No. _____

IN THE

Supreme Court of the United States

ARYEH SIMON AND SASSYA SIMON,
Petitioners,

v.

MARRIOTT INTERNATIONAL, INC,
ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States Constitution requires that parties have at least minimally diverse citizenship for a federal court to exercise diversity jurisdiction over a particular matter. See *State Farm Fire & Cas. Co.* v. *Tashire*, 386 U.S. 523, 530-31 (1967). The Class Action Fairness Act ("CAFA") similarly provides that federal courts can exercise only exercise diversity jurisdiction over class action lawsuits in which, *inter alia*, at least one member of the proposed class of plaintiffs is diverse from one defendant. 28 U.S.C. § 1332(d)(2). The question presented is whether a federal court can disregard the requirement of minimal diversity to exercise jurisdiction over a case that undisputedly lacks diversity, based on the court's belief that policy interests underlying CAFA support an exercise of federal jurisdiction.

PARTIES TO THE PROCEEDINGS

Petitioners Aryeh Simon and Sassya Simon, individuals, were the plaintiffs in the district court and petitioners in the court of appeals.

Respondent Marriott International, Inc. was an original defendant in the district court and respondent in the court of appeals.

Respondent Starwood Hotels & Resorts Worldwide LLC was an original defendant in the district court and respondent in the court of appeals.

Respondent Arne M. Sorenson, an individual, was an original defendant in the district court and respondent in the court of appeals.

The related proceedings are:

1) *In re: Marriott Int'l Consumer Data Breach Security Breach Litig.* No. 8:19-md-2879 (D. Md.)

2) *Simon, et al.* v. *Marriott Int'l, et al.*, No. 8:19-cv-01792 (D. Md.) – Judgment entered September 20, 2019

3) *Simon, et al.* v. *Marriott Int'l*, *et al.*, No. 19-385 (4th Cir.) – Judgment entered October 21, 2019.

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INTRODUCTION

This petition presents a question of exceptional importance regarding whether a district court may ignore the constitutional and statutory requirement of minimal diversity and exercise subject-matter jurisdiction over an action that undisputedly lacks such diversity.

The requirement of diversity of citizenship is rooted in Article III, Section 2 of the United States Constitution, which permits Congress to vest federal courts with original jurisdiction over all cases "between Citizens of different States…" U.S. Const. Art III § 2, cl. 1. This Court has long recognized that the Constitution permits federal jurisdiction in cases in which diversity of citizenship exists between any two parties on opposite sides of an action. See *State Farm Fire & Cas. Co.* v. *Tashire*, 386 U.S. 523, 530-31 (1967) (discussing the sufficiency of minimal diversity under the U.S. Constitution). Thus, in the absence of any other basis for federal jurisdiction, diversity jurisdiction can exist only "so long as any two adverse parties are not co-citizens." *Id.*

Congress recognized this limitation on federal jurisdiction when enacting the Class Action Fairness Act ("CAFA"). Although the existing diversity jurisdiction statute had been interpreted to require complete diversity, *Strawbridge* v. *Curtiss*, 3 Cranch 267 (1806), Congress liberalized that requirement in the class action context. Specifically, CAFA allows for diversity jurisdiction so long as "any member of a class of plaintiffs is a citizen of a State different from any defendant," or "any member of a class of plaintiffs is . . . a citizen or subject of a foreign state and any defendant is a citizen of a State." 28 U.S.C. §

1332(d)(2). Congress therefore incorporated the constitutional requirement of minimal diversity into CAFA's text.

Here, the District Court acknowledged the lack of minimal diversity but disregarded the constitutional and statutory requirement of diversity of citizenship in light of what it took to be "policy justifications for finding federal jurisdiction even when it is absent on the face of the plaintiff's complaint." Pet. App. at 12a. But CAFA's policy rationales cannot abrogate a threshold constitutional requirement. Certiorari is warranted to correct the lower courts' decisions to disregard the Constitution's minimal diversity requirement.

This case directly and cleanly presents this crucial issue. Petitioners filed their complaint in Connecticut state court, seeking damages and injunctive relief related to a data breach. They seek to represent a class of people who, like themselves, are United States citizens domiciled abroad. Because a United States citizen domiciled abroad is neither an alien nor a citizen of a state, there can be no diversity with such a class.

Nevertheless, Respondents removed this case to federal court, asserting that the Petitioners' claims were encompassed in class actions that had already been consolidated in a multi-district litigation in in the District of Maryland. The district court acknowledged that the case failed to meet CAFA's jurisdictional requirements, but it concluded that "[b]ecause this Court has jurisdiction over class action claims that subsume [Petitioners'] claims, this Court has jurisdiction over [Petitioners'] claims." Pet. App. at 3a-4a. And the Fourth Circuit implicitly sanctioned

this exercise of jurisdiction by denying Petitioners' petition for leave to appeal.

The Court should grant certiorari to vindicate the basic limits on federal jurisdiction imposed by the United States Constitution and incorporated into CAFA.

PETITION FOR A WRIT OF CERTIORARI

Petitioners Aryeh Simon and Sassya Simon respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals denying the petition for permission to appeal is unreported, and is attached at Petition Appendix 1a. The opinion of the district court is unreported, but is available at 2019 WL 4573415 and is attached at Petition Appendix 3a.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254. See *Dart Cherokee Basin Operating Co.* v. *Owens,* 574 U.S. 81, 90 (2014) (holding that the Court has authority to grant certiorari in a CAFA case where the Court of Appeals declined to hear the appeal).

RELEVANT STATUTORY PROVISIONS

Relevant provisions of the Class Action Fairness Act, 28 U.S.C. §§ 1332(d), 1453, are reproduced at Petition Appendix 16a.

STATEMENT OF THE CASE

A. Procedural Background

The Class Action Fairness Act was enacted to ensure "[f]ederal court consideration of interstate cases of national importance." *Standard Fire Ins. Co.* v. *Knowles*, 568 U.S. 588, 595 (2013). It vests the District Courts with subject-matter jurisdiction over any class action where: (1) the class has at least 100 members (numerosity); (2) at least one plaintiff and one defendant are citizens of different states (minimal diversity); and (3) the aggregate amount in controversy is at least $5 million (amount-in-controversy). 28 U.S.C. § 1332(d)(2), (5), (6). The numerosity and amount-in-controversy requirements are undisputed, and this case turns solely on the minimal diversity requirement.

B. Factual Background

In November 2018, Respondents announced a "data security incident" involving unauthorized access to the Starwood network since 2014 (the "Data Breach"). Pet. App. at 3a. The Data Breach resulted in nearly 80 consumer class actions against Respondents. Some of those class actions have been consolidated into a multi-district litigation proceeding in the District of Maryland (the "Marriott MDL"). *Id.* at 3a, 5a. Although no class has been certified in the Marriott MDL, two of the included class actions define their classes as: "[a]ll persons [whose personal identifying information] was accessed, compromised, or stolen from Marriott" as a result of the Data Breach. *Id.* at 7a; see also *Mendez* v. *Marriott Int'l, Inc.*, No. PWG-19-520 (D. Md.) (filed Dec. 17, 2018); *Trager* v. *Marriott Int'l, Inc.*, No. PWG-18-3745 (D. Md.) (filed Dec. 5, 2018).

