No. 18-

IN THE

Supreme Court of the United States

COMMERCE BANK,

Petitioner,

v.

BEVERLY WILLIAMSON AND REBECCA PALMER ,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Congress has the power to prescribe rules for the exercise of diversity jurisdiction within Article III's "judicial Power," and did just that when it enacted The Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. Concerned with abuses in state court class action litigation, and to "restore the intent of the framers of the . . . Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction," Congress broadened diversity jurisdiction and created a new and separate removal statute that expands the power to remove qualifying class actions to federal court by granting the removal right to "any defendant."

In *Home Depot, U.S.A., Inc. v. Jackson*, No. 17-1471, this Court granted certiorari to address whether an *additional defendant* to a state court class action counterclaim is "any defendant" entitled to remove under CAFA. This Petition presents separate but related questions. Commerce began the case as the plaintiff in a state court collection action, but when Respondents filed a class action counterclaim meeting CAFA's jurisdictional requirements, Commerce dismissed its action with prejudice and removed to federal court. At the time of removal, Commerce's role was solely that of defendant. The district court, like almost all lower federal courts to address the issue, interpreted removal under CAFA to be limited to only "original defendants" and remanded the case back to state court. The questions presented are:

Whether a counterclaim defendant in a state court class action is "any defendant" entitled to remove a class action which satisfies the jurisdictional requirements of the Class Action Fairness Act?

Whether a party which began a case as an original plaintiff, but is solely a defendant at the time of removal, may remove a class action which otherwise satisfies the jurisdictional requirements of the Class Action Fairness Act, or is such removal controlled by a doctrine of "once a plaintiff, always a plaintiff"?

PARTIES TO THE PROCEEDING

Petitioner Commerce Bank was the original plaintiff to the deficiency collection suit brought in Missouri state court, was solely the defendant at the time of removal of the putative nationwide class action to the district court, and was the petitioner in the court of appeals.

Respondents Beverly Williamson and Rebecca Palmer were the original defendants in the state court action, solely the plaintiffs at the time of removal of their putative nationwide class action to the district court, and were the respondents in the court of appeals.

RULE 29.6 STATEMENT

Petitioner Commerce Bank is a Missouri chartered bank and is a wholly owned subsidiary of Commerce Bancshares, Inc., a publicly traded company on the NASDAQ Exchange. Commerce Bancshares, Inc. has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Commerce Bank, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The order of the court of appeals denying rehearing *en banc* in Case No. 18-8016 is reproduced at Pet. App. 12a. The court of appeals' judgment denying permission to appeal is reproduced at Pet. App. 1a. The district court's opinion ordering remand (Pet. App. 2a) is not published in the *Federal Supplement* but is available at 2018 WL 4725217 (W.D. Mo. Oct. 2, 2018).

JURISDICTION

The judgment of the court of appeals denying permission to appeal (Pet. App. 1a) was entered on October 29, 2018, and its order denying rehearing *en banc* (Pet. App. 12a) was entered on January 28, 2019, so this Court has jurisdiction under 28 U.S.C. § 1254(1). *See Hohn v. United States*, 524 U.S. 236, 242 (1998) (noting Supreme Court may grant certiorari after court of appeals denies permission to appeal); *see, e.g., Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 555 (2014); *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588 (2013).

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 1441(a) provides:

Generally. - Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1453(b) provides:

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.

INTRODUCTION

This Petition presents important questions of statutory construction and congressional intent relating to the right to remove large multistate class actions to federal court under the Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4. With near unanimity, the lower courts have misconstrued the phrase "any defendant" in CAFA's removal statute, 28 U.S.C. § 1453(b), as constrained by the more narrow general removal provision, 28 U.S.C § 1441(a), and therefore have restricted CAFA removal to "original defendants." These courts overlook that when enacting CAFA, Congress viewed class action abuses as a matter of national importance and intended to *expand* the reach of the federal judiciary consistent with Article III, not narrow that jurisdiction, as was the case with the

general removal statute at issue in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 109 (1941). Denying removal of a class action that qualifies under the plain text of CAFA merely because the action is asserted via counterclaim rather than an original complaint contravenes this clear congressional intent.

Even if "any defendant" under § 1453(b) does not include original plaintiffs who are also counterclaim defendants, it necessarily must include original plaintiffs who, like Commerce, are forced to file in state court but then dismiss their claims with prejudice, so that *at the time of removal* they are solely and indisputably defendants under any common sense definition of the word. The lower courts' view that *Shamrock* establishes a "once-a-plaintiff-always-a-plaintiff" rule is unsupported by the facts, holding, or rationale of *Shamrock*. Unlike the *Shamrock* plaintiff, which could have filed in federal court in the first instance and still had claims pending against the defendant *at the time of removal*, Commerce had no choice of forum and was solely a defendant when it removed the class action.

This Court's precedent both before and after *Shamrock* establishes that the determination of who is a defendant for purposes of removal requires a substantive analysis, *see Mason City & Fort Dodge R.R. Co. v. Boynton*, 204 U.S. 570, 574, 578–80 (1907); *Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574, 579–80 (1954), and that analysis should be based on the removing parties' status at the time of the removal. *See Boynton*, 204 U.S. at 574, 580. Unlike the plaintiff in *Shamrock*, Commerce had permanently relinquished its claims and was in substance solely the defendant in the civil action; therefore it was entitled to remove under § 1453(b).

This Court's intervention is necessary to correct the lower courts' misplaced views, which have created "an unfortunate loophole in the Class Action Fairness Act that only the Supreme Court can now rectify." *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 345 (4th Cir. 2008) (Niemeyer, J., dissenting from denial of rehearing en banc). Plaintiffs' attorneys across the country have exploited this loophole and made a cottage industry out of filing class actions as *counterclaims* in mill run state court debt collection cases solely to avoid removal and adjudication in federal court. Such procedural gamesmanship is precisely what Congress sought to arrest when it enacted CAFA. Litigants seeking to collect relatively small debts (under $75,000) confront a dilemma—either bring a collection action in state court and risk being ensnared there to defend a massive multistate class action counterclaim, or write-off the debt and not pursue it. Defendants to class action counterclaims meeting CAFA's jurisdictional requirements should be allowed to avail themselves of the federal forum in accord with CAFA's intent that multimillion-dollar multistate class actions be heard in federal court.

Commerce requests that this Court hold this Petition pending the disposition of *Home Depot, U.S.A., Inc. v. Jackson*, No. 17-1471 (oral argument January 15, 2019). If the Court rules in *Home Depot* that § 1453(b)'s "any defendant" means what it says and applies to all parties who are defendants at the time of removal—regardless of whether they be "original defendants," third party defendants, or counterclaim defendants—then the Court should grant the Petition, vacate the judgment below, and remand the case for further consideration in light of *Home Depot*. *See Lawrence ex rel. Lawrence v. Chater*,

516 U.S. 163, 166-68 (1996) (per curiam) (discussing this Court's "GVR practice"). In the event this Court decides *Home Depot* on other grounds, it should grant Commerce's Petition to interpret "any defendant" under § 1453(b), and to clarify the reach of *Shamrock* and decide whether an original state court plaintiff can dismiss its claim and become a defendant entitled to remove under § 1453(b).

STATEMENT

1. a. Enacted in 2005, CAFA was aimed at correcting "abuses" of class actions "adjudicated in state courts, where the governing rules are applied inconsistently (frequently in a manner that contravenes basic fairness and due process considerations) and where there is often inadequate supervision over litigation procedures and proposed settlements." S. Rep. No. 109-14, at 4 (2005) [Senate Report]. Congress was concerned that plaintiffs lawyers were able "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"—and that, as a result, "consumers are the big losers." *Id.* The "fix" was to create a new provision regarding federal diversity jurisdiction over class actions. That solution included "modif[ying] the federal removal statutes to ensure that qualifying interstate class actions initially brought in state courts may be heard by federal courts if *any* of the defendants so desire." *Id.* at 5 (emphasis added).

