

No. 08-113

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

AT&T MOBILITY LLC and
AT&T MOBILITY CORPORATION,
Petitioners,

v.

CHARLENE SHORTS,
Respondent.

BRIEF OF PETITIONERS ON THE MERITS

On Petition for Permission to Appeal an Order of the United States
District Court for the Northern District of West Virginia
in Case No. 5:07-cv-00098-IMK (Keeley, J.)

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Only one form need be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil or bankruptcy case, corporate defendants in a criminal case, and corporate amici curiae. Counsel has a continuing duty to update this information. Please file an original and three copies of this form.

No. 08-113

Caption: AT&T Mobility v. Shorts

Pursuant to FRAP 26.1 and Local Rule 26.1,

AT&T Mobility who is Petitioner
(name of party/amicus) (appellant/appellee/amicus)

makes the following disclosure:

- 1. Is party/amicus a publicly held corporation or other publicly held entity?
 YES NO
- 2. Does party/amicus have any parent corporations?
 YES NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
See attachment.
- 3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?
 YES NO
If yes, identify all such owners:
See attachment.
- 4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?
 YES NO
If yes, identify entity and nature of interest:
- 5. Is party a trade association? (amici curiae do not complete this question)
 YES NO
If yes, identify all members of the association, their parent corporations, and any publicly held companies that own 10% or more of a member's stock:
- 6. Does this case arise out of a bankruptcy proceeding?
 YES NO
If yes, identify any trustee and the members of any creditors' committee:

s/Evan M. Tager
(signature)

August 5, 2008
(date)

**ATTACHMENT TO DISCLOSURE OF CORPORATE AFFILIATIONS
AND OTHER INTERESTS**

2. Does the party/amicus have any parent corporation?

YES.

AT&T Inc. (NYSE Ticker: T) is the ultimate parent company of AT&T Mobility LLC and AT&T Mobility Corporation. AT&T Inc. has no parent company, and there are no publicly held entities that own 10% or more of AT&T Inc.'s stock.

3. Is 10% or more of the stock of the party/amicus owned by a publicly held corporation or other publicly held entity?

YES.

AT&T Mobility LLC f/k/a Cingular Wireless LLC is a Delaware limited liability company ("LLC") with its principal place of business in Atlanta, Georgia. AT&T Mobility LLC is an indirect, wholly owned subsidiary of AT&T Inc. AT&T Mobility has five members: (1) SBC Long Distance, LLC; (2) SBC Alloy Holdings, Inc.; (3) AT&T Mobility Corporation f/k/a Cingular Wireless Corporation; (4) BellSouth Mobile Data, Inc.; and (5) New BellSouth Cingular Holdings, Inc. The ownership of the five members is as follows: (1) SBC Long Distance, LLC is wholly owned by SBC Telecom, Inc. SBC Telecom, Inc. is a Delaware corporation with no employees and no physical assets and with the majority of its corporate officers located in San Antonio, Texas; (2) SBC Alloy Holdings, Inc. is a Delaware corporation with its principal place of business in San Antonio, Texas; (3) AT&T Mobility Corporation f/k/a Cingular Wireless Corporation is a Delaware corporation with its principal place of business in Atlanta, Georgia; (4) BellSouth Mobile Data, Inc. is a Georgia corporation with its principal place of business in Atlanta, Georgia; and (5) New BellSouth Cingular Holdings, Inc. is a Delaware corporation with its principal place of business in Atlanta, Georgia. None of the companies listed above is publicly traded. All of the companies listed above are subsidiaries of AT&T Inc.

AT&T Mobility Corporation f/k/a Cingular Wireless Corporation is a Delaware corporation with its principal place of business in Atlanta, Georgia. AT&T Mobility Corporation is an indirect, wholly owned subsidiary of AT&T Inc. AT&T Mobility Corporation has two shareholders, AT&T Inc. and BellSouth Corporation. BellSouth Corporation is a Georgia corporation with its principal place of business in Atlanta, Georgia. BellSouth Corporation is a wholly owned subsidiary of AT&T Inc.

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JURISDICTIONAL STATEMENT

A. Jurisdiction of the District Court

On August 2, 2007, petitioners AT&T Mobility LLC and AT&T Mobility Corporation (together, “ATTM”) timely removed this putative class action from the Circuit Court of Brooke County, West Virginia, to the United States District Court for the Northern District of West Virginia. JA 33-40. As the district court correctly recognized, JA 49, 61-64, it has subject-matter jurisdiction pursuant to 28 U.S.C. § 1332(d), which, as amended by the Class Action Fairness Act of 2005 (“CAFA” or “Act”), Pub. L. No. 109-2, 119 Stat. 4 (2005), and subject to certain exceptions not applicable here, vests district courts with jurisdiction over putative class actions, like this one, in which (1) the amount in controversy exceeds \$5,000,000 (aggregating the claims of all putative class members) and (2) there is minimal diversity—*i.e.*, at least one member of the putative class and at least one defendant are citizens of different States. Contrary to the district court’s erroneous conclusion, JA 51-61, 64-70, and as we explain in this brief, this action is removable pursuant to 28 U.S.C. §§ 1441, 1446, and 1453.

B. Jurisdiction of the Court of Appeals

On January 16, 2008, the district court issued a memorandum opinion and order remanding the case to state court. The district court determined that ATTM, as an “additional counterclaim defendant,” has no authority to remove. On January

29, 2008, the district court issued a corrected memorandum opinion and order, JA 45-70, the corrections in which “affect neither the substance of the analysis nor the outcome of the case,” JA 45 n.1.

This Court has jurisdiction over ATTM’s appeal pursuant to 28 U.S.C. § 1453(c)(1), which provides that “a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order.”¹ ATTM timely filed a petition for permission to appeal on January 28, 2008—the seventh day, excluding intervening weekends and a legal holiday, after entry of the district court’s initial order.²

¹ With one exception, courts of appeals have uniformly held that the “not less than 7 days” language in Section 1453(c)(1) is a scrivener’s error that should be read as “not more than 7 days.” See *Estate of Pew v. Cardarelli*, 527 F.3d 25, 27-28 (2d Cir. 2008); *Morgan v. Gay*, 466 F.3d 276, 278-79 (3d Cir. 2006); *Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Servs., Inc.*, 435 F.3d 1140, 1146 (9th Cir. 2006); *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1093 n.2 (10th Cir. 2005); *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1326 (11th Cir. 2006). But see *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 983-85 (7th Cir. 2008). The correctness of those decisions has no bearing on this case, because ATTM’s petition was filed exactly seven days after the district court’s decision—which is both “not less than 7 days” and “not more than 7 days” later.

² Courts of appeals have uniformly held that, pursuant to Federal Rule of Appellate Procedure 26(a), intervening weekends and legal holidays are excluded from the seven-day period. See *Estate of Pew*, 527 F.3d at 28; *Morgan*, 466 F.3d at 277 n.1; *Patterson v. Dean Morris, L.L.P.*, 444 F.3d 365, 368 n.1 (5th Cir. 2006); *Smith*

On July 8, 2008, this Court issued an order directing the filing of formal briefs on the merits. The Court deferred action on the petition for permission to appeal pending assignment of the case to an argument panel, and it tentatively calendared the case for oral argument on the petition and the merits at the Court's October 28-31, 2008 argument session.

INTRODUCTION

The district court decided that a state-court class action covered by CAFA—one in which there is minimal diversity and the aggregated amount in controversy exceeds \$5 million—can be removed to federal court if it is pleaded as an independent action but not, as in this case, if it is pleaded as a counterclaim to an existing action (here, an action to collect a debt of less than \$800). Two propositions concerning CAFA and the district court's interpretation of it are not open to debate. One is that Congress enacted CAFA to ensure that plaintiffs' lawyers cannot manipulate pleadings to defeat removal of CAFA-covered class actions and that all such class actions can be litigated in federal court at the defendant's option. The other is that the district court's decision, if allowed to stand, will ensure that plaintiffs' lawyers *can* manipulate pleadings to defeat removal of CAFA-covered class actions (by pleading the class action as a counterclaim rather than an independent

v. Nationwide Prop., 505 F.3d 401, 404 (6th Cir. 2007); *Spivey*, 528 F.3d at 983; *Amalgamated Transit Union*, 435 F.3d at 1146; *Miedema*, 450 F.3d at 1326.

action) and that many such class actions *cannot* be litigated in federal court at the defendant's option (whenever plaintiffs' lawyers employ this tactic).

Taken together, these two propositions go a long way towards resolving this case. A statute whose indisputable purpose is to prevent the gaming of jurisdictional rules to keep class actions in state court cannot be interpreted to *allow* the gaming of jurisdictional rules to keep class actions in state court unless there is unambiguous language in the statute that compels that highly counterintuitive result. The district court did not identify any such language in CAFA, and in fact there is none. On the contrary, CAFA's removal provisions use broad language that is entirely consistent with the Act's core purpose of ensuring that covered class actions can be litigated in federal court, and class actions pleaded as counterclaims fall comfortably within the statutory text. *See* 28 U.S.C. § 1453(b).

