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 IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Whether this Court should review a District Court decision remanding this case for lack of federal subject-matter jurisdiction, where: (i) the District Court order was left unreviewed by the Court of Appeals for the Eighth Circuit, (ii) the order does not conflict with the judgment of any Circuit Court of Appeals, (iii) the order does not present an important question of federal law, and (iv) the question Petitioner seeks to present will be subsequently reviewable on certiorari from the state's highest court.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Patty Tomlinson ("Plaintiff") respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari ("Petition"). The Petition should be denied, for numerous reasons:

- The Petition seeks review not of a final decision by a *circuit court* on the merits, but rather of a *district court* order, regarding which the Eighth Circuit Court of Appeals denied permission to appeal.

- It is premature because it implicitly attacks a certification decision that the Arkansas state courts have not yet made and that will be reviewable in the future.

- It rests on a speculative chain of future events, as well as unsupported and incorrect assumptions about Arkansas law and the Arkansas state class action procedure.

- It ignores an alternative ground for decision that would prevent this Court from reaching the question presented.

- It involves the fact-specific application of well-settled principles of law.

STATEMENT

This case involves a putative class action filed in Arkansas state court (Washington County Circuit Court) on January 13, 2011, on behalf of a class of Arkansas residents. Pet. App. 4a. The action asserts no federal claims – only claims under Arkansas state law, based on injuries to Arkansas residents resulting from transactions occurring solely in Arkansas. *Id.* at 5a-6a. In particular, Plaintiff alleges that Defendant Skechers USA, Inc. ("Skechers"), in connection with the sale of toning shoes to Arkansas residents, committed violations of the Arkansas Deceptive Trade Practices Act, Ark. Code Ann. §§ 4-88-107(a)(1) *et seq.*, and Arkansas law regarding breach of warranty and unjust enrichment.

On February 18, 2011, Skechers removed the action to the U.S. District Court for the Western District of Arkansas. The sole basis of federal subject-matter jurisdiction asserted by Skechers was the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d)(2). CAFA creates federal subject-matter jurisdiction when three conditions are met: (1) an aggregate amount in controversy exceeding five million dollars ($5,000,000.00), exclusive of interest and costs; (2) a putative class with more than 100 members; and (3) minimal diversity, *i.e.*, a class in which at least one member is a citizen of a different state from any defendant. *Id.*

However, CAFA jurisdiction does not exist in this case, because the amount in controversy as a legal certainty does not exceed $5 million. The complaint seeks damages to Plaintiff and the proposed class in an amount not to exceed $75,000 per class

member and/or $5 million for the entire class. Pet. App. 5a-6a. Further, when filing her state-court complaint, Plaintiff attached an affidavit expressly stipulating that the amount in controversy will not exceed $5 million:

> I do hereby swear and affirm that I do not now, and will not at any time during this case, whether it be removed, remanded, or otherwise, seek damages for myself or any individual class member in excess of $75,000 (inclusive of costs and attorneys' fees) or seek damages for the class as alleged in the complaint to which this stipulation is attached in excess of $5,000.000 in the aggregate (inclusive of costs and attorneys' fees).

Id. at 6a. Plaintiff's counsel filed a similar "Sworn and Binding Stipulation" in which he swore that, as class counsel, he would not seek damages for the class as alleged in the complaint in excess of $5 million, inclusive of costs and attorneys' fees. *Id.*

Accordingly, on March 21, 2011, Plaintiff moved to remand this action to Arkansas state court. By Order of May 25, 2011, the federal district court granted the motion to remand. The court opined:

> After reviewing the parties' papers, the Court finds that defendant has likely established by a preponderance of the evidence that the amount in controversy in this case is greater than $5,000,000. In the absence of plaintiff's stipulation, the Court might agree that federal subject matter exists and, therefore, removal was proper.

Id. at 8a. However, the court held that "the binding stipulation filed by plaintiff and her counsel in this case is effective to evade federal subject matter jurisdiction under CAFA." *Id.* at 10a.

On June 21, 2011, the Eighth Circuit denied Skechers' petition for permission to appeal, without recorded dissent. *Id.* at 1a. On August 12, 2011, the Eighth Circuit denied Skechers' petition for rehearing, again without recorded dissent. *Id.* at 2a.

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT INVOLVE A DECISION ON THE MERITS BY THE COURT OF APPEALS.

The first reason to deny certiorari is the fact that the case at bar does not involve a decision on the merits by the Eighth Circuit. Rather, this case concerns a decision by the U.S. District Court for the Western District of Arkansas that was left unreviewed by the Court of Appeals for the Eighth Circuit, which denied Skechers' petition for permission to appeal. Pet. App. 1a.

