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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

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

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Plaintiff's brief disclaims both the foundation of the district court's remand order and his own prior arguments. The district court accepted the self-proclaimed "binding" nature of Plaintiff's stipulation, Pet. App. 74a–75a, holding that the stipulation "show[ed] 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. Now, unable to get around this Court's decision in *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2379 (2011), Plaintiff repudiates the district court's reasoning and *agrees* with Standard Fire that his stipulation has no legally binding effect on the absent class members. In fact, Plaintiff admits that, "[b]y definition, [his] stipulation can have *no effect* unless and until a court finds . . . that it does not render [him] an inadequate representative (at the class certification stage)." Resp. Br. 53 (emphasis added); *see also id.* at 12.

Now that the parties agree that the stipulation has no effect on the absent class members' claims, the only possible conclusion is that the stipulation likewise has no effect on the amount in controversy—which is determined by "aggregat[ing]" "the claims of the individual class members." 28 U.S.C. § 1332(d)(6). Indeed, Plaintiff admits that, notwithstanding the stipulation, it remains possible that the putative class could recover more than $5,000,000, effectively conceding that it is *not* legally certain that the damages will be below CAFA's jurisdictional threshold. *See*, *e.g.*, Resp. Br. 13, 20.

Plaintiff nevertheless defends the district court's remand order by relying on the "master of the com-

plaint" doctrine. According to Plaintiff, this case should be returned to state court simply because he "'does not desire to try his case in the federal court.'" Resp. Br. 1 (quoting *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938)). But that doctrine does not apply here. CAFA expressly provides a specific mechanism for determining the amount in controversy—one that turns not on the named plaintiff's desire but on "the claims of the individual class members." 28 U.S.C. § 1332(d)(6). When the district court aggregated those claims as CAFA requires, it found, based on the uncontradicted evidence produced by Standard Fire, that the amount in controversy exceeds $5,000,000. Pet. App. 6a. That should have been the end of the jurisdictional inquiry.

Faced with the plain text of Section 1332(d)(6), Plaintiff attempts to find support in the CAFA Senate Report. Resp. Br. 28–29. That Report, however, overwhelmingly supports Standard Fire's position, and underscores that "section 1332(d) is intended to expand *substantially* federal court jurisdiction over class actions" and "should be read *broadly*, with a strong preference that interstate class actions should be heard in a federal court." S. Rep. No. 109-14, at 43 (2005) (emphases added).

This is exactly the type of "interstate class action[ ]" that Congress had in mind when it enacted CAFA—a suit by a putative class of thousands of Arkansas residents against an out-of-state defendant involving a potential aggregate damages award in excess of $5,000,000. If this case is returned to state court, Standard Fire will be vulnerable to the abusive practices of a jurisdiction that is well known for coercing large settlements that predominantly benefit class action plaintiffs' lawyers. *See generally* Br.

of 21st Century Cas. Co., et al. ("21st C. Br."); Br. of Manufactured Hous. Inst., et al. ("MHI Br.").

For all of these reasons, this Court should reverse the district court's remand order.

I. PLAINTIFF'S CONCESSION THAT HIS STIPULATION IS NOT BINDING IS FATAL.

Plaintiff disavows the core reasoning of the district court's remand order and, in so doing, effectively concedes that the amount in controversy exceeds CAFA's $5,000,000 jurisdictional threshold.

A. In direct conflict with the district court's reasoning, Plaintiff's complaint, his position below, and even his brief in opposition, Plaintiff now admits that his stipulation has "no effect" on the claims of the absent class members he seeks to, but does not yet, represent. Resp. Br. 3. As Plaintiff explains, his stipulation "cannot have a binding effect on the merits of absent class members' claims unless and until the class is certified." *Id.* at 12; *see also id.* at 53. *But see* Pet. App. 60a (Complaint ¶ 11) ("Plaintiff *and Class* stipulate that they will seek to recover total aggregate damages of less than five million dollars") (emphasis added).[1]

That concession requires reversal because it acknowledges that, at the time of removal, Plaintiff's stipulation had no effect on the "claims of the individual class members," which, when "aggregated" by the district court based on Standard Fire's unrebut-

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[1] Plaintiff told the district court "[t]here can be no doubt that the stipulations in this case are binding," Br. in Support of Remand (D.E. 7) at 13, and told the Eighth Circuit there was "a sworn stipulation limiting the recovery of the alleged class," Ans. in Opp. to Pet. (8th Cir.) at 9.

ted evidence, exceeded CAFA's $5,000,000 jurisdictional threshold. 28 U.S.C. § 1332(d)(6).

