No. _____

In The
Supreme Court of the United States

AU OPTRONICS CORPORATION, *et al.*,
Petitioners,

v.

STATE OF SOUTH CAROLINA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Class Action Fairness Act ("CAFA") provides that its minimal diversity requirement for a class action is satisfied when any person "(named or unnamed) who fall[s] within the definition of [a] proposed . . . class," 28 U.S.C. § 1332(d)(1)(D), "is a citizen of a State different from any defendant." § 1332(d)(2)(A). It further provides that "a mass action shall be deemed to be a class action removable" under CAFA if it "otherwise meets" CAFA's requirements for federal jurisdiction over a class action. § 1332(d)(11)(A). In addition, *Navarro Savings Ass'n v. Lee*, 446 U.S. 458, 461 (1980) ("*Navarro*"), and other decisions of this Court establish that diversity jurisdiction must be based "only upon the citizenship of real parties to the controversy."

Whether the citizenship of the persons on whose behalf monetary relief claims are brought by a state may satisfy CAFA's minimal diversity requirement as set forth in 28 U.S.C. § 1332(d)(2)(A)-(C) and (d)(1)(D) for purposes of CAFA mass action jurisdiction even if those persons are not named plaintiffs?

PARTIES TO THE PROCEEDING

The named parties to the proceeding in the Fourth Circuit were Petitioners, AU Optronics Corporation, AU Optronics Corporation America, LG Display Co., Ltd., and LG Display America, Inc., and Respondent, the State of South Carolina.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

AU Optronics Corporation is a publicly traded company. AU Optronics Corporation has no parent corporation. No publicly held company owns more than 10% of AU Optronics Corporation's stock. AU Optronics Corporation America is a wholly owned subsidiary of AU Optronics Corporation and is not a publicly traded company.

LG Display Co., Ltd. is a publicly traded company. LG Display Co., Ltd. has no parent corporation. The only publicly held entity that owns 10% or more of the stock of LG Display Co., Ltd. is LG Electronics, Inc. LG Display America, Inc. is a wholly owned subsidiary of LG Display Co., Ltd.

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JURISDICTION

The Fourth Circuit entered the judgment on October 25, 2012. This petition is filed within 90 days of that entry. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Class Action Fairness Act of 2005, codified in part at 28 U.S.C. § 1332(d), provides in pertinent part:

> (d)(1) In this subsection–
>
> > (A) the term "class" means all of the class members in a class action;
> >
> > . . .
> >
> > (D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

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

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

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

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

. . .

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

(B)(i) As used in subparagraph (A), the term "mass action" means any civil action (except a [class action]) in which monetary relief claims of 100 or more persons are proposed to be tried jointly

> on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).
>
> . . .

The pertinent provisions of 28 U.S.C. § 1332(d); full text of Pub L. No. 109-2, § 2, 119 Stat. 4 (Feb. 18, 2005) (codified as amended at 28 U.S.C. § 1711, Findings and Purposes) ("CAFA Findings and Purposes"); and relevant provisions of the South Carolina Unfair Trade Practices Act ("SCUTPA"), S.C. Code Ann. §§ 39-5-10 *et seq*.; and the South Carolina antitrust laws, S.C. Code Ann. §§ 39-3-10 *et seq*., are set forth in the Appendix.

STATEMENT OF THE CASE

The Fourth Circuit, as well as the Ninth Circuit, has interpreted CAFA's minimal diversity requirement in conflict with the Fifth Circuit, CAFA's text, and this Court's diversity jurisprudence. The Fourth Circuit's interpretation allows plaintiff's counsel to circumvent CAFA and

bring what is essentially a class action in state court without fear of removal under CAFA.[1] It thus undermines Congress's purpose in expanding federal diversity jurisdiction over class and mass actions through CAFA. The Fourth Circuit's decision here prevents removal of two actions that are based on an alleged international price fixing conspiracy. Each action involves restitution claims of a large number of South Carolina citizens against defendants from other nations and states.

Before CAFA, federal diversity jurisdiction under 28 U.S.C. § 1332 was available only when there was complete diversity of citizenship. As a result, class actions based on state law claims could be removed only if each class representative was a citizen of a different state from each defendant. *See Carden v. Arkoma Assocs.*, 494 U.S. 185, 199-200 (1990). This allowed plaintiff's counsel to keep many class actions in state court by naming at least one non-diverse class representative. Naming a state as a plaintiff, for example, would prevent diversity jurisdiction because a state is a non-diverse party. *See Moor v. County of Alameda*, 411 U.S. 693, 717 (1973).

Congress concluded that the limited availability of diversity jurisdiction resulted in "[a]buses in class actions [that] undermine[d] the National judicial system, the free flow of interstate

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[1] *Knowles v. Standard Fire Ins. Co.*, No. 11-8030, 2012 WL 3828891 (8th Cir. Jan. 4, 2012), *cert. granted*, 133 S. Ct. 90 (Aug. 31, 2012) (No. 11-14a50) (addressing whether plaintiff's counsel may avoid CAFA removal by attempting to reduce the amount claimed by a class), involves a different CAFA avoidance strategy.

commerce, and the concept of diversity jurisdiction as intended by the framers of the United States constitution." CAFA Findings and Purposes (a)(4). App. 100a. Among the "abuses" Congress identified was the fact that "State and local courts" were

- "keeping cases of national importance out of Federal court,"
- "sometimes acting in ways that demonstrate bias against out-of-State defendants," and
- "making judgments that impose their view of the law on other States and bind the rights of the residents of those States." *Id*.

To prevent these abuses, CAFA expanded federal diversity jurisdiction for both class actions and mass actions. One of the critical changes CAFA made was to substitute minimal diversity for the complete diversity requirement. Under CAFA, plaintiff's counsel can no longer defeat removal by naming at least one class representative or one member of a mass action who is not diverse. A class action satisfies CAFA's minimal diversity requirement if any person "named or unnamed" falling "within the definition of the proposed . . . class" is a "citizen of a State different from any defendant." 28 U.S.C. § 1332(d)(1)(D) and (2)(A).[2]

CAFA does not provide a separate minimal diversity definition for mass actions. Its mass action

[2] Section 1332(d)(2)(C) provides a similar standard where a foreign defendant is involved.

provisions incorporate CAFA's minimal diversity language for class actions. A "mass action" is "any civil action (except a [class action]) in which monetary relief claims of 100 or more *persons* are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." § 1332(d)(11)(B) (emphasis added). Section 1332(d)(11)(A) provides that a "mass action shall be *deemed to be a class action* removable" to federal court under CAFA's class action provisions if it "otherwise meets" the requirements of CAFA class action jurisdiction, as stated in "paragraphs (2) through (10)" of § 1332(d) (emphasis added). Section 1332(d)(2) provides for minimal diversity jurisdiction based on the citizenship of "any member of a class of plaintiffs." Section 1332(d)(1), in turn, makes clear that the term "class of plaintiffs" means *all* class members, "named or unnamed." Thus, under § 1332(d)(2), supplemented by the definitions in § 1332(d)(1), minimal diversity exists in a CAFA mass action if any "member of a class of plaintiffs" is "a citizen of a State different from any defendant." "Class members" means "the persons (named or unnamed) who fall within the definition of the proposed . . . class . . . ." § 1332(d)(1)(D). In the context of a mass action, the phrase "member of a class of plaintiffs" means in practice "member of the group of persons whose monetary relief claims are to be tried jointly." *See* 13E Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 3606 (3d ed. 2011) ("Congress enacted [CAFA] . . . to grant the federal courts a form of minimal diversity jurisdiction over . . . mass actions in which any . . . mass action member is diverse in citizenship with regard to any defendant . . . .").

Petitioners are defendants in two actions that the Fourth Circuit remanded. Each action ("Action") involves restitution claims of more than 100 persons who are South Carolina citizens and, thus, of diverse citizenship from Petitioners.[3] Each Action was brought in state court jointly by both private attorneys on a contingency basis[4] and the state attorney general representing the State as the only named plaintiff. The Actions seek statutory forfeitures and penalties for the State in addition to restitution for the citizens involved.[5] While there is no diversity between the State and Petitioners, there is at least minimal diversity between Petitioners and the citizens whose claims are being litigated in the Actions.

More particularly, the State seeks restitution "on behalf of" those "citizens" of South Carolina who allegedly suffered an ascertainable loss as a result of an international price fixing conspiracy. App. 58a ¶1, 65a ¶28. The State alleges that "foreign manufacturers," App. 58a ¶1, fixed the prices of liquid crystal display ("LCD") panels that are

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[3] LG Display Co., Ltd. and LG Display America, Inc. (jointly "LGD") are Korean and California entities. AU Optronics Corporation and AU Optronics Corporation America (jointly "AU") are Taiwanese and Texas entities.

[4] *See* Litigation Retention Agreement For Special Counsel Appointed by the South Carolina Attorney General as to Certain Anti-Competitive Activities By Manufacturers of LCD Panels, http://www.scag.gov/wp-content/uploads/2011/09/LCD-antitrust-litigation-retention-agreement-final-signed.pdf) (last visited Jan. 19, 2012).

[5] The complaints in the Actions are almost identical. Only the complaint against LGD is included in the Appendix.

components of various electronic products. App. 59a ¶6. The State's private counsel asserted common law restitution claims based on the same alleged conspiracy in a prior class action in federal court in South Carolina but withdrew those claims after that action was transferred to a multidistrict litigation proceeding in the Northern District of California (the "MDL proceeding"). The consolidated complaint in the MDL proceeding emphasized the international nature of the claims. It alleged a conspiracy "effectuated through a combination of group and bilateral discussions that took place in Japan, Korea, Taiwan, and the United States." Indirect-Purchaser Plaintiffs' Third Consolidated Amended Complaint at 25 ¶135, *In re: TFT-LCD (Flat Panel) Antitrust Litig.*, No. C 07-1827 SI (N.D. Cal. April 29, 2011).[6]

While any forfeitures or civil penalties obtained in the Actions here will belong to the State, *see* S.C. Code Ann. §§ 39-3-180, 39-5-110(a), any restitution obtained must be paid to the citizens who suffered the loss. § 39-5-50(b). The restitution claims are allegedly based on § 39-5-50(b) of SCUTPA. That provision allows the court, in an action brought by the State, "to restore to any person

[6] Litigation related to the alleged conspiracy has included a nationwide class action on behalf of direct purchasers, a nationwide class action on behalf of indirect purchasers, more than thirty actions by opt-out plaintiffs, and fourteen state attorneys general ("AG") actions. Seven LCD panel manufacturers have paid nearly $1.3 billion in criminal fines. Current settlements of direct and indirect purchaser class actions and AG suits when finalized are expected to exceed $1.5 billion. Other AG suits and suits by opt-out plaintiffs are pending. Additionally, antitrust authorities in Europe, Japan, Korea, and China, among others, have announced investigations and fines against LCD panel manufacturers.

who has suffered any ascertainable loss by reason of [a violation of SCUTPA] any moneys or property . . . which may have been acquired by means of [the violation]."

But SCUTPA does not give the State exclusive rights to seek restitution on behalf of the "citizens." Section 39-5-140(a) of SCUTPA gives these "citizens" the right to bring their own individual actions to recover such "ascertainable loss," independently of any action by the State. *See* App. 108a. South Carolina's prohibition on double recoveries, however, would prevent any citizen from pursuing an individual claim should the State obtain restitution on their behalf in the Actions.[7]

Petitioners removed each Action based on CAFA mass action jurisdiction, among other grounds. App. 76a–77a, 89a–91a. In the courts below, Petitioners contended that minimal diversity exists based on both CAFA's text and the longstanding principle that diversity jurisdiction is based on the citizenship of the real parties in interest. Petitioners asserted that the citizenship of the persons who would receive restitution in the Actions satisfies the minimal diversity requirement of CAFA's text. App. 75a ¶10, 77a ¶15, 88a ¶10, 90a ¶15. Under Petitioners' application of CAFA's text, the persons whose restitution claims are asserted are deemed to be members of a proposed class for purposes of minimal diversity, § 1332(d)(1)(D) and (d)(2)(A) and (C), because a mass action is "deemed

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[7] *See*, *e.g.*, *Rutland v. S.C. Dep't of Transp.*, 734 S.E.2d 142, 145 (S.C. 2012) ("[I]t is 'almost universally held that there can be only one satisfaction for an injury or wrong.'").

to be a class action" under § 1332(d)(11)(A). Therefore, they satisfy the minimal diversity requirement of § 1332(d)(2)(A) and (C). Petitioners pointed out that looking to the citizenship of the persons whose claims form the mass action is further supported by CAFA's focus on "claims" of "persons" in § 1332(d)(11)(B)'s definition of a mass action.

In addition to the language of CAFA's minimal diversity requirement, Petitioners relied on the longstanding principle, recognized in *Missouri, Kansas & Texas Railway Co. v. Hickman*, 183 U.S. 53, 59 (1901) ("*Hickman*"), *Navarro*, and other decisions of this Court, as well as the Fifth Circuit's decision in *Louisiana ex rel. Caldwell v. Allstate Insurance Co.*, 536 F.3d 418, 424, 428 (5th Cir. 2008) ("*Caldwell*"), that diversity jurisdiction must be based on the citizenship of the real parties in interest, whether or not they are named plaintiffs. Petitioners agreed that the State is a real party in interest insofar as it seeks statutory penalties, but they urged the courts below to follow the approach of the Fifth Circuit in *Caldwell* (sometimes referred to as a "claim-by-claim" approach) and examine each claim asserted to determine whether any of the real parties in interest to that claim is diverse from any defendant. Petitioners asserted that, under this approach, each citizen who would receive restitution—just like an absent member of a class—is a real party in interest, satisfying CAFA's minimal diversity requirement.

The State moved to remand, contending that there is no diversity and, thus, no CAFA mass action

jurisdiction.[8] State of South Carolina's Memorandum in Support of Motion to Remand ("Mem. Remand") at 13, *South Carolina v. LG Display Co.*, No. 3:11-cv-00729-JFA (D.S.C. Sept. 14, 2011). The State asked the courts below to assess minimal diversity by looking only to the named plaintiff, the State, and ignoring the citizens whose restitution claims are asserted. *Id.* The State offered no analysis of CAFA's text. It simply asserted that minimal diversity does not exist because "there is no class or mass of plaintiffs bringing the action." Brief of Respondent at 27, *LG Display Co. v. South Carolina*, 699 F.3d 385 (4th Cir. 2012).

In response to Petitioners' real-party-in-interest arguments, the State urged the courts to reject the Fifth Circuit's approach and follow a "whole case" approach that had been developed before CAFA for the purpose of determining whether there was complete diversity. The Ninth Circuit applied this approach to CAFA in *Nevada v. Bank of America Corp.*, 672 F.3d 661, 672 (9th Cir. 2012) ("*Bank of America*").[9] According to the State, to assess minimal diversity under CAFA in the Actions, a court need determine only whether the State is a real party in interest to the case as a whole, and

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[8] The State also challenged CAFA mass action jurisdiction on other grounds not reached by the Fourth Circuit and not relevant for purposes of this petition.

[9] The Seventh Circuit has similarly applied the "whole case" approach to determining real-party-in-interest status, but only regarding CAFA's mass action definition, § 1332(d)(11)(B), rather than its minimal diversity requirement, § 1332(d)(2)(A)-(C). *LG Display Co. v. Madigan*, 665 F.3d 768, 773-74 (7th Cir. 2011) ("*Madigan*").

once the court finds that the state "is a real party, with a substantial stake in the litigation, the real-party-in-interest inquiry ends" and the existence of other diverse real parties in interest does not create minimal diversity. Mem. Remand at 13. The State contended that it is the real party in interest in each Action because it has a "sovereign interest in enforcing [its] antitrust and unfair trade practice laws." Mem. Remand at 9. It further argued that the State was the only real party in interest under any approach because it controlled the Actions. Thus, the State concluded that CAFA's minimal diversity requirement was not satisfied because the State is not a citizen of any state and does not create diversity.

Petitioners opposed the State's version of the "whole case" approach. They pointed out that this "whole case" approach does not apply to CAFA's minimal diversity requirement because the State's "whole case" approach was developed to assess complete diversity, where the presence of a state as a real party in interest would prevent complete diversity regardless of the presence of other real parties in interest. Petitioners warned that applying that "whole case" approach here to ignore the citizenship of some of the real parties in interest would effectively impose a complete diversity requirement contrary to CAFA's minimal diversity language.

The district court acknowledged there were "conflicting federal court decisions around the country, often by divided panels," regarding CAFA mass action jurisdiction and that this was "one of

those very difficult calls for a trial judge to make." Transcript of Record at 3, *South Carolina v. LG Display Co.*, No. 3:11-cv-00729-JFA (D.S.C. Sept. 14, 2011). In the end, the district court rejected the approach of the Fifth Circuit's *Caldwell* decision, decided to follow the State's "whole case" approach, concluded that there is no diversity because the State is a real party in interest, and granted the motion to remand without explaining how its ruling complies with the applicable text of CAFA. App. 33a–37a.

Petitioners petitioned the Fourth Circuit for review under 28 U.S.C. § 1453(c)(1). The Fourth Circuit granted the petition and affirmed the district court's conclusion that the Actions lack the requisite minimal diversity. App. 20a. The Fourth Circuit's opinion did not explain how its ruling fits CAFA's text, which it quoted in a footnote but never mentioned in its analysis. App. 11a n.8. Instead, the Fourth Circuit simply relied on the "whole case" approach to real-party-in-interest determinations applied by the Ninth Circuit,[10] rejecting the Fifth Circuit's "claim-by-claim" approach. Even though it recognized that its ruling arguably conflicts with *Hickman*, App.12a, the Fourth Circuit examined the complaints as a whole, determined that the State is "the real party in interest" in each Action, refused to consider any other real parties in interest, and concluded that minimal diversity does not exist. It

[10] The Fourth Circuit noted that the Seventh Circuit also had applied the "whole case" approach in *Madigan*, App. 14a–15a, but failed to acknowledge that *Madigan* addressed CAFA's mass action definition, § 1332(d)(11)(B), rather than its minimal diversity requirement, § 1332(d)(2)(A)-(C).

declared that the fact that restitution claims are "tacked onto other claims . . . properly pursued by the State" does not prevent the State from being a real party in interest to the case as a whole. App. 19a. It asserted that the "citizens" who will receive any restitution awarded "are not named plaintiffs" and "need not be considered in [CAFA's] diversity analysis . . . ." App. 20a.[11]

REASONS FOR GRANTING THE PETITION

The issue presented is an important jurisdictional question affecting many cases throughout the country. Petitioners ask the Court to grant this petition because the Fourth Circuit's interpretation of CAFA's minimal diversity requirement (which is the same as the Ninth Circuit's interpretation) directly conflicts with the Fifth Circuit's interpretation, as well as CAFA's text and the jurisdictional principles this Court declared in *Hickman* and *Navarro*. Moreover, many courts have struggled with this issue and will continue to struggle with it until this Court resolves the circuit conflict. And, most importantly, this Court's review is necessary because the Fourth Circuit's opinion ignores CAFA's text and, as a result, misapplies CAFA's minimal diversity requirement in a way that creates an improper loophole. This loophole allows plaintiff's counsel to avoid removal under CAFA in

[11] The Fourth Circuit concluded that resolving the appeal "on the issue of minimal diversity" made it unnecessary to address the other CAFA mass action jurisdictional requirements disputed in the appeal. App. 20a n.11. Implicitly, therefore, the Fourth Circuit must have determined that even if it had ruled in Petitioners' favor on all the other issues, the lack of minimal diversity would prevent jurisdiction.

interstate cases of national importance even though Congress intended to permit it.

