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To Remove Or Not To Remove -- *Lowery V. Alabama Power Co.* And The Eleventh Circuit's Uncertainty Over The Preponderance Of The Evidence Standard

Melanie M. Fernandez

To Remove or Not to Remove—*Lowery v. Alabama Power Co.* and the Eleventh Circuit's Uncertainty over the Preponderance of the Evidence Standard

MELANIE M. FERNANDEZ*

If this Court turns out to be right when, by separate order, it grants the motion to remand, the court will have come close to proving that the day of the knee-jerk removal of diversity tort cases from state to federal court within the three states comprising the Eleventh Circuit came to an end on April 11, 2007 when *Lowery v. Alabama Power Co.* was decided.[1]

I. INTRODUCTION

A defendant's right to defend his case in federal court is recognized as a powerful instrument against state court bias. It should therefore come as no surprise that Congress created the removal process first and

* Eleventh Circuit Editor Elect, *University of Miami Law Review*; J.D. Candidate, 2011, University of Miami School of Law; B.B.A. 2008 Florida International University. First and foremost, I'd like to thank my parents, Mariela and Tony Fernandez, whose love, support, and patience made this paper possible. Special thanks to Alex and my insane and loud family for their constant encouragement throughout the years, especially when my stress level was at an all time high.

1. Constant v. Int'l House of Pancakes, 487 F. Supp. 2d 1308, 1308 (N.D. Ala. 2007).

foremost to protect defendants.[2] Strategically, removal offers a defendant a potential plethora of tactical and logistical advantages, subject to the amount in controversy burden.[3] This burden varies, however, depending on whether the plaintiff pleads a specific jurisdictional amount in the complaint. If the plaintiff pleads an amount below the jurisdictional threshold, the defendant must then meet the legal certainty burden, a more stringent burden because the plaintiff has the primary right to choose his forum. On the other hand, if the plaintiff fails to plead a specific jurisdictional amount, the defendant must meet the preponderance of the evidence burden, a more lenient burden since the plaintiff has, in the first instance, failed to secure a forum choice.

Although the preponderance of the evidence standard is not a difficult burden for defendants to meet, the Eleventh Circuit Court of Appeals' decision in *Lowery v. Alabama Power Co.*[4] significantly narrowed a defendant's ability to prove the amount in controversy under that standard. The new *Lowery* standard has made it extremely difficult for defendants to remove to federal court and, as such, draws an increasing similarity to the more stringent legal certainty burden.

This note demonstrates, however, that although the Eleventh Circuit's holding in *Lowery* closely resembles the stringent legal certainty burden, recent district court decisions are easing a defendant's removal burden by moving away from *Lowery*'s strict framework and applying the more flexible pre-*Lowery* preponderance of the evidence standard. Moreover, in doing so, district courts are still justifying their decisions under *Lowery*, highlighting an external circuit split and the Eleventh Circuit's own internal disagreement over a proper jurisdictional standard where the plaintiff fails to plead a specific jurisdictional amount.

To establish this, the second part of this article presents a brief history of removal into federal courts, the amount in controversy burdens, including both the legal certainty burden and the preponderance of the evidence burden, and the Eleventh Circuit's application of the preponderance of the evidence standard. The third part discusses *Lowery* and the implications that led to the court's adoption of a more stringent preponderance of the evidence standard. The fourth part demonstrates that although *Lowery* has been criticized for narrowing defendants' chances of removal into federal court similar to the legal certainty burden, citing *Lowery*, district courts have recently eased defendants' removal burden.

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2. Penelope A. Dixon & David J. Walz, *Removal After* Lowery v. Alabama Power Co.; *A Whole New Bag of Tricks*, 26 No. 4 TRIAL ADVOC. Q. 39 (2007) (citing Legg v. Wyeth, 428 F.3d 1317, 1325 (11th Cir. 2005)).

3. *Id.* at 1.

4. Lowery v. Ala. Power Co., 483 F.3d 1184 (11th Cir. 2007).

This fact emphasizes the uncertainty present within the Eleventh Circuit as well as other circuits in applying the preponderance of the evidence standard. Finally, by examining other circuits' successful application of a uniform preponderance of the evidence standard, the fifth part recommends that although a uniform intra-circuit standard would also be effective, the Eleventh Circuit can only achieve this by creating a more helpful preponderance of the evidence standard that benefits defendants' chances of removal.

II. BACKGROUND

A. *Removal Generally*

Federal court subject matter jurisdiction for diversity of citizenship is governed by 28 U.S.C. § 1332. To meet the requirements of the statute, the minimum amount in controversy must be $75,000 and the opposing parties must be from different states.[5] Removal into federal court finds its basis in 28 U.S.C. § 1441(a). According to the statute, a case can be removed to federal court as long as it could have been brought there in the first place.[6] Section 1441(a) also provides that only defendants may remove a case to federal court.[7] For instance, under 28 U.S.C. § 1446, a removing defendant must file a removal notice within thirty days of receipt of the initial pleading setting forth a removable claim or within thirty days of notification that the action is removable.[8] The plaintiff then has thirty days to file a petition for remand.[9]

One of the most stringent aspects of diversity jurisdiction under

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5. Granting jurisdiction when the requisite amount in controversy is more than $75,000 and is between:

> 1) citizens of different States; 2) citizens of a State and citizens of subjects of a foreign state; 3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and 4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

28 U.S.C. § 1332 (2007); *see* 13B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3611–30 (4th ed. 2009) (discussing the rules that determine diversity of citizenship).

6. 28 U.S.C. § 1441(a) (2007); *see also* Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1356 (11th Cir. 1996) ("Any civil case filed in state court may be removed by the defendant to federal court if the case could have been brought originally in federal court.").

7. 28 U.S.C. § 1441(a); *see also* Sidney Powell & Deborah Pearce-Reggio, *The Ins and Outs of Federal Court: A Practitioner's Guide to Removal and Remand,* 17 MISS. C. L. REV. 227 (1997) (advising defendants to examine practical considerations before removal).

8. 28 U.S.C. § 1446 (2007).

9. *Id. But see* Russell D. Jessee, *Pleading to Stay in State Court: Forum Control, Federal Removal Jurisdiction, and the Amount in Controversy Requirement,* 56 WASH. & LEE L. REV. 651 (1999) ("[I]f the district court discovers that it lacks subject matter jurisdiction any time before final judgment, [28 U.S.C. § 1447 (2007)] requires remand even without a petition from the plaintiff.").

Section 1332 is the requirement that diversity be complete.[10] As such, all defendants and plaintiffs must be diverse from each other and no plaintiff can be a citizen of the same state as any defendant.[11] Another important limitation is the fact that diversity jurisdiction cannot be established if a defendant is sued in his home state.[12] The basis for these restrictions rests on the fact that Congress intended diversity jurisdiction to provide a national forum for out-of-state litigants that would diminish state court bias in favor of state residents.[13] For example, when citizens of one state are on opposite sides of the same lawsuit, the chance of bias decreases and diversity jurisdiction is no longer justified. The same reasoning applies when the defendant is sued in his home state: the fear of bias is nonexistent because the defendant is already in a favored forum, his home state. Diversity jurisdiction is therefore no longer a basis for removal.

Yet in 2005, Congress enacted the Class Action Fairness Act ("CAFA")[14] and abrogated the long-standing precedent of complete diversity for class action lawsuits.[15] Congress enacted CAFA after it found that "[a]buses in class actions undermine the national judicial system" because "[s]tate and local courts are . . . keeping cases of national importance out of Federal court . . . ."[16] CAFA amended the diversity statute[17] by giving federal courts jurisdiction over class actions where (1) any plaintiff is a citizen of a different state from the defendant, (2) the amount in controversy exceeds $5,000,000, and (3) the class action

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10. 28 U.S.C. § 1332; *see also* Deborah Pearce Reggio, *Removal and Remand: A Guide to Navigating Between the State and Federal Courts*, 23 MISS. C. L. REV. 97, 103 (2004).

11. *See* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978) (highlighting the rule that diversity jurisdiction is not available when plaintiff and defendant are citizens of the same state); Great N. Ry. Co. v. Galbreath Cattle Co., 271 U.S. 99, 102–03 (1926); AAA Abachman Enter. Inc., v. Stanley Steemer Int'l. Inc., 268 F. App'x 864 (11th Cir. 2008); Powell v. Offshore Nav. Inc. 644 F.2d 1063, 1066–67 (5th Cir. 1981) (stressing the importance of complete diversity in diversity jurisdiction actions).

12. 28 U.S.C. 1441(b) (2007). *But see* 14B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3723 (4th ed. 2009) (noting that "this limitation is not applicable to the removal of federal question cases nor to diversity cases filed in federal court by plaintiffs"); *see also* Caterpillar Inc. v. Lewis, 519 U.S. 61, 68 (1996); Martin v. Snyder, 148 U.S. 663, 664 (1893); Henderson v. Washington Nat. Ins. Co. 454 F.3d 1278 (11th Cir. 2006).

13. *Powell*, 644 F.2d at 1066 (citing Strawbridge v. Curtiss, 7 U.S. 267 (1806)) (noting that a diversity action is barred unless complete diversity exists between plaintiffs and defendants); *see also* 13E CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3605 (4th ed. 2009).

14. 28 U.S.C. § 1332(d) (2007).

15. Stephen J. Shapiro, *Applying the Jurisdictional Provisions of the Class Action Fairness Act of 2005: In Search of a Sensible Judicial Approach*, 59 BAYLOR L. R. 77, 97 (2007).

16. Emery G. Lee III & Thomas E. Willging, *Fairness to Whom? Perspectives on the Class Action Fairness Act of 2005*, 156 U. PA. L. REV. 1723, 1733 (2008) (citing S. Rep. No. 109–14, at 12 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 13).

17. 28 U.S.C. § 1332.

exceeds 100 members.[18] In general, CAFA's requirements broaden federal diversity jurisdiction by establishing a lower threshold requirement for diversity jurisdiction and removal.[19]

B. *Amount in Controversy Burdens*

In determining whether diversity jurisdiction exists, a court must first decide whether the amount in controversy has been met. Under Section 1332, the amount in controversy must exceed $75,000 exclusive of interests and costs.[20] On the other hand, under CAFA, the amount in controversy must exceed $5,000,000 provided the class exceeds 100 members.[21] In the removal context, whether pursuant to CAFA or the general removal statute, the defendant has the burden of proving that the amount in controversy has been met and that federal jurisdiction exists.[22] The burden of proof the defendant must bear, however, varies depending on whether the plaintiff has made a demand for damages below the jurisdictional amount—the legal certainty burden—or whether the plaintiff has pled an unspecified amount of damages—the preponderance of the evidence burden.[23]

1. Legal Certainty Burden

In a typical diversity suit, the plaintiff sues in federal court for more than the jurisdictional amount.[24] If the defendant chooses to remove in this instance, it must meet the legal certainty test, which applies when the plaintiff pleads damages in excess of the amount in controversy.[25] Discussion of the legal certainty burden begins with *St. Paul Mercury Indemnity Co. v. Red Cab*[26] where the Supreme Court held that the

18. *See* 28 U.S.C. § 1332(d); Lauren D. Fredericks, *Removal, Remand, and Other Procedural Issues Under the Class Action Fairness Act of 2005,* 29 Loy. L.A. L. Rev. 995 (2006).

19. Lowery v. Ala. Power Co., 483 F.3d 1184, 1193 (11th Cir. 2007).

20. 28 U.S.C. § 1332(a) (2007).

21. 28 U.S.C. § 1332(d).

22. Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1356 (11th Cir. 1996); *see also Lowery,* 483 F.3d at 1211 ("Because CAFA does not disturb the long-established rule that a removing defendant bears the burden of proving federal jurisdiction, upon the plaintiffs' motion to remand in this case, the defendants bear the burden of establishing the jurisdictional requirements for a CAFA mass action. Furthermore, because this case involves a complaint for unspecified damages, the defendants must establish jurisdiction by a preponderance of the evidence.").

23. *See Tapscott,* 77 F.3d at 1356; Powell & Pearce-Reggio, *supra* note 7, at 234 (stating that if the answer is not apparent from the face of the complaint or if a party challenges the amount demanded, the court can proceed by way of the legal certainty test or the preponderance of the evidence test).

