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 OF HARTFORD UNDERWRITERS INSURANCE COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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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.

CORPORATE DISCLOSURE STATEMENT

Hartford Underwriters Insurance Company is a wholly-owned subsidiary of Hartford Fire Insurance Company, which is a wholly-owned subsidiary of The Hartford Financial Services Group, Inc. ("Hartford Financial"). Hartford Financial is a publicly traded corporation that has no parent corporation. To the best of Hartford Financial's knowledge, no publicly held corporation currently owns 10% or more of its common stock.

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INTEREST OF *AMICUS CURIAE*

Hartford Underwriters Insurance Company ("Hartford") is an insurance company based in Hartford, Connecticut. Its insurance plans and policies include auto, home, and business coverage. It is affiliated with The Hartford Financial Services Group, Inc., one of America's largest investment and insurance companies.[1]

Like many insurance companies, Hartford and its affiliates have been repeat targets of certain class action plaintiffs' lawyers. Hartford and sister companies currently are defending class action and putative class action lawsuits in both federal and state courts. In connection with some of those lawsuits, Hartford has invoked the rights Congress conferred on defendants in the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) ("CAFA"), to remove cases to federal court. And, it has faced attempts by putative class representatives to defeat those rights by purporting to limit potential class recovery to below the $5 million amount-in-controversy threshold. As a result, Hartford has become aware of certain practical and legal nuances relevant to the question before the Court.

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[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. Both Petitioner and Respondent have consented to the filing of this brief.

For example, in *Frederick v. Hartford Underwriters Insurance Co.*, 683 F.3d 1242 (10th Cir. 2012), Hartford removed a putative class action to the U.S. District Court for the District of Colorado. The district court ordered the case remanded to state court but the Tenth Circuit reversed. Among other things, the Tenth Circuit held that once a removing defendant shows that the amount at stake may exceed $5 million, "remand is appropriate only if the plaintiff can establish that it is legally impossible to recover more than" that amount. *Id.* at 1247. The district court later concluded that a class recovery of $5 million was not impossible, because plaintiff's "request" in the prayer for relief portion of his complaint for up to $4,999,999.99 was not a binding limitation under state law. *Frederick v. Hartford Underwriters Ins. Co.*, No. 11-cv-2306-WJM-KLM, 2012 U.S. Dist. LEXIS 141390, at *11-12 (D. Colo. Oct. 1, 2012).

From its experience in CAFA cases, Hartford has gained perspectives on the question presented, and the practicalities of class action litigation that underlie it, which may be of assistance to the Court. And, for the same reasons, Hartford has a substantial interest in ensuring that CAFA's requirements are interpreted and implemented as Congress intended.

SUMMARY OF ARGUMENT

1. As Petitioner explains, stipulations by putative class representatives are irrelevant to how CAFA instructs courts to determine the amount in controversy. Even under the traditional "burden shifting" method for determining the amount in controversy, however, the result is the same. By its nature, the amount in controversy is merely an estimate at the beginning of the case of the amount that potentially will be at stake during the course of the litigation. Once the proponent of federal jurisdiction (whether a plaintiff suing in federal court or a defendant removing to federal court) estimates that the amount at stake exceeds the jurisdictional minimum (and, in the case of a removing defendant, proves any necessary supporting facts by a preponderance of the evidence), federal jurisdiction lies unless the party opposing federal jurisdiction shows to a "legal certainty" that plaintiff cannot recover the necessary amount. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938). In plain terms, the "legal certainty" requirement means that federal jurisdiction exists unless it is *impossible*, as a matter of law, for the plaintiffs to recover the requisite amount. Because, before a court certifies a named plaintiff as class representative, it necessarily *is* possible that the named plaintiff's recovery-limitation strategy will fail (for example, if the trial court refuses to certify him as class representative), purported recovery limitations cannot destroy removal jurisdiction under CAFA.

