No. __________

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PALISADES COLLECTIONS LLC,

Plaintiff and Counterclaim Defendant,

v.

CHARLENE SHORTS,

Respondent-Defendant and Counterclaim Plaintiff,

v.

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

Petitioners-Counterclaim Defendants.

PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1453(c)

From the January 16, 2007 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. _____ Caption: Palisades Collections LLC 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:

______________________ January 28, 2008
(signature) (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 owned by New AB Cellular, Inc. and BellSouth Mobile Data, Inc. New AB Cellular, Inc. is owned by BellSouth Mobile Data, Inc. New Bellsouth Cingular Holdings, Inc. and New AB Cellular, Inc. are Delaware corporations with their principal places of business in Atlanta, Georgia.

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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Pursuant to 28 U.S.C. 1453(c), AT&T Mobility LLC and AT&T Mobility Corporation (together, "ATTM") respectfully petition for permission to appeal the district court's remand order in this putative class action.

INTRODUCTION

Charlene Shorts, a former customer, owed ATTM a little less than $800. ATTM sold the debt to a debt collector, which sued Shorts in West Virginia state court. After Shorts filed a counterclaim against the debt collector, the state court allowed her to join ATTM as an "additional counterclaim defendant" and to assert class-action claims against it. Pursuant to the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4, which authorizes removal of certain class actions filed in state court, ATTM removed the action to federal court. The district court remanded the action to state court, holding that an "additional counterclaim defendant" cannot remove a class action under CAFA. This Court should grant review of the district court's remand order to consider this important legal issue of first impression.

Congress enacted CAFA because it believed that there had been "[a]buses in class actions" filed in "State and local courts," CAFA § 2(a)(4), and that class actions of "national importance" should therefore be litigated in federal courts, *id.* § 2(a)(4)(A), (b)(2). Shorts's putative class action, which seeks tens of millions of dollars from an out-of-state defendant on behalf of tens of thousands of class

members, is precisely the sort of suit that Congress had in mind when it enacted CAFA. Indeed, the district court itself acknowledged that ATTM would have had the right to remove the case to federal court if the class action had been filed as a freestanding suit in state court. The question presented in this petition is whether class-action lawyers can circumvent that right of removal, and thereby frustrate CAFA's purpose, by joining companies as "additional counterclaim defendants" in debt-collection actions in state court and then asserting class-action claims against them. The answer to that question cannot possibly be yes.

The issue in this case not only was decided wrongly by the district court, but also is critically important and certain to recur. It is thus precisely the type of issue that Congress "encourage[d] appellate courts to review" under CAFA's appellate-review provision. S. Rep. 109-14, at 49 (1st Sess. 2005). Accordingly, this Court should grant ATTM's petition for permission to appeal and reverse the decision of the district court.

FACTS NECESSARY TO UNDERSTAND THE QUESTION PRESENTED

Shorts contracted to receive wireless telephone service on two separate occasions from two of ATTM's predecessors in interest, entering into a contract with AT&T Wireless in February 2003 and one with Cingular Wireless in May 2005. Under both agreements, Shorts was permitted to terminate her service at any time and for any reason, provided that she pay an early termination fee ("ETF") if she

had not yet fulfilled the time commitment contained in her contract. When Shorts failed to make timely payments on those accounts, they were terminated and she was charged ETFs in accordance with her contracts.

ATTM eventually wrote off Shorts's AT&T Wireless account and sold the debt associated with it—$794.87—to Palisades Collections LLC ("Palisades"), which attempted to collect the debt on its own behalf.[1] When Shorts failed to pay, Palisades commenced this collection action against her by filing a complaint in the Magistrate Court of Brooke County, West Virginia. Exh. 1. The complaint did not name ATTM as a plaintiff. Shorts then filed an answer and counterclaim. Exh. 2. The counterclaim did not name ATTM as a counterclaim defendant. On August 2, 2006, Palisades removed the action from the Magistrate Court to the Circuit Court of Brooke County. See Exh. 4.

The action lay dormant for nearly ten months, until it was seized upon as a vehicle for expanding a CAFA ruling issued in another West Virginia action, *CitiFinancial, Inc. v. Lightner*, No. 06-0145, 2007 WL 1655225 (N.D. W.Va. June 6, 2007).[2] In *CitiFinancial*, the plaintiff removed a collection action it had originally filed in West Virginia state court after the defendant served it with a putative class-

[1] The debt associated with Shorts's Cingular Wireless account has not been sold to Palisades or any other third party.