24. Burns v. Windsor Ins. Co., 31 F.3d 1092, 1094 (11th Cir. 1994).

25. Powell & Pearce-Reggio, *supra* note 7, at 236.

26. 303 U.S. 283 (1938); Jessee, *supra* note 9, at 659; *see also* De Aguilar v. Boeing, 47 F.3d 1404, 1408–09 (5th Cir. 1995) ("Most discussions of jurisdictional amount in removal cases begin with *St. Paul Mercury.*").

plaintiff's demand controls jurisdiction as long as the plaintiff demanded that amount in good faith.[27] Thus, to justify dismissal from federal court, the defendant must prove to a legal certainty that the amount the plaintiff demands is really less than the jurisdictional amount necessary for federal jurisdiction.[28]

Almost sixty years later in *Burns v. Windsor Insurance Co.*, the Eleventh Circuit relied on *Red Cab* in developing the legal certainty burden for claims below the jurisdictional threshold.[29] In proving federal jurisdiction, the Eleventh Circuit held that the defendant's burden should be heavy because a plaintiff's right to choose his forum and a defendant's right to remand are not on "equal footing".[30] As a result, removal statutes are narrowly construed and, where both plaintiff and defendant clash over jurisdiction, remand is favored.[31] Further, because a lawyer has a duty to correctly plead the value of his client's case pursuant to Federal Rule of Civil Procedure 11 ("FRCP Rule 11"),[32] when the defendant asserts that plaintiff's counsel is incorrectly assessing damages, the court held that the defendant must prove to a legal certainty that the claim is above the jurisdictional amount.[33] According to the Eleventh Circuit, in deciding whether the defendant has met this removal burden, the court should ask itself whether "an award below the jurisdictional amount would be outside the range of permissible awards because the case is clearly worth more than [the jurisdictional amount]."[34]

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27. *See also Red Cab*, 303 U.S. at 290 (In the removal context, "[t]here is a strong presumption that the plaintiff has not claimed a large amount in order to confer jurisdiction on a federal court or that the parties have colluded to that end"). *See generally* 14A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3702 (4th ed. 2009) ("Plaintiff is the master of his or her own claim; if plaintiff chooses to ask for less than the jurisdictional amount, only the sum actually demanded is in controversy.").

28. Jessee, *supra* note 9, at 661 (citing *Red Cab*, 303 U.S. at 288–89).

29. *Burns*, 31 F.3d at 1094.

30. *Id.* at 1095.

31. *Id.* (citing Boyer v. Snap-on Tools Corp., 913 F.2d 108 (3d Cir. 1990)). *See generally* WRIGHT & MILLER, *supra* note 27 ("Plaintiff is the master of his or her own claim; if plaintiff chooses to ask for less than the jurisdictional amount, only the sum actually demanded is in controversy."). *But see* 14C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3725 (4th ed. 2009) (stating that the discrepancy in treatment between plaintiffs and defendants can be justified by the historical tradition that plaintiff is the master of his complaint "[b]ut the enactment of Section 1441 suggests that Congress intended this historical tradition to be replaced by a new regime in which either the plaintiff or the defendant can invoke the jurisdiction of the federal courts whenever a set of uniformly acceptable jurisdictional prerequisites is satisfied").

32. Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994); *see* FED. R. CIV. P. 11(b) (stating that an attorney who presents a document to the court represents that his "legal contentions are warranted by existing law" or have or will likely have "evidentiary support").

33. *Burns*, 31 F.3d at 1095.

34. *Id.* at 1096 (citing Kliebert v. Upjohn Co., 915 F.2d 142, 147 (5th Cir. 1990)). The

2. PREPONDERANCE OF THE EVIDENCE STANDARD

The preponderance of the evidence test, in contrast, applies in the removal context when the plaintiff fails to plead a certain amount of damages.[35] Circuit use of the preponderance standard can be traced back to *McNutt v. General Motors Acceptance Corp. of Indiana Inc.*[36] There, the Supreme Court found that unless the plaintiff pled all facts essential to support jurisdiction, jurisdiction was lacking.[37] Without providing any authority for its preponderance of the evidence requirement, the Court concluded that

> If his allegations of jurisdictional facts are challenged by his adversary in an appropriate manner, he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismissed, *and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence.*[38]

The District Court for the Eastern District of Michigan in *Garza v. Bettcher Industries*[39] first applied the *McNutt* preponderance of the evidence test to a state court complaint that failed to specify a certain amount of damages. The court held that the legal certainty burden should not be applied to cases where the plaintiff seeks an unspecified amount because in many cases, a predetermined set of damages is impossible to calculate.[40] Applying the stringent legal certainty burden to these situations would almost always preclude removal for defendants because the defendant would necessarily have to prove the plaintiff's case.[41] "Rather, where the complaint fails to state a specific amount of damages, the defendant must allege facts sufficient to establish that the plaintiff would more likely than not recover more than the jurisdictional amount."[42]

It was not until six years later in *Tapscott v. MS Dealer Service Corp.*[43] however, that the Eleventh Circuit first applied the preponder-

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Eleventh Circuit also noted that unlike Burns' proposed test, its legal certainty test does not expand federal jurisdiction or broaden the removal statute because anytime a plaintiff sued for less than the jurisdictional amount, the mere possibility that she would be awarded more than she pled was not enough to warrant removal. *Id.*

35. Powell & Pearce-Reggio, *supra* note 7, at 236.

36. 298 U.S. 178, 189 (1936); *see also* McPhail v. Deere & Co., 529 F.3d 947, 953 (9th Cir. 2008); Lowery v. Ala. Power Co., 483 F.3d 1184, 1209 (11th Cir. 2007).

37. *McNutt*, 298 U.S. at 189.

38. *Id.* (emphasis added).

39. 752 F. Supp. 753 (E.D. Mich. 1990).

40. *Id.* at 756.

41. *Id.*

42. *Id.*

43. 77 F.3d 1353 (11th Cir. 1996).

ance of the evidence standard to a plea of unspecified damages. The Eleventh Circuit held that "[w]here a plaintiff has made an unspecified demand for damages, a lower burden of proof is warranted because there is simply no estimate of damages to which a court may defer."[44] Citing *Gafford v. General Electric Co.*,[45] decided by the Sixth Circuit only three years after *Garza*, the court held that the defendant need only prove that the amount in controversy "more likely that not" exceeds the jurisdictional amount.[46]

3. Evidence assessed in the Eleventh Circuit under the preponderance of the evidence standard

Exactly what type of evidence the Eleventh Circuit evaluates in applying the preponderance of the evidence standard is disputed. On the one hand, decisions before *Lowery* seem to take a more liberal approach in considering certain evidence. For instance, in *Williams v. Best Buy Co. Inc.*,[47] the Eleventh Circuit held that a court may consider whether it is "facially apparent" from the facts in the complaint or removal petition[48] that the jurisdictional amount is in controversy.[49] Indeed, the Eleventh Circuit in *Miedema v. Maytag Corp.* and *Allen v. Toyota Motor Sales U.S.A., Inc.*, read into the factual allegations in the removal document and the complaint, respectively, in assessing whether the defendant met its burden in proving the jurisdictional amount. [50] In *Miedema* the Eleventh Circuit held that the declaration relied upon in the notice of removal did not establish the amount in controversy by a preponderance

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44. *Id.* at 1357. In *Gafford v. General Electric Co.* the Sixth Circuit also justified this lower burden:

> The "legal certainty" test in removal cases arose in a context where the plaintiff's prayer for damages in state court exceeded the federal amount-in-controversy requirement. In such a case as that, it is proper to presume that the plaintiff's prayer is an appropriate presentation of potential damages because the damages sought are against the plaintiff's interests. There can be no such presumption where there is no specific prayer for damages. Thus, the "legal certainty" test should not be applied to situations . . . where damages are unspecified.

Gafford v. Gen. Elec. Co., 997 F.2d 150, 160 (6th Cir. 1993): *see also* Singer v. State Farm Mut. Auto. Ins. Co., 116 F.3d 373, 376 (9th Cir. 1997); *Garza*, 752 F. Supp. at 755–56.

45. 997 F.2d 150, 159 (6th Cir. 1993) ("It does not place upon the defendant the daunting burden of proving, to a legal certainty, that the plaintiff's damages are not less than the amount-in-controversy requirement. Such a burden might well require the defendant to research, state and prove the plaintiff's claim for damages.").

46. *Id.* at 159.

47. 269 F.3d 1316 (11th Cir. 2001).

48. *See* Leonard v. Enter. Rent A Car, 279 F.3d 967 (11th Cir. 2002) (concluding that where conclusory jurisdictional allegations set forth in the removal petition are insufficient, remand is appropriate).

49. *Williams*, 269 F.3d at 1319.

50. Miedema v. Maytag Corp., 450 F.3d 1322 (11th Cir. 2006); Allen v. Toyota Motor Sales, U.S.A. Inc., 155 F. App'x 480 (11th Cir. 2005).

of the evidence because the declaration offered no explanation as to how the jurisdictional amount was calculated.[51] In the same way that the *Miedema* court relied on the removal petition, in *Toyota* the Eleventh Circuit relied on the amount of damages specified in the plaintiff's complaint in holding that *Toyota* proved by a preponderance of the evidence that the amount in controversy might exceed the jurisdictional amount.[52]

If, however, the jurisdictional amount is not apparent from the face of the complaint or removal petition, the Eleventh Circuit in *Williams* also concluded that the district court may "require evidence relevant to the amount in controversy at the time the case was removed."[53] This evidence should also include post-removal evidence because removal cannot merely be based on conclusory allegations.[54] The Eleventh Circuit first advocated this flexible approach in *Sierminski v. Transouth Financial Corp.*[55] when it failed to find a good reason to keep a district court from reviewing evidence outside the removal petition.[56] Citing *Allen* and *Harmon*, the court held that the only limitation was that any jurisdictional evidence in support of removal must be judged at the time of removal and, as a result, must shed light on the situation that existed when the case was removed.[57]

With Eleventh Circuit preponderance of the evidence precedent well underway, the district courts began applying the preponderance standard in a very similar stance. For example, courts began to hold that while allegations set forth in the complaint can help establish the amount in controversy,[58] if the defendant does not provide facts in his removal

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51. *Miedema*, 450 F.3d at 1331.

52. *Toyota*, 155 F. App'x at 482.

53. *Miedema*, 450 F.3d at 1331 (citing Williams v. Best Buy Co., 269 F.3d 1316, 1319 (11th Cir. 2001)); *see* Federated Mut. Ins. Co. v. McKinnon Motors, LLC, 329 F.3d 805 (11th Cir. 2003) (concluding that where the defendant, Federated, failed to provide evidence to show that plaintiff's bad faith claim satisfied the amount in controversy, Federated did not prove by a preponderance of the evidence that removal was proper).

54. *Williams*, 269 F.3d at 1319; *see also* McNutt v. Gen. Motors Acceptance Corp. of Ind. Inc., 298 U.S. 178, 189 (1936) (stating that the court may demand evidence necessary to support jurisdiction); Sierminski v. Transouth Fin. Corp., 216 F.3d 945, 949 (11th Cir. 2000) (holding that the district court may "require parties to submit summary judgment type evidence relevant to the amount in controversy at the time of removal" (quoting Singer v. State Farm Mut. Auto. Ins. Co., 116 F.3d 373, 377 (9th Cir. 1997)) (in turn quoting Allen v. R&H Oil and Gas Co., 63 F.3d 1326, 1335–36 (5th Cir. 1995))).

55. *Sierminski*, 216 F.3d at 945.

56. *Id.* at 949; *see also Allen*, 63 F.3d at 1335 ("[U]nder any manner of proof, the jurisdictional facts that support removal must be judged at the time of removal, any post-petition affidavits are allowable only if relevant to that period of time.").

