OVERCOMING THE PRESUMPTION: PRACTICAL CONSIDERATIONS FOR CORPORATE & AGRIBUSINESS LITIGANTS SEEKING REMOVAL FOLLOWING THE U.S. SUPREME COURT'S DECISION IN *DART CHEROKEE BASIN OPERATING CO., LLC V. OWENS*

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I. INTRODUCTION

Immediately following the U.S. Supreme Court's decision in *Dart Cherokee Basin Operating Co., LLC v. Owens* ("*Dart Cherokee*") many celebrated the fact that removal would now be easier under the Class Action Fairness Act ("CAFA"), and quite possibly outside of the class context as well. This article analyzes the Supreme Court's decision in *Dart Cherokee* and how courts across the country have interpreted its holdings in an effort to provide practical tips for defendants engaged in corporate and agribusiness litigation seeking removal of both collective actions invoking CAFA and individual, non-CAFA cases.

II. CASE BACKGROUND

Brandon Owens filed a putative class action lawsuit in Kansas state court against Dart Cherokee Basin Operating Company, LLC and Cherokee Basin Pipeline, LLC (collectively referred to hereinafter as the "Cherokee Defendants").[1] Owens sought to represent a class of royalty owners who were purportedly underpaid royalty payments under certain oil and gas leases.[2] He did not specify a damages amount in his complaint and instead included a generic prayer for "damages [that he and putative class members] have suffered and will suffer up to the time of trial."[3] The Cherokee Defendants removed the case to the District of Kansas, filing a Notice of Removal pursuant to the Class Action Fairness Act of 2005 ("CAFA").[4] Under CAFA, a class action is removable to federal court if there is minimal diversity, at least 100 putative class members, and $5 million or more in controversy.[5]

The Notice of Removal contained a "short and plain statement of the grounds for removal," as required under 28 U.S.C. § 1446(a).[6] It provided that the putative class included approximately 400 people; that the putative class members owned royalty rights in approximately 700 oil and gas wells; that Owens sought three types of royalty damages; and that, based on the nature of the claims asserted, the size of the putative class, and the length of the proposed class

1. Dart Cherokee Basin Operating Co. v. Owens, 135 S. Ct. 547, 549 (2014).

2. *Id.*

3. Class Action Petition Pursuant to K.S.A Chapter 60 at 7, Owens v. Dart Cherokee Basin Operating Co., (Kan. Dist. Ct. Dec. 5, 2012) (No. 2012-CV-69).

4. *Dart Cherokee*, 135 S. Ct. at 551-52.

5. Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345, 1348 (2013); *see* 28 U.S.C. §§ 1332(d)(2), (d)(5)(B) (2012).

6. 28 U.S.C. § 1446(a) (2012); Notice of Removal at 3-4, Owens v. Dark Cherokee Basin Operating Co., No. 2012-CV-68, 2012 WL 12350755, at *1 (D. Kan. 2012).

period, the amount in controversy exceeded $8.2 million.[7] Owens moved to remand the case to state court, arguing the Notice was "deficient as a matter of law" because it contained no admissible evidence in support of the jurisdictional allegations.[8]

In response to the remand motion, the Cherokee Defendants offered a declaration from one of Dart Cherokee's corporate officers.[9] The declaration contained evidence supporting the jurisdictional facts alleged in the Notice of Removal – including updated damages calculations based on limited informal discovery.[10] Owens did not dispute this evidence, but instead argued that the Notice of Removal could not be cured by attaching evidence in response to a motion to remand.[11] The district court granted Owens' motion and remanded the case to state court, finding that the Cherokee Defendants were required to prove in their Notice of Removal that CAFA's jurisdictional requirements were met.[12] The Cherokee Defendants petitioned the Tenth Circuit for review of the decision, but a divided panel of the Court denied the petition.[13] The Cherokee Defendants sought rehearing *en banc*, but the Tenth Circuit denied that petition as well.[14] The Cherokee Defendants filed a Petition for Writ of Certiorari in the U.S. Supreme Court, citing a circuit split on the issue of whether a defendant seeking removal to federal court is required to include evidence supporting federal jurisdiction in the notice of removal.[15] The Supreme Court granted the petition for Certiorari, and after full briefing and oral argument, decided the case on December 15, 2014, holding: (1) a defendant's notice of removal is only required to include a plausible allegation that the amount in controversy exceeds the jurisdictional threshold; (2) if a defendant's assertion of the amount in controversy is challenged, both sides must submit proof and the court will decide, by a preponderance of the evidence, whether the amount in controversy requirement has been satisfied; and (3) there is no presumption against removing cases to federal court under CAFA.[16]

