No. 02-1689

IN THE
Supreme Court of the United States

GRUPO DATAFLUX,

Petitioner,

v.

ATLAS GLOBAL GROUP, L.P., OSCAR ROBLES-CANON, and FRANCISCO LLAMOSA,

Respondents.

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

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE PETITION

Dataflux's petition for writ of certiorari should be denied because the majority opinion of the Fifth Circuit ("the Majority Opinion"): (1) applied correctly this Court's precedent; (2) the D.C. Circuit's opinion is not persuasive; and (3) policy concerns support the Majority Opinion.

I. The Majority Opinion Applied Correctly This Court's Precedent.

Dataflux goes to great lengths to characterize the Majority Opinion as a "new rule." The Majority Opinion is however merely a correct application of this Court's holding in *Caterpillar, Inc. v. Lewis* to this case; it is not a "new rule." 519 U.S. 61 (1996). As demonstrated below, this Court did not limit its holding in *Caterpillar*, as Dataflux suggests, to cases involving removal; to cases in which the lack of complete diversity was cured by the dismissal of a nondiverse party; or to cases in which a judgment was rendered before the lack of complete diversity was established. Instead, *Caterpillar* applies to cases such as this one. Namely, cases in which the complaint was filed originally in federal court; the lack of diversity was cured by a party's unilateral conduct; and the jury verdict was returned before the lack of diversity was raised by either party or the judge. Accordingly, for the reasons detailed below, Atlas asks the Court to deny Dataflux's petition.

A. This Court's Opinion in *Caterpillar* Applies to Cases Filed Originally in Federal Court.

1. This Court Did Not Limit Its Holding to Removal Cases.

Dataflux argues that the application of *Caterpillar* should be limited to removal cases. This Court did not however limit its holding in *Caterpillar* to cases that are removed to federal court. *See Caterpillar*, 519 U.S. at 61-78. While it is true that *Caterpillar* did involve a case that was removed, the *Caterpillar* Court's analysis concerning diversity jurisdiction, which is the issue here, did not focus on removal. This is demonstrated by the method in which the *Caterpillar* Court performed its analysis. The *Caterpillar* Court noted first that the underlying case had proceeded to trial, jury verdict, and judgment. *Id.* at 64-67. The *Caterpillar* Court noted further that, on appeal, the Sixth Circuit Court of Appeals had vacated the judgment for lack of subject matter jurisdiction because complete diversity did not exist when the case was removed. *Id.* at 67. Before the *Caterpillar* Court addressed issues regarding removal procedure, the Court analyzed whether the lack of complete diversity, at the time the case was removed, was sufficient to have deprived the district court of subject matter jurisdiction. *Id.* at 73. The *Caterpillar* Court concluded the Sixth Circuit had erred. *Id.* The *Caterpillar* Court held that the trial court did have subject matter jurisdiction because "[t]he jurisdictional defect was cured, i.e., complete diversity was established before the trial commenced." *Id.* at 73. Only after the *Caterpillar* Court concluded that subject matter jurisdiction existed did it address the issue of removal. *See id.* at 473-78. In particular, the *Caterpillar* Court addressed whether the trial court's error in denying the plaintiff's proper motion to remand was a

sufficient "statutory flaw" to warrant sending the case back to the trial court for the entire litigation process to be done over. *See id.* Notably, the Court held that even that error was not sufficient to prevent the trial court from entering judgment. *Id.* at 77.

Throughout the *Caterpillar* Court's opinion, it did not state that it intended the application of its reasoning or holding to be limited to removal cases. *See Caterpillar*, 519 U.S. at 61-78. In that regard, it is telling that Dataflux has cited to no portion of the *Caterpillar* decision that supports its position that this Court intended its opinion to be limited to removal cases. Dataflux seems to confuse this Court's noting of the obvious, that *Caterpillar* was a removal case, with this Court's limiting its opinion to removal cases.

2. Cases Filed Originally in Federal Court Should Not Be Subject to Different Rules Regarding Subject Matter Jurisdiction.