1. The circuit conflict regarding CAFA's minimal diversity requirement is clear.

The Fourth Circuit's opinion acknowledges the circuit conflict when it notes that its "sister circuits have disagreed somewhat" on how to determine whether minimal diversity exists in this context. App. 14a. A member of the Fourth Circuit panel noted during argument that "the Supreme Court may have to resolve this . . . I guess they will."[12] Indeed, decisions from the Fifth, Fourth, and Ninth Circuits make clear that courts in the Fifth Circuit would find CAFA's minimal diversity requirement satisfied in this case, while the Fourth Circuit did not, and the Ninth Circuit would not. Each of these opinions involves an action brought in state court under a state consumer protection or antitrust act where a state, represented jointly by private counsel and the state attorney general, seeks restitution or some other form of monetary relief on behalf of certain citizens, along with fines and penalties for the state.

The Fifth Circuit in *Caldwell* adopted an approach that fits CAFA's minimal diversity language and is faithful to this Court's precedents. That approach determines whether minimal

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[12] Oral Argument at 14:25, *LG Display Co. v. South Carolina*, 699 F.3d 385 (4th Cir. 2012) (No. 11-0255), *available at* http://www.ca4.uscourts.gov/ (follow "Argument Calendar" hyperlink; then follow "Listen to Oral Argument Audio Files").

diversity exists based on the citizenship of the persons, named and unnamed, whose claims are presented in the action.

In *Caldwell*, the Fifth Circuit recognized the existence of federal CAFA mass action jurisdiction over an action brought by the State of Louisiana represented by its attorney general and "a number of private law firms." 536 F.3d at 421. The State sued a group of insurance companies and a consulting company for violations of the Louisiana Monopolies Act. It sought "treble damages on behalf of Louisiana insurance policyholders," *id.* at 423, as well as injunctive relief on behalf of the State, *id.* at 430.

The state in *Caldwell* contended, similarly to the State in the Actions here, that there was no CAFA mass action or minimal diversity because the state was the only real party in interest. The Fifth Circuit rejected this argument based on its review of each of the claims asserted. (This has been called the "claim-by-claim" approach, even though the Fifth Circuit did not use that term.) The Fifth Circuit concluded that the claims for treble damages satisfied the minimal diversity requirement because, even if the state had standing and authority to seek treble damages on behalf of Louisiana policyholders,[13] the policyholders were the real parties in interest to those claims. *Caldwell* noted

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[13] Although "the parties vigorously debate[d]" the State's authority to seek treble damages on behalf of the policyholders, the Fifth Circuit assumed "*arguendo*" that the State had "authority to enforce" the treble damages remedy provided by state law. *Id.* at 429-30.

that the policyholders had the right to seek treble damages on their own, even if the state might also be entitled to seek treble damages on their behalf. *Id.* at 429. Because the policyholders' treble damages claims were being asserted, the Fifth Circuit concluded that the case fell within CAFA's mass action definition as an action involving "the monetary claims of 100 or more persons . . . proposed to be tried jointly" and, also, that the diverse citizenship of those persons satisfied CAFA's minimal diversity requirement even though they were not named plaintiffs. *Id.* at 430.

The South Carolina citizens whose restitution claims are involved in the Actions have the right to pursue these claims on their own under § 39-5-140(a) of SCUTPA.[14] Their diverse citizenship would have satisfied the minimal diversity requirement had the Fourth Circuit applied the Fifth Circuit's approach. But the Fourth Circuit applied a "whole case" approach to minimal diversity, the same approach the Ninth Circuit adopted in *Bank of America*, 672 F.3d at 672.

In *Bank of America*, the state alleged that the bank had defrauded certain Nevada consumers by misleading them about the terms of its home mortgaging processes. Rather than assessing minimal diversity—as the Fifth Circuit had in *Caldwell*—based on a consideration of each claim asserted, the Ninth Circuit looked "at the case as a whole," *id.* at 670, using an approach developed before CAFA to assess complete diversity. Its assessment of "the essential nature and effect of the

[14] *See supra* p. 9.

proceeding as it appear[ed] from the entire record" led it to conclude that the state was "the real party in interest" due to "its interest in protecting the integrity of mortgage loan servicing" along with claims of the state itself. *Id.* (internal quotation marks omitted).

The Ninth Circuit concluded that the state's interest was "not diminished merely because it has tacked on a claim for restitution" to the claims asserted on behalf of the state. *Id.* at 671. Its analysis would have been appropriate had the pre-CAFA complete diversity requirement applied and the presence of the state been sufficient to prevent federal jurisdiction without regard to any other real parties in interest. But its approach was wrong because it led the court to ignore the diversity created by the Nevada consumers whose claims were asserted in the action, even though the consumers were entitled to pursue those claims separately on their own. *Nevada v. Bank of Am. Corp.*, No. 3:11-CV-00135-RCJ-RAM, 2011 WL 2633641, at *4 (D. Nev. July 5, 2011), *rev'd*, 672 F.3d 661 (9th Cir. 2012). The court made no effort to explain why it concluded that the state was "the" real party in interest, as opposed to "a" real party in interest along with the consumers. Nor did it attempt to explain how its ruling fit CAFA's instruction to treat a mass action as a class action and to consider the citizenship of both named and unnamed class members for purposes of determining minimal diversity. Its reasoning essentially restored the complete diversity requirement that CAFA had removed. Having determined that the state was the only "real party in interest in [the] action," the Ninth

Circuit ruled that "CAFA's minimal diversity requirement . . . [was not] satisfied." *Id.* at 672.

Applying the Ninth Circuit's approach to the Actions and quoting from *Bank of America*, the Fourth Circuit assessed minimal diversity based on its evaluation of "the Complaint, read as a whole" and concluded that the state is "the real party in interest" in the Actions and, thus, minimal diversity does not exist. App. 19a–20a. It noted that the South Carolina citizens whose restitution claims are involved "are not named plaintiffs" and declared that their citizenship "need not be considered." App. 20a. But it did not explain how it could ignore CAFA's command to consider both named and unnamed claimants in the diversity determination. It merely asserted that the state had a "quasi-sovereign interest in enforcing its own laws" and that "a claim for restitution, when tacked onto other claims being properly pursued by the State," does not alter the state's interest or "the nature and effect of the proceedings." App. 19a. By using the Ninth Circuit's "whole case" approach and ignoring the claims of South Carolina citizens, the Fourth Circuit mistakenly reimposed the complete diversity requirement that CAFA had removed.

The approach of the Fourth and Ninth Circuits to determining minimal diversity for purposes of CAFA conflicts with that of the Fifth Circuit and leads to inconsistent jurisdictional outcomes. *Mississippi ex rel. Hood v. AU Optronics Corp.*, 701 F.3d 796 (5th Cir. 2012) ("*Hood*") further illustrates the conflict. In *Hood*, the Fifth Circuit applied the principles of *Caldwell* to find that there

is federal mass action jurisdiction based on restitution claims identical to those asserted in the Actions here. *Hood* is an action against Petitioners as well as other LCD manufacturers. It seeks restitution "on behalf of" Mississippi citizens who, like the South Carolina citizens involved in the Actions, have the right to bring individual claims for any loss. The restitution claims are based on the Mississippi Consumer Protection Act ("MCPA"). Its relevant language is almost identical to the relevant language in SCUTPA.[15] The *Hood* restitution claims arise from the same international conspiracy alleged in the Actions. Applying *Caldwell*, the district court in *Hood* concluded that the citizenship of the citizens whose restitution claims form the mass action satisfies CAFA's minimal diversity requirement, but it remanded based on the mistaken belief that CAFA's public interest exception applied. The Fifth Circuit corrected that error, however, and confirmed that *Hood* will "proceed in federal, not state, court" based on CAFA mass action jurisdiction. *Hood*, 701 F.3d at 803 n.2.

In contrast, the Actions here, which are almost identical to *Hood*, were remanded to state court in South Carolina based on a lack of minimal diversity. And the district court in the California MDL proceeding also remanded two cases against Petitioners, similar to *Hood*, to state courts in California and Washington based on a lack of

[15] Like SCUTPA § 39-5-50, the MCPA allows a court in an action brought by the state attorney general to "make such additional orders . . ., including restitution, as may be necessary to restore to any person . . . any monies . . . acquired by means of any practice" prohibited by the MCPA. Miss. Code Ann. § 75-24-11.

minimal diversity.[16] Like the Fourth Circuit, the district court in the MDL proceeding made no effort to apply CAFA's minimal diversity text but relied instead on the "whole case" rationale that the Ninth Circuit ultimately adopted in *Bank of America*. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. C 07-1827 SI, 2011 WL 560593, at *3 (N.D. Cal. Feb. 15, 2011) ("The Court is unpersuaded by defendants' argument that . . . federal courts are required to deviate from the traditional 'whole complaint' analysis when evaluating whether a State is the real party in interest in a *parens patriae* case."). Like the Ninth Circuit, the district court in the MDL proceeding failed to recognize that its application of the "whole case" approach restored the complete diversity requirement that CAFA had removed.

Only this Court can resolve the conflict among the circuits regarding the application of CAFA's minimal diversity requirement and ensure that CAFA's grant of a federal forum for class and mass actions is upheld consistently in all federal courts.

2. The Fourth Circuit's approach also conflicts with this Court's decisions in *Hickman* and *Navarro*.

In addition to conflicting with the Fifth Circuit, the Fourth Circuit's opinion conflicts with the real-party-in-interest jurisdictional principles established in *Hickman* and *Navarro*.

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[16] *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. C 07-1827 SI, 2011 WL 560593, at *5 (N.D. Cal. Feb. 15, 2011).

Hickman declared that an unnamed party should be considered a real party in interest for purposes of diversity jurisdiction when "the relief sought is that which inures to it alone." 183 U.S. at 59. *Hickman* was an action by railroad commissioners against a railroad to stop it from charging excessive rates to cross a bridge. The state court rejected the out-of-state railroad's removal petition on the ground that the state, although not a named party, was "the real party plaintiff," *id*. at 58, and thus prevented the complete diversity necessary for federal jurisdiction. This Court held that an unnamed party is a real party in interest for purposes of diversity jurisdiction when it receives "the relief sought."[17] *Id.* at 59. The Court concluded that the state was not a real party in interest in *Hickman* because the unnamed citizens who used the bridge were the ones who would benefit from the relief sought and they, not the state, were "the real parties in interest." *Id*. at 59-60. The Court rejected the idea that a state's "governmental interest in the welfare of all its citizens" made it a real party in

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[17] In *U.S. Fidelity & Guaranty Co. v. United States*, 204 U.S. 349 (1907), the Court reaffirmed that the real party in interest is "the party for whose benefit the recovery is sought" and evaluated the facts of the case to find that, based on "exceptional grounds," the United States was "a" real party in interest. *Id.* at 356-57. There, the United States sued on behalf of a subcontractor under its statutory authority to enforce a bond required of its contractor to ensure prompt payment for labor and materials. *Id.* at 357. The Court recognized the United States' unique and important interest in the suit: it "was a principal party to the contract," and the government has an interest in seeing that subcontractors for public works are timely paid so that its "contractors for such works are able to obtain materials and supplies with certainty and promptly" for future projects. *Id.* at 356.

interest for purposes of diversity jurisdiction, noting that "if that were so the state would be a party in interest in all litigation." *Id*. at 60.

The rule of *Hickman*[18] required the Fourth Circuit to ask who would receive the relief the State requested. Had it done so, it would have recognized that any restitution obtained would belong to the South Carolina citizens alone[19] and that their citizenship satisfies CAFA's minimal diversity requirement. But the Fourth Circuit followed the Ninth Circuit's "whole case" approach rather than *Hickman*.

The Fourth Circuit's opinion acknowledged its conflict with *Hickman*. It admitted that Petitioners found "arguable support for their proposition concerning the interests of individual South Carolina citizens" in *Hickman* but did not explain how its ruling can be reconciled with *Hickman's* principle.

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[18] In *Ex Parte Nebraska*, 209 U.S. 436 (1908), this Court applied the rule of *Hickman* to conclude that the state, although a named plaintiff, was not a real party in interest and, thus, did not destroy complete diversity. The Court remarked that the real-party-in-interest determination must be made based on "the whole record." *Id.* at 445. But it did not rule that any real party in interest could be ignored, and it did not use a "whole case" approach like that of the Fourth Circuit below. *Ex Parte Nebraska* involved only one claim and the application of the complete diversity requirement where the presence of the State as a real party would destroy jurisdiction. The Court did not suggest, as the Fourth Circuit apparently concluded, that there could be only one real party in interest, particularly in a case involving a minimal diversity standard and multiple claims for relief.

[19] *See supra* pp. 8-9.

App. 12a. The Ninth Circuit's *Bank of America* opinion ignored *Hickman* altogether,[20] even though the Ninth Circuit had relied extensively and primarily on *Hickman* in *Department of Fair Employment and Housing v. Lucent Technologies, Inc.*, 642 F.3d 728, 737-39 (9th Cir. 2011) ("*Lucent*"), to reject a key rationale of

[20] Other courts have struggled to distinguish *Hickman* or have ignored it altogether, as did the Seventh Circuit in *Madigan* and the Ninth Circuit in *Bank of America*. For example, *Wisconsin v. Abbott Labs*, 341 F. Supp. 2d 1057, 1063 (W.D. Wis. 2004), used the "whole case" approach, reasoning that although *Hickman* seems to say that a state is not a real party in interest when seeking restitution for private parties, "lower courts have not strictly construed the language in [*Hickman*], but instead have focused on the state's interest, monetary or otherwise, in the context of the entire case." Likewise, *West Virginia v. Morgan Stanley & Co.*, 747 F. Supp. 332, 338 (S.D. W. Va. 1990), stated that while *Hickman* suggests "the state is the real party in interest for diversity purposes only when the relief sought inures to the benefit of the state alone[,] . . . subsequent cases have not been so limiting." But the court in *Morgan Stanley* cited no decision of this Court, or even of a court of appeals, as support for its conclusion that *Hickman* has been limited. In contrast, the Sixth Circuit in *Geeslin v. Merriman*, 527 F.2d 452, 454-56 (6th Cir. 1975), faithfully applied *Hickman* in determining that a state was not a real party in interest to an action brought by a state officer, noting that *Hickman*'s principles "have never been overruled." 527 F.2d at 455. Similarly, the Third Circuit in *Ramada Inns, Inc. v. Rosemount Memorial Park Ass'n*, 598 F.2d 1303, 1308 (3d Cir. 1979), applied *Hickman* in rejecting claims that a state's general governmental interests were sufficient to make it a real party in interest.

many decisions applying the "whole case approach"[21] and sustain diversity jurisdiction based on the citizenship of an employee who did not bring the action and was not named in the complaint.

The Fourth Circuit's opinion also violates the jurisdictional principle that this Court articulated in *Navarro*, *i.e.,* that diversity jurisdiction must be based on the citizenship of the real parties in interest. *Navarro* addressed whether complete diversity in a suit brought by the trustees of a Massachusetts business trust should be determined based on the citizenship of the trustees or the citizenship of the trust's shareholders. This Court concluded that jurisdiction must be determined based on the citizenship of the trustees who would receive and hold "legal title" to any recovery. 446 U.S. at 465. The Court based its decision on the principle that "a federal court must . . . rest jurisdiction only upon the citizenship of real parties to the controversy." *Id.* at 461.

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[21] Many decisions applying the "whole case" approach have declared that a state's standing to bring a claim is sufficient to make it "the" real party in interest for jurisdictional purposes. *See*, *e.g.*, *Illinois v. AU Optronics Corp*., 794 F. Supp. 2d 845, 853 (N.D. Ill. 2011) (concluding that the state was the real party in interest based on its quasi-sovereign interest), *leave to appeal denied*, 665 F.3d 768 (7th Cir. 2011); *Illinois v. SDS West Corp*., 640 F. Supp. 2d 1047, 1052-53 (C.D. Ill. 2009) (same). But in *Lucent*, the Ninth Circuit concluded that *Hickman* is inconsistent with that reasoning. It declared that, under *Hickman*, "a state can possess standing to bring forth a claim, but lack status as a real party in the controversy for the purposes of diversity jurisdiction." 642 F.3d at 738 n.5. "Any district courts that have held to the contrary," the Ninth Circuit explained, "are incorrect." *Id.*

This principle is well established,[22] and there is no suggestion that Congress intended CAFA to alter it. *See Hall v. United States*, 132 S. Ct. 1882, 1889 (2012) ("'We assume that Congress is aware of existing law when it passes legislation.'" (citation omitted)); *United States v. Wells*, 519 U.S. 482, 495 (1997) ("[W]e presume that Congress expects its statutes to be read in conformity with this Court's precedents."). Nevertheless, both the Fourth and Ninth Circuits applied CAFA's minimal diversity requirement in conflict with *Navarro*. Under *Navarro*, each circuit should have recognized that any person who would receive restitution is a real party in interest to the restitution claim and, therefore, a basis for satisfying CAFA's minimal diversity requirement. Neither circuit, however, was willing to consider the real parties in interest to the restitution claims involved in its respective case. Instead, in conflict with *Navarro*, both pursued a "whole case" approach in a way that caused them to ignore, for all practical purposes, the persons of diverse citizenship who were or are real parties in interest to the restitution sought. Neither court

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[22] *See also Caldwell*, 536 F.3d at 424 ("It is well-established that in determining whether there is jurisdiction, federal courts look to the substance of the action and not only at the labels that the parties may attach."); *Koehler v. Dodwell*, 152 F.3d 304, 308 n.4 (4th Cir. 1998) (observing that the citizenship of a unnamed real party in interest is relevant to the question of diversity jurisdiction); *West Virginia ex rel. McGraw v. Comcast Corp.*, 705 F. Supp. 2d 441, 445-46 (E.D. Pa. 2010) ("*Comcast*") (observing that in the context of CAFA, real parties in interest should be considered plaintiffs for jurisdictional purposes); *Hood v. Hoffman-LaRoche, Ltd.*, 639 F. Supp. 2d 25, 29 (D.D.C. 2009) ("[T]his Court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy." (internal quotation marks omitted)).

acknowledged that the "whole case" approach it used was developed to test complete diversity rather than CAFA's minimal diversity. Neither court even tried to explain why it believed that *Navarro* allowed it to ignore some of the real parties in interest or how its ruling otherwise complied with *Navarro's* requirement that jurisdiction must be based on "the real parties in interest."

Even if there were no circuit conflict, the conflict between the Fourth Circuit's opinion and the principles the Court established in *Hickman* and *Navarro* would merit this Court's review.

