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No. 11-1450

IN THE

Supreme Court of the United States

THE STANDARD FIRE INSURANCE COMPANY,
Petitioner,

v.

GREG KNOWLES, INDIVIDUALLY AND AS CLASS REPRESENTATIVE ON BEHALF OF ALL SIMILARLY SITUATED PERSONS WITHIN THE STATE OF ARKANSAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* BY CENTER FOR CLASS ACTION FAIRNESS IN SUPPORT OF PETITIONER

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Center for Class Action Fairness (the "Center"), by and through the undersigned counsel, by consent of the parties, submits this brief *amicus curiae* in support of Petitioner respectfully praying that the Court reverse the lower court's holding that a putative class-action plaintiff may disclaim damages in excess of $5 million solely to avoid federal jurisdiction under the Class Action Fairness Act, Pub. L. No. 109-2, 119 Stat. 4 ("CAFA").* In support of Petitioner, the Center states as follows:

Interest of the Amicus

The Center is a non-profit organization; its attorneys represent consumers *pro bono* in class action litigation across the United States by, among other things, objecting to unfair class action settlements on their behalf. The Center's attorneys' litigation on behalf of consumers has been covered by the *Wall Street Journal*, *Forbes*, the *National Law Journal*, and the *ABA Journal*, among others. Unlike so-called "professional objectors" that threaten to disrupt a settlement in order to extract a share of plaintiffs' attorneys' fees, the Center makes no effort to engage in *quid pro quo* settlements for profit. *See* Paul Karlsgodt & Raj Chohan, *Class Action Settlement Objectors*: *Minor Nuisance or Serious Threat to Approval*, BNA: Class Action Lit. Report, Aug. 12, 2011 (distinguishing Center from for-profit "professional objectors"). Instead, the

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* Pursuant to Sup. Ct. R. 37.6, the Center certifies that no counsel for either party authored any part of this brief and that no person, other than the *amicus* and its counsel, made a monetary contribution intended to fund the preparation of the brief.

Center represents consumers by objecting to unfair settlements that do not provide meaningful relief to class members and by seeking court rulings that protect consumers from self-serving class action attorneys, in the process winning millions of dollars for class members. *E.g.*, *In re Classmates.com Consolidated Litig.,* No. 2:09-cv-00104-RAJ, slip op. at 16 (W.D. Wash. Jun. 15, 2012) (slip op.) (noting Center "was relentless in [its] identification of the numerous ways in which the proposed settlements would have rewarded class counsel (and a *cy pres* charity) at the expense of class members" and "significantly influenced the court's decision to reject the first settlement and to insist on improvements to the second").

The Center's work also makes it especially familiar with cases where putative class attorneys looking out for their own interests abuse the class action process at the expense of absent class members. The unfair settlements the Center has fought are not isolated cases: indeed, economic theory, experience, and Congressional findings all indicate that a significant number of class actions leave consumers without meaningful relief.

SUMMARY OF THE ARGUMENT

The Class Action Fairness Act ("CAFA") expanded federal jurisdiction over national class actions to ensure that out-of-state absent class members would be treated fairly given the "abuses" that were taking place in state court. Among those abuses was the structuring of settlements to ensure that the lion's share of the value of the defendant's payment would be realized by attorneys, rather than class members. Attorneys now seek to evade federal scrutiny of such self-dealing settlements by having putative class representatives disclaim intent to seek above the CAFA jurisdictional limits. But such abusive forum-shopping tactics both contradict this Court's precedents and demonstrate a fundamental failing of the Rule 23(a)(4) adequacy-of-representation requirement.

Just last year, this Court held that "[n]either a proposed class action nor a rejected class action may bind nonparties." *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2380 (2011). Yet, the district court and the Eighth Circuit Court of Appeals each allowed the named plaintiff here to do just that, specifically, to disclaim aggregate damages above $5 million, despite evidence that the class damages exceeded that amount. The decisions of the courts below are contrary to *Smith* and directly undermine the policy objectives of both Rule 23 and CAFA.

