No. 16-2300

In the

United States Court of Appeals

for the

Fourth Circuit

MICHAEL A. SCOTT, on behalf of himself and all others similarly situated,

Plaintiff-Appellee,

v.

CRICKET COMMUNICATIONS, LLC, f/k/a Cricket Communications, Inc.,

Defendant-Appellant.

On appeal from a final order of the United States District Court for the District of Maryland, Case Nos. 1:15-cv-03330-GLR and 1:15-cv-03759-GLR, Hon. George L. Russell, III

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest federation of businesses and associations, which represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size, in every economic sector, and from every geographic region of the country. One important Chamber function is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's businesses.

The Chamber was involved—on behalf of its members—in organizing support for the much-needed class action reforms embodied in the Class Action Fairness Act of 2005 ("CAFA"). As discussed below, CAFA expanded federal jurisdiction to ensure that class actions of national importance would be heard in federal courts. The Chamber's members are often defendants in such lawsuits and thus are directly impacted by the reforms Congress memorialized in CAFA. In

[1] All parties to this appeal have consented to the filing of this brief. As required by FED. R. APP. P. 29(c)(5), *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

light of this historical background, the Chamber has a strong interest in, and a wealth of experience relevant to, interpreting CAFA's jurisdictional requirements.

The Chamber is concerned that the ruling by the district court below will encourage the very class action abuse and jurisdictional gamesmanship that CAFA was intended to eliminate. The district court's ruling would allow a plaintiff's attorney to strategically plead class claims that are *likely* to exceed CAFA's amount in controversy requirement, but then avoid removal by demanding that the defendant establish to a near legal *certainty*—and at great cost—that the value of the claims exceed the amount in controversy requirement. That onerous requirement ignores the text and history of CAFA, and would create a substantial new exception to CAFA's broad removal provisions for cases squarely intended by Congress to be heard in federal court. Accordingly, the Chamber believes that reversal of the judgment below is necessary to clarify proper removal standards and ensure appropriate access to federal courts.

SUMMARY OF ARGUMENT

The "primary objective" of CAFA is to ensure "'Federal court consideration of interstate cases of national importance.'" *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013) (quoting Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 4, 5). Large interstate class actions "are the paradigm for federal diversity jurisdiction because, in a constitutional sense, they

implicate interstate commerce," and raise concerns about discrimination by state courts and local bias against interstate enterprises. *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 305 (3d Cir. 1998). Yet before CAFA was enacted, such class actions frequently were "beyond the reach of the federal courts." *Id.*

CAFA addressed this jurisdictional mismatch by facilitating removal of class actions "if the class has more than 100 members, the parties are minimally diverse, and the amount in controversy exceeds $5 million." *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 552 (2014). Congress intended these loosened requirements to facilitate removal of class actions from state courts, which may be inclined to favor local defendants, to federal courts that generally possess greater resources and expertise to handle large cases with national ramifications. *See* S. Rep. No. 109-14, at 14 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 15 (noting that "abuses are much more likely to occur when state court judges are unable to give class action cases and settlements the attention they need" due to lack of "necessary resources").

Since CAFA was enacted in 2005, plaintiffs repeatedly have attempted to circumvent CAFA's broad removal mandate. Plaintiffs have employed several tactics to evade CAFA, such as manipulating (i) the amount of damages sought by the class, (ii) the size of the proposed class, and (iii) the composition of the

members of the proposed class. *See* S. Rep. No. 109-14, at 10-11, *reprinted in* 2005 U.S.C.C.A.N. 3, 11-12; *Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 408 (6th Cir. 2008) (reversing a remand order when the plaintiff splintered a case into multiple lawsuits to avoid removal under CAFA). The tactic used by the Plaintiff in this case involves limiting the composition of the proposed class to "citizens" of a particular state—in this case, Maryland—and then arguing that Cricket's evidence that over 47,000 *residents* of Maryland bought Cricket's phones valued at $200 is not sufficient evidence of the number of Maryland *citizens*, and putative class members, who bought phones.

That tactic misconstrues the burden of proof, effectively requiring the defendant to establish, to a legal certainty, the amount in controversy. The Supreme Court has made clear that a defendant need only prove by a preponderance of the evidence that the amount in controversy exceeds $5,000,000. *Dart Cherokee Basin Operating Co., LLC*, 135 S. Ct. at 554. By accepting the Plaintiff's argument and remanding this case, the district court ignored *Dart Cherokee* and imposed an improper burden on Cricket.