Melissa Frank also filed a class action in Connecticut state court (the "*Frank* case") against Respondents on behalf of "American citizens who live abroad and whose Personal Information was accessed, compromised, or stolen in the [Data Breach.]" Pet. App. at 4a; see also *Frank* v. *Marriott Int'l Inc.*, No. 19-cv-329 (D. Conn.). Respondents removed the Frank case to the U.S. District Court for the District of Connecticut, arguing that Frank's complaint satisfied CAFA's minimal diversity requirement. Pet. App. at 4a. Following the removal, and before the District Court took any action or made any jurisdictional or other findings, Frank voluntarily dismissed that case. *Id.*

Two months later, Aryeh and Sassya Simon, who are represented by the same lawyers who represented Frank, filed their suit. The Simons are U.S. citizens who are domiciled in Israel. Following the Data Breach, the Simons were notified by a commercial monitoring service that their personal information had been exposed and accessed by malicious actors on the dark web. Based on this injury, the Simons filed this action in the Connecticut Superior Court. *Id.*

The Simons brought this lawsuit on behalf of themselves and a class of "[a]ll U.S. citizens who are domiciled abroad and whose Personal Information was compromised, accessed, or stolen in the [Marriott] Data Breach." *Id.* at 4a-5a.

Respondents removed this action to federal court under CAFA, 28 U.S.C. §§ 1332(d)(2), 1453, and the Judicial Panel on Multidistrict Litigation transferred it for pretrial consolidation with the Marriott MDL. *Id.* at 5a.

In seeking federal jurisdiction, Respondents acknowledged that the Simon's class action, as pleaded, does not satisfy CAFA's minimal diversity requirement. See *id.* at 6a. But it argued that the district court should exercise jurisdiction because of the similarities between the Simon's case and two other actions pending in the MDL, arguing that the Simons' claims would be encompassed in those other actions, even though no class had been certified in either of the other two cases. *Id.* at 7a. The defendants also urged the court to "ignore the Simon class definition and find minimal diversity based on the class definition" in *Frank,* a case filed by another, unrelated plaintiff and dismissed almost immediately. Defs.' Notice of Removal at 11 ¶ 34, *Simon* v. *Marriott*, No. 3:19-cv-00873, ECF No. 1 (D. Conn.).

The Simons moved to remand the case, arguing that there could be no federal jurisdiction unless CAFA's minimal diversity requirement was met and that even Respondents agreed that it was not met. Pet. App. at 5a.

The district court denied the remand motion, even though it recognized that the "class the Simons seek to represent does not support minimal diversity jurisdiction." *Id.* at 6a. The court concluded that CAFA and MDL considerations warranted "looking beyond" the plaintiffs' stated class definition. *Id.* at 10a. The court found that the proposed classes in two class actions consolidated into the Marriott MDL, namely the *Mendez* and *Trager* cases, were broad enough to include within them the Simons' claim. *Id.* at 10a-11a. Because federal jurisdiction had already attached to those actions and they had been consolidated for pretrial purposes, allowing the Simons to proceed in state court would "disrupt the

orderly progress of the pretrial process" in the Marriott MDL. *Id.* at 11a-12a. The court also implied that the Simons' complaint was designed to manipulate federal jurisdiction because the Simons were represented by the same counsel as Ms. Frank and the complaints in both actions were similar. *Id.* at 12a. The court did not explain how the Simons could be bound by the Frank action when they were not named in that complaint, no class had been certified in that action, and there was no evidence that the Simons and Ms. Frank were in privity or had any other relationship.

Thus, although, the court recognized that a "legitimately filed state court action" was not subject to removal to federal court, it nevertheless denied the Simons' motion to remand. *Id.* at 14a-15a.

The Simons timely filed a petition for permission to appeal the district court's decision under 28 U.S.C. § 1453. And the Fourth Circuit declined review of the district court's decision.[1] Pet. App. at 1a.

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[1] The Fourth Circuit's decision to deny the Simons' request for review does not foreclose review of the merits by this Court. In *Dart Cherokee Basin Operating Co.* v. *Owens,* 574 U.S. 81, 90 (2014), the Court held that it had jurisdiction, under 28 U.S.C. § 1254, to review the merits of a district court's decision to remand a case under CAFA, notwithstanding that review of such a decision by the court of appeals was discretionary and that the court of appeals had exercised its discretion to deny review. The Court held that such cases are properly considered "in" the applicable court of appeals and therefore, this Court has jurisdiction under 28 U.S.C. § 1254. *Id.* at 90-91.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE REGARDING THE LIMITS OF FEDERAL JURISDICTION

A. The Decisions Below Ignore the Fundamental Requirement of Diversity of Citizenship Rooted in the Constitution

Federal courts are courts of limited jurisdiction. *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). They possess only the power granted by the United States Constitution and Congress. *Exxon Mobil Corp.* v. *Allapattah Services, Inc.*, 545 U.S. 546, 552 (2005); *United States ex rel. Lutz* v. *United States*, 853 F.3d 131, 136 (4th Cir. 2017). A federal court that lacks subject-matter jurisdiction has no power to "proceed at all in any cause." *Steel Co.* v. *Citizens for a Better Environ.*, 523 U.S. 83, 94 (1998).

Section 2, Clause I of Article III of the U.S. Constitution gives Congress the power to vest the federal courts with jurisdiction over cases involving a controversy between citizens of different states or between a citizen of a state and an alien. The Constitution does not "automatically confer diversity jurisdiction upon the federal courts. Rather, it authorizes Congress to do so and, in doing so, to determine the scope of the federal courts' jurisdiction within constitutional limits." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 84 (2010). This Court has construed this constitutional provision to require minimal diversity of citizenship in cases arising under state law. See

Tashire, 386 U.S. at 530-31 (holding that that minimal diversity is required by the Constitution).

Minimal diversity means "the existence of at least one party who is diverse in citizenship from one party on the other side of the case." *Grupo Dataflux* v. *Atlas Global Group, L.P.*, 541 U.S. 567, 577 n.6 (2004). To be a citizen of a State within the meaning of the diversity requirement, "a natural person must [be] both a citizen of the United States and be domiciled within the State." *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U.S. 826, 828 (1989). A United States citizen who "has no domicile in any State . . . is stateless." *Id.* Such expatriates cannot support diversity jurisdiction, whether complete or minimal. See *Life of the S. Ins. Co.* v. *Carzell*, 851 F.3d 1341, 1348 (11th Cir. 2017) ("[U]nder either complete or CAFA minimal diversity, alienage jurisdiction is not available to the dual citizen who is American."); *Cresswell* v. *Sullivan & Cromwell*, 922 F.2d 60, 68 (2d Cir.1990) ("[T]he language of § 1332(a) is specific and requires the conclusion that a suit by or against United States citizens domiciled abroad may not be premised on diversity.").

This constitutional requirement is unyielding. *Steel Co.*, 523 U.S. at 94-95 ("The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of judicial power of the United States and is inflexible and without exception" (internal quotation marks and citation omitted)). Thus, federal courts cannot assert jurisdiction, and Congress cannot pass a statute authorizing federal jurisdiction, over actions raising purely state law claims that lack diversity.

The existence of minimal diversity is determined at the time of removal. 28 U.S.C. § 1332(d)(7); see also *Doyle* v. *OneWest Bank, FSB*, 764 F.3d 1097, 1098 (9th Cir. 2014) ("[T]he District Court should have determined the citizenship of the proposed plaintiff class based on Doyle's complaint as of the date the case became removable." (internal quotation omitted)).

This case indisputably lacks diversity. The Simons are U.S. citizens domiciled in Israel. And the class they seek to represent is limited to only "U.S. citizens who are domiciled abroad." Pet. App. at 4a-5a. Thus, as even the district court here recognized, Petitioners and the entire universe of proposed class members are stateless and cannot be used to establish diversity jurisdiction. See *id.* at 6a-7a.