The district court's determination that ATTM has no right to remove is particularly unwarranted because ATTM is an "additional" counterclaim defendant—one that was not a plaintiff in state court. To the extent, therefore, that the district court's rule is motivated by a concern that it would be unfair to allow a party to invoke the jurisdiction of the state court and then remove the case to federal court, that concern cannot support application of the rule to ATTM.

Even if CAFA precludes the removal of a state-court class action by an additional counterclaim defendant, the parties in this case should be realigned. Courts

have realigned parties, and treated the counterclaim defendant as the true “defendant” with authority to remove, in cases in which the counterclaim was the “main-spring” or “principal purpose” of the proceedings. That is surely the case here, where a counterclaim class action seeking tens of millions of dollars on behalf of tens of thousands of ATTM subscribers utterly dwarfs the original action, in which a single debt collector sought less than \$800 from a single customer.

STATEMENT OF THE ISSUES

1. Whether an “additional counterclaim defendant” may remove a putative class action to federal court.

2. Whether, assuming that an “additional counterclaim defendant” may not remove a putative class action to federal court, ATTM should be deemed a “defendant” with the authority to remove.

STATEMENT OF THE CASE

Palisades Collections LLC (“Palisades”) brought a collection action against respondent Charlene Shorts in the Magistrate Court of Brooke County, West Virginia, seeking to recover a debt of approximately \$800. Palisades had purchased the debt from petitioner ATTM’s predecessor in interest, which provided Shorts with wireless telephone service pursuant to a written agreement. After Palisades removed the case to the Circuit Court of Brooke County, West Virginia, Shorts was granted leave to join ATTM as an “additional” counterclaim defendant

and file a class-action counterclaim against Palisades and ATTM. The putative class action, which alleged violations of the West Virginia Consumer Credit & Protection Act, sought to recover tens of millions of dollars on behalf of tens of thousands of ATTM subscribers. JA 5-7, 13-32, 46, 62-63.

ATTM removed the case to the United States District Court for the Northern District of West Virginia. Shorts filed a motion to remand the case to state court, and the district court granted the motion. The court agreed that there was federal diversity jurisdiction but found that ATTM, as an “additional counterclaim defendant,” did not have the authority to remove. JA 33-40, 48-70.

STATEMENT OF FACTS

A. Statutory Background

Congress enacted CAFA in response to a decade’s worth of “abuses of the class action device” by plaintiffs’ lawyers. CAFA § 2(a)(2). One of the abuses that prompted Congress to act was the practice of filing large class actions in state court. Congress found that state-court judges frequently apply procedural rules “in a manner that contravenes basic fairness” and that class-action lawyers often “effectively control the litigation” in state court, S. Rep. No. 109-14, at 4 (1st Sess. 2005), to the benefit of the lawyers but to the detriment of both “class members with legitimate claims” and “defendants that have acted responsibly,” CAFA § 2(a)(2)(A). It was also common for class-action lawyers to “game the system”

by manipulating their pleadings to “defeat diversity jurisdiction,” thereby ensuring that defendants could not remove class actions to federal court. S. Rep. No. 109-14, at 4-5.

One of Congress’ main objectives in enacting CAFA was to ensure that large class actions could be litigated in federal court, so as to prevent the abuses that are prevalent in state court. CAFA § 2(a)(4)(A), (b)(2); S. Rep. No. 109-14, at 4-5. Congress specifically found that “[a]buses in class actions” undermine “the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution,” in that state courts are “keeping cases of national importance out of Federal court,” sometimes “acting in ways that demonstrate bias against out-of-State defendants,” and “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). Consistent with that finding, the Act specifically states that one of CAFA’s purposes is to “provid[e] for Federal court consideration of interstate cases of national importance under diversity jurisdiction.” *Id.* § 2(b)(2).

To effectuate that purpose, Congress amended 28 U.S.C. § 1332 in Section 4 of CAFA “to allow federal courts to hear more interstate class actions on a diversity jurisdiction basis” and it added 28 U.S.C. § 1453 in Section 5 of CAFA “to ensure that qualifying interstate class actions initially brought in state courts may

be heard by federal courts.” S. Rep. No. 109-14, at 5. As amended by CAFA, and subject to certain exceptions not applicable here, Section 1332 grants original jurisdiction to district courts over class actions in which (a) the amount in controversy exceeds \$5 million (aggregating the claims of all putative class members) and (b) minimal diversity exists—*i.e.*, any member of the putative class and any defendant are citizens of different states. 28 U.S.C. § 1332(d)(2), (6). Section 1453, in turn, authorizes the removal of putative class actions filed in state court and eliminates a number of restrictions that apply to the removal of other types of cases. *Id.* § 1453(b). In particular, Section 1453 provides that a defendant may remove without the consent of other defendants, may remove even if it is a citizen of the State in which the action was brought, and need not remove within one year of the suit’s commencement. *Id.*

B. Factual Background

Charlene Shorts purchased wireless telephone service from AT&T Wireless, which subsequently merged with Cingular Wireless. Shorts also purchased wireless telephone service directly from Cingular Wireless, which is now known as ATTM. Shorts maintained a West Virginia billing address on both accounts. Under the contracts with the providers, Shorts was permitted to terminate her service at any time and for any reason, as long as she paid an early termination fee (“ETF”) if she did so before the contract expired. When she failed to make timely

payments on her accounts, they were terminated and Shorts was charged ETFs in accordance with her contracts. JA 41-42, 46.

Before its merger with Cingular Wireless, AT&T Wireless sold certain unpaid account debts to Palisades. For a period after the merger, Cingular Wireless continued to sell certain unpaid AT&T Wireless account debts to Palisades, including the debt associated with Shorts' AT&T Wireless account, which totaled \$794.87. While some AT&T Wireless account debts were sold to Palisades both before and after the merger, no Cingular Wireless account debts, including the debt associated with Shorts' Cingular Wireless account, were ever sold to Palisades. Palisades attempted to collect Shorts' AT&T Wireless account debt but was unable to do so. JA 6, 43, 46.

C. Proceedings in State Court

On June 23, 2006, Palisades commenced a collection action against Shorts by filing a complaint in the Magistrate Court of Brooke County, West Virginia. JA 6-7, 46. The action sought to recover the AT&T Wireless account debt, of slightly less than \$800, that Palisades had purchased from ATTM. Shorts filed an answer and counterclaim. JA 8-11. None of the pleadings named ATTM as a party. On August 2, 2006, Palisades removed the action from the Magistrate Court to the Circuit Court of Brooke County. JA 5, 46.

The case lay dormant for more than ten months, until a district court in the Northern District of West Virginia issued its decision in *CitiFinancial, Inc. v. Lightner*, No. 5:06CV145. In that case, the plaintiff removed a collection action it had originally filed in West Virginia state court after the defendant served it with a putative class-action counterclaim. On April 9, 2007, the district court granted the defendant's motion to remand, finding that CitiFinancial, the original plaintiff in state court, did not have the right to remove. *See CitiFinancial, Inc. v. Lightner*, No. 5:06CV145, 2007 WL 1655225, at *3 (N.D. W. Va. June 6, 2007) (subsequent memorandum opinion and order) (“[o]nce a plaintiff always a plaintiff”) (internal quotation marks omitted).

Just a few weeks after the district court issued its ruling, putative class counsel in *CitiFinancial* entered an appearance on behalf of Shorts and filed a motion for leave to file an amended counterclaim. Pet. Exh. 6-8; JA 13-23. On June 26, 2007, the circuit court granted the motion. JA 24-25, 46-47.

The amended counterclaim (1) joined ATTM as an “additional counterclaim defendant” and (2) asserted putative class-action claims alleging that the ETFs violated the West Virginia Consumer Credit & Protection Act, W. Va. Code §§ 46A-1-101 *et seq.*, and seeking tens of millions of dollars on behalf of tens of thousands of ATTM subscribers. JA 13-23, 46-47, 62-63. Although it is named as a counterclaim defendant, the putative class-action counterclaim has little to do

with Palisades. *See* JA 26-32. The proposed class definition makes no mention of Palisades, *see* JA 28, and tens of thousands of the putative class members have no relationship with that party, *see* JA 43. Other allegations in Shorts’ counterclaim confirm that the class action is really directed against ATTM. *See* JA 28-29.

D. Proceedings in the District Court

On August 2, 2007, ATTM removed the action to the United States District Court for the Northern District of West Virginia. JA 33-40. Shorts filed a motion to remand the case to state court, citing *CitiFinancial* and arguing that ATTM, as an “additional” counterclaim defendant, had no right to remove. Mot. to Remand & Mem. in Support 2-5. The district court granted the motion. JA 45-70.