[2] A petition for permission to appeal is also currently pending in that case. *See CitiFinancial, Inc. v. Lightner*, No. 07-0200 (4th Cir.). A review of the docket indicates that this Court has yet to act on CitiFinancial's petition.

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 a right of removal. *See id.* at *3 ("once a plaintiff, always a plaintiff").

Just a few weeks after the court announced that ruling, putative class counsel in *CitiFinancial* entered an appearance on behalf of Shorts and sought leave to file an amended counterclaim that asserted class-action claims and joined ATTM as a purported "additional counterclaim defendant." *See* Exhs. 5-8. On June 26, 2007, the circuit court granted the motion for leave to file an amended counterclaim. Exh. 10. The putative class-action counterclaim had nothing to do with Palisades; the proposed class definition made no mention of that party, and the rest of the pleading confirmed that the claim was directed solely at ATTM.[3]

On August 2, 2007, ATTM timely removed the action under CAFA. Exh. 13. On August 6, 2007, Shorts filed a motion to remand, citing *CitiFinancial* and arguing that ATTM had no right to remove the action. In response, ATTM argued

[3] *See* Exh. 11 ¶ 11 (defining class as "[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"); *id.* ¶ 14 ("Shorts's claims and the claims of all class members arise from and were caused by the same wrongful course of conduct by Cingular/ATT."); *id.* ¶ 17 ("A class action is appropriate because there is a near total absence of individual issues, and 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.").

that *CitiFinancial* should not be applied in a case, like this, in which a putative class action is removed by an "additional counterclaim defendant" (*i.e.*, a counterclaim defendant that is not a plaintiff and has not chosen to litigate any aspect of the case in state court). ATTM also argued that it was not an "additional counterclaim defendant" in any event, because the original counterclaim against Palisades and the new class-action claim against ATTM were fundamentally different. Finally, ATTM argued that, if it *had* been properly joined as an "additional counterclaim defendant," and if an "additional counterclaim defendant" has no removal rights, the parties should be realigned according to their true interests, such that removal would undeniably be allowed.

On January 16, 2008, the district court granted the motion to remand. Exh. 15. It "agree[d] that this putative class action meets the jurisdictional requirements of CAFA, and thus [that] federal subject matter jurisdiction exists." *Id.* at 5; *see id.* at 17 (jurisdictional requirements of CAFA are that "(1) there are 100 or more class members, (2) the aggregate amount in controversy exceeds $5,000,000, and (3) minimal diversity exists") (citing 28 U.S.C. § 1332(d)). The district court nevertheless concluded that ATTM was an "additional counterclaim defendant," refused to realign the parties, and held that, as a counterclaim defendant, ATTM had no right to remove this putative class action.

QUESTION PRESENTED

Did the district court err in holding that ATTM, which was joined as a purported "additional counterclaim defendant" on putative class-action claims asserted on behalf of tens of thousands of consumers who had never been sued by anyone, has no right to remove the action under CAFA?

RELIEF SOUGHT

ATTM requests that this Court grant its petition for permission to appeal, reverse the order below, and remand with instructions that the district court retain its CAFA jurisdiction over this putative interstate class action.

STATUTORY AUTHORIZATION FOR THE APPEAL

Under CAFA, "a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not [more] than 7 days after entry of the order." 28 U.S.C. § 1453(c)(1).[4] This petition has been timely filed on the seventh day, excluding intervening weekends and legal holidays, following the entry of the district court's order.[5]

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[4] Courts have uniformly held that the "not less than 7 days" language in 1453(c)(1) is a scrivener's error that should be read as "not more than 7 days." *See Morgan v. Gay*, 466 F.3d 276, 278-79 (3d Cir. 2006); *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1326 (11th 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).

[5] Courts have uniformly held that, pursuant to Federal Rule of Appellate Proce-

REASONS WHY THE APPEAL SHOULD BE ALLOWED

Congress enacted CAFA's appellate-review provision, 28 U.S.C. 1453(c), because it wanted appellate courts "to create a * * * body of clear and consistent guidance for district courts." S. Rep. 109-14, at 49. Appellate courts were "particularly encourage[d] * * * to review cases that raise jurisdictional issues likely to arise in future cases." *Id.* This case raises just such a jurisdictional issue: whether an "additional" (*i.e.*, non-plaintiff) counterclaim defendant may remove to federal court a putative class action filed in state court.

