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 THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE RETAIL LITIGATION CENTER, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a class action that is removed under the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4, may be remanded solely on the ground that a would-be named plaintiff purports to waive any recovery for the class above CAFA's $5 million jurisdictional threshold.

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INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation.[1] The Chamber directly represents 300,000

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel

members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber represents the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the Nation's business community.

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and engages in legal proceedings that affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

This case presents a question of vital importance to *amici*'s members: Whether a putative class representative may evade the protections of the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, §4, 119 Stat. 4, 9-12—a law intended to guarantee a federal forum for significant class actions—by offering a stipulation purportedly waiving, for himself and absent class members, any recovery above CAFA's $5 million jurisdictional threshold. Many of *amici*'s members have first-hand experience with state-court systems that refuse to subject proposed classes to anything like the meaningful

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made a monetary contribution intended to fund this brief's preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

scrutiny required under Federal Rule of Civil Procedure 23, and which permit abusive and costly discovery tactics and other procedural devices that force defendants to settle meritless claims. Because there is no vehicle that allows for the consolidation of related class actions in different States' courts (as exists, for example, under the federal multi-district litigation statute, see 28 U.S.C. § 1407(a)), many of *amici*'s members have also been forced to shoulder the burden of simultaneously defending against a litany of overlapping class actions in state courts throughout the Nation.

Amici have advocated strongly against abusive state class-action procedures. The Chamber, for example, was an early and vocal supporter of CAFA's enactment, and the Chamber has filed briefs on CAFA issues in this and other courts seeking to fulfill CAFA's guarantee of a federal forum for important class actions—including a brief urging the Court to grant the petition for a writ of certiorari in this case. *E.g.*, *Knowles* v. *Standard Fire Ins. Co.*, No. 11-1450, cert. granted, 81 U.S.L.W. 3031 (Aug. 31, 2012); *Skechers U.S.A., Inc.* v. *Tomlinson*, No. 11-287, cert. denied, 132 S. Ct. 551 (2011); *Gay* v. *Morgan*, No. 06-1471, cert. denied, 552 U.S. 940 (2007); *Cappuccitti* v. *DirecTV, Inc.*, No. 09-14107 (11th Cir. 2010), reh'g granted, 623 F.3d 1118 (11th Cir. 2010). *Amici* and their members thus have both a unique perspective on the question presented and a substantial interest in ensuring that CAFA's requirements are interpreted and enforced consistent with its purpose.

SUMMARY OF ARGUMENT

I. CAFA was enacted to combat widespread "abuses of the class action device" in state courts—abuses that harmed class members and defendants, damaged interstate commerce, and undermined respect for the judicial

system. Pub. L. No. 109-2, §2(a)(2), (4)(C), 119 Stat. 4, 4-5.

A. Before CAFA, class-action plaintiffs regularly flocked to a small number of so-called "magnet" jurisdictions—state courts that, among other practices, often certified classes with little scrutiny. Those (and other) state courts were also often ill-equipped to handle large and complicated class-action suits, particularly when those suits required application of different States' laws.

B. To remedy those systemic defects, CAFA expanded federal diversity jurisdiction, allowing a purported class action to be removed to federal court whenever more than $5 million is at issue and minimal diversity exists. Congress made clear that it intended the statute's removal provisions to be read broadly in favor of a federal forum.

C. Under the decision below and similar Eighth Circuit precedent, putative lead plaintiffs and their counsel can evade CAFA's protections and defeat federal jurisdiction by signing a stipulation purporting to promise, on behalf of absent class members, that the class will seek less than $5 million. That rule is inconsistent with CAFA's purposes: It undermines CAFA's goal of federal supervision of class actions; strips absent class members of the federal protections Congress intended to provide them; and encourages the magnet jurisdictions Congress meant to curtail.

II. The rule adopted below is also inconsistent with this Court's long-held requirement that federal diversity jurisdiction can be defeated, and remand to state court permitted, only if the plaintiff can show to a "legal certainty" that the threshold federal jurisdictional amount will not be met. As a legal matter, stipulations of the sort at issue here cannot provide the legal certainty ordinarily

required. And practical experience confirms that such stipulations will not effectively limit the amount at issue.

A. In *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 292 (1938), this Court held that a party seeking remand to state court on the basis of a jurisdictional amount-in-controversy requirement must show, to a "legal certainty," that the threshold jurisdictional amount will not be met. This Court announced the "legal certainty" requirement in a case where Congress had sought to *limit* federal court jurisdiction. *Id.* at 288. "Legal certainty" thus is the *minimum* standard that should apply under CAFA, which seeks to *expand* federal court jurisdiction. Any lesser standard would encourage the abusive forum-shopping CAFA was meant to prevent. As petitioner notes, the text of CAFA may preclude such stipulations from being considered at all. Pet Br. 11. At the very least, however, defendants are entitled to insist on proof to a legal certainty that the stipulation in fact will preclude any recovery of more than $5 million.

B. The damages stipulations at issue here cannot satisfy *St. Paul Mercury*'s legal certainty standard. As this Court explained in *Smith* v. *Bayer Corp.*, 131 S. Ct. 2368 (2011), a would-be lead plaintiff has no authority to bind absent class members until he is appointed the representative of a certified class. It is thus impossible to conclude with legal certainty at the time of removal—*before* any class has been certified, and *before* the proposed named plaintiff's adequacy has been tested—that a stipulation will bind any future class. Even if a class ultimately is certified, moreover, absent class members may be expected to challenge the stipulation on due process grounds. In any event, the stipulation at issue here, by its own terms, cannot supply the requisite legal certainty:

Among other problems, an ambiguous statement by a would-be lead plaintiff that he will not "seek" damages for the class above the jurisdictional threshold does not preclude him from *accepting* a larger amount in settlement.

C. Experience has shown, moreover, that damages stipulations will not actually limit the amount in controversy. Before CAFA was enacted, lead plaintiffs and class counsel (including respondent's counsel below) often "stipulated" to limit the named plaintiff's requests for recovery below the $75,000 jurisdictional threshold for removal to federal court. Afterward, however, they used aggressive discovery tactics, permitted by state courts, to obtain substantial settlements and attorney's fee awards. That pattern has continued since CAFA's enactment. In practice, stipulated limitations on the damages sought are illusory.

III. The use of damages stipulations to defeat federal jurisdiction harms judicial economy and sound class-action policy.

