No. 11-1450

In the

Supreme Court of the United States

THE STANDARD FIRE INSURANCE COMPANY,

Petitioner,

v.

GEORGE KNOWLES,

Respondent.

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

BRIEF OF THE DEFENSE RESEARCH INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* DRI[1]

The Defense Research Institute ("DRI") is an international organization that includes more than 22,000 attorneys engaged in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys and the civil justice system. DRI's members routinely defend clients in collective litigation across the Nation, whether under Federal Rule of Civil Procedure 23 or other applicable provisions. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and—especially on national issues—consistent.

To promote its objectives, DRI participates as *amicus curiae* in cases that raise issues of vital concern to its membership, their clients, and the judicial system. This is just such a case. DRI believes that resolution of the important federal jurisdiction and procedural issues raised by this case is critical because the approach taken by the lower

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* DRI states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties received notice of *amicus curiae*'s intent to file this brief. Petitioner and respondent have consented to the filing of this brief and letters reflecting their consent have been filed with the Clerk of Court.

court will eviscerate the protections that the Class Action Fairness Act of 2005 ("CAFA") affords to absent class members and to non-resident defendants. The issue presented affects a substantial number of cases of nationwide importance that are potentially removable under CAFA.

The decision below allows class action attorneys and their named representatives to avoid federal court review of cases with national implications by sacrificing the damages claims of absent class members. This is the very sort of gamesmanship that Congress sought to eliminate with the passage of CAFA.

Because the right of removal is an issue of particular significance to defendants, DRI's members and their clients are frequently confronted with the precise issues raised by this case. This Court's review and reversal of the decision below will prevent unseemly and unfair forum-shopping and bring consistency and predictability to removal actions.

SUMMARY OF ARGUMENT

The District Court's decision below allows class representatives to defeat the federal forum Congress made available to protect defendants in large interstate class actions. Indeed, the decision provides a roadmap for class action attorneys and their named representatives to evade federal jurisdiction in virtually every case. That result creates a windfall for class action attorneys at the expense of both defendants and absent class members. The decision cannot be squared with either the plain terms of the Class Action Fairness Act of 2005 ("CAFA") or the dictates of constitutional due process.

Congress enacted CAFA to remedy "a flaw in the current diversity jurisdiction statute (28 U.S.C. § 1332) that prevent[ed] most interstate class actions from being adjudicated in federal courts." S. Rep. No. 109-14, 5 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 6. Congress believed that in allocating the scarce resource of diversity jurisdiction to the most important cases, large interstate class actions "properly belong in federal court," *id.* at 5, 2005 U.S.C.C.A.N. at 6, and that prior law "enable[d] lawyers to 'game' the procedural rules and keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests." *Id.* at 4, 2005 U.S.C.C.A.N. at 5–6.

Congress thus amended Title 28 to provide federal jurisdiction over *any* putative class action filed in state court against a non-citizen defendant

where class claims total $5 million. *See* 28 U.S.C. § 1332(d). Moreover, Congress specifically intended CAFA to make it more difficult "for plaintiffs' counsel to 'game the system' by trying to defeat diversity jurisdiction" and to firmly "place[] the determination of more interstate class action lawsuits in the proper forum—the federal courts." S. Rep. No. 109-14 at 5, 2005 U.S.C.C.A.N. at 6. As this Court explained just last term, CAFA was enacted to "enable[ ] defendants to remove to federal court any sizable class action involving minimal diversity of citizenship." *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2382 (2011).

There is no question that the congressional requirements of CAFA have been met in this case. The requirement of minimal diversity is easily satisfied as the named plaintiff is diverse from the defendant, and the potential classwide damages are worth well north of the $5 million amount-in-controversy requirement. Indeed, the District Court acknowledged that CAFA's removal conditions have been satisfied, Pet. App. 8a, yet remanded the case to state court on the basis of a damages "stipulation" signed by the class representative. Pet. App. 9a, 15a. In this stipulation, the named plaintiff vowed to refrain from "seek[ing] damages *for the class* ... in excess of $5,000,000 in the aggregate." Pet. App. 75a (emphasis added).[2]

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[2] The signed affidavit accompanying plaintiff's complaint states: "I do not now, and will not at any time during this case, whether it be removed, remanded, or otherwise ... 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

At the outset, it is plain that the damages stipulation in this case had but one purpose: to defeat federal jurisdiction. The plaintiff made his intentions clear by alleging that his "stipulation" was "binding on plaintiff for purposes of establishing the amount-in-controversy," and "[a]s such, there is neither diversity nor Class Action Fairness Act ('CAFA') jurisdiction for this claim in federal court." Pet. App. 60a. What is less clear is that the stipulation actually precludes the plaintiff and the class from accepting an award in excess of $5 million. Plaintiff fails to state that he will not *accept* damages in excess of $5 million and excepts attorneys' fees from the damages stipulation. *See* Pet. App. 75a. These deficiencies alone should be fatal to the District Court's conclusion that plaintiff demonstrated to a "legal certainty" that CAFA's jurisdictional threshold would not be breached.