That issue is likely to arise in future cases because the district court's decision provides a roadmap that other class-action lawyers are sure to follow. The roadmap shows how to circumvent the right of removal afforded by CAFA, a critical mechanism for carrying out Congress's intent that significant class actions be litigated in federal court.

The appeal should be allowed not only because the issue presented is an important and recurring one, and not only because it is precisely the type of issue that Congress wished to have reviewed, but also because the district court resolved the issue incorrectly. As explained below, an "additional counterclaim defendant"

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dure 26(a), intervening weekends and legal holidays must be excluded from this computation of time. *See Smith v. Nationwide Property*, 505 F.3d 401, 404 (6th Cir. 2007); *Morgan*, 466 F.3d at 277 n.1; *Miedema*, 450 F.3d at 1326; *Patterson v. Dean Morris, L.L.P.*, 444 F.3d 365, 368 n.1 (5th Cir. 2006); *Amalgamated Transit Union*, 435 F.3d at 1146.

may remove a class action; ATTM in any event is not an "additional counterclaim defendant"; and even if an "additional counterclaim defendant" may *not* remove a class action and ATTM *is* one, the parties should be realigned.

I. AN "ADDITIONAL COUNTERCLAIM DEFENDANT" MAY REMOVE A CLASS ACTION.

The district court's conclusion that "additional counterclaim defendants" cannot remove a class action covered by CAFA is erroneous in two independent respects. First, because Congress intended that CAFA be read broadly, a class action may be removed by counterclaim defendants—"additional" or otherwise. Second, because "additional" counterclaim defendants did not select the state-court forum, they have the right to remove *any* action—class action or otherwise.

A. Any counterclaim defendant may remove a class action.

1. In holding that a counterclaim defendant has no right of removal under CAFA, the district court relied on *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), in which the Supreme Court concluded that a counterclaim defendant had no right of removal under the general removal statute. Exh. 15, at 20-25. The decision in *Shamrock Oil*, however, was informed, at least in part, by the traditionally strict construction of removal statutes. *See* 313 U.S. at 108-09. CAFA is a fundamentally different kind of statute. It reflects Congress's intent that federal jurisdiction over class actions be construed *broadly*, with doubts resolved in favor of removal, not remand.

As the Eleventh Circuit recently observed, "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." *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1197 (11th Cir. 2007) (quoting CAFA § 2). CAFA's legislative history is replete with statements making clear Congress's intent that class actions covered by the statute be litigated in federal court.[6] Indeed, the statute itself includes a finding that class action "cases of national importance" should be in "Federal court," and it states that one of CAFA's purposes is to "restore the intent of the Framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." CAFA § 2(a)(4)(A), (b)(2). That purpose obviously "encourage[s] a reading that makes more inclusive the scope of [CAFA's] removal

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[6] *See, e.g.,* S. Rep. 109-14, at 5 (interstate class actions "properly belong in federal court"); *id.* ("federal courts" are "the proper forum" for covered class actions); *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"); *see also id.* at 43 ("Overall, new section 1332(d) is intended to expand substantially federal court jurisdiction over class actions. Its provisions should be read broadly, with a strong preference that interstate class actions should be heard in federal court if properly removed by any defendant."); 151 Cong. Rec. H723-01, 727 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner) (same).

provision[]." *Lowery*, 483 F.3d at 1197.

The text of CAFA's removal provision also suggests a broad construction. Although the general removal statute permits removal of actions by "the defendant or defendants," 28 U.S.C. §§ 1441(a), 1446(a), CAFA provides that covered class actions "may be removed by *any* defendant," *id.* § 1453(b) (emphasis added). As the Supreme Court reiterated just last week, the word "any" has a "broad" and "expansive" meaning. *Ali v. Fed. Bureau of Prisons*, No. 06-9130, 2008 WL 169359, at *3 (U.S. Jan. 22, 2008) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)). Particularly in light of CAFA's overriding purpose—ensuring that covered class actions are litigated in federal court—"any defendant" should be interpreted to include a counterclaim defendant. *Cf. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 86 (2006) (relying on "concerns" and "purpose" of statute in holding that Securities Litigation Uniform Standards Act of 1998 pre-empts certain state-law class-action claims).

