on the well-pleaded complaint rule to affirm the Fourth Circuit's opinion conflicts with precedent. Home Depot U.S.A, Inc. v. Jackson, 587 U.S. ___, 139 S. Ct. 1743, 1748 (2019) (citing Franchise Tax Board v. Constr. Laborers Vacation Trust, 463 U.S. 1, 10 (1983) and Holmes Group, Inc. v. Vornado Air Circulation Sys., 535 U.S. 826, 831 (2002)); Resp't. Br. at 22-23. This Court has previously held the rule applies only to removal based on federal question jurisdiction. Am. Nat'l Red Cross v. S.G., 505 U.S. 247, 258 (1992); Verlinden B. V. v. Central Bank, 461 U.S. 480, 494 (1983). It has no application where, as here, there is a "separate and independent jurisdictional grant"—i.e., diversity jurisdiction. Red Cross, 505 U.S. at 258 (making "short work" of attempt to invoke the well-pleaded complaint rule outside the realm of federal question jurisdiction). Rather, as in any other diversity case, the basis for removal can be found beyond the original plaintiff's complaint.

Second, for the same reason, the Court's holding that original jurisdiction can be established only by the plaintiff's complaint is mistaken. See Home Depot, 139 S. Ct. at 1748; Home Depot v. Jackson, No. 17-1471, Oral Arg. Tr. at 14, 15-16 ("there's only one—one place to look to decide whether original jurisdiction exists, and that's to the plaintiff's original complaint"), 27 (Jan. 16, 2019) (Arg. Tr.). Indeed, the removal statutes hold the opposite. 28 U.S.C. § 1332(d)(7); 28 U.S.C. § 1446(b)(3). The plain language of the traditional and Class Action Fairness Act (CAFA) removal statutes shows that a civil action can be outside federal jurisdiction as originally filed but brought within that jurisdiction by later developments in the record. See 28 U.S.C. § 1446(b)(3) (removal deadline triggered by "copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removeable"); § 1332(d)(7) ("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", then diversity jurisdiction can exist).

Practically speaking, in a diversity removal the plaintiff's complaint will frequently have pled little regarding the quantum of damages or even attempted to disclaim the minimum amount in controversy. That, of course, does not defeat removal because, under the removal procedure statute to which the Court gives much significance, "[i]f the case stated by the initial pleading is not removeable solely because the amount in controversy does not exceed

the amount specified in Section 1332(a), information relating to the amount in controversy in the record of the State proceeding, or in responses to discovery," can be considered on removal. [1] 28 U.S.C. § 1446(c)(3)(A); see Standard Fire Ins. Co. v. Knowles, 568 U.S. 588, 595-96 (2013) (finding plaintiff's non-binding stipulation in the complaint that the class damages would not exceed $5 million did not operate to keep amount in controversy below jurisdictional minimum). Thus, the Court's perception of the "statutory context", Home Depot, 139 S. Ct. at 1748, as somehow limiting the jurisdictional inquiry to the original plaintiff's complaint, is contradicted by the relevant statutory language. [2]

To the extent that the Court's decision was based on the language in Section 1441 regarding removal of a "civil action", Home Depot, 139 S. Ct. at 1748, it

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[1] Given that a post-complaint demand letter has been found to be "other paper" triggering the right to remove, Addo v. Globe Life & Accident Ins. Co., 230 F.3d 759, 761-62 (5th Cir. 2000), certainly a new class action complaint seeking more than $5M would likewise qualify.

[2] Cases like Mexican Nat'l R. Co. v. Davidson, 157 U.S. 201 (1895) and Tennessee v. Union & Planters' Bank, 152 U.S. 454 (1894) do not involve removals based on subsequent development of the record and are inapplicable. See Home Depot, 139 S. Ct. at 1748. For instance, Union & Planters' Bank involves the application of the well-pleaded complaint rule. See 152 U.S. at 460-61 (federal question jurisdiction stemmed from "the plaintiff's statement of his own claim"). In Davidson, removal immediately followed the filing of the complaint, 157 U.S. at 201, so the inquiry necessarily focused on the original complaint. Additionally, both cases pre-date the removal statutes here and were decided under outdated law.

overlooks that, under CAFA, qualifying class actions are "civil actions" within the original jurisdiction of the district courts, see 28 U.S.C. § 1332(d)(2), and the fact that the Federal Rules contemplate (i) removal of some, but not all, claims in a civil action and (ii) removal of entire civil action when not all the claims within it are subject to federal jurisdiction.[3] See 28 U.S.C. §§ 1441(c), 1446(b).

Under the plain language of the removal statutes, the question is not whether the civil action as filed was subject to federal jurisdiction, but rather whether *at the time of removal*, the case was subject to federal jurisdiction. Lowrey v. Alabama Power Co., 483 F.3d 1184, 1213 (11th Cir. 2007). There is no question that at the time of removal the class action complaint filed against Home Depot was subject to federal jurisdiction under CAFA.

