No. 11-1450

IN THE
Supreme Court of the United States

THE STANDARD FIRE INSURANCE COMPANY,
Petitioner,
v.

GREG KNOWLES, individually and on behalf of all others similarly situated within the State of Arkansas,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR PETITIONER

STEPHEN E. GOLDMAN
WYSTAN M. ACKERMAN
ROBINSON & COLE LLP
280 Trumbull Street
Hartford, CT 06103
(860) 275-8200

LYN P. PRUITT
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD PLLC
425 West Capitol Avenue
Suite 1800
Little Rock, AR 72201
(501) 688-8869

THEODORE J. BOUTROUS JR.
Counsel of Record
THEANE EVANGELIS KAPUR
JOSHUA S. LIPSHUTZ
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000
tboutrous@gibsondunn.com

AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioner

QUESTION PRESENTED

Whether, after *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), when a named plaintiff attempts to defeat a defendant's right of removal under the Class Action Fairness Act of 2005 by filing with a class action complaint a "stipulation" that attempts to limit the damages he "seeks" for the absent putative class members to less than the $5 million threshold for federal jurisdiction, and the defendant establishes that the actual amount in controversy, absent the "stipulation," exceeds $5 million, the "stipulation" is binding on absent class members so as to destroy federal jurisdiction.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all parties to the proceedings below.

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the district court ordering remand is unpublished but is electronically reported at 2011 WL 6013024. Pet. App. 2a. The order of the U.S. Court of Appeals for the Eighth Circuit denying permission to appeal is unpublished but is electronically reported at 2012 WL 3828891. Pet. App. 1a. The order of the Eighth Circuit denying panel rehearing and rehearing en banc is unpublished but is electronically available at 2012 WL 3828845. Pet. App. 16a.

JURISDICTION

The court of appeals denied permission to appeal on January 4, 2012. Pet. App. 1a. The court of appeals denied panel rehearing and rehearing en banc on March 1, 2012. *Id.* at 16a. The petition for a writ of certiorari was filed on May 30, 2012, and granted on August 31, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Class Action Fairness Act of 2005 ("CAFA") is reproduced in full in the addendum to this brief. As most relevant here, CAFA provides:

> (1)(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.
>
> (2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of

> $5,000,000, exclusive of interest and costs, and is a class action in which—
>
> (A) any member of a class of plaintiffs is a citizen of a State different from any defendant;
>
> . . .
>
> (6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

28 U.S.C. § 1332(d)

STATEMENT

In 2005, Congress enacted CAFA to curb class action abuses, to expand federal jurisdiction over interstate class actions, to protect the rights of defendants and absent class members, and to stop plaintiffs' attorneys from manipulating their complaints to evade federal diversity jurisdiction. In this case, which was filed in a state-court jurisdiction notorious for class action abuses, Plaintiff has pursued a litigation strategy that is flatly at odds with each of those statutory objectives.

CAFA provides for federal jurisdiction over interstate class actions where the amount in controversy—which "shall" be determined by "aggregat[ing]" the "claims of the individual class members," 28 U.S.C. § 1332(d)(6)—exceeds $5,000,000. The district court performed that exact calculation and determined that the aggregated claims of the individual class members exceeded the $5,000,000 threshold. Despite this finding, which Plaintiff did not dispute below or in his brief in opposition, the district court remanded the case based on a "stipula-

tion" in which Plaintiff attempted to bind the putative class to an aggregate classwide recovery that will *not* exceed $5,000,000. That stipulation, however, is a nullity for jurisdictional purposes because it has no bearing on the "claims of the individual class members" that must be aggregated under CAFA. Moreover, as this Court recently held in *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2379 (2011), it is well settled that, before certification of a class, a plaintiff has no authority to diminish the rights of absent individuals he does not yet, and may never, represent.

For each of these reasons, the Court should reverse the district court's remand order and prevent this attempted end run around CAFA.

1. *Plaintiff's Allegations*

The Standard Fire Insurance Company ("Standard Fire") is a Connecticut-based insurance company that provides property insurance to customers nationwide, including homeowners in Arkansas. When an insured homeowner presents a claim for physical loss or damage to his residence, Standard Fire has an adjuster review the damage and determine the appropriate payment under the insured's policy.

As part of that determination, the adjuster makes an assessment as to whether the work needed to repair the particular damage is sufficiently complex to require supervision and coordination by a general contractor, in addition to hiring trade contractors to perform the repairs. "General contractors customarily add a percentage to the total estimate for a job to cover their fee," referred to as "general contractors' overhead and profit ('GCOP')." Pet. App. 56a–57a. Plaintiff alleges that a typical GCOP percentage "within the construction and insurance industries is 20% of the estimated job," so that, for ex-

ample, "where the repair costs on a job equal $10,000, the GCOP payment will be an additional $2,000." *Id.* at 57a.

Plaintiff alleges that he is a Standard Fire homeowners insurance policyholder who filed a claim after his dwelling, located in Miller County, Arkansas, sustained physical loss or damage as a result of a hailstorm on March 10, 2010. Pet. App. 63a. Plaintiff admits that Standard Fire paid him "to complete [the] repairs to his dwelling," but contends that Standard Fire "failed to pay Plaintiff an additional 20% . . . for GCOP." *Id.* at 64a. Plaintiff alleges that he "should have received payment for GCOP with his payment from [Standard Fire]" because, "[a]t the time [Standard Fire's] adjuster(s)/agent(s) inspected the Plaintiff's dwelling, it was reasonably likely Plaintiff would incur the costs associated with retaining the services of a general contractor." *Id.*

Plaintiff filed this putative class action against Standard Fire in Miller County Circuit Court, a court known to be a "magnet jurisdiction" for class action plaintiffs' lawyers because of its willingness to force defendants to engage in prohibitively expensive and wide-ranging discovery that coerces substantial settlements prior to class certification, and its willingness to certify classes that have been rejected in other jurisdictions. *See* Nan S. Ellis, *The Class Action Fairness Act of 2005: The Story Behind the Statute*, 35 J. Legis. 76, 93 n.115 (2009) ("The most famous magnet jurisdictions are Madison County, Illinois and Miller County, Arkansas."); *see also infra* Part I.A. Plaintiff's complaint purports to assert claims on behalf of "[a]ny and all customers" of Standard Fire "who are residents of Arkansas, who received payments under a homeowners insurance policy . . . for physical loss or damage to their dwell-

ing, such dwelling located in Arkansas, at any time between January 1, 2009 and December 31, 2010" (with certain exceptions). Pet. App. 65a. According to the complaint, the "[c]lass comprises hundreds, and possibly thousands, of individuals geographically dispersed across Arkansas." *Id.* at 66a. The complaint pleads a single cause of action for breach of contract, alleging that Standard Fire "materially breached the terms of [its] standardized policy contracts with Plaintiff and the Class by failing to include payments for GCOP." *Id.* at 72a. The complaint prays for "money damages to Plaintiff and Class Members from the Defendants for their breach of contract in an amount equal to . . . 20% of the amount paid by Defendant to complete repairs to the damaged propert[ies]." *Id.* In Plaintiff's own words, "[t]his case presents the Court with an opportunity to ensure that not only Plaintiff, but all similarly situated insurance customers within the State of Arkansas, are *fully compensated* for their property losses." *Id.* at 57a (emphasis added).

Despite Plaintiff's stated goal of "fully compensat[ing]" the putative class, Pet. App. 57a, his complaint is accompanied by what he calls a "Sworn and Binding Stipulation," in which Plaintiff purports to cap the classwide recovery so that it does not exceed CAFA's $5,000,000 jurisdictional threshold. *Id.* at 74a. The stipulation states:

> I do not now, and will not at any time during this case, whether it be removed, remanded, or otherwise . . . seek damages for the class as alleged in the complaint to which this stipulation is attached in excess of $5,000,000 in the aggregate (inclusive of costs and attorneys' fees).