Accordingly, there can be no "circuit conflict" (Pet. 3, 15), because there is no meaningful decision in this case by a circuit court of appeals. Rather, Skechers asks this Court to review a district court remand order that the Eighth Circuit declined to review.

Even if the district court judgment in this case were directly in conflict with the decision of a court of appeals outside the Eighth Circuit (and, as discussed in Part III, *infra*, there is no such conflict),

there would be no basis for certiorari. This Court's practice with respect to district court decisions is well known:

> The Supreme Court will not grant certiorari to review a decision of a federal court of appeals merely because it is in direct conflict on a point of federal law with a decision rendered by a district court, whether in the same circuit or in another circuit. The Court tries to achieve uniformity in federal matters only among the various courts whose decisions are otherwise final in the absence of Supreme Court review – the courts of appeals, other federal courts of the same stature, and the highest state courts in which decisions may be had.

Eugene Gressman, et al., SUPREME COURT PRACTICE 256 (9th ed. 2007).

This Court has explained that it grants certiorari "to resolve disagreement among the *courts of appeals* on a question of national importance." *Grutter v. Bollinger*, 539 U.S. 306, 322 (2003) (emphasis added); *see also Clay v. United States*, 537 U.S. 522, 524 (2003) (granting review of "recurring question on which courts of appeals have divided"). The instant case does not involve a decision by a court of appeals on the merits.

Skechers fails to acknowledge the extraordinary nature of its request. In fact, the Petition contains an inaccurate description of the procedural posture of this case. The Petition states that "the Eighth Circuit affirmed an order" granting Plaintiff's motion

to remand. Pet. 2. That statement is incorrect. The Eighth Circuit did not affirm any order. Rather, the Eighth Circuit denied Skechers' petition for permission to appeal. Pet. App. 1a.

Similarly, the Petition refers to "[t]he Eighth Circuit's decision in this case," Pet. 10, and "[t]he Eighth Circuit rule announced in *Bell* and applied here." *Id.* at 7. These statements are misleading, as this case does not involve a decision on the merits by the Eighth Circuit. Also misleading are Skechers' claims that "[t]he Eighth Circuit has now endorsed this approach," *id.* at 11, and that in this case "[t]he Eighth Circuit thus joins the Third, Ninth, and Eleventh Circuits." *Id.* at 7; *see also id.* at 19 ("In applying the 'binding stipulation' exception, the Eighth Circuit abdicated that critical role."). Skechers should not be permitted to create the false impression that this case involves an Eighth Circuit decision rather than an unreviewed district court order.[1]

If Skechers is correct that the use of binding stipulations is expanding (Pet. 19), then this Court will have ample opportunities in the future to review the question presented. The instant case is not an appropriate vehicle.

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[1] Skechers mentions in passing that the Eighth Circuit "denied Skechers' Petition for Leave to Appeal," Pet. 7, and seeks to imply that the denial of leave to appeal "approved" the district court's judgment. *Id.* at 11 ("[T]he Eighth Circuit approved that [District Court] result by denying Skechers leave to appeal.").

II. THIS CASE DOES NOT REPRESENT AN APPROPRIATE VEHICLE TO DECIDE THE QUESTION PRESENTED.

A. Skechers' Argument Is Premature.

Certiorari should be denied for the further reason that the question Skechers seeks to present is premature. Skechers contends that "a plaintiff who explicitly refuses to pursue a full recovery on behalf of the absent class members obviously is not an appropriate representative." Pet. 2. "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." *Id.*

Skechers' argument is misguided and premature. This case was filed in Arkansas state court in January 2011 and removed a month later. Pet. App. 4a-8a. Plaintiff has not filed a motion for class certification, let alone been designated class representative. No class has been certified by any court. Hence, there is no ruling for this Court to review about "Rule 23's most essential command," or whether a plaintiff who enters into a binding stipulation "obviously is not an appropriate representative." Pet. 2. No court has considered Skechers' argument that the binding stipulation should disqualify plaintiff from serving as a class representative. Whether Plaintiff is an adequate representative will be addressed later, at certification, and Skechers will be free to argue that Plaintiff's stipulation is a factor to consider in whether the class should be certified or what class should be certified.

If the state court agrees with Skechers' position that Plaintiff is not an adequate representative, then her motion for certification will be denied, and Skechers will not face a class action or any of the risks of which it complains. Pet. 16. If a state court ultimately grants a motion for class certification, Skechers will have the opportunity to pursue appellate review in the usual course and eventually to seek certiorari on the question whether the binding stipulation prevents Plaintiff from serving as a class representative.

Such review, coming at a later time, would provide Skechers with the chance to raise its objection on the basis of a fully developed record on the adequate representation issue. That record would enable this Court to make a more informed assessment of the reasonableness of Plaintiff's binding stipulation, in light of the available evidence, Skechers' potential defenses, the likely damages and relief, and other issues. Without such a record, Skechers is premature in speculating that Plaintiff is an inadequate representative.

