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No. 11-____

IN THE

Supreme Court of the United States

SKECHERS U.S.A., INC.,

Petitioner,

v.

PATTY TOMLINSON,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4, was enacted to expand federal court jurisdiction over class actions of national importance in order to protect defendants and absent class members alike from lax class certification standards in many state courts. To that end, CAFA provides that removal of a class action to federal court is appropriate where, in pertinent part, "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).

The question presented is:

Whether a class action that is removed under CAFA and indisputably involves a potential class recovery exceeding $5 million may be remanded on the ground that the named plaintiff has purported to waive any recovery for class members above the jurisdictional threshold.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Eighth Circuit.

Petitioner is Skechers U.S.A., Inc. ("Skechers"). The Respondent here and Appellee below is Patty Tomlinson. By virtue of the allegations pled in her Complaint, Respondent seeks to represent a putative class of supposedly similarly situated persons, but no motion for class certification has been filed and no class has been certified.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, petitioner states as follows:

No publicly traded corporation owns 10% or more of Skechers U.S.A., Inc.'s common stock.

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Petitioner Skechers respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The Eighth Circuit's judgment denying Skechers' Petition for Leave to Appeal is unpublished, and is included as Appendix A. The subsequent order of the Eighth Circuit denying Skechers' Petition for Rehearing en Banc is also unpublished, and is included as Appendix B. The May 25, 2011 order of the U.S. District Court for the Western District of Arkansas granting Respondent's Motion for Remand and ruling on various other motions is also unpublished, and is included as Appendix C.

STATEMENT OF JURISDICTION

The Eighth Circuit entered judgment denying Skechers' Petition for Leave to Appeal pursuant to 28 U.S.C. § 1453(c)(1) on June 21, 2011. Skechers' Petition for Rehearing en Banc was denied on August 12, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The federal diversity jurisdiction statute, 28 U.S.C. § 1332, as amended by the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, § 4, 119 Stat. 4, provides in relevant part that "[t]he 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." 28 U.S.C. § 1332(d)(2).

STATEMENT OF THE CASE

This case presents the important and recurring question of whether a putative class representative may evade federal jurisdiction by purporting to unilaterally waive the rights of class members to pursue their own full recovery for alleged monetary losses, thereby avoiding the $5 million jurisdictional threshold established by CAFA. In direct conflict with the decisions of two other circuits, but consistent with the decisions of three others, the Eighth Circuit affirmed an order relying on this ploy to defeat removal under CAFA of a class action that—but for the named plaintiff's waiver of the class's recovery—indisputably implicates an amount in controversy well in excess of $5 million.

The decision below not only deepens a split among the federal circuits, it contradicts the text, structure, and purpose of CAFA, which was enacted specifically to prevent opportunistic plaintiffs from pursuing class actions in state courts unwilling to enforce the basic class certification requirements reflected in Rule 23 of the Federal Rules of Civil Procedure. Those requirements exist, at bottom, to "ensure[] that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011). But a plaintiff who explicitly refuses to pursue a full recovery on behalf of the absent class members obviously is not an appropriate representative. The decision below thus permits a plaintiff to avoid CAFA—and the Rule 23 scrutiny it mandates—by openly violating Rule 23's most essential command. That result turns CAFA completely on its head. This Court should grant the

petition, resolve the circuit conflict, and reverse the judgment below.

1. In 2005, Congress enacted CAFA out of an express concern that the national economy was threatened by a proliferation of state-court class actions that employed procedures unfair to non-resident defendants, while keeping "cases of national importance out of Federal court." *See* CAFA, Pub. L. No. 109-2, §§ 2(a)(2)(A)-(B), 2(a)(4). To address such abuses, Congress extended federal diversity jurisdiction to all class actions in which minimal diversity exists and the amount in controversy exceeds $5 million. *Id.* §§ 2(b)(2), 4(a)(2); 28 U.S.C. § 1332(d)(2). Congress's intent was both to provide defendants the protections of a federal forum and to assure "fair and prompt recoveries for class members with legitimate claims." *Id.* § 2(a)(4)(C), § 2(b). Indeed, by keeping these significant class actions in federal court, CAFA ensured that they would be subject to the strictures of Rule 23, which would, in turn, help protect the interests of absent class members. *See, e.g.*, *Brown v. Kelly*, 609 F.3d 467, 482 (2d Cir. 2010) (noting "Rule 23's deliberate balance between facilitating class actions and protecting the interests of absent class members"); *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 726 (11th Cir. 1987) ("Among the prerequisites to the maintenance of a class action is the requirement of Rule 23(a)(4) that the class representative 'will fairly and adequately protect the interests of the class.' The purpose of this requirement, as of many other of Rule 23's procedural mandates, is to protect the legal rights of absent class members.").