> I understand that this stipulation is binding, and it is my intent to be bound by it.

Id. at 75a. Plaintiff's complaint alleges that "the Plaintiff and Class stipulate" to limit their recovery to less than $5,000,000, that this "stipulation" is "binding on Plaintiff for purposes of establishing the amount in controversy," and, "[a]s such, there is neither diversity nor [CAFA] jurisdiction for this claim in federal court." *Id.* at 60a.[1]

2. *The District Court's Remand Order*

Based on the allegations in the complaint and the class definition proposed by Plaintiff, Standard Fire removed the case to the Western District of Arkansas because, as required by CAFA, diversity of citizenship exists between the parties and the total amount in controversy, based on the aggregated claims of the individual members of the putative class, is greater than $5,000,000. 28 U.S.C. § 1332(d)(2); Pet. App. 36a–54a.

Plaintiff filed a motion to remand. Pet. App. 4a. The district court granted that motion, applying a

[1] In addition to attaching this stipulation, Plaintiff's complaint also sought to evade CAFA's $5,000,000 jurisdictional threshold by using another tactic that, as Standard Fire argued below, was akin to fraudulent joinder: arbitrarily framing the class period as shorter than the statute of limitations, thereby opening the door for his counsel to bring separate state court class actions later for other time periods. Thus, here, Plaintiff defined the proposed class to include only Standard Fire policyholders who received payments within a two-year period (2009–10), Pet. App. 65a, even though the statute of limitations for a breach of contract claim under Arkansas law is five years. *See* Ark. Code Ann. § 16-56-111. This tactic is a powerful weapon that potentially enables plaintiffs' lawyers to coerce settlements far in excess of $5,000,000 based on the threat of a multiplicity of future class actions alleging similar theories of recovery.

two-step, burden-shifting analysis adopted by the Eighth Circuit and drawn from a line of authority interpreting the traditional diversity statute, Section 1332(a). *See id.* at 5a–6a (citing, *inter alia*, *Bell v. Hershey Co.*, 557 F.3d 953, 956 (8th Cir. 2009)). The district court began by inquiring whether Standard Fire had "show[n] by a preponderance of the evidence that the amount in controversy exceeds" $5,000,000. *Id.* at 6a. Based on the allegations in the complaint and the uncontradicted evidence that accompanied Standard Fire's opposition to the remand motion, the district court agreed that "the actual amount in controversy reaches, if not exceeds, the federal court's minimum threshold for jurisdiction pursuant to CAFA," emphasizing that "Plaintiff ha[d] failed to counter Defendant's estimates with evidence or argument." *Id.* at 8a.

Applying the second part of this test, the court noted that the "burden" then "shift[ed] to Plaintiff to prove to a legal certainty that his claim falls under the $5 million threshold for remand to state court." Pet. App. 9a. According to the district court, Plaintiff had met this burden, and was therefore entitled to a remand, because his stipulation is "legally binding" and "show[s] to a legal certainty that the aggregate damages claimed on behalf of the putative class shall in good faith not exceed the state court's jurisdictional limitation of $5,000,000." *Id.* at 9a, 15a.

Standard Fire petitioned the Eighth Circuit for permission to appeal pursuant to CAFA, 28 U.S.C. § 1453 (c)(1), but the court of appeals summarily denied the petition. Pet. App. 1a. While Standard Fire's petition for rehearing was pending, the Eighth Circuit decided *Rolwing v. Nestle Holdings, Inc.*, 666 F.3d 1069 (8th Cir. 2012), which affirmed an order of remand under CAFA based on a similar stipulation

purporting to limit class damages to less than $5,000,000. The court of appeals held that the stipulation in *Rolwing* was sufficient to defeat federal jurisdiction, *id.* at 1072, even though the aggregated total of the individual class members' claims exceeded $12,000,000—more than twice CAFA's jurisdictional threshold. *Id.* at 1070–71. After issuing *Rolwing*, the court of appeals denied Standard Fire's petition for rehearing. Pet. App. 16a.

SUMMARY OF ARGUMENT

Congress enacted CAFA to curtail state court class action abuses by authorizing defendants to remove sizable, interstate class actions to federal court. The district court's remand order contradicts CAFA's plain language, purpose, and history, as well as this Court's holding in *Smith v. Bayer* and other cases—all of which dictate that Plaintiff's stipulation purporting to waive damages on behalf of a not-yet-certified class can have no effect on CAFA's amount-in-controversy determination.

I. This case falls squarely within the federal courts' diversity jurisdiction under CAFA because the aggregated claims of the individual members of the putative class exceeded $5,000,000 at the time of removal.

A. CAFA fundamentally altered and expanded federal diversity jurisdiction over interstate class actions. In particular, Congress changed the amount-in-controversy requirement as it relates to these class actions in order to prevent plaintiffs from manipulating their complaints to keep such cases in class-action-friendly state courts—like the Circuit Court of Miller County—rather than federal court. Traditional diversity jurisdiction under 28 U.S.C. § 1332(a) looks only to the "matter in controversy,"

without specifying a methodology for determining that amount, and this Court has construed Section 1332(a) to forbid aggregation of individual class members' claims for jurisdictional purposes. CAFA, however, explicitly requires that "the claims of the individual class members shall be aggregated" to determine whether they exceed the statute's $5,000,000 jurisdictional threshold. 28 U.S.C. § 1332(d)(6).

B. The district court's remand order conflicts with CAFA's plain language. Based on the face of the complaint and Standard Fire's uncontradicted evidence and argument, the district court performed the calculation mandated by CAFA and found that the aggregate total of the individual class members' claims exceeded $5,000,000. That should have been the end of the jurisdictional inquiry. Instead, however, the district court concluded that a remand was appropriate because Plaintiff purports in his stipulation to limit the classwide recovery to no more than $5,000,000. But the term "claim," as used in CAFA, refers to each individual class member's *right to recovery* under the operative facts and causes of action alleged in the complaint, not the amount actually *sought in recovery* in vindication of that right. CAFA's text does not authorize Plaintiff to use a stipulation to alter the aggregated total of the *individual* class members' *claims* and thereby overcome the statutorily prescribed amount-in-controversy calculation.

C. The district court's remand order also conflicts with the purpose and history of CAFA, which was intended to prevent precisely the kind of manipulation of the amount in controversy and thwarting of federal jurisdiction that Plaintiff attempts in this case. *See* Pub. L. No. 109-2, § 2, 119 Stat. 4, 4–5 (2005). In seeking to curb state court class action

abuses and protect the rights of out-of-state class action defendants and the "legitimate claims" of absent class members, Congress intended to provide a federal forum for just this type of interstate class action. But the district court's remand order would force Standard Fire—and, in the event a class is certified, the class members—to litigate in a state court known for allowing "lawyers to 'game' the procedural rules" and failing to apply the rigorous protections that federal courts apply under Federal Rule 23. S. Rep. No. 109-14, at 4 (2005).

II. Basic class action doctrine and fundamental due process principles further confirm that Plaintiff's stipulation cannot be used to evade CAFA's jurisdictional threshold. This Court recently reaffirmed in *Smith v. Bayer* that an "uncertified class action cannot bind proposed class members," 131 S. Ct. at 2381 n.11, squarely rejecting the "novel and surely erroneous argument that a nonnamed class member is a party to the class action litigation *before the class is certified*." *Id.* at 2379. Thus, before a class is certified, nothing Plaintiff says or does can diminish the rights of absent individuals. Plaintiff's lack of authority to stipulate to any reduction in the "claims of the [other] individual class members" renders the stipulation irrelevant to the CAFA jurisdictional inquiry.