3. This is a recurring issue.

The proper application of CAFA's minimal diversity requirement in this context is a recurring issue. Lawsuits, like the Actions, where state attorneys general team with private counsel to pursue monetary claims of large numbers of people are increasingly common.[23] They are sometimes

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[23] *See*, *e.g.*, *Bank of America*, 672 F.3d at 670 (claims of "hundreds of thousands of homeowners"); *Caldwell*, 536 F.3d at 422-23 (claims of policyholders of six insurance companies); *Comcast*, 705 F. Supp. 2d at 443, 444, 450 (claims of 89,000 cable television subscribers); *West Virginia ex rel. McGraw v. CVS Pharm.*, 748 F. Supp. 2d 580, 589-90 (S.D. W. Va. 2010) (claims of consumers against six defendants for excess charges paid for generic drugs); *Mississippi ex rel. Hood v. Entergy Miss., Inc.*, No. 3:08-cv-780-HTW-LRA, 2012 WL 3704935, *9 (S.D. Miss. Aug. 25, 2012) ("*Entergy*") (claims of electric utility consumers); *Mississippi ex rel. Hood v. AU Optronics Corp.*, 876 F. Supp. 2d 758, 761-62 (S.D. Miss. 2012) (claims of purchasers of products containing LCD panels), *rev'd*, 701 F.3d 796 (5th Cir. 2012); First Amended Complaint, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. MDL 07-1827, *Oregon v. AU*

referred to as *parens patriae* actions.[24] Their use is predicted to grow in the future.[25] This type of lawsuit allows private counsel and/or a state attorney general to bring a class action without having to satisfy the class action requirements in the

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Optronics, Individual Case, No. 3:10-cv-04346-SI (N.D. Cal. May 26, 2011) (claims of purchasers of products containing LCD panels). *See also* Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 Harv. L. Rev. 486, 493, 498, 524 (2012) ("[S]tate attorneys general can and do engage in litigation that bears a striking resemblance to the much-maligned damages class action. . . . [A]ttorneys general sometimes hire private counsel to litigate state cases on a contingency basis."); Alexander Lemann, *Sheep in Wolves' Clothing: Removing Parens Patriae Suits Under the Class Action Fairness Act*, 111 Colum. L. Rev. 121, 122, 132-33 (2011) ("[P]arens patriae . . . has been an increasingly popular vehicle for state attorneys general to vindicate the rights of their constituents."); Donald G. Clifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. Rev. 913, 964-68 (2008) ("[I]n most . . . *parens patriae* litigation against product manufacturers, state attorneys general . . . have hired private attorneys, almost invariably chosen from a small cadre of sophisticated plaintiffs' mass products litigation firms . . . .").

[24] "*Parens patriae*" is a standing concept. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 594, 600 (1982). Sometimes it refers to standing conferred by a statute that allows a state to pursue claims of citizens on their behalf. Other times it refers to common law *parens patriae* standing where a state may pursue a quasi-sovereign interest. *See Pennsylvania v. Mid-Atlantic Toyota Distribs., Inc.,* 704 F.2d 125, 129-30 and n.8 (4th Cir. 1983). *See also supra* note 21.

[25] Myriam Giles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. Chi. L. Rev., 623, 675 (2012) ("Parens patriae litigation . . . poised for a qualitatively new role in the enforcement landscape").

Federal Rules or any comparable requirement of state law.[26] There is "no easy way to identify the universe of relevant cases" because "they almost always settle,"[27] but media reports reveal a constant and significant stream of these cases.[28]

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[26] Lemos, *supra* note 23, at 487 (observing that these actions bear "a striking resemblance to [a] . . . class action. Yet while private class actions are subject to a raft of procedural rules . . . , equivalent suits in the public sphere are largely free from constraint."); Giles & Friedman, *supra* note 25, at 668 ("[S]tate AGs can use parens patriae to get at many or most of the cases that would otherwise be the subject of class actions, and they can do so unconstrained by class action waivers and, at least for now, the other, lesser challenges that afflict class actions.").

[27] Lemos, *supra* note 23, at 498.

[28] *See*, *e.g.*, Press Release, Arizona Attorney General, AG Horne Obtains 10 Million Dollar Consumer Fraud Judgment Against Arizona Telemarketers (Dec. 12, 2012), *available at* https://www.azag.gov/press-release/ag-horne-obtains-10-million-dollar-consumer-fraud-judgement-against-arizona (announcing a judgment against defendants accused of "fraudulently telemarketing work-at-home business opportunities to consumers nationwide"); Press Release, Washington State Office of the Attorney General, States Throw the Book at Publishers Over e-Book Price-Fixing (August 29, 2012), *available at* http://www.atg.wa.gov/pressrelease.aspx?&id=30598 (reporting that publishers Hachette, HarperCollins and Simon & Schuster have agreed to pay consumers over $69 million to settle price fixing claims brought by the attorney generals for various states); Press Release, State of California Office of the Attorney General, Attorney General Kamala D. Harris Announces $40 Million Nationwide Settlement with Makers of Athletic "Toning" Shoes (May 16, 2012), *available at* http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-40-million-nationwide-settlement (discussing a settlement reached with the shoemaker Sketchers for false advertising claims); Press Release, Illinois Attorney

Defendants faced with these cases in state court typically rely on CAFA mass action jurisdiction to remove them to federal court. Each removal requires the application of CAFA's minimal diversity requirement. As a result, district courts have repeatedly faced the issue presented here.[29]

Now that the Fourth and Ninth Circuits have allowed plaintiff's counsel to use this type of action to avoid the federal jurisdiction Congress provided in CAFA, more of them will almost certainly use the strategy and bring lawsuits presenting the issue.

General, Attorney General Madigan Announces $25 Million Settlement For Vitamin Price Fixing Conspiracy (Dec. 2, 2009), *available at* http://illinoisattorneygeneral.gov/pressroom/2009_12/20091202.html (describing a nationwide settlement secured in conjunction with a private class action); Press Release, Attorney General of Texas, Attorney General Abbott Reaches $21 Million Settlement Benefitting Victims of Predatory Mortgage Lending (July 12, 2007), *available at* https://www.oag.state.tx.us/oagnews/release.php?id=2093 (describing funds secured for Texas consumers as a part of a $325 million nationwide settlement of predatory lending claims).

[29] *See*, *e.g.*, *Entergy*, 2012 WL 3704935, at *9 (minimal diversity found); *Hood*, 876 F. Supp. 2d at 769 (minimal diversity found), *rev'd on other grounds and remanded*, 701 F.3d 796 (5th Cir. 2012); *Bank of Am. Corp.*, 2011 WL 2633641, at *5 (minimal diversity found); *Illinois v. AU Optronics Corp.,* 794 F. Supp. 2d at 854-56 (minimal diversity absent), *petition for appeal denied,* 665 F.3d 768 (7th Cir. 2011); *Comcast*, 705 F. Supp. 2d at 447-50 (minimal diversity found).

4. This is an important issue that requires this Court's review.

This Court's review of the Fourth Circuit's ruling is necessary to ensure that this strategy does not undermine CAFA. Congress enacted CAFA to make diversity jurisdiction available to more class and mass actions. CAFA's minimal diversity requirement is a key component of this increased availability. Unless federal courts apply CAFA's minimal diversity requirement to mass actions consistently with CAFA's text, CAFA will not achieve its purpose.

CAFA's text states that Congress enacted CAFA to make federal diversity jurisdiction available "for interstate cases of national importance" in order to correct "abuses of the class action device." CAFA Findings and Purposes (b)(2) & (a)(2). Among those abuses were "State and local courts" "keeping cases of national importance out of Federal court," "sometimes acting in ways that demonstrate bias against out-of-State defendants," and "making judgments that impose their view of the law on other States and bind the rights of the residents of those States." *Id.* at (a)(4). Congress sought to remedy abuses like this by allowing defendants to remove these cases under CAFA. *See Smith v. Bayer*, 131 S. Ct. 2368, 2382 (2011).

Before CAFA, the complete diversity requirement restricted many class and mass actions to state court. No class representative could be a citizen of the same state of any defendant. *See Carden*, 494 U.S. at 199-200. Because a state is not

a citizen for diversity purposes, there was no diversity jurisdiction for any class or mass action where a state was a class representative or brought claims on behalf of itself and others. *Moor*, 411 U.S. at 717 ("There is no question that a State is not a 'citizen' for purposes of the diversity jurisdiction."). Thus, class and mass actions brought by a state on behalf of others were confined to state court.

CAFA's minimal diversity requirement, § 1332(d)(2), made the federal courts more available to class and mass actions. Diverse citizenship of "any member of a class [or mass] of plaintiffs" is sufficient. And "named" and "unnamed" persons are included within the term "class members." § 1332(d)(1)(D). Thus, the diversity requirement is satisfied whenever any "member of a class of plaintiffs" "is a citizen of a State different from any defendant." In a mass action, the requirement is satisfied whenever any one of the "100 or more persons" whose claims are asserted "is a citizen of a State different from any defendant."[30] It makes no difference that a State might also be a plaintiff. And the diverse citizen need not actually be a named plaintiff.

The Fourth Circuit's ruling otherwise ignores CAFA's text and frustrates CAFA's purpose. Even though CAFA provides that "unnamed" persons can establish diversity, the Fourth Circuit refused to recognize the diverse citizenship of the persons whose restitution claims are asserted in the Actions because, in its words, "[t]hose citizens are not named plaintiffs." App. 20a. Without referring to anything

[30] See *supra* pp. 5-6.

in CAFA that permitted it to ignore the citizenship of real parties in interest, the Fourth Circuit did just that. It based its determination on its own assessment of "the nature and effect of the proceeding." *Id.* It did not comply with CAFA's text and look to see if any of "the persons" whose claims constitute the mass action is "a citizen of a State different from any defendant." § 1332(d)(2)(A).

By refusing to allow the citizenship of "unnamed" persons to establish diversity, the Fourth and Ninth Circuits have provided a way around CAFA's minimal diversity provision. In those circuits, a state attorney general, either alone or together with private counsel, can now bring the claims of many persons in a single action that is essentially a class action with as much or more potential for abuse as a class action,[31] yet prevent removal under CAFA.

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[31] *See* Lemos, *supra* note 23, at 499-500 ("[P]arens patriae and other public actions . . . share much in common with damages class actions. . . . Like class actions, representative suits by state attorneys general adjudicate the rights of individuals who play no direct role in the conduct of the case."); *id.* at 511-30 (demonstrating that *parens patriae* suits present "many of the same perils as damages class actions," including problems with conflicts of interest, lack of client monitoring and control, and "premature and inadequate" settlements); Lemann, *supra* note 23, at 132-33 ("Parens patriae suits therefore bear an inherent resemblance to class actions."); Peter E. Halle, 6 Bus. & Com. Litig. Fed. Cts. § 67:45 (3d ed. 2012) ("Many of the state-law *parens patriae* antitrust cases are brought to obtain restitution based on the alleged losses of individual citizens within the state, and are little different from private class actions or mass actions that could have been brought by the individuals.").

Congress was aware of this strategy when it enacted CAFA. It rejected a proposed amendment that would have exempted actions by state attorneys general from removal. Senator Hatch opposed the exemption. He feared that "it [would] create a loophole that . . . plaintiffs' lawyers [would] surely manipulate in order to keep their lucrative class action lawsuits in State court [and that] . . . it [would] not take long for plaintiffs' lawyers to figure out that all they need to do to avoid the impact of [CAFA] is to persuade a State attorney general to . . . lend the name of his or her office to a private class action." *Caldwell*, 536 F.3d at 424 (quoting 151 Cong. Rec. S1157, 1163-64 (daily ed. Feb. 9, 2005)). The Fifth Circuit noted this history in *Caldwell*. *Id*. There, it appeared that private counsel had teamed with the state in an effort to bring what was essentially a class action in state court without being removed under CAFA. The private counsel representing the state in *Caldwell* had previously "filed, or attempted to file" "similar purported class actions . . . before the same federal district court" asserting "nearly identical claims as those alleged" by the state. *Id.* at 423. The Fifth Circuit prevented the loophole that Senator Hatch had feared by following CAFA's text and affirming mass action jurisdiction based on the diverse citizenship of the unnamed real parties in interest.[32]

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[32] *See* Jacob Durling, *Waltzing Through a Loophole: How Parens Patriae Suits Allow Circumvention of the Class Action Fairness Act*¸ 83 U. Colo. L. Rev. 549, 569-70 (2012) ("Given the potential for abuse unmasked in *Caldwell*, it appears that the Fifth Circuit adhered to CAFA's framers' intent when it exposed Louisiana's parens patriae suit as a mass action in disguise.").

Allowing the Fourth Circuit's contrary ruling to stand will permit the loophole. The Fourth Circuit's interpretation of CAFA's minimal diversity provisions leaves plaintiff's counsel free to keep actions in state court, in spite of CAFA, by persuading a state to lend its name. State attorneys general, acting either alone or through private plaintiff's counsel, will be able to prevent CAFA mass action jurisdiction over cases that, like the Actions here, assert claims of large numbers of persons against international defendants and seek to apply a state's laws to conduct occurring in other nations and states.[33] Congress enacted CAFA to provide a federal forum for this type of action. Congress stated that it intended CAFA to prevent state courts from "keeping cases of national importance out of Federal court," "sometimes acting in ways that demonstrate bias against out-of-State defendants," and "impos[ing] their view of the law on other States and bind[ing] the rights of residents of those States." CAFA Findings and Purposes (a)(4). Congress's concerns are equally applicable to cases of international importance where a state might seek to impose its laws in other nations. This Court's attention is necessary to ensure that CAFA's minimal diversity requirement is applied according to its text and that federal jurisdiction is indeed made more freely available under CAFA as Congress intended.

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[33] *See supra* pp. 7-8.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX TABLE OF CONTENTS

[ENTERED: October 25, 2012]

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

AU OPTRONICS CORPORATION;
AU OPTRONICS CORPORATION AMERICA,
Petitioners,

v. No. 11-254

STATE OF SOUTH CAROLINA,
Respondent.

LG DISPLAY CO., LTD.;
LG DISPLAY AMERICA, INC.,
Petitioners,

v. No. 11-255

STATE OF SOUTH CAROLINA,
Respondent.

On Petitions for Permission to Appeal
from the United States District Court
for the District of South Carolina, at Columbia.
Joseph F. Anderson, Jr., District Judge.
(3:11-cv-00731-JFA; 3:11-cv-00729-JFA)

Argued: September 18, 2012

Decided: October 25, 2012

Before KING, DUNCAN, and KEENAN,
Circuit Judges.

Petitions for permission to appeal granted and remand decisions affirmed by published opinion. Judge King wrote the opinion, in which Judge Duncan and Judge Keenan joined.

ARGUED: William Walter Wilkins, NEXSEN PRUET, Greenville, South Carolina, for AU Optronics Corporation and AU Optronics Corporation America. Henry L. Parr, Jr., WYCHE, PA, Greenville, South Carolina, for LG Display Co., Ltd., and LG Display America, Inc. Susan Campbell, MCGOWAN, HOOD & FELDER, LLC, Columbia, South Carolina, for State of South Carolina. **ON BRIEF:** Christopher Alan Nedeau, Carl Lawrence Blumenstein, Veronica Lashawn Harris, NOSSAMAN, LLP, San Francisco, California; Kirsten E. Small, NEXSEN PRUET, Greenville, South Carolina, for AU Optronics Corporation and AU Optronics Corporation America. Wallace K. Lightsey, Sarah S. Batson, Wade S. Kolb, III, WYCHE, PA, Greenville, South Carolina; Michael R. Lazerwitz, CLEARY GOTTLIEB STEEN & HAMILTON, LLP, New York, New York, for LG Display Co., Ltd., and LG Display America, Inc. Alan M. Wilson, Attorney General, C. Havird Jones, Jr., Assistant Deputy Attorney General, OFFICE OF THE ATTORNEY GENERAL, Columbia, South Carolina; Chad A. McGowan, MCGOWAN, HOOD & FELDER, LLC, Rock Hill, South Carolina, for State of South Carolina.

OPINION

KING, Circuit Judge:

Defendants AU Optronics Corporation and AU Optronics Corporation America (together, "AU Optronics") and LG Display Co., Ltd., and LG Display America, Inc. (together, "LG Display"), seek to appeal the district court's rejection of their assertions of federal court jurisdiction under the Class Action Fairness Act of 2005 ("CAFA"). The State of South Carolina initiated these cases in state court, alleging violations of the State's Antitrust Act and its Unfair Trade Practices Act ("SCUTPA"). AU Optronics and LG Display removed the cases to the District of South Carolina, invoking CAFA and general diversity principles. By virtually identical opinions of September 14, 2011, the district court remanded the proceedings to the state court. *See South Carolina v. AU Optronics Corp.*, No. 3:11-cv-00731 (D.S.C. Sept. 14, 2011); *South Carolina v. LG Display Co., Ltd.*, No. 3:11-cv-00729 (D.S.C. Sept. 14, 2011) (collectively, the "Remand Decisions"). The defendants have filed separate petitions for permission to appeal the Remand Decisions, contending that the court erred in deeming CAFA's jurisdictional requirements not satisfied. As explained below, we grant the petitions for permission to appeal, reject the defendants' contention concerning CAFA jurisdiction, and affirm the Remand Decisions.[1]

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[1] After the petitions for permission to appeal were filed in this Court, the State sought consolidation of the appellate proceedings for oral argument and disposition. On July 16, 2012, we denied the State's request. AU Optronics and LG

I.

A.

These nearly identical lawsuits were initiated by the State on February 18, 2011, in the state court of Richland County, South Carolina. The complaints alleged that the defendants — generally described as manufacturers of liquid crystal display ("LCD") panels — had engaged in a price-fixing conspiracy from 1996 through 2006.[2] The State sought relief from the defendants in three common respects: civil forfeitures for violations of the Antitrust Act, *see* S.C. Code §§ 39-3-130, -180; statutory penalties for violations of SCUTPA, *id.* § 39-5-110; and restitution

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Display thereafter submitted separate briefs and the cases were separately argued. Having now fully considered the briefs and arguments presented by the parties, we consolidate the appellate proceedings for disposition.

[2] The complaints differ in one respect. Because LG Display pleaded guilty to federal criminal charges emanating from the alleged conspiracy, *see* 15 U.S.C. § 1, the State's lawsuit against LG Display contains a paragraph entitled "Criminal Conspiracy to Fix Prices." No similar allegation is made in the AU Optronics action.

on behalf of South Carolina citizens for violations of SCUTPA, *id.* § 39-5-50.[3]

On March 25, 2011, the defendants removed these cases to the District of South Carolina. Each notice asserted three grounds for removal: (1) that the case is a class action removable under CAFA, 28 U.S.C. §§ 1332(d), 1453; (2) that it is also a mass action removable under CAFA; and (3) that it is removable under general diversity jurisdiction, as embodied in 28 U.S.C. § 1332(a). The common theory underlying removal is that, even though the State is the only named plaintiff, the "real parties in interest" to the restitution claims are the citizens of South Carolina who purchased products utilizing LCD panels manufactured by the defendants. More specifically, the defendants maintained that, when those citizens are properly viewed as plaintiffs, both cases satisfy CAFA's requirements for mass and class actions, and the proper — albeit unnamed — plaintiffs are completely diverse from AU Optronics

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[3] The restitution provision at issue in the complaints is found in SCUTPA and provides that,

> [t]he court may make such additional orders or judgments as may be necessary to restore to any person who has suffered any ascertainable loss by reason of the use or employment of such unlawful method, act or practice, any moneys or property, real or personal, which may have been acquired by means of any practice declared to be unlawful in this article.

S.C. Code § 39-5-50(b).

and LG Display.[4] On April 24, 2011, the State moved to remand these cases to state court for lack of subject matter jurisdiction, contending that CAFA's requirements for jurisdiction are not satisfied, and that the State, as the only named plaintiff, is not a citizen for purposes of diversity jurisdiction.

B.