Beyond causing an erroneous result in this case, the district court's approach, if applied generally, would carve a new exception to CAFA that would undermine that statute's purpose of facilitating easy removal of significant interstate class actions. Plaintiffs' attorneys could easily gerrymander class

definitions such that it would be extremely burdensome to prove to a certainty the size of the class—and hence the amount in controversy. Yet if the case likely places more than $5 million at stake and the defendant is a non-citizen of the forum state, the case clearly has the sort of interstate implications contemplated by CAFA.

The district court's ruling would encourage the very gamesmanship and forum shopping that CAFA was intended to eliminate. By bringing cases in their preferred state courts and insulating them against removal through the artful pleading of class definitions, plaintiffs could extract settlements from defendants who otherwise would be forced to expend considerable sums simply to get into federal court. This Court should reverse the district court's ruling and clarify that a defendant is not required to conclusively prove citizenship of putative class members to establish that CAFA's jurisdictional minimum is met.

I. CAFA is intended to encourage easy removal of class actions.

Congress enacted CAFA to combat "abuses of the class action device" by expanding the availability of removal in class action cases. *See* Pub. L. No. 109-2, § 2(a)(2), 2(b), 119 Stat. 4, 4-5. Among those abuses were efforts by "State and local courts" to keep "cases of national importance out of Federal court," and "sometimes acting in ways that demonstrate bias against out-of-State defendants." *Id.* § 2(a)(4)(A)–(B), 119 Stat. 4, 5; *see also United Steel, Paper & Forestry,*

Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC v. Shell Oil Co., 602 F.3d 1087, 1090 (9th Cir. 2010) ("Congress passed the Class Action Fairness Act 'primarily to curb perceived abuses of the class action device which, in the view of CAFA's proponents, had often been used to litigate multi-state or even national class actions in state courts.'"); *Davis v. Carl Cannon Chevrolet-Olds, Inc.*, 182 F.3d 792, 798 (11th Cir. 1999) (Nangle, J., concurring) (noting that plaintiffs had been "carefully crafting the language in the petitions or complaints in order to avoid the amount in controversy requirement of the federal courts").

During its deliberations, Congress expressly noted that state courts sometimes displayed bias or favored plaintiffs and their in-state counsel over largely out-of-state defendants. *See* 151 Cong. Rec. H685, H685 (daily ed. Feb. 16, 2005) (statement of Rep. Goodlatte) (noting the preponderance of class actions in state courts that "are overwhelmingly biased and favorable to the plaintiffs in a class action"); *see also* 151 Cong. Rec. S1225, S1235 (daily ed. Feb. 10, 2005) (statement of Sen. Sessions) (arguing that CAFA is consistent with the Founders' views that out-of-state defendants should be protected from the "home cooking" of state courts). Similarly, the Senate Judiciary Committee noted its belief "that the current diversity and removal standards as applied in interstate class actions have facilitated a parade of abuses, and are thwarting the underlying purpose of the

constitutional requirement of diversity jurisdiction." S. Rep. No. 109-14, at 6, *reprinted in* 2005 U.S.C.C.A.N. 3, 7.

To combat class action abuse, Congress wrote CAFA to substantially alter previous removal practice. Where the prior diversity jurisdiction statute had been interpreted to require each class member separately to meet the $75,000 amount-in-controversy requirement, *see Zahn v. Int'l Paper Co.*, 94 S. Ct. 505, 510-11 (1973), *superseded by statute*, Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, *as recognized in Exxon Mobil Corp. v. Allpattah Servs., Inc.*, 125 S. Ct. 2611, 2625 (2005), under CAFA the claims of putative class members are aggregated to determine if the new $5,000,000 jurisdictional threshold is met, 28 U.S.C. § 1332(d)(6). CAFA also replaced the requirement of complete diversity of citizenship between all plaintiffs and all defendants with a rule requiring only minimal diversity between any member of the putative class and any defendant. 28 U.S.C. § 1332(d)(2)(A)-(C).

In other words, CAFA applies the rationale for diversity jurisdiction—to protect out-of-state defendants against local bias and prejudice—to cases with minimal diversity that feature an aggregate amount in controversy exceeding $5,000,000. *See Burgess v. Seligman*, 2 S. Ct. 10, 22 (1883) ("[T]he very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent

tribunals, which, it might be supposed, would be unaffected by local prejudices and sectional views[.]"); 3 Joseph Story, Commentaries on the Constitution of the United States § 1684 (1833) (diversity jurisdiction provides noncitizens with a "national and impartial" tribunal). CAFA advances that goal by "ensur[ing] 'Federal court consideration of interstate cases of national importance." *Standard Fire Ins. Co.*, 133 S. Ct. at 1350 (citation omitted).

