No. 12-

IN THE

Supreme Court of the United States

STATE OF MISSISSIPPI,
EX REL. JIM HOOD, ATTORNEY GENERAL,
Petitioner,

v.

AU OPTRONICS CORP., ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state's *parens patriae* action is removable as a "mass action" under the Class Action Fairness Act when the state is the sole plaintiff, the claims arise under state law, and the state attorney general possesses statutory and common-law authority to assert all claims in the complaint.

PARTIES AND RULE 29.6 STATEMENT

In addition to the parties listed in the caption, Respondents include AU Optronics Corporation America, Incorporated; Chi Mei Corporation; Chimei Innolux Corporation, formerly known as Chi Mei Optoelectronics Corporation; Chi Mei Optoelectronics USA, Incorporated, formerly known as International Display Technology USA, Incorporated; CMO Japan Company, Limited, formerly known as International Display Technology, Limited; Hannstar Display Corporation; Hitachi, Limited; Japan Display East, Incorporated; Hitachi Electronic Devices (USA); LG Display Company, Limited, formerly known as LG Phillips LCD Company, Limited; LG Display America, Incorporated, formerly known as LGD LCD America, Incorporated; Samsung Electronics Company LTD; Samsung Semiconductor, Incorporated; Samsung Electronics America, Incorporated; Sharp Corporation; Sharp Electronics Corporation; Toshiba Corporation; Toshiba Mobile Display Company, Limited, formerly known as Toshiba Matsushita Display Technology Company, Limited; Toshiba America Electronic Components, Incorporated; Toshiba America Information Systems, Incorporated; and Chunghwa Picture Tubes Ltd.

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PETITION FOR WRIT OF CERTIORARI

Petitioner State of Mississippi, ex rel. Jim Hood, Attorney General, respectfully petitions for a Writ of Certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 701 F.3d 796. *See also* Pet. App. at 1a–22a. The decision of the U.S. District Court for the Southern District of Mississippi is reported at 876 F. Supp. 2d 758. *See also* Pet. App. at 23a–60a.

JURISDICTION

The Fifth Circuit issued its decision on November 21, 2012, *id.* at 1a, and issued its Judgment and Mandate on the same date, *id.* at 62a.[1] This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4, provides in part:

> **(d)**
>
> **(1)** In this subsection—
>
> **(A)** the term "class" means all of the class members in a class action;

[1] The Fifth Circuit issued an order denying rehearing on February 4, 2013. Pet. App. at 63a–65a. This petition is timely without regard to the rehearing petition.

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

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

> **(A)** any member of a class of plaintiffs is a citizen of a State different from any defendant;
>
> **(B)** any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or
>
> **(C)** any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or

a citizen or subject of a foreign state.

. . .

(11)

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

(B)

(i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711 (2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which—

. . .

(III) all of the claims in the action are asserted on behalf of the general public (and not on

> behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or
>
> . . .
>
> **(C)**
>
> **(i)** Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

28 U.S.C. §1332.

Relevant provisions of the Mississippi Antitrust Act, Miss. Code Ann. § 75-21-1 *et seq.*, and the Mississippi Consumer Protection Act, *id.* § 75-24-1 *et seq.*, are set forth in the Appendix.

STATEMENT OF THE CASE

In 2008, the Fifth Circuit became the first court of appeals to address the question of whether a state's *parens patriae* lawsuit is removable to federal court as a "mass action" under CAFA.[2] *See*

[2] A CAFA mass action is defined as a civil action in which the monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact. 28 U.S.C. § 1332(d)(11)(B)(i). A mass action meeting this definition is deemed a class action for purposes of CAFA removal. *Id.* § 1332(d)(11)(A).

Louisiana ex rel. Caldwell v. Allstate Ins. Co., 536 F.3d 418 (5th Cir. 2008). The court answered the question in the affirmative.

Since then, three circuits have addressed exactly the same question, and each has reached the *opposite* conclusion:

- *AU Optronics Corp. v. South Carolina*, 699 F.3d 385 (4th Cir. 2012), *petition for cert. filed*, No. 12-911 (Jan. 23, 2013);
- *LG Display Co. v. Madigan*, 665 F.3d 768 (7th Cir. 2011); and
- *Nevada v. Bank of America Corp.*, 672 F.3d 661 (9th Cir. 2011).

In the decision below, the Fifth Circuit reaffirmed its dissonant position. *See* Pet. App. at 4a–5a.

This circuit conflict has led to inconsistent jurisdictional outcomes. Indeed, this circuit conflict is so profound that cases involving the *same claims*, arising out of the *same conduct* by the very *same Defendants* have been remanded to state court in the Fourth, Seventh, and Ninth Circuits, but retained in federal court in the Fifth Circuit.[3] The Fourth, Seventh, and Ninth Circuits found no federal jurisdiction; the Fifth Circuit found federal jurisdiction as a CAFA mass action. Absent review by this Court, federal jurisdiction over state *parens patriae* lawsuits will continue to depend entirely on

[3] Compare the decision below with *South Carolina*, 699 F.3d at 392; *Madigan*, 665 F.3d at 773; and *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 848-49 (9th Cir. 2011).

the location of the federal court to which the suit is removed.

Review is also amply warranted because the Fifth Circuit's judgment runs counter to elementary principles of federalism and state sovereignty and conflicts with this Court's precedent regarding the nature of *parens patriae* actions, the "real party in interest" test, and the narrow construction of removal statutes. The Fifth Circuit's decision prevents state attorneys general from bringing *parens patriae* suits in state court, even when the state is the sole plaintiff, the claims arise under state law, and the state attorney general has statutory and common-law authority to assert the claims. Nothing in CAFA supports such an invasion into state sovereign prerogatives.

The same question presented is currently pending before this Court in the certiorari petition in *AU Optronics Corp. v. South Carolina*, No. 12-911. In that case, petitioners AU Optronics Corporation, AU Optronics Corporation America, LG Display Co., Ltd., and LG Display America, Inc.—all of which are respondents here and were Defendants in the courts below in this case—urge this Court to grant certiorari over essentially the same question presented, on the basis that there is a clear and substantial circuit split regarding the interpretation of CAFA with respect to *parens patriae* actions.

Mississippi submits that the instant petition is a better vehicle for deciding this question. While the Fifth Circuit's approach has been disavowed by every other court of appeals to consider the question, in the decision below, the Fifth Circuit reaffirmed its precedent and its conflict with three other circuits. The decision in this case contains a full explication of

the Fifth Circuit's views, and all relevant dimensions of the question are squarely before this Court.

This Court's review is warranted.

I. Background

On March 25, 2011, Mississippi commenced this action in state court, alleging that Defendants had engaged in price fixing of liquid crystal display (LCD) panels. Pet. App. at 24a. The lawsuit was brought in the name of the State, asserting claims under the Mississippi Antitrust Act (MAA) and the Mississippi Consumer Protection Act (MCPA).

As remedies, the complaint sought: (1) a permanent injunction prohibiting the Defendants from continuing to engage in anti-competitive behavior; (2) civil penalties of up to $10,000 per violation under the MCPA; (3) civil penalties of up to $2,000 per month, per Defendant under the MAA; (4) restitution to the State for its own losses caused by purchasing LCD panel products during the relevant time period; (5) restitution to the State on behalf of its citizens and local governments who suffered losses by purchasing LCD panel products during the relevant period; (6) punitive damages; and (7) other relief, including costs, pre- and post-judgment interest, and attorney's fees. *Id.* at 25a–26a.

Mississippi's lawsuit is one of thirteen *parens patriae* lawsuits against most of these same Defendants brought by the Attorneys General of Arkansas, California, Florida, Illinois, Michigan, Missouri, New York, Oregon, South Carolina, Washington, West

Virginia, and Wisconsin.[4] Some of these cases alleged both state and federal claims and were commenced in federal court.[5] A consolidated multi-district litigation (MDL) is pending in the Northern District of California and includes some of these attorney general actions as well as various private indirect purchaser class actions (including a Mississippi indirect purchaser class).[6] *See In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. 07-1827 (N.D. Cal. filed Apr. 20, 2007).

Five of the thirteen state attorneys general—from California, Illinois, Mississippi, South Carolina, and Washington—commenced their actions in their state courts asserting only state law claims. Defendants removed each of these actions to federal

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[4] *Missouri ex rel. Koster, Arkansas ex rel. McDaniel, Michigan ex rel. Cox, West Virginia ex rel. McGraw, Wisconsin ex rel. Van Hollen v. AU Optronics Corp.*, No. 3:10-cv-3619 (N.D. Cal.); *Florida v. AU Optronics Corp.*, No. 3:10-cv-03517 (N.D. Cal.); *New York v. AU Optronics Corp.*, No. 3:11-cv-711 (N.D. Cal.); *Oregon ex rel. Rosenblum v. AU Optronics Corp.*, No. 3:07-md-1827 (N.D. Cal); *South Carolina v. AU Optronics Corp.*, No. 3:11-cv-00731-JFA (D.S.C.); *California v. AU Optronics Corp.*, No. CGC-10-504651 (San Francisco Super. Ct.); *Illinois v. AU Optronics Corp.*, No. 10 CH 34472 (Cir. Ct. of Cook County); *Washington v. AU Optronics Corp.*, No. 10-2-29164-4 (King County Dist. Ct.).

[5] *See* Compl. for Damages, Civil Penalties, Injunctive and Other Relief (Dkt. 1), *Missouri ex rel. Koster v. AU Optronics Corp.*, No. 3:10-cv-03619 (N.D. Cal. filed Aug. 17, 2010).

[6] The indirect purchaser class action pending in the MDL, including the case on behalf of Mississippi consumers, has settled. The MDL Court's preliminary approval order indicated that the settlement would release all claims brought by the individual claimants but would not foreclose *parens patriae* claims being asserted by non-settling state attorneys general. *See In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. 07-1827 (N.D. Cal.) (Dkt. 4688).

court based upon CAFA jurisdiction. In all five cases, the district court remanded the case to state court, finding CAFA jurisdiction lacking. *See* Pet. App. at 15a n.3. In each case, *except for this one*, the circuit court upheld the district court's remand, agreeing that CAFA jurisdiction was lacking.[7]

II. The District Court's Decision

On June 9, 2011, Defendants removed this case on the grounds that it was either a "class action" or a "mass action" under CAFA. *Id.* at 26a. The district court granted the State's motion to remand, finding that Mississippi had filed the action to "protect the State's 'quasi-sovereign interest' in its economy and its citizens' economic well being." *Id.* at 24a. The district court found that "[w]ith this and other language, the Attorney General invoked his authority to file suit as *parens patriae* on behalf of the State and its citizens." *Id.*

First, the district court found that this action was not a class action within the meaning of CAFA. *Id.* at 40a–44a. Second, the district court found that, under the binding Fifth Circuit precedent of *Caldwell*, the Attorney General's lawsuit constituted a "mass action" under CAFA. *Id.* at 44a. *Caldwell* mandates a "claim-by-claim" analysis to determine CAFA jurisdiction, instructing that courts must isolate each claim for relief in a *parens patriae* lawsuit to count up the number of consumers who may benefit from that claim. If it appears there may be more than 100 such beneficiaries, the lawsuit is a "mass action" within the meaning of CAFA. *See* 536 F.3d at 429–30.

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[7] *See* cases cited *supra* note 3.

Despite its conclusion that the case qualified as a "mass action" under *Caldwell*, the district court nevertheless remanded the case because it found that all of the claims had been asserted "on behalf of the general public (and not on behalf of individual claimants or members of a purported class)" and, therefore, fell into the "general public exception" to CAFA mass action jurisdiction. Pet. App. at 48a–52a. The district court cited substantial scholarly commentary supporting the view that CAFA does not apply to *parens patriae* actions by state attorneys general. *See id.* at 47a.

III. The Court of Appeals' Decision

The Fifth Circuit reversed the district court's remand order. As a preliminary matter, citing the binding precedent of *Caldwell*, the Fifth Circuit agreed with the district court's conclusion that Mississippi's lawsuit was a mass action within the meaning of CAFA. *Id.* at 4a–5a. Applying the claim-by-claim approach mandated by *Caldwell*, the Court of Appeals opined that "the real parties in interest include not only the State, but also individual consumers residing in Mississippi." *Id.* at 6a.

However, the Court of Appeals reversed the district court's ruling that the general public exception was applicable. The Fifth Circuit acknowledged that its decision, finding the exception inapplicable, "may render such statutory exception a dead letter." *Id.* at 9a. As a result, the Court indicated that it "welcome[d] congressional clarification of this issue." *Id.* at 10a.

Judge Elrod, concurring in the judgment, wrote separately to urge reconsideration of the *Caldwell* decision: "*Caldwell*'s claim-by-claim

approach is problematic when applied to CAFA's 'mass action' provision in *parens patriae* suits such as the instant case." *Id.* at 12a. While acknowledging that the majority opinion in this case was "a fair application" of Fifth Circuit binding precedent, the concurrence nonetheless recognized that "every court of appeals to address the issue since *Caldwell* has rejected [the Fifth Circuit's] approach." *Id.* at 12a, 16a (citing *South Carolina*, 699 F.3d at 393-94; *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 670 (9th Cir. 2012); *Madigan*, 665 F.3d at 773-74).

Specifically, Judge Elrod noted:

> Here, as the majority opinion shows, applying the claim-by-claim approach leads to the conclusion that Mississippi consumers are the real parties in interest with respect to the state's restitution claim, so this is a "mass action" under CAFA. This result is the exact opposite of the outcome in many other similar lawsuits around the country. That so many other courts are reaching a different result in cases that involve similarly-situated litigants and nearly identical claims suggests that we should consider whether we have staked out the correct position. I believe we have not.

Pet. App. at 14a–15a (footnotes omitted).

The concurrence also pointed to the lack of statutory support for the claim-by-claim approach and its consequential nullification of the general public exception. First, "the claim-by-claim approach does not find a foothold in CAFA's text." *Id.* at 17a. Indeed, nothing in the text "suggest[s] that, in a case in which a single plaintiff brings suit,

a court should dissect the complaint to determine whether that plaintiff is the sole beneficiary of each basis for relief." *Id.* "Compounding the absence of textual support for the claim-by-claim approach is the Supreme Court's directive that removal statutes should be 'strictly construed.'" *Id.* at 18a (quoting *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002)). Further, Judge Elrod observed that "just as troubling, applying *Caldwell's* reasoning to CAFA's general public exception may render the exception a dead letter in this circuit. We should reconsider *Caldwell* and correct our course in this area of the law." *Id.* at 12a.

Mississippi filed a petition for rehearing en banc, which was denied on February 4, 2013. *Id.* at 64a.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's judgment warrants plenary review by this Court. First, it is beyond reasonable dispute that the Fifth Circuit's decision directly conflicts with the decisions of the Fourth, Seventh, and Ninth Circuits. The Fifth Circuit's judgment also conflicts with this Court's precedent regarding the nature of *parens patriae* actions, the real party in interest test, and the requirement that removal statutes such as CAFA be strictly construed. The decision below involves an important and recurring issue of federal law and runs counter to deeply-rooted principles of federalism. The Fifth Circuit's decision will result in additional, wasteful jurisdictional battles and administrative

complexity.[8] Review by this Court is amply warranted.

I. The Fifth Circuit's Judgment Conflicts with Decisions in Other Circuits.

The Fifth Circuit's conclusion that *parens patriae* actions brought by state attorneys general are removable under CAFA as mass actions is at odds with every other circuit court that has addressed the issue, as acknowledged by the concurrence in the Fifth Circuit's decision below. *Id.* at 16a–17a.

The circuit conflict regarding the removability of *parens patriae* actions under CAFA is unusually concrete and well suited to this Court's review. The conflict is not abstract. Several of the cases involve *the very same LCD lawsuits* against the *very same Defendants.* Accordingly, the circuit conflict has produced *different* results in the *same litigation.* As the concurring opinion in the court below explained, the outcome here is the "exact opposite" of the outcome of all other LCD price-fixing *parens patriae* cases proceeding in various state courts against these very same Defendants. *Id.* at 14a, 15a & n.3.

The circuit split is intolerable as a matter of federalism. Whether a state, through its attorney general, may assert a *parens patriae* action in state court should not depend on where that state is

[8] Indeed, the circuit split on whether *parens patriae* suits are removable as mass actions under CAFA has initiated two petitions for a writ of certiorari in the past month alone: *AU Optronics Corp. v. South Carolina* and the instant petition. These petitions further demonstrate that the split is deep and mature, and will not be resolved absent plenary review by this Court.

located. Nor should the interpretation of the CAFA removal provision be circuit-dependent. A uniform, nationwide rule affirming the authority of state attorneys general to bring *parens patriae* actions in state court is appropriate.

Further, the instant case presents the best vehicle for resolving the circuit split. The Fifth Circuit has taken a solitary approach in applying the CAFA removal statute to *parens patriae* actions. Its approach has been rejected by every subsequent court of appeals to consider the question. And, based upon its judgment below, it is clear that *Caldwell*'s claim-by-claim approach will continue to be applied in the Fifth Circuit to *parens patriae* claims. The opinion in this case contains a full explication of the Fifth Circuit's views, so all relevant dimensions of the question are squarely before this Court. The issue is cleanly presented by the instant case and ripe for this Court's consideration.

A. Seventh Circuit

The Seventh Circuit was the first circuit to reject *Caldwell*'s holding that a *parens patriae* lawsuit is a mass action within the meaning of CAFA. In *LG Display Co. v. Madigan*, the Illinois attorney general brought a *parens patriae* lawsuit against some of the same Defendants being sued by Mississippi in this case, based upon violations of the Illinois Antitrust Act. 665 F.3d at 773. Defendants removed Illinois's lawsuit to federal court under CAFA.

Defendants urged the Seventh Circuit to follow *Caldwell*'s holding and separately determine the real parties in interest in each of Illinois's claims in order to find out "what's *really* going on in this

suit." *Id.* at 772 (emphasis in original). Defendants conceded that there was only one plaintiff and also that Illinois was the real party in interest for the enforcement-related claims. They nevertheless claimed that the 100 or more residents of Illinois on whose behalf the Illinois attorney general was seeking restitution were the real parties in interest for that claim. *Id.* at 772-73.

