No. 11-1450

IN THE
Supreme Court of the United States

THE STANDARD FIRE INSURANCE COMPANY,
Petitioner,

v.

GREG KNOWLES,
Respondent.

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

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4, forecloses a court in a putative class action from relying on a stipulation by the named plaintiff, together with associated factual allegations in the plaintiff's complaint, limiting the damages sought to less than the $5,000,000 CAFA threshold for federal jurisdiction in deciding a motion to remand to state court a case removed to federal court under CAFA.

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INTRODUCTION

The Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4, enables defendants to remove putative class actions to federal court when certain requirements are met, including that "the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs." 28 U.S.C. § 1332(d)(2). Courts interpreting the parallel language in the general diversity-jurisdiction statute, 28 U.S.C. § 1332(a), have long recognized that "[i]f [the plaintiff] does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove." *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938). In enacting CAFA, "Congress presumably knew how [§ 1332(a)] had been construed, and presumably intended [§ 1332(d)(2)] to bear the same meaning." *United States v. Hayes*, 555 U.S. 415, 424 (2009) (citing *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85-86 (2006)).

Here, respondent, the named plaintiff in a putative class action, limited the damages sought in his state-court complaint raising exclusively state-law issues on behalf of only Arkansas residents to less than the $5,000,000 CAFA threshold for federal jurisdiction. Respondent also filed a binding stipulation with the state court expressly disavowing any greater damages. After petitioner The Standard Fire Insurance Company ("Standard Fire") removed the case to federal court, the district court granted respondent's motion to remand the case to state court, correctly holding that the complaint and stipulation were con-

trolling in establishing that the $5,000,000 amount-in-controversy requirement was not met.

Seeking to have the district court's remand order overturned, Standard Fire argues that a different provision of CAFA, 28 U.S.C. § 1332(d)(6), precludes district courts from relying on the amount in controversy alleged in the complaint and established through a binding stipulation. According to Standard Fire, that provision – which states that "the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000," *id.* – requires federal district courts to conduct full-blown evidentiary hearings at the removal stage to determine the amount in controversy in every CAFA case in which the jurisdictional amount is disputed.

Standard Fire's statutory interpretation is incorrect. The point of § 1332(d)(6) is to displace in CAFA cases the rule of *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), which prohibits courts from aggregating the claims of individual class members to satisfy the amount-in-controversy requirement of the general diversity statute. Section 1332(d)(6) does not override the traditional principle that the named plaintiff, as the master of the complaint, determines the content of the class members' claims at the pleading stage, including whether those claims exceed, in the aggregate, CAFA's jurisdictional amount.

In addition, Standard Fire's theory conflicts with CAFA's purposes and history, which were to address multi-state class actions asserting large damages filed in state courts while retaining state-court jurisdiction for small-damages, intra-state class actions. Standard Fire's approach also produces an unwork-

able jurisdictional regime that would force district courts to grapple with factually intensive merits inquiries at the outset of the case to determine their jurisdiction – a result that flatly contradicts the well-settled principles governing the interpretation of jurisdictional statutes.

Following the settled jurisdictional rule recognized nearly 75 years ago in *St. Paul Mercury* and applied by lower federal courts ever since does not violate the due process rights of absent class members, as Standard Fire claims. Unless and until a class is certified, any limitation on the amount in controversy contained in the complaint or an accompanying stipulation has no effect on the merits of absent class members' claims.

STATEMENT

A. Statutory Background

"Subject to certain limitations, the CAFA confers federal diversity jurisdiction over class actions where the aggregate amount in controversy exceeds $5 million." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 571 (2005). In particular, CAFA extends federal subject-matter jurisdiction to class actions when three conditions are met: (1) an aggregate amount in controversy exceeding $5,000,000; (2) a putative class with 100 or more members; and (3) minimal diversity, *i.e.*, a class in which at least one member is a citizen of a different state from any defendant. 28 U.S.C. § 1332(d)(2), (5)(B).[1]

CAFA provides that, "[i]n any class action, the claims of the individual class members shall be

[1] The relevant portions of CAFA are set forth in Addendum A to this brief.

aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs." *Id.* § 1332(d)(6). CAFA thereby alters by statute the rule against aggregating the claims of putative class members recognized in *Zahn*.

Section 2(b) of CAFA states that one of "[t]he purposes of th[e] Act" is to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of *interstate cases of national importance* under diversity jurisdiction." 28 U.S.C. § 1711 note (emphasis added). The CAFA Committee Report explained that the legislation was needed to address nationwide or multi-state class actions, whose enormous size creates pressure on defendants to settle, regardless of the merits of the clams: "[W]hen plaintiffs seek hundreds of millions of dollars in damages, basic economics can force a corporation to settle the suit, even if it is meritless and has only a five percent chance of success." S. Rep. No. 109-14, at 21 (2005) ("S. Rep." or "CAFA Report"). CAFA reflects the judgment that large interstate class actions "properly belong in federal court." *Id.* at 5.

The Report referred to the issue of "nationwide" or "multi-state" class actions, *id.* at 4, 11, 12, 22, 23, 25, 37, and "magnet" jurisdictions attracting claims from non-residents of the state, *id.* at 22-23. "The effect of class action abuses in state courts is being exacerbated by the trend toward 'nationwide' class actions, which invite one state court to dictate to 49 others what their laws should be on a particular issue, thereby undermining basic federalism principles." *Id.* at 24. Further, "most of the class actions brought in Madison County[, Illinois,] and other magnet

courts had little – if anything – to do with the venues where they were brought." *Id.* at 13; *see also id.* at 37 (citing "the filing of lawsuits in out-of-the-way 'magnet' state courts that have no real relationship to the controversy at hand"). The Report found that "current law enables lawyers to 'game' the procedural rules and keep nationwide or multi-state class actions in state courts." *Id.* at 4; *see also id.* at 6 (referring to "[i]nterstate class actions which often involve millions of parties from numerous states").

CAFA does not create subject-matter jurisdiction over all class actions with minimal diversity. In fact, "CAFA originally included a $2 million amount in controversy requirement, but it was increased to $5 million after the Congressional Budget Office [("CBO")] reported that 'the bill would impose additional costs on the Federal district court system' since most class-action lawsuits would likely satisfy the $2 million requirement." *Lewis v. Verizon Communications, Inc.*, 627 F.3d 395, 398 (9th Cir. 2010) (quoting Letter from Dan L. Crippen, Dir., CBO, to F. James Sensenbrenner, Jr., Chairman, Comm. on the Judiciary, U.S. House of Representatives (Mar. 11, 2002), *reprinted in* H.R. Rep. No. 107-370, at 27 (2002)). The CAFA Report explains that CAFA "appropriately leaves certain 'intrastate' class actions in state court: cases involving small amounts in controversy." S. Rep. at 61.

In enacting CAFA, Congress also considered whether to eliminate familiar principles and practices of diversity jurisdiction. The CAFA Report stated that "questions arise in current practice on jurisdictional issues. Well-established law exists to resolve these questions, and [CAFA] does not change – or even complicate – the answers to these

questions. In short, the 'rules of the road' on such issues are already established, and [CAFA] does not change them." *Id.* at 70.

The Report reiterated the need for a streamlined jurisdictional inquiry and explained that a putative class representative could enter into a *factual stipulation* on which a court could rely to make a jurisdictional determination at the outset of the case:

> The Committee understands that in assessing the various criteria established in all these new jurisdictional provisions, a federal court may have to engage in some fact-finding, not unlike what is necessitated by the existing jurisdictional statutes. The Committee further understands that in some instances, limited discovery may be necessary to make these determinations. However, the Committee cautions that these jurisdictional determinations should be made largely on the basis of readily available information. . . . Less burdensome means (e.g., *factual stipulations*) should be used in creating a record upon which the jurisdictional determinations can be made.

Id. at 44 (emphasis added).

B. Procedural History

1. The State-Court Proceeding. On April 13, 2011, respondent Greg Knowles filed this putative class action in the Circuit Court of Miller County, Arkansas, alleging only state-law claims, proposing a class limited to Arkansas residents, and expressly seeking less than the federal jurisdictional threshold. Pet. App. 2-3.

The gravamen of respondent's claim was that Standard Fire breached its insurance contract by underpaying claims for loss or damage to real property pursuant to homeowners' policies issued to Arkansas residents. *Id.* at 3. Specifically, respondent alleged that Standard Fire failed to pay for charges reasonably associated with retaining the services of a general contractor to repair or replace damaged property. These charges, known as general contractors' overhead and profit ("GCOP"), represent an extra 20% fee routinely assessed by contractors when repairing damaged property. *Id.* Although the homeowners' insurance policies obligated Standard Fire to pay GCOP, it failed to do so. By not covering those costs, Standard Fire violated its contracts with the Arkansas residents who procured insurance from it in the period at issue.

The body of the complaint stated that "neither Plaintiff's nor any individual Class Member's claim is equal to or greater than seventy-five thousand dollars ($75,000), inclusive of costs and attorneys fees. Plaintiff expressly stipulates to seek less than $75,000 total recovery, inclusive of costs and attorneys fees, individually or on behalf of any Class Member. Moreover, the total aggregate damages of the Plaintiff and all Class Members, inclusive of costs and attorneys' fees, are less than five million dollars ($5,000,000), and the Plaintiff and Class stipulate they will seek to recover total aggregate damages of less than five million dollars ($5,000,000)." *Id.* at 59-60 (citation omitted). The Prayer for Relief was expressly limited to these amounts and repeated that all elements of damages, costs, and fees "will not exceed $75,000 for Plaintiff individually or any Class

Member individually and/or $5,000,000 for the entire Class combined." *Id.* at 72-73.

Respondent attached as an exhibit to the complaint a "Sworn and Binding Stipulation," signed by respondent, which provided:

> I do hereby swear and affirm that I do not now, and will not at any time during this case, whether it be removed, remanded, or otherwise, seek damages for myself or any other individual class member in excess of $75,000 (inclusive of costs and attorneys' fees) or seek damages for the class as alleged in the complaint to which this stipulation is attached in excess of $5,000,000 in the aggregate (inclusive of costs and attorneys' fees).
>
> I understand that this stipulation is binding, and it is my intent to be bound by it.

Id. at 75.

2. Standard Fire's Removal. Standard Fire filed a notice of removal pursuant to CAFA. *See* Pet. App. 36. Standard Fire asserted that the amount in controversy exceeded $5,000,000 based on the following calculations:

- First, Standard Fire stated that a review of its records regarding payments and deductibles on those claims falling within the definition of the proposed class indicated that the aggregate total of payments for structural losses and deductibles was $15,274,806. *Id.* at 43.[2] Using the 20%

[2] Standard Fire subsequently submitted the Affidavit of Brian Harton, director of product management and a business analysis lead at Standard Fire, who confirmed the total of

figure for GCOP contained in the complaint, Standard Fire calculated the expected damages for the class as $3,054,961. *Id.* Standard Fire's calculation assumed that it had not reimbursed any class members for GCOP.

