No. ________

In The
Supreme Court of the United States

THE STANDARD FIRE INSURANCE COMPANY,

Petitioner,

v.

GREG KNOWLES, Individually and as Class Representative on Behalf of all Similarly Situated Persons Within the State of Arkansas,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

LYN P. PRUITT
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, P.L.L.C.
425 West Capitol Avenue
Suite 1800
Little Rock, Arkansas 72201
(501) 688-8869

STEPHEN E. GOLDMAN
WYSTAN M. ACKERMAN
Counsel of Record
ROBINSON & COLE LLP
280 Trumbull Street
Hartford, Connecticut 06103
(860) 275-8200
wackerman@rc.com

Counsel for Petitioner The Standard Fire Insurance Company

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Last Term, this Court held that in a putative class action "the mere proposal of a class . . . could not bind persons who were not parties." *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2382 (2011). In light of that holding, the question presented is:

When a named plaintiff attempts to defeat a defendant's right of removal under the Class Action Fairness Act of 2005 by filing with a class action complaint a "stipulation" that attempts to limit the damages he "seeks" for the absent putative class members to less than the $5 million threshold for federal jurisdiction, and the defendant establishes that the actual amount in controversy, absent the "stipulation," exceeds $5 million, is the "stipulation" binding on absent class members so as to destroy federal jurisdiction?

CORPORATE DISCLOSURE STATEMENT

Defendant-Petitioner The Standard Fire Insurance Company is an indirect, wholly-owned subsidiary of The Travelers Companies, Inc., a publicly-traded company.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT STATUTORY PROVISION	2
STATEMENT OF THE CASE	3
A. Background of Pre-CAFA Class Actions in Miller County, Arkansas	4
B. The Stipulation Device Used to Evade CAFA	6
C. Proceedings Below	8
REASONS FOR GRANTING THE WRIT	10
I. THE LOWER COURTS IMPROPERLY FAILED TO FOLLOW THIS COURT'S OPINION IN *SMITH v. BAYER CORP.*	11
A. The Orders Below are Contrary to *Smith v. Bayer Corp.*	11
B. The Orders Below Violate the Due Process Rights of Absent Putative Class Members	13

TABLE OF CONTENTS – Continued

Page

C. The Orders Below Contravene the Text of CAFA and the Intent of Congress 15

D. Several Circuits Disagree With the Eighth Circuit's Approach 17

CONCLUSION.. 20

APPENDIX

Eighth Circuit Judgment Denying Permission to Appeal..App. 1

District Court Memorandum Opinion and Order ....App. 2

Eighth Circuit Order Denying Rehearing *En Banc*..App. 16

Eighth Circuit Clerk's Letter Requesting Response to Petition for Rehearing *En Banc* .....App. 17

Plaintiff's Response to Petition for Rehearing *En Banc* ....App. 19

Notice of Removal..App. 36

Complaint ....App. 55

TABLE OF AUTHORITIES

Page

CASES

Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co., 637 F.3d 827 (7th Cir. 2011) 12, 18

Bass v. Carmax Auto Superstores, Inc., 2008 U.S. Dist. LEXIS 11180 (W.D. Mo. Feb. 14, 2008) 12, 19

Belin v. Int'l Paper Co., 2011 U.S. Dist. LEXIS 69449 (W.D. La. June 27, 2011)........................12, 19

Bell v. Hershey Co., 557 F.3d 953 (8th Cir. 2009) 8, 12

Creative Montessori Learning Centers v. Ashford Gear LLC, 662 F.3d 913 (7th Cir. 2011) 14

Ditcharo v. UPS, 376 Fed. Appx. 432 (5th Cir. 2010) 18

Fiore v. First American Title Ins. Co., 2005 WL 3434074 (S.D. Ill. Dec. 13, 2005) 12, 19

Freeman v. Blue Ridge Paper Prods., Inc., 551 F.3d 405 (6th Cir. 2008) 16

Hohn v. United States, 524 U.S. 236 (1998) 1

Manguno v. Prudential Prop. & Cas. Ins. Co., 276 F.3d 720 (5th Cir. 2002) 12, 18

Pfizer, Inc. v. Lott, 417 F.3d 725 (7th Cir. 2005)....12, 18

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 14

Reagan v. ArcelorMittal, 2012 WL 1023107 (E.D. Tenn. Mar. 26, 2012)................................13, 19

TABLE OF AUTHORITIES – Continued

Page

Rolwing v. Nestle Holdings, Inc., 666 F.3d 1069 (8th Cir. 2012) 9, 11, 17

Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431 (2010) 16

Smith v. Bayer Corp., 131 S. Ct. 2368 (2011) 6, 10, 11, 13, 16

Smith v. Nationwide Prop. & Cas. Ins. Co., 505 F.3d 405 (6th Cir. 2007) 18

St. Paul Mercury Ins. Co. v. Red Cab Co., 303 U.S. 283 (1938)..10, 12, 13

Wecker v. National Enameling & Stamping Co., 204 U.S. 176 (1907)..17

STATUTES

28 U.S.C. § 1254(1)...1

28 U.S.C. § 1332(d)...*passim*

28 U.S.C. § 1453(c)(1)..9

28 U.S.C. §§ 1711-1715...15

28 U.S.C. § 1712 15

Pub. L. No. 109-2, § 2 ....4, 6, 14, 16

ARTICLES AND TREATISES

"The colossal Colossus travesty," *Southeast Texas Record*, Mar. 28, 2009 5

Eugene Gressman et al., SUPREME COURT PRACTICE (9th ed. 2007)..13

TABLE OF AUTHORITIES – Continued

Page

"Judge OKs $90M 'click fraud' settlement," *Associated Press Financial Wire*, July 29, 2006 ....5, 15

Michelle Massey, "'Failure to communicate' could lead to $45 M in discovery costs," *Southeast Texas Record*, Aug. 8, 2007 5

PETITION FOR A WRIT OF CERTIORARI

Petitioner The Standard Fire Insurance Company ("Standard Fire") respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit in *Greg Knowles v. The Standard Fire Insurance Company*, No. 11-8030.

OPINIONS BELOW

The district court's opinion granting remand is at 2011 WL 6013024; *see also* App. 2. The Eighth Circuit judgment denying permission to appeal is at App. 1. The Eighth Circuit order denying rehearing *en banc* and panel rehearing is at App. 16.

JURISDICTION

The Eighth Circuit judgment denying permission to appeal was entered on January 4, 2012. App. 1. The Eighth Circuit denied rehearing *en banc* and by the panel on March 1, 2012. App. 16. This petition for certiorari is timely filed within 90 days of denial of rehearing *en banc*. S. Ct. R. 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1). *See also Hohn v. United States*, 524 U.S. 236, 242 (1998) (Supreme Court may grant *certiorari* after court of appeals denies permission to appeal).

RELEVANT STATUTORY PROVISION

The Class Action Fairness Act of 2005, 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;

. . .

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the amount in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

. . .

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

STATEMENT OF THE CASE

This petition presents an issue vital to the efficacy of the Class Action Fairness Act of 2005 ("CAFA") and the future of class action litigation. CAFA provides defendants with the right to remove putative class actions to federal court in all cases seeking class treatment that are: (i) filed in a state other than the defendant's state of incorporation or principal place of business; and (ii) have an amount in controversy over $5 million. *See* 28 U.S.C. § 1332(d). In cases in which the amount in controversy, based on the claims alleged, exceeds $5 million, some class action plaintiffs' lawyers have sought to destroy federal jurisdiction under CAFA by having the named plaintiff sign a "stipulation" that purports to be "binding" on the members of the putative class and purports to limit to under $5 million, in the aggregate, the damages the named plaintiff "seeks" on behalf of all members of the putative class he or she hopes to, but does not yet,

have authority to represent. The Eighth Circuit has allowed such a "stipulation" to defeat federal jurisdiction even though the district court concluded that the defendant had established an amount in controversy, absent the "stipulation," that met the $5 million threshold.

The Eighth Circuit erred in upholding this tactic. The Constitution, CAFA, and basic principles of class action law do not allow a plaintiff to represent absent putative class members without any court authorization. They do not allow a plaintiff to impose a binding limitation on the amount potentially recoverable by those persons for the purpose of depriving a defendant of its right to removal under CAFA. Such a purported "stipulation" by an unauthorized representative of an uncertified class is a legal nullity that must be disregarded by federal courts in determining the jurisdictional amount in controversy. Disregarding these "stipulations," which are indisputably contrived for the sole purpose of evading federal jurisdiction under CAFA, not only protects defendants' right of removal and absent class members' constitutional rights, but also ensures that CAFA will achieve its expressed purpose of protecting against state-court abuses of the class action device. *See* Pub. L. No. 109-2, § 2.

A. Background of Pre-CAFA Class Actions in Miller County, Arkansas

Prior to CAFA, the same attorneys who represent Plaintiff filed many class actions in the Circuit Court

of Miller County, Arkansas, against corporate defendants, including numerous cases against insurance companies (some of them alleging the same theory asserted here). In these cases, Plaintiff's counsel obtained orders from the state court deferring briefing on all dispositive motions until after discovery was complete and class certification was decided. The Circuit Court of Miller County then allowed Plaintiff's counsel, over vigorous objection from defendants, to pursue discovery that was incredibly expensive and burdensome. Compliance with this staggeringly expensive discovery was ordered prior to briefing on certification in order to force massive nationwide settlements in cases in which the federal courts would have never certified a class. *See*, *e.g.*, Michelle Massey, "'Failure to communicate' could lead to $45 M in discovery costs," *Southeast Texas Record*, Aug. 8, 2007 (describing how Miller County court "ordered defendant Foremost Insurance Company to produce all of its claim files, even though the defendants estimated the cost for production at $45 million.").

These forced settlements resulted in attorneys' fees awards to Plaintiff's counsel of hundreds of millions of dollars. *See* "The colossal Colossus travesty," *Southeast Texas Record*, Mar. 28, 2009; *see also* App. 46. In some of these settlements, no one received any money except for Plaintiff's lawyers. *See* "Judge OKs $90M 'click fraud' settlement," *Associated Press Financial Wire*, July 29, 2006 ("No one will receive cash except the lawyers, who will split $30 million."). These are precisely the types of abuses of the class action

device that Congress sought to eliminate when it enacted CAFA. *See* Pub. L. No. 109-2, § 2(a)(4) (finding that "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. . . .").

B. The Stipulation Device Used to Evade CAFA

CAFA was intended to bring the types of class actions that Plaintiff's attorneys had filed in Arkansas state court before CAFA into federal court if such suits were filed after CAFA's effective date. Congress enacted CAFA to "enable[ ] defendants to remove to federal court any sizable class action involving minimal diversity of citizenship." *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2382 (2011). CAFA provides that, when a named plaintiff files a putative class action in a state court against a defendant that is not a citizen of the state where suit is filed, federal jurisdiction exists if the $5 million amount in controversy is satisfied.[1]

In almost all of the pre-CAFA cases filed by Plaintiff's counsel, the amounts in controversy were well in excess of $5 million. When the cases settled, the attorneys' fees alone amounted to substantially in excess of $5 million. *See* App. 46. After CAFA took

[1] The "home state" and "local controversy" exceptions in CAFA are inapplicable where no defendant is a citizen of the state where suit is filed. *See* 28 U.S.C. §§ 1332(d)(3), (4).

effect, Plaintiff's counsel initially did not file any new class action lawsuits in Miller County Circuit Court. Then, beginning in 2010, Plaintiff's counsel started to file new class actions in Miller County Circuit Court similar to the pre-CAFA cases. In these post-CAFA cases, Plaintiff's attorneys have attempted to circumvent CAFA by utilizing the following procedural maneuver: although the actual amount in controversy on the claims pleaded exceeds $5 million, the complaint is accompanied by a "stipulation" that purports to be "binding" and to limit to under $5 million not only the named plaintiff's own damages, but also the damages of the putative class members the plaintiff hopes to, but does not yet, represent. Here, Plaintiff's Complaint was accompanied by a signed affidavit by Plaintiff that:

> I do not now, and will not at any time during this case, whether it be removed, remanded, or otherwise . . . *seek damages for the class as alleged in the complaint to which this stipulation is attached* in excess of $5,000,000 in the aggregate (inclusive of costs and attorneys' fees).
>
> I understand that this stipulation is binding, and it is my intent to be bound by it. (App. 75 (emphasis added).)

Plaintiff alleged in his Complaint that this "stipulation" was "binding on Plaintiff for purposes of establishing the amount in controversy," and "[a]s such, there is neither diversity nor Class Action Fairness Act ('CAFA') jurisdiction for this claim in federal

court." App. 60. But Plaintiff left open some doors to potentially modify or negate his "stipulation" at a later date. The "stipulation" is carefully worded in an attempt to avoid limiting the damages the Plaintiff could *accept* for the class if awarded at trial. The "stipulation" is also worded so that it will not apply if the class definition is altered at a later point.

Plaintiff's attorneys have used this tactic in filing dozens of post-CAFA cases, all of them purporting to be worth just under $5 million. They have persuaded several Arkansas federal district court judges, and, just recently, the Eighth Circuit, to approve the use of this tactic to keep a class action in state court. Similar tactics have been used elsewhere (*see infra* at 12-13), but by far the largest number of these stipulations has been filed in the Miller County Circuit Court.

C. Proceedings Below

Standard Fire removed this case from the Miller County Circuit Court to the Western District of Arkansas, and Plaintiff moved to remand. Under Eighth Circuit precedent, if a defendant removing a case under CAFA proves the amount in controversy by a preponderance of the evidence, the burden shifts to the plaintiff to "establish to a legal certainty that the claim is for less than the requisite amount." *Bell v. Hershey Co.*, 557 F.3d 953, 956 (8th Cir. 2009). Plaintiff did not challenge this burden below. The district court held that Standard Fire had satisfied its burden

of establishing, by a preponderance of the evidence, that the $5 million threshold was satisfied. App. 8. The district court concluded, however, that Plaintiff's "stipulation" was sufficient for him to prove to a "legal certainty" that the amount in controversy fell below $5 million. The district court held that a named plaintiff can avoid removal under CAFA by stipulating to a purportedly "binding" limit on the damages being sought for the members of the proposed class, even though the named plaintiff, the only party executing this stipulation, has never been authorized to represent the class members or to stipulate away their rights. App. 9-10.

Standard Fire petitioned the Eighth Circuit for permission to appeal pursuant to CAFA, 28 U.S.C. § 1453(c)(1). The court of appeals denied permission to appeal without explanation. App. 1. Standard Fire then petitioned for rehearing *en banc*. After requesting a response to Standard Fire's petition for rehearing, *see* App. 17, the court of appeals issued a new opinion on the issue presented by Standard Fire's petition. In *Rolwing v. Nestle Holdings, Inc.*, 666 F.3d 1069 (8th Cir. 2012), the court of appeals affirmed an order of remand under CAFA based on a "stipulation" by the named plaintiff purporting to limit the damages of putative class members to below $5 million. Such a "stipulation" was allowed to defeat federal jurisdiction even where the actual amount in controversy otherwise was over $12 million, more than twice the $5 million threshold. *Id.* at 1072. After issuing the opinion in *Rolwing*, in the instant case the court of

appeals denied rehearing *en banc* and by the panel without comment. App. 16.