57. Harmon v. OKI Sys.,115 F.3d 477, 479–80 (7th Cir. 1997); *Allen*, 63 F.3d at 1335.

58. Branson v. Medtronic, Inc., No. 5:06cv332, 2007 WL 170094, at *5 (M.D. Fla. Jan. 18, 2007) (finding that the defendants established the jurisdictional amount because the "[c]ourt [was] hard-pressed to conclude that if liability was established in this case there is any possibility that the damages would be less than $75,000").

petition showing that the plaintiff's claim "more likely than not" exceeds the jurisdictional limit, the defendant has not met his burden.[59] Subsequent to *Williams*, district courts also found that if the amount in controversy is not apparent from the complaint or the removal petition, the defendant may introduce supporting evidence relevant to the time of removal.[60] This evidence not only includes estimates of damages alleged in the plaintiff's complaint,[61] but also the submission of declarations, settlement offers, and affidavits that establish the amount in controversy.[62]

III. *LOWERY V. ALABAMA POWER CO.*

It was not until the Eleventh Circuit's 2007 decision in *Lowery* that the court significantly narrowed the amount of evidence a district court can consider under the preponderance of the evidence standard.[63] In this

59. Stanridge v. Wal-Mart Stores, Inc., 945 F. Supp. 252 (N.D. Ga. 1996); *see also* Moore v. CNA Found., 472 F. Supp. 2d 1327, 1332 (M.D. Ala. 2007) (holding that defendants did not meet the amount in controversy burden because they did not discuss specific facts that indicate the value of the plaintiff's claim); Wheeler v. Allstate Floridian Indem. Co., No. 3:05cv208, 2006 WL 1133249, at *2 (N.D. Fla. Apr. 26, 2006) (holding in a CAFA case that where a removal petition's bare assertions are based on the complaint's cursory estimation of the amount of potential class members claims, without further evidentiary support, the defendant failed to prove the jurisdictional amount by a preponderance of the evidence); Tidwell v. Coldwater Covers, Inc., 393 F. Supp. 1257, 1260 (N.D. Ala. 2005) (stating that conclusory allegations that the jurisdictional amount is satisfied is insufficient); Big Stakes Match Play, LLC, v. Golf Stakes, LLC, No. 1:02-cv-1876, 2002 WL 34186932, at *2 (N.D. Ga. Aug. 8, 2002) (concluding that a bald assertion on the value of injunctive relief is insufficient).

60. Young v. Cargill Juice N.A., Inc., No. 8:06cv1350, 2006 WL 3544810, at *3 (M.D. Fla. Nov. 13, 2008); Morock v. Chautauqua Airlines, Inc., No. 8:07cv00210, 2007 WL 1725232, at *2–3 (M.D. Fla. June 14, 2007); Main Drug, Inc. v. Aetna U.S. Healthcare, Inc., 455 F. Supp. 2d 1323, 1327 (M.D. Ala. 2006); Deel v. Metromedia Rest. Serv., Inc., No. 3:05cv120, 2006 WL 481667, at *2 (N.D. Fla. Feb. 27, 2006).

61. Anderson v. Lotus Cars USA, Inc., No. 8:06cv1944, 2007 WL 1229105, at *2 (M.D. Fla. Apr. 26, 2007) (stating that the defendant did not meet his burden because he failed to provide an estimate on damages); Pensinger v. State Farm and Cas. Co., 347 F. Supp. 2d 1101, 1107 (M.D. Ala. 2003) (holding that defendants did not meet their burden because they did not present evidence that established the cost of damage to plaintiff's home).

62. *Young*, 2006 WL 3544810, at *3 (holding that where plaintiff admitted in her response to discovery requests that she was claiming damages in excess of $75,000, the defendant established the amount in controversy); *Morock*, 2007 WL 1725232, at *3 (holding that the defendant met the preponderance of the evidence burden by plaintiff's refusal to comply with discovery in regards to the settlement offer); *Main Drug*, 455 F. Supp. 2d at 1327 (finding that defendants met the amount in controversy through the submission of plaintiff affidavits and declarations); *Deel*, 2006 WL 481667, at *2 (finding that under the preponderance of the evidence standard, a settlement letter is sufficient to determine removal jurisdiction). *But see* Lowe's OK'D Used Cars, Inc. v. Acceptance Ins. Co., 995 F. Supp. 1388, 1392 (M.D. Ala. 1998) (concluding that although standing alone defendant had met its preponderance burden by offering damage award examples and by the fact that plaintiff refused to state in her answers to interrogatories that the amount in controversy was below $75,000, plaintiff's offered enough evidence to rebut this presumption).

63. J. Brannon Maner, *Removal Under* Lowery v. Alabama Power Co., 70 ALA. LAW. 120, 120 (2009).

CAFA case decided shortly after the Act's passage, the plaintiffs sued twelve corporations and 120 fictitious entities for emitting gas into the atmosphere and ground water.[64] In the third and final amended complaint, filed a year later, the plaintiffs added Alabama Power Company and Filler Products Company as defendants.[65] A month later, Alabama Power filed a notice of removal under CAFA's mass action provision asserting that the district court had diversity jurisdiction over the case because the complaint consisted of claims of over 100 persons, the claims totaled more than $5,000,000, each claim was for an amount in excess of $75,000, and all the claims involved common questions of law or fact.[66] Alabama Power attached to its removal petition a copy of the original complaint and the third amended complaint.[67] In a footnote, the Eleventh Circuit explained that although Alabama Power had engaged in considerable discovery with the plaintiffs before the removal petition was filed, discovery that included the location of the plaintiffs' properties, Alabama Power cited nothing from such discovery in support of its removal petition.[68]

The plaintiffs responded to Alabama Power's removal petition by claiming that Alabama Power had not met its burden of establishing jurisdiction because neither the complaint nor the removal petition specifically stated the amount of damages the plaintiffs were claiming.[69] Alabama Power quickly responded by filing a supplement to its removal petition which stated that the amount in controversy had been met because the case involved over 100 persons, each plaintiff only had to recover $12,500 for the claims to total an excess of $5,000,000, and similar Alabama tort class-action verdicts or settlements totaled over $5,000,000.[70]

At the jurisdiction hearing two days later, plaintiffs' counsel conceded jurisdiction.[71] However, after the hearing on August 16, the district court ordered plaintiffs' counsel to file, pursuant to FRCP Rule 11, the names of the plaintiffs whose claims reasonably exceeded $75,000.[72]

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64. Lowery v. Ala. Power Co., 483 F.3d 1184, 1188 (11th Cir. 2007).

65. *Id.*

66. *Id.*

67. *Id.* at 1189.

68. *Id.* at n.8.

69. *Id.* at 1189.

70. *Id.*

71. *Id.* at 1190.

72. *Id. But see* Thomas M. Byrne & Valerie S. Sanders, *'See No Removal, Hear No Removal': The Eleventh Circuit's New Posture on Removal in* Lowery v. Alabama Power Co., 25 No. 15 ANDREWS TOXIC TORTS LIT. REP. 11 (2007) (noting that although *Lowery* required the removing documents to unequivocally establish jurisdiction pursuant to FRCP Rule 11, that rule requires only that the allegations "have evidentiary support or if specifically so identified, are

The plaintiffs replied to the order by stating that they lacked sufficient information to deny that each claim exceeded the $75,000 threshold.[73] A week later, Alabama Power filed a response to the plaintiffs' reply stating that CAFA's $75,000 threshold is an exception, rather than a requirement, to the court's jurisdiction.[74] Specifically, Alabama Power argued that under CAFA, defendants could establish jurisdiction as long as the plaintiff class exceeds 100 claims and as long as the total amount in controversy exceeds $5,000,000.[75]

In a memorandum opinion, the district court held that first, it lacked jurisdiction over those defendants who had been made parties prior to CAFA's enactment.[76] Second, the court held that even if every single defendant was properly before the court, the defendants had failed to prove by a preponderance of the evidence that each individual plaintiff's claim was in excess of $75,000 or that the total sum of all the claims was in excess of $5,000,000.[77] Following the district court's remand order, Alabama Power and a majority of the pre-CAFA defendants moved the Eleventh Circuit for leave to appeal.

Although the defendants' appeals involved four distinct issues, including an explanation of CAFA's mass action provision and removal guidelines, the removal burden discussion is the one of most concern here. After a brief critique of the *McNutt* preponderance of the evidence standard, the Court noted that assuming past Eleventh Circuit decisions were correct in relying on *McNutt*, the preponderance of the evidence standard has always been used to weigh pieces of evidence in a situation and, as such, cannot be applied to naked pleadings.[78] The Eleventh Circuit stated that although it did not have the evidence to determine the amount in controversy and only had naked pleadings, it was bound to follow Eleventh Circuit precedent and erroneously apply the preponderance of the evidence standard to the naked-pleading context.[79] As such, it was at a loss at how to apply the preponderance standard because Alabama Power had not produced any evidence beyond the pleadings

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likely to have evidentiary support after a reasonable opportunity for further investigation or discovery") (citing FED. R. CIV. P. 11).

73. Lowery v. Ala. Power Co., 483 F.3d 1184, 1191 (11th Cir. 2007).

74. *Id.*

75. *Id.*

76. *Id.* at 1192.

77. *Id.*

78. *Id.* at 1210.

79. *Id.* (The Eleventh Circuit cited *Tapscott*, *Gafford*, and *Garza* in holding that courts typically always have evidence beyond the pleadings when they apply the preponderance of the evidence standard in the removal context to determine the amount in controversy); *see* Friedman v. N.Y. Life Ins. Co., 410 F.3d 1350, 1352–53 (11th Cir. 2005); Kirkland v. Midland Mortgage Co., 243 F.3d 1277, 1281 n.5 (11th Cir. 2001).

for the court to weigh in determining the amount in controversy.[80] Instead, all the Court had before it was the jurisdictional representations in the removal petition and the allegations of the third amended complaint.[81]

Significantly, the court held that per the removal scheme set forth in 28 U.S.C. §§ 1446(b) and 1447(c),[82] courts must assess the amount in controversy by relying only on the removal documents:

> If the jurisdictional amount is either stated clearly on the face of the documents before the court, or readily deducible from them, then the court has jurisdiction. If not, the court must remand. Under this approach, jurisdiction is either evident from the removing documents or remand is appropriate.[83]

By applying a method of analysis similar to the removal scheme found in Section 1446(b), the court stated that when assessing the propriety of removal, the court could only consider the notice of removal and any accompanying documents.[84] This fact falls in line with the requirements set forth by Section 1446(b), which allows the court to consider only documents received by the defendant from the plaintiff. If, the court stated, the evidence allowed is insufficient to establish the amount in controversy, the court must remand because neither "the defendants nor the court may speculate in an attempt to make up for the notice's filings."[85] The court also noted in a footnote that if the defendant could meet this heightened evidentiary burden, it could surely meet a more stringent evidentiary standard similar to the legal certainty burden.[86]

The Eleventh Circuit eventually remanded the case and concluded that Alabama Power had failed to meet its burden and assert a factual basis that fulfilled CAFA's jurisdictional requirements.[87] Specifically,

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80. Lowery v. Ala. Power Co., 483 F.3d 1184, 1211 (11th Cir. 2007).

81. *Id.* The Eleventh Circuit also held that under the preponderance of the evidence standard, the removing defendant must establish the amount in controversy by the "greater weight of the evidence, . . . [a] superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." *Id.* at 1209 (citing BLACK'S LAW DICTIONARY 1220 (8th ed. 2004)).

82. 28 U.S.C. §§ 1446(b)–(c) (2007) (referring to the notice of removal as a prerequisite to establishing jurisdiction).

83. *Lowery*, 483 F.3d at 1211.

84. *Id.* at 1214. The court also made clear that defendant's knowledge of the amount in controversy will usually come from an "other paper" under Section 1446(b) because in the usual circumstance, a plaintiff who has chosen to file in state court will purposely fail to assign a specific damage amount to the complaint. In these situations, if the defendant fails to produce this "other paper," the amount of damages will be too speculative and remand will ordinarily be appropriate. *See id.* at 1215 n.63.

85. *Id.* at 1214; The court noted that if it allowed mere speculation as a basis for removal, the "reasonable inquiry" standard under FRCP Rule 11 would serve no purpose. *See id.* at 1215 n.67.

86. *Id.*

87. *Id.* at 1218.

the court stated that the defendants were unable to establish that the amount in controversy exceeded $5,000,000. Pursuant to Section 1446(b), after looking to the face of the notice of removal and any attached documents, including the third amended complaint, the court held that neither document provided any concrete information on the amount of the plaintiffs' claims.[88] Further, the court rebutted Alabama Power's argument in concluding that the value of the plaintiffs' claims could not be speculated from the pleadings themselves without any evidence on the subject.[89] Before concluding, the court also held that evidence of damage awards in similar tort cases could not be introduced to support the amount in controversy because extrinsic evidence fails to say anything about the value of a plaintiffs' claim.[90]

IV. ANALYSIS: THE RETURN TO THE ORIGINAL PREPONDERANCE OF THE EVIDENCE STANDARD

Critics say *Lowery*'s holding is designed to make "removal more difficult [for defendants] when the plaintiff opposes it."[91] The *Lowery* court made clear its intention when it said that any "[d]ocuments received by the defendant must contain an *unambiguous statement* that clearly establishes federal jurisdiction."[92] Particularly, the court explicitly stated that the defendant should be able to satisfy a higher burden similar to the legal certainty burden to remove.[93] Although district court decisions after *Lowery* place a very high removal burden similar to the legal certainty burden on the defendant, recent district court decisions have shifted away from the *Lowery* holding and shifted back to the original, more liberal preponderance of the evidence standard, increasing defendants' chances of removal. At its core, this shift makes apparent the uncertainty federal circuits face in applying the preponderance of the evidence standard especially when most courts "disagree as to the requirements of their own particular standard."[94]

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88. *Id.* at 1220.

