24-8010

FILED

OCT 08 2024

U.S. Court of Appeals
Eighth Circuit

No. _____

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIDGET COBURN, individually and on behalf of all others similarly situated,

Plaintiff-Respondent,

v.

THE KROGER CO.,

Defendant-Petitioner.

Petition for Permission to Appeal from the United States District Court
Eastern District of Missouri, Case No. 4:23-cv-01399-HEA
Hon. Henry Edward Autrey, District Judge

KROGER'S PETITION FOR PERMISSION TO APPEAL ORDER GRANTING REMAND PURSUANT TO 28 U.S.C. § 1453(c)

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U.S. COURT OF APPEALS
EIGHTH CIRCUIT

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 8th Cir. R. 26.1A, Defendant-Petitioner The Kroger Co. (Kroger) discloses that it is a publicly held corporation and does not have a parent corporation. No publicly held corporation owns 10% or more of Kroger's stock.

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INTRODUCTION

This Court should grant The Kroger Co.'s (Kroger) Petition for Permission to Appeal an Order of Remand pursuant to 28 U.S.C. § 1453(c). Kroger's removal petition, as well as the erroneous remand Order from which Kroger appeals, presents important, recurring, and unsettled issues regarding actions removed under the Class Action Fairness Act of 2005 (CAFA), 28 U.S.C. § 1332(d)(2).

Kroger removed this putative class action, filed by plaintiff-respondent Bridget Coburn, on two independent grounds, both of which the District Court resolved incorrectly and merit this Court's review.

The* Freeman *Aggregation Rule. First, this Court should allow Kroger's appeal to consider the important question of whether a defendant may aggregate amounts-in-controversy of other similar cases where, as here, it has been brought strategically as part of a wider procedural gambit to splinter the actions to avoid CAFA jurisdiction. Kroger removed this action because it comprises a part of a larger lawsuit (made of five individual complaints in one) strategically split up around the country in divergent jurisdictions with the express purpose of needlessly complicating litigation and, here, of avoiding CAFA. These

cases spawned from the business model of Spencer Sheehan, the profligate attorney who has gained notoriety and has been repeatedly sanctioned for "filing and re-filing [frivolous] complaints in jurisdictions around the nation" in "court after court seeking a different result from the same claims." *Durant v. Big Lots, Inc.*, 2024 WL 3321879, at *5 (M.D. Fla. July 3, 2024). Here, Mr. Sheehan filed four prior cases asserting the same claims against Kroger and its subsidiary—that its Private Selection Smoked Gouda label is misleading to consumers based on its addition of liquid smoke—on behalf of consumers from at least eleven states. Kroger removed on the basis that this case effectively amounted to the same case as the others under the *Freeman* rule of the Sixth Circuit, which permits courts to aggregate such divided cases to reach CAFA's $5 million amount in controversy where plaintiff's counsel "splinter[s]" cases in such a manner, as "CAFA was clearly designed to prevent plaintiffs from artificially structuring their suits to avoid federal jurisdiction." *Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 408 (6th Cir. 2008). Here, however, the District Court declined to follow *Freeman* because the Eighth Circuit had not yet "sanctioned" this approach, and appeared to "exceed" the statute's

intent, without further explanation. (Ex. A at 4.) This Eighth Circuit should address this novel, important question regarding whether it will adopt the *Freeman* rule.

Removal Burdens of Proof. *Second*, this Court should permit the appeal because, independent of aggregation, the District Court misconstrued the burden of proof for removal based on this action alone, and in ways that raises important and unsettled questions concerning CAFA removal. To start, the District Court rejected Kroger's declaration demonstrating the total sales of the product at issue in Missouri, contending Kroger was required to "submit[]" "proof" of the specific portion of sales Plaintiff contends is her damages. But this Court has repeatedly rejected such a requirement, and held that a declaration of total sales is sufficient. *Brunts v. Walmart, Inc.*, 68 F.4th 1981, 1094–95 (8th Cir. 2023); *Raskas v. Johnson & Johnson*, 719 F.3d 884, 887–88 (8th Cir. 2013). The District Court also improperly limited the amount in controversy to sales of the specific cheese product that Plaintiff purchased, rather than all the products she put at issue in her complaint. And the Court failed to even address the attorneys' fees and punitive damages in its analysis, both of which raise unsettled issues,

including under new Missouri statutes. Kroger submits this Court should review and reverse.