III. Even if this Court were to apply the traditional burden-shifting framework borrowed by the Eighth Circuit from decisions interpreting Section 1332(a), Plaintiff's stipulation still would not establish "*to a legal certainty*" that the amount in controversy in this case is $5,000,000 or less. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938) (emphasis added). Before Plaintiff can take *any* actions to bind the absent class members, the

trial court would have to appoint Plaintiff as class representative and ensure that enforcement of the stipulation is in the best interests of the class. Those contingent events had not occurred as of the time of removal, were not legally certain to occur in the future, and therefore could not defeat federal jurisdiction as a matter of law. *Id.* at 293.

For each of these reasons, the district court's remand order should be reversed so this putative class action can be litigated in federal court where it belongs under CAFA.

ARGUMENT

I. REMAND WAS IMPROPER BECAUSE PLAINTIFF'S STIPULATION CANNOT REDUCE THE AMOUNT IN CONTROVERSY UNDER CAFA.

This Court has frequently reaffirmed "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them" by Congress. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). In CAFA, Congress gave federal courts diversity jurisdiction over interstate class actions in which the amount in controversy exceeds $5,000,000, and directed courts to determine that amount by "aggregat[ing]" the "claims of the individual class members." 28 U.S.C. § 1332(d)(6). The district court found, based on Standard Fire's undisputed calculation, that the aggregated total of the individual class members' claims—as determined by the class definition and allegations in Plaintiff's complaint at the time of removal—exceeded CAFA's $5,000,000 jurisdictional requirement. Pet. App. 8a. That should have been the end of the inquiry, and Plaintiff's motion to remand should have been denied. *See*, *e.g.*, *St. Paul Mercury*, 303 U.S. at 291

("the status of the case as disclosed by the plaintiff's complaint is controlling in the case of a removal").

Despite the district court's factual finding, it concluded that Plaintiff could nonetheless defeat federal jurisdiction based on the stipulation in which he purports to bind the class to a classwide recovery of no more than $5,000,000 in damages. But the amount in controversy under CAFA is based on the aggregated total of the *individual* class members' claims, not the potential *classwide* recovery sought by the named plaintiff. Plaintiff's stipulation therefore is irrelevant to the CAFA jurisdictional inquiry. To hold otherwise would contradict CAFA's text, purpose, and history, and would revive the exact state court class action abuses and jurisdictional manipulations that CAFA was designed to eliminate. *See Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907) ("Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right . . . .").

A. CAFA Expanded Federal Diversity Jurisdiction To Address Precisely The Class Action Abuses Exemplified By This Case.

Congress established diversity jurisdiction "to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 554–55 (2005). Before CAFA, federal diversity jurisdiction over putative class actions was narrow because it was governed by the traditional diversity statute, 28 U.S.C. § 1332(a), which requires complete diversity among plaintiffs and defendants—*i.e.*, all plaintiffs must be citizens of different States from all defendants. Section 1332(a)

further requires the named plaintiff's "matter in controversy [to] exceed[ ] the sum or value of $75,000." Where that is not the case, the amount in controversy as to each putative class member cannot be aggregated to reach the federal jurisdictional threshold. *See Zahn v. Int'l Paper Co.*, 414 U.S. 291, 300 (1973) (describing "the well-established rule . . . that there may be no aggregation and that the entire case must be dismissed where none of the plaintiffs claims more than [the jurisdictional minimum]"); *Snyder v. Harris*, 394 U.S. 332, 338 (1969).[2]

For many years, plaintiffs' lawyers exploited these requirements, filing major interstate class actions in certain state courts, such as the Circuit Court of Miller County, known to be hospitable to class actions and "bias[ed] against out-of-State defendants." Pub. L. No. 109-2, § 2(a)(2), 119 Stat. at 4. As Congress stated in CAFA's findings, this led to "abuses of the class action device" that harmed absent class members and foreign defendants, and undermined federal diversity jurisdiction. *See id.* § 2(a)(4), 119 Stat. at 5.

Chief among the tactics used by plaintiffs' lawyers to keep class actions in state court was manipulation of the amount-in-controversy requirement, accomplished by pleading demands that fell just below the $75,000 jurisdictional threshold under 28 U.S.C. § 1332(a). *See*, *e.g.*, *Davis v. Carl Cannon Chevrolet-Olds, Inc.*, 182 F.3d 792, 797–98 (11th Cir. 1999); *see also In re Prudential Ins. Co. Am. Sales Practice*

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[2] After CAFA was enacted, this Court held that once a federal court determines that the matter in controversy on a named plaintiff's claim exceeds $75,000, the court can exercise supplemental jurisdiction over the absent class members' claims under 28 U.S.C. § 1367. *See Exxon Mobil*, 545 U.S. at 549.

Litig., 148 F.3d 283, 305 (3d Cir. 1998); *infra* Section I.C. Indeed, before CAFA took effect, Plaintiff's counsel in this very case had filed dozens of class action complaints in Miller County—including eight cases against insurance companies alleging the same GCOP-related claim asserted here[3]—in which they framed the complaints to prevent removal by limiting the named plaintiffs' requests for recovery to under the $75,000 amount in controversy applicable under Section 1332(a). They then obtained orders from the Miller County court deferring briefing on all dispositive motions until after class certification was decided. The court permitted Plaintiff's counsel to pursue expensive, far-ranging, and burdensome discovery—potentially costing defendants tens of millions of dollars and disrupting their ability to do business—prior to briefing on certification. *See*, *e.g.*, Michelle Massey, *'Failure to Communicate' Could Lead to $45 M in Discovery Costs*, Southeast Texas Record, Aug. 8, 2007 (explaining that a Miller County court "ordered defendant Foremost Insurance Company to produce all of its claim files" within ninety days, "even though the defendants estimated the cost for production at $45 million").

None of those eight cases resulted in a decision on class certification, let alone a trial. Instead, because of the extraordinarily expensive pre-

[3] *Droste v. Farmers Ins. Exch.*, No. CV-2004-294-3; *Feely v. Allstate Cnty. Mut. Ins. Co.*, No. CV-2004-294-3A; *Freeman v. Farm Bureau Mut. Ins. Co. of Ark., Inc.*, No. CV-2004-294-3B; *Beasley v. Prudential Gen. Ins. Co.*, No. CV-2005-58-1; *Beasley v. Reliable Life Ins. Co.*, No. CV-2005-58-1; *Alexander v. Nationwide Mut. Ins. Co.*, No. CV-2009-120-3; *Johnson v. State Auto Mut. Ins. Co.*, No. CV-2010-114-3; *Chivers v. State Farm Fire & Cas. Co.*, No. CV-2010-251-3 (all in Ark. Cir. Ct. Miller County).

certification discovery authorized by the state court, all of the defendants agreed to settlements. *Cf. Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (recognizing that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases"); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (noting "the risk of 'in terrorem' settlements that class actions entail"). Although many of the court filings in these cases remain under seal, available information and news reports indicate that these settlements resulted in attorneys' fee awards that totaled more than $150 million. *See*, *e.g.*, Mem. in Opp. to Motion to Remand, Ex. D at 23 ($63.9 million attorneys' fee award in Allstate settlement of GCOP class action); *see also Big Money for Lawyers*, Arkansas Times, Dec. 14, 2011 (describing another Miller County class action in which a settlement resulted in "the lawyers g[etting] $185 million in legal fees"). It is not known what portion of those settlements, if any, was distributed to class members. *Cf. Judge OKs $90M "Click Fraud" Settlement*, Associated Press Financial Wire, July 29, 2006 ("No one will receive cash except the lawyers, who will split $30 million.").[4]