Moreover, as Plaintiff further concedes, the determination regarding "[f]ederal jurisdiction cannot be based on contingent future events." Resp. Br. 20. But, by Plaintiff's own admission, the stipulation's effectiveness is contingent on several hypothetical future events that may never occur—the class must be certified, Plaintiff must be declared the class representative, and the stipulation must be deemed binding on the absent class members. *See id*. at 53 (conceding that the "stipulation can have *no effect* unless and until a court finds . . . that it does not render [Plaintiff] an inadequate representative (at the class-certification stage)") (emphasis added); *see also id.* at 13, 20; Br. of Public Citizen, Inc. 13. Plaintiff's own arguments thus confirm that, at the time of removal, the stipulation did not establish "to a legal certainty" that the amount in controversy was below $5,000,000. *St. Paul Mercury*, 303 U.S. at 289.[2]

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[2] Contrary to Plaintiff's assertion, Standard Fire is not challenging the "legal certainty" standard. Resp. Br. 51. Rather, Standard Fire merely contends that the test is unnecessary here because, under CAFA's plain language, the district court's calculation of the aggregated total of the "claims of the individual class members" is controlling for jurisdictional purposes. *See* Pet. Br. 36. In any event, Plaintiff's brief confirms what Standard Fire argued in its opening brief (at 35–38): If the Court applies the "legal certainty" test, the result is the same—the case belongs in federal court because, as explained above, Plaintiff has conceded that there are many ways in which the putative class could recover more than $5,000,000 in damages. *See* Resp. Br. 13, 20. Indeed, Plaintiff never even argues, let alone demonstrates, that he meets the "legal certainty" test.

B. Plaintiff asks this Court to treat the stipulation as a legal fiction that limits the amount in controversy for jurisdictional purposes only. *See* Resp. Br. 40 (the stipulation "will merely be considered for purposes of determining the amount in controversy for removal at this time"). But the true amount of damages potentially at stake controls, not merely the amount alleged in the complaint. This Court has expressly rejected "the idea that jurisdiction may be maintained by mere averment," instead requiring "competent proof" of "'the facts as they really exist.'" *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 184, 189 (1936) (quoting *Wetmore v. Rymer*, 169 U.S. 115, 120 (1898)); *see also Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1194–95 (2010) ("[A]llegations of jurisdictional facts . . . must [be] support[ed] . . . by competent proof.").

Even under 28 U.S.C. § 1332(a), where an individual plaintiff can avoid federal court by "suing for less than the jurisdictional amount . . . though he would be justly entitled to more," *St. Paul Mercury*, 303 U.S. at 294, he cannot avoid federal court simply by *saying* he is suing for less than the jurisdictional amount, while in fact there is nothing *actually* preventing him from recovering more. *See id*. at 289 (requiring a plaintiff seeking remand to establish that he "*cannot* recover" more than the threshold amount) (emphasis added).

Here, Plaintiff concedes that his stipulation does not foreclose the individual class members from recovering aggregate damages in excess of $5,000,000. The stipulation therefore did not reduce the amount

in controversy below CAFA's jurisdictional threshold.[3]

C. Plaintiff argues in the alternative that this Court should affirm the remand order because it is only attorney's fees that bring the amount in controversy over $5,000,000. *See* Resp. Br. 13, 57. But it is far too late for Plaintiff to raise that argument. Plaintiff did not dispute Standard Fire's attorney's fees calculation in the district court, the Eighth Circuit, or his brief in opposition, and has never argued (until now) that his stipulation could reduce the fee award independently of the other damages components. His argument is therefore waived. *See Peralta v. Heights Med. Ctr., Inc*., 485 U.S. 80, 86 (1988).