To accomplish the desired solution, CAFA expanded the jurisdictional reach of federal courts by *adding to* 28 U.S.C. § 1332 to create original jurisdiction over class

actions if: (i) the amount-in-controversy exceeds $5 million in the aggregate; (ii) the citizenship of at least one member of the proposed class is diverse from any defendant; and (iii) the proposed class size is not less than 100. *See* 28 U.S.C. § 1332(d)(2)(A), d(5)(B), d(6). "[CAFA] is intended to expand substantially federal court jurisdiction over class actions." Senate Report at 43.

"In order to enable more class actions to be removed to federal court," Congress also expanded removal powers. *Id.* at 29. Rather than adding to the existing general removal statute, § 1441, Congress created an *entirely new* statute, 28 U.S.C. § 1453(b), which provides for removal of class actions (under the broader diversity jurisdiction established by § 1332(d)) "by any defendant without the consent of all defendants." Senate Report at 29. In contrast to the general removal statute, when construing CAFA's application to removal proceedings, this Court has directed that "no antiremoval presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court." *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 554 (2014).

b. Sixty four years before CAFA was enacted, this Court construed the predecessor statute to the current general removal statute, § 1441(a). The Court observed that between 1875 and 1877, Congress had briefly expanded removal to allow "either party" to remove, but otherwise all removal statutes since 1789 had confined "the privilege of removal to 'defendants' alone." *Shamrock*, 313 U.S. at 105-06. Explaining that these "alterations in the statute are of controlling significance as indicating the Congressional purpose to narrow the federal jurisdiction

on removal," *id.* at 107, and citing "[d]ue regard for the rightful independence of state governments," the Court determined that the general removal statute is subject to "strict construction." *Id.* at 108-09. It found "no basis for saying that Congress, by omitting from the [operative] statute all reference to 'plaintiffs,' intended to save a right of removal to some plaintiffs and not to others," *id.* at 108, and held an original plaintiff *who was also a counterclaim defendant* at the time of removal, could not remove the case to federal court. *Id.* at 107-08.

Although the *Shamrock* plaintiff could have filed its original case in federal court, it chose to bring its suit in state court. *Id.* at 108. This election precluded the plaintiff from getting a second bite at the forum selection apple when confronted with a state court counterclaim. *Id.* at 106 n.2 (" 'If he elects to sue in a State court when he *might have brought his suit in a Federal court* there would seem to be, ordinarily, no good reason to allow him to remove the cause.' " (Emphasis added) (quoting H.R. Rep. No. 49-1078, at 1 (1886)).

2. This case began on May 2, 2016, as a simple state court collection action. Respondents defaulted on their automobile loan, and Commerce sought to collect a $13,023 deficiency that remained after Commerce repossessed the car and sold it. Ex. B to Notice of Removal 5-8, ECF No. 1-2 (Case No. 4:18-cv-513). Commerce filed its collection action in Missouri associate circuit court because that was the only court with subject matter jurisdiction over the small amount in controversy. Mo. Rev. Stat. § 517.011.1(1); 28 U.S.C. § 1332(a).

On June 14, 2016, Respondents filed a counterclaim on behalf of a putative nationwide class, alleging that certain notices sent by Commerce to borrowers failed to comply with the Missouri UCC. Ex. B to Notice of Removal 28-38, ECF 1-2 (Case No. 4:18-cv-513). Respondents' counsel have filed similar class actions as counterclaims to deficiency collection actions in at least eighteen other cases in Missouri. Pet. for Rehearing En Banc 2 n.1 (Case No. 18-8016, Nov. 12, 2018).

Commerce dismissed its affirmative collection claims *with prejudice* (Ex. B to Notice of Removal 190-91, ECF 1-2 (Case No. 4:18-cv-513)), leaving Plaintiffs' putative class action seeking millions of dollars in damages as the only remaining claims in the pending civil action. Notice of Removal ¶¶17-21, ECF 1 (Case No. 4:18-cv-513). Commerce simultaneously filed a Motion to Re-Align the Parties.[1] Ex. B to Notice of Removal 192-93, ECF 1-2 (Case No. 4:18-cv-513). On June 27, 2018, the state court granted Commerce's motion, and formally realigned and nominated Commerce as the "Defendant" in this case. Ex. A to Notice of Removal 2, ECF 1-1 (Case No. 4:18-cv-513). On July 6, 2018, Commerce removed the entire civil action

1. Commerce sought and obtained realignment in the state court before removal to be in accord with a Missouri district court decision remanding a CAFA class action counterclaim brought by Respondents' counsel in a separate case against a different lender. *General Credit Acceptance Co., LLC v. Deaver,* No. 4:13CV00524 ERW, 2013 WL 2420392, at *3 (E.D. Mo. June 3, 2013) (granting remand when the lender sought realignment after removal; the court found that the lender "was still the plaintiff at removal"), *petition to appeal under CAFA denied, see* Judgment at 1, *General Credit Acceptance Co., LLC v. Deaver*, No. 13-8012 (8th Cir. June 25, 2013).

pursuant to CAFA. Notice of Removal, ECF 1 (Case No. 4:18-cv-513).

In their July 11, 2018 Motion to Remand, Respondents did not challenge that the jurisdictional requirements of CAFA were met. Rather, they argued that their class action could not be removed to federal court solely because it was initially filed in state court as a counterclaim against an original plaintiff. Pet. App. 7a-8a. On October 2, 2018, the district court remanded the case (Pet. App. 2a), reasoning that Commerce did not have the "statutory right to remove" because "at the time the [original] complaint was filed [in state court], Commerce was the plaintiff." Pet. App. 8a. On October 29, 2018, an Eighth Circuit panel denied Commerce's Petition for Permission to Appeal Under 28 U.S.C. § 1453, stating: "Petition for permission to appeal has been considered by the court and is denied." Pet. App. 1a. Commerce petitioned for rehearing en banc, which, was denied without opinion by the Eighth Circuit on January 29, 2019 (after requesting a response brief from Respondents). Pet. App. 12a.

REASONS FOR GRANTING THE PETITION

Like *Home Depot*, this is the rare case that deserves review despite the absence of a circuit split because of the lower courts' unanimity in restricting removal of CAFA-qualifying class actions to "original defendants." The lower courts have overlaid § 1441(a) (and its attendant baggage of an overly expansive reading of *Shamrock*) upon § 1453(b), instead of correctly reading the plain text of § 1453(b) as a separate and independent source of removal power. Courts have further construed *Shamrock* beyond its boundaries to mean that an original state court

plaintiff can never *become* a defendant entitled to remove. No decision from this Court has ever recognized such a "once-a-plaintiff-always-a-plaintiff" rule for removal. Nonetheless—and evidencing how deeply entrenched the over extension of *Shamrock* is in the lower courts' jurisprudence, the district court below teetered on imposing sanctions against Commerce for removing this case. Pet. App. 9a-10a. Without this Court's intervention, plaintiffs' attorneys will continue to exploit the loophole identified by Judge Niemeyer in *Palisades*, and class actions which Congress clearly intended be heard in federal court will instead remain entombed in state court.

The Fourth and Seventh Circuits have virtually invited this Court to weigh in regarding the plain meaning of "any defendant" in § 1453(b). *Jackson v. Home Depot U.S.A., Inc.*, 880 F.3d 165, 171 (4th Cir. 2018) (quoting *Tri-State Water Treatment, Inc. v. Bauer*, 845 F.3d 350, 356 (7th Cir. 2017), *cert. denied*, 137 S. Ct. 2138 (2017)) ("If the Supreme Court believes that CAFA expanded the meaning of 'defendant,' it will say so directly."). This case, and *Home Depot*, provide that opportunity. Because review under CAFA is discretionary, and because courts of appeals are not free to narrowly construe broad language in this Court's opinions, the lower courts will continue to mistakenly restrict removal under CAFA until this Court intervenes. *See Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1311 (2017) (Thomas, J., concurring in part and dissenting in part) (noting that the Court granted certiorari "despite the absence of a circuit conflict" to clarify the meaning of the Court's own precedents).