7. Notice of Removal, *supra* note 6, at 3-4.
8. *Dart Cherokee*, 135 S. Ct. at 550.
9. *Id.*
10. *Id.*
11. *Id.*
12. *See id.*
13. *Id.*
14. *Id.*
15. *Id.* at 552-53.
16. *Id.* at 554.

III. HOW HAVE COURTS ACROSS THE COUNTRY INTERPRETED *DART CHEROKEE*?

Since the U.S. Supreme Court's decision in *Dart Cherokee*, several courts have weighed in on what its holdings mean for removal of cases both under CAFA and in individual actions outside of the class action context.[17] This paper discusses how each of the main holdings of the case have been applied in jurisdictions across the country.

A. A Defendant's Notice of Removal Need Only Include a Plausible Allegation that the Amount in Controversy Exceeds the Jurisdictional Threshold.

The question before the Supreme Court in *Dart Cherokee* was "whether evidence supporting the amount in controversy must be included in a notice of removal."[18] The District of Kansas answered the question affirmatively, and the Tenth Circuit denied the Cherokee Defendants' request for review of the decision.[19] The Supreme Court held the district court's decision was made in error, and the Tenth Circuit abused its discretion in denying the Cherokee Defendants' request for review.[20] After *Dart Cherokee*, the law is clear: "a defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold. Evidence establishing the amount is required by § 1446(c)(2)(B) only when the plaintiff contests, or the court questions, the defendant's allegation."[21] The "short and plain" statement required by 28 U.S.C. § 1446(a) does not require evidentiary submissions.[22]

In a recent decision, the Ninth Circuit reiterated the *Dart Cherokee* holding, reversing a district court's order remanding a case to state court where the defendant had offered "an 'unchallenged, plausible assertion' that the jurisdictional requirements of CAFA [were] met."[23]

17. *See generally, e.g.*, Sumrall v. Ricoh USA Inc., No. 15-61-JWD-SCR, 2015 WL 2338585, at *2 (M.D. La. Apr. 14, 2015) (discussing viability of Fifth Circuit's framework for evaluating amount in controversy after Dart Cherokee decision); McPhail v. Lyft, Inc., No. A-14-CA-829-LY, 2015 WL 1143098, at *2 (W.D. Tex. Mar. 13, 2015) (declining to extend *Dart Cherokee* analysis when no federal question was presented in removal case and preponderance of evidence indicated insufficient amount in controversy to support diversity jurisdiction).

18. *Dart Cherokee*, 135 S. Ct. at 557.

19. *Id.* at 552.

20. *Id.* at 558.

21. *Id.* at 554.

22. *See id.*

23. Reyes v. Dollar Tree Stores, Inc., 781 F.3d 1185, 1190 (9th Cir. 2015); *see also* Roa v. TS Staffing Servs., Inc., No. 2:14-cv-08424-ODW, 2015 WL 300413, at *2 (C.D. Cal. Jan. 22, 2015) (denying plaintiff's motion to remand and holding the court must accept jurisdictional allegations as true unless contested by plaintiff or questioned by the court).

In the Central District of California, *Dart Cherokee* applies not only to the amount-in-controversy requirement, but to the other jurisdictional requirements of CAFA as well.[24] Reiterating the fact that there is no anti-removal presumption following *Dart Cherokee*, the court said it had "no reason to *sua sponte* question" the defendants' jurisdictional allegations.[25] "The 'short and plain statement' language from § 1446(a) applies to the entire notice of removal, and therefore would apply equally to all CAFA allegations and not just the amount-in-controversy requirement."[26]

Dart Cherokee has also been applied in individual actions outside of the CAFA landscape. For example, in *Lundahl v. Am.. Bankers Insurance Co. of Fla.*, the Tenth Circuit, citing *Dart Cherokee* held the appellee had timely and effectively removed the action under Section 1332 by alleging diversity of citizenship and an amount in controversy exceeding $75,000.[27]