In any event, under Arkansas law, attorney's fees are a statutory component of each putative class member's potential recovery. *See* Ark. Code Ann. § 23-79-208(a)(1). Plaintiff therefore cannot limit the absent class members' ability to recover attorney's fees any more than he can limit any other component of their potential damages—at least not until the class is certified and Plaintiff is deemed an adequate representative. Thus, the district court's calculation—including attorney's fees—is dispositive and precludes remand.

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[3] Public Citizen argues that a class representative "could legitimately choose to waive" a portion of the class recovery in order to remain in state court, and that such a litigation strategy does not necessarily render him inadequate for class-certification purposes. Br. of Public Citizen, Inc. 5; *see also id.* at 11–12. That argument, however, misses the point. At the time of removal, Plaintiff had *not* yet been determined to be an adequate class representative. Thus, the enforceability of the stipulation remains contingent on a court's future determinations. *See St. Paul Mercury*, 303 U.S. at 289–90.

Indeed, recent experience in Miller County belies the notion that Plaintiff's stipulation could limit attorney's fees. Over the past few years alone, Plaintiff's class-action counsel have been awarded nearly half a *billion* dollars in attorney's fees. *See* MHI Br. 16–17, 10a–13a.

II. PLAINTIFF'S STIPULATION CANNOT REDUCE THE AMOUNT IN CONTROVERSY UNDER CAFA.

Having abandoned the district court's reasoning, Plaintiff instead defends the district court's remand order by invoking the principles of traditional federal diversity jurisdiction. But that argument is based on the faulty premise that the rules governing traditional federal diversity jurisdiction apply wholesale in the CAFA context, and ignores both CAFA's plain language and Congress's intent.

A. Under CAFA, Courts Must Aggregate The Claims Of The Individual Class Members.

1. Plaintiff contends that "[b]y borrowing the amount-in-controversy language directly from the diversity statute, CAFA incorporates the settled construction of that language to permit plaintiffs to establish the amount in controversy for jurisdictional purposes through pleadings and stipulations." Resp. Br. 15. That "settled construction," however, has never applied to class actions because, until CAFA, the claims of absent individuals were not relevant to the amount-in-controversy calculation. *See* 28 U.S.C. § 1367; *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 300–01 (1973).

In enacting CAFA, moreover, Congress did *not* merely "borrow" the language of the traditional di-

versity statute. There are substantial differences between CAFA jurisdiction and traditional diversity jurisdiction, all of which appear in the plain text of the U.S. Code. *See*, *e.g.*, 28 U.S.C. § 1332(d)(2)(A) (replacing the complete diversity requirement with a minimal diversity requirement); *id.* § 1453(b) (eliminating the one-year limitation on removal, allowing a defendant to remove an action brought in its home State, and eliminating the consent requirement for removal). Most importantly, Plaintiff ignores the plain language of 28 U.S.C. § 1332(d)(6), which expressly prescribes the method for calculating the amount in controversy in the class-action context: "[T]he 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." Section 1332(a), in contrast, is silent about the method courts should use to calculate the amount in controversy in the traditional diversity setting.

Thus, Plaintiff is simply wrong when he asserts that CAFA "reflects Congress's intent to embrace . . . th[e] settled principles" of traditional diversity jurisdiction. Resp. Br. 16. To the contrary, the Senate Report explains that Congress enacted CAFA because "the [traditional] diversity and removal standards as applied in interstate class actions [were] facilitat[ing] a parade of abuses, and [we]re thwarting the underlying purpose of the constitutional requirement of diversity jurisdiction." S. Rep. No. 109-14, at 6. There was nothing "*sub silentio*," Resp. Br. 19, about Congress's decision to displace the traditional method of determining the amount in controversy—it was explicit and intentional. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 594 n.12 (2005) (Ginsburg, J., dissenting) ("CAFA's enlargement of federal-court diversity jurisdiction

was accomplished, 'clearly and conspicuously,' by amending § 1332.").