The Seventh Circuit discussed *Caldwell* at length and concluded that the district court was correct in rejecting *Caldwell's* claim-by-claim approach. *Id.* at 773 ("The district court was in good company; claim-by-claim analysis has been questioned by a number of courts." (citations omitted)). The Seventh Circuit noted that the Fifth Circuit did not adopt its approach "based on any language in CAFA itself, nor is there any language to be found." *Id.* The Seventh Circuit also rejected the Fifth Circuit's attempt to "rationalize[ ] its claim-by-claim approach as consistent with Congress' intent." *Id.* Looking at the complaint as a whole, the court held that Illinois's *parens patriae* suit was not a mass action under CAFA.

The Seventh Circuit's holding—that CAFA jurisdiction was lacking over the *parens patriae* lawsuit—is directly contrary to the Fifth Circuit's decision with respect to the very same Defendants in this case.

B. Ninth Circuit

In *Nevada v. Bank of America*, the Ninth Circuit expressly considered the Fifth Circuit's claim-by-claim approach and rejected it. 672 F.3d at 669. In that case, the Nevada attorney general filed a *parens patriae* lawsuit against Bank of America,

alleging the bank misled Nevada consumers in mortgage transactions. The defendants removed the action to federal court under CAFA.

The Ninth Circuit rejected defendants' argument that the case was removable as a mass action. The court noted that the two circuits that had already addressed the issue had "reached conflicting results." *Id.* at 668. In declining to follow *Caldwell's* claim-by-claim approach, the Ninth Circuit instead examined "'the essential nature and effect of the proceedings as it appears from the entire record.'" *Id.* at 670. The court found that Nevada's status as the real party in interest was "not diminished merely because it has tacked on a claim for restitution." *Id.* at 671. Instead, the court concluded that the "Complaint, read as a whole, demonstrates that Nevada is the real party in interest in this action, . . . so the action falls 99 persons short of a 'mass action.'" *Id.* at 672.[9]

The Ninth Circuit's decision in *Bank of America* is flatly contrary to the decision in this case.

C. Fourth Circuit

In October 2012, the Fourth Circuit joined the Seventh and Ninth Circuits in rejecting the Fifth Circuit's claim-by-claim approach. The context was another *parens patriae* action against some of the same Defendants involved in this case. *AU*

[9] The Ninth Circuit had already addressed whether a *parens patriae* action brought by the attorneys general of Washington and California against some of these same LCD Defendants was removable under CAFA as a *class* action. In *Washington v. Chimei Innolux Corp.*, the Ninth Circuit held that the two states' *parens patriae* lawsuits were not removable as class actions. 659 F.3d 842 (9th Cir. 2011).

Optronics Corp. v. South Carolina, 699 F.3d 385, 392 (4th Cir. 2012).[10]

South Carolina asserted claims under a statutory scheme strikingly similar to the state laws under which Mississippi sues here.[11] The Fourth Circuit analyzed *Caldwell* at length and became the third circuit court of appeals to decline to follow it. In its opinion, the Fourth Circuit explicitly acknowledged the circuit split: "[o]ur sister circuits have disagreed somewhat on whether to apply the 'whole-case approach' or the 'claim-by-claim approach' to the resolution of similar jurisdictional disputes." *Id.*

The Fourth Circuit rejected the Fifth Circuit's claim-by-claim approach to *parens patriae* actions:

> The State, in these *parens patriae* actions, is enforcing its own statutes in seeking to protect its citizens against price-fixing conspiracies. That the statutes authorizing these actions in the name of the State also permit a court to award restitution to injured citizens is incidental to the State's overriding interests and to the substance of these proceedings. Those citizens are not named plaintiffs here, and they need not be considered in the diversity analysis of the State's claims.

Id. at 394. The Fourth Circuit concluded: "We therefore agree with the Ninth and the Seventh Circuits that a claim for restitution, when tacked

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[10] On January 23, 2013, Defendants filed a petition for certiorari with this Court as No. 12-911.

[11] *Compare* Miss. Code Ann. §§ 75-24-9 & 75-24-11, *with* S.C. Code § 39-5-50.

onto other claims being properly pursued by the State, alters neither the State's quasi-sovereign interest in enforcing its own laws, nor the nature and effect of the proceedings."[12] *Id*.

Thus, in its judgment below and in its decision in *Caldwell*, the Fifth Circuit is in conflict with the Fourth, Seventh, and Ninth Circuits, which will inevitably lead to inconsistent jurisdictional outcomes. Only this Court can resolve the conflict among the circuits regarding whether a *parens patriae* lawsuit brought in state court by a state attorney general pursuant to state statutes and common law is removable as a mass action under CAFA.

II. The Fifth Circuit's Judgment Conflicts with Decisions of this Court.

A. *Parens patriae* actions

Parens patriae actions are cases in which the state, by definition, "'must be deemed to represent all its citizens'" and not be subject to intervention and joinder by such constituent individuals in the absence of a showing of "some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *New Jersey v. New York*, 345 U.S. 369, 373-74 (1953). This Court has described the "prerogative of *parens patriae*" as "inherent in the supreme power of every state," and opined that it is "often necessary to be exercised in the interests of humanity, and for the

[12] In reaching its holding, the Fourth Circuit cited as instructive *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, which held that a *parens patriae* action is not removable as a class action. 646 F.3d 169, 174, 176 & n.2 (4th Cir. 2011).

prevention of injury to those who cannot protect themselves." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez*, 458 U.S. 592, 600 (1982) (quoting *Mormon Church v. United States*, 136 U.S. 1, 57 (1890)).

In *Snapp*, this Court confirmed a state's standing to sue as *parens patriae* to protect its sovereign and quasi-sovereign interests. These fundamental interests include "the power to create and enforce a legal code," *id.* at 601, and the protection of the "health and well-being—both physical and economic—of its residents in general," *id*. at 607. Furthermore, this Court's precedent rejects the view that *parens patriae* actions should involve the joinder of the constituent citizens on whose behalf the state seeks to act.[13]

The Fifth Circuit's judgment conflicts with this precedent. In reaching its decision below, the Fifth Circuit determined that removal jurisdiction existed under CAFA because Mississippi citizens were the real parties in interest for Mississippi's restitution claim. Pet. App. at 5a–6a. In undertaking that analysis, the Fifth Circuit answered a question it need not have ever asked and failed to apply this Court's instruction that a state has the authority to vindicate its *own* interest in bringing a *parens patriae* action.

Mississippi law grants the Attorney General direct authority to bring such an action on

[13] Unless individual monetary relief claims "are proposed to be tried jointly," CAFA's mass action definition is not satisfied. 28 U.S.C. § 1332(d)(11)(B)(i).

behalf of citizens in the State.[14] Nothing in that authority requires that *parens patriae* cases attempt to try citizens' claims jointly. To the contrary, the point of *parens patriae* cases is to permit a state's appointed officer to bring claims on behalf of the whole state and its citizens in the absence of direct participation of and control by individuals.[15]

Under this Court's precedent, there is one plaintiff in this case: the State. The Fifth Circuit's judgment, finding the State's *parens patriae* action to be a mass action, is thus contrary to this Court's precedent.

B. Real party in interest test

The Fifth Circuit's judgment is inconsistent with this Court's precedent regarding the real party in interest test. Federal courts should generally not interfere with the nomenclature of the complaint and the parties selected for inclusion, absent the use of "an *unacceptable* device to defeat diversity."

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[14] Provisions of both the MAA and the MCPA establish that the Attorney General possesses the authority to assert claims for monetary and injunctive relief in the name of the State on behalf of the public interest and for the public welfare. Miss. Code Ann. §§ 75-21-1, -21-37, -24-9, -24-11. The Attorney General also possesses "the powers of the Attorney General at common law," *id.* § 7-5-1, which powers include "the right to institute, conduct and maintain all suits necessary for the enforcement of the laws of the state, preservation of order and the protection of public rights," *Gandy v. Reserve Life Ins. Co.*, 279 So. 2d 648, 649 (Miss. 1973) (citations omitted).

[15] Under the MCPA, intervention by or joinder of individuals is not expressly authorized where the Attorney General has sued in the name of the State on behalf of unnamed citizens. *See generally* Miss. Code Ann. § 75-24-1 *et seq.*

Lincoln Prop. Co. v. Roche, 546 U.S. 81, 93 (2005) (emphasis added) (quoting 16 James Wm. Moore et al., *Moore's Federal Practice* § 107.14[2][c], at 107-67 (3d ed. 2005)).

This Court has consistently held that a state's overall interest in the case it has brought in its name is the determinative inquiry, not who may ultimately benefit from the relief sought. When determining whether a state is suing properly under its *parens patriae* authority, and therefore as the real party in interest for jurisdictional purposes, this Court has considered the "gravamen" of the complaint as a whole, and *all* the interests sought to be realized therein. *See Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 452 (1945) (holding that state was not merely nominal party where it sued for damages and injunctive relief in both its proprietary capacity and as *parens patriae* on behalf of individual shippers, and "the gravamen of [the suit] runs far beyond the claim of damage to individual shippers"); *cf. In re State of New York*, 256 U.S. 490, 500 (1921) (holding that whether a state is the real party in interest is to be determined "by the essential nature and effect of the proceeding, as it appears from the entire record").

Even where the state seeks a mix of proprietary relief and relief on behalf of private citizens, a state may sue as the *sole* plaintiff and real party in interest for purposes of jurisdiction. *See Kansas v. Colorado*, 533 U.S. 1, 8–9 (2001) (where state filed suit seeking to prevent continued harm to public and sought monetary relief, even calculated in part on injuries to individual citizens, Court held that state "unquestionably" demonstrated it is the real party in interest for purposes of jurisdiction). This is true even if private injury stands as the basis

for relief to the state alone. *Texas v. New Mexico*, 482 U.S. 124, 132 n.7 (1987) (holding that request for restitution to the state, even though based on calculation of harm to individual citizens, would benefit the state, creating a general public interest sufficient to establish that state was proper plaintiff).

Finally, this Court considers a state the real party in interest when it seeks monetary relief on behalf of consumers where a sufficiently significant segment of its population has been harmed. *Snapp*, 458 U.S. at 607; *see also Maryland v. Louisiana*, 451 U.S. 725, 737 (1981) (state may act as real party in interest as representative of its citizens where injury alleged affects general population of state in substantial way). The named plaintiff is the real party in interest where it (rather than individual beneficiaries) controls the litigation.[16]

The Fifth Circuit's judgment conflicts with these decisions. In none of these cases has this Court looked to the citizenship of private parties for jurisdictional purposes, nor has it required that they be joined to the litigation. As long as the named party seeks relief that benefits the named plaintiff in such circumstances, "the fact that others are interested who are not necessary parties, and are not made parties," will not give cause to question the

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[16] *See Kansas*, 533 U.S. at 8-9 (Kansas not mere nominal party where it sued in *parens patriae* and had right to control litigation while injured individual citizens did not); *Knapp v. R.R. Co.*, 87 U.S. 117, 123 (1873) (trustees who sued for benefit of others and not themselves were real parties in interest where claim accrued to them, they controlled the litigation and were responsible for conducting it, and where beneficiaries could not prevent institution or prosecution of actions or exercise any control over them).

plaintiff's real interest. *Little v. Giles*, 118 U.S. 596, 603 (1886). The only cases holding that a named state plaintiff is not the real party in interest for purposes of federal jurisdiction are those where *none* of the relief benefited the state and *all* of the relief benefited a limited number of other parties.[17]

The Fifth Circuit acknowledged this is not a case where *none* of the relief benefits the state and *all* of the relief benefits a limited number of other parties. Pet. App. 5a (noting that Mississippi's lawsuit included allegations that "the injury is 'generalized harm' to the State as a whole," as well as harm to numerous individual Mississippi consumers). Yet the Fifth Circuit held that the State was "*not* the sole party in interest" and that individual citizens who purchased LCD products within Mississippi were also real parties in interest. *Id.* (emphasis in original). But this "sole party in interest" standard is contrary to this Court's instruction that federal courts look to the "gravamen" of the complaint as a whole. *See Georgia*, 324 U.S. at 452.

As demonstrated above, the Attorney General has been charged by statute and is permitted by

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[17] *See Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 395 (1938) (holding that "the State must show a direct interest of its own and *not merely* seek recovery for the benefit of individuals who are the real parties in interest" (emphasis added)); *Oklahoma v. Atchison, Topeka & Santa Fe Ry. Co.*, 220 U.S. 277, 289 (1911) (state held to be nominal party for purposes of federal jurisdiction where it did not seek to protect its own property or any other interest, but sought "*only* to vindicate the wrongs of *some* of its people" (emphasis added)); *Mo., Kan. & Tex. Ry. Co. v. Hickman*, 183 U.S. 53, 59 (1901) (unnamed party is real party in interest "when the relief sought is that which inures *to it alone*" (emphasis added)).

common law to seek restitution to the State, civil penalties, and injunctive relief for antitrust violations and deceptive pricing, in the name of the State as *parens patriae*. There is nothing "unacceptable" about invoking that power. Therefore, under this Court's precedent, Mississippi is entitled to sue as the sole plaintiff without being removed to federal court. Mississippi seeks injunctive relief for the whole State, civil penalties to be paid to the State, and restitution calculated based on far-reaching consumer and proprietary injuries to the State. Further, Mississippi prosecutes this lawsuit in its own name, and controls the litigation apart from any individual citizens.

The Fifth Circuit's judgment has improperly expanded federal jurisdiction.

C. Strict construction of removal statutes

1. Removal statutes generally

This Court has long held that statutory procedures for removal must be strictly construed. Where there is any doubt about the reach of a removal statute, this Court has firmly established that any doubts must be resolved against removal. A presumption against removal comports with the broader principle that "[f]ederal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Federal subject-matter jurisdiction "is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.* (citations omitted). "The dominant note" in the approach to diversity

jurisdiction" is "jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state courts' in order to keep them free for their distinctive federal business." *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76 (1941) (citation omitted).

This Court has explained that "the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of [removal legislation]. . . . 'Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.'" *Shamrock Oil & Gas Co. v. Sheets*, 313 U.S. 100, 108–09 (1941) (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)); *see also Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 832 (2002). Hence, "statutory procedures for removal are to be strictly construed." *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002) (citing *Shamrock Oil* and *Healy*); *see also Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212 (1971) ("[W]e should proceed with caution in construing constitutional and statutory provisions dealing with the jurisdiction of the federal courts.").

2. Removal under CAFA

The strict construction rule has not been altered by CAFA. In *Hertz Corp. v. Friend*, this Court confirmed that, in the CAFA context, the "burden of persuasion for establishing diversity jurisdiction, of course, remains on the party asserting it." 130 S. Ct. 1181, 1194 (2010) (citing *Kokkonen*, 511 U.S. at 377; *McNutt v. Gen. Motors*

Acceptance Corp. of Ind., Inc., 298 U.S. 178, 189 (1936)). Therefore, for a *parens patriae* action to be removable under CAFA, Defendants must show that the statute being strictly construed authorizes such removal.

Nothing in the language of CAFA either contemplates or authorizes removal of a *parens patriae* action when the state is the sole plaintiff, the claims arise under state law, and the state attorney general has statutory and common-law authority to assert the claims. To establish diversity jurisdiction under CAFA's "mass action" provision, Defendants were required to demonstrate that the State's complaint constituted

> [a] civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the *plaintiffs'* claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under [28 U.S.C. § 1332(a)].

28 U.S.C. § 1332(d)(11)(B)(i) (emphasis added).

Congress's use of the word "plaintiffs" demonstrates that a mass action refers to an action where individually injured persons lend their names, as *parties*, to a complaint. CAFA provides that "jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a)," i.e., greater than $75,000 for each individual person. This language is additional confirmation that the group of "100" must comprise actual, named "plaintiffs."

The Fifth Circuit's interpretation would improperly conflate two separate inquiries: (1) whether the case is a mass action, and (2) whether the State is a nominal or real party in interest. The CAFA requirement that a case satisfy the "mass action" definition under § 1332(d)(11)(B)(i) is distinct from whether the State is merely a nominal party or a real party in interest for purposes of establishing diversity under § 1332(d)(2).

The Fifth Circuit's interpretation would also nullify the general public exception provided under CAFA. Strict rules of statutory construction advise that statutes should be construed so as to avoid rendering any statutory language superfluous. The general public exception provides that a suit is not a mass action if "all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class)." *Id.* § 1332(d)(11)(B) (ii)(III). As the concurrence below noted, application of *Caldwell* renders this exception a nullity in the Fifth Circuit. Pet. App. at 20a.

III. The Removal Question at the Center of This Circuit Conflict Is an Important and Recurring Issue.

A. Federalism implications

Review of the Fifth Circuit's judgment is necessary to preserve deeply-rooted principles of federalism. Under our federal system, "[s]tates possess sovereignty concurrent with that of the Federal Government." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). This system of dual sovereignty requires that states be treated in a manner that is consistent with their status as sovereigns and that

preserves the dignity to which they are entitled. *See Alden v. Maine*, 527 U.S. 706, 715, 748 (1999); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997) (recognizing "the dignity and respect afforded a State"); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (emphasizing the need to "accord[] the States the respect owed them as members of the federation").

Accordingly, this Court's precedent establishes that non-consenting states are entitled to sovereign immunity from being haled into any court. *See Alden*, 527 U.S. at 718; *see also Hans v. Louisiana*, 134 U.S. 1, 12 (1890). Such sovereign immunity is far reaching, and extends to protect states that bring suit in their own state courts. *See Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 21 n.22 (1983). Considerations of comity should make federal courts "reluctant to snatch" those cases "unless some clear rule demands it." *Id.* No rule requires such an extraordinary result in this case.

State courts have "inherent authority, and are thus presumptively competent, to adjudicate claims arising *under the laws of the United States*." *Tafflin*, 493 U.S. at 458 (emphasis added). Federal courts should be most reluctant to compel removal of a state's case that involves matters of state law. Here, the claims arise under *state law*, where the particular expertise of state courts is at its height, and where federal courts are constrained by the doctrine of *Erie R. Co. v. Tompkins*. *See* 304 U.S. 64, 78 (1938). Indeed, it is "particularly desirable" for a federal court to decline to exercise jurisdiction "when the result is to permit a State court to have an opportunity to determine questions of State law." *Burford v. Sun Oil Co.*, 319 U.S. 315, 333 n.29

(1943). State law matters are best left to state courts because they "presumably have greater expertise" over state law. *Tafflin*, 493 U.S. at 465. "To hold otherwise would . . . denigrate the respect accorded coequal sovereigns." *Id.* at 466.