Rather than ruling that these undisputed points required remand, the district court went on to consider whether the policies of CAFA warranted consolidating Petitioner's action into the pending MDL and asserting jurisdiction without minimal diversity. This was wrong and an affront to the constitutional and statutory limitations on the district court's power. By asserting federal jurisdiction when there decidedly was not even minimal diversity between Petitioners and Respondents, the district court disregarded a fundamental constitutional requirement in favor of its own authority. And the Fourth Circuit implicitly sanctioned this choice by denying the Simons' petition for leave to appeal. See *Dart Cherokee*, 574 U.S. at 92 ("[T]he Court of Appeals' denial of review established the law not simply for this case, but for future CAFA removals sought by defendants.").

The Court should grant certiorari to correct the course of the lower courts and reinforce the constitutional limitations on federal jurisdiction.

B. Review is Warranted To Vindicate The Plain Text of CAFA

Certiorari is also warranted to uphold the plain language of CAFA. Although Congress opened the doors of the federal courts wider by imposing only a minimal diversity requirement for certain class actions, it did not—and constitutionally it could not—do away with the requirement of diversity of citizenship altogether. The text of 28 U.S.C. § 1332(d) hews closely to the constitutional minimal diversity requirement.

Any analysis of CAFA must begin with the statutory text. Congress "says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992). Where a statute's language is plain, the court's obligation is to enforce it according to its terms. *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000).

Section 1332(d)(2) gives the district courts jurisdiction over a class action where, *inter alia*, "any member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C. § 1332(d)(2)(A). In turn, § 1332(d)(1) defines "class members" as it is used in (d)(2) to mean "the persons (named or unnamed) who fall within the definition of *the proposed or certified class* in a class action." 28 U.S.C. § 1332(d)(1)(D) (emphasis added). Taken together, these provisions instruct the court to look to the citizenship of those persons who fall within the "proposed class" for purposes of determining diversity.

CAFA does not define the term "proposed class," and so it must be construed in accordance with its "ordinary or natural meaning." *F.D.I.C.* v. *Meyer*, 510 U.S. 471, 476 (1994); *Smith* v. *United States*, 508 U.S. 223, 228 (1993). The word "class" is modified by the word "proposed," which typically means something that has been put forward for consideration. *See Proposed*, Webster's International Dictionary (3d ed. 2002). Thus, the ordinary meaning of the term "proposed class" means only the class that Petitioners have set forth in their Complaint.

The language of 28 U.S.C. § 1332(d)(2)(A) is equally clear that for purposes of determining whether there is minimal diversity, courts should look to the citizenship of class members as defined by § 1332(d)(1)—namely, the "proposed or certified class." It does not mention considering the citizenship of anyone else. The omission is significant. Legislative intent "can be derived only from the words they have used; and [courts] cannot speculate beyond the reasonable import of those words." *Univ. of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 353 (2013); see also *Animal Legal Defense Fund* v. *Dep't of Agriculture*, 789 F.3d 1206, 1217 (11th Cir. 2015) ("Where Congress knows how to say something but chooses not to, its silence is controlling."). Accordingly, under § 1332(d), only those who fall within the proposed class definition set forth by the plaintiff are considered for purposes of determining CAFA diversity jurisdiction.

As explained above, Petitioners' proposed class definition does not satisfy the minimal diversity requirement. By bootstrapping Petitioners' action together with *different* actions already consolidated, the district court took for itself more jurisdiction than either Congress or the Constitution permits. There is

no basis for such an expansion of federal authority. The Court should grant review to vindicate the plain language of CAFA's jurisdictional provisions.

C. The District Court Improperly Elevated CAFA's Policy Justifications Over Constitutional Requirements and the Statutory Language

The district court and Respondents repeatedly referred to the general policy goals of CAFA to support the court's assertion of its own jurisdiction. See Pet. App. at 11a (suggesting that the Petitioners' complaint "defeats the purpose of CAFA by forcing litigation of the same claims, in both state and federal court"); *id.* at 12a ("The policy justifications for finding federal jurisdiction under CAFA even when it is absent on the face of the plaintiff's complaint, such as preventing inefficiency and ensuring Federal court consideration of interstate cases of national importance, hold even more true in the MDL context." (internal quotation marks omitted)).

But reliance on vague congressional intent cannot trump the language of the statute. *See Allapattah Servs., Inc.*, 545 U.S. at 568 ("Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms."); *Garcia* v. *United States*, 469 U.S. 70, 76 n. 3 (1984) ("Resort to legislative history is only justified where the face of the Act is inescapably ambiguous" (internal quotation marks and citation omitted)). Here, CAFA's plain language does not allow a court to disregard a constitutional limit on federal jurisdiction; indeed, a limit that Congress intentionally enshrined within CAFA's threshold jurisdictional requirements.

The Senate Report published after CAFA was enacted explains that the statute was intended to expand federal courts' jurisdiction See S. Rep. No. 109-14, at 4 (2005), *reprinted in* U.S.C.C.A.N. 3, 73. But that same report recognizes that plaintiffs "undoubtedly possess some power to seek to avoid federal jurisdiction by defining a proposed class in particular ways." *Id.* at 43. This power is abrogated somewhat after a case is *properly* removed to federal court. *Id.* But such removal presupposes that all of CAFA's statutory requirements are met. Courts should not, and cannot, ignore CAFA's plain language in favor of policy considerations. Indeed, when interpreting CAFA, courts have repeatedly recognized that it is their duty to "interpret the [CAFA] statute as it was written," *Palisades Collections LLC* v. *Shorts*, 552 F.3d 327, 336 (4th Cir. 2008), not to try effectuate policy choices that do not appear in the statutory language, *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 564 F.3d 75, 80 (1st Cir. 2009) ("The analysis will turn on the precise language of that section of CAFA. Our job is to effectuate the intent expressed in the plain language Congress has chosen, not to effectuate purported policy choices regardless of language."); see also *In re Sprint Nextel Corp.*, 593 F.3d 669, 673 (7th Cir. 2010) (concluding that statutory exceptions to federal jurisdiction enacted in CAFA override "Congress's general goal" of ensuring that "national controversies . . . are decided in federal court").

Accordingly, the district court's reliance on the policies of CAFA to assert jurisdiction over a case that does not meet CAFA's statutory requirements was inconsistent with the plain language of the statute. The Court should grant review to reinforce the

primacy of unambiguous statutory language over vague notions of congressional intent.

D. The Decision Erodes Limitations on Federal Jurisdiction

The decisions below dramatically expand federal judicial power. Due regard for the states and their courts requires that federal courts "scrupulously confine their own jurisdiction to the precise limits" set by Congress. *Healy* v. *Ratta*, 292 U.S. 263, 270 (1934); see also *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Manning*, 136 S. Ct. 1562, 1573 (2016). This Court's long-standing jurisprudence reflects a "deeply felt and traditional reluctance . . . to expand the jurisdiction of federal courts through a broad reading of jurisdictional statutes." *Merrill Lynch*, 136 S. Ct. at 1573 (quoting *Romero* v. *Int'l Terminal Operating Co.*, 358 U.S. 354, 379 (1959)). As Justice Frankfurter wrote in *City of Indianapolis* v. *Chase National Bank*, 314 U.S. 63, 76-77 (1941): "The policy of the statute (conferring diversity jurisdiction upon the district courts) calls for its strict construction." Respect for the principles of federalism are most apposite where, as here, the action is governed by state law. See *Carlsberg Res. Corp.* v. *Cambria Sav. & Loan Ass'n*, 554 F.2d 1254, 1257 (3d Cir. 1977) ("Even more serious would be the disservice rendered to the cardinal precepts of federalism should judges abdicate their responsibility to determine whether diversity truly exists whenever such jurisdiction is invoked. By its nature, the diversity jurisdiction of the federal courts interferes with the autonomy of state tribunals by diverting litigation, ordinarily handled by such courts, to federal forums.").