REASONS FOR GRANTING THE WRIT

The decisions below violate the constitutional rights of proposed class members and basic principles of removal law and class action law. It is well-settled that the amount in controversy is determined at the time of removal, and cannot be based on any events that may occur subsequent to removal. *St. Paul Mercury Ins. Co. v. Red Cab Co.*, 303 U.S. 283, 293 (1938). Under this Court's recent decision in *Smith v. Bayer Corp.* and longstanding principles of class action law, putative class members are *not* bound by actions taken by named plaintiffs or litigation outcomes before certification. A named plaintiff has *no* right to stipulate to a binding cap on the damages of people he or she does not represent. Such a limitation, if effective at the time suit is filed, would violate the due process rights of the proposed class members. Any such "stipulation" is therefore a nullity that must be disregarded in determining jurisdiction.

I. THE LOWER COURTS IMPROPERLY FAILED TO FOLLOW THIS COURT'S OPINION IN *SMITH v. BAYER CORP.*

A. The Orders Below are Contrary to *Smith v. Bayer Corp.*

The Eighth Circuit's conclusion in *Rolwing* is erroneous. A named plaintiff, at the time of filing a complaint, does not have any authority to cap damages of proposed class members he or she does not represent. Last Term, in *Smith v. Bayer Corp.*, another case from the Eighth Circuit, this Court reversed the court of appeals and held that members of a proposed class are *not* parties to a case and that the named plaintiff does *not* represent them unless and until a class is certified. The Court adopted a rule that "in the absence of certification . . . [n]either a proposed class action nor a rejected class action may bind non-parties," and "the mere proposal of a class . . . could not bind persons who were not parties." *Smith*, 131 S. Ct. at 2380, 2382 (emphasis added). Under *Smith*, Plaintiff's unauthorized "stipulation" on behalf of people he has not been authorized to represent is a legal nullity.

Plaintiff *conceded* in the court of appeals that, under *Smith*, "[i]t is true, of course, that merely filing a proposed class action will not 'bind' proposed class members" and that "the due process rights of such proposed class members are always protected before any such decisions [limiting damages] are considered 'binding.'" App. 27, 29. A concededly non-binding stipulation *cannot*, as a matter of law, "establish to a

legal certainty that the claim is for less than the requisite amount" for federal jurisdiction. *Bell*, 557 F.3d at 956; *see also St. Paul Mercury*, 303 U.S. at 289-90 (federal jurisdiction exists unless it "appear[s] to a legal certainty that the claim is really for less than the jurisdictional amount"); *Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830 (7th Cir. 2011) ("[w]hat [the named plaintiff] is willing to accept thus does not bind the class and therefore does not ensure that the stakes fall under $5 million"); *Pfizer, Inc. v. Lott*, 417 F.3d 725, 725 (7th Cir. 2005) (stipulation by the named plaintiffs regarding damages "would not bind the other members of the class"); *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 724 (5th Cir. 2002) ("it is improbable that [plaintiff] can ethically unilaterally waive the rights of the putative class members to attorney's fees without their authorization"); *Bass v. Carmax Auto Superstores, Inc.*, 2008 U.S. Dist. LEXIS 11180, at *6 (W.D. Mo. Feb. 14, 2008) ("Plaintiff has no right to limit or compromise the recovery of the class without Court approval, particularly before she has even been approved as a representative for the class."); *Fiore v. First American Title Ins. Co.*, 2005 WL 3434074, at *3 (S.D. Ill. Dec. 13, 2005) ("Plaintiff cannot in good faith place a $5,000,000 limitation on the recovery of the putative class"); *Belin v. Int'l Paper Co.*, 2011 U.S. Dist. LEXIS 69449, at *7 (W.D. La. June 27, 2011) ("although the class representatives appear willing to waive their own claims for damages in excess of the jurisdictional threshold, they do not have authority to waive damages on behalf of other unnamed

class members"); *Reagan v. ArcelorMittal*, 2012 WL 1023107, at *2 (E.D. Tenn. Mar. 26, 2012) (named plaintiff's disclaimer of damages over $5 million did not preclude removal where defendant demonstrated an amount in controversy over $5 million).

Because the amount in controversy is determined solely as of the time of removal, *see St. Paul Mercury*, 303 U.S. at 293, and because the stipulation was not binding at the time of removal, the stipulation must be disregarded in determining whether federal jurisdiction exists. The district court held that, absent Plaintiff's stipulation, federal jurisdiction exists in this case. App. 8. This Court should therefore grant certiorari, reaffirm *Smith*, and reverse the judgment of the court of appeals. *See* Eugene Gressman et al., SUPREME COURT PRACTICE 250 (9th ed. 2007) ("Where the decision of the court of appeals clearly fails to apply prior Supreme Court decisions because of error or oversight, the Court usually grants certiorari. Often in such circumstances the Court will reverse summarily without oral argument or merits briefing, typically through a brief per curiam opinion.").

B. The Orders Below Violate the Due Process Rights of Absent Putative Class Members

Allowing a named plaintiff to bind absent putative class members to a limitation on damages, and giving effect to such a "stipulation" as of the time of removal, plainly violates basic due process rights of the absent

putative class members. This Court has held that a state court *cannot* bind members of a putative class before providing them with adequate notice and an opportunity to be heard. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) ("If the forum State wishes to bind an absent plaintiff [class member] concerning a claim for money damages . . . [t]he plaintiff must receive notice plus an opportunity to be heard and participate in the litigation"). Here, the absent putative class members did not receive any notice, and therefore had no opportunity to be heard. Treating Plaintiff's "stipulation" as binding at the time of removal would violate the due process rights of these absent putative class members.

Sanctioning Plaintiff's stipulation device jeopardizes the rights of the putative class members. As Judge Posner recently explained, in class actions "[t]he court takes the place, as monitor of counsel, of the nominal clients," to protect the interests of the putative class. *See Creative Montessori Learning Centers v. Ashford Gear LLC*, 662 F.3d 913, 917 (7th Cir. 2011). In enacting CAFA, Congress recognized this important role of the court, and specifically acknowledged the need to eliminate class action settlements in which "[class] counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value," or "confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights." Pub. L. No. 109-2, § 2(3)(A), (C). To remedy these problems, CAFA provides various safeguards to

protect class members in proposed settlements made in federal court. *See* 28 U.S.C. §§ 1711-1715. But many states, including Arkansas, have no equivalent provisions. Some of the pre-CAFA settlements in Miller County likely would not have survived CAFA scrutiny. *See*, *e.g.*, "Judge OKs $90M 'click fraud' settlement," *Associated Press Financial Wire*, July 29, 2006 ("No one will receive cash except the lawyers, who will split $30 million."); 28 U.S.C. § 1712 (providing for special judicial scrutiny of coupon settlements and limiting attorneys' fees awards for such settlements). Plaintiff's "device," if sanctioned, will deprive absent class members of the benefit of a federal ruling on any proposed settlement in accordance with CAFA.

C. The Orders Below Contravene the Text of CAFA and the Intent of Congress

There is nothing in the text of CAFA that permits a plaintiff to limit the damages of putative class members he or she is not authorized to represent. The pertinent statutory text provides that "the claims of the individual class members *shall be aggregated* to determine whether the amount in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs." 28 U.S.C. § 1332(d)(6) (emphasis added). CAFA thus requires the aggregation of the full claims of the putative class members as alleged in the complaint. It does not provide that full aggregation is optional, or that aggregation can be followed by a reduction of the aggregate amount to under $5 million based on a "stipulation" of a putative class

representative not yet appointed to represent a class. In the present case, the trial court found that the claims of the individual class members, when aggregated, exceeded $5 million, but that the plaintiff was able to defeat federal jurisdiction by "stipulating" to a reduction in the aggregate amount of the claims. Congress did not provide class action plaintiffs with the ability to defeat federal jurisdiction in this manner.

The decisions below are also contrary to the expressed purpose of CAFA. Congress intended CAFA to "enable[ ] defendants to remove to federal court any sizable class action involving minimal diversity of citizenship," *Smith*, 131 S. Ct. at 2382, because "Congress sought to check what it considered to be the over-readiness of some state courts to certify class actions." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1473 (2010). In enacting CAFA, Congress found that "[a]buses 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. . . ." Pub. L. No. 109-2, § 2(a)(4).

If federal courts permit the use of stipulations by plaintiffs to avoid CAFA, "Congress's obvious purpose in passing [CAFA] – to allow defendants to defend large interstate class actions in federal court – can be avoided almost at will. . . ." *Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 407 (6th Cir. 2008). In *Rolwing*, for example, the actual amount in controversy was over $12 million, but the court of appeals allowed the plaintiff to "stipulate away" over $7

million of the potential class recovery (approximately 60%) so that he could deprive the nonresident defendant of a federal forum and litigate in state court. *See Rolwing*, 660 F.3d at 1070-71. Such a result defeats the defendant's right of removal even where it can show that all of the requirements for CAFA jurisdiction are met, including an actual amount in controversy on the allegations pled that exceeds $5 million. Congress's plain intent to provide defendants with a federal forum in these cases is defeated.

The federal courts have long rejected improper devices contrived by creative plaintiffs' attorneys to prevent removal, such as fraudulent joinder of nondiverse parties. As this Court explained in upholding the fraudulent joinder doctrine, "the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction." *Wecker v. National Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907). The same holds true today. The "device" employed by Plaintiff here is the post-CAFA equivalent of fraudulent joinder.

D. Several Circuits Disagree With the Eighth Circuit's Approach

Several circuits, at least in dicta, have rejected the Eighth Circuit's view on the effect of "stipulations" that purport to limit damages in putative class

actions. The Sixth Circuit explained that "[a] disclaimer in a complaint regarding the amount of recoverable damages does not preclude a defendant from removing the matter to federal court upon a demonstration that damages are more likely than not to meet the amount in controversy requirement, but it can be sufficient absent adequate proof from defendant that potential damages actually exceed the jurisdictional threshold." *Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 405, 407 (6th Cir. 2007). The Seventh Circuit reasoned that a named plaintiff "has a fiduciary duty to its fellow class members" and "[w]hat [the named plaintiff] is willing to accept thus does not bind the class and therefore does not ensure that the stakes fall under $5 million." *Back Doctors*, 637 F.3d at 830; *see also Pfizer*, 417 F.3d at 725 (explaining that stipulation by the named plaintiffs regarding damages "would not bind the other members of the class"). The Fifth Circuit has noted that "it is improbable that [plaintiff] can ethically unilaterally waive the rights of the putative class members to attorney's fees without their authorization." *Manguno*, 276 F.3d at 724. An unpublished opinion by the Fifth Circuit involving traditional diversity jurisdiction also noted that the named plaintiffs did not have "the authority to deny other members of their putative class action the right to seek an award greater than $75,000." *Ditcharo v. UPS*, 376 Fed. Appx. 432, 437 (5th Cir. 2010). A number of district courts likewise have held that named plaintiffs have no right to place a dollar limit on proposed class members' damages to avoid federal jurisdiction under CAFA. *See*

Bass, 2008 U.S. Dist. LEXIS 11180, at *6; *Fiore*, 2005 WL 3434074, at *3; *Belin*, 2011 U.S. Dist. LEXIS 69449, at *7; *Reagan*, 2012 WL 1023107, at *2.

While the Eighth Circuit, in *Rolwing*, was the first court of appeals to address the question presented squarely, this error is likely to go uncorrected for a long time if this Court waits for an express circuit split to develop. The use of "stipulations" by named plaintiffs is concentrated in specific state courts where the judicial environment is so plaintiff-friendly that plaintiffs' attorneys can potentially wreak havoc on corporate defendants in a "less-than-$5 million" class action. Indeed, it appears that more of these "stipulations" have been filed in the Miller County Circuit Court (and by the same counsel) than in any other court nationwide. It could take many years, and cost corporate defendants billions of dollars, if this Court waits for an express circuit split to develop on this important national issue.

Seven years after CAFA's enactment, the time has come for this Court to take its first CAFA case. By deciding the question presented here, this Court will determine whether CAFA is a strong remedy for state court abuses in class actions, as Congress expressly intended, or if it has a loophole that allows plaintiffs' lawyers to easily avoid federal jurisdiction. This issue merits this Court's review because of its importance to the federal-court system, class action litigation, and our Nation's economy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN E. GOLDMAN
WYSTAN M. ACKERMAN
Counsel of Record
ROBINSON & COLE LLP
280 Trumbull Street
Hartford, Connecticut 06103
(860) 275-8200
wackerman@rc.com

LYN P. PRUITT
MITCHELL, WILLIAMS, SELIG,
GATES & WOODYARD, P.L.L.C.
425 West Capitol Avenue
Suite 1800
Little Rock, Arkansas 72201
(501) 688-8869

Counsel for Petitioner
The Standard Fire
Insurance Company

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 11-8030

Greg Knowles, Individually and as Class Representative on Behalf of all Similarly Situated Persons

Respondent

v.

The Standard Fire Insurance Company

Petitioner

Appeal from U.S. District Court for the Western District of Arkansas – Texarkana
(4:11-cv-04044-PKH)

JUDGMENT

The Petition for permission to file an interlocutory appeal has been considered by the court and is denied.

January 04, 2012

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

GREG KNOWLES, Individually and as Class Representative on Behalf of all Similarly Situated Persons within the State of Arkansas, PLAINTIFF

v. No. 4:11-cv-04044

THE STANDARD FIRE INSURANCE COMPANY, DEFENDANT

MEMORANDUM OPINION AND ORDER

(Filed Dec. 2, 2011)

Currently before the Court are Plaintiff's Motion to Remand and supporting Memorandum of Law (Docs. 6-7) and Defendant's Response (Doc. 9). Plaintiff disputes the existence of diversity jurisdiction in this case, as he contends that the amount in controversy does not exceed the sum or value of $5,000,000, pursuant to the jurisdictional requirements described in the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d). For the reasons reflected herein, Plaintiff's Motion to Remand (Doc. 6) is **GRANTED**, and this case is remanded to the Circuit Court of Miller County, Arkansas.