In class action litigation, the named class representative is a placeholder plaintiff for a putative class of individuals harmed by a defendant's alleged acts. During the certification process, a court adjudicates whether the named class member truly represents other members of the

hoped-for class. Before certification, the named representative has a right to the adjudication of only his or her individual claim against the defendant.

The district court's central mistake in this case was in granting the named class plaintiff unfettered authority to limit the recovery of absent non-parties, when the defendant presented evidence that the recovery, if the liability claims were proven, would likely be greater than $5 million. Alternatively and additionally, the district court erred in assuming, without investigation, that counsel for the putative class had a good-faith reason to disclaim damages and bind absent class members solely to avoid federal jurisdiction under CAFA.

These mistakes ignore Congress's intent that CAFA should expand the scope of federal jurisdiction over class actions. And most importantly, they permit class action counsel to take advantage of state-court systems that lack the resources, the authority, or the inclination to ensure that class members are treated fairly.

A federal system that allows state courts to approve class action settlements that prejudice the rights of absent or out-of-state class members is inherently unstable, and provided much of the warrant for Congress to enact CAFA in the first place. This case presents a critical opportunity for this Court to curtail the slippage back to abusive pre-CAFA practice, and enforce Congress's intent that federal courts should resolve important class action cases.

ARGUMENT

In the case below, initially filed in state court in Arkansas, the named plaintiff, Greg Knowles, alleged that he represented a class of "hundreds, and possibly thousands," of individuals allegedly injured by the Defendant's failure to pay certain charges pursuant to its homeowners insurance policies. Pet. App. 66a. Mr. Knowles alleged that "the total aggregate damages of the Plaintiff and all Class Members, inclusive of costs and attorneys' fees, are less than five million dollars ($5,000,000), and the Plaintiff and Class stipulate they will seek to recover total aggregate damages of less than five million dollars ($5,000,000)." *Id.* at 72a. Attached to the Complaint was a "Sworn and Binding Stipulation" Mr. Knowles had executed, affirming that he would not "*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)." *Id.* at 75a (emphasis added).

In the Eighth Circuit as in other circuits, a defendant seeking removal of a class action under CAFA must show by a preponderance of evidence that the amount in controversy, in the aggregate, exceeds $5 million. In the district court's judgment, the Defendant here made that showing. Thus, pursuant to the circuit's precedents, the burden shifted to Mr. Knowles to establish "that it is legally impossible to recover in excess of the jurisdictional minimum." *Bell v. Hershey Co.*, 557 F.3d 953, 959 (8th Cir. 2009).

The district court concluded that Mr. Knowles' stipulation proved to a "legal certainty that his claim

falls under the $5 million threshold for remand to state court." Pet. App. 9a. It supported this conclusion on its understanding that (1) circuit precedent required it to resolve any ambiguities about federal jurisdiction in favor of remand, and (2) if made in apparent good faith, a plaintiff may defeat removal by suing for less than the jurisdictional amount, though he would be justly entitled to more. *See Transit Casualty Co. v. Certain Underwriters at Lloyd's of London*, 119 F.3d 619, 625 (8th Cir. 1997); *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938). In making this ruling, the district court noted that because absent class members have a right under state law to opt out of any class, once certified, they were not prejudiced by the limitations Mr. Knowles and his counsel placed on class recovery. Pet. App. 8a.

The district court's conclusions below rely on Mr. Knowles and his counsel having authority to bind persons with claims ostensibly similar to Mr. Knowles' to a limited recovery long before any court certifies the case as a class action. The court therefore endorsed the view that Mr. Knowles and his counsel may elect themselves as "representatives" of individual non-parties with the power to decide where to sue and how much to accept in damages. This conclusion stands in direct contravention to this Court's holdings.

Additionally, while the district court made passing reference to the requirement that an individual plaintiff must show that he is restricting his damages to avoid federal removal "in good faith," the court did not require plaintiff to provide any good-faith reason for deliberately evading removal. Rather, it tacitly considered the mere desire to avoid

federal jurisdiction as good enough reason for Mr. Knowles to cut off his and his fellow potential class-members' future recovery.