2. Plaintiff contends that "Standard Fire places more weight on § 1332(d)(6) than its language can bear." Resp. Br. 30. According to Plaintiff, Section 1332(d)(6) does nothing more than "displace in CAFA cases the rule of *Zahn* . . . , which prohibits courts from aggregating the claims of individual class members to satisfy the amount-in-controversy requirement of the general diversity statute." Resp. Br. 2; *see also id.* at 30. Thus, Plaintiff contends that Section 1332(d)(2)—not Section 1332(d)(6)—is "the governing standard of CAFA's amount-in-controversy test." *Id.* at 29.

But those two provisions speak for themselves, working *together* to create the "governing standard" for determining the amount in controversy under CAFA. Resp. Br. 29. Section 1332(d)(2) states that the "matter in controversy" must exceed $5,000,000 to give rise to federal jurisdiction. And Section 1332(d)(6) instructs courts how they "shall" calculate the "matter in controversy" in a class action.

Congress could have drafted Section 1332(d)(6) to do nothing more than declare that the rule against aggregation does not apply to CAFA. *Cf.* 28 U.S.C. § 1453(b) ("the 1-year limitation under section 1446(c)(1) shall not apply" to removal of class actions). Or it could have drafted that provision to define "matter in controversy" as the total classwide demand asserted by the named plaintiff in the complaint. Congress did neither, instead making the amount in controversy a function of the claims of the *individual class members*, who (at the outset of a putative class action) are beyond the named plaintiff's

control, as Plaintiff now concedes. *See* Resp. Br. 12, 53.

Plaintiff further misreads Section 1332(d)(6) when he asserts that the provision "shifts the amount-in-controversy focus from a person-by-person analysis of individual class members to a class-wide total," "mak[ing] a stipulation regarding that total precisely what a court should consider." Resp. Br. 16, 30. To the contrary, Section 1332(d)(6) directs courts to determine the amount in controversy by evaluating (and aggregating) the "claims of the *individual* class members." Section 1332(d)(6)'s focus on the individual class members is yet another reason why a pre-certification stipulation purporting to limit only the total *classwide* recovery has no bearing on the amount in controversy.

Plaintiff attempts to draw support for his reading of Section 1332(d)(6) from the Senate Report's reference to "'aggregating damages.'" Resp. Br. 30 (quoting S. Rep. No. 109-14, at 43). But that passage simply explains that making a single determination as to whether the aggregate of the individual class members' claims exceeds $5,000,000 is preferable to determining whether *each* class member's claim exceeds $75,000, "as is required by the [pre-CAFA] diversity jurisdictional statute." S. Rep. No. 109-14, at 70. It is not a license to ignore the claims of the individual class members in favor of a named plaintiff's classwide demand.

Moreover, the method Congress selected for determining the amount in controversy under CAFA—"aggregat[ing]" "the claims of the individual class members," 28 U.S.C. § 1332(d)(6)—comports with the nature of a named plaintiff's role in an uncertified class action. In crafting the class complaint, a

named plaintiff is, of course, free to make factual allegations and generally decide which theories of recovery to pursue. But, unless and until the class is certified and the named plaintiff is declared to be the class representative, he is not the master of the "claims" of the absent individuals that flow from those allegations. Those individuals remain the master of their own claims. *See* Resp. Br. 12; *see also Smith*, 131 S. Ct. at 2379–81. And because Plaintiff has no authority to limit the right of absent class members to recover the full value of their claims, the total amount that is actually in controversy before class certification is the sum of each individual class member's claims. *See United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723, 1728–29 (2011) (defining "claim" as the right to relief that arises from a set of "operative facts").

Plaintiff ignores the import of *Tohono*, pointing to one sentence in that opinion for the proposition that the term "claim" can refer either to "a right or demand." Resp. Br. 33 (citing *Tohono*, 131 S. Ct. at 1728–29). *Tohono* goes on to explain, however, that where an allegedly aggrieved party has not yet asserted *any* demand, "claim" must refer to his legal right to recovery. *Tohono*, 131 S. Ct. at 1728–31. Other than Plaintiff, none of the individual class members in this case has asserted any demand against Standard Fire; thus, to aggregate their "claims," 28 U.S.C. § 1332(d)(6), a court must look to their potential right to recovery under the operative facts and causes of action alleged in the complaint.

3. Plaintiff cites three cases from this Court for the proposition that, contrary to the plain language of Section 1332(d)(6), an individual plaintiff's traditional ability to plead around the amount-in-controversy requirement "extends to class actions."