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[4] In sharp contrast, federal courts have routinely stricken class allegations or have denied class certification in cases raising the same GCOP-related claims. *See*, *e.g.*, *Nguyen v. St. Paul Travelers Ins. Co.*, No. 06-4130, 2008 WL 4534395, at *8 (E.D. La. Oct. 6, 2008); *Mills v. Foremost Ins. Co.*, 269 F.R.D. 663, 682 (M.D. Fla. 2010); *John v. Nat'l Sec. Fire & Cas. Co.*, No. 06-1407, 2008 WL 394220, at *2 (W.D. La. Feb. 12, 2008); *John v. Nat'l Sec. Fire & Cas. Co.*, No. 06-1407, 2006 WL 3228409, at *4 (W.D. La. Nov. 3, 2006), *reconsideration den'd*, 2007 WL 148735 (W.D. La. Jan. 16, 2007), *aff'd*, 501 F.3d 443 (5th Cir. 2007); *Bailey v. State Farm Fire & Cas. Co.*, No. CIV-00-1239-R, slip op. at 9-14 (W.D. Okla. Jan. 2, 2002); *Harring-*

Nor can the Arkansas Supreme Court be relied upon to protect out-of-state defendants from such abuses arising out of Miller County. Contrary to this Court's holding in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551–52 (2011), the Arkansas Supreme Court has instructed trial courts that class certification "does not require a rigorous analysis," *Farmers Union Mut. Ins. Co. v. Robertson*, 370 S.W.3d 179, 186 (Ark. 2010), and held that trial courts should not "delve into the merits" on class certification. *Gen. Motors Corp. v. Bryant*, 285 S.W.3d 634, 638 (Ark. 2008); *see also DirecTV, Inc. v. Murray*, 2012 Ark. 366, at *11–12 (Oct. 4, 2012) ("Neither this court nor the circuit court delves into the merits of the underlying claims at this stage . . . ."); F. Ehren Hartz, *Certify Now, Worry Later: Arkansas's Flawed Approach to Class Certification*, 61 Ark. L. Rev. 707 (2009). In fact, earlier this month, the Arkansas Supreme Court upheld certification of a Miller County class action (certified by the same judge presiding over this case) that could not have been certified in federal court—holding that "individual issues and defenses . . . raised by the defendant cannot defeat class certification." *DirecTV*, 2012 Ark. 366, at *16; *see also id.* at *13 (class certification is appropriate "irrespective of varying fact patterns which underlie individual claims") (internal quotation marks and emphasis omitted). That holding directly contradicts *Wal-Mart*. *See* 131 S. Ct. at 2561 (rejecting class certification because a defendant is "entitled to litigate its statutory defenses to individual claims").

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ton v. State Farm Lloyds, Inc., No. 4:97-CV-832-Y, slip op. at 16-17 (N.D. Tex. Mar. 31, 1999).

To put an end to the gamesmanship that was keeping major class actions in such state courts, CAFA fundamentally altered the principal rules governing diversity jurisdiction in the class action context, "enlarg[ing] . . . federal-court diversity jurisdiction . . . clearly and conspicuously, by amending § 1332." *Exxon Mobil*, 545 U.S. at 594 n.12 (Ginsburg, J., dissenting) (internal quotation marks omitted); *see also Hollinger v. Home State Mut. Ins. Co.*, 654 F.3d 564, 569 (5th Cir. 2011) (per curiam) (CAFA "greatly expand[ed] federal jurisdiction" over class actions) (footnote omitted). First and foremost, CAFA created a jurisdictional threshold that is determined by the "aggregated" "claims of the individual class members"—specifically, the individual claims of every person "who fall[s] within the definition of the proposed class." 28 U.S.C. § 1332(d)(1)(D), (6); *see also Exxon Mobil*, 545 U.S. at 571 (CAFA "abrogates the rule against aggregating claims"). In addition, CAFA discarded the traditional requirement of complete diversity under Section 1332(a) in favor of only minimal diversity, which exists when "*any* member of a class of plaintiffs is a citizen of a State different from *any* defendant." 28 U.S.C. § 1332(d)(2)(A) (emphases added). It also eliminated the usual one-year limitation that applies to removal on the basis of diversity jurisdiction, eliminated the limitation preventing a defendant from removing a case brought in its home State, and eliminated the requirement that all defendants consent to removal. 28 U.S.C. § 1453(b).

These significant changes were intended to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance." Pub. L. No. 109-2, § 2(b)(2), 119 Stat. at 5; *see also*

Smith, 131 S. Ct. at 2382 ("In [CAFA], Congress enabled defendants to remove to federal court any sizable class action involving minimal diversity of citizenship."); *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1473 (2010) (Ginsburg, J., dissenting) (In passing CAFA, "Congress sought to check what it considered to be the overreadiness of some state courts to certify class actions.").[5] But, as this case demonstrates, plaintiffs' lawyers have deployed tactics meant to evade CAFA's terms and to facilitate exactly the same litigation behavior in state court that preceded CAFA. In fact, after CAFA took effect and nearly all of the cases filed pre-CAFA were settled, in 2010, Plaintiff's counsel in this case (and other lawyers) began filing numerous additional class action suits in the Miller County Circuit Court that included stipulations or allegations purporting to limit the class recovery to less than $5,000,000. *See*, *e.g.*, *Basham v. Am. Nat'l Cnty. Mut. Ins. Co.*, No. CV-2011-0623-3 (Ark. Cir. Ct. Miller County). To date, those tactics have been successful at thwarting removal under CAFA by convincing federal district courts in Arkansas to remand the class actions to Miller County and other Arkansas state courts.[6]

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[5] *See also* Sarah S. Vance, *A Primer on the Class Action Fairness Act of 2005*, 80 Tul. L. Rev. 1617, 1621 (2006); Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. Pa. L. Rev. 1823, 1864–65 (2008); *Knudsen v. Liberty Mut. Ins. Co.*, 435 F.3d 755, 758 (7th Cir. 2006) ("The conduct of plaintiffs and the state judge in this litigation . . . illustrates why Congress enacted the Class Action Fairness Act.").

[6] *See*, *e.g.*, *Deaton v. Frito-Lay N. Am., Inc.*, No. 1:12-cv-01029, 2012 WL 3986804 (W.D. Ark. Sept. 11, 2012); *Goodner v. Clayton Homes, Inc.*, No. 4:12-cv-04001, 2012 WL 3961306 (W.D. Ark. Sept. 10, 2012); *Basham v. Am. Nat'l Cnty. Mut. Ins.*

B. Permitting Plaintiff To Rely On A Stipulation To Defeat Removal Conflicts With The Plain Language Of CAFA.

Under CAFA's plain language, removal was proper in this case because, as the district court expressly found, the aggregated total of the individual class members' claims exceeds CAFA's $5,000,000 jurisdictional threshold. The district court disregarded CAFA's text by permitting Plaintiff to resort to pre-CAFA tactics to try to reduce the amount in controversy.

