No. 08-2188

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

AT&T MOBILITY LLC and AT&T MOBILITY CORPORATION,

Petitioners,

v.

CHARLENE SHORTS,

Respondent-Defendant and Counterclaim Plaintiff.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR REHEARING EN BANC

On Appeal from the United States District Court for the Northern District of West Virginia in Case No. 5:07-cv-00098-IMK (Keeley, J.)

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Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Local Rule 26.1, *amicus* states as follows:

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TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

IDENTITY OF AMICUS CURIAE, ITS INTEREST, AND SOURCE OF AUTHORITY TO FILE 1

INTRODUCTION 1

ARGUMENT 3

I. THE PANEL MAJORITY'S CONSTRUCTION OF CAFA IS INCONSISTENT WITH THE STATUTE'S CENTRAL PURPOSE OF EXPANDING FEDERAL JURISDICTION 3

II. THE PANEL MAJORITY'S DECISION WOULD LEAD TO THE VERY TYPES OF ABUSES THAT CAFA SOUGHT TO PREVENT 6

CONCLUSION 8

CERTIFICATE OF SERVICE 9

CERTIFICATE OF COMPLIANCE 10

TABLE OF AUTHORITIES

Page(s)

CASES

Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit,
547 U.S. 71 (2006) 5

Palisades Collections LLC v. Shorts,
2008 WL 249083 (N.D. W. Va. Jan. 29, 2008) 2, 3

STATUTES

28 U.S.C. § 1441 .... 4, 5

28 U.S.C. § 1453 6

Class Action Fairness Act of 2005,
Pub. L. No. 109-2, 119 Stat. 4 (2005) 2, 5

LEGISLATIVE HISTORY

151 Cong. Rec. H730 (daily ed. Feb. 17, 2005) 5

S. Rep. No. 109-14 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3 .... 2, 5, 7

OTHER AUTHORITIES

Jay Tidmarsh, *Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action*,
35 W. St. U. L. Rev. 193 (2007) 6, 7

IDENTITY OF *AMICUS CURIAE*, ITS INTEREST, AND SOURCE OF AUTHORITY TO FILE

The Chamber of Commerce of the United States of America ("the Chamber") is the nation's largest business federation, representing an underlying membership of more than 3,000,000 companies and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing amicus curiae briefs involving issues of national concern to American business.

The Chamber's members are frequently defendants in large interstate class actions in which the existence of federal jurisdiction under the Class Action Fairness Act ("CAFA") is at issue. Accordingly, the central question presented by this appeal – *i.e.*, whether counterclaim defendants are statutorily barred from invoking CAFA's removal provisions – is of significant and widespread importance to the Chamber and its members.

A motion for leave to file accompanies this brief.

INTRODUCTION

Four years ago, our nation took a critical step toward ending class action abuse with the enactment of CAFA. The decade preceding CAFA's passage had seen an exponential increase in the number of class actions brought in the United States, as plaintiffs' attorneys exploited a loophole in federal diversity jurisdiction allowing them to bring interstate class actions involving tens or even hundreds of

millions of dollars in certain state courts that came to be known as "magnet jurisdictions." Class Action Fairness Act of 2005, S. Rep. No. 109-14, at 13 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 13-14. These magnet jurisdictions engaged in numerous abusive practices, such as certifying class actions on an *ex parte* basis and approving class settlements that primarily benefited the plaintiffs' attorneys. *Id.* at 13-23. CAFA ended many of these abusive practices by creating federal jurisdiction over most large interstate class actions. The results have been dramatic: "magnet jurisdictions" have seen a marked drop in class action activity and reports of class action abuse are waning.

The panel majority's decision here – issued over a forceful 20-page dissent by Judge Niemeyer – threatens to erase these advances and put magnet jurisdictions back in business by barring counterclaim defendants from invoking CAFA's removal provisions. In this case, Palisades Collection LLC brought a debt collection proceeding against Respondent Charlene Shorts arising out of an unpaid cellphone bill. Shorts then transformed that suit into a multi-million dollar putative statewide class action by filing a counterclaim class action against Palisades and Petitioners AT&T Mobility LLC and AT&T Mobility Corporation, alleging violations of the West Virginia Consumer Credit & Protection Act. *See Palisades Collections LLC v. Shorts*, No. 5:07CV098, 2008 WL 249083, at *1 (N.D. W. Va. Jan. 29, 2008). The proposed class action created by the counterclaim – involving more

than 160,000 potential class members and putting at least $16 million in controversy – is precisely the type of large, interstate class action over which CAFA was intended to create federal jurisdiction. *Id.* at *7-8. Nonetheless, the panel majority held that removal was improper because the putative class action was brought as a counterclaim as opposed to a free-standing case.