B. There is No Presumption Against Removing Cases to Federal Court under CAFA.

In *Dart Cherokee,* the district court relied in part on a purported presumption against removal in remanding the case to state court.[28] The Supreme Court made clear in its decision that "no anti-removal presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court."[29] In the Ninth Circuit there now exists a presumption *in favor* of removal in CAFA cases.[30] *In Jordan v. Nationstar Mort., LLC*, the Court noted that *Dart Cherokee* instructs courts to interpret CAFA's provisions under 28 U.S.C. § 1332 broadly and in favor of removal and extended that con-

24. *See Roa*, 2015 WL 300413, at *2.

25. *Id.*

26. *Id.*

27. Lundahl v. Am. Bankers Ins. Co. of Fla., 610 F. App'x 734, 736 (10th Cir. 2015) ("removal notice need only contain short and plain statement of grounds for court's jurisdiction"); *see also* Johnson v. Safeco Ins. Co. of Am., No. 14-cv-03052-PAB-KLM, 2015 WL 2019395, at *2 (D. Colo. 2015) (holding, in light of the *Dart Cherokee* decision, that defendant's notice of removal satisfied Section 1446(a)'s requirement that it contain a short and plain statement of the grounds for removal. Plaintiff did not argue that the amount in controversy did not exceed $75,000, but instead that Safeco's evidence in support of the amount in controversy allegation was insufficient); Heartland-Mt. Airy of Cincinnati Oh, LLC v. Johnson, No. 1:15-cv-86, 2015 WL 667682, at *1 (S.D. Ohio Feb. 17, 2015) ("When a plaintiff invokes federal jurisdiction by filing an action in federal court, the amount-in-controversy allegation is accepted if made in good faith.")

28. Dart Cherokee Basin Operating Co. v. Owens, 135 S. Ct. 547, 554 (2014).

29. *Id.*

30. Jordan v. Nationstar Mortg. LLC, 781 F.3d 1178, 1184 (9th Cir. 2015).

struction to cases removable for purposes of section 1446, as well.[31] This clarification reinforces our holding that "the objecting party bears the burden of proof as to the applicability of any express statutory exception under §§ 1332(d)(4)(A) and (B)."[32] Furthermore, while there is no presumption against removing cases to federal court under CAFA, there still remains the question of whether courts will read *Dart Cherokee* as establishing a pro-removal presumption in such cases.[33] The Ninth Circuit appears to be leaning that way, highlighting the following language from *Dart Cherokee* in a recent decision: "CAFA's 'provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant.'"[34]

Meanwhile, Judge Jennifer Walker Elrod of the Fifth Circuit recently warned her court against taking that next step. "The Supreme Court has recognized that 'no antiremoval presumption attends cases invoking CAFA,' . . . but we should not go further and announce a *pro-removal* presumption, whether for CAFA as a whole or as to the local controversy exception."[35] In *Arbuckle Mountain Ranch of Texas, Inc. v. Chesapeake Energy Corp.*, the majority held the local controversy exception to CAFA did not apply and reversed the district court's decision to remand the case on that basis.[36]

There still may exist a presumption against removal in non-CAFA cases – at least in the Ninth, Tenth and D.C. Circuits. In *Johnson v. Twin City Fire Insurance Co.*, the District of Arizona rejected the defendant's argument that *Dart Cherokee* overturned prior Ninth Circuit law recognizing a strong presumption against removal.[37] "*Dart*, which addressed removal of class actions under the Class Action Fairness Act, specifically stated that it was not altering presumptions in ordinary removal cases: 'We need not here decide whether such a presumption is proper in mine-run diversity cases.'"[38] Similarly, in *Sloan v. Soul*

31. *Id.*

32. Serrano v. 180 Connect, Inc., 478 F.3d 1018, 1024 (9th Cir. 2007).

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

34. *Dart Cherokee*, 135 S. Ct. at 554; *Jordan*, 781 F.3d at 1183; S. Rep. No. 109-14, at 43 (2005).

35. *Dart Cherokee*, 135 S. Ct. at 554; Arbuckle Mountain Ranch of Tex., Inc. v. Chesapeake Energy Corp., 810 F.3d 335, 347 (5th Cir. 2016) (Elrod, J., dissenting).