2. Petitioner Skechers is a Delaware corporation, headquartered in Manhattan Beach, California, that designs and markets thousands of styles of contemporary footwear for men, women, and children. The product at issue in these proceedings, Shape-ups, is a type of athletic footwear known as a "toning shoe" that promotes certain fitness benefits by using a curved, rocker-bottom sole to challenge the wearer's muscles. Skechers sells Shape-ups through independent department stores, specialty stores, athletic retail stores, and boutiques that together represent more than 7,500 physical locations in all 50 states and the District of Columbia. Skechers also sells its shoes directly to consumers nationwide over the Internet and through company-owned retail stores located in thirty-five states, including California, New York, Florida, Hawaii, and Texas, but not in Arkansas, the state where this action arose. In the roughly two and a half years since the shoe's introduction, Skechers has sold millions of pairs of Shape-ups nationwide.

3. a. In the summer of 2010—long before Respondent initiated this action—Skechers was named as a defendant in three class actions brought in federal district courts in California, each seeking to represent an alleged nationwide class of Shape-ups purchasers.[1] The plaintiffs in these nationwide

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[1] The nationwide class actions are *Grabowski v. Skechers USA, Inc.*, Case No. 10-cv-1300-JM (WVG), filed on June 18, 2010 in the United States District Court for the Southern District of California; *Stalker v. Skechers USA, Inc.*, filed on July 2, 2010 in the California Superior Court for Los Angeles County as Civil Case No. BC440890, and subsequently removed to the United States District Court for the Central District of California, Case No. 10-cv-5460 SJO (JEM); and *Morga v.*

lawsuits claim that, in purchasing their Shape-ups, they relied on supposedly false and misleading marketing claims by Skechers regarding the benefits of wearing the shoes.

b. In January 2011, some seven months after the first nationwide class action was filed, Respondent Patty Tomlinson filed a complaint in Arkansas state court[2] in which she purported to represent a class of Arkansas residents who had purchased Shape-ups in reliance on the same allegedly false and misleading advertising claims as the nationwide classes. Thus, the class alleged here is entirely encompassed within the nationwide classes being litigated in the pre-existing federal actions.

Though Respondent's complaint does not specify the amount of damages sought, she and her counsel each filed a "Sworn and Binding Stipulation" stating that they will not "seek damages for the class . . . in excess of $5,000,000 in the aggregate (inclusive of costs and attorneys' fees)" along with the Complaint.

Skechers USA, Inc., Case No. 10-cv-1780-JM, filed on August 25, 2010 in the United States District Court for the Southern District of California.

[2] *Tomlinson v. Skechers U.S.A., Inc.*, filed on January 13, 2011 in the Circuit Court of Washington County, Arkansas, and subsequently removed to the United States District Court for the Western District of Arkansas, Case No. 11-cv-5042-JLH. A second Arkansas-resident class action was also filed in Arkansas state court in May 2011. *Lovston v. Skechers U.S.A., Inc.*, filed on May 13, 2011 in the Circuit Court of Lonoke County, Arkansas, and subsequently removed to the United States District Court for the Eastern District of Arkansas, Case No. 11-cv-0460-DPM.

c. On February 18, 2011, Skechers timely removed this action on diversity grounds pursuant to 28 U.S.C. § 1332(d), as amended by the Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 4, 119 Stat. 4. In support of removal and in opposition to Respondent's motion to remand, Skechers submitted affidavits from Skechers' Senior Vice President of Domestic Sales establishing that the amount in controversy was greater than $5 million, and as high as $38 million. App. 12a-14a, 15a-19a.