RELIEF SOUGHT

Kroger respectfully requests this Court grant its Petition to Appeal the District Court's order of remand under 28 U.S.C. § 1453(c), order full briefing on the merits, and schedule oral argument.

QUESTIONS PRESENTED

1. Should the Eighth Circuit adopt the Sixth Circuit's reading of CAFA to permit courts to aggregate amount in controversy from multiple actions where plaintiffs counsel divided those actions rather than filing one national or multi-state class action, for no colorable reason other than to frustrate CAFA? (*Yes.*)

2. Did the District Court incorrectly apply the burden of proof for satisfying CAFA's amount in controversy requirement, and rule contrary to binding Eighth Circuit law, by (i) requiring Defendant to essentially prove Plaintiff's damages, (ii) improperly limiting amount-in-controversy to a subset of the products alleged to be at issue, and (iii) failing consider attorneys' fees or putative damages? (*Yes.*)

STATEMENT OF CASE AND FACTS

A. Plaintiff's Counsel, Spencer Sheehan, Is Notorious for Filing Hundreds of Repeat Class Actions Nationwide.

Because opposing counsel's forum-shopping and gamesmanship is relevant to key issues on appeal, Kroger provides important context regarding plaintiff-respondent's counsel, Spencer Sheehan.

Sheehan has "developed a fair bit of notoriety for filing cases about consumer labeling," *Guzman v. Walmart, Inc.*, 2023 WL 4535903, at *3 (N.D. Ill. May 15, 2023)—a total of over five hundred cases since 2018. As one judge observed: "Mr. Sheehan is aware that he files class action lawsuits primarily pertaining to allegedly false labeling on consumer products … that plainly do not meet the pleading requirements for such claims on their faces. Nonetheless, … Mr. Sheehan continues to file these frivolous actions in violation of Rule 11(b)(2)." *Brownell v. Starbucks Coffee Co.*, 2023 WL 9053058, at *6 (N.D.N.Y. Nov. 2, 2023). Sheehan's *modus operandi* is filing copycat actions in different courts nationwide, as Judge Gregory Presnell of the U.S. District Court for the Middle District of Florida recently explained:

> Sheehan collects consumer plaintiffs through social media advertising in whose name he can file and re-file complaints in jurisdictions around the nation. … In this manner, Sheehan and his associates [] pursue nationwide defendants []

> around the country in court after court seeking a different result from the same claims.

Durant, 2024 WL 3321879, at *5.

Other courts have had enough. In the past year alone, three separate district courts sanctioned Sheehan for filing frivolous class actions in bad faith. *Id*. at *3–10 (exercising inherent authority to sanction Sheehan for "knowingly" filing a "frivolous Complaint" and committing "fraud on the court"); *Dakus v. Koninklijke Luchtvaart Maatschappij, N.V.*, 2024 WL 4265646, at *3–7 (S.D.N.Y. Sept. 23, 2024) (sanctioning Sheehan *sua sponte* under Rule 11 and 28 U.S.C. § 1927); *Brownell*, 2023 WL 9053058, at *6 (N.D.N.Y. Nov. 2, 2023) (sanctioning Sheehan *sua sponte* under Rule 11 and finding him in contempt of court). In *Durant*, 2024 WL 3321879, at *5–6, Sheehan was specifically sanctioned for re-filing a claim in Florida that he had previously unsuccessfully litigated in New York against the same defendant, among other bad faith conduct.