36. *Arbuckle*, 810 F.3d at 343 (majority opinion). The local controversy exception to CAFA has several distinct requirements and seeks to exclude a "narrow category of truly localized controversies." *Id.* at 337; Hollinger v. Home State Mut. Ins. Co., 654 F.3d 564, 570 (5th Cir. 2011).

37. See Johnson v. Twin City Fire Ins. Co., No. CV15-00202-PHX-DGC, 2015 WL 1442644, at *2 (D. Ariz. Mar. 27, 2015).

38. *Id.* at *2 n.2; *see also* Hunter v. Philip Morris USA, 582 F.3d 1039, 1042 (9th Cir. 2009); Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir. 1995); Graham v. Troncoso, No. CIV 14-0745 JB/WPL, 2015 WL 1568433, at *7 (D.N.M. Mar. 30, 2015) ("Federal courts are

Circus, Inc., the court noted that "[j]ust as it was before *Dart*, therefore, when a removing defendant seeks to establish this Court's diversity jurisdiction under 28 U.S.C. § 1332(a), there is 'a strong presumption that the plaintiff has not claimed a large amount in order to confer jurisdiction on a federal court.'"[39]

C. If a Defendant's Assertion of the Amount in Controversy is Challenged, Both Sides Must Submit Proof and the Court will Decide, by a Preponderance of the Evidence, Whether the Amount in Controversy Requirement has been Satisfied.

The Supreme Court reiterated in *Dart* that where a defendant's allegations concerning the amount in controversy are challenged, "both sides submit proof and the court decides, by a preponderance of the evidence, whether the amount-in-controversy requirement has been satisfied."[40] "Of course, a dispute about a defendant's jurisdictional allegations cannot arise until *after* the defendant files a notice of removal containing those allegations."[41] In application, courts evaluating removal both under CAFA and in individual actions have found that the Supreme Court did not change course with regard to this longstanding requirement.[42]

For example, in *Dudley v. Eli Lilly & Co.*, the Eleventh Circuit held that because *Dart Cherokee* did not involve a plaintiff challenging a defendant's jurisdictional allegations, it did not disrupt pre-existing CAFA case law applicable to when a plaintiff does contest jurisdiction.[43] Affirming the district court's remand of the case, the *Dudley* court recognized the absence of any presumption in favor of remand in deciding CAFA jurisdictional questions, but found the defendant's affidavits and briefing failed to show, by a preponderance of the evidence, that CAFA's amount-in-controversy requirement had been met.[44] The defendant provided affidavits in support of the jurisdictional requirement, but provided little actual evidence concerning the amount of compensation that was

courts of limited jurisdiction; thus, there is a presumption against removal jurisdiction, which the defendant seeking removal must overcome."); Strahan v. Allstate Indem. Co., No. CIV-14-1392-C, 2015 WL 730055, at *2 (W.D. Okla. Feb. 19, 2015) ("[T]here is a presumption against removal jurisdiction.") (alteration in original); Madison v. U.S. Bancorp, No. C-14-4934-EMC, 2015 WL 355984, at *2 (N.D. Cal. Jan. 27, 2015) ("nothing in *Dart* calls into question or undermines existing Ninth Circuit precedent that in a 'mine-run diversity case' . . . the court must resolve 'all ambiguity in favor of remand'").

39. Sloan v. Soul Circus, Inc., No. 15-01389 (RC), 2015 WL 9272838, at *6 (D.D.C. Dec. 18, 2015); Breakman v. AOL LLC, 545 F. Supp. 2d 96, 103 (D.D.C. 2008).

40. *Dart Cherokee*, 135 S. Ct. at 554.

41. *Id.*; Brief for Petitioner at 14, Dart Cherokee Basin Operating Co. v. Owens, 135 S. Ct. 547 (2014) (No. 13-719).

42. *See* Dudley v. Eli Lilly & Co., 778 F.3d 909, 912-13 (11th Cir. 2014).

43. *Id.* at 913.