I. Background

On April 13, 2011, Plaintiff Greg Knowles filed a putative class action complaint in the Circuit Court

of Miller County, Arkansas, against Defendant The Standard Fire Insurance Company alleging breach of contract due to Defendant's underpayment of claims for loss or damage to real property made pursuant to certain homeowners insurance policies. *See* Doc. 2, ¶ 32. Plaintiff's home was damaged by hail on or about March 10, 2010, and thereafter, Plaintiff requested payment from Defendant for this damage. Plaintiff alleges that under the homeowners policy of insurance issued by Defendant, Plaintiff and others similarly situated were entitled to be fully reimbursed for such loss or damage but were not fully reimbursed. Specifically, Plaintiff asserts that Defendant failed to pay for charges reasonably associated with retaining the services of a general contractor to repair or replace damaged property. These charges, known as general contractors' overhead and profit ("GCOP"), comprise an extra 20% fee routinely assessed by contractors when repairing damaged property. *Id.* at ¶¶ 1-4. According to Plaintiff, Defendant fraudulently concealed its obligation to pay GCOP charges and forced Plaintiff to bear this cost and suffer the ensuing damage. *Id.* at ¶¶ 33-45. The purported class of persons injured by Defendant's alleged breach of contract for failure to pay GCOP on homeowners insurance contracts includes "hundreds, and possibly thousands, of individuals geographically dispersed across Arkansas . . . " *Id.* at ¶ 26.

Defendant removed this case to federal court on May 18, 2011, arguing that Plaintiff fraudulently framed the definition of the purported class in order

to limit recovery to two years, rather than the five years available under the applicable statute of limitations. Defendant also asserted that although Plaintiff signed a stipulation limiting his and the purported class's recovery, Plaintiff's counsel failed to sign a stipulation that they would not seek or accept an award of attorneys' fees that would allow the total amount in controversy to exceed state court jurisdictional limits. Moreover, Defendant maintained that Plaintiff lacked the authority to place a limit on recovery that would bind the other class members.

On June 6, 2011, Plaintiff moved to remand the case back to state court, citing in support of his motion his binding stipulation executed prior to removal, which expressly limited his and the class's recovery to within state jurisdictional limits. Plaintiff also asserted that as master of his Complaint, he had the right to limit his claims so as to bring this action in the forum of his choice. *See* Doc. 7, pp. 5-6.

II. Legal Standard

When analyzing the propriety of removal of a case to federal court, the removing party has the burden of showing that jurisdiction in the federal courts is proper and the requisite amount in controversy has been met. *Hatridge v. Aetna Cas. & Sur. Co.,* 415 F.2d 809, 814 (8th Cir. 1969). Federal courts must strictly construe the federal removal statute and resolve any ambiguities about federal jurisdiction in favor of remand. *Transit Casualty Co. v. Certain*

Underwriters at Lloyd's of London, 119 F.3d 619, 625 (8th Cir. 1997).

CAFA operates to grant federal district courts original jurisdiction over class actions where there is diversity of citizenship between the plaintiff and defendant and when "the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs." 28 U.S.C. § 1332(d)(2). The claims of the potential class members must be aggregated to determine whether the jurisdictional minimum has been met. 28 U.S.C. § 1332(d)(6). The guiding principal courts follow in establishing whether or not removal is proper is that the plaintiff is the master of his complaint, even in class action cases. *Bell v. Hershey Co.,* 557 F.3d 953, 956 (8th Cir. 2009). Therefore, in determining the amount in controversy, a court looks first to the complaint. "If [a plaintiff] does not desire to try his case in the federal court, he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove." *St. Paul Mercury Indem. Co. v. Red Cab Co.,* 303 U.S. 283, 294 (1938).

Generally, "the sum claimed by the plaintiff controls if the claim is apparently made in good faith." *Id.* at 289. Although Plaintiff in the instant case does not claim to be owed a specific dollar amount in damages, he does impose a limitation on the amount he and the purported class may recover. In his Complaint, Plaintiff states that "neither Plaintiff's nor any individual Class Member's claim is equal to or greater than seventy-five thousand dollars ($75,000),

inclusive of costs and attorneys fees, individually or on behalf of any Class Member . . . Moreover, the total aggregate damages of the Plaintiff and all Class Members, inclusive of costs and attorneys' fees, are less than five million dollars ($5,000,000), and the Plaintiff and Class stipulate they will seek to recover total aggregate damages of less than five million dollars ($5,000,000)." Doc. 2, ¶ 11.

Exhibit A attached to the Complaint is a "Sworn and Binding Stipulation," signed by Plaintiff, affirming that he will not at any time during the pendency of the case "seek damages for myself or any other individual class member in excess of $75,000 (inclusive of costs and attorneys' fees) or seek damages for the class as alleged in the complaint to which this stipulation is attached in excess of $5,000,000 in the aggregate (inclusive of costs and attorneys' fees)." *Id.* at p. 16.

To defeat remand, a defendant has the burden of showing by a preponderance of the evidence that the amount in controversy exceeds the federal court's minimum threshold for jurisdiction, which is $5 million in the aggregate. *In re Minn. Mut. Life Ins. Co. Sales Practices Litig.,* 346 F.3d 830, 834 (8th Cir. 2003). The Court must engage in a "fact intensive" inquiry to determine whether the preponderance of the evidence standard has been met. *Bell,* 557 F.3d at 959. Mere speculation or conjecture on the part of the defendant as to the amount in controversy will not be sufficient to meet the preponderance standard. *See, e.g., Thomas v. Southern Pioneer Life Ins. Co.,* 2009

WL 4894695, *2 (E.D. Ark. Dec. 11, 2009); *Nowak v. Innovative Aftermarket Sys.,* 2007 WL 2454118 (E.D. Mo. Aug. 23, 2007).

Once the preponderance standard is met and the defendant establishes enough detail to meet the jurisdictional requirement for the amount in controversy, the court turns its attention to the plaintiff, who must establish "to a legal certainty" that his claim is actually under the $5 million threshold. *Bell,* 557 F.3d at 956 (*citing St. Paul Mercury,* 303 U.S. at 290). Any doubt as to federal jurisdiction must be resolved in favor of remand. *In re Prempro Prods. Liab. Litig.,* 591 F.3d 613, 620 (8th Cir. 2010).

III. Discussion

A. Defendant's Legal Burden: Preponderance of the Evidence

Defendant has presented evidence to the Court that the class as defined in Plaintiff's Complaint has an actual amount in controversy of slightly over $5 million (*see* Doc. 9-9).[1] Defendant arrives at that figure by calculating the GCOP at 20% of the total

[1] Defendant submitted alternate sets of data to the Court: one for a class spanning two years of recovery, and one for a class spanning five years of recovery. As explained in further detail below, the Court finds that Plaintiff has the right to limit the class to a two-year period of recovery for purposes of calculating damages. Accordingly, the data referred to in the Court's discussion pertains to the two-year period set forth in Plaintiff's Complaint.

damages purportedly owed to class members over the course of two years. This GCOP total for the proposed class is $3,054,961. *See* Doc. 1, ¶ 17. Added to that are a 12% statutory penalty for breach of contract and an award of attorneys' fees amounting to 40% of the presumed recovery, plus pre-judgment interest. Defendant arrives at the 40% figure on attorneys' fees by referencing a similar case in which the Arkansas Court of Appeals calculated an attorney fee award in an insurance case using 40% of the damages awarded. *See* Doc. 9, pp. 9-10. When Defendant's projection for the cost of Plaintiff's attorneys' fees is added in, this brings the total award up to $5,024,150, which exceeds the statutory maximum for state court jurisdiction by $24,150.

The affidavit of Brian N. Harton, Director of Product Management for Defendant, attests that the damages total submitted, excluding the penalty and attorneys' fees, is true and correct. Doc. 9-9. Overall, considering the briefing and evidence before the Court, Defendant's calculations do not appear to be mere speculation or conjecture. Moreover, Plaintiff has failed to counter Defendant's estimates with evidence or argument. Therefore, the Court considers Defendant to have satisfied its initial burden of proving by a preponderance of the evidence that the actual amount in controversy reaches, if not exceeds, the federal court's minimum threshold for jurisdiction pursuant to CAFA.

B. Plaintiff's Legal Burden: Legal Certainty

Now that Defendant has met its burden of proof, the burden shifts to Plaintiff to prove to a legal certainty that his claim falls under the $5 million threshold for remand to state court. The question is whether a plaintiff may meet his burden of proof by stipulating at the time the complaint is filed that he will not seek more than the federal jurisdictional minimum for himself and the putative class. Even though the *Bell* court did not specifically reference the legal certainty burden, it did conclude that a clear stipulation would meet the requirements for defeating removal. It follows, therefore, that if a stipulation is legally binding and made in good faith, it can satisfy the plaintiff's legal certainty burden and defeat removal. *Bell,* 557 F.3d at 956; *see also Tuberville v. New Balance Athletic Shoe, Inc.,* 2011 WL 1527716, *3 (W.D. Ark., April 21, 2011).

1. Plaintiff's Stipulation

The law in this circuit is clear that a binding stipulation sworn by a plaintiff in a purported class action will bar removal from state court if the stipulation limits damages to the state jurisdictional minimum. *Bell,* 557 F.3d at 958, *citing De Aguilar v. Boeing Co.,* 47 F.3d 1404, 1412 (5th Cir. 1995) ("In order to ensure that any attempt to remove would have been unsuccessful, [plaintiff] Bell could have included a binding stipulation with his petition stating

that he would not seek damages greater than the jurisdictional minimum upon remand"). Various federal courts in Arkansas, including this one, have remanded several purported class actions to state court using the guideline set forth in *Bell* regarding the effect of a plaintiff's binding stipulation. *See, e.g., Thompson v. Apple, Inc.,* 2011 WL 2671312 (W.D. Ark. July 8, 2011); *Tomlinson v. Skechers U.S.A., Inc.,* Case No. 5:11-CV-05042-JLH (W.D. Ark. May 25, 2011); *Murphy v. Reebok Int'l, Ltd.,* 2011 WL 1559234 (E.D. Ark. April 22, 2011); *Tuberville v. New Balance Athletic Shoe, Inc.,* 2011 WL 1527716 (W.D. Ark. April 21, 2011).

Defendant claims that Plaintiff's sworn stipulation is invalid for two reasons. First, Defendant contends that the wording of the stipulation telegraphs Plaintiff's desire to circumvent CAFA and receive an award in excess of the $5 million threshold. Plaintiff's stipulation states that he "will not . . . seek" damages in excess of $5 million in the aggregate. This language does not adequately bind Plaintiff, according to Defendant, because Plaintiff has not "refused to accept" a damage award in excess of the maximum. Defendant fears that Plaintiff's choice of the word "seek" is intentionally made in order to leave open the door for a larger award than the maximum allowed in state court. Defendant cites no authority to support its view that Plaintiff's promise not to "seek" an award over jurisdictional limits is unenforceable, but "refusing to accept" such an award would be binding. Magic words or blood oaths are not required in order

to make a sworn stipulation binding. The Court finds Plaintiff's sworn stipulation is sufficient and meets the standard suggested by the Eighth Circuit in *Bell* to effectively bar removal. Plaintiff would also be judicially estopped from asserting a claim in state court for attempting to recover more than the amount contemplated in the stipulation. *See Thompson,* 2011 WL 2671312 at *3, *citing Dupwe v. Wallace,* 140 S.W.3d 464, 467 (Ark. 2004); *see also Tuberville,* 2011 WL 1527716 at *4.

The second argument Defendant makes regarding the stipulation has to do with attorneys' fees. Defendant contends that because Plaintiff's counsel did not sign the stipulation, this means that the attorneys' fees and costs in this case will not be limited by the stipulation and may exceed the statutory maximum of $5 million. Essentially, Defendant makes the argument that, despite Plaintiff's sworn stipulation to the contrary, Plaintiff's counsel intends to abuse CAFA's intent by exceeding the jurisdictional minimum after remand and seeking a large fee award. Defendant cites to examples of other class action lawsuits involving Plaintiff's counsel in which counsel received large attorneys' fee awards, ostensibly to show that large fee awards in other cases will translate to a large fee award in the case at bar. Despite Defendant's arguments, however, the Court finds that Plaintiff's sworn stipulation is sufficient to limit the total award, including the award for attorneys' fees. The stipulation is explicitly "inclusive of costs and

attorneys' fees," and the same limitation is present in the text of the Complaint.

The overarching argument Defendant submits is that the Court should completely disregard Plaintiff's self-imposed limitations in his Complaint and attached stipulation, and instead calculate the amount in controversy based on the possibility that Plaintiff could amend his Complaint in the future to increase the amount of recovery sought. Speculation as to Plaintiff's future actions cannot vest this Court with jurisdiction where it otherwise has none at the time of removal. If a court could base its jurisdiction solely upon the possibility of a future amendment by a plaintiff, any case filed in state court would be susceptible to removal no matter how the plaintiff stated his claims.

The Arkansas legislature has addressed this very issue in passing a statute this year that codifies *Bell* and explicitly allows a plaintiff to file a binding stipulation "with respect to the amount in controversy" in order to establish subject matter jurisdiction. *See* Ark. Code Ann. § 16-63-221(a). Defendant reads a portion of this statute to "[provide] an avenue for plaintiffs to attempt to evade their initial stipulations about the amount in controversy." Doc. 9, p. 24. The Court disagrees with Defendant's characterization of the statute and finds that it merely preserves a plaintiff's option to amend the Complaint in the future. *See* Ark. Code Ann. § 16-63-211(b) ("A Declaration . . . is binding on the Plaintiff with respect to the amount in controversy unless the Plaintiff

subsequently amends the complaint to pray for damages in an amount which exceeds the jurisdictional limits of the Court . . . ").

Defendant's concern about Plaintiff's future amendment of the Complaint is of no moment. If Plaintiff were to amend his Complaint after remand, disclaiming his sworn stipulation and seeking instead an amount in excess of the jurisdictional maximum, it follows that Defendant would have the right to remove again, should removal be justified. It is no longer the rule that CAFA cases must be removed within a year. Now they may be removed at any time, assuming they are removable. 28 U.S.C. § 1453(b); *see e.g. Bartnikowski v. NVR Inc.,* 307 Fed. Appx 730, 739 (4th Cir. 2009) ("a CAFA defendant who cannot meet his burden for removal at the early stages of litigation may still have recourse to the federal courts later, as Congress has eliminated the one-year time limit on CAFA removal actions"); *Lowdermilk v. U.S. Bank Nat'l Assoc.,* 479 F.3d 994, 1002-03 (9th Cir. 2007) ("CAFA mitigates some of the potential for abuse [by plaintiffs] by eliminating the one-year removal limitation"). In short, Defendant's fear regarding Plaintiff's plans for the future of this litigation cannot drive the Court's decision on remanding the case, considering Plaintiff's legal and binding stipulation limiting the dollar amount of aggregate recovery.

2. Due Process Concerns for the Class

Defendant believes Plaintiff has exhibited bad faith in seeking to limit the as-yet-unknown class members to damages over a two-year period, rather than the full five years of damages potentially recoverable under the statute of limitations. *See* Doc. 9, p. 13. As the master of his complaint, Plaintiff may choose what claims to bring and what claims to leave out. "[A] removing defendant can't make the plaintiff's claim for him; as master of the case, the plaintiff may limit his claims (either substantive or financial) to keep the amount in controversy below the threshold." *Brill v. Countrywide Home Loans, Inc.,* 427 F.3d 446, 449 (7th Cir. 2005). Defendant fails to cite any authority which states that a plaintiff may not seek to recover damages for a period of time shorter than the statute of limitations provides. Nor is the Court persuaded that Plaintiff's temporal limitation on recovery evidences his bad faith.