This case, moreover, is simply representative of the onslaught of clever maneuvering that class action plaintiffs' attorneys have employed to avoid the federal jurisdiction provided by CAFA. In *Freeman v. Blue Ridge Paper Products, Inc.*, 551 F.3d 405, 406 (6th Cir. 2008), for example, plaintiffs' attorneys filed five identical suits in state court covering distinct six-month time periods and limiting each period to less than CAFA's $5 million threshold. Counsel conceded that the only basis for dividing the claims was "to avoid CAFA." *Id.* at 407. The Sixth Circuit refused

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costs and attorneys' fees). I understand that this stipulation is binding, and it is my intent to be bound by it." Pet. App. 75a.

to allow plaintiffs to "artificially structur[e]" their lawsuit to evade federal jurisdiction and aggregated the five lawsuits for the amount-in-controversy requirement. *Id.* at 407–08; *see also Proffitt v. Abbott Labs*, No. 2:08-CV-151, 2008 WL 4401367 (E.D. Tenn. Sept. 23, 2008) (treating eleven identical lawsuits as one lawsuit for purposes of the amount-in-controversy requirement); *but cf. Anglin v. Bristol-Myers Squibb Co.*, No. 12-60-GPM, 2012 WL 1268143 (S.D. Ill. April 13, 2012) (remanding to state court three identical mass actions splintered into suits with less than 100 plaintiffs); *Marple v. T-Mobile Cent. LLC*, 639 F.3d 1109 (8th Cir. 2011) (permitting plaintiffs to break up lawsuit into ten identical lawsuits covering ten different time periods).

The decision below misapplies foundational rules of civil procedure, thwarts Congress' intent in enacting CAFA, and risks undermining the due process rights of unnamed class members. At its most basic, the trial court below erred by applying the general rule that an *individual* plaintiff is "the master of his complaint" to a *representative* suit. While it might be possible for a lawyer to have an informed dialogue with an individual client in which the latter agrees to limit any recovery in order to secure a more favorable forum, such a conversation cannot take place between the class representative's lawyer and the class. Nonetheless, the trial court permitted the class representative to bind unnamed class members to a fraction of their potential damages in order to evade federal jurisdiction. That result cannot stand. The *sine qua non* of a representative action is that the named class member must fairly and adequately represent the

unnamed class members at all times. *Hansberry v. Lee*, 311 U.S. 32, 45 (1940). But if representing a sufficiently numerous class will deprive the named plaintiff of a favored state forum unless the class representative purports to forego a portion of class members' damages, the conflict between the named plaintiff and absent class members is obvious.

Nor is the possibility of an opt-out a remotely satisfactory option. An absent class member has a right to opt out of a properly certified class action—the opt-out right is not a means of solving an inherent adequacy problem or ignoring a clear conflict of interest that renders class treatment inappropriate. Moreover, the possibility of later collateral challenges by absent class members who learn their damage claims were surrendered risks undermining CAFA's purposes and eliminating the efficiencies the class action device is designed to achieve. In short, the answer is clear: A class representative may not jettison the constitutional rights of absent class members in order to avoid the jurisdictional threshold contained in CAFA.

ARGUMENT

I. Whatever Its Effect In An Individual Action, A Damages "Stipulation" Cannot Preclude Removal In The Class Context.

The well-pleaded-complaint rule generally allows a plaintiff to choose between federal and state court. Since the plaintiff is "the master[] of the complaint," *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398–99 (1987), he may forego a federal claim and thus avoid removal to federal court. *See Holmes Group, Inc. v.*

Vornado Air Circulation Sys., Inc., 535 U.S. 826, 831 (2002) (quoting *Caterpillar Inc.*, 482 U.S. at 398–99). The "well-pleaded-complaint rule" thus enables a plaintiff "by eschewing claims based on federal law ... to have the cause heard in state court." *Id*. (internal quotation omitted).

A similar rule applies in diversity actions. In *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 293–94 (1938), this Court held, subject to a good faith pleading requirement, that a plaintiff who "does not desire to try his case in the federal court 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." As master of her complaint, a diversity plaintiff may limit the amount of damages she seeks and remain in state court. *See id.*

In theory, the ability of the individual plaintiff to limit recovery below the amount-in-controversy could have the beneficial consequence of introducing a degree of "voluntary tort reform" that could limit recoveries and perhaps facilitate settlement by placing an outer limit on plaintiff's recovery. In practice, however, the rule has proven problematic, because a number of states permit plaintiffs, once litigation has begun, to request a different award from the amount specified in the complaint. *See Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1097 n.11 (11th Cir. 1994). In such jurisdictions, the non-binding nature of plaintiff's prayer for relief "created the potential for abusive manipulation by plaintiffs." *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1410 (5th Cir. 1995). Plaintiffs could "plead for damages below the

jurisdictional amount … with the knowledge that the claim is actually worth more, but also with the knowledge that they may be able to evade federal jurisdiction by virtue of the pleading." *Id.*

As a result, federal courts allow an individual plaintiff to plead herself out of federal court by limiting damages only where that limitation is legally binding. *De Aguilar*, 47 F.3d at 1410; (citing 1A James W. Moore et al., *Moore's Federal Practice* ¶ 0.157[6], at 133–34 (2d ed. 1993) (stating that plaintiff "may prevent removal by the expedient of suing for less than the jurisdictional amount unless his attempted waiver of the balance is legally ineffective")). As *Moore's Federal Practice* explains, where under state law a plaintiff can "recover more on his state claim than the jurisdictional minimum, the case is removable." 16 *Moore's Federal Practice*, § 107 App. 103 (3d ed. 2002).