On August 22, 2011, the district court heard argument on the State's remand motions. Three weeks later, the court remanded both cases to state court. In so ruling, the court first decided that the cases failed to satisfy CAFA's minimal diversity requirement. *See* Remand Decisions 10. As the court recognized, class and mass actions are subject to the jurisdictional dictates of 28 U.S.C. § 1332(d), which provides, inter alia, that the parties in such actions need only be *minimally diverse* from one another to justify removal to federal court. This minimal diversity requirement is satisfied when "any member of a class of plaintiffs is a citizen of a State different from any defendant." *See* § 1332(d)(2)(A). Though the defendants in these cases are citizens of Taiwan, Korea, Texas, and California, *see supra* note 4, South Carolina is not a citizen of any state for purposes of diversity jurisdiction. *See Moor v. Alameda County*, 411 U.S. 693, 717 (1973) ("There is no question that a State is not a 'citizen' for purposes of the diversity jurisdiction."). Thus, minimal diversity does not exist among the named parties, as the district court explained. *See* Remand Decisions 5.

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[4] The AU Optronics defendants are Texas and Taiwan corporations, and the LG Display defendants are California and Korea corporations.

In light of the defendants' contention that South Carolina citizens are real parties in interest in these cases, the district court also recognized the proposition that "a federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy." Remand Decisions 5 (citing *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 461 (1980)). Nevertheless, the court determined that these proceedings were *parens patriae* lawsuits, and that South Carolina had asserted a quasi-sovereign interest therein, as opposed to the private interests of a subset of its population. *Id.* at 9-10.[5] That framing of the complaints, the court ruled, rendered South Carolina more than a nominal party to these proceedings. *Id.* at 9-11. The court declined to parse the complaints on a claim-by-claim basis, and it rejected the defendants' contention that the real parties in interest to the restitution claims are citizens of South Carolina, and not the State. Thus, the court did not include those citizens in its diversity analysis. Rather, the court focused on the nature of the cases as *parens patriae* actions and

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[5] *Parens patriae*, literally "parent of the country," is a doctrine that provides a state with standing to sue as a guardian of its citizens when the state can "articulate an interest apart from the interests of particular private parties." *LG Display Co., Ltd. v. Madigan*, 665 F.3d 768, 771 (7th Cir. 2011) (internal quotation marks omitted). A state may sue on behalf of its citizens as *parens patriae* when the interests of a group of citizens are at stake, as long as the state is also pursuing a quasi-sovereign interest. *See United States v. Johnson*, 114 F.3d 476, 481-82 (4th Cir. 1997); *In re Edmond*, 934 F.2d 1304, 1310 (4th Cir. 1991) ("The state must be more than a nominal party without a real interest of its own; it must articulate an interest apart from the interests of . . . particular private parties . . . ." (internal quotation marks omitted)).

distinguished them from proceedings where a state is pursuing claims on behalf of private parties. The court explained that,

> [u]nder a wholesale approach, the case[s are] *parens patriae* action[s], where the State has a clear quasi-sovereign interest in enforcing its own antitrust and consumer protection laws. Based on this recognized quasi-sovereign interest, the State is a real party in interest to the action[s], and there is no need to pierce the pleadings. As such, minimal diversity does not exist.

Id.

Finally, the district court acknowledged that, in addition to seeking civil forfeitures and statutory penalties, which South Carolina is unquestionably entitled to do, the State was also seeking restitution on behalf of individual citizens. Remand Decisions 10-11. The court declined, however, to permit the restitution claims to transform these cases into proceedings where South Carolina citizens may be deemed real parties in interest. The court explained that

> it is possible for a State to have multiple interests in a case, including some that are quasi-sovereign and some that are not. While individual consumers may benefit from the restitution sought by the State in [these cases], the remedies sought in [these cases] also generally

> inure to all residents of South Carolina by making it less likely these defendants will engage in future price-fixing and by recovering taxpayer money paid to the defendants as overcharges.

Id. Concluding that South Carolina was properly pursuing these *parens patriae* lawsuits under its own antitrust and unfair trade practices laws, the court remanded them to the state court in Richland County.[6]

After the Remand Decisions were rendered, the defendants petitioned our Court for permission to pursue appeals under CAFA, which specifically authorizes a court of appeals to "accept an appeal from an order of a district court granting or denying a motion to remand a class [or mass] action." 28 U.S.C. § 1453(c)(1).[7] By Order of December 2, 2011, we deferred ruling on the defendants' petitions for

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[6] Other states have pursued or are pursuing similar actions against LCD panel manufacturers, predicated on conduct similar to that alleged here. For example, multi-district litigation being pursued in a California federal court involves such cases. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:07-md-01827-SI (N.D. Cal.). According to the Remand Decisions, most of those cases allege violations of federal law, and the parties in those matters have not contested federal jurisdiction. *See* Remand Decisions 2.

[7] Generally, a district court's remand to state court of a removed case is not appealable. *See* 28 U.S.C. § 1447(d) (providing that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise"). CAFA, however, creates an exception to this general proposition and permits a court of appeals to consider an appeal from a remand order. *See id.* § 1453(c)(1).

permission to appeal pending full briefing and argument.

II.

We review de novo the question of whether a district court possessed subject matter jurisdiction under CAFA and, thus, whether a remand to state court was appropriate. *See Moffit v. Residential Funding Co., LLC*, 604 F.3d 156, 159 (4th Cir. 2010); *In re Celotex Corp.*, 124 F.3d 619, 625 (4th Cir. 1997). The burden of establishing federal jurisdiction for a class or mass action under CAFA is on the removing party. *See Strawn v. AT&T Mobility LLC*, 530 F.3d 293, 298 (4th Cir. 2008).

III.

In their petitions for permission to appeal, the defendants have abandoned all but one of their grounds for removal. That is, they maintain only that federal jurisdiction is proper because their cases qualify as mass actions under CAFA. A mass action is defined in CAFA as

> any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a) [that

> the matter in controversy exceed $75,000].

28 U.S.C. § 1332(d)(11)(B)(i).[8] To proceed as a mass action, a civil action must therefore satisfy CAFA's minimal diversity requirement, its numerosity requirement of 100 or more persons, and its amount-in-controversy requirement that all claims, when aggregated, must exceed $5,000,000 and an individual claim must exceed $75,000. Defendants contend that these proceedings satisfy each of the mass action requirements.

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[8] The CAFA definition of a class action is codified in 28 U.S.C. § 1332(d)(1), and the jurisdictional requirements for a class action are set forth in subsections (2) through (10) thereof. Subsection (d)(11) defines a mass action, and provides that "[f]or purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs." 28 U.S.C. § 1332(d)(11)(A). Thus, a mass action is subject to the same jurisdictional requirements as a class action. As relevant here, the minimal diversity jurisdictional hook is found in § 1332(d)(2)(A), which provides:

> (2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—
>
> > (A) any member of a class of plaintiffs is a citizen of a State different from any defendant
>
> . . . .

28 U.S.C. § 1332(d)(2)(A).

A.

1.

Relying on *Navarro Savings Ass'n v. Lee*, 446 U.S. 458 (1980), the defendants first urge us to recognize that South Carolina is a nominal or formal party only. Thus, they assert that we must, in order to properly decide the remand issue, look to the citizenship of the real parties in interest (i.e., those South Carolina citizens who purchased products with LCD panels made by AU Optronics and LG Display). Indeed, even when a state is pursuing a *parens patriae* action, "if the State is only a nominal party without a real interest of its own — then it will not have standing." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 (1982). For a state to be more than a nominal party in a lawsuit pursued on behalf of its citizens, the complaint must pursue a "quasi-sovereign" interest, or an interest "that the State has in the well-being of its populace." *Id.* at 602.

The defendants find arguable support for their proposition concerning the interests of individual South Carolina citizens in *Missouri, Kansas, & Texas Railway Co. v. Hickman*, 183 U.S. 53 (1901), and *Messer v. American Gems, Inc.*, 612 F.2d 1367, 1370 (4th Cir. 1980). In both matters, the party that initiated the lawsuit was determined to be a nominal party only, rather than the real party in interest. In *Hickman*, the Supreme Court ruled that there was federal jurisdiction where the plaintiff was a state, but also where the real and substantive plaintiffs in the controversy were real people who were citizens of

a different state than the defendants. *See* 183 U.S. at 60-61. The Court explained that the citizenship of those individuals counted toward diversity because any recovery in the action would "not inure to the benefit of the state as a state in any degree." *Id.* at 59 (explaining that the state is the real party in interest when "the relief sought is that which inures to it alone, and in its favor the judgment or decree, if for the plaintiff, will effectively operate").

More recently, in our *Messer* decision, we explained that, in a wrongful death action, the citizenship of the beneficiary, rather than the administrator, must be taken into account in the diversity analysis. *See* 612 F.2d at 1370-71. AU Optronics and LG Display thus contend that the restitution being sought by the State will inure to the benefit of specific South Carolina citizens and, as in *Hickman* and *Messer*, those beneficiaries are real parties in interest who must be taken into account in our diversity analysis.

2.

AU Optronics and LG Display are correct in asserting that South Carolina seeks restitution on behalf of certain of its citizens. As the district court recognized in the Remand Decisions, however, the State pursues other remedies authorized under its Antitrust Act and SCUTPA, each of which inure to the benefit of the State's treasury. The court, in the removal proceedings, analyzed the State's actions in their entireties, focusing on its *parens patriae* role in the claims alleged. The defendants contend in their petitions that we should now adopt and apply what

is referred to as the "claim-by-claim approach" — as opposed to the "whole-case approach" — as the proper analysis for our jurisdictional inquiry. Under the claim-by-claim approach, a court must dissect the complaint and decide whether the state is the beneficiary of each basis for relief. If any party other than the state itself would benefit from a particular claim — such as restitution — such party should be deemed a real party in interest and thus a plaintiff. The whole-case approach, on the other hand, requires the court to consider the complaint in its entirety and decide from the nature and substance of its allegations what interest the state possesses in the lawsuit as a whole.

Our sister circuits have disagreed somewhat on whether to apply the "whole-case approach" or the "claim-by-claim approach" to the resolution of similar jurisdictional disputes. For example, the Ninth Circuit, in *Nevada v. Bank of America Corp.*, recently held that the State of Nevada was the real party in interest in its *parens patriae* action against a mortgage lender, even though some relief was being sought on behalf of individual citizens. *See* 672 F.3d 661, 670 (9th Cir. 2012). The court of appeals reasoned that "Nevada brought this suit pursuant to its statutory authority . . . because of its interest in protecting the integrity of mortgage loan servicing." *Id.* The court concluded, applying the whole-case approach, that "Nevada's sovereign interest in protecting its citizens and economy from deceptive mortgage practices is not diminished merely because it has tacked on a claim for restitution." *Id.* Similarly, the Seventh Circuit in *LG Display Co., Ltd. v. Madigan*, another of the LCD panel price-

fixing cases, rejected the claim-by-claim approach in favor of the whole-case approach and held, based on the "essential nature and effect of the proceeding," that the State of Illinois was the real party in interest in the lawsuit. *See* 665 F.3d 768, 772 (7th Cir. 2011).

The Fifth Circuit, on the other hand, has applied the claim-by-claim approach. *See Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 431 (5th Cir. 2008). The *Caldwell* case was an antitrust action brought by Louisiana against several insurance companies for conspiring to suppress competition. As part of the relief sought, Louisiana requested treble damages on behalf of its citizens. The defendants removed the case to federal court, arguing that, "although labeled *parens patriae*, [the] case [was] in substance and fact a 'class action' or a 'mass action'" under CAFA. *Id.* at 423. The Fifth Circuit applied the claim-by-claim approach and determined that Louisiana's consumers were the real parties in interest with respect to the treble damages claim. *Id.* at 429-30. The court of appeals reasoned that, even though Louisiana possessed a quasi-sovereign interest in pursuing the balance of its claims, individual consumers were properly included in the diversity analysis because a treble damages award would benefit them. *Id.* Concluding that such consumers were Louisiana citizens and diverse from the insurance companies, the court upheld diversity jurisdiction and declined to mandate that the case be remanded to state court. *Id.* at 430.

B.

We have never directly addressed the issue of whether the whole-case approach or the claim-by-claim approach should be utilized in situations such as this. Our recent decision in *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, however, is somewhat instructive. *See* 646 F.3d 169 (4th Cir. 2011). There, West Virginia's Attorney General initiated a lawsuit against several pharmacies for their failure to pass along certain cost savings to consumers on generic prescription drugs, in contravention of West Virginia law. The defendants removed the action under CAFA, and the district court remanded on the State's motion. After granting the defendants' petition for permission to appeal, we affirmed the remand order. Even though West Virginia's request for relief included restitution and repayment of "excess charges" to affected consumers, we ruled that the proceeding was not properly a class action under CAFA because it was being pursued under West Virginia statutes that were insufficiently "similar" to the procedures mandated by Federal Rule of Civil Procedure 23, as required by CAFA's class action definition. *See id.* at 177-78.[9]

Our *CVS Pharmacy* decision involved a dispute regarding whether the case should be considered as a "class action" under CAFA, rather than whether a CAFA "mass action" was alleged,

[9] As we explained in *CVS Pharmacy*, CAFA "defines 'class action' to mean 'any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action.'" *CVS Pharm.*, 646 F.3d at 174 (citations and emphasis omitted).

and our decision did not reach or address the issue of minimal diversity.[10] The panel majority, however, recognized that the case was "essentially a *parens patriae* type of action for enforcement of [West Virginia's] own laws on behalf of itself and its citizens," and explained that the State possessed a quasi-sovereign interest in the right to enforce its own consumer protection laws in its own courts. *CVS Pharm.*, 646 F.3d at 176, 179. Applying the principles of *CVS Pharmacy*, South Carolina's Attorney General is plainly authorized to pursue a *parens patriae* action in state court, on behalf of South Carolina citizens, for violations of the State's antitrust laws and SCUTPA. Moreover, like West Virginia in *CVS Pharmacy*, South Carolina possesses a quasi-sovereign interest in doing so.

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[10] In response to a dissenting opinion, the panel majority in *CVS Pharmacy* specifically declined to reach the issue we face today, explaining that

> [t]he dissent suggests that the Attorney General "does not have a quasi-sovereign interest" in Count III because the reimbursement sought . . . would flow directly to an identifiable group of consumers, rather than to the State or its citizens generally. . . . From this, the dissent concludes that Count III does not state a valid *parens patriae* claim and that the action as a whole must be classified as a class action. . . . [W]hile we conclude that this action is a *parens patriae* action, based on the State's deterrence and consumer protection interests, that conclusion is not essential to the separate, and more meaningful determination that the action in this case was not brought under a procedure "similar" to Rule 23.

646 F.3d at 176 n.2.

Similar to West Virginia in *CVS Pharmacy*, and also to Nevada in *Bank of America Corp.* — and unlike Louisiana in *Caldwell* — the State of South Carolina "seeks substantial relief that is available to it alone." *Bank of Am. Corp.*, 672 F.3d at 672. The statute under which Louisiana sought treble damages in *Caldwell* provided, in part, that "*[a]ny person* who is injured . . . by reason of any act or thing forbidden by this Part may sue . . . and shall recover threefold the damages." La. Rev. Stat. Ann. § 51:137 (emphasis added). The *Caldwell* statute "plainly contemplated individual enforcement," something not authorized by the relevant provisions of South Carolina's Antitrust Act or SCUTPA. *See West Virginia ex rel. McGraw v. CVS Pharm., Inc.*, 748 F. Supp. 2d 580, 597 (S.D. W. Va. 2010). In the matters before us, moreover, "there is no doubt that the Attorney General has statutory authority to pursue such claims." *Bank of Am. Corp.*, 672 F.3d at 670.

South Carolina's Antitrust Act specifically subjects violators to civil forfeitures, "to be recovered by an action in the name of the State, at the relation of the Attorney General." S.C. Code § 39-3-180. Meanwhile, SCUTPA authorizes the Attorney General, "acting in the name of the State," to seek civil penalties and forfeitures, as well as injunctive relief, when the court finds that a violation of SCUTPA has occurred. *Id.* § 39-5-110. SCUTPA also authorizes the Attorney General to pursue an action in the name of the State seeking injunctive relief if there is reason to believe someone is violating the Act. *See id.* § 39-5-50(a). Thus, each of these statutes is specifically enforceable by the State's Attorney

General, who is authorized to pursue the claims being alleged in the name of the State.

As explained by the Ninth Circuit in *Bank of America Corp.*, "[t]he Complaint, read as a whole, demonstrates that [the State] is the real party in interest in this action." 672 F.3d at 672. South Carolina's claims for relief in these cases are each unique to the State and are consistent with its role as *parens patriae*, inasmuch as the State possesses a quasi-sovereign interest in enforcing — in state court — its laws with respect to price-fixing conspiracies. Furthermore, South Carolina is the sole named plaintiff in these lawsuits. Indeed, the provisions of the Antitrust Act and SCUTPA invoked in the complaints designate the State as the proper plaintiff.

We are therefore satisfied to resolve these petitions for permission to appeal by adopting the whole-case approach and rejecting the claim-by-claim approach. In so doing, we conclude that the nature and effect of these actions demonstrate that South Carolina is the real party in interest, a fact that is unencumbered by the restitution claims. We therefore agree with the Ninth and Seventh Circuits that a claim for restitution, when tacked onto other claims being properly pursued by the State, alters neither the State's quasi-sovereign interest in enforcing its own laws, nor the nature and effect of the proceedings. The purpose of these cases is the protection of the State's citizens and upholding the integrity of South Carolina law. The State, in these *parens patriae* actions, is enforcing its own statutes in seeking to protect its citizens against price-fixing

conspiracies. That the statutes authorizing these actions in the name of the State also permit a court to award restitution to injured citizens is incidental to the State's overriding interests and to the substance of these proceedings. Those citizens are not named plaintiffs here, and they need not be considered in the diversity analysis of the State's claims. Thus, CAFA's minimal diversity requirement is not satisfied in either of these cases, and the district court properly remanded them to state court.[11]

IV.

Pursuant to the foregoing, the petitions for appeal of AU Optronics and LG Display are hereby granted, and the Remand Decisions are affirmed.

PETITIONS FOR PERMISSION TO APPEAL GRANTED AND REMAND DECISIONS AFFIRMED

[11] Inasmuch as we resolve these proceedings on the issue of minimal diversity, we need not address or rule on the other CAFA jurisdictional requirements.

[ENTERED: September 14, 2011]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

The State of South Carolina,	)
	)
Plaintiff,	)
	)
vs.	)
	)
LG Display Co., Ltd. and LG Display America, Inc.,	)
	)
Defendants.	)
	)

C/A No.: 3:11-cv-00729-JFA

ORDER

JUDGE JOSEPH F. ANDERSON, JR.

This matter is before the Court on Plaintiff the State of South Carolina's ("the State") Motion to Remand. In the motion, the State asks this Court to remand this case to state court because the parties are not diverse under the Class Action Fairness Act ("CAFA"). Defendants LG Display Co., Ltd. and LG Display America, Inc. (collectively "LG") oppose the State's motion for remand, claiming that this case qualifies as a "mass action" under CAFA and, thus, that this Court has jurisdiction. After considering the parties' briefs and the arguments made at a

hearing on this motion, this Court finds that remand is appropriate and hereby grants the State's motion and remands this case to state court.

