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THE DISTRICT OF SOUTH CAROLINA'S APPROACH TO POST-REMOVAL DAMAGE STIPULATIONS: THE NEED FOR ONE LESS "CONTROVERSY" IN THE AMOUNT-IN-CONTROVERSY ANALYSIS

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I. INTRODUCTION

Consider the following hypothetical: On an August day, Mary, a South Carolina citizen, is driving along I-26 from Columbia to Folly Beach to enjoy her last free weekend before school starts back. Suddenly, she is sideswiped by a Big Corp. truck, causing her to lose control of her car and strike the guardrail. While not seriously injured, Mary is taken to a hospital where she is examined, x-rayed, and CT scanned out of precaution, racking up thousands of dollars in medical bills in the process. Once back in Columbia, Mary meets

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with a lawyer and decides to sue Big Corp. in the Orangeburg County Court of Common Pleas under the theory of respondeat superior.[1]

In her complaint, Mary alleges she suffered "serious and severe injuries" that required her to seek medical treatment. She also claims she suffered damage to her vehicle "including but not limited to the cost for repairs, loss of use, and diminution in value." Eventually, she prays for "actual damages, punitive damages, and other such relief as the Court may deem just and proper," failing to name a specific dollar amount in the *ad damnum* clause.[2]

On October 1, Big Corp., a company incorporated in Delaware with its principal place of business in North Carolina, receives a copy of the summons and complaint. Big Corp.'s counsel, an experienced federal litigator, wants to remove the case to the District of South Carolina as soon as possible; however, he faces a dilemma. Although he has until October 31 to file a notice of removal, based on Mary's ambiguous complaint, he is unsure whether he can prove by a preponderance of the evidence that she could recover damages greater than $75,000.[3] On the one hand, he would prefer to serve Mary with a request for admission or interrogatory in order to solidify the amount of damages she is seeking, but obtaining a response before October 31 is likely impossible.[4] If he waits until Mary responds and uses that response as a basis for removal,[5] the court may find removal was untimely if it concludes that removability was apparent from the initial pleading.[6]

On the other hand, if he files an immediate removal, the court may, after a hearing, find that the amount-in-controversy requirement is not satisfied and order Big Corp. to pay the costs and attorney's fees Mary incurred as a result of the wrongful removal.[7] Big Corp.'s counsel is also aware that his removal notice is subject to Rule 11 of the Federal Rules of Civil Procedure, which requires he undertake a reasonable inquiry into whether an evidentiary basis

1. "Under the doctrine of respondeat superior, the employer is liable for the acts of an employee acting within the scope of employment." Austin v. Specialty Transp. Servs., 358 S.C. 298, 318, 594 S.E.2d 867, 877–78 (Ct. App. 2004) (citing S.C. Ins. Co. v. James C. Greene & Co., 290 S.C. 171, 179, 348 S.E.2d 617, 621 (Ct. App. 1986)).

2. An *ad damnum* clause is "[a] clause in a prayer for relief stating the amount of damages claimed." *Ad Damnum Clause*, BLACK'S LAW DICTIONARY (11th ed. 2019).

3. *See* 28 U.S.C. § 1446(b)(1) ("The notice of removal . . . shall be filed within 30 days after the receipt of the defendant . . . of a copy of the initial pleading . . . ."); *infra* Section II.A.

4. Big Corp. would have to serve Mary with the interrogatory the same day it received the summons and complaint and hope that she actually answers within thirty days instead of objecting or seeking more time. *See* S.C. R. CIV. P. 33(a).

5. § 1446(b)(3) ("[I]f the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant . . . 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.").

6. *See infra* Part IV and note 126.

7. *See infra* Part IV and notes 127–128.

exists to support his allegations.[8] Ultimately, out of caution, Big Corp.'s counsel files a notice of removal before October 31 and asserts that the amount in controversy exceeds $75,000 based on Mary's demand for uncapped actual and punitive damages.

Now in federal court, Mary faces a dilemma. Assuming the case goes to trial, she would prefer to stay in state court and appear in front of a potentially sympathetic Orangeburg County jury opposite out-of-state Big Corp. and its "deep pockets." Mary's lawyer explains that he could file a motion to remand along with a signed stipulation, which would include language that "Mary agrees that the amount in controversy is less than $75,000.01 and will neither seek nor accept more than $75,000.00 in satisfaction of her claims against Big Corp." Her lawyer explains that such a stipulation will demonstrate that the amount in controversy was did not exceed $75,000 at the time of removal. He further explains that, if the court grants the motion, she will be bound to recover less than $75,000 once back in state court.[9] Mary knows her injuries are worth far $75,000 or less, so she is willing to limit her damages in exchange for home-field advantage over Big Corp. in state court. She therefore consents for her lawyer to file the motion to remand and attached stipulation.

While this hypothetical may simply seem like a run-of-the-mill negligence action, it poses several interesting issues regarding removal. First, how does a federal court determine whether it has subject-matter jurisdiction over a removed case like Mary's where the amount in controversy is not specifically stated? Second, what weight, if any, should the court give a post-removal damage stipulation in determining whether, at the time of removal, the amount in controversy exceeded the $75,000 threshold for federal jurisdiction? Finally, how can defendants counter the effectiveness of such stipulations?

This Note seeks to answer these questions and proposes a process that would prevent post-removal damage stipulations from being considered in the amount-in-controversy analysis. Section II.A generally discusses the background of, and procedures for, removal. Section II.B explains how plaintiffs use damage stipulations to support remand orders in cases where their original complaint is silent as to the amount of damages sought. Section III.A analyzes how courts in the District of South Carolina weigh post-removal damage stipulations when deciding remand motions, while Section III.B discusses the issues associated with the treatment of these stipulations. Finally, Part IV provides a recommendation for courts in the District of South Carolina to adopt, as well as a procedure for "removal-minded defendants"[10]

8. *See* FED. R. CIV. P. 11(b).
9. *See infra* Section II.B and note 52.
10. Shaw v. Dow Brands, Inc., 994 F.2d 364, 367 (7th Cir. 1993).

to follow, that will limit the effectiveness of post-removal damage stipulations.

II. PROVISIONS GOVERNING AMOUNT-IN-CONTROVERSY ISSUES IN REMOVED ACTIONS

A. Background of, and Procedures for, Removal

Forum selection has been referred to as "the most important strategic decision a party makes in a lawsuit."[11] Plaintiffs generally prefer to litigate in state court, especially when suing large, out-of-state corporations.[12] In contrast, defendants usually prefer to be in federal court as soon as possible.[13] Removing to federal court has a profound effect on case outcomes; one study found that—after controlling for the parties' corporate status and citizenship—removal reduces a plaintiff's odds of winning a diversity case by 11%.[14]

The history of the "judicial curiosity"[15] known as removal can be traced back to the First Congress and its passage of the Judiciary Act of 1789.[16] Removal based on diversity jurisdiction was established to protect out-of-state

11. Paul Rosenthal, *Improper Joinder: Confronting Plaintiffs' Attempts to Destroy Federal Subject Matter Jurisdiction*, 59 AM. U. L. REV. 49, 55 (2009).

12. *See id.* at 57; *see also* Victor E. Flango, *Litigant Choice Between State and Federal Courts*, 46 S.C. L. REV. 961, 969 (1995) ("[T]he classic situation in which local bias works together with an anticorporate bias is when an in-state plaintiff sues an out-of-state corporation. In the words of one attorney, '[W]hen representing a local individual against [an] out-of-state corporation, the judge presiding who is an elected official has a natural, inherent bias for the local voter."). In general, plaintiffs' attorneys are less likely to be experienced in federal court; they usually represent individuals instead of corporations and prefer litigating in state court because of convenience (geographic convenience, familiarity with the state court, and the relative absence of burdensome pretrial requirements) and lower costs. *See* Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 391, 402–05 (1992).