By easing the burden of removal, Congress tilted the scale in favor of having large interstate class actions adjudicated in federal court. This intent was expressed in the Senate Judiciary Committee Report, which states the Committee's "belie[f] that the federal courts are the appropriate forum to decide most interstate class actions because these cases usually involve large amounts of money and many plaintiffs, and have significant implications for interstate commerce and national policy." S. Rep. No. 109-14, at 27, *reprinted in* 2005 U.S.C.C.A.N. 3, 27. *See also* S. Rep. No. 109-14, at 35, *reprinted in* 2005 U.S.C.C.A.N. 3, 34 (Congress intended CAFA "to strongly favor the exercise of federal diversity jurisdiction over class actions with interstate ramifications").

To effectuate its desire to move interstate class actions into the federal judicial system, Congress intended that CAFA be read broadly and expansively. In a House-floor colloquy that occurred just before CAFA's passage, then-House Judiciary Committee Chairman F. James Sensenbrenner said: "The bottom line is

that [CAFA] is intended to substantially expand Federal court jurisdiction over class actions" and its provisions "should be read broadly, with a strong preference that interstate class actions should be heard in a Federal court if properly removed by a defendant." 151 Cong. Rec. H723, H730 (daily ed. Feb. 17, 2005). Congress's remedial objective was expressly extended to CAFA's amount-in-controversy provision, which the legislature intended "to be interpreted expansively." S. Rep. No. 109-14, at 42, *reprinted in* 2005 U.S.C.C.A.N. 3, 40. According to the Senate Report, "if a federal court is uncertain about whether 'all matters in controversy' in a purported class action 'do not in the aggregate exceed the sum or value or $5,000,000,' the court should err in favor of exercising jurisdiction over the case." *Id.* The Supreme Court has recognized this intent to facilitate broad removal, finding that "no antiremoval presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court." *Dart Cherokee Basin Operating Co., LLC*, 135 S. Ct. at 554; *see also Jordan v. Nationstar Mortg., LLC*, 781 F.3d 1178, 1184 (9th Cir. 2015) (finding that "Congress and the Supreme Court have instructed us to interpret CAFA's provisions under section 1332 broadly in favor of removal").

Consistent with Congress's intent that CAFA be read broadly, CAFA was intended to "make it harder for counsel to 'game the system' and keep class actions in state court." S. Rep. No. 109-14, at 27, *reprinted in* 2005 U.S.C.C.A.N. 3, 27.

CAFA thus instructs district courts to evaluate removal petitions in cases that might appear to implicate only local interests with an eye to whether the action "has been pleaded in a manner that seeks to avoid Federal jurisdiction," 28 U.S.C. § 1332(d)(3)(C). This inquiry includes "determin[ing] whether the plaintiffs have proposed a 'natural' class—a class that encompasses all of the people and claims that one would expect to include in a class action, as opposed to a class that appears to be gerrymandered solely to avoid federal jurisdiction by leaving out certain potential class members or claims." S. Rep. No. 109-14, at 37, *reprinted in* 2005 U.S.C.C.A.N. 3, 36. "If the federal court concludes evasive pleading is involved, that factor would favor the exercise of federal jurisdiction." *Id.*

II. The district court's ruling empowers plaintiffs to preclude removal of interstate class actions through the very sort of gamesmanship and artful pleading that CAFA seeks to eliminate.

The district court's ruling undermines CAFA's policy of easy removal of interstate class actions by making it virtually impossible for a defendant to establish the factual predicate for removal when the putative class comprises "citizens" of a particular state. That ruling would encourage rather than ignore artful pleading, it would carve a significant and atextual new exception to CAFA's broad removal mandate, and it would defeat Congress's intent that interstate class actions be easily removed from potentially biased state court forums.

The mechanics for removing a case under CAFA are straightforward. A "defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold." *Dart Cherokee Basin Operating Co., LLC*, 135 S. Ct. at 554. That allegation is "accepted when not contested by the plaintiff or questioned by the court," *id.* at 553, and the defendant's notice of removal "need not contain evidentiary submissions." *Id.* at 551. If a plaintiff contests, or the court questions, the defendant's amount in controversy allegation, "both sides submit proof and the court decides, by a preponderance of the evidence, whether the amount-in-controversy requirement has been satisfied." *Id.* at 554.