I. THIS COURT SHOULD GRANT REVIEW TO CORRECT THE LOWER COURTS' ERRONEOUS VIEW THAT ONLY AN ORIGINAL STATE COURT DEFENDANT MAY REMOVE A CLASS ACTION UNDER SECTION 1453(b).

Almost every court to address whether a party who was not the original defendant can remove a CAFA-qualifying class action has construed § 1453(b) as restricted by the general removal statute, § 1441(a), instead of correctly reading § 1453(b) as a separate and independent source of removal power. In so doing, the courts have nearly unanimously construed *Shamrock* to require an atextual reading of the plain language of § 1453(b) and bar removal by parties who were either original state court plaintiffs (e.g., Commerce) or were not the original defendant (e.g., Home Depot and Commerce). Further, courts have construed *Shamrock* beyond its boundaries to mean that an original state court plaintiff can never *become* a defendant entitled to remove. This "once-a-plaintiff-always-a-plaintiff" doctrine ignores long-established precedent that holds the determination of who is a "defendant" for purposes of removal jurisdiction requires a *substantive* analysis of the parties' status at the time of removal.

A. Section 1453(b) Is An Independent Grant Of Removal Power That The Lower Courts Have Misconstrued As Limited To Original State Court Defendants.

In enacting CAFA, Congress gave the right to remove class actions satisfying certain jurisdictional requirements to "any defendant." 28 U.S.C. § 1453(b). Despite the plain

and unambiguous language of § 1453(b), the vast majority of federal courts have held that the right to remove a class action under CAFA is limited to original defendants only. *See Jackson*, 880 F.3d at 171; *Tri-State*, 845 F.3d at 355; *In re Mortg. Elec. Registration Sys., Inc.*, 680 F.3d 849, 853 (6th Cir. 2012); *Westwood Apex v. Contreras*, 644 F.3d 799, 804-805 (9th Cir. 2011); *First Bank v. DJL Properties, LLC*, 598 F.3d 915, 917 (7th Cir. 2010); *Palisades*, 552 F.3d at 334 n.4, 334-37; *Progressive W. Ins. Co. v. Preciado*, 479 F.3d 1014, 1017-18 (9th Cir. 2007); *Deutsche Bank Nat'l Tr. Co. v. Collins*, No. 4:11-CV-04092-SOH, 2012 WL 768206, at *1 (W.D. Ark. Mar. 7, 2012); *HSBC Bank USA, Nat'l Ass'n v. Arnett*, 767 F. Supp. 2d 827, 832 (N.D. Ohio 2011); *U.S. Bank Nat'l Ass'n v. Adams*, 727 F. Supp. 2d 640, 645–46 (N.D. Ohio 2010); *Capital One Bank (USA) N.A. v. Jones,* 710 F. Supp. 2d 630, 633 (N.D. Ohio 2010). To reach this conclusion, courts have improperly exported their understanding of § 1441(a)'s phrase that allows removal by "the defendant or the defendants" to restrict the meaning of "any defendants" under § 1453(b). *Tri-State*, 845 F.3d at 354 (citing *First Bank*, 598 F.3d at 917-18). This narrow interpretation of removal authority under § 1453(b) has no basis in the text of the statute and is contrary to Congress' intent in enacting CAFA.

The proper focus here is the plain language of § 1453(b), not § 1441(a). Section 1453(b) is an independent grant of removal power by Congress for qualifying class actions. It does not reference § 1441(a), and the right to remove a "class action" granted to "any defendant" in § 1453(b) is not dependent upon § 1441(a), but rather rests upon the grant of original jurisdiction for CAFA class actions, set forth in § 1332(d). Section 1332(d) establishes the types of class actions that qualify for CAFA removal,

and § 1453(b) provides that any of those CAFA actions may be removed by "any defendant." *See Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 552 (2014) ("CAFA gives federal courts jurisdiction over certain class actions, defined in § 1332(d)(1), if the class has more than 100 members, the parties are minimally diverse, and the amount in controversy exceeds $5 million."); *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 592 (2013) (same).

Further supporting that § 1453(b) is a separate grant of removal power is that it falls within the plain meaning of the "except" clause of § 1441(a), which provides that "*Except as otherwise expressly provided by Act of Congress,*" "any civil action" may be removed by "the defendant or the defendants." (Emphasis added). In the sections that follow §1441, Congress expressly granted separate removal power to a few select categories of cases, including bankruptcy cases (§ 1452) and patent cases (§ 1454). Section 1453, entitled "Removal of class actions," is another of these § 1441(a) "exceptions"—§ 1453 is part of CAFA, an "Act of Congress" that "expressly provides" a right of removal.

Interpretation of § 1453(b) begins with the plain text of the statute "and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) (quoting *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004)). Courts "must enforce plain and unambiguous statutory language according to its terms." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010). And, "[w]hen a statute does not define a term, [this Court] typically 'give[s] the phrase its ordinary meaning.'" *FCC*

v. AT&T Inc., 562 U.S. 397, 403 (2011) (quoting *Johnson v. United States*, 559 U.S. 133, 134 (2010)).

CAFA expanded removal authority to include counterclaim defendants to a class action by authorizing removal by "*any* defendant," rather than "*the* defendant." The term "defendant" is not an esoteric or colloquial term, but rather quite simply means a person against whom "any right to relief is asserted." *See* Fed. R. Civ. P. 20(a)(2)(A) (providing that persons "may be joined in one action as defendants if . . . any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction [or] occurrence"); *see also Defendant*, Black's Law Dictionary (10th ed. 2014) ("A person sued in a civil proceeding or accused in a criminal proceeding."); *Defendant*, Merriam-Webster Online Dictionary, http://www.merriam-webster.com (last visited 23 April 2019) ("[A] person or group against whom a criminal or civil action is brought."); *Defendant*, Oxford Online Dictionary, https://en.oxforddictionaries.com (last visited 23 April 2019) ("An individual, company, or institution sued or accused in a court of law."). The word "any" means "one or some indiscriminately of whatever kind." *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976)). Thus, "Congress's use of 'any' to modify '[defendant]' " in § 1453(b) "is most naturally read to mean [defendants] of whatever kind." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 220 (2008). Because Commerce is a defendant "of whatever kind," under the plain language of § 1453(b), it should have been permitted to remove this case to federal court.

There is no indication in § 1453(b) or elsewhere in CAFA that Congress intended to constrict the phrase "any defendant" to only the original state court defendant, as held by the majority of federal courts, including the district court below. Section 1453(b)'s authorization of removal by "*any* defendant" rather than "*the* defendant" is a strong indicator that Congress did not intend CAFA's removal statute to be narrowly construed. *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017) ("[U]sually at least, when [this Court is] engaged in the business of interpreting statutes [the Court] presume[s] differences in language like this convey differences in meaning.").

It also makes sense that Congress would employ the phrase "any defendants" and thereby avoid clogging the statutory text with more cumbersome phrases such as "defendants, including counterclaim defendants" and "plaintiffs, including counterclaim plaintiffs." *See Ali*, 552 U.S. at 220 (discussing that there is no reason for Congress to specify each subcategory within the broader class when it uses a broad phrase describing a category of entities covered by a statute). Section 1453(b)'s "any defendant" specifies every type of defendant that can remove, and it would be absurd to require that Congress list each subcategory of defendant entitled to remove under CAFA when Congress has unequivocally provided that right to *any defendant*. *Ali*, 552 U.S. at 221 ("We have no reason to demand that Congress write less economically and more repetitiously.").

The lower courts have felt bound to ignore the plain meaning of "any defendant" because they construe *Shamrock* as defining the word "defendant" for purposes

of *all* removal statutes. *See, e.g., Tri-State*, 845 F.3d at 355; *In re Mortg. Elec.*, 680 F.3d at 853 (6th Cir. 2012); *Westwood Apex*, 644 F.3d at 804-805; *Palisades*, 552 F.3d at 334-335, 335 n.4. That interpretation of *Shamrock* is contrary to underlying rationale of the case, which was based on statutory construction consistent with congressional intent.