44. *Id.* at 912, 917.

allegedly denied to the class members.[45] The Court found that "the evidential foundation was bare . . . and the district court was unable to make any 'reasonable inferences and deductions drawn from that evidence[ ] to determine whether the defendant has carried its burden' of sustaining the jurisdictional threshold."[46] The defendant argued that at the removal/remand stage of the litigation it should not be required to concede liability or provide detailed sales record information to satisfy the amount-in-controversy requirement.[47] The Court generally agreed, but held that it could not see how the district court could infer the amount in controversy from the evidence in the record.[48]

Similarly, in *Johnson v. Twin City Fire Ins. Co.*, the District of Arizona remanded an individual (non-CAFA) action to state court where on the face of a motion to remand, the defendant failed to present evidence showing that the plaintiffs' auto damage claim exceeded the $75,000 jurisdictional amount.[49] "*Dart* made clear that evidentiary proof is still required when the amount in controversy is contested. 'In such a case,' *Dart* explained, 'both sides submit proof and the court decides, by a preponderance of the evidence, whether the amount-in-controversy requirement has been satisfied.'"[50] "*Dart* addressed the required contents of the removal notice, not the procedure to be followed when removal is challenged in a motion to remand."[51]

45. *Id.* at 916-17.

46. *Id.* at 917 (alteration in original); *see S. Fla. Wellness, Inc. v. Allstate Ins. Co.*, 745 F.3d 1312, 1315 (11th Cir. 2014).

47. *Dudley*, 778 F.3d at 917.

48. *Id.*

49. Johnson v. Twin City Fire Ins. Co., No. CV15-00202-PHX-DGC, 2015 WL 1442644, at *3 (D. Ariz. Mar. 27, 2015).

50. *Id.* at *2; Dart Cherokee Basin Operating Co. v. Owens, 135 S. Ct. 547, 554 (2014).

51. *Johnson*, 2015 WL 1442644, at *2; *see* McDannell v. Precision Pipeline, LLC, No. 5:15CV4, 2015 WL 1588149, at *12 (N.D. W. Va. Apr. 9, 2015) (preponderance of the evidence standard applies when parties or court contests the evidence supporting the defendant's alleged amount in controversy); *see also* Robertson v. Exxon Mobil Corp., No. 15-30920, 2015 WL 9592499, at *2 (5th Cir. Dec. 31, 2015); McPhail v. Lyft, Inc., No. A-14-CA-829-LY, 2015 WL 1143098, at *4 (W.D. Tex. Mar. 13, 2015) ("[T]o suggest that the Supreme Court's decision in *Dart* clarified the procedure to follow when there is a dispute about the amount in controversy in a removed case completely misunderstands the decision.").

> Defendants alleged satisfaction of the aggregate and individual jurisdictional amounts in their notice of removal, but Plaintiffs contested those allegations by filing a motion to remand. In such a case, the court must decide by a preponderance of the evidence whether the relevant amount in controversy is met . . . . A removing defendant can meet its burden of demonstrating the amount in controversy by showing that the amount is 'facially apparent' from the plaintiffs' pleadings alone, or by submitting summary-judgment-type evidence.

In *In re Whole Foods Market, Inc.*, the Western District of Texas declined to hold that *Dart Cherokee* requires the removing party to submit *extrinsic* evidence of the amount in controversy even where federal jurisdiction is challenged by the non-removing party, holding a defendant may rely solely on the face of the plaintiff's complaint "to show by a preponderance of the evidence that CAFA's jurisdictional requirements are met."[52] The Court held that the issue of whether the removing party must submit evidence of the amount in controversy or whether the defendant may look solely to the face of the complaint was not before the *Dart Cherokee* Court.[53] As such, the court refused to follow what it determined was dicta in *Dart Cherokee*.[54]

In cases where the jurisdictional requirements are challenged, the trial court must consider evidence from *both* the plaintiff and the defendant.[55] In the Ninth and Fifth Circuits, remand decisions have been vacated and remanded to the district courts where the district court failed to consider jurisdictional evidence from both sides.[56]

"Under the preponderance of the evidence standard, if evidence submitted by both sides is balanced . . . the scales tip against federal-court jurisdiction."[57]

Dart Cherokee, 135 S. Ct. at 553-54; Manguno v. Prudential Property & Casualty Ins. Co., 276 F.3d 720, 723 (5th Cir. 2002); *Robertson*, 2015 WL 9592499, at *2.

52. *In re* Whole Foods Mkt., Inc., No. 1:14-CV-1135-SS, 2015 WL 5737692, at *6 (W.D. Tex. Sept. 30, 2015).