13. *See* Howard B. Stravitz, *Recocking the Removal Trigger*, 53 S.C. L. REV. 185, 185 (2002). Professor Stravitz identified five "personal, practical, and tactical" reasons why plaintiffs prefer state court and defendants prefer federal court. *Id.* at 185 & n.1. First, plaintiffs' lawyers are generally more familiar and comfortable with state court procedure. *Id.* at 185 n.1. Second, federal courts are more likely to grant summary judgment to defendants. *Id.* Third, federal courts are more likely to bifurcate a trial into liability and damages phases, which tends to increase the plaintiff's burden. *Id.* Fourth, federal judges strictly supervise pretrial preparation. *Id.* Fifth, defense lawyers perceive increased neutrality and competence in federal judges, especially in diversity cases brought against out-of-state corporate defendants. *Id.*

14. Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 603–04, 606–07 (1998).

15. Tinney v. McClain, 76 F. Supp. 694, 698 (N.D. Tex. 1948).

16. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79–80.

defendants from local bias and prejudice.[17] Accordingly, removal strikes a compromise between two competing interests: (1) the belief that plaintiffs, as "masters of their complaints," should be allowed to choose their forum and (2) the principle that defendants should have equal access to the federal judiciary.[18] Federal courts tend to construe removal strictly[19] and resolve doubts in favor of remand,[20] usually citing concerns of state sovereignty,[21] the limited nature of federal jurisdiction,[22] and judicial efficiency and fairness.[23] In the same vein, courts hold that the defendant, as the party invoking the federal court's jurisdiction, has the burden of establishing the court's subject-matter jurisdiction over a case.[24]

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17. In *Martin v. Hunter's Lessee*, Justice Story opined:

> The constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their priviliges [sic], before the same forum. Yet, if the construction contended for be correct, it will follow, that as the plaintiff may always elect the state court, the defendant may be deprived of all the security which the constitution intended in aid of his rights. Such a state of things can, in no respect, be considered as giving equal rights. To obviate this difficulty, we are referred to the power which it is admitted congress possess to remove suits from state courts to the national courts . . . .

14 U.S. (1 Wheat.) 304, 348–49 (1816).

18. Lincoln Prop. Co. v. Roche, 546 U.S. 81, 91 (2005). *See generally* Scott R. Haiber, *Removing the Bias Against Removal*, 53 CATH. U. L. REV. 609 (2004). Haiber argues federal courts have incorrectly elevated the right of the plaintiff to select the forum to be greater than that of the defendant. *See id.* at 638–39. He notes the basis of this superior "right" that federal courts routinely cite is not found in the Constitution or in any congressional statute and was not intended by the Framers. *Id.* at 657–58. In fact, it runs afoul of the principle that all citizens should have equal access to the federal court system. *See id.* at 658. As a result, he concludes this strict presumption against removal encourages gamesmanship and has led to "a practice that protracts and fosters litigation and multiplies costs." *Id.* at 662.

19. *E.g.*, Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108 (1941); Clipper Air Cargo, Inc. v. Aviation Prods. Intern., Inc., 981 F. Supp. 956, 958 (D.S.C. 1997); *see also* Haiber, *supra* note 18, at 636.

20. *E.g.*, Palisades Collections LLC v. Shorts, 552 F.3d 327, 336 (4th Cir. 2008); *see also* Haiber, *supra* note 18, at 636–37.

21. *See, e.g.*, Mulcahey v. Columbia Organic Chems. Co., 29 F.3d 148, 151 (4th Cir. 1994) (citing *Shamrock*, 313 U.S. at 109); *see also* Haiber, *supra* note 18, at 638.

22. *See, e.g.*, Auto Ins. Agency, Inc. v. Interstate Agency, Inc., 525 F. Supp. 1104, 1106 (D.S.C. 1981); *see also* Haiber, *supra* note 18, at 638–39.

23. *See, e.g.*, Thompson v. Gillen, 491 F. Supp. 24, 26 (E.D. Va. 1980); Gray v. Remley, No. 1:03CV421, 2004 WL 951485, at *6 (M.D.N.C. Apr. 30, 2004) ("[I]t would be judicially inefficient to allow a case to proceed to conclusion, only to result in a pronouncement of no value." (citing Barnhill v. Ins. Co. of N. Am., 130 F.R.D. 46, 50–51 (D.S.C. 1990))); *see also* Haiber, *supra* note 18, at 639.

24. *See, e.g.*, Strawn v. AT&T Mobility LLC, 530 F.3d 293, 296–97 (4th. Cir. 2008); *see also* Haiber, *supra* note 18, at 636.

Defendants are only authorized to remove state court actions "of which the district courts of the United States have original jurisdiction . . . ."[25] Thus, an action is not removable based on diversity jurisdiction unless there is complete diversity between all plaintiffs and all defendants and the amount-in-controversy requirement has been satisfied.[26] However, even if complete diversity exists, the right of removal is limited to out-of-state defendants.[27]

The amount-in-controversy requirement in diversity cases is satisfied unless it appears to a legal certainty that the claim is for less than the jurisdictional minimum.[28] In cases originally filed in federal court, the sum demanded by the plaintiff is deemed to be the amount in controversy if it is "apparently made in good faith."[29] In removed actions, the amount-in-controversy requirement must be met at the time of removal;[30] if a complaint's *ad damnum* clause listed an amount greater than $75,000 when the action was removed, the requirement is normally satisfied.[31]

When a plaintiff's complaint is silent as to the amount of damages demanded, whether the claim satisfies the amount-in-controversy requirement is less clear. This situation often occurs in states that permit plaintiffs to plead only that the amount in controversy exceeds a minimum amount.[32] For example, in North Carolina, a plaintiff with a negligence claim potentially

25. 28 U.S.C. § 1441(a).

26. *See* § 1332(a); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806) (holding that complete diversity, where none of the plaintiffs are from the same state as any defendant, is required).

27. *See* § 1441(b)(2). For individuals, "citizenship" is synonymous with "domicile" or, in other words, "[one's] true, fixed and permanent home and place of habitation." Vlandis v. Kline, 412 U.S. 441, 454 (1973). Corporations, on the other hand, are citizens of both the state where their principal place of business is located and the state in which they are incorporated. § 1332(c)(1). The Supreme Court has concluded that a corporation's "principal place of business" is the place where the corporation's "nerve center"—usually its headquarters—is located. Hertz Corp. v. Friend, 559 U.S. 77, 92–93 (2010).

28. *See* St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 284, 289 (1938).

29. *Id.* at 288.

30. *E.g.*, Chavis v. Fid. Warranty Servs., Inc., 415 F. Supp. 2d 620, 626 (D.S.C. 2006) (citing Thompson v. Victoria Fire & Cas. Co., 32 F. Supp. 2d 847, 848 (D.S.C. 1999)).

31. *See* Joan E. Steinman et al., *Amount in Controversy in Removed Actions—The Time for Determining the Amount in Controversy*, *in* 14C FEDERAL PRACTICE AND PROCEDURE § 3725.4 (rev. 4th ed., 2020) ("[W]hen the amount in controversy claimed in the plaintiff's state-court complaint exceeds $75,000, the complaint generally is determinative of the amount in controversy for purposes of federal removal jurisdiction.").

32. *See, e.g.*, MINN. R. CIV. P. 8.01 ("If a recovery of money for unliquidated damages is demanded in an amount less than $50,000, the amount shall be stated. If a recovery of money for unliquidated damages in an amount greater than $50,000 is demanded, the pleading shall state merely that recovery of reasonable damages in an amount greater than $50,000 is sought.").

worth $100,000 may merely plead that the amount sought exceeds $25,000.[33] Other states prohibit plaintiffs from even naming a specific dollar amount in their complaint.[34] States have adopted these pleading rules to eliminate exaggerated claims for damages and limit the publicity generated by multimillion-dollar claims.[35] However, these rules have "the unintended effect of making it difficult for federal courts to determine whether they have jurisdiction" over removed cases.[36] Does a complaint that alleges damages in excess of $25,000 mean that the amount in controversy is between $25,000 and $75,000? Or, instead, does the amount in controversy exceed $75,000 and thus satisfy the requirement for federal jurisdiction? To answer these questions, courts look to the nature of the plaintiff's claims as alleged in the complaint,[37] the removal notice,[38] the state court record,[39] and a variety of other relevant materials, such as settlement letters[40] and even damage awards in similar cases.[41]

In 2011, Congress passed the Jurisdiction and Venue Clarification Act (JVCA), which clarified the procedure for determining the amount in controversy when it is unclear from the face of the complaint.[42] In cases where the complaint seeks non-monetary relief or a money judgment and state law

33. N.C. R. CIV. P. 8(a)(2) ("In all negligence actions, and in all claims for punitive damages in any civil action, wherein the matter in controversy exceeds the sum or value of twenty-five thousand dollars ($25,000), the pleading shall not state the demand for monetary relief, but shall state that the relief demanded is for damages incurred or to be incurred in excess of twenty-five thousand dollars ($25,000).").