Courts have ensured that a plaintiff's limitation on recovery is enforceable through shifting burdens that do not simply take the plaintiff's professed self-restraint at face value. To ensure that the "right of removal" guaranteed to defendants by 28 U.S.C. § 1332 is not subject "to the plaintiff's caprice," *St. Paul*, 303 U.S. at 294, an out-of-state defendant need not accept a plaintiff's self-serving damages request. *See, e.g.*, *De Aguilar*, 47 F.3d at 1410; *Rolwing v Nestle Holdings, Inc.*, 666 F.3d 1069, 1070–71 (8th Cir. 2012); *In re Shell Oil Co.*, 970 F.2d 355, 356 (7th Cir. 1992). Rather, a defendant is entitled to remove a diversity action to federal court by demonstrating that—regardless of the plaintiff's prayer for relief—the actual amount-in-controversy is greater than the

jurisdictional threshold.[3] *See, e.g., De Aguilar*, 47 F.3d at 1410. Once a defendant has made such a showing, a plaintiff may defeat removal only by establishing to a "legal certainty" the inability to recover more than the jurisdictional amount-in-controversy. *See St. Paul*, 303 U.S. at 289.

In the run-of-the-mill diversity case, the Courts of Appeals have allowed plaintiffs to meet this "legal

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[3] The Courts of Appeals vary the standard by which a defendant must demonstrate that the amount-in-controversy is greater than the jurisdictional threshold. The majority approach employed by the Fifth, Seventh, Eighth, and Eleventh Circuits is that the defendant needs to show jurisdiction by a preponderance of the evidence; where the defendant satisfies that burden, the plaintiff may avoid federal jurisdiction only by showing that it is legally impossible to recover in excess of the jurisdictional minimum. *Blomberg v. Serv. Corp. Int'l*, 639 F.3d 761, 763 (7th Cir. 2011); *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 754 (11th Cir. 2010); *Bell v. Hershey Co.*, 557 F.3d 953 (8th Cir. 2009); *1994 Exxon Chem. Fire v. Berry*, 558 F.3d 378 (5th Cir. 2009). The First and Sixth Circuits take a similar approach. *See Amoche v. Guar. Trust Life Ins. Co.*, 556 F.3d 41, 51–52 (1st Cir. 2009) (requiring defendant to show a "reasonable probability" of damages in excess of the jurisdictional minimum); *Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 401, 407–08 (6th Cir. 2007) (requiring defendant to show that damages are "more likely than not" in excess of the jurisdictional minimum). In contrast, at least where the plaintiff specifically requests damages below CAFA's jurisdictional threshold, the Ninth and Third Circuits hold that a "defendant will be able to remove the case to federal court by showing to a legal certainty that the amount-in-controversy exceeds the statutory minimum." *Lowdermilk v. U.S. Bank Nat'l Ass'n*, 479 F.3d 994, 998–99 (9th Cir. 2007) (quoting *Morgan v. Gay*, 471 F.3d 469, 474 (3rd Cir. 2006)).

certainty" test by filing a binding affidavit with their complaint stating that they will neither seek nor accept an award that exceeds the jurisdictional threshold of 28 U.S.C. § 1332(a). *See Rolwing*, 666 F.3d at 1070–71; *De Aguilar*, 47 F.3d at 1412; *In re Shell Oil Co.*, 970 F.2d at 356 ("Litigants who want to prevent removal must file a binding stipulation or affidavit with their complaints.").

At the end of the day, an individual plaintiff's ability to sue a non-resident defendant and yet avoid federal court is limited by the relatively low amount-in-controversy requirement contained in 28 U.S.C. § 1332(a). Individual litigants who wish to sue an out-of-state defendant and remain in state court may do so, but only where they make a binding disclaimer of any entitlement to damages in excess of the $75,000 amount-in-controversy requirement. *See St. Paul*, 303 U.S. at 289. While that option will rarely make sense in an individual action, there may be circumstances in which a lawyer counsels a client that preserving a state forum is worth limiting a potential recovery below the amount-in-controversy threshold. And as long as the stipulation is legally binding, such a counseled choice of preserving the state forum should not sacrifice the defendant's rights. The requirement that a plaintiff submit a binding damages stipulation preserves an out-of-state defendant's statutory right to remove to federal court any case in which a plaintiff may be awarded damages in excess of the jurisdictional threshold.

But whatever the merits of the stipulated damages rule in *individual* actions, it is clear that such stipulations have no place in *representative*

litigation. Indeed, the conditions necessary for valid stipulations in the individual context are impossible to replicate in the class action context.