I. Factual and Procedural History

A. The Instant Case Between the State of South Carolina and LG

On February 18, 2011, the State of South Carolina, through its Attorney General Alan Wilson, filed a complaint in the Richland County Court of Common Pleas against LG. The complaint alleges that LG engaged in a conspiracy from 1996-2006 to fix prices for thin film transistor liquid crystal display ("TFT-LCD") panels. The State seeks the following recovery from the defendants: civil forfeitures under S.C. Code Ann. §39-3-180 for violations of the South Carolina Antitrust Act, S.C. Code Ann. § 39-3-130; restitution pursuant to S.C. Code Ann. § 39-5-50 on behalf of the citizens of the State of South Carolina for the ascertainable loss occasioned by the violations of the defendants; and statutory penalties under S.C. Code Ann. § 39-5-110 for violations of S.C. Code Ann. § 39-5-20, known as the South Carolina Unfair Trade Practices Act ("SCUTPA"). On March 25, 2011, the defendants removed this case to the District of South Carolina, asserting that removal was proper on the following grounds: the action is a "class action" removable under CAFA, 28 U.S.C. §§ 1332(d) and 1453; the action is, in the alternative, a "mass action" removable under CAFA, 28 U.S.C. §§ 1332(d) and 1453; the action is removable on principles of traditional diversity jurisdiction, 28 U.S.C. § 1332;

and supplemental jurisdiction, 28 U.S.C. § 1367, exists over the remainder of the State's claims.

The State now seeks remand of these actions to the Richland County Court of Common Pleas, claiming that diversity does not exist under either the traditional diversity framework or under the minimum diversity requirements of CAFA. The State further contests federal jurisdiction under CAFA, asserting that neither case meets the additional requirements of CAFA. As such, the State claims that this Court lacks subject-matter jurisdiction over these cases.

B. Similar Cases Brought by Other States

Since December 2006, a number of other states' attorneys general and private plaintiffs have filed actions based on the same alleged conduct in federal and state courts around the country. Many of those cases have been transferred to a multidistrict litigation pending in the Northern District of California, In re TFT-LCD (Flat Panel) Antitrust Litigation, MDL No. 3:07-md-01827-SI ("MDL"). In contrast to the present case where the State Attorney General has asserted only state law claims, most of the actions filed by state attorneys general that have been consolidated in the MDL include both state and federal claims (primarily federal antitrust claims) against LG. See Compl. for Damages, Civil Penalties, Injunctive and Other Relief 5, ECF No. 1, filed in State of Missouri et al. v. AU Optronics Corp., et al., Case No. 3:10-cv-03619-SI. As such, in those cases the states themselves

have alleged that federal subject matter jurisdiction exists under the federal antitrust statutes, and the issue of CAFA "mass action" jurisdiction has not been raised by either the parties or the court. Id.

However, other cases similar to the one before this Court have been filed by states' attorneys general that assert only state law claims against the TFT-LCD Defendants, and all of these cases, thus far, have been remanded to their respective state courts. See Order Remanding State of Washington v. AU Optronics Corp., to King County Superior Court; And Remanding The People of the State of California v. AU Optronics Corporation, to the Superior Court for the county of San Francisco, ECF No. 2456, In re TFT-LCD (Flat Panel) Antitrust Litigation, MDL No. 3:07-md-01827-SI (Feb. 15, 2011). For example, the State of Washington and the State of California, through their respective attorneys general, filed similar cases seeking damages from TFT-LCD defendants on behalf of their state agencies and on behalf of consumers. Both cases were removed by the defendants and were consolidated with the other MDL cases. The States sought remand, and the district court granted remand in both cases, finding that subject matter jurisdiction was lacking because the States were the real parties in interest and because the lawsuits did not qualify as either "class actions" or "mass actions" under CAFA. In another case related to the MDL proceedings, the Northern District of Illinois remanded a case brought by the State of Illinois against various TFT-LCD defendants where the State of Illinois sought civil penalties, injunctive relief, declaratory relief, and damages under Illinois

state law. Although this Court is not bound by the decisions in the Northern District of California and in the Northern District of Illinois, the decisions of these courts are persuasive. Both decisions are further discussed below.

II. Legal Standard

In general, an action filed in state court may be removed to federal court only if the action originally could have been brought in federal court. 28 U.S.C. § 1441(a). Courts should strictly construe removal jurisdiction because of the implications of federalism. Mulcahey v. Columbia Organic Chemicals Co., Inc., 29 F.3d 148, 151 (4th Cir. 1994) (citing Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941)). "If federal jurisdiction is doubtful, a remand [to state court] is necessary." Id. "The burden of establishing federal jurisdiction is placed upon the party seeking removal." Id. (citing Wilson v. Republic Iron & Steel Co., 257 U.S. 92 (1921)). However, once a defendant has established that the general requirements of CAFA have been met, the burden shifts to the plaintiff to establish, by a preponderance of the evidence, an exception to jurisdiction under CAFA applies. Bowen v. Houser, 2011 WL 380455 (D.S.C. February 3, 2011).

CAFA was enacted in 2005 to expand federal jurisdiction for class actions removed to federal court, and it creates special rules governing removal of class actions. For example, CAFA requires minimal diversity of citizenship among parties to the action. 28 U.S.C. § 1332(d)(2). As such, for covered class actions, CAFA abdicates the complete

diversity rule that generally applies in federal diversity cases. See Abrego Abrego v. The Dow Chemical Co., 443 F.3d 676, 680, 684 (9th Cir. 2006). Second, an action removable under CAFA must satisfy the statute's definition of a "class action" or a "mass action." CAFA defines a "class action" as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar state statute or rule or judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. §1332(d)(1)(B). CAFA defines a "mass action" as "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under [28 U.S.C. § 1332(a)]." 28 U.S.C. § 1332(d)(11)(B)(i).

III. Analysis

Plaintiff's motion to remand presents three issues: (1) whether this case satisfies the minimal diversity requirement necessary to create federal subject matter jurisdiction under CAFA, (2) whether the case constitutes a "class action" under CAFA, and (3) whether the case constitutes a "mass action" under CAFA.

A. Whether Minimal Diversity Exists Between the Parties so as to Establish Jurisdiction in this Court Under CAFA

In order to satisfy the minimal diversity requirement of CAFA, any member of the plaintiff class may be diverse from any defendant. 28 U.S.C. § 1332(d)(2)(A). Here, defendants LG Display and LG Display America are citizens of Korea and California, respectively; however, the single plaintiff of the instant action is the State of South Carolina, and it is well-established "that a State is not a 'citizen' for purposes of [] diversity jurisdiction." Moor v. Alameda County, 411 U.S. 693, 717 (1973). As such, even minimal diversity cannot exist between the named parties in this case. This is the reasoning behind the State's Motion to Remand. However, Defendants ask this Court to find that the citizens of South Carolina, not the State, are the real parties in interest for the State's restitution claim and, thus, that minimal diversity exists in this matter between the real parties in interest.

As established by the Supreme Court, "a federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy." Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 461 (1980). Therefore, if a court determines on the basis of the complaint that the named plaintiff is merely a nominal party, then the court should look past the complaint to determine if any unnamed plaintiffs are the real parties in interest. See id. Here, the State of South Carolina's complaint is framed as a *parens*

patriae suit, but "if the State is only a nominal party without a real interest of its own—then it will not have standing under the *parens patriae* doctrine." Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez, 458 U.S. 592, 600 (1982). In order to be a real party in interest in a *parens patriae* suit, "the State must articulate an interest apart from the interests of particular private parties . . . . The State must express a quasi-sovereign interest." Id. at 607. Though the term quasi-sovereign interest is difficult to give an exact definition to, it does include a State's "interest in the health and well-being—both physical and economic—of its residents in general." Id. A State that brings a suit in which it asserts not a quasi-sovereign interest but exclusively the private interests of a small subset of the State's population is not a real party in interest; rather, it is only a nominal party. Id. at 601–02. The Supreme Court has distinguished states' quasi-sovereign interests from their interests in bringing cases on behalf of private parties, stating

> [A] State may, for a variety of reasons, attempt to pursue the interests of a private party, and pursue those interests only for the sake of the real party in interest. Interests of private parties are obviously not in themselves sovereign interests, and they do not become such simply by virtue of the State's aiding in their achievement. In such situations, the State is no more than a nominal party.

Id. In cases where a State is merely a nominal party, it is appropriate to look past the parties named in the complaint to determine the real parties in interest. See Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 461 (1980).

In the present case, the State is seeking civil forfeitures and statutory penalties, both of which may clearly be pursued under its *parens patriae* power, in addition to restitution on behalf of a particular subset of South Carolina citizens. The Defendants encourage this Court to follow the rule adopted in the Fifth Circuit and followed by a district court in the Third Circuit, urging this Court to first look at the State's case on a claim-by-claim basis rather than at the case as a whole and, second, to look beyond the single named plaintiff of the case to find that the real parties in interest are the consumers of South Carolina. See Louisiana ex rel. Caldwell v. Allstate Ins. Co., 536 F.3d 418, 423-25 (5th Cir. 2008); West Virginia ex rel. McGraw v. Comcast, 705 F. Supp. 2d 441, 447 (E.D. Pa. 2010). According to the Defendants, it is consistent with CAFA and a minimal diversity analysis to look at each of the claims in the complaint separately rather than looking at the complaint as a whole when determining who the real party in interest is. As support for their assertion, Defendants cite the definition of "mass action" set forth in CAFA, which provides that "the term 'mass action' means any civil action . . . *in which* monetary relief claims of 100 or more persons are proposed to be tried jointly . . . ." 28 U.S.C. § 1332(d)(11)(B)(i) (emphasis added). The Defendants point out that CAFA does not say that the action must be limited to the claims of these

persons—it only requires that the action include those claims.

The other courts that have taken the claim-by-claim approach endorsed by the Defendants have found federal jurisdiction over the whole case because unnamed plaintiffs on whose behalf a State asserts damages are minimally diverse from the defendant under CAFA. For example, the Fifth Circuit approved the use of a claim-by-claim approach in a case where the State of Louisiana brought an action seeking forfeiture of illegal profits, treble damages, and injunctive relief under its own antitrust statutes. Caldwell, 536 F.3d at 423-25. In Caldwell, the lower court was actually the one that pierced the complaint and used a claim-by-claim analysis, and the Fifth Circuit refused to question that decision because the State of Louisiana waived the issue by failing to argue it, but the court did "recognize[] that 'defendants may pierce the pleadings to show that the . . . . claim has been fraudulently pleaded to prevent removal." Id. at 424–25. The Fifth Circuit identified the central issue as whether the citizens on whose behalf the State of Louisiana brought the lawsuit were the real parties in interest and then stated, "[w]e have no reason to believe that they are not, especially given that the purpose of antitrust treble damages provisions are to encourage private lawsuits by aggrieved individuals for injuries to their businesses or property." Id. at 430. Accordingly, the Fifth Circuit found that CAFA-required minimal diversity existed between the real parties in interest and that the case was properly removed as a mass action. Id. at 430.

In another case a court in the Eastern District of Pennsylvania decided to follow the Fifth Circuit's Caldwell decision, but the court provided an in depth discussion of whether it was more appropriate to "frame the relief the state seeks at a wholesale level or on a claim-by-claim basis" where a State was seeking treble damages on behalf of some of its consumers in addition to other relief. West Virginia ex rel. McGraw v. Comcast, 705 F. Supp. 2d 441, 447 (2010). The court noted that other courts' decision on whether to use a claim-by-claim or a wholesale approach has had a correlation to whether a State is found to be a real party in interest or not. Id. ("Courts that have adopted the claim-by-claim approach . . . have found that treble and compensatory damages primarily benefit private individuals, which means that the state has no quasi-sovereign interest for such claims."). In Comcast, the court ultimately concluded that a claim-by-claim approach was appropriate because "CAFA was intended to expand federal jurisdiction over class actions, which suggests that courts should carefully examine actions removed under CAFA to ensure that legitimate removal requests are not thwarted by jurisdictional gamesmanship." Id. The court further explained that "[t]he claim-by-claim approach does a better job of unearthing a state's real interest in a suit because, unlike the wholesale approach, it does not blur the lines between those claims for which a state has a well-recognized interest, and those claims for which a state's interest is negligible." Id. at 449. Using the claim-by-claim approach, the court determined that the citizens on whose behalf West Virginia was bringing the suit were the real parties in interest, and, therefore,

CAFA's minimal diversity requirement was met. Id. at 450.

Plaintiff, on the other hand, urges this Court to examine the State's interest in this suit as a whole in determining the real party in interest for the restitution claim, referencing cases that have used such an approach from the Supreme Court and from other district courts. See, e.g., Ex parte Nebraska, 209 U.S. 436, 444–45 (1908); Illinois v. SDS W. Corp., 640 F. Supp. 2d 1047, 1052 (C.D. Ill. 2009) (acknowledging that although a few courts have divided complaints according to the relief sought in deciding real party in interest issues, "[m]ost have rejected [that approach] and viewed the complaint as a whole"); Hood ex rel. Mississippi v. Microsoft Corp., 428 F. Supp. 2d 537, 545 – 46 (S.D. Miss. 2006); New York ex rel. Abrams v. Gen. Motors Corp., 547 F. Supp. 703, 706–07 (S.D.N.Y. 1982). Of course, other courts considering substantially the same issue before this Court regarding claims brought by other states' attorneys general have also decided that a wholesale approach is appropriate in evaluating whether minimal diversity exists. See Illinois v. AU Optronics Corp., --- F. Supp. 2d ---, 2011 WL 2214034 (N.D. Ill. 2011) ("[T]he Court respectfully rejects Defendants' arguments and concludes that it should look to the complaint as a whole."); In re TFT-LCD (Flat Panel) Antitrust Litigation, No. 07-1827 (N.D. Cal. Feb. 15, 2011) ("The Court is unpersuaded by defendants' argument that simply because CAFA was intended to broaden federal jurisdiction over class actions, federal courts are required to deviate from the traditional 'whole

complaint' analysis when evaluating whether a State is a real part in interest in a *parens patriae* case.").

This Court is inclined to agree with the argument of the Plaintiff—namely, that the case should be examined as a whole rather than on a claim-by-claim basis. Under a wholesale approach, the case is a *parens patriae* action, where the State has a clear quasi-sovereign interest in enforcing its own antitrust and consumer protection laws. Based on this recognized quasi-sovereign interest, the State is a real party in interest to the action, and there is no need to pierce the pleadings. As such, minimal diversity does not exist.

Even were this Court to adopt the case-by-case approach proffered by the Defendants, the State would still be a real party in interest to the restitution claim, and minimal diversity would still be lacking in the instant case. Again, a state's status as a real party in interest in a *parens patriae* suit hinges on whether it has a quasi-sovereign interest. As discussed above, the State has articulated a clear quasi-sovereign interest by bringing suit against the Defendants to enforce its own antitrust and consumer laws, but even the State's claim seeking wide-ranging relief on behalf of its citizens from the alleged price-fixing qualifies as a quasi-sovereign interest. As pointed out by Defendants, the Fourth Circuit has stated that "'[n]o state has a legitimate quasi-sovereign interest in seeing that consumers or any other group of persons receive a given sum of money.'" Pennsylvania v. Mid-Atlantic Toyota Distributors, Inc., 704 F.2d 125, 129 n. 8 (1983). However, the Fourth Circuit has

also recognized a quasi-sovereign interest of a State in bringing an action to enforce its laws, disgorge the proceeds of ill-gotten gains, and refund them to its citizens. In re Edmond, 934 F.2d 1304, 1312 (1991) ("The Division acted, not as a class representative, but on behalf of the state's quasi-sovereign interest in ensuring consumer protection and in securing its borders against violations."). Indeed, the Fourth Circuit's language in Mid-Atlantic admits that "a state can have a legitimate public interest in ensuring the economic well-being of its citizens—and in indirectly promoting a smoothly functioning economy freed of antitrust violations—even though the most obvious beneficiaries may be individual consumers who ultimately recoup money damages." 704 F.2d at 132. This language intimates that it is possible for a State to have multiple interests in a case, including some that are quasi-sovereign and some that are not. While individual consumers may benefit from the restitution sought by the State in this case, the remedies sought in this case also generally inure to all residents of South Carolina by making it less likely these defendants will engage in future price-fixing and by recovering taxpayer money paid to the defendants as overcharges. Further bolstering this Court's finding that the State has a quasi-sovereign interest in pursuing its restitution claim under SCUTPA, the South Carolina Court of Appeals has interpreted the language of the Act to require that suits brought under the Act address more than just a private interest. "To be actionable under the UTPA, [] the unfair or deceptive act or practice in the conduct of trade or commerce must have an impact upon the public interest. The act is not available to redress a

private wrong where the public interest is unaffected." Noack Enter., Inc. v. Country Corner Interiors, 290 S.C. 475, 479 (1986). This Court is unconvinced by LG's contention that the State is not a real party in interest to its restitution claim—though the claim has been brought on behalf of South Carolina consumers, the State has a quasi-sovereign interest in pursuing the claim.

B. Whether the Action is a "Class Action" as Defined in CAFA

Although initially raised in the Defendants Notice of Removal, Defendants have conceded since that time that the Fourth Circuit's recent decision in West Virginia ex rel. McGraw v. CVS Pharmacy, Inc. binds this Court as to whether this case is removable as a CAFA "class action." 646 F.3d 169 (2011). In accordance with CVS, this case cannot be properly removed as a CAFA "class action" because it "was brought by the State under state statutes that are not 'similar' to Federal Rule of Civil Procedure 23, . . . [and therefore] it is not removable under CAFA as a class action." Id. at 172.

C. Whether the Action is a "Mass Action" as Defined in CAFA

CAFA provides that "mass actions" are removable to federal court. 28 U.S.C. § 1332(d)(11)(A). As defined in CAFA, a mass action is

> Any civil action . . . in which monetary relief claims of 100 or more persons are proposed to

> be tried jointly on the ground that the plaintiffs' claims involve common question of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional requirements under subsection (a) ['where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs'].

28 U.S.C. § 1332(d)(11)(B)(i) & § 1332(a).

The State argues that the mass action provisions of CAFA do not confer jurisdiction here for three reasons. First, Plaintiff states that this case does not satisfy CAFA's numerosity requirement. 28 U.S.C. § 1332(d)(11)(B)(i). Second, Plaintiff argues that the Defendants have not satisfied their burden of showing that any of the South Carolina residents' claims meet the $75,000 requirement to stay in federal court. See id. at §§ 1332(a) & 1332(d)(11)(B)(i). Third, Plaintiff argues that this case fits within the carve-out in CAFA for lawsuits brought on behalf of the general public, which CAFA excludes from the definition of "mass action." See id. at § 1332(d)(11)(B)(ii)(III).

This Court concludes that, for the same reasons that it found the State to be a real party in interest, this suit does not constitute a "mass action" under CAFA. Because the State is a real party in interest, the minimal diversity required for mass actions under CAFA does not exist. See 28 U.S.C. § 1332(a). Absent minimal diversity, this Court does not have subject matter jurisdiction over the instant

action. Furthermore, this Court finds that as the real party in interest, the State does not satisfy the numerosity requirement for mass actions under CAFA. See Tanoh v. Dow Chem. Co., 561 F.3d 945, 952–53 (9th Cir. 2009) (holding that CAFA's requirement of 100 or more plaintiffs refers only to actual, named plaintiffs); Cal. Pub. Employees Ret. Sys. v. Moody's Corp., 2009 WL 3809816 at *7 (N.D. Cal. 2009) (interpreting the mass action provisions of CAFA as requiring plaintiffs to appear and make claims in order to count toward the numerosity requirement, and refusing to count 490 unnamed plaintiffs represented by an unincorporated association who failed to do so toward the numerosity requirements); Kitazado v. Black Diamond Hospitality Inv., LLC, No. 09-00271, 2009 WL 3209298, at *6 (D. Haw. Oct. 6, 2009). As another court recently summarized in words that apply equally here, "[b]ecause the State is a real party in interest and sues to protect and vindicate the rights of the public in general [under the SCUTPA], this action is not a 'mass action.'" Connecticut v. Moody's Corp., No. 3:10cv546, 2011 WL 63905, at *4 (D. Conn. Jan. 5, 2011).