Dataflux argues that a case that is filed originally in federal court should be treated differently than one that is removed to federal court. Dataflux seeks to support this argument with its assertion that the judge and the parties will somehow behave differently in the context of a case removed to federal court than in the context of a case filed originally in federal court. Specifically, that a case will be scrutinized closer in the removal context. However, in both an originally filed case and a removal case, the same opportunities and obligations to remedy a defect in jurisdiction exist. In the context of removal, it is the party removing the case who has the burden to establish diversity. *See Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921); *Estate of Martineau v. Arco Chem. Co.*, 203 F.3d 904, 910 (5th Cir. 2000). In the

context of an original filing, it is the party filing the suit who bears the burden to establish diversity. *See Stafford v. Mobil Oil Corp.*, 945 F.2d 803, 804 (5th Cir. 1991). Regardless of whether a case is removed to, or filed originally in, federal court, the party that seeks to avoid federal jurisdiction has the opportunity to raise the lack of diversity. *See* 28 U.S.C. § 1447(c) (permitting a party to file a motion for remand for lack of subject matter jurisdiction); FED. R. CIV. P. 12(b)(1) (permitting a party to move for dismissal for lack of subject matter jurisdiction). Further, the court can raise the lack of diversity at any time, regardless of whether a case is removed or filed originally in federal court. *See Stafford*, 945 F.2d at 804 (noting that the lack of subject matter jurisdiction can be, and should be, raised by the court). Considering these well settled principles, it seems illogical that a removal case is subject to greater scrutiny, or that courts should apply a different jurisdictional standard to cases filed originally in federal court.

Ultimately then, as demonstrated above, the mere fact that *Caterpillar* was a removal case is a distinction without a difference. Atlas requests therefore that this Court reject Dataflux's suggested interpretation of *Caterpillar*.

B. *Caterpillar* Applies to Cases in Which A Plaintiff Unilaterally Cures The Lack of Complete Diversity.

Dataflux contends that the application of *Caterpillar* should be limited to cases in which the lack of complete diversity is cured through dismissal of the nondiverse party. This Court did not however limit its holding in *Caterpillar* to cases in which the lack of diversity is cured in that manner. *See Caterpillar*, 519 U.S. at 61-78. Although *Caterpillar* did involve a nondiverse party that was eliminated through

dismissal, the Court's analysis concerning diversity jurisdiction, which is the issue here, did not focus on how the nondiverse party was eliminated. Again, as discussed above, this is demonstrated by the method in which the Court performed its analysis. Namely, the *Caterpillar* Court determined that diversity jurisdiction existed because the lack of diversity was cured "before trial commenced." *Id.* at 73. In reaching this conclusion, the *Caterpillar* Court did not rely, in any way, on how the lack of diversity was cured. *See Caterpillar*, 519 U.S. at 61-78. Further, as detailed above, the same opportunities and obligations to remedy a defect in jurisdiction exist before the nondiverse party is eliminated, regardless of whether that party is eliminated through dismissal or a unilateral act of the party seeking to assert jurisdiction. *See* 28 U.S.C. § 1447(c); FED. R. CIV. P. 12(b)(1); *Wilson*, 257 U.S. at 97; *Estate of Martineau*, 203 F.3d at 910; *Stafford*, 945 F.2d at 804. Atlas requests therefore that this Court reject Dataflux's proposed interpretation of *Caterpillar*.

C. *Caterpillar* Applies to Cases in Which The Jury Has Returned A Verdict.

Dataflux argued below that *Caterpillar* does not apply to cases in which a verdict has been returned, but judgment has not been rendered. In an abundance of caution, Atlas will address that argument. This Court did not limit its holding in *Caterpillar* to cases in which judgment was entered. *See Caterpillar*, 519 U.S. at 61-78. In fact, the *Caterpillar* Court stated clearly that the basis for its holding that the trial court had subject matter jurisdiction to enter the judgment was that "[t]he jurisdictional defect was cured, i.e., complete diversity was established *before the trial commenced.*" *Id.* at 73 (emphasis added).