B. Sheehan Files Substantially Identical Cheese Suits Nationwide.

Plaintiff's action arises out of yet another string of Sheehan's repeat class actions filed in multiple states across the country. In this instance, he has filed *eight* putative class actions alleging smoked gouda

products are mislabeled because they allegedly are smoked entirely or in part with liquid smoke flavor, as opposed to smoked over hardwoods.

Four of these cases were against Kroger or its subsidiary Ralphs, all alleging that Kroger's Private Selection Smoked Gouda cheeses were mislabeled because they are described as "smoked" when they were smoked in whole or in part with liquid smoke rather than by smoking over hardwoods, which is not disclosed on the front label. *Kinman v. Kroger Co.*, 604 F. Supp. 3d 720, 724 (N.D. Ill. 2022) ("Plaintiff alleges that the front label 'does not disclose that all of the Product's smoked flavor is from liquid smoke … instead of being smoked over hardwoods."); *Avigne*, No. 2:22-cv-11889 (E.D. Mich.), Dkt. 1 ¶ 32 (same); *Castle v. Kroger Co.*, 634 F. Supp. 3d 539, 546 (E.D. Wis. Oct. 3, 2022) ("[Plaintiff] alleges that consumers are misled because 'the …label … gives them the false impression that all the Product's smoked attributes … are imparted by smoking, when none of those attributes are."); *Grimes v. Ralphs Grocery Co.*, 2024 WL 455332, at *1 (C.D. Cal. Feb. 5, 2024) ("Grimes alleged that consumers were misled by the

labeling … because it failed to state that it contained smoke flavor.").[1] Mr. Sheehan filed these four actions on behalf of putative classes of purchasers of Kroger's Private Selection cheeses ***from at least eleven states***: Illinois, Indiana, Ohio, Texas, Wisconsin, Georgia, Kentucky, Michigan, Tennessee, West Virginia, and California. *Kinman*, No. 1:21-cv-1154 (N.D. Ill.), Dkt. 1 ¶ 46, Dkt. 20 ¶ 81; *Castle*, No. 2:21-cv-1171 (E.D. Wis.), Dkt. 1 ¶ 86; *Avigne*, No. 2:22-cv-11889 (E.D. Mich.), Dkt. 1 ¶ 84; *Grimes*, No. 2:23-cv-9086 (C.D. Cal.), Dkt. 1-1.

Mr. Sheehan filed the latest of these in California state court. *Grimes*, No. 2:23-cv-9086 (C.D. Cal.), Dkt. 1-1. Kroger removed *Grimes*, and Mr. Sheehan unsuccessfully moved to remand. *Grimes*, 2024 WL 455332, at *1 (denying motion for remand). That case remains pending in federal court.

C. Sheehan Files a Recycled Complaint in Missouri.

On September 25, 2023, while three of his cheese complaints

[1] Mr. Sheehan's four other putative cheese class actions assert the same claims, but challenge smoked gouda products sold by other defendants. *See Brownell v. The Price Chopper, Inc.*, No. 006951/2023 (N.Y. filed July 7, 2023); *Buechler v. Albertsons Cos., Inc.*, No. 1:22-cv-2717 (D. Md. filed Oct. 21, 2022); *Vesota v. Aldi Inc.*, No. 1:21-cv-3574 (N.D. Ill. filed July 3, 2021); *Watson v. Dietz & Watson Inc.*, No. 1:20-cv-6550 (S.D.N.Y. filed Aug. 17, 2020).

against Kroger and Ralphs were still pending in federal court, Mr. Sheehan recycled and re-filed the same claims on behalf a new plaintiff—Bridget Coburn—and in a new forum, St. Louis County Circuit Court. (Ex. B (Compl.).) As in the other actions, Mr. Sheehan (though Coburn) brings this putative class action against Kroger alleging Kroger's Smoked Gouda misled consumers to believe its "smoked taste was entirely from being smoked over hardwoods, instead of only some of its smoked taste being the result of such smoking." (*Id.*)

D. Kroger Removes Based on CAFA Jurisdiction.

On November 2, 2023, Kroger timely filed its Notice of Removal of this action under CAFA, alleging Plaintiff's claims put in controversy over $5 million, including damages, attorneys' fees, and punitive damages. (Ex. D (Notice).)