Skechers' proof as to the amount in controversy was uncontroverted. On a disgorgement theory, for example, Skechers demonstrated that, if plaintiffs sought and were able to establish a basis to recover the typical $100 advertised retail price for Shape-ups, the class's potential damages could exceed $38 million given that 383,893 pairs of shoes had been sold to Arkansas residents. *See* App. 12a-14a. Alternatively, if plaintiffs sought and were able to establish a basis to recover amounts received by the company (as opposed to amounts paid by the class or profits), the potential recovery could reach approximately $16 million. *Id.* Under the plaintiffs' breach of warranty theory, the class similarly could recover approximately $13.5 million in damages, representing the price differential between a pair of Shape-ups shoes and a pair of regular Skechers athletic shoes. App. 15a-19a. Respondent did not provide any competing proof establishing a different amount in controversy.

d. On March 21, 2011, Respondent moved to remand, relying entirely on her "Sworn and Binding Stipulation" concerning the damages she would seek to show that the amount in controversy was less

than $5 million. On May 25, 2011, the district court granted Respondent's motion. App. 3a-11a. Although the court found that Skechers "has likely established by a preponderance of the evidence that the amount in controversy in this case is greater than $5,000,000," the court nevertheless ordered the case remanded because it believed Respondent's stipulations sufficed to limit the putative class's potential recovery and thus rendered remand appropriate under *Bell v. Hershey*, 557 F.3d 953 (8th Cir. 2009). In *Bell*, the Eighth Circuit noted that "[i]n order to ensure that any attempt to remove would have been unsuccessful, [the putative class plaintiff] could have included a binding stipulation with his petition stating that he would not seek damages greater than the jurisdictional minimum upon remand." *Id.* at 958. The district court found *Bell* "dispositive," and ordered this case remanded to Arkansas state court.

e. The Eighth Circuit subsequently denied Skechers' Petition for Leave to Appeal under 28 U.S.C. § 1453(c), as well as Skechers' Petition for Rehearing *en Banc*. App. 1a-2a.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit rule announced in *Bell* and applied here permits putative class plaintiffs and their counsel to evade federal court jurisdiction by unilaterally cutting off the recovery of the proposed class without its consent, and without any meaningful judicial scrutiny. The Eighth Circuit thus joins the Third, Ninth, and Eleventh Circuits in holding that so long as a purported damages waiver is timely made and enforceable under state law,

remand automatically follows regardless of the impact on the putative class. *See Morgan v. Gay*, 471 F.3d 469, 476 n.7 (3d Cir. 2006); *Lowdermilk v. U.S. Bank Nat'l Ass'n*, 479 F.3d 994, 999 n.5 (9th Cir. 2007); *Darden v. Ford Consumer Fin. Co.*, 200 F.3d 753, 755-56 (11th Cir. 2000). This approach directly conflicts with that of the Fifth and Seventh Circuits, which have rejected efforts by putative representatives to cap the class's monetary recovery solely to evade federal jurisdiction, recognizing that the fiduciary and ethical duties the would-be class representative owes to absent class members preclude him from unilaterally electing to forgo a full recovery. *See, e.g.*, *Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827 (7th Cir. 2011) (Easterbrook, C.J.) ("Back Doctors has a fiduciary duty to its fellow class members. . . . What Back Doctors is willing to accept thus does not bind the class and therefore does not ensure that the stakes fall under $5 million."); *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720 (5th Cir. 2002) ("It is improbable that Manguno can ethically unilaterally waive the rights of the putative class members to attorney's fees without their authorization.").

This Court should grant review to resolve this clear circuit conflict, which bears on issues of exceptional importance involving the jurisdiction of the federal courts and the due process rights of class action participants under CAFA. The judicially created "binding stipulation" exception to CAFA jurisdiction threatens to nullify CAFA's carefully crafted statutory scheme by permitting putative class representatives and their attorneys to escape federal jurisdiction wholly at their own discretion

and at the expense of both unnamed class members and defendants. In the circuits that follow this exception, particularly the Eighth, named plaintiffs have absolute authority to ensure that any class action filed in state court stays there—even when the action "presents issues of national or interstate significance" that would otherwise trigger CAFA jurisdiction, S. Rep. No. 109-14, at 36 (2005), or when the amount objectively in controversy is tens or even hundreds of millions of dollars. This practice directly contravenes CAFA's express purposes both to afford defendants a federal forum with the procedural protections of Rule 23, and to implement safeguards to protect the rights of absent class members.

