

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

September 19, 2023

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

PHELPS OIL AND GAS, LLC, on behalf
of itself and a class of similarly situated
royalty owners,

Plaintiff - Appellant,

v.

NOBLE ENERGY INC.; DCP
MIDSTREAM, LP,

Defendants - Appellees.

No. 23-1243
(D.C. No. 1:22-CV-02637-RM-SKC)
(D. Colo.)

ORDER AND JUDGMENT*

Before **MORITZ**, **BALDOCK**, and **KELLY**, Circuit Judges.

In this appeal, we affirm the district court’s denial of a motion to remand the underlying action to state court.

Background

This case is a class action involving oil and gas royalties. Through leases with Phelps Oil and Gas and others, Noble Energy produces natural gas and other

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

products. But before the gas can be sold, it must be processed. Noble sells its gas to DCP Midstream for processing. After processing, DCP sells the gas, keeps a share of the proceeds, and pays the rest to Noble.

Noble owes royalties to Phelps and the other class members on 100% of cash payments it receives from processors like DCP. It also owes royalties on 50% of the cash proceeds retained by the processors. And it further owes royalties on 50% of the value of any volumes of natural gas and natural gas liquids retained by a processor, used up in production, or otherwise lost or unaccounted for.

Following an audit of DCP, Noble claimed DCP had underpaid it by roughly \$35.4 million. Noble and DCP ultimately reached a settlement. Under the settlement, DCP agreed to spend \$17.5 million to improve its own infrastructure.

Phelps filed this class action in Colorado state court against Noble and DCP, seeking damages for lost royalties related to DCP's alleged underpayments to Noble. DCP removed the case to federal district court, claiming diversity jurisdiction. Phelps moved to remand the case to state court, but the district court denied the motion. So the case moved forward in federal court, and Phelps filed an amended complaint. The amended complaint retained several claims from the original complaint (breach of contract and breach of the implied duty of good faith and fair dealing against Noble, and unjust enrichment against DCP) and added claims for civil

theft and conversion against DCP.¹ The federal district court ultimately entered judgment against Phelps. On appeal, however, we concluded that the amount in controversy did not support diversity jurisdiction and reversed the denial of Phelps’s motion to remand the case to state court. *Phelps Oil & Gas, LLC v. Noble Energy Inc.*, 5 F.4th 1122, 1124 (10th Cir. 2021).

Following the appeal, the federal district court vacated its judgment and other orders “addressing the substance of the claims.” *Aplt. App. vol. 1 at 23*. But it declined to vacate other orders, including its order granting Phelps leave to file a revised amended complaint. It then remanded the case to state court.

DCP soon removed the case to federal court once again, this time relying on the Class Action Fairness Act, 28 U.S.C. § 1332(d), a provision giving federal district courts jurisdiction over class actions if the class has at least 100 members, the parties are minimally diverse, and the amount in controversy exceeds \$5 million, *see id.* § 1332(d)(2), (5)(B); *Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. 81, 84–85 (2014).

Phelps again moved to remand the case back to state court, alleging that the federal court lacked subject-matter jurisdiction. Phelps targeted the amount-in-controversy requirement. A dispute arose over which complaint should determine the amount in controversy—the original complaint filed in state court, or

¹ The amended complaint omitted a breach-of-contract claim against DCP and declaratory-judgment claims against Noble and DCP that had been included in the original complaint.

the amended complaint filed in federal court before the remand to state court. Phelps argued that its original complaint filed in state court should control, while Noble and DCP argued that the amended complaint filed in federal court should determine the amount in controversy. Noble and DCP alternatively argued that both the original complaint and the amended complaint put more than \$5 million in controversy.

The district court denied the motion to remand for two reasons. First, it concluded that the amended complaint should determine the amount in controversy because it was the operative complaint when DCP removed the case the second time. And Phelps did not dispute that the amended complaint put more than \$5 million in controversy. Second, the court concluded that Phelps had “claimed and attempted to prove” damages exceeding \$5 million “based on the claims asserted in the original complaint.” Aplt. App. vol. 1 at 242.

Phelps sought permission to appeal the denial of its motion to remand, *see* 28 U.S.C. § 1453(c), and we granted permission.

Discussion

A defendant seeking to remove a civil action from state court must file in the federal district court “a short and plain statement of the grounds for removal.” 28 U.S.C. § 1446(a). When the defendant removes an action to federal court under the Class Action Fairness Act, the “amount-in-controversy allegation should be accepted when not contested by the plaintiff or questioned by the court.” *Dart Cherokee Basin*, 574 U.S. at 87. If the defendant’s allegation is challenged, however, then “both sides submit proof and the court decides, by a preponderance of the

evidence, whether the amount-in-controversy requirement has been satisfied.” *Id.* at 88.

Although we ultimately review de novo “the district court’s ruling on the propriety of removal,” *Frederick v. Hartford Underwriters Ins. Co.*, 683 F.3d 1242, 1245 (10th Cir. 2012), we review its factual findings for clear error, *see Aves ex rel. Aves v. Shah*, 997 F.2d 762, 766 (10th Cir. 1993).

Phelps insists that the amount in controversy must be determined under its original complaint filed in state court rather than its amended complaint filed in federal court, and it takes issue with the district court’s determination that the latter is the operative complaint. We need not decide which complaint controls, however, because they both place more than \$5 million at stake.