It is important to note that if the entry of judgment were required, the same danger of "jurisdictional manipulation" of which Dataflux has expressed concern would exist. For example, an unscrupulous defendant could realize that diversity was not complete when the plaintiff filed its complaint. The defendant could then wait to hear the jury's verdict. If the defendant did not like the verdict, the defendant could merely object before the judge entered the judgment, and thereby unwind the entire case, and receive "a second bite at the apple." Taking Dataflux's argument to the absurd, if a trial court were to apply Dataflux's proposed interpretation of *Caterpillar*, that court would be compelled to dismiss a fully litigated case in the following circumstance: a jury verdict has been returned, the judge is in the process of entering the judgment, and a split second before the judge does so, the defendant objects to the lack of complete diversity at the time the case was filed.[1] It is unlikely this Court intended this result, especially in light of its statement that jurisdiction existed in *Caterpillar* because diversity was cured "before trial commenced." Atlas requests therefore that this Court reject Dataflux's proposed interpretation of *Caterpillar*.

D. The Fifth Circuit's Opinion Stated Clearly That It Viewed *Newman-Green* Only As Instructive.

Dataflux argues that the Fifth Circuit erred in relying on *Newman-Green, Inc. v. Alfonzo-Larrain* because "*Newman-Green* addressed the narrow question of whether a court of appeals may dismiss a non-diverse dispensable party to cure

1. Atlas seeks in no way to suggest that Dataflux or its counsel engaged in such inappropriate behavior. Atlas points out the possibility only to demonstrate that an unscrupulous party or counsel could engage in such behavior.

a jurisdictional defect, or whether the appellate court must remand the case to the district court to determine if dismissal is proper." 490 U.S. 826 (1989). Dataflux is mistaken in its reading of the Majority Opinion. The Fifth Circuit stated clearly that *Newman-Green* is distinguishable from the present case, and that the majority saw *Newman-Green* as only instructive in addressing the current case. In particular, the Majority Opinion reads in relevant part as follows:

> Although *Newman-Green* is distinguishable because Rule 21 is not at issue in the case before us, we find its underlying policy theme instructive. The Court in *Newman-Green* stressed that "requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention." It is this rationale that persuaded the Court in *Newman-Green* and again in *Caterpillar*.

Atlas Global Group, L.P. v. Grupo Dataflux, 312 F.3d 168, 171 (5th Cir. 2002). It bears noting that in *Caterpillar*, this Court likewise noted that while *Newman-Green* was distinguishable from the facts in *Caterpillar*, the policy concerns detailed in *Newman-Green* were "instructive." *See Caterpillar*, 519 U.S. at 75-76.

Dataflux cites no authority to support an assertion that the Fifth Circuit was not entitled to look to *Newman-Green* as instructive. In light of Dataflux's incorrect reading of the Majority Opinion and Dataflux's failure to cite supporting authority, Atlas urges the Court to reject Dataflux's assertion that the Fifth Circuit erred by relying on *Newman-Green*.

II. The *Saadeh* Opinion is Not Persuasive.

Dataflux argues that the Majority Opinion "creates a split with the D.C. Circuit." In particular, Dataflux contends that the Majority Opinion conflicts with the D.C. Circuit's decision in *Saadeh v. Farouki*, 107 F.3d 52 (D.C. Cir. 1997). In *Saadeh*, complete diversity did not exist when the plaintiff filed his complaint. *Id.* at 53-54. Before trial, the defendant raised the lack of diversity in a motion to dismiss. *Id.* at 54. The trial court denied the motion. On appeal, the D.C. Circuit considered this Court's holding in *Caterpillar*. The D.C. Circuit refused to apply *Caterpillar*. In doing so, the D.C. Circuit did not, however, provide analysis to support its rejection of *Caterpillar*. Specifically, the *Saadeh* Court stated the following:

> In *Caterpillar*, a removal case involving non-diverse parties, the district court denied a timely motion to remand and entered judgment following a jury trial. The Supreme Court, noting that as the result of a settlement resulting in dismissal of the non-diverse defendant, allowed the judgment to stand on the ground that considerations of finality, efficiency, and economy were paramount. . . . Although we are mindful of the considerations of finality, efficiency and economy that concerned the Supreme Court in *Caterpillar*, those concerns in the removal context are insufficient to warrant a departure here from the bright-line rule that citizenship and domicile must be determined as of the time a complaint is filed.

