

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
LUBBOCK DIVISION

JERRY MONK, )  
)  
Plaintiff, )  
)  
v. )  
)  
UNITED RENTALS, INC., et al., )  
)  
Defendants. ) Civil Action No. 5:15-CV-083-C

**ORDER**

On March 24, 2015, the Court ordered the removing Defendant, Atlantic Credit & Finance Special Finance Unit III, LLC (“Atlantic”), to show cause why this matter should not be remanded as improperly removed. Following the Court’s show cause order, Plaintiff, Jerry Monk (“Monk”), filed his Motion to Remand. Defendant Atlantic was dismissed without prejudice on April 13, 2015. However, Defendant Citicorp Credit Services, Inc. (“Citi”) filed a Response to the Motion to Remand. Removal was based on diversity of citizenship.<sup>1</sup> Although it appears that there is complete diversity between the parties, the Court finds that the amount in controversy does not meet the \$75,000 threshold.

Federal courts are under a continuing obligation to examine the basis for their subject-matter jurisdiction. *See MCG, Inc. v. Great W. Energy Corp.*, 896 F.2d 170, 173 (5th Cir. 1990). The issue may be raised by the court at any time. *Id.* The removing party bears the burden of

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<sup>1</sup>Although the Notice of Removal also stated that removal was proper under 28 U.S.C. § 1331, Defendant Citi does not argue that removal was proper based on a federal question and appears to have conceded that the statement relating to § 1331 in the Notice was an error.

establishing both the existence of federal subject-matter jurisdiction and the propriety of removal. *See Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002).

Importantly, “[a]ny ambiguities are construed against removal because the removal statute should be strictly construed in favor of remand.” *Id.* A district court will be found to have erred if the amount-in-controversy requirement is not met and the issue may be raised for the first time on appeal. The standard for determining the amount in controversy depends on whether the plaintiff demanded a specific amount of damages in the complaint. *Scarlott v. Nissan N. Am., Inc.*, 771 F.3d 883, 888 (5th Cir. 2014). If a plaintiff did not demand a specific amount, the removing party has the burden of establishing, by a preponderance of the evidence, that the amount exceeds the minimal threshold amount. *Id.* (citing *De Aguilar v. Boeing Co.*, 11 F.3d 55, 58 (5th Cir. 1993)). However, if a plaintiff does list specific damage amounts in the petition, “[t]he amount stated in the complaint is itself dispositive of jurisdiction if the claim is apparently made in good faith.” *Id.*

Section 1332 requires that “the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs[.]” In his First Amended Petition for Declaratory Judgment, Plaintiff seeks a declaration that he does not owe \$9,130.88 charged to his Citi Mastercard credit card by Defendant United Rentals, Inc. (Notice Removal at Ex. A.)<sup>2</sup> Plaintiff also states that “[p]ursuant to Texas Rule of Civil Procedure 47(c)(3), [Plaintiff] seeks total

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<sup>2</sup>More precisely, Plaintiff alleges in his First Amended Petition, upon which removal was based, that Defendant United wrongfully charged \$9,130.88 instead of the \$3,212.00 that Plaintiff agreed to pay and owed. Thus, he alleges an overcharge of \$5,918.00 on his Citi Mastercard credit card account by Defendant United. Plaintiff’s request for declaratory relief seeks a declaration that he did not and does not owe anything beyond the amount he paid. He also makes allegations of a full accord and satisfaction payment tendered and accepted by Defendant United in the amount of \$5,047.43.

monetary relief over \$100,000 but not more than \$200,000.” (*Id.*)<sup>3</sup> Rule 47(c) is a pleading statement under the Texas Rules of Civil Procedure for determining whether the expedited actions process governed by Rule 169 is applicable. A party who chooses Rule 47(c)(1), less than \$100,000, faces the expedited procedures and discovery found in Rule 169. However, the statements under Rule 47(c)(2)-(5) “do[] not affect a party’s substantive rights.” *See* Tex. R. Civ. P. 47 Comment–2013.<sup>4</sup> Plaintiff further states that “[b]y reason of the conduct of United, [Plaintiff] has been required to engage the services of the undersigned law firm, and has agreed to pay the law firm a reasonable fee for prosecution of his claims, through final judgment, and in the event of an appeal.” (Notice Removal at Ex. A.) “[A]ll [of Plaintiff’s] court costs and reasonable and necessary attorney’s fees, through final judgment and in the event of an appeal” are sought “[p]ursuant to Chapter 37 of the Texas Civil Practice & Remedies Code[.]” (*Id.*)

Plaintiff contends that the amount in controversy at the time of removal clearly does not exceed the \$75,000 required under 28 U.S.C. § 1332(a)(1). Plaintiff argues that the range of damages under Texas Rule of Civil Procedure 47(c) chosen in the First Amended Petition includes the attorney’s fees amounts requested in conjunction with his claim brought under the Texas Declaratory Judgment Act. As such, Plaintiff directs the Court to Fifth Circuit precedent that a party “may not rely on the Texas DJA to authorize attorneys’ fees in a diversity case

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<sup>3</sup>Where an exact amount of damages is not stated, a court may rely on summary judgment-type evidence to ascertain the amount in controversy. *St. Paul Reinsurance Co., Ltd. v. Greenberg*, 134 F.3d 1250, 1253 (5th Cir. 1998).