34. *E.g.*, COLO. R. CIV. P. 8(a) ("No dollar amount shall be stated in the prayer of demand for relief."). In South Carolina, a party is permitted to plead a sum certain for actual damages but "claims for punitive or exemplary damages shall be in general terms only and not for a stated sum . . . ." S.C. R. CIV. P. 8(a).

35. Alice M. Noble-Allgire, *Removal of Diversity Actions When the Amount in Controversy Cannot Be Determined from the Face of Plaintiff's Complaint: The Need for Judicial and Statutory Reform to Preserve Defendant's Equal Access to Federal Courts*, 62 MO. L. REV. 681, 689 (1997); S.C. R. CIV. P. 8(a) cmt. (explaining that the ban on pleading a sum certain in claims for punitive or exemplary damages is intended "to eliminate prayers for exaggerated and sensational claims for damages").

36. *See* Noble-Allgire, *supra* note 35, at 689–90.

37. Roe v. Michelin N. Am., Inc., 613 F.3d 1058, 1063 (11th Cir. 2010) ("[T]he Fifth Circuit has repeatedly acknowledged the power of district court judges to appraise the worth of plaintiffs' claims based on the nature of the allegations stated in their complaints.").

38. Williams v. Best Buy Co., 269 F.3d 1316, 1319 (11th Cir. 2001).

39. *See* Thompson v. Victoria Fire & Cas. Co., 32 F. Supp. 2d 847, 849 (D.S.C. 1999).

40. Grinnell Mut. Reinsurance Co. v. Haight, 697 F.3d 582, 585 (7th Cir. 2012) ("Although settlement negotiations are not admissible at trial pursuant to Federal Rule of Evidence 408 to prove liability for or invalidity of the claim or its amount, they can be considered 'to show the stakes' when determining whether the amount in controversy is met." (quoting Rising-Moore v. Red Roof Inns, Inc., 435 F.3d 813, 816 (7th Cir. 2006))).

41. Mullaney v. Endogastric Solutions, Inc., No. 11-62056, 2011 WL 4975904, at *2 (S.D. Fla. Oct. 19, 2011).

42. *See* Dart Cherokee Basin Operating Co. v. Owens, 574 U.S. 81, 88 (2014).

prohibits an *ad damnum* clause for a specific amount or permits recovery in excess of the amount demanded, the defendant may assert in the notice of removal that the amount-in-controversy requirement is met.[43] Upon this assertion, removal is proper if the district court finds, by a preponderance of the evidence, that the amount in controversy exceeds $75,000.[44]

The Supreme Court's 2014 decision in *Dart Cherokee Basin Operating Co. v. Owens* provides additional guidance.[45] First, the defendant's assertion in the notice of removal need only be "plausible," and if it is, the court should accept it unless the plaintiff contests.[46] In the event this assertion is challenged, the court may allow discovery on the issue upon which both sides are permitted to submit evidentiary proof.[47] The court then makes its finding, in accordance with the removal statute, as to whether the defendant has proven by a preponderance of the evidence that the amount-in-controversy requirement is satisfied.[48]

B. How Plaintiffs Attempt to Use Post-Removal Damage Stipulations to Support Remand

A plaintiff who believes removal was improper may challenge the removal by filing a motion to remand.[49] As previously mentioned, where the original pleading does not contain a specific *ad damnum* clause, a plaintiff may contest the defendant's allegations in the notice of removal by producing evidence that shows the amount in controversy did not exceed $75,000 at the

43. *See* 28 U.S.C. § 1446(c)(2)(A).

44. *See* § 1446(c)(2)(B); § 1332(a). Prior to the passage of the JVCA, courts were split as to the burden a defendant must meet to show the amount in controversy was sufficient where the complaint did not state a specific amount of damages. Some required defendants to prove to a "legal certainty" that the plaintiff's claim met the jurisdictional amount. *E.g.*, White v. J.C. Penney Life Ins. Co., 861 F. Supp. 25, 27 (S.D.W. Va. 1994). A similar test required defendants to prove to a "reasonable probability" that the amount in controversy supported federal jurisdiction. *E.g.*, Reason v. Gen. Motors Corp., 896 F. Supp. 829, 834 (S.D. Ind. 1995) (first quoting NLFC, Inc. v. Devcom Mid-America, Inc., 45 F.3d 231, 237 (7th Cir.1995); and then quoting Shaw v. Dow Brands, Inc., 994 F.2d 364, 366 (7th Cir. 1993)). Others followed the "preponderance of the evidence" standard, requiring defendants to prove that the amount in controversy more likely than not exceeded the jurisdictional amount. *E.g.*, Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1357 (11th Cir. 1996). Finally, a handful of courts articulated an "inverse legal certainty" test, under which the defendant had to show "that it does not appear to a legal certainty that the removed claim is for less than the jurisdictional amount." *E.g.*, Spann v. Style Crest Prods., Inc., 171 F. Supp. 2d 605, 607 (D.S.C. 2001).

45. *See* 574 U.S. 81 (2014).

46. *Id.* at 87, 89.

47. *Id.* at 88–89.

48. *See id.* at 88.

49. § 1447(c).

time of removal.[50] This leads to "somewhat bizarre situations" where the "plaintiff's personal injury lawyer protests up and down that [his or her] client's injuries are as minor and insignificant as can be" in hopes of evading the federal court's jurisdiction, "while attorneys for the [defendant] paint a sob story about how [the] plaintiff's life has been wrecked."[51]

To effectuate remand, plaintiffs often file post-removal damage stipulations or affidavits to "clarify" the amount of damages sought and persuade the court that the amount in controversy did not exceed $75,000 at the time of removal.[52] In so doing, plaintiffs argue their current willingness not to accept more than $75,000 demonstrates that the amount-in-controversy requirement was not met because they never intended to recover damages greater than $75,000 in state court.[53] These stipulations are not determinative. Instead, they are only one piece of evidence the court must weigh against the content of the complaint itself and any additional evidence submitted by the parties.[54]

St. Paul Mercury Indemnity Co. v. Red Cab Co. is the leading case addressing the effect of post-removal filings and amendments to the amount of damages sought.[55] In *St. Paul Mercury*, the plaintiff filed suit in state court, seeking $4,000 in damages arising from a dispute over whether an insurance contract covered worker's compensation claims.[56] At the time of filing, to warrant federal court jurisdiction, the amount in controversy had to have been greater than $3,000.[57] Accordingly, the defendant removed the case based on diversity jurisdiction.[58] In response, the plaintiff filed an amended complaint, which repeated the allegations of its original complaint and again sought $4,000 in damages.[59] The plaintiff also attached an exhibit that "gave the

50. *Dart Cherokee Basin*, 574 U.S. at 88.

51. Samuel-Bassett v. Kia Motors Am., Inc., 357 F.3d 392, 398 (3d Cir. 2004) (quoting Shaw v. Dow Brands, Inc., 994 F.2d 364, 366 (7th Cir. 1993)).

52. *See* Benjamin T. Clark, *A Device Designed to Manipulate Diversity Jurisdiction: Why Courts Should Refuse to Recognize Post-Removal Damage Stipulations*, 58 OKLA. L. REV. 221, 230–31 (2005); C. Kinnier Lastimosa, *One Man's Ceiling Is Another Man's Floor: The Effect of Post-Removal Damage Stipulations on the Amount in Controversy Requirement of a Diversity Case*, 81 WASH. U. L.Q. 633, 640 (2003).