The Chamber agrees with the arguments raised in the Petition for Rehearing En Banc – *i.e.*, that the panel majority's decision cannot be reconciled with either CAFA's statutory language or its central purpose, and thus requires the attention of the full Court. The Chamber writes separately, however, to emphasize two additional arguments that support rehearing. First, the panel majority erred in construing CAFA strictly despite its central purpose of ***expanding*** federal jurisdiction over multistate class actions. Second, if allowed to stand, the panel majority's interpretation of CAFA will invite the plaintiffs' bar to circumvent CAFA – and resume the gamesmanship that led to CAFA's enactment – by bringing large class actions as counterclaims in state court proceedings.

For these reasons, as well as those raised by Petitioners, the Court should grant rehearing en banc.

ARGUMENT

I. THE PANEL MAJORITY'S CONSTRUCTION OF CAFA IS INCONSISTENT WITH THE STATUTE'S CENTRAL PURPOSE OF EXPANDING FEDERAL JURISDICTION.

The panel majority based its conclusion that Petitioners lack a right to remove on a canon of construction that applies to pre-CAFA removals: *i.e.*, that courts must "construe removal jurisdiction strictly and resolve doubts in favor of remand." Slip op. 21 n.5. The clear language of CAFA – allowing "any defendant" to remove a class action to federal court – should leave no doubt that counterclaim defendants possess removal rights. *See* slip op. 27-38 (Niemeyer, J., dissenting). But even if the statute were ambiguous, the strict construction canon invoked by the panel majority has no application to CAFA.

As Judge Neimeyer explained, the interpretive canon mandating "strict construction" of the traditional removal statute, 28 U.S.C. § 1441, reflects: (1) the Supreme Court's "observation that successive acts of Congress had constricted federal jurisdiction, evincing a clear congressional policy to narrow federal jurisdiction"; and (2) the Supreme Court's conclusion "that federalism principles required strict construction of encroachment on state court jurisdiction." Slip op. 35-36 (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941) and *Healy v. Ratta*, 292 U.S. 263, 269-70 (1934)). "[N]either of those rationales," however, "applies with any force in this case." Slip op. 36.

First, unlike section 1441, "CAFA unquestionably expanded federal jurisdiction and liberalized removal authority, thus reversing the restrictive federal jurisdiction policies" that animated construction of section 1441. *Id.* (citation omitted). After all, the text of CAFA explicitly states that the purpose of enacting the statute was to address the problem of state and local courts "keeping cases of national importance out of Federal court." Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(4)(A), 119 Stat. 4 (2005).[1] Second, CAFA's statutory text itself "addresses the federalism principle, stating that Congress intended the extension of federal jurisdiction over large interstate class actions and liberalization of removal to ***further*** the proper balance of federalism 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.'" Slip op. 37 (quoting CAFA, § 2(b)(2)).[2]

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1 *See also, e.g.*, S. Rep. No. 109-14, at 35 (the intent of CAFA "is to strongly favor the exercise of federal diversity jurisdiction over class actions with interstate ramifications"); 151 Cong. Rec. H730 (daily ed. Feb. 17, 2005) (comments of Mr. Sensenbrenner) (CAFA "should be read broadly, with a strong preference that interstate class actions should be heard in a Federal court if properly removed by a defendant").

2 Judge Niemeyer also noted that the Supreme Court recently relied on legislative statements of purpose in finding federal preemption of state law where a canon of strict construction would have suggested a narrow reading of the statute. *Id.* In *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71 (2006), the Court read a phrase in the Securities Litigation Uniform Standards Act of 1998 to pre-

In sum, the traditional justifications for strictly construing jurisdictional statutes are altogether absent in the context of CAFA. Thus, even if the term "any defendant" in 28 U.S.C. § 1453 were ambiguous, it should be interpreted to encompass additional counterclaim defendants such as petitioners. Rehearing en banc is warranted to correct the panel majority's error.