The lynchpin of *Shamrock* was the legislative history of the general removal statute, which this Court determined evidenced Congressional intent to "narrow the federal jurisdiction on removal." 313 U.S. at 106-08. Section 1453(b) must likewise be construed in the context of CAFA's legislative history and stated purpose. Congress' policy was clear, and it was simple: All CAFA-qualifying class actions (defined in §1332 (d)) are granted access to the federal courts, and hence are removable by "any defendant." Although Congress did not "roll out the welcome mat for *all* multistate class actions," *Tri-State,* 845 F.3d at 357 (emphasis added), Congress certainly intended that the qualifying class actions to which it *did* extend jurisdiction in § 1332(d) are removable via § 1453(b).

By enacting CAFA, Congress intended to broaden federal jurisdiction to include qualifying class actions, consistent with Article III of the Constitution, which extends the "judicial Power" to "controversies . . . between Citizens of different States." U.S. Const. art. III, § 2. The framers of the Constitution viewed federal courts as best situated for resolving disputes between citizens of different states. "[T]he national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens" because a federal court "will be likely to be impartial between

the different states and their citizens." *The Federalist No. 80*, at 537 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). In CAFA's "Findings," Congress made clear that this concern for impartiality in matters of "national importance" was paramount:

> (4) Abuses in class actions undermine the *national judicial system* . . . and the *concept of diversity jurisdiction as intended by the framers of the United States Constitution*, in that State and local courts are—
>
> (A) *keeping cases of national importance out of Federal court*;
>
> (B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and
>
> (C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

CAFA § 2(a)(4) (emphasis added). Continuing on, Congress stated that one of CAFA's purposes was to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." CAFA § 2(b)(2); *see Standard Fire*, 568 U.S. at 595. CAFA was "intended [by Congress] to expand substantially federal court jurisdiction over class actions." Senate Report at 43. It could hardly be more clear that the congressional purpose behind CAFA stands in stark contrast to Congress' "narrowing purpose" regarding the general removal statute at issue in *Shamrock*.

This Court acknowledged Congress' intent to expand federal jurisdiction via CAFA when it observed that the Act's legislative history demonstrates its provisions "*should be read broadly*, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant." *Dart*, 135 S. Ct. at 554 (quoting Senate Report at 43) (emphasis added); *see also Dart*, 135 S. Ct. at 554 (holding that any antiremoval presumption that might exist with respect to ordinary diversity jurisdiction does not "attend[] cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court"). The "narrowing purpose" and federalism concerns that resulted in "strict construction" of the general removal statute in *Shamrock* are absent in CAFA. But *Shamrock*'s reasoning that removal statutes should be construed consistent with congressional purpose still applies. That reasoning compels adherence to Congress' intent that CAFA *expand* access to the federal courts for qualifying class actions and requires that the phrase "any defendants" in § 1453(b) be interpreted in accord with its plain meaning to include counterclaim defendants.

The issue of statutory interpretation presented here is currently before the Court in *Home Depot*. A "counterclaim defendant" is just as much a "defendant" as an "additional" counterclaim defendant, and is within the meaning of "any defendant" under § 1453(b). Thus, when this Court decides *Home Depot*, if it construes "any defendant" in § 1453(b) to apply to all parties who are defendants at the time of removal, this Court should grant Commerce's Petition, vacate the district court's remand order, and remand this case for further proceedings in light of that decision. In the event this Court decides *Home*

Depot on other grounds or otherwise does not reach this issue, it should grant Commerce's Petition to resolve this novel, important, and recurring CAFA issue.

B. *Shamrock* Did Not Create A "Once-A-Plaintiff-Always-A-Plaintiff" Rule That Bars An Original State Court Plaintiff From Becoming A Defendant Entitled To Remove A Qualifying Class Action Under CAFA.

Even if "any defendant" in § 1453(b) is encumbered by *Shamrock*'s narrow construction of § 1441(a), it nevertheless includes an original plaintiff, like Commerce, who had no choice but to initially file in state court and dismissed its state court claims with prejudice, so that at the time of removal it was *in substance solely a defendant* to a qualifying CAFA class action. Allowing an original plaintiff to renounce its original claims and become a defendant entitled to remove a CAFA-qualifying class action is fully consistent with the policy behind CAFA, the flexibility in § 1446(b)(3), and the law in every circuit that removal jurisdiction is assessed at the time of removal.

The question presented in *Shamrock* was whether a state court lawsuit in which a counterclaim was filed was removable by the *current state court plaintiff* under the general removal statute for diversity cases. 313 U.S. at 103. The Court held that the general removal statute conferred the ability to remove only on defendants, and therefore the *plaintiff* (who still had claims pending against the defendant) was not entitled to remove despite also being a counterclaim defendant. *Id.* at 107-08. Nowhere in *Shamrock* did this Court establish or even suggest the "once-a-plaintiff-always-a-plaintiff" doctrine

that has been adopted by the majority of federal courts. *See, e.g.*, cases cited at 12, *supra*; *Midland Funding LLC v. Jackson*, No. 1:13CV177 ACL, 2014 WL 2800756, at *2 (E.D. Mo. June 19, 2014); *Steeby v. Discover Bank*, 980 F. Supp. 2d 1131, 1135 (W.D. Mo. 2013); *Deaver*, 2013 WL 2420392, at *3, *6; *Young v. CACH, LLC*, No. 4:12CV0399, 2013 WL 999237, at *4 (N.D. Ohio Mar. 13, 2013); *Arrow Fin. Servs., LLC. v. Williams*, No. 10-3416-CV-S-DW, 2011 WL 9158435, at *2-3 (W.D. Mo. Jan. 20, 2011). Indeed, such a doctrine is directly contrary to earlier precedent from this Court establishing that the determination of who is a "defendant" for purposes of removal requires a substantive analysis at the time of removal. *See Mason City & Fort Dodge Railroad R.R. Co. v. Boynton*, 204 U.S. 570, 574, 578–80 (1907) (affirming that "landowner [was] a defendant within the meaning of the removal statute, *when the suit was removed*") (emphasis added); *see Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574, 579–80 (1954).

Similar to the current general removal statute, § 1441(a), the 1940 removal provision at issue in *Shamrock* authorized removal "by the defendant or defendants." 313 U.S. at 104, 104 n.1 (quoting 28 U.S.C. § 71 (1940)). An earlier removal statute, effective from 1875 until 1887, had allowed removal by "either party, or any one or more of the plaintiffs or defendants." 313 U.S. at 104-06 (quoting Act of Mar. 3, 1875, ch. 137, § 3, 18 Stat. 470, 471). In 1887, Congress changed this language to the phrase "by the defendant or defendants," which the Court interpreted as placing a limit on the scope of removal that had not existed in the 1875 predecessor statute, noting that all removal statutes between the time of the 1789 Judiciary Act and 1875 had restricted "removal to 'defendants' alone." 313 U.S. at 104-06. Based on this history, and the

House Report that accompanied the 1887 Act, the Court narrowly construed the general removal statute to restrict removal authority to "the defendant or defendants," which did not include original state court plaintiffs *who are also counterclaim defendants* at the time of removal. *Id.* at 106-109. The Court did not address (the issue was not before it) whether an original state court plaintiff can become a "defendant" for purposes of removal. *See Tri-State*, 845 F.3d at 354 ("All we know from *Shamrock Oil* is that removal is not available for a plaintiff who *is* a counterclaim-defendant.") (Emphasis added).

The view taken by the majority of federal courts (including the court in this case), that a party's status is permanently fixed at the time of the original complaint, ignores two settled principles of law. First, this Court's precedents have long established that the determination of who is a "defendant" for purposes of removal requires a *substantive analysis* based on the circumstances of the particular case. *Stude*, 346 U.S. at 579–80; *City of Indianapolis v. Chase Nat'l Bank of City of New York*, 314 U.S. 63, 69 (1941) (holding that federal courts have a duty "to look beyond the pleadings, and arrange the parties according to their sides in the dispute," and in so doing, look to "the principal purpose of the suit, and the primary and controlling matter in dispute") (internal citations and quotations omitted); *Boynton*, 204 U.S. at 574, 580 (affirming that "landowner [was] a defendant within the meaning of the removal statute, *when the suit was removed*") (emphasis added).