2. Purported recovery limitations also can fail for the separate and independent reason that they are non-binding under relevant state law. For example, some states do not permit demands for specific sums in complaints, and thus treat purported recovery limitations in complaints as non-binding. These differing state rules provide additional support for Petitioner's argument that stipulations by putative class representatives are irrelevant to the CAFA amount in controversy. To hold otherwise would be to make federal jurisdiction contingent on varying state laws and procedures, with different results in different states, contrary to CAFA's apparent purpose to make the jurisdictional standard uniform. That being said, if the Court were to hold that putative class representatives can, in some circumstances, bind putative class members for purposes of the CAFA amount in controversy, it should refrain from suggesting that such purported limitations *necessarily* destroy federal jurisdiction. Rather, trial courts still would have to consider the particulars of individual purported recovery limitations to determine whether the purported limitations before them make it legally impossible for the putative class to recover $5 million.

ARGUMENT

Hartford agrees with the reasoning and conclusions in the Brief for Petitioner, in particular, its explanation that stipulations by putative class representatives purporting to waive damages on behalf of a

not-yet-certified class can have no effect on CAFA's amount-in-controversy determination. The purposes of this brief are twofold: (1) to explicate the concept of "legal certainty" and (2) to alert the Court to different ways that putative class representatives purport to limit potential class recoveries in attempts to avoid CAFA jurisdiction.

I. UNDER THE *ST. PAUL MERCURY* FRAMEWORK, IF A REMOVING DEFENDANT ESTIMATES THAT THE AGGREGATE OF PUTATIVE CLASS CLAIMS EXCEEDS $5 MILLION, PLAINTIFF MUST SHOW THAT IT IS IMPOSSIBLE FOR THE CLASS TO RECOVER THAT AMOUNT

As Petitioner explains, CAFA instructs courts how to determine the amount in controversy. *See* Brief for Pet. at 11-29. CAFA's methodology differs from the traditional methodology for determining the amount in controversy in non-CAFA diversity cases. *See id.* at 12-13.[2] CAFA directs that "the claims of the

[2] Effective January 1, 2012, the Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat. 759 (2011), set forth new rules for determining the amount in controversy in non-CAFA cases. Now, in removal cases based on 28 U.S.C. § 1332(a), whatever sum the complaint demands in good faith generally shall be deemed to be the amount in controversy, except if the complaint seeks (1) non-monetary relief or (2) a money judgment, but the pertinent state practice either does not permit demands for a specific sum or permits recovery of damages in excess of the amount demanded, in which case the defendant may assert the amount in controversy

(Continued on following page)

individual class members shall be aggregated" to determine whether those claims exceed $5 million. 28 U.S.C. § 1332(d)(6). Courts simply must add together the potential claims of each individual putative class member – that is, the amounts that each putative class member legally could recover. The classwide recovery a particular named plaintiff chooses to *seek* is beside the point. Accordingly, purported class-recovery limitations by named plaintiffs are jurisdictionally irrelevant.

Even if the Court were to hold that CAFA does not alter the traditional method for determining the amount in controversy, however, the result is the same. That is because under the traditional approach, if a removing defendant shows that the aggregate of individual putative class members' claims exceeds $5 million, federal jurisdiction lies unless it is *impossible*, as a matter of law, for the putative class to recover that amount. And because not-yet-certified class representatives cannot bind absent class members, it necessarily *is* possible at the time of removal that the putative class's recovery will exceed $5 million.

The seminal case for the traditional amount-in-controversy approach is *St. Paul Mercury*, 303 U.S. 283. In substance, that case holds that when a party

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in the notice of removal. *See* 28 U.S.C. § 1446(c)(2). The new rules do not apply to removals under CAFA, whose jurisdictional requirements appear in 28 U.S.C. § 1332(d).

asserts that the amount at stake exceeds the jurisdictional floor, that assertion constitutes the amount in controversy unless the opponent shows it is "legally certain" that the controversy is worth less. *See, e.g., id.* at 288-89 (holding that amount in controversy is based on amount asserted "in good faith" unless it appears "to a legal certainty" that what is at stake "is really for less than the jurisdictional amount").