53. *See, e.g.*, Bennett v. Hanesbrands, Inc., No. 2:11-0613, 2011 WL 1459213, at *1 (D.S.C. Apr. 15, 2011) ("[P]laintiff states that she filed her claim in state court 'with the intention that damages in this case would not exceed the sum or value of seventy five thousand ($75,000) dollars . . . .'"); Singleton v. Wal-Mart Stores, Inc., No. 2:18-1254, 2018 WL 3340373, at *2 n.2 (D.S.C. June 18, 2018) ("Plaintiff states that no such [amount in controversy] was set forth in the pleadings because she did not anticipate the case being removed from state court . . . .").

54. *See supra* notes 37–41 and accompanying text.

55. *See* St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 292 (1938).

56. *See id.* at 284–85.

57. *Id.* at 286.

58. *See id.* at 285.

59. *Id.*

names of employees and the amounts expended in connection with their asserted injuries totaling $1,380.89."[60]

The Supreme Court affirmed the district court's denial of remand and concluded that the sum claimed by the plaintiff controls the removal question.[61] Importantly, the Court also held that "events occurring subsequent to removal which reduce the amount recoverable, whether beyond the plaintiff's control or the result of his volition, do not oust the district court's jurisdiction once it has attached."[62] The Court explained that such a rule was "supported by ample reason."[63] First, if the plaintiff could always reduce the amount of damages to defeat federal jurisdiction, the defendant's right of removal would be effectively nullified.[64] Second, because a change in citizenship does not defeat diversity jurisdiction once a case has been filed, neither should a reduction of the amount in controversy.[65] Ultimately, if the amount in controversy exceeded the jurisdictional minimum at the time of removal, it is now generally accepted that a plaintiff's post-removal stipulation, affidavit, or amendment reducing the amount in controversy to $75,000 or below does not deprive a federal court of jurisdiction.[66]

III. EFFECT OF POST-REMOVAL DAMAGE STIPULATIONS ON THE AMOUNT-IN-CONTROVERSY ANALYSIS

A. How Courts in the District of South Carolina Weigh Post-Removal Damage Stipulations

In line with *St. Paul Mercury*, courts in the District of South Carolina have consistently found that, if the amount in controversy can be ascertained from the face of the complaint, any post-removal stipulation or affidavit reducing the requested damages below the jurisdictional threshold should be disregarded.[67] For example, in *Covington v. Syngenta Corp.*, the court

60. *Id.*
61. *See id.* at 285, 291, 296.
62. *Id.* at 293.
63. *Id.* at 294.
64. *See id.*
65. *See id.* at 295.
66. Thompson v. Victoria Fire & Cas. Co., 32 F. Supp. 2d 847, 849 (D.S.C. 1999); *see* Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 872 (6th Cir. 2000). *But see* Bailey v. Wal-Mart Stores, Inc., 981 F. Supp. 1415, 1415, 1417 (N.D. Ala. 1997) (allowing the plaintiff's stipulation to support her motion to remand sixteen months after removal and after partial summary judgment had been granted in favor of the defendant even though the plaintiff originally sought $500,000 in state court).
67. *See* Covington v. Syngenta Corp., 225 F. Supp. 3d 384, 390 (D.S.C. 2016) ("[F]or the purpose of a jurisdictional determination, the only reasonable interpretation available from the

disregarded the plaintiff's post-removal stipulation because the "only reasonable interpretation available from the face of the complaint at the time of removal [was] that the alleged damages . . . exceed[ed] $75,000."[68] The plaintiff alleged the defendant sold him defective agricultural chemicals that damaged approximately 1,200 acres of his cotton crops.[69] He asserted causes of action for breach of warranty and negligence and "pray[ed] for a judgment in his favor as well as any other relief deemed to be proper."[70] Based on these allegations, the court conceded the plaintiff's claims were arguably indeterminate.[71]

However, the court noted that, excluding ginning costs, the average gross value of producing 1,200 acres of cotton on the southern seaboard in 2012 was approximately $1 million.[72] Although the court acknowledged it had "no idea" whether this estimate accurately described the plaintiff's cotton crops, other production expenses, and the damage to his crops, it nonetheless concluded the only "reasonable interpretation" of the plaintiff's stated loss of 1,200 acres of cotton was that the claim exceeded $75,000.[73] Because the court found subject-matter jurisdiction was proper at the time of removal, it therefore viewed the plaintiff's stipulation as a "post-removal maneuver to defeat jurisdiction, prohibited by *St. Paul Mercury*."[74]

Conversely, where a complaint is ambiguous as to whether the amount in controversy exceeded the jurisdictional minimum, some South Carolina

face of the complaint at the time of removal is that the alleged damages—the loss of up to 1200 acres of cotton—exceeds $75,000. Plaintiff's stipulation is not the 'first evidence of the value of the claim' in this case."); Zuber v. Goodyear Tire & Rubber Co., No. 3:19-cv-0015, 2019 WL 4439431, at *2 (D.S.C. Sept. 17, 2019) ("The court finds the amount in controversy reasonably exceeded $75,000 at the time Plaintiff filed his Complaint and Plaintiff's post-removal stipulation does not destroy this court's subject matter jurisdiction."); Meadows v. Nationwide Mut. Ins. Co., No. 1:14-cv-04531, 2015 WL 3490062, at *5 (D.S.C. June 3, 2015) ("[B]ecause the court has found that it was a legal certainty or, at least, within a reasonable probability that Plaintiff's claims exceeded $75,000.00 upon removal, Plaintiff's post-removal stipulation does not divest this court of jurisdiction that has already attached."); Mattison v. Wal-Mart Stores, Inc., No. 6:10-cv-01739, 2011 WL 494395, at *3–4, (D.S.C. Feb. 4, 2011) (holding that the plaintiff's post-removal statement did not "deprive [the] court of jurisdiction" where there was a "reasonable probability that [the plaintiff] could recover in excess of $75,000.00 if she were to prevail on all of her claims").

68. 225 F. Supp. 3d 384, 390 (D.S.C. 2016).
69. *Id.* at 387.
70. *Id.* at 387, 389.
71. *Id.* at 389.
72. *Id.* at 390.
73. *Id.*
74. *Id.*

district courts have been willing to weigh a binding, post-removal stipulation as evidence tending to show that it did not.[75]

For example, in *Ferguson v. Wal-Mart Stores, Inc.*, the court found the plaintiff's post-removal stipulation was persuasive as to whether the amount-in-controversy requirement was satisfied at the time of removal.[76] In *Ferguson*, the plaintiff originally sought unspecified actual and punitive damages after being struck by a metal shelf in the defendant's store.[77] Once the case was removed on the basis of diversity jurisdiction, the plaintiff filed a motion to remand and attached a stipulation stating the amount in controversy did not exceed $50,000—the jurisdictional threshold at the time.[78] Interestingly, the court held *St. Paul Mercury* was not controlling in this scenario.[79] Relying on an earlier decision from the Eastern District of Kentucky, the court explained that "[u]nlike the [*St. Paul*] scenario, [the plaintiff's] subsequent stipulation did not have the effect of changing the information on which [the defendant] relied, but instead providing the information for the first time."[80] As a result, the court viewed the stipulation as a clarification "permitted, not forbidden" by *St. Paul Mercury* and thus remanded the case to state court.[81]

Similarly, the court in *Stanley v. Auto-Owners Insurance Co.* interpreted the plaintiffs' post-removal stipulation as a clarification of the damages

