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

OPENING BRIEF FOR DEFENDANT-APPELLANT CRICKET COMMUNICATIONS, LLC

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 16-2300 Caption: Scott v. Cricket Communications, LLC

Pursuant to FRAP 26.1 and Local Rule 26.1,

Cricket Communications, LLC
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☑ YES ☐ NO
If yes, identify all parent corporations, including all generations of parent corporations:

Petitioner Cricket Communiciations, LLC is a wholly-owned subsidiary of Cricket Wireless LLC. Cricket Wireless LLC is an indirect, wholly-owned subsidiary of AT&T Inc.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☑ YES ☐ NO
If yes, identify all such owners:

Petitioner Cricket Communications, LLC is indirectly owned by AT&T Inc., a publicly held corporation.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Archis A. Parasharami Date: 12/19/2016

Counsel for: Cricket Communications, LLC

CERTIFICATE OF SERVICE

****

I certify that on December 19, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Archis A. Parasharami
(signature)

12/19/2016
(date)

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STATUTES AND RULES

MISCELLANEOUS

INTRODUCTION

The district court's holding in this case allowed the plaintiff to circumvent federal jurisdiction under the Class Action Fairness Act ("CAFA") through use of manipulative pleading. That end-run around CAFA is improper: As the Supreme Court has explained, "CAFA's primary objective'" is to "ensur[e] 'Federal court consideration of interstate cases of national importance'" (*Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 554 (2014), quoting *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013))—and Congress enacted the statute specifically to prevent use of manipulative devices like the one at issue here.

In this case, the named plaintiff, Michael Scott, is a Maryland citizen who brought an action in Maryland state court on behalf of a putative class of Maryland citizens, suing an out-of-State defendant, Cricket Communications, LLC. Scott asserts that Cricket's sale of certain phones to Maryland citizens for "hundreds" of dollars each violated the federal Magnuson-Moss Warranty Act. Cricket removed the case to federal court under CAFA, alleging in its notice of removal—and demonstrating with evidence—that CAFA's $5 million amount-in-controversy requirement was met because Cricket sold at least 47,760 phones in question to customers with Maryland addresses during the class period. Making the reasonable

assumption that most of those Maryland customers are citizens of the State, an amount on the order of $9.5 million is at stake in the suit. Scott provided no evidence in response.

Nonetheless, the district court remanded the case to state court, holding that because not all Maryland residents necessarily are citizens of the State (in theory, some residents might be legally domiciled elsewhere), Cricket's evidence was "over-inclusive" and therefore not probative of the amount in controversy. Instead, the district court demanded evidence of every potential class member's domicile—an impossible task given that definitive determination of domicile requires consideration of numerous unpublished factors, including the place where an individual votes, pays taxes, is employed, and intends to remain indefinitely.

That holding cannot be squared with CAFA. As we explain below, federal jurisdiction exists under CAFA so long as the proponent of jurisdiction shows, by a preponderance of the evidence, that $5 million is in controversy. The district court's decision to disregard Cricket's uncontested evidence simply because *some* Cricket customers with Maryland addresses *might* in theory not be Maryland citizens violated the preponderance standard. There is no rule that bars the consideration of "over-inclusive" evidence, so long as the evidence logically bears on the question before the

court. And as a matter of common sense and judicial experience, evidence of an individual's residence and billing address (uncontrovertibly established here) suffices to show by a preponderance of the evidence that the individual is a citizen of the State of his or her residence—as other courts repeatedly have recognized.

The district court's contrary conclusion not only misapplied the preponderance-of-the-evidence standard, but also disregarded the policy of CAFA, which "Congress enacted to facilitate adjudication of certain class actions in federal court." *Dart Cherokee*, 134 S. Ct. at 554. In particular, Congress intended to prevent the use of manipulative devices by plaintiffs for the purpose of frustrating the exercise of federal jurisdiction. But the district court's approach here, which would make it possible for plaintiffs to evade federal court simply by defining a class to include "citizens" of a particular State, would improperly "exalt form over substance, and run directly counter to CAFA's primary objective" of allowing interstate class actions to be heard in a federal forum. *Standard Fire*, 133 S. Ct. at 1350. The decision below should be reversed.

JURISDICTION

The district court had subject-matter jurisdiction under CAFA, 28 U.S.C. § 1332(d)(2). On August 19, 2016, the district court entered a final

order remanding the case to state court. JA 98. Cricket timely petitioned this Court for permission to appeal the remand order pursuant to 28 U.S.C. § 1453(c). *See* Pet. for Permission to Appeal, *Scott v. Cricket Commc'ns, LLC*, No. 16-3051 (Aug. 29, 2016), ECF No. 2. Section 1453(c) permits a court of appeals to "accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not more than 10 days after entry of the order." 28 U.S.C. § 1453(c)(1).

On November 8, 2016, this Court ordered that Cricket's petition for permission to appeal be placed in abeyance pending "briefing and further consideration of the merits of the appeal" in this case (No. 16-2300), which was docketed the same day. *See* Order, *Scott v. Cricket Commc'ns, LLC*, No. 16-3051, ECF No. 16.

ISSUE PRESENTED FOR REVIEW

Whether, in light of evidence that the defendant sold more than $9.5 million worth of the products in dispute to Cricket customers who list Maryland addresses, as well as common-sense inferences drawn from that evidence, it is more likely than not that at least $5 million is in controversy in a case seeking damages for Cricket customers who are Maryland citi-

zens.

STATEMENT OF THE CASE

A. Factual Background

This case presents the question whether a class action brought on behalf of Maryland "citizens" against an out-of-State defendant may be heard in federal court under CAFA, which Congress enacted to "ensur[e] 'Federal court consideration of interstate cases of national importance.'" *Standard Fire*, 133 S. Ct. at 1350 (quoting Pub. L. No. 109–1, § 2(b)(2), 119 Stat. 4, 5 (2005)). To accomplish this goal, CAFA creates federal jurisdiction "to hear a 'class action' if the class has more than 100 members, the parties are minimally diverse, and"—of particular relevance here—"the 'matter in controversy exceeds the sum or value of $5,000,000'" when "'the claims of the individual class members [are] aggregated.'" *Id.* (quoting 28 U.S.C. §§ 1332(d)(2), (d)(5)(B), and (d)(6)).

Plaintiff Scott, a Maryland citizen, filed this putative class action ("*Scott I*") in Maryland state court against Cricket, a Delaware corporation whose principal place of business is Georgia. *See* JA 11, 26, 49. Scott's complaint asserts that Scott purchased two Samsung Galaxy S4 mobile telephones from Cricket between 2013 and 2014, both of which could be used only on Code Division Multiple Access ("CDMA") networks. JA 21

¶ 26. Scott alleged that by the time he acquired the phones, Cricket knew that it would be transitioning all of its customers to a Global Systems for Mobile ("GSM") network. JA 25 ¶ 5.