Federalism also favors leaving matters of state policy to state courts in order to avoid interfering with the policy concerns of the state. For example, this Court has explained that federal courts must abstain from deciding cases that present a particularly important question of state policy due to the need to maintain "harmonious federal-state relations in a matter close to the political interests of a State." *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 29 (1959). This principle applies equally to CAFA. The Senate Committee Report recognized that CAFA "promotes the concept of federalism and protects the ability of states to determine their own laws and policies for their citizens." S. Rep. No. 109-14, at 57 (2005).

Here, the Attorney General filed this action in Mississippi state court, on behalf of the State, to enforce state antitrust and consumer protection laws applicable only in Mississippi. State law governs whether the Attorney General has the ability to seek the relief requested in the State's complaint. Moreover, as a matter of policy, the Mississippi legislature chose to provide the Attorney General with the power to seek that relief. Federalism favors leaving these matters to the court best equipped for interpreting Mississippi law: Mississippi state court. Nothing in CAFA provides a "clear rule" directing removal or subordinating the State's sovereign dignity.

B. Recurring jurisdictional battles and administrative complexity

The circuit conflict created by *Caldwell*'s claim-by-claim approach virtually assures extended jurisdictional battles in every *parens patriae* case filed in every circuit that has not yet addressed the issue. Defendants facing *parens patriae* actions in these circuits are consistently arguing that *Caldwell* stands for the proposition that a *parens patriae* lawsuit is removable. *See In re Oxycontin Antitrust Litig.*, 821 F. Supp. 2d 591, 602 (S.D.N.Y. 2011), *appeal denied sub nom. Purdue Pharma L.P. v. Kentucky*, 2013 WL 85918, at *7 (2d Cir. Jan. 9, 2013) (rejecting defendant's invitation to adopt the *Caldwell* approach to the class action provision); *Colorado Civil Rights Comm'n v. Wells Fargo Bank & Co.*, 2011 WL 2610205, at *3–5 (D. Colo. July 1, 2011) (rejecting defendant's invitation to adopt the claim-by-claim approach in determining the real party in interest); *Connecticut v. Moody's Corp.*, 2011 WL 63905, at *2–3 (D. Conn. Jan. 5, 2011) (rejecting defendant's invitation to adopt *Caldwell*'s real party in interest analysis); *West Virginia ex rel. McGraw v. Comcast Corp.*, 705 F. Supp. 2d 441, 447 (E.D. Pa. 2010) (applying the *Caldwell* approach); *Missouri ex rel. Koster v. Portfolio Recovery Assocs., Inc.*, 686 F. Supp. 2d 942, 944 (E.D. Mo. 2010) (rejecting defendants' invitation to adopt the *Caldwell* approach).

Further, the claim-by-claim approach raises more questions than it answers. The *Caldwell* decision itself foreshadowed the complexity which results from applying its test. In *Caldwell*, the court ordered that unnamed consumers be added as plaintiffs, leaving how to accomplish this feat of joinder to the "well-able hands" of the district court.

Louisiana ex rel. Caldwell v. Allstate Ins. Co., 536 F.3d 418, 430 (5th Cir. 2008). The dissent noted that the majority was essentially ordering the case to be "deformed." *Id.* at 432 (Southwick, J., dissenting).

Indeed, the only two district court judges in the Fifth Circuit to apply *Caldwell*, including the district court below, have highlighted the administrative, jurisdictional, and logistical complexities the decision creates. These district court judges' explicit acknowledgement of the hurdles imposed by the Fifth Circuit approach is further proof that CAFA jurisdiction was not intended to be expanded to sweep *parens patriae* actions into federal court under the rubric that they are mass actions.[18]

In *Entergy*, the district court, noting that it was "duty-bound" to follow *Caldwell*, ruled that a *parens patriae* action brought by the state was a mass action under CAFA. *Mississippi ex rel. Hood v. Entergy Mississippi, Inc.*, No. 3:08cv780, 2012 WL 3704935, at *16 n.6 (S.D. Miss. Aug. 25, 2012). The court enumerated some of the difficulties this

[18] Application of the *Caldwell* claim-by-claim test will without question result in the vast majority of *parens patriae* cases brought in the Fifth Circuit being removed to federal court. The test itself essentially dictates this outcome, as it is unlikely that a quasi-sovereign interest could be based on injury to fewer than 100 citizens. Almost all *parens patriae* lawsuits include at least one claim that seeks some kind of restitution on behalf of the state's consumers. *See* Alexander Lemann, *Sheep in Wolves' Clothing: Removing Parens Patriae Suits Under the Class Action Fairness Act*, 111 Colum. L. Rev. 121, 140 (2011). Hence, lawsuits that had previously been considered quintessentially state court matters will all be transformed into federal cases. There is no evidence in the language of CAFA demonstrating that it was intended to trample on States' sovereign dignity in this way.

entailed: "[a] key challenge in applying the *Caldwell* rationale to *parens patriae* lawsuits" is that it requires the district court to "not only rewrite the plaintiff's complaint but to force the plaintiff to recruit or name parties not initially in the lawsuit." *Id.* (citing *Caldwell*, 536 F.3d at 433 (Southwick, J., dissenting)). The court also noted that the claim-by-claim analysis leads to "awkward litigation gymnastics" when applied to *parens patriae* actions brought by individual attorneys general and removed under CAFA. *Id.*

These "awkward litigation gymnastics" were presaged by the district court below. Although finding this case was a mass action under *Caldwell*, the district court nonetheless remanded this case pursuant to CAFA's general public exception. Pet. App. at 52a. In a section entitled "The Future of this Case," the district court set forth its understanding of what the law would require if the Fifth Circuit were to reverse its remand order. *Id.* at 52a–56a.

First, the district court anticipated that if the case remained in federal court as a mass action, the injunctive relief, civil penalty claims, and restitution claims for individuals with losses less than or equal to $75,000 would be severed. This severance would be in accordance with CAFA's mandate that federal jurisdiction only extends to those plaintiffs in a CAFA mass action whose claims satisfy the $75,000 jurisdictional amount. *Id.* at 52a–53a. The district court certified that guidance from the Fifth Circuit on this issue would help the case proceed if the case remained in federal court.

The district court also sought guidance on whether or not the part of the case that remained in federal court could be transferred to the pending

MDL. *See id.* 55a-56a. CAFA bars transfer of a mass action to another court unless the majority of the plaintiffs consent. 28 U.S.C. § 1332(d)(11)(C)(i). But there is no mechanism through which a majority of Mississippi consumers, who would be deemed to be the real parties in interest—although not plaintiffs—could consent to transfer. Neither the majority opinion nor the concurrence provided guidance on these issues.

The Fifth Circuit's mandate that, in every *parens patriae* lawsuit, the pleadings must be pierced and the complaint dissected claim-by-claim to deduce the true nature of the proceedings, to see if the attorney general is acting, in effect, as a class representative, is at odds with this Court's admonition that "administrative simplicity is a major virtue in a jurisdictional statute." *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1193 (2010) (citing *Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in judgment)). According to this Court:

> Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims. Complex tests produce appeals and reversals, encourage gamesmanship, and again, diminish the likelihood that results and settlements will reflect a claim's legal and factual merits.

Id. (citation omitted).

Under the Fifth Circuit's claim-by-claim test, enormous time, expense, and judicial resources will be expended determining whether, despite the presence of only one plaintiff, persons other than the State may benefit from the State's lawsuit and

therefore must be found and added as plaintiffs, thereby completely reforming the nature of the lawsuit.

This Court has instructed that jurisdictional statutes must be interpreted to promote administrative simplicity. The Fifth Circuit's approach burdens the federal judiciary and runs afoul of that goal.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted.

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APPENDIX

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APPENDIX A

United States Court of Appeals,

Fifth Circuit.

State of MISSISSIPPI, ex rel. Jim HOOD, Attorney General, Plaintiff - Appellee,

v.

AU OPTRONICS CORPORATION; AU Optronics Corporation America, Incorporated; Chi Mei Corporation; Chimei Innolux Corporation, formerly known as Chi Mei Optoelectronics Corporation; Chi Mei Optoelectronics USA, Incorporated, formerly known as International Display Technology USA, Incorporated; CMO Japan Company, Limited, formerly known as International Display Technology, Limited; Hannstar Display Corporation; Hitachi, Limited; Japan Display East, Incorporated; Hitachi Electronic Devices (USA); LG Display Company, Limited, formerly known as LG Phillips LCD Company, Limited; LG Display America, Incorporated, formerly known as LGD LCD America, Incorporated; Samsung Electronics Company LTD; Samsung Semiconductor, Incorporated; Samsung Electronics America, Incorporated; Sharp Corporation; Sharp Electronics Corporation; Toshiba Corporation; Toshiba Mobile Display Company, Limited, formerly known as Toshiba Matsushita Display Technology Company, Limited; Toshiba America Electronic Components, Incorporated; Toshiba America Information Systems, Incorporated, Defendants - Appellants.

No. 12-60704.

Nov. 21, 2012.

Before JOLLY, CLEMENT and ELROD, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Appellants, manufacturers and distributors of liquid crystal display ("LCD") panels, jointly removed this case to federal district court on the grounds that (1) the action was a "class action" under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d)(1)(B), or (2) the action was a "mass action" under the CAFA, § 1332(d)(11)(B). The State of Mississippi, Appellee, then moved to remand the case to state court, and the district court granted the motion. Because we find that the suit qualifies as a mass action under the CAFA, we find removal to be proper. Accordingly, we REVERSE the district court's remand order and REMAND for further proceedings.

I.

Ordinarily, a district court's remand order is not appealable, *see* 28 U.S.C. § 1447(d); however, there is a statutory exception to this rule that grants federal appellate courts discretionary jurisdiction to review remand orders in actions that are removed under the CAFA. *See* 28 U.S.C. § 1453(c). We review *de novo* a district court's order remanding an action that was removed pursuant to the CAFA. *Admiral Ins. Co. v. Abshire*, 574 F.3d 267, 272 (5th Cir. 2009).

II.

Under the CAFA, removal of a suit to federal court is proper if the suit qualifies as a "class action" or a "mass action." *See* 28 U.S.C. § 1453(b); 28 U.S.C. § 1332(d)(11)(A). Our analysis begins by considering whether Mississippi's suit against the LCD manufacturers qualifies as a "class action," a question that can be answered quickly in the negative. Under the

relevant provision, a class action is defined as "any civil action filed under Rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B). Because Mississippi did not bring this suit under Rule 23 or a rule of judicial procedure and because Mississippi state law explicitly prohibits class actions, *see Am. Bankers Ins. Co. of Fla. v. Booth*, 830 So. 2d 1205, 1214 (Miss. 2002) ("[T]he rule is that Mississippi does not permit class actions, even equitable class actions in chancery court."), the only question is whether the suit is brought under a state statute "similar" to Rule 23. This suit was brought under the Mississippi Consumer Protection Act ("MCPA"), Miss. Code Ann. § 75-24-1 *et seq.*, and the Mississippi Antitrust Act ("MAA"), Miss. Code Ann. § 75-21-1 *et seq*. The MCPA explicitly forbids class actions, *see* Miss. Code Ann. § 75-24-15(4), and the MAA does not require that suits brought by the State satisfy any requirements that resemble the adequacy, numerosity, commonality, and typicality requirements of class action lawsuits under Rule 23, *see* Miss. Code Ann. § 75-21-7. It is thus clear that neither the MCPA nor the MAA, the statutes under which Mississippi brings the present suit, are "similar" to Rule 23. Accordingly, we hold that the district court did not err in finding that the suit does not qualify as a "class action" under the CAFA.

III.

This conclusion brings us to the more difficult question: whether this suit qualifies as a "mass action" under the CAFA. Under the terms of the statute, a mass action is defined as a civil action in which (1) monetary relief claims of (2) 100 or more persons

(3) are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact and (4) include an amount in controversy exceeding $75,000. 28 U.S.C. § 1332(d)(11)(B)(i). It is undisputed that the present suit involves "monetary relief" claims, *see* Compl. 54, ¶¶ 2, 3, and that the relief sought satisfies the amount in controversy requirement. Therefore, the decisive question is whether the suit involves the claims of "100 or more persons." If so, the suit is a mass action, and removal is proper.

In *Louisiana ex rel. Caldwell v. Allstate Insurance Company*, we first considered the application of the mass action provision to a suit filed by a state attorney general on behalf of a subset of injured citizens. 536 F.3d 418, 429–30 (5th Cir. 2008). *Caldwell* instructs us to pierce the pleadings and look at the real nature of a state's claims so as to prevent jurisdictional gamesmanship. *See id.* at 424–25, 429 ("It is well-established that in determining whether there is jurisdiction, federal courts look to the substance of the action and not only at the labels that the parties may attach . . . . This court has recognized that defendants may pierce the pleadings to show that the claim has been fraudulently pleaded to prevent removal." (citations and inset quotation marks omitted)). The *Caldwell* claim-by-claim approach contrasts with other circuits that look to a state's complaint "as a whole" and then subjectively determine if the state alone is the real party in interest. *See, e.g.*, *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 670 (9th Cir. 2012); *LG Display Co., Ltd. v. Madigan*, 665 F.3d 768, 774 (7th Cir. 2011). *Caldwell,* binding precedent on this court, effectively defined "persons" in the mass action context to be the real parties in interest

as to the respective claims. *See Caldwell*, 536 F.3d at 424–25, 429. We follow its approach.

The real parties in interest in Mississippi's suit are those more than 100 persons who, "by substantive law, possess[ ] the right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery." *Richards v. Reed*, 611 F.2d 545, 546 n.2 (5th Cir. 1980) (inset quotations omitted); Charles Alan Wright & Mary Kay Lane, LAW OF FEDERAL COURTS 492 (6th ed. 2002). We find that the real parties in interest are numerous – far in excess of 100. Contrary to the State's assertions, Mississippi is thus *not* the sole party in interest. Instead, the State (as a purchaser of LCD products) *and* individual citizens who purchased the products within Mississippi possess "rights sought to be enforced." We have several bases for this conclusion.

First, the complaint: When the State sued the LCD manufacturers, its claim was that the manufacturers had engaged in a conspiracy to fix prices for LCD panels and that their conduct artificially inflated prices, which harmed the consumers who were forced to pay higher prices. In its complaint, the State includes a series of diverse statements about the nature of the injury involved. At times, it seems to be arguing the injury is "generalized harm" to the State as a whole. *See* Compl. 2, ¶ 1 ("[T]he State of Mississippi has a quasi-sovereign interest in the direct and indirect effect of defendants' illegal conspiracy on the state's economy and the citizens' economic condition."); Compl. 51, ¶ 194(g) ("The economy of the state of Mississippi has been damaged."). At other times, the Complaint indicates the injury it seeks to remedy with money damages is the injury suffered by the purchaser consumer. *See* Compl. 38, ¶ 145 ("Defendants' conspiracy to raise . . . the price of LCD

panels at artificial levels resulted in harm to Plaintiff *and other indirect-purchaser consumers in Mississippi* . . .") (emphasis added); Compl. 44, ¶ 169 ("[D]efen- dants have passed through . . . to *their customers* 100% of the supra-competitive price increases that resulted from the defendants' conspiracy . . . ") (emphasis added); Compl. 51, ¶ 194(f) ("Plaintiff *and other Mississippi indirect purchasers* have paid supra-competitive, artificially inflated prices for LCD products.") (emphasis added); Compl. 54, ¶ 3 (Plaintiff is bringing this action "*on behalf of Mississippi residents* . . .") (emphasis added). We think the variety of allegations demonstrate that the real parties in interest include not only the State, but also individual consumers residing in Mississippi.

Second, the state statutes: Neither the MCPA nor the MAA, the statutory bases of the State's suit, give the State sole authority to recover for particularized injuries suffered by consumers. The MCPA gives the State authority to seek injunctive relief and civil penalties, *see* Miss. Code Ann. §§ 75-24-9; 75-24-19(1)(b), and may indeed be interpreted as giving the State authority to seek restitution for its own injury, *see* Miss. Code Ann. § 75-24-11. However, no provision of the MCPA gives the State authority to enforce claims for injuries *suffered by others.* In other words, the statute does not authorize public collection of private damages. Similarly, the MAA allows the State to sue for injunctive relief and civil penalties, *see* Miss. Code Ann. §§ 75-21-1; 75-21-7, but not for restitution for injuries suffered by parties other than the State, *see* §§ 75-21-9; 75-21-37. To be sure, there is one unpublished Mississippi state case (from a chancery trial court) that lends support, under § 75-24-11, for the proposition that a court may "restore" damages to an individual for a particularized

injury, and also to the state on the basis of some generalized harm. *See Miss. ex rel. Hood v. BASF Corp.*, No. 56863, 2006 WL 308378 (Miss. Ch. Jan. 17, 2006). But even if *BASF Corporation* were a more authoritative precedent, it cannot be denied that the case before us is distinguishable; the crucial question before us was not dealt with by the *BASF Corporation* court – namely, who are the real parties in interest? Our case involves generalized and individual harms, which demonstrate the real parties in interest are both the State and consumers. In short, *BASF Corporation* does not provide the State with the power it seeks to assert "ownership" over all individualized claims in the name of the State.

Third and finally, common law *parens patriae* authority: Even assuming *arguendo* that the State has *parens patriae* standing to bring the claims here (an issue that we do not decide), that standing does not change the fact that Mississippi is acting, not in its *parens patriae* capacity, but essentially as a class representative. Although the relevant statutory provision does not appear on the face of the complaint, we note that Mississippi law gives the state attorney general "powers at common law." Miss. Code Ann. § 7-5-1. The State argues that *parens patriae* authority under common law allows the attorney general to bring the current suit, which, as we have seen, involves alleged state injury based on harm suffered by individual claimants. This argument fails to account for the precise nature of the injury in this case and thus also fails to establish the State as the sole party in interest. As a general background principle, *Caldwell* reminds us that there are limitations on states' *parens patriae* authority. 536 F.3d at 425–28 ("[I]t is clear that . . . there are some limitations [on *parens patriae* actions], particularly when a state is

seeking to recover damages for alleged injuries to its economy."). The Supreme Court, for example, has stated that when a state pursues the interests of a private party, the state is not asserting its sovereign interest, and the state remains only a nominal party. *Snapp v. Puerto Rico,* 458 U.S. 592, 602 (1982). That directive may apply here, where Mississippi is pursuing the interests of LCD purchasers. And even ignoring the Supreme Court and *Caldwell*'s caveats regarding the over-extension of *parens patriae* to suits to which that concept should not attach, two additional considerations demonstrate that the State is not the sole party in interest.