Finally, it bears mention that, in enacting CAFA, Congress determined that certain class actions should remain in state court and included a number of carefully crafted exceptions to the general rule of federal jurisdiction. *See* 28 U.S.C. § 1332(d). Congress could easily have added counterclaim class actions to that detailed list if had intended that they remain in state court.

2. 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 thousands of people who were never sued by the plaintiff. So, assuming for the sake of argument that a party is deemed to be a counterclaim defendant as to the named class representative (who was sued), that party cannot be anything other than a defendant as to the unnamed members of the putative class (who were not sued). To prevent that party from removing the action would be to ignore the very nature of the proceeding. It would also be inconsistent with the requirement that CAFA jurisdiction be determined by the nature of the putative class as a whole. *See, e.g.*, 28 U.S.C. § 1332(d)(1)(D) (basing jurisdictional determinations such as amount in controversy and minimal diversity on "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, which considered only named class representatives when making jurisdictional determinations. *See Snyder v. Harris*, 394 U.S. 332 (1969).

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. We simply note that remanding cases such as this one would lead to an absurd result if a class *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 believe that she is the "defendant" and that Palisades and ATTM are not, but if a class were certified, the members of the putative class would formally become parties in their own right. Those subscribers, who were never sued by Palisades,[7] can only be considered plaintiffs. And, as to them, ATTM and Palisades can only be considered defendants. So, if a class is certified, this action will one day be removable. It makes no sense to allow a state court to preside over critical issues such as dispositive motions and class certification only to have an action removed once a class is certified. Indeed, the very point of CAFA was that it should be federal courts, not state courts, that rule on such motions. *See, e.g.*, S. Rep. No. 109-14, at 4, 14, 21.

3. The district court's interpretation of CAFA has other consequences that Congress could not have intended.

The district court acknowledged that this class action "meets the requirements for federal jurisdiction under CAFA." Exh. 15, at 17. Accordingly, had Shorts filed her class action against ATTM as a freestanding suit in state court, it would have been removable under CAFA. It was held not to be removable only because

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[7] ATTM presented undisputed evidence to that effect. In support of its removal, ATTM provided a declaration from Eric Glymph, director of business operations for its West Virginia market, who explained that the putative class consisted of at least 160,000 people whose accounts had not and never would have been sold to Palisades. *See* Exh. 14 ¶¶ 6, 12.

the district court concluded that "an additional counter-claim defendant is not a defendant for purposes of removal" under CAFA. *Id.* at 25. The consequence of that holding is that a covered class action involving tens, or hundreds, or even thousands of millions of dollars is removable if it is filed as a freestanding case but not if it is filed as a "counterclaim" to a collection action originally filed in small-claims court that involves only a few hundred dollars. Such an "anomalous result" is, to put it mildly, "not easily attributable to congressional intent." *Cedar Rapids Community School Dist. v. Garret F.*, 526 U.S. 66, 78 n.10 (1999).

Similarly, if the district court's decision is correct, a plaintiff's lawyer can circumvent CAFA by the simple expedient of finding a single customer who has been sued for collection of a debt and then bringing a "counterclaim" class action that challenges some aspect of the charges imposed. Congress could not have intended to create such a gaping loophole. Indeed, the whole point of CAFA was to prevent lawyers from using jurisdictional loopholes to keep nationwide class actions in state court. *See, e.g.*, *Pritchett v. Office Depot, Inc.*, 404 F.3d 1232, 1238 (10th Cir. 2005) (CAFA "was designed, in the first place, to curtail jurisdictional gaming and forum-shopping"); *In re Lupron® Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 80 n.10 (D. Mass. 2005) ("Bringing an end to unseemly attempts to exact advantage over class action defendants * * * was a principal argument advanced by advocates of [CAFA]."); *see also* S. Rep. No. 109-14, at 4, 10.

Finally, if the district court's decision is allowed to stand, businesses may choose not to bring meritorious collection claims out of fear that they will invite "counterclaim" class actions that otherwise would not have been filed. Because Congress could not possibly have contemplated (or endorsed) that result, an interpretation of CAFA that would lead to it should be rejected.[8]

B. An "additional" counterclaim defendant may remove any action.

Even if Congress meant to incorporate the holding of *Shamrock Oil* when it enacted CAFA, that would not prevent ATTM from removing this putative class action to federal court, because the holding does not apply to an "additional" counterclaim defendant—*i.e.*, a counterclaim defendant that is not a plaintiff.