89. *Id.*

90. *Id.* at 1221; *see also* Ponce v. Fontainebleau Resorts, LLC., No. 0921548, 2009 WL 2948543, at *6 (S.D. Fla. July 13, 2009) (citing *Lowery* in holding that the court was skeptical to assess the value of the plaintiff's claim by looking to damage awards in similar cases).

91. Thomas M. Byrne, *Eleventh Circuit Survey*, 59 MERCER L. REV. 1117, 1117 (2008); *see also* Brannon Maner, *supra* note 63, at 126; Byrne & Sanders, *supra* note 72; Dixon & Walz, *supra* note 2, at 1.

92. Lowery v. Ala. Power Co., 483 F.3d 1184, 1213 n.63 (11th Cir. 2007) (emphasis added); *see also* Petition for Writ of Certiorari, Hanna Steel Corp., et al., v. Lowery, et al., 76 USLW 3633 app. at 66a, 79a (U.S. Apr. 1. 2008) (No. 07-1246) (stating that the *Lowery* Court held that a defendant cannot remove a case to federal court unless it has "received from the plaintiff 'clear' and 'unequivocal' evidence establishing the amount in controversy").

93. *Lowery*, 483 F.3d at 1211 n.59.

94. Alice M. Noble-Allgire, *Removal of Diversity Actions When the Amount in Controversy*

A. *Legal Certainty Decisions in the Eleventh Circuit*

The main thrust of almost all the legal certainty decisions in the Eleventh Circuit is the fact that the defendant has a right to remain in federal court as long as the case is "*clearly worth more than the jurisdictional amount.*"[95] In other words, the defendant has the burden of proving that to a legal certainty, the value of the plaintiff's claim is not less than the jurisdictional threshold.[96] In meeting this standard, that the plaintiff "could" recover more is not sufficient to establish the jurisdictional amount—the plaintiff's claim "must" exceed the amount in controversy.[97] Though it is heavier than the "more likely than not" balancing scheme of the preponderance of the evidence standard, the legal certainty burden is not impossible to meet.[98]

B. *Post-Lowery Decisions Similar to the Legal Certainty Burden*

In *Lowery*, the Eleventh Circuit concluded that the court would not speculate on the value of the plaintiffs' claims by reading into the pleadings without the benefit of any evidence.[99] Similarly, district court decisions decided soon after *Lowery* began to hold that under the preponderance of the evidence standard, *clear evidence* as to the value of a claim must be presented in order for the court to read into the pleadings allegations.[100] Courts justified this contention by citing *Lowery* and

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Cannot be Determined from the Face of the Complaint: The Need for Judicial and Statutory Reform to Preserve the Defendant's Equal Access to Federal Courts, 62 MO. L. REV. 681, 692 (1997).

95. Burns v. Windsor Ins. Co., 31 F.3d 1092 (11th Cir. 1994) (emphasis added); *see also* Hogans v. Reynolds, No. 2:05cv350, 2005 WL 1514070, at *2 (M.D. Ala. June 24, 2005); Cowan v. Outpatient Partners, Inc., No. 6:04cv28, 2004 WL 1084160, at *7 (M.D. Fla. Mar. 31, 2004) (holding that the defendant had not proved the amount in controversy to a legal certainty because there was more than a chance that a state court would award the plaintiff less than the jurisdictional amount); Pease v. Medtronic, 6 F. Supp. 2d 1354, 1356 (S.D. Fla. 1998); Jackson v. Am. Bankers, 976 F. Supp. 1450, 1451 (S.D. Ala. 1997); Progressive Specialty v. Nobles, 928 F. Supp. 1096, 1098 (S.D. Ala. 1997).

96. *Jackson*, 976 F. Supp. at 1454.

97. *Burns*, 31 F.3d at 1096; *Hogans*, 2005 WL 1514070, at *3 n.7; Quitman Church's Chicken, Inc. v. Chi. Title Ins. Co., 93 F. Supp. 2d 1252, 1253 (M.D. Ga. 2000).

98. *Hogans*, 2005 WL 1514070, at *2 (citing *Burns*, 31 F.3d at 1096); *see Burns*, 31 F.3d at 1096 (holding that although settlement offers alone are not enough to prove the amount in controversy, they do count for something); James v. CSX Transp. Inc., No. cv507-17, 2007 WL 1100503, at *2 (S.D. Ga. Apr. 9, 2007) (concluding that clear evidence, through expert witnesses and similar cases, of compensatory damages coupled with punitive damages is sufficient to meet the legal certainty burden); *Pease*, 6. F. Supp. 2d at 1357 (same); *Progressive Specialty*, 928 F. Supp at 1098 (holding that settlement offers count for something when attempting to prove the amount in controversy).

99. Lowery v. Ala. Power Co., 483 F.3d 1184, 1220 (11th Cir. 2007).

100. McCollough Enter., LLC, v. Marvin Windows & Doors, No. cv09-0310, 2009 WL 2216599, at *2 (S.D. Ala. July 20, 2009); MacDonald v. Circle K Stores, Inc., No. 6:08cv1825, 2009 WL 113377, at *3 (M.D. Fla. Jan. 16. 2009) (holding that the defendant did not establish the

noting that after *Lowery*, speculations on the value of the plaintiff's claim were not allowed in the Eleventh Circuit.[101] For instance, in *McCall v. Dickson* and *Spivey v. Fred's Inc.*, the District Court for the Middle District of Alabama found that outlining the types of damages the plaintiff had suffered was not enough to meet the jurisdictional amount in controversy.[102] The District Court for the Southern District of Alabama also noted the complexity of damage speculations in *Johnson v. Ansell Protective Products* when it found that nothing about the plaintiff's allegations that he sustained severe burns and permanent scarring and was claiming medical expenses, pain and suffering, emotional distress, and mental anguish made it easy to deduce the amount in controversy.[103] The court there held that "[f]ollowing *Lowery* 'it [was] insufficient to rely on the severity of the injuries alleged' to establish that it is readily deducible or 'facially apparent that the damages exceed the jurisdictional minimum.'"[104] Moreover, in *Howell v. Fields Realty* and *Wood v. Option One Mortgage Corp.*, district courts like the Middle and Northern District of Alabama, respectively, were quick to concede that although the amount in controversy might exist per the plaintiff's allegations, deciding so without the basis of any evidence would be mere

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jurisdictional amount where the defendant failed to provide supporting documentation and evidence, other than the already submitted requests for admission, relevant to the amount in controversy); Eyler v. ILD Telecomm., Inc., No. 3:08cv351, 2008 WL 5110754, at *9 (M.D. Fla. Nov. 25, 2008) (stating that an affidavit confirming that defendant had customers numbering in the hundreds of thousands was not enough to establish jurisdiction for a CAFA claim because the affiant could have been more specific).

101. McCall v. Dickson, No. 3:08cv985, 2009 WL 424727, at *2 (M.D. Ala. Feb. 17, 2009) (holding that outlining the type of damages in the complaint is not sufficient to establish jurisdiction); McAndrew v. Nolen, et al., No. 3:08cv294, 2009 WL 259735, at *4 (N.D. Fla. Feb. 4, 2009) (holding that the allegations in the complaint for permanent injuries, pain and suffering, lost wages, loss of earning capacity, and loss of quality of life did not demonstrate that the plaintiff was so seriously injured that she sustained damages in excess of the jurisdictional amount); Spivey v. Fred's Inc., 554 F. Supp. 2d 1271, 1275 (M.D. Ala. 2008) (holding that determining the amount in controversy from damages for mental anguish and punitive damages, costs, fees, and medical expenses, was mere speculation); Wood v. Option One Mortgage Corp., 580 F. Supp. 2d 1248, 1252–53 (N.D. Ala. 2008) (recognizing that "while the amount in controversy might exist" if the court finds jurisdiction on the allegations and damages in the complaint and removal documents, it would be mere speculation); Johnson v. Ansell Protective Prods., No. 08-0394, 2008 WL 4493588, at *8 (S.D. Ala. Oct. 2, 2008) (holding that nothing about the plaintiff's allegations that he sustained severe burns, permanent scarring, and is claiming medical expenses, pain and suffering, emotional distress, and mental anguish make it easy to deduce the amount in controversy); Howell v. Fields Realty, LLC, No. 2:08cv492, 2008 WL 2705383, at *2 (M.D. Ala. July 10, 2008) (finding that although the plaintiff alleged permanent injuries and punitive damages of a nature that a claim exceeding $75,000 is reasonable, the defendant presented no evidence that the amount in controversy had been met).

102. *McCall*, 2009 WL 424727, at *2; *Spivey*, 554 F. Supp. 2d at 1275.

103. *Johnson*, 2008 WL 4493588, at *8.

104. *Id.* (citing Williamson v. Home Depot USA Inc., No. 07-61643, 2008 WL 2262044, at *2 (S.D. Fla. May 30, 2008)).

speculation.[105]

Arguably, the clear-evidence standard advocated in *Lowery* and post-*Lowery* district court preponderance of the evidence decisions strikes a very close resemblance to the legal certainty burden. Much like *Lowery*'s heightened preponderance of the evidence standard, the legal certainty burden holds that unless it is clear that the amount in controversy is worth more than the jurisdictional amount, removal is not proper.[106] Further, under both, plaintiff admission of the amount in controversy is insufficient to establish jurisdiction.

To begin with, in *Burns* the Eleventh Circuit first held that under the legal certainty standard, settlement offers by themselves are not sufficient proof of jurisdiction.[107] District courts such as the Southern District of Alabama and the Southern District of Georgia also took a similar position toward settlement offers when they found them insufficient to meet the legal certainty standard in *Jackson v. American Bankers Insurance Co. of Florida* and *General Pump & Well Inc. v. Matrix Drilling Products Co.*[108] After *Lowery*, however, contrary to pre-*Lowery* precedent, district courts began to hold that under the preponderance of the evidence standard, plaintiff stipulations about the amount in controversy, particularly in the form of settlement offers, were insufficient to support jurisdiction.[109] The Southern District of Alabama reiterated the ineffec-

105. *Wood*, 580 F. Supp. 2d at 1252–53; *Howell*, 2008 WL 2705383, at *2.

106. Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994).

107. *Id.* at 1097.

108. Gen. Pump & Well Inc. v. Matrix Drilling Prods. Co., No. cv608045, 2009 WL 812340, at *3 n.5 (S.D. Ga. Mar. 26, 2009) (citing *Burns* in holding that a settlement offer is not sufficient to prove the amount in controversy); Jackson v. Am. Bankers Ins. Co. of Fla., 976 F. Supp. 1450, 1454 (S.D. Ala. 1997) (noting that the jurisdictional amount of a case is not the settlement value); *see also* Daniel v. Nationpoint, No. 2:07cv640, 2007 WL 4533121, at *2 (M.D. Ala. Dec. 19, 2007) (holding that the fact that the defendants offered to settle the case for more than the jurisdictional amount does not establish to a legal certainty that the amount in controversy had been met); Progressive v. Nobles, 928 F. Supp. 1096, 1098 (M.D. Ala. 1996) (relying on the fact that the only evidence was a settlement offer, the court held that the defendant failed to prove to a legal certainty that the jurisdictional amount had been met).