This network transition, Scott continued, rendered his CDMA phones "useless and worthless." JA 25 ¶ 7. He asserts a single claim under the federal Magnuson-Moss Warranty Act ("MMWA") for alleged breach of express and implied warranties, demanding "compensatory damages" and seeking to represent a putative class of "[a]ll Maryland citizens who, between July 12, 2013 and March 13, 2014, purchased a CDMA mobile telephone from Cricket which was locked for use only on Cricket's CDMA network." JA 34 ¶ 51; JA 36–37 ¶¶ 60-66; JA 31.

Cricket timely removed the case to the U.S. District Court for the District of Maryland. *See* JA 8. In its notice of removal, Cricket explained that *Scott I* is subject to federal jurisdiction under CAFA[1] because—insofar as is relevant here—the amount in controversy exceeds $5 million. JA 11 ¶ 8.[2] Scott in turn moved to remand the case to state court, arguing that

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[1] Cricket's notice of removal also raised and preserved the argument that federal-question jurisdiction exists because Scott's claim arises under the MMWA. The district court rejected that argument, which is not presented in this appeal. *See* JA 95 n.3.

[2] Cricket subsequently moved to compel arbitration in *Scott I*, pointing to the arbitration provision in Cricket's terms and conditions of service. In

Cricket had not proven the $5 million amount in controversy necessary to support CAFA jurisdiction.

In response, Cricket produced a declaration from its employee Rick Cochran, who testified that "Cricket customers who listed addresses located in Maryland on their Cricket accounts during [the class] period purchased at least 47,760 CDMA handsets that were 'locked' to Cricket's CDMA network." JA 77 ¶ 6. Given that Scott himself alleged that his phones cost "hundreds of dollars each" (JA 28 ¶ 27), Cricket conservatively estimated the alleged damages per phone at $200 (the minimum amount that could be signified by Scott's reference to "hundreds of dollars"). Taking all of these 47,760 purchases into account, a straightforward calculation of the amount in dispute exceeds $9.5 million. JA 88. As a consequence, Cricket submitted that the CAFA amount-in-controversy requirement—which looks to the amount put in controversy by the class claims—is satisfied.

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response, Scott filed an Amended Complaint Petitioning To Stay Threatened Arbitration in Maryland state court ("*Scott II*"). JA 41. Cricket removed *Scott II* as well, invoking federal jurisdiction under the "look-through" doctrine of *Vaden v. Discover Bank*, 556 U.S. 49 (2009), because the parties' underlying controversy was a putative class action that qualified for federal jurisdiction under CAFA. *See* JA 95.

B. The District Court's Decision

The district court, however, granted Scott's motion to remand. It held that Cricket had not established the existence of CAFA jurisdiction in *Scott I* by a preponderance of the evidence because a customer who represents his or her address to be in Maryland may, at least in theory, not be domiciled in the State. As the court put it, Cricket's evidence of the amount in controversy was "over-inclusive—the Class [as defined by Scott] includes only Maryland *citizens*, but Cricket's evidence pertains to all consumers who provided Maryland addresses. Residency is not tantamount to citizenship." JA 92 (emphasis added). Expressly declining to follow decisions from three courts of appeals that had held to the contrary (*see* JA 89 n.2), the district court reasoned that a case must be remanded to state court "when defendants present evidence that is broader than the class defined in the complaint." JA 89.

Here, the court continued, "[a]ssuming $200 in controversy per class member, Cricket must prove at least 25,000 consumers who purchased locked CDMA cellphones during the relevant period are *domiciled* in Maryland" (domicile being the basis of state citizenship, *see Johnson v. Advance Am.*, 549 F.3d 932, 937 n.2 (4th Cir. 2008)). JA 92. The evidence that these consumers had Maryland billing addresses, the court concluded, was

insufficient to make such a showing, meaning that "the Court would have to speculate to determine the number of class members that purchased CDMA cellphones and the amount in controversy." JA 93. The court found this to be so even though, as Cricket argued below, jurisdiction was established unless, improbably, almost half of the people with Maryland addresses who purchased the phones at issue are not domiciled in Maryland. Notably, even Scott never asserted that the number of Maryland citizens who are Cricket customers is materially smaller than the number who are Maryland residents.

In reaching its conclusion, the district court acknowledged that, "[b]y strategically defining the class as including Maryland citizens, Scott places Cricket in somewhat of a predicament" because Cricket could not determine which of its customers were Maryland citizens "without extensive discovery of facts related to the domiciles of potentially tens of thousands of Cricket customers." JA 87–88. But deeming the plaintiff "the master of his complaint," which allows him to "choose to circumscribe his class definition to avoid federal jurisdiction under CAFA" (JA 94), the court nevertheless held that the case must be remanded "because Cricket does not tai-

lor its evidence to Scott's narrowly defined class." JA 95.[3]

This appeal followed.

SUMMARY OF THE ARGUMENT

I. The district court's holding turned on its view that determinations of CAFA jurisdiction must be based on a particular type of precisely targeted evidence. But that proposition is incorrect. Federal jurisdiction exists under CAFA when, insofar as is relevant here, the district court finds by a *preponderance* of the evidence that at least $5 million is in controversy. The preponderance standard does not require proof of the requisite amount to a legal certainty; instead, the court simply must find it likelier than not that the jurisdictional amount is at issue. In making this determination, the court may consider *all* evidence that bears on the question, as well as reasonable inferences drawn from that evidence, common sense, and judicial experience. And as other courts of appeals have held, in de-

[3] In light of its decision in *Scott I*, the district court also remanded *Scott II*, holding that because it did not have subject-matter jurisdiction over *Scott I* it could not exercise subject-matter jurisdiction over *Scott II* under *Vaden*'s look-through doctrine. JA 89–90. A few days after the district court issued its remand order, Scott voluntarily dismissed the *Scott II* complaint. *See* Not. of Voluntary Dismissal Without Prejudice, *Scott v. Cricket Commc'ns, LLC*, No. 03C15012335 (Md. Cir. Ct. Balt. Cnty. Aug. 22, 2016). Thus, only *Scott I* remains pending in state court following the remand order.

termining the existence of CAFA jurisdiction, the district court should *not* categorically disregard "over-inclusive" evidence, which may shed considerable light on the question before it.