II. THE PANEL MAJORITY'S DECISION WOULD LEAD TO THE VERY TYPES OF ABUSES THAT CAFA SOUGHT TO PREVENT.

The Court should also grant rehearing en banc because the panel majority opinion carves a jurisdictional loophole in CAFA that would severely compromise the statute's effectiveness. If allowed to stand, the panel's ruling that counterclaim defendants have no removal rights would provide plaintiffs' attorneys with a simple tool for evading CAFA – bringing class actions as counterclaims. Indeed, confirming the viability of this stratagem is likely one of the primary goals of Respondent's counsel in this litigation; as Petitioners note, one of the Respondent's litigation consultants authored a law review article advocating the use of counterclaims to evade CAFA's restrictions. *See* Jay Tidmarsh, *Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action*, 35 W. St. U. L. Rev. 193 (2007).

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empt state law "based largely on SLUSA's purposes, as stated in [the Act]." Slip op. 37.

The Tidmarsh article provides a playbook for plaintiffs' counsel seeking to evade CAFA in this manner. According to the article, in the "typical scenario," a consumer "fails to make a required payment under the contract to the other party – usually a financial institution that sells credit, mortgage, or insurance products." *Id.* at 196-97. After the service provider sues in state court to recover the relatively small sum due under the contract, the consumer promptly asserts a counterclaim class action, alleging that the contractual term on which the debt collection action is based violates state law. *Id.* at 197. "***If consumers can successfully avoid federal court with this tactic***, . . . the state case suddenly transforms from an individual action with $75,000 or less at stake into a class suit with more than $5,000,000 at stake," and "[t]he entire litigation dynamic and its center of gravity switches in an instant." *Id.* at 199 (emphasis added). "Faced with this reality, financial institutions will need to think carefully before they file collection actions in state courts in which they do not wish to defend their credit and lending policies." *Id.*

The article further highlights that the "tactic" employed in this case is no anomaly, but rather is certain to become a recurring problem. Pointing to a number of recent counterclaim class actions brought in state court, including this case, the article boasts that such cases "reveal just the tip of an approaching iceberg." *Id.* The Tidmarsh article leaves no doubt: this is a test case for circumventing

CAFA, and if the technique proves successful, it will no doubt be replicated in short order.

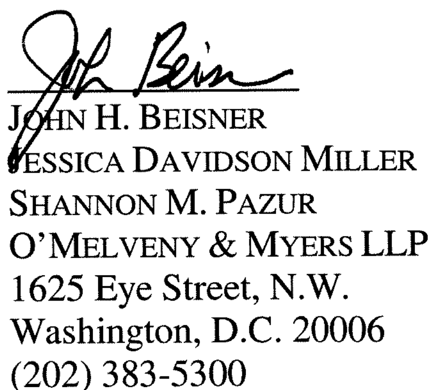
The primary goal of CAFA was to close loopholes in the federal diversity jurisdiction statute and thereby end the jurisdictional gamesmanship employed by plaintiffs' attorneys who sought to litigate class actions in "magnet courts." S. Rep. No. 109-14, at 10-11. The panel majority's bar on CAFA removals by counterclaim defendants would directly contravene the statute's central purpose by providing plaintiffs' attorneys with an easy way to avoid federal jurisdiction over high stakes, interstate class actions. For this reason, too, the Court should grant rehearing en banc.

CONCLUSION

For the foregoing reasons and those set forth by Petitioners, the Court should grant rehearing en banc.

January 9, 2009

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that, on the 9th day of January, 2009, a true and accurate copy of the foregoing Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* In Support of Petition for Rehearing En Banc was filed with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users. In addition, per Local Rule 31(d), eight bound copies of the foregoing brief were sent to the Clerk of the Court and two courtesy copies were sent to the counsel listed below via FedEx for delivery within three days.

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Dated: January 9, 2009

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-2188 **Caption:** Palisades Collections LLC v. Shorts

CERTIFICATE OF COMPLIANCE WITH RULES 35(b)(2) and 29(d)

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the page limitation of Fed. R. 35(b)(2) & 29(d) because it does not exceed 7.5 pages, excluding material not counted under Fed. R. App. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2003 in Times New Roman, 14 point.

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Dated: January 9, 2009