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 Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF FOR PETITIONER

Plaintiff does not even attempt to argue that he had the authority to bind the absent members of his proposed, uncertified class when this case was removed to federal court. Unless Plaintiff had that authority, his allegation that "the Plaintiff *and Class* stipulate they will seek to recover total aggregate damages of less than five million dollars," Pet. App. 60 (emphasis added), and attempted stipulation to the same effect, Pet. App. 75, cannot defeat federal jurisdiction. Neither Plaintiff nor the District Court nor the Eighth Circuit offered any supporting authority for the proposition that Plaintiff, who does not represent the absent members of his proposed but uncertified class, somehow had the ability to bind them as of the time of removal. If Plaintiff's stipulation does not bind them, federal jurisdiction exists in this case, as the District Court acknowledged.

The decision below finding Plaintiff's stipulation to be binding is contrary to the Class Action Fairness Act of 2005 ("CAFA"), contrary to this Court's decision in *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), and contrary to basic due process principles articulated in *Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). The result below is also contrary to the intervening Tenth Circuit opinion in *Frederick v. Hartford Underwriters Ins. Co.*, 2012 WL 2443100 (10th Cir. June 28, 2012), which establishes a direct circuit conflict. Certiorari should be granted.

ARGUMENT

I. THE DECISIONS BELOW ARE CONTRARY TO *SMITH v. BAYER CORP.*

Plaintiff concedes, correctly, that "the question in the instant case is whether there was federal jurisdiction *at the time of removal* . . . i.e., whether the stipulation is binding *now* on Plaintiff and on the class *now* being proposed by the Plaintiff." Opp. at 12 (emphasis in original). As Plaintiff admits, it is "hornbook law" that jurisdiction must be determined at the time of removal, and thus, the question is whether Plaintiff's stipulation was binding, as of the time of removal, on those persons who fall within the definition of Plaintiff's proposed class. *Id.* at 12-13. Tellingly, Plaintiff *fails* to even attempt to explain how, as a matter of law, his stipulation could have bound such persons as of the time of removal, where the absent members of the putative class are not parties to this litigation because no class has been certified. Plaintiff has no authority, either in fact or under the law, to represent them.

Indeed, Plaintiff, through his new Supreme Court counsel, attempts at length to explain away his Eighth Circuit counsel's acknowledgement that "[i]t is true, *of course*, that *merely filing a proposed class action will not 'bind' proposed class members*." (Pet. App. 27 (emphasis added); Opp. at 13-14.) But, while he tries to deflect the Court's focus onto other issues, even Plaintiff is not "willing to advance the novel and surely erroneous argument that a nonnamed class

member is a party to the class-action litigation *before the class is certified*." *Devlin v. Scardelletti*, 536 U.S. 1, 16 n.1 (2002) (Scalia, J., dissenting). He also provides no explanation for how a non-binding stipulation could possibly satisfy his burden to contradict the evidence put forth by Standard Fire that was accepted by the District Court, and establish, to a "legal certainty," that the amount in controversy is below $5 million. *Bell v. Hershey Co.*, 557 F.3d 953, 956 (8th Cir. 2009).

Like Plaintiff, the District Court and Eighth Circuit (in *Rolwing v. Nestle Holdings, Inc.*, 666 F.3d 1069 (8th Cir. 2012)), also failed to explain how a stipulation could bind absent members of an uncertified putative class, or how a non-binding stipulation could conclusively establish the amount in controversy. They therefore failed to follow basic, fundamental principles of class action law and due process. As this Court held last Term in *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2382 (2011), a member of a putative class is *not* a party to the case prior to class certification and is *not* bound by litigation events prior to certification.