Second, as noted in *Boynton,* and as is settled law in every circuit, the right to remove a case is assessed at the *time of removal*, not when the original pleading is filed.

204 U.S. at 574, 580; *Lawless v. Steward Health Care Sys., LLC*, 894 F.3d 9, 17 (1st Cir. 2018); *F5 Capital v. Pappas*, 856 F.3d 61, 77 (2d Cir. 2017), *cert. denied* 138 S. Ct. 473 (2017); *Hampton v. Safeco Ins. Co. of Am.*, 614 F. App'x 321, 323 (6th Cir. 2015); *Dudley v. Eli Lilly & Co.*, 778 F.3d 909, 913 (11th Cir. 2014); *Grawitch v. Charter Commc'n, Inc.*, 750 F.3d 956, 959 (8th Cir. 2014); *Louisiana v. Am. Nat'l Prop. Cas. Co.*, 746 F.3d 633, 636 (5th Cir. 2014); *Francis v. Allstate Ins. Co.*, 709 F.3d 362, 367 (4th Cir. 2013); *In re Transamerica Assur. Co.*, 198 F.3d 259, 259 (10th Cir. 1999) (unpublished); *Gossmeyer v. McDonald*, 128 F.3d 481, 487 (7th Cir. 1997); *Additive Controls & Measurement Sys., Inc. v. Flowdata, Inc.*, 986 F.2d 476, 477 (Fed. Cir. 1993); *Abels v. State Farm Fire & Cas. Co.*, 770 F.2d 26, 29 (3d Cir. 1985). In short, the "jurisdictional snapshot" for purposes of removal jurisdiction is taken when the case first enters federal court.

By refusing to acknowledge that an original plaintiff can "become" a defendant entitled to remove, the district court (and other courts) have ignored that removal jurisdiction requires a substantive analysis measured at the time of removal. Instead, they have over read *Shamrock* as forever fixing the parties' status as "plaintiff/defendant" at the point of the filing of the original complaint, and in so doing they have elevated form over substance, contrary to the policies of CAFA. *See Standard Fire*, 568 U.S. at 595 (unanimously rejecting "form over substance" application of CAFA's removal requirements).

Furthermore, it makes no sense to equate a plaintiff who *must* file in state court with the *Shamrock* plaintiff, who could have filed in federal court but elected to sue in state court instead. Indeed, in *Shamrock,* although noting

that a purpose of the 1887 amendment was to "require the plaintiff to abide his selection of a forum" when suing in state court, this Court clearly indicated that the "selection of a forum" requires that the plaintiff had a *choice* between state and federal court in the first place:

> In the opinion of the committee it is believed to be just and proper to require the plaintiff to abide his selection of a forum. If he elects to sue in a State court *when he* ***might*** *have brought his suit in a Federal court* there would seem to be, ordinarily, no good reason to allow him to remove the cause.

313 U.S. at 106, 106 n.2, (emphasis added) (quoting H.R. Rep. No. 49-1078, at 1 (1886)).

Just like Petitioner Home Depot, Commerce did not "voluntarily choose" state court in favor of filing in federal court, and is not getting two bites at the federal-election apple. To be sure, Commerce "originally filed" its collection claim in state court, but this was not because it *voluntarily chose* the state forum in favor of federal court. Nor did Commerce choose state court as the forum to defend Respondents' multimillion-dollar class action. Rather, Commerce filed in the Missouri state associate circuit court because the small amount of the claim ($13,023) dictated that there was no other forum in which Commerce *could* file. *See* 28 U.S.C. § 1332(a); Mo. Rev. Stat. § 517.011.1(1). Commerce's situation at the time of filing was not one in which it "might have brought [its] suit in a Federal court," 313 U.S. at 106 n.2, and thus Commerce could not avail itself of the meaningful choice that was referenced in *Shamrock*.

There is also no risk of later "gamesmanship" which, according to the Fourth Circuit, could arise if the "original plaintiff might later attempt to reinstate its state court action, creating parallel proceedings in state court," *Jackson*, 880 F.3d at 172, because Commerce dismissed its original collection claim *with prejudice* while in state court. The only gamesmanship concern here is that of class action plaintiffs' attorneys who use mill run state court collection actions as vehicles for keeping large multistate class actions in state court, contrary to the express purpose of CAFA. *See* Jay Tidmarsh, *Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action*, 35 W. St. U. L. Rev. 193, 199 (2007) [Tidmarsh] (explaining how to evade removal under CAFA by using the "tactic" of "filing a counterclaim class action," which "suddenly transforms [the state collection case] from an individual action with $75,000 or less at stake into a class suit with more than $5,000,000 at stake.")

The rigid "once-a-plaintiff-always-a-plaintiff" doctrine is also contrary to the flexibility in CAFA's removal procedures. Section 1453(b) directs that class actions "may be removed . . . in accordance with section 1446." Section 1446(b)(3) expressly contemplates that even though an initial pleading (i.e., an "original complaint") might not provide a basis for removal, a later change in circumstances can trigger removability. 28 U.S.C. § 1446(b)(3) ("[I]f the case stated by the initial pleading is not removable," removal may be commenced by a timely filing after receipt "of a 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 removable."). Likewise, CAFA's jurisdictional provisions

in § 1332 also contemplate that removal may become proper upon a change in circumstances. *See* 28 U.S.C. § 1332(d)(7) (providing that "if the case stated by the initial pleading is not subject to Federal jurisdiction," then a party's citizenship for CAFA removal purposes "shall be determined . . . as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the presence of Federal jurisdiction.").

Additionally, § 1441(a)'s "original jurisdiction" requirement poses no barrier to Commerce's removal. First, as discussed above, § 1453(b) is a separate grant of removal power and does not have an "original jurisdiction" requirement. Second, "original jurisdiction" in the § 1441(a) context does not limit removal to state-court cases that could have originally been filed in federal court based on the initial pleading. 28 U.S.C. § 1446(b)(3); *see* 28 U.S.C. § 1332(d)(7). Third, "original jurisdiction" in § 1441(a) diversity cases rests on § 1332, which (unlike the "well-pleaded complaint" rule in federal question cases arising under § 1331), assumes that the relevant claims *do not* arise under federal law. Although a counterclaim cannot serve as the basis for removal in federal questions cases, *Vaden v. Discover Bank*, 556 U.S. 49, 54-55, 61-62 (2009); *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 832 (2002), these decisions did not involve diversity jurisdiction or removal, and the Court carefully noted that the holdings were limited to federal question jurisdiction. The well-pleaded complaint rule serves different purposes in the federal-question context, by safeguarding a plaintiff's right "to have the cause [of action] heard in state court" "by eschewing claims based on federal law." *Holmes Grp.*, 535 U.S. at 831 (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 399

(1987)). Diversity cases present converse considerations—diversity jurisdiction protects a *defendant's* right to choose a federal forum when sued in state court. And in the context of CAFA, "any defendant" can remove such cases under Section 1453(b).