After the Plaintiff challenged removal, Cricket provided uncontroverted proof that during the class period, it sold 47,760 handsets locked to its CDMA network to customers who listed addresses located in Maryland. JA 77. There is no dispute that those handsets cost at least $200 each, JA 28 ¶ 27, putting over $9.5 million in controversy. That evidence more than satisfied Cricket's burden to establish, by a preponderance of the evidence, that CAFA's jurisdictional minimum was met. The Plaintiff, in turn, stood on its pleadings and offered no evidence to support its highly counterintuitive inference that nearly *half* of the customers with addresses in Maryland were in fact not citizens of Maryland.

Despite this one-sided evidence, the district court found that Cricket failed to meet its burden because it failed to prove how many of its Maryland customers were "citizens," and not just mere "residents," of that state. JA 92. The court deemed "over-inclusive" Cricket's uncontroverted evidence that 47,760 Cricket customers with Maryland addresses bought handsets locked to Cricket's CDMA network during the class period. Instead, the district court found that without additional evidence of domicile (such as where consumers are registered to vote, where they are employed, and where they pay taxes), it "would have to speculate to determine the number of class members that purchased CDMA cellphones and the amount in controversy." JA 93. In effect, by refusing to infer that it was more likely than not that roughly half of the customers with Maryland addresses were Maryland citizens, the district court discounted Cricket's evidence as no evidence at all.

As Cricket has forcefully explained, the district court's ruling misallocates the burden of proof in this case. Instead of faithfully applying the preponderance of the evidence standard, the district court effectively required Cricket to prove the amount in controversy to a near "legal certainty" in contravention of clear direction from the Supreme Court. *See Dart Cherokee Basin Operating Co., LLC*, 135 S. Ct. at 554 (quoting H.R. Rep. No. 112-10, p. 16 (2011)) (stating that removing

defendant does "not need to prove to a legal certainty that the amount in controversy requirement has been met").

Moreover, the district court's approach would undercut the broad policy of removal advanced by CAFA by empowering plaintiffs to use artful pleading of class definitions to avoid removal of substantial interstate class actions that any objective observer could discern put far more than $5,000,000 in controversy. Plaintiffs frequently limit the membership of proposed classes to residents or citizens of a particular state. CAFA anticipates this, and provides narrow exceptions from removal for class actions involving in-state defendants that are truly local in nature. For instance, a district court must decline jurisdiction when "two-thirds or more of the members of all proposed classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed." 28 U.S.C. § 1332(d)(4)(B); *see id.* § 1332(d)(4)(A) (barring removal of class actions when, among other things, "greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed," and at least one defendant "from whom significant relief is sought by members of the plaintiff class" is a "citizen of the State in which the action was originally filed"); *see also id.* § 1332(d)(3) (permitting district courts to decline jurisdiction when "the primary defendants" are citizens of the

forum state and more than one-third, but less than two-thirds, of the members of all proposed classes are citizens of the forum state).

CAFA makes no such exceptions, however, for class actions that involve only out-of-state defendants. The absence of such an exception makes sense, as those types of "interstate" class actions squarely implicate the policy concerns that animated CAFA as well as diversity jurisdiction more generally. *See, e g., Lowery v. Alamaba Power Co.*, 483 F.3d 1184, 1193 (11th Cir. 2007) (finding that "CAFA seeks to address [inequitable state court treatment of class actions] and abusive practices [by plaintiffs' class counsel] by . . . broadening federal diversity jurisdiction over class actions with interstate implications."); *Freeman*, 551 F.3d at 407 (finding that "Congress's obvious purpose in passing [CAFA]" was "to allow defendants to defend large interstate class actions in federal court").

The approach embraced by the district court, however, would carve an exception to federal jurisdiction for a significant number of interstate class actions that finds no warrant in CAFA's text or legislative history. One of CAFA's most significant innovations was to allow the amount in controversy requirement to be met by aggregating the claims of the putative class members. By the district court's logic, however, that mechanism cannot function in a class action limited to the "citizens" of a particular state (or states) where the defendant will almost

always lack conclusive proof of the *domicile* of thousands—if not millions—of putative class members.

As a practical matter, requiring that sort of proof would insulate against removal a large number of class actions intended to be covered by CAFA. This is particularly true of class actions brought on behalf of consumers against out-of-state defendants and involving small-ticket items—such as cosmetics, food, and beverage products—the sale of which does not involve any exchange of detailed information about the purchaser's domicile. Taking the district court's cue, by simply defining the putative class based on the "citizenship" of its members, a plaintiff could practically eliminate any possibly that such class actions could be removed. Thus, by use of "magic words" and artful pleading, a plaintiff could easily prevent removal of the sort of large interstate class actions CAFA was unambiguously intended to cover. For this reason alone, the district court's ruling should be reversed.