The decisions below impose no limits on defendants who wish to remove a properly filed state case. The district court concluded that allowing Petitioners to "manipulate" their class definition to avoid federal jurisdiction would run counter to the "policy justifications" underlying CAFA and MDL litigation. See Pet. App. at 9a-11a. But under that rationale, federal courts would be able to assume original jurisdiction over cases where diversity is absent whenever a MDL, or even another federal case, is based on the same conduct or occurrence. The *only* constraint mentioned in the decisions below is that a court cannot exercise jurisdiction over a "legitimately filed" state-court case. Pet. App. at 14a.

However, the district court did not explain what constitutes a "legitimately filed" case, and its tautological basis for finding Petitioners' complaint illegitimate is that Petitioners were trying to have their case heard in Connecticut state court. On this reasoning, any non-diverse plaintiff who opts out of a class and decides to pursue his or her own claim in state court is subject to removal right back to federal court. Similarly, a defendant who identifies any diverse individual excluded from a state plaintiff's class definition could remove the state action to federal court and claim that the sole purpose of the narrow definition was solely to avoid federal jurisdiction. In sum, the decisions below essentially write-out the minimal diversity requirement from CAFA.

The decisions below will lead to jurisdictional mischief in future cases. For instance, allowing defendants to remove cases that lack minimal diversity dramatically expands the prudential "first-to-file" rule. Simply stated, the "first-to-file" rule

provides that when actions involving nearly identical parties and issues have been filed in two different district courts, the court in which the first suit was filed should generally proceed to judgment. See *Baatz* v. *Columbia Gas Trans., LLC*, 814 F.3d 785, 789 (6th Cir. 2016). The doctrine's application has been consistently limited to only federal courts. See *Colo. River Water Cons. Dist.* v. *United States*, 424 U.S. 800, 817 (1976) ("As between *federal district courts*, . . . the general principle is to avoid duplicative litigation." (emphasis added)); *Zide Sport Shop of Ohio* v. *Ed Tobergte Assoc., Inc.*, 16 F. App'x 433, 437 (6th Cir. 2001) (noting that the rule "encourages comity among federal courts of equal rank"); *Burger* v. *Am. Maritime Officers Union*, No. 97-31099, 1999 WL 46962 at *1 (5th Cir. Jan. 27, 1999) (recognizing that courts have "only applied the first-to-file rule when similar actions are pending in two federal district courts and where similar actions are pending in the same federal district court").

There is no authority for expanding this prudential rule to allow federal courts to hear cases that were brought in state court simply because a federal court is already entertaining a similar action. But that is exactly what the decisions below allow: a defendant sued first in federal court can remove a subsequent state court case arising out of the same conduct, transaction or occurrence simply on the basis that it would avoid overlapping litigation.

Although CAFA may have served to expand federal jurisdiction over certain class actions, Congress certainly did not intend to alter through CAFA our federal system of dual sovereignty, in which we presume state courts to be competent. See *Tafflin* v. *Levitt*, 493 U.S. 455, 458-59 (1990). Certiorari is

warranted to allow this Court to reaffirm the competence and value of state courts in our federalist system.

II. THE DISTRICT COURT'S RELIANCE ON OTHER ACTIONS CONSOLIDATED IN THE MARRIOT MDL TO ASSERT JURISDICTION OVER PETITIONER'S CASE IS INCONSISTENT WITH THIS COURT'S PRECEDENT

After recognizing that the case lacked minimal diversity, the district court erroneously relied on the existence of other actions in the Marriott MDL that would potentially encompass Petitioner's claims to assert jurisdiction. Pet. App. at 3a-4a ("Because this Court has jurisdiction over class action claims that subsume the Simons' claims, this Court has jurisdiction over the Simons' claims."). But this Court has held that ancillary or supplemental jurisdiction over a particular case cannot be based on the existence of other cases. Moreover, the district court's invocation of fraudulent joinder doctrine to "look through" Petitioners' complaint represents a dramatic and unwarranted expansion of that doctrine.

A. A Pending MDL Does Not Provide Any Basis for Federal Jurisdiction

The mere existence of a MDL in federal court is not a basis for federal jurisdiction. The statute allowing for the courts to transfer cases to an MDL, 28 U.S.C. § 1407, is, by its plain terms, simply a venue statute. It allows for the transfer of cases "pending in different districts" of the federal system that involve one or more common questions of fact. 28 U.S.C. § 1407. Thus, section 1407 permits only the transfer and consolidation of *federal* cases. See *BancOhio*

Corp. v. *Fox*, 516 F.2d 29, 32 (6th Cir. 1975) ("there is nothing in [section 1407] to provide an exception to the rules normally governing removal of cases from state courts. Such a transfer cannot be made unless *the district court properly has jurisdiction of the subject matter of the case*." (emphasis added)); *see also Lexecon, Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40-41 (1998) (explaining that although permitting transferee courts to try coordinates cases might "be more desirable than preserving a plaintiff's choice of venue . . . the proper place for resolving that issue remains the floor of Congress").

The system of multi-district litigation that has developed over time recognizes that cases arising out of the same transaction or incident may proceed in both federal and state courts at the same time, and courts have developed ways to coordinate and harmonize proceedings in such cases. See *Manual for Complex Litigation (Fourth)* § 31.312 (2004); *Guidelines and Best Practices for Large and Mass-tort MDLs* (Second) 81 (2018). This accommodates the fact that federal courts must respect the limits of their jurisdiction. *See Camsoft Data Sys.* v. *S. Elecs. Supply, Inc.*, 756 F.3d 327, 339 (5th Cir. 2014) ("[There is little doubt that remand will result in a certain degree of inconvenience [to a federal court]. Yet we must respect the outer limit of our jurisdiction 'regardless of the costs' imposed." (citation omitted)). Indeed, this Court has cautioned against creating jurisdictional exceptions for the sake of judicial economy. *See Grupo Dataflex*, 541 U.S. at 580-81.

More fundamentally, this Court has explained that a federal court cannot tie a state court case over which it did not have original jurisdiction to similar

cases over which it did have jurisdiction in order to make a case removable. *Syngenta Crop Prot., Inc.* v. *Henson*, 537 U.S. 28, 33-34 (2002). In *Syngenta*, the plaintiff sued in state court in Louisiana, asserting various tort claims related to the defendants' manufacture of a certain insecticide. *Id.* at 30. A similar action was pending in the United States District Court for the Southern District of Alabama, in which the state plaintiff successfully intervened in order to participate in settlement negotiations. *Id.*

After the federal case settled, the Louisiana state court continued its case on the understanding that the settlement only required dismissal of some of the claims raised in the state court. The defendants promptly removed the state action, asserting federal jurisdiction under the All Writs Act, 28 U.S.C. § 1651. They moved to dismiss, arguing that the federal court in Alabama had jurisdiction over the state case, because its claims were encompassed by the settlement agreement. *Id.* Although the district court dismissed the action, the Eleventh Circuit reversed, reasoning that the All Writs Act did not provide federal subject-matter jurisdiction in its own right. *Id.* at 31.