109. *See* Eyler v. ILD Telecomm., Inc., No. 3:08cv351, 2008 WL 5110754, at *9 (M.D. Fla. Nov. 25, 2008). *But see,* Young v. Cargill Juice N.A., Inc., No. 8:06cv1350, 2006 WL 3544810, at *3 (M.D. Fla. Nov. 13, 2008) (holding that where plaintiff admitted in her response to discovery requests that she was claiming damages in excess of $75,000, the defendant established the amount in controversy under the preponderance of the evidence standard); Morock v. Chautauqua Airlines, Inc., No. 8:07cv00210, 2007 WL 1725232, at *3 (M.D. Fla. June 14, 2007) (holding that the defendant met the preponderance of the evidence burden by plaintiff's refusal to comply with discovery in regards to the settlement offer); Deel v. Metromedia Rest. Serv., Inc., No. 3:05cv120, 2006 WL 481667, at *2 (N.D. Fla. Feb. 27, 2006) (finding that under the preponderance of the evidence standard, a settlement letter is sufficient to determine removal jurisdiction); Lowe's OK'D Used Cars, Inc. v. Acceptance Ins. Co., 995 F. Supp. 1388, 1392 (M.D. Ala. 1998) (concluding that defendant had met its preponderance burden by offering damage award examples and by the fact that plaintiff had refused to state in her answers to interrogatories that the amount in controversy was below $75,000).

tiveness of settlement offers in *Jackson v. Select Portfolio Servicing, Inc.*, when it noted that under the preponderance of the evidence standard, the judiciary should approach settlement demands with skepticism.[110] Skeptic the courts were: the District Courts for the Southern District and Middle District of Florida ultimately determined that a settlement offer was insufficient evidence[111] because it is merely a stipulation by the plaintiff that it believes its case is worth a certain amount.[112]

The key similarity, however, is the fact that under both the legal certainty burden and the *Lowery* preponderance of the evidence standard, the amount in controversy must be an objective determination.[113] In other words, speculations and guesstimates derived from reading into the plaintiff's allegations are prohibited.[114] In reaching this determination, both standards rely heavily on the implications of FRCP Rule 11.[115] In adopting the legal certainty burden in *Burns* the Eleventh Circuit held that a difficult burden was necessary because "plaintiff's claim, when it is specific and in a pleading signed by a lawyer, deserves deference and a presumption of truth."[116] In support of this contention, the Court cited Rule 11 of Alabama's Rules of Civil Procedure that, almost identically to FRCP Rule 11, ensures the certification and support base of counsel's arguments.[117] Similarly, in *Lowery*, the Eleventh Circuit again held that to allow speculation as a basis for removal would be to

110. Jackson v. Select Portfolio Servicing, Inc., No. 08-0628, 2009 WL 2385084, at *1 (S.D. Ala. July 31, 2009).

111. Desmond v. HSBC Card Servs., Inc., No. 8:09cv1272, 2009 WL 2436582, at *2 (M.D. Fla. Aug. 6, 2009); Love v. N. Tool & Equip. Co., No. 08-20453, 2008 WL 2955124, at *2 (S.D. Fla. Aug. 1, 2008); *see also* Dutton v. State Farm Mut. Auto Ins. Co., No. 6:09cv1057, 2009 WL 2985685, at *2 (M.D. Fla. Sept. 15, 2009) (determining that plaintiff's settlement offer, along with other evidence, fell short of proving that defendants fulfilled the preponderance of the evidence burden and establishing the amount in controversy); Fields v. State Farm Mut. Auto Ins. Co., No. 6:08cv632, 2008 WL 2705424, at *1 n.1 (M.D. Fla. July 9, 2008) (finding that although the defendant could have made an argument supporting the amount in controversy by plaintiff's demand letter, he failed to do so).

112. *Love*, 2008 WL 2955124, at *2; *see also* Lowery v. Ala. Power Co., 483 F.3d 1184, 1215 (11th Cir. 2007) (noting that "the defendant nor the court can speculate to make up for the notice's failings").

113. *See* Burns v. Windsor Ins. Co., 31 F.3d 1092, 1096 (11th Cir. 1994) ("The standard is an objective one; plaintiff's or plaintiff's counsel's subjective intent in drafting the prayer is not the true issue."); Ponce v. Fontainebleau Resorts, LLC., No. 0921548, 2009 WL 2948543, at *6 (S.D. Fla. July 13, 2009) (citing *Burns*, 31 F.3d at 1096); Pease v. Medtronic, 6 F. Supp. 2d 1354, 1356 (S.D. Fla. 1998); *Jackson*, 976 F. Supp. at 1451.

114. *Lowery*, 483 F.3d at 1214–15, 1220.

115. FED. R. CIV. P. 11; *see Lowery*, 483 F.3d at 1214 n.67; *Burns*, 31 F.2d at 1095 n.5.

116. *Burns*, 31 F.3d at 1095; *see also Ponce*, 2009 WL 2948543, at *6; James v. CSX Transp. Inc., No. cv50717, 2007 WL 1100503, at *2 (S.D. Ga. Apr. 9, 2007); Hogans v. Reynolds, No. 2:05cv350, 2005 WL 1514070, at *2 (M.D. Ala. June 24, 2005); Cowan v. Outpatient Partners, Inc., No. 6:04cv28orl22jgg, 2004 WL 1084160, at *6 (M.D. Fla. Mar. 31, 2004); Quitman Church's Chicken, Inc. v. Chi. Title Ins. Co., 93 F. Supp. 2d 1252, 1253 (M.D. Ga. 2000).

117. ALA. R. CIV. P. 11.

"erode the 'reasonable inquiry' standard of Rule 11 generally."[118]

Although both the legal certainty burden and the *Lowery* preponderance standard justify their holdings on the veracity and importance of the plaintiff's claims, it appears that the legal certainty burden has more reason to do so. Under that burden, the plaintiff has already alleged a specific amount of damages below the jurisdictional threshold. That the plaintiff's allegations should be given deference in this situation is obvious.[119] According to the *Burns* Court, a defendant's right to remove and a plaintiff's right to choose his forum are not on equal footing.[120] This is so because the plaintiff is the master of his complaint and, if the plaintiff chooses to plead less than the jurisdictional amount, the sum demanded should be the amount in controversy.[121]

C. *Recent District Court Decisions Apply the Original Preponderance of the Evidence Standard*

Recently, however, district courts in the Eleventh Circuit have begun to stray away from *Lowery*'s strict holding by applying the more liberal and circuit-recognized, pre-*Lowery* preponderance of the evidence standard. But despite this fact, courts are still justifying these decisions under *Lowery*. For example, similar to the Eleventh Circuit's holding in *Williams*, district courts began to determine the amount in controversy by making a common sense evaluation of the facts alleged in the removal document or the complaint.[122] Although it seems that this

118. Lowery v. Ala. Power Co., 483 F.3d 1184, 1214 n.67 (11th Cir. 2007).

119. *But see* Federated Mut. Ins. Co. v. McKinnon Motors, LLC, 329 F.3d 805, 808 (11th Cir. 2003) (citing *Burns* in noting that pursuant to FRCP Rule 11, the court should give great deference to any representations by plaintiff, whether or not a specific amount of damages is stated in the complaint).

120. *See* Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994).

121. WRIGHT & MILLER, *supra* note 27.

122. Devore v. Howmedica Osteonics Corp., No. 3:09cv690, 2009 WL 3110814, at *7 (M.D. Fla. Sept. 28, 2009) (stating that defendant satisfied the jurisdictional amount by asserting that the claim was a products liability action in which the plaintiff claimed to have suffered significant injuries severe enough to value over $100,000 in medical bills); Windfall Props. v. AnnTaylor Retail, Inc., No. 6:09cv1033, 2009 WL 2928892, at *2 (M.D. Fla. Sep. 9, 2009) (stating that the plaintiff met the jurisdictional amount by presenting allegations that it had not re-let the premises it sought back-rent for as of the date of the complaint); Roe v. Michelin N.A., No. 2:08cv837, 2009 WL 2232207, at *2 (M.D. Ala. July 28, 2009) (holding that the defendant satisfied the jurisdictional amount by asserting that the wanton conduct of a large company resulting in plaintiff's wrongful death was enough to meet the amount in controversy); Harrison v. Ace Am. Ins. Co., No. 2:09cv229, 2009 WL 1664372, at *2 (M.D. Ala. June 15, 2009) ("Jurisdiction is unambiguously established by the face of the complaint because it alleges that Harrison made a demand for policy limits, which exceed [the jurisdictional amount], and on a policy issued by the defendant."); Henderson v. Dollar Gen. Corp., No. 07-0799, 2009 WL 959560, at *4 (S.D. Ala. Apr. 7, 2009) (holding that "a fair and impartial mind" would find that the damages claimed and the years of pain add up to over the jurisdictional amount); Angrinon v. KLI, Inc., No. 08-81218, 2009 WL 506954m at *4 (S.D. Ala. Feb. 27, 2009) ("Based on the unchallenged factual allegation

evaluation runs contrary to *Lowery*'s refusal to rely on speculations and conclusory allegations without any clear evidence, courts have justified their holdings by stating that

> *Lowery* does not impose hyper-technical rules on litigants seeking to remove cases that clearly belong in federal court. The removal rules as interpreted by *Lowery* protect against "speculation" as to whether jurisdiction exists. It is the absence of factual allegations that should prevent courts from determining the existence of jurisdiction "by looking to the stars."[123]

In *Roe v. Michelin North America* and *Devore v. Howmedica Osteonics Corp.*, the Middle Districts of both Florida and Alabama were quick to make clear that *Lowery* in no way prevents a district court from using common sense to determine the jurisdictional amount, especially when a plaintiff refuses to concede that it is seeking a specific amount of damages.[124]

Most importantly, recent district court decisions support the pre-*Lowery*, *Williams*, and *Sierminksi* rule by allowing the introduction of supporting evidence relevant to the time of removal, including settlement offers.[125] Although the *Lowery* court did state that settlement

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that a life was lost, the Court has engaged in a common sense evaluation of the types of damages that plaintiff is seeking and concludes defendant has established by a preponderance of the evidence that the amount in controversy is in excess of $75,000."); Pittinos v. Provident Life & Accident Ins. Co., No. 08-0662, 2009 WL 424317, at *10 (S.D. Ala. Feb. 17, 2009) (recognizing that if the plaintiff proves that the defendant breached the contract it is reasonable to expect that damages will be in excess of the jurisdictional amount because the plaintiff will live and be entitled to benefits up until the date of trial); Macy's Fla. Stores, LLC v. Ill. Nat. Ins. Co., No. 08-21619, 2008 WL 2741132, at *3 (S.D. Fla. July 11, 2008) (holding that the defendant satisfied the jurisdictional amount because the evidence introduced confirmed that the minimum amount in controversy was $85,000 to $70,000 already expended defending the lawsuit and $15,000 expended in meeting the jurisdictional requirements); Sanderson v. Daimler Chrysler Motor Corp., No. 07-0559, 2009 WL 2988222, at *2 (S.D. Ala. Oct. 9, 2007) (holding that the defendant met the jurisdictional amount by asserting that the complaint's allegations, which stated the plaintiff had experienced serious permanent disfigurement and scarring to her face and body, were enough to meet the jurisdictional threshold); Barnes v. JetBlue Airways Corp., No. 07-60441, 2007 WL 1362504, at *2 (S.D. Fla. May 7, 2007) (recognizing that the defendant met the amount in controversy by offering the allegations of plaintiff's complaint and its own records as evidence that the compensatory damages, front pay, attorneys fees, and emotional distress would exceed $75,000).

123. *Harrison*, 2009 WL 1664372, at *2.

124. *Devore*, 2009 WL 3110814, at *7; *Roe*, 2009 WL 2232207, at *2.