Phelps has not disputed that the amended complaint puts more than \$5 million at issue.² It does, however, dispute that the original complaint conferred subject-matter jurisdiction. Its argument is twofold. First, although it contends that

² Phelps argues that the district court made a clearly erroneous factual finding when it said that Phelps did not contest, and that the court had no reason to question, “the amount-in-controversy allegation in the Amended Complaint.” Aplt. App. vol. 1 at 240–41. The court’s statement is technically inaccurate because, as Phelps says, its amended complaint did not allege any amount in controversy. But the court’s misstatement does not matter—the point is that Phelps did not dispute, or offer a reason to question, the allegation *in the notice of second removal* that the amended complaint seeks damages satisfying the amount-in-controversy requirement. Under those circumstances, the allegation should be accepted. *See Dart Cherokee Basin*, 574 U.S. at 87. And so the district court’s technical misstatement does not warrant reversal. *See In re Syngenta AG MIR 162 Corn Litig.*, 61 F.4th 1126, 1179 (10th Cir. 2023) (recognizing that we would reverse only if an error prejudiced a “party’s substantial rights”).

the original complaint is operative, Phelps nevertheless argues that the district court should not have considered whether the original complaint supported subject-matter jurisdiction. The propriety of removal, Phelps maintains, depends solely on the allegations in the notice of second removal. And because DCP's notice of second removal relied only on the *amended* complaint, the argument goes, the district court essentially allowed an improper amendment of the notice by considering whether the claims in the *original* complaint satisfied the amount-in-controversy requirement. Second, it asserts that the district court clearly erred when it found that Phelps claimed and attempted to prove more than \$5 million in damages for the claims in the original complaint. We disagree on both counts.

The district court did not err when it considered whether the claims in the original complaint satisfied the amount-in-controversy requirement.³ Granted, DCP's notice of second removal identified the amended complaint as operative and alleged that the claims in *that* complaint placed more than \$5 million in controversy. Outside of the thirty-day period for removal, defendants generally "may not add completely new grounds for removal or furnish missing allegations, even if the court rejects the" basis for removal originally offered. 14C Charles Alan Wright et al., Federal

³ Phelps relatedly argues that the district court erroneously concluded that it had waived the ability to oppose the alternative argument that the original complaint supported jurisdiction. We question whether the district court actually reached that conclusion. But even if it did, and even if that conclusion was error, we would not reverse based on it because we have reviewed and rejected the merits of Phelps's opposition to the alternative argument. *See In re Syngenta*, 61 F.4th at 1179 (recognizing that we would reverse only if an error prejudiced a "party's substantial rights").

Practice and Procedure § 3733 (Rev. 4th ed. Apr. 2023 update). Even after the removal period has expired, however, “amendment is appropriate for technical changes, such as the exact grounds underlying diversity jurisdiction.” *Wood v. Crane Co.*, 764 F.3d 316, 323 (4th Cir. 2014). Noble and DCP’s alternative argument that the original complaint also supported jurisdiction relied on the same source of jurisdiction articulated in the notice of second removal—the Class Action Fairness Act. Earlier in this litigation, moreover, Phelps represented that, aside from the theft and conversion claims, the claims in the amended complaint were substantively the same as claims in the original complaint. In other words, there is significant overlap between the two complaints. And although the notice identified the amended complaint as operative, it attached both the original and amended complaints as exhibits. Under these circumstances, adding an alternative theory that the original complaint also supported jurisdiction amounted to nothing more than a permissible technical change. *See id.* at 323–24.

Nor did the district court clearly err when it found that Phelps has claimed that Noble and DCP are liable for more than \$5 million based on the claims in the original complaint. The original complaint alleged that Noble breached its settlement agreement by “failing to pay royalties based upon 100 percent of the amounts which should have been paid by DCP to Noble,” Aplt. App. vol. 1 at 73, an amount later alleged to be roughly \$35.4 million. In support of their position that both complaints sought more than \$5 million in damages, Noble and DCP submitted a declaration estimating that “the average royalty burden across the class exceeds 15%.” *Id.* at

181. Given that estimation, the breach-of-contract claim alone supports the district court's finding (15% of \$35.4 million is \$5.31 million).

Phelps now argues, however, that our opinion in *Watts v. Atlantic Richfield Co.*, 115 F.3d 785 (10th Cir. 1997), limits the class members' potential recovery "to their proportionate share of the \$17.5 million settlement between Noble and DCP." Aplt. Reply Br. at 11. Yet earlier in this litigation, Phelps took a different view of *Watts*, relying on it to support its argument that "Noble is required to pay Phelps its royalty share in the full amounts DCP was legally obligated to pay Noble." Aplee. Second Suppl. App. at 266. But even Phelps's current take on *Watts* at most creates uncertainty about whether the class would be able to prevail on the claims or recover the full damages originally sought. That is not enough to deprive the district court of subject-matter jurisdiction. See *McPhail v. Deere & Co.*, 529 F.3d 947, 955 (10th Cir. 2008). After all, the "amount in controversy is not proof of the amount the plaintiff will recover. Rather, it is an estimate of the amount that will be put at issue in the course of the litigation." *Id.* at 956.

Phelps also argues that entities not included in the class might also have claims to royalties based on the alleged underpayments from DCP to Noble. Phelps made this argument in the district court too, but it submitted no evidence showing clear error in the district court's finding that Phelps sought to prove damages exceeding \$5 million based on the claims in the original complaint. It did not submit evidence showing, for example, that excluding royalties that would go to entities outside of the class would reduce the value of Phelps's claims below the required threshold.

Disposition

Regardless of which complaint was operative when the second removal occurred, the district court has subject-matter jurisdiction. We affirm the denial of Phelps's motion to remand the case to state court. We grant both pending motions for leave to file a supplemental appendix. We grant Phelps's unopposed motion for leave to file its supplemental appendix under seal.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge