

IN THE  
**Supreme Court of the United States**

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FIRST BANK,

*Petitioner,*

*v.*

DJL PROPERTIES, LLC, *et al.*,

*Respondents.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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GORDON R. BROOM

*Counsel of Record*

TROY A. BOZARTH

W. JASON RANKIN

HEPLERBROOM LLC

103 W. Vandalia Street

Suite 300

Edwardsville, IL 62040

(618) 656-0184

[gordon.broom@heplerbroom.com](mailto:gordon.broom@heplerbroom.com)

*Counsel for Petitioner*



## **QUESTION PRESENTED**

The question presented is whether *Shamrock Oil & Gas v. Sheets*, 313 U.S. 100 (1941) prohibits a counterclaim defendant from removing a class action counterclaim under the Class Action Fairness Act, 28 U.S.C. § 1453(b)?

## **COMPLETE LISTING OF PARTIES**

First Bank  
DJL Properties, LLC  
Jonathon E. Guthrie  
Lisa M. Guthrie  
Metro East Sanitary District  
American Bottoms Regional Wastewater Treatment  
Facility  
Land of Lincoln Securities  
Village of Sauget  
Raven Securities, Inc.  
St. Clair County Trustee  
VI Inc.

### **RULE 29.6 STATEMENT**

First Bank is chartered in Missouri with its principal place of business in Creve Coeur, Missouri. First Bank's parent company is The San Francisco Company, which is wholly owned by First Banks, Inc. No publicly held corporation owns 10% or more of First Bank's stock.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Courts of Appeals for the Seventh Circuit in this case.

## OPINIONS BELOW

The orders of the district court remanding the cases to state court (App., *infra*, 6a-17a) are not published in either the *Federal Supplement* or *Federal Reporter*, but are available at 2010 U.S. Dist. LEXIS 7204 and 2010 U.S. Dist. LEXIS 7700. The opinion of the court of appeals affirming the district court's ruling (App., *infra*, 1a-5a) is reported at 598 F.3d 915. The order denying rehearing and rehearing *en banc* (App., *infra*, 18a-19a) is not published in either the *Federal Supplement* or *Federal Reporter*, but is available at 2010 U.S. App. LEXIS 8950.

## JURISDICTION

The court of appeals entered its opinion and judgment on March 24, 2010. The order denying Petitioner's petition for rehearing and rehearing *en banc* was entered on April 22, 2010. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The relevant portions of the following statutory provisions are reproduced in the Appendix: Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4-5; 28 U.S.C. § 1332; 28 U.S.C. § 1441; 28 U.S.C. § 1446; and 28 U.S.C. § 1453. App., *infra*, 20a-39a.

## STATEMENT OF THE CASE

The issue in this case is whether this Court's holding in *Shamrock Oil v. Sheets*, 313 U.S. 100 (1941) prohibits a counterclaim defendant from removing a qualifying class action under 28 U.S.C. § 1453(b), the class action removal statute enacted as part of the Class Action Fairness Act of 2005 ("CAFA" or "Act"). The Seventh Circuit Court of Appeals, citing *Shamrock Oil*, declared that § 1453(b) does not allow counterclaim defendants to remove otherwise qualifying class actions to federal district courts because a counterclaim defendant is not a "defendant" under § 1453(b). The effect of the Seventh Circuit's holding is that plaintiffs whose claims satisfy the prerequisites for federal jurisdiction under CAFA may avoid federal court jurisdiction merely by bringing their class actions as counterclaims, even though the language of CAFA forecloses such maneuverings by class action plaintiffs. The panel's holding is inconsistent with both the text and purposes of CAFA.

### A. Proceedings in State Court

Petitioner First Bank initiated its Complaint for Breach of Note and Guarantees against Respondent DJL Properties, LLC ("DJL") on May 12, 2009, in the Circuit Court of St. Clair County, Illinois, Case No. 09-L-238. On May 18, 2009, Petitioner First Bank filed a separate lawsuit in St. Clair County, Illinois to foreclose the relevant mortgage, Case No. 09-CH-506. Approximately four months later, without leave of court and without having filed an answer, DJL filed a Class Action Counterclaim against First Bank on October 20, 2009 in both the foreclosure action and the action based

upon breach of the promissory note. The Class Action Counterclaims were identical. The Class Action Counterclaims asserted state statutory and breach of contract claims. App., *infra*, 9a.

## B. Proceedings in the District Court

On November 19, 2009, First Bank removed both lawsuits to the United States District Court for the Southern District of Illinois.<sup>1</sup> See App., *infra*, 9a. In its Notice of Removal, First Bank acknowledged the rule of *Shamrock Oil & Gas v. Sheets*, 313 U.S. 100 (1941), where this Court construed the statutory predecessor to 28 U.S.C. § 1441 as limiting removal rights to “the defendant or defendants” and, thus, prohibiting plaintiffs/counterclaim defendants from enjoying removal rights. App., *infra*, 10a. First Bank, however, submitted that the express language of § 1453(b), enacted as part of CAFA, permits “any defendant,” including a counterclaim defendant, to remove “a class action” to federal court. App., *infra*, 11a-12a, 15a. First Bank further argued that in *Shamrock Oil* the Court construed different language in a different statute and, thus, its holding did not bar the removal. App., *infra*, 10a.