A. Allowing damages stipulations to defeat removal under CAFA frustrates the ability of class-action plaintiffs and defendants to achieve a global resolution of the underlying controversy. Uncertainty regarding a stipulation's binding power invites collateral attacks upon any class-action judgment or settlement. Damages stipulations also encourage disaffected class members to opt out of the class, fomenting inefficient "splinter litigation." And such stipulations make it even more difficult to settle class actions affecting citizens of multiple States because, unlike in federal practice, States lack procedures for even marginal coordination and consolidation of overlapping lawsuits in different States' courts.

B. Finally, damages stipulations are at odds with Congress's efforts to ensure that plaintiffs are properly represented and that defendants are afforded the procedural protections available in federal court. If such stipulations truly limited recovery, they would rarely be in the interest of absent class members, who may see their recoveries limited to a pittance without any of the procedural safeguards Congress sought to provide. The only persons who stand to benefit from damages stipulations are would-be lead plaintiffs and their counsel.

ARGUMENT

Congress enacted CAFA in response to widespread abuses in state-court class actions. See Pub. L. No. 109-2, §2(a)(2), 2(b), 119 Stat. 4, 4-5. Many of those abuses were concentrated in a few jurisdictions notoriously hostile to class-action defendants—including the Circuit Court of Miller County, Arkansas, the court to which respondent seeks remand. A key part of Congress's response was to expand federal diversity jurisdiction over class actions so that "interstate cases of national importance" could be handled by the federal courts. *Id.* §2(b)(2), 119 Stat. 4, 5.

The rule adopted by the Eighth Circuit and applied below effectively nullifies a key component of that effort. Under the Eighth Circuit's approach, cases that are otherwise properly removed under CAFA must be remanded to state court for failure to reach CAFA's amount-in-controversy requirement whenever the putative class representative purportedly promises not to seek more than $5 million on behalf of himself and the class. But cases should not be dismissed for failure to meet the amount-in-controversy requirement unless it is "legally certain" that sum cannot be met. A purported stipulation by a putative class representative like the one

at issue here cannot provide that legal certainty. As a legal matter, it is at least uncertain whether such stipulations are binding on the class. And as a practical matter, experience has proven that they will not actually limit the amount in controversy to $5 million. Ultimately, such stipulations ill serve the interests of judicial economy and disserve plaintiffs, defendants, and the public alike.

I. CAFA Is Intended Broadly To Encourage Removal To Federal Court

A. CAFA Was Enacted To Overcome Systemic Problems In State Class Actions

1. Before CAFA was enacted, class-action plaintiffs regularly flocked to a small number of "magnet" jurisdictions with little or no connection to the nationwide claims being asserted. See S. Rep. No. 109-14, at 13 (Feb. 28, 2005); see also 151 Cong. Rec. 1551-1552 (Feb. 7, 2005) (statement of Sen. Frist); 151 Cong. Rec. 2636 (Feb. 17, 2005) (statement of Rep. Sensenbrenner) (noting that "[a] major element of the worsening crisis is the exponential increase in State class action cases in a handful of 'magnet' or 'magic' jurisdictions"); 151 Cong. Rec. 2652 (Feb. 17, 2005) (statement of Rep. Shays) ("Attorneys are increasingly filing interstate class actions in State courts, mostly in what are known as 'magnet' jurisdictions.").[2] That trend has been documented in studies showing the "explosive" growth of class-action filings in "improbable" state jurisdictions. S. Rep. No. 109-14, at 13 & nn.41-42

[2] See also 151 Cong. Rec. 2632 (Feb. 17, 2005) (statement of Rep. Barrett) ("[I]n the past few years, we have witnessed an explosion of interstate class actions being filed in State courts, particularly in certain 'magnet' jurisdictions."); 151 Cong. Rec. 2387 (Feb. 16, 2005) (statement of Rep. Capito) (abusive practices "take advantage of class action law by shopping for venues where they can find sympathetic juries and judges").

(collecting studies); see also 151 Cong. Rec. 2660 (Feb. 17, 2005) (statement of Rep. Smith) (describing "forum shopping" as "one of the worst problems in class actions today"). While federal court class-action filings rose 300 percent from 1995 to 2005, state court class-action filings during the same period rose over 1,000 percent. *Ibid.*[3]

Unsurprisingly, the most "magnetic" courts were also the ones most likely to certify a class with minimal scrutiny, or were otherwise seen as more favorable to plaintiffs (or to class counsel actually controlling the litigation). See S. Rep. No. 109-14, at 14; 151 Cong. Rec. 2392 (Feb. 16, 2005) (statement of Rep. Keller); 151 Cong. Rec. 2074 (Feb. 10, 2005) (statement of Sen. Hatch); 151 Cong. Rec. 2084 (Feb. 10, 2005) (statement of Sen. Enzi); 151 Cong. Rec. 2071 (Feb. 10, 2005) (statement of Sen. Vitter); 151 Cong. Rec. 1663 (Feb. 8, 2005) (statement of Sen. Grassley). Congress noted that state courts sometimes displayed bias or favored plaintiffs and their in-state counsel over largely out-of-state defendants. See 151 Cong. Rec. 2431 (Feb. 17, 2005) (statement of Rep. Goodlatte) (noting the preponderance of class actions in state courts that "are overwhelmingly biased and favorable to the plaintiffs in a class action").

This case arises out of one of those "magnet" jurisdictions—the Circuit Court of Miller County, Arkansas. Pet. Br. 4; Nan S. Ellis, *The Class Action Fairness Act of 2005: The Story Behind the Statute*, 35 J. Legis. 76, 95 &

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[3] In one "magnet jurisdiction," the Circuit Court of Madison County, Illinois, class-action filings increased *3,650* percent over the same decade. S. Rep. No. 109-14, at 13; see also Am. Tort Reform Found., *Judicial Hellholes 2006*, at 18 (2006), available at http://bit.ly/LE8gxJ (describing Madison County as a "perennial Judicial Hellhole" with a "reputation as a horrible place to be targeted by a class action").

n.115 (2009) ("The most famous magnet jurisdictions are Madison County, Illinois and Miller County, Arkansas."). Indeed, the American Tort Reform Foundation named Miller County a "judicial hellhole" because of its courts' propensity to "unfair rulings" and "large awards," noting that the county has more tort cases per capita than any other county in the State. Am. Tort Reform Found., *Judicial Hellholes 2006*, at v, 22 (2006), available at http://bit.ly/LE8gxJ.