Plaintiff tries in vain to distinguish *Smith v. Bayer* on the grounds that it involved whether a federal district court could enjoin a state court under the relitigation exception to the Anti-Injunction Act, and involved a circumstance where class certification had been denied in a previous class action. Opp. at 11-12. But this Court's unanimous holding in *Smith v. Bayer* was based, in part, on a principle so basic to

class action law that it cannot be reasonably disputed: absent members of a proposed class are *not* parties, and *cannot* be bound, unless and until a class is certified. As this Court explained:

> Federal Rule 23 determines what is and is not a class action in federal court, where McCollins brought his suit. So in the absence of a certification under that Rule, the precondition for binding Smith was not met. Neither a proposed class action nor a rejected class action may bind nonparties. What does have this effect is a class action approved under Rule 23. But McCollins' lawsuit was never that.

Id. at 2380. As this Court reiterated in the very last sentence of its opinion, "the mere proposal of a class in the federal action could not bind persons who were not parties there." *Id.* at 1282. This basic principle is equally applicable to state courts, which, as a matter of due process, cannot bind putative class members without notice and an opportunity to be heard. *Shutts*, 472 U.S. at 811-12.

Plaintiff also argues that "the decision to stipulate to damages of a certain size is no different from innumerable other decisions that class representatives inevitably make as masters of their complaints," such as deciding which defendants to sue and which causes of action to assert. Opp. at 14. Stipulations of the sort proffered by Plaintiff, however, are fundamentally different because they purport to be binding on the absent members of the putative class and, if

given effect, they eviscerate the right of removal in a manner that no other tactic can accomplish. Other decisions made by a named plaintiff are not binding on the absent putative class members and also can be overcome by a defendant's evidence establishing that the case, as pleaded, implicates a potential recovery of over $5 million. A stipulation, however, if enforced as binding, not only destroys rights of absent, unrepresented persons, but also renders defendants' evidence in support of removal meaningless, as the District Court held. Pet. App. 9. In order for Congress's conferral of a right of removal under CAFA to be meaningful, federal courts must be "equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction." *Wecker v. National Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907).

II. BASED ON AN INTERVENING DECISION, THERE IS NOW A DIRECT CIRCUIT CONFLICT

After the Petition was filed (and before the Opposition was filed), the Tenth Circuit decided a case where the plaintiff's complaint expressly sought less than $5 million on behalf of the putative class. The district court remanded, treating this as a "binding limitation on damages" equivalent to the stipulation in the instant case. *Frederick v. Hartford Underwriters Ins. Co.*, 2012 WL 2443100, *1 (10th Cir. June 28, 2012). The Tenth Circuit reversed. Addressing the circuit split over the burden of proof under CAFA,

it agreed with the Eighth Circuit and majority of circuits applying a preponderance standard. *Id.* at *2. The Tenth Circuit then held, contrary to *Rolwing*, that "a plaintiff's attempt to limit damages in the complaint is *not dispositive* when determining the amount in controversy" because "*[r]egardless of the plaintiff's pleadings*, federal jurisdiction is proper if a defendant proves jurisdictional facts by a 'preponderance of the evidence' such that the amount in controversy may exceed $5,000,000." *Id.* at *3 (emphasis added). *Frederick* is at odds with the decision of the Eighth Circuit in *Rolwing*, which allowed the plaintiff's limitation on damages to control over the defendant's evidence. *Rolwing*, 666 F.3d at 1071-72. *Frederick* also demonstrates how the question presented here is important and recurring, and worthy of certiorari.

III. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW

Plaintiff argues that "[t]he district court applied well-settled law," citing non-class action cases explaining that an individual plaintiff can choose not to plead a claim involving a federal question, or choose to seek for herself an amount less than the diversity jurisdiction threshold (currently $75,000) in order to avoid federal jurisdiction. *See Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002); *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938). Those cases simply do not address the question presented here regarding a named plaintiff's authority to bind absent, unrepresented

persons. Although *United States v. Hohri*, 482 U.S. 64 (1987) was a putative, uncertified class action in which the plaintiffs limited their claims to below $10,000 to achieve district court jurisdiction under the Little Tucker Act, there is no indication in this Court's opinion or the lower court opinions that the plaintiff attempted to limit the damages of the absent members of the putative class, and in any event none of the courts addressed the enforceability of such a limitation. *See also Hohri v. United States*, 586 F. Supp. 769 (D.D.C. 1984), *aff'd in part and rev'd in part*, 782 F.2d 227 (D.C. Cir. 1986). Moreover, prior to CAFA, no such limitation would have been necessary because, if federal jurisdiction existed over the named plaintiffs' individual claims, supplemental jurisdiction then would exist over the putative class members' claims. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 549 (2005).