- Standard Fire next added a 12% statutory penalty for breach of an insurance contract, based on Arkansas Code Annotated § 23-79-208(a)(1). Standard Fire computed the 12% statutory penalty as an additional $366,595, "for a potential total compensatory damages award of $3,421,556." Pet. App. 44.
- Standard Fire then added a projected award of attorneys' fees of $1,602,594. *Id.* at 45. Standard Fire derived those fees by assuming that a court would award 40% of the total of (i) the presumed recovery of $3,421,556, and (ii) two years' worth of prejudgment interest at the maximum Arkansas state-court rate of 5% above the federal discount rate. *Id.* at 45 n.4.

Respondent disputed the basis for Standard Fire's calculation (Dist. Ct. Dkt. No. 7, at 16-17) but, in accordance with settled Eighth Circuit and Arkansas district court precedent regarding the validity of binding stipulations, did not introduce evidence of his own regarding the amount in controversy.

3. The District Court's Decision. Respondent moved to remand this action to Arkansas state court, which the district court granted. Pet. App. 2. The district court accepted Standard Fire's calculations of expected GCOP damages for the class of $3,054,961,

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$15,274,806 of payments for structural losses and deductibles. JA9a-11a.

a 12% statutory penalty for breach of contract, and projected 40% attorneys' fees computed on the basis of both compensatory damages and prejudgment interest. *Id.* at 7-8. The court explained that "this brings the total award up to $5,024,150, which exceeds the statutory maximum for state court jurisdiction by $24,150." *Id.* at 8.

Although the district court found that Standard Fire had met its initial burden of proving the requisite amount in controversy by a preponderance of the evidence, it held that respondent's stipulation demonstrated to a legal certainty that the claim fell under the $5,000,000 jurisdictional threshold. *Id.* at 8-9. The court opined that the stipulation was binding under Arkansas law, *id.* at 11-12, and rejected the argument that it was made in bad faith, *id.* at 14. The court noted that, if respondent attempted to amend the complaint in the future to increase the amount of recovery sought, the case would be removable at that time. *Id.* at 12.

On January 4, 2012, the Eighth Circuit denied Standard Fire's petition for permission to appeal, without recorded dissent. *Id.* at 1. On March 1, 2012, the Eighth Circuit denied Standard Fire's petition for rehearing, again without recorded dissent. *Id.* at 16.

SUMMARY OF ARGUMENT

I. In a putative state-law class action filed in state court, CAFA does not preclude a court from considering a representative plaintiff's pleading, including a stipulation attached to the complaint, in determining the amount in controversy at the time of removal. Where that stipulation is not made in bad faith and is enforceable under state law, it is controlling on the amount-in-controversy issue.

The text, purposes, and history of CAFA all demonstrate that Congress did not intend to preclude a federal district court from considering a sworn stipulation in assessing the amount in controversy. CAFA incorporates the relevant amount-in-controversy language of the diversity statute. CAFA thus reflects the longstanding principles that a plaintiff is the master of the complaint and that jurisdiction is determined at the time of removal based on the plaintiff's pleading. The CAFA Report expressly cited the practice of jurisdictional stipulations and observed that a putative class representative could enter into "*factual stipulations*" on which a court could rely to make a jurisdictional determination. S. Rep. at 44 (emphasis added).

Standard Fire and its *amici* wrongly accuse respondent of attempting an end-run around CAFA. In fact, in this case, CAFA has operated exactly as Congress intended. Respondent's complaint is a single-state (not a multi-state or nationwide) class action. It is limited to claims under Arkansas law, proposes a class limited to Arkansas residents, and is expressly capped at less than the federal jurisdictional threshold. This case therefore avoids all of the concerns of "judicial blackmail," nationwide classes

in state court, and other problems at which CAFA was directed. The instant class action is exactly the kind of case that Congress determined should remain in state court.

Standard Fire's construction, in contrast, would frustrate CAFA's purposes. It would be utterly unworkable and would vastly complicate jurisdictional inquiries. It would force courts to conduct full dress rehearsals of the merits (including damages) at the outset of each case. It would require extensive discovery and fact-finding that would increase the very burdens of which Standard Fire complains in this case. Moreover, Standard Fire's position opens the door to reexamine every decision made by named plaintiffs in framing their complaints. The decision to seek damages of a certain size is no different from innumerable other choices that class representatives inevitably make as masters of their complaints, including which claims to assert and which defendants to name.

II. Considering a damages limitation at the jurisdictional stage is consistent with due process, because the limitation cannot have a binding effect on the merits of absent class members' claims unless and until the class is certified. As with any jurisdictional inquiry, the amount-in-controversy determination does not adjudicate the merits of the claims of absent class members. *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), has no application here.

III. Many of the arguments advanced by Standard Fire and its *amici* in this case are offensive *ad hominem* attacks, plain and simple. Jurisdictional stipulations may be disregarded if they are made in bad faith or have no plausible basis. A defendant may

remove a case to federal court if a damages limitation is subsequently amended to exceed the jurisdictional threshold.

Standard Fire and its *amici* spill much ink attacking the Arkansas judiciary. The allegations of "abuse" gain no credibility simply by dint of repetition throughout the *amici* briefs. The allegations are demonstrably untrue, and Standard Fire's indignant tone is misplaced. By Standard Fire's own calculations, the aggregated damages for the class of Arkansas policyholders are a mere $3,054,961. *See* Pet. App. 8. Standard Fire is able to reach (and just barely) the $5,000,000 CAFA threshold only by adding extremely generous attorneys' fees that were wholly speculative and based on an inapposite precedent involving a case with multiple trials and appeals.

IV. Even if this Court adopts Standard Fire's interpretation of CAFA, it should still affirm on the ground that the amount in controversy was not met here. At a minimum, a stipulation for a jurisdictional inquiry may be used to limit attorneys' fees while at the same time affording full damages to be recovered by absent class members.

ARGUMENT

I. UNDER CAFA, COURTS SHOULD CONSIDER NAMED PLAINTIFFS' PLEADINGS AND STIPULATIONS IN DETERMINING THE AMOUNT IN CONTROVERSY

The text, purposes, and history of CAFA all show that Congress incorporated familiar principles of the amount-in-controversy test of diversity jurisdiction. Accordingly, in ascertaining whether the CAFA jurisdictional threshold is met, a district court should analyze the pleadings, including any stipulation attached to the named plaintiff's complaint. Where a stipulation and other limitations in the pleadings are not made in bad faith and are enforceable under state law, they will be controlling on the amount-in-controversy issue.

A. CAFA's Text Does Not Preclude Courts From Considering Pleadings And Stipulations In Determining The Jurisdictional Amount In Controversy

1. CAFA's governing standard incorporates traditional principles of diversity jurisdiction

The governing standard of CAFA's amount-in-controversy test is whether "the matter in controversy exceeds the sum or value of $5,000,000." 28 U.S.C. § 1332(d)(2), (6). CAFA took this key language directly from the traditional diversity statute governing non-class actions. *See id.* § 1332(a) (whether "the matter in controversy exceeds the sum or value of $75,000"). Standard Fire admits that CAFA was

enacted as part of Congress's authority to regulate diversity jurisdiction. Pet. Br. 17.[3]

By borrowing the amount-in-controversy language directly from the diversity statute, CAFA incorporates the settled construction of that language to permit plaintiffs to establish the amount in controversy for jurisdictional purposes through pleadings and stipulations. Under the general diversity statute, it has long been the rule that "[i]f [the plaintiff] does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove." *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938). In enacting CAFA, "Congress presumably knew how [§ 1332(a)] had been construed, and presumably intended [§ 1332(d)(2)] to bear the same meaning." *United States v. Hayes*, 555 U.S. 415, 424 (2009); *accord*, *e.g.*, *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998). Moreover, this Court "'assume[s] that Congress is aware of existing law'" – including the rule that the plaintiff is the master of the complaint and therefore may avoid removal to federal court by suing for less than the jurisdictional amount – "'when it passes legislation.'" *Hall v. United States*, 132 S. Ct. 1882, 1889 (2012) (quoting

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[3] CAFA contains a congressional finding regarding "diversity jurisdiction." CAFA § 2(a)(4), 119 Stat. 5 (codified at 28 U.S.C. § 1711 note). CAFA states as one of its avowed "purposes" the restoration of "the intent of the framers of the United States Constitution" regarding "diversity jurisdiction." *Id.* § 2(b)(2), 119 Stat. 5 (codified at 28 U.S.C. § 1711 note). The subsection of CAFA at issue here (§ 4(a)) is entitled, "Application Of Federal Diversity Jurisdiction," 119 Stat. 9, and makes a series of amendments to the federal diversity statute, 28 U.S.C. § 1332.

Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990)); *accord Traynor v. Turnage*, 485 U.S. 535, 546 (1988); Chamber Br. 17. CAFA's text reflects Congress's intent to embrace and not to foreclose those settled principles.

In § 1332(d)(6), CAFA expressly abrogates the anti-aggregation rule of *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). CAFA thereby shifts the amount-in-controversy focus from a person-by-person analysis of individual class members to a class-wide total. Subsection (d)(6) confirms that a stipulation or other evidence that directly relates to the size of that aggregated total – the potential class-wide amount in controversy – is exactly what a court should consider under CAFA.

CAFA's statutory definitions reinforce the conclusion that, under the statute, the named plaintiff plays the familiar role of master of the complaint for jurisdictional purposes. CAFA's text recognizes that "claims" of "class members" in a "class action" do not exist in a vacuum. Rather, under CAFA, a "class action" is a "civil action . . . brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B). The representative plaintiff necessarily frames "the definition of the proposed or certified class" (*id.* § 1332(d)(1)(D)) and decides what "claims of the individual class members" to assert (*id.* § 1332(d)(6)).

2. Familiar principles of diversity jurisdiction support relying on pleadings and stipulations

Several familiar principles of diversity jurisdiction, incorporated by CAFA, confirm that Congress did not intend to foreclose courts from considering a named

plaintiff's pleading and any stipulation attached to the complaint in determining the amount in controversy at the time of removal.