The plaintiff in *St. Paul Mercury* initially sought damages above the jurisdictional floor. *Id.* at 284-85. As most courts that have addressed the issue have recognized, however, the jurisdictional question is the same when the plaintiff alleges damages below that floor and the removing defendant is the party that believes in good faith that the amount at stake is higher. Whichever party proposes federal jurisdiction, the court should accept as the amount in controversy that party's good faith assessment of how much potentially is at stake (unless it is legally certain that the controversy is worth less). *See, e.g., Frederick*, 683 F.3d at 1247 (defendant is "entitled to present its own estimate of the stakes"; once defendant proves facts supporting estimate over $5,000,000, burden shifts to plaintiff to show to a legal certainty that jurisdictional minimum is not met); *Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830 (7th Cir. 2011) ("[T]he estimate of the dispute's stakes advanced by the proponent of federal jurisdiction controls" unless party seeking remand satisfies legal certainty test); *Bell v. Hershey*, 557 F.3d 953, 956 (8th Cir. 2009) ("Once the removing party has established

by a preponderance of the evidence that the jurisdictional minimum is satisfied, remand is only appropriate if the plaintiff can establish to a legal certainty that the claim is for less than the requisite amount."); *McPhail v. Deere & Co.*, 529 F.3d 947, 954 (10th Cir. 2008) (rejecting "double standard" on removing defendants versus plaintiffs who sue in federal court); *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1412 (5th Cir. 1995) ("[O]nce a defendant is able to show that the amount in controversy exceeds the jurisdictional amount, removal is proper, provided plaintiff has not shown that it is legally certain that his recovery will not exceed the amount stated in the state complaint."); *but see Campbell v. Vitran Express, Inc.,* 471 Fed. Appx. 646, 647 (9th Cir. 2012) (where complaint alleges amount in controversy less than $5 million, defendant must show that it is "legally certain" that the amount in controversy exceeds $5 million); *Morgan v. Gay*, 471 F.3d 469, 474 (3d Cir. 2006) ("The party wishing to establish subject matter jurisdiction has the burden to prove to a legal certainty that the amount in controversy exceeds the statutory threshold."). This approach reflects the common sense principle that, by its nature, the amount in controversy is merely an estimate of how much the plaintiff potentially could recover. *See, e.g., Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 468 (1947) ("Nor does the fact that it cannot be known as a matter of absolute certainty that the amount which may ultimately be paid . . . will exceed [the jurisdictional minimum] mean that the jurisdictional amount is lacking."). It would be unfair and impractical at the beginning of a

case to require the proponent of federal jurisdiction (especially a removing defendant) to present more than an estimate. A double-standard directed against defendants, moreover, would undermine "[t]he evident purpose of diversity jurisdiction," which is "to protect out-of-state defendants." *McPhail*, 529 F.3d at 952. That being said, if for some reason the federal-jurisdiction proponent's estimate contains a *fatal legal flaw* that shows plaintiff actually is *precluded* from recovering the jurisdictional minimum, the federal courts logically should not defer to that party's estimate.

In plain terms, under the *St. Paul Mercury* framework, if the proponent of federal jurisdiction states in good faith that the amount at stake exceeds the jurisdictional floor (and supports any necessary facts that do not appear in the complaint with a preponderance of the evidence), then to defeat federal jurisdiction, the opposing party must show that it is *impossible* for the plaintiff to recover the jurisdictional amount. As *St. Paul Mercury* put it, federal jurisdiction lies unless the amount at stake "*really*" – that is, definitely – is less than the jurisdictional threshold because "the plaintiff *cannot* recover the amount claimed." 303 U.S. at 288-89 (emphasis added). Numerous courts have framed the inquiry in this sensible way. *See, e.g., Frederick*, 683 F.3d at 1247 (once defendant proves jurisdictional facts by preponderance of the evidence, remand is appropriate only if plaintiff can establish that it is "legally impossible" to recover more than $5 million); *Rolwing v. Nestle*