As an initial matter, the court found that (1) the action was commenced after CAFA’s effective date, (2) the aggregated amount in controversy easily exceeds \$5,000,000, (3) there is minimal diversity among the parties, and (4) none of CAFA’s exceptions to diversity jurisdiction applies. JA 61-64. The court therefore agreed that “this putative class action meets the jurisdictional requirements of CAFA”; that “federal subject matter jurisdiction exists”; and that the court may “retain jurisdiction if it determines that ATTM has the authority to remove.” JA 49; *see also* JA 61, 64. The court decided, however, that ATTM does not have the authority to remove. The court reasoned that “ATTM is properly characterized as a counterclaim defendant”; that a counterclaim defendant—even an “additional”

counterclaim defendant (one that is not a plaintiff and has not chosen to litigate in state court)—“may not remove [a] case to federal court” under the general removal statute, 28 U.S.C. § 1441(a); that realignment of the parties “is not proper”; and that “CAFA does not create independent removal authority.” JA 53, 56, 61, 70. The court therefore ordered that the case be remanded to state court.

SUMMARY OF ARGUMENT

The district court held that ATTM, as an “additional counterclaim defendant,” may not remove this class action to federal court. That holding is erroneous, both because CAFA authorizes an “additional counterclaim defendant” to remove and because, even if it did not, ATTM should be deemed a “defendant” with the authority to remove.

I. An “additional counterclaim defendant” may remove a CAFA-covered class action for two independent reasons. First, *any* counterclaim defendant—“additional” or otherwise—may remove a class action; and second, an “additional” counterclaim defendant may remove *any* action—class action or otherwise.

A. Under CAFA, the party against which a covered class action is brought may remove it to federal court whether the class action is pleaded as an independent action or as a counterclaim to an existing action. The district court’s contrary conclusion undermines the basic purpose of CAFA; is inconsistent with its text;

and is not compelled by *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), the decision on which the court relied.

Congress' fundamental objective in enacting CAFA was to ensure that plaintiffs' lawyers could not manipulate their pleadings to keep large class actions in state court, where abuses were found to be common, and that large class actions could therefore be litigated in federal court at the option of the defendant. *See, e.g.*, CAFA § 2(a)(2), (a)(4), (b); S. Rep. No. 109-14, at 4-5 (1st Sess. 2005). The rule adopted by the district court severely undermines that objective, because it enables plaintiffs' lawyers to circumvent removal by the simple expedient of appending an otherwise-removable class action, as a "counterclaim," to an existing action in state court. Congress could not have intended to give plaintiffs' lawyers the ability to litigate in state court, over the objection of the defendant, the very substantial proportion of class actions that can be pleaded as counterclaims. Because the district court's interpretation of the Act not only permits but encourages the very sort of gaming of jurisdictional rules that CAFA was enacted to prevent, and because its effect is to leave a large proportion of CAFA-covered class actions in state court, the interpretation should be rejected.

The text of CAFA confirms that a counterclaim defendant may remove a covered class action. Unlike the general removal statute, which provides that "any civil action * * * may be removed *by the defendant or the defendants*[] to [a]

district court,” 28 U.S.C. § 1441(a) (emphasis added), CAFA provides generally that “[a] class action may be removed to a district court” without restricting who has the authority to remove, *id.* § 1453(b). Unlike the general removal statute, moreover, the same provision of CAFA later states that “any” defendant may remove, *id.*, and a statutory phrase introduced by “any” is ordinarily interpreted to have “a broad meaning,” *Ali v. Fed. Bureau of Prisons*, 128 S. Ct. 831, 835 (2008). Finally, a separate subsection specifies that CAFA’s removal provisions “shall not apply” to enumerated types of class actions and does not include counterclaim class actions in that list. 28 U.S.C. § 1453(d).

The district court believed that Congress meant for CAFA to incorporate the holding of *Shamrock Oil*—that a plaintiff had no right to remove under the general removal statute then in effect, even after the plaintiff became a counterclaim defendant. The district court was mistaken in that belief, because CAFA’s removal provisions differ from the removal statute at issue in *Shamrock Oil* in a number of critical respects. In particular, the statute at issue there was framed in narrower language than CAFA; it did not have any purpose remotely comparable to CAFA’s—namely, a strong preference for litigation in federal court; and the federalism-based canon of strict construction employed by the Court has no applicability to CAFA.

If the district court were correct in its belief that CAFA codified the holding of *Shamrock Oil* (a case that did not involve a class action), a counterclaim defendant could not remove a class action before the class was certified, but could remove it afterwards. That is because the unnamed class members, who would be parties after certification but had never been sued, could not be considered anything other than plaintiffs and, as to them, the party against which the class action was brought could not be considered anything other than a defendant. Congress could not have intended that removal would be prohibited before certification but permitted afterwards, and CAFA should therefore be interpreted to avoid that result.

B. Even if CAFA does incorporate the holding of *Shamrock Oil*, ATTM may remove Shorts' class action. The counterclaim defendant in *Shamrock Oil* was the plaintiff, and the justification for the Court's decision was that it would be unfair to allow the party that had chosen to litigate in state court to remove the case to federal court. *See Shamrock Oil*, 313 U.S. at 105-06 & n.2, 108. The Court thus must be understood to have interpreted "defendant" in the removal statute at issue there to mean a party that is not a plaintiff. Accordingly, even if "defendant" in CAFA has the same meaning, an "additional" counterclaim defendant like ATTM—which was never a plaintiff and did not invoke the jurisdiction of the state court—is a "defendant" with the right to remove.

II. If the Court nevertheless concludes that CAFA does not authorize an “additional counterclaim” defendant to remove a class action, it should realign the parties so that ATTM is a “defendant.” The district court correctly recognized that a federal court may realign parties when deciding who is the true “defendant” with authority to remove, and it correctly recognized that the true “plaintiff” for these purposes is the party whose intent to achieve a particular result is the “mainspring” of the proceedings and who is responsible for the continued existence of the action. The district court erred, however, in finding that the true plaintiff here is Palisades rather than Shorts (and thus that ATTM cannot be deemed a defendant). It is Shorts’ class action, which seeks to recover tens of millions of dollars on behalf of tens of thousands of ATTM subscribers, not Palisades’ collection action, which seeks to recover less than \$800 from Shorts on its own behalf, that is the “mainspring” of the litigation and responsible for its continued existence. Realigning the parties, so that ATTM is a “defendant,” is particularly warranted because there is only the most tenuous basis, if there is any basis at all, for finding that ATTM was properly joined as a “counterclaim defendant” in the first place.

STANDARD OF REVIEW

“For questions concerning removal to federal court, [the] standard of review is *de novo*.” *Payne ex rel. Estate of Calzada v. Brake*, 439 F.3d 198, 203 (4th Cir. 2006) (citing *Lontz v. Tharp*, 413 F.3d 435, 439 (4th Cir. 2005)). Moreover, this

Court “review[s] de novo a ruling by a district court on an issue of statutory interpretation,” *United States v. Jackson*, 524 F.3d 532, 544 (4th Cir. 2008)—here, the interpretation of CAFA’s removal provisions.

ARGUMENT

In remanding this case to state court, the district court held that ATTM may not remove the case to federal court because (1) an “additional counterclaim defendant” may not remove a putative class action and (2) ATTM must be treated as an “additional counterclaim defendant.” JA 48-70. As explained below, each of those holdings is mistaken.

I. AN “ADDITIONAL COUNTERCLAIM DEFENDANT” MAY REMOVE A PUTATIVE CLASS ACTION

The district court’s holding that an “additional counterclaim defendant” has no right to remove a putative class action is mistaken in two independent respects. First, under CAFA, *any* counterclaim defendant—“additional” or otherwise—may remove a putative class action as to which federal jurisdiction exists. Second, quite apart from CAFA, an “additional” counterclaim defendant may remove *any* action—class action or otherwise—as to which federal jurisdiction exists.

A. Any Counterclaim Defendant May Remove A Putative Class Action

As Judge Posner recently observed, when CAFA is “silent” on an issue, “the interpretation that is consistent with [its] goal is * * * preferable,” and the interpretation that “would defeat [its] goal” should be rejected. *Springman v. AIG Mktg.*,

Inc., 523 F.3d 685, 688 (7th Cir. 2008). The “goal” of CAFA is that large class actions will be litigated in federal court; the district court’s interpretation of CAFA is that large class actions must remain in state court as long as they are pleaded as counterclaims. That interpretation defeats CAFA’s “goal,” and for that reason alone it should be rejected.

There is a further reason to reject the district court’s interpretation, which is that CAFA is not in fact “silent” on the issue. Although the text of the Act does not directly address whether class actions pleaded as counterclaims are removable, a number of features of the text confirm that Congress intended them to be.

Contrary to the district court’s view, there is no reason to think that Congress meant for CAFA to incorporate the holding of *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), that a plaintiff that became a counterclaim defendant could not remove under the general removal statute then in effect. CAFA has a different text and a very different purpose, and the federalism-based canon of strict construction on which *Shamrock Oil* relied has no applicability to the Act.