53. *Id.*

54. *Id.*

55. *See* Ibarra v. Manhein Invs., Inc., 775 F.3d 1193, 1198 (9th Cir. 2015) ("Under this system, CAFA's requirements are to be tested by consideration of real evidence and the reality of what is at stake in the litigation, using reasonable assumptions underlying the defendant's theory of damages exposure.").

56. *See* Townsend v. BP Am., Inc., 593 Fed. App'x 606, 606 (9th Cir. 2015) (reversing and remanding district court's decision in light of *Dart*, holding defendant would be permitted opportunity to provide evidence demonstrating case meets requirements of 28 U.S.C. § 1332(d)(2), if Plaintiff challenges jurisdiction); *Ibarra*, 775 F.3d at 1198, 1200 (vacating and remanding decision to district court because neither side presented proof regarding rate of alleged violations of California Labor Code. "[W]hen the defendant's assertion of the amount in controversy is challenged by plaintiffs in a motion to remand, the Supreme Court has said that both sides submit proof and the court then decides where the preponderance lies."); Statin v. Deutsche Bank Nat'l Trust Co., 599 F. App'x 545, 547-48 (5th Cir. 2014) (holding where a challenge to jurisdiction is raised for the first time on appeal, the case must be remanded to the district court so that both parties can submit evidence on the issue and the district court can decide jurisdiction by a preponderance of the evidence).

57. *Ibarra*, 775 F.3d at 1199; *see also* Hertz Corp. v. Friend, 559 U.S. 77, 96 (2010) ("The burden of persuasion for establishing diversity jurisdiction . . . remains on the party asserting it" and "[w]hen challenged on allegations of jurisdictional facts, the parties must support their allegations by competent proof."); Autoport LLC v. Volkswagen Grp. of Am., Inc., No. 2:15-cv-04260-NKL, 2016 WL 123431, at *2-3 (W.D. Mo. Jan. 11, 2016) (holding de-

And in the Ninth Circuit, "when the defendant relies on a chain of reasoning that includes assumptions to satisfy its burden of proof, the chain of reasoning and its underlying assumptions must be reasonable ones."[58]

IV. LITIGATION STRATEGY IN LIGHT OF *DART CHEROKEE*

Dart Cherokee is a helpful case for class action practitioners – and for corporate defense counsel as a whole. The Supreme Court clarified that there is no presumption against removal in cases invoking federal jurisdiction under CAFA.[59] The Court also made clear that a notice of removal need not contain evidence supporting the grounds for removal (i.e., the amount in controversy), just a plausible allegation.[60] The Court did note, however, that where the plaintiff or the court contest the defendant's allegation, evidence establishing that the amount in controversy must exceed the jurisdictional threshold is required by 28 U.S.C. § 1446(c)(2).[61]

Most of the recent cases applying *Dart Cherokee* involve motions to remand.[62] Unlike the plaintiffs in *Dart Cherokee,* plaintiffs now are not only challenging the substance of the removal notice, but also arguing that the evidence does not support defendants' jurisdictional allegations.[63] Plaintiffs' counsel have learned that to most effectively contest removal a strong motion for remand should be filed, upon which the burden shifts to the defendant to prove by a preponderance of the evidence that the federal jurisdictional requirements, whether under CAFA or otherwise, are satisfied.[64] Because it is not enough to just contest the notice of removal, plaintiffs are digging in and substantively challenging defendants' evidence and potential damages calculations.[65] For example, in *Dudley*, the plaintiff filed a motion to remand, arguing the defendant's calculations conflicted with the complaint, were erroneous, and assumed information without offering any correlating proof.[66]

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fendant carries burden of proof where removal is challenged and noting "the Fifth, Eleventh and Ninth Circuits have declined after *Dart Cherokee* to shift the burden of proof when a plaintiff challenges the amount in controversy").

58. LaCross v. Knight Transp. Inc., 755 F.3d 1200, 1202 (9th Cir. 2015); *Ibarra*, 775 F.3d at 1199.

59. Dart Cherokee Basin Operating Co. v. Owens, 135 S. Ct. 547, 554 (2014).

60. *Id.*

61. *Id.*

62. *See, e.g.*, *Autoport LLC*, 2016 WL 123431, at *3.