The Eighth Circuit denied permission to appeal. Pet. App. 1a. This ruling was likewise error. If the case were permitted to proceed in state court, it would likely result in a settlement that will be very profitable for putative class counsel, but will provide little benefit to the putative class members.

I. MANY STATE COURTS DO NOT OFFER THE SAME PROTECTIONS TO ABSENT CLASS MEMBERS AS FEDERAL COURTS.

The primary purpose of class action litigation is to provide compensation to injured class members. *See* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.04, comment d (2010) ("PRINCIPLES") ("Various doctrines imply that the primary objective of aggregate litigation must be to benefit claimants."). And Rule 23 exists in part to protect the due process rights of those class members who never appear before the court. *See AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1751 (2011). Nevertheless, courts, legislators, and scholars have long worried that class actions have the potential to benefit class counsel at the expense of the absent class members. *See, e.g., Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004) (Posner, J.); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 796-97 (3d Cir. 1995); John C. Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action,* 95 COLUM. L. REV. 1343, 1347-48 (1995) (discussing agency problem in class action settlements).

As a direct result of these concerns, Congress passed CAFA to "assure fair and prompt recoveries for class members with legitimate claims," to "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," and prevent "abuses of the class action device that have harmed class members." 28 U.S.C. § 1711 note §§ 2(a)(2)(A), (b)(1), (b)(2). In particular, Congress 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." 28 U.S.C. § 1711 note §§ 2(a)(3), (a)(3)(A). Thus, several sections of CAFA contain provisions specifically aimed at reducing various settlement abuses that had resulted in profits for class-action attorneys at the expense of the absent class members. *See* 28 U.S.C. §§ 1712 (requiring coupon settlements to be valued at value of redeemed coupons, rather than their face value), 1713 (prohibiting "negative value" settlements where absent class members must pay attorneys), 1714 (prohibiting settlements that discriminate in favor of class members located closer to the court), 1715 (requiring notice of settlements to appropriate government authorities). Moreover, federal courts subject these settlements to higher scrutiny because of the potential for abuse by counsel. *See, e.g., Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 654 (7th Cir. 2006) ("CAFA required heightened judicial scrutiny of coupon-based settlements"). Even beyond settlements explicitly covered by CAFA, federal

courts generally provide heightened scrutiny of settlements, especially pre-certification settlements. *Id.* (applying heightened scrutiny to pre-CAFA settlement); *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011).

This Court has recognized that, given the opportunity, class-action lawyers will engage in forum-shopping. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1447-48 (2010); *see generally* John H. Beisner & Jessica Davidson Miller*, They're Making a Federal Case Out of It . . . in State Court,* 25 HARV. J.L. & PUB. POL'Y 143 (2001) (discussing problem of abusive anomalous "magnet" courts that "exercise a widely disproportionate role in adjudicating national disputes"); *see also* Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U PENN. L. REV. 1649, 1660–66 (2008) (discussing how CAFA partially solves the problem of the anomalous court "by trusting federal courts to police the legitimacy of class counsel's representation of the absent class members"). It would make little sense to interpret one provision of CAFA (the $5 million amount-in-controversy provision) in such a way as to undermine the remainder of the statute simply by the fiat of a putative class counsel.

And, as the case below demonstrates, lawyers will be attracted to jurisdictions that do not afford the same protections for absent class members, because those jurisdictions impose fewer barriers to certification and settlement of a class action. Indeed, Miller County, Arkansas, the state court venue for this class action below, has been home to at least 26 class action settlements worth more than $175 million in fees to class counsel, since 2004. *See*

Alison Frankel, *Are class action lawyers in Arkansas snubbing SCOTUS (and CAFA)?,* Thomson , available at http://newsandinsight.thomsonreuters.com /Legal/News/2012/10_-_October/Are_class_action_lawyers_in_Arkansas_snubbing_SCOTUS_(and_CAFA)_/, last viewed Oct. 20, 2012. Despite the state-only nature of the claims in these cases, many of the settlements were nationwide in scope. *Id.*