II. "Defendant" Is The Only Term That Properly Defines Home Depot's Role In This Case.

Though the Court's opinion intends to give service to the plain language of Sections 1441 and 1453,

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[3] Any one qualifying claim within a civil action triggers the right to remove. Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 559 (2005); see also, 28 U.S.C. § 1446(b)(1) (notice of removal due within 30 days of receipt of qualifying "claim for relief"). That triggering claim does not have to be present at the commencement of the civil action. 28 U.S.C. §§1446(b)(3); 1332(d)(7). Accordingly, the fact that, here, the claims in the original complaint, like the since-dismissed debt collection claim, did not establish federal jurisdiction does not mean that Home Depot could not remove under CAFA based on the qualifying class action against it.

the focus on the "original plaintiff" and the "plaintiff's complaint," see Home Depot, 139 S. Ct. at 1748; Arg. Tr. at 14, 15-16 is atextual. Section 1441 does not refer to the "original plaintiff" or the "plaintiff's complaint". See 28 U.S.C. § 1441. Nor does the statute say that only the "original defendant" can remove, or that only claims brought against the "original defendant" can be removed. Id. None of those apparent bases of the Court's opinion are in the statutory text. See Virginia Uranium, Inc. v. Warren, No. 16-1275, 587 U.S. __, slip op. at 1 (June 17, 2019) ("[I]t is our duty to respect not only what Congress wrote but, as importantly, what it didn't write."). Rather, Section 1441 focuses on "the defendant" or "the defendants" being able to remove a "civil action" within the "original jurisdiction" of the district courts. Id. Further, Section 1453 allows for removal of a "class action" "by any defendant." 28 U.S.C. § 1453(b).

Home Depot's argument is rooted in the plain language of those statutes—Home Depot is simply and solely a defendant to a class action. It is not a "third-party counterclaim defendant"—a nomenclature not found in the Federal Rules and which, even as defined by the Court, does not encompass Home Depot. See Home Depot, 139 S. Ct. at 1747 n.1. Home Depot was not "brought into the case as an additional defendant to a counterclaim asserted against the original plaintiff." Id. Rather, Respondent filed a consumer fraud class action complaint against Home Depot that he joined in the same pleading with

a separate and independent non-class claim against Citibank. See generally, JA18-JA40.[4]

While the Court is correct that Federal Rules 12 and 14 differentiate between third-party defendants, counterclaim defendants, and defendants, see Home Depot, 139 S. Ct. at 1749, those distinctions actually support a ruling in Home Depot's favor. Home Depot only fits one of those definitions—defendant. Home Depot is not being sued for indemnity or contribution, JA36-JA39, JA64-67, so by definition Home Depot is not a third-party defendant. Fed. R. Civ. P. 14 (third-party defendant is "a nonparty who is or may be liable to [the original defendant] for all or part of the claim against it".)[5] Likewise, Home Depot is not a counterclaim defendant. Home Depot was not in the case prior to being sued in Respondent's class action complaint, has never sued anyone in this case and, so, cannot be subject to a *counter*claim. Fed. R. Civ. P. 13. Home Depot is simply, and solely, a defendant.

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[4] Even if Home Depot had been joined to the counterclaim against Citibank, Home Depot still would have been only a "defendant" (and the respondent a "plaintiff.") Fed. R. Civ. P. 13(h) (1966 advisory committee notes)("for the purpose of determining who must or may be joined as additional parties to a counterclaim . . ., the party pleading the claim is to be regarded as a plaintiff and the additional parties as plaintiffs or defendants as the case may be.") (emphases added); N.C. R. Civ. P. 13 (additional parties to a counterclaim are "brought in as defendants").

[5] Although Respondent's pleading against Home Depot is labeled a third-party complaint, in reality it is just a complaint as it does not demand indemnity or contribution. See Fed. R. Civ. P. 14; N.C. R. Civ P. 14(a); Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 76 (1941) (substance, not labels, governs the interpretation of a pleading).

Consequently, the Court's conclusion that there is no meaningful difference between Home Depot and the original plaintiff/counterclaim defendant in Shamrock Oil—i.e., that it saw "no textual reason to reach a different conclusion for a counterclaim defendant who was not originally part of the lawsuit,"—is wrong at the inception. Home Depot, 139 S. Ct. at 1749 (discussing Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941)). Home Depot is not a counterclaim defendant under the Federal Rules. It has only one role in this case, a defendant to the class action filed by Respondent.