(a) A plaintiff is the "master" of the complaint

Traditionally, "the plaintiff is the master of the complaint." *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 91 (2005) (internal quotation marks omitted); *see also Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Thus, a plaintiff may deliberately plead a case to avoid federal jurisdiction and may enter into a binding stipulation to ensure that the amount in controversy stays below the jurisdictional minimum. This Court has long recognized that, "since the plaintiff is the master of the complaint, the well-pleaded-complaint rule enables him . . . to have the cause heard in state court" by limiting the claim to avoid federal subject-matter jurisdiction. *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002) (internal quotation marks omitted); *see*, *e.g.*, *St. Paul Mercury*, 303 U.S. at 294.

That rule has been the law for more than a century. As Justice Holmes recognized, a plaintiff may frame a suit to avoid removal jurisdiction: "Of course, the party who brings a suit is master to decide what law he will rely upon." *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) (Holmes, J.); *see*, *e.g.*, *Central R.R. Co. v. Mills*, 113 U.S. 249, 257 (1885); *Great North Ry. Co. v. Alexander*, 246 U.S. 276, 282 (1918); *see also Iowa Cent. Ry. Co. v. Bacon*, 236 U.S. 305, 308 (1915) (holding that plaintiff could defeat removal by requesting only $1,990 in damages (at a time when

the jurisdictional threshold was $2,000), even though plaintiff's loss was $10,000).

Standard Fire questions (at 23 n.7) whether this principle extends to class actions. But this Court is familiar with the principle in the context of class actions. For example, *United States v. Hohri*, 482 U.S. 64 (1987), involved a putative class-action suit by 19 individuals (former internees or their representatives) against the United States. The named plaintiffs limited requested damages to $10,000 per claim in order to qualify for federal district court jurisdiction and avoid the claims court. *Id.* at 66 & n.1. This Court did not suggest any infirmity with that jurisdictional strategy. Similarly, in such cases as *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2548 (2011), and *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 622-23 & n.18 (1997), the Court has examined the class claims as framed by the named representatives without suggesting that it is the court's role to second-guess at the jurisdictional stage the litigation strategies of the named class representative.[4] Standard Fire's argument that a represen-

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[4] Numerous lower federal courts, both before and after CAFA, have recognized the named plaintiff as the master of the complaint for jurisdictional purposes. *See*, *e.g.*, *Garbie v. DaimlerChrysler Corp.*, 211 F.3d 407, 410 (7th Cir. 2000) (stating in a class-action case that "plaintiffs as masters of the complaint may include (or omit) claims or parties in order to determine the forum") (citing *Caterpillar*, 482 U.S. at 392); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 449 (7th Cir. 2005) (stating in a CAFA case that, "as master of the case, the plaintiff may limit his claims (either substantive or financial) to keep the amount in controversy below the threshold"); *Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 401, 407 (6th Cir. 2007); *Johnson v. Advance Am.*, 549 F.3d 932, 937 (4th Cir. 2008); *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 953 (9th Cir. 2009).

tative plaintiff "cannot be the master" of class claims prior to class certification (Pet. Br. 23 n.7) rests on the mistaken premise – refuted in Part II below – that a court, merely by considering an amount-in-controversy stipulation at the jurisdictional stage, somehow resolves absent class members' claims on the merits.

The longstanding nature of the "master of the complaint" principle undermines any suggestion that CAFA meant to displace it *sub silentio*. *See Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979). Moreover, here, Congress was not merely *silent*; rather, CAFA took its amount-in-controversy test from the traditional diversity statute, 28 U.S.C. § 1332(a). CAFA made a series of detailed modifications to the statutory scheme governing diversity jurisdiction, altering certain established rules but not others. Nothing in CAFA eliminates the representative plaintiff's role as master of the complaint or prevents a class plaintiff from "suing for less than the jurisdictional amount." *St. Paul Mercury*, 303 U.S. at 294. Indeed, the CAFA Report repeatedly cited *St. Paul Mercury*. *See* S. Rep. at 43 n.128, 70-71.

(b) Jurisdiction is determined on the basis of the plaintiff's pleadings at the time of removal

As Standard Fire concedes, CAFA incorporates the familiar diversity principle that "'the status of the case as disclosed by the plaintiff's complaint is controlling in the case of a removal.'" Pet. Br. 11-12 (quoting *St. Paul Mercury*, 303 U.S. at 291); *see also Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 390 (1998) ("[F]or purposes of removal jurisdic-

tion, we are to look at the case as of the time it was filed in state court – prior to the time the defendants filed their answer in federal court.").

Accordingly, at the jurisdictional stage, it is not relevant to the amount-in-controversy question whether the pleadings might be amended in the future or whether the stipulation might later be rejected, and class certification denied, by a hypothetical future ruling at the class-certification stage. Federal jurisdiction cannot be based on contingent future events. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003).

Therefore, if and when the named plaintiff moves to certify a class, absent class members (and the defendant) are free to argue that the manner in which the plaintiff has framed the claims is unreasonable, that the stipulation is a factor to consider in whether the plaintiff is an adequate class representative or the claims are typical of other class members, and that the stipulation violates the due process rights of absent class members. That is precisely the system practiced by trial courts today, which are able to consider the reasonableness of a stipulation as part of any objections to the plaintiff's adequacy of representation at the class-certification stage.[5]

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[5] *See Eufaula Drugs, Inc. v. ScripSolutions*, No. 2:05CV370-A, 2005 WL 2465746, at *6 (M.D. Ala. Oct. 6, 2005) ("While it may be that, by limiting the class recovery, [plaintiff] has raised issues as to its fitness to act as a class representative, those are questions to be resolved in the class certification stage and do not determine jurisdictional issues."); *Holcombe v. SmithKline Beecham Corp.*, 272 F. Supp. 2d 792, 797 (E.D. Wis. 2003) ("[C]oncern about a limitation on the value of claims may be addressed when the question of plaintiff's adequacy as a representative is considered."); *Kline v. Avis Rent A Car Sys., Inc.*, 66

(c) Doubts are resolved against removal

Any doubts about the meaning of CAFA should be resolved against federal jurisdiction under the long-standing principle that jurisdictional statutes are narrowly construed. *See Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 810 (1986). This Court has adopted a policy of "strict construction" of removal statutes because of "'[d]ue regard for the rightful independence of state governments.'" *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941) (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)). Hence, "statutory procedures for removal are to be strictly construed." *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002) (citing *Shamrock Oil* and *Healy*); *see also Holmes Group*, 535 U.S. at 832 ("our cases addressing removal require" "'[d]ue regard for the rightful independence of state governments'") (quoting *Shamrock Oil* and *Healy*); *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212 (1971) ("[W]e should proceed with caution in construing constitutional and statutory provisions dealing with the jurisdiction of the federal courts.").

Those interpretive canons flow from the bedrock principle that "[f]ederal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed

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F. Supp. 2d 1237, 1240 (S.D. Ala. 1999) (concern "applies solely to the issue of whether the class should be certified, and that issue does not arise until after the court determines it has subject matter jurisdiction"); *see also Quebe v. Ford Motor Co.*, 908 F. Supp. 446, 453 (W.D. Tex. 1995); *Four Way Plant Farm, Inc. v. National Council on Compensation Ins.*, 894 F. Supp. 1538, 1544 (M.D. Ala. 1995); *Hall v. ITT Fin. Servs.*, 891 F. Supp. 580, 582 (M.D. Ala. 1994).

that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted).

CAFA did not change that fundamental and longstanding rule. In *Hertz Corp. v. Friend*, 130 S. Ct. 1181 (2010), this Court reaffirmed in the CAFA context that "[t]he burden of persuasion for establishing diversity jurisdiction . . . remains on the party asserting it." *Id.* at 1194 (citing *Kokkonen*, 511 U.S. at 377; *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)).[6]

B. Standard Fire's Approach Would Destroy The Administrability Of The System Congress Intended In CAFA

Standard Fire's construction would violate the purposes of CAFA by creating an unworkable system that would vastly complicate jurisdictional inquiries. As this Court recognized in *Hertz*, which was a CAFA case, "administrative simplicity is a major virtue in a

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[6] *Amicus* Partnership for America urges (at 19) this Court to reject this settled principle in reliance on the "mandatory" view of federal jurisdiction expressed by Justice Story in dictum in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 328 (1816). It is too late in the day for such a radical change, which was rejected even by the First Congress. "Beginning with the Judiciary Act of 1789, Congress has never vested the federal courts with the entire 'judicial Power' that would be permitted by Article III." RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 276 (6th ed. 2009); *see also* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 275 (3d ed. 2000) ("[t]he Supreme Court has never endorsed Justice Story's argument").

jurisdictional statute." 130 S. Ct. at 1193. The Court explained:

> Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims. Complex tests produce appeals and reversals, encourage gamesmanship, and, again, diminish the likelihood that results and settlements will reflect a claim's legal and factual merits. Judicial resources too are at stake. Courts have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it. So courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case.
>
> Simple jurisdictional rules also promote greater predictability. Predictability is valuable to corporations making business and investment decisions. Predictability also benefits plaintiffs deciding whether to file suit in a state or federal court.

Id. (citations omitted). Accordingly, the Court "place[d] primary weight upon the need for judicial administration of a jurisdictional statute to remain as simple as possible." *Id.* at 1185-86; *see also id*. at 1194 (citing the benefit of "a clearer rule" and the need "to avoid overly complex jurisdictional administration"). This Court has frequently stressed the importance of keeping jurisdictional inquiries simple

and judicially administrable, rather than front-loading fact-intensive, merits-related issues.[7]

Standard Fire's approach contravenes that principle. If courts cannot rely on pleadings, stipulations, and other devices to resolve disputes about the amount in controversy, they will be forced to consider a host of merits questions, such as damages calculations, at the very outset of a case, prior to discovery or the development of any evidence. In many cases, assessing the amount in controversy could mean reviewing full-blown damages models and hearing testimony from dueling expert witnesses, a needlessly expensive and time-consuming endeavor for cases allegedly involving less than $5 million for the entire state-wide class. Such a system would run directly counter to the CAFA Report's promise that CAFA

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[7] *See*, *e.g.*, *Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in the judgment) (A jurisdictional boundary "'should . . . , if possible, be a bright line, so that very little thought is required to enable judges to keep inside it. If, on the contrary, that boundary is vague and obscure, raising "questions of penumbra, of shadowy marches," two bad consequences will ensue similar to those on the traffic artery. Sometimes judges will be misled into trying lengthy cases and laboriously reaching decisions which do not bind anybody. At other times, judges will be so fearful of exceeding the uncertain limits of their powers that they will cautiously throw out disputes which they really have capacity to settle, and thus justice which badly needs to be done will be completely denied. Furthermore, an enormous amount of expensive legal ability will be used up on jurisdictional issues when it could be much better spent upon elucidating the merits of cases. In short, a trial judge ought to be able to tell easily and fast what belongs in his court and what has no business there.'") (quoting ZECHARIAH CHAFEE, THE THOMAS M. COOLEY LECTURES, SOME PROBLEMS OF EQUITY 312 (1950) (in turn quoting *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 426 (1916) (Holmes, J., concurring))) (alteration in original).