Mississippi law clearly prohibits double recovery for the same harm to respective class members. *See City of Jackson v. Estate of Stewart ex rel. Womack,* 908 So. 2d 703, 711 (Miss. 2005). Thus, the state cannot recover for the injury to the consumers and still preserve the right of the consumers to recover, a right that the consumers clearly have under the statutes pursuant to which the suit is brought. *See* Miss. Code Ann. §§ 75-24-15; 75-21-9. In short, we have been directed to no statutory or common law that permits the State to extinguish the right and remedy the consumer has for his injury. There is, finally, the all too troubling suggestion by the plaintiff that Mississippi could obtain restoration for harm to individual citizens, yet keep that money for itself. We think that consideration, coupled with the reasons provided above, is enough to find against the State having *carte blanche* to recover for others' injuries under common law *parens patriae* authority.

After analyzing the complaint, the relevant statutes, and the *parens patriae* authority of the State, we hold that the real parties in interest in this suit include both the State and individual consumers of

LCD products. Because it is undisputed that there are more than 100 consumers, we find that there are more than 100 claims at issue in this case. The suit therefore meets the CAFA definition of a "mass action." *See* 28 U.S.C. § 1332(d)(11)(B)(i).

IV.

This conclusion alone, however, does not yield a final result. The CAFA contains a number of disqualifying exceptions to the term "mass action." Of these, the "general public" exception is relevant here. It provides that a suit is not a mass action if "all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action." 28 U.S.C. § 1332(d)(11)(B)(ii)(III). But this public exception does not exempt this case from the CAFA and federal jurisdiction. The requirement that "all of the claims" be asserted on behalf of the public is not met here. As discussed above, individual consumers, in addition to the State, are real parties in interest, so there is no way that "all of the claims" are "asserted on behalf of the general public." *Accord Mississippi ex rel. Hood v. Entergy Mississippi, Inc.*, No. 3:08cv780, 2012 WL 3704935, at *15 (S.D. Miss. Aug. 25, 2012) (A "finding that the State has brought [an] action in its representative capacity to recoup restitution for individual[s] . . . precludes application of the general public exception.").

We do, however, acknowledge the concern that finding the general public exception inapplicable here may render such statutory exception a dead letter (because finding a suit to be a mass action negates the possibility of the exception applying), and we

welcome congressional clarification of this issue.[1] Nevertheless, the argument that our finding vitiates the application of the exception must yield to our responsibility to apply the unambiguous, express language of a statute as written. *Davis v. Johnson*, 158 F.3d 806, 810 (5th Cir. 1998). Here, doing precisely that (i.e., finding a suit to be a mass action because "monetary relief claims of 100 or more persons" are at issue) precludes us from finding that the general public exception applies.

V.

At its core, this case practically can be characterized as a kind of class action in which the State of Mississippi is the class representative. By proceeding the way it has, the plaintiff class and its attorneys seek to avoid the rigors associated with class actions (and avoid removal to federal court). *See generally, Waltzing through a Loophole: How Parens Patriae*

[1] The general public exception here, in the development of the law, has become somewhat problematical in the sense it reflects statutory surplusage when the State brings consumer-related actions such as the one before us today. *See* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (1st ed. 2012) (discussing the "surplusage canon" of construction, which provides that "[i]f possible, every word and every provision is to be given effect . . . . None should be ignored. None should be given an interpretation that causes it . . . to have no consequence" (emphasis added)). If a court such as ours decides that the case must be considered on a "claim-by-claim" basis and is, therefore, a mass action, it has necessarily decided that not *all* of the claims are claims of the State and the public exception has no relevance. On the other hand, if, as other circuits have held, these cases' complaints should be evaluated "as a whole," and not on a "claim-by-claim" basis, such a decision means that the case is not a mass action because the State is the sole party in interest. Consequently, the public exception has no application. Thus, under either scenario, the public exception becomes statutory surplusage.

Suits Allow Circumvention of the Class Action Fairness Act, 83 U. COLO. L. REV. 549 (2012). Because this suit is a mass action under the terms of the CAFA, removal is proper.[2]

The judgment of the district court is therefore REVERSED, and the case is REMANDED for further proceedings.

REVERSED and REMANDED.

[2] Nothing we have said denies the State of Mississippi the right to proceed with this case. It will simply proceed in federal, not state, court.

JENNIFER WALKER ELROD, Circuit Judge, concurring in the judgment:

I concur in the judgment because the majority opinion is a fair application of our binding precedent, namely *Louisiana ex rel. Caldwell v. Allstate Insurance Co.*, 536 F.3d 418 (5th Cir. 2008). I write separately, however, to express my concerns with *Caldwell*. *Caldwell*'s claim-by-claim approach is problematic when applied to CAFA's "mass action" provision in *parens patriae* suits such as the instant case.[1] Moreover, and just as troubling, applying *Caldwell*'s reasoning to CAFA's general public exception may render the exception a dead letter in this circuit. We should reconsider *Caldwell* and correct our course in this area of the law.

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[1] I disagree with the majority opinion's veiled assertion that this may not be a *parens patriae* suit because "Mississippi is pursuing the interests of LCD purchasers." In its complaint, Mississippi identified a valid quasi-sovereign interest in preventing illegal antitrust conduct prohibited under MAA and MCPA. The facts in Mississippi's complaint also show that it sought restitution based, at least in part, on generalized harm to the Mississippi economy caused by Appellants' price-fixing scheme. The LCD consumers may be real parties in interest under *Caldwell*'s approach but that does not eviscerate Mississippi's asserted quasi-sovereign interest in the restitution claim. Moreover, the caveats to *parens patriae* authority that the majority opinion references apply only when the state is a nominal party in interest. The majority opinion never states that Mississippi is merely a nominal party in interest; to the contrary, it recognizes that "the real parties in interest in this suit include both the State and individual consumers of LCD products." Furthermore, unlike in *Caldwell,* where the damages were to go to specific policyholders, Mississippi asserted both in its complaint and at oral argument that it would retain any restitution damages.

We have jurisdiction over this case only if it is a "class action" or a "mass action" under CAFA. For the reasons stated in the majority opinion, this is not a "class action." The central issue, then, is whether Mississippi's lawsuit is a "mass action." CAFA defines that term as:

> [A]ny civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdiction amount requirement under [28 U.S.C. § 1332(a)].

28 U.S.C. § 1332(d)(11)(B)(i). In *Caldwell,* we considered the application of this provision to a *parens patriae* suit.

As the majority opinion explains, *Caldwell* essentially defined "persons" in the mass action context as the real parties in interest with respect to each claim in the suit. *See* 536 F.3d at 424, 429. In that case, Louisiana sued several insurance companies for conspiring to suppress competition and sought, among other things, treble damages on behalf of its citizens. *Id.* at 422–23. The defendants removed the case to federal court, "argu[ing] that although labeled *parens patriae*, th[e] case [was] in substance and fact a . . . 'mass action'" under CAFA. *Id.* at 423. We evaluated Louisiana's suit on a claim-by-claim basis, rather than as a whole. *Id.* at 429–30. Using this approach, we concluded that Louisiana consumers were the real parties in interest with respect to the treble damages claim; therefore, the suit involved the monetary claims of 100 or more persons and (because

it also met the other statutory requirements) was a mass action. *Id.*

Here, as the majority opinion shows, applying the claim-by-claim approach leads to the conclusion that Mississippi consumers are the real parties in interest with respect to the state's restitution claim, so this is a "mass action" under CAFA.[2] This result is the exact opposite of the outcome in many other similar law-

[2] The majority opinion reaches this result using the claim-by-claim approach from *Caldwell,* but there are notable differences between Louisiana's claims in *Caldwell* and Mississippi's claims here. In *Caldwell,* Louisiana sued under the Louisiana Monopolies Act, which provided that "*any person* who is injured in his business or property" under the Monopolies Act "shall recover[ ] [treble] damages." 536 F.3d at 429 (emphasis added) (quoting La. Rev. Stat. § 51:137). Because the Louisiana statute contemplated individual enforcement, the court reasoned that "the policyholders, and not the State, [were] the real parties in interest." *Id.* (citation omitted); *see also id.* at 430 (concluding that there was "no reason to believe" that the policyholders were not the real parties in interest "given that the purpose of antitrust treble damages provisions [is] to encourage private lawsuits by aggrieved individuals for injuries to their businesses or property") (citing *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972)). Here, Mississippi sued under MAA and MCPA, which specifically authorize the Attorney General to sue on behalf of the general public for violations of the respective statutes. *See* Miss. Code Ann. § 75-21-37 (providing direct statutory authority for Mississippi "to enforce civil features of the antitrust laws . . . at law or in equity"); *id.* § 75-24-19(1)(b) (giving the attorney general direct statutory authority "[to] recover on behalf of a state a civil penalty in a sum not to exceed [$10,000] per violation"). In addition, the Mississippi Attorney General has "the powers of the Attorney General at common law." *Id.* § 7-5-1. Those powers include "the right to institute, conduct and maintain all suits necessary for the enforcement of the laws of the State, preservation of order and the protection of public rights." *Gandy v. Reserve Life Ins. Co.*, 279 So.2d 648, 649 (Miss. 1973) (citations omitted). Simply put, this case turns on different facts and law than did *Caldwell.*

suits around the country.[3] That so many other courts are reaching a different result in cases that involve similarly-situated litigants and nearly identical claims suggests that we should consider whether we have staked out the correct position. I believe we have not.

I.

As an initial matter, I agree with Judge Southwick's dissenting opinion in *Caldwell*. Judge Southwick would have ordered remand of Louisiana's suit to state court because its complaint did not "on its face" present a class or mass action. *Caldwell*, 536

[3] Several other states' attorneys general and private plaintiffs filed actions against the makers of LCD flat panels based on the same alleged conduct that forms the basis for this suit. *See, e.g.*, *LG Display Co., Ltd. v. Madigan*, 665 F.3d 768 (7th Cir. 2011); *Illinois v. AU Optronics Corp.*, 794 F. Supp. 2d 845 (N.D. Ill. 2011); *South Carolina v. AU Optronics Corp.*, No. 3:11-CV-731, 2011 WL 4344079 (D.S.C. Sept. 14, 2011). These cases essentially fall into two groups. Some were transferred to an MDL court in the Northern District of California. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-1827, 2011 WL 560593, at *1 (N.D. Cal. Feb. 15, 2011). Others, however, remained in the district courts to which they were removed—these cases were first filed in state court and involved states' attorneys general asserting only state law claims against the LCD defendants. *See, e.g.*, *South Carolina*, 2011 WL 4344079, at *2. The MDL court handling the first group of cases has examined states' interests in the actions "as a whole" when deciding real-party-in-interest questions. *See In re TFT-LCD*, 2011 WL 560593, at *3–4. The district courts dealing with the second set of cases have done the same, consistently remanding *parens patriae* suits back to state court. *See, e.g.*, *Illinois*, 794 F. Supp. 2d at 859; *South Carolina*, 2011 WL 4344079, at *2. *But see Mississippi ex rel. Hood v. Entergy Miss., Inc.*, No. 3:08-CV-780, 2012 WL 3704935, at *15 (S.D. Miss. Aug. 25, 2012) at *7 n.6 (following *Caldwell* because it believed it was "duty bound" to do so).

F.3d at 436 (Southwick, J., dissenting). In reaching that conclusion, Judge Southwick acknowledged two important principles: (1) "the plaintiff is the master of his complaint," and (2) "[d]oubts about propriety of removal are resolved in favor of remand." *Id.* at 433 (citations omitted). Consistent with these principles, "when we decide whether a suit is removable under CAFA, we should determine what the case is, not what it must be if all the relief requested is to be part of the litigation." *Id.* at 432–33. Of course, this view did not carry the day in *Caldwell*, but the development of case law outside this circuit since then suggests that we should take another look.

Consistent with Judge Southwick's dissent, almost every court that has independently considered *Caldwell*'s claim-by-claim approach has either questioned or disagreed with it.[4] Indeed, every court of appeals to address the issue since *Caldwell* has rejected its approach. *See AU Optronics Corp. v. South Carolina*, ___F.3d___, Nos. 11–254 & 11–255, 2012 WL 5265799, at *6 (4 th Cir. Oct. 25, 2012) (slip. op.) (adopting "the whole-case approach and rejecting the claim-by-claim approach"); *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 670 (9th Cir. 2012) (acknowledging the court's adoption of "the approach of looking at the case as a whole to determine the real party

[4] *See, e.g.*, cases cited *supra* n.2. Courts in other contexts (*i.e.*, non-LCD cases) have also disagreed with *Caldwell*'s approach. *See, e.g.*, *West Virginia ex rel. McGraw v. JPMorgan Chase & Co.*, 842 F. Supp. 2d 984, 997–98 (S.D. W. Va. 2012); *Connecticut v. Moody's Corp.*, No. 3:10-CV-546, 2011 WL 63905, at *2–3 (D. Conn. Jan. 5, 2011); *Missouri ex rel. Koster v. Portfolio Recovery Assocs., Inc.*, 686 F. Supp. 2d 942, 945–46 (E.D. Mo. 2010); *Illinois v. SDS W. Corp.*, 640 F. Supp. 2d 1047, 1052 (C.D. Ill. 2009). *But see West Virginia ex rel. McGraw v. Comcast Corp.*, 705 F. Supp. 2d 441, 449–50 (E.D. Penn. 2010) (concluding that *Caldwell*'s framework is consistent with CAFA's goals).

in interest, rather than the claim-by-claim approach adopted in *Caldwell*"); *Madigan*, 665 F.3d at 773–74 (referencing the courts that have questioned *Caldwell*'s analysis and holding that an action was not a removable "mass action" under CAFA, even if the state was not a real party in interest for damages claims). Each of these decisions includes convincing reasons to discard the claim-by-claim approach, a few of which I discuss here.

First, the claim-by-claim approach does not find a foothold in CAFA's text. The *Caldwell* court resorted to CAFA's legislative history to rationalize its approach. 536 F.3d at 424; *see Madigan*, 665 F.3d at 773 (reasoning that *Caldwell* "did not adopt the claim-by-claim approach based on any language in CAFA itself, nor is there any such language to be found"). Perhaps that is because CAFA's text does not suggest that, in a case in which a single plaintiff brings suit, a court should dissect the complaint to determine whether that plaintiff is the sole beneficiary of each basis for relief. This court has repeatedly cautioned against considering legislative history unless the text of a statute is ambiguous.[5] *See, e.g.*, *Carrieri v. Jobs.com Inc.,* 393 F.3d 508, 518–19 (5th Cir. 2004); *see also Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1980 (2011) ("Congress's 'authoritative statement is the statutory text, not the legislative history.'") (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (citations omitted)). There is no ambiguity here. Moreover, even assuming *arguendo* that the legislative

[5] I have previously expressed that I generally eschew the use of legislative history to determine a statute's intent. *See, e.g.*, *Villas at Parkside Partners v. City of Farmers Branch, Tex.*, 675 F.3d 802, 829 n.4 (5th Cir. 2012) *reh'g en banc granted*, 688 F.3d 801 (5th Cir. 2012).

development of CAFA were relevant, the *Caldwell* court acknowledged that CAFA's history reveals conflicting expressions of intent. *See* 536 F.3d at 424 n.4; *see also Harvey v. Blockbuster, Inc.*, 384 F. Supp. 2d 749, 752–54 (D.N.J. 2005) (discussing CAFA's legislative history and concluding that Congress did not intend to encroach on the ability of states' attorneys general to bring *parens patriae* actions).

Compounding the absence of textual support for the claim-by-claim approach is the Supreme Court's directive that removal statutes should be "strictly construed." *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002). This rule undermines the argument that a case is removable under CAFA even though it does not on its face satisfy the statute's requirements. *See Caldwell*, 536 F.3d at 433 (Southwick, J., dissenting). Furthermore, the rule should apply with particular force when the plaintiff is a state that sued in its own courts. Removing such a case to federal court implicates important principles of federalism, and "considerations of comity [should] make us reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 21 n.22 (1983); *see also West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 178 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 761, 181 (2011) ("While it is true that West Virginia voluntarily entered into its own courts to enforce its laws, it did not voluntarily consent to removal of its case to a federal court, and a federal court should be most reluctant to compel such removal, reserving its constitutional supremacy only for when removal serves an overriding federal interest.").

Finally, the impetus for *Caldwell*'s procedure to pierce the pleadings and look to the nature of each claim for relief—instead of considering the essential nature and effect of the proceedings—does not provide a compelling basis to persist with that approach. At the outset of its opinion, the *Caldwell* court recognized that "Louisiana did not raise any objections to [the district court's] decision to pierce the pleadings *or [its] procedure for doing so* . . . . As such, that issue [was] waived." *Caldwell*, 536 F.3d at 425 (emphasis added). Therefore, while the *Caldwell* court referenced the proposition that "federal courts look to the substance of the action" when determining jurisdiction, *id.* at 424 (citations omitted), the court did not consider different methods for evaluating the substance (*e.g.*, "as a whole," as other circuits have done). The procedure stemming from the waived argument in *Caldwell* does not withstand the persuasive force of the analysis in the subsequent decisions rejecting it.

II.

Beyond the problems of using the claim-by-claim approach for the mass action analysis, I am also concerned that its application to CAFA's general public exception will negate the exception altogether in this circuit.

CAFA tells us not only what a "mass action" *is,* but also what it is *not*. *See* 28 U.S.C. § 1332(d)(11)(B)(ii)(I)–(IV). Specifically, the general public exception provides:

> [T]he term "mass action" shall not include any civil action in which . . . all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or

members of a purported class) pursuant to a State statute specifically authorizing such action.

28 U.S.C. § 1332(d)(11)(B)(ii)(III). The majority opinion implicitly concludes that *Caldwell*'s approach also governs our analysis of this exception. If that is correct, then there is no question that the exception does not apply in this case because, as the majority opinion states, "there is no way that 'all of the claims' are 'asserted on behalf of the general public.'" This result is troublesome.