III. The district court's ruling also will impose substantial costs on defendants seeking to remove class actions, encouraging abusive litigation tactics and extortionate settlements.

In addition to serving as an effective bar on removal of interstate class actions brought on behalf of "citizens" of a particular state, the district court's ruling would impose prohibitive costs and complexity on any defendant who attempted to prove the citizenship of enough class members to meet CAFA's

amount in controversy requirement. The district court recognized this fact, observing that by "strategically defining the Class as including only Maryland citizens, Scott place[d] Cricket in somewhat of a predicament: [Cricket] can't prove there is at least $5 million in controversy without extensive discovery of facts related to the domiciles of potentially tens of thousands of Cricket customers." JA 87-88.

The extensive discovery generated by that judicially created predicament could include document production, depositions, and expert reports. That costly undertaking is inconsistent with the preliminary nature of the jurisdictional inquire under CAFA, a fact recognized by Judge Wilkinson:

> Although [the removing defendant] bears the ultimate burden of proving by a preponderance of the evidence that the jurisdictional amount is in controversy, it need not produce reams of personnel records simply to present a prima facie case. To require more would lead to voluminous discovery requests and document production at the preliminary stages of what is itself a preliminary jurisdictional issue. Encouraging this sort of deluge adds more litigiousness to already litigious class action undertakings.

Bartnikowski v. NVR, Inc., 307 F. App'x 730, 740-41 (4th Cir. 2009) (Wilkinson, J., dissenting). CAFA was intended to ease the burden of removal, not enhance it. *See* Diane Bratvold & Daniel Supalla, *Standard of Proof to Establish Amount in Controversy when Defending Removal Under the Class Action Fairness Act*, 36 WM. MITCHELL L. REV. 1397, 1426-27 (2010) ("Congress intended that CAFA

would expand federal jurisdiction over some class actions by making removal easier for defendants[.]").

By making removal more difficult, costly, and uncertain, the district court's ruling will increase the incentive for plaintiffs' lawyers to file meritless lawsuits on behalf of putative classes of "citizens" of one or more states knowing the settlement value of those suits will be greatly enhanced. By their very nature, class actions enhance the risk of *in terrorem* settlements. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (observing that class action defendants may be "pressured into settling questionable claims" when faced with "a small chance of devastating loss" created by the aggregation of thousands of potential claims); *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 678 (7th Cir. 2009) (Posner, J.) ("When the potential liability created by a lawsuit is very great, even though the probability that the plaintiff will succeed in establishing liability is slight, the defendant will be under pressure to settle rather than to bet the company, even if the betting odds are good[.]"). CAFA was designed to pare back abusive settlement practices, in part by allowing for removal of interstate class actions from state courts that "lack the necessary resources to supervise proposed class settlements properly." S. Rep. No. 109-14, at 14, *reprinted in* 2005 U.S.C.C.A.N. 3, 15. The district court's approach, however, would force interstate class actions brought on behalf of "citizens" to languish in state courts with little hope of

removal, and afford plaintiffs additional leverage to extract settlements based on the cost of mounting a removal effort.

The district court's approach also would harm the consumers who are the supposed beneficiaries of coerced class action settlements. As Congress recognized when it passed CAFA, many settlements approved by state courts benefit only class counsel, while affording the class members little, if any, tangible benefit. S. Rep. No. 109-14, at 33, *reprinted in* 2005 U.S.C.C.A.N. 3, 32 ("Abusive class action settlements in which plaintiffs receive promotional coupons or other nominal damages while class counsel receive large fees are all too commonplace."). Far from ameliorating those concerns, trapping interstate class actions in state court based on artful pleading and a misallocated burden of proof would only exacerbate the threat that plaintiffs' attorneys will extract extortionate settlements and profit at the expense of both the defendants who pay those settlements, and the class members on whose behalf those settlements are purportedly collected.

CONCLUSION

The decision under review is important. It creates a loophole in CAFA that Congress did not intend, and would exclude from federal jurisdiction large interstate class actions that Congress unequivocally intended to be adjudicated in federal court. Far from advancing the policies underpinning CAFA, the district

court's decision will make removal harder, not easier, and will encourage the sort of abusive behavior CAFA was intended to eliminate. Accordingly, the decision of the district court to remand this case should be reversed.

Respectfully submitted,

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Dated: December 27, 2016

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/s/ *Ryan L. Bangert*
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Counsel for *Amicus Curiae*

Dated: December 27, 2016

CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2016, I electronically filed the foregoing Brief of Amicus Curiae Chamber of Commerce of the United States of America in Support of Appellant with the Clerk of court using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

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