"will simplify – not complicate – a court's jurisdictional inquiries." S. Rep. at 68; *see also Holmes Group*, 535 U.S. at 831-32 (rejecting jurisdictional interpretation that would "contravene the longstanding policies underlying our precedents," including that "the plaintiff is 'the master of the complaint,'" that would "radically expand the class of removable cases," and that would "undermine the clarity and ease of administration of the well-pleaded-complaint doctrine").

Standard Fire complains that Arkansas courts currently permit plaintiffs "to pursue expensive, far-ranging, and burdensome discovery" prior to briefing on class certification, Pet. Br. 14, but the evidence does not support that assertion, *see infra* Part III.C. In any event, if the problem were real, Standard Fire's approach would make the situation *worse*, as this case illustrates. In the district court below, respondent did not introduce his own amount-in-controversy calculations (Pet. Br. 7), but only because respondent's pleading and stipulation provided a clear guarantee that the $5,000,000 threshold could not be met. If this Court adopts Standard Fire's approach, however, plaintiffs will be forced to present competing jurisdictional calculations, and both plaintiffs and defendants will need to develop increasingly elaborate and detailed evidence regarding the amount in controversy. No longer will cases be able to proceed on the basis of an abbreviated and conclusory declaration of the kind that Standard Fire submitted here. *See* JA9a-11a. Rather, the defendant will be appropriately required to justify the data assumed in the declaration, to produce the documents relevant to its jurisdictional calculation, and to produce its declarant for deposition, so that the plaintiff has an

opportunity to respond to the defendant's calculation and present one of her own. Jurisdictional discovery could well consume months of activity and millions of dollars in fees and expenses, for both parties.

Moreover, attorneys' fees made up roughly one-third of Standard Fire's proposed amount in controversy, and those fees required an assessment of eight factors, such as the skill of counsel and the results obtained. *See infra* Part IV. Typically, the award of such fees is made at the very conclusion of a proceeding, by a trial judge who has grown familiar with the case and the efforts of counsel over time. Under Standard Fire's approach, a projected fee award will need to be made before the case has hardly started, in an exercise of pure guesswork.

There is no logical stopping point to Standard Fire's approach. 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. Named plaintiffs bringing putative class actions necessarily "limit" the recovery of the proposed class by, for example, picking and choosing which defendants to sue and which causes of action and elements of damages to include. According to Standard Fire, none of these decisions is "bind[ing]" on absent class members at the jurisdictional stage. Pet. Br. 10 ("[B]efore a class is certified, nothing Plaintiff says or does can diminish the rights of absent individuals."); *id.* at 32.

Under Standard Fire's test, a court would be required to reexamine every strategic and tactical decision by a named plaintiff in assessing the value of absent class members' claims – potential claims

that the named plaintiff did not assert, possible defendants the named plaintiff did not pursue, and so on. In this very case, Standard Fire challenges respondent's decision in his pleading to limit the class period to two years rather than five. *Id.* at 6 n.1. The reasonableness of that decision was not raised in Standard Fire's petition for a writ of certiorari and is not fairly included in the Question Presented. Nor does Standard Fire point to anything in the record to impeach the district court's finding that the decision to limit the class period was not made in bad faith. Pet. App. 14. But the very fact that Standard Fire seeks to second-guess at the removal jurisdiction stage respondent's decision with respect to the *class period* demonstrates the utter impracticality of Standard Fire's approach, which would place district courts in the untenable position of revisiting key strategic decisions made by a plaintiff simply to determine whether federal-court jurisdiction exists.

If a putative class representative's decisions in framing the complaint could be disregarded, a federal court could always speculate (for example) that an entirely hypothetical new class representative *might* assert a federal claim for the class (establishing federal-question jurisdiction) or *might* expand the class to meet the CAFA jurisdictional minimum. The result would be to enable defendants to remove to federal court virtually any class action filed in state court, forcing federal district courts to engage in complex factual inquires in addressing motions to remand. The litigation that would ensue over those actions is precisely the *opposite* of the clear jurisdictional rules this Court has generally favored. *See Hertz*, 130 S. Ct. at 1193.

C. CAFA's History Confirms That Congress Did Not Intend To Foreclose Class Representatives' Factual Stipulations As To The Amount In Controversy

Remarkably, although Standard Fire and its *amici* cite the legislative history of CAFA some 80 times in their multifarious briefs, they fail to present the Court with the most relevant portions of that history. In fact, the CAFA Report expressly approved of the courts' consideration of jurisdictional stipulations – *the very practice at issue here.* The Report observed that a putative class representative could enter into a *factual stipulation* on which a court could rely to make a jurisdictional determination: "[T]he Committee cautions that these jurisdictional determinations should be made largely on the basis of readily available information. . . . Less burdensome means (e.g., *factual stipulations*) should be used in creating a record upon which the jurisdictional determinations can be made." S. Rep. at 44 (emphasis added).[8]

The CAFA Report acknowledged the ability of putative class representatives to structure their complaints to avoid federal jurisdiction: "class counsel can limit the potential for removal as the case proceeds by defining the class to encompass only parties that were injured as of the date on which the

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[8] The CAFA Report's reference to "factual stipulations" refutes Standard Fire's argument regardless of whether the Committee intended to refer to unilateral stipulations by the plaintiff or to joint stipulations between both parties. In either case, Standard Fire would contend that a putative class representative, "before certification of a class," "has no authority" "to bind the putative class" and that any such stipulation is therefore "a nullity for jurisdictional purposes." Pet. Br. 3. The Report, however, rejects that position.

action was filed or only parties who are citizens of a certain state." *Id.* at 72. The Report recognized a named plaintiff's control over amount-in-controversy allegations: "if a plaintiff, through amendment or otherwise, increased the amount in controversy . . . a complaint filed in state court – and previously not subject to federal jurisdiction – could properly be removed." *Id.* at 71.

The Report explained that "questions arise in current practice on jurisdictional issues. Well-established law exists to resolve these questions, and [CAFA] does not change – or even complicate – the answers to these questions. In short, the 'rules of the road' on such issues are already established, and [CAFA] does not change them." *Id.* at 70.

D. Standard Fire's Construction Of CAFA Is Flawed

1. Standard Fire's textual argument has no merit

Standard Fire ignores the fact that the governing standard of CAFA's amount-in-controversy test – whether "the matter in controversy exceeds the sum or value of $5,000,000," 28 U.S.C. § 1332(d)(2) – was taken directly from the traditional diversity statute governing non-class actions, 28 U.S.C. § 1332(a). Instead, Standard Fire focuses on the portion of § 1332(d)(6) providing that "the claims of the individual class members shall be aggregated" to determine whether they exceed $5,000,000. Standard Fire erroneously contends that the term "claims" somehow prevents a court from considering a stipulation in assessing the value of the class claims. Pet. Br. 3, 8-9, 19-25. Standard Fire is incorrect, for several reasons.

(a) Standard Fire's focus on § 1332(d)(6) is misplaced

Standard Fire places more weight on § 1332(d)(6) than its language can bear. The thrust of § 1332(d)(6) is to abrogate *Zahn*'s holding that the claims of individual members of a putative class cannot be aggregated to satisfy the amount-in-controversy requirement. Given the narrow interpretation presumptively given to removal statutes, *see supra* Part I.A.2(c), a clear statement would be needed before the word "claims" in § 1332(d)(6) could be construed as eliminating the longstanding rule of diversity jurisdiction – that the plaintiff can avoid removal by asking for less than the jurisdictional amount. That rule, which is incorporated in both subsections (d)(2) and (d)(6) via the "the matter in controversy" language, is not countermanded by any language in § 1332(d)(6), let alone by any clear statement.

Indeed, the elimination of *Zahn*'s anti-aggregation rule in subsection (d)(6) strongly supports respondent's interpretation of the statute. By making the class-wide total of damages the relevant amount-in-controversy test, subsection (d)(6) makes a stipulation regarding that total precisely what a court should consider. *See supra* Part I.A.1. Thus, the CAFA Report refers to "aggregating damages," S. Rep. at 43, and explains that "it will be much easier to determine whether the amount in controversy presented by a purported class as a whole (that is, in the aggregate) exceeds $5 million than it is to assess the value of the claim presented by each and every individual class member," *id.* at 70.

In fact, Standard Fire followed just such an approach in the calculations in its notice of removal in this case. *See* Pet. App. 41-47; JA9a-11a. Standard Fire did not address individual class members' hypothetical "right to recovery" under applicable law, although it now urges the Court to adopt such an approach. Pet. Br. 23-24 (emphasis omitted). In the district court, Standard Fire considered rough-and-ready aggregate data in calculating the probable value of the class-wide claim. *See* JA9a-11a. Standard Fire conducted a search of two databases to conclude that payments to Arkansas policyholders, on an aggregate basis, totaled $15,274,806. *See* JA10a-11a. Standard Fire then multiplied the total by 20% to reflect the allegation in respondent's Complaint (Pet. App. 57) and Prayer for Relief (*id.* at 72) that the typical GCOP payment is "20% of the estimated job." *Id.* at 43.

Ironically, Standard Fire's calculation of the amount in controversy in this case violates its own legal standard. Standard Fire premised its calculation on respondent's allegation that the typical GCOP payment is 20% of the job, even though, under Standard Fire's own theory, such an allegation could not be binding on absent class members, who would be free to propose different percentages. Nor did Standard Fire inquire whether any members of the class had lost their "legal entitlement to relief" (Pet. Br. 24) because they had already received compensation for GCOP as part of their insurance payments. Standard Fire's inconsistency implicitly demonstrates its own understanding of the relevance of a plaintiff's pleadings in calculating the amount in controversy.

(b) Standard Fire's interpretation of "claims" is flawed

Standard Fire unpersuasively attempts to draw a distinction between class members' hypothetical "right to recovery" and "the amount actually sought in recovery." Pet. Br. 23-24 (emphases omitted). A plaintiff's pleading (including any attached stipulation) affects *both* her "legal entitlement to relief" and "monetary demand." *Id.* at 24. Respondent in this case is not using a pleading or stipulation "to alter the aggregated total" of the claims. *Id.* at 9. Rather, the "claims" to be aggregated will be *defined* by the named plaintiff's complaint and pleading, including any attached stipulation. *See supra* note 4 (collecting authority demonstrating that the named plaintiff is the master of the class complaint for jurisdictional purposes).