1. *CAFA's plain language requires aggregating the claims of the individual class members.* "As with any question of statutory interpretation," the "analysis" of CAFA's amount-in-controversy requirement "begins with the plain language of the statute." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). CAFA provides that federal district courts have jurisdiction over class actions where there is minimal diversity of citizenship and "the matter in controver-

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Co., No. 4:12-cv-04005, 2012 WL 3886189 (W.D. Ark. Sept. 6, 2012); *Oliver v. Mona Vie, Inc.*, No. 4:11-cv-04125, 2012 WL 1965613 (W.D. Ark. May 31, 2012); *Smith v. Am. Bankers Ins. Co. of Fla.*, No. 2:11-cv-02113, 2011 WL 6090275 (W.D. Ark. Dec. 7, 2011); *McClendon v. Chubb Corp.*, No. 2:11-cv-02034, 2011 WL 3555649 (W.D. Ark. Aug. 11, 2011); *Thompson v. Apple, Inc.*, No. 3:11-cv-03009, 2011 WL 2671312 (W.D. Ark. July 8, 2011); *Tomlinson v. Skechers U.S.A., Inc.*, No. 11-5042, 2011 U.S. Dist. LEXIS 142862 (W.D. Ark. May 25, 2011); *Murphy v. Reebok Int'l, Ltd.*, No. 4:11-cv-214-DPM, 2011 WL 1559234 (E.D. Ark. Apr. 22, 2011); *Tuberville v. New Balance Athletic Shoe, Inc.*, No. 1:11-cv-01016, 2011 WL 1527716 (W.D. Ark. Apr. 21, 2011); *Harris v. Sagamore Ins. Co.*, No. 2:08-cv-00109, 2008 WL 4816471 (E.D. Ark. Nov. 3, 2008).

sy exceeds the sum or value of $5,000,000." 28 U.S.C. § 1332(d)(2). The statute further sets forth a specific mechanism for calculating the "sum or value" of the "matter in controversy": "the *claims* of the *individual class members* shall be *aggregated* to determine whether" the total exceeds the jurisdictional threshold. *Id.* § 1332(d)(6) (emphases added).

Here, in opposing the remand motion, Standard Fire presented the district court with a calculation of the aggregated total of the "claims of the individual class members" that was based on the class definition and the breach-of-contract allegations Plaintiff asserted in his complaint. Pet. App. 7a–8a. Specifically, "Plaintiff seeks money damages for himself and the Class for breach of contract arising from Defendant's failure to provide proper payments for GCOP," which allegedly amounts to "20% of the amount paid by Defendant to complete repairs to a damaged dwelling." *Id.* at 69a. Thus, for each customer falling within Plaintiff's proposed class definition, Standard Fire "calculat[ed] the GCOP at 20% of the total" amount of the insurance payment, and added both "a 12% statutory penalty for breach of contract" and attorneys' fees also provided by the same statute. *Id.* at 7a–8a. Standard Fire then aggregated each of these putative class member's claims and arrived at a total amount in controversy in excess of $5,000,000. *Id.* at 8a.

Based on Standard Fire's showing, the district court found that "the actual amount in controversy reaches, if not exceeds, the federal court's minimum threshold for jurisdiction pursuant to CAFA." Pet. App. 8a. In fact, as the district court noted, Plaintiff "failed to counter" Standard Fire's estimates with *any* "evidence or argument" of his own. *Id.* Nor did Plaintiff challenge the district court's factual finding

in the court of appeals or in his opposition to Standard Fire's petition for certiorari.

The district court's finding that the "aggregated" total of the "claims of the individual class members" exceeded CAFA's $5,000,000 threshold at the time of removal is controlling and irrebuttable; the statute expressly directs courts to determine the amount in controversy by aggregating the claims of the individual class members. Once that determination has been made, it does not authorize a putative class representative to evade the calculation through a stipulation, allegation, or any other means.

Despite CAFA's plain language, the district court reasoned that the purported cap on *classwide recovery* set forth in Plaintiff's stipulation, not the aggregated *claims* of the *individual* class members, governed the amount-in-controversy determination. Pet. App. 11a; *cf. Rolwing*, 666 F.3d 1069, 1070–72 (permitting plaintiff to stipulate to reduce $12 million worth of claims by absent class members to $5 million). But if Congress had wanted federal jurisdiction under CAFA to turn on the sum demanded by the named plaintiff for a classwide recovery—rather than the "aggregated" "claims of the *individual* class members"—it would have said so. Congress "knows how to" premise federal jurisdiction on the sum demanded in a complaint "when it wants to." *Atl. Sounding Co. v. Townsend*, 557 U.S. 404, 416 (2009) (internal quotation marks omitted); *see*, *e.g.*, 28 U.S.C. § 1446 (c)(2) ("the *sum demanded* in good faith in the initial pleading shall be deemed to be the amount in controversy" under Section 1332(a)) (emphasis added). It did not do so in CAFA. Accordingly, the district court's undisputed finding that the aggregated total of the individual class members' claims exceeded $5,000,000 conclusively establishes

that CAFA's amount-in-controversy requirement was satisfied at the time this case was removed to federal court.

2. *The amount in controversy calculation under CAFA is different from the calculation under Section 1332(a).* The rules that govern CAFA diversity differ significantly from those that govern in the traditional diversity setting under 28 U.S.C. § 1332(a). In that context, "[i]f [the plaintiff] does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove." *St. Paul Mercury*, 303 U.S. at 294. This rule flows directly from the language of Section 1332(a) itself, which provides that diversity jurisdiction exists "where the matter in controversy exceeds the sum or value of $75,000." *See also* 28 U.S.C. § 1446(c)(2) (where a removing party invokes federal jurisdiction under Section 1332(a), "the sum demanded in good faith in the initial pleading" generally controls).

CAFA expressly establishes a different regime. Although, like Section 1332(a), CAFA provides that the existence of diversity jurisdiction turns on whether "the matter in controversy exceeds" a specific amount—"the sum or value of $5,000,000"—CAFA, unlike Section 1332(a), explicitly directs how that amount "shall" be calculated: CAFA specifies that courts are to calculate the "matter in controversy" by "aggregat[ing]" the "claims of the individual class members." 28 U.S.C. § 1332(d)(2), (6). Thus, although an individual plaintiff's stipulation imposing a cap on the damages he is seeking to recover on his own behalf may limit the value of the "matter in controversy" under Section 1332(a) (the "sum demanded," in the words of Section 1446(c)(2))—and thus de-

feat removal of an individual action—a similar stipulation is irrelevant to the CAFA inquiry because CAFA focuses on the claims of the individual class members, not the amount being sought by the named plaintiff on behalf of the putative class.[7]

3. *The term "claim," as used in CAFA, refers to the individual class members' right to recovery under the operative facts and causes of action alleged in the complaint.* Plaintiff's inability to use a stipulation to reduce the amount in controversy under CAFA is confirmed by the statute's use of the term "claim" in requiring the court to "aggregate[ ]" the "claims of the individual class members." In this context, "claim" refers to each individual class member's *right to recovery* under the operative facts and causes of action alleged in the complaint, not the amount ac-

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[7] The district court below, like other courts that have held that such stipulations defeat federal jurisdiction, invoked the "master of the complaint" doctrine to hold that the plaintiff can avoid federal court if he so chooses. *See* Pet. App. 27a ("'[T]he plaintiff is the master of the case and may limit his claims . . . to keep the amount in controversy below the threshold . . . .'") (quoting *Morgan v. Gay*, 471 F.3d 469, 474 (3d Cir. 2006)). But that doctrine—which applies in the traditional diversity setting governed by 28 U.S.C. § 1332(a), where the individual plaintiff's own demand controls the amount in controversy, *see St. Paul Mercury*, 303 U.S. at 294—does not authorize this type of stipulation in the class action setting. Even if a putative class representative, like an individual plaintiff, is the "master of the complaint" and is free to frame the substantive allegations giving rise to the causes of action he asserts therein, *see Caterpillar Inc. v. Williams*, 482 U.S. 386, 398–99 (1987), the mere filing of the complaint does not make him the master of the claims that flow from those allegations belonging to *other* individual class members. Plaintiff cannot be the master of those claims because he does not yet represent those individuals. *See* Part II, *infra*.

tually *sought in recovery* in vindication of that right. *See Black's Law Dictionary* 281 (9th ed. 2009) (defining "claim" as the "aggregate of operative facts giving rise to a right enforceable by a court"). This is consistent with Federal Rule 23 itself, which speaks to the "claims or defenses of the class" and "the desirability . . . of concentrating the litigation of the claims in the particular forum." Fed. R. Civ. P. 23 (a)(3), (b)(3)(C). Rule 23 is plainly referring to the putative class members' legal entitlement to relief arising from a common set of operative facts, not merely to the class members' monetary demand.