Access to the federal courts and the protections attendant thereto should not depend on a mere accident of circuit geography. Certiorari should be granted.

I. THE CIRCUIT COURTS ARE DEEPLY DIVIDED ON WHETHER A NAMED PLAINTIFF MAY EVADE FEDERAL JURISDICTION UNDER CAFA BY PURPORTING TO UNILATERALLY LIMIT ABSENT CLASS MEMBERS' RECOVERY

The court of appeals below let stand the district court's order holding that "the binding stipulation filed by plaintiff and her counsel in this case is effective to evade federal jurisdiction under CAFA." App. 10a. It did so notwithstanding the district court's express finding that Skechers had "likely established by a preponderance of the evidence that the amount in controversy in this case is greater

than $5,000,000." App. 8a. The Eighth Circuit's decision in this case thus widens the rift between the circuits on the question of whether a putative class representative may avoid federal diversity jurisdiction by purporting to unilaterally waive the rights of absent class members to full monetary recovery. The circuits have taken two starkly different approaches to this important, threshold legal question.

The first approach is that taken by the Third, Eighth, Ninth, and Eleventh Circuits. In these circuits, courts will remand a putative class action to state court based on the view that a would-be class representative may unilaterally stipulate to limit the recovery of the entire class, subject to assurances that such a limitation is binding upon remand to state court.

The leading case is *Morgan v. Gay*, 471 F.3d 469 (3d Cir. 2006), which involved false advertising claims brought by a plaintiff seeking to represent a putative class of New Jersey purchasers of skin cream products. In *Morgan*, the Third Circuit allowed the named plaintiff to employ a disclaimer in her complaint to limit the class's recovery to no more than $5 million in order to avoid diversity jurisdiction under CAFA. *Id.* at 471, 476 n.7. The Court of Appeals explicitly rejected the defendants' "assertion that [the named plaintiff] does not have the ability to limit damages of unnamed class members"—a contention it dismissed as "ha[ving] no merit." *Id.* at 476 n.7. The court found that "the availability of opting out by unnamed class members assuages any concerns that [the named plaintiff's]

damage limitation harms these other class members." *Id.*

Two other circuits take a similar approach. In the Ninth Circuit, a "plaintiff may . . . stipulate to damages in order to avoid federal jurisdiction," including in a putative class action. *Lowdermilk v. U.S. Bank Nat'l Ass'n*, 479 F.3d 994, 999 n.5 (9th Cir. 2007); *see also Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 705 n.6 (9th Cir. 2007) (O'Scannlain, J., concurring) ("[A]lternatively, the party might file a binding stipulation, prior to removal, that it will not seek more in recovery than the jurisdictional threshold."). The Eleventh Circuit has likewise accepted a putative class representative's stipulation "that each individual class member will neither request nor accept damages in excess of $75,000"—the pre-CAFA jurisdictional threshold. *Darden v. Ford Consumer Fin. Co.*, 200 F.3d 753, 755-56 (11th Cir. 2000).

The Eighth Circuit has now endorsed this approach. In *Bell v. Hershey Co.*, the court observed that the named plaintiff could have avoided removal by "includ[ing] a binding stipulation with his petition stating that he would not seek damages greater than the jurisdictional minimum upon remand." 557 F.3d at 958. The district court here followed *Bell* in holding that "by filing a binding stipulation to limit damages below the jurisdictional threshold, plaintiff can evade federal subject matter jurisdiction," App. 8a, and the Eighth Circuit approved that result by denying Skechers leave to appeal, App. 1a-2a. Other district courts in the Eighth Circuit have reached similar conclusions. *See Thompson v. Apple, Inc.*, 2011 WL 2671312

(W.D. Ark. July 8, 2011); *Murphy v. Reebok Int'l, Ltd.*, 2011 WL 1559234 (E.D. Ark. Apr. 22, 2011); *Tuberville v. New Balance Athletic Shoe, Inc.*, 2011 WL 1527716 (W.D. Ark. Apr. 21, 2011).