Indeed, because Home Depot was not in the case prior to being sued by Respondent, in order to be bound in the proceeding, Home Depot was required to be served with a summons and service of process. Under Federal Rule 4, only one party is served with a summons—"the defendant." Fed. R. Civ. P. 4(a)(1)(B) (summons is "directed to the defendant,"; 4(a)(1)(D) (summons "state[s] the time within which the defendant must appear and defend"; 4(a)(1)(E) (summons "notif[ies] the defendant that a failure to appear and defend will result in a default judgment against the defendant,") (emphases added).[6] There is no reason, textual or otherwise, to distinguish between "the defendant" that is served with the summons of a lawsuit and "the defendant" that will remove the case—those are the same party. See Fed. R. Civ. P. 4; 28 U.S.C. § 1441.

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[6] In contrast, a true counterclaim defendant, i.e., the original plaintiff, is not required to be served with a summons because they are already present in the case. Fed. R. Civ. P. 4, 5.

The Court did not need to read Home Depot out of the definition of "defendant" to preserve the "original plaintiff" rule from Shamrock Oil or address the issue of whether and what other types of defendants must consent to removal under Section 1441. See Home Depot, 139 S. Ct. at 1748, n.3. First, under CAFA, the statute under which Home Depot actually removed this case, consent of all defendants is not required. 28 U.S.C. § 1453(b). Second, unlike the plaintiff in Shamrock Oil, Home Depot has no other role in this case than defendant to a class action. Thus, the Court's concerns regarding other additional parties are only hypothetical, not present here, and need not be decided at this time.

Additionally, Shamrock Oil, along with other jurisprudence prohibiting additional defendants like Home Depot from removing, is rooted in a presumption against removal. See Shamrock Oil, 313 U.S. 100. But, this Court has already held such a presumption does not apply under CAFA. Dart Cherokee Basin Operating Co. v. Owens, 574 U.S. 81, 135 S. Ct. 547, 554 (2014). If Dart Cherokee's instruction that courts are not to apply an antiremoval presumption to cases subject to CAFA is given effect, Home Depot's reading of the removal statutes becomes more than merely "plausible," Home Depot, 139 S. Ct. at 1751, it becomes clear that it is the correct reading based on the text, context, and policy behind the removal statutes.

Finally, the Court's suggestion that CAFA compels the ruling against Home Depot and that it is up to Congress to change it if it so chooses, see Home Depot, 139 S. Ct. at 1751, ignores the actual state of

the law when CAFA was passed. Then, in 2005, two of the three circuits to have addressed the issue had actually allowed additional defendants like Home Depot to remove. See Carl Heck Eng'rs, Inc. v. Lafourche Parish Police Jury, 622 F.2d 133, 135-36 (5th Cir. 1980); Texas el rel. Bd. of Regents v. Walker, 142 F.3d 813, 816 (5th Cir. 1998); United Benefit Life Ins. Co. v. United States Life Ins. Co., 36 F.3d 1063, 1064 n.1 (11th Cir. 1994); cf. First Nat'l Bank v. Curry, 301 F.3d 456, 462 (6th Cir. 2002). Accordingly, even assuming Congress was aware of this issue and courts' rulings thereon when it enacted CAFA (allowing "any defendant" to remove), its understanding would have been that additional defendants like Home Depot could remove. Thus, it is inaccurate to conclude that when enacting CAFA, the purpose of which was to broaden federal jurisdiction over interstate class actions, S. Rep. No. 109-14 at 5, 28-29 (2005) (Senate Report), Congress somehow locked in one circuit's minority interpretation of the meaning of "defendant." Nothing in the record supports that counterintuitive notion.

While Congress at most was silent on that issue, it was not silent on some of the particular state court venues in which it was concerned about litigating interstate class actions. Perhaps the most egregious of those venues was Madison County, Illinois. Senate Report 13. Under the Court's holding, class actions like that filed by Respondent against Home Depot can once again be heard in Madison County with no way for the defendant to remove. Indeed, Home Depot has already litigated a class action in Madison County in which removal was denied on the same

theory endorsed by the Court. Tri-State Water Treatment, Inc. v. Bauer, 845 F.3d 350 (7th Cir.), *cert. denied* 137 S. Ct. 2138 (2017). It is simply not plausible to believe, and the text of CAFA certainly does not support, the notion that Congress intended otherwise removable class actions to be locked in a venue Congress specifically identified as necessitating the passage of CAFA. But that is the outcome this Court's erroneous judgment endorses. Given how at odds that outcome is with the purpose and broad language used in CAFA, it is respectfully submitted that the better reading of the statute is that Home Depot is at a minimum "any defendant" and thus entitled to remove under CAFA.

CONCLUSION

Based on the foregoing, the application for rehearing should be granted. Home Depot is simply and solely a defendant and as such is entitled to remove this case under CAFA. The Fourth Circuit's ruling should be reversed.

Respectfully submitted,

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June 21, 2019

CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay.

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