If we deny the applicability of the general public exception when individual consumers are parties in interest, then, as a practical matter, we will have eliminated the exception in this circuit. *Caldwell* specifies that a case is a mass action if more than 100 persons are the real parties in interest as to *any* claim for relief; and pursuant to CAFA's plain text, the general public exception cannot apply *unless* the case is a mass action. Under this framework, it is difficult to imagine a case that could be a mass action that also falls within the general public exception. *See, e.g.*, *Entergy Miss.*, 2012 WL 3704935, at *7 n.6, *15 (following *Caldwell* and concluding that the general public exception could not apply because "[e]ven if the State has a quasi-sovereign interest in protecting Mississippi consumers . . . the presence of the discrete group of [citizens] who have a substantive legal right to receive restitution . . . means that 'all of the claims in the action' are not asserted on behalf of the general public"). In essence, our precedent has created a situation in which a case cannot satisfy the criteria of both the mass action provision and the general public exception.[6]

[6] I note some commentary consistent with this concern. *See* Dwight R. Carswell, Comment, *CAFA and* Parens Patriae *Ac-*

The majority opinion states that this concern "must yield to our responsibility to apply the unambiguous, express language of a statute as written," but that misses the point. It is not CAFA's plain text that causes the problem, but rather our approach in applying the text. But for the claim-by-claim approach, we could give effect to both the mass action provision and the general public exception.[7] In CAFA, Congress defined a category of cases that are mass actions and explicitly specified that certain cases "shall not" be included in that category. Our approach in applying the statute has essentially eliminated the latter provision, contrary to well-established canons of construction that counsel against interpretations that render parts of a statute

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tions, 78 U. Chi. L. Rev. 345, 370 (2011) (recognizing that "[l]awsuits that seek only injunctive relief or money that will go to the state treasury rather than to state citizens are not mass actions as defined by CAFA. Thus, it does not make sense to argue that these are the only lawsuits that will fall within the mass action exception.").

[7] The majority opinion also suggests that the general public exception is statutory surplasage under any analysis. In making that assertion, the majority opinion conflates the definition of "persons" in the mass action provision with "claimants" and "members of a purported class" in the general public exception. *See Russell v. Law Enforcement Assistance Admin.*, 637 F.2d 354, 356 (5th Cir. 1981) (recognizing the "well settled rule of statutory construction that where different language is used in the same connection in different parts of a statute it is presumed that the Legislature intended a different meaning and effect," and holding that a "claimant" under one provision was not an "applicant or grantee" within the meaning of another provision (citation omitted)); *cf. Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1707–08 (2012) (holding that the term "individual" in the Torture Victim Protection Act meant "natural person," but reiterating that courts should "respect Congress' decision to use different terms to describe different categories of people or things" (citation omitted)).

meaningless. *See, e.g.*, *White v. Black*, 190 F.3d 366, 368 (5th Cir. 1999) (citation omitted) (explaining that we must "give words their ordinary meaning and . . . not render as meaningless the language of a statute"); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 174 (1st ed. 2012) (discussing the "surplusage canon" of construction, which provides that "[i]f possible, every word and every provision is to be given effect . . . . None should be ignored. *None should be given an interpretation that causes it . . . to have no consequence.*" (emphasis added)). Therefore, we should reconsider *Caldwell*'s approach to ensure that every facet of CAFA may be given effect in our circuit.

III.

I concur in the judgment because the majority opinion is a fair application of our precedent in this challenging context. For the reasons above, however, we should reconsider that precedent and adopt a different approach for analyzing the removal of *parens patriae* suits under CAFA.

APPENDIX B

United States District Court,

S.D. Mississippi,

Jackson Division.

State of MISSISSIPPI ex rel. Jim HOOD, Attorney General, Plaintiff

v.

AU OPTRONICS CORPORATION; AU Optronics Corporation America, Inc.; Chi Mei Corporation; Chi Me Optoelectronics Corporation; Chi Mei Optoelectronics USA, Inc.; CMO Japan Co., Ltd.; Chunghwa Picture Tubes Ltd.; Hannstar Display Corporation; Hitachi, Ltd.; Hitachi Electronic Devices (USA), Inc.; Japan Display East, Inc.; LG Display Co.; LG Display America, Inc.; Samsung Electronics Co., Ltd.; Samsung Semiconductor, Inc.; Samsung Electronics America, Inc.; Sharp Corporation; Sharp Electronics Corporation; Toshiba Corporation; Toshiba Mobile Display Co., Ltd.; Toshiba America Electronic Components, Inc.; Toshiba America Information Systems, Inc., Defendants.

Cause No. 3:11-CV-345-CWR-FKB.

May 3, 2012.

ORDER

CARLTON W. REEVES, District Judge.

Pending before the Court is the plaintiff's motion to remand. Docket No. 19. The defendants have responded in opposition, Docket No. 25, the plaintiff has replied, Docket No. 29, and the Court is ready to rule. The motion to remand will be granted. Also

pending is the defendants' motion to strike portions of the plaintiff's reply brief. Docket No. 30. That motion is fully briefed, *see* Docket Nos. 31 & 33, and will be granted.

I. Factual and Procedural History

On March 25, 2011, the State of Mississippi filed a complaint in the Chancery Court of Hinds County alleging that the defendants had engaged in price-fixing in violation of the Mississippi Consumer Protection Act ("MCPA"), Miss. Code § 75-24-1 *et seq.*, and the Mississippi Antitrust Act ("MAA"), *id.* § 75-21-1 *et seq*. Docket No. 1-1.

The action was brought by the Attorney General of Mississippi, who sought to protect the State's "quasi-sovereign interest" in its economy and its citizens' economic well-being. *Id.* at 3. The State claimed that the number of citizens harmed by the defendants' conduct is "a sufficiently substantial segment of the State's population to establish Mississippi's quasi-sovereign interests, as relief is sought on behalf of all local governmental entities and consumers (not limited groups of private parties) who bought a wide range of price-fixed products." *Id.* at 4. With this and other language, the Attorney General invoked his authority to file suit as *parens patriae* on behalf of the State and its citizens. *Id.* at 3-4.

The defendants are companies that manufactured, marketed, sold, and/or distributed LCD panels, which are components of computers, televisions, and a wide variety of other electronic devices. *Id.* at 4-9. According to the State, the defendants formed an international cartel that conspired to artificially limit the supply and increase the price of LCD panels between 1996 and 2006, thereby increasing the price of every product containing a LCD panel during that

time period. *Id.* at 3-4, 11-12, and 20. The complaint described how the defendants, who together make up over 80% of the market for LCD panels, carried out their scheme through regular meetings of high-level executives, public statements, and a tangled web of cross-licensing and cross-purchasing agreements and joint ventures. *Id.* at 11-36. As a result of these acts, when Mississippi's consumers, local governments, and state agencies purchased products containing LCD panels, they allegedly paid more than they otherwise would have, had the market been fair and competitive. *Id.* at 19 and 39-49.

It was further alleged that several of the defendants and their co-conspirators had pled guilty to criminal charges brought by the United States Department of Justice for this conduct and paid more than $890 million in criminal fines to the United States government. *Id.* at 3 and 38-39. The State claimed that none of those fines were dedicated to recompense Mississippi's consumers and governmental entities, nor were funds set aside for civil penalties owed to States under state laws. *Id.* at 3.

The State sought the following relief: (1) a permanent injunction prohibiting the defendants from continuing to engage in anti-competitive behavior; (2) civil penalties of $10,000 per LCD panel product sold in Mississippi during the relevant time period, pursuant to the MCPA[1]; (3) civil penalties of up to $2,000 per month, per defendant for violations of the MAA during the relevant time period; (4) restitution to the State for its own losses caused by purchasing LCD

[1] Civil penalties recovered under the MCPA are divided evenly between the Attorney General's Office of Consumer Protection and the General Fund of the State of Mississippi. Miss. Code § 75-24-19(1)(b).

panel products during the relevant time period; (5) restitution to the State on behalf of its citizens and local governments who suffered losses by purchasing LCD panel products during the relevant time period; (6) punitive damages; and (7) other relief including costs of court, pre- and post-judgment interest, and attorney's fees. *Id.* at 55-56.

On June 9, 2011, the defendants jointly removed the case to this Court. Docket No. 1. They asserted that federal jurisdiction was satisfied under the Class Action Fairness Act ("CAFA"), 28 U.S.C. §§ 1332(d) and 1453. *Id.* at 4. That law establishes federal jurisdiction over certain suits determined to be "class actions" or "mass actions." 28 U.S.C. § 1332(d). The defendants further asserted that a federal question existed pursuant to the Sherman Act, 15 U.S.C. § 7 *et seq*. Docket No. 1-1, at 10.

Shortly thereafter, the United States Judicial Panel on Multidistrict Litigation issued a Conditional Transfer Order transferring this case to the United States District Court for the Northern District of California, where Judge Illston presides over a number of other suits against LCD panel manufacturers. Docket No. 19-1; *see In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. C07-1827, 2011 WL 560593 (N.D. Cal. Feb. 15, 2011). That Order was postponed to await a decision on the motion to remand. Docket No. 24.

II. Standard of Review

"The party seeking removal bears the burden of showing that federal jurisdiction is proper." *Lone Star OB/GYN Assoc. v. Aetna Health Inc.*, 579 F.3d 525, 528 (5th Cir. 2009) (citation omitted); *see Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921). "[B]ecause the effect of removal is to deprive the state

court of an action properly before it, removal raises significant federalism concerns." *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 365-66 (5th Cir. 1995) (citations omitted). "The removal statute is therefore to be strictly construed and any doubt as to the propriety of removal should be resolved in favor of remand." *In re Hot-Hed Inc.*, 477 F.3d 320, 323 (5th Cir. 2007) (citations omitted). "The court has wide, but not unfettered, discretion to determine what evidence to use in making its determination of jurisdiction." *Hollinger v. Home State Mut. Ins. Co.*, 654 F.3d 564, 570-71 (5th Cir. 2011) (quotation marks and citations omitted) (affirming the district court's decision to decline federal jurisdiction pursuant to a CAFA exception).

III. Discussion

The defendants claimed two independent sources of federal jurisdiction: diversity jurisdiction under CAFA and a federal question presented under the Sherman Act. Each will be evaluated below. The Court will begin, though, with a discussion of *parens patriae* actions and a summary of a significant Fifth Circuit case that addressed some of the issues presented here.

A. The Nature of These Actions

"The concept of *parens patriae* stems from the English constitutional system, where the King retained certain duties and powers, referred to as the 'royal prerogative,' which he exercised in his capacity as 'father of the country.'" *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 425 (5th Cir. 2008) (citation omitted); *see Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez*, 458 U.S. 592, 600-02 (1982). While the term originally meant the King's power to protect those without "the legal capacity to

act for themselves," *Caldwell*, 536 F.3d at 425, in the United States *parens patriae* actions were "greatly expanded" over the 1900s, *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 257 (1972) (collecting cases). Today they are "an increasingly popular vehicle for state attorneys general to vindicate the rights of their constituents." Alexander Lemann, *Sheep in Wolves' Clothing: Removing Parens Patriae Suits Under the Class Action Fairness Act*, 111 Colum. L. Rev. 121, 122 (2011).

Parens patriae actions are brought to protect a state's "quasi-sovereign interests," which include interests in "the health and well-being – both physical and *economic* – of its residents in general . . . [and] not being discriminatorily denied its rightful status within the federal system." *Snapp*, 458 U.S. at 607 (emphasis added). More specifically, quasi-sovereign interests have been held to include suits seeking to abate public nuisances, maintain access to energy sources, and halt price fixing[2]. *Id.* at 604-06 (collecting cases).

There are boundaries on the *parens patriae* authority. "A State is not permitted to enter a contro-

[2] In *Hawaii v. Standard Oil*, the Supreme Court held that the Clayton Act did not permit the State of Hawaii to seek damages for its citizens via a *parens patriae* suit alleging antitrust violations. *Hawaii*, 405 U.S. at 260-62. In response, Congress passed 15 U.S.C. § 15c, which authorizes state attorneys general to sue for antitrust violations and recover damages on behalf of their citizens. *State v. Marsh & McLennan Companies*, 286 Conn. 454, 466-68 (2008); *see Caldwell*, 536 F.3d at 427 n.5; *TFT-LCD*, 2011 WL 560593, at *4 n.2. The Supreme Court has acknowledged "the long history of state common-law and statutory remedies against monopolies and unfair business practices" and concluded that "this is an area traditionally regulated by the States." *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989).

versy as a nominal party in order to forward the claims of individual citizens. But it may act as the representative of its citizens in original actions where the injury alleged affects the general population of a State in a substantial way." *Maryland v. Louisiana*, 451 U.S. 725, 737 (1981) (citations omitted).[3] *Parens patriae* actions are disfavored where the injury falls "on a small group of citizens who are likely to challenge" the harm directly. *Id.* at 739. But where "a great many citizens . . . are faced with increased costs aggregating millions of dollars per year" and "cannot be expected to litigate [the issue] given that the amounts paid by each consumer are likely to be relatively small," *parens patriae* suits are appropriate. *Id.* Unsurprisingly, then, "*[p]arens patriae* statutes are most common in the antitrust and consumer protection contexts." Dwight R. Carswell, *CAFA and Parens Patriae Actions*, 78 U. Chi. L. Rev. 345, 348 (2011)

The Supreme Court "has not attempted to draw any definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior." *Snapp*, 458 U.S. at 607. In *Snapp*, it reiterated that a state must allege "injury to a sufficiently substantial segment of its population," not just an "injury to an identifiable group of individual residents." *Id.* A district court determines the proportion of the population that has allegedly been affected by analyzing the complaint as of the date it was filed. *See Hollinger*, 654 F.3d at 573 ("Citizenship, for purposes of proving an exception to CAFA, must be analyzed as of the date the complaint or amended complaint was filed.") (citations omitted).

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[3] While *Maryland* was brought in the Supreme Court as an original action, it remains a helpful explanation of the *parens patriae* authority.

There is a debate, both in our case and in the wider legal community, over whether *parens patriae* suits are class actions brought under a different label or *sui generis*. *Parens patriae* actions are certainly a form of representative action, and "attorneys general often hire plaintiffs' lawyers to help prosecute *parens patriae* suits. . . . [T]he conceptual similarity between [class actions and *parens patriae* actions] is unavoidable." Lemann, 111 Colum. L. Rev. at 133 (citations omitted).

That said, distinctions can be identified. For one, an attorney general is not a true class representative. "Rather, in representing the citizens, the State [through its Attorney General] acts more in the capacity of trustee representing beneficiaries or a lawyer representing clients, neither of which is the type of representation essential to the representational aspect of a class action." *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 176-77 (4th Cir. 2011); *see LG Display Co. v. Madigan*, 665 F.3d 768, 772 (7th Cir. 2011) ("This case was brought by the Attorney General, not by a representative of a class."). The Fourth Circuit has concluded that "[a]ll class actions are representative in nature; but not all representative actions are necessarily class actions." *McGraw*, 646 F.3d at 175 n.1.

There also are procedural differences between the two. *See id.* at 175-76; *Madigan*, 665 F.3d at 772. "Unlike private litigants, the Attorneys General have statutory authority to sue in *parens patriae* and need not demonstrate standing through a representative injury nor obtain certification of a class in order to recover on behalf of individuals." *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 848 (9th Cir. 2011) (citations omitted). "Additionally, attorneys general are not always required to provide notice to

the citizens whose damages they are recovering, and the citizens may not be able to opt out." Carswell, 78 U. Chi. L. Rev. at 362. Further, in some states a *parens patriae* suit may result in a recovery for the state's General Fund but not the individual victims of the fraud. *Washington*, 659 F.3d at 848.

The Fifth Circuit has found that a *parens patriae* suit may, in certain circumstances, constitute a CAFA mass action. *Caldwell*, 536 F.3d at 430. It has recited CAFA's legislative history to conclude that "the term 'class action' should be defined broadly to prevent 'jurisdictional gamesmanship.'" *Id.* at 424. But it has not held that *parens patriae* suits are necessarily class or mass actions. *Id.* at 430.

B. The Fifth Circuit's Decision in Caldwell

Because *Caldwell* controls our case and its interpretation is contested by the parties, it will be summarized here.

In *Caldwell,* the Attorney General of Louisiana filed suit against a number of insurance companies and their business partners, claiming that they had "continuously manipulated Louisiana commerce by rigging the value of policyholder claims and raising the premiums." *Id.* at 422 (quotation marks omitted). The complaint alleged that the defendants had systematically undervalued and underpaid policyholders' property claims in the aftermath of Hurricanes Katrina and Rita. *Id.* at 422-23. The suit, which was styled as a *parens patriae* action and filed in Louisiana state court, sought forfeiture of illegal profits, treble damages, and injunctive relief. *Id.* at 423.

The defendants removed the case to the United States District Court for the Eastern District of Louisiana, arguing federal jurisdiction under CAFA. *Id.*

The district court determined that the real parties in interest were the individual policyholders who had been harmed, and reasoned that the suit was "really an artfully pled class action." Transcript of Hearing at 32, *State of Louisiana v. Allstate Ins. Co.*, No. 07-9409 (E.D. La. Apr. 2, 2008) ("Caldwell Transcript"). The district court rejected the argument that the suit was a CAFA mass action. *Id.* at 21.

The Fifth Circuit affirmed on different grounds. It analyzed the complaint claim-by-claim, finding that Louisiana was a real party in interest as to the injunctive relief and that the policyholders were real parties in interest with respect to the treble damages. *Caldwell*, 536 F.3d at 429-30. As real parties in interest, the policyholders' citizenship had to be counted, and since they were Louisiana residents, there was minimal diversity of the parties as required by CAFA. *Id.* at 430. The Fifth Circuit declined to address whether the suit was a class action – the district court's rationale for federal jurisdiction – and found that it was a mass action: "a civil action involving the monetary claims of 100 or more persons that is proposed to be tried jointly." *Id.*

Judge Southwick, in dissent, concluded that the suit was neither a class action nor a mass action as CAFA defines those terms. *Id.* at 433 (Southwick, J., dissenting). The Attorney General's complaint did not invoke the federal or state class action rules, and the mass action provision could not be invoked by a defendant seeking to join additional parties. *Id.* at 434-35. Instead, Judge Southwick argued that Louisiana's courts had jurisdiction over the complaint as it was pled and should first resolve whether the Attorney General could recover treble damages on behalf of Louisiana consumers in a representative capacity. *Id.* Under the applicable standard of review,

which requires doubts and uncertainties to be resolved against a finding of federal jurisdiction, he thought the case should have been remanded. *Id.* at 433.[4]

C. The Present Dispute

1. The Class Action Fairness Act

"Congress enacted CAFA to encourage federal jurisdiction over interstate class action lawsuits of national interest." *Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc.*, 485 F.3d 793, 797 (5th Cir. 2007). "The CAFA exceptions are 'designed to draw a delicate balance between making a federal forum available to genuinely national litigation and allowing the state courts to retain cases when the controversy is strongly linked to that state.'" *Id.* at 803 (quoting *Hart v. FedEx Ground Package Sys., Inc.*, 457 F.3d 675, 682 (7th Cir. 2006)); *see McGraw*, 646 F.3d at 178 ("CAFA is also sensitive to deeply-rooted principles of federalism, reserving to the States primarily local matters.").