IV. Conclusion

Accordingly, the action is remanded to the Richland County Court of Common Pleas. A certified copy of this order of remand shall be sent by the Clerk of this Court to the Clerk of the Court of Common Pleas, Richland County, Fifth Judicial Circuit of South Carolina.

IT IS SO ORDERED.

/s/ Joseph F. Anderson, Jr.
Joseph F. Anderson, Jr.
United States District Judge

September 14, 2011
Columbia, South Carolina

[ENTERED: September 14, 2011]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

The State of South Carolina,	)
	)
Plaintiff,	)
	)
vs.	)
	)
AU Optronics Corp. and AU Optronics Corp. Am.,	)
	)
Defendants.	)
	)

C/A No.: 3:11-cv-00731-JFA

ORDER

JUDGE JOSEPH F. ANDERSON, JR.

This matter is before the Court on Plaintiff the State of South Carolina's ("the State") Motion to Remand. In the motion, the State asks this Court to remand this case to state court because the parties are not diverse under the Class Action Fairness Act ("CAFA"). Defendants AU Optronics Corp. and AU Optronics Corp. Am. (collectively "AU") oppose the State's motion for remand, claiming that this case qualifies as a "mass action" under CAFA and, thus, that this Court has jurisdiction. After considering the parties' briefs and the arguments made at a

hearing on this motion, this Court finds that remand is appropriate and hereby grants the State's motion and remands this case to state court.

I. Factual and Procedural History

A. The Instant Case Between the State of South Carolina and AU

On February 18, 2011, the State of South Carolina, through its Attorney General Alan Wilson, filed a complaint in the Richland County Court of Common Pleas against AU. The complaint alleges that AU engaged in a conspiracy from 1996-2006 to fix prices for thin film transistor liquid crystal display ("TFT-LCD") panels. The State seeks the following recovery from the defendants: civil forfeitures under S.C. Code Ann. §39-3-180 for violations of the South Carolina Antitrust Act, S.C. Code Ann. § 39-3-130; restitution pursuant to S.C. Code Ann. § 39-5-50 on behalf of the citizens of the State of South Carolina for the ascertainable loss occasioned by the violations of the defendants; and statutory penalties under S.C. Code Ann. § 39-5-110 for violations of S.C. Code Ann. § 39-5-20, known as the South Carolina Unfair Trade Practices Act ("SCUTPA"). On March 25, 2011, the defendants removed this case to the District of South Carolina, asserting that removal was proper on the following grounds: the action is a "class action" removable under CAFA, 28 U.S.C. §§ 1332(d) and 1453; the action is, in the alternative, a "mass action" removable under CAFA, 28 U.S.C. §§ 1332(d) and 1453; the action is removable on principles of traditional diversity jurisdiction, 28 U.S.C. § 1332;

and supplemental jurisdiction, 28 U.S.C. § 1367, exists over the remainder of the State's claims.

The State now seeks remand of these actions to the Richland County Court of Common Pleas, claiming that diversity does not exist under either the traditional diversity framework or under the minimum diversity requirements of CAFA. The State further contests federal jurisdiction under CAFA, asserting that neither case meets the additional requirements of CAFA. As such, the State claims that this Court lacks subject-matter jurisdiction over these cases.

B. Similar Cases Brought by Other States

Since December 2006, a number of other states' attorneys general and private plaintiffs have filed actions based on the same alleged conduct in federal and state courts around the country. Many of those cases have been transferred to a multidistrict litigation pending in the Northern District of California, In re TFT-LCD (Flat Panel) Antitrust Litigation, MDL No. 3:07-md-01827-SI ("MDL"). In contrast to the present case where the State Attorney General has asserted only state law claims, most of the actions filed by state attorneys general that have been consolidated in the MDL include both state and federal claims (primarily federal antitrust claims) against AU. See Compl. for Damages, Civil Penalties, Injunctive and Other Relief 5, ECF No. 1, filed in State of Missouri et al. v. AU Optronics Corp., et al., Case No. 3:10-cv-03619-SI. As such, in those cases the states themselves have alleged that

federal subject matter jurisdiction exists under the federal antitrust statutes, and the issue of CAFA "mass action" jurisdiction has not been raised by either the parties or the court. Id.

However, other cases similar to the one before this Court have been filed by states' attorneys general that assert only state law claims against the TFT-LCD Defendants, and all of these cases, thus far, have been remanded to their respective state courts. See Order Remanding State of Washington v. AU Optronics Corp., to King County Superior Court; And Remanding The People of the State of California v. AU Optronics Corporation, to the Superior Court for the county of San Francisco, ECF No. 2456, In re TFT-LCD (Flat Panel) Antitrust Litigation, MDL No. 3:07-md-01827-SI (Feb. 15, 2011). For example, the State of Washington and the State of California, through their respective attorneys general, filed similar cases seeking damages from TFT-LCD defendants on behalf of their state agencies and on behalf of consumers. Both cases were removed by the defendants and were consolidated with the other MDL cases. The States sought remand, and the district court granted remand in both cases, finding that subject matter jurisdiction was lacking because the States were the real parties in interest and because the lawsuits did not qualify as either "class actions" or "mass actions" under CAFA. In another case related to the MDL proceedings, the Northern District of Illinois remanded a case brought by the State of Illinois against various TFT-LCD defendants where the State of Illinois sought civil penalties, injunctive relief, declaratory relief, and damages under Illinois state law. Although this

Court is not bound by the decisions in the Northern District of California and in the Northern District of Illinois, the decisions of these courts are persuasive. Both decisions are further discussed below.

II. Legal Standard

In general, an action filed in state court may be removed to federal court only if the action originally could have been brought in federal court. 28 U.S.C. § 1441(a). Courts should strictly construe removal jurisdiction because of the implications of federalism. Mulcahey v. Columbia Organic Chemicals Co., Inc., 29 F.3d 148, 151 (4th Cir. 1994) (citing Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941)). "If federal jurisdiction is doubtful, a remand [to state court] is necessary." Id. "The burden of establishing federal jurisdiction is placed upon the party seeking removal." Id. (citing Wilson v. Republic Iron & Steel Co., 257 U.S. 92 (1921)). However, once a defendant has established that the general requirements of CAFA have been met, the burden shifts to the plaintiff to establish, by a preponderance of the evidence, an exception to jurisdiction under CAFA applies. Bowen v. Houser, 2011 WL 380455 (D.S.C. February 3, 2011).

CAFA was enacted in 2005 to expand federal jurisdiction for class actions removed to federal court, and it creates special rules governing removal of class actions. For example, CAFA requires minimal diversity of citizenship among parties to the action. 28 U.S.C. § 1332(d)(2). As such, for covered class actions, CAFA abdicates the complete diversity rule that generally applies in federal diversity cases.

See Abrego Abrego v. The Dow Chemical Co., 443 F.3d 676, 680, 684 (9th Cir. 2006). Second, an action removable under CAFA must satisfy the statute's definition of a "class action" or a "mass action." CAFA defines a "class action" as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar state statute or rule or judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. §1332(d)(1)(B). CAFA defines a "mass action" as "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under [28 U.S.C. § 1332(a)]." 28 U.S.C. § 1332(d)(11)(B)(i).

III. Analysis

Plaintiff's motion to remand presents three issues: (1) whether this case satisfies the minimal diversity requirement necessary to create federal subject matter jurisdiction under CAFA, (2) whether the case constitutes a "class action" under CAFA, and (3) whether the case constitutes a "mass action" under CAFA.

A. Whether Minimal Diversity Exists Between the Parties so as to Establish Jurisdiction in this Court Under CAFA

In order to satisfy the minimal diversity requirement of CAFA, any member of the plaintiff class may be diverse from any defendant. 28 U.S.C. § 1332(d)(2)(A). Here, defendants AU Optronics and AU Optronics America are citizens of Taiwan and California, respectively; however, the single plaintiff of the instant action is the State of South Carolina, and it is well-established "that a State is not a 'citizen' for purposes of [] diversity jurisdiction." Moor v. Alameda County, 411 U.S. 693, 717 (1973). As such, even minimal diversity cannot exist between the named parties in this case. This is the reasoning behind the State's Motion to Remand. However, Defendants ask this Court to find that the citizens of South Carolina, not the State, are the real parties in interest for the State's restitution claim and, thus, that minimal diversity exists in this matter between the real parties in interest.

As established by the Supreme Court, "a federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy." Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 461 (1980). Therefore, if a court determines on the basis of the complaint that the named plaintiff is merely a nominal party, then the court should look past the complaint to determine if any unnamed plaintiffs are the real parties in interest. See id. Here, the State of South Carolina's complaint is framed as a *parens*

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Plaintiff, on the other hand, urges this Court to examine the State's interest in this suit as a whole in determining the real party in interest for the restitution claim, referencing cases that have used such an approach from the Supreme Court and from other district courts. See, e.g., Ex parte Nebraska, 209 U.S. 436, 444–45 (1908); Illinois v. SDS W. Corp., 640 F. Supp. 2d 1047, 1052 (C.D. Ill. 2009) (acknowledging that although a few courts have divided complaints according to the relief sought in deciding real party in interest issues, "[m]ost have rejected [that approach] and viewed the complaint as a whole"); Hood ex rel. Mississippi v. Microsoft Corp., 428 F. Supp. 2d 537, 545 – 46 (S.D. Miss. 2006); New York ex rel. Abrams v. Gen. Motors Corp., 547 F. Supp. 703, 706–07 (S.D.N.Y. 1982). Of course, other courts considering substantially the same issue before this Court regarding claims brought by other states' attorneys general have also decided that a wholesale approach is appropriate in evaluating whether minimal diversity exists. See Illinois v. AU Optronics Corp., --- F. Supp. 2d ---, 2011 WL 2214034 (N.D. Ill. 2011) ("[T]he Court respectfully rejects Defendants' arguments and concludes that it should look to the complaint as a whole."); In re TFT-LCD (Flat Panel) Antitrust Litigation, No. 07-1827 (N.D. Cal. Feb. 15, 2011) ("The Court is unpersuaded by defendants' argument that simply because CAFA was intended to broaden federal jurisdiction over class actions, federal courts are required to deviate from the traditional 'whole

complaint' analysis when evaluating whether a State is a real part in interest in a *parens patriae* case.").

This Court is inclined to agree with the argument of the Plaintiff—namely, that the case should be examined as a whole rather than on a claim-by-claim basis. Under a wholesale approach, the case is a *parens patriae* action, where the State has a clear quasi-sovereign interest in enforcing its own antitrust and consumer protection laws. Based on this recognized quasi-sovereign interest, the State is a real party in interest to the action, and there is no need to pierce the pleadings. As such, minimal diversity does not exist.

Even were this Court to adopt the case-by-case approach proffered by the Defendants, the State would still be a real party in interest to the restitution claim, and minimal diversity would still be lacking in the instant case. Again, a state's status as a real party in interest in a *parens patriae* suit hinges on whether it has a quasi-sovereign interest. As discussed above, the State has articulated a clear quasi-sovereign interest by bringing suit against the Defendants to enforce its own antitrust and consumer laws, but even the State's claim seeking wide-ranging relief on behalf of its citizens from the alleged price-fixing qualifies as a quasi-sovereign interest. As pointed out by Defendants, the Fourth Circuit has stated that "'[n]o state has a legitimate quasi-sovereign interest in seeing that consumers or any other group of persons receive a given sum of money.'" Pennsylvania v. Mid-Atlantic Toyota Distributors, Inc., 704 F.2d 125, 129 n. 8 (1983). However, the Fourth Circuit has also recognized a

quasi-sovereign interest of a State in bringing an action to enforce its laws, disgorge the proceeds of ill-gotten gains, and refund them to its citizens. In re Edmond, 934 F.2d 1304, 1312 (1991) ("The Division acted, not as a class representative, but on behalf of the state's quasi-sovereign interest in ensuring consumer protection and in securing its borders against violations."). Indeed, the Fourth Circuit's language in Mid-Atlantic admits that "a state can have a legitimate public interest in ensuring the economic well-being of its citizens—and in indirectly promoting a smoothly functioning economy freed of antitrust violations—even though the most obvious beneficiaries may be individual consumers who ultimately recoup money damages." 704 F.2d at 132. This language intimates that it is possible for a State to have multiple interests in a case, including some that are quasi-sovereign and some that are not. While individual consumers may benefit from the restitution sought by the State in this case, the remedies sought in this case also generally inure to all residents of South Carolina by making it less likely these defendants will engage in future price-fixing and by recovering taxpayer money paid to the defendants as overcharges. Further bolstering this Court's finding that the State has a quasi-sovereign interest in pursuing its restitution claim under SCUTPA, the South Carolina Court of Appeals has interpreted the language of the Act to require that suits brought under the Act address more than just a private interest. "To be actionable under the UTPA, [] the unfair or deceptive act or practice in the conduct of trade or commerce must have an impact upon the public interest. The act is not available to redress a private wrong where the public interest is

unaffected." Noack Enter., Inc. v. Country Corner Interiors, 290 S.C. 475, 479 (1986). This Court is unconvinced by AU's contention that the State is not a real party in interest to its restitution claim—though the claim has been brought on behalf of South Carolina consumers, the State has a quasi-sovereign interest in pursuing the claim.

B. Whether the Action is a "Class Action" as Defined in CAFA

Although initially raised in the Defendants Notice of Removal, Defendants have conceded since that time that the Fourth Circuit's recent decision in West Virginia ex rel. McGraw v. CVS Pharmacy, Inc. binds this Court as to whether this case is removable as a CAFA "class action." 646 F.3d 169 (2011). In accordance with CVS, this case cannot be properly removed as a CAFA "class action" because it "was brought by the State under state statutes that are not 'similar' to Federal Rule of Civil Procedure 23, . . . [and therefore] it is not removable under CAFA as a class action." Id. at 172.

C. Whether the Action is a "Mass Action" as Defined in CAFA

CAFA provides that "mass actions" are removable to federal court. 28 U.S.C. § 1332(d)(11)(A). As defined in CAFA, a mass action is

> Any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the

> ground that the plaintiffs' claims involve common question of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional requirements under subsection (a) ['where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs'].

28 U.S.C. § 1332(d)(11)(B)(i) & § 1332(a).

The State argues that the mass action provisions of CAFA do not confer jurisdiction here for three reasons. First, Plaintiff states that this case does not satisfy CAFA's numerosity requirement. 28 U.S.C. § 1332(d)(11)(B)(i). Second, Plaintiff argues that the Defendants have not satisfied their burden of showing that any of the South Carolina residents' claims meet the $75,000 requirement to stay in federal court. See id. at §§ 1332(a) & 1332(d)(11)(B)(i). Third, Plaintiff argues that this case fits within the carve-out in CAFA for lawsuits brought on behalf of the general public, which CAFA excludes from the definition of "mass action." See id. at § 1332(d)(11)(B)(ii)(III).

This Court concludes that, for the same reasons that it found the State to be a real party in interest, this suit does not constitute a "mass action" under CAFA. Because the State is a real party in interest, the minimal diversity required for mass actions under CAFA does not exist. See 28 U.S.C. § 1332(a). Absent minimal diversity, this Court does not have subject matter jurisdiction over the instant

action. Furthermore, this Court finds that as the real party in interest, the State does not satisfy the numerosity requirement for mass actions under CAFA. See Tanoh v. Dow Chem. Co., 561 F.3d 945, 952–53 (9th Cir. 2009) (holding that CAFA's requirement of 100 or more plaintiffs refers only to actual, named plaintiffs); Cal. Pub. Employees Ret. Sys. v. Moody's Corp., 2009 WL 3809816 at *7 (N.D. Cal. 2009) (interpreting the mass action provisions of CAFA as requiring plaintiffs to appear and make claims in order to count toward the numerosity requirement, and refusing to count 490 unnamed plaintiffs represented by an unincorporated association who failed to do so toward the numerosity requirements); Kitazado v. Black Diamond Hospitality Inv., LLC, No. 09-00271, 2009 WL 3209298, at *6 (D. Haw. Oct. 6, 2009). As another court recently summarized in words that apply equally here, "[b]ecause the State is a real party in interest and sues to protect and vindicate the rights of the public in general [under the SCUTPA], this action is not a 'mass action.'" Connecticut v. Moody's Corp., No., 3:10cv546, 2011 WL 63905, at *4 (D. Conn. Jan. 5, 2011).

IV. Conclusion

Accordingly, the action is remanded to the Richland County Court of Common Pleas. A certified copy of this order of remand shall be sent by the Clerk of this Court to the Clerk of the Court of Common Pleas, Richland County, Fifth Judicial Circuit of South Carolina.

IT IS SO ORDERED.

/s/ Joseph F. Anderson, Jr.
Joseph F. Anderson, Jr.
United States District Judge

September 14, 2011
Columbia, South Carolina

[FILED: February 18, 2011]

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

The State of South Carolina,

Plaintiff

vs.

LG Display CO., Ltd.
and LG Display America, Inc.

Defendants.

IN THE COURT OF COMMON PLEAS

CA No:

COMPLAINT

(JURY TRIAL DEMANDED)

The Plaintiff, State of South Carolina, by and through its Attorney General Alan Wilson and its undersigned counsel, alleges on information and belief, the following:

PARTIES

Plaintiff

1. The Plaintiff is the State of South Carolina brought through its Attorney General, Alan Wilson. The State of South Carolina brings this action to recover statutory penalties and restitution for the citizens of South Carolina from foreign manufacturers of Thin Film Transistor-Liquid Crystal Display panels ("TFT-LCD panels") that have engaged in a criminal price fixing conspiracy that also violates the law of South Carolina.

Defendants

2. Defendant LG Display Co., Ltd. maintains a corporate headquarters at 20 Yoido-dong, Youngdungpo-gu, Seoul, 150-721, Republic of Korea. During the relevant period, LG Display Co., Ltd., through its agents LG Display America, Inc. and others, manufactured, marketed, sold, and/or distributed TFT-LCD panels in South Carolina and/or TFT-LCD panels incorporated into TFT-LCD products sold in South Carolina.

3. Defendant LG Display America, Inc., which is a wholly owned subsidiary of LG Display Co., Ltd., maintains a corporate headquarters at 150 East Brokaw Road, San Jose, California. LF Display America, Inc. was formerly known as LG Phillips TFT-LCD America, Inc. LG Display America, Inc., through its agents LG Display Co., Ltd., and others,

manufactured, marketed, sold, and/or distributed TFT-LCD panels in South Carolina and/or TFT-LCD panels incorporated into TFT-LCD products sold in South Carolina.

4. The actions of Defendants are the joint and several responsibility of each Defendant due to the agency relationships between the parties and that the criminal conduct complained of herein was accomplished through Defendant's subsidiaries, agents, and employees. Defendants may hereinafter be referred to collectively as "LG".

5. Jurisdiction is proper in this Court under S.C. Code Ann. § 36-2-803. Venue is also proper in this court. This action does not seek relief under any federal statute, but instead, asserts only state causes of action.

6. TFT-LCD panels are an almost ubiquitous part of modern life. They are the screens with which we use computers, cell phones, and watch TV. There are literally millions of TFT-LCD panels in use in South Carolina alone.

FACTUAL ALLEGATIONS

7. In some cases, from the beginning of 1996 to the end of 2006, the manufacturers of TFT-LCD panels conspired with one another to fix the prices of these objects of commerce. That is, instead of having the free market determine the price for these products, these Defendants, and others, illegally agreed to fix prices and production so to

take improper advantage of consumers in South Carolina.

