

No. 11-287

In The
Supreme Court of the United States

SKECHERS U.S.A., INC.,
Petitioner,

v.

PATTY TOMLINSON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE
IN SUPPORT OF PETITIONER

J. Tracy Walker IV
Counsel of Record
MCGUIREWOODS, LLP
One James Center
901 East Cary Street
Richmond, Virginia 23219
(804) 775-7727
twalker@mcguirewoods.com

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF AMICUS CURIAE	1
ARGUMENT	2
I. THE LEGITIMACY OF BINDING STIPULATIONS HAS IMPORTANT IMPLICATIONS FOR THE FIDUCIARY DUTY THAT CLASS COUNSEL OWE TO CLASS MEMBERS.....	2
II. THE RIGHTS OF CLASS MEMBERS IN A NATIONWIDE CLASS SHOULD NOT DEPEND ON THE JURISDICTION IN WHICH THEIR ATTORNEY BRINGS THE CASE	4
CONCLUSION.....	7

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>AT&T Mobility LLC v. Concepcion</i> , 131 S. Ct. 1740 (2011)	4
<i>Bachman v. A.G. Edwards</i> , 344 S.W.3d 260, 2011 Mo. App. LEXIS 730 (2011)	5
<i>Back Doctors Ltd. v. Metropolitan Prop. & Cas. Ins. Co.</i> , 637 F.3d 827 (7th Cir. 2011)	3
<i>Ballard v. Advance Am.</i> 349 Ark. 545, 79 S.W.3d 835 (2002)	5
<i>Brennan v. GN Netcom, Inc.</i> , No. 09-56683, 2011 U.S. App. LEXIS 17224 (9th Cir. 2011)	2
<i>Devlin v. Scardelletti</i> , 536 U.S. 1 (2002)	5
<i>In re Monster Worldwide, Inc. Sec. Lit.</i> , No. 07 Civ 2237 (S.D.N.Y. Jul. 15, 2008)	3-4
<i>Manguno v. Prudential Prop. & Cas. Ins. Co.</i> , 276 F.3d 720 (5th Cir. 2002)	3

<i>Nordstrom Com'n Cases</i> , 186 Cal. App. 4th 576, 112 Cal. Rptr. 3d 27 (2010)	5
<i>Reynolds v. Beneficial Nat'l Bank</i> , 288 F.3d 277 (7th Cir. 2002)	2
<i>Simpson Housing Solutions, LLC v. Hernandez</i> , 2009 Ark. 480, 2009 Ark. LEXIS 660 (2009)	5
<i>Synfuel Techs., Inc. v. DHL Express (USA), Inc.</i> , 463 F.3d 646 (7th Cir. 2006)	6
<i>Zucker v. Occidental Petroleum Corp.</i> , 192 F.3d 1323 (9th Cir. 1999)	2
STATUTE	
28 U.S.C. § 1711	4
RULES	
Fed. R. Civ. P. 23	4, 6
N.J. R. Civ. P. 4:32-2(b)(2)	5

OTHER AUTHORITIES

Dan Fisher, <i>St. Louis Judge Hands Lawyers \$21 Million For Coupons</i> , Forbes.com, Jun. 23, 2010	5-6
Paul Karlsgodt & Raj Chohan, <i>Class Action Settlement Objectors: Minor Nuisance or Serious Threat to Approval</i> , BNA: Class Action Lit. Report, Aug. 12, 2011	1
Stephen Meili, <i>Collective Justice or Personal Gain?: An Empirical Analysis of Consumer Class Action Lawyers & Named Plaintiffs</i> , 44 Akron L. Rev. 67 (2011)	3

STATEMENT OF INTEREST OF
AMICUS CURIAE¹

The Center for Class Action Fairness is a non-profit litigation project that represents consumers *pro bono* in class action litigation across the United States by, among other things, objecting to unfair class action settlements on their behalf. The Center's litigation on behalf of consumers has been covered by *Forbes*, the *National Law Journal*, and the *ABA Journal*, among others. Unlike so-called "professional objectors" that threaten to disrupt a settlement in order to extract a share of plaintiffs' attorneys' fees, the Center makes no effort to engage in *quid pro quo* settlements for profit. See Paul Karlsgodt & Raj Chohan, *Class Action Settlement Objectors: Minor Nuisance or Serious Threat to Approval*, BNA: Class Action Lit. Report, Aug. 12, 2011 (distinguishing Center from for-profit "professional objectors"). Instead, the Center — which has never settled an objection — represents consumers by objecting to unfair settlements that do not provide meaningful relief to class members and by seeking court rulings that protect consumers from self-serving class action attorneys.