This Court affirmed. The Court held that the All-Writs Act did not provide an independent basis for removal jurisdiction, because the removal statute, 28 U.S.C. § 1441, provided specific statutory procedures for removal, one of which is an independent basis for federal jurisdiction. *Id.* at 32-33. The Court also rejected the argument that the doctrine of ancillary jurisdiction sufficed to create federal jurisdiction. *Id.* at 34 ("[A] court must have jurisdiction over a case or controversy before it may assert jurisdiction over ancillary claims."); see also *Ahearn* v. *Charter Twp. of*

Bloomfield, 100 F.3d 451, 456 (6th Cir. 1996) (recognizing that a removing defendant must show that a federal court can exercise jurisdiction over a removed action when considered on its own).

The same analysis applies here. Respondents removed the Petitioners' action on the basis that Petitioners' claims were encompassed by other actions already pending in the Marriott MDL. See Pet. App. at 10a-11a. And like the district court in *Syngenta*, the district court here agreed that "because the Simons' complaint was filed after . . . the opening of the Marriott MDL," it had jurisdiction over the Petitioners' claims "through the Marriott MDL." Pet. App. at 7a. However, like the All Writs Act, the MDL statute does not provide an independent basis for removal. Under *Syngenta*, Respondents had to show that there was minimal diversity between the parties. See *Syngenta*, 537 U.S. at 34. Put differently, CAFA requires that a particular action have minimal diversity *before* it can be removed, and the MDL statute does not confer pendent jurisdiction to assert jurisdiction where it does not exist. Because that basic threshold requirement was not met in this case, there was no basis for a federal court to assert jurisdiction.

In short, the courts below and Respondents cannot "avoid complying with the statutory requirements for removal" required by CAFA. *Id.* at 32-33.

B. "Looking Through" Petitioners' Complaint Reveals Nothing but the Same Information on Its Face

Below, the district court repeatedly touted its authority to "look through" the pleadings to assert

jurisdiction. It likened this case to one of fraudulent joinder. But this case is clearly distinguishable from fraudulent joinder cases.

In *Mississippi ex. rel. Hood* v. *AU Optronics*, 571 U.S. 161, 174 (2014), the Court explained that certain circumstances require federal courts to "look behind the pleadings to ensure that parties are not improperly creating or destroying diversity jurisdiction." For example, "a plaintiff may not keep a case out of federal court by fraudulently naming a non diverse defendant;" or "collusively assign[] his interest in an action." *Id.* "And in cases involving a State or state official, [courts] have inquired into the real party in interest because a State's presence as a party will destroy complete diversity." *Id.*

The purpose of such a "look" is for the court to determine the real parties in interest. *Id.* But, once such real parties in interest are identified, this Court has explained that federal courts have "no warrant . . . to inquire whether some other person might have been joined" to a particular case when evaluating diversity jurisdiction. *Lincoln Prop. Co.* v. *Roche*, 546 U.S. 81, 93 (2005); see also *Knapp* v. *Railroad Co.,* 20 Wall. 117, 122 (1874) ("In determining the point of jurisdiction, we will not make inquiry outside of the case in order to ascertain whether some other person may not have an equitable interest in the cause of action."); *Little* v. *Giles*, 118 U.S. 596, 603 (1886) (explaining "where the interest of the [named] party is real, the fact that others are interested who are not necessary parties, and are not made parties, will not affect" diversity jurisdiction).

Here, there is no basis to claim that Petitioners or the members of their proposed class are not the real

parties in interest to this suit. Respondents' failure to adequately protect the private, personal information of Petitioners and the proposed class is the direct and proximate cause of the alleged injuries. Each of the Petitioners and each member of the proposed class seek to vindicate their own interests through this lawsuit. but on the other side of this complaint is the same thing it says on its face. Put simply, looking through the pleadings reveals nothing but what is on the face of Petitioners' complaint: the Simons are stateless individuals seeking to represent a class made up entirely of stateless individuals.

Further, Petitioners have not fraudulently named a non-diverse party to defeat jurisdiction. To establish such fraudulent joinder, "the removing party must show either 'outright fraud in the plaintiff's pleading of jurisdictional facts' or that 'there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court.'" *Johnson* v. *American Towers, LLC*, 781 F.3d 693, 704 (4th Cir. 2015) (quoting *Hartley* v. *CSX Transp., Inc.*, 187 F.3d 422, 424 (4th Cir. 1999)).

In this case, there is no fraud in Petitioners' pleadings. The defendants concede that Petitioners are U.S. Citizens domiciled in Israel, and they acknowledge that the proposed class members are not citizens of any U.S. state for diversity jurisdiction purposes. See, *e.g.*, Pet. App. at 6a ("It is not disputed that the class the Simons seek to represent does not support minimal diversity jurisdiction if only the allegations within the four corners of the Complaint are considered."). And both Petitioners and every member of the purported class have at least a possibility of establishing a claim against Respond-

ents. The Data Breach exposed the private, personal information of nearly 383 million individuals, including the Simons and the members of the class they seek to represent, to malicious actors. Accordingly, every one of the Simons' proposed class members have a colorable claim against each of the named defendants. See *Johnson*, 781 F.3d at 704 (plaintiffs need only show a "glimmer of hope" of their claim succeeding to defeat a claim of fraudulent joinder).

Indeed, there is nothing improper about limiting a putative class to only citizens of a particular state, or in this case, to individuals who have no state citizenship. Such a practice is "a practically reasonable and even common option" in class action lawsuits. *McCown* v. *NGS, Inc.*, No. 3:14-27719, 2015 WL 251489 at *3 (S.D.W. Va. Apr. 3, 2015). The Courts of Appeals agree that CAFA did not alter the longstanding proposition that the plaintiff is the master of his or her own claims and may structure such claims to avoid federal subject matter jurisdiction. See, *e.g.*, *Scimone* v. *Carnival Corp.*, 720 F.3d 876, 882 (11th Cir. 2013) ("[P]laintiffs are the 'master of the complaint' and are 'free to avoid federal jurisdiction by structuring their case to fall short of a requirement of federal jurisdiction" so long as the method of avoidance is not fraudulent. (internal citations omitted)); *Anderson* v. *Bayer Corp.*, 610 F.3d 390, 393 (7th Cir. 2010) (recognizing that the "general rule in a diversity case is that plaintiffs as masters of the complaint may include (or omit) claims or parties in order to determine the forum"); *Johnson* v. *Advance Am.*, 549 F.3d 932, 937 (4th Cir. 2008) (plaintiff is entitled to "limit the class to citizens" of one state "so as to avoid federal jurisdiction under CAFA.");

Morgan v. *Gay*, 471 F.3d 469, 474 (3d Cir. 2006) ("CAFA does not change the proposition that the plaintiff is the master of her own claim."); *In re Hannaford Bros. Co.*, 564 F.3d at 76 (rejecting argument that plaintiff has improperly defined the class by requiring all class members to be citizens of a certain state).[2]

Accordingly, the district court's "look through the pleadings" approach and invocation of fraudulent joinder, stretch both doctrines beyond their breaking point. The decisions below are inconsistent with this Court's precedent mandating that a plaintiff's non-fraudulent pleadings be evaluated for the presence of diversity solely based on the proposed class therein. The Court should grant review to reinforce the narrow application of these propositions.