Shamrock Oil was not based on an analysis of the general removal statute's "defendant or defendants" language, which could just as easily have been read to allow removal by counterclaim defendants, third-party defendants, or any third party that is haled into court involuntarily. *See, e.g.*, *Mignogna v. Sair Aviation,*

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[8] To our knowledge, only one court of appeals has addressed the question whether a counterclaim defendant can remove a class action under CAFA. In *Progressive Western Insurance Co. v. Preciado*, 479 F.3d 1014 (9th Cir. 2007), the Ninth Circuit concluded that "CAFA does not create an exception to *Shamrock*'s longstanding rule that a plaintiff/[counterclaim]-defendant cannot remove an action to federal court." *Id.* at 1017. That conclusion appears to be 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. Because CAFA did not apply, there was no need for the court to opine on whether it afforded a right of removal. Whether dictum or not, however, the Ninth Circuit's conclusion is erroneous, for the reasons stated above.

Inc., 679 F. Supp. 184, 189 (N.D.N.Y. 1988); *Ford Motor Credit Co. v. Aaron-Lincoln Mercury, Inc.*, 563 F. Supp. 1108, 1113 (N.D. Ill. 1983). Instead, the Court discerned Congress's intent from the evolution of the removal statute, which at one time permitted removal by "either party" (*i.e.*, either the defendant or the plaintiff). The Court concluded that, by excising the "either party" language, Congress meant to "'require the plaintiff to abide his selection of a forum.'" *Shamrock Oil*, 313 U.S. at 107 n.2 (quoting H. Rep. No. 49-1078, at 1 (1st Sess. 1887)). The Court explained that the "right of removal [is] conferred only on a defendant who has not submitted himself to the jurisdiction [of the state court]," *id.* at 106 (citing *West v. Aurora City*, 73 U.S. 139 (1868)), and found "no basis for saying that Congress * * * intended to save a right of removal to some plaintiffs"—*i.e.*, those who are counterclaim defendants—"and not to others," *id.* at 108. In other words, the Court's view was that Congress did not mean to limit removal to "the defendant" so much as it meant to prohibit removal by the plaintiff.

Thus, even if *Shamrock Oil* is relevant in CAFA cases generally, it has little relevance to an action, like this one, that was removed by a purported "additional" counterclaim defendant that did not voluntarily submit to the state-court forum. *Shamrock Oil* "den[ied] the original plaintiff the benefit of the removal statute"; it did not hold that "only the original defendant is eligible to [remove]." Michael C.

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

II. ATTM IS NOT AN "ADDITIONAL COUNTERCLAIM DEFENDANT."

Even if an "additional counterclaim defendant" has no right to remove a class action, the district court erred in concluding that ATTM is in fact an "additional counterclaim defendant." As far as Shorts's class-action claims are concerned, ATTM is simply a defendant, and it therefore has a right of removal.

The district court found that ATTM was an "additional counterclaim defendant" under Rule 13(h) of the Federal Rules of Civil Procedure. Exh. 15, at 7-9. But Rule 13(h) is not a blank check to join anyone under the sun to an action. Unlike Rule 20(a), which permits joinder of parties to the "action" generally, Rule 13(h) permits joinder "to a counterclaim" specifically. The difference is critical; Rule 13(h) can be invoked only if the third party to be joined is jointly liable (typically as a co-conspirator, joint tortfeasor, or surety) on a claim against a party that is already before the court. *See* 3 James Wm. Moore *et al.*, *Moore's Federal Practice* § 13.112 (3d ed. 2005); 6 Charles Alan Wright & Arthur R. Miller, *Fed-*

eral Practice & Procedure §§ 1434, 1435 (2d ed. 1987); *see also FDIC v. Bathgate*, 27 F.3d 850, 873-874 (3d Cir. 1994); *Kirkcaldy v. Richmond County Bd. of Educ.*, 212 F.R.D. 289, 299 (M.D.N.C. 2002); *Sternaman v. Macloskie*, 37 F.R.D. 316, 317 (E.D.S.C. 1965). The district court focused on the factual similarities between Shorts's claims, but failed to examine the substance of the claims to determine whether any of them actually lay against both ATTM and Palisades. *See* Exh. 15, at 9 ("Because Shorts asserts that both Palisades and ATTM have violated West Virginia law, and are therefore liable to Shorts and the other putative class members, the Court finds that ATTM is properly characterized as a counterclaim defendant.").