125. McCollough v. Plum Creek Timberlands, L.P., No. 3:09cv1038, 2010 WL 55862, at *5 (M.D. Ala. Jan. 4, 2010); Boland v. Auto-Owners Ins. Co., No. 2009 WL 4730681, at *3 (M.D. Ala. Dec 7, 2009); Ralph v. Target Corp., No. 6:09-cv-1328-Orl-19KRS, 2009 WL 3200680, at *3 (M.D. Fla. Sept. 30, 2009); *Devore*, 2009 WL 3110814, at *7; Rollo v. Kleim, No. 3:09cv146, 2009 WL 1684612, at *3 (N.D. Fla. June 16, 2009); Frazier ex. rel. Corado v. Shelton & Tyrone Powe Logging, No. 09-0119, 2009 WL 1598428, at *4 (S.D. Ala. June 3, 2009); Katz v. J.C. Penney Corp., No. 09cv60067, 2009 WL 1532129, at *4 (S.D. Fla. June 1, 2009); Hardesty v. State Farm Mut. Auto Ins. Co., No. 6:09cv735, 2009 WL 1423957, at *2 (M.D. Fla. May 18,

offers and demand letters could be considered an "other paper" under Section 1446(b)'s removal scheme,[126] under the preponderance of the evidence standard, district courts soon after *Lowery* were wary to rely on settlement offers in establishing jurisdiction. Since its inception, the *Burns* decision has been consistently cited in holding that settlement offers should not alone determine jurisdiction,[127] mostly because they "reflect puffing and posturing" and should therefore be entitled to little weight.[128] This fact coupled with *Lowery*'s strict holding made it fairly impossible to establish jurisdiction by way of a settlement offer, unless it provided specific information about the plaintiff's damages to support the contention that jurisdiction was present.[129] In practice, the Southern District of Alabama in *Jackson v. Select Portfolio Servicing, Inc.* even went as far to note that because the defendant failed to offer a *non-speculative* way of determining the settlement offer's value, it was not relevant to the jurisdictional analysis.[130]

Yet district courts are more consistently finding demand and settlement letters sufficient to establish jurisdiction.[131] In doing so, some courts are also relying on common sense and the factual allegations of the plaintiff's case.[132] For instance, in *Ralph v. Target*

2009); Bankhead v. Am. Suzuki Motors Corp., 529 F. Supp. 2d 1329, 1334 (M.D. Ala. 2008); Lazo v. US Airways, Inc., No. 08-80391, 2008 WL 3926430, at *5 (S.D. Fla. Aug 26, 2008).

126. Lowery v. Ala. Power Co., 483 F.3d 1184, 1212 n.62 (11th Cir. 2007).

127. *See* Burns v. Windsor Ins. Co., 31 F.3d 1092, 1097 (11th Cir. 1994).

128. Jackson v. Select Portfolio Servicing, Inc., 651 F. Supp. 2d 1279 (S.D. Ala. 2009); *see also* Dutton v. State Farm Mut. Auto Ins. Co., No. 6:09cv1057, 2009 WL 2985685, at *2 (M.D. Fla. Sept. 15, 2009); Desmond v. HSBC Card Servs., Inc., No. 8:09cv1272, 2009 WL 2436582, at *2 (M.D. Fla. Aug. 6, 2009); Love v. N. Tool & Equip. Co., No. 08-20453, 2008 WL 2955124, at *2 (S.D. Fla. Aug. 1, 2008).

129. Golden Apple Mgmt. Co. v. Geac Computers, Inc., 990 F.Supp. 1364, 1368 (M.D. Ala. 1998); *see also Lowery*, 483 F.3d at 1214 (noting that if the accompanying documents to the notice of removal do not clearly establish that jurisdiction was present, a court cannot speculate as to whether the amount in controversy has been met).

130. *Jackson*, 651 F. Supp. 2d at 1282 n.5 (emphasis added).

131. Ralph v. Target Corp., No. 6:09-cv-1328-Orl-19KRS, 2009 WL 3200680, at *3 (M.D. Fla. Sept. 30, 2009); Rollo v. Kleim, No. 3:09cv146, 2009 WL 1684612, at *3 (N.D. Fla. June 16, 2009). Alongside settlement offers, district courts in the Eleventh Circuit are also finding affidavits sufficient evidence to establish jurisdiction. *See* Katz v. J.C. Penney Corp., No. 09cv60067, 2009 WL 1532129, at *4 (S.D. Fla. June 1, 2009) (stating that an affidavit by defendant's counsel confirming that damages would exceed the jurisdictional minimum could be considered in determining the jurisdictional amount); Lazo v. US Airways, Inc., No. 08-80391, 2008 WL 3926430, at *5 (S.D. Fla. Aug 26, 2008) (holding that the defendant had provided sufficient evidence to establish jurisdiction by providing an affidavit attesting to a conversation he had with plaintiff's counsel regarding the amount in controversy).

132. *See Katz*, 2009 WL 1532129, at *4 (concluding that plaintiff's pre-suit demand package claiming damages that exceed the jurisdictional amount may be considered in evaluating whether a case has been properly removed); Hardesty v. State Farm Mut. Auto Ins. Co., No. 6:09cv735, 2009 WL 1423957, at *2 (M.D. Fla. May 18, 2009) (holding that where plaintiff's counsel sends

Corp.,[133] the Middle District of Florida held that the settlement letter was enough to establish jurisdiction because the plaintiff had specifically described her injuries and held that her damages were in excess of the jurisdictional amount.[134] Similarly, in *Rollo v. Kleim*, the District Court for the Northern District of Florida recognized that the special damages in the demand letter, together with the likelihood of general damages, and the loss of consortium claim show that the defendant met its burden in proving the jurisdictional amount.[135]

On different justifications, district courts are also finding settlement and demand letters sufficient as long as the plaintiff's demand is in line with *Lowery*'s "unambiguous evidence" requirement[136] or jurisdiction is evident from the settlement.[137] For example, in *Frazier ex. rel. Corado v. Shelton & Tyrone Powe Logging* the Southern District of Alabama determined that the demand letter was enough to establish the amount in controversy where the plaintiff explicitly stated that the case was worth more than the jurisdictional amount.[138] In *Bankhead v. American Suzuki Motor Corp.* the court went even further in holding that jurisdiction was evident from the initial settlement letter without any further concessions by the plaintiff.[139]

D. *The Circuit Split*

While recent district courts applying the pre-*Lowery* preponderance of the evidence standard are still justifying their holdings under *Lowery*, the Eleventh Circuit explicitly held that district courts should not speculate by reading into the pleadings allegations or even settlement offers in

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defendant a detailed settlement letter justifying the settlement demand, defendant proved by a preponderance of the evidence that the jurisdictional amount had been met).

133. *Ralph*, 2009 WL 3200680, at *3.

134. *See also* Devore v. Howmedica Osteonics Corp., No. 3:09cv690, 2009 WL 3110814, at *7 (M.D. Fla. Sept. 28, 2009) (holding that the defendants met their burden by presenting both interrogatory responses and a demand letter that helped establish jurisdiction).

135. *Rollo*, 2009 WL 1684612, at *3.

136. Lowery v. Ala. Power Co., 483 F.3d 1184, 1213 n.63 (11th Cir. 2007).

137. *Id.* at 1211 (holding that jurisdiction is evident from the removing documents or remand is appropriate).

138. No. 09-0119, 2009 WL 1598428, at *4 (S.D. Ala. June 3, 2009); *see also* Boland v. Auto-Owners Ins. Co., No. 1:09cv976-MHT, 2009 WL 4730681, at *3 (M.D. Ala. Dec 7, 2009) (holding that plaintiff's settlement demands were enough to meet the jurisdictional burden because "the documents, read together, represent Boland's own specific and reasonable estimates of the lost rental income for his properties").

139. 529 F. Supp. 2d 1329, 1334 (M.D. Ala. 2008); *see also* McCollough v. Plum Creek Timberlands, L.P., No. 3:09cv1038, 2010 WL 55862, at *5 (M.D. Ala. Jan. 4, 2010) (citing *Bankhead*, the court held that here, jurisdiction was even more readily deducible from the removal documents than in *Bankhead* because the settlement offer indicated a strong analysis of the case by the plaintiff).

deciding whether the amount in controversy has been met.[140] This uncertainty over how to apply the preponderance burden is nothing new in this circuit. As evidenced in this note, district courts since before *Lowery* have been attempting to juggle what type of evidence they can evaluate in determining the jurisdictional amount. The *Lowery* court even stated that it was at a loss for how to apply the preponderance of the evidence standard because district courts in the Eleventh Circuit have consistently and erroneously applied it to the naked-pleading context.[141] But interestingly enough, the Eleventh Circuit is not the only circuit to entertain some insecurity in applying the preponderance of the evidence standard. Indeed, the *Lowery* court's uncertainty in applying the standard only highlights the increasing circuit split over the defendant's burden in proving the amount in controversy when the plaintiff fails to plead a specific jurisdictional amount.[142]

In the first instance, the Second and the Third Circuits have been plagued with inconsistencies in applying a specific standard. The Second Circuit, for example, has been known to use the preponderance of the evidence and the reasonable probability standard interchangeably.[143] Under the reasonable probability standard, a much lighter burden, if it appears that there is a reasonable probability that the plaintiff can recover more than the jurisdictional amount, the case is removable.[144] Under either standard, however, the defendant must present enough

140. *Lowery*, 483 F.3d at 1214.

141. *Id.* at 1210.

142. *See* Petition for Writ of Certiorari, Hanna Steel Corp., et al., v. Lowery, et al., 76 USLW 3633 app. at 66a, 79a (U.S. Apr. 1. 2008) (No. 07-1246); *id* at 18 (noting that the uncertainty over a removing defendant's burden of proof can be traced to confusion over the interpretation of *Red Cab* and *McNutt*); *see also* Frederico v. Home Depot, 507 F.3d 188, 193 (3d Cir. 2007) (citing Samuel Basset v. KIA Motors of Am., 357 F.3d 392, 397 (3d Cir. 2004)) (distinguishing *Red Cab* and *McNutt* based on whether the jurisdictional dispute involves factual matters); Guglielmino v. McKee Foods Corp., 506 F.3d 696, 702–05 (9th Cir. 2007) (O'Scannlain, J., concurring) (attempting to harmonize both *McNutt* and *Red Cab*); Meridian Security Ins. Co., v. Sadowski, 441 F.3d 536, 540–41 (7th Cir. 2006) (clarifying the confusion between the *McNutt* and *Red Cab* standards).

143. *See* United Food and Commercial Workers Union, Local 919, AFL-CIO v. Centermark Props. Meridian Square, Inc., 30 F.3d 298, 305 (2d Cir. 1994) (holding that a defendant has the burden of proving the amount in controversy by a reasonable probability and must do so by a preponderance of the evidence); McLoughlin v. People's United Bank, Inc., 586 F. Supp. 2d 70, 72 (D. Conn. 2008) (citing both the reasonable probability and the preponderance of the evidence standard); Setlock v. Renwick, No. 04cv0079e, 2004 WL 1574663, at *1 (W.D.N.Y. May 21, 2004) (same); Royal Ins. Co. v. Jones, 76 F. Supp. 2d 202, 204 (D. Conn. 1999) (same); Michael W. Lewis, *Comedy or Tragedy: The Tale of Diversity Jurisdiction Removal and the One-Year Bar*, 62 SMU L. REV. 201, 210 (2009) (noting the Second Circuit's uncertainty over either standard); *see also* Cheung v. Union Cent. Life Ins. Co., 269 F. Supp. 2d 321, 323 (S.D.N.Y. 2003) (noting that "the standard governing a removing defendant's burden where the plaintiff challenges the jurisdictional amount appears to be open in this circuit").

144. Ball v. Hershey Foods Corp., 842 F. Supp. 44, 47 (D. Conn. 1993).

proof that the jurisdictional allegations have been met.[145]

The Third Circuit, interestingly enough, also exhibited serious irregularity in applying both the preponderance of the evidence standard and the reasonable probability standard.[146] In fact, some district courts have "acknowledged that the Third Circuit itself has not clearly indicated the standard to be applied and, therefore, have developed their own approaches."[147] But unlike the Second Circuit, who used both standards interchangeably, the Third Circuit applied them separately. It was not until *Samuel Basset v. KIA Motors of America* that the Third Circuit finally realized it was in dire need of a standard courts could consistently apply.[148] There, the court held that in disputes over factual matters, the *McNutt* preponderance of the evidence standard should be used.[149] Once findings of fact have been made, the case should only be remanded if it appears to a legal certainty that the plaintiff cannot recover more than the jurisdictional amount.[150] In other words, whatever facts are *not* in dispute should be held to the legal certainty standard.[151] In *Frederico v. Home Depot*,[152] the Third Circuit ultimately adopted this inverted legal certainty test and denied the motion to remand because the pleadings did not show to a legal certainty that the plaintiff could not recover more than the jurisdictional amount.[153]

Second, it is important to note that the Fifth, Seventh, and Tenth Circuits all apply the preponderance of the evidence standard, even where the plaintiff alleges an amount less than the jurisdictional amount.[154] Their reasons for doing so benefit the defendant, who in cases with indeterminate damages faces a difficult obstacle in removing.[155] For instance, in *De Aguilar v. Boeing Co.*, the Fifth Circuit held

145. Lewis, *supra* note 143, at 210.

146. *See Samuel Basset*, 357 F.3d at 396 (quoting Irving v. Allstate Indem. Co., 97 F. Supp. 2d 653, 654 (E.D. Pa. 2000)) ("Courts in the Third Circuit are unencumbered by consistency in their characterization of a defendant's burden of proving the amount in controversy on a motion to remand.").