III. WITHOUT IMMEDIATE REVIEW OF THIS IMPORTANT CONSTITUTIONAL ISSUE, PETITIONERS WILL BE DENIED ANY POSSIBILITY OF RELIEF

This case presents an ideal vehicle for clarifying the continued constitutional constraints on federal jurisdiction following CAFA, and there is no reason to delay that resolution. In *Dart Cherokee*, the Court

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[2] Respondents further claim that Petitioners' complaint must be viewed in light of the previous complaint that was voluntarily dismissed. Not so. This Court has consistently recognized that "a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified. *Standard Fire Ins. Corp.* v. *Knowles*, 568 U.S. 588, 593 (2013); see also *Smith* v. *Bayer Corp.*, 564 U.S. 299, 315 (2011) ("Neither a proposed class action nor a rejected class action may bind nonparties").

explained the "practical effect" of a court of appeals' denial of review established "the law not simply for [that] case, but for future CAFA removals sought by defendants in [that] Circuit." 574 U.S. at 92.

The same is true here. Compare *Dart Cherokee*, 574 U.S. at 91 (explaining that the Tenth Circuit denied review in that case upon "careful consideration of the parties' submission"), and Pet. App. 1a (denying review "upon consideration of the submissions relative to [Petitioners'] petition for leave to appeal" under CAFA) By denying Petitioners' request for review, the Fourth Circuit impliedly sanctioned the district court's construction of CAFA. Moreover, the question whether the district court properly denied Petitioners' motion to remand and whether the Fourth Circuit abused its discretion in denying review are effectively the same questions. *Id.* at 94-95.

This petition squarely raises the improper expansion of federal power to take jurisdiction over a case despite plain constitutional text forbidding it. If the Court determines, in accordance with its precedent, that CAFA diversity jurisdiction must be based on Petitioners' proposed class definition, and that the constitutional and statutory requirements supersede CAFA's abstract policy goals then Petitioners' right to proceed with their case in state court will be clear. If, on the contrary, the Court determines that diversity jurisdiction in one case can be premised on a federal court already having jurisdiction over a different case, then the Petitioners' claims will be tried in federal court.

This is the only way the Court can reasonably expect to have an opportunity to review such an end run around the constitutional minimal diversity

requirement. A search of PACER for the past five years reveals that the Fourth Circuit has not granted review of a single petition filed under 28 U.S.C. § 1453 seeking review of an order denying remand, despite having granted six § 1453 petitions since 2015. If the Fourth Circuit denied review from a ruling that federal jurisdiction exists over a case that indisputably lacks minimal diversity, there is no reason to conclude that it will ever grant future § 1453(c) petitions seeking review of similar orders denying remand. Thus, without review by this Court, Petitioners will have lost all possibility of relief; they cannot realistically hope to vindicate their right to proceed in the forum of their choice in post-trial proceedings.

CONCLUSION

For the foregoing reasons, the petition should be granted, the judgment below should be reversed, and the case should be remanded with instructions to return the case to the Connecticut Superior Court for further proceedings.

Respectfully submitted,

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APPENDICES

APPENDIX A

FILED: October 21, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-385
(8:19-md-02879-PWG)
(8:19-cv-01792-PWG)

ARYEH SIMON; SASSYA SIMON, on behalf of themselves and all others similarly situated

Petitioners

v.

MARRIOTT INTERNATIONAL, Inc; STARWOOD HOTELS & RESORTS WORLDWIDE LLC; ARNE SORENSON

Respondents

O R D E R

Upon consideration of submissions relative to the petition for leave to appeal denial of remand order under the Class Action Fairness Act, 28 U.S.C. § 1453(c)(1), the court denies the petition.

Entered at the direction of Senior Judge Hamilton with the concurrence of Judge Wilkinson and Judge Thacker.

For the Court
/s/ Patricia S. Connor, Clerk

APPENDIX B

Case No. 8:19-md-02879-PWG

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

ARYEH SIMON, *et al.*,
Plaintiffs,

v.

FILED
September 20, 2019

MARRIOTT INTERNATIONAL, INC., *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiffs Aryeh and Sassya Simon, on behalf of themselves and others similarly situated, filed suit in state court in Connecticut seeking permanent injunctive relief and monetary damages from Defendants[1] for claims arising out of the data breach incident that is the subject of the Multidistrict Litigation against Marriott ("Marriott MDL") pending before me, *In re Marriott*, No. PWG-19-2879. *See* Compl., ECF No. 1-1. Marriott removed the action to federal court in Connecticut; the case was transferred to this Court as part of the Marriott MDL, and the Simons filed a Motion to Remand to Connecticut state court for lack of subject matter jurisdiction. *See* Pls.' Mot., ECF No. 28; Pls.' Mem. 1, ECF No. 29. Because

[1] Plaintiffs brought this action against three Defendants: Marriott International, Inc., Starwood Hotels & Resorts Worldwide LLC, and Arne M. Sorenson as President and Chief Executive Officer of Marriott. Compl., ECF No.1-1. I will refer to them collectively as "Marriott."

this Court has jurisdiction over class action claims that subsume the Simons' claims, this Court has jurisdiction over the Simons' claims, and the Motion to Remand is denied.

Factual Background

To provide context, I begin with an action that another litigant, Melissa Frank, filed against Marriott. Frank filed suit in Connecticut state court against Marriott on behalf of "American citizens who live abroad and whose Personal Information was accessed, compromised, or stolen in the [Marriott] Data Breach." *Frank* Compl. ¶ 59, ECF No. 1-6 (emphasis added); *see Frank v. Marriott Int'l Inc.*, No. 19-cv-326 (D. Conn.). Marriott removed the case to the United States District Court for the District of Connecticut pursuant to 28 U.S.C. § 1332(d). *Frank* Notice of Removal, ECF No. 1-7. Marriott argued the court had diversity jurisdiction under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1711, because there was likely one person in Frank's action domiciled in the United States in a state other than Delaware or Maryland, where Marriott is a citizen, and therefore CAFA's requirement of minimal diversity was met.[2] *Id.* The next day, plaintiff's counsel voluntarily dismissed *Frank*. *Frank* Notice of Voluntary Dismissal, ECF No. 1-8. The same counsel then filed this action on behalf of the Simons, again in Connecticut state court. Compl. 1.[3]

The Simons seek to represent "[a]ll U.S. citizens who are *domiciled abroad* and whose Personal

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[2] 28 U.S.C. § 1332(d)(2)(A).

[3] Citations are to the Simons' individual case, not the Marriott MDL, unless otherwise noted.

Information was compromised, accessed, or stolen in the [Marriott] Data Breach." Compl. ¶ 66 (emphasis added). Marriott removed the suit to the United States District Court for the District of Connecticut pursuant to 28 U.S.C. § 1332(d), based on diversity jurisdiction under CAFA, and sought its inclusion into the Marriott MDL. *See* Defs.' Notice of Removal, ECF No. 1. The Judicial Panel on Multidistrict Litigation transferred it to this Court for inclusion in the MDL, despite the Simons' efforts to keep the action in state court. J.P.M.L. Transfer Order, ECF No. 19.

The Simons have filed a Motion to Remand, arguing that this Court does not have subject matter jurisdiction over this action because CAFA's minimal diversity requirement is not met. *See* Pls.' Mot. & Mem. The parties have fully briefed the motion. ECF Nos. 29, 36, 38. A hearing is not necessary. *See* Loc. R. 105.6.

Standard of Review

If a federal court determines that it does not have jurisdiction over a case that has been removed from state court, the federal court must remand the case back to state court. *See* 28 U.S.C. § 1447(c). In considering a motion to remand, the court must "strictly construe the removal statute and resolve all doubts in favor of remanding the case to state court." *Richardson v. Phillip Morris Inc.*, 950 F. Supp. 700, 702 (D. Md. 1997) (quoting *Creekmore v. Food Lion, Inc.*, 797 F. Supp. 505, 507 (E.D. Va. 1992)).