<sup>4</sup>Because the pleading statements under Rule 47(c) are specifically designated as procedural and not substantive, it is not clear that such statements would have any bearing on whether an action is removable under 28 U.S.C. § 1332. This creates an ambiguity that must be interpreted against removal and in favor of remand.

because the statute is not substantive law.” *See Utica Lloyd's of Texas v. Mitchell*, 138 F.3d 208, 210 (5th Cir. 1998). Reasoning that Plaintiff’s attorney’s fees are not collectable in federal court on the underlying declaratory judgment claim, Plaintiff argues that the amount in controversy is less than \$75,000. Thus, Plaintiff asserts, the amount in controversy, exclusive of interest, attorney’s fees, and court costs, is less than \$75,000 and the Court lacks jurisdiction. *See In re 1994 Exxon Chem Fire*, 558 F.3d 378, 387-88 (5th Cir. 2009) (holding that a plaintiff may establish that it is legally certain that his recovery will not exceed the threshold amount).

Defendant Citi counters that the amount in controversy should be found to be the jurisdictional pleading amount under the state rules of civil procedure. That is, Citi argues, Plaintiff should be held to the jurisdiction damage amount stated under Texas Rule of Civil Procedure 47(c)(3). Citi relies upon *TFHSP LLC Series 605 v. Lakeview Loan Servicing, LLC*, No. 3:14-CV-1782-B, 2014 WL 5786949, at \*4 (N.D. Tex. Nov. 3, 2014), in arguing that Plaintiff’s choice of an amount under Rule 47(c) is a facially apparent designation of amount in controversy. However, the Court notes that here, as argued by Plaintiff, the amount chosen includes attorney’s fees under the Texas Declaratory Judgment Act. While such fees may be recoverable as damages under Chapter 37 of the Texas Civil Practice & Remedies Code, they are not recoverable in federal court, as argued by Plaintiff. *See Utica Lloyd's of Texas*, 138 F.3d at 210.

Thus, a novel ambiguity exists in this instance as to the amount in controversy. Such an ambiguity must be resolved against federal jurisdiction and in favor of remanding the case. *See Acuna v. Brown & Root Inc.*, 200 F.3d 335, 339 (5th Cir. 2000). Further, “[Rule 47(c)] does not alone establish, by a preponderance of the evidence, that the amount in controversy satisfies the

jurisdictional minimum.” *Jackson v. Bank of Am., N.A.*, No. 3:13-CV-4093-L, 2014 WL 2616872, at \*3 (N.D. Tex. June 12, 2014) (citing *Oliver v. CitiMortgage, Inc.*, No. 3:13-CV-2566-G, 2014 WL 285218, at \*3 (N.D. Tex. Jan. 27, 2014)).

Citi also includes a copy of an invoice and a declaration stating that the amount owed on the credit card account is a balance of \$74,395.64 on April 15, 2015. This amount is on its face clearly less than \$75,000; and even if Citi were asserting a counterclaim for this amount—which it is not—a defendant’s counterclaim cannot serve as the basis for establishing the requisite amount in controversy.<sup>5</sup> “The preponderance burden forces the defendant to do more than point to a state law that *might* allow the plaintiff to recover more than what is pled. The defendant must produce evidence that establishes that the actual amount of the claim exceeds [the jurisdictional amount].” *De Aguilar*, 47 F.3d at 1412 (emphasis in original).

Thus, Citi’s evidence controverts any choice made by Plaintiff under Rule 47(c) if attorney’s fees cannot be collected. It is not clear that Citi has met its preponderance burden. Therefore, the Court finds that it lacks subject matter jurisdiction. *See* 28 U.S.C. § 1447(c).

Although Plaintiff has requested attorney’s fees based on improvident removal, the Court finds that the issues presented here are novel and a close question. Thus, the Court cannot say that the case was “improvidently” removed, and Plaintiff’s request is **DENIED**. *See* 28 U.S.C. § 1447(c) (stating a court “may” award attorney’s fees if the circumstances so warrant); *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005) (removing party must have lacked an objectively reasonable basis for seeking removal).

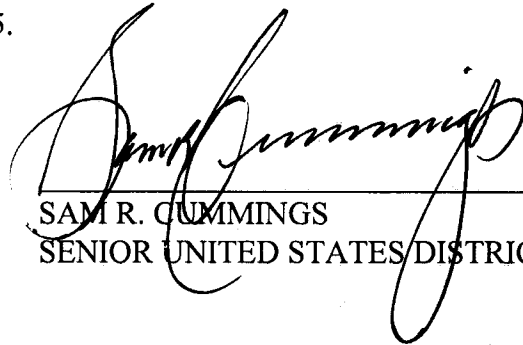
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<sup>5</sup>The propriety of removal is determined by the amount in controversy in a plaintiff’s state court petition at the time of removal, notwithstanding any counterclaims by any defendant.

IT IS, THEREFORE, ORDERED that Plaintiff's Motion to Remand is **GRANTED** and this case is **REMANDED** to the 287th Judicial District Court of Bailey County, Texas.

The Clerk of the Court is directed to mail a certified copy of this Order to the District Clerk of Bailey County, Texas.

Dated this 7<sup>th</sup> day of July, 2015.



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SAM R. CUMMINGS  
SENIOR UNITED STATES DISTRICT JUDGE