B. Skechers' Argument Is Impermissibly Speculative.

Certiorari should be denied for the further reason that Skechers' argument is impermissibly speculative. Skechers argues some third person – a hypothetical new class representative or intervenor – would not necessarily be bound by Plaintiff's stipulation. Skechers assumes that (a) a state court will reject its adequacy of representation arguments and certify a class, Pet. 17-19, (b) afterwards "[e]ither a

state or a federal judge might insist that some other person, more willing to seek punitive damages, take over as representative," Pet. 12 (citation and internal quotation marks omitted), (c) the subsequent court would conclude that Plaintiff's stipulation "does not bind the class" (*id*.) (despite the earlier certification decision), and (d) the amount in controversy would ultimately exceed $5 million. *Id.* at 12-13.

Skechers' scenario makes little sense and is highly implausible.[2] More fundamentally, Skechers' conjecture is not remotely sufficient to justify removal under CAFA at the very outset of the case. The question is whether there is federal jurisdiction over *this* case filed by *this* Plaintiff. It is hornbook

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[2] For example, Skechers does not explain how its scenario would provide an incentive for an "opportunistic" plaintiff (Pet. 2) to pursue the "binding stipulation" strategy in the first place. Why would a plaintiff (and her counsel) go to the trouble of filing a lawsuit and attaching a stipulation with the intent of causing the plaintiff to be replaced as class representative and her lawyer disqualified as class counsel? What would a plaintiff and her counsel hope to gain from such a self-defeating strategy? Nor does Skechers address the role of judicial estoppel in preventing the scenario it posits. *See Harris v. Sagamore Ins. Co.*, 2008 WL 4816471, *3 (E.D. Ark. Nov. 3, 2008) ("[I]n view of that court's recognition of the doctrine of judicial estoppel, this Court is convinced that the Supreme Court of Arkansas would not permit a plaintiff to recover damages in excess of the minimum amount for federal diversity jurisdiction after expressly disclaiming such damages in the complaint. This Court can say to a legal certainty that the Arkansas courts will not permit the plaintiff to recover damages for the class as a whole in excess of $4,999,999. . . . The plaintiff has made her choice, and the plaintiffs in state court who choose not to opt out of the class must live with it.") (citation and internal quotation marks omitted).

law that jurisdiction must be determined based upon the allegations of the complaint as set forth at the time the petition for removal was filed and that contingent events are inadequate to establish federal jurisdiction. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003); *see also Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 390 (1998) ("for purposes of removal jurisdiction, we are to look at the case as of the time it was filed in state court – prior to the time the defendants filed their answer in federal court").

Skechers cannot demonstrate federal jurisdiction by piling conjecture upon conjecture. That principle is particularly salient in the CAFA context, because CAFA eliminates the requirement that cases must be removed within one year of filing. 28 U.S.C. § 1453(b). Under CAFA, a case may be removed at any time, assuming that the requirements of federal subject-matter jurisdiction are satisfied. *Id.* Thus, if this case changed form in the future, with a different class representative pursuing claims for different relief and different amounts in controversy, then Skechers could attempt to remove this action to federal court pursuant to 28 U.S.C. § 1446(b). But that question is for another day. There is no reason to allow Skechers to remove the action now, on the basis of its completely hypothetical scenario.

C. There Is An Alternative Ground For Decision.

"If it appears that upon a grant of certiorari the Supreme Court might be able to decide the case on another ground and thus not reach the point upon

which there is conflict, the conflict itself may not be sufficient reason for granting review." Gressman, SUPREME COURT PRACTICE at 248. "If the resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court, certiorari may be denied." *Id.*

That principle is squarely apposite here, because even apart from Plaintiff's binding stipulation, there is no federal subject-matter jurisdiction in this case. The Question Presented asserts that the instant case "indisputably involves a potential class recovery exceeding $5 million." Pet. i; see *also id.* at 2 (case "indisputably implicates an amount in controversy well in excess of $5 million"). That assertion is untrue. In the district court below, Skechers failed its burden of demonstrating the requisite $5 million amount in controversy under CAFA. [3]

Skechers bases its amount-in-controversy calculation on its assertion that "383,893 pairs of shoes had been sold to Arkansas *residents*." Pet. 6 (emphasis added). The truth is more complex. In the district court, Skechers averred in an affidavit and verification attached to the Notice of Removal that it has sold "approximately 383,893 pairs of Shape-ups to persons *or entities* located in Arkansas." Pet. App. 13a (emphasis added). It repeated the same figure in a second affidavit. *Id.* at 17a, 18a. But this data includes sales to *retailers* and *wholesalers* located in

[3] Skechers also asserts that Plaintiff's motion to remand "rel[ied] entirely on her 'Sworn and Binding Stipulation.'" Pet. 6. That statement is untrue. Plaintiff's motion to remand argued extensively that Skechers had failed to satisfy the amount-in-controversy requirement.