Such forum-shopping is not unique to Arkansas, and class action attorneys engage in it to evade scrutiny not just of class certification decisions, but class settlement decisions. For example, after a federal court rejected an unfair coupon settlement on behalf of a putative class of Honda Civic Hybrid owners, class attorneys simply used the vehicle of a supposed state-only class action to create a nationwide class-action settlement under more attorney-friendly California state law and avoid CAFA scrutiny. *Compare True v. American Honda Motor Co.*, 749 F. Supp. 2d 1052 (2010) (rejecting coupon settlement that would pay attorneys $2.95 million) *with Lockabey v. American Honda Motor Co.*, No. 37-20 1 0-00087755-CU-BT-CTL (Cal. Superior Ct., San Diego Cty., Mar. 16, 2012) (applying California law to approve materially similar nationwide coupon settlement that would pay attorneys $8.474 million and settle *True* complaint).

The ability of class counsel to extract fees in a state-court settlement of a national class action several times what federal courts would consider reasonable invariably comes at the expense of absent class members. A "defendant is interested only in disposing of the total claim asserted against it" rather than who gets the money. *Bluetooth*, 654 F.3d

at 949 (internal quotations and citations omitted). Thus every dollar that goes to fees (or can be anticipated as going to fees) above what a federal court would consider reasonable will effectively come out of the pocket of the class, even when the parties engage in the economic fiction that fees come from a separate fund. *Johnston v. Comerica*, 83 F.3d 241 (8th Cir. 1996) ("[I]n essence the entire settlement amount comes from the same source. The award to the class and the agreement on attorney fees represent a package deal."); *accord GMC Pick-Up,* 55 F.3d at 820. "If fees are unreasonably high, the likelihood is that the defendant obtained an economically beneficial concession with regard to the merits provisions, in the form of lower monetary payments to class members or less injunctive relief for the class than could otherwise have obtained." *Bluetooth*, 654 F.3d at 947; *accord* John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 883 (1987) ("The classic agency cost problem in class actions involves the 'sweetheart' settlement, in which the plaintiff's attorney trades a high fee award for a low recovery.").

If the practice of using binding stipulations to avoid removal under CAFA continues, class action attorneys will continue to lodge cases in state-court venues that lack the protections federal courts offer absent class members. While it is difficult to get reliable data on class action settlements in state court, several publicized cases have shown just how difficult it can be to protect the rights of absent class members in these venues. Each of the following coupon settlements, for example, was approved *after*

the passage of the CAFA, and each runs counter to the express intentions of federal class action policy as expressed in Rule 23 and CAFA.

- In May 2010, the City of St. Louis Circuit Court in Missouri approved a classwide settlement against A.G. Edwards. The millions of class members received less than $6 million in cash, and another $34 million in face value of coupons (issued at one $8.22 coupon per class member per year for three years, with heavy restrictions on their use). The lawyers, on the other hand, received an award of $21.6 million. Though the Missouri Court of Appeals purports to follow federal class-action law, it affirmed the settlement approval without addressing objections that coupons should be valued at their redemption rate rather than their face value, as done in federal court. *Bachman v. A.G. Edwards*, 344 S.W.3d 260 (Ct. App. Mo. 2011); *see also* Dan Fisher, *St. Louis Judge Hands Lawyers $21 Million For Coupons*, Forbes.com, Jun. 23, 2010. Given that the typical redemption rate for coupons is between 1% and 3% (see James Tharn & Brian Blockovich, Coupons and the Class Action Fairness Act, 18 Geo. J. Legal Ethics 1443 (2005)), the value of the relief to the class was likely less than $10 million, less than half the double-lodestar the attorneys received.

- In 2010, a California Court of Appeals affirmed a classwide settlement between retailer Nordstrom and its sales associates that included a $2.5 million "merchandise voucher" component. It reasoned in part that California courts do not disfavor coupon settlements. *Nordstrom Com'n*

Cases, 186 Cal. App. 4th 576, 591, 112 Cal. Rptr. 3d 27, 38 (2010).