Holdings, Inc., 666 F.3d 1069, 1073 (8th Cir. 2012) (legal certainty test met where plaintiff showed it was "legally impossible" for the amount in controversy to exceed $5 million); *Back Doctors*, 637 F.3d at 830 ("[T]he estimate of the dispute's stakes advanced by the proponent of federal jurisdiction controls unless a recovery that large is legally impossible."); *Bell*, 557 F.3d at 959 ("If the [defendants] prove by a preponderance of the evidence that the amount in controversy is satisfied, remand is only appropriate if [plaintiff] can establish that it is legally impossible to recover in excess of the jurisdictional minimum."); *Zellner-Dion v. Wilmington Fin., Inc.*, No. 10-CV-2587 (PJS/JSM), 2012 U.S. Dist. LEXIS 99986, at *14-15 (D. Minn. July 19, 2012) (plaintiff failed to meet legal certainty test because estimate of damages insufficient to show that recovery over $5 million is "legally impossible"); *Thornton v. DFS Servs. LLC*, No. 4:09CV1040 SNLJ, 2009 U.S. Dist. LEXIS 94366, at *2-4 (E.D. Mo. Oct. 9, 2009) (legal certainty test requires party seeking to avoid federal jurisdiction to establish that it is "legally impossible to recover in excess of the jurisdictional minimum").

As Petitioner explains, before a trial court certifies a named plaintiff as class representative, it necessarily remains possible that his or her strategy of trying to avoid federal court by sacrificing potential class recovery through a sub-$5 million recovery limitation will fail. Brief for Pet. at 30-38. For example, the trial court could refuse to certify the named plaintiff as class representative (because of his

decision to sacrifice potential class recovery, or for other reasons), and instead certify someone who would not forgo potential class recovery. This Court need not speculate as to the likelihood of that occurring, because the likelihood necessarily is greater than zero. Pre-certification purported recovery limitations, therefore, *cannot* render it *impossible* for the putative class to recover more than the jurisdictional minimum. Accordingly, such purported limitations cannot defeat federal jurisdiction under traditional amount-in-controversy analysis.

II. SOME PURPORTED RECOVERY LIMITATIONS ARE NON-BINDING UNDER STATE LAW

Purported recovery limitations also might fail to show that it is impossible for the class to recover $5 million for the separate and independent reason that they are not binding under applicable state law. By definition, cases in which CAFA's amount in controversy is relevant are ones in which state law provides the rule of decision; removal jurisdiction under CAFA is a form of diversity jurisdiction. Even if putative class representatives could bind absent members in some cases, therefore, the question would remain whether particular purported sub-$5 million recovery limitations do so effectively under controlling state law (thus making it impossible for the putative class to recover the jurisdictional minimum).

Although Arkansas apparently recognizes as binding the kind of stipulation Respondent offered in the present case, *see* Brief for Pet. at 7, putative class representatives employ a variety of purported-recovery-limitation strategies. Those strategies may or may not bind the plaintiffs who purport to make them, depending on the strategy and the governing state law.

Purported-recovery-limitation strategies vary in at least two ways: by form and by content. With respect to form, plaintiffs' lawyers might attempt to limit class recovery to under $5 million through at least the following:

***Prayers for Relief* (Ad Damnum *Clauses*).** *See, e.g., Frederick*, 683 F.3d at 1248; *Rolwing*, 666 F.3d at 1071; *De Aguilar*, 47 F.3d at 1412; *Stroh v. Colonial Bank, N.A.*, No. 4:08-CV-73 (CDL), 2008 U.S. Dist. LEXIS 89540, at *4-5 (M.D. Ga. Nov. 4, 2008).