1. The district court’s interpretation of CAFA undermines the fundamental purpose of the Act

a. As the Eleventh Circuit has noted, “Congress intended CAFA to encourage the litigation of certain class actions—‘cases of national importance’—in federal courts, so as to minimize bias against out-of-state defendants and promote the fair application of state law to the multifarious parties in class actions.” *Low-*

ery v. Ala. Power Co., 483 F.3d 1184, 1197 (11th Cir. 2007). That this was in fact Congress’ intent is undeniable. It is demonstrated by statements on the floor of both Houses by sponsors of the legislation; by the Senate Report on CAFA; and by the text of the Act itself.

To begin with the text, Section 2 of CAFA sets forth the “findings” of Congress and the “purposes” of the Act. Among the findings are that “there have been abuses of the class action device” over the previous decade that have “undermine[d] the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction,” in that “State and local courts” have been “keeping cases of national importance out of Federal court.” CAFA § 2(a)(2), (4)(A). Consistent with that finding, one of the purposes of CAFA listed in the Act is to “provid[e] for Federal court consideration of interstate cases of national importance under diversity jurisdiction.” *Id.* § 2(b)(2).

The Senate Judiciary Committee’s Report includes more detailed findings and purposes. In the section of the Report setting forth the Act’s “purposes,” the Committee observed that “[a] mounting stack of evidence” shows “numerous problems with our current class action system” and that a “key reason for these problems is that most class actions are currently adjudicated in state courts,” where rules are frequently applied “in a manner that contravenes basic fairness” and “there is often inadequate supervision over litigation procedures and proposed

settlements.” S. Rep. No. 109-14, at 4 (1st Sess. 2005). The Report went on to say that “current law enables lawyers to ‘game’ the procedural rules and keep nationwide or multi-state class actions in state courts,” especially those whose judges “have reputations for readily certifying classes and approving settlements without regard to class member interests.” *Id.* The Report stated that CAFA is intended to address these “problems in class action practice” by, among other things, “plac[ing] the determination of more interstate class action lawsuits in the proper forum—the federal courts.” *Id.* at 5. The Report emphasized the Committee’s “firm[] belie[f]” that “interstate class actions”—which “typically involve more people, more money, and more interstate commerce ramifications than any other type of lawsuit”—“belong in federal court.” *Id.* Other portions of the Report made the same essential point. *See, e.g. id.* at 27 (“the federal courts are the appropriate forum to decide most interstate class actions”); *id.* at 53 (“class actions are precisely the kind of cases that should be heard in federal court”); *id.* (“large interstate class actions belong in federal court”); *id.* at 61 (“[f]ederal courts are the appropriate forum to decide interstate class actions involving large amounts of money, many plaintiffs and interstate commerce disputes”).

While CAFA was being debated, virtually every sponsor of the legislation to speak on its behalf expressed the view that was ultimately reflected in the Senate

Report and the Act itself: that CAFA's purpose was to ensure that large class actions could be litigated in federal court. For example:

- “Our bill attempts to * * * ensure that cases with a national scope are heard in Federal court.” 151 Cong. Rec. S1086-02, 1099 (daily ed. Feb. 8, 2005) (statement of Sen. Kohl).
- “[CAFA] will allow nationwide class actions to be heard in a proper forum, the Federal courts.” 151 Cong. Rec. S1086-02, 1105 (daily ed. Feb. 8, 2005) (statement of Sen. Grassley).
- “What we have sought to do * * * is to make sure that the class action lawsuits brought by an individual in a State, if they are of a national scope, * * * would be in a Federal court.” 151 Cong. Rec. S1157-02, 1161 (daily ed. Feb. 9, 2005) (statement of Sen. Carper).
- “[CAFA] would alleviate many of the problems present in the current class action system by allowing truly national class actions to be filed in or removed to Federal court.” 151 Cong. Rec. S1157-02, 1179 (daily ed. Feb. 9, 2005) (statement of Sen. Hatch).
- “[A] lawsuit that is predominantly int[er]state in nature * * * should be in Federal court.” 151 Cong. Rec. S1225-02, 1235 (daily ed. Feb. 10, 2005) (statement of Sen. Sessions).

- “[CAFA] moves those large nationwide cases that genuinely impact interstate commerce to the Federal courts where they belong.” 151 Cong. Rec. S1225-02, 1249 (daily ed. Feb. 10, 2005) (statement of Sen. Frist).
- “The bill before the House today offers commonsense procedural changes that will end the most serious abuses by allowing more interstate class actions to be heard in Federal courts * * * .” 151 Cong. Rec. H723-01, 726 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner).

These sentiments were echoed by other members of Congress. *See, e.g.*, 151 Cong. Rec. S1086-02, 1076 (daily ed. Feb. 8, 2005) (statement of Sen. Specter) (“[T]here is * * * a very important purpose here: to put cases in the Federal court to avoid forum shopping and judge shopping.”); 151 Cong. Rec. S1225-02, 1239 (daily ed. Feb. 10, 2005) (statement of Sen. Allen) (“This class action reform legislation is primarily designed to allow defendants to move a class action lawsuit from State court to Federal court * * * .”); 151 Cong. Rec. H723-01, 748 (daily ed. Feb. 17, 2005) (statement of Rep. Blunt) (“[CAFA] is a commonsense bipartisan plan that addresses [a] serious problem by allowing larger interstate class action cases * * * to be filed in Federal court.”). The President made the same point when he signed the Act into law. *See* Remarks on Signing the Class Action Fair-

ness Act of 2005, 41 *Weekly Comp. Pres. Doc.* 265, 266 (Feb. 18, 2005) (“[CAFA] moves most large, interstate class actions into Federal courts. This will prevent trial lawyers from shopping around for friendly local venues.”).

b. Congress’ overriding objective in enacting CAFA is highly relevant to the interpretation of the Act’s removal provisions, because a statute obviously must be read in light of its purposes. *See, e.g., McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 861 (2005). As the Eleventh Circuit has explained, “CAFA’s purposes encourage a reading that makes more inclusive the scope of its removal provisions, not less.” *Lowery*, 483 F.3d at 1197. “To read the * * * language of the removal provisions narrowly * * * would frustrate congressional intent that CAFA be used to provide for more uniform federal disposition of class actions affecting interstate commerce.” *Id.* In particular, CAFA’s purposes support an interpretation broad enough to authorize the removal of class actions pleaded as counterclaims.

CAFA “was designed, in the first place, to curtail jurisdictional gaming and forum-shopping,” *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1097 (10th Cir. 2005)—to prevent class-action lawyers from “manipulat[ing] their pleadings” to defeat federal jurisdiction and thereby “ensure that their cases remain at the state level,” S. Rep. No. 109-14, at 26; *accord, e.g., id.* at 4-5, 10-12; 151 Cong. Rec. S1225-02, 1245 (daily ed. Feb. 10, 2005) (statement of Sen. Dodd); 151 Cong.

Rec. H723-01, 729 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner). That is just what happened here. Counsel’s motivation for pleading Shorts’ class action as a counterclaim is transparent: to try to keep the case in state court; obtain the benefits of litigating there (including a higher likelihood of class certification); and increase—perhaps dramatically—the settlement value of the suit. And that sort of jurisdictional gaming is precisely what the district court’s decision has ratified.

The court acknowledged that Shorts’ putative class action satisfies CAFA’s jurisdictional requirements. JA 49, 61, 64. Had it been filed as a freestanding suit, therefore, the class action would have been removable. It was held not to be removable only because the district court concluded that ATTM’s status as a counterclaim defendant, as opposed to a defendant *simpliciter*, deprived it of the right to remove. The consequence of that holding is that a putative class action seeking to recover tens of millions of dollars on behalf of tens of thousands of class members may be removed if it is pleaded as an independent action but not if it is pleaded as a “counterclaim” to a collection action brought by a single debt collector to recover a few hundred dollars from a single customer.

Congress could not have intended to enable plaintiffs’ lawyers to circumvent removal by the simple expedient of recruiting a defendant in a state-court collection action to serve as named “counterclaim plaintiff” in an otherwise-removable

class action. And this Court should not “interpret[] th[e] Act as containing a loophole that Congress could not have intended to create.” *Morse v. Republican Party of Va.*, 517 U.S. 186, 239 (1996) (Breyer, J., concurring in the judgment).

Indeed, “loophole” is probably not an adequate term. The rule adopted by the district court is tantamount to a determination that CAFA’s removal provisions have no application to the very substantial proportion of class actions that can be pleaded as counterclaims, since plaintiffs’ lawyers are certain to take advantage of the rule, and defeat removal, by pleading class actions in that manner whenever they can. It is inconceivable that Congress intended to leave that large category of class actions in state court. On the contrary, that result is so “anomalous” that—to put it mildly—it “[can]not easily [be] attributable to congressional intent.” *Cedar Rapids Cmty. School Dist. v. Garret F.*, 526 U.S. 66, 78 n.10 (1999).³

³ This is hardly the only post-CAFA case in which plaintiffs’ lawyers have employed the tactic of pleading a class action as a counterclaim. *See, e.g., Progressive W. Ins. Co. v. Preciado*, 479 F.3d 1014 (9th Cir. 2007) (insurance); *Unifund CCR Partners v. Wallis*, No. Civ. A. 06-CV-545-GRA, 2006 WL 908755 (D.S.C. Apr. 7, 2006) (credit card); *CitiFinancial, Inc. v. Lightner*, No. 5:06CV145, 2007 WL 1655225 (N.D. W. Va. June 6, 2007) (consumer loan); *Ford Motor Credit Co. v. Jones*, No. 1:07 CV 728, 2007 WL 2236618 (N.D. Ohio July 31, 2007) (automobile lease). And, as an academic defender of the tactic—and consultant to Shorts in this litigation—has correctly suggested, these cases are likely “just the tip of an approaching iceberg.” 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); *see id.* at 193 n.*. A number of the cases cited in this footnote are discussed later in this brief. *See infra*, pp. 35-36, 37 n.6.