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1. Upon removal to the United States District Court of the Southern District of Illinois, the Complaint to Foreclose Mortgage was assigned Cause No. 09-cv-970-JPG, and was assigned to the Honorable J. Phil Gilbert for decision. The Complaint for Breach of Note and Breach of Guarantees was assigned Cause No. 09-cv-969-MJR, and was assigned to the Honorable Michael J. Reagan for decision.

Each case was remanded to state court in late January 2010.<sup>2</sup> The district court held that CAFA did not alter the rule of *Shamrock Oil* that only “the defendant,” and not plaintiff/counterclaim defendants, may remove cases to federal court, even class action counterclaims that otherwise satisfy the requirements of CAFA. App., *infra*, 6a-17a. The district court stated, “When viewed with the legal landscape as it existed when CAFA was enacted and in the context of the removal statutes as a whole, the Court believes ‘any defendant’ is more likely to mean ‘any of the defendants,’ with ‘defendants’ being interpreted as it was in *Shamrock Oil*.” App., *infra*, 15a. The district court concluded that it “can only interpret the laws as they are written.” App., *infra*, 15a.

### C. Proceedings in the Appellate Court

On February 5, 2010, First Bank filed petitions for leave to appeal to the Seventh Circuit Court of Appeals in each case.<sup>3</sup> See App., *infra*, 1a-5a. The Seventh Circuit had jurisdiction to review the remand orders of the district courts pursuant to 28 U.S.C. § 1453(c)(1). 28 U.S.C. § 1453(c)(1). First Bank’s petition argued that

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2. Only Judge Gilbert’s order to remand the case to state court contained an opinion. See App., *infra*, 8a-17a. Judge Reagan adopted the reasoning of Judge Gilbert’s opinion and likewise ordered Cause No. 09-cv-969-MJR remanded to state court. See App., *infra*, 6a-7a.

3. The Complaint to Foreclose Mortgage was assigned Case No. 10-8008 in the Seventh Circuit. The Complaint for Breach of Note and Breach of Guarantees was assigned Case No. 10-8009.

§ 1453(b) expressly authorizes “any defendant” to remove qualifying class actions to federal court including class actions brought as counterclaims. App., *infra*, 2a, 38a. First Bank requested the Seventh Circuit to reverse the district court’s remand orders and remand the case to the district court for further proceedings.

In its order,<sup>4</sup> the panel granted First Bank’s petition for leave to appeal, “because the cases present an issue not yet resolved in this circuit.” App., *infra*, 2a. The panel simultaneously issued its decision affirming the orders of the federal district court remanding these matters to the circuit court of St. Clair County, Illinois. App., *infra*, 1a-5a. The panel reasoned that the two appellate circuits that have held that counterclaim defendants may not remove class action counterclaims to federal court under CAFA, *Palisades Collections, LLC v. Shorts*, 552 F.3d 327, 336 (4th Cir. 2008) *cert. denied*, *AT&T Mobility LLC v. Shorts*, 129 S.Ct. 2826 (2009); *Progressive W. Ins. Co. v. Preciado*, 479 F.3d 1014, 1018 (9th Cir. 2007), were correct in so holding. App., *infra*, 3a. The panel noted that § 1453 says that a class action may be removed “in accordance with section 1446.” App., *infra*, 3a. Because § 1446 identifies the procedures used to remove cases, and § 1441, which creates the general right of removal, states that

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4. In addition, because DJL filed the exact same counterclaims in each case, First Bank filed a Motion to Consolidate Consideration and Briefing of the Petition for Permission to Appeal. Though the Seventh Circuit did not issue a formal order granting the motion, on March 24, 2010, it issued a single order and opinion addressing both petitions for leave to appeal. App., *infra*, 1a-5a. Thus, Petitioner has filed this single Petition for Writ of Certiorari.

“defendants” may remove a suit, the panel reasoned consistent with *Shamrock Oil* that First Bank is not a “defendant” under § 1441 or § 1446. App., *infra*, 3a-4a. The panel further reasoned that the word “any” in § 1453 does not imply that “defendant” means something different in § 1453 than in either § 1441 or § 1446. App., *infra*, 4a.

### REASONS FOR GRANTING THE PETITION

The Seventh Circuit Court of Appeals held that a party forced to defend a class action that is otherwise removable under CAFA cannot remove the case pursuant to § 1453(b) if it is a counterclaim defendant and not a defendant as defined in *Shamrock Oil*. App., *infra*, 5a. The panel’s interpretation ignores both the language of § 1453(b) and the purpose for which CAFA was enacted. Moreover, its construction forecloses CAFA’s protections to an entire class of defendants confronted with the types of class actions that Congress determined should be heard in federal courts. This creates a gaping loophole that Congress intended to prevent.

Although the courts of appeal that have confronted this issue are not split in their interpretations of § 1453(b), this Court should grant this petition because this Court has not decided this important issue and the Seventh Circuit’s holding creates a loophole that raises a question of statutory construction of national importance. Plaintiffs’ counsels from across the nation are increasingly aware of this loophole in CAFA’s protections created by these incorrect rulings. Without guidance from this Court, the exact types of class actions that Congress deemed should be litigated in federal