Arkansas, not merely to *consumers* in Arkansas. As Skechers explains, it "does not own or operate any retail stores in the State of Arkansas." *Id.* at 17a. Rather, its shoes are sold through other outlets:

> Skechers' products, including our Shape-ups® line of shoes, are sold through department stores, specialty stores, athletic retailers, and boutiques across the United States, as well as by catalog and Internet retailers. Skechers has hundreds of wholesale customers around the country, ranging from retailers with stores in multiple states such as Dillards, Sam's Club, J.C. Penney, Macy's, Nordstrom, and Kohls; to large specialty shoe retailers with stores in multiple states like Famous Footwear, Shoe Carnival, Finish Line, and Lady Footlocker; to large sporting goods retailers with stores in multiple states like Dick's Sporting Goods and Modell's Sporting Goods; to hundreds of smaller, independent (or "mom-and-pop") local retailers scattered throughout the country.

Id. at 16a-17a.

Hence, Skechers' calculation of "approximately 383,893 pairs of Shape-ups to persons *or entities* located in Arkansas," Pet. App. 13a, 17a-18a (emphasis added), does not correspond to the putative class definition and artificially inflates the amount in controversy in this case. Plaintiff does not seek to represent all entities located in Arkansas who purchased Shape-up shoes. Instead, the proposed class is limited to "Arkansas residents who purchased Skecher's Shape Up shoes." Complaint ¶ 22. Thus,

Plaintiff seeks to represent only Arkansas *consumers* (not retailers or wholesalers) who purchased Shape-up shoes.

Further, Skechers has failed to establish that its wholesale customers are residents of Arkansas at all. Few of the large retailers mentioned by Skechers, such as the larger specialty shoe retailers and large sporting goods retailers, are "residents" of Arkansas. Arkansas is unlikely to be their state of incorporation or principal place of business. *See* 28 U.S.C. § 1332(c)(1) (federal diversity jurisdiction statute providing that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business"). Skechers ignores the distinction between a "resident" of Arkansas and an "entity" merely having a store or warehouse "located in Arkansas" but holding citizenship in another state.

In short, Skechers has presented no evidence of the number or value of Shape-up shoes sold to Arkansas consumers – the members of the putative class represented by Plaintiff. Skechers' overbroad, aggregate evidence cannot establish the amount in jurisdiction under CAFA.

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994) (citations omitted).

CAFA did not change this fundamental and longstanding rule. "The burden of persuasion for establishing diversity jurisdiction, of course, remains on the party asserting it." *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1194 (2010) (CAFA case). In *Hertz*, the Court reaffirmed that a party seeking removal must meet its burden by presenting "competent proof." *Id.* at 1195. The Court found that a Form 10–K listing a corporation's "principal executive offices" was not "competent proof" of its citizenship. *Id.* Skechers' "proof" as to the amount in controversy is similarly flawed and inadequate.

To be sure, the district court in this case opined that "defendant has likely established by a preponderance of the evidence that the amount in controversy in this case is greater than $5,000,000. In the absence of plaintiff's stipulation, the Court *might* agree that federal subject matter exists and, therefore, removal was proper." Pet App. 8a (emphasis added). However, the district court's statement was only dictum. The district court apparently did not conduct any detailed analysis of the quantum of damages, because it believed that any such calculation was made moot by the binding stipulation. The court highlighted its lack of a definitive finding by making its observation equivocal ("likely" and "might"). Moreover, regardless of what the district court found, this Court would have an independent obligation to inquire into the existence of federal subject-matter jurisdiction. *See Hertz Corp.*, 130 S. Ct. at 1193 ("Courts have an independent obligation to determine whether subject-matter jurisdiction exists . . . ").

Accordingly, this Court could not avoid the need to determine whether Skechers met its burden of demonstrating that the $5 million jurisdictional threshold was satisfied. On this record, it is clear that Skechers did not meet its burden. Certiorari is therefore inappropriate, because the question presented would not affect the outcome in this case. Indeed, if this Court were to grant the Petition, it would not even reach the question presented.

III. THERE IS NO CIRCUIT CONFLICT.

Certiorari should be denied because the district court's order in this case does not conflict with decisions of any circuit court. Skechers' description of the cases cited in its Petition is incomplete, and none of the decisions cited by Skechers has recognized a conflict. In fact, the claimed "circuit conflict" is illusory. Despite Skechers' professed emphasis on "the post-CAFA world" (Pet. 13 n.3), several of the cases it cites are pre-CAFA, and all of them turn on their own individual facts. Instead of presenting the kind of well-developed and mature circuit conflict that this Court considers in its certiorari process, this case involves a district court order that is consistent with precedent in every other circuit.