2. Even apart from such magnet jurisdictions, Congress expressed concern that state court judges might certify class actions not to facilitate judicial resolution, but to force settlement. See S. Rep. No. 109-14 at 20-21 (state court judges "often are inclined to certify cases for class action treatment not because they believe a class trial would be more efficient than an individual trial, but because they believe class certification will simply induce the defendant to settle the case without trial"). Indeed, Congress heard testimony about "drive-by certification," a phenomenon in which a judge orders class certification before a defendant has been given a chance to respond or, sometimes, before the defendant has even read the complaint. In one notorious case noted by Congress, a state-court judge certified a nationwide class of 23 million people *the same day* the case was filed, before the defendant even learned that the suit existed. S. Rep. No. 109-14, at 22.

Congress was also concerned that, unlike their federal counterparts, state courts often found themselves ill-equipped to handle large and complicated class suits. Many state courts have "comparatively crushing caseloads," with the average state court judge assigned three times as many cases as the average federal judge. S. Rep. No. 109-14, at 51, 52. And unlike federal judges,

state judges often lack law clerks, magistrates, or special masters who can aid in streamlining and efficiently disposing of new cases. *Id.* at 14; 151 Cong. Rec. 2081 (Feb. 10, 2005) (statement of Sen. Sessions); 151 Cong. Rec. 1670 (Feb. 8, 2005) (statement of Sen. Brownback).

That lack of resources imposed needless delay on litigants and the courts. A 2004 study by the Federal Judicial Center, for example, found that state court judges were more likely than federal judges to let class actions linger without issuing a ruling on class certification. Thomas Wiliging & Shannon Wheatman, *Attorney Reports on the Impact of* Amchem *and* Ortiz *on Choice of a Federal or State Forum in Class Action Litigation* 9 (Federal Judicial Center 2004); see also 151 Cong. Rec. 2081 (Feb. 10, 2005) (statement of Sen. Sessions).

3. Finally, Congress was concerned that the explosive growth of state court class-action litigation in a few jurisdictions had given a handful of state courts undue control over national legal policy. The concentration of suits in a handful of jurisdictions meant that a few courts would make important policy decisions for the rest of the country, "bind[ing] the rights of the residents of [other] States." Pub. L. No. 109-2, §2(a)(4)(C), 119 Stat. 4, 5. Those few state courts were often called upon to interpret and apply the laws of other States. That did not merely create delay and increase the risk of error—it naturally led to the forum State reading other States' laws to be exactly like its own laws. See 151 Cong. Rec. 2081 (Feb. 10, 2005) (statement of Sen. Sessions). State court judges, Congress further determined, were often "less careful than their federal counterparts about applying the procedural requirements that govern class actions." S. Rep. No. 109-14 at 14.

B. CAFA Sought To Expand The Availability Of Federal Courts To Remedy Those Systemic Shortcomings

Confronted by those systemic shortcomings, Congress concluded that "the federal courts are the appropriate forum to decide most interstate class actions because these cases usually involve large amounts of money and many plaintiffs, and have significant implications for interstate commerce and national policy." S. Rep. No. 109-14 at 27; see also Pub. L. No. 109-2, § 2(b), 119 Stat. 4, 5.

To discourage "magnet jurisdictions" and other state court class-action abuses, CAFA confers federal jurisdiction over class actions "in which the matter in controversy exceeds the sum or value of $5 million" and where minimal diversity is present. Pub. L. No. 109-2, § 4(a)(2), 119 Stat. 4, 9, codified at 28 U.S.C. § 1332(d)(2). The statute provides that "the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5 million," *id.* § 4(a)(6), 119 Stat. 4, 10, codified at 28 U.S.C. § 1332(d)(6), "abrogat[ing] the [prior] rule against aggregating claims," *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 571 (2005). And CAFA did away with the absolute bar on removal by in-state defendants in diversity actions. See 28 U.S.C. § 1441(b)(2). Instead, Congress established a sliding scale that gave judges discretion to permit such removals. See Pub. L. No. 109-2, § 4(a)(3)-(4), 119 Stat. 4, 9, codified at 28 U.S.C. § 1332(d)(3)-(4).

Congress intended courts to read CAFA's jurisdictional provisions "broadly" in favor of a federal forum. See, *e.g.*, S. Rep. No. 109-14, at 43 (Feb. 28, 2005) ("[N]ew section 1332(d) is intended to expand substantially federal court jurisdiction over class actions. Its provisions

should be read broadly, with a strong preference that interstate class actions be heard in a federal court if properly removed by any defendant."). That preference for a broad reading of CAFA's provisions applies to the $5 million amount-in-controversy requirement: As the then-House Judiciary Committee Chairman explained, "if a Federal court is uncertain about whether the $5 million threshold is satisfied, the court should err in favor of exercising jurisdiction." 151 Cong. Rec. 2637 (Feb. 17, 2005) (statement of Rep. Sensenbrenner); see *id.* at 2640.

For a time, CAFA had its intended effect. The filing or removal of class actions in federal court roughly doubled in a single year following CAFA's enactment. Emery Lee & Thomas Willging, *The Impact of the Class Action Fairness Act on the Federal Courts*, 156 U. Pa. L. Rev. 1723, 1754 (2008). But the practice of utilizing damages stipulations to avoid removal threatens to reverse that trend. Putative class representatives seeking to evade federal jurisdiction now regularly stipulate to limit damages to less than $5 million. See pp. 24-25, *infra*. The practice is inconsistent both with CAFA's text and with its intent.

C. Remanding To State Court Based On Damages Stipulations Is Inconsistent With CAFA's Purposes

The Eighth Circuit's automatic remand rule—remanding whenever the class representative or his counsel promises to limit the class's recovery—sets CAFA on its head. It undermines CAFA's goal of federal supervision over the class-action system. It also threatens the interests of absent class members and encourages the very magnet jurisdictions Congress meant to curtail.

Aside from its jurisdiction-conferring sections, CAFA's most significant provisions are devoted to regulat-

ing class-action *settlements* in federal court to ensure that class representatives and their counsel do not enrich themselves at the expense of absent class members.[4] But the automatic remand rule adopted below allows putative class representatives and their counsel to stipulate away damages otherwise awardable to absent class members for nothing more than the chance of evading federal jurisdiction and, with it, the protections federal law would provide. Congress surely could not have intended that *settling* a case for a *guarantee* of 50 cents on the dollar would require compliance with extensive procedural safeguards, but signing a stipulation that gratuitously limits damages to a maximum of 40 cents (or 5 cents) on the dollar to avoid federal jurisdiction is permitted on the putative lead plaintiff's or counsel's unreviewable whim.