The approach taken by these courts, however, is squarely at odds with that of the Fifth and Seventh Circuits, which have rejected efforts by putative class representatives to cap the class's recovery in order to avoid federal jurisdiction. In *Back Doctors Ltd. v. Metropolitan Property & Casualty Insurance Co.*, 637 F.3d 827 (7th Cir. 2011) (Easterbrook, C.J.), the Seventh Circuit rejected a named plaintiff's attempt to avoid CAFA jurisdiction by foreswearing the class's entitlement to punitive damages in order to keep the class's recovery below $5 million. In stark contrast to the view expressed by the Third Circuit in *Morgan*, the Seventh Circuit in *Back Doctors* reasoned:

> Back Doctors [the named plaintiff] has a fiduciary duty to its fellow class members. *A representative can't throw away what could be a major component of the class's recovery.* Either a state or a federal judge might insist that some other person, more willing to seek punitive damages, take over as representative.

Id. at 830-31 (emphasis added). The Seventh Circuit concluded that "[w]hat Back Doctors is willing to accept *thus does not bind the class* and therefore does not ensure that the stakes fall under $5 million." *Id.* at 831 (finding that amount in controversy exceeded $5 million and vacating order

of remand (emphasis added));[3] *see also Pfizer, Inc. v. Lott,* 417 F.3d 725, 725-26 (7th Cir. 2005) (Posner, J.) (observing that "[t]he named plaintiffs stipulated that they would not seek or even accept damages in excess of $75,000," but that "the stipulation *would not bind the other members of the class*" (emphasis added)).[4]

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[3] The *Back Doctors* court acknowledged that an individual plaintiff is always free to limit his own recovery by binding stipulation. *See Back Doctors*, 637 F.3d at 830 (citing *In re Shell Oil*, 970 F.2d 355 (7th Cir. 1992) (individual plaintiff, non-class action); *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 511 (7th Cir. 2006) (pre-CAFA decision in which jurisdiction was determined based on whether the named plaintiff's damages exceeded $75,000)). But, in the post-CAFA world, in which the value of the potential class's recovery as a whole is the determining jurisdictional factor, the named plaintiff's fiduciary duties to the absent class members preclude the use of stipulations to limit the *class's* recovery. *See Back Doctors,* 637 F.3d at 830 ("[C]lass representatives' fiduciary duty might ensure that the amount in controversy exceeds $5 million no matter where the litigation occurs.").

[4] In permitting named plaintiffs to limit their *own* recovery, but not that of absent class members, the Seventh Circuit's approach in *Pfizer* strikes an appropriate balance consistent with this Court's holding in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938). That approach recognizes that "[i]f [a 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." *Id.* at 294. But, at the same time, it recognizes that plaintiffs should not be able to game the system to secure their preferred forum. *See, e.g., id.* at 288-89; *see also Morgan*, 471 F.3d at 474 (acknowledging "broad good faith requirement" in pleading amount in controversy); *Lowdermilk*, 479 F.3d at 999 (plaintiff may sue for less than the jurisdictional amount "subject to a 'good faith' requirement in pleading").

The Fifth Circuit adopted the same approach in *Manguno v. Prudential Property & Casualty Insurance Co.*, 276 F.3d 720 (5th Cir. 2002). In *Manguno*, the court of appeals rejected the named plaintiff's purported waiver of the class members' rights to attorneys' fees in a bid to avoid federal diversity jurisdiction. The court did so, in part, on the ground that "it is improbable that [the named plaintiff] can ethically unilaterally waive the rights of the putative class members to attorneys' fees without their authorization." *Id.* at 724-25 (affirming district court's denial of plaintiff's motion to remand to state court (citing *De Aguilar v. Boeing Co.*, 47 F.3d 1404 (5th Cir. 1995) (holding that named plaintiffs had no authority to limit recovery of unidentified claimants))); *see also Ditcharo v. United Parcel Serv., Inc.*, 376 F. App'x 432, 437 (5th Cir. 2010) (named plaintiffs' stipulations "do not provide [them] with the authority to deny other members of the putative class action the right to seek an award greater than $75,000").