Plaintiff notes that this Court denied certiorari in *Skechers USA, Inc. v. Tomlinson*, 132 S. Ct. 551 (2011), which involved a stipulation by a named plaintiff purporting to limit the recovery of putative class members to below $5 million. The Eighth Circuit's denial of permission to appeal in *Skechers*, however, was issued before its decision in *Rolwing*, and the district court (ruling prior to *Smith v. Bayer*) had relied upon mere dictum by the Eighth Circuit suggesting that such a stipulation might be enforceable. *See Tomlinson v. Skechers U.S.A., Inc.,* 2011 U.S. Dist. LEXIS 142862, *6-8 (W.D. Ark. May 25, 2011) (relying on *Bell*, 557 F.3d at 958). This Court

might have wished to give the Eighth Circuit an opportunity to squarely address the question presented before granting certiorari. The circuit split also has further developed based on *Frederick*.

Plaintiff argues that his purportedly binding stipulation on behalf of persons he has no authority to represent "serves CAFA's purposes by ensuring that that the damages in this case will be capped at $5 million and will not present the risk of a limitless judgment." Opp. at 21-22. But the purpose of CAFA was *not* to have claims of absent class members artificially limited. Rather, CAFA was expressly intended to "assure fair and prompt recoveries for class members with legitimate claims," Pub. L. No. 109-2, § 2(b)(1), but have such controversies determined in federal court. Congress found that fairness to absent class members as well as defendants would be best achieved by bringing class actions to federal court and thereby eliminating state court abuses of the class action device that often enriched class counsel at the expense of the class. *See id.*, § 2(a)(2)-(4).[1]

Plaintiff also argues that "[n]othing that Congress included in CAFA suggests that a plaintiff

[1] If Plaintiff were correct that the members of the putative class are bound now by his stipulation, they would have no right to object if, faced with extensive state court discovery (such as the over 100 pages of discovery requests propounded with Plaintiff's Complaint, *see* Pet. App. 53), the defendant agreed to enter into a class settlement consistent with the cap on damages in the stipulation.

bringing a class action is no longer the master of her complaint or is somehow prevented from 'suing for less than the jurisdictional amount.'" Opp. at 22. To the contrary, CAFA mandates that "the claims of the individual class members *shall be aggregated*" to determine the amount in controversy, 28 U.S.C. § 1332(d)(6) (emphasis added), and does not allow such aggregation to be defeated by a reduction of the aggregate amount of such claims to under $5 million based on a stipulation of a putative class representative.

IV. THE FACT THAT THE EIGHTH CIRCUIT DECIDED THE QUESTION PRESENTED IN *ROLWING* RATHER THAN THE INSTANT CASE IS IMMATERIAL

Plaintiff contends that certiorari should be denied because "the *Rolwing* case, rather than this one, would be the proper vehicle" for review. Opp. at 8. But the defendant in *Rolwing*, for whatever unknown reason, chose not to seek certiorari. And it is very unlikely that the Eighth Circuit will choose, in its discretion, to decide the same issue it decided in *Rolwing* on the merits in another case. Any subsequent panel of the Eighth Circuit would be bound by *Rolwing*. *See Brock v. Astrue*, 674 F.3d 1062, 1065 (8th Cir. 2012). Thus, the *only* way that the holding in *Rolwing* can be corrected (absent *en banc* review, which was denied below) is by this Court granting certiorari in this case or another case with a similar procedural posture.