Here, when viewed under the correct standard, it is clear that Cricket's showing satisfied the CAFA amount-in-controversy requirement. Cricket demonstrated that it sold more than 47,000 phones to customers with Maryland addresses during the class period. There is every reason to believe that (at a minimum) most of these customers were Maryland citizens. Billing address tends to establish residence, a factor that correlates closely with domicile; the law has long recognized a presumption that a person's residence *is* their domicile. Indeed, Scott did not even attempt to, and could not, rebut that presumption in this case—offering *no* evidence to support the proposition that any (let alone many) of Cricket's Maryland customers are domiciled outside the State. Accordingly, using a conservative damages estimate of $200 per phone, the potential damages in the case exceed $9.5 million unless nearly *half* of Cricket's Maryland customers are not domiciled in the State. Judicial experience and common sense tell us that proposition is highly *im*probable.

II. By nevertheless requiring Cricket to make a detailed, individualized showing of the domicile of each of its Maryland customers, the district

court effectively obligated Cricket to prove the amount in controversy to a legal certainty. That is not the meaning of the preponderance standard. And as a practical matter, it would be impossible for any defendant to make such a showing—which, as the district court itself recognized, in this case would require extensive discovery about the personal circumstances of thousands of Cricket customers. If that were the rule, plaintiffs could evade CAFA jurisdiction in practically any case simply by pleading a class that consists of citizens of the forum State. Such a rule would defeat the fundamental purpose of CAFA, which Congress enacted to ensure that significant class actions with interstate implications could be heard in federal court.

It is no answer to this concern that, as the district court suggested, the plaintiff is the "master of the complaint" and therefore may define the class so as to escape federal jurisdiction. A plaintiff's ability to avoid federal court in a diversity action always has required a tradeoff, in which the plaintiff voluntarily reduces the size of the claim so as to preclude federal jurisdiction; courts consistently have been hostile to attempts to avoid federal jurisdiction through manipulative pleading that does not affect the amount or substance of the plaintiff's claim. That, however, is the very sort of manipulation that Scott attempts here.

STANDARD OF REVIEW

This Court ordinarily reviews district courts' "jurisdictional findings of fact" for clear error. *See, e.g.*, *United States ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 348 (4th Cir. 2009). But the district court's findings of jurisdictional fact here were infected by legal errors—including the court's categorical refusal to consider "over-inclusive" evidence of the amount in controversy and its apparent conclusion that residence is irrelevant to the determination of domicile. This Court therefore should review the district court's conclusions under the *de novo* standard that applies to legal conclusions about CAFA jurisdiction. *See, e.g.*, *AU Optronics Corp. v. South Carolina*, 699 F.3d 385, 390 (4th Cir. 2012) ("We review de novo the question of whether a district court possessed subject matter jurisdiction under CAFA and, thus, whether a remand to state court was appropriate.").

ARGUMENT

I. CRICKET MET ITS BURDEN OF PROVING THE AMOUNT IN CONTROVERSY BY A PREPONDERANCE OF THE EVIDENCE.

In this case, the district court's focus on whether Cricket's evidence of the amount in controversy was "over-inclusive" kept it from directly addressing the dispositive question: whether, in light of the evidence and common-sense inferences drawn from that evidence, it is more likely than not that the amount in controversy here exceeds $5 million. Had the dis-

trict court properly conducted that inquiry, it would have been bound to conclude that Cricket met its burden. And because Scott cannot show that it is "legally impossible" for the class to recover at least $5 million, the case should remain in federal court. Because the district court's contrary holding is incorrect on its own terms and runs counter to CAFA's basic purposes, this Court should reverse the decision below.

A. Federal Jurisdiction Exists Under CAFA When The Preponderance Of The Evidence Shows That At Least $5 Million Is In Controversy.

1. Amount-in-controversy determinations are made under the preponderance-of-the-evidence standard.

The nature of the parties' respective burdens in establishing CAFA jurisdiction is not symmetrical. While the defendant need only demonstrate the amount in controversy by a preponderance of the evidence to justify removal, the plaintiff must submit proof that it is legally impossible to recover more than $5 million to compel a remand.

As an initial matter, in determining whether the amount-in-controversy requirement is satisfied, "the defendant's amount in controversy allegation [stated in the removal motion] should be accepted when not contested by the plaintiff or questioned by the court." *Dart Cherokee*, 135 S. Ct. at 553. But "[i]f the plaintiff contests the defendant's allega-

tions, [28 U.S.C.] § 1446(c)(2)(B) instructs: '[R]emoval … is proper on the basis of an amount in controversy asserted' by the defendant 'if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds' the jurisdictional threshold." *Id.* at 553–54. As the Supreme Court has explained, "[i]n such a case, 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.[4]

"Once a defendant meets this burden, remand is appropriate only if the plaintiff can establish that it is legally impossible to recover more than $5,000,000." *Frederick v. Hartford Underwriters Ins. Co.*, 683 F.3d 1242, 1247 (10th Cir. 2012) (citing *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283 (1938)); *see also St. Paul Mercury*, 303 U.S. at 289 (dismissal for lack of jurisdiction precluded unless it "appear[s] to a legal certainty that the claim is really for less than the jurisdictional amount"); *Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830 (7th Cir. 2011) (applying *St. Paul Mercury* standard); *Bell v. Hershey Co.*, 557 F.3d 953,

[4] The Court drew the standard stated in *Dart Cherokee* from the Federal Courts Jurisdiction and Venue Clarification Act of 2011, which amended Section 1446. *See Dart Cherokee*, 135 S. Ct. at 554. That statute codified the prior standard that had been generally applied by the courts in determining diversity jurisdiction. *See* H.R. Rep. 112–10, at 16 (2011) (citing *McPhail v. Deere & Co.*, 529 F.3d 947 (10th Cir. 2008); *Meridian Security Ins. Co. v. Sadowski*, 441 F.3d 536 (7th Cir. 2006)).

959 (8th Cir. 2009) ("If the [defendants] prove by a preponderance of the evidence that the amount in controversy is satisfied, remand is only appropriate if [plaintiff] can establish that it is legally impossible to recover in excess of the jurisdictional minimum.") (citing *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 986 (7th Cir. 2008)) (in turn citing *St. Paul Mercury*, 303 U.S. at 288–89).

2. Preponderance of the evidence is established when the proof, and inferences logically drawn from that evidence, show that a proposition is more likely than not.