Interpreting "claim[ ]" in Section 1332(d)(6) to mean only the sum demanded would be illogical because, in a yet-to-be-certified class action, *none* of the "individual class members" (other than the named plaintiff who seeks to become the class representative) has asserted *any* demand for payment against the defendant. Two Terms ago, this Court arrived at the same meaning of the term "claim" in interpreting 28 U.S.C. § 1500, explaining that "the term 'claim' is used . . . synonymously with 'cause of action,'" and that both terms "refer[ ] simply to facts without regard to judicial remedies." *United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723, 1728–29 (2011) (internal quotation marks omitted). Just like here, that interpretation of "claim" was the only "reasonable interpretation" in *Tohono* because the statute applied even where a party had not yet demanded any relief:

> The statute refers to a person who acts under color of federal law in respect to a cause of action at the time it arose. *But at that time, the person could not act in respect to the relief requested, for no complaint was yet filed.* This use of the phrase "in respect to a cause of ac-

> tion" *must refer to operative facts and not whatever remedies an aggrieved party might later request*.

Id. at 1728 (emphases added). Thus, this Court held that "[t]wo suits are for or in respect to the same claim . . . if they are based on substantially the same operative facts, regardless of the relief sought in each suit." *Id.* at 1731.

In reaching that decision, the Court also relied on the meaning of the word "claim" in the context of claim preclusion: "The now-accepted test in preclusion law for determining whether two suits involve the same claim or cause of action depends on factual overlap . . . ." *Tohono*, 131 S. Ct. at 1730; *see also* Restatement (Second) of Judgments § 24 ("[T]he claim extinguished [by claim preclusion] includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose."). The claim preclusion context is particularly relevant when interpreting CAFA because class action doctrine is a species of claim preclusion. *See Smith*, 131 S. Ct. at 2379 (one of "the recognized exception[s] to the rule against nonparty preclusion [is] for members of [certified] class actions"); *see also Taylor v. Sturgell*, 553 U.S. 880, 900–01 (2008). CAFA ensures fairness in class actions in part by shielding absent class members from abuses of the claim preclusion doctrine and explicitly protecting their "legitimate claims," Pub. L. No. 109-2, § 2(b), 119 Stat. at 5—which is a clear reference to the class members' legal rights under state law, rather than the amount requested to remedy the violation of those rights.

C. The Purpose And History Of CAFA Confirm That Remand Was Improper.

The purpose and history of CAFA confirm what the text itself makes clear: Plaintiff's stipulation cannot oust federal jurisdiction. Allowing putative class representatives to evade federal jurisdiction under CAFA in the manner attempted here would create a gaping loophole that would defeat the congressional objectives underlying CAFA—to the profound detriment of both absent class members and class action defendants. *See United States v. Naftalin*, 441 U.S. 768, 776–77 (1979) (reviewing legislative history and avoiding a construction that would "create a loophole in the statute that Congress simply did not intend to create").

1. *Congress's findings in the Act made clear that CAFA was enacted to stop state-court abuses and provide a federal forum for interstate class actions.* In enacting CAFA, Congress left no doubt about its intentions, describing in the Act itself the findings and purposes animating the law. For example, Congress described the "abuses of the class action device that have . . . harmed class members with legitimate claims and defendants that have acted responsibly." Pub. L. No. 109-2, § 2(a)(2), 119 Stat. at 4. Congress also found that "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed, such as where . . . counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value." *Id.* § 2(a)(3). And, perhaps most relevant to this case, Congress found that "[a]buses in class actions undermine . . . the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are . . . keeping cases of

national importance out of Federal court [and] . . . sometimes acting in ways that demonstrate bias against out-of-State defendants." *Id.* § 2(a)(4), 119 Stat. at 5.

Based on those findings, Congress announced its purposes in enacting CAFA: to "assure fair and prompt recoveries for class members with legitimate claims" and "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." Pub. L. No. 109-2, § 2(b)(1), (2), 119 Stat. at 5. These purposes would be defeated by endorsing Plaintiff's stipulation tactic.

2. *CAFA's legislative history further elucidates Congress's intent.* CAFA's legislative history further confirms Congress's intention to protect both out-of-state defendants and absent class members from class action abuses in state courts like the Circuit Court of Miller County. Specifically, CAFA was intended to close the loopholes created by the pre-CAFA diversity regime, which "enable[d] lawyers to 'game' the procedural rules and keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests." S. Rep. No. 109-14, at 4.

In particular, CAFA's legislative history brims with congressional condemnation of attorneys "seek[ing] $74,999 in damages on behalf of each plaintiff or explicitly exclud[ing] from the proposed class anybody who has suffered $75,000 or more in damages." S. Rep. No. 109-14, at 26–27; *see also id.* at 11 ("class action complaints often include a provision stating that no class member will seek more

than $75,000 in relief, even though they can simply amend their complaints after the removal to seek more relief and even though the class action seeks millions of dollars in the aggregate"); 151 Cong. Rec. S1104 (Feb. 8, 2005) (statement of Sen. Grassley) (denouncing "gamesmanship tactics" with respect to the amount in controversy in class actions); 151 Cong. Rec. S1079 (Feb. 8, 2005) (statement of Sen. Dodd) (same). By changing the prerequisites for diversity jurisdiction in the class action context, CAFA gave effect to Congress's "overall intent . . . to strongly favor the exercise of federal diversity jurisdiction" over interstate class actions. S. Rep. No. 109-14, at 35. Moreover, leaders on both sides of the aisle agreed when CAFA was enacted that the bill would "not in any way limit damages" to absent class members. 151 Cong. Rec. S1080 (Feb. 8, 2005) (statement of Sen. Dodd); *id.* (statement of Sen. Lott) (same).

The legislative history of CAFA expressly identifies rampant class action abuse in "magnet" jurisdictions as one of the problems that Congress attempted to remedy through CAFA. *See*, *e.g.*, S. Rep. No. 109-14, at 13–14, 22–23; 151 Cong. Rec. H726 (Feb. 17, 2005) (statement of Rep. Sensenbrenner) (noting that "[a] major element of the worsening crisis is the exponential increase in State class action cases in a handful of 'magnet' or 'magic' jurisdictions"); 151 Cong. Rec. S997 (Feb. 7, 2005) (statement of Sen. Frist) ("Aggressive trial lawyers have found there are a few counties . . . [where] State court judges are quick to certify a class action").