These two lines of precedent in the federal circuits cannot be reconciled. Accordingly, a class action defendant's right to a federal forum under CAFA—in the increasing number of cases in which class action plaintiffs seek to evade federal jurisdiction by filing damages-capping stipulations—could depend entirely on the circuit in which the action is removed. A defendant sued in such a case in Illinois could properly remove the action to federal district court in Illinois, whereas the very same defendant faced with the same allegations in New Jersey could not open the doors to the federal courts. A party's right to a federal forum under CAFA

should not be determined by mere geography. As discussed below, the choice of a federal or state forum in class action litigation is of enormous consequence, with significant constitutional and due process implications. Review by this Court is necessary to resolve this circuit conflict and to ensure that the provisions of CAFA are applied on a uniform basis nationwide.

II. THE QUESTION PRESENTED IMPLICATES IMPORTANT QUESTIONS OF FEDERAL LAW THAT SHOULD BE ADDRESSED BY THIS COURT

The issue that has divided the federal circuits is one of exceptional importance, bearing directly on the jurisdiction of the federal courts and the rights of class action participants to the procedural and substantive safeguards and protections afforded under federal law.

A. The "Binding Stipulation" Exception Threatens To Undermine Congress's Broad Grant Of Federal Jurisdiction Under CAFA

The uniform and correct application of standards governing federal courts' exercise of diversity jurisdiction is particularly important given "the underlying purpose of diversity of citizenship legislation," which "is to provide a separate forum for out-of-state citizens against the prejudices of local courts and local juries by making available to them the benefits and safeguards of the federal courts." S. Rep. No. 85-1830 (1958), *as reprinted in* 1958 U.S.C.C.A.N. 3099, 3102 (Senate Report accompanying the 1958 amendments to 28 U.S.C.

§ 1332(c)(1)). In light of such concerns, this Court has long recognized that "federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right." *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907). "The removal process was created by Congress to protect defendants. Congress 'did not extend such protection with one hand, and with the other give plaintiffs a bag of tricks to overcome it.'" *Legg v. Wyeth*, 428 F.3d 1317 (11th Cir. 2005).

Those concerns have even greater significance in class action litigation, in which the stakes are high. "[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011).[5] In enacting CAFA, Congress similarly recognized the *in terrorem* threat posed by lax state-court certification standards, which can operate as a form of "judicial blackmail" to force settlement. S. Rep. No. 109-14, at 20-21 ("[S]tate court judges often are inclined to certify cases for class action . . . because they believe class certification will

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[5] *See also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."); *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (class certification "can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight").

simply induce the defendant to settle the case without trial.").

The express purpose of CAFA was to expand the federal courts' jurisdiction over class actions, "open[ing] federal courts to corporate defendants out of concerns that the national economy risked damage from a proliferation of meritless class action lawsuits." *Bell*, 557 F.3d at 957; *see Westerfeld v. Indep. Processing, LLC*, 621 F.3d 819, 822 (8th Cir. 2010) ("The language and structure of CAFA . . . indicate [] that Congress contemplated broad federal court jurisdiction with only narrow exceptions."). The approach taken by the Third, Eighth, Ninth, and Eleventh Circuits, however, denies defendants like Skechers the important procedural safeguards that, in Congress's judgment, too many state-court systems do not take seriously. Under the approach applied here, defendants are relegated—*at the named plaintiff's discretion*—to the vagaries of state courts' lax class certification procedures. *Compare Gen. Motors Corp. v. Bryant*, 374 Ark. 38, 46 (2008) (affirming view of Arkansas' highest court that "we have previously rejected any requirement of a rigorous-analysis inquiry" in class certification proceedings), *with Wal-Mart Stores, Inc.*, 131 S. Ct. at 2551 (Rule 23 requires actual evidence and "rigorous analysis" by the district court); *see generally* S. Rep. No. 109-14, at 4 ("[T]he governing rules [in state court] are applied inconsistently [and] frequently in a manner that contravenes basic fairness and due process considerations[].").