Moreover, the Eighth Circuit's practice of reflexively remanding on the basis of such stipulations has allowed "magnet jurisdictions" to flourish once again. District courts in that circuit have repeatedly ordered remand to state courts in recent years (almost always to state courts in Arkansas, often to Miller County), based on damages stipulations.[5] The frequency of such remands has risen

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[4] See 28 U.S.C. § 1712 (imposing limits on contingency fees and other attorney's fee awards in so-called "coupon settlements"); *id.* § 1713 (prohibiting a court from approving a settlement that would cause a net loss to any class member, unless the court finds in writing that nonmonetary benefits to that class member substantially outweigh the monetary loss); *id.* § 1714 (prohibiting class settlements that discriminate against class members based on geographic proximity to the court); *id.* § 1715 (requiring notification of appropriate state and federal officials of proposed settlement).

[5] See *Deaton* v. *Frito-Lay N. Am., Inc.*, No. 12 Civ. 1029, 2012 WL 3986804, at *3 (W.D. Ark. Sept. 11, 2012); *Goodner* v. *Clayton Homes, Inc.*, No. 12 Civ. 4001, 2012 WL 3961306, at *2, *6-7 (W.D. Ark. Sept. 10, 2012); *Basham* v. *Am. Nat'l Cnty. Mut. Ins. Co.*, No. 12 Civ. 4005, 2012 WL 3886189, at *2, *6 (W.D. Ark. Sept. 6, 2012);

dramatically since the Eighth Circuit first suggested in *dicta* that a damages stipulation could defeat CAFA diversity jurisdiction. See *Bell* v. *Hershey Co.*, 557 F.3d 953, 958 (8th Cir. 2009). Its more recent opinion expressly approving such stipulations, *Rowling* v. *Nestle Holdings, Inc.*, 666 F.3d 1069, 1072 (8th Cir. 2012), will only encourage that trend, imposing precisely the costs on plaintiffs, defendants, and the judiciary that CAFA was designed to avoid.

II. DAMAGES STIPULATIONS CANNOT PROVIDE "LEGAL CERTAINTY" TO DEFEAT FEDERAL JURISDICTION

A. A Plaintiff Must, At A Minimum, Show "Legal Certainty" To Defeat CAFA Diversity Jurisdiction

In *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283 (1938), this Court held that a party seeking to defeat federal diversity jurisdiction by limiting the amount in controversy must demonstrate "to a *legal certainty*" that the plaintiff could not recover above the jurisdictional threshold. *Id.* at 289 (emphasis added); see also *id.* at 292 ("removal will be futile and remand will

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Oliver v. *Mona Vie, Inc.*, No. 11 Civ. 4125, 2012 WL 1965613, at *3 (W.D. Ark. May 31, 2012); *Smith* v. *Am. Bankers Ins. Co. of Fla.*, No. 11 Civ. 2113, 2011 WL 6090275, at *5-7 (W.D. Ark. Dec. 7, 2011); *Knowles* v. *Standard Fire Ins. Co.*, No. 11 Civ. 4044, 2011 WL 6013024, at *6 (W.D. Ark. Dec. 2, 2011); *McClendon* v. *Chubb Corp.*, No. 11 Civ. 2034, 2011 WL 3555649, at *10 (W.D. Ark. Aug. 11, 2011); *Thompson* v. *Apple, Inc.*, No. 11 Civ. 3009, 2011 WL 2671312, at *2 (W.D. Ark. July 8, 2011); *Murphy* v. *Reebok Int'l, Ltd.*, No. 11 Civ. 214, 2011 WL 1559234, at *3 (E.D. Ark. Apr. 22, 2011); *Tuberville* v. *New Balance Athletic Shoe, Inc.*, No. 11 Civ. 1016, 2011 WL 1527716, at *2, *6 (W.D. Ark. Apr. 21, 2011); *Harris* v. *Sagamore Ins. Co.*, No. 08 Civ. 109, 2008 WL 4816471, at *2-3 (E.D. Ark. Nov. 3, 2008); *Dowell* v. *Debt Relief Am., L.P.*, No. 07 Civ. 39, 2007 WL 2907881, at *3 (E.D. Mo. Oct. 3, 2007).

follow" where "it is *obvious* that the suit cannot involve the necessary amount" (emphasis added)). The Court so held even though, at least with respect to the diversity statute at issue there, it was the "intent of Congress drastically to restrict federal jurisdiction." *Id.* at 288. Consequently, "legal certainty" must be the minimum standard that would apply under CAFA, which seeks to *expand* federal court jurisdiction.

This Court and the courts below have applied *St. Paul Mercury*'s "legal certainty" test to a number of jurisdictional statutes that contain an amount-in-controversy requirement. For example, before 1980, when § 1331 federal-question jurisdiction contained a $10,000 amount-in-controversy requirement, see 28 U.S.C. § 1331 (1976), this Court held that *St. Paul Mercury*'s "legal certainty" test applied to that statute. *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 276-277 (1977); cf. Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 2, 94 Stat. 2369, 2369 (Dec. 1, 1980) (eliminating the amount-in-controversy requirement for federal-question claims). Likewise, courts have held that the "legal certainty" test applies to the $10,000 amount-in-controversy requirement for federal jurisdiction over interstate-shipping suits brought under the Carmack Amendment. 49 U.S.C. § 14706; 28 U.S.C. § 1337(a). See *Underwriters* v. *BE Logistics, Inc.*, 736 F. Supp. 2d 1311, 1314 (S.D. Fla. 2010); *Nat'l Semiconductor Corp.* v. *Commercial Lovelace Motor Freight, Inc.*, 560 F. Supp. 908, 910 (N.D. Ill. 1983) ("The rule that it must appear to a legal certainty that the claim is actually for less than the jurisdictional amount to justify a dismissal is equally applicable under 28 U.S.C. § 1337(a)[.]"); *Bank of Am. N.A.* v. *Engler*, No. 11 Civ. 01457, 2011 WL 5909884, at *2 (C.D. Cal. Nov. 7, 2011).