As a result, the Center can offer this Court a unique perspective on how review of this case serves the interests of absent class members, as opposed to defendants. The Center's work makes it especially

¹ No party or entity other than *amicus curiae* and its counsel authored this brief in whole or in part or made any monetary contribution intended to fund this brief's preparation or submission.

familiar with cases where class attorneys looking out for their own interests abuse class litigation and settlements at the expense of their putative clients. The unfair settlements the Center has fought are not isolated cases: indeed, both economic theory and empirical evidence indicate a significant number of class actions leave consumers without meaningful relief. Given its commitment to helping consumers, the Center has a strong interest in seeing the Court review the decision below, which rests upon the untenable assumption that before certification, the proposed class representative may limit the recovery of the proposed class in order to achieve her attorneys' short-term goals.

ARGUMENT

I. THE LEGITIMACY OF BINDING STIPULATIONS HAS IMPORTANT IMPLICATIONS FOR THE FIDUCIARY DUTY THAT CLASS COUNSEL OWE TO CLASS MEMBERS.

Most federal courts have recognized that the class-action attorney owes a fiduciary duty to absent class members that begins as soon as he files a complaint that seeks class-action status. *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 279 (7th Cir. 2002) (noting counsel's fiduciary duty to class); *Brennan v. GN Netcom, Inc.*, No. 09-56683, 2011 U.S. App. LEXIS 17224 (9th Cir. Aug. 19, 2011) (same); *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1327 (9th Cir. 1999) (same). Allowing one's named plaintiff to bind the entire class to relief less than \$5 million is in tension with the fiduciary

duty to seek the maximum possible recovery on behalf of the class. Indeed, the Court of Appeals for the Fifth and Seventh Circuits, which have prohibited binding stipulations of this type, did so because of the named plaintiff's fiduciary duty to the class. *Back Doctors Ltd. v. Metropolitan Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830-31 (7th Cir. 2011) ("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, 724 (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 tension provides another, independent reason for review. Review of the case below would offer direction to lower courts as to the nature and extent of the fiduciary duty that class counsel owe to a class. Recent scholarship has documented the fact that class-action attorneys do not just recruit class representatives, but in fact seek out prospective named plaintiffs over whom they can exert the maximum amount of control. See Stephen Meili, *Collective Justice or Personal Gain?: An Empirical Analysis of Consumer Class Action Lawyers & Named Plaintiffs*, 44 Akron L. Rev. 67, 111 (2011) ("given that class action lawyers often have the luxury of selecting named plaintiffs who are willing to align their goals with the attorneys, this power is more pronounced in class actions than in individual cases, where the client normally chooses the lawyer"); see also, e.g., *In re Monster Worldwide, Inc.*

Sec. Lit., No. 07 Civ 2237 (S.D.N.Y. Jul. 15, 2008) (slip op.) (criticizing proposed lead plaintiff that “has no interest in, genuine knowledge of, and/or meaningful involvement in this case and is simply the willing pawn of counsel”). Given the tension between the best interests of class members and the financial best interests of the class attorneys, outlining the precise boundaries of the attorneys’ fiduciary duty to the members of their proposed class becomes critically important.

II. THE RIGHTS OF CLASS MEMBERS IN A NATIONWIDE CLASS SHOULD NOT DEPEND ON THE JURISDICTION IN WHICH THEIR ATTORNEY BRINGS THE CASE.

Given the uncertain status of the class attorneys’ fiduciary duty to class members, the protections afforded by Rule 23 and CAFA are critical to ensuring that the rights of unnamed class members are adequately protected. Indeed, CAFA explicitly states that it was passed to “assure fair and prompt recoveries for class members with legitimate claims,” 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,” and prevent “abuses of the class action device that have harmed class members.” 28 U.S.C. § 1711 note §§ 2(a)(2)(A), (b)(1), (b)(2). And Rule 23 exists primarily to protect the due process rights of those class members who never appear before the court. *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.”).

Unlike the federal courts, the state of Arkansas does not have the same concerns about due process when presiding over class actions. For example, it expressly refuses to require its courts to exercise rigorous scrutiny when certifying class actions. See, e.g., *Simpson Housing Solutions, LLC v. Hernandez*, 2009 Ark. 480, 2009 Ark. LEXIS 660, *21 (2009) (“the federal courts apply a rigorous-analysis test for class actions, which this court has consistently rejected”). Nor, unlike in federal court, may an unnamed class member appeal the approval of a settlement if the lower court rejects her request to intervene. Compare *Ballard v. Advance Am.*, 349 Ark. 545, 548, 79 S.W.3d 835, 836 (2002) with *Devlin v. Scardelletti*, 536 U.S. 1 (2002). Arkansas is not alone in providing lesser protections to class members. New Jersey for example, has lesser notice requirements than those of the federal rules. See *N.J. R. Civ. P. 4:32-2(b)(2)*. And California and Missouri, unlike federal courts, leaves the approval of coupon settlements entirely to the discretion of the trial-court judge. *Nordstrom Com’n Cases*, 186 Cal. App. 4th 576, 591, 112 Cal. Rptr. 3d 27, 38 (2010) (approving coupon settlement not abuse of discretion because California courts do not disfavor coupon settlements); *Bachman v. A.G. Edwards*, 344 S.W.3d 260, 2011 Mo. App. LEXIS 730, *12-13 (2011) (same, Missouri courts); see also Dan Fisher, *St. Louis*

Judge Hands Lawyers \$21 Million For Coupons, Forbes.com, Jun. 23, 2010. By contrast, federal courts subject these settlements to higher scrutiny because of the potential for abuse by counsel. See, e.g., *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 654 (7th Cir. 2006) (“CAFA required heightened judicial scrutiny of coupon-based settlements based on its concern that in many cases counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value.”)