There is also no question that *at the time of removal* the *entire civil action* removed by Commerce consisted solely of the class claims asserted by Petitioners. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 562-564 (2005) (explaining that removal in diversity jurisdiction cases requires examination of whether one or more claims in the civil action is within § 1332). It is likewise indisputable that, at the time of removal, Commerce was a defendant (and only a defendant) because: (1) by bringing a class action counterclaim, Respondents "instituted a cause of action" and "invoked the jurisdiction" of the court in which it was filed, *Tex. & Pac. Ry. Co. v. Eastin & Knox*, 214 U.S. 153, 159 (1909); *see Freeman v. Bee Mach. Co., Inc.*, 319 U.S. 448, 453 (1943), at which point, "the [Petitioners] bec[a]me [] plaintiff[s]," *Merchs. Heat & Light Co. v. James B. Clow & Sons*, 204 U.S. 286, 289 (1907), and Commerce became a defendant; (2) the "principal purpose of the suit" and "the primary and controlling matter in dispute" (indeed the only matters in dispute) were the putative nationwide class claims asserted by Respondents in their class action; and (3) Respondents (and only Respondents) control "the institution and continuance of the proceedings." *Chase*, 314 U.S. at 69 (internal quotation omitted); *Stude*, 346 U.S. at 580 (citing *Boynton*, 204 U.S. at 579-80). Thus, unlike the plaintiff in *Shamrock*, Commerce did not wear the dual hats of both plaintiff and defendant when it removed—it was *solely* a defendant. Had the district court

and the Eighth Circuit correctly interpreted *Shamrock* and performed the proper substantive analysis based on Commerce's status at the time of removal, there would have been no question that Commerce was entitled to remove the class action pursuant to CAFA.

This issue is not before the Court in *Home Depot*. In *Home Depot* the Petitioner asks the Court to hold that *Shamrock* does not restrict "any defendant" in § 1453(b) to a defendant to a claim asserted by the original state court plaintiff. Commerce asks the Court take to take a further logical step and clarify that *Shamrock* is limited to the facts presented and does not prohibit removal of CAFA qualifying class actions by original state court plaintiffs who dismiss their claims with prejudice and are solely defendants at the time of removal. Without this Court's intervention, the lower courts will feel duty-bound to continue to overextend the holding of *Shamrock* creating a massive "loophole" in CAFA.

II. THE QUESTIONS PRESENTED ARE NOVEL, IMPORTANT, AND RECURRING.

Two years after CAFA's enactment, a plaintiff's class action consultant exhorted class action attorneys to circumvent CAFA removal by "filing a counterclaim class action" to convert a state case "individual action with $75,000 or less at stake into a class suit with more than $5,000,000 at stake." Tidmarsh, at 198, 199. The author presciently forecast that the few cases that had been filed as of 2007 were "just the tip of the iceberg." *Id.* at 199. Since then, creative plaintiffs' attorneys have evaded CAFA's reach by intentionally filing class actions as counterclaims to state court collection actions (and,

like in *Home Depot*, suing additional parties who were not part of the original suit).[2] Although it is impossible to discern how many of these counterclaim class actions are CAFA-qualifying (without knowing, for example, the home-state makeup of the putative class), Congress intended that those that *do qualify* should be entitled to remove to federal court.

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2. *See, e.g.*, numerous Missouri cases cited in Pet. for Rehearing En Banc 2 n.1 (Case No. 18-8016, Nov. 12, 2018), and the following cases alleging class action counterclaims: *Elmore v. Gemini Capital Grp., LLC*, 523 S.W.3d 393, 394 (Ark. Ct. App. 2017) (alleging violations of the FDCPA and AR Deceptive Trade Practices Action); *TD Auto Fin., LLC v. Harrison*, X07HHDCV166065842S, 2018 WL 1749964, at *1 (Conn. Super. Mar. 8, 2018) (alleging lender violated laws governing repossession procedures); *Credit Acceptance Corp. v. Hinton*, AANCV166021002S, 2018 WL 793934, at *1 (Conn. Super. Ct. Jan. 16, 2018) (alleging violations of UCC, CT Retail Installment Sales Finance Act, CT Creditor Collection Practices Act, and CT Unfair Trade Practice Act); *Polito v. Keybank Nat'l Ass'n*, 237 So. 3d 361, 362 (Fla. Dist. Ct. App. 2017) (alleging violations of Ohio UCC); *Midland Funding, LLC v. Raney*, 93 N.E.3d 724, 726-27 (Ill. App. Ct. 2018) (alleging violations of IL Collection Agency Act, the IL Deceptive Business Practices Act, and the FDCPA); *Bank of Am. v. All About Drapes, Inc.*, No. 1-16-2849, 2017 WL 4127489, at *4 (Ill. App. Ct. Sept. 15, 2017) (alleging consumer fraud, RICO, breach of contract, and fraudulent misrepresentation); *Dupreez v. GMAC, Inc.*, No. 02086, 2017 WL 6016592, at *2 (Md. Ct. Spec. App. Dec. 5, 2017) (alleging violations of MD's Usury Statute, MD's Consumer Protection Act,and MD's Retail Installment Sales Act); *Midwest Acceptance Corporation v. Rivers & Sailor*, Case No. 1722-AC10854 (Mo. Cir. Ct. Apr. 16, 2018) (alleging UCC violations); *Ford Motor Credit Co., LLC v. Jones*, 549 S.W.3d 14, 18 (Mo. Ct. App. 2018) (alleging UCC violations); *Unifund CCR Partners v. Piaser,* 2019-Ohio-183 (FDCPA); *Dodeka, L.L.C. v. Keith,* 2017-Ohio-7449, ¶ 10 (alleging violations of the FDCPA and OH Consumer Sales Practices Act).

A number of lower federal courts have addressed the questions presented in this Petition with varying results. The majority of courts rely on an over-expansive reading of *Shamrock* to hold that a counterclaim defendant is not "any defendant" under § 1453(b). *See Tri-State*, 845 F.3d at 355; *In re Mortg. Elec.*, 680 F.3d at 853; *Westwood Apex*, 644 F.3d at 804-805; *DJL Properties, LLC*, 598 F.3d at 917; *Palisades*, 552 F.3d at 334-37, 334 n.4; *Preciado*, 479 F.3d at 1017-18; *Collins*, 2012 WL 768206, at *1; *Arnett*, 767 F. Supp. 2d at 832; *Adams*, 727 F. Supp. 2d at 645–46; *Capital One Bank,* 710 F. Supp. 2d at 633. *But see Palisades*, 552 F.3d at 338 (Niemeyer, J. dissenting) (recognizing *Shamrock* held that only original defendants can remove and stating: "But 28 U.S.C. § 1453(b), which was added by CAFA, provides a different rule for removal of class actions over which the district court has removal jurisdiction. It states that a class action 'may be removed by *any* defendant without the consent of all defendants.' This language expands removal authority in the CAFA context.").

In *Dart*, this Court held that it had authority under 28 U.S.C. § 1254 to review the Tenth Circuit's denial of permission to appeal under § 1453(c)(1) because "[t]he case was 'in' the Court of Appeals because of Dart's leave-to-appeal application, and we have jurisdiction to review what the Court of Appeals did with that application." *Dart*, 135 S. Ct. at 555 (citing 28 U.S.C. § 1254; *Hohn*, 524 U.S. at 248); *see also Standard Fire*, 568 U.S. at 591–92 (granting petition for writ of certiorari from the Eighth Circuit's denial of permission to appeal under § 1453(c)(1)). This Court also found there was "no jurisdictional barrier to [its] settlement of the question presented" by the *Dart* petition for writ of certiorari—i.e., the merits of the district court's remand order. *Dart*, 135 S. Ct. at 555.

The Eighth Circuit panel's order in this case is substantively identical to the Tenth Circuit's order denying permission to appeal in *Dart*. In *Dart,* the Tenth Circuit based its denial "[u]pon careful consideration of the parties' submissions, as well as the applicable law," 135 S. Ct. at 556, whereas the Eighth Circuit's denial stated that Commerce's "[p]etition for permission to appeal has been considered by the court and is denied." Pet. App. at 1a. It is a strong inference—if not a presumption—that the Eighth Circuit's "consider[ation]" was careful, and it included review of the parties' submissions and the law. As held in *Dart,* a circuit court's failure to state a reason or reasons for denying permission to appeal, or to specify what it relied on to reach its decision (e.g., "applicable law"), does not insulate its judgment from review by this Court. "Cases in the courts of appeals may be reviewed . . . [b]y writ of certiorari upon the petition of any party . . . before or after rendition of judgment." *Dart*, 135 S. Ct. at 554-55 (quoting 28 U.S.C. § 1254(1)).