Skechers acknowledges that the district court remand order in this case is consistent with precedent in the Third, Ninth, and Eleventh Circuits. Pet. 10-12. However, Skechers claims that the district court order conflicts with decisions in the Fifth and Seventh Circuits. That is incorrect.

A. There Is No Conflict With The Fifth Circuit.

Skechers cites three decisions from the Fifth Circuit. Pet. 14. Two of them were decided prior to CAFA and thus do not involve the statute, and the other is unpublished and non-precedential:

• *De Aguilar v. Boeing Co.*, 47 F.3d 1404 (5th Cir. 1995), was a pre-CAFA case that was not a class action at all, but a lawsuit by over one hundred heirs and personal representatives of victims of a plane crash. The action was initially filed in Texas state court. After defendant removed the case to federal court, some of the plaintiffs filed affidavits purporting to limit their damages to less than the jurisdictional minimum. The Fifth Circuit noted the district court's reasoning that the affidavits were irrelevant because "jurisdiction attaches at the time of removal, and subsequent events do not oust the court of jurisdiction." *Id.* at 1406 (citation omitted). Further, "the complaint named one hundred unknown plaintiffs who were not bound by the affidavits, and plaintiffs' counsel could not bind minor beneficiaries (constituting approximately twenty of the named plaintiffs) to judgments in wrongful death suits without leave of court." *Id.* at 1407. Even so, the Fifth Circuit recognized that "[l]itigants who want to prevent removal must file a binding stipulation or affidavit with their complaints." *Id.* at 1412 (quoting *In re Shell Oil Co.*, 970 F.2d 355, 356 (7th Cir. 1992) (per curiam)). Hence, *De Aguilar* did not address the question presented here, and to the extent the opinion expressed any relevant views as to the impact of stipulations

and affidavits, they are consistent with the district court decision in this case.

• Next, Skechers cites another pre-CAFA case, *Manguno v. Prudential Property & Casualty Ins. Co.*, 276 F.3d 720 (5th Cir. 2002), which upheld the denial of a class representative's motion to remand because a purported waiver of attorneys' fees in the petition itself (rather than a binding stipulation) was inconsistent with state law. The Fifth Circuit noted that "[t]he magistrate disregarded [plaintiff] Manguno's stated waiver of statutory fees because Manguno had neither verified her petition nor submitted a binding stipulation waiving a claim for such fees." *Id.* at 722. The Fifth Circuit opined (in a portion of the opinion not quoted by Skechers):

> Manguno's purported waiver of attorney's fees is ineffective. Louisiana Code of Civil Procedure article 862 provides that state courts will grant to a successful plaintiff the relief to which she is entitled, even if she has not demanded such relief. Likewise, in *De Aguilar*, state law did not limit the plaintiff's recovery to the amount specified in the ad damnum clause.

Id. at 724. Only then did the Fifth Circuit offer the dictum quoted by Skechers: "Moreover, it is *improbable* that Manguno can ethically unilaterally waive the rights of the putative class members to attorney's fees without their authorization." *Id.* (emphasis added). Thus, the Fifth Circuit did not squarely address the issue presented by Skechers. *Manguno* did not even involve a binding stipulation separate from the petition and most assuredly did not hold

that binding stipulations are inherently unenforceable.

• Skechers cites an unpublished Fifth Circuit decision, *Ditcharo v. United Parcel Serv., Inc.*, 376 Fed. Appx. 432 (5th Cir. 2010), which under the Fifth Circuit's rules is not precedential except in very limited circumstances. 5th Cir. R. 47.5.4.

B. There Is No Conflict With The Seventh Circuit.

Skechers also claims that the district court's remand order conflicts with Seventh Circuit precedent, Pet. 12-13, but that assertion does not withstand scrutiny.

• Skechers cites dictum from *Pfizer, Inc. v. Lott*, 417 F.3d 725 (7th Cir. 2005), but omits mention of the holding of that case: that CAFA did not apply to the plaintiff's suit at all, because it was filed prior to the effective date of the statute. *Id.* at 726-27. Although the Seventh Circuit offered dictum that a "stipulation would not bind the other members of the class," *id.* at 725, the sole authority cited, *Manguno v. Prudential Property & Casualty Ins. Co.*, 276 F.3d 720, 724 (5th Cir.2002), did not involve a binding stipulation, as noted in Part III-A, *supra*.