First, the Supreme Court has recently confirmed that absent class members are not bound by actions taken by the named plaintiff before certification. *See Smith*, 131 S. Ct. at 2382. Thus, counsel for a named plaintiff has no authority to bind absent class members to a damages stipulation. *See id.* And if such a limitation were effective, it would create due process problems of the first order. But in the individual context, a stipulation can defeat federal jurisdiction only if it is, indeed, binding. Moreover, while a lawyer can counsel an individual plaintiff about the pros and cons of limiting damages in order to secure a forum perceived to be more favorable, no such communication is possible in the pre-certification context. Indeed, the fact that securing the named plaintiff's preferred forum requires limiting absent class members' recoveries indicates an inherent conflict of interest and adequacy problem that should preclude certification.

Second, damages stipulations that limit the amount of damages ultimately to be awarded to absent class members distort the class action device by incentivizing class members to opt out. But the opt-out right exists to protect absent class members, not as a means to ameliorate inherent adequacy problems by giving class members with a particularly good damages claim an artificial incentive to opt out.

Third, absent class members may be able to collaterally attack judgments that give effect to damages stipulations on due process grounds.

Whatever the ultimate resolution of those collateral attacks, there are ample incentives to bring them, which defeats the very efficiency rationale that gave rise to the class action device in the first place. For all of these reasons, the court below erred in holding that a named plaintiff in a putative class action could evade federal jurisdiction by stipulating to a reduction in aggregated class damages.

A. The District Court's Conclusion that the Named Plaintiff's Damages Stipulation Binds Absent Class Members in a Putative Class Action Conflicts with this Court's Holding in *Smith v. Bayer Corporation*.

The District Court's conclusion that a damages stipulation in a putative class action is "legally binding" conflicts with this Court's holding in *Smith v. Bayer Corporation*. In that case, this Court held that "the mere proposal of a class ... c[an] not bind persons who [a]re not parties." 131 S. Ct. at 2382. "[I]n the absence of certification," the Court wrote, "[n]either a proposed class action nor a rejected class action may bind nonparties." *Id*. at 2380.

In the present case, the District Court found that the aggregated claims of individual class members exceeded CAFA's $5 million amount-in-controversy requirement, but nevertheless concluded that the named plaintiff could defeat federal jurisdiction by stipulating to a reduction in the amount of aggregated damages sought by the class. Pet. App. 8a–9a, 15a. That conclusion cannot be reconciled with either *Smith* or basic principles of due process. Under *Smith*, absent class members cannot be bound

before certification. 131 S. Ct. at 2380, 2382. As the Fifth Circuit has noted, "by definition [unnamed potential class members] do not and cannot participate in any stipulations concocted by the named parties." *Stirman v. Exxon Corp.*, 280 F.3d 554, 563 n.7 (5th Cir. 2002) (internal quotation marks omitted).

The District Court therefore clearly erred in holding that an affidavit that purported to limit damages on behalf of unnamed and absent class members demonstrated to a "legal certainty" that CAFA's jurisdictional threshold was not satisfied. *See* Pet. App. 9a, 15a. The decision below, moreover, turns CAFA on its head, permitting a named representative and class counsel to defeat removability *by sacrificing the claims of absent class members*. That absurdity is inconsistent not only with the text and purposes of CAFA, but also with due process.

At a minimum, procedural due process requires adequate notice, an opportunity to be heard, and adequate representation by the named plaintiff before a state may bind absent class members. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985) ("If the forum State wishes to bind an absent plaintiff [class member] concerning a claim for money damages ... [t]he plaintiff must receive notice plus an opportunity to be heard and participate in the litigation"); *id.* at 812 (due process requires "that the named plaintiff at all times adequately represent the interests of the absent class members").

The absent class members in the present case have had neither notice nor an opportunity to be

heard on the damages issue. Moreover, a named plaintiff who stipulates away a large portion of class members' potential damages in favor of his forum of choice can hardly be considered an adequate representative. *See Rolwing*, 666 F.3d at 1070–71 (holding that named representative could bind absent class members to less than $5 million of their $12 million lawsuit in order to evade federal jurisdiction). There is an inherent conflict of interest between a named plaintiff who desires a state forum and absent class members whose damage claims must be sacrificed in order for the named plaintiff to secure that wish.

Due process requires that absent class members be afforded fair and adequate representation at all times. *See Hansberry*, 311 U.S. at 45. And the adequacy requirement secures this due process right as it "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625–26 (1997); *see also Gen. Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, 157–58 n. 13 (1982). Indeed, the absence of a material conflict of interest between named and absent class members is central to the adequacy inquiry: "[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974)).

Where, as here, a class representative may obtain her favored state forum only by purporting to stipulate away the damages of absent class members

there is a material conflict of interest. Such a representative is constitutionally inadequate because she does not "possess the same interest … as the class members." *E. Tex. Motor Freight*, 431 U.S. at 403 (internal quotation marks omitted). The representative, in other words, would have no incentive—indeed would be legally forbidden—to seek the entire amount of class damages. That conflict should preclude certification under Federal Rule of Civil Procedure 23 and the Due Process Clause. And, more to the point, it should make clear that the named plaintiff is in no position to adequately represent absent class members when it comes to stipulating away their damage claims.