Unlike some other circuits, *see Dart*, 135 S. Ct. at 555, the Eighth Circuit has not stated considerations that it regards as relevant to the intelligent exercise of discretion under § 1453(c)(1). It has, however, stated that review under § 1453(c)(1) is appropriate to "address a novel and important CAFA issue." *Hargett v. RevClaims, LLC*, 854 F.3d 962, 965 (8th Cir. 2017); *see also Froud v. Anadarko E & P Co. Ltd. P'ship*, 607 F.3d 520, 523 (8th Cir. 2010) (denying permission to appeal under § 1453(c)(1) because the petitioner did not provide a basis on which the court could exercise its discretion, and citing decisions from the Seventh and Second circuits that allowed review for "important" and "consequential" questions under CAFA). These precedents demonstrate it was an abuse

of discretion for the Eighth Circuit to deny permission to appeal when a case presents novel and important CAFA issues. Additionally, the fact that the issue of the correct interpretation of "any defendants" in § 1453(b) is currently before the Court in *Home Depot* strongly suggests the questions presented here are novel, important, and recurring enough to merit permission to appeal under § 1453(c)(1).

The Eighth Circuit's own case law "weighed heavily in favor of accepting [Commerce's] appeal." *See Dart* 135 S. Ct. at 556. That the Eighth Circuit rejected Commerce's petition for permission to appeal strongly suggests it either thought the district court got it right, or thought that the questions presented was not important or novel. Either way, refusal to grant permission to appeal was an abuse of discretion. *See id.* at 555 ("A court 'would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.'") (*quoting Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990)); *Hargett*, 854 F.3d at 965. The practical effect of the Eighth Circuit's *repeated* denials of review of this issue (*see* n.1, *supra*) is its endorsement of the "once-a-plaintiff-always-a-plaintiff" doctrine for all future CAFA (and general) removals in the Eighth Circuit, and to set in stone that a counterclaim defendant can never remove under § 1453(b). *Dart,* 135 S. Ct. at 556-57 (discussing that the Tenth Circuit's "denial of review established the law not simply for this case, but for future CAFA removals sought by defendants"). That is evident from the district court's order in this case, which stated that it was a "close call" as to whether Commerce's removal "lacked an objectively reasonable basis" and entitled Respondents to an award of costs and attorneys' fees under 28 U.S.C. § 1147(c). Pet. App. 9a-10a. The

chilling effect of such statements is likely to heavily deter counsel from pursuing similar removals in the future.

This Court "no doubt [has] authority to review for abuse of discretion the [Eighth] Circuit's denial of [Commerce's] appeal from the District Court's remand order, and in doing so, to correct the erroneous view of the law the [Eighth] Circuit's decision fastened on district courts within the Circuit's domain." *Dart*, 135 S. Ct. at 558 (internal citations omitted); *see also Standard Fire*, 568 U.S. at 591–92; *Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982) (finding authority under 28 U.S.C. § 1254 to review court of appeals' decision to dismiss for lack for jurisdiction and holding that there was no need to remand the case to the court of appeals for decision on the merits once the Court took jurisdiction because the "immunity question is a pure issue of law, appropriate for our immediate resolution"). Granting this Petition will resolve an unsettled, important, and novel CAFA issue, and provide clear guidance to litigants, district courts, and courts of appeal concerning the determination of who is entitled to remove a class action under Section 1453(b).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A – JUDGMENT OF THE UNITED STATES COURT OF APPEAL FOR THE EIGHTH CIRCUIT DENYING PERMISSION TO APPEAL (OCTOBER 29, 2018)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-8016

BEVERLY J. WILLIAMSON; REBECCA PALMER,

Respondents,

v.

COMMERCE BANK,

Petitioner.

Appeal from U.S. District Court for the Western District of Missouri - Kansas City (4:18-cv-00513-DGK)

JUDGMENT

Before LOKEN, SHEPHERD and KELLY, Circuit Judges.

Petition for permission to appeal has been considered by the court and is denied. Mandate shall issue forthwith.

October 29, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

_____

/s/ Michael E. Gans

APPENDIX B – ORDER OF THE UNITED STATED DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION (OCTOBER 2, 2018)

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI,
WESTERN DIVISION

No. 4:18-CV-00513-DGK

BEVERLY J. WILLIAMSON,
AND NICHOLE POTTER,

Plaintiffs,

v.

COMMERCE BANK,

Defendant.

October 2, 2018, Decided;
October 2, 2018, Filed

ORDER GRANTING MOTION TO REMAND

This lawsuit arises from Plaintiffs Beverly Williamson and Nichole Potter's class action counterclaim filed after Defendant Commerce Bank ("Commerce") attempted to collect a deficiency judgment against them in state court.

Now before the Court is Plaintiffs' motion to remand (Doc. 7). Williamson and Palmer argue Commerce did

not have the right to remove this case from state court because Commerce is a plaintiff for purposes of the federal removal statutes, 28 U.S.C. §§ 1441 and 1446(a), 28 U.S.C. § 1331, and the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d). Commerce alleges that because it dismissed its deficiency judgment against Plaintiffs with prejudice and the state court recaptioned it as a defendant, it is a defendant for the purposes of the federal removal statutes. Because the parties' alignment is determined as of the time the original complaint is filed for purposes of the federal removal statutes, the motion is GRANTED and this case is REMANDED to the Circuit Court of Carroll County, Missouri.

Background

In May 2016, Commerce filed a petition in the Circuit Court of Carroll County against Williamson and Palmer, seeking a deficiency judgment after it repossessed their car. Williamson and Palmer responded by filing a class action counterclaim against Commerce, alleging Commerce's presale and post-sale notices violated the Uniform Commercial Code ("UCC"). In September 2016, Commerce filed a motion to dismiss Williamson and Palmer's class action counterclaims. The state court denied Commerce's motion in June 2017. Three months later, Commerce voluntarily dismissed its deficiency judgment and moved to realign the parties.[1] In June

1. The state court Order realigning the parties stated, "Counterclaim Defendant requests realignment for the express purpose for seeking removal to federal court under the Class Action Fairness Act ("CAFA")" (Doc. 1, Ex. 1, p.2).

2018, the state court realigned the parties, designating Williamson and Palmer as the Plaintiffs and Commerce as Defendant. A month later, Commerce filed its notice of removal.

Williamson and Palmer move to remand this case, arguing Commerce is considered a plaintiff pursuant to the federal removal statutes, and therefore, did not have the statutory authority to remove the case to federal court.

Standard

CAFA provides that any class action over which the district court has jurisdiction pursuant to § 1332(d)(2) is removable by any defendant without the consent of the remaining defendants and without regard to whether any defendant is a citizen of the state in which the action is brought. 28 U.S.C. § 1453(b). A class action must be removed in accordance with section 1446,[2] which sets forth the removal procedure for "[a] defendant or defendants desiring to remove any civil action ... from a State court."

A plaintiff, however, may challenge removal through a motion to remand. 28 U.S.C. § 1447(c). Traditionally, the party seeking removal and opposing remand has the burden of establishing that an action should not remanded. *Westerfeld v. Indep. Processing, LLC*, 621 F.3d 819, 823 (8th Cir. 2010). But the Supreme Court has made clear that "no antiremoval presumption attends cases invoking

2. The one-year time limitation under section 1446(c)(1) does not apply to removal pursuant to CAFA. 28 U.S.C. § 1453(b).

CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court." *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 554, 190 L. Ed. 2d 495 (2014).

Discussion

The issue here is whether Commerce became a defendant for purposes of the federal removal statute by dismissing its claims and being recaptioned by the state court as the defendant.