Thus, a plaintiff seeking to defeat removal under CAFA must at the very minimum satisfy *St. Paul Mercury*'s "legal certainty" standard. As petitioner notes, CAFA provides that "the claims of individual class members shall be aggregated to determine whether" the total exceeds $5,000,000. 28 U.S.C. §1332(d)(6); Pet. Br. 11. That language is most plausibly read to require a district court to independently calculate the aggregate value of class members' *claims* and disregard any stipulation purporting to limit classwide *recovery*. Pet Br. 12. But even if the Court does not adopt that straightforward rule, at the very least, plaintiffs seeking to defeat removal under CAFA must be held to the same standard that applies in other jurisdictional contexts. This Court presumes that, when Congress legislates, it is aware of this Court's precedents. *Hall* v. *United States*, 132 S. Ct. 1882, 1889 (2012); *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32 (1991); *Cannon* v. *Univ. of Chicago*, 441 U.S. 677, 696-698 (1979). There is no indication that any member of Congress supported applying a *lower* standard under §1332(d)(2) than this Court applied in *St. Paul Mercury*. Accordingly, to the extent a stipulation purports to limit class-wide damages and thereby defeat CAFA jurisdiction, the defendant *at least* should be permitted to insist on proof to a legal certainty that the stipulation would bind the entire putative class to a recovery of less than $5 million.

B. Damages Stipulations Cannot Provide The Required "Legal Certainty"

The Eighth Circuit adopted a rule, applied below, that a plaintiff's stipulation not "to seek damages for the class *** in excess of $5 million" defeats CAFA removal by providing "legal certainty" that no more than $5 million is in controversy. App. 75. But that is erroneous as a mat-

ter of law. For myriad reasons, it is highly uncertain that such purported stipulations can bind absent class members. Accordingly, they cannot provide the "legal certainty" that *St. Paul Mercury* demands.

1. Where, as here, a purported stipulation is signed by a *putative* class representative—a plaintiff not yet certified as the *actual* representative of absent class members—his authority to bind putative class members to any course of action is uncertain at best. As this Court made clear in *Smith* v. *Bayer Corp.*, 131 S. Ct. 2368 (2011), an absent class member cannot be considered a "party" before any class is certified, and "an uncertified class action cannot bind proposed class members." *Id.* at 2379, 2381 n.11. Given that, *at the time of removal* it may be impossible for a court to conclude that any stipulation the *putative* lead plaintiff signs will in fact bind his as-yet *uncertified* class with the requisite legal certainty.

Ironically, courts permitting putative class representatives to stipulate away a portion of the potential class recovery have invoked *St. Paul Mercury* for that result. But *St. Paul Mercury* concluded that a plaintiff may limit *his own* claims if he "does not desire to try his case in the federal court," even "though he would be justly entitled to more." 303 U.S. at 294. Asserting that "CAFA does not change the proposition that the plaintiff is the master of her own claim," some courts have reflexively engrafted *St. Paul Mercury* onto CAFA removal decisions. *Morgan* v. *Gay*, 471 F.3d 469, 474 (3d Cir. 2006), cert. denied, 552 U.S. 940 (2007); cf. *Lowdermilk* v. *U.S. Bank Nat'l Ass'n*, 479 F.3d 994, 999 (9th Cir. 2007) (noting that it was "preserv[ing] the plaintiff's prerogative" to limit recovery). But it goes well beyond *St. Paul Mercury* to hold that the plaintiff in a *putative* class action is master of *absent class members'* claims, long before any court has

granted him authority as a proper class representative to bind the class.

2. Moreover, due process may prevent any stipulation and any judgment in a case involving such a stipulation from being given preclusive effect as to absent class members or from otherwise limiting the ability of such absent class members to bring subsequent suits. Courts have held that "a class action judgment will not bind absent members if they were not accorded due process of the law," and "[t]he preclusive effect of a prior judgment will depend upon whether absent members were '*in fact*' adequately represented by parties who are present." *Pelt* v. *Utah*, 539 F.3d 1271, 1284 (10th Cir. 2008) (emphasis added). This Court has similarly stated that, "[f]or a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members." *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1751 (2011); see also *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 388 (1996) (Ginsburg, J., concurring in part and dissenting in part) ("adequate representation is among the due process ingredients that must be supplied if the judgment is to bind absent class members"). Thus, in subsequent litigation, a second court may conclude that absent class members did not in fact receive adequate representation in the initial class action litigation—particularly in connection with the stipulation—and therefore cannot be bound by the stipulation and judgment.

Indeed, it is highly questionable whether a plaintiff who stipulates away class damages will be deemed a constitutionally adequate representative of absent class members. "Adequacy" requires that, "at a minimum, (1) the interests of the nonparty and her representative are aligned * * * and (2) either the party understood her-

self to be acting in a representative capacity or the original court took care to protect the interests of the nonparty." *Taylor* v. *Sturgell*, 553 U.S. 880, 900 (2008) (citing *Hansberry* v. *Lee*, 311 U.S. 32, 43 (1940)). The Fifth and Seventh Circuits have indicated that a lead plaintiff's ethical and fiduciary duties to the class forbid him from stipulating away class damages for the purpose of evading federal jurisdiction. See *Manguno* v. *Prudential Prop. & Cas. Co.*, 276 F.3d 720, 724-725 (5th Cir. 2002); *Back Doctors Ltd.* v. *Metro Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830-831 (7th Cir. 2011) (Easterbrook, C.J.). At the very least, the prospect of litigation over that issue is another reason that damages stipulations cannot provide "legal certainty" that defendants will not be subject to potential liability exceeding CAFA's $5 million jurisdictional threshold.[6]

3. Finally, even on its own terms, a proposed lead plaintiff's promise not "to *seek* damages for the class * * * in excess of $5 million," App. 75 (emphasis added), cannot confer the legal certainty required to prevent removal to federal court. A promise not to "seek" damages, for instance, does not preclude the promisor from *accepting* a larger amount in settlement if that larger offer can be

[6] It is clear, moreover, that the stipulation-accepting court cannot insulate itself from subsequent challenge by absent class members. "It is well settled that the court adjudicating a dispute cannot predetermine the binding effect of its own judgment; that can be tested only in a subsequent suit." 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1789, at 554-555 (3d ed. 2005). The Advisory Committee's Note to the 1966 amendment of Rule 23 recognizes as much, noting that a court presiding over a class action should "carefully consider[]" the scope of its judgment to better facilitate *subsequent* consideration of *res judicata* issues. See Fed R. Civ. P. 23 Advisory Comm. Note, 39 F.R.D. 98, 106 (1966).

extracted (which it can). See *Brill* v. *Countrywide Home Loans, Inc.*, 427 F.3d 446, 449 (7th Cir. 2005); see also pp. 21-25, *infra*. That too makes the prospect of "legal certainty" from a damages stipulation illusory.