As one of CAFA's sponsors explained, Congress was "attempt[ing] to put an end to the type of gaming engaged in by plaintiffs' lawyers to keep cases in State court," and CAFA's "removal provisions * * * should thus be interpreted with this intent in mind." 151 Cong. Rec. H723-01, 729 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner). Because the district court's interpretation of the removal provisions not only permits but encourages this type of gaming, and because its effect is to leave a large proportion of CAFA-covered class actions in state court, the interpretation is flatly inconsistent with congressional intent.

c. The issue in this case is much like that in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006), another case involving a statute enacted to stem abusive class actions. The result should be much like that in *Dabit* as well.

The statute at issue in *Dabit* was the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Pub. L. No. 105-353, 112 Stat. 3227 (1998), which prohibits the filing of certain securities-fraud class actions premised on state law. Plaintiffs' lawyers had begun to employ that tactic after Congress placed limits on securities-fraud class actions premised on *federal law* in the Private Securities Litigation Reform Act of 1995 ("1995 Reform Act"), Pub. L. No. 104-67, 109 Stat. 737 (1995). In *Dabit*, the court of appeals interpreted SLUSA narrowly, finding that a category of state-law class actions was not covered by the statute and thus

was not preempted. The Supreme Court unanimously reversed. It explained that “[t]he presumption that Congress envisioned a broad construction” follows, in part, from “the particular concerns that culminated in SLUSA’s enactment.” *Dabit*, 547 U.S. at 86. The Court believed that “[a] narrow reading of the statute would undercut the effectiveness of the 1995 Reform Act and thus run contrary to SLUSA’s stated purpose, viz., ‘to prevent certain State private securities class action lawsuits * * * from being used to frustrate the objectives’ of the 1995 Act.” *Id.* (quoting SLUSA § 2(5)).

The same is true here. The presumption that Congress envisioned a broad construction of CAFA follows, in part, from the particular concerns that culminated in its enactment. A narrow reading of CAFA would allow plaintiffs’ lawyers to litigate large class actions in state court and thus run contrary to one of its stated purposes, viz., to “provid[e] for Federal court consideration of interstate cases of national importance.” CAFA § 2(b)(2).

2. The district court’s interpretation of CAFA is inconsistent with the text of the Act

An interpretation of a provision that undermines one of the statute’s basic purposes should not be adopted unless unambiguous statutory language leaves the court with no choice. There is no such language in CAFA’s removal provisions. On its face, the Act does not say, or even imply, that a counterclaim defendant may not remove. On the contrary, CAFA’s text suggests the opposite.

CAFA's principal removal provision, 28 U.S.C. § 1453(b), states that "[a] class action may be removed to a district court of the United States in accordance with [28 U.S.C. §] 1446," which sets forth the procedures for removal. Section 1453(b) also states that "the 1-year limitation under section 1446(b) shall not apply" and that a class action "may be removed by any defendant without the consent of all defendants" and "without regard to whether any defendant is a citizen of the State in which the action is brought." *Id.* Another provision states that CAFA's removal provisions "shall not apply" to enumerated types of class actions (those involving corporate governance and certain securities). *Id.* § 1453(d). Three features of the text support the conclusion that counterclaim defendants may remove, particularly when read in light of Congress' objective that large class actions be litigated in federal court.

First, CAFA's principal removal provision begins with the broad statement that "[a] class action may be removed to a district court of the United States," without specifying which parties are authorized to remove. 28 U.S.C. § 1453(b). It thus differs from the language of the general removal statute, which specifies that "any civil action * * * may be removed *by the defendant or the defendants* [] to [a] district court of the United States." *Id.* § 1441(a) (emphasis added). The Supreme Court has held that, because a statute providing generally that "rights * * * may be enforced by civil actions in appropriate United States district courts"

contains “no particular statutory restrictions on potential plaintiffs,” the statute does not contemplate a “restricted class of plaintiffs.” *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 102-03 (1979) (quoting 42 U.S.C. § 3612 (1976)). So too here. Because the opening words of CAFA’s principal removal provision contain no particular statutory restrictions on who may remove, the provision does not contemplate a restricted class of parties with the authority to remove putative class actions.

Second, while the general removal statute permits removal of actions by “the defendant or the defendants,” 28 U.S.C. § 1441(a), CAFA’s principal removal provision later states that putative class actions “may be removed by *any* defendant,” *id.* § 1453(b) (emphasis added). Indeed, the phrase “any defendant” appears twice in the provision, which is only one sentence long. *Id.* As the Supreme Court recently observed, a statutory phrase introduced by the word “any” is ordinarily interpreted to have “a broad meaning.” *Ali v. Fed. Bureau of Prisons*, 128 S. Ct. 831, 835 (2008). “[R]ead naturally, the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’” *Id.* at 835-36 (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)). A counterclaim defendant is surely a defendant “of whatever kind.” Particularly in light of CAFA’s purposes, “any defendant” should be interpreted to mean just what it says.

Third, CAFA explicitly provides that its removal provisions “shall not apply” to enumerated types of class actions. 28 U.S.C. § 1453(d). If Congress had intended to exclude class actions pleaded as counterclaims from the scope of CAFA’s removal provisions, “it could easily have done so explicitly in this section as it did with respect to the other listed exceptions.” *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 109 (1980). That it did not do so suggests that it meant for counterclaim class actions, other than those specifically excepted, to be removable to federal court. *Cf. Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 450-51 (7th Cir. 2005) (Easterbrook, J.) (holding that a class action alleging a violation of the Telephone Consumer Protection Act is removable because, among other things, CAFA has a “list of claims to which its removal provisions are inapplicable” and “the Telephone Consumer Protection Act is not on that list”) (citation omitted).

3. The district court’s interpretation of CAFA is not compelled by *Shamrock Oil*

a. In deciding that a counterclaim defendant has no right of removal under CAFA, the district court did not deny that the purpose of the Act was to ensure that large class actions are litigated in federal court, and it did not identify anything in the text of the Act that precludes the removal of class actions pleaded as counterclaims. Instead, the court relied mainly on the Supreme Court’s decision in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941). JA 50, 64-70. That

case, which was not a class action, held that a plaintiff that later became a counterclaim defendant had no right to remove under the general removal statute then in effect, and the district court interpreted CAFA to incorporate its holding *sub silentio*. JA 69-70. The court’s reliance on *Shamrock Oil* was seriously misplaced. CAFA’s removal provisions differ from the removal statute at issue there in a number of critical respects, and thus there is no basis to conclude that Congress meant to codify the decision in enacting CAFA.⁴

First, the language of CAFA is broader than that of the statute at issue in *Shamrock Oil*. Whereas the general removal statute provided specifically that an action “may be removed by the defendant or defendants therein to the district court,” 313 U.S. at 105 n.1 (quoting 28 U.S.C. § 71 (1940)), CAFA’s principal removal provision states that a class action “may be removed to a district court” without limiting the parties entitled to remove, 28 U.S.C. § 1453(b), and it later states—in two different places—that “any” defendant may remove, *id.* It is unreasonable to assume that Congress meant to carry over the Court’s interpretation of narrower language to a statute employing broader language.

⁴ As we later explain, the district court’s reliance on *Shamrock Oil* was misplaced for another reason: even if CAFA incorporates it, the decision does not prevent removal by a counterclaim defendant, like ATTM, that is not a plaintiff. *See infra*, Point I.B.

Second, the removal statute at issue in *Shamrock Oil* did not have any purpose remotely comparable to CAFA's—namely, to ensure that covered lawsuits can be litigated in federal court and thereby to prevent the abuses that frequently occur in state court. Congress cannot be presumed to have incorporated into CAFA, by mere implication, a principle that is so patently inconsistent with the Act's clearly expressed objective and that facilitates its circumvention. On the contrary, the fundamental incompatibility between *Shamrock Oil*'s interpretation of the general removal statute and Congress' purpose in enacting CAFA—a purpose reflected in the text of the Act itself, *see* CAFA § 2(b)(2)—is powerful evidence that Congress did not intend CAFA to codify the holding of *Shamrock Oil*.