To establish jurisdiction under CAFA, the removing party must first show that the parties are minimally diverse, which means that:

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

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[4] *Caldwell* was "groundbreaking," Lemann, 111 Colum. L. Rev. at 133, and has been discussed in a number of circuit and district court decisions, discussed below. It also has been the subject of academic attention, perhaps because of an emerging circuit split. *E.g.*, *id.*; Jacob Durling, *Waltzing Through a Loophole: How Parens Patriae Suits Allow Circumvention of the Class Action Fairness Act*, 83 U. Colo. L. Rev. 549 (2012); Carswell, 78 U. Chi. L. Rev. at 353-57; Guyon Knight, *The CAFA Mass Action Numerosity Requirement: Three Problems with Counting to 100*, 78 Fordham L. Rev. 1875 (2010).

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

28 U.S.C. § 1332(d)(2)(A)-(C). The removing party must then prove that the action is a class action or a mass action.

A CAFA class action is "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." *Id.* § 1332(d)(1)(B). A class action must have 100 or more "members of all proposed plaintiff classes" and an aggregate amount in controversy in excess of $5 million. *Id.* § 1332(d)(2), (d)(5)(B), and (d)(6).

CAFA defines a mass action as:

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

Id. § 1332(d)(11)(B)(i). The jurisdictional amount requirement in 28 U.S.C. § 1332(a) is $75,000. *Id.* § 1332(a). Therefore, in a mass action, federal courts have jurisdiction "only" over plaintiffs whose individual claims exceed $75,000, exclusive of interest and costs. *Id.* § 1332(a) and (d)(11)(B)(i). Mass actions may not be transferred to a multidistrict litigation

court "unless a majority of the plaintiffs in the action request transfer." *Id.* § 1332(d)(11)(C)(i).

Once the removing party meets its burden to establish federal jurisdiction, the party seeking remand can attempt to prove one of CAFA's exceptions to jurisdiction. *Hollinger*, 654 F.3d at 571. One of those exceptions states that "the term 'mass action' shall not include any civil action in which . . . all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action." 28 U.S.C. § 1332(d)(11)(B)(ii) and (d)(11)(B)(ii)(III).

2. Arguments

The State argues that when the complaint is viewed as a whole, the real party in interest is the State of Mississippi, not its citizens and local governments. Docket No. 20, at 5-7. Because the State is not a 'citizen' for purposes of diversity jurisdiction, it concludes that there is no minimal diversity. *Id.* at 5. The State next claims that the action is not a CAFA class action because it was not filed pursuant to Federal Rule of Civil Procedure 23 or an analogous state rule; in fact, Mississippi lacks a class action rule. *Id.* at 9-10. Finally, the State argues that its suit is not a mass action pursuant to an exception in CAFA denying mass action status to suits brought on behalf of the general public. *Id.* at 10-11.

The defendants agree that the State is the real party in interest as to the damages it seeks on its own behalf, civil penalties, and injunctive relief. Docket No. 25, at 6. They argue, though, that because the complaint also seeks damages for injuries incurred by Mississippi's consumers and local governments, those

consumers and local governments are also real parties in interest. *Id.* at 6-9. Because Mississippi's consumers and local governments are obviously citizens of Mississippi, and none of the defendants are citizens of Mississippi, the defendants conclude that minimal diversity is established. *Id.* The defendants next challenge the State's interpretation of "class action," claiming that this suit is one within the meaning of CAFA. *Id.* at 9-12. Finally, they argue that the suit is a mass action that does not fall into the State's claimed statutory exception, again because "individual Mississippi consumers are the real parties in interest when the State seeks to recover damages on their behalf in a representative capacity." *Id.* at 12.

In its reply, the State explains in more detail its contention that *parens patriae* actions are procedural vehicles separate and distinct from class actions. Docket No. 29, at 5-9. It again claims that mass action status should be denied because the case is brought on behalf of the general public, arguing that the products at issue "are ubiquitous in modern life and inflated prices for these products would affect nearly every single Mississippi resident." *Id.* at 12 n.6.

3. The Defendants' Motion to Strike

The State's reply brief then argues that the defendants failed to prove CAFA's amount in controversy requirements. *Id.* at 13-17. It denies that the defendants have put forward any evidence that the aggregate amount sought in the complaint exceeds $5 million and that at least one consumer or local government seeks more than $75,000. *Id.* The State claims that the defendants were required to provide such proof in their Notice of Removal. *Id.* at 14-16.

Finally, it recites that if this case is a mass action, the Court should bifurcate the suit. *Id.* at 19.

The defendants have moved to strike these arguments, claiming that these grounds were not briefed in the State's original motion to remand. Docket No. 30, at 2-3. In the alternative, the defendants ask for leave to file a sur-reply and attach affidavits to establish the amount in controversy requirements. *Id.* They have included a summary of their argument to be made in any sur-reply. *Id.* at 3-8. The State opposes the motion, Docket No. 31, and the defendants have responded, Docket No. 33. The defendants' response brief contains the affidavits they would have attached to any sur-reply. *See* Docket Nos. 33-1; 33-2; 33-3.

The defendants' motion is well-taken and will be granted. The State should have presented all of its arguments for remand in its original motion. *Kennedy v. BAE Sys. Info. Tech., Inc.*, No. 1:09-cv-254, 2011 WL 6211171, at *7 (S.D. Miss. Dec. 14, 2011) ("A reply memorandum is not the appropriate place to raise new arguments"). The State's new arguments will be stricken and the defendants are excused from proving CAFA's amount in controversy requirements. Further, for reasons that will become apparent later, the State's suggestion of bifurcation is moot.

4. Analysis

a. Minimal Diversity

The State of Mississippi is not a 'citizen' for purposes of diversity jurisdiction. *In re Katrina Canal Litig. Breaches*, 524 F.3d 700, 706 (5th Cir. 2008) ("*Road Home*"). In this situation, "a federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties

to the controversy." *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 461 (1980) (citations omitted). The question is whether Mississippi's citizens and local governments are real parties in interest and must be counted for citizenship purposes.

"[T]he 'real party in interest' is the party who, by substantive law, possesses the right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery." *Richards v. Reed*, 611 F.2d 545, 546 n.2 (5th Cir. 1980) (quotation marks and citation omitted). Federal Rule of Civil Procedure 17 states that actions "must be prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17(a)(1). It also states, however, that executors, administrators, guardians, and parties "authorized by statute" "may sue in their own names without joining the person for whose benefit the action is brought." *Id.*; *see Proctor v. Gissendaner*, 579 F.2d 876, 880 (5th Cir. 1978).

In *Caldwell,* the property insurance policyholders who had been injured by the defendants' conduct were considered real parties in interest as to the claim for treble damages, because Louisiana law granted the policyholders the right to bring suit on their own for those damages.

> We conclude that as far as the State's request for treble damages is concerned, the policyholders are the real parties in interest. The text of § 137 of the Monopolies Act, which authorizes the recovery of treble damages, plainly states that "any person who is injured in his business or property" under the Monopolies Act "shall recover[ ] treble damages." The plain language of that provision makes clear that individuals have the right to enforce this provision. Accordingly, we agree with the

> district court and hold that under § 137 the policyholders, and not the State, are the real parties in interest.

Caldwell, 536 F.3d at 429 (brackets omitted); *see West Virginia ex rel. McGraw v. Comcast Corp.*, 705 F. Supp. 2d 441, 450 (E.D. Pa. 2010) (finding that "a discrete group of Comcast's premium subscribers" were real parties in interest as to an attorney general's claim for treble damages on their behalf).

Here, the MCPA permits individuals to sue for damages incurred as a result of prohibited business practices. Miss. Code § 75-24-15(1). Before filing such an action, the consumer "must have first made a reasonable attempt to resolve any claim through an informal dispute settlement program approved by the Attorney General." *Id.* § 75-24-15(2). The MAA also permits individuals to sue when "injured or damages by a trust and combine . . . or by its effects direct or indirect." *Id.* § 75-21-9. Under *Caldwell*, Mississippi's consumers are considered real parties in interest with respect to the State's request for restitution on their behalf. *Caldwell*, 536 F.3d at 429; *accord Hood v. F. Hoffman-La Roche, Ltd.*, 639 F. Supp. 2d 25, 31-33 (D.D.C. 2009).

These statutes afford local governments similar rights. The MCPA provides a remedy to "any person who purchases or leases goods or services primarily for personal, family or household purposes" who is injured by a prohibited business practice. Miss. Code § 75-24-15(1). A local government is considered a person under the law, *id.* § 75-24-3(a), and at least one state court has found that a governmental entity purchases goods for its own, "personal" uses, *id.* § 75-24-15(1). *Hood ex rel. State v. BASF Corp.*, No. 56863, 2006 WL 308378, at *12 (Miss. Ch. Jan. 17,

2006). Further, local governments have the right to sue under the MAA for "all damages of every kind sustained . . . and in addition a penalty of five hundred dollars ($500.00)." Miss. Code § 75-21-9.

As a result, the State of Mississippi, its consumers, and its local governments are all real parties in interest in this action. While the State has no citizenship for purposes of diversity jurisdiction, Mississippi's consumers and local governments are obviously citizens of Mississippi. Counting their citizenship, and seeing that no defendant is a citizen of Mississippi, CAFA's requirement of minimal diversity has been met. *See* 28 U.S.C. § 1332(d)(2)(A).

b. Class Action

This suit is not a CAFA class action because it was not brought pursuant to Federal Rule of Civil Procedure 23 or a "similar State statute or rule of judicial procedure." *Id.* § 1332(d)(1)(B). The action was not originally filed in federal court under Rule 23 and the parties agree that Mississippi has no rule permitting class actions.[5] None of the state laws under which this action was brought impose class action-like re-

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[5] To be clear, class actions are not authorized in Mississippi courts. *USF & G Ins. Co. of Miss. v. Walls*, 911 So. 2d 463, 467 (Miss. 2005) ("Since there is no rule or statute which expressly or impliedly provides for class actions, we are compelled to conclude that they are not permitted in any legal proceedings in our state courts.").

The MCPA also bars class actions attempted to be brought under its auspices. Miss. Code § 75-24-15(4). "Thus, any purported class action complaint or master complaint on behalf of several plaintiffs asserting violations of Section 75-24-5 is arguably improper." Walker W. Jones, III & Jason R. Bush, *An Overview of the Mississippi Consumer Protection Act*, Mississippi Defense Lawyers Assoc. Quarterly, Winter 2006, at 12 (collecting cases).

quirements of adequacy, numerosity, commonality, or typicality, nor is the Attorney General, with his distinct duties, powers, and interests, a typical class representative. *See Madigan*, 665 F.3d at 772; *McGraw*, 646 F.3d at 174-77; *In re Vioxx Prod. Liab. Litig.*, MDL No. 1657, 2012 WL 10552, at *7-8 (E.D. La. Jan. 3, 2012).

In a recent decision addressing issues much like our own, Judge Fallon of the Eastern District of Louisiana found that "Congress chose to define 'class action' not in terms of joinder of individual claims or by representative relief in general, but in terms of the statute or rule the case is filed under." *Vioxx*, 2012 WL 10522, at *8 (citing 28 U.S.C. § 1332(d)(1)(B)). Because the Attorney General of Kentucky's *parens patriae* suit was not brought under such a federal or state statute or rule, it was remanded to Kentucky state court.[6] *Id.* Judge Fallon reasoned, "[i]f this is a formalistic outcome, it is a formalism dictated by Congress. Moreover, it is an understandable bright-line rule." *Id.* The Fifth Circuit declined to review the decision. Order, In re Vioxx Prod. Liab. Litig., No. 12-90002 (5th Cir. Feb. 24, 2012).

The defendants in our case interpret CAFA more broadly. They rely upon CAFA's legislative history to argue that "generally speaking, lawsuits that *resemble* a purported class action should be considered class actions for the purpose of applying CAFA." Docket No. 25, at 11 (brackets omitted) (quoting S. Rep. No. 109-14, at 35). But the word "resemble" is not found in 28 U.S.C. § 1332(d). That omission leads to an ongoing debate about whether the Senate Re-

[6] The defendant in *Vioxx* did not argue that the suit was a mass action. *Vioxx*, 2012 WL 10522, at *5 n.4.

port relied upon by the defendants is a reliable source to discern Congress's intent in enacting CAFA.

The Fourth Circuit has found that the Senate Report in question "was issued 10 days *after* CAFA was signed into law, and for that reason alone, it is a questionable source of congressional intent. . . . *Post hoc* statements of a congressional Committee are not entitled to much weight." *McGraw*, 646 F.3d at 177 (citations, quotation marks, and brackets omitted); *see Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006) (same). The Second and Third Circuits declined to rely upon this Senate Report to establish CAFA's burden-shifting framework, where CAFA's text did not address burden-shifting. *Galeno*, 472 F.3d at 57-58; *Morgan v. Gay*, 471 F.3d 469, 472-73 (3d Cir. 2006). The Seventh Circuit also found this Senate Report problematic, reasoning that "when the legislative history stands by itself, as a naked expression of 'intent' unconnected to any enacted text, it has no more force than an opinion poll of legislators – less, really, as it speaks for fewer." *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005); *see also Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 685-86 (9th Cir. 2006).

The Eleventh Circuit thought the Senate Report of greater value, observing that although it "was issued ten days following CAFA's enactment, it was submitted to the Senate on February 3, 2006 – while that body was considering the bill." *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1206 n.50 (11th Cir. 2007) (citation omitted). But that court used legislative history to interpret the "statutory labyrinth" of CAFA's mass action provisions, not the relatively more straightforward class action provisions. *Id.* at 1199. The Fifth Circuit has quoted the Senate Report and the language relied upon by the defendants, but

also did not address whether the suit before it was a class action. *Caldwell*, 536 F.3d at 424 and 430. Others have found "no clear answer" on the Senate Report's validity for a legislative history analysis. Guyon Knight, *The CAFA Mass Action Numerosity Requirement: Three Problems with Counting to 100,* 78 Fordham L. Rev. 1875, 1892 (2010).

"[A] powerful line of Supreme Court authority suggests that legislative history should rarely be used in statutory interpretation, because only the text of the law has been passed by Congress, not the often-contrived history." *Stanley ex rel. Estate of Hale v. Trinchard*, 579 F.3d 515, 518 n.6 (5th Cir.2009) (quotation marks and citations omitted). "[T]here is no reason to recite legislative history" when the statutory text is clear, in part because "as is often the case with legislative history, statements can be pulled from the record to support the contrary proposition as well." *Khalid v. Holder*, 655 F.3d 363, 371 (5th Cir. 2011) (citation omitted); *see Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355, 377 (5th Cir. 2009) (collecting cases).[7]

Because CAFA unambiguously defines class action, it is unnecessary to consider the legislative history on this point. This Court will apply the "understandable bright-line rule" articulated in *Vioxx*. 2012 WL 10552, at *8.

The conclusion that this suit is not a class action accords with rulings by the Fourth, Seventh, and Ninth Circuits. *Id.* at 660-64 (citing *Madigan*, 665

[7] An opinion from the United States District Court for the District of New Jersey aptly illustrates one way in which CAFA's legislative history can be manipulated to support either party's position. *See Harvey v. Blockbuster, Inc.*, 384 F. Supp. 2d 749, 752-54 (D.N.J. 2005).

F.3d at 770-72; *Washington*, 659 F.3d at 846-48[8]; and *McGraw*, 646 F.3d at 174-77); *see also Kentucky ex rel. Conway v. Daymar Learning, Inc.*, No. 4:11-cv-103, 2012 WL 1014989, *6 (W.D. Ky. Mar. 22, 2012). Nor is it in conflict with the Fifth Circuit's decision in *Caldwell,* which again did not resolve whether Louisiana's suit was a CAFA class action. *Vioxx*, 2012 WL 10552, at *5-6 and 8 (quoting *Caldwell*, 536 F.3d at 429-30).

c. Mass Action

Under *Caldwell*, this suit is a mass action. It is a civil action "in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i). *Caldwell* stands for the proposition that the words "persons" and "plaintiffs" in this sub-section are to be defined as "real parties in interest." Here, as there, this suit is a mass action because there are more than

[8] *Madigan* and *Washington* involved the same issues pending before this Court: whether the attorney generals of Illinois, Washington, and California could, via *parens patriae* suit alleging antitrust violations by LCD panel makers, seek restitution, damages for their citizens, injunctive relief, and civil penalties in their own state courts. *Madigan*, 665 F.3d at 770; *Washington*, 659 F.3d at 846.

The Attorney General of South Carolina brought a similar suit in state court. The defendants removed the action to federal court for reasons akin to those argued here. The action was remanded. *South Carolina v. AU Optronics Corp.*, No. 3:11-cv-731, 2011 WL 4344079 (D.S.C. Sept. 14, 2011).

100 real parties in interest that seek a joint trial on common questions of law or fact.[9]

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[9] Although *Caldwell* forecloses it, there is a possibility that a "mass action" should be thought of as a "mass joinder." Courts apply CAFA's mass action provisions to mass joinders, and typically decline to apply the mass action provisions to suits lacking 100 named plaintiffs. *See Lowery*, 483 F.3d at 1198 ("CAFA's mass action provisions extend federal diversity jurisdiction to certain actions brought individually by large groups of plaintiffs.") (evaluating an amended complaint listing over 400 plaintiffs under CAFA's mass action provisions); *Abrego Abrego*, 443 F.3d at 678 (evaluating a complaint filed by 1,160 plaintiffs as a mass action); *Nevada v. Bank of America Corp.*, 672 F.3d 661, 672 (9th Cir. 2012) (holding that the State of Nevada's *parens patriae* suit was not removable as a mass action because the state was the real party in interest and thus "the action [fell] 99 persons short of a 'mass action'"); *Anderson v. Bayer Corp.*, 610 F.3d 390, 393 (7th Cir. 2010) ("The instant cases contain fewer than 100 plaintiffs and thus are not removable under the plain language of the statute."); *Nunn v. Monsanto Co.*, No. 4:11-cv-1657, slip op. at 5 (E.D. Mo. Nov. 7, 2011) ("In order for this Court to have jurisdiction under the mass action provisions, defendants must demonstrate that there really are 100 plaintiffs."); *TFT-LCD*, 2011 WL 560593, at *8 ("courts have held that the plaintiffs in a mass action must be individually named plaintiffs with their own direct claims in order to be counted toward CAFA's 100 person requirements.") (collecting cases); *see also* Nan S. Ellis, *The Class Action Fairness Act of 2005: The Story Behind the Statute*, 35 J. Legis. 76, 104-05 (2009); Hittner et al., Fed. Civ. Pro. Before Trial – 5th Cir. Ed. ¶ 2:3027 (2011) (mass actions require 100 or more plaintiffs and CAFA can be avoided "by filing separate lawsuits, each involving fewer than 100 plaintiffs").