Defendant cites to the case of *Bass v. Carmax Auto Superstores, Inc.,* 2008 WL 441962 (W.D. Mo., Feb. 14, 2008), for the proposition that a class plaintiff has no right to limit recovery for a class without court approval. However, the *Bass* case was decided before *Bell,* and the holding in *Bass* contradicts both the plain language and the spirit of the Eighth Circuit's holding in *Bell.* Furthermore, putative class members may simply opt out of the class and pursue their own remedies if they feel that the limitations placed on the class by Plaintiff are too restrictive. *See Murphy,* 2011 WL 1559234 at *3 (" . . . the plaintiffs

in state court who choose not to opt out of the class must live with it," *quoting Morgan v. Gay,* 471 F.3d 469, 477-78 (3rd Cir. 2006), *cert. denied,* 128 S. Ct. 66 (2007)).

III. Conclusion

The Court finds that Plaintiff has shown to a legal certainty that the aggregate damages claimed on behalf of the putative class shall in good faith not exceed the state court's jurisdictional limitation of $5,000,000. Accordingly, Plaintiff's Motion to Remand (Doc. 6) is hereby **GRANTED**. This case shall be remanded forthwith to the Circuit Court of Miller County, Arkansas.

IT IS SO ORDERED this 2nd day of December, 2011.

/s/ P.K. Holmes, III
P.K. HOLMES, III
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 11-8030

Greg Knowles, Individually and as Class Representative on Behalf of all Similarly Situated Persons

Respondent

v.

The Standard Fire Insurance Company

Petitioner

Appeal from U.S. District Court for the Western District of Arkansas – Texarkana
(4:11-cv-04044-PKH)

ORDER

The petition for rehearing *en banc* is denied. The petition for panel rehearing is also denied.

March 01, 2012

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans **VOICE (314) 244-2400**
Clerk of Court **FAX (314) 244-2780**
www.ca8.uscourts.gov

January 24, 2012

Mr. Richard Eugene Norman
CROWLEY & NORMAN
Three Riverway
Suite 1775
Houston, TX 77056

RE: 11-8030 The Standard Fire Insurance Co v. Greg Knowles

Dear Counsel:

A petition for rehearing with petition for rehearing en banc has been filed by the petitioner in the above case. I have been instructed by the court to request that you respond to the petition.

Please electronically file your response, limited to ten pages, by February 3, 2012. If you have any questions concerning the court's request, please contact this office.

Michael E. Gans
Clerk of Court

LMT

cc: Mr. Wystan M. Ackerman
Mr. Michael B. Angelovich
Mr. Stephen Edward Goldman
Mr. John Clinton Goodson
Mr. Donald Mattson Keil
Ms. Lyn Peoples Pruitt
Mr. Brad E. Seidel

District Court/Agency Case
Number(s): 4:11-cv-04044-PKH

8th Circuit No. 11-8030

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

GREG KNOWLES,
Plaintiff-Respondent

v.

THE STANDARD FIRE INSURANCE COMPANY.
Defendant-Petitioner.

On Appeal from the United States District Court
For the Western District of Arkansas
Case No. 11-cv-04044
The Honorable P.K. Holmes III

**RESPONSE TO PETITION
FOR REHEARING EN BANC**

(Filed Feb. 3, 2012)

MICHAEL B. ANGELOVICH
BRAD E. SEIDEL
CHRISTOPHER R. JOHNSON
NIX PATTERSON
& ROACH, LLP
3600 Capitol of
Texas Highway
Building B, Suite 350
Austin, TX 78746
Tel.: (512) 328-5333
Fax: (512) 328-3232

MATT KEIL
JOHN C. GOODSON
KEIL & GOODSON, P.A.
406 Walnut Street
Texarkana, AR 71854
Tel.: (870) 772-4113
Fax: (870) 773-2967

RICHARD E. NORMAN
CROWLEY NORMAN LLP
3 Riverway, Ste. 1775
Houston, Texas 77056
Tel.: (713) 651-1771
Fax: (713) 651-1775

Attorneys for Plaintiff-Respondent Greg Knowles

TABLE OF CONTENTS

1. Plaintiff filed this action in state court, alleging state-law claims, proposing a class of Arkansas residents, and expressly seeking less than the federal jurisdiction minimums 1

2. The enactment of CAFA did not alter the proposition that the plaintiff is the master of the complaint 2

3. The question is whether *the particular class action proposed by Plaintiff* falls within federal jurisdiction 3

4. The decision to stipulate to damages of a certain size is not unlike innumerable other decisions class representatives inevitably make as masters of their complaints 4

5. The stipulation unequivocally provides that Plaintiff will not *at any time* seek damages or fees sufficient to satisfy CAFA jurisdiction 7

6. This Court's February 2, 2012 opinion in Rolwing, No. 11-3445, confirms the decision of the district court to remand the present case 8

7. The Fifth, Sixth and Seventh Circuits have NOT held that a plaintiff may not defeat CAFA jurisdiction by sworn stipulation 9

Conclusion and Prayer 10

TABLE OF AUTHORITIES

Federal Cases

Adams v. Williams, 2009 WL 1585972 (S.D. Miss. June 4, 2009) 7

Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997) 5

Ar*nold v. State Farm Fire and Cas. Co.*, 277 F.3d 772 (5th Cir. 2001) 8

Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co., 637 F.3d 827 (7th Cr. 2011) 9

Bell v. Hershey Co., 557 F.3d 953 (8th Cir. 2009) 2, 4, 7

Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 449 (7th Cir. 2005) 2, 4

Chakejian v. Equifax Information Services LLC, 256 F.R.D. 492 (E.D.Pa. 2009) 5

Ditcharo v. United Parcel Service, Inc., 376 Fed. Appx. 432 (5th Cir. 2010) 10

Four Way Plant Farm, Inc. v. National Council on Compensation Ins. (NCCI), 894 F. Supp. 1538 (M.D. Ala. 1995) 5, 7

Freeman v. Blue Ridge Paper Products, Inc., 551 F.3d 405 (6th Cir. 2008) 2, 9

Harris v. Sagamore Ins. Co., 2008 WL 4816471 (E.D. Ark. Nov. 3, 2008) 8

Holcombe v. Smithkline Beecham Corp., 272 F.Supp.2d 792 (E.D. Wis. 2003) 5, 7

In re Shell Oil Co., 970 F.2d 355 (7th Cir. 1992) 3

Iowa City RY. v. Bacon, 236 U.S. 305 (1915) 3

Kansas City, Mo. v. Federal Pac. Elec. Co., 310 F.2d 271 (8th Cir. 1962) 3

Lippett v. Raymond James Fin. Svcs., Inc., 340 F.3d 1033 (9th Cir. 2003) 8

Lowdermilk v. U.S. Bank Nat'l Ass'n, 479 F.3d 994 (9th Cir. 2007) 2

Manguno v. Prudential Prop. and Cas. Ins. Co., 276 F.3d 720 (5th Cir. 2002) 10

Morgan v. Gay, 471 F.3d 469 (3d Cir. 2006), cert. denied, 128 S. Ct. 66 (2007) 2, 4

Murphy v. Reebok Intern, Ltd., 2011 WL 1559234 (E.D. Ark., April 22, 2011)......................7, 8

Pfizer, Inc. v. Lott, 417 F.3d 725 (7th Cir. 2005) 10

Quebe v. Ford Motor Co., 908 F. Supp. 446 (W.D. Tex. 1995) 5

Rolwing v. Nestle Holding, Inc., No. 11-3445 (8th Cir. Feb. 2, 2012) 1, 3, 4, 8

Ruhrgas AG v. Marathon Oil Co, 526 U.S. 574 (1999)..8

Smith v. American Bankers Ins. Co. of Florida, 2011 WL 6090275, (W.D. Ark. Dec. 7, 2011)............7

Smith v. Bayer Corp., 131 S. Ct. 2368 (2011) 4, 6

Smith v. Nationwide Property and Cas. Ins. Co., 505 F.3d 401 (6th Cir. 2007) 9

St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283 (1938)..3

Thompson v. Apple, Inc., 2011 WL 2671312 (W.D.Ark. July 8, 2011) (J. P.K. Holmes III)...........8

Tinkham v. Jenny Craig, Inc., 699 N.E.2d 1255 (Mass. App. 1998)..8

Tuberville v. New Balance Athletic Shoe, Inc. et al, 2011 WL 1527716 (W.D. Ark. April 21, 2011) 7, 8

Welbern v. Hunt, 874 F.2d 532 (8th Cir. 1989).............8

Wineland v. Casey's General Stores, Inc., 267 F.R.D. 669 (S.D. Iowa 2009)....................................5

State Cases

Dupwe v. Wallace, 140 S.W.3d 464 (Ark. 2004) 7

MacSteel Div. of Quanex v. Arkansas Oklahoma Gas Corp., 210 S.W.3d 878 (Ark., 2005).............8

National Enterprises, Inc. v. Lake Hamilton Resort, Inc., 142 S.W.3d 608 (Ark. 2004)..................8

Parsons Dispatch, Inc. v. John J. Jerue Truck Broker, Inc., 199 S.W.3d 686 (Ark. App. 2004) 8

Federal Statutes

28 U.S.C. § 1332(d)..1, 4

State Statues [sic]

Ark. Code Ann. § 16-63-221...9

Ark. Code Ann. § 16-63-221(b) 7

This Court's decision denying Defendant's petition under 28 U.S.C. § 1453(c) for Leave to Appeal was correct. The district court's decision ordering remand was proper, and the reasoning underlying

that decision was recently confirmed by this Court in No. 11-3445, *Rolwing v. Nestle Holding, Inc.* (Feb. 2, 2012). Defendant's request for rehearing should be denied.

1. Plaintiff filed this action in state court, alleging state-law claims, proposing a class of Arkansas residents, and expressly seeking less than the federal jurisdiction minimums. Doc. 2.[1] Plaintiff alleges breach of contract due to underpayment of claims made pursuant to homeowner insurance policies. *Id*. Plaintiff also filed a sworn stipulation stating he will never seek more than $5 million for the proposed class. *Id*. at 16. Defendant removed claiming jurisdiction under 28 U.S.C. § 1332(d) ("CAFA"). Defendant presented evidence below that – assuming the class recovered all damages alleged plus a 12% statutory penalty combined with an unlikely attorney's fee of ***40%*** of the entire class recovery (a percentage far outside the norm awarded in class actions in Arkansas state court and federal courts in this circuit) – an award *might* (absent Plaintiff's stipulation) be $5,024,150 – or just $24,150 over CAFA's $5 million threshold. Doc. 13 at 5. Thus, the district court required Plaintiff "to prove to a legal certainty that his claim falls under the $5 million threshold." *Id.* at 6. The court then applied the rule that "if a stipulation is legally binding and made in good faith, it can satisfy the plaintiff's legal

[1] References to the record below are in the form "Doc. [docket entry number] [page number]."

certainty burden and defeat removal." *Id.*, citing *Bell v. Hershey Co.*, 557 F.3d 953, 956 (8th Cir. 2009). Finding "Plaintiff has shown to a legal certainty that the aggregate damages claimed on behalf of the putative class shall ***in good faith*** not exceed the state court's jurisdictional limitation of $5,000,000," the court granted the motion to remand. Doc. 13 at 10 (emphasis supplied).

2. "The enactment of CAFA did not alter the proposition that the plaintiff is the master of the complaint." *Bell*, 557 F.3d at 956, citing *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 449 (7th Cir. 2005) ("a removing defendant can't make the plaintiff's claim for him; as master of the case, the plaintiff may limit his claims (either substantive or financial) to keep the amount in controversy below the threshold."); *Morgan v. Gay*, 471 F.3d 469, 474 (3d Cir. 2006), cert. denied, 128 S. Ct. 66 (2007) (plaintiff may limit recovery to avoid CAFA jurisdiction); *Lowdermilk v. U.S. Bank Nat'l Ass'n*, 479 F.3d 994, 1000 at n. 5 (9th Cir. 2007) (noting, in post-CAFA class action, that a "plaintiff may, of course, stipulate to damages in order to avoid federal jurisdiction"); *Freeman v. Blue Ridge Paper Products, Inc.,* 551 F.3d 405, 409 (6th Cir. 2008) ("plaintiffs can avoid removal under CAFA by limiting the damages they seek"). Long before CAFA, the Supreme Court explained, "[i]f [the plaintiff] does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant

cannot remove." *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938).[2] Even as state law construing *ad damnum* clauses became less strict, federal courts consistently recognized that plaintiffs could nonetheless avoid removal by filing a binding stipulation. *See In re Shell Oil Co.*, 970 F.2d 355, 356 (7th Cir. 1992) ("[l]itigants who want to prevent removal must file a binding stipulation or affidavit with their complaints"). "[I]t is to be assumed that Congress was aware of established rules of law applicable to the subject matter of the statute and thus, upon enactment, the statute is to be read in conjunction with the entire existing body of law." *Kansas City, Mo. v. Federal Pac. Elec. Co.*, 310 F.2d 271, 275 (8th Cir. 1962). Nothing Congress included in CAFA suggests a class action plaintiff is no longer the master of his complaint or is somehow prevented from "suing for less than the jurisdictional amount." *St. Paul Mercury*, 303 U.S. at 294. Thus, "a binding stipulation limiting damages sought to an amount not exceeding $5 million can be used to defeat CAFA jurisdiction." *Rolwing v. Nestle Holding, Inc.*, No. 11-3445 (8th Cir. Feb. 2, 2012).

3. The question is whether *the particular class action proposed by Plaintiff* falls within federal jurisdiction. CAFA recognizes that "claims" of "class

[2] *See also Iowa City Ry. v. Bacon*, 236 U.S. 305, 308 (1915) (holding that plaintiff could defeat removal by requesting only $1,900 in damages (at a time when the jurisdictional threshold was $2,000) even though plaintiff's loss was $10,000).

members" in a "class action" do not exist in a vacuum. Rather, under CAFA, a "class action" is a "civil action . . . brought by 1 or more representative persons as a class action" who decides on the "definition of the proposed class" and chooses what "claims of the individual class members" to assert. 28 U.S.C. § 1332(d). It is true, of course, that merely filing a proposed class action will not "bind" proposed class members. *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011). However, it is equally true that the question on removal is whether the particular class action ***being proposed by the plaintiff*** falls within federal jurisdiction. "[B]ecause the plaintiff is the 'master of the case' and 'may limit his claims . . . to keep the amount in controversy below the threshold,' the removing party must 'show not only what the stakes of the litigation could be, but also what they are ***given the plaintiff's actual demands***.'" *Morgan*, 471 F.3d at 474 (emphasis supplied), quoting *Brill*, 427 F.3d at 449. Here, "to ensure that any attempt to remove [will be] unsuccessful," Plaintiff filed "a binding stipulation" with the state court complaint binding him to "not seek damages greater than the jurisdictional minimum upon remand." *Bell*, 557 F.3d at 958. Given Plaintiff's "actual demands," it is legally certain that less than $5 million is "in controversy." *See Rolwing*, No. 11-3445.