Third, the Court's decision in *Shamrock Oil* relied on the interpretive canon, derived from federalism concerns, that removal statutes should be strictly construed. 313 U.S. at 108-09. The Congress that enacted CAFA, in contrast, believed that federalism principles argue *in favor of*, not against, having large class actions in federal court. Indeed, one section of the Senate Report bears the title “National Class Actions Belong in Federal Court Under Traditional Notions of Federalism.” S. Rep. No. 109-14, at 24. As the Report explained, “a system that allows state court judges to dictate national policy on * * * issues from the local courthouse steps” is “contrary to the intent of the Framers when they crafted our system of federalism.” *Id.*; *see also id.* at 26, 61. Statements by sponsors of

CAFA are to the same effect. *See, e.g.*, 151 Cong. Rec. S1086-02, 1096 (daily ed. Feb. 8, 2005) (statement of Sen. Hatch); 151 Cong. Rec. S1225-02, 1226 (daily ed. Feb. 10, 2005) (statement of Sen. Vitter). And CAFA itself sets forth Congress' finding that "[a]buses in class actions" have enabled state courts to "mak[e] 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)(C). Federalism-based canons of strict construction, which favor the adjudication of disputes by state courts, therefore have no place in the interpretation of CAFA. If there is any federalism-based interpretive canon that applies to CAFA, it is that the Act should be broadly construed in favor of federal jurisdiction.

b. CAFA differs from the general removal statute at issue in *Shamrock Oil* in another critical respect. For purposes of removal, it makes sense for class-action counterclaims to be treated differently than individual counterclaims, because class-action counterclaims are asserted on behalf of individuals who were never sued by the plaintiff. Assuming that a party is deemed a counterclaim defendant as to the named class representative (who was sued), the party cannot be anything other than a defendant as to the unnamed members of the putative class (who were not sued). To prevent the party from removing the action would be to ignore the nature of the proceeding. It would also be inconsistent with the requirement that jurisdiction under CAFA be determined by the nature of the puta-

tive class as a whole. *See, e.g.*, 28 U.S.C. § 1332(d)(1)(D) (determination of jurisdictional prerequisites, such as amount in controversy and minimal diversity, is based upon “the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action”). That is a significant departure from prior practice, under which courts considered only named class representatives when making jurisdictional determinations. *See* 7A Charles A. Wright et al., *Federal Practice and Procedure* §§ 1755-56 (3d ed. 2005).

Even if the unnamed members of the putative class are not considered at this stage of the proceedings, they will eventually become parties if Shorts succeeds in having a class certified. Of course, we do not concede that a class can be certified. Our point is simply that remanding cases like this would lead to an absurd result if a class ultimately *were* certified. Because there is no longer a one-year limitation on removal, 28 U.S.C. § 1446(b), a case can be removed if it becomes removable after years of state-court litigation. That is precisely what would happen if a class were ever certified here.

Shorts may take the position that she is the “defendant” and that Palisades and ATTM are not, but if a class were certified, the other members of the putative class would become parties in their own right. *See Devlin v. Scardelletti*, 536 U.S. 1, 9-10 (2002). Those subscribers, who were never sued, cannot be considered anything other than plaintiffs. And as to them, ATTM and Palisades cannot be

considered anything other than defendants—“the part[ies] against whom relief or recovery is sought.” *Black’s Law Dictionary* 419 (6th ed. 1990).⁵ If a class is certified, therefore, this action will one day be removable even if counterclaim defendants may not remove.

It is nonsensical to allow a state court to preside over critical issues like dispositive motions and class certification only to have an action removed once a class is certified. Indeed, the very point of CAFA is that it should be federal courts, not state courts, that decide those issues. *See, e.g.*, S. Rep. No. 109-14, at 4, 14, 21. It is thus inconceivable that Congress could have intended that a class-action counterclaim must remain in state court—but only until a class is certified. Yet that is the inevitable consequence of the district court’s interpretation of the Act.

c. In deciding that a counterclaim defendant has no right to remove under CAFA, the district court relied, JA 65-70, on decisions of two other district courts: *CitiFinancial, Inc. v. Lightner*, No. 5:06CV145, 2007 WL 1655225 (N.D. W. Va. June 6, 2007), and *Ford Motor Credit Co. v. Jones*, No. 1:07 CV 728, 2007 WL

⁵ Shorts’ own consultant acknowledges as much:

With a counterclaim class action, * * * new parties are added to the case. These new parties—the class members—face no claims from the original plaintiff. They are only plaintiffs; with respect to their claims, the defendant is only a defendant.

Tidmarsh, *supra*, at 211.

2236618 (N.D. Ohio July 31, 2007). Although both of those decisions rejected the argument that CAFA authorizes a counterclaim defendant to remove a class action, they did so with little or no analysis. Neither decision addressed the text or purpose of CAFA, and neither considered whether the statutory text and purpose made it unlikely that Congress meant for the Act to incorporate the holding of *Shamrock Oil*. The decisions should therefore be accorded little weight.

Nor does the district court's interpretation of CAFA find support in this Court's intervening decision in *Strawn v. AT&T Mobility LLC*, 530 F.3d 293 (4th Cir. 2008). In holding there that a defendant that removes a class action under CAFA bears the burden of establishing federal jurisdiction, *id.* at 296-98, the Court reasoned that there was no indication in CAFA that Congress intended to "reverse" the "long-settled principle" that the burden of proof is on the removing party, *id.* at 297. Here, in contrast, there *are* indications that Congress did not intend CAFA to incorporate the holding of *Shamrock Oil*. The most powerful such indication is that a prohibition on removal of class-action counterclaims would be manifestly inconsistent with the Act's core purpose of ensuring that large class actions are litigated in federal court and would provide class-action lawyers with a ready method of circumventing that purpose. *Strawn's* holding that the removing party bears the burden of establishing federal jurisdiction, in contrast, will not have the effect of leaving a large category of class actions in state court. Indeed, in apply-

ing that holding in *Strawn* itself, this Court concluded that the defendant had met its burden and reversed the district court’s order remanding the case to state court. *Id.* at 298-99. In this connection, it bears mention that, in the same case in which—consistent with *Strawn*—it placed the burden of proof on the removing party, the Eleventh Circuit adopted a broad interpretation of a different aspect of CAFA’s removal provisions based on the statutory purpose. *Compare Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1196-98 (11th Cir. 2007), *with id.* at 1207-08.⁶

B. An “Additional” Counterclaim Defendant May Remove Any Action

Even if Congress did mean to codify the holding of *Shamrock Oil* in CAFA, that would not prevent ATTM from removing this case to federal court, because *Shamrock Oil*’s holding does not apply to an “additional” counterclaim defen-

⁶ Only one other court of appeals has addressed the question whether a counterclaim defendant may remove a class action under CAFA. In *Progressive W. Insurance Co. v. Preciado*, 479 F.3d 1014 (9th Cir. 2007), the Ninth Circuit concluded that “CAFA does not alter the longstanding rule announced in *Shamrock* that precludes plaintiff/[counterclaim]-defendants from removing class actions to federal court.” *Id.* at 1018. That conclusion is arguably dictum, because the court found that the action had been commenced before CAFA’s effective date and that CAFA therefore did not apply. *Id.* at 1015-17. There was thus no need for the court to opine on whether the Act afforded a right of removal. Whether dictum or not, however, the Ninth Circuit’s conclusion is erroneous, for the reasons stated in the text above. In any event, because the counterclaim defendant in that case was the plaintiff, the Ninth Circuit’s decision is inapplicable to a case, like this one, in which the removing party is an “additional” counterclaim defendant. *See infra*, Point I.B.

dant—one that, like ATTM, is not a plaintiff and has not chosen to litigate in state court. The district court believed that, “if *Shamrock Oil* * * * appl[ies] when a plaintiff/counterclaim defendant seeks removal under CAFA, reason compels that such precedent should apply when an additional counterclaim defendant seeks removal.” JA 67-68. In fact, reason compels the opposite conclusion.

The Supreme Court’s decision in *Shamrock Oil* depended on the fact that the counterclaim defendant in that case was the plaintiff. The Court framed the “question for decision” as “whether the suit in which the counterclaim is filed, is one removable *by the plaintiff* to the federal district court.” *Shamrock Oil*, 313 U.S. at 103 (emphasis added). The justification for the Court’s holding that the suit was not removable was that “the plaintiff, having submitted himself to the jurisdiction of the state court, was not entitled to avail himself of a right of removal.” *Id.* at 106.

Quoting the legislative history, the Court’s decision in *Shamrock Oil* emphasized that the reason the statute restricted the right to remove to a “defendant” was that Congress believed it to be “just and proper to require the plaintiff to abide his selection of a forum” and that, if the plaintiff “elects to sue in a State court when he might have brought his suit in a Federal court,” there was “no good reason to allow him to remove the cause.” 313 U.S. at 106 n.2 (quoting H.R. Rep. No. 49-1078, at 1 (1st Sess. 1887)). The Court also relied, *id.* at 105-06, 108, on its prior

decision in *West v. Aurora City*, 73 U.S. 139 (1868), which held that “[t]he right of removal is given only to a defendant who has not submitted himself to [the State court’s] jurisdiction; not to an original plaintiff in a State court who, by resorting to that jurisdiction, has become liable under the State laws to a cross-action.” *Id.* at 141. Finally, in rejecting the argument that a limited category of plaintiffs had the right to remove counterclaims, the Court explained that Congress did not “intend[] to save a right of removal to some plaintiffs and not to others.” *Shamrock Oil*, 313 U.S. at 108.