In *Stirman v. Exxon Corp.*, 280 F.3d 554 (2002), for example, the Fifth Circuit held that the class representative was inadequate because she had "no incentive to fully litigate" the claims of unnamed class members. *Id.* at 563 n.7. A key factor in the Fifth Circuit's analysis was that the named representative had likely "forfeited the rights of some class members" by offering to stipulate to, among other things, "a four-year limit on seeking damages." *Id.*

So too here. By stipulating away a portion of the absent class members' damages in favor of his forum of choice, the named plaintiff has "forfeited the rights of some class members" and has "no incentive to fully litigate" their claims. *See id.* The named plaintiff has vowed to limit class damages to a fraction of their worth. This material conflict precludes the named plaintiff from serving as a constitutionally adequate representative for the precise purpose of

stipulating away the ordinary entitlement to a full damages remedy. *See id.*

Further, the common class action practice of awarding incentives to named plaintiffs exacerbates the conflict of interest that arises when a named plaintiff stipulates away a large portion of class damages. *See Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) (incentive awards "are fairly typical in class action cases") (citing 4 William B. Rubenstein et al., *Newberg on Class Actions* § 11:38 (4th ed. 2008)). Incentive awards are intended to compensate class representatives for the time and effort they invested in the litigation, but they all too often compensate named representatives at an exorbitant rate relative to unnamed class members. *See Rodriguez,* 563 F.3d at 958–61. Indeed, incentive awards were one of the reasons Congress enacted CAFA. Congress found that "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed, such as where ... (B) unjustified awards are made to certain plaintiffs at the expense of other class members." Pub. L. No. 109-2, § 2(a)(3), 119 Stat. 4.[4]

Incentive awards give class representatives—whose ultimate award may bear little relation to the class award—an added inducement to compromise

[4] Congress has expressed concern with incentive awards in other contexts. For example, the Private Securities Litigation Reform Act of 1995 (PSLRA) forbids the granting of incentive awards to class representatives in securities class actions. *See* 15 U.S.C. § 78u-4(a)(2)(A)(vi).

the damage claims of absent class members. They may help to explain why a named plaintiff is content to stipulate away a portion of class damages. They thus create an "unacceptable disconnect" between the named representative and members of the class. *Rodriguez*, 563 F.3d at 958–61. As the Ninth Circuit has observed, when faced with the prospect of a lucrative incentive award, class representatives may be "more concerned with maximizing [their own] incentives" than with fully litigating the claims of absent class members. *Staton v. Boeing Co.,* 327 F.3d 938, 977–78 (9th Cir. 2003) (declining to approve settlement agreement with incentive awards).[5] But regardless of a named plaintiff's motivation, the inherent tension between the named plaintiff's desired forum and the interests of absent class members is fatal to the named class members' ability to stipulate away valuable rights of absent class members. *See E. Tex. Motor Freight*, 431 U.S. at 403.

In short, the District Court in this case erred by failing to recognize the fundamental difference between an individual and a representative action. While an individual plaintiff may make a decision informed by counsel to enter a binding agreement to limit damages in order to remain in state court, *see*

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[5] Incentive awards also create at least the appearance of impropriety and may violate rules of professional conduct, which prohibit fee sharing among clients and their counsel. *See Rodriguez*, 563 F.3d at 958–61.

St. Paul, 303 U.S. at 293–94, a putative class representative has no ability to provide such counsel to absent class members and no authority to bind absent class members to a fraction of their damages, *see Smith*, 131 S. Ct. at 2380–82. And any effort to give such a limitation binding effect would plainly violate the due process rights of proposed class members. As this Court explained in *Hansberry*, to permit a material conflict of interest to exist between the class representative and absent class members would afford opportunities "for the fraudulent and collusive sacrifice of the rights of absent parties." 311 U.S. at 45.

B. Allowing CAFA-Defeating Damages Stipulations Would Also Distort the Class-Action Device Generally and the Opt-Out Process in Particular.

It is certainly no answer that absent class members with viable damages claims retain the option of opting out of the class after certification. To the contrary, the distorting effect of plaintiff's proposal on the class action device in general and the opt-out process in particular is yet an additional reason for rejecting it. The opt-out process is a necessary option for absent class members when it comes to a class action involving substantial damages. It is not a means to ameliorate glaring conflicts of interest or adequacy problems that render class treatment inappropriate.

The Due Process Clause guarantees absent class members the right to opt out of class litigation when the action is "predominantly" for money damages. *Phillips Petroleum*, 472 U.S. at 811–12 & n.3; *Wal-*

Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751 (2011) ("For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class."). CAFA-defeating jurisdictional stipulations of the kind endorsed by the District Court pit the named plaintiff's desire to avoid federal court against the absent class members' right to seek full compensatory damages. That conflict of interest should preclude a named plaintiff who seeks to preserve a state forum from serving as an adequate representative of absent class members for purposes of stipulating limits on classwide relief. But if such stipulations were upheld, absent class members would have an artificial and unusual incentive to exercise their right to opt out of the class action. That result would not only defeat the purposes of CAFA but it would distort Rule 23 by eliminating the efficiencies that the class device promises to class plaintiffs and defendants alike.