The *nature* of the preponderance inquiry also is settled. When the plaintiff disputes the amount in controversy, "'[d]efendants do not need to prove to a legal certainty that the amount in controversy requirement has been met.'" *Dart Cherokee*, 135 S. Ct. at 554 (quoting H.R. Rep. No. 112–10, p. 16 (2011)). Instead, "the amount in controversy is simply an estimate of the total amount in dispute, not a prospective assessment of the defendant's liability." *Lewis v. Verizon Commc'ns, Inc.*, 627 F.3d 395, 400 (9th Cir. 2010); *see Raskas v. Johnson & Johnson*, 719 F.3d 884, 887 (8th Cir. 2013). This amount is determined under a probabilistic standard, which "simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence." *In re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring); *accord Concrete Pipe & Prods. of Cal.,*

Inc. v. Constr. Laborers Pension Tr. for S. Cal., 508 U.S. 602, 622 (1993) (it is enough that the court "'believe[s] that the existence of [the] fact is more probable than its nonexistence'") (citation omitted). The standard does not, in the context of CAFA, require the defendant to prove that the damages *are* more than $5 million; rather, the defendant need only prove by a preponderance of the evidence that "a fact finder *might* legally conclude that they are." *Bell*, 557 F.3d at 959 (internal quotation marks omitted).

Moreover, in conducting this inquiry, no particular form of evidence is required. It is sufficient that the proponent of jurisdiction supports its claim with "competent proof" that "justif[ies] [its] allegations." *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936). When such supportive proof is offered, "in making [the amount in controversy] calculation, a court may rely on evidence put forward by the removing defendant, as well as *reasonable inferences and deductions drawn from that evidence*." *Dudley v. Eli Lilly & Co.*, 778 F.3d 909, 913 (11th Cir. 2014) (quotation marks and brackets omitted) (emphasis added). And when a court considers the evidence, a defendant's showing of the amount in controversy "is not to be defeated by unrealistic assumptions that run counter to common sense." *S. Fla. Wellness, Inc. v. Allstate Ins. Co.*, 745 F.3d 1312, 1317 (11th Cir. 2014); *see also, e.g.*, *Robertson v. Exxon Mobil Corp.*, 814

F.3d 236, 240 (5th Cir. 2015) (removing party may ask the court "to make common-sense inferences about the amount put at stake by the injuries the plaintiffs claim").

Courts accordingly have recognized that the inquiry into whether a CAFA defendant has established the required amount in controversy "is not nuclear science" and "does not demand decimal-point precision." *S. Fla. Wellness*, 745 F.3d at 1317. To the contrary, a court must inform its amount-in-controversy determination with any "reasonable assumptions underlying the defendant's theory of damages exposure." *Ibarra v. Manheim Investments, Inc.*, 775 F.3d 1193, 1198 (9th Cir. 2015).

As discussed in section I.A.4 below, Cricket more than satisfied its burden to establish the amount in controversy.

3. There is no rule against considering "over-inclusive evidence."

We respectfully suggest that the court below misapplied this settled preponderance standard. The court's principal reason for remand appears to have been its belief that Cricket "present[s] evidence that is broader than the class defined in the complaint" (JA 89), an observation it repeated at several points in its decision. *See* JA 88 ("Cricket presents evidence that is broader than the class"), JA 91–92 ("evidence that is broader than

the class defined in the complaint"), JA 92 (Cricket "presents evidence that is over-inclusive"), JA 95 ("Cricket does not tailor its evidence to Scott's narrowly defined class"). But insofar as the court regarded "over-inclusive" evidence as wholly non-probative, it was wrong as a matter of law. The question before the court in this case is simply whether the amount in controversy more likely than not exceeds $5 million—and there is no bright-line rule, in this Circuit or any other, against a court's considering "over-inclusive" evidence that bears on the jurisdictional determination.

a. At the outset, a rule against reliance on over-inclusive evidence is wrong as a matter of principle. Under the preponderance inquiry, the court must determine whether "the existence of a fact is more probable than its nonexistence." *Winship*, 397 U.S. at 371 (Harlan, J., concurring). There is no reason that over-inclusive evidence (albeit not precisely targeted to the court's inquiry) cannot bear powerfully on that question, so long as the trier of fact has some basis—grounded in the evidence, in "common sense" (*S. Fla. Wellness, Inc.*, 745 F.3d at 1317), or in "reasonable assumptions" from the evidence (*Ibarra*, 775 F.3d at 1198)—to make a rational judgment about the question before it.

Of course, there may be cases where the nature of over-inclusive evidence is such that it simply gives the trier of fact *no* basis on which to an-

swer the relevant question. But that point is not reached whenever, and simply because, the evidence *is* over-inclusive—which is to say only that the evidence is not *precisely* targeted to the question before the Court. Such precise tailoring is not required as a matter of law: as noted above, "'[t]he amount in controversy is simply an estimate of the total amount in dispute, not a prospective assessment of defendant's liability.'" *Raskas*, 719 F.3d at 887 (citation omitted). The relevant question is not whether the evidence is over-inclusive; it is whether that evidence sheds light on the issue before the court.

b. It therefore is no surprise that each of the courts of appeals to have considered the issue has expressly rejected the argument that reliance on "over-inclusive" evidence is improper—in decisions that the district court here noted but declined to follow. *See* JA 89.

First, in *Spivey v. Vertrue*, the Seventh Circuit held that the defendant had proved CAFA jurisdiction in a putative class action lawsuit to recover alleged unauthorized credit card charges. 528 F.3d at 983. In support of removal, the defendant had based its amount-in-controversy calculation on the total amount of the charges it submitted in Illinois, rather than try to determine (and thus implicitly concede) the amount of these charges that was "unauthorized" under plaintiffs' theory. *Id.* at 985–86.

The district court held that the defendant's evidence was insufficient because it did not indicate what portion of the charges that the defendant submitted was "unauthorized." But the Seventh Circuit rejected that reasoning, explaining that CAFA "does not make federal jurisdiction depend on how much the plaintiff is *sure to recover*." *Id.* at 985 (emphasis added). Although there was no suggestion that *all* charges imposed by the defendant were unauthorized, the defendant's purportedly over-inclusive evidence nevertheless demonstrated that the stakes likely exceeded $5 million and thereby satisfied CAFA.

Next, in *Lewis v. Verizon Communications, Inc.*, 627 F.3d 395 (9th Cir. 2010), the Ninth Circuit likewise rejected an over-inclusiveness argument. There, the plaintiff alleged that Verizon had unlawfully charged some customers for landline telephone service without their consent. *Id.* at 400–02. Verizon submitted evidence that its total billings in California during the putative class period exceeded $5 million, but the district court held that this evidence was insufficient because "the complaint placed only the *unauthorized* charges into controversy." *Id.* at 398.

Here again, although there was no allegation that the entirety of the charges were improper, the court of appeals reversed, explaining that "[t]he amount in controversy is simply an estimate of the total amount in

dispute, not a prospective assessment of [a] defendant's liability." *Id.* at 400. Thus, the defendant's affidavit explaining why "the potential damages *could* exceed the jurisdictional amount" was sufficient to prove jurisdiction by a preponderance of the evidence, despite being over-inclusive. *Id.* at 397 (emphasis added).