75. *See* Sanders v. Progressive Direct Ins. Co., No. 9:20-cv-2480, 2020 WL 5017855, at *3 (D.S.C. Aug. 25, 2020) ("This is not a case in which the plaintiff is stipulating to a reduction in the damages sought in his complaint. Instead, Sanders's post-removal stipulation clarifies that the unspecified amount of damages his complaint seeks is below the jurisdictional level."); Walker v. Poland, No. 4:09-cv-02713, 2009 WL 5195762, at *1 (D.S.C. Dec. 22, 2009) ("The court is in agreement with other decisions characterizing a post-removal stipulation regarding the amount in controversy as a clarification permitted by *St. Paul*, not an amendment forbidden by *St. Paul*."); Cox v. Willhite Seed, Inc., No. 1:13-cv-02893, 2014 WL 6816990, at *2 (D.S.C. Dec. 4, 2014) ("[T]he court accepts Plaintiff's Stipulation as to Damages that the total amount of damages he is seeking is less than $75,000.00 and remands the matter to state court because the jurisdictional threshold for diversity jurisdiction does not exist in this case."); Tommie v. Orkin, No. 8:09-1225, 2009 WL 2148101, at *2 (D.S.C. July 15, 2009) ("The complaint requests an unspecified amount of damages. The court interprets Tommie's statement in the motion as to the amount in controversy as a stipulation that she cannot recover a total amount of actual and punitive damages exceeding the sum of $75,000.00, exclusive of interest and costs."); Clifton v. Allen, No. 9:17-cv-02920, 2018 WL 3095026, at *2 (D.S.C. June 22, 2018) ("Because of [the plaintiff's] ambiguous and indeterminate claims, the court is able to consider [the plaintiff's] stipulations that the controversy does not exceed $75,000 and that he will not accept anything beyond this amount.").

76. *See* No. 4:94-2696-22, 1994 WL 653479, at *2 (D.S.C. Nov. 15, 1994).

77. *Id.* at *1–2.

78. *Id.* at *1.

79. *Id.* at *2.

80. *Id.* (alterations in original) (quoting Cole v. Great Atl. & Pac. Tea Co., 728 F. Supp. 1305, 1309 (E.D. Ky. 1990)).

81. *Id.*

sought and determined it bound them to collect no more than $75,000 upon remand.[82] The plaintiffs sought actual and punitive damages for an alleged breach of contract and bad faith failure to pay an insurance claim.[83] While the plaintiffs did not allege a specific amount of damages in their complaint, a proof of loss revealed the insurance claim in question was for $47,520.53 resulting from flood damage to the plaintiffs' home.[84] Like the *Ferguson* court, the *Stanley* court held that *St. Paul Mercury* was not controlling in this scenario because that case "[did] not reach the question of whether a post-removal stipulation that clarifies, rather than reduces, an unspecified amount in controversy defeats diversity [jurisdiction]."[85] Therefore, in the court's mind, the plaintiffs' clarification was "permitted" under *St. Paul Mercury*.[86] The court also noted it was aware of the potential for abuse by litigants who "use the stipulation mechanism as a ploy to retain a more favorable state court jurisdiction" but concluded that the limiting nature of the plaintiffs' stipulation was enough to alleviate this concern.[87]

B. *Issues Arising from the District of South Carolina's Treatment of Post-Removal Damage Stipulations*

Several issues arise from the District of South Carolina's treatment of post-removal damage stipulations. First, South Carolina district courts apply inconsistent legal standards when determining whether a complaint is ambiguous as to the amount of damages sought or, instead, is removable on its face.[88] This initial determination is crucial because the evidentiary weight that a plaintiff's post-removal stipulation will be given hinges on whether the district court decides the amount in controversy can be ascertained from the complaint. If a court concludes it can, then post-removal stipulations are generally disregarded under *St. Paul Mercury*.[89] Conversely, if a court determines the claims are truly ambiguous or indeterminate, it may be willing to consider a "clarifying" post-removal damage stipulation.[90]

In making their initial determination, several courts have held that requests for punitive damages are a strong indication that the amount-in-

82. 423 F. Supp. 3d 225, 229–30 (D.S.C. 2019).
83. *Id.* at 228.
84. Exhibit "A" at 2, *Stanley*, 423 F. Supp. 3d at 225.
85. *Stanley*, 423 F. Supp. 3d at 229–30, 230 n.2.
86. *Id.* at 229.
87. *See id.* at 231.
88. *See infra* notes 91–92 and accompanying text.
89. *See* cases cited *supra* note 67.
90. *See* cases cited *supra* note 75.

controversy requirement has been met.[91] Another line of cases has rejected this approach, however, asserting that "it was never the intent of Congress for the federal courts to exercise jurisdiction over every state case in which punitive damages have been pled and the parties are of diverse citizenship."[92] As an example of this divide, consider two South Carolina district court cases: *Hayes v. Canopius US Insurance Inc.*[93] and *Thompson v. Victoria Fire and Casualty Co.*[94]

In *Hayes*, the plaintiff asserted a claim against the defendant insurer, expressly requesting that the court order the defendant to pay a $50,000 judgment that the plaintiff had already obtained against one of the defendant's policyholders.[95] The complaint also asserted four additional claims against the defendant and sought actual, consequential, and punitive damages and attorney's fees for those claims.[96] As to whether the additional four claims plus the $50,000 claim exceeded $75,000, the court found the complaint was "indeterminate."[97] On the basis of its finding, the court accepted the plaintiff's

91. *See, e.g.*, McClurkin v. Champion Labs., Inc., No. 0:11-cv-02401, 2011 WL 5117599, at *3 (D.S.C. Oct. 25, 2011) ("Although the actual damages in this case may be less than $75,000, Plaintiff's decision to seek punitive damages increases the amount in controversy to above $75,000."); Mattison v. Wal-Mart Stores, Inc., No. 6:10-cv-01739, 2011 WL 494395, at *3 (D.S.C. Feb. 4, 2011) (denying remand where the plaintiff's request for punitive damages made it "difficult . . . to prove she could not possibly recover the jurisdictional limit were she to prevail at trial"); Woodward v. Newcourt Com. Fin. Corp., 60 F. Supp. 2d 530, 532 (D.S.C. 1999) ("[The plaintiff's] claim for punitive damages alone makes it virtually impossible to say that the claim is for less than the jurisdictional amount."); Meadows v. Nationwide Mut. Ins. Co., No. 1:14-cv-04531, 2015 WL 3490062, at *4 (D.S.C. June 3, 2015) ("In light of Plaintiff's six causes of actions against Defendant and Plaintiff's prayer for actual and compensatory damages, treble damages, attorney's fees, and punitive damages, the court finds it falls within a legal certainty or reasonable probability that the value of Plaintiff's claims exceed $75,000.00."); Zuber v. Goodyear Tire & Rubber Co., No. 3:19-cv-0015, 2019 WL 4439431, at *2 (D.S.C. Sept. 17, 2019) ("[W]here Plaintiff pled actual damages from a dangerous accident leading to 'serious injury, pain and suffering and emotional distress,' in addition to punitive damages, it is reasonable to conclude that the amount requested was over the jurisdictional threshold.").

92. Hagood v. Electrolux Home Prods., Inc., No. 8:06-1799, 2006 WL 1663804, at *2 (D.S.C. June 15, 2006); *see also* Hamilton v. Ocwen Loan Servicing, LLC, No. 9:12-CV-03111, 2013 WL 499159, at *6 (D.S.C. Feb. 7, 2013) ("Plaintiffs' request for punitive damages alone does not show that the jurisdictional minimum has been met."); Moore v. Pendergraph Cos., No. 2:13-3122, 2014 WL 897138, at *3 (D.S.C. Mar. 6, 2014) (holding that the amount in controversy did not exceed $75,000 where the plaintiff sought $63,000 in addition to punitive damages); Bencivengo v. Jewelry Ins. Brokerage of N. Am., No. 2:16-cv-03200, 2017 WL 2608848, at *3 (D.S.C. June 16, 2017) (holding that the plaintiff's original complaint, which set actual damages at $23,000, in addition to unspecified punitive damages, did not put the defendants on notice that the amount in controversy exceeded $75,000).

93. No. 2:17-cv-02216, 2018 WL 396846 (D.S.C. Jan. 12, 2018).

94. 32 F. Supp. 2d 847 (D.S.C. 1999).

95. *See Hayes*, 2018 WL 395846, at *2.