Congress used the term "claims" in 28 U.S.C. § 1332(d)(6), not "potential claims." The absent class members' "claims" for jurisdictional purposes are exactly what the complaint says they are. If Congress had meant to make amount in controversy turn on the hypothetical "right to recovery" (Pet. Br. 9, 23 (emphasis omitted)), it would have said so. As Standard Fire ultimately concedes, the value of the class members' claims must be "determined by the class definition and allegations in Plaintiff's complaint at the time of removal." *Id.* at 11. For purposes of the amount-in-controversy inquiry, the "claims" of class members do not have some sort of transcendental existence, separate and apart from the actual pleadings.

Moreover, Standard Fire erroneously attempts to detach the stipulation and other features of the

complaint from the class members' "claims." The familiar rule, of course, is that stipulations and other exhibits attached to a complaint become part of the pleading for all purposes. *See*, *e.g.*, *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 608 n.3 (2003). Hence, the stipulation is a *constituent element* of the claims.

Standard Fire mis-cites (at 24-25) *United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723 (2011), in arguing that CAFA's use of the term "claims" excludes consideration of a plaintiff's requested monetary demand. On the contrary, *Tohono* stated that "'[c]ause of action' is the more technical term, while 'claim' is often used in a commonsense way to mean a right or *demand*." *Id.* at 1728-29 (emphasis added). It noted that the term "claim" in the Little Tucker Act "refers only to requests for money." *Id.* at 1728 (citing *United States v. Jones*, 131 U.S. 1 (1889)). And it referred to *Keene Corp. v. United States*, 508 U.S. 200 (1993), as holding that whether there is "some overlap in *the relief requested*" is germane to determining when "two suits are for or in respect to the same claim." 131 S. Ct. at 1727 (emphasis added; internal quotation marks omitted).

Standard Fire also cites (at 21) 28 U.S.C. § 1446(c)(2), enacted as part of the Federal Courts Jurisdiction and Venue Clarification Act of 2011 ("JVCA"), Pub. L. No. 112-63, 125 Stat. 758, but the JVCA does not apply to removals under CAFA, *see* Hartford Br. 6 n.2, and the JVCA proves the opposite of what Standard Fire claims.[9]

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[9] New 28 U.S.C. § 1446(c)(2) provides an exception in ordinary diversity cases to the usual rule that "the sum demanded in good faith in the initial pleading shall be deemed to be the

(c) The complaint meets Standard Fire's interpretation

In any event, the complaint in this case satisfies even Standard Fire's interpretation of CAFA. The pertinent language in respondent's complaint provides, as part of the class members' claims, that the "right to recovery" (as used in Pet. Br. 23-24) is limited to $5,000,000 for all members of the class. The body of the complaint states that "the total aggregate damages of the Plaintiff and all Class Members" are less than $5,000,000. Pet. App. 60. The Prayer for Relief and attached Stipulation are limited to these amounts as well. *Id*. at 72-73, 75. In Standard Fire's parlance, the pleadings show that "the aggregated total of the *individual* class members' claims" (Pet. Br. 12) is less than $5,000,000.

2. Standard Fire misreads CAFA's legislative history

Standard Fire and its *amici* cite snippets of CAFA's legislative history but ignore the passages expressly approving of jurisdictional stipulations. Pet. Br. 27-28. The cited snippets do not support Standard Fire. For example, Standard Fire refers to a passage

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amount in controversy," and § 1446(c)(2) allows a defendant to assert an amount in controversy in the notice of removal where a plaintiff's initial pleading seeks non-monetary relief or a money judgment in instances where the state practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded. The Committee Report states that the JVCA was enacted because "[j]udges believe the current rules force them to waste time determining jurisdictional issues at the expense of adjudicating underlying litigation." H.R. Rep. No. 112-10, at 1-2 (2011). Standard Fire's approach would frustrate this objective, whereas respondent's position fulfills the purposes that Congress sought to achieve in the JVCA.

in the CAFA Report referring to state courts allowing "'lawyers to "game" the procedural rules.'" *Id.* at 10 (quoting S. Rep. at 4). But Standard Fire improperly truncates the quotation from the Report, which actually refers to courts allowing "lawyers to 'game' the procedural rules and keep *nationwide or multi-state* class actions in state courts." S. Rep. at 4 (emphasis added). This case does not involve a nationwide or multi-state class action, nor does it involve a suit seeking astronomical damages whose very pendency creates settlement pressure on a defendant. The class here is not the kind that Congress believed belonged in federal court. Indeed, Standard Fire also overlooks the fact that CAFA originally included a $2,000,000 amount-in-controversy requirement, but Congress increased the threshold to $5,000,000 after the CBO reported that most class-action lawsuits would likely satisfy the $2,000,000 requirement. *See supra* p. 5. Standard Fire's interpretation would lead to the problem that amendment sought to avoid, enabling defendants to flood the federal courts with small-dollar, state-specific class actions.[10]

Contrary to petitioner's assertion, the stipulation here is not an example of a "pre-CAFA tactic[]." Pet. Br. 19. Rather, the CAFA Report makes clear that the problem with pre-CAFA stipulations was that, under *Zahn*, federal jurisdiction was lacking if no class member's damages exceeded $75,000, even if

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[10] Although precise data are not available, researchers at the Federal Judicial Center have estimated that approximately 5,000 class actions per year are filed in state courts. *See* Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. Pa. L. Rev. 1723, 1741-42 (2008).

the total amount at stake ran into the millions or even billions of dollars. *See* S. Rep. at 11 ("This leads to the nonsensical result under which a citizen can bring a 'federal case' by claiming $75,001 in damages for a simple slip-and-fall case against a party from another state, while a class action involving 25 million people living in all fifty states and alleging claims against a manufacturer that are collectively worth $15 billion must usually be heard in state court (because each individual class member's claim is for less than $75,000).").

Congress addressed that issue by creating a $5,000,000 jurisdictional amount in controversy, not by prohibiting the consideration of stipulations in the jurisdictional inquiry. If Congress had wanted to provide that a class-action complaint seeking $4,999,999 in damages satisfied federal jurisdictional requirements, it could have said so. A plaintiff does not "game" the system by suing for less than the specified jurisdictional threshold, any more than a driver "cheats" the traffic laws by driving 1 MPH under the speed limit. The nature of a bright-line jurisdictional threshold is that a complaint under the requisite amount does not trigger jurisdiction, whether the difference is $1 or $1,000,000.

II. A COURT'S CONSIDERATION OF A NAMED CLASS PLAINTIFF'S PLEADINGS AND ATTACHED STIPULATION DOES NOT OFFEND DUE PROCESS

A. Standard Fire Ignores The Nature Of Jurisdictional Facts

A court's determination of jurisdictional facts at the outset of a case does not resolve the merits of absent class members' claims. In *Jerome B. Grubart,*

Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995), for example, this Court rejected the argument that "the truth of jurisdictional allegations must always be determined with finality at the threshold of litigation." *Id.* at 537; *see also Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 285 (1993) (distinguishing between merits of claim and jurisdictional determination); *Bell v. Hood*, 327 U.S. 678, 682-83 (1946) (same).

Therefore, as with any jurisdictional inquiry, the amount-in-controversy determination is not a merits decision and does not adjudicate the merits of the claims of absent class members. Indeed, under the prior rule of *Zahn*, courts looked to the claims of unnamed class members in determining the jurisdictional amount, without causing any due process problems.[11] Standard Fire's own *amicus* admits that "the amount in controversy is merely an estimate at the beginning of the case." Hartford Br. 3.

Standard Fire insists, implausibly, that it seeks to vindicate the due process interests of absent class members. Citing *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), Standard Fire contends that, prior to class certification, a named plaintiff "has no authority to diminish the rights" of absent class members. Pet. Br. 3. That argument misconstrues the nature of the amount-in-controversy determination at the jurisdictional stage. There is no potential "deprivation" of property (within the meaning of this Court's

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[11] In *Zahn* itself, the district court relied on *St. Paul Mercury*, 303 U.S. at 288-89, and looked to the "allegations" of "the named plaintiffs" in ascertaining whether absent class members could satisfy the amount in controversy. *Zahn v. International Paper Co.*, 53 F.R.D. 430, 431 (D. Vt. 1971), *aff'd*, 469 F.2d 1033 (2d Cir. 1972), *aff'd*, 414 U.S. 291 (1973).

procedural due process jurisprudence) until after class certification, when class counsel is authorized to make binding decisions that have an impact on absent class members. No due process violation can occur at the jurisdictional stage because there is no constitutionally cognizable "deprivation" of property or liberty. *See American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999) ("The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'").

B. Standard Fire Erroneously Asserts That Absent Class Members Must Be Regarded As "Nonparties" For All Purposes

Standard Fire insists that absent class members must be treated strictly as "nonparties" prior to certification. Pet. Br. 30. Both CAFA and this Court's precedents reject Standard Fire's absolutist view. The CAFA Report explained that "the critics allege that there is an absolute bar on considering unnamed class members to be 'parties' to a purported class action." S. Rep. at 72. "[The premise of this challenge – that unnamed class members cannot be deemed parties to an action – is flatly inconsistent with the fact that in a variety of contexts over the years, federal court[s] have treated unnamed class members as parties to class actions." *Id.*; *see also id.* at 72-73 (citing, as examples of other instances where courts have treated unnamed class members as "parties" for certain purposes, *Zahn*, *supra*; *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 550-51 (1974) (holding that a putative class action tolls the statute of limitations as to all unnamed class members, because "the claimed members of the class stood as parties to the suit until and

unless they received notice thereof and chose not to continue"); and *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002) (unnamed class members are considered "parties" for purposes of mounting an appeal)).

The CAFA Report explained that CAFA treats "unnamed class members [as] 'parties' to the litigation for purposes of the 'minimal diversity' jurisdictional requirement." *Id.* at 73. The Report states that "such a congressional determination about who is a class action 'party' would be wholly consistent with long-standing practice. For years, Congress and the courts have made practical determinations about how various categories of parties should be treated in assessing compliance with diversity jurisdiction prerequisites and specifically about the circumstances in which unnamed class members should be treated as parties to a lawsuit. The enactment of the 'minimal diversity' provisions of [CAFA] would be merely another such practical determination . . . that for purposes of the 'minimal diversity' jurisdictional inquiry established by the legislation, unnamed class members (as well as any named class members) shall be considered 'parties.'" *Id.*

Smith v. Bayer Corp., on which Standard Fire relies, is inapposite. It did not involve a stipulation or subject-matter jurisdiction under CAFA. Rather, *Smith* concerned a federal-court injunction ordering a West Virginia state court not to consider a motion for class certification filed by plaintiffs who had previously been absent class members in a Minnesota federal-court action that had denied class certification. This Court held that the injunction was improper under the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283. *Smith*

thus involved the ability of an absent class member to relitigate (in a *subsequent* action) a certification question previously resolved by a different court.