4. The decision to stipulate to damages of a certain size is not unlike innumerable other decisions class representatives inevitably make as masters of their complaints. Named plaintiffs

bringing putative class actions necessarily "limit" the recovery of their proposed class by choosing which defendants to sue, which causes of action and elements of damages to include, and what kinds of litigation tactics to pursue in discovery, pretrial motions, and beyond. For example, a plaintiff might limit his proposed class to state-law claims though valuable federal claims exist,[3] limit recovery to actual damages by waiving class claims for punitive damages,[4] or limit recovery to minimal statutory, liquidated damages though some proposed class members may have viable claims for more in actual damages.[5]

> Like other plaintiffs, class action plaintiffs should be able to make strategic decisions concerning how to plead a case. Judicial concern about a limitation on the value of claims may be addressed when the question of plaintiff's adequacy as a representative is considered.

Holcombe v. Smithkline Beecham Corp., 272 F. Supp.2d 792, 793 (E.D. Wis. 2003). In fact, plaintiffs can and often do go so far as to enter into a proposed settlement of the claims of proposed class

---

[3] *Four Way Plant Farm, Inc. v. National Council on Compensation Ins. (NCCI),* 894 F. Supp. 1538, 1544 (M.D. Ala. 1995).

[4] *Quebe v. Ford Motor Co.*, 908 F. Supp. 446, 453 (W.D. Tex. 1995).

[5] *Chakejian v. Equifax Information Services LLC*, 256 F.R.D. 492 (E.D. Pa. 2009).

members *prior to the class being certified*.[6] Few things could be construed more clearly as "limiting" the value of a proposed class member's claim than a proposed settlement of that very claim. In sum, plaintiffs proposing class actions can and often must make decisions affecting the ultimate value of the claims of merely "proposed" class members. Importantly, the due process rights of such proposed class members are always protected before any such decisions are considered "binding." In particular, the plaintiff must always demonstrate "adequate representation" of the class throughout the case. Defendant suggests that allowing the stipulation to defeat removal is contrary to due process rights of the proposed class members. Defendant forgets its favorite quote from *Smith*: "Neither a proposed class action nor a rejected class action may bind nonparties." 131 S.Ct. at 2380.

As discussed, plaintiffs proposing class actions often make such "value" – related decisions. Defendant's argument is just a premature challenge to whether Plaintiff is an adequate representative. It is also wrongly premised on the perverse idea that

[6] *See, gen. Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 618 (1997) ("the 'settlement only" class has become a stock device"). For illustration only, in *Wineland v. Casey's General Stores, Inc.*, 267 F.R.D. 669 (S.D. Iowa 2009), a proposed class action was filed, a proposed settlement of the claims of the proposed class members was agreed to by the named plaintiff, and then the court was asked to certify the class and approve the settlement.

Defendant is the protector of the class, when the argument is being advanced by lawyers zealously advocating the interests of Defendant, ***not the class***. Here, Defendant has conceded the state forum would be in the best interests of the class. (Pet. for Permission to Appeal at 4). In any event, concerns regarding the propriety of the stipulation should, can, and will be addressed at the class certification stage and again if a judgment is considered for approval by the court in Arkansas.[7]

5. The stipulation unequivocally provides that Plaintiff will not *at any time* seek damages or fees sufficient to satisfy CAFA jurisdiction. Doc. 2 at 16. In *Bell,* this Court used the word "seek" and did not mention "accept." *Bell,* 557 F. 3d at 958. The district court properly concluded that "[m]agic words or blood oaths are not required in order to make a sworn stipulation binding." Doc. 13 at 7. "Seeks" is clearly sufficient given Arkansas law because "[a] Declaration . . . is binding on the Plaintiff with respect to the amount in controversy unless the Plaintiff subsequently amends the complaint." Ark. Code Ann. § 16-63-221(b); *see* Doc. 13 at 8-9; *see also Smith v. American Bankers Ins. Co. of Florida*, 2011 WL 6090275, **6-7 (W.D. Ark. Dec. 7, 2011). As applied

---

[7] *See, e.g., Tuberville v. New Balance Athletic Shoe, Inc. et al*, 2011 WL 1527716, at **4-5 (W.D. Ark. April 21, 2011); *Murphy v. Reebok Intern., Ltd.,* 2011 WL 1559234, at *3 (E.D. Ark. April 22, 2011); *Holcombe,* 272 F. Supp. 2d at 793; *Four Way Plant Farm*, 894 F. Supp. at 1544.

here, the stipulation obviously prevents Plaintiff from ever amending to "seek" more. *See, e.g., Adams v. Williams*, 2009 WL 1585972, *3 (S.D. Miss. June 4, 2009) (construing similar stipulation as waiving any right to later amend complaint's ad damnum clause).

Unlike *Bell*, this case involves direct statements in a **sworn affidavit**. And, unlike Iowa law considered in *Bell*, Arkansas applies judicial estoppel to prevent a party from taking "a position clearly inconsistent . . . with a position taken **in the same case.**" *Dupwe v. Wallace*, 140 S.W.3d 464, 466 (Ark. 2004) (emphasis supplied).[8] Federal judges sitting in Arkansas agree that Arkansas will apply estoppel in these circumstances.[9] The court's finding that Plaintiff is estopped from recovering more in state court (Doc. 13 at 7) will clearly "travel back with the case."

---

[8] "A litigant is not permitted to assume wholly inconsistent positions on the same issue in the same case." *MacSteel Div. of Quanex v. Arkansas Oklahoma Gas Corp.*, 210 S.W.3d 878, 886 (Ark., 2005); *see also National Enterprises, Inc. v. Lake Hamilton Resort, Inc.*, 142 S.W.3d 608 (Ark. 2004); *Parsons Dispatch, Inc. v. John J. Jerue Truck Broker, Inc.*, 199 S.W.3d 686 (Ark. App. 2004).

[9] *See, e.g, Thompson v. Apple, Inc.,* 2011 WL 2671312, at *3 (W.D.Ark. July 8, 2011) (J. P.K. Holmes III); *Murphy,* 2011 WL 1559234 at *2 (J. Marshall); *Tuberville*, 2011 WL 1527716 at *4 ((J. Dawson); *Harris v. Sagamore Ins. Co.,* 2008 WL 4816471,*3 (E.D. Ark. Nov. 3, 2008) (J. Leon Holmes); *see, also, gen., Welbern v. Hunt*, 874 F.2d 532, 534 (8th Cir. 1989) ("For many reasons, district courts are inherently more reliable interpreters of the laws of the states in which they operate than the more removed courts of appeals.").

See gen., Ruhrgas AG v. Marathon Oil Co, 526 U.S. 574, 585-86 (1999).[10]

6. This Court's February 2, 2012 opinion in *Rolwing*, No. 11-3445, confirms the decision of the district court to remand the present case. In *Rolwing*, stipulations defeated removal even though the plaintiff had apparently conceded the class claims were potentially worth more than $13 million and the same attorney had already litigated the same claims for the same class to a final judgment. Here, the court expressly found that Plaintiff's stipulation is in good faith. Doc. 13 at 10. Even using an implausibly high 40% attorney's fee, the total claimed to be in controversy by Defendant in the present case is only $24,000 over $5 million. *Id*. at 5. There has been no "prior litigation" of the claims asserted herein by Plaintiff. Given the law in Arkansas on judicial

---

[10] *See also Lippett v. Raymond James Fin. Svcs., Inc.,* 340 F.3d 1033, 1046 (9th Cir. 2003) ("Lippitt's counsel stated that his client would not amend the complaint to add a federal claim upon remand . . . We remand in reliance that Lippitt will adhere to this promis [sic] . . . since judicial estoppel 'bars a party from taking inconsistent positions in the same litigation.'"); A*rnold v. State Farm Fire and Cas. Co*., 277 F.3d 772, 775 n.3 (5th Cir. 2001) ("We agree with the judge's view that the affidavits preclude Arnold and Vining from seeking damages in excess of that amount in state courts either as a judicial admission, judicial estoppel or a matter of preclusion"); *Tinkham v. Jenny Craig, Inc.,* 699 N.E.2d 1255, 1260 (Mass. App. 1998) (applying estoppel to prevent plaintiffs from seeking damages above $50,000 because, in order to obtain remand, plaintiff had made "commitment" in federal court not to seek more).

estoppel as well as Ark. Code Ann. § 16-63-221 which limits Plaintiff to his declared maximum in controversy, the stipulation is clearly binding.

7. The Fifth, Sixth and Seventh Circuits have NOT held that a plaintiff may not defeat CAFA jurisdiction by sworn stipulation. ***None*** of the cases that Defendant cites from those circuits even involve a sworn stipulation limiting the recovery of the proposed class. *Smith v. Nationwide Property and Cas. Ins. Co*., 505 F.3d 401 (6th Cir. 2007) considers only allegations in a complaint. If anything, the case supports the decision here below. *See id*. at 408 (punitive damages not in controversy because not alleged). Further, the Sixth Circuit has since stated "plaintiffs can avoid removal under CAFA by limiting the damages they seek." *Freeman*, 551 F.3d at 409. In *Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.,* 637 F.3d 827 (7th Cr. [sic] 2011), the court took pains to emphasize the plaintiff could have "prevent[ed] removal by filing a binding stipulation" but "did not file any kind of limiting document with its complaint." *Id*. at 830-31. In *Pfizer, Inc. v. Lott,* 417 F.3d 725 (7th Cir. 2005), the stipulation did not address damages sought on behalf of the class.

The unpublished *Ditcharo v. United Parcel Service, Inc.,* 376 Fed. Appx. 432 (5th Cir. 2010), is not precedent. In any event, the plaintiffs stipulated to limit their own damages but did not even attempt to limit the recovery of other class members. *Ditcharo* at *437. The *Ditcharo* stipulation is attached as *Ex. 1.* As the stipulations did not even mention damages

class members might seek, the stipulations obviously "did not provide [plaintiffs] with the authority to deny other members of their putative class action the right to seek an award greater than $75,000." *Id.* at *437. In *Manguno v. Prudential Prop. and Cas. Ins. Co*., 276 F.3d 720 (5th Cir. 2002), there was no sworn stipulation, but the court did note the plaintiff could have defeated removal "by filing a binding stipulation." *Id*. at 724.

CONCLUSION AND PRAYER

The district court's decision in the present case is not contrary to any decision by another circuit, this Court, or the Supreme Court. Instead, the decision followed the well-established rule that, as master of his case, Plaintiff could and did defeat removal by filing a stipulation that is legally binding and made in good faith to seek less than the federal jurisdictional minimum. The petition for rehearing should be denied.

Respectfully submitted,

MICHAEL B. ANGELOVICH
BRAD E. SEIDEL
CHRISTOPHER R. JOHNSON
NIX PATTERSON & ROACH, LLP
3600 Capitol of Texas Highway
Building B, Suite 350
Austin, TX 78746
Tel.: (512) 328-5333
Fax: (512) 328-3232

MATT KEIL
JOHN C. GOODSON
KEIL & GOODSON, P.A.
406 Walnut Street
Texarkana, AR 71854
Tel.: (870) 772-4113
Fax: (870) 773-2967

BY: /S/ Richard E. Norman
RICHARD E. NORMAN
CROWLEY NORMAN LLP
3 Riverway, Ste. 1775
Houston, Texas 77056
Tel.: (713) 651-1771
Fax: (713) 651-1775

Attorneys for Plaintiff-Respondent Greg Knowles

[Certificate Of Service Omitted]

[Exhibits Omitted In Printing]

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION**

GREG KNOWLES, Individually
and as Class Representative on Behalf
of all Similarly Situated Persons
Within the State of Arkansas PLAINTIFF

v. No. 11-4044

THE STANDARD FIRE
INSURANCE COMPANY DEFENDANT

NOTICE OF REMOVAL

(Filed May 18, 2011)

Defendant The Standard Fire Insurance Company ("Standard Fire"), pursuant to 28 U.S.C. §§ 1441 and 1446, hereby removes to this Court the action captioned, *Greg Knowles v. The Standard Fire Insurance Company,* Case No. CV-2011-0239-3 on the docket of the Circuit Court of Miller County, Arkansas.

In support of its Notice of Removal, Standard Fire respectfully alleges:

1. On April 13, 2011, Plaintiff Greg Knowles commenced the captioned action by filing a complaint in the Circuit Court of Miller County, Arkansas. A copy of all process, pleadings, and orders served upon Standard Fire in the state court action is attached as *Exhibit A* hereto.

2. The Summons and the Complaint were served by certified mail on the Corporation Service Company as agent for service of process for Standard Fire on April 18, 2011. This Notice of Removal is filed within 30 days of service of process and is therefore timely under 28 U.S.C. § 1446(b).

3. This Court has jurisdiction under the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d), because this lawsuit is a putative class action in which there is minimal diversity of citizenship and the amount in controversy exceeds $5 million, as explained more fully below.

PARTIES

4. Plaintiff Greg Knowles is an individual domiciled in Miller County, Arkansas. (Complaint, ¶ 5.)

5. Defendant Standard Fire is a corporation organized under the laws of Connecticut with its principal place of business in Connecticut. (*Id.*, ¶ 7.)

PLAINTIFF'S ALLEGATIONS[1]

6. Plaintiff filed this case as a putative class action under Arkansas Rule of Civil Procedure 23. (Complaint, ¶ 8.) Plaintiff alleges that Standard Fire insured his property and that he made a claim with Standard Fire for property damage occurring on or about March 10, 2010. (*Id.*, ¶¶ 15-17.) Plaintiff alleges that Standard Fire improperly failed to include fees for a general contractor's services, known as general contractor overhead and profit ("GCOP"), in payments made to Plaintiff. (*Id.*, ¶¶ 20-23.) Plaintiff further alleges that Standard Fire "actively concealed information about entitlement to GCOP." (*Id.*, ¶ 33.) Plaintiff claims that "[t]hese underpayments . . . have generated extensive profits for Defendant [and] Defendant's failure to compensate their [sic] insureds for benefits to which they are entitled constitutes breach of contract." (*Id.*, ¶ 1.)