While Plaintiff suggests that this Court never reviews a case where there was no appellate decision below, that is incorrect. Just last Term, the Court granted certiorari and reviewed an order of a state trial court where both the court of appeal and state supreme court had denied review. *Smith v. Cain*, 132 S. Ct. 627, 630 (2012); *see also Sears v. Upton*, 130 S. Ct. 3259, 3261 (2010); *Norfolk & Western Ry. v. Ayers*, 538 U.S. 135, 144 (2003).

V. THE ISSUE PRESENTED IS NOT PREMATURE

Plaintiff argues that this Court can decide this case on a petition for certiorari from a final decision of the Arkansas Supreme Court. Opp. at 8-10. Plaintiff's argument, however, is not that this Court would decide federal jurisdiction at that stage. Rather, Plaintiff suggests that this Court would decide whether hypothetical determinations by the state trial and appellate courts that Plaintiff was an adequate class representative, notwithstanding his stipulation, comported with federal due process requirements. That is a different question that would not necessarily resolve whether federal jurisdiction existed. Moreover, even if this Court could revisit whether federal jurisdiction existed after a state court trial and appeal, it is unlikely this case would reach that stage. All of the previous putative class actions filed by Plaintiff's counsel in the Miller County Circuit Court settled before certification. *See* Pet. at 5. If, as Plaintiff suggests, a class were certified, it is well-recognized that

"[c]ertification as a class action can coerce a defendant into settling on highly disadvantageous terms regardless of the merits of the suit." *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 723 (7th Cir. 2011) (Posner, J.). This is especially true in a class action that is limited to $5 million because, if the case is litigated all the way through discovery, class certification and trial, the costs of such litigation are likely to equal, if not exceed, the amount in controversy.

Plaintiff also argues that the state court should decide, at class certification, whether the stipulation is fair to absent class members and, if it is not, Plaintiff could be deemed an inadequate class representative. Opp. at 9. This argument, however, is inconsistent with Plaintiff's position and the District Court's conclusion that the stipulation binds the absent putative class members *now*. If the stipulation is binding on the putative class members now, it could not be revisited at class certification (and class members could not opt out of it). Alternatively, if the stipulation is *not* binding now, it cannot defeat Standard Fire's evidence and establish, to a "legal certainty," that the amount in controversy *now* is below $5 million. *Bell*, 557 F.3d at 956.

Plaintiff also notes that Standard Fire could remove this case again if developments in state court demonstrate that the amount in controversy exceeds $5 million. Opp. at 10-11. But to allow the use of a non-binding stipulation to defeat defendants' right of removal, and require defendants to wait until a

potentially much later stage of the litigation before being entitled to removal, not only would waste substantial resources in both state and federal court systems and improperly eviscerate defendants' rights under CAFA, it also would fly in the face of the well-established proposition that federal jurisdiction exists if the amount in controversy at the time of removal satisfies the jurisdictional threshold. *St. Paul Mercury*, 303 U.S. at 293. Moreover, it might not become apparent that the aggregate damages will exceed $5 million until a class has been certified and a jury verdict has been rendered.[2] As discussed above, Standard Fire will also have faced substantial pressure to settle before then.

[2] Arkansas court rules allow a judgment in excess of the amount demanded, Ark. R. Civ. P. 54(c); *Grytbak v. Grytbak*, 227 S.W.2d 633, 635-36 (Ark. 1950), and also allow amendments to pleadings to conform to the evidence after trial. Ark. R. Civ. P. 15(b); *Myers v. Yingling*, 279 S.W.3d 83, 90 (Ark. 2008). Plaintiff's carefully worded stipulation, which attempts to limit only the damages he and the putative class will "seek" and not the damages they will accept, does not rule out a verdict for more than $5 million and the quagmire of novel issues that would result from a removal post-verdict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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