The instant case is different. This case involves a question of removal under CAFA, not a decision after the denial of certification to enjoin a subsequent state-court proceeding in light of the Anti-Injunction Act. The fact that no class-certification motion has been brought here is *just the point*: at this stage, the stipulation will have no impact on the merits of absent class members' claims. It will merely be considered for purposes of determining the amount in controversy for removal at this time. *See* Pet. App. 27.

III. STANDARD FIRE'S REMAINING ARGUMENTS LACK MERIT

A. Well-Settled Principles Of Law Would Prevent The "Abuses" Predicted By Standard Fire And Its *Amici*

Standard Fire and its *amici* raise the specter of potential abuses, but their arguments have no basis in reality. Standard Fire cannot cite a single case, in Arkansas or elsewhere, where a named plaintiff who had stipulated to less than $5,000,000 in class-wide damages was nonetheless subsequently: (i) awarded more than $5,000,000 by a court judgment, or (ii) permitted to amend the pleadings even to seek such a sum. The "abuses" and risks of which Standard Fire and its *amici* complain are entirely hypothetical and find no support in reality. In fact, settled legal principles would prevent any misconduct.

1. Stipulations protect defendants

The $5,000,000 threshold prevents class actions from having an "in terrorem" effect (Pet. Br. 15 (internal quotation marks omitted)) or operating as "judicial blackmail" (Mfrd. Housing Inst. Br. 6 (internal quotation marks omitted)). The amount at stake is limited. Standard Fire suggests that a plaintiff could amend a pleading or stipulation, post-removal, to seek additional damages in excess of the jurisdictional threshold. Pet. Br. 27-28. But CAFA eliminates the requirement that cases must be removed within one year of filing. *See* 28 U.S.C. § 1453(b). Accordingly, a defendant would have the opportunity to see a federal forum if the class action ever sought more than $5,000,000 in damages. Similarly, if a future court ever ruled that a stipulation was not binding on absent class members as a matter of due process, enabling a different class representative to pursue claims for different relief and different amounts in controversy, then a defendant would be free to invoke CAFA at that time.[12]

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[12] The district court also found that judicial estoppel under state law would prevent subsequent amendment, Pet. App. 11, as even Standard Fire ultimately concedes. Pet. Br. 32 n.8; *see also* 21st Century Br. 6 n.5; Hartford Br. 13. An Arkansas statute specifically makes a stipulation binding with respect to the amount in controversy. *See* Ark. Code Ann. § 16-63-221(b). Although the statute permits amendments subject to the Arkansas Rules of Civil Procedure, a court has the power to strike an amendment if it "determines that prejudice would result or the disposition of the cause would be unduly delayed because of the filing of an amendment." Ark. R. Civ. P. 15(a). In addition, the district court considered and rejected the suggestion that the stipulation's language would permit "accepting" (Defense Research Inst. Br. 5 ("DRI Br.")) more than $5,000,000 in damages. *See* Pet. App. 10-11.

Where a stipulation or other device is unenforceable as a matter of state law, it need not be considered in the amount-in-controversy calculation. *See* Hartford Br. 2, 4; DRI Br. 9. But the possibility of state-by-state variations in the enforceability of stipulations is not a troubling one. "The general rule, 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.'" *Howlett v. Rose*, 496 U.S. 356, 372-73 (1990) (citation omitted).

2. Plaintiffs cannot stipulate at "whim"

The Chamber of Commerce ominously but erroneously warns that a plaintiff might stipulate at 5 cents on the dollar or at "unreviewable whim." Chamber Br. 14. A plaintiff's role as master of the complaint is not unlimited. In *St. Paul Mercury*, the Court opined that a plaintiff's pleaded amount in controversy would control only if it were made "in good faith." 303 U.S. at 288. In addition, of course, Federal Rule of Civil Procedure 11 and similar provisions impose sanctions on parties and attorneys who make allegations with no reasonable basis.

Accordingly, courts already have ample authority to ignore (even for jurisdictional purposes) a stipulation or an aspect of a plaintiff's pleading that is made in bad faith or that reflects wildly implausible factual assumptions. Thus, the district court in the instant case inquired into whether plaintiff's allegations were made in "bad faith," but concluded that they were not. Pet. App. 14.

Given the facts of this case, that conclusion was plainly correct. Standard Fire itself calculated the amount in controversy as barely exceeding (by a mere $24,150) the $5,000,000 CAFA jurisdictional

threshold (*id.* at 8), using its own internal business data that were not available to respondent when he filed his complaint. Standard Fire's accusation that respondent's conduct is somehow evidence of "abuse[]" (Pet. Br. 12) rings completely hollow in light of the miniscule discrepancy between respondent's stipulation and Standard Fire's calculation. Moreover, Standard Fire itself calculated the expected damages for the class as just $3,054,961 – far below the CAFA jurisdictional threshold. Standard Fire was able to reach the requisite $5,000,000 threshold only by making a series of questionable assumptions, including that class counsel would receive a 40% attorneys' fee, that the fee would be computed on the basis of two years' worth of prejudgment interest, and that the court lacked the authority to order a lower amount in attorneys' fees to ensure that the total amount in controversy did not exceed $5 million. *See infra* Part IV.

B. Standard Fire Does Not Accurately Describe The Arkansas Class-Action System

This case requires this Court to adopt a nationwide interpretation of CAFA, but Standard Fire and its *amici* proceed as though this case is really a referendum on Arkansas and the Miller County courts. They caricature the Arkansas judiciary as a lawless system run amok and ask this Court to bend a federal statute to address this supposed local problem.

Their plea is misplaced and the caricature insulting. This Court has recognized that a state judiciary is free to operate according to its own rules of civil procedure, even where a state has adopted a verbatim version of federal Rule 23. *See Smith*, 131 S. Ct. at 2377 ("Federal and state courts, after

all, can and do apply identically worded procedural provisions in widely varying ways."). Of course, no state may depart from due process requirements, but there cannot be any serious suggestion of such an issue here. "A State's interest in regulating the work load of its courts . . . certainly suffices to give it legislative jurisdiction to control the remedies available in its courts." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730 (1988).

Standard Fire distorts Arkansas precedent when it asserts that the Arkansas Supreme Court "'does not require a rigorous analysis'" of class certification. Pet. Br. 16 (quoting *Farmers Union Mut. Ins. Co. v. Robertson*, 2010 Ark. 241, at 10, 370 S.W.3d 179, 186 (Ark. 2010)). Arkansas law "allows class actions to be certified first when there are predominating threshold issues of liability common to the class, even though there may be individualized issues that come later requiring either the creation of subclasses or decertification altogether." *Farmers Union*, 2010 Ark. 241, at 17, 370 S.W.3d at 189. The Arkansas Supreme Court has explained that a "'certify now, decertify later' approach to class-action litigation" is "fair to both sides." *Id.* at 15-16, 17, 370 S.W.3d at 188-89 (internal quotation marks omitted). "[E]ven if the trial court eventually decides that individual claims have to splinter in bifurcated proceedings, resolution of the issue of wrongful conduct common to all class members can achieve real efficiency as a starting point. We also note that there is a real benefit to the [defendants] in a class action in that they have the opportunity to nip multiple claims in the bud with common defenses." *Id.* at 17, 370 S.W.3d at 189 (internal quotation marks omitted). In the second phase of the bifurcated approach, defen-

dants may present whatever individualized defenses they choose. *See*, *e.g.*, *SEECO, Inc. v. Hales*, 954 S.W.2d 234, 241 (Ark. 1997) (defendants may "present individual defenses subsequently").

The Arkansas approach is not a blank check for class action, and the state courts deny certification where no common, overarching issues exist to ensure class cohesion and predominance. In *Union Pacific Railroad v. Vickers*, 209 Ark. 259, at 15-21, 308 S.W.3d 573, 581-83 (Ark. 2009), and *Arthur v. Zearley*, 895 S.W.2d 928, 936 (Ark. 1995), for example, the state supreme court reversed trial-court certification orders on the ground that individualized questions prevented the satisfaction of the predominance requirement. *See also Faigin v. Diamante*, 2012 Ark. 8, 2012 WL 89978 (Ark. Jan. 12, 2012) (affirming denial of class certification); *Simpson Hous. Solutions, LLC v. Hernandez*, 2009 Ark. 480, 347 S.W.3d 1 (Ark. 2009) (affirming order that held one subclass appropriate for class certification but denied certification of another subclass); *Baptist Health v. Haynes*, 240 S.W.3d 576, 582-83 (Ark. 2006) (reversing trial court order that failed to analyze certification issues adequately); *Mittry v. Bancorpsouth Bank*, 200 S.W.3d 869, 871 (Ark. 2005) (affirming the denial of class certification for failure to meet predominance and other factors); *Williamson v. Sanofi Winthrop Pharm., Inc.*, 60 S.W.3d 428, 434-35 (Ark. 2001) (same); *Baker v. Wyeth-Ayerst Labs. Div.*, 992 S.W.2d 797, 800-02 (Ark. 1999) (affirming denial of certification for failure to meet predominance factor).

The Arkansas courts also enforce adequacy-of-representation requirements. *See*, *e.g.*, *Advance Am. Servicing of Arkansas, Inc. v. McGinnis*, 2009 Ark. 151, at 5-6, 300 S.W.3d 487, 491 (Ark. 2009)

(summarizing factors governing adequacy standard); *Farm Bureau Policy Holders & Members v. Farm Bureau Mut. Ins. Co. of Arkansas, Inc.*, 984 S.W.2d 6, 15 (Ark. 1998) (finding that class representative could not adequately represent certain members of the class).

The Arkansas Supreme Court has instructed that trial courts must set forth their findings regarding adequacy of representation in order to permit meaningful review. *See BNL Equity Corp. v. Pearson*, 10 S.W.3d 838, 844-45 (Ark. 2000). "When reviewing a class-certification order, [the state court] focus[es] on the evidence contained in the record to determine whether it supports the circuit court's conclusion regarding certification." *Asbury Auto. Group, Inc. v. Palasack*, 237 S.W.3d 462, 465 (Ark. 2006).