The type of relief requested in a class action matters, as this Court underscored in *Wal-Mart*. As the Second Circuit has explained, "[w]here class-wide injunctive or declaratory relief is sought … there is a presumption of cohesion and unity between absent class members and the class representatives such that adequate representation will generally safeguard absent class members' interests and thereby satisfy the strictures of due process." *Robinson v. Metro-North Commuter R.R. Co.,* 267 F.3d 147, 165–66 (2d Cir. 2001). This "presumption

of cohesion and unity" is permissible because such relief "does not vary based on the subjective considerations of each class member's claim, but 'flow[s] directly from a finding of liability on the … claims for class-wide injunctive and declaratory relief.'" *Id.* (quoting *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 416 (5th Cir. 1998)).

In contrast, where, as here, compensatory damages are sought "the presumption of class homogeneity and cohesion falters." *Robinson*, 267 F.3d at 165. This is because the amount of individual damages suffered by class claimants may vary dramatically, depending on the circumstances and merits of each plaintiff's claim. *Id.* at 166. These individualized considerations give rise to divergent interests. *See id.* And since "members of a class seeking substantial monetary damages may have [such] divergent interests, due process requires that putative class members receive notice and an opportunity to opt out." *In re Veneman*, 309 F.3d 789, 792 (D.C. Cir. 2002) (citing Fed. R. Civ. P. 23(c)(2); *Robinson,* 267 F.3d at 165–66).

In compensatory damages actions, absent class members retain their right to pursue their claims separately where "active participation would better protect their individual interests." *Robinson*, 267 F.3d at 165–66. If this Court were to uphold the approach taken by the District Court in this case and allow stipulations that place artificial limits on class members' recovery if they remain in the class, an unusually high percentage of absent class members would benefit from exercising their constitutional right to opt out of the representative suit. *See In re*

Silicone Gel Breast Implant Prods. Liab. Litig., No. CV-92-P-10000-S, 1994 WL 578353, at *6 (N.D. Ala. Sept. 1, 1994) (noting that approximately 5% of a class had opted out of a settlement because "they believed they could recover more through individual litigation than under the settlement"). This artificial inflation of the opt-out right would in turn dismantle the very benefits of class action litigation and undermine the goals of CAFA.

The utility of the class action device hinges on efficiency and aggregation. As Congress found in enacting CAFA, "[c]lass-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." CAFA § 2(a)(1), 28 U.S.C. § 1711 note (emphases added). Thus, aggregation, or the "efficiency and economy of litigation" is "a principal purpose of the [class action] procedure." *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974). And the purpose of Rule 23(b)(3) damages suits in particular is to "achieve economies of time, effort, and expense and promote … uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem Prods.*, 521 U.S. at 615 (quoting Adv. Comm. Notes, 28 U.S.C. App., p. 697).

Representative litigation can improve the efficiency and economy of litigation in several ways. First, the aggregation of claims decreases the expense and dead-weight loss of repetitive trials. *See*

Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996). Representative litigation may also solve the problem of small recoveries by aggregating "relatively paltry potential recoveries" into "something worth someone's (usually an attorney's) labor." *Amchem Prods.*, 521 U.S. at 617. A class action can additionally improve efficiency in so-called "limited fund cases." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 839 (1999). In such cases, the centralization of claims in one forum allows a court to divide limited assets equitably among prevailing class plaintiffs. Finally, the class action device achieves efficiency when it minimizes the potential for divergent outcomes and inconsistent verdicts.

The opt-out right runs counter to the overall goal of efficiency by allowing individual class members to force individual trials with the possibility of divergent outcomes. In the normal course, however, the incentives to opt out in properly certified class actions are relatively limited so that the opt-out right secures the rights of individual class members without sacrificing the overall efficiency justification for the class action device. But the creation of artificial incentives to opt out distorts that balance and creates the possibility that defendants will face both class actions and numerous individual actions. The prospect that artificial limitations of damages will induce a large number of absent class members to opt out may well "defeat[] the policies behind Rule 23 class actions." *Tedesco v. Mishkin*, 629 F. Supp. 1474, 1483 (S.D.N.Y. 1986).

Indeed, not only do such artificial incentives to opt out create the prospect of duplicative individual

trials, they also threaten the viability of any class settlement "by destroying its ability to provide the defendant with global peace." Michael Perino, *Class Action Chaos? The Theory of the Core and an Analysis of Opt Out Rights in Mass Tort Class Actions*, 46 Emory L.J. 85, 95 (1997). During settlement discussions in the asbestos litigation, for example, one defendant, Continental Insurance, "made it clear from the beginning that it would only entertain a global settlement if the settlement brought 'total peace.'" *In re Asbestos Litig.*, 90 F.3d 963, 970 (5th Cir. 1996). Continental "was unwilling to pay billions in settlement and forego its substantial arguments against coverage without the assurance that it did not face unknown liabilities in the future." *Id.*; *see also Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 106 (2nd Cir. 2005) ("Practically speaking, class action settlements simply will not occur if the parties cannot set definitive limits on defendants' liability.") (internal quotation marks omitted); *Laughman v. Wells Fargo Leasing Corp.*, 1997 WL 567800, at *1 n.1 (N.D. Ill. Sept. 2, 1997) (defendant would withdraw from settlement if more than 2,000 class members opted out); *In re Silicone Gel Breast Implant Prods.*, 1994 WL 578353, at *6 (the potential for a large number of opt-outs "raises the specter that one or more defendants may elect to withdraw from the settlement in view of risks and costs of potential litigation with these claimants").