Finally, in *Raskas v. Johnson & Johnson*, 719 F.3d 884, 887 (8th Cir. 2013), the Eighth Circuit held that defendants properly proved the amount in controversy by producing data of the "total sales of their respective medications in Missouri" when plaintiffs alleged that consumers were deceived into throwing away *some portion* of unused medications based on incorrect expiration dates. *Id.* at 886–87. The plaintiffs argued and the district court held that the defendants' evidence was "overinclusive, as Plaintiffs are only attempting to recover damages for the medications *wrongfully discarded and replaced*," and not for medications that were used. *Id.* at 887 (emphasis added). But the court of appeals held that "when determining the amount in controversy, the question is not whether the damages *are* greater than the requisite amount, but whether a fact finder *might* legally conclude that they are." *Id.* (internal quotation marks omitted). Thus, the defendants' evidence of their total sales in Missouri proved the amount in controversy by a preponderance of the evidence—

even though the plaintiffs likely could recover damages for only a portion of those sales. *Id.* at 888.

At the petition stage, Scott attempted to distinguish *Spivey*, *Lewis*, and *Raskas* as cases in which the defendants' evidence was (in his view) suitably tailored to the relevant classes. Resp't's Answer at 13–15, No. 16-3051 (Sept. 12, 2016), ECF No. 8. But the decisions cannot be so easily dismissed. In each, the alleged evidentiary deficiency was the same as the one alleged here: the defendant had produced evidence pertaining to more sales and charges than were likely to be in dispute. And in each, the court held that the defendant had nonetheless met its burden because its evidence sufficed to show that the amount in controversy likely exceeded $5 million.

In *Spivey* and *Lewis*, for example, the defendants' evidence showed the total charges they had made in the respective states—even though only some of those charges were at issue. And in *Raskas*, the defendant had submitted evidence of the total amount of medication it sold in Missouri—even though the lawsuit was about only the portion of the medication that consumers had discarded after the expiration date. So too here: Cricket's evidence shows the total number of phones it sold to persons with Maryland billing addresses, even though Scott is suing only on behalf of the

Maryland purchasers who are legally domiciled in the State. Thus, this Court should hold that Cricket's evidence—like the evidence in *Spivey*, *Lewis*, and *Raskas*—may be considered despite being "over-inclusive."

4. On a proper view of the evidence, at least $5 million is in controversy here.

When viewed under the correct standard, it is clear that Cricket's showing of the amount in controversy satisfies the preponderance-of-the-evidence standard. The evidence establishes that Cricket sold more than 47,000 CDMA cell phones to customers with a Maryland address. JA 77 ¶ 6. Assuming damages of $200 for each device (a conservative estimate, and one accepted by the district court), the amount of potential damages thus exceeds $9.5 million.

At least in theory, of course, it is possible that *one or more* of the Maryland customers captured in this total are not Maryland domiciliaries and therefore not members of Scott's class. But even so, the amount in controversy could be less than $5 million only if nearly *half* of Cricket's Maryland customers are not domiciled in the State. "[J]udicial experience and common sense" (*Roe v. Michelin N. Am., Inc.*, 613 F.3d 1058, 1066 (11th Cir. 2010)) tell us that such a proposition is highly *im*probable.

In reaching its contrary conclusion, the district court opined that

"Cricket presents no evidence of any of the factors relevant to domicile." JA 93. But that simply is not so. Billing address, at a minimum, tends to establish an individual's residence. *See, e.g.*, *Katopothis v. Windsor-Mount Joy Mut. Ins. Co.*, 2016 WL 5374081, at *15 (D.D.C. Sept. 26, 2016) (that "Plaintiffs' 'billing address' happened to be in D.C." was an "acknowledgment that Plaintiffs were D.C. residents"); *WebZero, LLC v. ClicVU, Inc.*, 2008 WL 1734702, at *4 n.4 (C.D. Cal. Apr. 4, 2008) (assumption that a customer's billing address was the customer's physical residence was "completely reasonable"). The district court here evidently agreed, seemingly recognizing that customer addresses offer proof of "[r]esidency." JA 92. And physical residence is a factor that is highly relevant to domicile. *See*, *e.g.*, *Blount v. Boston*, 718 A.2d 1111, 1115 (Md. 1998) ("The two most significant objective factors evidencing a person's intent regarding domicile are where the person lives and where he or she votes or is registered to vote.").

Indeed, the law has long recognized "a rebuttable presumption that a person's residence is his domicile." *Mason v. Lockwood, Andrews & Newnam, P.C.*, 842 F.3d 383, 390 (6th Cir. 2016); *see also, e.g.*, *Anderson v. Watts*, 138 U.S. 694, 706 (1891) (same); *Mitchell v. United States*, 88 U.S. (21 Wall.) 350, 352 (1874) (same); *Ennis v. Smith*, 55 U.S. (14 How.)

400, 423 (1852) (same).[5] Here, Scott did not even attempt to rebut that presumption.

Accordingly, given that Cricket's Maryland customers can reasonably be presumed to be Maryland domiciliaries, Cricket has shown that the amount in controversy more likely than not exceeds $5 million. This conclusion does not require "speculat[ion]," as the district court believed (JA 93); it is a "reasonable assumption[]" (*Ibarra*, 775 F.3d at 1198) that follows from the evidence presented. And for the same reason, Scott clearly *cannot* demonstrate that it is "legally impossible" for the amount in controversy to exceed $5 million, the showing that he must make to preclude jurisdiction once Cricket has established by a preponderance of the evi-

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[5] Certain courts have declined to apply this residency-domicile presumption in the CAFA context. *See Reece v. AES Corp.*, 638 F. App'x 755, 769 (10th Cir. 2016); *In re Sprint Nextel Corp.*, 593 F.3d 669, 673 (7th Cir. 2010). But as the Sixth Circuit recently noted, these decisions relied upon holdings addressing federal diversity jurisdiction under 28 U.S.C. § 1332(a), which establishes non-CAFA *original* diversity jurisdiction, as a basis for that refusal. *See Mason*, 842 F.3d at 391 (noting citations). In such Section 1332(a) cases, "there is a *presumption* against federal jurisdiction" (*id.*) that "takes precedence" over the residency-domicile presumption (*id.* at 392). By contrast, there is no reason to ignore the residency-domicile presumption in cases where no countervailing presumption against federal jurisdiction applies. *Id.* And as the Supreme Court recently made clear, "no antiremoval presumption attends cases invoking CAFA." *Dart Cherokee*, 135 S. Ct. at 554. The residency-domicile presumption thus applies with full force here.

dence that the amount in controversy exceeds $5 million. *See Bell*, 557 F.3d at 959; *Spivey*, 528 F.3d at 986. Scott sensibly has never suggested that he could make such a showing; indeed, he has never contended that any substantial number of Cricket's Maryland customers are not, in fact, Maryland domiciliaries.