- Similarly, in 2008, a California Court of Appeal affirmed—over objection—a class action settlement against Netflix, in which class members received a free upgrade of their Netflix service for a month (or a free month of service if they were no longer subscribers), and class counsel received more than $2 million in fees and expenses. *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 48-50 (2008). In doing so, the court specifically dismissed an objector's argument that CAFA evidenced a justifiable skepticism of coupon settlements. *Id.* at 54.

- In 2008, the Cleveland County District Court in Oklahoma approved a class-action settlement against Compaq that provided a coupon towards the purchase of a new Compaq computer or a 256 MB flash drive to class members, and $40 million in fees to the class counsel, again valuing the coupons at face value rather than their likely small redemption rate. *See* Tom Blakely, *Local court OKs $640M class settlement in computer lawsuit,* The Norman Transcript, May 15, 2008, available at http://normantranscript.com/local/x519016885/Local-court-OKs-640M-class-settlement-in-computer-lawsuit, last viewed Oct. 14, 2012.

Each of these state-court settlements of national claims offered little benefit to the absent class members (why, for example, would someone who lost data on a Compaq computer wish to buy another one?), while providing the lion's share of settlement value, millions of dollars, in fees to their attorneys.

These are exactly the kinds of settlements that Congress—through CAFA—sought to prevent. Had these settlements been negotiated in federal court, CAFA scrutiny would have been substantially more likely to prevent class counsel from receiving a disproportionate share of the settlement value at the expense of their putative clients.

State courts also often provide less protection to absent class members than federal courts do in other aspects of class action settlement review. For example, federal courts regularly scrutinize the *cy pres* provisions of settlements to ensure that they avoid conflicts of interest and that money is going to class members before it goes to third parties. *See, e.g., Dennis v. Kellogg*, No. 11-55674, 2012 U.S. App. LEXIS 18576 (9th Cir. Sep. 4, 2012); *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468 (5th Cir. 2011); *see generally Nachshin v. AOL, Inc.*, 663 F.3d 1034, 1038-39 (9th Cir. 2011) (discussing "nascent dangers to the fairness of the distribution process" of unbridled *cy pres*) (citing authorities). But state courts have signed off on diversion of settlement funds from class members to the judiciary. For example,

- An Ohio state court approved a *cy pres* distribution of over $450,000 from a settlement fund to buy "historically appropriate" furniture and accessories for the courthouse in which the presiding judge sat. *See* Cy Pres Donation for Geauga County Courthouse, http://www.ohiolawyersgiveback.org/charities/geauga_courthouse.asp (last visited Oct. 25, 2010).

- A West Virginia state court approved a *cy pres* distribution of $8 million to the presiding judge's

> *alma mater* law school instead of ensuring that the money went to the putative class beneficiaries. Andrew Clevenger, *WVU Receives $8M Gift; Money Is Left Over From Class-Action Against H&R Block*, CHARLESTON GAZETTE, May 3, 2008, at 1A.

In short, allowing attorneys to evade CAFA by disclaiming relief on behalf of class members they do not yet represent would undermine the express purpose of Rule 23 and of CAFA, and result in a wealth transfer from nationwide class members to class counsel.

II. THE NAMED PLAINTIFF OF A PROPOSED CLASS LACKS THE POWER TO BIND ABSENT CLASS MEMBERS TO A RESTRICTED RECOVERY, AND ONE WHO DOES SO TO FAVOR CLASS COUNSEL OVER THE CLASS LACKS ADEQUACY.

Until a court certifies a class, the named plaintiff does not represent any absent class members. *Smith,* 131 S. Ct. at 2381 ("a properly conducted class action, with binding effect on nonparties, can come about in federal courts in just one way—through the procedure set out in Rule 23") (internal quotation omitted). Instead, the named plaintiff of a proposed class action is prosecuting only his individual claims.