Stipulations. *See, e.g., Rolwing*, 666 F.3d at 1071; *Bell*, 557 F.3d at 958; *Basham v. Am. Nat'l County Mut. Ins. Co.*, No. 4:12-CV-04005, 2012 U.S. Dist. LEXIS 126609, at *18-24 (W.D. Ark. Sept. 6, 2012).

Affidavits. *See, e.g., Oshana v. Coca-Cola Co.*, 472 F.3d 506 (7th Cir. 2006); *Parnell v. State Farm Mut. Auto. Ins. Co.*, 173 F.R.D. 446, 447 n.1 (W.D. Ky. 1997); *Thompson v. Apple, Inc.*, No. 3:11-CV-03009-PKH, 2011 U.S. Dist. LEXIS 73861, at *6-8 (W.D. Ark. July 8, 2011).

Interrogatory Responses. *See, e.g., Ambrozich v. Conagra Foods, Inc.*, No. 7:07-107, 2007 U.S. Dist. LEXIS 86448, at *7-8 (E.D. Ky. Aug. 2, 2007).

Class Definitions. *See, e.g., Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 401, 403 (6th Cir. 2007); *Smith v. Unum Life Ins. Co. of Am.*, No. 4:06CV00280JMM, 2006 U.S. Dist. LEXIS 81990, at *7-8 (E.D. Ark. Nov. 6, 2006); *see also Roche v. Country Mut. Ins. Co.*, No. 07-367-GPM, 2007 U.S. Dist. LEXIS 48921, at *11 n.4 (S.D. Ill. July 6, 2007) (stating that plaintiff could avoid federal jurisdiction "by redrafting the class definition, stipulating to certain limitations on the class definition, and so forth").

Other Pleadings Potentially Binding By Operation Of The Doctrine Of Judicial Estoppel. *See, e.g., Rolwing*, 666 F.3d at 1072 (under Missouri law, judicial estoppel prevents plaintiff who disclaims damages above $5 million from accepting damages exceeding that amount); *see also Morgan*, 471 F.3d at 477 n.9 ("We note the potential availability of judicial estoppel arguments by the defendants should the plaintiffs in the future change legal positions in an attempt to achieve an award in excess of $5 million.").

Contracts. *See, e.g., Woodmen of the World Life Ins. Soc'y v. Manganaro*, 342 F.3d 1213, 1217 (10th Cir. 2003) ("[D]ismissal under the legal certainty standard will be warranted . . . when a contract limits the possible recovery. . . .").

Purported recovery limitations also differ in content. Some go so far as to *forswear* recovery greater than $5 million. *Smith v. Nationwide*, 505 F.3d at 403 (plaintiffs expressly limited claims to less than $5 million). Some consist of mere "requests" for up to $5 million. *See, e.g., Frederick*, 683 F.3d at 1245 & 1248. As in this case, some purported recovery limitations consist of promises not to "seek" more than $5 million. *Compare also Boegeman v. Bank Star*, No. 4:12CV1514 JCH, 2012 U.S. Dist. LEXIS 145338, at *5-6 (E.D. Mo. Oct. 9, 2012) (statement in complaint that plaintiffs "will not seek damages" in excess of the jurisdictional minimum insufficient to defeat federal jurisdiction) *with Smith v. Am. Bankers Ins. Co.*, No. 2:11-cv-02113, 2011 U.S. Dist. LEXIS 140881, at *13-14 (W.D. Ark. Dec. 7, 2011) (stipulation that plaintiffs "will not seek" damages above threshold sufficient to defeat federal jurisdiction). Some simply involve statements that the amount at stake is under $5 million. *See, e.g., Probola v. Long & Foster Real Estate, Inc.*, No. 11-6334 (AET), 2012 U.S. Dist. LEXIS 7512, at *5-6 (D.N.J. Jan. 20, 2012) (plaintiffs stated in complaint that "upon information and belief" the amount in controversy was less than $5 million).