7. Plaintiff purports to bring this lawsuit on behalf of a putative class proposed to be defined as "[a]ny and all customers of The Standard Fire Insurance Company who are residents of Arkansas, who received payments under a homeowners insurance policy issued by The Standard Fire Insurance Company for physical loss or damage to their dwelling,

[1] Standard Fire does not admit the underlying facts as alleged by Plaintiff or as summarized herein. Standard Fire expressly denies any liability to Plaintiff or the putative class. Similarly, Standard Fire reserves its rights to challenge the legal sufficiency of the allegations in the Complaint.

such dwelling located in Arkansas, at any time between January 1, 2009 and December 31, 2010."[2] (*Id.*, ¶ 25.)

8. The Complaint pleads a single cause of action for breach of contract. (*Id.*, ¶¶ 39-45.) The sole alleged breach of contract is that "Defendant materially breached the terms of their [sic] standardized policy

[2] The proposed class definition further provides that "Excluded from the Class are: (1) Defendant and all directors, officers, employees, partners, principals, shareholders and agents of Defendant; (2) Persons or entities who timely opt-out of this proceeding using the correct protocol for 'opting-out' that will be formally established by this Court; (3) any and all Federal, State and/or Local Governments, including, but not limited to, their Departments, Agencies, Divisions, Bureaus, Boards, Sections, Groups, Councils and/or any other subdivision, and any claim that such governmental entities may have directly or indirectly; (4) Any currently-sitting Arkansas State Court Judge or Justice, and the current spouse and all other persons within the third-degree of consanguinity to such judge/justice; (5) Any claim which resulted in the payment of policy limits or more by Defendant; and (6) Plaintiff s Counsel." (Complaint, ¶ 25.) In analyzing the claims of putative class members for purposes of this Notice of Removal, Standard Fire has used reasonable measures to attempt to identify any claims attributable to any persons or entities excluded by Plaintiff from the proposed class, including attempting to identify and remove from the analysis any claims of persons described in categories (1), (4), (5) and (6) above (except for non-spouses falling within the third degree of consanguinity to currently sitting Arkansas state court judges or justices, whose identity is not known to Standard Fire). With respect to category (3), insofar as Standard Fire is aware none of these claims are attributable to governmental entities.

contracts with Plaintiff and the Class by failing to include payments for GCOP." (*Id.*, ¶ 44.)

9. The Complaint also contains a series of allegations of "Fraudulent Concealment." (*See id.*, ¶¶ 33-37.) These allegations assert that Standard Fire failed to disclose to Plaintiff and the putative class information regarding entitlement to GCOP and that "Defendant's fraudulent concealment tolls the running of any applicable statute of limitations." (*Id.*, ¶ 37.) The Complaint further alleges that "Plaintiff is not asserting a cause of action or seeking damages for fraud, but is pleading fraudulent concealment for the sole purpose of tolling the statute of limitations." (*Id.*)

10. The Complaint seeks, on behalf of Plaintiff and the putative class, damages for breach of contract, attorneys' fees, interest and costs. (*Id.* at 10.)

JURISDICTION UNDER CAFA

11. Congress intended CAFA "to open the federal courts to corporate defendants out of concern that the national economy risked damage from a proliferation of meritless class action suits." *Bell v. Hershey Co.,* 557 F.3d 953, 957 (8th Cir. 2009). Removal is proper under CAFA, 28 U.S.C. § 1332(d)(2), where, as here, a putative class action involves minimal diversity of citizenship and an aggregate amount in controversy exceeding $5 million.

12. CAFA applies "to any class action before or after the entry of a class certification order by the

court with respect to that action." 28 U.S.C. § 1332(d)(8). This case is a putative "class action" under CAFA because it was brought under a state statute or rule, namely Ark. R. Civ. P. 23, authorizing an action to be brought by one or more representative persons as a class action. *See* 28 U.S.C. § 1332(d)(1)(B); Complaint, ¶¶ 8, 31.

Minimal Diversity

13. This case satisfies the minimal diversity requirement of CAFA because at least one member of the putative class is a citizen of a state different from at least one defendant. *See* 28 U.S.C. § 1332(d)(2)(A). The named Plaintiff is a citizen of Arkansas. (Complaint, ¶ 6.) Standard Fire is not a citizen of Arkansas. (*Id.*, ¶ 7.)

Amount in Controversy

14. As the Eighth Circuit has explained, "a party seeking to remove under CAFA must establish the amount in controversy by a preponderance of the evidence regardless of whether the complaint alleges an amount below the jurisdictional minimum." *Bell,* 557 F.3d at 958. In analyzing the amount in controversy, the question is "not whether the damages *are* greater than the requisite amount, but whether a fact finder *might* legally conclude that they are. . . ." *Id.* at 959 (internal quotations and citation omitted; emphasis in original). If the defendant "prove[s] by a preponderance of the evidence that the amount in

controversy is satisfied, remand is only appropriate if [the plaintiff] can establish that it is legally impossible to recover in excess of the jurisdictional minimum." *Id.* at 959. Any allegation by the plaintiff claiming a specific amount is immaterial where there is "no evidence that upon remand [the state] court would prohibit recovery in excess of the amount alleged as a matter of law." *Id.*

15. This case satisfies CAFA's amount in controversy requirement because the matter in controversy exceeds the sum of $5 million, exclusive of interest and costs. 28 U.S.C. § 1332(d)(2). CAFA provides that "the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs." *Id.,* § 1332(d)(6). In determining the amount in controversy, this Court properly considers all applicable damages, including statutory penalties and attorneys' fees. *See, e.g., Powell v. State Farm Fire & Cas. Co.,* 2010 U.S. Dist. LEXIS 6796, at *2-3 (W.D. Ark. Jan. 27, 2010) (Barnes, J.) (holding that, in case involving insurance claim for property damage, amount in controversy included potential statutory penalty under Ark. Code Ann. § 23-79-208 of 12% of amount sought under insurance policy, plus attorneys' fees).

16. Plaintiff alleges that Standard Fire breached the insurance contracts "by failing to include payments for GCOP." (Complaint, ¶ 44.) Plaintiff alleges that "[t]he percentage assessed for overhead and profit within the construction and

insurance industries is 20% of the estimated job." (*Id.*, ¶ 3.) As an example, Plaintiff explains that "where the repair costs on a job equal $10,000, the GCOP payment will be an additional $2,000." (*Id.*) A reasonable estimate of the "repair costs" attributable to the homeowners' insurance claims of Plaintiff and the putative class members can be made by ascertaining the total amount of loss that was determined to be covered under their policies with respect to structural losses. This amount consists of the sum of the benefits paid on such claims and the deductibles associated with those claims. For example, if the repair costs on a particular claim were determined to be $10,000, and the amount paid was $9,000 after applying a deductible of $1,000, then if GCOP were payable on the claim this would add another $2,000 in benefits (i.e., 20% of the $10,000). Thus, a portion of the amount in controversy can be reasonably estimated to constitute 20% of the aggregate total of prior payments and deductibles.

17. A review of data maintained regarding payments and deductibles on those claims falling within the definition of the proposed class reflects that the aggregate total of payments for structural losses and deductibles is $15,274,806. Twenty percent of that amount is $3,054,961.

18. If Plaintiff and the putative class succeed in establishing breaches of contract, they could potentially be entitled to an additional 12% penalty, plus attorneys' fees. Arkansas law provides, as a general rule, that "[i]n all cases in which loss occurs and the

. . . property . . . insurance company . . . shall fail to pay the losses within the time specified in the policy after demand is made, the [company] shall be liable to pay the holder of the policy or his or her assigns, in addition to the amount of the loss, twelve percent (12%) damages upon the amount of the loss, together with all reasonable attorney's fees for the prosecution and collection of the loss." Ark. Code Ann. § 23-79-208(a)(1).[3] This Court considers such damages and attorneys' fees as part of the amount in controversy for purposes of federal jurisdiction. *See Powell,* 2010 U.S. Dist. LEXIS 6796, at *2-3.

19. Here, an additional 12% statutory penalty added to the estimated amount in controversy set forth in Paragraph 17 constitutes an additional $366,595, for a potential total compensatory damages award of $3,421,556.

20. With respect to attorneys' fees, in cases brought against insurance companies seeking to recover under insurance policies, attorneys' fees are potentially available under Ark. Code Ann. § 23-79-208(a)(1). Arkansas courts have held that attorneys' fees of "forty percent of the amount recovered by

---

[3] There are certain exceptions to this general rule where the amount recovered is more than 20% below the amount demanded (assuming there is a specific amount in demand). *See* Ark. Code Ann. § 23-79-208(d). For purposes of analyzing the amount in controversy, however, it must be presumed that Plaintiff and the putative class can prove the facts alleged and recover on the claims alleged.

[plaintiff] under the policies, plus penalty and prejudgment interest," are reasonable under that statute. *Capital Life & Accident Ins. Co. v. Phelps,* 76 Ark. App. 428, 434-35, 66 S.W.3d 678, 682-83 (2002). Here, attorneys' fees calculated, as in *Phelps*, as 40% of breach of contract damages plus the penalty and prejudgment interest,[4] would be an additional amount in excess of $1,602,594, for a total amount in controversy exceeding $5,024,150. This calculation is more conservative than the actual attorneys' fees awarded in *Phelps,* which were 58% of the damages for breach of contract (attorneys' fees of $30,589.86 on a breach of contract award of $52,610.07). *See Phelps*, 76 Ark. App. at 434-35, 66 S.W.3d at 682-83. Here, an attorneys' fees award measured as 58% of the potential damages for breach of contract would be $1,771,877, for a total amount in controversy of $5,193,433.

---

[4] In this calculation of attorneys' fees, prejudgment interest is calculated at the maximum rate of 5% above the federal discount rate (*see* Ark. Const. art. 19, § 13), and assumes that this case could reach a final judgment within two years of the date of filing. This calculation of the approximate amount of interest was done with interest beginning to accrue on the additional amounts allegedly owed on claim payments during a given year only after the end of that year. Interest would actually begin to accrue within 60 days after Standard Fire owed a payment. An interest calculation running from these actual dates would be higher, and the amount of attorneys fees set forth in this Notice (i.e., $1,602,594) would therefore actually be higher if interest were calculated with more precision.

21. Because this case is a putative class action, the attorneys' fees awarded by the Miller County Circuit Court potentially could exceed the amounts set forth in Paragraph 20. In other class actions involving the exact same issue regarding alleged failure to pay GCOP and involving the very same lawyers who represent Plaintiff here, tens of millions of dollars have been awarded in attorneys' fees by the Miller County Circuit Court. These fees were awarded where the case settled *prior* to trial, and *prior* to class certification. *See, e.g., Beazley v. Hartford Insurance Company of the Midwest,* Case No. CV-2005-58-1 (Ark. Cir. Ct., Miller County); *Alexander v. Nationwide Mutual Insurance Company,* Case No. CV-2009-120-3 (Ark. Cir. Ct., Miller County); *Chivers v. State Farm Fire & Casualty Company,* Case No. CV-2010-251-3 (Ark. Cir. Ct., Miller County); *Feely v. Allstate County Mutual Insurance Company,* Case No. CV-2004-294-3A (Ark. Cir. Ct., Miller County); *see also Johnson v. State Auto Mutual Insurance Company,* CV-2010-114-3 (Ark. Cir. Ct., Miller County).

22. Moreover, based on the allegations of fraudulent concealment (Complaint, ¶¶ 33-37), this Court should conclude that Plaintiff intends to pursue certification of a class of policyholders for a class period longer than the January 1, 2009 to December 31, 2010 period alleged in Paragraph 25 of the Complaint. Plaintiff alleges that he "is pleading fraudulent concealment for the sole purpose of tolling the statute of limitations." (Complaint, ¶ 37.) The statute of limitations for breach of contract in Arkansas is

five years.[5] *See* Ark. Code Ann. § 16-56-111; *Shelter Mut. Ins. Co. v. Nash,* 357 Ark. 581, 184 S.W.3d 425 (2004). Thus, when the Complaint is fairly read as a whole, Plaintiff must be seeking to certify a class for a time period *longer* than the five-year statute of limitations for breach of contract. Otherwise, the allegations of fraudulent concealment in Paragraphs 33 through 37 of the Complaint would serve no purpose.

23. Using the most conservative assumption that, when the fraudulent concealment allegations are given effect, the class period encompasses, at a minimum, five years and one day measured retrospectively from the filing of the Complaint on April 13, 2011 (i.e., April 12, 2006, through April 13, 2011), the amount in controversy for breach of contract, using the same method of analysis set forth above, is $7,109,753. When an additional penalty of 12% and attorneys' fees of 40% are added to that amount, the total amount in controversy exceeds $11 million.

Fraudulent Framing of Class Definition

24. Alternatively, the Court should bar Plaintiff from fraudulent framing his class definition so that it encompasses an arbitrary period shorter than the applicable statute of limitations. Federal courts have

---

[5] Many of Standard Fire's homeowners' insurance policies issued in Arkansas contain a provision requiring that suit be brought within five years from the date of loss.

long recognized the doctrine of fraudulent joinder, under which a plaintiff cannot prevent removal "by fraudulently joining a defendant who has 'no real connection with the controversy.'" *Knudson v. Sys. Painters, Inc.,* 634 F.3d 968, 976 (8th Cir. 2011). "The purpose of this exception is to strike a balance between the plaintiff's right to select a particular forum and the defendant's right to remove the case to federal court." *Id.* Similarly, under CAFA, this Court should not permit the newly emerging tactic used by plaintiffs' attorneys of selecting an arbitrary class period that is shorter than the applicable statute of limitations for the sole purpose of attempting to avoid federal jurisdiction. This tactic constitutes a fraudulent manipulation of the provisions of CAFA and contravenes the purpose and intent of CAFA. "CAFA was clearly designed to prevent plaintiffs from artificially structuring their suits to avoid federal jurisdiction." *Freeman v. Blue Ridge Paper Prods., Inc.,* 551 F.3d 405, 407 (6th Cir. 2008). Indeed, if courts allow this tactic, a plaintiffs' attorney can make any class action non-removable simply by pleading a class period that is short enough that the amount in controversy for that arbitrarily shortened class period falls below $5 million. Plaintiffs' attorneys then could bring multiple class actions with class periods encompassing short periods of time, but as long as they file the cases separately and the cases are not pending simultaneously (which would allow removal under *Freeman*), a defendant could not remove any of the cases to federal court. Such a rule of law would completely defeat Congress's intent in enacting

CAFA. Accordingly, this Court should bar the fraudulent framing of a class definition and prevent Plaintiff from arbitrarily limiting the time period for his proposed class action to a period shorter than the applicable statute of limitations.[6]

25. Here, based on Plaintiff's fraudulent framing of their class definition to an arbitrary two-year period, where the applicable statute of limitations is five years, this Court should calculate the amount in controversy based on a five-year period. Using a five-year period, the amount in controversy far exceeds $5 million, based on the analysis set forth in Paragraph 23 above.

26. Moreover, the Court should not allow an arbitrary cutoff of the class period at December 31, 2010, where, if the class period ended when this suit was filed, that would add an additional amount in excess of $163,683 to the amount in controversy with respect to Plaintiffs' two-year period.