Cricket's case is further bolstered by Scott's failure to offer *any* competing evidence of his own. Scott has not, for example, submitted proof about how many people residing in Maryland (or billed for services in the State) are not legally domiciled there—a striking omission, given that his case against removal rests entirely on the dubious proposition that almost half of Cricket's Maryland customers are domiciled elsewhere. His failure should weigh in this Court's calculus: as the First Circuit recently put it, "[t]he decision as to whether the defendants have met their burden may well require analysis of what *both* parties have shown. Thus, it is not enough for the plaintiffs to merely label the defendant's showing as speculative without discrediting the facts upon which it rests." *Pazol v. Tough Mudder Inc.*, 819 F.3d 548, 552 (1st Cir. 2016) (alterations, citation, and internal quotation marks omitted)). Scott's failure to muster any evidence in his favor confirms that the proper assumption to draw from the evidence is that most Cricket customers in Maryland are domiciled in Mary-

land—which satisfies the CAFA minimum amount in controversy.

B. Stricter Standards Govern The Showing Needed To Support Remand Under CAFA Than That Needed To Support CAFA Removal.

Scott will likely attempt to salvage his claim that district courts may not rely upon evidence of residence in determining domicile by pointing to a handful of out-of-circuit decisions he cited at the petition stage—*Reece v. AES Corp.*, 638 F. App'x 755 (10th Cir. 2016), *Hood v. Gilster-Mary Lee Corp.*, 785 F.3d 263 (8th Cir. 2015), and *In re Sprint Nextel Corp.*, 593 F.3d 669 (7th Cir. 2010). But these decisions offer no support for the district court's decision to disregard Cricket's evidence. Tellingly, the district court itself did not rely on any of these decisions in applying its rule against considering "over-inclusive" evidence of jurisdiction.[6]

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[6] Instead, it cited four district court decisions—all of which are inapposite here. Three of the four relied on a presumption in favor of remand. *See Pauley v. Hertz Glob. Holdings, Inc.*, 2014 WL 2112920, at *2 (S.D.W. Va. May 19, 2014); *Caufield v. EMC Mortg. Corp.*, 803 F. Supp. 2d 519, 529 (S.D.W. Va. 2011); *Krivonyak v. Fifth Third Bank*, 2009 WL 2392092, at *7 (S.D.W. Va. Aug. 4, 2009). But in *Dart Cherokee*, which postdated those decisions, the Supreme Court squarely held that "no antiremoval presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court." 135 S. Ct. at 554.

The fourth decision relied upon by the district court, *James v. Santander Consumer USA, Inc.*, 2015 WL 4770924 (D. Md. Aug. 12, 2015), is quite different from this case. The court there held the defendant's evi-

1. Remand is appropriate under CAFA only when the plaintiff shows to a "legal certainty" that the jurisdictional amount is not in controversy.

This case on the one hand, and the decisions upon which Scott relied on the other, arose in very different procedural postures. This case turns on the showing that must be made by the party seeking to establish federal jurisdiction in the first instance; the decisions invoked by Scott addressed the very different showing that must be made by a party seeking *remand* to state court *after* a prima facie showing of federal jurisdiction has been made. That distinction is crucial, and explains the outcome in the decisions cited by Scott.

In each of those decisions, the defendants properly removed class actions under CAFA. The plaintiffs then sought remand to state court under CAFA's home-state or local-controversy exceptions. Those provisions were designed to limit the exercise of federal jurisdiction when *both* the plaintiffs *and* the defendants have ties to the forum State; they bar the exercise of federal jurisdiction when two-thirds or more of the members of the pro-

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dence insufficient because the defendant had attempted to redefine the class rather than produce evidence addressing the class as defined in the complaint. *Id.* at *4. Cricket, by contrast, did not attempt to redefine the class; it produced evidence designed to shed light on how many CDMA phones it sold to Maryland citizens—who make up the putative class defined by Scott.

posed class, *and* at least one defendant (1) from which significant relief is sought or (2) is the "primary" defendant, are citizens of the forum State. 28 U.S.C. § 1332(d)(4)(A)-(B). In each case, the court held that this limit on the exercise of federal jurisdiction did not apply because the available information showed only where putative class members resided, not where they were domiciled. *See Reece*, 638 F. App'x at 772 ("the party moving for remand under the local-controversy exception bears the burden of demonstrating that more than two-thirds of its proposed class members are citizens of the state from whose courts the case was removed"); *Hood*, 785 F.3d at 266 ("[T]he employees did not meet their burden of proof that a CAFA exception . . . applies"); *Sprint Nextel*, 593 F.3d at 676 ("[E]ven though satisfaction of the citizenship requirement may be a reasonable inference, it does not satisfy the plaintiff's burden of proof" for remand under local-controversy exception) (internal quotation marks omitted).

In the context of these *exceptions* to CAFA—exceptions that are not applicable here because Cricket, the sole defendant, is not a citizen of Maryland—these decisions found that evidence of residence was insufficient to *defeat* federal jurisdiction. Those holdings were unexceptional: as noted above, it has long been black-letter law that, "[o]nce the proponent of federal jurisdiction has explained plausibly [why federal jurisdiction ex-

ists], then the case belongs in federal court unless it is legally impossible" for the jurisdictional requirements to be satisfied. *Spivey*, 528 U.S. at 986; *see also St. Paul Mercury*, 303 U.S. at 289 (dismissal for lack of jurisdiction precluded unless it "appear[s] to a legal certainty that the claim is really for less than the jurisdictional amount"). Plaintiffs seeking remand therefore must prove "legal[] impossib[ility]" "to a certainty" and may not rest on common sense.

Consequently, because physical residence and citizenship (*i.e.*, legal domicile) have different formal elements, the plaintiffs in *Reece*, *Hood*, and *Sprint Nextel* could not rely on evidence of residence to show that it was "legally impossible" that federal jurisdiction was present. That is so even though residence is closely correlated with domicile and common sense may have indicated that two thirds of the class members probably were citizens of the forum State in those cases. But Cricket need not make a showing of "legal impossibility"; it prevails under the preponderance standard so long as it is likelier than not that a majority of its Maryland customers are domiciled in the State.

2. Congress mandated stricter standards to defeat than to establish CAFA jurisdiction.

Moreover, even if the "legal certainty" remand standard of *St. Paul*

Mercury were thought not to apply to application of the CAFA home-state or local-controversy exceptions, it is plain that Congress established stricter standards for the showing required to *defeat* CAFA jurisdiction under the home-state or local-controversy exceptions (at issue in the decisions cited below by Scott) than that required to *establish* CAFA jurisdiction (at issue here); those standards are not symmetrical.