96. *Id.*

97. *Id.* at *3.

stipulation, which limited his recovery to below $75,000, and remanded the case to state court.[98]

In *Thompson*, the plaintiff sued for "breach of contract, bad faith failure to pay insurance benefits, and negligent failure to pay insurance benefits."[99] He sought actual damages in the amount of $25,000 as well as consequential damages, punitive damages, attorney's fees, and costs.[100] Unlike in *Hayes*, the court concluded there was "no dispute" that the amount in controversy exceeded $75,000—largely due to the claim for punitive damages—and denied the plaintiff's motion to remand.[101] As evidenced by *Hayes* and *Thompson*, the inconsistent legal standards applied in light of a claim for punitive damages provide little guidance to litigants assessing the "potential for, and propriety of, removal."[102]

Second, some courts have contradicted *St. Paul Mercury* by allowing a post-removal stipulation to support the plaintiff's motion to remand despite the amount in controversy being satisfied at the time of removal.[103] For example, the court in *Hayes* initially noted the plaintiff's four additional claims "would likely amount to more than $25,000 to meet the $75,000 amount-in-controversy requirement when added to the requested $50,000 judgment," especially because the plaintiff stood to recover treble damages under the South Carolina Unfair Trade Practices Act.[104] Despite this observation, the court went on to accept the plaintiff's stipulation and remand the case to state court.[105] Similarly, the court in *Wanning v. Duke Energy Carolinas, LLC* remanded the case after the plaintiffs filed a limiting damage stipulation nearly fifteen months after removal—even though the plaintiffs had claimed over $125,000 in damages three days prior to moving for remand.[106] Critically, the *Wanning* court explicitly acknowledged it had jurisdiction over the case at the time of removal.[107] Where the amount in controversy surpasses $75,000 at the time of removal, courts allowing post-

98. *Id.*

99. *Thompson*, 32 F. Supp. 2d at 847–48.

100. *Id.* at 848.

101. *See id.* at 848–49.

102. *See* Oxier v. Roberson, No. Civ.A. 5:00-CV-8, 2000 WL 34449334, at *4 (N.D. W. Va. Mar. 2, 2000).

103. *See Hayes*, 2018 WL 395846, at *3; Wanning v. Duke Energy Carolinas, LLC, No. 8:13-cv-00839, 2014 WL 12607975, at *2 (D.S.C. Aug. 6, 2014).

104. *Hayes*, 2018 WL 395846, at *2.

105. *See id.* at *2–3.

106. *See Wanning*, 2014 WL 12607975, at *2. Even though the defendant consented to remand, courts "cannot remand a case simply because the parties have come to an understanding after removal." Bengfort v. Twist, No. 2:11-cv-00174, 2011 WL 2111893, at *1 (S.D. W. Va. May 26, 2011).

107. *Wanning*, 2014 WL 12607975, at *4.

removal damage stipulations to "deprive" them of jurisdiction are exceeding their discretion.[108]

Third, South Carolina district courts continue to incorrectly state that defendants must prove to a "legal certainty" or "reasonable probability" that the amount in controversy has been satisfied.[109] The 2011 amendments to the removal statute expressly provide a defendant need only show "by a preponderance of the evidence" that the amount in controversy has been satisfied.[110] In other words, a defendant need only show that it is more likely than not that the plaintiff has a possibility of recovering more than $75,000. Therefore, a removing defendant in the District of South Carolina does not have to prove by a "legal certainty" that the amount in controversy exceeds the jurisdictional minimum.[111]

Finally, courts in the District of South Carolina facilitate forum-shopping and gamesmanship by recognizing post-removal stipulations and allowing those stipulations to support remand orders.[112] South Carolina law allows recovery of damages in excess of the relief requested in a complaint.[113] Thus, plaintiffs are encouraged to file ambiguous complaints in state court seeking unnamed compensatory and punitive damages "against the chance the case will not be removed" and then file a stipulation or affidavit, which attempts to "clarify" the amount of damages sought and destroy diversity jurisdiction, if the case is removed to federal court.[114] Consider, for example, *Carter v.*

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108. *See* St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 292 (1938) ("And though, as here, the plaintiff after removal, by stipulation, by affidavit, or by amendment of his pleadings, reduces the claim below the requisite amount, this does not deprive the district court of jurisdiction.").

109. *See, e.g.*, Stanley v. Auto-Owners Ins. Co., 423 F. Supp. 3d 225, 228 (D.S.C. 2019) ("[C]ourts within the District of South Carolina have leaned towards requiring defendants in this position to show either to a 'legal certainty' or at least within a 'reasonable probability' that the amount in controversy has been satisfied." (quoting Clifton v. Allen, No. 9:17-cv-02920, 2018 WL 3095026, at *2 (D.S.C. June 22, 2018))); Gill v. Crowe, No. 1:15-cv-01827, 2015 WL 4231798, at *3 (D.S.C. July 10, 2015) ("The court, having reviewed the pleadings and documents of record filed in this case, is of the opinion that Defendant has not met his burden of showing either to a 'legal certainty' or at least within 'reasonable probability' that the amount in controversy has been satisfied.").

110. 28 U.S.C. § 1446(c)(2)(B).

111. *See generally* Gallagher v. Fed. Signal Corp., 524 F. Supp. 2d 724, 728 (D. Md. 2007) (noting that the defendant's burden in proving that the amount in controversy exceeds $75,000 is higher under the legal certainty standard than the preponderance of evidence standard).

112. *See infra* notes 113–120 and accompanying text.

113. *See* S.C. R. CIV. P. 54(c) ("[E]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.").

114. *Cf.* Purple Passion, Inc. v. RCN Telecom Servs., 406 F. Supp. 2d 245, 247 (S.D.N.Y. 2005) (suggesting that plaintiffs engage in gamesmanship by stipulating their damages are less than the amount-in-controversy requirement once their case is removed to federal court).

Bridgestone Americas, Inc.[115] In that case, the plaintiff requested compensatory damages and "such other relief . . . deem[ed] just and necessary" for injuries arising out of an accident allegedly caused by a tire manufactured by the defendant that "failed and shredded causing [the plaintiff] to lose control of her motor vehicle and . . . strike an embankment."[116] The defendant filed a timely notice of removal, and nearly five months later, the plaintiff moved to remand and filed a notarized affidavit, which stated she "[would] not seek to recoup or execute collection for any amount beyond the principle amount declared" and "agree[d] that the value of the amount in controversy [was] not more than $60,000.00."[117] Because the plaintiff's complaint did not specify an amount of damages, the court interpreted her notarized affidavit as a stipulation, which clarified that the amount of damages sought was below $75,000.[118] Accordingly, the court concluded it was without subject-matter jurisdiction and remanded the case to state court.[119]

Plaintiffs, like the one in *Carter*, are emboldened to file indeterminate complaints and, later, post-removal damage stipulations in hopes that the district court will find the amount in controversy was truly ambiguous, in which case the court will treat the stipulation as a clarification of the amount of damages sought. South Carolina district courts should be wary of such "plaintiffs who devilishly move to limit their damages and return to state court only after litigation has taken an unfavorable turn."[120]

IV. RECOMMENDATIONS FOR COURTS IN THE DISTRICT OF SOUTH CAROLINA

As discussed, the jurisdictional dilemmas posed by post-removal damage stipulations result from state court complaints lacking a specific *ad damnum* clause. It is these ambiguous complaints that give courts the opportunity to consider post-removal stipulations in the first place because, if the amount in controversy is determinate at the time of removal, there is no need to "clarify" the complaint, and any damage stipulation will be disregarded.[121]

Accordingly, to reduce the rate at which defendants remove ambiguous complaints, the District of South Carolina should adopt a bright-line rule: Where a complaint does not "explicitly state[], either numerically or in so many words, that the amount in controversy satisfies the federal jurisdictional

115. No. 2:13-CV-00287, 2013 WL 3946233 (D.S.C. July 31, 2013).
116. *Id.* at *1.
117. *Id.*
118. *See id.* at *3.
119. *Id.*
120. *See* Brooks v. Pre-Paid Legal Servs., 153 F. Supp. 2d 1299, 1302 (M.D. Ala. 2001).
121. *See* cases cited *supra* note 67.

requirement," the thirty-day period for removal should not begin.[122] This rule allows defendants to ascertain the amount of damages sought by plaintiffs through state court discovery without "accidentally letting the thirty-day window to federal court close when it is unclear that the initial pleading satisfies the amount in controversy."[123]

One court has observed, "In the Wild West, the rule was 'shoot first, ask questions later.' In modern civil litigation, the rule seems to be 'remove first, ask questions later.'"[124] This is because removing defendants confronted with indeterminate complaints face a dilemma.[125] If they wait to verify that the claim is for more than $75,000 and remove after thirty days, the removal may be untimely if the court concludes that the basis for removal was apparent from the initial pleading.[126] Conversely, immediate removal creates a risk that the court will find removal premature and remand the case to state court.[127] The court could also impose fees on defendants for improper removal.[128] At worst, defense counsel could be sanctioned under Rule 11 of the Federal Rules of Civil Procedure for noticing removal without making an adequate inquiry.[129]

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122. *See* GEORGENE VAIRO, 16 MOORE'S FEDERAL PRACTICE – CIVIL § 107.140 (3d ed. 2020).