147. Penn v. Wal-Mart Stores, Inc., 116 F. Supp. 2d 557, 562 (D.N.J. 2000) (citing Mercante v. Preston Trucking, Co. Inc., No. 96-5904, 1997 WL 230826, at *1 (E.D. Pa. 1997)).

148. 357 F.3d 392 (3d Cir. 2004). *But see Penn*, 116 F. Supp. 2d at 562 (discussing the external circuit split and the Third Circuit's disagreement on amount in controversy burdens).

149. *Samuel Basset*, 357 F.3d at 398.

150. *Id.* at 397–98.

151. *Id.* at 398 (emphasis added).

152. 507 F.3d 188 (3d Cir. 2007).

153. *Id.* at 199.

154. Guglielmino v. McKee Foods Corp., 506 F.3d 696, 703 (9th Cir. 2007) (O'Scannlain, J., concurring) (noting that the preponderance of the evidence standard strikes a balance between plaintiff's right to remain in state court and defendant's right to remove to federal court).

155. *Id.* at 703 (citing De Aguilar v. Boeing Co., 47 F.3d 1404, 1411 (5th Cir. 1995)) (holding that imposing a more stringent burden on defendants may fail to protect defendants from plaintiffs who fail to specify a damage amount in the complaint in order to avoid federal jurisdiction).

that the plaintiff's claim remains correct until the defendant proves by a preponderance of the evidence that the jurisdictional amount has been met.[156] Removal is then proper unless the plaintiff proves to a legal certainty that recovery cannot exceed the jurisdictional threshold.[157] On a similar stance, the Seventh Circuit in *Meridian Security Insurance Co. v. Sadowski* determined that when the defendant establishes that the amount in controversy more likely than not exceeds the jurisdictional amount, removal is proper unless the plaintiff shows to a legal certainty that federal jurisdiction is improper.[158] Citing *Meridian*, the Tenth Circuit quickly followed pace in *McPhail v. Deere & Co.*, when it held that the proponent of federal jurisdiction must prove contested facts by a preponderance of the evidence.[159] Once he does so, he is entitled to remain in federal court unless it is legally certain that less than $75,000 is at stake.[160]

Further, although circuits vary as to what standard to apply to a complaint seeking an unspecified amount of damages, those circuits that do apply the preponderance of the evidence standard apply it very inconsistently.[161] This phenomenon "more than probably" stems from that fact that *McNutt* provided little guidance as to how much and what type of proof was sufficient and competent enough to meet the preponderance of the evidence standard.[162] As such, applying a preponderance of the evidence is usually undefined and requires either a different set of evidentiary rules per circuit or, in some instances, requires a defendant to abide by the ambiguous "more likely than not" standard.

For instance, according to the Fifth Circuit, if the jurisdictional amount is not apparent from the face of the complaint, the court then considers the removal petition, affidavits, and other summary judgment-type evidence.[163] Following the Fifth Circuit, the Ninth Circuit also promotes the introduction of summary judgment-type evidence in meeting

156. *De Aguilar*, 47 F.3d at 1412.

157. *Id.*

158. 441 F.3d 536, 542 (7th Cir. 2006).

159. 529 F.3d 947 (10th Cir. 2008).

160. *Id.* at 954.

161. *Id.*; *Meridian*, 441 F.3d at 541–42; Singer v. State Farm Mut. Auto. Ins. Co., 116 F.3d 373, 377 (9th Cir. 1997); Allen v. R&H Oil and Gas Co., 63 F.3d 1326, 1335 (5th Cir. 1995).

162. McNutt v Gen. Motors Acceptance Corp. of Ind. Inc., 298 U.S. 178, 189 (1936) ("If his allegations of jurisdictional facts are challenged by his adversary in an appropriate manner, he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismissed, *and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence.*") (emphasis added); *see also* Lowery v. Ala. Power Co., 483 F.3d 1184, 1210 (11th Cir. 2007) (finding precedential reliance on *McNutt* problematic because the language describing the preponderance of the evidence standard was only dicta).

163. *Allen*, 63 F.3d at 1335.

the jurisdictional threshold.[164] The Seventh Circuit, on the other hand, considers a broader array of evidence that includes, but is not limited to, interrogatories and admissions, the face of the complaint, settlement demands, informal estimates, and affidavits.[165] After agreeing with the Seventh Circuit, the Tenth Circuit adopted this same evidentiary standard but expanded it by allowing the possibility of post-removal evidence and discovery in support of jurisdiction.[166] On the other end of the spectrum, however, and similar to the Eleventh Circuit, the Sixth Circuit allows only the introduction of evidence relevant to the time of removal.[167]

This confusion over what evidence to consider under the preponderance of the evidence standard is further evidenced by the fact that some circuits assess the standard under a "more likely than not" threshold.[168] Taking into account that different circuits provide for different loads of evidence in meeting the preponderance of the evidence standard, the "more likely than not" threshold is at times ambiguous, confusing, and, in reality, not a workable threshold. Indeed, the *Lowery* court noted that circuits have assessed the preponderance of the evidence standard under the "more likely than not" threshold because of the confusion that commonly arises when considering evidence under the preponderance of the evidence standard.[169] Its meaning therefore varies and consequently, defendants' ease of removal ultimately depends on a circuit's viewpoint, whether flexible or not.

V. AFTER-THOUGHT/RECOMMENDATION

It is clear that a circuit-wide uniform preponderance of the evidence standard would certainly be more effective. In fact, other circuits have already recognized the need for a uniform burden and have begun the move toward one standard by implementing a cohesive preponderance of the evidence standard for their district courts to apply.[170] As such, it

164. *Singer*, 116 F.3d at 377.

165. *Meridian*, 441 F.3d at 541–42.

166. McPhail v. Deere & Co., 529 F.3d 947, 954 (10th Cir. 2008).

167. Williamson v. Aetna Life Ins. Co., 481 F.3d 369, 375 (6th Cir. 2007); Everett v. Verizon Wireless, 460 F.3d 818, 822 (6th Cir. 2006); Caudill v. Ritchie, No. 09-28 ART, 2009 WL 1211017, at *4 (E.D. Ky. May 1, 2009) (concluding, similar to the *Lowery* court, that if defendants wanted to remove to federal court, they should have conducted discovery in state court prior to removal).

168. Rogers v. Wal-Mart Stores, 230 F.3d 868, 871 (6th Cir. 2000) (holding that under the preponderance of the evidence standard, a defendant must prove it is "more likely than not" that the plaintiff's claims exceed the jurisdictional amount); Sanchez v. Monumental Life Ins. Co., 102 F.2d 398, 404 (9th Cir. 1996) (same); Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1357 (11th Cir. 1996) (same); Gafford v. Gen. Elec. Co., 997 F.2d 150, 158 (6th Cir. 1993) (same).

169. Lowery v. Ala. Power Co., 483 F.3d 1184, 1209 n.57 (11th Cir. 2007).

170. *McPhail*, 529 F.3d at 953; Meridian Security Ins. Co., v. Sadowski, 441 F.3d 536, 541

seems reasonable to note that in the first instance, the Eleventh Circuit must also come together and implement a more effective standard that district courts could and will follow. In doing so, the circuit should take note that one of the major reasons other circuits have been successful in creating a uniform standard that district courts *actually follow* is because they have created a preponderance of the evidence standard that benefits defendants' chances of removal.

For instance, similar to the Eleventh Circuit in *Lowery*, the Tenth Circuit in *McPhail* confronted the problem with the lack of evidence available when a removal petition is filed. At that point, the question primarily becomes how a defendant could possibly prove facts in support of the amount in controversy when pre-removal discovery is probably insufficient, when the plaintiff will most probably not respond well to interrogatories, and when the chances of post-removal discovery are nonexistent, since the plaintiff will immediately move to remand.[171] The Tenth Circuit further agreed with the Seventh Circuit in *Meridian* in holding that the proponent must prove contested factual assertions to remain in federal court. This, the Tenth Circuit said, "explains the proper role of the 'preponderance of the evidence' standard, and how defendants may have a chance at satisfying it."[172]

Specifically, Judge Easterbrook in *Meridian* relied on the requirements set out in Rules 8(a)(1) and 12(b)(1) of the Federal Rules of Civil Procedure in holding that jurisdiction is a "legal conclusion, a *consequence* of facts rather than a provable fact."[173] In other words, once the defendant proves contested factual assertions, the case should remain in federal court unless it appears to a legal certainty that the claim does not exceed the jurisdictional amount. Unlike *Lowery*'s preponderance of the evidence standard, any uncertainty about the plaintiff's claims exceeding the jurisdictional threshold is not enough to justify dismissal.[174] In creating this burden, Judge Easterbrook noted that its requirements harmonized the Supreme Court's decisions in *McNutt* and *Red Cab*: it placed the burden of removal on the defendant, the party seeking jurisdiction,

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(7th Cir. 2006); De Aguilar v. Boeing Co., 47 F.3d 1404, 1411 (5th Cir. 1995); United Food and Commercial Workers Union, Local 919, AFL-CIO v. Centermark Props. Meridian Square, Inc., 30 F.3d 298, 304 (2d Cir. 1994).

171. *McPhail*, 529 F.3d at 953; *see also* Noble-Allgire, *supra* note 94, at 731.

172. McPhail v. Deere & Co., 529 F.3d 947, 954 (10th Cir. 2008) (citing *Meridian*, 441 F.3d at 540–43).

173. *Meridian*, 441 F.3d at 541. The Court relies on these Federal Rules of Civil Procedure primarily to show that jurisdiction, or a lack thereof, can be established through the use of the fact pleading process. *See* Fed. R. Civ. P. 8(a)(1) (stating that a short and plain statement is all that is necessary to establish jurisdiction); FED. R. CIV. P. 12(b)(1) (noting that a party may present the defense of subject-matter jurisdiction by motion).

174. *Meridian*, 441 F.3d at 543.

and then allowed the plaintiff to defeat jurisdiction by proving that its claim cannot exceed the jurisdictional amount.[175] The Fifth Circuit in *De Aguilar* and Judge O'Scannlain of the Ninth Circuit's concurrence in *Guglielmino v. McKee Foods Corp.*[176] were also quick to note that a stricter burden on defendants would allow plaintiffs to get away with pleading manipulation that would ultimately allow them to remain in state court and recover a larger sum on remand.[177]

The Second Circuit, on the other hand, successfully applies a standard very similar to the "more likely than not" standard, the reasonable probability standard, in helping defendants remove to federal court. The reason for its success, however, is that as opposed to most other circuits that have applied or continue to apply the ill-defined "more likely than not" standard or the inconsistent preponderance of the evidence standard, including the Eleventh Circuit,[178] the Second Circuit actually specifies the evidence threshold defendants must meet under the preponderance of the evidence standard. For example, in *United Food & Commercial Workers Union*, the Second Circuit held that the defendant must prove through a preponderance of the evidence that it is reasonably probable that the plaintiff's claim exceeds the jurisdictional amount.[179] To a certain extent, defendants are more aware of how much evidence is necessary to prove the amount in controversy—whatever makes it reasonably probable.[180] This burden has been recognized as not overly

175. Guglielmino v. McKee Foods Corp., 506 F.3d 696, 703 (9th Cir. 2007) (O'Scannlain, J., concurring) (citing *Meridian*, 441 F.3d at 543).

176. *Id.*

177. *Id.* at 704; De Aguilar v. Boeing Co., 47 F.3d 1404, 1411 (5th Cir. 1995). *But see* Frederico v. Home Depot, 507 F.3d 188, 198 (3d Cir. 2007) (noting the possible benefit of pleading manipulation under the inverted legal certainty test—in situations where the plaintiff fails to plead a certain amount of damages, the plaintiff will usually continue to withhold information about the value of her claim with the purpose of keeping herself out of federal court; but, in withholding all this information, the pleadings only show that it is legally certain the plaintiff could not recover more than the amount in controversy and the plaintiff will ultimately have to remain in federal court); *see also* Lewis, *supra* note 143, at 212.

178. Although the Eleventh Circuit in *Lowery* credited the Ninth and Sixth Circuit's application of the "more likely than not" threshold to an uncertainty over the preponderance of the evidence standard, the Eleventh Circuit itself actually applied the "more likely than not" threshold in *Tapscott* when it first applied the standard in the circuit. This fact may well have contributed to the confusion over how to apply the standard properly. Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1357 (11th Cir. 1996).