• Skechers also cites *Back Doctors Ltd. v. Metropolitan Property & Casualty Ins. Co.*, 637 F.3d 827 (7th Cir. 2011) (Easterbrook, C.J.), which found that the $5 million CAFA jurisdictional threshold was met on the basis of a punitive damages claim. However, the complaint in the instant case does not seek punitive damages. Moreover, the plaintiff in *Back*

Doctors did not file any kind of pre-removal stipulation limiting the amount of the claim. As the Seventh Circuit explained:

> Back Doctors did not file in state court a complaint that disclaimed punitive damages or otherwise make a disavowal that is conclusive as a matter of state law. Instead it declared in the district court that it does not "now" want punitive damages, and the district judge relied on this when remanding the suit.

637 F.3d at 830. The Seventh Circuit held that "[f]irst, events after the date of removal do not affect federal jurisdiction, and this means in particular that a declaration by the plaintiff following removal does not permit remand." *Id.* The Seventh Circuit then proceeded to opine (as Skechers quotes in its Petition at 12-13):

> Second, Back Doctors 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. 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.

Id. at 830-31. The language quoted by Skechers is insufficient to create a circuit conflict. *Back Doctors* did not involve a pre-removal stipulation, and the

language is therefore dictum with respect to the question presented by Skechers. The passage from *Back Doctors* quoted by Skechers was labeled "Second" (a detail omitted by Skechers in its Petition at 12) and was plainly subsidiary to the Court's holding that post-removal events cannot deprive the federal court of jurisdiction.

Further, *Back Doctors* itself explained that "[l]itigants sometimes . . . prevent removal, by forswearing any effort to collect more than the jurisdictional threshold." 637 F.3d at 830. For that proposition, *Back Doctors* cited *Oshana v. Coca-Cola Co.*, 472 F.3d 506 (7th Cir. 2006), a class action case in which the Seventh Circuit reaffirmed that "the plaintiff [is] the master of the complaint" and opined that "[i]f [named plaintiff] Oshana really wanted to prevent removal, she should have stipulated to damages not exceeding the $75,000 jurisdictional limit. . . . A stipulation would have had the same effect as a statute that limits a plaintiff to the recovery sought in the complaint." *Id.* at 511-12.

Back Doctors also cited the Seventh Circuit's prior decision in *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005) (Easterbrook, J), a class action case under CAFA explaining that, because the plaintiff is the "master of the case" and "may limit his claims (either substantive or financial) to keep the amount in controversy below the threshold," the removing party must "show not only what the stakes of the litigation could be, but also what they are given the plaintiff's actual demands." 427 F.3d at 44; *see also Garbie v. DaimlerChrysler Corp.*, 211 F.3d 407, 411 (7th Cir. 2000) ("Even if the

Michiganders were added [to the class action] to prevent removal, that is their privilege; plaintiffs as masters of the complaint may include (or omit) claims or parties in order to determine the forum.").

Hence, the Seventh Circuit, in *Back Doctors* itself and in other decisions reaffirmed in *Back Doctors*, has plainly recognized that a plaintiff in a class action remains the master of the complaint and may properly limit claims via a pre-removal stipulation in order to avoid federal jurisdiction.

There is no conflict between the district court decision in the instant case and precedent in either the Fifth or Seventh Circuits.

IV. THIS CASE DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW.

Skechers contends that the district court's decision has created a novel "jurisdictional loophole" (Pet. 19) that warrants this Court's review. That contention is baseless. The district court applied well-settled law in a fact-bound way that raises no important federal question.

This Court has long recognized that, "since the plaintiff is the master of the complaint, the well-pleaded-complaint rule enables him . . . to have the cause heard in state court" by limiting the claim to avoid federal subject-matter jurisdiction. *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 831 (2002) (internal quotation marks and citation omitted). *See, e.g.*, *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938)

("If [the plaintiff] does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove."). In fact, the general rule that a plaintiff may frame her suit to avoid removal jurisdiction has been the law for over a century.[4]

This Court is familiar with the same principle in the context of class actions. For example, *United States v. Hohri*, 482 U.S. 64 (1987), involved a putative class action suit by nineteen individuals (former internees or their representatives) against the United States. The named plaintiffs limited requested damages to $10,000 per claim in order to qualify for federal district court jurisdiction and avoid the claims court. *Id.* at 66 & n.1. This Court did not suggest any infirmity with that jurisdictional strategy.

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[4] *See, e.g.*, *Central R. Co. v. Mills*, 113 U.S. 249, 257 (1885) ("[T]he question whether a party claims a right under the constitution or laws of the United States is to be ascertained by the legal construction of its own allegations, and not by the effect attributed to those allegations by the adverse party."); *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) ("Of course, the party who brings a suit is master to decide what law he will rely upon . . . ."") (Holmes, J.); *Great North R. Co. v. Alexander*, 246 U.S. 276, 282 (1918) ("[T]he plaintiff may by the allegations of his complaint determine the status with respect to removability of a case . . . ."); *see also Iowa City Ry. v. Bacon*, 236 U.S. 305, 308 (1915) (holding that plaintiff could defeat removal by requesting only $1,900 in damages (at a time when the jurisdictional threshold was $2,000), even though plaintiff's loss was $10,000).