The aims of CAFA, however, were not limited to safeguarding the rights of defendants; CAFA was

also designed to protect the rights of absent class members to a fair and adequate recovery. *See, e.g.*, Pub. L. No. 109-2, § 3, 119 Stat. 4 (section of CAFA entitled "Consumer Class Action Bill of Rights"); 28 U.S.C. § 1712 (requiring judicial scrutiny to ensure coupon settlements are "fair, reasonable, and adequate"); *id.* § 1713 (imposing heightened requirements for settlements in which class members would incur a net loss); *id.* § 1714 (prohibiting discrimination against class members based on geography); *see generally* S. Rep. No. 109-14, at 4 ("[T]he strict requirements of Rule 23 . . . are intended to protect the *due process rights of both unnamed class members* and defendants." (emphasis added)). The Senate Report accompanying CAFA's enacting legislation noted the proliferation of "class action settlements approved by state courts in which most—if not all—of the monetary benefits went to the class counsel" with "little or no recovery for the class members themselves." *Id.* at 5, 14-15. It observed that "the lawyers who bring the lawsuits effectively control the litigation; their clients—the injured class members—typically are not consulted about what they wish to achieve in the litigation and how they wish it to proceed." *Id.* at 4. CAFA was intended to curb these abuses. *Id.* at 23; *see also* Pub. L. No. 109-2, § 6, 119 Stat. 4 (suggesting that a goal of CAFA is to "ensure that proposed class action settlements are fair to the class members that the settlements are supposed to benefit").

The approach followed in this case perpetuates the very abuses that CAFA was intended to address. Without so much as consulting the thousands of members of the putative class, the named plaintiff

and her lawyers here have been permitted to (1) bind the class to a stipulation that forgoes over two-thirds of the class's potential monetary recovery, and (2) consigns class members to a state-court system that quite explicitly *refuses* to subject proposed classes to any sort of "rigorous" scrutiny. The named plaintiff's unilateral, discretionary, tactical decision about what recovery to pursue for a class is plainly no substitute for independent judicial review. *Cf. Shelton v. Pargo, Inc.*, 582 F.2d 1298 (4th Cir. 1978) (ordering judicial scrutiny of partial, pre-certification settlement on grounds that mere notification to absent putative class members under Fed. R. Civ. P. 23(e) was insufficient to protect the rights of the class). Under Rule 23, it is "the court [that] plays the important role of protector of the absentees' interest." *In re Gen. Motors Corp. Pick-up Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) ("[T]he Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members."). In applying the "binding stipulation" exception, the Eighth Circuit abdicated that critical role.

B. The Use Of "Binding Stipulations" Is Expanding

The use of "binding stipulations" to avoid CAFA removal and evade federal jurisdiction is expanding. Class action plaintiffs and their lawyers have wasted no time in exploiting the jurisdictional loophole in those circuits that have adopted the "binding stipulation" exception. In fact, just a few months after Skechers was sued in this action, *Lovston v.*

Skechers U.S.A., Inc., a nearly identical purported class action with a similar damages-limiting stipulation, was filed against Skechers in Arkansas state court. Furthermore, in just a three-month period from December 2010 to February 2011, counsel for Respondent in this case filed at least 20 complaints, many brought against national retailers and distributors, using stipulations purporting to cap each of the classes' potential recovery. App. 20a-23a. And, from September 2010 through May 2011, another plaintiff's firm in Arkansas filed nine class action complaints in state court employing similar stipulations. *Id.*

This Court should take the opportunity presented by this case to review—and reject—this increasingly popular tactic. It is not fair either to defendants or to absent class members, and it is an affront to CAFA's central objective of ensuring that both defendants and absent class members obtain the protections of Rule 23 in cases objectively implicating more than $5 million in controversy. It would be a perverse irony, indeed, if CAFA were construed to permit a plaintiff to *avoid* federal-court scrutiny of a proposed class under Rule 23 through a device that could never *survive* federal-court scrutiny under Rule 23.

CONCLUSION

For the foregoing reasons, Skechers respectfully requests that the Petition for a Writ of *Certiorari* be granted.

Respectfully submitted,

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