C. Experience Demonstrates That Damages Stipulations Offer No Legal Certainty

Experience demonstrates that, in practice, damages stipulations will not limit the amount inventive class counsel and lead plaintiffs can receive in settlement. Even if a state court would enforce a damages-capping stipulation at a trial, plaintiffs' counsel understand that, upon defeating removal, they will be able to extract significantly more than the jurisdictional threshold in a state court settlement.

Before CAFA took effect, respondent's counsel below filed dozens of putative class actions in Arkansas state courts in which they prevented removal by purporting to limit the named plaintiffs' requests for recovery to an amount below the $75,000 amount-in-controversy requirement applicable under 28 U.S.C. §1332(a). They then obtained at least 13 sizeable settlements nonetheless, many of which exceeded $100 million.[7] Indeed, the

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[7] See, *e.g.*, *Droste* v. *Farmers Ins. Exch.,* No. CV-2004-294-3 (Ark. Cir. Ct. Miller Cnty. Jan. 21, 2011) (settlement value of $833 million); *Chivers* v. *State Farm Fire & Cas. Co.,* No. CV-2010-251-3 (Ark. Cir. Ct. Miller Cnty. Oct. 14, 2010) ($190-260 million); *Johnson* v. *State Auto Mut. Ins. Co.,* No. CV-2010-114-3 (Ark. Cir. Ct. Miller Cnty. June 25, 2010) ($40 million); *Freeman* v. *Farm Bureau Mut. Ins. Co. of Ark.,* No. CV-2004-294-3-B (Ark. Cir. Ct. Miller Cnty. Apr. 22, 2010) ($34.3 million); *Alexander* v. *Nationwide Mut. Ins. Co.,* No. CV-2009-120-3 (Ark. Cir. Ct. Miller Cnty. July 23, 2009) ($538 million); *Meredith* v. *Clayton Homes, Inc.,* No. CV-2005-72-2 (Ark. Cir. Ct. Miller Cnty. Mar. 3, 2009) ($77.3-92.4 million); *Lane's Gifts and Collectibles, L.L.C.* v. *Yahoo! Inc.,* No. CV-2005-52-1 (Ark. Cir. Ct. Miller Cnty. Apr. 29, 2008) ($4 million); *Lane's Gifts and Collecti-*

attorney's fees awarded to plaintiffs' counsel alone often exceeded eight figures.[8]

Respondent's counsel below achieved those results, after defeating removal, through a multi-pronged process. Initially, they sought to defer dispositive motions until full-blown discovery was completed; Arkansas judges typically grant such requests or defer dispositive motions of their own accord.[9] If the particular judge refused to

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bles, L.L.C. v. *Yahoo! Inc.,* No. CV-2005-052-1 (Ark. Cir. Ct. Miller Cnty. Mar. 12, 2008) ($820,000); *Lane's Gifts and Collectibles, L.L.C.* v. *Yahoo! Inc.,* No. CV-2005-052-1 (Ark. Cir. Ct. Miller Cnty. Feb. 28, 2008) ($2.5 million); *Grammer* v. *Sunbeam Prods., Inc.,* No. CV-2004-407-2 (Ark. Cir. Ct. Miller Cnty. Dec. 14, 2007) ($88-138 million); *Beasley* v. *Reliable Life Ins. Co.,* No. CV-2005-58-1 (Ark. Cir. Ct. Miller Cnty. Mar. 28, 2007) ($41 million); *Lane's Gifts and Collectibles, L.L.C.* v. *Yahoo! Inc.,* No. CV-2005-52-1 (Ark. Cir. Ct. Miller Cnty. July 21, 2006) ($112 million); *Beasley* v. *Prudential Gen. Ins. Co.,* No. CV-2005-58-1 (Ark. Cir. Ct. Miller Cnty. June 12, 2006) ($88 million); *Feely* v. *Allstate Ins. Co.,* No. CV-2004-294-3A (Ark. Cir. Ct. Miller Cnty. May 5, 2005) ($1.4 billion).

[8] See, *e.g.*, *Droste* v. *Farmers Ins. Exch.,* No. CV-2004-294-3 (Ark. Cir. Ct. Miller Cnty. Jan. 24, 2011) (attorney's fees of $37 million); *Chivers* v. *State Farm Fire & Cas. Co.,* No. CV-2010-251-3 (Ark. Cir. Ct. Miller Cnty. Oct. 5, 2010) ($40 million); *Feely* v. *Allstate Ins. Co.,* No. CV-2004-294-3A (Ark. Cir. Ct. Miller Cnty. May 6, 2005) ($63.9 million).

[9] See, *e.g.*, *Basham* v. *Am. Nat'l Cnty. Mut. Ins. Co.*, No. CV-2005-59-3A (Ark. Cir. Ct. Miller Cnty. Oct. 24, 2011) (granting plaintiffs' motion to defer dispositive motions pending discovery); *Basham* v. *Am. Nat'l Cnty. Mut. Ins. Co.*, No. CV-2005-59-3A (Ark. Cir. Ct. Miller Cnty. Aug. 30, 2011) (permitting discovery pending motion to dismiss); *Oliver* v. *Mona Vie, Inc.*, No. 2010-644-1 (Ark. Cir. Ct. Miller Cnty. Aug. 18, 2011) (setting deadline to complete fact discovery before hearing on dispositive motions); *Oliver* v. *Mona Vie, Inc.*, No. 2010-644-1 (Ark. Cir. Ct. Miller Cnty. June 6, 2011) (granting plaintiffs' motion to defer dispositive motions); *Chivers* v. *State Farm Fire & Cas. Co.*, No. CV-2004-294-3 (Ark. Cir. Ct. Miller Cnty. Apr. 28, 2009) (granting motion to defer dispositive motions and al-

delay consideration of a dispositive motion, counsel would simply dismiss the case without prejudice, in order to refile it before a judge thought to be more amenable. For example, in one case, the trial court denied the plaintiffs' motion to stay dispositive motions on November 23, 2011, and plaintiffs voluntarily dismissed the case without prejudice two weeks later. See *McClendon* v. *Chubb Corp.*, No. CV-2010-1176 (Ark. Cir. Ct. Sebastian Cnty. Nov. 23, 2011) (denying plaintiffs' motion to stay dispositive motions); *McClendon* v. *Chubb Corp.*, No. CV-2010-1176-1 (Ark. Cir. Ct. Sebastian Cnty. Dec. 7, 2011) (plaintiffs' motion for voluntary dismissal without prejudice). That same day, the very same plaintiff (McClendon), represented by the same counsel, joined another plaintiff in filing an identical suit in Miller County. See *Basham* v. *Am. Nat'l Cnty. Mut. Ins. Co.*, No. 4:12-cv-04005, 2012 WL 3886189, at *1 (W.D. Ark. Sept. 6, 2012) (recounting procedural history).