Invalidity of Plaintiff's Purported Stipulation

27. Plaintiff purports to stipulate that he will not "seek damages for myself or any other individual

[6] If Plaintiff had alleged in good faith a valid basis for his January 1, 2009 to December 31, 2010 class period, such as if he alleged that Standard Fire commenced the allegedly improper practice on January 1, 2009, and ended it on December 31, 2010, that might not be fraudulent framing of a class definition. But Plaintiff makes no such allegation.

class member in excess of $75,000 (inclusive of costs and attorneys' fees) or seek damages for the class *as alleged in the complaint to which this stipulation is attached* in excess of $5,000,000 in the aggregate (inclusive of costs and attorneys' fees)." (Complaint, "Sworn and Binding Stipulation," attached as Ex. A thereto (emphasis added); *see also* Complaint, ¶ 11 and "Prayer for Relief.") However, Plaintiff's putative stipulation does not limit Plaintiff's or the putative class's recovery for several reasons. First, Plaintiff's stipulation does not bind either the *class* or *class counsel.* Only Plaintiff himself signed the stipulation, and his replacement as putative class representative would free the class and class counsel to pursue *any* amount of damages. (Complaint Ex. A.) Moreover, under the express terms of the stipulation itself, it applies only "for the class as alleged in the complaint to which this stipulation is attached" and would not apply to an amended complaint that modifies the proposed class definition (and also might not apply if the state court on its own certified a class defined differently from the proposed class). Second, putative class counsel (who has not even yet been appointed as such) did *not* sign the stipulation, and thus the stipulation is not necessarily binding with respect to whether class counsel could obtain attorneys' fees that would bring the amount in controversy above $5 million. Third, Plaintiff *cannot* waive the rights of the putative class members to seek full recovery simply because he would prefer to litigate in state court. *See Back Doctors Ltd. v. Metropolitan Prop. & Cas. Ins. Co.,* No. 11-8003, ___ F.3d ___, 2011 WL 1206184, at

*3 (7th Cir. Apr. 1, 2011) ("[Plaintiff] has a fiduciary duty to its fellow class members. A representative can't throw away what could be a major component of the class's recovery. . . . What [Plaintiff] is willing to accept thus does not bind the class and therefore does not ensure that the stakes fall under $5 million."); *Bass v. Carmax Auto Superstores, Inc.,* No. 07-0883, 2008 U.S. Dist. LEXIS 11180, at *6 (W.D. Mo. Feb. 14, 2008) (explaining, in analyzing amount in controversy under CAFA, that "Plaintiff has no right to limit or compromise the recovery of the class without Court approval, particularly before she has even been approved as a representative for the class"); *see also Manguno v. Prudential Prop. & Cas. Ins. Co.,* 276 F.3d 720, 724 (5th Cir. 2002) ("it is improbable that [the named plaintiff] can ethically unilaterally waive the rights of the putative class members to attorney's fees without their authorization").

28. Further, and contrary to Plaintiff's assertion in Paragraph 11 of the Complaint, Plaintiff's stipulation is *not* necessarily binding even upon Plaintiff himself. Under a new Arkansas statute enacted shortly before Plaintiff filed this lawsuit, Plaintiff may simply file an amended complaint to negate the effect of the stipulation. Ark. Code. Ann § 16-63-221(b) provides that "[a] declaration . . . is binding on the plaintiff with respect to the amount in controversy *unless the plaintiff subsequently amends the complaint* to pray for damages in an amount that exceeds the jurisdictional limits of the court, at which time the amendment is governed by the Arkansas

Rules of Civil Procedure." Ark. Code § 16-63-221(b) (cited in the Complaint at ¶ 11) (emphasis added). It appears that Plaintiff intends to take advantage of this new loophole in Arkansas law, given the text of his stipulation, which provides that it applies only to "the class as alleged in the complaint to which this stipulation is attached. . . ." (Complaint, Exhibit A.)[7]

---

[7] If Plaintiff seeks remand, he likely will rely upon *dicta* in *Bell v. Hershey Co.,* 557 F.3d 953 (8th Cir. 2009), and recent unpublished decisions in *Tuberville v. New Balance Athletic Shoe, Inc.,* No. 1:11-cv-01016, slip op. (W.D. Ark. Apr. 21, 2011) (Dawson, J.) and *Murphy v. Reebok Int'l, Ltd.,* Case No. 4:11-cv-214-DPM, slip op. (E.D. Ark. Apr. 22, 2011) (Marshall, J.). None of these decisions are on point here. In *Bell,* the court commented, in *dicta,* that a binding stipulation might bar removal, citing pre-CAFA jurisprudence on stipulations that the amount in controversy is below $75,000. *See Bell,* 557 F.3d at 958. But *Bell* did not address fraudulent framing of a class definition or what a binding stipulation must contain in order for it to be effective in barring removal. *Tuberville* and *Murphy* are likewise inapposite for several reasons. First, the stipulations in those cases were substantially broader than in the case at bar because: (1) putative class *counsel* signed a binding stipulation that they would not seek or accept an award of attorneys' fees that would allow the total amount in controversy (including attorneys' fees) to go above $5 million; (2) unlike here, the stipulations were *not,* by their own terms, inapplicable to an amended complaint; and (3) neither case involved fraudulent framing of a class definition. *See Tuberville,* slip op. at 3; *Murphy,* slip op. at Appendix A. Second, both opinions were based on a premise that Arkansas state law would *bar* the plaintiff from later seeking more than $5 million. *See Tuberville,* slip op. at 9; *Murphy,* slip op. at 4-5. That is no longer the law of Arkansas – as amended effective March 18, 2011, Ark. Code § 16-63-221(b) now expressly provides that a stipulation regarding the amount in controversy is not binding if a complaint is amended. Third, in both *Tuberville*

(Continued on following page)

29. In addition, when Plaintiff served the Complaint, he also served a First Request For Admissions and a First Set of Interrogatories over 100 pages in length.[8] These requests seek a vast amount of information regarding Standard Fire's policies and practices with respect to GCOP and with respect to homeowners' insurance claims in general. The vast majority of that material would not be necessary or even useful for purposes of proving a simple breach of contract. This discovery is clearly intended and directed towards establishing claims that go beyond a simple breach of contract.

Exceptions to CAFA Jurisdiction

30. None of the exceptions to CAFA jurisdiction applies. Standard Fire is not a citizen of the state in which the action was filed, i.e., Arkansas. Accordingly, Sections 1332(d)(3) and (d)(4) do not apply. Section 1332(d)(5)(A) does not apply because Standard Fire, the only defendant, is not a State, State official or other governmental entity against which this Court may be foreclosed from ordering relief. Section

and *Murphy* the courts did not even need to reach the enforceability of the stipulation because the courts concluded that the defendants failed to demonstrate adequately that the actual amount in controversy exceeded $5 million. *See Tuberville,* slip op. at 11, *Murphy,* slip op. at 6.

[8] The discovery requests are not attached hereto because of their extraordinary length. If Plaintiff files a motion to remand, Standard Fire will submit a copy of the discovery requests with its response.

1332(d)(5)(B) does not apply because the number of members of all proposed plaintiff classes in the aggregate is not less than 100. Section 1332(d)(9) does not apply because Plaintiff's claims do not involve securities or the internal affairs or governance of a corporation or other form of business enterprise.

31. Accordingly, this Court has original jurisdiction under CAFA.

REMOVAL PROCEDURE

32. A copy of this notice of removal is being served upon all known counsel of record, along with a copy of the Notice to the Clerk of Court for the Circuit Court of Miller County, Arkansas, which is being filed simultaneously in that court.

33. Copies of all process, pleadings, and orders served upon Standard Fire in the state court action are attached as *Exhibit A* hereto.

WHEREFORE, Standard Fire hereby provides notice that this action is duly removed to this Court.

MITCHELL, WLLIAMS [sic], SELIG,
GATES & WOODYARD, P.L.L.C.
425 West Capitol Avenue,
Suite 1800
Little Rock, Arkansas 72201
Phone: (501) 688-8869
Facsimile: (501) 918-7869
lpruitt@mwlaw.com

By: /s/ Lyn P. Pruitt
Lyn P. Pruitt, Ark. Bar No. 84121

Attorneys for Defendant
The Standard Fire
Insurance Company

[Certificate Of Service Omitted In Printing]

EXHIBIT A

[Notice Of Service Of Process
Omitted In Printing]

[Summons Omitted In Printing]

IN THE CIRCUIT COURT OF
MILLER COUNTY, ARKANSAS

GREG KNOWLES, Individually and as Class Representative on Behalf of all Similarly Situated Persons Within the State of Arkansas,	§	
PLAINTIFF	§	CV-2011-0239-3 CLASS ACTION
vs.	§	
THE STANDARD FIRE INSURANCE COMPANY,	§	
DEFENDANT	§	

PLAINTIFF'S CLASS ACTION COMPLAINT

(Filed Apr. 13, 2011)

COMES NOW Plaintiff, Greg Knowles, individually and as class representative on behalf of all similarly situated persons within the State of Arkansas, and submits the following Complaint against Defendant, The Standard Fire Insurance Company.

INTRODUCTION AND NATURE OF CASE

1. For years, Defendant has improperly profited at the expense of its customers by wrongfully underpaying claims for loss or damage to real property under homeowners insurance policies. These underpayments, in the form of failing to pay general contractors' overhead and profit ("GCOP"), have generated extensive profits for Defendant. Although an insurance company has the right to make a profit, it cannot do so to the detriment of its customers. Defendant's failure to compensate their insureds for benefits to which they are entitled constitutes breach of contract.

2. GCOP is simply the fee paid for the services of a general contractor. GCOP is owed by Defendant when certain circumstances arise under a homeowner's loss. Specifically, when it is reasonably likely an insured will incur the costs associated with retaining the services of a general contractor to repair or replace damaged property, GCOP is a necessary element of compensation owed to the customers. It is a paid-for benefit to the customer.

3. General contractors customarily add a percentage to the total estimate for a job to cover their

fee (overhead and profit). The percentage assessed for overhead and profit within the construction and insurance industries is 20% of the estimated job. This payment enables the customer to obtain the services of a general contractor to assist with the various matters involved in a property loss. When owed, payment for GCOP should be 20% of the amount paid by Defendant to complete repairs to the damaged property. Thus, where the repair costs on a job equal $10,000, the GCOP payment will be an additional $2,000.

4. Defendant provides its customers nothing explaining entitlement to GCOP. Thus, the customer is never made aware of his/her possible entitlement to such benefits. Without an allowance for GCOP, the customer must either: a) pay the general contractor out of his/her own pocket; b) go without the services of a general contractor; or c) do the general contracting work himself/herself for free. As long as the Defendant can avoid making this additional 20% payment, it has no concern over which of these options is chosen by their customers. This case presents the Court with an opportunity to ensure that not only Plaintiff, but all similarly situated insurance customers within the State of Arkansas, are fully compensated for their property losses.

5. As a result of Defendant's actions, Plaintiff and the Class were damaged because they received payments from Defendant that were less than they were entitled to for their homeowners' losses.

PARTIES

6. Greg Knowles ("Plaintiff") is a citizen of the State of Arkansas and a resident of Miller County, Arkansas, and was a resident of Miller County at all times relevant to this Complaint. The property insured by Defendant and at issue in this matter is located in Miller County, Arkansas.

7. Defendant, The Standard Fire Insurance Company, is a foreign insurance company, incorporated under the laws of the State of Connecticut with its principal place of business in Connecticut, subject to personal jurisdiction in Arkansas.

JURISDICTION AND VENUE

8. This is a class action lawsuit seeking money damages pursuant to Arkansas Rule of Civil Procedure 23. Plaintiff files this lawsuit for the purpose of certifying a class of Arkansas-only residents pursuant to A.R.C.P. 23.

9. Defendant is subject to personal jurisdiction in the state of Arkansas pursuant to Arkansas Code Annotated Section 16-4-101 because of (a) its systematic and continuous contacts with the state of Arkansas; (b) the systematic and continuous contacts of its agents and/or representatives with the state of Arkansas; (c) the systematic and continuous contacts of its parent, subsidiary and affiliate entities with the state of Arkansas; and/or (d) their systematic underpayment of GCOP, which affects Arkansas consumers.

Defendant is amenable to service under the Arkansas long-arm statute and the exercise of jurisdiction over it does not offend traditional notions of fair play and substantial justice.

10. Defendant has purposefully availed itself of the privilege of conducting activities within Arkansas, thus invoking the benefits and protections of its laws. Defendant nor its agents or subsidiaries have or had customers residing in Arkansas; have or had claims arising from within Arkansas or involving Arkansas residents; have or had agents in Arkansas; have advertised in Arkansas; have been subject to or defended lawsuits in Arkansas; and/or affiliated itself with persons operating and/or conducting business in Arkansas. Further, it was reasonably likely that Defendant could be hailed [sic] into court in Arkansas based on its systematic underpayment of GCOP which Defendant knew would directly affect Arkansas residents. These actions by the Defendant constitute sufficient minimum contacts with Arkansas to warrant this Court's exercise of jurisdiction over it.

11. This Court has subject matter jurisdiction over this matter because the amount in controversy exceeds the minimum jurisdictional limits of the Court. Defendant is not an Arkansas citizen for purposes of a federal court diversity analysis. However, neither Plaintiff's nor any individual Class Member's claim is equal to or greater than seventy-five thousand dollars ($75,000), inclusive of costs and attorneys fees. Plaintiff expressly stipulates to seek less than $75,000 total recovery, inclusive of costs and

attorneys fees, individually or on behalf of any Class Member. (See Sworn and Binding Declaration attached hereto as Exhibit "A"). Moreover, the total aggregate damages of the Plaintiff and all Class Members, inclusive of costs and attorneys' fees, are less than five million dollars ($5,000,000), and the Plaintiff and Class stipulate they will seek to recover total aggregate damages of less than five million dollars ($5,000,000). (See Sworn and Binding Declaration, attached hereto as Exhibit "A"). Pursuant to Section 16-63-221 of the Arkansas Code, this declaration is binding on Plaintiff for purposes of establishing the amount in controversy. As such, there is neither diversity nor Class Action Fairness Act ("CAFA") jurisdiction for this claim in federal court. Pursuant to Arkansas Rule of Civil Procedure 8(a), this pleading demands unliquidated damages. Accordingly, it is intended, and shall by rule be interpreted, to limit recovery to an amount less than that required for diversity jurisdiction in federal court. Plaintiff makes no claim for declaratory on [sic] injunctive relief. Although asserting no cause of action that would support a punitive damage award, Plaintiff specifically disclaims any actual or potential entitlement to punitive damages and stipulates that he will not seek punitive damages in this action.