Standard Fire cites (at 16) *DIRECTV, Inc. v. Murray*, 2012 Ark. 366, 2012 WL 4712206 (Ark. Oct. 4, 2012), but it misquotes the opinion. In fact, *DIRECTV* expressly acknowledged that individual issues may defeat predominance in the absence of sufficient common questions. *Id.* at 16, 2012 WL 4712206, at *9 (citing *Union Pacific Railroad v. Vickers* and *Arthur v. Zearley*, "two cases in which [the Arkansas Supreme Court] held that the predominance requirement had not been satisfied due to individual issues"). Standard Fire also cites (at 16) *General Motors Corp. v. Bryant*, 285 S.W.3d 634 (Ark. 2008), where the Arkansas Supreme Court upheld, under an abuse-of-discretion standard, a trial court's certification order that factual variations among class members' claims did not preclude a finding of predominance. The trial court found that "individual determinations relating to right to recovery or damages . . . pale in comparison to the

common issues surrounding GM's alleged defectively designed parking brake and cover up." *Id.* at 642. Standard Fire and its *amici* may disagree with that finding, but such disagreement is hardly a basis for construing CAFA or for insinuating that the Arkansas judiciary operates in a lawless fashion.

C. Standard Fire Misstates Class-Action And Discovery Practice In Miller County

Standard Fire and its *amici* assert that CAFA-evading stipulations are rampant in Arkansas state courts, particularly in Miller County, and they complain of burdensome discovery orders. However, they cannot point to anything in CAFA or its history that would make state-court *discovery orders* a proper factor in construing the amount-in-controversy provision.

Nor does the evidence bear out the accusations. For example, Standard Fire and its *amici* repeatedly cite Nan S. Ellis, *The Class Action Fairness Act of 2005: The Story Behind the Statute*, 35 J. LEGIS. 76, 93 n.115 (2009), for the proposition that Miller County is a "judicial hellhole[]." Yet the very footnote they cite in fact disproves their allegation:

- "The hellhole label persists in spite of the fact that empirical research tends to debunk the industry complaints." *Id.* (internal quotation marks omitted).
- "[T]he use of the term is 'catchy' and . . . the point of the hellhole campaign is not to create[] an accurate snapshot of reality. The point of the hellhole campaign is to motivate legislators and judges to make law that will favor repeat corporate defendants." *Id.* (internal quotation marks omitted).

- "[B]y sheer repetition these claims have gained some credibility . . . . [I]f you repeat something often enough, people will come to treat it as general knowledge." *Id.* (internal quotation marks omitted).

One *amicus* calculates 26 class-action settlements in Miller County since 2004. *See* Ctr. for Class Action Fairness Br. 9-10 ("CCAF Br."). In fact, the clerk's office of the Miller County Circuit Court has reported that only a total of 28 class actions have been *filed* in that court since 2000, or fewer than 2.5 per year. *See* Addendum B. In the end, Standard Fire and its *amici* admit that "it is difficult to get reliable data on class action settlements in state court." CCAF Br. 11. Settlements are confidential and "remain under seal." Pet. Br. 15.

Standard Fire's claim of burdensome discovery ignores the remedies available under Arkansas law. Arkansas Rule of Civil Procedure 26(c) specifically allows a party to move for a protective order on the ground of "undue burden or expense." Parties reluctant to move to quash discovery for fear of jeopardizing personal jurisdiction defenses can simply refuse to comply with discovery requests that they believe to be unreasonable and force plaintiffs to file a motion to compel under Rule 37. In response to that motion, the defendants can detail their objections.

Although Standard Fire's *amici* complain about the lack of interlocutory review of Arkansas discovery orders, *see* Mfrd. Housing Inst. Br. 11; 21st Century Br. 4, the materials they cite reveal that the Arkansas Supreme Court does intervene in discovery

disputes.[13] *See also Cooper Tire & Rubber Co. v. Phillips County Circuit Court*, 2011 Ark. 183, at 10, 2011 WL 1587755, at *6 (Ark. Apr. 28, 2011) (granting writ of certiorari in discovery dispute and opining that "[t]he circuit court grossly abused its discretion in this instance"). Further, interlocutory review of discovery orders is typically unavailable in federal court. *See Cheney v. United States Dist. Court for Dist. of Columbia*, 542 U.S. 367, 381 (2004).

An Arkansas cost-bond statute is available to protect a defendant's out-of-pocket costs stemming from discovery.[14] The very Arkansas scheduling orders cited by Standard Fire's *amici* show that hearing dates for motions to dismiss based on lack of personal jurisdiction, insufficiency of process, insufficiency of service of process, improper venue, and forum non conveniens, are set well in advance (by six months) of hearings on class certification. *See* 21st Century Br. App. 6a-9a.

Even on its own terms, Standard Fire's story is full of holes. The "crushingly expensive" (Mfrd. Housing Inst. Br. 16) and "mountainous discovery" (21st Century Br. 8) of which Standard Fire's *amici* complain turns out to be discovery requests on the order of "131 interrogatories, 189 requests for production of documents," and a request for a physical inspection of defendants' data systems. *Id.* at 18. Another case involved "185 interrogatories, 385 document requests,

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[13] *See* Michelle Massey, *Sanctioned Insurance Company Petitions Arkansas Supreme Court*, Southeast Texas Record, Dec. 29, 2009 (*cited in* Mfrd. Housing Inst. Br. 16).

[14] *See* Michelle Massey, *Farmers Seeks Bond To Cover Discovery Costs in Arkansas Class Action,* Southeast Texas Record, Feb. 25, 2010 (*cited in* Mfrd. Housing Inst. Br. 13).

and 86 requests for admission." Chamber Br. 23. A third concerned discovery expenses of "$1.45 million." *Id.* at 24 n.10. Quite simply, it is not plausible for Standard Fire's *amici* – who have spared little expense in filing more than a dozen *amici* briefs before this Court in this case – to claim that they have been coerced by such requests into settlements of "$100 million" or more. *Id.* at 21.

Standard Fire and its *amici* repeatedly cite one proceeding that they claim involved a defendant potentially facing $45,000,000 in discovery costs. *See* Michelle Massey, *'Failure To Communicate' Could Lead to $45 M in Discovery Costs*, Southeast Texas Record, Aug. 8, 2007 (*cited in* Pet. Br. 14); Michelle Massey, *Class Counsel Attempts To Disqualify Defense Attorney in Foremost Insurance Case*, Southeast Texas Record, Mar. 13, 2008 (*cited in* Mfrd. Housing Inst. Br. 13, 14). Yet the cited news articles make clear that the "$45 million" figure was Foremost Insurance's own self-serving estimate, that Foremost had previously refused a streamlined approach proposed by the plaintiffs, and that it served the plaintiffs with discovery requests that they believed to be equally burdensome. The 2007 article also reveals that the Miller County Circuit Court urged the parties to resolve their discovery dispute and warned both of them that the court opposed practices "that would drag out the proceedings and drive up the cost of litigation." In the end, there is no indication that Foremost actually spent $45,000,000, or anything like it.

Other defendants ignore their own role in triggering discovery disputes. Farmers Insurance insisted on defending an action on a plaintiff-by-plaintiff basis, without use of statistical sampling, but then

complained of excess costs when the plaintiffs sought production of each claim file that would have formed a basis of Farmers' defense. *See* 21st Century Br. 21-23.

In short, Standard Fire's partisan criticisms of Miller County provide no basis to adopt its construction of CAFA.

D. The Court Should Not Consider Standard Fire's New Argument About The Burden Of Proof At The Jurisdictional Stage

Standard Fire argues that the district court erred in relying on the Eighth Circuit's legal framework that puts the burden initially on the removing defendant to prove the amount in controversy by a preponderance of the evidence and then (if that initial burden is met) allows a plaintiff to rebut the showing by using a stipulation to establish the absence of the requisite jurisdictional amount. Pet. Br. 35-36. This argument is waived, because Standard Fire proposed exactly such an approach to the district court below. *See* Pet. App. 41-42. Nor is the point fairly included within the Question Presented, which does not refer to the standard of proof or burden-shifting framework by which a court should analyze the amount in controversy. In any event, the Eighth Circuit's approach is the majority rule, as Standard Fire's own *amicus* concedes. *See* DRI Br. 10 n.3.

Standard Fire also contends that a stipulation cannot supply the requisite assurance to defeat removal jurisdiction. Pet. Br. 10-11, 36-38. This contention relies on Standard Fire's previous (defective) arguments. The short answer is that, at the time of removal (which is the relevant time for assessing the jurisdictional amount), a stipulation *does* provide

sufficient assurance to overcome a defendant's amount-in-controversy showing, and the hypothetical possibility of a subsequent change to the stipulation cannot be used to create federal jurisdiction. As Standard Fire's own *amicus* acknowledges, "[t]he form and content of purported recovery limitations can be decisive as to . . . whether it is legally impossible for the putative class to recover $5 million." Hartford Br. 14. Further, Standard Fire ignores the body of respondent's complaint, as well as the prayer for relief, which limited damages below the jurisdictional threshold regardless of the stipulation.

In addition, Standard Fire misstates the relative burdens of the parties. This Court has already opined in the CAFA context that "[t]he *burden of persuasion* for establishing diversity jurisdiction . . . remains on the party asserting it." *Hertz*, 130 S. Ct. at 1194 (emphasis added). The Court held that the removing party's burden will be satisfied only by "competent proof" of the jurisdictional facts in question. *Id.* at 1194-95. By using the term "burden of persuasion," this Court indicated that the removing defendant bears the burden throughout the proceeding, as eight circuits have held under CAFA. *See Amoche v. Guarantee Trust Life Ins. Co.*, 556 F.3d 41, 48 (1st Cir. 2009) ("[T]he burden of showing federal jurisdiction is on the defendant removing under CAFA. This is also the conclusion reached by the seven other circuits that have considered this issue.") (citing *Strawn v. AT&T Mobility LLC*, 530 F.3d 293, 298 (4th Cir. 2008) (compiling cases)) (internal citation omitted).

E. This Court Should Not Consider New Arguments By Petitioner's *Amici*

Petitioner's *amici* propose numerous arguments that Standard Fire does not advance, that were not raised below, and that are not fairly included within the Question Presented. "[T]his Court does not decide issues raised by *amici* that were not decided by the court of appeals or argued by the interested party." *Reno v. Koray*, 515 U.S. 50, 55 n.2 (1995) (citing cases); *see also Dickerson v. United States*, 530 U.S. 428, 444 n.8 (2000). Even so, the arguments have no merit.