The form and content of purported recovery limitations can be decisive as to whether they are binding under state law, and thus whether it is legally impossible for the putative class to recover $5 million. For example, several states provide, through civil procedure rules and/or case law, that certain

kinds of attempted recovery limitations are non-binding; courts accordingly have held that they do not defeat federal jurisdiction. *See, e.g., Bell*, 557 F.3d at 958 (when state law prohibits pleading damages with specificity, an *ad damnum* clause is a "legal nullity" and does not bind plaintiffs to a recovery below the jurisdictional minimum); *Oshana*, 477 F.3d at 511 (citing 735 Ill. Comp. Stat. 5/2-604 (2004)) ("Illinois does not bind plaintiffs to such disclaimers in complaints. . . . [P]laintiffs in Illinois are not limited to the amounts they've requested. So Oshana's disclaimer had no legal effect."); *Ambrozich*, 2007 U.S. Dist. LEXIS 86448, at *7-8 (absent subsequent interrogatory, complaint does not provide any limitation on the amount of damages sought); *see also De Aguilar*, 47 F.3d at 1410 (noting that "[t]he majority of states now . . . have followed the example of Fed. R. Civ. P. 54(c) and do not limit damage awards to the amount specified in the *ad damnum* clause of the state pleading").

Courts also hold that some named plaintiffs' assertions do not *really* purport to limit recovery, because they do not actually disclaim the right to recover the jurisdictional minimum. *See, e.g., In re 1994 Exxon Chemical Fire v. Berry*, 558 F.3d 378, 389 (5th Cir. 2009) ("[P]laintiffs merely alleged that the amount in controversy did not exceed the jurisdictional amount; they did not deny that they would *accept* more.") (emphasis in original); *Aikens v. Microsoft Corp.*, 159 Fed. Appx. 471, 476 (4th Cir. 2005) (plaintiffs' assertion insufficient because it did not "stipulate that the plaintiffs will not *accept* more than

[the jurisdictional amount] if the court awards it") (emphasis in original). As the Seventh Circuit has explained, plaintiffs "cannot have it both ways – [they] cannot disclaim damages in excess of [$5 million] in order to defeat federal jurisdiction but preserve [their] right to recover more than that amount by refusing to admit or stipulate to the jurisdictional limit." *Oshana*, 472 F.3d at 513.

The point is not to attempt to catalog here all the ways plaintiffs' lawyers might attempt to limit class recovery. Nor is it to argue how far putative class representatives must go in disclaiming potential recoveries to avoid federal jurisdiction. It is simply to note that the state-law issue would remain even if this Court were to hold that a putative class representative does not inherently lack the power to bind his or her putative class for purposes of the amount in controversy. This is important for two reasons. First, it bolsters Petitioner's argument that purported classwide recovery limitations are irrelevant to determination of the amount in controversy under CAFA. To hold otherwise would make federal jurisdiction "largely dependent upon the vagaries of state law." *Bell*, 557 F.3d at 958 (quoting *Carlsberg Res. Corp. v. Cambria Sav. and Loan Ass'n*, 554 F.2d 1254, 1261 (3d Cir. 1977)). Such a result would contradict CAFA's purpose and subject defendants within the same circuit to disparate treatment.

Second, the potential for state law to render purported recovery limitations non-binding is something the Court should keep in mind even if it were to

conclude that some purported limitations are relevant under CAFA. For all the reasons above and those in Petitioner's brief, Petitioner has established that putative class representatives *cannot* bind absent class members, and purported class-recovery limitations *cannot* destroy CAFA jurisdiction. If the Court were to disagree with Petitioner on those points, however, the Court should be careful not to suggest that purported recovery limitations by putative class representatives *necessarily* defeat federal jurisdiction. Rather, federal courts considering motions for remand to state court still would have to analyze on a case-by-case basis the particulars of each purported recovery limitation in light of, among other things, relevant state law to determine whether the purported limitations before them make it legally impossible for the putative class to recover $5 million.

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CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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