Resp. Br. 18. None of those cases, however, comes close to supporting Plaintiff's argument.

Plaintiff relies primarily on *United States v. Hohri*, 482 U.S. 64, 66 & n.1 (1987), describing that case as a putative class action in which "[t]he named plaintiffs limited requested damages to $10,000 per claim in order to qualify for federal district court jurisdiction and avoid the claims court." Resp. Br. 18. But the only question presented in *Hohri* involved *appellate* jurisdiction that turned on the *type* of claims involved, not the amount in controversy. *See* 482 U.S. at 66 ("[W]e must decide which court [of appeals] . . . has jurisdiction over . . . a case raising both a nontax claim under the Little Tucker Act and a claim under the Federal Tort Claims Act . . . .").

Plaintiff also relies on *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2548 (2011), and *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 622–23 & n.18 (1997), two class actions that this Court decertified because of improper decisions by the named plaintiff in framing the complaint. In *Wal-Mart*, this Court unanimously held that the named plaintiff invoked the wrong provision of Rule 23 and, in so doing, "perverse[ly]" jettisoned absent class members' claims for compensatory damages. 131 S. Ct. at 2559. In *Amchem*, the named plaintiff sought to represent such a "sprawling" class that this Court found he sacrificed the due process rights of absent class members. 521 U.S. at 624. These cases directly refute Plaintiff's argument that courts should not "second-guess . . . the litigation strategies of the named class representative," Resp. Br. 18, and neither case mentions the "master of the complaint" doctrine.

4. The legislative history on which Plaintiff relies likewise fails to support his interpretation of

CAFA. According to Plaintiff, the "most relevant portion[ ]" of CAFA's legislative history is a single parenthetical appearing in the Senate Report that mentions "factual stipulations." Resp. Br. 28; *see also id.* ("'Less burdensome means (*e.g.*, factual stipulations) should be used in creating a record upon which the jurisdictional determinations can be made.'") (quoting S. Rep. No. 109-14, at 44). Based on that reference alone, Plaintiff leaps to the conclusion that his stipulation must be a proper method for establishing the amount in controversy.

But even Plaintiff recognizes (in a footnote) that his so-called "stipulation" is not the type of "factual stipulation" to which Congress was referring. Resp. Br. 28 n.8. A "factual stipulation" (as the name implies) pertains to the undisputed *facts* at issue in the case—for example, that the number of putative class members exceeds 100, or that the events in question took place in Arkansas; such stipulations allow the parties to avoid discovery and the court to avoid the need for fact-finding. *See* S. Rep. No. 109-14, at 44. The Senate Report itself explains that the parties might enter into a "factual stipulation" in which they agree, for example, on the citizenship of putative class members. *Id.* That type of stipulation bears no resemblance to Plaintiff's unilateral pronouncement, in which he purports to limit the substantive rights of others and defeat Standard Fire's right to litigate this case in federal court.

Contrary to Plaintiff's assertions, CAFA's legislative history demonstrates that Congress did not intend to authorize a named plaintiff to unilaterally trump the statutorily prescribed method for calculating the amount in controversy. Congress was determined to prevent the type of gamesmanship exemplified by such stipulations—which historically had

been used to "keep . . . class actions in state court[s], whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests." S. Rep. No. 109-14, at 4; *see also infra* 17–18. CAFA should be interpreted to effectuate that objective. *See Hertz*, 130 S. Ct. at 1195 (rejecting an interpretation of Section 1332 that "would readily permit jurisdictional manipulation").

B. Determining The Amount In Controversy In The Manner CAFA Prescribes Is Not Unmanageable Or Unusual.

Plaintiff also contends that Standard Fire's method of determining the amount in controversy in a class action—the method prescribed by Section 1332(d)(6)—"create[s] an unworkable system that would vastly complicate jurisdictional inquiries." Resp. Br. 22. According to Plaintiff, aggregating the claims of the individual class members "would force courts to conduct full dress rehearsals of the merits (including damages) at the outset of the case," *id.* at 12, and "require[ ] federal district courts to conduct full-blown evidentiary hearings at the removal stage to determine the amount in controversy," "consum[ing] months of activity and millions of dollars in fees and expenses." *Id.* at 2, 26.