123. *See* Mumfrey v. CVS Pharm., Inc., 719 F.3d 392, 399 (5th Cir. 2013) (citing Chapman v. Powermatic, Inc., 969 F.2d 160, 163 (5th Cir. 1992)).

124. May v. Wal-Mart Stores Inc., 751 F. Supp. 2d 946, 947 (E.D. Ky. 2010).

125. *See* Rollwitz v. Burlington N. R.R., 507 F. Supp. 582, 588 n.7 (D. Mont. 1981).

126. *See, e.g.*, Napier v. Humana Marketplace, Inc., 826 F. Supp. 2d 984, 989 (N.D. Tex. 2011) (finding removal untimely because the plaintiff's complaint put the defendant "on notice that the amount in controversy exceeded $75,000"); McCoy v. GMC, 226 F. Supp. 2d 939, 942–43 (N.D. Ill. 2002) ("[W]e hold that the removability of plaintiff's suit was obvious from the face of the complaint, and that therefore [defendant] should have removed the case within 30 days of receiving the initial complaint."); Carroll v. United Air Lines, 7 F. Supp. 2d 516, 517, 522–23 (D.N.J. 1998) (remanding case sua sponte and holding that removal was untimely because "[the defendant] knew or should have known upon receipt of the Complaint that the amount in controversy would meet the requirements for diversity jurisdiction").

127. *See, e.g.*, Shiflette v. Synthes, Inc., No. Civ.A 806-347, 2006 WL 287501, at *3 (D.S.C. Feb. 6, 2006) (granting remand because the defendant did not present "a sufficient factual basis for the Court to make an informed decision as to whether Plaintiff [could] . . . recover damages in excess of $75,000 . . . .").

128. *See* 28 U.S.C. § 1447(c) (stating that an order to remand "may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal"); *see also* Caufield v. EMC Mortg. Corp., 803 F. Supp. 2d 519, 530 (S.D. W. Va. 2011) (awarding plaintiff attorney's fees because "there [was] no[t] a factual basis on the record for the defendant's argument that the amount in controversy exceed[ed] $5,000,000" in order to establish jurisdiction under the Class Action Fairness Act).

129. *See* Lovern v. GMC, 121 F.3d 160, 163 (4th Cir. 1997) ("If a defendant were required to file a notice of removal within 30 days after service of the initial pleading, even where the pleading did not reveal a ground for removal, he would often be faced with an intractable dilemma of either risking Rule 11 sanctions for noticing removal without making an adequate inquiry or forgoing removal altogether.").

In response to these concerns, several circuits have held where a complaint does not "affirmatively reveal on its face" that the plaintiff is seeking damages in excess of $75,000, the thirty-day window for removal does not begin upon the defendant's receipt of the initial pleading.[130] Courts within the District of South Carolina are guided by the Fourth Circuit's decision in *Lovern v. General Motors Corp.*, in which the court concluded:

> [W]e will not require courts to inquire into the subjective knowledge of the defendant, an inquiry that could degenerate into a mini-trial regarding who knew what and when. Rather, we will allow the court to rely on the face of the initial pleading and on the documents exchanged in the case by the parties to determine when the defendant had notice of the grounds for the removal, *requiring that those grounds be apparent within the four corners of the initial pleading or subsequent paper*.[131]

Thus, in the District of South Carolina, the thirty-day clock for removal should not begin when a defendant is served with a complaint that fails to state a specific amount of damages.[132]

In this scenario, a defendant can obtain a statement of damages from the plaintiff via a request for admission or other discovery device.[133] For example, the defendant may ask the plaintiff to admit that his or her damages are *not* greater than $75,000. If the plaintiff admits, the case is not removable and will remain in state court for the time being. However, if the plaintiff denies this request, the response will be considered the first "other paper" from which it

130. *E.g.*, Chapman v. Powermatic, Inc., 969 F.2d 160, 163 (5th Cir. 1992) ("We believe the better policy is to focus the parties' and the court's attention on what the initial pleading sets forth, by adopting a bright line rule requiring the plaintiff, if he wishes the thirty-day time period to run from the defendant's receipt of the initial pleading, to place in the initial pleading a specific allegation that damages are in excess of the federal jurisdictional amount."); *In re* Willis, 228 F.3d 896, 897 (8th Cir. 2000) (per curiam) ("We find the thirty-day time limit of section 1446(b) begins running upon receipt of the initial complaint only when the complaint explicitly discloses the plaintiff is seeking damages in excess of the federal jurisdictional amount."); Moltner v. Starbucks Coffee Co., 624 F.3d 34, 38 (2nd Cir. 2010) ("[T]he removal clock does not start to run until the plaintiff serves the defendant with a paper that explicitly specifies the amount of monetary damages sought.").

131. *Lovern*, 121 F.3d at 162 (emphasis added).

132. *See, e.g.*, Jones v. Wesby, No. 5:09-cv-2204, 2009 WL 10713777, at *2 (D.S.C. Nov. 16, 2009) ("Because the Complaint does not expressly state that there is at least $75,000 in controversy, the court declines to find that the case stated by the Complaint was removable.").

133. *See, e.g.*, Mack v. Wal-Mart Stores, Inc., No. 1:07-cv-3105, 2007 WL 3177000, at *2 (D.S.C. Oct. 26, 2007) ("Although Plaintiff requested damages in excess of $50,000.00 in her Complaint, it appears to this court that based upon Plaintiff's responses to [Defendant's] requests for admission that Plaintiff seeks an amount of damages in excess of the minimum jurisdictional amount of this court." (footnote omitted)).

can be determined that the case is removable.[134] This denial should also be considered strong evidence that the amount in controversy has been satisfied.[135]

Moreover, if a plaintiff denies the defendant's request to admit, the plaintiff should be judicially estopped from stipulating after removal that the amount in controversy does not exceed $75,000 and from attempting to limit damages below that amount.[136] Judicial estoppel is an equitable doctrine invoked to "prevent a party from 'playing fast and loose' with the courts[] and to protect the essential integrity of the judicial process."[137]

This approach does not unfairly prejudice plaintiffs. South Carolina's Rules of Civil Procedure allow a plaintiff to plead that the amount in controversy does not exceed a stated sum—technically up to $75,000.00—if

134. *See, e.g.*, Gillen v. Wal-Mart Stores, Inc., No. 3:06-358, 2006 WL 844319, at *5 (D.S.C. May 1, 2006) ("[T]he thirty-day time period for removal did not begin to run until [Defendant] received the plaintiff's response to its Request to Admit concerning the amount of damages being sought."); Speer v. Ardovini, No. 4:08-18, 2008 WL 11349728, at *3 (D.S.C. Aug. 25, 2008) ("Defendant promptly served on plaintiff a request to admit one fact: that the amount in controversy exceeded $75,000 to establish the threshold amount in controversy. Defendant timely removed this case pursuant to § 1446(b) after plaintiff failed to respond to the Request to Admit.").