Shamrock Oil thus makes clear that the statute at issue limited the right of removal because it would have been unfair to allow a party to invoke the jurisdiction of a state court and then remove the case to federal court. The Court should therefore be understood to have interpreted “defendant” in the statute to mean a party that is not a plaintiff. For that reason, even if “defendant” in CAFA has the same meaning as “defendant” in the statute at issue in *Shamrock Oil*, an “additional” counterclaim defendant like ATTM—which was never a plaintiff and did not invoke the jurisdiction of the state court—is a “defendant” with the right to remove. In the language of the Court, an “additional” counterclaim defendant has the right to remove because it is not “an original plaintiff in a State court who[] [has] resort[ed] to that jurisdiction,” but rather “a defendant who has not submitted himself to that jurisdiction.” *West*, 73 U.S. at 141. In short, when, as here, “the

[counterclaim] defendant[] that filed for removal * * * [is] not [a] plaintiff[] [in] the original action, *Shamrock [Oil]* does not control.” *H & R Block, Ltd. v. Housden*, 24 F. Supp. 2d 703, 706 (E.D. Tex. 1998).⁷

In deciding that the holding of *Shamrock Oil* does extend to “additional” counterclaim defendants, the district court relied, JA 53-56, on decisions of three other district courts: *Dartmouth Plan, Inc. v. Delgado*, 736 F. Supp. 1489 (N.D. Ill. 1990); *OPNAD Fund, Inc. v. Watson*, 863 F. Supp. 328 (S.D. Miss. 1994); and *CapitalSource Finance, LLC v. THI of Columbus, Inc.*, 411 F. Supp. 2d 897 (S.D. Ohio 2005). Each of those decisions recognized that an “additional” counterclaim defendant differs from a counterclaim defendant that is a plaintiff, in that the latter but not the former has voluntarily chosen the state-court forum, *Dartmouth Plan*, 736 F. Supp. at 1492; *OPNAD Fund*, 863 F. Supp. at 332; *CapitalSource Fin.*, 411 F. Supp. 2d at 900, but the decisions all *failed* to recognize that the *Shamrock Oil*

⁷ A commentator makes the point this way:

The effect of the *Shamrock Oil* Court’s “narrow” reading of the removal statute was to deny the original plaintiff the benefit of the removal statute, regardless of the circumstance in which that plaintiff faces a counterclaim. It is a far stretch to move from that holding to the contention that *Shamrock Oil* stands for the proposition that only the original defendant is eligible to invoke the rule. The essence of this criticism is that “not the original plaintiff” is not the same rule as “only the original defendant.”

Michael C. Massengal, Note, *Riotous Uncertainty: A Quarrel with the “Commentators’ Rule” Against Section 1441(c) Removal for Counterclaim, Cross-Claim, and Third-Party Defendants*, 75 Tex. L. Rev. 659, 676 (1997) (citation omitted).

decision *depended* on the fact that the counterclaim defendant there was the plaintiff. That failure severely undermines whatever persuasive force they might otherwise have.

II. ATTM SHOULD NOT BE TREATED AS AN “ADDITIONAL COUNTERCLAIM DEFENDANT”

Even if the district court was correct in holding that an “additional counterclaim defendant” has no authority to remove a putative class action, it erred in holding that ATTM should be treated as such a party. If an “additional counterclaim defendant” may not remove, the parties should be realigned so that ATTM is deemed a “defendant” with the right of removal.

A. The district court correctly recognized that “federal courts may review the alignment of the parties and reconsider their proper status for the purpose of allowing removal.” JA 56. As the court explained, “[f]ederal law determines who is a plaintiff and who is a defendant for purposes of applying the removal statute,” and “the federal court may realign the parties according to their real interests * * * before deciding whether a true ‘defendant’ is seeking removal to federal court.” *Id.* (quoting 14C Charles A. Wright et al., *Federal Practice and Procedure* § 3731, at 255 (3d ed. 1998)). Other recent decisions have recognized this principle as well. *See, e.g., In re Gardner*, No. 06-9154, 2007 WL 625825, at *2 (E.D. La. Feb. 26, 2007); *Hillman Lumber Prods., Inc. v. Webster Mfg., Inc.*, No. 06-1246 2006 WL 2644968, at *2 (W.D. La. Sept. 14, 2006).

The district court also correctly recognized that there is a “functional test” for determining “which party is the defendant for purposes of removal.” JA 56 (quoting *Estate of C.A. Spragins v. Citizens Nat’l Bank of Evansville*, 563 F. Supp. 424, 426 (N.D. Miss. 1983)). Under that test, the plaintiff is the party “whose intent to achieve a particular result, such as the recovery of property or money, is the mainspring of the proceedings” and “who is responsible for the continued existence of the action.” JA 57 (quoting *Estate of C.A. Spragins*, 563 F. Supp. at 426). Conversely, the party “opposing or resisting the plaintiff’s claim,” under that test, is “the defendant, who may remove.” *Estate of C.A. Spragins*, 563 F. Supp. at 426. The term “mainspring of the proceedings” was first used in a century-old Supreme Court decision by Justice Holmes. *Mason City & Fort Dodge R.R. Co. v. Boynton*, 204 U.S. 570, 580 (1907). The Court has also articulated other formulations, similar in substance, for determining whether realignment is warranted, such as “principal purpose of the suit” and “primary and controlling matter in dispute.” *City of Indianapolis v. Chase Nat’l Bank of City of N.Y.*, 314 U.S. 63, 69 (1941).

Courts have employed this “functional test” to realign parties in some circumstances so that a counterclaim defendant is treated as the “true defendant” with the authority to remove. *See, e.g., Gardner*, 2007 WL 625825, at *2-*3; *Allstate Ins. Co. v. Blankenship*, No. Civ. A. 7:05-194-DCR, 2005 WL 2095679, at *2-*4 (E.D. Ky. Aug. 30, 2005); *Sadeghian v. City of Aubrey, Tex.*, No. Civ. A.

300CV2561-D, 2001 WL 215931, at *1 (N.D. Tex. Mar. 1, 2001); *Gen. Motors Corp. v. Gunn*, 752 F. Supp. 729, 730-732 (N.D. Miss. 1990). Those courts found that the counterclaim in the case was the “mainspring” of the proceedings.

Although the district court here correctly recognized that realignment of parties may be appropriate in certain cases and that the decision whether to realign is governed by the “mainspring” test, it erred in concluding that the “mainspring of the proceedings” in this case is “Palisades’ attempt to seek payment of a debt from Shorts” and that realignment is therefore inappropriate. JA 61. Contrary to that conclusion, the “mainspring” of the proceedings—their “chief or most powerful motive, agent, or cause,” *Webster’s Third New International Dictionary* 1362 (1986)—is manifestly the putative class action commenced by Shorts.

Palisades’ attempts to collect Shorts’ \$794.87 debt cannot plausibly be thought to be the “principal purpose” of the litigation or the “primary and controlling matter in dispute.” *City of Indianapolis*, 314 U.S. at 69. Nor is it responsible for the “continued existence” of the action. JA 57. Had it not been for class-action counsel’s decision to use this case as a vehicle for asserting claims they believed would be impervious to removal, the case would no doubt have settled or otherwise been resolved by now. The only reason it is still on any court’s docket is the injection into it of class-action allegations, which seek tens of millions of dollars in recovery on behalf of tens of thousands of putative class members. It is those

allegations, not Palisades' attempt to collect less than \$800 from Shorts, that overwhelmingly dominate the litigation and are responsible for its continuation. In short, realignment is warranted because a very small collection-action "tail" should not be permitted to wag a very large class-action "dog."⁸

In declining to realign the parties, the district court relied, JA 59-60, on decisions of three other district courts: *OPNAD Fund, Inc. v. Watson*, 863 F. Supp. 328 (S.D. Miss. 1994); *Green Tree Fin. Corp. Inc. v. Arndt*, 72 F. Supp. 2d 1278 (D. Kan. 1999); and *Rodriguez v. Federal Nat'l Mortgage Ass'n*, 268 F. Supp. 2d 87 (D. Mass. 2003). In each of those cases, the court did rule that a counterclaim defendant could not remove. But the counterclaims asserted in *OPNAD Fund* and *Green Tree Financial* were not class actions; and the court in *Rodriguez* did not consider realignment. Accordingly, none of the cases addressed the question here, which is whether realignment is appropriate when the defendant in a state-court collection action involving a few hundred dollars files a counterclaim class action seeking to recover tens of millions of dollars on behalf of tens of thousands of class

⁸ Even Shorts' consultant acknowledges the effect of pleading a class action as a counterclaim to a state-court collection action:

If consumers can successfully avoid federal court with this tactic, and assuming that state law permits certification of the counterclaim as a class action, the state case suddenly transforms from an individual action with \$75,000 or less at stake into a class suit with more than \$5,000,000 at stake. The entire litigation dynamic and its center of gravity switches in an instant.