12. Defendant is properly joined pursuant to Arkansas Rules of Civil Procedure 23 and 20(a). Rule 23(a) provides that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all . . . " Plaintiff is a member of the

proposed class, as defined herein, because he was a customer of The Standard Fire Insurance Company, who received payments, directly or indirectly, from The Standard Fire Insurance Company for physical loss or damage to his dwelling under his homeowners insurance policy, such dwelling located in the State of Arkansas, at any time between January 1, 2009 through December 31, 2010. Therefore, Plaintiff is an appropriate representative and brings this lawsuit on behalf of all class members under Rule 23.

13. Further, Defendant is properly joined pursuant to Rule 20(a), *Permissive Joinder,* which provides:

> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more

defendants according to their respective liabilities.

Defendant is properly joined pursuant to Arkansas Rule of Civil Procedure 20(a) because this lawsuit arises from a series of transactions and occurrences related to underpayment of GCOP in connection with Plaintiff's claim for physical loss or damage to his dwelling and multiple common questions of law or fact exist, as detailed herein. Plaintiff and all Class Members seek the same relief against Defendant related to Defendant's underpayment of GCOP.

14. Plaintiff incorporates by reference any and all facts alleged in this Complaint for purposes of establishing venue in Miller County, Arkansas. Venue for this proposed Rule 23 class action is proper in Miller County, Arkansas. First, venue is proper in Miller County, Arkansas, pursuant to Arkansas Code Annotated Section 16-55-213. This is a class action. Pursuant to section 16-55-213, venue is proper in a class action in the county of residence of any properly joined named class representative. Plaintiff is undisputedly a citizen of the State of Arkansas and resident of Miller County, Arkansas. Plaintiff was a resident of Miller County, Arkansas at the time his dwelling was damaged, at the time his claim was adjusted, at the time payment was made for loss or damage to his dwelling, and at the time the lawsuit was filed. Therefore, venue is proper in Miller County, Arkansas pursuant to Section 16-55-213. Because of the clear and unambiguous operation of Section 16-55-213 in the context of a proposed class action,

venue is proper as to Plaintiff and Defendant in Miller County, Arkansas due to the residency of Plaintiff in Miller County, Arkansas.

FACTUAL BACKGROUND

15. Plaintiff is a customer of Defendant and maintained a homeowners insurance policy with Defendant at all times relevant to this matter. At all times mentioned herein, Defendant owed a fiduciary duty and/or had a special relationship with Plaintiff and the Class.

16. At all times mentioned herein, Defendant was obligated to make payments to Plaintiff under his homeowners insurance policy for loss or damage to his residence, home, house, dwelling and other structures (collectively "dwelling") occasioned by certain events or occurrences.

17. Plaintiff's dwelling (which is located in Miller County, Arkansas) sustained physical loss and damage as the result of hail damage that occurred on or about March 10, 2010 that triggered Defendant's obligation to pay Plaintiff for all loss and damages occasioned thereby.

18. Thereafter, Plaintiff properly requested payment from Defendant for the loss and damage to his dwelling.

19. Defendant confirmed that Plaintiff's dwelling had in fact sustained loss and damage and that

Defendant had an obligation and duty to pay Plaintiff for all damages to Plaintiff's dwelling.

20. Although Plaintiff fulfilled any and all obligations or promises imposed upon him, Defendant failed to properly pay Plaintiff for the loss to his dwelling. Specifically, Defendant failed to pay Plaintiff an additional 20% of the amount provided by Defendant to complete repairs to his dwelling for GCOP.

21. At the time Defendant's adjuster(s)/agent(s) inspected the Plaintiff's dwelling, it was reasonably likely Plaintiff would incur the costs associated with retaining the services of a general contractor. Therefore, Plaintiff should have received payment for GCOP with his payment from Defendant. However, Defendant failed to provide Plaintiff a payment for GCOP and did not disclose to Plaintiff that he was entitled to payment from Defendant for GCOP.

22. Although the services of a general contractor were reasonably likely to be incurred, Defendant made no payment for GCOP to Plaintiff.

23. Pursuant to its handling of Plaintiff's loss, Defendant has a practice of not including required payments for GCOP and not disclosing entitlement to such payments in connection with loss or damage to dwellings under homeowners policies in Arkansas.

24. Plaintiff's claims in this suit only relate to losses arising under homeowners insurance policies.

No other types of policies or coverage, such as flood insurance and/or fire insurance, are at issue.

CLASS ALLEGATIONS

25. Plaintiff brings this lawsuit on behalf of himself, and all other persons similarly situated, pursuant to A.R.C.P. 23. The Class that the Plaintiff seeks to represent consists of:

> Any and all customers of The Standard Fire Insurance Company who are residents of Arkansas, who received payments under a homeowners insurance policy issued by The Standard Fire Insurance Company for physical loss or damage to their dwelling, such dwelling located in Arkansas, at any time between January 1, 2009 and December 31, 2010. Excluded from the Class are: (1) Defendant and all directors, officers, employees, partners, principals, shareholders and agents of Defendant; (2) Persons or entities who timely opt-out of this proceeding using the correct protocol for "opting-out" that will be formally established by this Court; (3) any and all Federal, State and/or Local Governments, including, but not limited to, their Departments, Agencies, Divisions, Bureaus, Boards, Sections, Groups, Councils and/or any other subdivision, and any claim that such governmental entities may have directly or indirectly; (4) Any currently-sitting Arkansas State Court Judge or Justice, and the current spouse and all other persons within the third-degree of consanguinity to such

judge/justice; (5) Any claim which resulted in the payment of policy limits or more by Defendant; and (6) Plaintiff's Counsel.

26. The Class comprises hundreds, and possibly thousands, of individuals geographically dispersed across Arkansas, the joinder of whom is impractical and the disposition of whose claims in a class action will provide substantial benefit to the parties and the court system. The identities of Class Members can be ascertained from Defendant's records. Joining and naming each Class Member as a co-plaintiff is unreasonable and impracticable.

27. There is a well-defined commonality of interest in the questions of law and fact that affect the Class Members. Indeed, questions of law and fact common to the Class plainly predominate over any questions affecting only individual Class Members. Some of these common questions of law and fact are:

a. Whether Class Members are entitled to payment of GCOP in connection with loss or damage to their dwelling;

b. Whether Defendant failed to pay Class Members GCOP in connection with loss or damage to their dwellings;

c. Whether Defendant breached the terms of its homeowners insurance policies with Class Members;

d. Whether Class Members are entitled to money damages for Defendant's breach of contract;

28. The claims asserted by Plaintiff are typical of claims of the Class. Plaintiff is a customer of Defendant. Plaintiff received payment from Defendant for loss or damage to his dwelling under his homeowners insurance policy. In connection with the payment from Defendant for loss or damage to Plaintiff's dwelling, Defendant failed to pay Plaintiff any amount for GCOP. Defendant further failed to disclose to Plaintiff that he was entitled to payment for GCOP.

29. The Plaintiff will fairly and adequately represent the interests of the Class. The interests of the Class are coincident with and not antagonistic to those of the Plaintiff. The Plaintiff has the ability to assist intelligently in the decision-making in connection with the litigation. Furthermore, Plaintiff is represented by legal counsel who are both competent and experienced in this type of class action litigation.

30. Defendant's conduct in withholding payments of GCOP in connection with loss or damage to dwellings was pursuant to policies and practices common to Class Members. Consequently, common questions of law and fact will predominate.

31. This Class Action is not only an appropriate method for the fair and efficient adjudication of this controversy but is, in fact, superior to all other available methods because:

a. The joinder of hundreds or thousands of geographically diverse individual Class Members across the state of Arkansas is

impracticable, cumbersome and unduly burdensome.

b. There is no special interest by Class Members in individually controlling the prosecution of separate actions;

c. Class Members' individual claims may be relatively modest compared with the expense of litigating the claim, making it impracticable, unduly burdensome and expensive, if not practicably impossible, for individual Class Members to redress their losses;

d. When the Defendant's liability has been adjudicated, claims of Class Members can be determined by the Court and administered efficiently and in a manner far less onerous and burdensome than if attempted through the filing of individual lawsuits;

e. This Class Action will promote an orderly and expeditious adjudication and administration of Class claims, and promote economies of time, effort and resources;

f. This Class Action will assure uniformity of decisions among Class Members;

g. Without this Class Action, Class Members will go without money damages;

h. Without this Class Action, no damages will be ordered and Defendant will reap the benefits of the monies they have retained as a result of their breach of contract; and

i. The resolution of this controversy through this Class Action presents fewer management difficulties than individually filed lawsuits and conserves the resources of the parties and the judicial system while protecting the rights of each Class Member.

32. Plaintiff seeks money damages for himself and the Class for breach of contract arising from Defendant's failure to provide proper payments for GCOP. As discussed herein, when owed, payment for GCOP should be 20% of the amount paid by Defendant to complete repairs to a damaged dwelling.

FRAUDULENT CONCEALMENT

33. Rather than disclosing information about entitlement to GCOP to Plaintiff, Defendant actively concealed information about entitlement to GCOP and represented that the amount paid was all that was owed under the homeowners policy.

34. Through the claims process, Plaintiff and Class Members asked Defendant what was owed to them under the terms of their respective homeowners policies for their claims. Defendant responded that the amount settled for was all that was owed. Plaintiff and Class Members justifiably relied on Defendant's representation that the amount paid was all that was owed.

35. Defendant's acts described herein were executed in a manner that was designed to conceal entitlement to GCOP. Plaintiff and Class Members

could not have known of their entitlement to GCOP through the exercise of reasonable diligence because of Defendant's actions.

36. Additionally, because of the fiduciary duty owed by Defendant to Plaintiff and Class Members and/or the special relationship between Defendant and Plaintiff/Class Members, Defendant had an obligation to disclose information concerning entitlement to GCOP payments to Plaintiff and Class Members. Defendant failed to disclose this information.

37. Defendant's fraudulent concealment tolls the running of any applicable statute of limitations. Plaintiff is not asserting a cause of action or seeking damages for fraud, but is pleading fraudulent concealment for the sole purpose of tolling the statute of limitations. Indeed, fraudulent concealment is not a cause of action, and is simply a response against the defense of statute of limitations. See *Barre v. Hoffman,* 2009 Ark. 373, 326 S.W.3d 415; *Jones v. Central Ark. Radiation Therapy Inst., Inc.,* 270 Ark. 988, 607 S.W.2d 334 (1980).

MISCELLANEOUS

38. Any condition precedent to the institution of this lawsuit has been performed, has occurred, or has been waived.

BREACH OF CONTRACT

39. Plaintiff fully incorporates into this Paragraph each and every allegation contained in Paragraphs 1 through 38 of this Complaint as if each were fully iterated verbatim herein.

40. As previously indicated, Plaintiff's dwelling was insured pursuant to a policy of homeowners insurance by the terms of which Defendant agreed to properly pay Plaintiff for losses occasioned by certain events or occurrences.

41. Defendant's policies are standardized contracts which were drafted by the Defendant and imposed upon their policyholders without the ability to negotiate the terms. Policyholders were given the choice only of adhering to Defendant's standard policy language or rejecting the policy. As such, the policies are contracts of adhesion.

42. All conditions precedent to Defendant's liability under their standardized homeowners insurance policies have been performed including the payment of all premiums necessary to keep the policies in effect and the presentation of claims by insured persons for losses under their homeowners policies in question.

43. On or about March 10, 2010, Plaintiff's home was damaged by a named peril and Defendant was, pursuant to the policy of insurance, required to fully and properly pay Plaintiff for all damages occasioned thereby.

44. Though Plaintiff fulfilled all policy obligations imposed upon him by Defendant's insurance contract, Defendant materially breached the terms of their standardized policy contracts with Plaintiff and the Class by failing to include payments for GCOP.

45. As a result of Defendant's material breaches of their policy contracts, Plaintiff and the Class have been damaged.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, Greg Knowles, individually and as class representative on behalf of all similarly situated persons within the State of Arkansas, respectfully prays for relief and judgment against the Defendant as follows:

A. Certifying that the action may be maintained as an Arkansas-only class action under A.R.C.P. 23, and appointing Plaintiff and Plaintiff's counsel to represent the Class;

B. Awarding money damages to Plaintiff and Class Members from the Defendant for their breach of contract in an amount equal to the amount that should have been paid to Class Members for GCOP (20% of the amount paid by Defendant to complete repairs to the damaged property), which, when aggregated with all other elements of damages, costs, and fees, will not exceed $75,000 for Plaintiff individually or any Class Member individually and/or $5,000,000 for the entire Class combined;

C. Awarding pre-judgment interest, which, when aggregated with all other elements of damages, costs, and fees, will not exceed $75,000 for Plaintiff individually or any Class Member individually and/or $5,000,000 for the entire Class combined;

D. Awarding attorneys' fees and costs, which, when aggregated with all other elements of damages, costs, and fees, will not exceed $75,000 for Plaintiff individually or any Class Member individually and/or $5,000,000 for the entire Class combined;

Plaintiff seeks recovery of less than $75,000 for himself and each Class Member, inclusive of costs and attorneys' fees, from Defendant and/or total aggregate damages for himself and all Class Members, inclusive of costs and attorneys' fees, in an amount less than five million dollars ($5,000,000), jointly and severally from Defendant. Plaintiff makes no claim for declaratory on [sic] injunctive relief. Although asserting no cause of action that would support a punitive damage award, Plaintiff specifically disclaims any actual or potential entitlement to punitive damages and stipulates that he will not seek punitive damages in this action.

Respectfully Submitted,

KEIL & GOODSON P.A.
406 Walnut Street
Texarkana, Arkansas 71854
Telephone: 870.772.4113
Facsimile: 870.773.2967

BY: /s/ Matt Kiel
MATT KEIL
Arkansas Bar Number 86099

JOHN C. GOODSON
Arkansas Bar Number 90018

AND

Brad E. Seidel
Arkansas Bar No. 2007122
NIX PATTERSON & ROACH, LLP
3600 Capital Texas Highway
Building B, Suite 350
Austin, Texas 78746
Telephone: (512) 328-5333
Fax: (512) 328-5332

EXHIBIT A

Sworn and Binding Stipulation

Before me, the undersigned authority on this day personally appeared Greg Knowles, known to me to be the undersigned Affiant whose name is subscribed below, who, after having been duly sworn by me, upon his oath deposed and stated as follows:

1. My name is Greg Knowles. I am a plaintiff in this lawsuit. I am over the age of eighteen. I am of sound mind, capable of making this affidavit, fully competent to testify to the matters stated herein, and am under no legal disability. I have personal knowledge of the

facts and statements contained herein, and of the facts and statements are true and correct.

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

3. I understand that this stipulation is binding, and it is my intent to be bound by it.

Further affiant sayeth not.

/s/ Greg Knowles
Greg Knowles

SUBSCRIBED AND SWORN TO BEFORE ME, to which witness my hand and official seal on this 13th day of April, 2011.

/s/ Carmen Renee Heflin
Notary Public

[NOTARY STAMP]

Commission Expires: 1-27-2018