Id. at 57 (citations omitted).

Apparently, the D.C. Circuit is basing its decision on *Caterpillar*'s having been a removal case. However, the *Saadeh* Court does not explain why it believes this Court intended *Caterpillar* to be limited to removal cases. Further, the *Saadeh* Court does not explain why a removal case should receive different treatment. In light of the lack of analysis in *Saadeh*, the opinion does not provide a basis to overcome clear Supreme Court precedent. Atlas urges this Court therefore to reject *Saadeh*.

III. Policy Concerns Support The Majority Opinion.

A. Judicial Economy Weighs In Favor of the Majority Opinion.

Dataflux contends that judicial economy does not support the Majority Opinion. Dataflux argues that if the Majority Opinion is permitted to stand, it will increase consumption of judicial resources over time as litigants "test the limits" of the Majority Opinion. Dataflux is wrong.

The Majority Opinion stated the following about judicial economy:

> In the instant case, this dispute has been completely adjudicated by a federal district court, which had jurisdiction over the parties throughout the trial and at the time the jury rendered its verdict of $750,000 in favor of Atlas. The parties and the court have committed ample resources to its adjudication. They have had the benefit of a full assessment of the evidence by an impartial jury during a six-day trial. To erase the result of that process by requiring them to re-litigate their

> claims in state court, or likely in federal court, is not necessary under *Caterpillar*.

Atlas Global Group, L.P., 312 F.3d at 174.[2]

In reaching its conclusion, the Majority Opinion noted that *Newman-Green* was instructive on the issue of judicial economy. The Majority Opinion pointed specifically to the portion of *Newman-Green* that "stressed that 'requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention.'" *Atlas Global Group, L.P.*, 312 F.3d at 171 (quoting *Newman-Green*, 490 U.S. at 836). The Majority Opinion relied also on the following statements by the *Caterpillar* Court about judicial economy: "Once a diversity case has been tried in federal court, with rules of decision supplied by state law under the regime *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), considerations of finality, efficiency, and economy become overwhelming." *Atlas Global Group, L.P.*, 312 F.3d at 172 (quoting *Caterpillar*, 519 U.S. at 75, 77).

Despite the Majority Opinion's clear reliance on Supreme Court statements regarding judicial economy, Dataflux seeks to challenge these principals. Specifically, Dataflux asserts that judicial economy should not be a consideration because future litigants may seek to "test the limits" of the Majority Opinion. Dataflux appears to argue therefore that courts

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2. In addition to the jury verdict against Dataflux, the jury also found against Dataflux on its third-party claims against two individual plaintiffs. Under Dataflux's interpretation of *Caterpillar*, the verdict on the third-party claims would likewise be erased, thereby requiring the parties to retry those issues. Clearly, this would also cut against the policy of judicial economy.

should not seek to apply exceptions to general rules because future litigants may seek to broaden the application of the exceptions. Dataflux does not however cite any authority for such a proposition. Considering the lack of authority for such a proposition, and the general absurdity of the idea that a court should refrain from applying an exception because future litigants may ask the court to extend the application, Atlas urges the Court reject Dataflux's argument and to conclude instead that judicial economy weighs in favor of the Majority Opinion.

B. The Majority Opinion Prevents Inconsistent Fact Findings.

In addition to issues of judicial economy, the policy concern of preventing inconsistent factfindings also weighs in favor of the Majority Opinion. In particular, if the law were not as set out in *Caterpillar*, the danger of inconsistent findings would be created. Namely, as in this case, a party could receive a jury verdict, have its case dismissed, go through the entire litigation process again, and have a jury reach a different verdict. The Majority Opinion, as written, prevents such an inconsistent result. Atlas asks the Court to maintain that protection by denying Dataflux's petition.

CONCLUSION

For the reasons stated above it is evident that the Majority Opinion is correct, and supported by clear Supreme Court precedent. Atlas requests therefore that the Court deny Dataflux's petition.

Respectfully submitted,

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