Tidmarsh, *supra*, at 199.

members. For the reasons stated above, the answer to that question is yes (assuming, of course, that the district court did not err in holding that an “additional counterclaim defendant” otherwise lacks the authority to remove a class action).

B. Realigning the parties, so that ATTM is a “defendant,” is particularly warranted because there is only the most tenuous basis, if there is any basis at all, for finding that ATTM was properly joined as a “counterclaim defendant” in the first place. *See* JA 51-53.

“For the purpose of removal, the federal law determines who is plaintiff and who is defendant.” *Chi., R.I. & P. R.R. Co. v. Stude*, 346 U.S. 574, 580 (1954). The applicable federal law here is Rule 13(h) of the Federal Rules of Civil Procedure, which authorizes “the addition of a person as a party to a counterclaim” in accordance with the rules governing joinder. The critical phrase in Rule 13(h) is “to a counterclaim”; the rule allows parties to be joined to a counterclaim, not to the action generally. “This means that a counterclaim * * * may not be directed solely against persons who are not already parties to the original action, but must involve at least one existing party.” *FDIC v. Bathgate*, 27 F.3d 850, 873 n.13 (3d Cir. 1994) (quoting 6 Charles A. Wright et al., *Federal Practice and Procedure* § 1435, at 271 (2d ed. 1990)); *accord, e.g., Hawkins v. Berkeley Unified Sch. Dist.*, ___ F.R.D. ___, No. C-07-4206 EMC, 2008 WL 681880, at *3 (N.D. Cal. Mar. 11, 2008); *Microsoft Corp. v. Ion Tech. Corp.*, 484 F. Supp. 2d 955, 965 (D. Minn.

2007). As a purely formal matter, it may be that Shorts' class-action allegations are directed against Palisades (the existing party) as well as ATTM (the new party). In substance as opposed to mere form, however, the allegations are directed solely against ATTM.

Perhaps the best evidence of that fact is Shorts' proposed class definition, which does not even mention Palisades. According to her allegations, Shorts seeks to represent "[a]ll persons who agreed to a term contract for cell phone service with Cingular or AT&T between June 30, 2002 and the present, and who, at any time during the term of the contract, had a billing address in West Virginia." JA 28. Other portions of the class-action allegations confirm that the claims are really directed against ATTM. *See, e.g., id.* ("Shorts' claims and the claims of all class members arise from and were caused by the same wrongful course of conduct *by Cingular/AT&T*") (emphasis added); JA 29 ("A class action is appropriate * * * because it would avoid inconsistent verdicts and varying adjudications which would establish incompatible standards of conduct *for Cingular/AT&T* with respect to members of the class.") (emphasis added). The violations of West Virginia law alleged in the counterclaim, JA 29-31, moreover, concern the sale of wireless telephone service and the imposition of ETFs, activities in which Palisades does not engage. *See* W.V. Code § 46A-2-115 ("the agreement with respect to a consumer credit sale * * * may not provide for charges as a result of default by the

consumer other than those authorized by this chapter”); *id.* § 46A-2-121(1)(a) (a court may refuse to enforce an “agreement or transaction” if the court finds that it was “unconscionable at the time it was made).

There is another reason to conclude that Shorts’ class action is in practical effect directed solely against ATTM: the putative class includes tens of thousands of ATTM customers who have no relationship with Palisades. Shorts asserts claims on behalf of all persons who have entered into contracts with ATTM or its predecessors since June 2002. JA 28. Palisades purchased certain unpaid AT&T Wireless account debts both before and after its merger with Cingular Wireless (now known as ATTM) in October 2004, but it never purchased any unpaid Cingular Wireless account debts. JA 43. Accordingly, there are several categories of putative class members that have no relationship with Palisades: (a) customers who contracted directly with Cingular Wireless; (b) customers who contracted with AT&T Wireless but did not incur ETFs; (c) customers who contracted with AT&T Wireless and incurred ETFs but paid them; and (d) customers who contracted with AT&T Wireless, incurred ETFs, and did not pay them but did not have their accounts sold to Palisades. *Id.* The number of putative class members in category (a) alone exceeds 160,000. JA 42-43.

Because, as a matter of federal law, a party cannot be joined to a counterclaim that is not directed against an existing party, and because there is only the

slightest connection, if any, between Shorts' class-action allegations and Palisades, there is only the barest justification, if any, for joining ATTM to the action as a counterclaim defendant. If ATTM had not been joined as a counterclaim defendant, Shorts' only option would have been to file an independent class action, in which event ATTM would have been simply a "defendant," with the indisputable authority to remove. That is an additional reason to realign the parties for purposes of removal and treat ATTM as the true defendant.

STATEMENT CONCERNING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a) and this Court's Rule 34(a), ATTM requests oral argument. This appeal raises important and recurring issues of federal law that this Court has not previously addressed. Oral argument will enable the parties to address those issues adequately and respond to the Court's questions and concerns. We note that, in its order directing the filing of briefs on the merits, the Court tentatively calendared the case for argument at the October 28-31, 2008 argument session. 7/8/08 Ord. 1-2.

CONCLUSION

For the foregoing reasons, the order of the district court remanding the case to the Circuit Court of Brooke County, West Virginia, should be reversed.

Respectfully submitted,

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ADDENDUM A: CAFA § 2

CLASS ACTION FAIRNESS ACT OF 2005, Pub. L. No. 109-2, 119 Stat. 4 SEC. 2. FINDINGS AND PURPOSES

(a) **FINDINGS.**—Congress finds the following:

(1) Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.

(2) Over the past decade, there have been abuses of the class action device that have—

(A) harmed class members with legitimate claims and defendants that have acted responsibly;

(B) adversely affected interstate commerce; and

(C) undermined public respect for our judicial system.

(3) Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where—

(A) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value;

(B) unjustified awards are made to certain plaintiffs at the expense of other class members; and

(C) confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights.

(4) Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, 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.

(b) PURPOSES.—The purposes of this Act are to—

(1) assure fair and prompt recoveries for class members with legitimate claims;

(2) 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; and

(3) benefit society by encouraging and lowering consumer prices.

ADDENDUM B: 28 U.S.C. § 1332

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE CHAPTER 85—DISTRICT COURTS; JURISDICTION

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

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between—

- (1) citizens of different States;
- (2) citizens of a State and citizens or subjects of a foreign state;
- (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
- (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States. For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of \$75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

- (1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d)(1) In this subsection—

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

(B) the term “class action” means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

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

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

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

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

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

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

and the primary defendants are citizens of the State in which the action was originally filed based on consideration of—

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

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

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

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

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

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

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

(A)(i) over a class action in which—

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

(II) at least 1 defendant is a defendant—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) As used in subparagraph (A), the term “mass action” shall not include any civil action in which—

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

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

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

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

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

(ii) This subparagraph will not apply—

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

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

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

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

ADDENDUM C: 28 U.S.C. § 1441

**TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
CHAPTER 89—DISTRICT COURTS; REMOVAL OF CASES FROM
STATE COURTS**

§ 1441. Actions removable generally

(a) 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. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e)(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if—

(A) the action could have been brought in a United States district court under section 1369 of this title; or

(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

ADDENDUM D: 28 U.S.C. § 1446

**TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
CHAPTER 89—DISTRICT COURTS; REMOVAL OF CASES FROM
STATE COURTS**

§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, 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, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

(c)(1) A notice of removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the defendant or defendants leave to file the notice at a later time.

(2) A notice of removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the notice shall constitute a waiver of such grounds, and a second notice may be filed only on grounds not existing at the time of the original notice. For

good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a notice of removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the prosecution is first remanded.

(4) The United States district court in which such notice is filed shall examine the notice promptly. If it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand.

(5) If the United States district court does not order the summary remand of such prosecution, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the prosecution as justice shall require. If the United States district court determines that removal shall be permitted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(e) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.

(f) With respect to any counterclaim removed to a district court pursuant to section 337(c) of the Tariff Act of 1930, the district court shall resolve such counterclaim in the same manner as an original complaint under the Federal Rules of Civil Procedure, except that the payment of a filing fee shall not be required in such cases and the counterclaim shall relate back to the date of the original complaint in the proceeding before the International Trade Commission under section 337 of that Act.

ADDENDUM E: 28 U.S.C. § 1453

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE CHAPTER 89—DISTRICT COURTS; REMOVAL OF CASES FROM STATE COURTS

§ 1453. Removal of class actions

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

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

(c) **Review of remand orders.**—

(1) **In general.**—Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order.

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

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

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

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

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

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

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

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

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

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 08-113

Caption: AT&T Mobility v. Shorts

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Attorney for AT&T Mobility

Dated: August 5, 2008

CERTIFICATE OF SERVICE

I hereby certify that, on the 5th day of August, 2008, a true and accurate copy of the foregoing Brief of Petitioners on the Merits was filed with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users, and was served by Federal Express delivery and, with counsel's prior written consent, by electronic mail:

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