The decision below threatens the very aggregation and efficiency rationales that justify representative actions. If this Court affirms and allows a named plaintiff to stipulate away a large

portion of class damages, absent class members would have an unusual incentive to exercise their constitutionally guaranteed right to opt out of the action in order to protect their own interests. This opt-out incentive would in turn destroy the very aggregation and efficiency rationales behind class action litigation, to the detriment of plaintiffs, defendants, and the state and federal court systems.

C. To Enforce Damage Stipulations Would Invite Collateral Attacks that Would Further Undermine the Underlying Purposes of the Class Action Device and CAFA.

If this Court were to sanction the District Court's approach and bind absent class members to a damage award that puts the named plaintiff's interest in preserving a state forum ahead of absent class members' interest in a full recovery, it would invite collateral attack upon collateral attack and obviate the core purposes of the class action device. As noted, enforcing a damage limitation that pits the named class representative's (or his lawyer's) desire to be in state court against the potential recovery of absent class members presents an impermissible conflict that impairs the due process rights of absent class members. *See supra* pp. 11–17. Once a class action has run its course and resulted in either judgment or settlement (at possibly pennies on the dollar of recovery due to the class representative's stipulation), absent class members will have an undoubted incentive to mount collateral due process challenges to any such judgment or settlement. If absent class members are not bound by stipulations

entered into by lawyers laboring under inherent conflicts of interest, the "efficiency and economy of litigation which is a principal purpose of the [class action] procedure," *American Pipe*, 414 U.S. at 553, would be sacrificed. But however such collateral challenges are ultimately resolved, the very fact that they are likely undermines the efficiency rationale of the class action device, not to mention CAFA's promise that defendants facing serious exposure to a class will have a federal forum, not a state forum and multiple follow-on collateral cases.

Rules of finality serve an important function in our Anglo-American judicial system. They act to conserve judicial resources, protect litigants from multiple lawsuits, and facilitate certainty. *See Montana v. United States*, 440 U.S. 147, 153–54 (1979). Generally speaking, the "principles of res judicata, or claim preclusion, apply to judgments in class actions as in other cases." *Juris v. Inamed Corp.*, 685 F.3d 1294, 1312 (11th Cir. 2012) (quoting *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1226 (11th Cir. 1998)). Indeed, the very purpose of the class action device is to dispose of numerous claims within one, efficient proceeding. *See Amchem Products*, 521 U.S. at 615. Thus, the strong public policy favoring the finality of judgments "is particularly muscular in class action suits." *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 593 (3rd Cir. 2010); *see also King v. S. Cent. Bell Tel. & Tel. Co.*, 790 F.2d 524 (6th Cir. 1986).

Yet while finality principles routinely apply to representative litigation they are informed by another principle of general application: An

individual may not be bound by a judgment in which he is not a party. *Taylor v. Sturgell*, 553 U.S. 880, 898 (2008); *see also Pennoyer v. Neff*, 95 U.S. 714, 714 (1877). To enforce a judgment against an absent party who did not receive adequate representation would violate due process. *Id.*; *Hansberry*, 311 U.S. at 41; *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 327 n.7 (1979).

The class action, then, is an exception to the general rule that non-parties are not bound, but the exception depends critically on absent class members receiving adequate representation. *Taylor*, 553 U.S. at 900; *Smith*, 131 S. Ct. at 2380 ("[U]nnamed members of a class action [may] be bound, even though they are not parties to the suit."); *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984) ("[U]nder elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation."). As this Court explained in *Hansberry v. Lee*, "where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree." 311 U.S. at 41–42.

As a result, while class action judgments generally bind absent class members, there is an exception to this rule: "Before the bar of claim preclusion may be applied to the claim of an absent class member, it must be demonstrated that invocation of the bar is consistent with due process."

Juris, 685 F.3d at 1312 (citation omitted). Accordingly, an absent class member "may collaterally attack the prior judgment on the ground that to apply claim preclusion would deny him due process." *Id.* at 1312–13 (citations omitted); *see also* 3 William B. Rubenstein et al., *Newberg on Class Actions* § 8:30 (4th ed. 2011) ("A right of collateral attack, through which the essential fairness of a judgment is questioned during subsequent litigation, remains a potential limitation on the binding effect of determinations in representative actions.").