63. *See, e.g.*, McDanell v. Precision Pipeline, LLC, No. 5:15 CV4, 2015 U.S. LEXIS 46535, at *11 (N.D.W.V. Apr. 9, 2015).

64. *See, e.g.*, *id.* at *4 -*5.

65. *See, e.g.*, *id.* at *3.

66. Dudley v. Eli Lilly & Co., 778 F.3d 909, 914, 915 (11th Cir. 2014) (affirming district

Nevertheless, defendants have been successful in defeating motions to remand post-*Dart Cherokee*.[67] There even appears to be a growing presumption *in favor of* removal in CAFA actions.[68] On the other hand, corporate defendants seeking to remove individual actions may still find themselves facing an anti-removal presumption, especially in Circuits like the Ninth and Tenth, which have explicitly acknowledged such a presumption exists notwithstanding the *Dart Cherokee* decision.[69]

The best strategy for removal, whether under CAFA or otherwise, is to think ahead. Federal court is generally more desirable for corporate defendants and therefore plaintiffs often file motions to remand if they believe there is a chance at success. As such, defendants should be prepared with evidence to support their jurisdictional allegations in the event a motion to remand is filed. In *Dart Cherokee*, the defendants presented a declaration from one of Dart Cherokee's corporate officers that contained evidence supporting the jurisdictional facts alleged in the notice of removal, including updated damages calculations and evidence supporting federal jurisdiction discovered after removal (*e.g.*, a statement by Plaintiff in a brief that the amount in controversy was over $20 million, including interest).[70] This is the type of evidence courts will be looking for in determining whether to remand the case to state court. Defendants should also be prepared to rebut evidence submitted by the plaintiff in the remand motion.

It is important to remember that for purposes of removal and the amount-in-controversy, damages calculations do not have to be perfect, nor do they prevent the defendant from later challenging the actual damages recoverable.[71] De-

court's remand of case where defendant failed to show by a preponderance of the evidence, that CAFA's amount-in-controversy requirement had been met).

67. *See, e.g.*, LaCross v. Knight Transp. Inc., 755 F.3d 1200, 1203 (9th Cir. 2015) (holding reasonable assumptions and extrapolations of actual data are sufficient to satisfy preponderance standard on motion to remand; amount in controversy does not have to equate to amount of damages actually recoverable).

68. Jordan v. Nationstar Mortg., LLC, 781 F.3d 1178, 1184 (9th Cir. 2015) ("Congress and the Supreme Court have instructed us to interpret CAFA's provisions under section 1332 broadly in favor of removal, and we extend the liberal construction to section 1446.").

69. *See, e.g.*, Graham v. Troncoso, No. CIV 14-0745 JB/WPL, 2015 WL 1568433, at *7 (D.N.M. Mar. 30, 2015).

70. *See* Dart Cherokee Basin Operating Co. v. Owens, 135 S. Ct. 547, 549, 552 (2014).

71. *See* Ibarra v. Manheim Invs., Inc., 775 F.3d 1195, 1198 n.1 (9th Cir. 2015)

> Even when defendants have persuaded a court upon a CAFA removal that the amount in controversy exceeds $5 million, they are still free to challenge the actual amount of damages in subsequent proceedings and at trial. This is so because they are not stipulating to damages suffered, but only estimating the damages that are in controversy.

Id.

fendants prepared with affidavits or other information to support the amount in controversy will have the upper hand in responding to a motion for remand and are more likely to succeed in keeping the case in federal court.

V. CONCLUSION

It is still too early to say what *Dart Cherokee* will ultimately mean for corporate and agribusiness litigants seeking removal both under CAFA and otherwise.[72] It is clear, however, that (1) a defendant's *notice* of removal is only required to include a plausible allegation that the amount in controversy exceeds the jurisdictional threshold; (2) if a defendant's assertion of the amount in controversy is challenged, *both sides* must submit proof and the court will decide, by a *preponderance of the evidence*, whether the amount in controversy requirement has been satisfied; and (3) there is *no anti-removal presumption* for cases invoking CAFA.[73]

72. *See Dart Cherokee*, 135 S. Ct. at 547-58 (showing four justices dissented from the opinion).

73. *Id.* at 554.