The burden of establishing jurisdiction rests with the party seeking removal, here Marriott. *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 816 (4th Cir. 2004). The party asserting subject matter jurisdiction must prove by a preponderance of the evidence the facts

necessary to establish jurisdiction. *Vest v. RSC Lexington, LLC*, No. 16-3018-CMC, 2016 WL 6646419, at *7 (D.S.C. Nov. 10, 2016). I can consider facts outside the pleadings and am not limited by the allegations in a plaintiff's complaint when evaluating a motion to remand. *See United States v. Smith*, 395 F.3d 516, 519 (4th Cir. 2005) (considering the entire record in evaluating a motion to remand); *Linnin v. Michielsens*, 372 F. Supp. 2d 811, 819 (E.D. Va. 2005) (holding that the court has "authority to look beyond the pleadings and consider summary-judgment-type evidence, such as the affidavits and the depositions accompanying either a notice of removal or a motion to remand").

Discussion

The Simons do not challenge Defendants' assertions in their notice of removal that CAFA's requirements for numerosity (100 plaintiffs), 28 U.S.C. § 1332(d)(5)(B), and amount-in-controversy (five million dollars), 28 U.S.C. § 1332(d)(2) are both met. *See* Pls.' Mot. & Mem.; Defs.' Notice of Removal. Therefore, the only issue here is whether minimal diversity exists under CAFA.

Under CAFA, minimal diversity exists if "any member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C. § 1332(d)(2)(A). It is not disputed that the class the Simons seek to represent does not support minimal diversity jurisdiction if only the allegations within the four corners of the Complaint are considered. The Simons seek to represent "[a]ll U.S. citizens who are domiciled abroad and whose Personal Information was compromised, accessed, or stolen in the [Marriott] Data Breach." Compl. ¶ 66. Because U.S. citizens who are domiciled abroad are "stateless" (and

therefore not a citizen of any State), they cannot be diverse from any defendant. *See Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 828 (1989) (holding that, for diversity jurisdiction purposes, one must be a citizen of the United States and domiciled in a State); *see also Herrick Co., Inc. v. SCA Commc'ns*, 251 F.3d 315, 322 (2d Cir. 2001) (holding that a U.S. citizen that is domiciled abroad cannot be diverse from a U.S. citizen that is also domiciled in a State).

Marriott argues that this Court has jurisdiction nonetheless because federal jurisdiction already attached to two CAFA class actions in this MDL before the Simons filed their suit, that broadly defined their classes as: "[a]ll persons [whose personal identifying information] was accessed, compromised, or stolen from Marriott" because of the data breach. See Compl. ¶ 59, ECF No. 1 in *Mendez v. Marriott Int'l, Inc.*, No. PWG-19-520 (D. Md.) (filed Dec. 17, 2018); Compl. ¶ 46, ECF No. 1 in *Trager v. Marriott Int'l, Inc.*, No. PWG-18-3745 (D. Md.) (filed Dec. 5, 2018). In Marriott's view, the Mendez and Trager classes are broad enough to include within them the Simons' claims and those of all the putative class members that they purport to represent. Defs.' Opp'n 6. And because the Simons' complaint was filed after both Mendez and Trager and the opening of the Marriott MDL, this Court already had jurisdiction over the Simons' claims through the Marriott MDL. Id. at 7. Marriott also argues that, because there is evidence that the Simons' complaint is an attempt to skirt federal jurisdiction and CAFA's efficiency goals, and because the Simons are, in essence, trying to divest this court of jurisdiction over class members whose claims properly are before it, this Court has authority to deny the Simons' motion to remand in

order to maintain its existing jurisdiction. *Id.* at 4. I agree.

In reaching this result, I must acknowledge that this issue appears to be one of first impression. My research has not yielded any case from the Fourth Circuit, this Court, or another jurisdiction, that has dealt with the narrow issue before me: Can a class action plaintiff pursue a lawsuit in state court consisting of claims that already are included in a CAFA suit within an existing MDL by manipulating the allegations in their complaint to skirt the minimal diversity requirement of CAFA? However, case law addressing the federal court's jurisdiction and parties' efforts to avoid it under analogous circumstances is informative and supports the conclusion which I have reached.

A. Crafting a complaint to avoid CAFA jurisdiction

While the old chestnut that the plaintiff is the "master of the complaint" is true, there are limits to that sovereignty. For example, a plaintiff cannot tailor a suit (or series of suits) to avoid federal jurisdiction by manipulating the amount in controversy or number of class members to fall short of the CAFA requirements. For example, in *Freeman v. Blue Ridge Paper Prods., Inc.*, on review of a motion to remand, the Sixth Circuit held that the plaintiffs were not permitted to divide a lawsuit into five separate state court cases—each one seeking under five million dollars in damages—to avoid CAFA jurisdiction. 551 F.3d 405, 406-07 (6th Cir. 2008). The court required the aggregation of the five cases after defendant removed to federal court because it determined, after looking beyond the pleadings, that there was "no colorable basis" for the pleading tactic

used by plaintiffs "other than to frustrate CAFA," and that splintering what, in essence, was a single lawsuit into multiple suits did not deprive the federal court of jurisdiction. *Id.* at 406-09.[4] The court noted that the purpose of CAFA is to "allow defendants to defend large interstate class actions in federal court," and concluded that CAFA's purpose justified the forced aggregation, notwithstanding the plaintiffs' desire to balkanize their claims into a series of suits to remain in state court. *Id.* at 407. The court reasoned that "[enacting] CAFA was necessary because the previous law 'enable[d] lawyers to "game" the procedural rules and keep nationwide or multi-state actions in state courts.'" *Id.* at 408 (quoting S. Re. No. 109-114, at 5 (2005)).

In re Kitec, No. 09-md-2098-F, No. 10-cv-1193-F, No. 10-cv-1192-F, 2010 WL 11618052, at *1 (N.D. Tex. Aug. 23, 2010), provides similar guidance. In that

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[4] Other Circuits have distinguished *Freeman*, but those cases do not detract from its holding that a plaintiff may not evade CAFA jurisdiction while simultaneously expanding recovery. 551 F.3d at 409. For example, in *Tanoh v. Dow Chemical Co.*, the Ninth Circuit held that seven state court actions, each with fewer than 100 plaintiffs, should not be treated as a single "mass action" under CAFA. 561 F.3d 945 (9th Cir. 2009). The court concluded that the plaintiffs were not clearly evading CAFA jurisdiction by filing several "copycat" actions, like the *Freeman* plaintiffs, because the plaintiffs were not representing a nationwide class and were not alleging the same injuries. *Id.* at 954. The court noted that if the seven actions were copycat actions, the holding could be different because "competing claims to represent the same class of plaintiffs might raise concerns that overlapping or identical claims would be litigated in multiple jurisdictions." *Id.* Thus, the Ninth Circuit's holding would support aggregation in the context of this case because the Simons are representing a class of plaintiffs already before this Court and alleging the same injuries.

case, two plaintiffs filed class actions in state court (the *Steiner* class and the *Hillary* class). Both plaintiffs were represented by the same counsel and the complaints had overlapping claims for relief, but the class members lived in different communities in Washington State. The defendant sought inclusion of the actions into an already existing MDL that had within it a class action (*Fliss*) defined broadly enough to include the *Steiner* and *Hillary* members, so the defendant removed the actions to federal court. Id. at *2. The plaintiffs filed motions to remand, arguing that each complaint alleged that recovery of its respective class would be less than five million dollars. *Id.* The court held that the *Steiner* and *Hillary* plaintiffs could not avoid the original federal jurisdiction it had acquired by the filing of the *Fliss* class action, which satisfied CAFA's requirements, and conferred federal jurisdiction over the claims in the *Steiner* and *Hillary* suits. *Id.* at *6. The court relied upon *Freeman* in holding that the claims must be aggregated with Fliss because, in looking beyond the pleadings, there was no colorable basis for separating plaintiffs by their geographical location and because the plaintiffs sought to expand their recovery by filing actions that could allow a member plaintiff to recover from both the state court actions and the Fliss action. *Id.*