If this Court were to enforce damage stipulations that pit the named class representative's desire to evade federal court against the full recovery of absent class members, collateral due process challenges would be sure to follow. The outcome of those challenges is far from certain: Over the last decade, a split of authority has developed regarding the proper scope of collateral review. *Juris*, 685 F.3d at 1314 n.16; *see also* Patrick Woolley, *Collateral Attack and the Role of Adequate Representation in Class Suits For Money Damages*, 58 U. Kan. L. Rev. 917, 917 (2010) ("Over the last decade, debate has raged over whether an absent class member may attack a class judgment for inadequate representation in subsequent litigation.").

Traditionally, courts permitted an inadequately represented class member to collaterally attack a class action. *See* Woolley, *supra* at 918–19; 18A Charles Alan Wright et al., *Federal Practice and Procedure* § 4455, at 485 (2002) ("It has long been the general understanding that only adequate representation can justify preclusion against

nonparticipating class members."). Yet more recent decisions suggest that absent class members may not relitigate due process issues that were raised and rejected by the certification court. *See Juris*, 685 F.3d at 1314 n.16; *Epstein v. MCA, Inc.*, 179 F.3d 641, 648 (9th Cir. 1999) ("Simply put, the absent class members; due process right to adequate representation is protected not by collateral review, but by the certifying court initially, and thereafter by appeal within the state system and by direct review in the United States Supreme Court."); *In re Diet Drugs Prods. Liab. Litig.*, 431 F.3d 141, 146 (3rd Cir. 2005) ("Once a court has decided that the due process protections did occur for a particular class member or group of class members, the issue may not be relitigated.").

Other courts, however, still sanction more broad-ranging collateral review. *See Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 257–61 (2d Cir. 2001), *judgment affirmed in part, vacated in part on other grounds by Dow Chemical Co. v. Stephenson*, 539 U.S. 111 (2003) (permitting collateral attack); *Gonzales v. Cassidy*, 474 F.2d 67, 72–73 (5th Cir. 1973) (reviewing certifying court's determination that class representatives were adequate); *Hege v. Aegon USA, LLC*, 780 F. Supp. 2d 416, 429 (D.S.C. 2011) (reviewing whether the notice and representation given absent plaintiffs was constitutionally sufficient).

In the end, the exact scope of collateral review is less important than the reality that artificial constraints on the recovery of absent class members based on stipulations entered by named plaintiffs is a

recipe for collateral attacks. The greater the discount imposed to avoid a federal forum, the more likely such inefficient collateral litigation will ensue. Certainly a rule that has been applied to permit a named plaintiff to stipulate away approximately 60% of class recovery, *see Rolwing*, 660 F.3d at 1070–71 (permitting the named plaintiff to limit $12 million class action to less than $5 million) will inevitably raise serious due process challenges on collateral review. *See Nevada v. United States*, 463 U.S. 110, 135 n. 15 (1983) (citing *Hansberry*, 311 U.S. at 44 for the rule "that persons vicariously represented in a class action could not be bound by a judgment in the case where the representative parties had interests that impermissibly conflicted with those of persons represented"); *Taylor*, 553 U.S. at 900 ("[A] party's representation of a nonparty is 'adequate' for preclusion purposes only if, at a minimum: (1) the interests of the nonparty and her representative are aligned, and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the nonparty's interests.") (internal citations omitted).

If this Court were to permit class representatives to bind absent class members to a damage award grounded in nothing other than CAFA's jurisdictional threshold, it would invite a plethora of due process challenges after judgment. The weighty due process issues raised by such attacks threaten the finality of class action settlements and judgments alike. The resulting uncertainty would undermine the class action procedure in general and settlement efforts in particular. *See Visa U.S.A., Inc.*, 396 F.3d at 106 ("Practically speaking, class action settlements

simply will not occur if the parties cannot set definitive limits on defendants' liability.") (internal quotation marks omitted).

CONCLUSION

The decision below endorses the very sort of gamesmanship that CAFA was designed to eliminate. Congress believed that large class actions involving minimal diversity were suits of national importance that belonged in federal court. CAFA, § 2(a)(4)(A), 28 U.S.C. § 1711 note. And as the Sixth Circuit recently noted, "CAFA was clearly designed to prevent plaintiffs from artificially structuring their suits to avoid federal jurisdiction." *Freeman*, 551 F.3d at 407–08.

In this case, there is no dispute that the statutory predicates of CAFA—minimal diversity and a $5 million amount-in-controversy—are satisfied. As such, the defendant in this case is entitled to remove to federal court. *See Smith*, 131 S. Ct. at 2382 (CAFA "enables defendants to remove to federal court any sizable class action involving minimal diversity of citizenship"). Yet the District Court endorsed an approach that allowed the named plaintiff and his lawyers to opt out of federal jurisdiction—and all at the expense of absent class members and the policy goals underlying CAFA. S. Rep. No. 109-14 at 5, 2005 U.S.C.C.A.N. at 6 (CAFA was enacted to "make it harder for plaintiffs' counsel to 'game the system' by trying to defeat federal jurisdiction"). This Court should send a clear signal that class representatives cannot sacrifice the damages claims of absent class members in favor of their forum of choice or otherwise artificially

structure their lawsuits to avoid the jurisdictional threshold contained in CAFA.

Respectfully submitted,

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October 29, 2012