Skechers contends that the use of binding stipulations to limit class claims below the jurisdictional threshold would "nullify CAFA's carefully created statutory scheme." Pet. 8. To the contrary: the use of stipulations is perfectly consistent with CAFA. Section 2(b) of CAFA states that one of "[t]he purposes of th[e] Act" is to "restore the intent of the framers of the United States Constitution by providing for federal court consideration of interstate cases of national importance under diversity jurisdiction." 28 U.S.C. § 1711 note, subpart (2). Cases like this one – involving purely state-law claims by residents of a single state, below the jurisdictional minimum – do not implicate the congressional purpose.

Further, the longstanding nature of the jurisdictional principle applied by the district court militates against any inference that CAFA meant to displace it *sub silentio*. This Court has opined that "[w]e assume that Congress is aware of existing law when it passes legislation." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). Nothing that Congress included in CAFA suggests that a plaintiff bringing a class action is no longer the master of her complaint or is somehow prevented from "suing for less than the jurisdictional amount." *St. Paul Mercury*, 303 U.S. at 294.

Skechers complains that "the stakes are high" because a class action "can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight." Pet. 16 & n.5 (citation and internal quotation marks omitted). Skechers warns that "when damages allegedly owed to tens of thousands of potential clai-

mants are aggregated and decided at once, the risk of an error will often become unacceptable." *Id.* at 16 (citation and internal quotation marks omitted). "Certification of a large class may so increase the defendant's potential damages liability" that there is an "*in terrorem* threat." *Id.* at 16 & n.5 (citation and internal quotation marks omitted).

Whatever force those concerns might have in other contexts is entirely absent here. The damages in this case will never be aggregated to astronomical levels. They are capped by binding stipulation at $5 million and do not present the risk of a limitless judgment. The stipulation avoids the risk of which Skechers complains. Defendant refuses to take "yes" for an answer.

Skechers insists, with less than complete plausibility, that it seeks to vindicate the interests of absent class members. It maintains that the stipulation is "not fair" to absent class members, Pet. 20, who supposedly would be in better hands if Skechers were permitted to protect their interests by removing this case to federal court. Skechers' argument that class representatives should not be permitted to make "unilateral, discretionary, tactical decision[s]" (Pet. 19) has no merit.

The decision to stipulate to damages of a certain size is no different from innumerable other decisions that class representatives inevitably make as masters of their complaints. Named plaintiffs bringing putative class actions necessarily "limit" the recovery of the proposed class by, for example, picking and choosing which defendants to sue, which causes of action and elements of damages to include, and what

kinds of litigation tactics to pursue in discovery, pretrial motions, trial, and beyond. Under Skechers' view, none of these decisions could ever be binding on absent class members, and class actions could never be brought. In addition, Skechers' argument could likely support removal jurisdiction in virtually any class action filed in state court under state law for that state's residents. For example, a court could always speculate that an entirely hypothetical new class representative *might* assert a federal claim for the class (establishing federal question jurisdiction) or *might* expand the class to meet the CAFA jurisdictional minimum.

The law has taken a different approach. When and if a motion for class certification is brought (which has not happened in the instant case), the court determines the adequacy of a class representative and class counsel, partly on the basis of the litigation tactics to date. If the court confirms the adequacy of the class representative and counsel, putative class members are free to invoke opt out rights and pursue their own remedies or join a different ongoing class action if they feel that the limitations placed on the class by the Plaintiff are too restrictive. A decision to stipulate to a particular level of damages is no different from any other strategic choices that a class representative must make in litigating a case.[5]

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[5] *See Holcombe v. Smithkline Beecham Corp.*, 272 F. Supp.2d 792, 793 (E.D. Wis. 2003) ("Judicial concern about a limitation on the value of claims may be addressed when the question of plaintiff's adequacy as a representative is considered."); *Hooks v. Associates Fin. Serv. Co.*, 966 F. Supp.

Skechers criticizes Arkansas class action procedure, which it suggests "quite explicitly *refuses* to subject proposed classes to any sort of 'rigorous' scrutiny." Pet. 19 (emphasis in original). Skechers accuses the Arkansas state courts of being "unwilling to enforce the basic class certification requirements reflected in Rule 23 of the Federal Rules of Civil Procedure." Pet. 2 (citing *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011)).