Mississippi's own history sheds some light on the issue. Because Mississippi law prohibits class actions, mass joinders became a popular work-around. *See, e.g.*, *Harold's Auto Parts, Inc. v. Mangialardi*, 889 So. 2d 493, 494 (Miss. 2004) ("The case before us has endured seven amended complaints, and now involves the claims of 264 plaintiffs against 137 named defendants who have identified approximately 600 different employers where asbestos exposure might have taken place."). Mass join-

The State argues that a statutory exception requires remand.[10] CAFA denies federal jurisdiction to any mass action in which "all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action." *Id.* § (d)(11)(B)(ii)(III). This will be referred to as the "general public exception."

Other courts have found the general public exception to exclude *parens patriae* suits from federal jurisdiction. *See Madigan*, 665 F.3d at 772 ("By the plain language of that provision, too, this case is not a mass action."); *Connecticut v. Moody's Corp.*, No. 3:10-cv-546, 2011 WL 63905, at *4 (D. Conn. Jan. 5, 2011) ("Because the State is a real party in interest and sues to protect and vindicate the rights of its

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ders were arguably so popular that CAFA's drafters made them removable; at least, some lawyers have concluded as much: "The inclusion of 'mass actions' in [CAFA's] definition of 'class action' was a Congressional attempt to address notorious joinder abuses at the state level in Mississippi and other states." Anthony Rollo & Gabriel A. Crowson, *Mapping the New Class Action Frontier – A Primer on the Class Action Fairness Act and Amended Federal Rule 23,* 59 Consumer Fin. L.Q. Rep. 11, 14 (Spring-Summer 2005); *see also* S. Amy Spencer, *Once More Into the Breach, Dear Friends: The Case for Congressional Revision of the Mass Action Provisions in the Class Action Fairness Act of 2005,* 39 Loy. L.A. L. Rev. 1067, 1081 (2006) (discussing the mass action provision's attempt to address "cases with claims joined under liberal West Virginia or Mississippi statutes"); 14B Charles A. Wright et al., Fed. Practice & Procedure § 3724, at 910-11 (4th ed. 2009) ("The mass actions made removable [by CAFA] typically are actions brought in states whose court systems do not provide for class actions."); Knight, 78 Fordham L. Rev. at 1878.

[10] "Indeed, [CAFA] is not complete without its exceptions." *Hollinger*, 654 F.3d at 569.

public in general under Conn. Gen. Stat. § 42–110m, this action is not a 'mass action.'"); *see also South Carolina v. AU Optronics Corp.*, No. 3:11-cv-731, 2011 WL 4344079, at *7 (D.S.C. Sept. 14, 2011) (same).[11] Several commentators also believe this exception applies to *parens patriae* suits. *See* Marcy Hogan Greer & Paul L. Peyronnin, *The Class Action Fairness Act of 2005*, *in* A Practitioner's Guide to Class Actions 241, 282 (Marcy Hogan Greer, ed. 2010) ("a mass action does not include state attorney general actions"); Peter M. Cummins, *Parens Patriae Suits Filed by State AGs*, For the Defense, Feb. 2008 ("CAFA similarly offers no hope to defendants in this situation because enforcement actions filed by State AGs are specifically excluded from the statute's coverage."); Catherine M. Sharkey, *CAFA Settlement Notice Provision: Optimal Regulatory Policy?*, 156 U. Pa. L. Rev. 1971, 1979 n.33 (2008) ("CAFA permits defendants to remove 'mass actions' (or class-action-like lawsuits) from state to federal court, but it contains an exception for *parens patriae* actions."); Antitrust Modernization Commission, Report and Recommendations 272 (2007) ("CAFA also does not apply to *parens patriae* actions by state attorneys general."); Gregory P. Joseph, *Federal Class Action Jurisdiction After CAFA, Exxon Mobil and Grable*, 8 Del. L. Rev. 157, 181 (2006).

Whether the general public exception can be invoked in the Fifth Circuit is contested. *Caldwell* determined that the State of Louisiana's suit was a

[11] At least one court has found the exception applicable outside of the *parens patriae* context, in a case where the sole plaintiff was a citizen suing on behalf of the general public. *Breakman v. AOL LLC*, 545 F.Supp.2d 96, 100-01 (D.D.C.2008). The defendant conceded that the general public exception applied. *Id.* at 101.

mass action without addressing whether the exception applied. One possible reason for this is that the Attorney General of Louisiana failed to argue the exception to the Fifth Circuit. *See* Brief of Appellant, State of Louisiana ex rel. Caldwell v. Allstate Ins. Co., No. 08-30465, 2008 WL 7789594 (5th Cir. May 19, 2008); *see also South Carolina,* 2011 WL 4344079, at *4 (noting that the Attorney General of Louisiana waived another argument on appeal as well). The failure to brief the issue resulted in the State forfeiting any claim it had to the exception. *See United States v. Delgado*, 672 F.3d 320, 329 n.6 (5th Cir. 2012). Nor did the district court need to consider the general public exception, as it considered the suit a class action only. *See* Caldwell Transcript at 21.

With no such procedural default here, this Court will proceed to consider whether this action satisfies CAFA's general public exception.

i. "Claims . . . Asserted on Behalf of the General Public"

The exception first states that all of the claims in the suit must be asserted on behalf of the general public, not individuals or a purported class. 28 U.S.C. § 1332(d)(11)(B)(ii)(III). The facts of *Caldwell* would not have satisfied this requirement. The State of Louisiana's claim for treble damages was brought on behalf of a limited subset of its population: those policyholders who had paid premiums to certain defendants for particular kinds of insurance policies. *See Ohio v. GMAC Mortg., LLC*, 760 F. Supp. 2d 741, 748 (N.D. Ohio 2011) (denying motion to remand *parens patriae* suit where relief sought "would benefit only a specific subset of Ohio citizens . . . and would do little to protect Ohio citizens generally").

In contrast, the complaint in our case alleges that the defendants, who control over 80% of the market for LCD panels, have substantially affected a product contained in laptops, desktop computer monitors, mobile phones, digital cameras, video cameras, televisions, motor vehicles, and other electronic devices commonly used and purchased in everyday life. Docket No. 1-1, at 4 and 17.[12] United States census data shows that during the relevant time period, computers and mobile phones were present in more than half of America's households. Docket No. 1-1, at 4 n.1.[13] The alleged price-fixing was so broad and pervasive as to affect the general public, and the State's claims in this suit are asserted on behalf of the general public. *See TFT-LCD*, 2011 WL 560593, at *5 ("In contrast to *Comcast* and *Caldwell,* where the States sued on behalf of limited groups of private parties (premium cable subscribers and insurance policyholders), here the States are suing on behalf of all consumers in their respective states who purchased a wide range of allegedly price-fixed products.").

There also are significant differences between the insurance market at issue in *Caldwell* and the electronics market here that broaden the latter's reach into the general population. The insurance industry has a paper trail documenting each agreement between insured and insurer, and more importantly,

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[12] The State further alleged that LCD panels are not minor components of those devices, claiming that LCD technology has a "virtually 100% market share for laptops and flat panel computer monitors, and at least 80% market share for flat panel TVs." Docket No. 1-1, at 14.

[13] Courts may take judicial notice of census data. *Hollinger*, 654 F.3d at 571-72 ("United States census data is an appropriate and frequent subject of judicial notice.") (citations omitted).

each insured is readily identifiable. But electronics retailers permit customers to pay with cash and do not record personally identifiable information on every transaction. It is unlikely that the defendants have records identifying every Mississippian who purchased a product containing a LCD panel between 1996 and 2006. There also is a person-to-person resale market of electronic goods that does not exist in the insurance industry, which further expands the percentage of the population affected by the violations alleged in this suit. Moreover, the sheer number of LCD panel products purchased and used by consumers – including computers, mobile phones, toys, car navigation systems, and televisions, among others – indisputably fall within the state's quasi-sovereign interest. If this collection of items did not implicate the overall economic well-being of Mississippi's citizens, then the Court would be hard pressed to find something which does.

ii. Pursuant to a "Statute Specifically Authorizing Such Action"

The second and final element of the general public exception is satisfied, as the claims in this action are brought under state statutes specifically authorizing these kinds of suits.

The Attorney General of Mississippi is generally empowered by a state law granting him "the powers of the Attorney General at common law." Miss. Code § 7-5-1; *see Hood ex rel. Mississippi v. Microsoft Corp.*, 428 F. Supp. 2d 537, 544-45 (S.D. Miss. 2006). Under Mississippi common law, the Attorney General has the "power and authority . . . to institute, conduct and maintain all suits necessary for the enforcement of the laws of the State, preservation of order and the protection of public rights." *Hood v. AstraZeneca*

Pharm., LP, 744 F. Supp. 2d 590, 595 (N.D. Miss. 2010) (citations omitted). *Parens patriae* suits to protect the State's quasi-sovereign interest in its citizens' economic well-being are a part of that common law tradition. *See* Part III.A, *infra*. A number of state and federal courts have recognized the Attorney General's *parens patriae* authority to represent Mississippi's consumers. *See BASF*, 2006 WL 308378, at *3 (collecting cases); *Microsoft*, 428 F. Supp. 2d at 544-46.

More specifically, the MCPA and the MAA provide statutory grounds for the relief sought in this suit. Under the MCPA,

> [w]henever the Attorney General has reason to believe that any person is using, has used, or is about to use any method, act or practice prohibited by Section 75-24-5, and that proceedings would be in the public interest, he may bring an action in the name of the state against such person to restrain by temporary or permanent injunction the use of such method, act or practice.

Miss. Code § 75-24-9. The next section confirms that in those suits, "[t]he court may make such additional orders or judgments, including restitution, as may be necessary to restore to any person in interest any monies or property, real or personal, which may have been acquired by means of any practice prohibited by this chapter." *Id.* § 75-24-11. Civil penalties, investigative costs, and reasonable attorney's fees are authorized by a later section. *Id.* § 75-24-19(1)(b).

The MAA not only authorizes persons to recover damages for anti-competitive behaviors, *id.* § 75-21-9, but permits the Attorney General and the Attorney General alone to recover civil penalties for those behaviors, *id.* § 75-21-7. "This statute clearly gives the

Attorney General of the State the authority to bring suit in the name of the State for violations of Mississippi antitrust law." *Moore ex rel. State of Miss. v. Abbott Laboratories, Inc.*, 900 F. Supp. 26, 31 (S.D. Miss. 1995). Further, a Mississippi state court has found punitive damages to be available for violations of the MAA. *BASF*, 2006 WL 308378, at *11.

Taken together, these statutes authorize the Attorney General to receive all of the relief sought in the complaint. Because "all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class)," and are brought "pursuant to a State statute specifically authorizing such action," this suit satisfies the general public exception. 28 U.S.C. § 1332(d)(11)(B)(ii)(III).

Having determined that this case is neither a class action nor a mass action that does not fall into a statutory exception, the case will be remanded to state court.

D. The Future of This Case

An exception to the usual law of remand permits the defendants to seek an immediate appeal. *See Road Home*, 524 F.3d at 702 n.1 (quoting 28 U.S.C. § 1453(c)(1)). Should the Fifth Circuit reverse and remand this case here as a CAFA mass action, the Court will now describe its understanding of what the law requires upon its return. All involved have an interest in there being only one appeal.

If returned here as a mass action, the case will be severed in accordance with the command of 28 U.S.C. § 1332(d)(11)(B)(i). The State's interests in permanent injunctive relief; civil penalties; restitution for losses incurred by the State in its proprietary capac-

ity; and restitution for losses incurred by individuals[14] claiming less than or equal to $75,000 each, including individual punitive damages but excluding interest and costs; will all be remanded to state court. In mass actions, federal jurisdiction extends "only" to individual claims that exceed $75,000. 28 U.S.C. § 1332(d)(11)(B)(i). This Court's supplemental jurisdiction cannot be extended to those individuals with claims under $75,000. *See Lowery*, 483 F.3d at 1206 n.51.

The defendants argue that the State's request for punitive damages suffices to permit every individual claim to remain in federal court, because the aggregate amount of punitive damages exceeds $75,000 and is imputed to each individual. Docket No. 1, at 8 (citing *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1335-36 (5th Cir. 1995)). But *Allen* was determined to conflict with a previous panel decision and therefore is no longer good law as to that point. "Because *Lindsey* is the earliest, and thus controlling, decision in this circuit, the punitive damages claims of the putative class cannot be aggregated and attributed to each plaintiff to meet the jurisdictional requirement." *H & D Tire and Automotive-Hardware, Inc. v. Pitney Bowes Inc.*, 227 F.3d 326, 330 (5th Cir. 2000) (discussing *Lindsey v. Alabama Tel. Co.*, 576 F.2d 593 (5th Cir. 1978)). Other circuits have recognized that *Pitney Bowes* effectively overruled this part of *Allen*. *E.g.*, *Martin v. Franklin Capital Corp.*, 393 F.3d 1143, 1148 (10th Cir. 2004); *Smith v. GTE Corp.*, 236 F.3d 1292, 1301 (11th Cir. 2001).

It is not clear how much in restitution the State is seeking on behalf of individuals. Assuming without

[14] In this discussion, "individuals" and "individual claims" includes consumers and local governments.

deciding that this case merits punitive damages under Mississippi law, the parties are bound by constitutional limits on punitive damages. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) ("in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process"); *see also Church v. Nationwide Ins. Co.*, No. 3:10-cv-636, 2011 WL 2112416, at *4 n.2 (S.D. Miss. May 26, 2011) (citing *Munro v. Golden Rule Ins. Co.*, 393 F.3d 720, 721 (7th Cir.2004) (discussing constitutional limits on punitive damages imposed in cases of simple economic loss)). Again assuming that the maximum punitive damages allowed under due process would apply, an individual claim could remain in state court by seeking only an amount of restitution, plus a punitive damages multiplier in accordance with *Campbell*, that totals $75,000 or less. *See id.*; *accord Smith*, 236 F.3d at 1304 (applying similar reasoning).

Whether the case will develop in that fashion remains to be seen; the purpose of this section is to minimize the necessity for a second appeal on a jurisdictional question by resolving the parties' dispute over *Allen*. This Court recognizes uncertainty about the application of the $75,000 amount in controversy clause, *see Lowery*, 483 F.3d at 1203-07, and certifies that guidance would help this case proceed should it remain in federal court.[15]

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[15] Other courts have recognized the difficulty in construing CAFA's mass action provisions. The Eleventh Circuit found that "CAFA's mass action provisions present an opaque, baroque maze of interlocking cross-references that defy easy interpretation." *Lowery*, 483 F.3d at 1198. The Ninth Circuit called the mass action language "bewildering" and once declined to rule on some of its "thorniest" provisions. *Abrego Abrego*, 443 F.3d at

There is another practical concern that could be clarified on appeal. In a later part of CAFA – in a sub-section not presented to the *Caldwell* court – the statute states that mass actions removed to federal court "shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407." 28 U.S.C. § 1332(d)(11)(c)(i). "[S]ection 1407" refers to the federal statute authorizing and governing multidistrict litigation. *See id.* § 1407. CAFA thus bars a transfer to a MDL court unless a majority of plaintiffs in the mass action consent.[16]

The concern is this: in our case, who may grant or deny such consent? The State of Mississippi is the sole plaintiff. While Mississippi's consumers constitute hundreds of thousands if not millions of real

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682, 686. Commentators have agreed. Andrew D. Weinstock & Philip G. Watson, *Where Defendants Fear to Tread?*, For The Defense, Apr. 2009, at 15, 17 ("Unfortunately, the language of the [mass action] provision is dense and ambiguous. . . . [Congress] passed a law that is puzzling, overly complex, and at times contradictory."); Spencer, 39 Loy. L.A. L. Rev. at 1073 ("CAFA's plain language by no means provides clear guidelines for attorneys or the judiciary.").

Fortunately, then, mass actions "are apparently not common. Clermont and Eisenberg's study [of federal cases decided under CAFA between February 18, 2005 and August 18, 2007] unearthed only two cases that involved a mass action and only three others that discussed a mass action." Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. Pa. L. Rev. 1439, 1449 n.29 (2008) (citing Clermont & Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. Pa. L. Rev. 1553, 1566 n.34 (2008) (describing federal mass actions as "rare")).

[16] In other cases, this sub-section has been moot because the action had already been transferred to a MDL court. *E.g.*, *Vioxx*, 2012 WL 10552.

parties in interest, they are not plaintiffs and there is no mechanism through which they can consent to transfer this case to a MDL court. In *Caldwell*, the real parties in interest were fewer and identifiable, and there was an opportunity for them to be found and offered a chance to participate in the case pursuant to the statute. In contrast, applying this sub-section to our real parties in interest would require a substantial number of people to be polled about their preferred forum. This is not an outcome directed by the plain language of CAFA. Nor is it one that comports with traditional standards of judicial economy and efficiency. *See State of N.J. v. State of N.Y.*, 345 U.S. 369, 372-73 (1953) (describing, in a *parens patriae* action brought pursuant to the Supreme Court's original jurisdiction, "a working rule for good judicial administration" that places a "practical limitation on the number of citizens . . . who would be entitled to be made parties" alongside the state as sovereign). If this case is returned to federal court, the parties will be asked to provide supplemental briefing on how to resolve this issue.

E. Federal Question Under the Sherman Act

As recited above, "[t]he party seeking removal bears the burden of showing that federal jurisdiction is proper," *Lone Star*, 579 F.3d at 528 (citation omitted), and "any doubt as to the propriety of removal should be resolved in favor of remand," *Hot-Hed*, 477 F.3d at 323 (citations omitted).

1. Arguments

The State contends that state antitrust remedies supplement federal remedies and are not completely preempted by them. Docket No. 20, at 11-12. It claims that the defendants' commercial activities are subject to the MAA and that any substantive defect in the

complaint is for the state courts to resolve. *Id.* at 13-15. The State argues that federal question jurisdiction here is foreclosed by existing Supreme Court caselaw. Docket Nos. 20, at 11-12; 29, at 17-19.