Here, both CAFA and MDL considerations warrant looking beyond the pleadings like in *Freeman* and *In re Kitec*, respectively. Both *Mendez* and *Trager* are CAFA actions that allege Marriott's liability for injuries sustained by the data breach—classes that are not only multi-state, but international. *See*

Mendez Compl. ¶ 59; *Trager* Compl. ¶ 46.[5] Because the Simons' claims are wholly included in both *Mendez* and *Trager*, the Simons are attempting to represent class members already before the court in those actions. This defeats the purpose of CAFA by forcing litigation of the same claims, in both state and federal court. Although the Simons seek to plead around the minimal diversity requirement of CAFA, rather the amount in controversy like in *Freeman*, the intent of this manipulation remains the same—divesting this court of jurisdiction it already has acquired.

Moreover, neither the Simons' Complaint nor their Motion to Remand offers any legitimate basis for the need to litigate their claims separately from the MDL because of their geographical locations—having a domicile abroad. Consequently, they do not offer any colorable basis for limiting their claims by a characteristic that evades federal jurisdiction. *See In re Kitec*, 2010 WL 11618052, at *1. Additionally, the Simons are seeking to expand their recovery because they could recover from both their state court action and from the MDL, from either (or both) the *Mendez* or *Trager* actions.

Furthermore, like in *Freeman*, there is ample evidence here that the Simons' complaint was designed to manipulate federal jurisdiction, albeit by defeating the diversity requirement rather than the amount-in-controversy requirement. As noted, prior

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[5] As noted above, the *Mendez* and *Trager* actions define their classes broadly: "[a]ll persons [whose [personal identifying information] was accessed, compromised, or stolen from Marriott" because of the data breach. *See Mendez* Compl. ¶ 59; *Trager* Compl. ¶ 46.

to the filing of the Simons' suit, another plaintiff, Frank, brought a nearly identical class action against Marriott in Connecticut state court and voluntarily dismissed it the day after Marriott removed it to federal court. Then, the same attorneys filed suit on behalf of the Simons in the same state court, revising slightly the class definition from *Frank* in a transparent effort to avoid federal jurisdiction. Specifically, the attorney changed only "live abroad" to "domiciled abroad," to prevent an argument that a plaintiff living abroad nonetheless was domiciled in the United States. *Compare Frank* Compl. ¶ 59, *with* Compl. ¶ 66 (emphasis added).

The policy justifications for finding federal jurisdiction under CAFA even when it is absent on the face of the plaintiff's complaint, such as preventing inefficiency and "ensuring 'Federal court consideration of interstate cases of national importance,'" hold even more true in the MDL context. *See Standard Fire Insurance Co. v. Knowles*, 568 U.S. 588, 595 (2013) (quoting § 2(b)(2), 119 Stat. 5). The primary objective of an MDL is to "promote the just and efficient conduct of . . . actions" that involve common questions of fact. 28 U.S.C. § 1407(a). This interest in fairness and efficiency is even stronger in the context of MDLs than in a stand-alone CAFA class action because MDLs combine multiple class (and individual) actions into one lawsuit for purposes of pretrial proceedings.

Allowing the Simons to manipulate CAFA would be harmful here because it could disrupt the orderly progress of the pretrial process in the Marriott MDL. While the Simons' action was pending in the District of Connecticut, they tried to force Marriott to file an answer immediately, in contradiction to the schedule

set by this Court; refused to agree to a stay while the case was transferred to the Marriott MDL; and objected to an extension of time, resulting in Marriott filing an emergency motion. Defs.' Opp'n 10. Harm to putative class members and defendants is exactly what MDLs seek to avoid by streamlining the litigation process and encouraging settlement. *Manual for Complex Litigation (Fourth)* (2004) 22.315 (explaining the bellwether process). Here, granting the Motion to Remand would open the door for possibly inconsistent verdicts, as well as duplicative costs to both Defendants and putative class members.

B. Fraudulent Joinder

Lastly, a plaintiff's ability to amend a complaint to avoid federal jurisdiction is limited by the principle of fraudulent joinder. The fraudulent joinder doctrine permits removal to federal court when a non-diverse party is a defendant in a case, if that party is not a proper defendant, but rather named only to defeat diversity jurisdiction. *Marshall v. Manville Sales Corp.*, 6 F.3d 229, 232 (4th Cir. 1993). The doctrine "effectively permits a district court to disregard, for jurisdictional purposes, the citizenship of certain nondiverse defendants, assume jurisdiction over a case, dismiss the nondiverse defendants, and thereby retain jurisdiction." *Mayes v. Rapoport*, 198 F.3d 457, 461 (4th Cir. 1999). In *Mayes*, the Fourth Circuit found the fraudulent joinder doctrine to be dispositive when evaluating whether to allow amendments to a complaint *post*-removal. *Id.* at 463. The court held that, when the district court is evaluating a request to amend a complaint, it should carefully scrutinize any attempt to add a nondiverse defendant immediately after removal and "be wary that the amendment

sought is for the specific purpose of avoiding federal jurisdiction." *Id.*

What the Simons are attempting to do here is analogous to what the fraudulent joinder rule prohibits, and further militates against granting a remand to state court. In fraudulent joinder cases, the district court may retain jurisdiction over cases that it would be forced to remand if the court were bound to determine its jurisdiction by the face of the plaintiff's pleadings alone. The policy which the fraudulent joinder rule promotes is no less applicable here.

C. When this Court should not exercise jurisdiction

An action involving an MDL defendant could be legitimately subject to state court jurisdiction and not within the purview of federal jurisdiction. The *Manual for Complex Litigation* even contemplates coordination between cases in the federal and state court systems by harmonizing scheduling hearings, discovery schedules and rulings, and witness availability. *See Manual for Complex Litigation (Fourth)* § 31.312 (2004); *see also Guidelines and Best Practices for Large and Mass-tort MDLs (Second)* 81 (2018). But this coordination assumes the existence of legitimately filed state court actions for which there is no basis to exercise federal jurisdiction—not federal claims genetically altered to keep them in state court. Moreover, coordination is not feasible if the schedule in the state court case interferes with the schedule in the MDL—a circumstance likely to occur here if a remand is ordered, given the tactics previously employed by the Simons while their case was pending in Connecticut.

For the reasons explained above, the Motion to Remand, ECF No. 28, is DENIED.

_____/S/_____
Paul W. Grimm
United States District Judge

September 20, 2019
Date

APPENDIX C

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1332(d)

(1) In this subsection—

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

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

. . .

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

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

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

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

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

. . .

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of

paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

28 U.S.C. § 1453

(a) Definitions.—

In this section, the terms "class", "class action", "class certification order", and "class member" shall have the meanings given such terms under section 1332(d)(1).

(b) In General.—

A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(c)(1) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

(c) Review of Remand Orders.—

(1) In general.—

Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may 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.

(2) Time period for judgment.—

If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3).

(3) Extension of time period.—The court of appeals may grant an extension of the 60-day period described in paragraph (2) if—

(A) all parties to the proceeding agree to such extension, for any period of time; or

(B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.

(4) Denial of appeal.—

If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied.

(d) Exception.—This section shall not apply to any class action that solely involves—

(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3) [1]) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).