Once the case was before an amenable judge, counsel would impose such broad and costly discovery demands upon defendants that compliance would have ultimately cost defendants a large share of the suit's purported value. In one case, for example, plaintiffs' counsel served 185 interrogatories, 385 document requests, and 86 requests for admission. See *Hensley* v. *Computer Sci.*

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lowing discovery); *Basham* v. *Computer Sci. Corp.*, No. CV-2005-59-3A (Ark. Cir. Ct. Miller Cnty. Sept. 19, 2008) (permitting discovery on class certification and other issues pending motion to dismiss); *Meredith* v. *Clayton Homes, Inc.*, No. CV-2005-072-2 (Ark. Cir. Ct. Miller Cnty. July 10, 2007) (permitting full-blown discovery pending consideration of dispositive motions); *Hensley* v. *Computer Sci. Corp.*, No. CV-2005-59-3 (Ark. Cir. Ct. Miller Cnty. June 13, 2006) (same); *Whitehead* v. *Nautilus Grp., Inc.*, No. CV-2005-66-2 (Ark. Cir. Ct. Miller Cnty. Oct. 11, 2005) (deferring motions to dismiss until after class certification).

Corp., No. CV-2005-59-3 (Ark. Cir. Ct. Miller Cnty.). In another case, a Miller County judge ordered a defendant insurance company to produce all of its claims files within 90 days, at an estimated cost of $45 million. Pet. Br. 14. Similar examples abound.[10]

Lawsuits filed after CAFA's effective date have followed a similar pattern. As petitioner notes, after respondent's counsel below settled most of the cases it had filed before CAFA's enactment, they began filing additional putative class actions that included damages-limiting stipulations like those at issue here. Pet. Br. 18. There is every reason to believe counsel will use similar aggressive discovery tactics to force defendants into settlements far above the "stipulated" amount. In one case filed after CAFA, for example, counsel filed a complaint accompanied by a stipulation purporting to cap classwide recovery at $5 million, but also simultaneously served 131 interrogatories and 189 document requests, seeking information going back 20 years. *Basham* v. *Am. Nat'l Cnty. Mut. Ins. Co.*, No. 2011-0623-3 (Ark. Cir. Ct. Miller Cnty.). That is hardly the magnitude of discovery one would expect to see in a suit where the recovery is not expected to exceed $5 million.

Far from limiting the true amount in controversy, damages-limiting stipulations have proved in practice to be illusory. The damages "cap" seems to target a hypo-

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[10] See, *e.g.*, *Oliver* v. *Mona Vie, Inc.*, No. 2010-644-1 (Ark. Cir. Ct. Miller Cnty. Mar. 11, 2011) (serving 157 interrogatories); *Oliver* v. *Mona Vie, Inc.*, No. 2010-644-1 (Ark. Cir. Ct. Miller Cnty. Mar. 11, 2011) (serving 137 document requests); *Oliver* v. *Mona Vie, Inc.*, No. 2010-644-1 (Ark. Cir. Ct. Miller Cnty. Mar. 11, 2011) (serving 220 requests for admission); *Meredith* v. *Clayton Homes, Inc.*, No. CV-2005-072-2 (Ark. Cir. Ct. Miller Cnty. May 22, 2008) (describing how compliance with discovery requests required the production of nearly 3 million pages of documents at a cost of $1.45 million).

thetical future trial whose date will never come. Practical experience thus demonstrates precisely what legal analysis suggests: that damages stipulations of the sort at issue here do not meaningfully limit the amount in controversy. To the contrary, it is clear that they will not prevent far more than the stipulated amount from changing hands in state court following remand. Because such stipulations do not provide the legal certainty this Court's cases at a minimum require, and because they result in precisely the abuses CAFA was meant to end, they cannot be invoked to defeat federal jurisdiction.

III. PUTATIVE STIPULATIONS DISSERVE JUDICIAL ECONOMY AND SOUND CLASS-ACTION POLICY

A. Damages Stipulations Undermine The Finality Of Class-Action Judgments

Allowing purported damages stipulations to defeat removal under CAFA also frustrates the ability of class-action plaintiffs and defendants to achieve a comprehensive resolution of such controversies. As this Court has explained, the "goals" of "modern plaintiff class actions" are to solve collective-action problems by allowing litigation of a suit with "common questions when there are too many plaintiffs for proper joinder" and where individual claims "would be uneconomical to litigate individually." *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 809 (1985). Central to those goals is the ability to "bind not only the representative parties but also all nonparticipating members of the class certified by the court." 18A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 4455, at 448 (2d ed. 2002).[11] The Eighth Circuit's rule undermines certai-

[11] See also Fed. R. Civ. P. 23 Advisory Comm. Note, 39 F.R.D. 69, 99 (1966) (Rule 23 is designed to "result in judgments including those

nty and finality by making it more difficult to reach a global, conclusive resolution of class-action disputes of national importance.

1. The Eighth Circuit's rule all but invites collateral attacks on final judgments in class actions. As discussed above, see pp. 19-20, *supra*, final judgments in class actions are not binding on absent class members if a court determines that they did not receive adequate representation. See *Concepcion*, 131 S. Ct. at 1751; *Taylor*, 553 U.S. at 900. Where the named plaintiff purports to waive some of the class recovery, it is all but inevitable that dissatisfied absent class members represented by counsel seeking greater remuneration will file additional suits after the judgment, asserting that they cannot be bound by its terms because they were not adequately represented. The putative class representative's decision to curtail the class's potential recovery dramatically, for the sole purpose of avoiding federal jurisdiction, gives absent class members more than ample ammunition to assert such claims after the fact.

The Eighth Circuit's approach thus does not merely subject defendants to potential liability far exceeding the $5 million cap. It threatens the finality of otherwise concluded class-action litigation and undermines the incentives for voluntary resolution. If allowed to stand, defendants will be caught in a Catch-22, forced to litigate or settle class-action cases knowing that the outcome might have no preclusive effect on later claims.