Hyperbole aside, Plaintiff's concerns are unfounded. Plaintiff points to no examples in which the determination required by Section 1332(d)(6) has been judicially unmanageable or even required significant judicial resources. Indeed, the district court in this case determined the aggregate amount of the individual class members' claims with little difficulty based on Standard Fire's uncontroverted evidentiary submission. *See* Resp. Br. 9–10.

In some cases, a court may need to weigh "competing jurisdictional calculations," Resp. Br. 25, or estimate "a projected fee award." *Id.* at 26. But federal courts routinely manage those same evidentiary and fact-finding tasks outside the class-action setting, often looking beyond the demand asserted in the complaint when determining the amount in controversy under Section 1332(a). That determination is manageable, in part, because courts need only evaluate whether recovery in excess of the jurisdictional threshold is "legally possible," without deciding whether "the plaintiff *ought* to recover less than the jurisdictional amount." *Smithers v. Smith*, 204 U.S. 632, 644 (1907) (emphasis added).[4]

There is nothing unusual or unworkable about Section 1332(d)(6) requiring district courts to perform a similar function in the class-action context. In fact, the CAFA Senate Report expressly contemplates the occasional need for judicial fact-finding and discovery to determine whether the federal courts have jurisdiction over a class action. *See* S.

[4] *See, e.g.*, *McMillian v. Sheraton Chi. Hotel & Towers*, 567 F.3d 839, 845 (7th Cir. 2009) (to prove that "future medical expenses and pain and suffering . . . reach the jurisdictional threshold," a party might provide "documentary or testimonial evidence that would show the necessity for future medical treatment of their injuries"); *McPhail v. Deere & Co.*, 529 F.3d 947, 954 (10th Cir. 2008) ("to the extent that a defendant must rely on the federal discovery process to produce [evidence of the amount in controversy,] he may ask the court to wait to rule on the remand motion until limited discovery has been completed"); *Hartford Ins. Grp. v. Lou-Con Inc.*, 293 F.3d 908, 910 (5th Cir. 2002) (per curiam) (if the amount in controversy is not apparent from the face of the complaint, courts may rely on "summary judgment" type evidence); *see also* 14A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3702.3 (4th ed. 2012).

Rep. No. 109-14, at 44 ("[I]n assessing the various criteria established in all these new jurisdictional provisions, a federal court may have to engage in some fact-finding, *not unlike what is necessitated by the existing jurisdictional statutes*.") (emphasis added).

Nor has this Court expressed misgivings about such jurisdictional fact-finding. Indeed, in *Hertz*—a case featured prominently in Plaintiff's brief, Resp. Br. 22–23—this Court held that district courts cannot simply rely on the allegations contained in a pleading to determine a corporation's principal place of business for diversity-of-citizenship purposes. "When challenged on allegations of jurisdictional facts," the Court explained, "the parties must support their allegations by competent proof." 130 S. Ct. at 1194–95.

Plaintiff further argues that courts must be able to "rely on [the] pleadings" when determining the amount in controversy in a putative class action, Resp. Br. 24, and cautions that "a putative class representative's decisions in framing the complaint [should not] be disregarded." *Id.* at 27. Standard Fire *agrees* with Plaintiff that the allegations in the complaint are part of determining the amount in controversy under CAFA—in fact, that is largely why determining the amount in controversy is not as "complicate[d]" as Plaintiff insists. *Id.* at 22. Here, as directed by 28 U.S.C. § 1332(d)(6), 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. Plaintiff never disputed this calculation.

III. THIS PUTATIVE CLASS ACTION BELONGS IN FEDERAL COURT.

Plaintiff posits a variety of reasons why he believes this case should be adjudicated in state court as a policy matter. But none of those reasons comports with CAFA's language, purpose, or history.

A. Plaintiff describes this case as a "small-damages, intra-state class action[ ]," Resp. Br. 2, and argues that it is "exactly the kind of case that Congress determined should remain in state court." *Id.* at 11–12, 35. But the best way to determine the kind of class action that Congress wanted to be heard in federal court is to examine the statute Congress enacted. CAFA created two bright-line rules, both of which make clear that this case should be in federal court.