135. *See, e.g.*, Everhart v. Waffle House, Inc., No. 7:10-cv-01424, 2011 WL 13312349, at *3 (D.S.C. Feb. 1, 2011) (denying remand because the plaintiff's denial that the amount in controversy was less than $75,000.01 alone provided "sufficient proof" that the amount in controversy exceeded $75,000); Freeman v. Witco Corp., 984 F. Supp. 443, 450 (E.D. La. 1997) (holding that the plaintiff's response to the defendant's request for admission, "wherein [the plaintiff] denied that he would not seek damages nor execute on a judgment rendered in his favor in excess of $75,000" constituted "other paper" that affirmatively showed the plaintiff was seeking damages in excess of $75,000); Easley v. Lowe's Home Ctrs., Inc., No. 1:06CV291, 2007 WL 2127281, at *2 (N.D. Miss. July 23, 2007) ("It is now axiomatic that when a plaintiff fails to admit or stipulate that he will not accept more than $75,000 in damages, a federal court may deem that failure to be sufficient proof that the amount in controversy exceeds $ 75,000 and that the federal diversity jurisdictional amount is therefore satisfied." (first citing Field v. Household Bank, 380 F. Supp. 2d 530, 532 (N.D. Miss. 2003); then citing Blount v. Hardcastle, No. 2:04cv203, 2006 WL 278567, at *2 (N.D. Miss Jan. 5, 2006); and then citing Holmes v. Citifinancial Mortg. Co., 436 F. Supp. 2d 829, 832 (N.D. Miss. 2006))).

136. *Cf.* Spann v. Style Crest Prods., 171 F. Supp. 2d 605, 610 n.5 (D.S.C. 2001) ("[A] subsequent increase in the amount sought by plaintiffs would not be a good career move for plaintiffs' attorneys considering their anticipated future dealings with this court and would probably be barred by judicial estoppel."); Sanford v. Gardenour, No. 99-5504, 2000 WL 1033025, at *3 (8th Cir. July 17, 2000) ("We hold that plaintiffs are estopped from arguing their case is worth less than $75,000 by their Rule 26 disclosures."); Ratliff v. Merck & Co., F. Supp. 2d 571, 576 (E.D. Ky. 2005) ("[B]ecause Plaintiffs' complaint alleges that damages will not exceed $75,000, Plaintiffs are judicially estopped from taking an inconsistent position in the future.").

137. Allen v. Zurich Ins. Co., 667 F.2d 1162, 1166 (4th Cir. 1982). Another court has held, quite colorfully, that "courts are under no compulsion to heed the shifting theories of 'chameleonic litigants.'" DeGuiseppe v. Vill. of Bellwood, 68 F.3d 187, 191 (7th Cir. 1995).

the plaintiff wishes to stay in state court.[138] This pleading limits the claim "for all purposes."[139] Additionally, concerned plaintiffs can file a binding affidavit or stipulation with their complaints to ensure the amount in controversy does not exceed the jurisdictional minimum.[140]

As to defendants, adopting this bright-line rule would not preclude them from removing within thirty days of receiving the initial pleading.[141] For example, if the complaint alleged a loss of twenty new vehicles and did not contain a specific *ad damnum* clause,[142] the defendant would have little trouble proving by a preponderance of the evidence that the amount in controversy is greater than $75,000. In this situation, even if the defendant failed to affirm the plaintiff's damages via a pre-removal discovery request, a district court should still give little weight to any "clarifying" post-removal stipulation or affidavit that attempts to reduce damages and destroy diversity jurisdiction. The plaintiff had an opportunity under the South Carolina Rules of Civil Procedure to avoid federal court and chose not to.[143] Instead, the plaintiff's stipulation should be viewed as an "improper attempt to avoid federal jurisdiction by amending damages," and any motion to remand should be denied.[144]

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138. S.C. R. CIV. P. 8(a); *see also* Brooks v. GAF Materials Corp., 532 F. Supp. 2d 779, 782–83 (D.S.C. 2008) (remanding the case because the plaintiffs' amended complaint "plainly provide[d] a specific limitation on damages").

139. S.C. R. CIV. P. 8(a); *see also Brooks*, 532 F. Supp. 2d at 782–83 (same).

140. *See* Woodward v. Newcourt Com. Fin. Corp., 60 F. Supp. 2d 530, 533 n.7 (D.S.C. 1999) (noting that a state court plaintiff "may, before removal, file a binding affidavit confirming that damages he is suing for shall not exceed $75,000"); Jones v. Allstate Ins. Co., 258 F. Supp. 2d 424, 427 n.2 (D.S.C. 2003) ("[T]his court strongly suggests that any plaintiff wishing to limit a claim for monetary damages file a pre-removal sworn affidavit of both the plaintiff and counsel disclaiming any monetary recovery in excess of $ 75,000.").

141. Lipford v. Boehringer Ingelheim Pharms., Inc., No. 13-2858, 2014 WL 458359, at *3 (W.D. La. Feb. 4, 2014) ("[A]lthough the clock doesn't begin ticking unless the damages claimed are affirmatively set forth, a defendant is always free to remove the case within that 30 days by showing by a preponderance of the evidence that the claim is really for more than $75,000."); Pretka v. Kolter City Plaza II, Inc., 608 F.3d 744, 767 n.23 (11th Cir. 2010) ("This case . . . concerns a defendant that can, within thirty days of receiving the initial complaint, marshal enough evidence of the jurisdictional facts to support a notice of removal . . . . [N]othing in § 1446(b) or elsewhere requires a defendant . . . to wait until the plaintiff gives it evidence establishing what it could already establish.").

142. This hypothetical is borrowed from *Covington v. Syngenta Corp.*, 225 F. Supp. 3d 384, 389 (D.S.C. 2016).

143. *See* S.C. R. CIV. P. 8(a) ("[A] party may plead that the total amount in controversy shall not exceed a stated sum which shall limit the claim for all purposes.").

144. Zuber v. Goodyear Tire & Rubber Co., No. 3:19-cv-0015, 2019 WL 4439431, at *1 (D.S.C. Sept. 17, 2019).

V. CONCLUSION

The District of South Carolina's current approach to calculating the amount in controversy in removed cases where the complaint is unclear has resulted in the disparate treatment of post-removal damage stipulations. A degree of predictability and reliability is needed as litigants are left wondering what legal standards will be applied. This Note's proposed bright-line rule discourages defendants from removing cases prematurely by giving them an opportunity to affirmatively determine the amount in controversy via state court discovery. In cases where a defendant takes advantage of this opportunity, any post-removal damage stipulation would become "irrelevant," just as *St. Paul Mercury* intended.[145] This rule protects the defendant's statutory right to removal, encourages transparency and clarity at the outset of the case, and greatly reduces the potential that plaintiffs will participate in forum-shopping and gamesmanship. Finally, and perhaps most importantly, it eliminates a waste of both the parties' and judiciary's time and resources "associated with the unnecessary battle over the issue of remand."[146]

145. *In re* Shell Oil Co., 970 F.2d 355, 356 (7th Cir. 1992) ("Litigants who want to prevent removal must file a binding stipulation or affidavit with their complaints; once a defendant has removed the case, *St. Paul* makes later filings irrelevant.").

146. Masters v. Lin, No. 6:14-2473, 2015 WL 12830505, at *7 (D.S.C. Jan. 23, 2015) ("It is clear . . . that the amount in controversy in this litigation initiated by [Plaintiff] has always exceeded $75,000. A candid response to Defendant's request to admit this fact in the state court discovery process would have saved all concerned the time, energy, and expense associated with the unnecessary battle over the issue of remand."); *see also* Fortune v. XFit Brands, Inc., No. 3:18-CV-545, 2018 WL 6332640, at *4 (S.D. Miss. Dec. 4, 2018) ("[I]t is better to just admit on the front end that the amount in controversy exceeds $75,000. And it is better for the judiciary to encourage clarity at the beginning of the case, both for the parties' sake and to avoid the inevitable satellite litigation over fees.").