Congress expressly wanted it to be difficult for plaintiffs to obtain remand under the statutory exceptions once CAFA jurisdiction is established. The local-controversy exception, for example, is a "narrow exception that was carefully drafted to ensure that it does not become a jurisdictional loophole." S. Rep. 109-14, at 39 (2005); *see Reece*, 638 F. App'x at 767–68 (emphasizing that under local-controversy provision, all doubts are resolved in favor of exercising jurisdiction); *Hood*, 785 F.3d at 265 (same). By contrast, Congress made clear its intent to facilitate removal of class actions generally, explaining that CAFA's jurisdiction-creating "provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant." S. Rep. 109-14, at 43. As a consequence, courts rightly impose a greater burden on plaintiffs invoking one of the CAFA exceptions than they do on defendants seeking removal. *Compare, e.g.*, *Dart Cherokee*, 135

S. Ct. at 554 ("[N]o antiremoval presumption attends cases invoking CAFA."), *with Hood*, 785 F.3d at 265 ("Any doubt about the applicability of the local-controversy exception is resolved against the party seeking remand."). For this reason, as we have noted (at 14–16 & n.4, *supra*), courts apply very different presumptions to the evidence in determining whether jurisdiction has been established under CAFA (which is favored) and whether a CAFA exception comes into play (which is *dis*favored).

It also made sense as a practical matter for the courts in *Reece*, *Hood*, and *Sprint Nextel* to hold the plaintiffs to a stringent evidentiary standard because the jurisdictional problems there were of the plaintiffs' own making. The plaintiffs in those cases could have avoided any dispute over federal jurisdiction by defining their classes in terms of State citizenship, yet did not because doing so "would have limited the pool of potential class members." *Sprint Nextel*, 593 F.3d at 676. By contrast, Cricket had no control over the class definition, and it should therefore be held to no higher standard than any other party invoking federal jurisdiction.

And in fact, although *Sprint Nextel* purported to apply the preponderance standard to the plaintiffs' showing of putative class members' citizenship (593 F.3d at 673), in reality it held the plaintiffs to a much higher standard. The court evidently believed that it was likelier than not that

two-thirds of the putative *Sprint Nextel* class had Kansas citizenship: it stated that it was "inclined to think" that was so and called the alternative "hard to believe." 593 F.3d at 674. That understanding should have satisfied the preponderance standard. But the *Sprint Nextel* court nevertheless denied remand—which shows that, in practice, *Sprint Nextel* applied a standard much more demanding than the usual preponderance requirement that the trier of fact "simply … believe that the existence of a fact is more probable than its nonexistence." *In re Winship*, 397 U.S. at 371 (Harlan, J., concurring).[7]

II. A RULE THAT EVIDENCE SUPPORTING REMOVAL MUST BE CLOSELY TIED TO THE PLAINTIFF'S CLASS DEFINITION WOULD RUN DIRECTLY COUNTER TO CAFA'S PURPOSE.

For the reasons addressed above, both the ordinary rules governing the preponderance inquiry and the particular principles that apply to CAFA's jurisdictional determination dictate a finding of federal jurisdiction in this case. But it also bears emphasis that the approach taken by the district court here—an approach that disregards (or finds per se insuf-

[7] *Reece* and *Hood*, meanwhile, both relied on *Sprint Nextel*'s analysis in interpreting the plaintiffs' burden. *Reece*, 638 F. App'x at 770 ("[T]he Seventh Circuit's decision in *Sprint Nextel* is both apposite and persuasive."); *Hood*, 785 F.3d at 266 (following *Sprint Nextel*'s "general rule" that "[a] court may not draw conclusions about the citizenship of class members"). Accordingly, these decisions also applied a standard stricter than the ordinary preponderance requirement.

ficient) a category of evidence that is plainly relevant to the CAFA amount-in-controversy inquiry—threatens to undermine the broader purposes of CAFA.

A. Congress Intended CAFA To Create Federal Jurisdiction For Class Actions Like This One.

There is no doubt about Congress's principal goal in enacting CAFA: It was concerned about abuses in state-court class-action litigation—including the use of procedural gamesmanship to "keep[] most class actions out of federal court, even though most class actions are precisely the type of case for which diversity jurisdiction was created" (S. Rep. 109–14, at 10). To address this abuse, Congress "dramatically expanded federal subject matter jurisdiction over state law class actions," thus "ensur[ing] that nearly all large-scale class actions could be filed in or removed to federal court." Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. Pa. L. Rev. 1593, 1597–98 (2008).

But the approach to removal that Scott advocates and the district court adopted "run[s] directly counter to CAFA's primary objective: ensuring Federal court consideration of interstate cases of national importance." *Standard Fire*, 133 S. Ct. at 1350 (internal quotation marks omitted). If evidence of residence (or other "over-inclusive" proof) may not be used to

establish domicile in a case like this one, plaintiffs could easily avoid CAFA in practically any case simply by defining their classes in terms of State citizenship; it is almost always impossible for defendants to produce amount-in-controversy evidence that relates *only* to domiciliaries of a particular State.

By the same token, although residence presumptively establishes domicile, *definitive* resolution of any given individual's domicile requires consideration of a host of factors, including, among other things, a person's "'current residence; voting registration and voting practices; location of personal and real property; location of brokerage and bank accounts; membership in unions, fraternal organizations, churches, clubs, and other associations; place of employment or business; driver's license and automobile registration; [and] payment of taxes.'" *Dyer v. Robinson*, 853 F. Supp. 169, 172 (D. Md. 1994) (internal citations omitted). This data is used to answer the ultimate question whether the person "inten[ds] to make the State a home." *Johnson*, 549 F.3d at 937. Yet companies like Cricket simply do not collect most of this information, which is completely irrelevant to everyday consumer transactions.

Consequently, if a particularized demonstration of the domicile of each class member is necessary to support removal in a case such as this

one, plaintiffs will have a formula for the defeat of CAFA jurisdiction. And that would run directly counter to Congress's "'strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant.'" *Dart Cherokee*, 135 S. Ct. at 554 (quoting S. Rep. 109-14, p. 43).

B. The District Court Misunderstood CAFA's Policy.

The district court noted, but was unpersuaded by, these CAFA policies. On examination, however, its rationales are insupportable.

1. Congress intended CAFA to prevent use of manipulative tactics to circumvent federal jurisdiction.

First, the district court observed that a plaintiff "is the master of his complaint, and he can choose to circumscribe his class definition to avoid federal jurisdiction under CAFA." JA 94. But this principle does not authorize the sort of jurisdictional gamesmanship that Scott attempted here.