First, regarding the amount of potential damages at issue, Congress drew a line at $5,000,000. Thus, any class action in which the amount in controversy exceeds $5,000,000 is large enough to warrant federal jurisdiction, in part because it creates the kind of "'in terrorem' effect," Resp. Br. 41, and "settlement pressure on a defendant," *id.* at 35, that gave Congress cause for concern. It does not matter whether the potential aggregate damages award exceeds the jurisdictional threshold by $24,150 (as in this case, *see* Resp. Br. 10), or by $7,000,000 (as in *Rolwing v. Nestle Holdings, Inc.*, 666 F.3d 1069, 1070–71 (8th Cir. 2012)). Either way, Congress determined that the monetary stakes were large enough for the case to be heard in federal court. *Cf.* Resp. Br. 36 ("The nature of a bright-line jurisdictional threshold is that a complaint under the requisite amount does not trigger jurisdiction, whether the difference is $1 or $1,000,000.").

Second, with respect to the geographic scope of the putative class action, Congress drew a line at minimal diversity—not complete diversity as is required in an individual action under Section 1332(a). Class actions in which "*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) (emphasis added), are sufficiently interstate in nature to give rise to federal jurisdiction under CAFA. Both CAFA's statutory findings and legislative history confirm that Congress was concerned with cases just like this one, where out-of-state defendants are hauled into another State's courts and subjected to that State's class-action procedures—even if all of the putative class members reside in the State where the court sits. *See* Pub. L. No. 109-2, § 2(a)(4), 119 Stat. 4, 5 (2005) (discussing "bias against out-of-State defendants"); S. Rep. No. 109-14, at 6 ("ensur[ing] fairness for . . . defendants from one state [that] are sued in the local courts of another state").

Thus, to the extent CAFA demarcated between putative class actions that Congress wanted in federal court and those it was content to leave in state court, this case falls squarely on the federal side of the line.

B. Plaintiff also argues that "[a]ny doubts about the meaning of CAFA should be resolved against federal jurisdiction under the longstanding principle that jurisdictional statutes are narrowly construed." Resp. Br. 21. But there are no "doubts" about how CAFA should be construed in this case—the plain language of 28 U.S.C. § 1332(d)(6) is clear about the method for determining the amount in controversy.

Further, even if there were ambiguity in CAFA's language, Plaintiff's argument that this Court should

apply a presumption *against* federal jurisdiction ignores CAFA itself, which, in substance and effect, abrogated any presumption against federal jurisdiction that might have existed in diversity cases. *See Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830 (7th Cir. 2011) ("There is no presumption against federal jurisdiction in general, or removal in particular. The Class Action Fairness Act must be implemented according to its terms, rather than in a manner that disfavors removal of large-stakes, multi-state class actions."). As the CAFA Senate Report—which Plaintiff embraces (Resp. Br. 4–6, 11, 19, 25, 28–30, 35–39)—explains, "the overall intent of [Section 1332(d)] is to strongly *favor* the exercise of federal diversity jurisdiction." S. Rep. No. 109-14, at 35 (emphasis added); *see also id.* at 43. The Report further states:

> The Committee intends this subsection [1332(d)(6)] to be interpreted expansively. . . . And if a federal court is uncertain about whether all matters in controversy in a purported class action do not in the aggregate exceed the sum or value of $5,000,000, the court should err in favor of exercising jurisdiction over the case.

Id. at 42 (internal quotation marks omitted). That is why all of the cases that Plaintiff cites for the inapplicable presumption *against* federal jurisdiction predate CAFA. Resp. Br. 21–22.

C. Plaintiff goes to great lengths to defend the Arkansas judiciary, particularly the courts of Miller County. Resp. Br. 12, 43–51. But Plaintiff does not dispute that the Arkansas courts take an approach to class actions—particularly class certification—that is *different* from their federal counterparts. *See id.* at

44 (describing the Arkansas Supreme Court's "certify now, decertify later approach to class-action litigation") (internal quotation marks omitted); *see also* Amicus Br. of Arkansas State Chamber of Commerce 15–17.