8. The method was relatively simple and in many cases very well documented in secret memos, messages, and other documents. Simply put, these Defendants, and others, had secret meetings and arrangements with other manufacturers where illegal agreements were made to restrict output and control prices in South Carolina.

9. These actions eventually got the attention of the United States Department of Justice. Despite Defendants' continued denials of liability, LG Display Co., Ltd. and LG Display America, Inc. pled guilty on December 15, 2008 to violations of the Sherman Antitrust Act, 15 U.S.C. 1. That plea agreement is attached hereto as **Exhibit A** and is incorporated herein by reference.

10. Defendant, pled guilty to a price fixing conspiracy in violation of 15 U.S.C.1 for a conspiracy spanning from September 21, 2001 to June 1, 2006.

11. Defendant LG pled guilty, and admitted in Federal Court that:

> (a) During the relevant period, defendants, through their officers and employees, including high-level personnel of the defendants, participated in a conspiracy among major TFT-LCD producers, the primary purpose of which was to fix the price of TFT-LCD sold in the United States and elsewhere. In furtherance of the conspiracy,

> the defendants, through their officers and employees, engaged in discussions and attended meetings, including group meetings commonly referred to by the participants as "crystal meetings," with representatives of other major TFT-LCD producers. During these discussions and meetings; agreements were reached to fix the price of TFT-LCD to be sold in the United States and elsewhere.
>
> (b) During the relevant period, TFT-LCD sold by one, or more of the conspirator firms, and equipment and supplies' necessary to the production and distribution of TFT-LCD as well as payments for TFT-LCD, traveled in interstate and foreign trade and commerce. The business activities of the defendants and its coconspirators in connection with the production and sale of TFT-LCD affected by this conspiracy were within the flow of, and substantially affected, interstate and foreign trade and commerce.
>
> See, LG Plea Agreement, **Exhibit A** attached hereto.

12. The criminal acts to which LG pled guilty were accomplished through it agents and employees, and indeed the other defendants in this case, all of whom are subsidiaries of LG, were the agents of LG in connection with its violations of law. Thus, all Defendants in this case are jointly and severally liable for the damages sought in this case.

APPLICABLE SOUTH CAROLINA LAW.

13. South Carolina has an antitrust statutory scheme. See, S.C. Code Ann. § 39-3-10. Additionally, South Carolina has an Unfair Trade Practices Act. S.C. Code Ann. §39-5-10. Both of these acts are applicable here.

South Carolina Antitrust Act

14. S.C. Code Ann. 39-3-130 provides:

> Any corporation organized under the laws of this or any other State or country transacting or conducting any kind of business in this State or any partnership, individual or other person or association of persons whatsoever, who shall create, enter into or become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual or other person or association of persons to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience or repair, any product of mining or other article or thing whatsoever or to maintain such price when so regulated or fixed or shall enter into or become a member of or a party to any pool, agreement, combination, contract, association or confederation to fix or limit the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience or repair, product of mining or

> other article or thing whatsoever or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado or any other kind of policy issued by any person shall be guilty of a conspiracy to defraud and be subject to the penalties provided by this article.

15. S.C. Code Ann. § 39-3-180 provides for certain penalties for the violation of Section § 39-3-130. These penalties include up to $5,000 per day of any violation to be forfeited to the State Treasury.

16. The State of South Carolina, therefore, is entitled to the statutory penalties provided for in S.C. Code Ann. § 39-3-180, as well as other remedies provided by law.

South Carolina Unfair Trade Practices Act

17. South Carolina statutory law also includes the South Carolina Unfair Practices Act ("SCUTPA"), S.C. Code. Ann. § 39-5-10 *et seq*.

18. The SCUTPA makes unlawful "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." S.C. Code. Ann § 39-5-20(a).

19. The SCUTPA provides for remedies for violations. The Attorney General may seek civil penalties of up to $5,000 per violation, under S.C. Code Ann. § 39-5-110(a), and the Court "may make such additional orders or judgment as may be necessary to restore to any person who has suffered

any ascertainable loss ...". S.C. Code Ann. §39-5-50(b).

CRIMINAL CONSPIRACY TO FIX PRICES

20. The Defendant's criminal guilty plea to violation of 15 U.S.C. 1, that of engaging in a criminal conspiracy to fix prices on TFT-LCD's, is a violation of S.C. Code Ann. § 39-3-130 and § 39-5-20. As a result, the guilty plea collaterally estopps Defendants from denying any violation of S.C. Code Ann. § 39-3-130 or § 39-5-20.

FRAUDULENT CONCEALMENT

21. Throughout the relevant period, Defendants and their co-conspirators repeatedly sought to conceal and did conceal the existence of the conspiracy which gave rise to their guilty plea as alleged in this Complaint. Defendants engaged in active, intentional and fraudulent concealment of their unlawful conspiracy.

FOR A FIRST CAUSE OF ACTION

(State Antitrust, S.C. Code Ann 39-3-130)

22. Plaintiff reiterates the above paragraphs as if set forth verbatim herein.

23. Defendants have violated S.C. Code Ann. § 39-3-130 by virtue of their admitted conduct which gave rise to their criminal violation of 15 U.S.C. 1. As a result, the State of South Carolina, by

and through its Attorney General, is entitled to the remedies provides in S.C. Code Ann. § 39-3-180.

24. Plaintiff is entitled to a civil forfeiture of $200 to $5,000 per day of the combination and conspiracy. These funds must be recovered and paid to the State Treasury as allowed by S.C. Code Ann. § 39-3-180.

FOR A SECOND CAUSE OF ACTION

(SCUTPA, S.C. Code Ann 39-5-10, et seq)

25. Plaintiff reiterates herein the above paragraphs as if set forth verbatim herein.

26. Defendants have violated S.C. Code Ann. § 39-5-20 by virtue of their admitted conduct which gave rise to their criminal violation of 15 U.S.C. 1. As a result, the State of South Carolina, by and through its Attorney General, is entitled to the remedies provides in S.C. Code Ann. §39-5-50 and §39-5-110.

27. The actions of Defendant, given their scope, time, value, and criminality, had an adverse impact on the public interest.

28. Plaintiff is entitled to restitution, pursuant to S.C. Code Ann. § 39-5-50, on behalf of the Citizens of the State of South Carolina for the ascertainable loss occasioned by the violations of Defendants.

29. Plaintiff is also entitled to the statutory penalties pursuant to S.C. Code Ann. § 39-5-110 of up to $5,000 per willful violation. The violations here were willful and indeed Defendant is collaterally estopped to deny their willful nature due to their criminal guilty plea.

30. Each LCD sold in the State of South Carolina that was subject to the conspiracy is a separate violation and thus the State of South Carolina seeks a statutory penalty of up to $5,000 per LCD screen sold in South Carolina that was the subject of the conspiracy.

WHEREFORE, Plaintiff respectfully prays for judgment against the Defendants, for statutory penalties and restitution as above stated, a jury trial for all aspects of this case so triable, for the costs and disbursements of this action and for such other and further relief as this court deems just and proper. Plaintiff specifically avers that the damages at issue in this case are more than $100,000, such averment made to allow all manner of discovery under South Carolina Law. Defendants have violated S.C. Code Ann. § 39-3-130 by virtue of their admitted conduct which gave rise to their criminal violation of 15 U.S.C. 1. As a result the State of South Carolina, by and through its Attorney General, is entitled to the remedies provides in S.C. Code Ann. § 39-3-180.

/s/ Alan Wilson
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Columbia, SC
February 18, 2011

PLAINTIFF DEMANDS A JURY TRIAL

[FILED: MARCH 25, 2011]

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

THE STATE OF SOUTH CAROLINA

Plaintiff,

vs.

LG DISPLAY CO., LTD.; LG DISPLAY AMERICA, INC.,

Defendants.

C.A. No. 3:11-cv-00729-JFA

Removed from:

COURT OF COMMON PLEAS
COUNTY OF RICHLAND

Case No.: 2011-CP-40-1173

NOTICE OF REMOVAL OF CIVIL ACTION

TO: The United States District Court for the District of South Carolina, Columbia Division;

The Clerk of Court of the South Carolina Court of Common Pleas for Richland County, South Carolina;

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AND

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P.O. Box 6728
Greenville, SC 29606

PLEASE TAKE NOTICE that the above-captioned action brought against defendants LG Display Co., Ltd. ("LGD Korea") and LG Display America, Inc. ("LGD America"); together, ("LG Display") is hereby removed from the Court of Common Pleas, County of Richland, State of South

Carolina, to the United States District Court for the District of South Carolina, Columbia Division, under the Class Action Fairness Act ("CAFA"), 28 U.S.C. §§ 1332(d) and 1453 and principles of traditional diversity jurisdiction, 28 U.S.C. § 1332, and supplemental jurisdiction 28 U.S.C. 1367".[1] In support of the removal of this action, LG Display alleges as follows:

BACKGROUND

1. On February 18, 2011, the State of South Carolina ("the State"), through its Attorney General Alan Wilson, filed a complaint in the Court of Common Pleas of the State of South Carolina, County of Richland, against LG Display. The State's action is Case No. 2011-CP-40-1173 in the files and records of the Court of Common Pleas. The complaint alleges that LG Display engaged in a conspiracy from 1996-2006 to fix prices for thin film transistor liquid crystal display ("TFT-LCD") panels. The State seeks civil forfeitures under S.C. Code Ann § 39-3-180 for violations of the South Carolina Antitrust Act, S.C. Code Ann § 39-3-130. The State also seeks restitution on behalf of the citizens of South Carolina under S.C. Code Ann. § 39-5-50 and statutory penalties under S.C. Code Ann § 39-5-110

[1] LG Display expressly reserves and does not waive all defenses or contentions it may assert in this action, including without limitation, lack of personal jurisdiction, insufficient service of process, running of the statute of limitations and failure to state a claim upon which relief may be granted. This notice of removal is not intended in any way to constitute an appearance or a waiver of service on behalf of either defendant.

for violations of the South Carolina Unfair Trade Practices Act ("SCUTPA"), S.C. Code Ann § 39-5-20.

2. Since December 2006, a number of other attorneys general and private plaintiffs have filed actions based on the same alleged conduct in federal and state courts around the country. Many of those cases have been transferred to a multidistrict litigation pending in the Northern District of California, *In re TFT*-LCD *(Flat Panel) Antitrust Litigation*, MDL No. 3:07-md-01827-SI.

GROUNDS FOR REMOVAL

I. The South Carolina Action is a "Class Action" Removable Under CAFA

3. This action is removable to federal court under CAFA, 28 U.S.C. §§ 1332(d) and 1453. CAFA provides federal jurisdiction over class actions in which monetary claims are made by one-hundred (100) or more persons involving an aggregate amount in controversy exceeding $5,000,000 and the claimant plaintiffs are at least minimally diverse from defendants. 28 U.S.C. § 1332(d)(2) and (5).

A. South Carolina Residents are the Real Parties in Interest

4. The State seeks restitution "on behalf of the citizens of the State of South Carolina."[2] Comp. ¶ 28. Such an action is in substance a class action within the meaning of CAFA.

5. In determining whether an action is removable under CAFA, a court must "look to the substance of the action and not only at the labels that the parties may attach." *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 424 (5th Cir. 2008).

6. What matters when determining jurisdiction is the identity of the real parties in interest. *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 460-61 (1980). Where a state Attorney General seeks monetary recovery based on injuries suffered by individual residents, such residents are the real parties in interest. *See Caldwell*, 536 F.3d at 429 (individuals were real parties in interest where Louisiana Attorney General's complaint made "clear

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[2] LG Display contests the Attorney General's ability to maintain a restitution claim under SCUTPA as a representative of South Carolina consumers. But a removing defendant may rely on the claims as alleged in the complaint in establishing a basis for removal. *See Lovern v. Gen. Motors Corp.*, 121 F.3d 160, 162 (4th Cir. 1997) ("[W]e will allow the court to rely on the face of the initial pleading and on the documents exchanged in the case by the parties to determine when the defendant had notice of the grounds for removal, requiring that those grounds be apparent within the four corners of the initial pleading or subsequent paper.").

that it is seeking to recover damages suffered by *individual policyholders*.") (emphasis in original). Here, the complaint in the State's action seeks restitution for alleged injuries that the State asserts private South Carolina consumers sustained. *See* Compl. ¶ 28.

7. In bringing restitution claims on behalf of "the Citizens of South Carolina," the State purports to represent these individuals as a class representative in a class action. CAFA defines a class action as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C § 1332(d)(1)(B). This definition should be "interpreted liberally" and "lawsuits that resemble a purported class action should be considered a class action for the purposes of applying these provisions." *West Virginia ex rel. McGraw v. Comcast Corp.*, 705 F. Supp. 2d 441, 452 (E.D. Pa. 2010) (quoting S. Rep. No. 109-14, at 35 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3). The State's complaint, purporting to bring a restitution claim on behalf of all purchasers in South Carolina, demonstrates that the South Carolina suit is a class action within the meaning of CAFA.

B. The South Carolina Action Meets the Other Requirements of a CAFA Class Action

8. A CAFA class action requires monetary claims of 100 or more persons, an aggregate in controversy of at least $5,000,000, and plaintiffs that

are at least minimally diverse from defendants. 28 U.S.C. § 1332(d)(2), (5). The requirements for a class action are satisfied here.

9. The number of claimants in this action exceeds 100. The complaint seeks restitution "on behalf of the Citizens of the State of South Carolina." Compl. ¶ 28. Over four-and-a-half million people reside in South Carolina and undoubtedly many of them bought LCD televisions, laptop computers, monitors, mobile phones, and other devices at issue in the complaint. Corporations and other entities also reside in South Carolina and have made significant purchases. Therefore, the real parties in interest include many more than 100 individual persons, corporations, and other entities.

10. The real plaintiffs in interest reside in South Carolina. LGD Korea is a Korean corporation with a principal place of business in Korea; LGD America is a California corporation with a principal place of business in California, Compl. ¶¶ 2-3; and therefore LGD Korea and LGD America are not citizens of South Carolina. Accordingly, the minimal diversity requirement of 28 U.S.C. § 1332(d)(2) is met.

11. Jurisdiction under CAFA requires an aggregate amount in controversy exceeding $5,000,000. 28 U.S.C. § 1332(d)(2). The amended complaint does not explicitly quantify the damages sought. But it seeks restitution for the "ascertainable loss" that LG Display allegedly caused "the Citizens of South Carolina," Comp. ¶ 28, which, as set forth in paragraph 9, includes all natural persons,

corporations and other entities residing in South Carolina who may have been injured[3] by LG Display's alleged conduct. Therefore, the monetary relief sought on behalf of South Carolina residents appears to exceed $5,000,000.

II. The South Carolina Action is, in the Alternative, a "Mass Action" Removable under CAFA

12. CAFA also provides federal jurisdiction over "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a)." 28 U.S.C. § 1332(d)(11)(B)(i).

13. A CAFA mass action requires monetary claims by 100 or more persons, an aggregate amount in controversy of at least $5,000,000, and plaintiffs that are at least minimally diverse from defendants. 28 U.S.C. § 1332(d)(11)(B)(i). The requirements for a mass action are met given the factual circumstances of this case.

14. As set forth in paragraph 9, the State seeks restitution on behalf of many more than 100 individual persons and corporations. These persons'

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[3] LG Display contests the State's assertion that its actions caused any injury to South Carolina consumers but again relies on the allegations in the complaint for purposes of establishing a basis for removal.

claims involve common questions of law and fact under SCUTPA, S.C. Code Ann § 39-5-20, based on alleged conduct in restraint of trade or commerce.

15. As set forth in paragraph 10, the action involves claims of South Carolina citizens who are minimally diverse from LGD America and LGD Korea; therefore, CAFA's diversity requirement is satisfied. 28 U.S.C. § 1332(d)(2).

16. As set forth in paragraph 11, the $5,000,000 statutory threshold is met. 28 U.S.C. § 1332(d)(2).

17. The "$5,000,000 aggregate amount in controversy, minimal diversity, numerosity, and commonality serve as threshold requirements for a district court to have subject matter jurisdiction over the *action* as a whole." *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1206. (11th Cir. 2007). There may be an additional requirement that at least one plaintiff have claims exceeding $75,000, *Id.*, but even assuming that this requirement exists, it has been met in this case. As set forth in paragraph 9, the State is seeking relief on behalf of resident corporations and associations as well as individual persons. If the State's remaining allegations are taken as true, at least one of these entities would have a claim for more than $75,000 in damages based on its total purchases of LCD products during the time period at issue. Therefore, at least one individual claimant seeks more than $75,000 in damages. *See* 28 U.S.C. § 1332(d)(11)(B)(i).

III. The Action is Removable on Traditional Diversity Jurisdiction Principles

18. Traditional diversity jurisdiction provides another basis for removing this action, as the real parties in interest, the South Carolina consumers involved, are completely diverse from defendants and the amount in controversy exceeds $75,000. *See* 28 U.S.C. § 1332.

19. While a State is not considered a citizen for diversity purposes, courts must look beyond the pleading labels to determine whether the State is the real party in interest. *Ohio v. GMAC Mortgage*, *LLC*, *et al,* --- F.Supp. 2d ----, 2011 WL 124187 at *2 (N.D. Ohio 2011) (citations omitted).

20. In analyzing whether a State is a real party in interest, courts look to a variety of factors, such as whether state law requires that the action be brought in the name of the state and whether the relief sought will inure to the state alone, and whether the judgment will effectively operate in favor of the state. *State ex rel. Guste v. Fedders Corp.*, 524 F.Supp. 552, 557 (M.D.La.1981).

21. As noted in Section I.A, the Attorney General's claims for restitution are brought on behalf of South Carolina consumers who purchased a TFT-LCD finished product, such as a television, notebook computer, or monitor. While the Attorney General also brings claims for civil penalties, it cannot be said that the overall relief sought will "benefit citizens regardless of the consumers involved." *Id.* at *5. Rather, the Attorney General

seeks relief on behalf of a defined subset of South Carolina consumers. Such targeted relief weakens any claim that South Carolina is acting primarily on behalf of the general public and therefore is the real party in interest. While South Carolina's citizens may indirectly benefit from the collection of civil penalties, on the whole, the real beneficiaries of the "[c]omplaint's narrowly tailored prayer for relief" are those citizens who purchased a TFT-LCD finished product. *Id.* at *6.

22. Thus, the real plaintiffs in interest reside in South Carolina. LGD Korea is a Korean corporation headquartered in Korea and LGD America is a Californian corporation headquartered in California Compl. ¶¶ 2-3; and therefore LGD Korea and LGD America are not citizens of South Carolina. Accordingly, the complete diversity requirement of 28 U.S.C. § 1332(a) is met.

23. As noted in paragraph 17 above, at least one of the claims asserted exceeds $75,000.

24. This Court has supplemental jurisdiction under 28 U.S.C. § 1367 over the other claims asserted.

IV. Supplemental Jurisdiction Exists over the Remainder of the State's Claims

25. To the extent necessary, this Court has supplemental jurisdiction under 28 U.S.C. § 1367 over the State's claims for civil forfeitures and penalties. Compl. ¶¶ 24, 29.

NOTICE AND FILING

26. This Notice of Removal is timely filed. Under 28 U.S.C. § 1446(b), this Notice of Removal is being filed within thirty days of first receipt by LG Display, through service or otherwise, of a copy of the initial pleading setting for the claim for relief upon which the state court proceeding is based.