2. Even beyond the issues of enforceability and collateral attack, the Eighth Circuit's approach burdens defendants with needless splinter litigation. By artificially

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whom the court finds to be members of the class, whether or not the judgment is favorable to the class").

restricting recovery for remaining class members, the rule permitting limitation of class claims by stipulation increases each class member's incentive to opt out of any possible settlement. The multiplication of lawsuits resulting from opt-outs creates the precise situation class-action settlements are meant to avoid. See, *e.g.*, Mark W. Friedman, Note, *Constrained Individualism in Group Litigation: Requiring Class Members To Make a Good Cause Showing Before Opting Out of a Federal Class Action*, 100 Yale L.J. 745, 754-755 (1990) (explaining that defendants in a class action will grow more reluctant to settle as additional litigants opt out).

Nor is that opt-out risk merely theoretical. The plaintiffs' bar is extraordinarily competitive and responds quickly to perceived litigation opportunities. Plaintiffs' attorneys will seize on the settlement notice provided to potential class members, taking the opportunity to solicit them to opt out of the class action and pursue individual lawsuits in hopes of a greater recovery. Several law firms, such as respondent's counsel below, already have niche practices of filing class actions accompanied by binding stipulations. See pp. 21-25, *supra*. The Eighth Circuit's approach will only encourage scores of new, parallel lawsuits by increasing class members' incentives to opt out of limited-damages class actions.

3. The resulting costs and consequences of that multiplicity of litigation are aggravated further by the absence of mechanisms to organize competing claims, particularly where they affect citizens of multiple States. To be sure, CAFA does not prevent multiple overlapping class actions from being filed in, or removed to, *federal district courts* throughout the Nation. But Congress relied on the Multidistrict Litigation ("MDL") statute to assist in coordinating such claims. That statute author-

izes the Judicial Panel on Multidistrict Litigation to transfer civil actions with common issues of fact "to any district for coordinated or consolidated pretrial proceedings." 28 U.S.C. §1407(a). By coordinating multiple cases in a single forum for pretrial proceedings, the MDL statute provides a mechanism that can, at least in some circumstances, permit multiplicitous litigation to progress in an orderly fashion, "prevent[ing] duplication of discovery and eliminat[ing] the possibility of conflicting pretrial rulings." *In re Liquid Carbonic Truck Drivers Chem. Poisoning Litig.*, 423 F. Supp. 937, 939 (J.P.M.L. 1976). Just two Terms ago, this Court recognized the interplay between CAFA and the MDL statute, explaining that the MDL statute can help address "special problems of relitigation" in the class-action context: CAFA allows removal of "any sizable class action involving minimal diversity," while the MDL statute allows "federal courts [to] consolidate multiple overlapping suits against a single defendant in one court" for pretrial proceedings. *Smith*, 131 S. Ct. at 2381-2382.

But the MDL statute does not apply to related cases pending in state courts, at any stage of proceedings. Nor is there any similar mechanism to coordinate cases pending in multiple States' courts. The rule embraced below thus effectively nullifies any benefits and protections the MDL structure affords to defendants. If this Court affirms the judgment below, defendants would find it much more difficult to resolve disputes of a nationwide character, and would instead be required to litigate a glut of related class actions on multiple fronts in state courts across the Nation.

B. Damages Stipulations Benefit Named Plaintiffs And Class Counsel At The Expense Of Absent Class Members And Defendants

The Eighth Circuit's approach, at bottom, allows putative class representatives to circumvent congressionally imposed protections simply by betraying the class they purport to represent. By stipulating away absent class members' potential recovery, putative class representatives can deny absent plaintiffs the benefit of federal statutory protections designed to guard against precisely such self-serving behavior. And it also prejudices defendants by denying them the impartial federal forum that CAFA's jurisdictional provisions were intended to ensure. The only beneficiaries of the Eighth Circuit's approach are would-be lead plaintiffs and their counsel.

Congress intended that, by providing for federal oversight over important class actions, CAFA would help ensure that class representatives adequately protect the interests of the class. See pp. 13-14, *supra*. Congress thus added a host of procedural safeguards designed to protect the interests of absent class members, including various protections in connection with any proposed classwide settlement. See p. 14 n.4, *supra*. Yet under the rule adopted below, a putative class representative may give away a substantial portion of class members' monetary recovery with *no* settlement in return, without any federal oversight thereof, and then—by having done so—avoid the federal forum and prevent class members from enjoying any federal protections thereafter. And the putative representative can do all that before even being certified as the actual representative of the class. Congress could not have intended to brook such a perverse result. See pp. 12-15, *supra*.

Congress also designed CAFA to provide defendants with an impartial federal forum and curtail the phenomenon of "magnet" state court jurisdictions, which often certify classes with little to no scrutiny and otherwise prove hostile to out-of-state defendants. See pp. 12-13, *supra*. The automatic remand rule, however, has effectively denied defendants access to the federal courts and resulted in a resurgence of the class-action-friendly state-court magnet jurisdictions whose influence Congress sought to diminish. See pp. 14-15, *supra*.

The incentives to putative class representatives and their counsel to utilize damages-limiting stipulations and place their own interests over the putative class's, moreover, should not be underestimated. Although such stipulations theoretically purport to waive recovery in excess of $5 million to gain a remand to state court, they nonetheless have become ubiquitous, particularly in courts within the Eighth Circuit. See pp. 24-25, *supra*. And it is easy to see why. Such stipulations often fail to limit the class's recovery. See pp. 21-24, *supra*. But even if such stipulations actually do end up limiting the class's recovery, they often represent little sacrifice for class representatives and class counsel. Class representatives can often expect that any decrease in their pro rata share of the capped class award will be offset by incentive payments they could receive from any settlement agreement. See, *e.g.*, Elisabeth M. Sperle, *Here Today, Possibly Gone Tomorrow: An Examination of Incentive Awards and Conflicts of Interest in Class Action Litigation*, 23 Geo. J. Legal Ethics 873, 875 (2010) (noting that "incentive awards are common in class action settlements").

As noted previously, there is every reason to believe that class counsel's attorney's fees will not actually be limited by a damages stipulation in the event of a settle-

ment. See pp. 21-22, *supra*. But even if class counsel's fees are also limited by the $5 million cap, that only aggravates the problem: Counsel's fee demands stay the same, but the pot available for paying those fees and compensating the class shrinks. State court procedures on class certification and settlement often lack the rigor of CAFA and Rule 23. And if plaintiffs' counsel sacrifices fees by limiting her clients' recovery, she can make up the difference through filing new lawsuits in bulk. Respondents' counsel below has done just that. *See* pp. 21-25, *supra*. That clearly is not the result CAFA was intended to achieve.

CONCLUSION

For the foregoing reasons and those stated in the petitioner's brief, the judgment of the Eighth Circuit should be reversed.

Respectfully submitted.

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