None of the Arkansas cases cited by Plaintiff rebuts the fact that the Arkansas courts' permissive approach to class actions regularly results in the certification of classes that would almost certainly not meet the federal requirements for certification. *Compare DirecTV, Inc. v. Murray*, 2012 Ark. 366, at *18 (Oct. 4, 2012), *with Wal-Mart*, 131 S. Ct. at 2561; *see also Advance Am. Servicing of Ark., Inc. v. McGinnis*, 300 S.W.3d 487, 492–94 (Ark. 2009) (finding a schizophrenic to be an adequate class representative even though "she has hallucinations in which she sees people and hears voices that are not really there"). Although Plaintiff cites a few cases in which the Arkansas Supreme Court denied class certification, those cases involved unusual circumstances that no court could have possibly found sufficient for class certification. *See*, *e.g.*, *Faigin v. Diamante*, 2012 Ark. 8, at *7 (Jan. 12, 2012) (declining to certify a class of defendants who did not share a common defense); *Baptist Health v. Haynes*, 240 S.W.3d 576, 582–83 (Ark. 2006) (reversing and remanding a class-certification order where the trial court provided only a single, conclusory sentence finding that the class-certification requirements were satisfied).

Further, even if Plaintiff were correct that "[t]he Arkansas approach is not a blank check for class action," Resp. Br. 45, it is indisputably *not* the same as the federal approach that Congress thought should apply to sizeable, multi-state class actions like this one. Congress enacted CAFA so that out-of-state defendants like Standard Fire could be protected by the

Federal Rules of Civil Procedure and the substantial body of federal law that requires uniform and rigorous enforcement of those rules. *See* Pub. L. No. 109-2, § 2(b)(2), 119 Stat. at 5; S. Rep. No. 109-14, at 4.[5]

In Miller County, in particular, out-of-state defendants are provided no such protections. *See generally* 21st C. Br.; MHI Br. Plaintiff argues that the abuses by the Miller County courts have been exaggerated, providing a letter from the Miller County clerk of court stating "that only a total of 28 class actions have been *filed* in that court since 2000." Resp. Br. 48. But Plaintiff neglects to mention that *one* of those 28 cases (filed in 2005, shortly before CAFA became effective) asserted class action claims against more than 500 separate defendants, nearly all of which were forced to settle pre-class certification. *See* MHI Br. 2; Editorial, *The Colossal Colossus Travesty*, Southeast Tex. Rec., Mar. 28, 2009, http://www2.setexasrecord.com/arguments/218179-the-colossal-colossus-travesty.

We may never know the true number of class actions that have been filed in Miller County, or the true number of out-of-state defendants that have been forced into court there. *See* Resp. Br. 13a ("class action cases do not have a category of their

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[5] It is particularly telling that eighteen States joined an *amicus* brief supporting Standard Fire in this case, even though Standard Fire is arguing that CAFA expanded federal jurisdiction to encompass putative class actions traditionally brought in state court. *See* Br. of Alabama, et al. Only three States filed in support of Plaintiff's effort to keep this case in state court. *See* Br. of Arkansas, et al. One of those States is Mississippi, which does not even allow state-court class actions. *See USF&G Ins. Co. of Miss. v. Walls*, 911 So. 2d 463, 464 (Miss. 2005) (en banc).

own"). But we do know that hundreds of out-of-state companies have agreed to settlements potentially worth multiple billions of dollars—including more than $400 million in fees to Plaintiff's counsel alone—without the Miller County courts holding a single class-certification hearing. MHI Br. 10a–13a.

D. Finally, Plaintiff contends that if procedural developments later make clear that the putative class could recover more than $5,000,000 in damages, then it would be appropriate for Standard Fire to remove at that time—but not before. *See* Resp. Br. 29, 41. The class-action abuses in Miller County, however, render any potential future right of removal illusory because Standard Fire, like many other out-of-state defendants hauled into the Miller County court, could be forced to settle long before anything substantive ever happens in this case. *See* Pet. Br. 13–16. That is exactly what Congress sought to prohibit by enacting CAFA.

CONCLUSION

The district court's order remanding this case to Arkansas state court should be reversed.

Respectfully submitted.

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