The defendants respond that the Sherman Act, 15 U.S.C. § 7 *et seq.*, completely preempts Mississippi's antitrust laws in this instance because the alleged violations are interstate and international in nature. Docket No. 25, at 14. "Mississippi antitrust laws apply only to intrastate activity." *Id.* (citing *Standard Oil Co. of Ky. v. State*, 65 So. 468, 470-71 (1914)). They acknowledge caselaw holding that there is no complete federal preemption in this area, but argue it is inapposite because "the Attorney General here has artfully pleaded phantom Mississippi state antitrust remedies, which do not exist for interstate conduct and transactions." *Id.* at 15.

2. Discussion

"We start with the long-established axiom that a plaintiff is master of his complaint and may generally allege only a state law cause of action even where a federal remedy is also available." *Bernhard v. Whitney Nat'l Bank*, 523 F.3d 546, 551 (5th Cir. 2008) (citation omitted). "In determining whether a case arises under federal law, we look to whether the plaintiff's well-pleaded complaint raises issues of federal law." *Budget Prepay, Inc. v. AT & T Corp.*, 605 F.3d 273, 278 (5th Cir. 2010) (quotation marks and citation omitted).

The defendants have invoked "the 'artful pleading' doctrine, which is an 'independent corollary' to the well-pleaded complaint rule." *Bernhard*, 523 F.3d at 551 (citation omitted). "Under this principle, even though the plaintiff has artfully avoided any suggestion of a federal issue, removal is not defeated by the

plaintiff's pleading skills in hiding the federal question." *Id.* (citation omitted). But the artful pleading doctrine "applies *only* where state law is subject to complete preemption." *Id.* (citation omitted).

"[A] state claim may be removed to federal court . . . when a federal statute wholly displaces the state-law cause of action through complete pre-emption." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003). In *Beneficial,* "the dispositive question" was whether "the National Bank Act provide[d] the exclusive cause of action for usury claims against national banks." *Id.* at 9. A review of that Act and "the special nature of federally chartered banks" supported that the answer was 'yes'; federal jurisdiction was appropriate. *Id.* at 10. This was a rare instance of complete preemption, which is an "extraordinary" finding. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987); *see Hoskins v. Bekins Van Lines*, 343 F.3d 769, 773 (5th Cir. 2003) (collecting the few cases finding complete preemption).

"The question in complete preemption analysis is whether Congress intended the federal cause of action to be the exclusive cause of action for the particular claims asserted under state law." *Elam v. Kansas City S. Ry. Co.*, 635 F.3d 796, 803 (5th Cir. 2011) (quotation marks and citations omitted). Courts presume that state laws are not preempted until Congress clearly states otherwise. *Id.* at 803-04. "This assumption applies with 'particular force' when Congress legislates in a field traditionally occupied by state law." *Id.* at 804 (citation omitted).

The Supreme Court has concluded that "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies." *California v. ARC America Corp.*, 490 U.S. 93, 102 (1989) (citations

omitted). "And on several prior occasions, the Court has recognized that the federal antitrust laws do not pre-empt state law." *Id.* (citations omitted); *Moore*, 900 F. Supp. at 33.

The defendants concede the existence of *ARC America*, even as they observe that it did not address Mississippi law. Docket No. 25, at 15. They have not pointed to any statute indicating that Congress intended federal antitrust laws to completely preempt state antitrust laws and be the exclusive remedy for claimed violations of state antitrust laws. The defendants further acknowledge that "the Fifth Circuit has not decided whether a Mississippi state antitrust claim based on interstate activity is preempted by the Sherman Act," and rely instead upon two district court decisions in New York that allegedly found state antitrust laws preempted. Docket Nos. 1, at 11; 25, at 17-18.

That is not enough. The defendants have not met their burden to show that federal antitrust laws completely preempt Mississippi's antitrust laws. There is no federal question jurisdiction. *See Adams v. General Motors Acceptance Corp.*, 307 F. Supp. 2d 812, 817 (N.D. Miss. 2004) (citing *Waste Control Specialists, LLC v. Envirocare of Tex., Inc.*, 199 F.3d 781, 784 (5th Cir.) (holding that federal court lacked jurisdiction to consider whether state law claims were viable "considering the absence of complete preemption in the antitrust context"), *withdrawn and superseded in part*, 207 F.3d 225 (5th Cir. 2000)).

IV. Conclusion

The Attorney General of Mississippi filed this action in a Mississippi state court, to enforce Mississippi's consumer protection and antitrust laws, for the protection of the economic well-being of Missis-

sippi's consumers and governmental entities. *See McGraw*, 646 F.3d at 178. The State's motion to remand [Docket No. 19] is granted. The defendants' motion to strike [Docket No. 30] is granted. This cause will be remanded to the Chancery Court of Hinds County, Mississippi.

SO ORDERED, this the third day of May, 2012.

s/ Carlton W. Reeves

UNITED STATES DISTRICT COURT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 12-60704

State of MISSISSIPPI, ex rel. Jim HOOD,
Attorney General,

Plaintiff - Appellee,

v.

AU OPTRONICS CORPORATION; AU Optronics Corporation America, Incorporated; Chi Mei Corporation; Chimei Innolux Corporation, formerly known as Chi Mei Optoelectronics Corporation; Chi Mei Optoelectronics USA, Incorporated, formerly known as International Display Technology USA, Incorporated; CMO Japan Company, Limited, formerly known as International Display Technology, Limited; Hannstar Display Corporation; Hitachi, Limited; Japan Display East, Incorporated; Hitachi Electronic Devices (USA); LG Display Company, Limited, formerly known as LG Phillips LCD Company, Limited; LG Display America, Incorporated, formerly known as LGD LCD America, Incorporated; Samsung Electronics Company LTD; Samsung Semiconductor, Incorporated; Samsung Electronics America, Incorporated; Sharp Corporation; Sharp Electronics Corporation; Toshiba Corporation; Toshiba Mobile Display Company, Limited, formerly known as Toshiba Matsushita Display Technology Company, Limited; Toshiba

America Electronic Components, Incorporated;
Toshiba America Information Systems, Incorporated,

Defendants - Appellants.

Appeal from the United States District Court for the
Southern District of Mississippi, Jackson

Before JOLLY, CLEMENT, and ELROD, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that plaintiff-appellee pay to defendants-appellants the costs on appeal to be taxed by the Clerk of this Court.

JENNIFER WALKER ELROD, Circuit Judge, concurring in the judgment:

ISSUED AS MANDATE: Nov 21 2012

A True Copy
Attest

Clerk, U.S. Court of Appeals, Fifth Circuit
By: *Sabrina B. Short*
Deputy

Nov 21 2012

New Orleans, Louisiana

APPENDIX D

U.S. COURT OF APPEALS
Received
Feb 04 2013
FIFTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 12-60704

State of MISSISSIPPI, ex rel. Jim HOOD,
Attorney General,

Plaintiff - Appellee,

v.

AU OPTRONICS CORPORATION; AU Optronics Corporation America, Incorporated; Chi Mei Corporation; Chimei Innolux Corporation, formerly known as Chi Mei Optoelectronics Corporation; Chi Mei Optoelectronics USA, Incorporated, formerly known as International Display Technology USA, Incorporated; CMO Japan Company, Limited, formerly known as International Display Technology, Limited; Hannstar Display Corporation; Hitachi, Limited; Japan Display East, Incorporated; Hitachi Electronic Devices (USA); LG Display Company, Limited, formerly known as LG Phillips LCD Company, Limited; LG Display America, Incorporated, formerly known as LGD LCD America, Incorporated; Samsung Electronics Company LTD;

Samsung Semiconductor, Incorporated; Samsung Electronics America, Incorporated; Sharp Corporation; Sharp Electronics Corporation; Toshiba Corporation; Toshiba Mobile Display Company, Limited, formerly known as Toshiba Matsushita Display Technology Company, Limited; Toshiba America Electronic Components, Incorporated; Toshiba America Information Systems, Incorporated,

Defendants - Appellants.

Appeal from the United States District Court for the Southern District of Mississippi, Jackson

ON PETITION FOR REHEARING EN BANC

(Opinion ____, 5 Cir., ____, ____, F.3d ____)

Before JOLLY, CLEMENT, and ELROD, Circuit Judges.

PER CURIAM:

(x) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and

not disqualified not having voted in favor (Fed. R. App. P. and 5th Cir R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly

United States Circuit Judge

APPENDIX E

Mississippi Antitrust Act

Sec. 75-21-1. Trust and combine; defined.

A trust or combine is a combination, contract, understanding or agreement, expressed or implied, between two or more persons, corporations or firms or association of persons or between any one or more of either with one or more of the others, when inimical to public welfare and the effect of which would be:

(a) To restrain trade;

(b) To limit, increase or reduce the price of a commodity;

(c) To limit, increase or reduce the production or output of a commodity;

(d) To hinder competition in the production, importation, manufacture, transportation, sale or purchase of a commodity;

(e) To engross or forestall a commodity;

(f) To issue, own or hold the certificate of stock of any trust and combine within the spirit of this chapter knowing it to be such at the time of the issue or the acquisition or holding such certificate; or

(g) To place the control to any extent of business or of the proceeds or earnings thereof, contrary to the spirit and meaning of this chapter, in the power of trustees, by whatever name called; or

(h) To enable or empower any other person than themselves, their proper officers, agents and employees to dictate or control the management of

business, contrary to the spirit and meaning of this chapter; or

(i) To unite or pool interest in the importation, manufacture, production, transportation, or price of a commodity, contrary to the spirit and meaning of this chapter.

Any corporation, domestic or foreign, or any partnership, or individual, or other association, or person whatsoever, who are now, or shall hereafter create, enter into, become a member of, or a party to any trust or combine as hereinabove defined shall be deemed and adjudged guilty of a conspiracy to defraud and shall be subject to the penalties hereinafter provided. Any person, association of persons, corporation, or corporations, domestic or foreign, who shall be a party or belong to a trust and combine shall be guilty of crime and upon conviction thereof shall, for a first offense be fined in any sum not less than one hundred dollars ($100.00) nor more than five thousand dollars ($5,000.00) and for a second or subsequent offense not less than two hundred dollars ($200.00) nor more than ten thousand dollars ($10,000.00), and may be enjoined by a final decree of the chancery court, in a suit by the state on the relation of the attorney general, from the further prosecution of or doing of the acts constituting the trust and combine as defined in this chapter.

Sec. 75-21-7. Penalty for violation of anti-trust laws.

Any person, corporation, partnership, firm or association of persons and the officers and representatives of the corporation or association violating any of the provisions of this chapter shall forfeit not less than one hundred dollars ($100.00) nor more than two thousand dollars ($2,000.00) for every such violation. Each month in which such person, corporation or association shall violate this chapter shall be a separate violation, the forfeiture and penalty in such case to be recovered alone by suit in the name of the state on the relation of the attorney general and by the consent of the attorney general suits may be brought by any district attorney, such suits to be brought in any court of competent jurisdiction.

Sec. 75-21-9. Private persons and corporations may sue.

Any person, natural or artificial, injured or damaged by a trust and combine as herein defined, or by its effects direct or indirect, may recover all damages of every kind sustained by him or it and in addition a penalty of five hundred dollars ($500.00), by suit in any court of competent jurisdiction. Said suit may be brought against one or more of the parties to the trust or combine and one or more of the officers and representatives of any corporation a party to the same, or one or more of either. Such penalty may be recovered in each instance of injury. All recoveries herein provided for may be sued for in one suit.

Sec. 75-21-37. Duties of district attorneys.

It shall be the duty of the district attorneys in their several districts, when requested by the attorney general, to enforce the civil features of the antitrust laws of this state by appropriate legal proceedings and suits at law or in equity; and their duty to enforce criminal features of said laws shall be the same as their duty to enforce other criminal statutes. All such suits shall be brought by and in the name of the State of Mississippi upon the relation of the attorney general or an authorized district attorney.

Sec. 75-21-39. Application of chapter.

No right, liability, pain, penalty, forfeiture, prosecution or suit under laws existing prior to the adoption of this chapter shall be in any wise affected thereby, but the same may be asserted, prosecuted, declared, inflicted and imposed under the laws in force prior to the adoption of this chapter. This chapter shall be liberally construed in all courts to the end that trusts and combines may be suppressed, and the benefits arising from competition in business preserved to the people of this state.

Mississippi Consumer Protection Act

Sec. 75-24-1. Creation of office of consumer protection.

There is hereby created and established within the office of the attorney general an "Office of Consumer Protection," which shall be charged with the administration of this chapter. The attorney general is hereby authorized and empowered to employ the necessary personnel to carry out the provisions of this chapter.

Sec. 75-24-5. Prohibited acts or practices.

(1) Unfair methods of competition affecting commerce and unfair or deceptive trade practices in or affecting commerce are prohibited. Action may be brought under Section 75-24-5 (1) only under the provisions of Section 75-24-9.

(2) Without limiting the scope of subsection (1) of this section, the following unfair methods of competition and unfair or deceptive trade practices or acts in the conduct of any trade or commerce are hereby prohibited:

(a) Passing off goods or services as those of another;

(b) Misrepresentation of the source, sponsorship, approval, or certification of goods or services;

(c) Misrepresentation of affiliation, connection, or association with, or certification by another;

(d) Misrepresentation of designations of geographic origin in connection with goods or services;

(e) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses,

benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;

(f) Representing that goods are original or new if they are reconditioned, reclaimed, used, or secondhand;

(g) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

(h) Disparaging the goods, services, or business of another by false or misleading representation of fact;

(i) Advertising goods or services with intent not to sell them as advertised;

(j) Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(k) Misrepresentations of fact concerning the reasons for, existence of, or amounts of price reductions.

Sec. 75-24-9. Injunction to restrain or prevent violation.

Whenever the Attorney General has reason to believe that any person is using, has used, or is about to use any method, act or practice prohibited by Section 75-24-5, and that proceedings would be in the public interest, he may bring an action in the name of the state against such person to restrain by temporary or permanent injunction the use of such method, act or practice. The action shall be brought in the chancery or county court of the county in which such person resides or has his principal place of business, or, with consent of the parties, may be brought in the chancery or county court of the county in which the State Capitol is located. The said courts are authorized to issue temporary or permanent injunctions to restrain and prevent violations of this chapter, and such injunctions shall be issued without bond.

Sec. 75-24-11. Additional orders or judgments; appointment of receiver; revocation of license or certificate to do business.

The court may make such additional orders or judgments, including restitution, as may be necessary to restore to any person in interest any monies or property, real or personal, which may have been acquired by means of any practice prohibited by this chapter, including the appointment of a receiver or the revocation of a license or certificate authorizing that person to engage in business in this state, or both.

Sec. 75-24-13. Powers of receivers; right of injured party to participate; jurisdiction of court.

When a receiver is appointed by the court pursuant to this chapter, he shall have the power to sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, records, documents, papers, choses in action, bills, notes and property of every description, derived by means of any practice prohibited by this chapter, including property with which such property has been mingled if it cannot be identified in kind because of such commingling, and collect or to bring suit to collect in the name of the state for and on behalf of the owner of any chose in action, and to sell, convey, and assign the same and hold and dispose of the proceeds thereof under the direction of the court. Any person who has suffered damages as a result of the use of employment of any practices prohibited by this chapter, and submits proof to the satisfaction of the court that he has in fact been damaged, may participate with general creditors in the distribution of the assets to the extent he has sustained out-of-pocket losses. The receiver shall settle the estate and distribute the assets under the direction of the court. The court shall have jurisdiction of all questions arising in such proceedings and may make such orders and judgments therein as may be required.

Sec. 75-24-15. Action or counterclaim by individual suffering loss; class actions prohibited.

(1) In addition to all other statutory and common law rights, remedies and defenses, any person who purchases or leases goods or services primarily for per-

sonal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use of employment by the seller, lessor, manufacturer or producer of a method, act or practice prohibited by Section 75-24-5 may bring an action at law in the court having jurisdiction in the county in which the seller, lessor, manufacturer or producer resides, or has his principal place of business or, where the act or practice prohibited by Section 75-24-5 allegedly occurred, to recover such loss of money or damages for the loss of such property, or may assert, by way of setoff or counterclaim, the fact of such loss in a proceeding against him for the recovery of the purchase price or rental, or any portion thereof, of the goods or services.

(2) In any private action brought under this chapter, the plaintiff must have first made a reasonable attempt to resolve any claim through an informal dispute settlement program approved by the Attorney General.

(3) In any action or counterclaim under this section of this chapter, a prevailing defendant may recover in addition to any other relief that may be provided in this section costs and a reasonable attorney's fee, if in the opinion of the court, said action or counterclaim was frivolous or filed for the purpose of harassment or delay.

(4) Nothing in this chapter shall be construed to permit any class action or suit, but every private action must be maintained in the name of and for the sole use and benefit of the individual person.

Sec. 75-24-19. Civil penalties; imposition and recovery.

(1) Civil remedies.

(a) Any person who violated the terms of an injunction issued under Section 75-24-9 shall forfeit and pay to the state a civil penalty in a sum not to exceed Ten Thousand Dollars ($10,000.00) per violation which shall be payable to the General Fund of the State of Mississippi. For the purposes of this section, the chancery or county court issuing an injunction shall retain jurisdiction, and the cause shall be continued, and in such cases the Attorney General acting in the name of the state may petition for recovery of civil penalties.

(b) In any action brought under Section 75-24-9, if the court finds from clear and convincing evidence, that a person knowingly and willfully used any unfair or deceptive trade practice, method or act prohibited by Section 75-24-5, the Attorney General, upon petition to the court, may recover on behalf of the state a civil penalty in a sum not to exceed Ten Thousand Dollars ($10,000.00) per violation. One-half (1/2) of said penalty shall be payable to the Office of Consumer Protection to be deposited into the Attorney General's special fund. All monies collected under this section shall be used by the Attorney General for consumer fraud education and investigative and enforcement operations of the Office of Consumer Protection. The other one-half (1/2) shall be payable to the General Fund of the State of Mississippi. The Attorney General may also recover, in addition to any other relief that may be provided in this section, investigative costs and a reasonable attorney's fee.

(2) No penalty authorized by this section shall be deemed to limit the court's powers to insure compliance with its orders, decrees and judgments, or punish for the violations thereof.

(3) For purposes of this section, a knowing and willful violation occurs when the court finds from clear and convincing evidence that the party committing the violation knew or should have known that his conduct was a violation of Section 75-24-5.