Yet the Federal Rules govern proceedings in federal court only. Arkansas courts operate according to the Arkansas Rules of Civil Procedure. Even where a State has adopted a verbatim version of Federal Rule 23, its courts are free to apply the rule differently. *Smith v. Bayer Corp*., 131 S.Ct. 2368, 2377 (2011) ("Federal and state courts, after all, can and do apply identically worded procedural provisions in widely varying ways."). This Court lacks jurisdiction to decide the state-law question of whether a state court has correctly applied its own rules. *See, e.g.*, *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 636 (1875).

1098, 1101 (M.D. Ala. 1997) ("[A]ny putative class members who disagree with the Plaintiffs limitation of damages have the ability to opt out from the class at the appropriate time."); *Four Way Plant Farm, Inc. v. National Council on Compensation Ins.*, 894 F. Supp. 1538, 1544 (M.D. Ala. 1995) ("Whether plaintiffs, as representatives of a presently uncertified class, can waive any potential federal claims is an issue to consider when deciding whether the class should be certified or what class should be certified.").

Moreover, the instant case presents a poor vehicle for examining the manner in which Arkansas courts apply state rules of class certification, because *no Arkansas court has even considered class certification in this case*, let alone ruled on the issue. A more natural candidate for airing Skechers' criticisms would have been the very decision Skechers cites (Pet. 17) – the Arkansas Supreme Court's decision in *General Motors Corp. v. Bryant*, 374 Ark. 38, 285 S.W.3d 634 (2008), *cert. denied*, 129 S.Ct. 901 (2009).

In any event, Skechers' criticisms of the Arkansas system are misplaced. Pet. 17. Skechers cites the Arkansas Supreme Court's explanation that it has eschewed a "rigorous-analysis inquiry" in the context of choice-of-law questions presented by multistate class actions as they affect the commonality and predominance requirements of certification.[6]

But Skechers' Petition does not concern the elements of commonality and predominance. In fact, the Arkansas judiciary's approach to multistate class actions is irrelevant to the instant case, which in-

[6] *General Motors Corp. v. Bryant*, 374 Ark. at 45-46, 285 S.W.3d at 640-41 ("[T]here are clearly common questions concerning General Motors's alleged wrongdoing that will have to be resolved for all class members, and we view any potential choice-of-law determination and application as being similar to a determination of individual issues, which cannot defeat certification. . . . [W]e have previously rejected any requirement of a rigorous-analysis inquiry by our circuit courts. Instead, we have given the circuit courts of our state broad discretion in determining whether the requirements for class certification have been met, recognizing the caveat that a class can always be decertified at a later date if necessary.") (citations omitted).

volves a class limited to Arkansas consumers raising claims solely under Arkansas law.

With respect to the adequacy of representation requirement of class certification, Skechers fails to mention that the Arkansas courts have articulated several important factors to protect the interests of absent class members.[7] The Arkansas Supreme Court has instructed that trial courts must set forth their findings regarding adequacy of representation in order to permit meaningful review. *BNL Equity Corp. v. Pearson*, 340 Ark. 351, 10 S.W.3d 838, 844 (Ark. 2000). "When reviewing a class-certification order, [the state court] focus[es] on the evidence contained in the record to determine whether it supports the circuit court's conclusion regarding certification." *Asbury Automotive Group, Inc. v. Palasack*, 366 Ark. 601, 237 S.W.3d 462, 465 (Ark. 2006). The state supreme court scrutinizes certification decisions and reverses them when the require-

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[7] *E.g.*, *Advance America Servicing of Arkansas, Inc. v. McGinnis*, 2009 Ark. 151, 300 S.W.3d 487, 491 (Ark. 2009) ("Rule 23(a)(4) specifically requires that the representative parties and their counsel be able to adequately protect the interests of the class. This court has previously interpreted Rule 23(a)(4) to require three elements: (1) the representative counsel must be qualified, experienced, and generally able to conduct the litigation; (2) that there be no evidence of collusion or conflicting interest between the representative and the class; and (3) the representative must display some minimal level of interest in the action, familiarity with the practices challenged, and ability to assist in decision making as to the conduct of the litigation."); *Farm Bureau Policy Holders v. Farm Bureau Mutual Insurance Co. of Arkansas, Inc*., 335 Ark. 285, 303, 984 S.W.2d 6, 15 (Ark. 1998) (finding that class representative could not adequately represent certain members of the class).

ments of Rule 23 of the Arkansas Rule of Civil Procedure are not met.[8]

Skechers' criticisms of the Arkansas class action procedure have no foundation. There is no warrant for this Court to superintend the Arkansas Supreme Court's administration of its class action procedural rule under state law, even if that were a proper use of this Court's certiorari jurisdiction, which of course it is not.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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[8] *E.g.*, *Union Pacific R.R. v. Vickers*, 2009 Ark. 259, 308 S.W.3d 573 (Ark. 2009) (reversing certification order); *Baptist Health v. Haynes*, 367 Ark. 382, 240 S.W.3d 576 (Ark. 2006) (same).