When Congress enacted CAFA, it was particularly focused on the victimization of out-of-state defendants, S. Rep. No. 109-14, at 13, emphasizing that "the Framers established diversity jurisdiction to ensure fairness for all parties . . . , particularly . . . de-

fendants from one state [that] are sued in the local courts of another state." *Id.* at 6. In Congress's view, however, pre-CAFA diversity and removal standards "facilitated a parade of abuses" and "thwart[ed] the underlying purpose of the constitutional requirement of diversity jurisdiction." *Id.*

Congress also sought to protect the due process rights of absent class members. Congress understood that "[w]hen judges indiscriminately certify class actions, unnamed plaintiffs lose important legal rights and can be denied appropriate awards for their injuries." S. Rep. No. 109-14, at 66; *see also id.* at 14 ("[C]onstitutional due process rights are often ignored in class actions."). In fact, at the time CAFA was passed, there was "clear and undeniable" evidence that collusion between state courts and the plaintiff's bar was "victimizing plaintiffs . . . who unwittingly have their legal rights adjudicated." 151 Cong. Rec. S1094 (Feb. 8, 2005) (statement of Sen. Hatch); *see also* S. Rep. No. 109-14, at 26. Of equal concern were examples of class actions certified in state court even though a federal court had already found that the identical class action "would clearly violate the due process rights of . . . the purported class members." S. Rep. No. 109-14, at 22.

The district court's remand order deprives Standard Fire of the federal forum that Congress intended to provide to defendants facing significant potential liability in interstate class actions, and jeopardizes the due process rights of absent class members by allowing Plaintiff to unilaterally impose an arbitrary limit on classwide recovery in order to evade federal jurisdiction. Such a "perverse" interpretation of CAFA cannot stand. *Wal-Mart*, 131 S. Ct. at 2559.

II. PERMITTING PLAINTIFF TO RELY ON A STIPULATION TO DEFEAT REMOVAL VIOLATES BASIC CLASS ACTION PRINCIPLES AND THE DUE PROCESS RIGHTS OF ABSENT CLASS MEMBERS.

Basic class action doctrine and fundamental due process principles also prevent a putative class representative from using a stipulation to defeat removal under CAFA. As this Court recently reaffirmed in *Smith v. Bayer*, an "uncertified class action cannot bind proposed class members" because those absent class members have not had their own day in court and are not adequately represented by a party to the litigation. 131 S. Ct. at 2381 n.11. As a matter of federal class action law, a named plaintiff's ability to bind nonparties "can come about in federal courts in just one way—through the procedure set out in Rule 23." *Id.* at 2381 (citing *Taylor*, 553 U.S. at 901).

Fundamental due process principles mandate the same result: In a class action for monetary relief, absent class members may not be bound by a named plaintiff's actions until, at a minimum, they have "receive[d] notice plus an opportunity to be heard and participate in the litigation," they have "be[en] provided with an opportunity to remove [themselves] from the class," and the named plaintiff has been determined to "adequately represent the interests of the absent class members." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Thus, a putative class representative is powerless to diminish the "claims of the [other] individual class members" before a class has been certified.

A. *A named plaintiff cannot alter absent class members' claims before class certification*. It is well settled that absent class members are not parties to

a putative class action *before* a class has been certified. *See Smith*, 131 S. Ct. at 2379 (rejecting the "novel and surely erroneous argument that a nonnamed class member is a party to the class action litigation *before the class is certified*"). Only where a court concludes that adequacy of representation and the other requirements for class certification have been met can "nonnamed class members [become] parties to the proceedings in the sense of being bound by the" outcome because their interests have been represented by another person. *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002); *see also Phillips Petroleum Co.*, 472 U.S. at 811–12. Accordingly, "the mere proposal of a class . . . c[an] not bind persons who [a]re not parties" to the case because, "in the absence of a certification," the "precondition for binding [nonparties]"—adequate representation by a duly appointed class representative—"[is] not met." *Smith*, 131 S. Ct. at 2380, 2382; *see also id.* at 2380 ("Neither a proposed class action nor a rejected class action may bind nonparties."); *id.* at 2381 n.11 ("The great weight of scholarly authority . . . agrees that an uncertified class action cannot bind proposed class members.").

Indeed, faced with this Court's decision in *Smith,* Plaintiff himself conceded as much below, acknowledging "that merely filing a proposed class action will not 'bind' proposed class members." Pet. App. 27a. To hold otherwise would violate the due process rights of the absent class members because they are not parties to the still-uncertified class action and are not represented by the still-undesignated class representative. *Smith*, 131 S. Ct. at 2379; *see also Richards v. Jefferson County*, 517 U.S. 793, 794 (1996) ("[I]t would violate the Due Process Clause of the Fourteenth Amendment to bind litigants to a

judgment rendered in an earlier litigation to which they were not parties and in which they were not adequately represented.").

Plaintiff's lack of representative authority at the time of removal means that he was powerless to reduce the "claims of the individual class members" to evade CAFA's jurisdictional threshold. 28 U.S.C. § 1332(d)(6). Nothing that a named plaintiff says or does before class certification can have any binding effect on the claims of individual members of the class who are not before the court. *See Frederick v. Hartford Underwriters Ins. Co.*, 683 F.3d 1242, 1247 (10th Cir. 2012) ("[A] plaintiff's attempt to limit damages in the complaint is not dispositive when determining the amount in controversy.").[8]

At the very most, then, Plaintiff could reduce the amount of his own "claim"—not those of any other member of the putative class—through his stipulation. *See Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 831 (7th Cir. 2011) ("What [the named plaintiff] is willing to accept thus does not bind the class and therefore does not ensure that the stakes fall under $5 million."); *Pfizer, Inc. v. Lott*, 417 F.3d 725, 725 (7th Cir. 2005) (a stipulation by the named plaintiffs regarding damages "would not bind the other members of the class"); *Manguno v.*

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[8] Nor was the district court correct to hold that Plaintiff had defeated federal diversity jurisdiction because his stipulation "would . . . judicially estop[him] from . . . attempting to recover more than the amount contemplated in the stipulation." Pet. App. 11a. Even if the district court were correct about principles of estoppel law, the possibility of such a future development—the eventual application by a state court of judicial estoppel—cannot defeat federal diversity jurisdiction that exists at the time of removal. *See St. Paul Mercury*, 303 U.S. at 289.

Prudential Prop. & Cas. Ins. Co., 276 F.3d 720, 724 (5th Cir. 2002) ("[I]t is improbable that [plaintiff] can ethically unilaterally waive the rights of the putative class members to attorney's fees without their authorization.").[9]

B. *The ability to opt out of a class is no substitute for Rule 23 or due process requirements*. The district court found that these class action and due process principles were no obstacle to remand because, in its view, the rights of absent class members would supposedly be protected by their ability to opt out of the class if and when it is certified. *See* Pet. App. 14a ("[P]utative class members may simply opt out of the class and pursue their own remedies if they feel that the limitations placed on the class by Plaintiff are too restrictive."). But the fact that members of the putative class might have the opportunity to opt out in the event a class is certified in the future does not change the fact that, *at the time of removal*, Plaintiff lacked the authority to represent the absent class members and thus could not diminish their "claims" for purposes of CAFA jurisdiction. The amount in controversy, if satisfied at the time of removal, cannot be altered by events subsequent to removal. *See St. Paul Mercury*, 303 U.S. at 293; *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824) (Marshall, C.J.) ("It is quite clear, that the jurisdiction of the Court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events."); *see also* Pl.'s Brief

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[9] Plaintiff did not even attempt to demonstrate below that, if his individual claim is reduced by stipulation (even to a *de minimis* amount), the aggregated total of the "claims" of the remaining "individual class members" would be $5,000,000 or less. 28 U.S.C. § 1332(d)(6).

in Opp. to Pet. at 12 (conceding that the question before this Court is "whether the stipulation is binding *now*").