So long as the status of remands like these remain unresolved, the protections consumers enjoy under CAFA—including the right to be free from coupon settlements that provide no value to class members—could depend entirely on the circuit in which the action is filed. Consumers in Illinois or Mississippi would wind up as class members in federal court, subject to the protections afforded by Federal Rule of Civil Procedure 23 and CAFA, and entitled to recover the full range of remedies available to them. Meanwhile, consumers in Arkansas, New Jersey, or California would instead find themselves in state court, without these same due process protections, and with only the *pro rata* share of the \$4,999,999.99 that their class representative chose to seek on their behalf. This sort of inconsistent treatment of consumers is exactly the kind that this Court is best equipped to address.

CONCLUSION

Given the importance of ensuring that the interests of absent class members are served in any disposition of classwide claims, the petition for certiorari should be granted.

Respectfully submitted,



J. TRACY WALKER IV

Counsel of Record

MCGUIREWOODS, LLP

One James Center

901 East Cary Street

Richmond, Virginia 23219

(804) 775-7727

twalker@mcguirewoods.com

PS SHIP

Route

Deliver To
(Floor / Room)

Petrocelli, D...

Sender
The Lex Group DC

INB0089754



Signature Required

Note: Express Envelope containing sensitive or cash equivalent.

To qualify for the UPS Express Envelope, certain conditions apply. Visit ups.com/impor

International Shipping: The UPS Express Envelope is available for certain countries. Visit ups.com/impor for more information. UPS Internet Shipping: Shipment Label MD 914 1102/9/01

Visit ups.com or call 1-800-PICK-UPS® (1-800-742-5877) to schedule a pickup or find a drop off location near you.

Apply shipping documents on this envelope for: Do not use this envelope for:

DANIELLE STALEY
202 955 0001
THE LEX GROUP DC
1850 K STREET, NW
WASHINGTON DC 20006

0.0 LBS LTR 1 OF 1

SHIP TO:
DANIEL M. PETROCELLI
OMELVENY & MYERS LLP
7TH FLOOR
1999 AVENUE OF THE STARS
LOS ANGELES CA 90067-4621

CA 900 9-30

UPS NEXT DAY AIR 1
TRACKING #: 1Z 297 R9A 01 9690 7763

BILLING: P/P

UPS 13.6.08. WNTJNV50 18.0A 07/2011

FOR UPS SHIPPING/DOWNLOAD: ups.com/uis/create?Action=OriginPair=default PrintW... 1 of 1

UPS Worldwide Express™
UPS 2nd Day Air®

OMELVENY & MYERS
1999 AVENUE OF THE STARS
FL 7
LOS ANGELES CA 90067 - 6022

P: BLUE S: 1:25
507 - RDL
1Z297R9A019690 7763
1030
difax®
OCT 07 07:34:03 2011
CAOLY237 ZEBRA24HP
HIP 11.1.3

International Shipping Notice — Carriage hereunder may be subject to the rules relating to liability and other terms and/or conditions established by the Convention for the Unification of Certain Rules Relating to International Carriage by Air (the "Warsaw Convention") and/or the Convention Contract for the International Carriage of Goods by Road (the "CMR Convention"). These commodities, technology or software were exported from the U.S. in accordance with the Export Administration Regulations. Diversion contrary to U.S. law prohibited.

010195101 1/10 PAC United Parcel Service, Ltd

CALENDAR REQUEST

Job Number 
0 0 0 0 0 3 0 4 3 7 - 0 0 0

Requested Date 10/07/2011 11:22 AM

Requested By CALENDAR,LITIGATION

Due Date 10/07/2011 02:22 PM

User ID 1000000000

Client Number 0600000

Phone

Matter Number 00010

Office Floor

Case Number 11-287

Room Number

Number of Documents 4.000

Email Legal Team 1

Email Legal Team 2

Email Legal Team 3

Number of Pages including coversheet 15

Document sent to Calendar

Document Type AFFIDAVIT OF SERVICE

Method of Service

USPS Mail

Overnight Courier

Personally Served

Other

Postmark date-Date sent OCT.6, 2011

Deliver Original To DANIEL PETROCELLI

Special Instructions