That was error. A careful review of the operative pleading and the undisputed facts reveals that the original claim against Palisades and the new class-action claim against ATTM are separate and distinct.

Shorts's counterclaim against Palisades alleged that Palisades was not entitled to collect the $794.87 debt that it owned and she owed. ATTM did not, however, file suit to collect that debt. Nor could it have, as it no longer owned the debt when Palisades filed suit. Whether Shorts's $794.87 debt to Palisades should be reduced because she thinks her ETF was illegal is a dispute between Palisades, which owned the debt, and Shorts, who owed it. ATTM may have evidence bearing on that claim, and it certainly has an opinion as to the claim's merits, but its evidence

could easily be obtained by serving it with a subpoena, and its opinion of the merits is beside the point. There was simply no need or cause to join it as an additional defendant on that counterclaim. Indeed, ATTM was not joined as a defendant for nearly a year, and then only because counsel seized on this case as an opportunity to expand on the ruling they obtained in *CitiFinancial*.

Conversely, the new class-action claim that was asserted against ATTM has little if anything to do with Palisades. That new claim concerns, not the collection of debt, but the charging of ETFs and the ETF component of the contracts between ATTM and its subscribers. *See* W. Va. Code §§ 46A-2-115, 46A-2-121(1)(a). Palisades, of course, does not charge ETFs to anyone, as it has no subscribers. Only ATTM charges ETFs, and only it is a proper defendant under this new claim. Shorts's own pleading bears this out; her class definition makes no mention of Palisades, and the remainder of the pleading confirms that this claim was directed solely at ATTM. *See* Exh. 11 ¶¶ 11, 14, 17. The evidence offered by ATTM in support of its removal bears this out as well. *See supra* note 7.

In sum, while Shorts's new putative class-action claim against ATTM and her counterclaim against Palisades have certain facts in common, that factual similarity does not mean that ATTM can be characterized as an "additional counterclaim defendant" on her wrongful-collection claim against Palisades. The joinder rules may be liberal, but they are not limitless. Here, their limit was crossed.

III. ATTM, PALISADES, AND SHORTS SHOULD BE REALIGNED ACCORDING TO THEIR TRUE INTERESTS IN THIS PUTATIVE CLASS ACTION.

Even if an "additional counterclaim defendant" may not remove a class action, and even if ATTM is an "additional counterclaim defendant," the parties should be realigned, because the $794.87 collection action filed by Palisades is now dominated by the putative class action filed by Shorts. The district court erred in failing to realign the parties.

When the parties' status has jurisdictional implications, courts have a duty to consider whether to realign them. *See, e.g., Seminole County v. Pinter Enters., Inc.*, 184 F. Supp. 2d 1203, 1209 (M.D. Fla. 2000). To that end, the Supreme Court has adopted a "functional test" for determining a party's true status:

> 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. The party opposing or resisting the plaintiff's claim is the defendant, who may remove.

Estate of Spragins v. Citizens Nat'l Bank of Evansville, 563 F. Supp. 424, 426 (N.D. Miss. 1983) (quoting *Mason City & Fort Dodge R.R. Co. v. Boynton*, 204 U.S. 570, 580 (1907) (Holmes, J.)).

The district court erred in rejecting realignment because the "mainspring" of the proceeding here is the putative class action that Shorts injected into it. She cannot credibly contend that anyone's attempts to collect her $794.87 debt is

"responsible for the continued existence of the action." Indeed, had she not allowed her counsel to use this as a test case for expanding the *CitiFinancial* ruling and asserting what they hoped would be CAFA-proof claims, the collection action would doubtless have settled or been resolved in small-claims court long ago. Thus, the only reason this action is still on any court's docket is the injection of class-action claims into it. It is those claims that are the mainspring of the action.

In sum, Shorts voluntarily converted this action into something fundamentally different and exponentially larger than it was before, and it is her putative class-action claim that is now the mainspring of the proceeding. The district court's contrary conclusion ignores reality. The parties should be realigned.

CONCLUSION

For the foregoing reasons, ATTM respectfully requests that this Court grant its petition for permission to appeal and reverse the order below.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. _____ **Caption:** Palisades Collections LLC v. Shorts

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Attorney for AT&T Mobility

Dated: January 28, 2008

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Petition for Permission to Appeal Pursuant to 28 U.S.C. § 1453(c) was served the 28th day of January, 2008, by Federal Express delivery and, with counsel's prior written consent, by e-mail on:

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