179. United Food and Commercial Workers Union, Local 919, AFL-CIO v. Centermark Props. Meridian Square, Inc., 30 F.3d 298, 304 (2d Cir. 1994).

180. *See* Tongkook Am. Inc., Shipton Sportswear Co., 14 F.3d 781, 784 (2d Cir. 1994) (citing Moore v. Betit, 511 F.2d 1004, 1006 (2d Cir. 1975) (noting that the party invoking federal jurisdiction has the burden of proving that it is reasonably probable that the amount in controversy exceeds the jurisdictional minimum)).

heavy[181] and can be achieved through the allegations on the face of the complaint, demand letters,[182] and affidavits.[183]

On simple policy grounds, a more relaxed preponderance of the evidence standard is further justified by the fact that in setting a lower standard of proof for indeterminate complaints, federal courts have relied on striking a proper balance between the interests of both plaintiffs and defendants.[184] According to the Eleventh Circuit in *Tapscott*, "[w]here a plaintiff has made an unspecified demand for damages, a lower burden of proof is warranted because there is simply no estimate of damages to which a court may defer."[185] The Fifth Circuit first adopted the more lenient preponderance of the evidence standard in *Garza* because applying the legal certainty standard to situations where damages are difficult to calculate and specify would almost always preclude defendants from removing in appropriate cases.[186] In other words, a lower jurisdictional burden is warranted where plaintiffs do not claim a specific amount of damages because it would not otherwise be possible for defendants to remove. In support of this contention, the Fifth Circuit in *De Aguilar* reiterated the fact that a plaintiff should not be allowed to destroy a defendant's choice to remove under the removal statute.[187]

Generally speaking, benefitting a defendant's chance of removal is further justified by Congress's enactment of the diversity jurisdiction statute.[188] Many scholars and federal judges agree that in granting diver-

181. Ball v. Hershey Foods Corp., 842 F. Supp. 44, 47 (D. Conn. 1993) (citing *Moore*, 511 F.2d at 1006).

182. Royal Ins. Co. v. Jones, 76 F. Supp. 2d 202, 204 (D. Conn. 1999).

183. *United Food*, 30 F.3d at 305–06.

184. Sanchez v. Monumental Life Ins. Co., 102 F.2d 398, 403 (9th Cir. 1996); *see also* Jessee, *supra* note 9, at 679; Scott R. Haiber, *Removing the Bias Against Removal*, 53 CATH. U. L. REV. 609, 621 (2004) ("In interpreting the removal statutes as amended by these acts, federal courts continued to reflect Justice Story's view that removal was a procedural mechanism intended to ensure that plaintiffs and defendants had equal opportunities to invoke the federal jurisdiction of the federal courts . . . .").

185. Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1357 (11th Cir. 1996); *see* Gafford v. Gen. Elec. Co., 997 F.2d 150, 160 (6th Cir. 1993) ("The 'legal certainty' test in removal cases arose in a context where the plaintiff's prayer for damages in state court exceeded the federal amount-in-controversy requirement. In such a case as that, it is proper to presume that the plaintiff's prayer is an appropriate presentation of potential damages because the damages sought are against the plaintiff's interests. There can be no such presumption where there is no specific prayer for damages. Thus, the 'legal certainty' test should not be applied to situations . . . where damages are unspecified."); *see also* Singer v. State Farm Mut. Auto. Ins. Co., 116 F.3d 373, 376 (9th Cir. 1997); Garza v. Bettcher Indus. Inc., 752 F. Supp. 753, 755–56 (E.D. Mich. 1990).

186. *Garza*, 752 F. Supp. at 756.

187. De Aguilar v. Boeing Co., 47 F.3d 1404, 1411 (5th Cir. 1995) (citing Borlens v. Redman Homes, Inc., 759 F.2d 504, 507 (5th Cir. 1985)). *But see* Jessee, *supra* note 9, at 680 (noting that in favoring a less strict jurisdictional burden in *De Aguilar*, the Fifth Circuit ignored the fact that removal statutes should be construed narrowly).

188. 28 U.S.C. § 1332.

sity jurisdiction to the federal courts, Congress hoped to reduce the potential for state bias against out of state litigants.[189] This position has withstood much criticism, though. For instance, according to the American Law Institute ("ALI"), when one considers the increased mobility in society, the potential for state bias is minimal if not absent.[190] Justice Frankfurter, a long time enemy of the diversity statute, also noted the statute's potential to over-crowd the federal docket.[191] However, in *Burford v. Sun Oil*, Frankfurter did ultimately note that whether the federal courts should be relieved of diversity jurisdiction was a matter for Congress to decide, not for judges, "as the duty of the judiciary is to exercise the jurisdiction which Congress has conferred".[192] Based upon this premise, it is difficult to wonder why judges aggressively decide removal issues under the diversity statute.

One, and possibly the best, explanation has been proposed by Professor Scott R. Haiber:

> Rather than seeking to interpret removal statutes in a manner consistent with equity and common sense, courts apply a strict construction to removal statutes even when it leads to patently unfair results. Rather than seeking to achieve a statutory construction that furthers a longstanding congressional desire for fair and uniform procedures, courts justify confusion and arbitrary results with the assurance that removal must be limited. Moreover, many courts seem entirely undisturbed by the fact that defendants' constitutionally based removal rights are routinely destroyed by lawyers' procedural games.[193]

Heiber proposes three important reasons federal courts have created

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189. *See* 13E CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3601 (4th ed. 2009); Benjamin J. Conley, *Will the Real Party in Interest Please Stand Up?: Applying the Capacity to Sue in Diversity Cases*, 65 WASH. & LEE L. REV. 675, 682 (2008) (noting that most scholars agree that the purpose for the enactment of the diversity statute was the fear of bias against out of state citizens); *see also* Bank of U.S. v. Deveaux, 9 U.S. 61, 87 ("[I]t is not less true that the constitution . . . views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states."); S. REP. NO. 85-1830 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3099, 3102 (amending the diversity statute to classify corporations as citizens of a state and noting that "[t]he underlying purpose of diversity of citizenship legislation . . . is to provide a separate forum for out-of-state citizens against the prejudices of local courts and local juries by making available to them the benefits and safeguards of the federal courts").

190. Conley, *supra* note 190 (citing AM. LAW INSTIT., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 106 (Official Draft 1969) ("[N]one of the significant prejudices that beset our society today begins or ends when a state line is traversed.")).

191. Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 58 (1954) (Frankfurter J., concurring) ("For the last ten years the proportion of diversity cases has greatly increased, so that it is safe to say that diversity cases are now taking at least half of the time that the District Courts are devoting to civil cases.").

192. Burford v. Sun Oil, 319 U.S. 315, 337, 348 (1943) (Frankfurter, J., dissenting).

193. Heiber, *supra* note 185, at 656–57 (citations omitted).

a baseless presumption against removal: First, plaintiffs have a preferred access to federal courts; second, the concept of federalism requires removal from state court to be strictly construed; and finally, the limited nature of federal jurisdiction.[194] In rebutting the first presumption, Heiber states that neither Congress nor the Constitution has ever given plaintiffs preferred access to federal court.[195] Specifically, he notes that "[p]roviding plaintiffs with a superior right to select the judicial forum elevates one party's strategic litigation preference over the structural constitutional principle of equal justice."[196] Next, in responding to the federalism justification, Heiber makes it a point to note that removal can in no way be at tension with the notion of federalism when it was an essential component of the jurisdictional theme created by the Framers.[197] Finally, similar to Frankfurter's *Buford* dissent, federal courts are not adept to decide the nature of federal jurisdiction because under the Constitution, Congress, not the judiciary branch, defines the limits of federal jurisdiction.[198] In other words, federal courts should abandon whatever beliefs they have against removal practice and stick to the "long-held view that removal is a vital structural component of the American judicial system empowered by the constitution."[199]

VI. CONCLUSION

While it has been proven that *Lowery* did significantly narrow the preponderance of the evidence burden rendering it similar to the legal certainty burden, the importance courts grant a defendant's removal right is already being seen again in the Eleventh Circuit through the plain and simple fact that district courts post-*Lowery* have expanded *Lowery*'s holding to assist those defendants who are reasonably entitled to removal.[200]

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194. *Id.* at 657–62.

195. *Id.* at 658.

196. *Id.*

197. *Id.* at 659.

198. *Id.* at 660.

199. *Id.* at 663.

200. Although this departure may come as a surprise to many, in dicta the *Lowery* court itself advocated a preponderance of the evidence standard that militated toward allowing some breathing room in determining whether or not the amount in controversy will and can potentially satisfy the jurisdictional amount. This breathing room may well be the reason why district courts citing *Lowery* have taken the liberty of expanding *Lowery*'s holding. *See* Lowery v. Ala. Power Co., 483 F.3d 1184, 1209 (11th Cir. 2007) (holding that "the removing defendant must establish the amount in controversy by '[t]he greater weight of the evidence, . . . [a] superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other"); *see also* Allen v. Toyota Motor Sales, 155 F. App'x 480, 480-81 (11th Cir. 2005) (holding that based on the damage specifications in the removal notice, the amount in controversy more than probably

Whether or not the Eleventh Circuit intended for the standard to be extended on such grounds remains unknown. That the court even advocated this standard in the first place does, however, lead to the reasonable conclusion that while it significantly narrowed the preponderance of the evidence standard, the fear of deviating from well-established precedent barred the Eleventh Circuit from completely abandoning the pre-*Lowery* preponderance of the evidence standard federal courts were familiar with. This confusion over the preponderance of the evidence standard is, as seen, nothing new in this circuit or other circuits, as different circuits apply a different evidentiary burden under that standard.

While the most effective solution to this confusion is certainly a uniform circuit-wide preponderance of the evidence standard that benefits defendants, as evidenced by the Tenth, Seventh, Fifth, and Second Circuit's experience, the road to uniformity must first begin within the Eleventh Circuit itself. Based on the Eleventh Circuit's and other circuits' advancement of a more lenient preponderance of the evidence standard, the truth of the matter may be that courts have an inherent fear of abandoning removal burdens that will completely disadvantage defendants. To the discontent of many plaintiffs, that district courts in the Eleventh Circuit have interpreted *Lowery* with such breadth ultimately goes to show that in the indeterminate complaint context, whether or not as a result of human nature, courts will inevitably by and large give defendants the benefit of the doubt in removing. In other words, if the Eleventh Circuit does not jump on the bandwagon soon enough, it is going to be left behind.[201]

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exceeds jurisdictional amount); Henderson v. Dollar Gen. Corp., No. 070799cgm, 2009 WL 959560, at *4 (S.D. Ala. Apr. 7, 2009) (citing *Allen* and *Lowery* in finding that "[a]lthough the evidence before the court is not impregnable, 'a fair and impartial mind' would clearly find that years of pain in addition to the other elements of damage that the plaintiffs claim add up to a dispute of at least that amount"); Spivey v. Fred's Inc., 554 F. Supp. 2d 1271, 1275 (M.D. Ala. 2008) (agreeing with the damage specification test set out in *Allen* but declining to apply it to the facts of the case at bar).

201. The Eleventh Circuit recently reconsidered their decision in *Lowery* in Pretka v. Kolter City Plaza III, Inc., 608 F.3d 744 (11th Cir. 2010). There, in an opinion by Judge Carnes, the court held that *Lowery* was limited to its facts because it specifically involved the removal procedures of 28 U.S.C. § 1446(b) (2007). *Id.* at 757, 762. The court found that the question in *Lowery* was "how to apply the preponderance of the evidence standard in the 'fact-free context' of that particular case." *Id.* at 753. And that a different question was presented "when a removing defendant makes specific factual allegations establishing jurisdiction and can support them (if challenged by the plaintiff or the court) with evidence combined with reasonable deductions, reasonable inferences, or other reasonable extrapolations" because that type of reasoning was not similar to speculation. *Id.* at 754. Most importantly, the court refused to follow *Lowery*'s dicta limiting the type of evidence a defendant can present in establishing the amount in controversy requirement because: 1) it has never been the jurisdictional rule that a defendant can remove a diversity case only when the plaintiff is the source of all the evidence; and b) *Lowery* undermines Congress's intentions to benefit defendants with the removal statute. *Id.* at 764–68.