Some *amici* complain that jurisdictional stipulations will lead absent class members to opt-out or mount collateral attacks to class-action settlements and deprive defendants of the benefits of res judicata. *See* 21st Century Br. 7-8; Wash. Legal Found. Br. 6, 13 ("WLF Br."); DRI Br. 19-31; Chamber Br. 25-28. Even if such secondary effects were a proper basis for interpreting CAFA, the supposed problem is a fiction. Any decision that a named plaintiff makes – what parties to sue, what claims to bring, and so on – could in theory lead an absent class member to opt-out and pursue his or her own claim. Far from disfavoring this process, Rule 23(b)(3) facilitates it. There is no more reason to disallow a jurisdictional stipulation on this basis than any other strategic choice by a named plaintiff. By definition, a stipulation can have no effect unless and until a court finds that it is not made in bad faith (at the jurisdictional stage) and that it does not render a named plaintiff an inadequate representative (at the class-certification stage). Court approval of settlements is also required for certified class actions in any state (such as Arkansas) that follows a version of federal

Rule 23. Tellingly, *amici*'s position here contradicts their earlier positions before this Court that collateral attacks are barred by res judicata.[15]

Amici Alabama *et al.* stress the need for state officers to have the opportunity to challenge the fairness of any proposed class-action settlements under CAFA. Alabama Br. 1, 21-28. But every state already has the ability to craft rules governing the approval of class-action settlements in its own courts, and indeed the Alabama brief stresses the legislative measures taken by many jurisdictions. *Id.* at 9-13. There is no need to distort the meaning of CAFA to provide federal jurisdiction simply to allow state attorneys general to appear in federal court, when those officers have the ability to appear in state courts.

Alabama also contends that multi-state class actions improperly allow one state court to impose its views extraterritorially. *Id.* at 14-21. The instant case involves a single-state action limited to a plaintiff class composed solely of Arkansas residents. Thus, the shoe is on the other foot: here, Alabama seeks to dictate to Arkansas the procedures it should use in its own courts. Moreover, Alabama's objection is not limited to the concept of a jurisdictional stipu-

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[15] *See* Br. for Petitioners at 18, *Dow Chem. Co. v. Stephenson*, 539 U.S. 111 (2003) (per curiam) (No. 02-271), 2002 WL 31914663 ("[B]arring respondents from relitigating adequacy of representation is fully consistent with the requirements of due process."); Br. for The American Ins. Ass'n, National Ass'n of Mfrs., and Chamber of Commerce of the United States, *Dow Chem. Co. v. Stephenson*, *supra* (No. 02-271), 2002 WL 31886866; Br. for Defense Research Inst., *Dow Chem. Co. v. Stephenson*, *supra* (No. 02-271), 2002 WL 31886878; Br. of Wash. Legal Found., *Dow Chem. Co. v. Stephenson*, *supra* (No. 02-271), 2002 WL 31886893.

lation. It seeks a more fundamental change in the law – a ban on multi-state class actions – that Congress did not adopt in CAFA.[16]

IV. AT MINIMUM, A STIPULATION IS ENFORCEABLE TO THE EXTENT IT LIMITS ATTORNEYS' FEES

Even if this Court were to accept Standard Fire's approach to determining the amount in controversy under CAFA, this Court should make clear that a stipulation is enforceable to the extent it limits attorneys' fees so that the amount in controversy remains below $5,000,000.

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[16] The National Association of Manufacturers ("NAM") contends that 28 U.S.C. § 1453 – a provision not cited in the notice of removal, *see* Pet. App. 36 (relying on 28 U.S.C. § 1441) – authorizes the removal of class actions without regard to amount in controversy, or even minimal diversity. However, § 1453 does not speak to subject-matter jurisdiction but instead prescribes procedures for removal, like the adjacent statutory provisions in Title 28, 28 U.S.C. §§ 1446-1452, 1454-1455. It does not independently confer subject-matter jurisdiction for removed class actions. Moreover, NAM's reading would be extraordinary; it would authorize the removal of actions that would exceed the federal court's authority under Article III to adjudicate. Not surprisingly, Standard Fire disagrees with NAM. *E.g.*, Pet. Br. 8 (referring to "the amount-in-controversy requirement as it relates to these class actions"). This Court, too, has recognized that CAFA's amount-in-controversy requirement applies to removal actions. *See Smith*, 131 S. Ct. at 2382 (CAFA "enable[s] defendants to remove to federal court any *sizable* class action involving minimal diversity of citizenship") (emphasis added). NAM's construction is disavowed by its own authority. *See* Adam N. Steinman, *Sausage-Making, Pigs' Ears, and Congressional Expansion of Federal Jurisdiction:* Exxon-Mobil v. Allapattah *and Its Lessons for the Class Action Fairness Act*, 81 WASH. L. REV. 279, 335 (2006) (concluding that "a class action must have some basis for removal elsewhere in federal law").

In this case, Standard Fire calculated the aggregated damages for the class as $3,054,961. *See* Pet. App. 8. Even when it added $366,595 (representing a 12% statutory penalty under state law for breach of an insurance contract), its calculated aggregate damages came to merely $3,421,556. *Id.* at 44. Standard Fire was able to generate $5,000,000 in amount in controversy only by adding a wholly speculative projected award of attorneys' fees amounting to 40% of an amount reflecting both the presumed recovery and two years' worth of prejudgment interest. *Id*. at 8, 45 n.4.[17]

To arrive at the 40% figure, Standard Fire relied on *Capital Life & Accident Insurance Co. v. Phelps*, 66 S.W.3d 678 (Ark. Ct. App. 2002). In that case, the Arkansas court of appeals did not independently calculate the reasonableness of a fee, but merely upheld the chancellor's award of 40% under an abuse-of-discretion test. The court of appeals noted eight factors to be assessed after completion of a case, including "the time and labor required to perform the service properly" and "the result obtained." *Id.* at 682. The court added that the factors were a "guide[]" but "there is no fixed formula in determining the reasonableness of an award of attorney fees." *Id*. at 682-83. The court of appeals concluded that, "[c]onsidering that this case has been tried twice and appealed three times, we see no abuse of discretion in the award in this case." *Id*. at 683.

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[17] Standard Fire based its projected award of attorneys' fees on a percentage of not only its estimated compensatory-damages amount but also two years' worth of prejudgment interest, even though CAFA provides that the amount in controversy is to be computed "exclusive of interest and costs." 28 U.S.C. § 1332(d)(2).

Here, the *Capital Life* factors could not be meaningfully assessed at the outset of this case, and there certainly was no basis for assuming that the case would be "tried twice and appealed three times." *Id*. Accordingly, the attorneys' fees component of Standard Fire's amount-in-controversy calculation was entirely speculative.

If the projected attorneys' fees are not stricken entirely from Standard Fire's computation as wholly conjectural, at a minimum this Court should rule that a stipulation should be considered in the jurisdictional inquiry to the extent it limits attorneys' fees rather than the recovery of absent class members. As Standard Fire's own *amici* note, "putative class counsel is restrained by legal and ethical obligations." WLF Br. 9. Enforcing a stipulation that has the effect of limiting attorneys' fees would be consistent with CAFA, as Standard Fire notes. *See* Pet. Br. 26 (citing concern over "large fees") (internal quotation marks omitted); Mfrd. Housing Inst. Br. 6 (attorneys' fees). Imposing such a rule would enable courts to hold parties to their stipulations without harming any class member and would vindicate Congress's intent for small-damages, state-law class actions to remain in state courts.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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ADDENDUM A

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. § 1332(a) and (d) provides:

28 U.S.C. § 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

* * * * *

(d)(1) In this subsection –

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought

by 1 or more representative persons as a class action;

(C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which –

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of –

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2) –

(A)(i) over a class action in which –

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant –

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

(5) Paragraphs (2) through (4) shall not apply to any class action in which –

(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of

an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim –

(A) concerning a covered security as defined under 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

(11)(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B)(i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which –

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C)(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

(ii) This subparagraph will not apply –

(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

* * * * *

2. 28 U.S.C. § 1446(c)(2) provides:

28 U.S.C. § 1446. Procedure for removal of civil actions

* * * * *

(c) Requirements; Removal Based on Diversity of Citizenship. –

* * * * *

(2) If removal of a civil action is sought on the basis of the jurisdiction conferred by section 1332(a), the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy, except that –

(A) the notice of removal may assert the amount in controversy if the initial pleading seeks –

(i) nonmonetary relief; or

(ii) a money judgment, but the State practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded; and

(B) removal of the action is proper on the basis of an amount in controversy asserted under subparagraph (A) if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a).

* * * * *

3. 28 U.S.C. § 1453 provides:

28 U.S.C. § 1453. Removal of class actions

(a) Definitions. – In this section, the terms "class", "class action", "class certification order", and "class member" shall have the meanings given such terms under section 1332(d)(1).

(b) In General. – A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(c)(1) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

(c) Review of Remand Orders. –

(1) In general. – Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not more than 10 days after entry of the order.

(2) Time period for judgment. – If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3).

(3) Extension of time period. – The court of appeals may grant an extension of the 60-day period described in paragraph (2) if –

(A) all parties to the proceeding agree to such extension, for any period of time; or

(B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.

(4) Denial of appeal. – If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied.

(d) Exception. – This section shall not apply to any class action that solely involves –

(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

4. Section 2 of the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, codified at 28 U.S.C. § 1711 note, provides:

Sec. 2. FINDINGS AND PURPOSES.

(a) FINDINGS. – Congress finds the following:

(1) Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.

(2) Over the past decade, there have been abuses of the class action device that have –

(A) harmed class members with legitimate claims and defendants that have acted responsibly;

(B) adversely affected interstate commerce; and

(C) undermined public respect for our judicial system.

(3) Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where –

(A) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value;

(B) unjustified awards are made to certain plaintiffs at the expense of other class members; and

(C) confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights.

(4) Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are –

(A) keeping cases of national importance out of Federal court;

(B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and

(C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

(b) PURPOSES. – The purposes of this Act [see Short Title of 2005 Amendments note set out under section 1 of this title] are to –

(1) assure fair and prompt recoveries for class members with legitimate claims;

(2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and

(3) benefit society by encouraging innovation and lowering consumer prices.

ADDENDUM B

[Header Graphics Omitted]

Office of Clerk of the Circuit Court Miller County

Mary Pankey, Circuit Clerk

November 8, 2012

Mr. Johnny Goodson
406 Walnut Street
Texarkana, AR 71854

Dear Mr. Goodson:

I have researched the court records of Miller County to determine how many class action cases have been filed from 2000 thru the present. We located 28 class action cases filed during that period. Inasmuch as class action cases do not have a category of their own, we had to review several different categories to obtain this number. Therefore, this number is researched to the best of our knowledge.

Sincerely,

/s/ MARY PANKEY

Mary Pankey
Circuit Clerk

412 Laurel, Room 109 • Texarkana, AR 71854-5235
mpankey@cableone.net • Tel. 870-774-4501 • Fax 870-772-5293