The idea that a plaintiff bringing a putative class action can unilaterally decide to restrict the amount in controversy is founded in two errors: (1) an ignorance of this Court's holding in *Smith,* and (2) a misapplication of this Court's well-known phrase from *St. Paul Mercury Indemnity Co. v. Red*

Cab Co., that "unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith." 303 U.S. at 294. This concept is inapplicable in the context of a putative class action because the named representative is not the complaint's master until a state or federal court determines that he deserves to be in that role.

The two circuit courts of appeal that had previously denied putative class representatives the right to restrict the damages of the future class did so even before this Court's holding in *Smith*. The Fifth Circuit Court of Appeal, in *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720 (5th Cir. 2002), asserted that it was "improbable that Manguno can ethically unilaterally waive the rights of the putative class members to attorney's fees without their authorization." *Id.* at 724. The Seventh Circuit Court of Appeal, in *Back Doctors Ltd. v. Metropolitan Prop. & Cas. Ins. Co.*, 637 F.3d 827 (7th Cir. 2011) reached a similar conclusion on slightly different grounds, ruling that because the named plaintiff had a "fiduciary duty" to other members of the putative class, it could not "throw away what could be a major component of the class's recovery." *Id.* at 830-31.

Each of these courts zeroed in on the same concern: a class representative who is willing to jettison relief to which the class was entitled for his (or his lawyers') personal benefit cannot adequately represent that class. Indeed, this is why the certification process contains an inquiry into adequacy, because *before* the named plaintiff may bind absent class members, the court must ascertain that he will serve as a faithful fiduciary to the class.

Hansberry v. Lee, 311 U.S. 32, 42-43 (1940) ("members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present"); *Concepcion*, 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"); *see also* PRINCIPLES §1.05 comment c ("The requirement of adequate representation is a creature of due process that exists in class actions and other representational lawsuits where parties stand in judgment on behalf of others."). By summarily accepting the disclaimer of damages at the remand stage, however, the courts below prevented the very adequacy inquiry that would have revealed Mr. Knowles' conflict of interest, and thus denied the absent class members the due process protections provided by CAFA and Rule 23.

The right of opt out is not enough to protect class members from such abusive practices in the typical consumer class action. The point of a class action is to aggregate claims that cannot be vindicated individually. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997). Opt-outs are valuable rights in cases where an individual has a sizable claim, like a large shareholder in a securities class action, or where a defendant offers an arbitration process that protects the ability of a plaintiff to bring low-value claims. *Cf. Concepcion*, 131 S.Ct. at 1751. But an opt-out in a consumer class action settlement where, as is typical, the defendant denies liability while waiving the class's claims is all but worthless. The individual class member opting out has no chance of prosecuting the case

individually: "Economic reality dictates that petitioner's suit proceed as a class action or not at all." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974). Courts cannot rely on the opt-out right to cure class action settlement abuses in a case with claims of this size.

As discussed in Section I above, one major reason for such forum shopping is the fact that many state courts are willing to award a disproportionate share of the settlement recovery to the attorneys, rather than the class, permitting class counsel to engage in self-dealing without federal scrutiny. In other circumstances, courts have held that the willingness of the class representative to put the interests of class counsel ahead of the class precludes a finding of adequacy. *In re Aqua Dots Prod. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011) (Easterbrook, J.); *cf. also Robert F. Booth Trust v. Crowley*, 687 F.3d 314 (7th Cir. 2012) (Rule 23.1). While the Court need not reach this issue here, the Center suggests that any class representative that would put the interests of class counsel's hope for a disproportionate fee ahead of the maximum recovery for the class *per se* flunks the Rule 23(a)(4) adequacy test. *Cf. Back Doctors Ltd. v. Metropolitan Property*, 637 F.3d 827, 830 (7th Cir. 2011) (noting that class representative's willingness to breach fiduciary duty to class by waiving valuable rights may result in replacement of class representative at future juncture).

CONCLUSION

For these reasons, your *amicus* respectfully urges the Court to reverse the lower court's holding that a class-action plaintiff may disclaim damages in excess of $5 million to avoid federal jurisdiction under CAFA.

RESPECTFULLY SUBMITTED,

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