27. On February 25, 2011, defendant LGD America received via first class mail a summons, civil coversheet, complaint, and ADR statement in this case. True and correct copies of the summons, civil coversheet, complaint, and ADR statement mailed to LGD America are attached as Exhibit A, as required under 28 U.S.C.§ 1446(a). LGD America has no notice of any other process, pleadings, or orders in this action other than proof of service, which is also included in Exhibit A. Upon information and belief, other than the filing of the complaint and proof of service, no activity has occurred in this action.

28. Under 28 U.S.C. § 1441(a), the United States District Court for the District of South Carolina, Columbia Division is the federal district court for the district and division embracing the place where the state court suit is pending. The Court of Common Pleas, County of Richland, State of South Carolina, wherein the complaint was initially filed, is located in the District Court of South Carolina, Columbia Division, and therefore this Court (and this division) is the proper court for removal of this action.

29. Under 28 U.S.C. § 1446(d), all adverse parties are being provided with written notice of the filing of this Notice of Removal.

30. Under 28 U.S.C. § 1446(d), a copy of this Notice of Removal is being filed with the Clerk of the Court of Common Pleas of South Carolina, Richland County.

31. A filing fee of $350.00 has been tendered to the Clerk of the United States District Court for the District of South Carolina.

32. Accordingly, LG Display hereby removes this action, now pending in the Court of Common Pleas of South Carolina, Richland County under Case No. 2011-CP-40-1173, to this Court.

Respectfully submitted,

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March 25, 2011

[FILED: March 25, 2011]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA COLUMBIA DIVISION

The State of South Carolina,

Plaintiff,

vs.

AU Optronics Corporation and AU Optronics Corporation America,

Defendants.

NOTICE OF REMOVAL

3:11-cv-00731-JFA

PLEASE TAKE NOTICE that the above-captioned action brought against defendants AU Optronics Corporation and AU Optronics Corporation America ("AUO Defendants") is hereby removed from the Court of Common Pleas of the State of South Carolina, County of Richland, to the United States District Court for the District of South Carolina, Columbia Division. This Court has jurisdiction pursuant to the Class Action Fairness Act ("CAFA"), 28 U.S.C. §§ 1332(d) and 1453, principles of traditional diversity jurisdiction, 28 U.S.C. 1332, and supplemental jurisdiction, 28

U.S.C. § 1367.[1] In support of the removal of this action, AUO Defendants allege as follows:

BACKGROUND

1. On February 18, 2011, the State of South Carolina ("the State"), through its Attorney General Alan Wilson, filed a complaint in the Court of Common Pleas of the State of South Carolina, County of Richland, against AUO Defendants. The State's action is Case No. 2011-CP-40-1172 in the files and records of the Court of Common Pleas. The State, as named plaintiff, alleges in its complaint that AUO Defendants engaged in a conspiracy from 1996-2006 to fix prices for thin film transistor liquid crystal display panels ("TFT-LCD panels"). The State seeks civil forfeitures under S.C. Code Ann § 39-3-180 for violations of the South Carolina Antitrust Act, S.C. Code Ann. § 39-3-130. The State also seeks restitution on behalf of the citizens of South Carolina under S.C. Code Ann. § 39-5-50 and statutory penalties under S.C. Code Ann § 39-5-110 for violations of the South Carolina Unfair Trade Practices Act ("SCUTPA"), S.C. Code Ann § 39-5-20.

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[1] AUO Defendants expressly reserve and do not waive all defenses or contentions they may assert in this action, including without limitation, lack of personal jurisdiction, insufficient service of process, running of the statute of limitations and failure to state a claim upon which relief may be granted. This notice of removal is not intended in any way to constitute an appearance or a waiver of service on behalf of AUO Defendants.

2. Since December 2006, a number of other state attorneys general and private plaintiffs have filed actions based on the same alleged conduct in federal and state courts around the country. Many of those cases have been transferred to a multidistrict litigation pending in the Northern District of California, *In re TFT-LCD (Flat Panel) Antitrust Litigation*, MDL No. 3:07-md-01827-SI.

GROUNDS FOR REMOVAL

I. The South Carolina Action is a "Class Action" Removable Under CAFA

3. This action is removable under CAFA, 28 U.S.C. §§ 1332(d) and 1453. CAFA provides federal jurisdiction over class actions in which monetary claims are made by one-hundred (100) or more persons, the aggregate amount in controversy is at least $5,000,000, and the claimant plaintiffs are at least minimally diverse from defendants. 28 U.S.C. § 1332(d)(2), (5).

A. South Carolina Residents are the Real Parties in Interest

4. The State seeks restitution "on behalf of the citizens of the State of South Carolina."[2] Comp. ¶ 27. Such an action is in substance a class action within the meaning of CAFA.

5. In determining whether an action is removable under CAFA, a court must "look to the substance of the action and not only at the labels that the parties may attach." *Louisiana ex rel.Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 424 (5th Cir. 2008).

6. The identity of the real parties in interest is the significant factor in determining if the federal courts have jurisdiction pursuant to CAFA. *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 460-61 (1980). Where a state Attorney General seeks monetary recovery based on injuries suffered by individual citizens, such citizens are the real parties in interest. *See Caldwell*, 536 F.3d at 429 (individuals were real parties in interest where

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[2] AUO Defendants contest the Attorney General's ability to maintain a restitution claim under SCUTPA as a representative of South Carolina consumers. But a removing defendant may rely on the claims as alleged in the complaint in establishing a basis for removal. *See Lovern v. Gen. motors Corp.*, 121 F.3d 160, 162 (4th Cir. 1997) ("[W]e will allow the court to rely on the face of the initial pleading and on the documents exchanged in the case by the parties to determine when the defendant had notice of the grounds for removal, requiring that those grounds be apparent within the four corners of the initial pleading or subsequent paper."

Louisiana Attorney General's complaint made "clear that it is seeking to recover damages suffered by *individual policyholders*.") (emphasis in original). Here, the State seeks restitution for alleged injuries that it asserts private South Carolina consumers sustained. *See* Compl. ¶ 27.

7. In bringing a restitution claim on behalf of "the Citizens of South Carolina," the State purports to represent these individuals as a class representative in a class action. CAFA defines a class action as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C § 1332(d)(1)(B). This definition should be "interpreted liberally" and "lawsuits that resemble a purported class action should be considered a class action for the purposes of applying these provisions." *West Virginia ex rel. McGraw v. Comcast Corp.*, 705 F. Supp. 2d 441, 452 (E.D. Pa. 2010) (quoting S. Rep. No. 109-14, at 35 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3). In its complaint the State purports to bring a restitution claim on behalf of all purchasers in South Carolina. This demonstrates that this action is a class action within the meaning of CAFA and therefore properly removed to this Court.

B. The South Carolina Action Meets the Other Requirements of a CAFA Class Action

8. As stated in paragraph 3, a CAFA class action requires monetary claims of one-hundred

(100) or more persons, an aggregate in controversy of at least $5,000,000, and plaintiffs that are at least minimally diverse from defendants. 28 U.S.C. § 1332(d)(2), (5). The requirements for a class action are satisfied here.

9. The number of claimants in this action, who are the real parties in interest, exceeds one-hundred (100). The complaint seeks restitution "on behalf of the Citizens of the State of South Carolina." Compl. ¶ 27. Over four-and-a-half million people reside in South Carolina, and undoubtedly many of them bought LCD televisions, laptop computers, monitors, mobile phones, and other devices at issue in the complaint. Corporations and other entities also reside in South Carolina and have made significant purchases of these items. Therefore, the claimants include many more than one-hundred (100) individual persons, corporations, and other entities.

10. The real parties in interest reside in South Carolina. AU Optronics Corporation is a Taiwan-based corporation with headquarters in Hsinchu, Taiwan. Compl. ¶ 2. AUO America is a California corporation with headquarters in Milpitas, California. Compl. ¶ 3. Therefore, neither of the AUO Defendants resides in South Carolina. Accordingly, the minimal diversity requirement of 28 U.S.C. § 1332(d)(2) is met.

11. Jurisdiction under CAFA requires an aggregate amount in controversy exceeding $5,000,000. 28 U.S.C. § 1332(d)(2). The amended complaint does not explicitly quantify the damages

sought. Nonetheless, the complaint makes clear that the State seeks restitution for the "ascertainable loss" that AUO Defendants allegedly caused "the Citizens of South Carolina." (Comp. ¶ 27). "[T]he Citizens of South Carolina," as defined in the complaint, includes all natural persons, corporations and other entities residing in South Carolina who may have been injured[3] by AUO Defendants' alleged conduct. (Comp. ¶ 10). Therefore, the amount in controversy exceeds $5,000,000.

II. The South Carolina Action is, in the Alternative, a "Mass Action" Removable under CAFA

12. CAFA also provides federal jurisdiction over "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a)." 28 U.S.C. § 1332(d)(11)(B)(i).

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[3] AUO Defendants contest the State's assertion that their actions caused any injury to South Carolina consumers. But a removing defendant may rely on the claims as alleged in the complaint in establishing a basis for removal. *See Lovern v. Gen. Motors Corp.*, 121 F.3d 160, 162 (4th Cir. 1997) ("[W]e will allow the court to rely on the face of the initial pleading and on the documents exchanged in the case by the parties to determine when the defendant had notice of the grounds for removal, requiring that those grounds be apparent within the four corners of the initial pleading or subsequent paper.").

13. A CAFA mass action requires monetary claims by one-hundred (100) or more persons, an aggregate amount in controversy of at least $5,000,000, and plaintiffs that are at least minimally diverse from defendants. 28 U.S.C. § 1332(d)(11)(B)(i). The requirements for a mass action are met given the factual circumstances of this case.

14. As set forth in paragraph 9, the State seeks restitution on behalf of many more than one-hundred (100) individual persons and corporations. These claims involve common questions of law and fact under SCUTPA, S.C. Code Ann § 39-5-20, based on alleged conduct in restraint of trade or commerce.

15. As set forth in paragraph 10, this action involves claims of South Carolina citizens who are minimally diverse from AUO Defendants; therefore, CAFA's diversity requirement is satisfied. 28 U.S.C. § 1332(d)(2).

16. As set forth in paragraph 11, the $5,000,000 statutory threshold is met. 28 U.S.C. § 1332(d)(2).

17. A case can proceed in federal court under CAFA mass action jurisdiction if at least one individual claimant seeks more than $75,000 in damages. 28 U.S.C. § 1332(d)(11)(B)(i); *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1197, n.31 (11th Cir. 2007). As set forth in paragraph 11, the State is seeking relief on behalf of resident corporations and associations as well as individual citizens of South Carolina. If the State's remaining allegations are

taken as true, at least one of these corporations, associations, or individual citizens would have a claim for more than $75,000 in damages based on its total purchases of LCD products during the time period at issue. For example, many hotels in South Carolina undoubtedly made large purchases of televisions and computers containing the TFT-LCD panels at issue and could claim restitution in an amount exceeding $75,000.

III. The Action is Removable on Traditional Diversity Jurisdiction Principles

18. Traditional diversity jurisdiction provides another basis for removing this action, as the real parties in interest, the South Carolina consumers involved, are completely diverse from the AUO Defendants and the amount in controversy exceeds $75,000. *See* 28 U.S.C. 1332.

19. This action was filed by the Attorney General of South Carolina, on behalf of the citizens of the State. The real parties in interest are the individual citizens and private corporations of South Carolina. *See Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 424 (5th Cir. 2008); *Ohio v. GMAC Mortgage LLC*, 2011 WL 124187 (N.D. Ohio). AU Optronics Corporation is a Taiwan-based corporation with headquarters in Hsinchu, Taiwan.[4] Compl. ¶ 2. Therefore, it is a citizen or a subject of a

[4] AUO Defendants both join in asserting the this Court has jurisdiction pursuant to principles of traditional diversity jurisdiction, however AU Optronics Corporation (Taiwan) reserves the right to contest service of process upon it at a later date.

"foreign state" for the purposes of diversity jurisdiction. *See* 28 U.S.C. § 1332. Also, AU Optronics Corporation America is a California corporation with headquarters in Milpitas, California. Compl. ¶ 3. Therefore, it is a citizen of California.[5] *See* 28 U.S.C. § 1332(c)(1) ("[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"). Thus, both defendants are completely diverse from the real parties in interest.

20. As noted in paragraph 17 above, at least one of the individual citizens of or businesses in South Carolina would have a claim for restitution exceeds $75,000.

21. Accordingly, this Court has jurisdiction. *See* 28 U.S.C. § 1332(a)(3) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States and in which citizens or subjects of a foreign state are additional parties.")

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[5] AU Optronics Corporation America is no longer headquartered in Houston, Texas as the Complaint alleges.

IV. Supplemental Jurisdiction Exists over the Remainder of the State's Claims

22. This Court has supplemental jurisdiction under 28 U.S.C. § 1367 over the State's claims for civil forfeitures and penalties. Compl. ¶¶ 23, 28-29.

NOTICE AND FILING

23. This Notice of Removal is timely filed. Under 28 U.S.C. § 1446(b), this Notice of Removal is being filed within thirty days of first receipt by AUO Defendants, through service or otherwise, of a copy of the initial pleading setting forth the claims for relief upon which the state court proceeding is based.

24. On February 25, 2011, AU Optronics Corporation America received via first class mail a summons, civil coversheet, complaint, and ADR statement in this case. True and correct copy of the civil cover sheet, summons, complaint, and return receipts evidencing service are attached as **Exhibit A**, as required under 28 U.S.C.§ 1446(a). AUO Defendants have no notice of any other process, pleadings, or orders in this action. Upon information and belief, other than the filing of the complaint, no activity has occurred in this action.

25. Under 28 U.S.C. § 1441(a), the United States District Court for the District of South Carolina, Columbia Division, is the federal district court for the district and division embracing the place where the state court suit is pending. The Court of Common Pleas, County of Richland, State of

South Carolina, wherein the complaint was initially filed, is located in the District of South Carolina, Columbia Division, and therefore this Court (and this division) is the proper court for removal of this action.

26. Under 28 U.S.C. § 1446(d), all adverse parties are being provided with written notice of the filing of this Notice of Removal.

27. Under 28 U.S.C. § 1446(d), a copy of this Notice of Removal is being filed with the Clerk of the Court of Common Pleas of South Carolina, Richland County.

28. A filing fee of $350.00 has been tendered to the Clerk of the United States District Court for the District of South Carolina.

29. Accordingly, AUO Defendants hereby remove this action, now pending in the Court of Common Pleas of South Carolina, Richland County under Case No. 2011-CP-40-1172, to this Court.

s/ William W. Wilkins
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AU Optronics Corporation and AU Optronics
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March 25, 2011
Greenville, South Carolina

The Class Action Fairness Act of 2005, codified in part at 28 U.S.C. § 1332(d), provides in pertinent part:

(d)(1) In this subsection--

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

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

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

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

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

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

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

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

. . .

(11)

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

(B)

(i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711 (2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the

plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

. . . .

Pub L. No. 109-2, § 2, 119 Stat. 4 (Feb. 18, 2005) (codified as amended at 28 U.S.C. § 1711, Findings and Purposes), provides:

(a) Findings. Congress finds the following:

> (1) Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.
>
> (2) Over the past decade, there have been abuses of the class action device that have--
>
> > (A) harmed class members with legitimate claims and defendants that have acted responsibly;
> >
> > (B) adversely affected interstate commerce; and
> >
> > (C) undermined public respect for our judicial system.
>
> (3) Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where--
>
> > (A) counsel are awarded large fees, while leaving class members

with coupons or other awards of little or no value;

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

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

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

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

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

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

(b) Purposes.--The purposes of this Act [the Class Action Fairness Act of 2005, which enacted this note, this chapter, and 28 U.S.C.A. § 1453, amended 28 U.S.C.A. §§ 1332, 1335, and 1603, and enacted provisions set out as notes under 28 U.S.C.A. §§ 1332, 2071, and 2074] are to--

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

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

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

S.C. Code Ann. § 39-3-130. Agreement in restraint of trade shall be conspiracy to defraud.

Any corporation organized under the laws of this or any other State or country transacting or conducting any kind of business in this State or any partnership, individual or other person or association of persons whatsoever, who shall create, enter into or become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual or other person or association of persons to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience or repair, any product of mining or other article or thing whatsoever or to maintain such price when so regulated or fixed or shall enter into or become a member of or a party to any pool, agreement, combination, contract, association or confederation to fix or limit the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience or repair, product of mining or other article or thing whatsoever or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado or any other kind of policy issued by any person shall be guilty of a conspiracy to defraud and be subject to the penalties provided by this article.

S.C. Code Ann. § 39-3-180. Penalties for certain violations.

Any person, partnership, firm, association, corporation or company or any officer, representative or agent thereof violating any of the provisions of this article other than Section 39-3-150 shall forfeit not less than two hundred dollars, nor more than five thousand dollars, for every such offense and each day such person shall continue to do so shall be a separate offense, the penalties in such cases to be recovered by an action in the name of the State, at the relation of the Attorney General or the solicitor of the judicial circuit within which the offense was committed. The moneys thus collected shall go into the State Treasury, and become a part of the general fund except as otherwise provided. The amount of the forfeit shall be fixed by the judge before whom the case is tried in each case, within the limits provided in this section and the collection of such penalty shall be enforced as the collection of fines against defendants upon conviction of a misdemeanor.

S.C. Code Ann. § 39-5-20. Unfair methods of competition and unfair or deceptive acts or practices unlawful; application of interpretations of Federal act.

(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(b) It is the intent of the legislature that in construing paragraph (a) of this section the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to § 5(a) (1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.

S.C. Code Ann. § 39-5-50. Action for injunction against violation of article; additional orders or judgments to restore property acquired by illegal means.

(a) Whenever the Attorney General has reasonable cause to believe that any person is using, has used or is about to use any method, act or practice declared by § 39-5-20 to be unlawful, and that proceedings would be in the public interest, he may bring an action in the name of the State against such person to restrain by temporary restraining order, temporary injunction or permanent injunction the use of such method, act or practice. Unless the Attorney General determines in writing that the purposes of this article will be substantially impaired by delay in instituting legal proceedings, he shall, at least three days before instituting any legal proceedings as provided in this section, give notice to the person against whom proceedings are contemplated and give such person an opportunity to present reasons to the Attorney General why such proceedings should not be instituted. The action may be brought in the court of common pleas in the county in which such person resides, has his principal place of business or conducts or transacts business. The courts are authorized to issue orders and injunctions to restrain and prevent violations of this article, and such orders and injunctions shall be issued without bond. Whenever any permanent injunction is issued by such court in connection with any action which has become final, reasonable costs shall be awarded to the State.

(b) The court may make such additional orders or judgments as may be necessary to restore to any person who has suffered any ascertainable loss by reason of the use or employment of such unlawful method, act or practice, any moneys or property, real or personal, which may have been acquired by means of any practice declared to be unlawful in this article, including the revocation of a license or certificate authorizing that person to engage in business in this State, provided the order declaring the practice to have been unlawful has become final.

S.C. Code Ann. § 39-5-110. Civil penalties for willful violation or violations of injunction.

(a) If a court finds that any person is willfully using or has willfully used a method, act or practice declared unlawful by § 39-5-20, the Attorney General, upon petition to the court, may recover on behalf of the State a civil penalty of not exceeding five thousand dollars per violation.

. . .

S.C. Code Ann. § 39-5-140(a). Actions for damages.

(a) Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, but not in a representative capacity, to recover actual damages. If the court finds that the use or employment of the unfair or deceptive method, act or practice was a willful or knowing violation of § 39-5-20, the court shall award three times the actual damages sustained and may provide such other relief as it deems necessary or proper. Upon the finding by the court of a violation of this article, the court shall award to the person bringing such action under this section reasonable attorney's fees and costs.

. . .