Moreover, the right of absent class members to opt out does not change the fact that absent class members can only be bound by a class representative's actions where "the named plaintiff . . . adequately represent[s] the[ir] interests." *Phillips Petroleum Co.*, 472 U.S. at 811–12. As Federal Rule of Civil Procedure 23 itself makes clear, opt-out rights are no substitute for the adequacy of representation mandated by Rule 23(a). The Rule requires adequacy of representation as a prerequisite to *all* class actions—even those categories of class actions in which absent class members are afforded opt-out rights. *See* Fed. R. Civ. P. 23(a)(4); *see also Wal-Mart*, 131 S. Ct. at 2550 (the requirements of Rule 23 exist to "ensure[ ] that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate"); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (noting that the right to opt out is "[i]n addition to satisfying Rule 23(a)'s prerequisites").

As the Court has time and again emphasized, this is because of "our 'deep-rooted historic tradition that everyone should have his own day in court.'" *Richards*, 517 U.S. at 798 (quoting *Martin v. Wilks*, 490 U.S. 755, 762 (1989)). There are only narrow exceptions to this "principle of general application in Anglo-American jurisprudence." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940); *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (same). One of those exceptions is that, "[i]n a class action, . . . a person not named as a party may be bound by a judgment on the merits of the action, *if* she was adequately represented by a party who actively participated in

the litigation." *Taylor*, 553 U.S. at 884 (emphasis added); *see also Smith*, 131 S. Ct. at 2380 ("[U]nnamed members of a class action [may] be bound, even though they are not parties to the suit.").

The district court therefore erred when it permitted Plaintiff—a putative class representative who has no authority over other potential class members who at this point are "strangers to the litigation," *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007)—to use a stipulation to circumvent CAFA's jurisdictional threshold.

III. EVEN IF THE "LEGAL CERTAINTY" FRAMEWORK THAT COURTS APPLY UNDER SECTION 1332(a) WERE ENGRAFTED ONTO CAFA, REMAND WAS IMPROPER.

This Court established long ago under the traditional diversity statute, Section 1332(a), that a party can defeat federal jurisdiction on the basis of the amount in controversy only "if, from the face of the pleadings, it is apparent, *to a legal certainty*, that the plaintiff cannot recover" the threshold amount, or if "the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount." *St. Paul Mercury*, 303 U.S. at 289 (emphasis added). Thus, the Court in *St. Paul Mercury* held that a plaintiff's amendment subsequent to removal reducing the amount he is seeking to recover cannot require a remand because that would subject the defendant's statutory right of removal "to the plaintiff's caprice." *Id.* at 294.

Applying this Court's decision in *St. Paul Mercury*, the Eighth Circuit has used a burden-shifting framework to determine the propriety of federal diversity jurisdiction. First, "a party seeking to re-

move . . . must establish the amount in controversy by a preponderance of the evidence regardless of whether the complaint alleges an amount below the jurisdictional minimum." *Bell*, 557 F.3d at 958. Then, "[i]f the [removing defendants] prove by a preponderance of the evidence that the amount in controversy is satisfied, remand is only appropriate if [the plaintiff] can establish that it is legally impossible to recover in excess of the jurisdictional minimum." *Id.* at 959 (citing *St. Paul Mercury*, 303 U.S. at 288–89). The district court below applied this test, and Plaintiff has never disputed its correctness.

As demonstrated above, there was no need for the district court to resort to this judicially-fashioned test in this case. Unlike jurisdictional determinations under Section 1332(a), which focus only on the amount sought in recovery, under CAFA's plain statutory language, the district court's calculation of the aggregated total of the "claims of the individual class members" is controlling for jurisdictional purposes. But even if the legal-certainty framework could be engrafted onto CAFA, Plaintiff still would not be entitled to a remand.

That is because, before Plaintiff can take *any* actions to bind the absent class members, the trial court would have to appoint Plaintiff as class representative, which would require determining that Plaintiff has satisfied the Arkansas standards for certifying a class action, including the requirement that Plaintiff is an adequate representative of the absent class members who will protect their interests. *See* Ark. R. Civ. P. 23(a)(4); *Smith,* 131 S. Ct. at 2379; *AT&T Mobility*, 131 S. Ct. at 1751 ("For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent

members must be afforded notice, an opportunity to be heard, and a right to opt out of the class."). In addition to determining whether to appoint Plaintiff as class representative, before enforcing the stipulation the court also would need to ensure, at some point in the future, that enforcement of the stipulation is in the best interests of the class. These events had not occurred as of the time of removal; nor were they certain to occur in the future.

Moreover, even if those events might occur at some point in the future, as the Court in *St. Paul Mercury* held, "events occurring subsequent to removal which reduce the amount recoverable, whether beyond the plaintiff's control or the result of his volition, do not oust the district court's jurisdiction once it has attached." 303 U.S. at 293. Since any binding effect of the stipulation *on the absent individual class members* is contingent on future class certification rulings that post-date the time of removal, the district court's ruling that Plaintiff's stipulation "satisf[ies] the plaintiff's legal certainty burden and defeat[s] removal" is simply wrong as a matter of law. Pet. App. 9a.

In fact, because Plaintiff lacked the authority to bind the absent class members at the time of removal, he did not and cannot rule out the possibility that another individual class member might intervene in this action to pursue damages in excess of the jurisdictional threshold. *See* Ark. R. Civ. P. 24(a). It is altogether possible Plaintiff might be found to be an inadequate class representative and replaced by a representative unwilling to stipulate away a portion of the class's potential recovery. *See* Ark. R. Civ. P. 23(a)(4); *see also Back Doctors*, 637 F.3d at 830 ("[A class action plaintiff] has a fiduciary duty to its fellow class members. A representative can't throw

away what could be a major component of the class's recovery."). As the Seventh Circuit explained in *Back Doctors*, where the putative class representative purported to waive punitive damages, federal jurisdiction exists "unless recovery of an amount exceeding the jurisdictional minimum is legally impossible"—which means accounting for the possibility that, for example, "some other person, more willing to seek punitive damages, [might] take over as representative," or that a jury might "award damages not requested by the complaint." *Id.* at 830–31; *see also Ditcharo v. United Parcel Serv., Inc.*, 376 F. App'x 432, 438 (5th Cir. 2010) (per curiam) (denying remand as inappropriate where "unnamed plaintiffs in the class would likely seek damages in excess of [the jurisdictional minimum] if this class were certified and the case were to move forward"). The binding effectiveness on the absent individual class members of Plaintiff's stipulation is contingent on multiple future events and, therefore, it is legally impossible for the stipulation to satisfy Plaintiff's "legal certainty" burden.

Finally, the district court's ruling that such future developments could provide Standard Fire "the right to remove again, should removal be justified," Pet. App. 13a, misses the point. Federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.). Forcing out-of-state defendants to litigate in state court until all future contingencies are resolved inverts the legal certainty standard, *see St. Paul Mercury*, 303 U.S. at 288–89, and would directly contravene CAFA's intent to eliminate state court class action abuses and to afford a federal forum for just this type of case.

CONCLUSION

For the foregoing reasons, the district court's order remanding this case to Arkansas state court should be reversed.

Respectfully submitted.

STEPHEN E. GOLDMAN
WYSTAN M. ACKERMAN
ROBINSON & COLE LLP
280 Trumbull Street
Hartford, CT 06103
(860) 275-8200

LYN P. PRUITT
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD PLLC
425 West Capitol Avenue
Suite 1800
Little Rock, AR 72201
(501) 688-8869

THEODORE J. BOUTROUS JR.
Counsel of Record
THEANE EVANGELIS KAPUR
JOSHUA S. LIPSHUTZ
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000
tboutrous@gibsondunn.com

AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioner

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