I. Commerce is the plaintiff for purposes of the federal removal statute.

The Court addressed this exact issue in *Steeby v. Discover Bank*, 980 F. Supp. 2d 1131, 1134 (W.D. Mo. 2011), under the general removal statute, 28 U.S.C. § 1441. In that case, Discover Bank ("Discover") sued to recover a credit card debt and then voluntarily dismissed its claims against the original defendant, Steeby, after he filed a counterclaim against Discover. The state court then recaptioned Discover as the defendant, and Discover removed the case to federal court. *Id.* The Court remanded the case back to state court, finding a state court's realignment is irrelevant in determining who is a defendant for purposes of the federal removal statute. *Id.* at 1135. The Court noted that, under federal law, "the parties' alignment is determined as of the time the original complaint is filed, not at the time of removal." *Id.*, citing, *Universal Underwriters Ins. Co. v. Wagner*, 367 F.2d 866, 871 (8th Cir. 1966). Because Discover was the

plaintiff when it filed the original complaint in state court, it therefore was also considered the plaintiff for purposes of the removal statute. Accordingly, because a "plaintiff may not remove a state court action when it has to defend a counterclaim that could have been brought in federal court," the Court remanded the case to state court. *Id.* at 1137; *accord Midland Funding LLC v. Jackson*, No. 1:13-CV-177-ACL, 2014 U.S. Dist. LEXIS 83928, 2014 WL 2800756, at *2 (E.D. Mo. June 19, 2014); *Arrow Financial Services, LLC v. Williams*, No. 10-3416-CV-S-DW, at *2-3, 2011 U.S. Dist. LEXIS 156370 (W.D. Mo. Jan 20, 2011).

The Court's ruling in *Steeby* has been echoed by a sister district court in the Eastern District of Missouri. In *General Credit Acceptance, Co., LLC v. Deaver*, No. 4:13-CV-00524, 2013 U.S. Dist. LEXIS 77303, 2013 WL 2420392, at *2 (E.D. Mo. June 3, 2013), the court found the original state court plaintiff was the plaintiff for purposes of removal under CAFA, even though it dismissed its claims against the original defendant, and the only claims remaining in the case were counterclaims. The court noted:

> CAFA's removal provision, section 1453(b), provides that "[a] class action may be removed to a district court ... in accordance with section 1446." Section 1446, in turn, sets forth the removal procedure for "[a] defendant or defendants desiring to remove any civil action ... from a State court." The interpretation of "*defendant or defendants*" for purposes of federal removal jurisdiction continues to be

> controlled by *Shamrock* [*Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108, 61 S. Ct. 868, 85 L. Ed. 1214 (1941)], which excludes plaintiff/cross-defendants from qualifying "defendants." The Court therefore finds, in accordance with *Shamrock*, that GCAC, the original Plaintiff, cannot remove this action based on Deaver's counterclaim.

Id. at *3 (internal citations omitted) (emphasis in original). The court, therefore, remanded the case back to state court. *Id.*[3]

Commerce's argument that *Steeby* and *Deaver* have been superseded by subsequent Eighth Circuit decisions holding that the propriety of removal is determined at the time of removal is at best unavailing, and arguably misleading.[4] The cases cited by Commerce address whether the federal court had subject matter jurisdiction,

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3. Acknowledging that removal under CAFA does not change who is a defendant for purposes of federal removal (Doc. 10, p. 11, n. 10), Commerce attempts to distinguish *Deaver* by arguing that, unlike in this case, the party removing was not realigned by the state court. But as this Court held in *Steeby*, 980 F. Supp. 2d at 1135, and as the state court also noted in its decision to realign the parties in this case (Doc. 1, Ex. 1), a state court's realignment is irrelevant in determining who is a defendant for purposes of the federal removal statute.

4. Commerce also cites to district court cases from other circuits that have held the propriety of removal is determined at the time of removal. Those cases are not binding on this Court, and *Steeby* recognized "the handful of district courts that have discussed this question have reached different results." 980 F.Supp.2d at 1134.

not whether the defendant had the statutory right to remove the case. *See Williams v. Employers Mut. Cas. Co.*, 845 F.3d 891, 900 (8th Cir. 2017) (finding the district court had subject matter jurisdiction over the case because *at the time of removal* it was a "class action" as defined by CAFA); *Rudlowski v. The St. Louis Rams, LLC*, 829 F.3d 963, 964 (8th Cir. 2016) (holding that although a federal court's subject matter jurisdiction is measured "at the time of removal," the district court erred in refusing to consider post-removal evidence, effectively denying the Rams the opportunity for jurisdictional discovery to establish federal jurisdiction); *Grawitch v. Charter Commc'ns*, 750 F.3d 956, 959-60 (8th Cir. 2014) (addressing whether Charter met its burden of showing the amount in controversy exceeded CAFA's $5 million jurisdictional threshold at the time of removal).

This Court agrees a federal court's subject matter jurisdiction is determined at the time of removal. *See Simon v. Liberty Mut. Fire Ins. Co.*, No. 4:17-CV-0152-DGK, 2017 U.S. Dist. LEXIS 202320, 2017 WL 6209705, at *3 (W.D. Mo. 2017). But that is not the issue here. The issue is whether Commerce had the statutory right to remove the case. The Court concludes it did not.

As stated in *Steeby*, "What matters for the removal analysis is whether [Commerce] was a defendant at the time the complaint was filed." 980 F. Supp. 2d at 1136. Here, at the time the complaint was filed, Commerce was the plaintiff. Accordingly, Commerce had no statutory right to remove the case, and this case should be remanded.

II. Commerce's removal was not objectively unreasonable.

Williamson and Palmer request the Court award fees and costs because Commerce improvidently removed this case. The decision whether to award costs and fees under 28 U.S.C. § 1447(c) rests in the Court's discretion. *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141, 126 S. Ct. 704, 163 L. Ed. 2d 547 (2005). "Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal." *Id.* In determining whether the removing party lacked an objectively reasonable basis for seeking removal, the Court does not consider the removing defendant's motive, but instead must consider "the objective merits of removal at the time of removal, irrespective of the ultimate remand." *Convent Corp. v. City of North Little Rock, Ark.*, 784 F.3d 479, 483 (8th Cir. 2015).

Williamson and Palmer contend Commerce lacked an objectively reasonable basis to remove because it was aware of the authority finding the propriety of removal is determined at the time the original complaint is filed. They also argue Commerce removed for the purpose of prolonging the litigation. Commerce responds, however, by alleging its removal was objectively reasonable because the Eighth Circuit clarified after *Steeby* that a federal court's jurisdiction is determined at the time of removal and removal under CAFA, which has no antiremoval presumption, changes the outcome of *Steeby*.

This case presents a close call. Commerce was clearly aware of the district court cases in this circuit finding that for purposes of the federal removal statute, alignment is determined at the time the original complaint was filed; Williamson and Palmer cited these cases in their state court brief opposing realignment. The Court also finds it concerning that Commerce attempts to blur the line between subject matter jurisdiction and the statutory authority to remove by misrepresenting that the Eighth Circuit has held alignment for purposes of the federal removal statute must be determined at the time of removal.

At the same time, the objective of awarding fees and costs is not to discourage defendants from seeking removal in all but the most obvious cases, *Martin*, 546 U.S. at 141, and the Court in *Steeby* recognized the issue presented here is a "difficult" one involving the "collision of two jurisdictional principles," 980 F. Supp. 2d at 1134. Although Commerce's argument is weak, the Court cannot find it lacked an objectively reasonable basis for seeking removal, especially given that the Eighth Circuit has not addressed the exact issue in this case.

Conclusion

Accordingly, Plaintiffs' Motion is GRANTED, and this case is remanded to the Circuit Court of Carroll County, Missouri, without an award of costs or attorney's fees.

IT IS SO ORDERED.

Appendix B

Date: October 2, 2018

/s/ Greg Kays
GREG KAYS, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING REHEARING (JANUARY 28, 2019)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-8016

BEVERLY J. WILLIAMSON
AND REBECCA PALMER

Respondents

v.

COMMERCE BANK

Petitioner

Appeal from U.S. District Court for the Western District of Missouri - Kansas City (4:18-cv-00513-DGK)

ORDER

The petition for rehearing *en banc* is denied. The petition for rehearing by the panel is also denied.

January 28, 2019

Appendix C

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

_____

/s/ Michael E. Gans