A plaintiff's ability to avoid diversity jurisdiction by limiting his or her claim has always required a tradeoff, in which the plaintiff voluntarily reduces the size of the claim so as to avoid federal court: "If [plaintiff] does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and *though he would be justly entitled to more*, the defendant cannot remove." *St. Paul Mercury*,

303 U.S. at 294 (emphasis added); *see Lowdermilk v. U.S. Bank Nat'l Ass'n*, 479 F.3d 994, 999 (9th Cir. 2007) (noting "the plaintiff's prerogative, subject to the good faith requirement, to *forgo a potentially larger recovery* to remain in state court") (emphasis added), *overruled on other grounds, Standard Fire*, 133 S. Ct. 1345.

By contrast, federal courts have consistently been hostile to plaintiffs' attempts to avoid federal jurisdiction through pleading manipulations that do *not* affect the substance or amount of their claims. In *Standard Fire Insurance Co. v. Knowles*, for example, the Supreme Court held that a named plaintiff could not avoid CAFA jurisdiction by stipulating that damages would not exceed $5 million because the stipulation would not be binding on absent class members and thus "ha[d] not reduced the value of the putative class members' claims." 133 S. Ct. at 1349.[8] And in *Carnegie-Mellon University v. Cohill*, the Court noted that if a plaintiff in

[8] At oral argument in the same case, several Justices expressed skepticism about other potential ways of gerrymandering a class's claims purely for the sake of evading CAFA. *See* Tr. of Oral Argument at 29, *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013) (No. 11–1450), 2013 WL 67701 (Chief Justice Roberts questioning whether a lead plaintiff could bring one class action on behalf of individuals "whose names begin with A to K" and another class action on behalf of individuals "whose names begin L to Z"); *id.* at 30 (Justice Breyer noting that if this tactic were permitted, "it swallows up all of [CAFA]").

a removed case deleted all his federal-law claims in an attempt to "regain a state forum," a district court should consider those "manipulative tactics" when deciding whether to remand the case or retain jurisdiction. 484 U.S. 343, 357 (1988); *cf. Hertz Corp. v. Friend*, 559 U.S. 77, 97 (2010) (holding that "if the record reveals attempts at manipulation" of which jurisdiction is a corporate party's principal place of business, a court should ignore this manipulation in favor of the facts concerning the corporation's "place of actual direction, control, and coordination").

The tactic Scott seeks to employ here is just this sort of substanceless manipulation. By defining his class in terms of Maryland *citizens* rather than Maryland *residents*, Scott has not modified the nature of his claim in a way that requests less than he is "justly entitled" to seek—the tradeoff ordinarily required of plaintiffs who wish to plead around federal jurisdiction. *See St. Paul*, 303 U.S. at 294. As we have explained, logic and common sense suggest that the number of Maryland citizens who are Cricket customers is not appreciably smaller than the number of Maryland residents in that category (*see* pp. 24–27, *supra*)—***and Scott, very notably, has never argued otherwise.*** Scott's tactic thus did not materially change the amount in controversy; it simply (under the district court's approach) made it more difficult for Cricket to prove the amount in

controversy. Congress intended CAFA to prevent just this sort of gamesmanship.

2. CAFA's policies apply fully to single-State class actions like this one.

In addition, focusing on the word "interstate" in the Supreme Court's recognition that Congress intended CAFA to ensure federal court consideration of "interstate cases of national importance" (JA 93–94 (quoting *Standard Fire*, 133 S. Ct. at 1350 (internal quotation marks omitted))), the district court held that "requiring defendants to prove state citizenship when a plaintiff challenges CAFA removal" would not frustrate CAFA's purpose because "[l]imiting a class to citizens of only one state creates an action that is inherently *intra*state." JA 95. But that conclusion was wrong. Even when putative class members are all from one State, a class action is interstate if the *defendant* is from another State—which is the case here. And CAFA is, in any event, not strictly limited to class actions where all the parties on each side of the case are from different states; CAFA's purposes are implicated whenever the defendant is engaged in "interstate business[] and commercial activities." S. Rep. 109–14, at 8. That certainly is true of Cricket, which conducts a national business.

In fact, class actions defined in terms of State citizenship are among

the *most* important to adjudicate in federal court. Congress intended that federal jurisdiction be used as a means of barring state courts from "discriminate[ing] against interstate businesses and commercial activities" and "preventing even the appearance of discrimination in favor of local residents." *See* S. Rep. 109–14, at 8 (internal quotation marks omitted). Yet the district court's holding means that class actions based on State citizenship—where *all* class members are domiciliaries of the forum State, and where the danger of discrimination against an out-of-State defendant accordingly is *greatest*—are now more likely to be litigated in state court than other class actions.

Moreover, in a class action defined by State citizenship, a defendant has a federal due process right to test whether each putative class member actually is a citizen of the forum State before that class member can recover. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) (holding that class could not be certified if doing so would deprive the defendant of its right "to litigate its . . . defenses to individual claims"). But state courts, as Congress found, are likelier to employ procedures that deny defendants the opportunity to conduct this inquiry, and thereby to violate

due process. *See* S. Rep. 109–14, at 21-22.[9]

To be sure, as this Court has recognized, CAFA preserved state-court jurisdiction for cases "consisting of primarily local matters." *Johnson*, 549 F.3d at 938 (internal quotation marks omitted). But it did so through two specific, limited provisions—the home-state and local controversy exceptions. S. Rep. 109–14, at 28–29. A significant class action affecting interstate commerce that is not covered by one of those exceptions, like this case, is one that Congress wanted heard in federal court. Scott's approach would often make it impossible to achieve that goal.

CONCLUSION

The district court's order should be reversed.

REQUEST FOR ORAL ARGUMENT

In light of the importance and complexity of the issue presented in

[9] We note that if Scott were correct that residency may not be used as presumptive proof of State citizenship, he and other plaintiffs representing putative classes defined by citizenship would face an uphill battle in seeking class certification. In Maryland state court, as in federal court, a plaintiff seeking to certify a class for damages must show that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Md. Rules 2-231(b)(3). It will be difficult for plaintiffs like Scott to show that this predominance requirement is satisfied—and thus to obtain class certification—if a fact-intensive, individualized inquiry into all the factors that inform domicile is needed to identify each member of the class.

this case, Cricket believes that oral argument would be useful to the Court in resolving this appeal. Thus, Cricket respectfully requests oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for Defendant-Appellant Cricket Communications, LLC certifies that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 9,412 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: December 19, 2016 /s/ *Archis A. Parasharami*

CERTIFICATE OF SERVICE

I hereby certify that that on December 19, 2016, I electronically filed the foregoing Opening Brief for Cricket Communications, LLC with the Clerk of the 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.

Dated: December 19, 2016 /s/ *Archis A. Parasharami*