E. Ms. Coburn Moves to Remand and Amends.

On December 5, 2023, Ms. Coburn moved to remand, disputing only whether Kroger satisfied the $5 million amount in controversy requirements—but conceding all other CAFA requirements. (Ex. E (Mot. to Remand) at 2–7.) Ms. Coburn argued Kroger must limit the amount in controversy to (i) the specific product she purchased rather than the list of products her complaint places at issue; (ii) just a her

claimed "price premium" for compensatory damages, rather than the full sales price she put at issue, and that it should not include (iii) her own requests for attorneys' fees and other relief. (*Id.*)

While the remand motion was pending, Ms. Coburn filed the operative First Amended Complaint. (Ex. C (FAC).) The FAC alleges the same claims as the initial Complaint, but confirms the alleged scope of Plaintiff's claims includes every cheese product Kroger sells in Missouri. (*Id.* ¶¶64–71, 85, 92–112; *id.* at 23–24.)

F. Kroger Opposes Remand, With Evidence.

On January 17, 2024, Kroger filed its Opposition to the motion. (Ex. F (Opp.).) Kroger explained that the value of Sheehan's five separate cheese class actions, which he rationed across states for "no colorable basis" "other than to frustrate CAFA," should be considered together for purposes of removal, as the Sixth Circuit held in *Freeman*, 551 F.3d at 409. (Ex. F (Opp.) at 2, 8–12.) Kroger also demonstrated that, as required under the standard for CAFA removal, a fact finder *might* legally conclude her complaint, even if considered alone, puts over $5 million at issue. (*Id.* at 12–16.) In support, Kroger provided a declaration establishing that it made more than $1.5 million in revenue

for Private Selection cheese products sold in Missouri from January 1, 2019, through September 25, 2023—a fraction of the alleged five-year class period. (*Id*. at 12–14; Ex. G (Decl. of Mark Lugbill (Lugbill Decl.) ¶ 7.) Kroger detailed how its sales revenue, taken together with Ms. Coburn's requests for relief, including punitive damages and attorneys' fees, surpasses the $5 million threshold to invoke CAFA jurisdiction. (Ex. F at 12–15.)

G. The District Court Erroneously Remands.

On September 26, 2024, the District Court erroneously granted Ms. Coburn's motion for remand. (Ex. A (Order).) *First*, the Court declined to aggregate Sheehan's copycat cheese cases, reasoning only that the Eighth Court had not yet "sanctioned" this approach, and that it "exceeds the intent of the statutes' territorial purposes," without further explanation. (*Id*. at 4.) *Second*, the Court concluded the $1.5 million revenue representing the damages in dispute was also insufficient because Kroger should instead submit "proof" of the smaller, alternative "price premium" damages Ms. Coburn alleged. (*Id*. at 5.) *Third*, the lower court disregarded Kroger's declaration, because it included sales revenues of all Private Selection cheeses that she

placed at issue in her complaint, not just the Smoked Gouda cheese she purchased. (*Id*. at 5.) *Fourth*, the Court ignored and did not address her requests for attorneys' fees and potential punitive damages. (*Id*. at 4–6.)

Kroger's Petition for Permission to Appeal timely follows.

STANDARD OF REVIEW

This Circuit has "jurisdiction," 28 U.S.C. § 1453(c)(1), and "discretion," *Hargett v. RevClaims, LLC*, 854 F.3d 962, 966 (8th Cir. 2017) to accept appeals from a class action remand order. The Eighth Circuit grants such review where, for example, the Petition presents "important" and "recur[ring]" CAFA-related issues that would otherwise "escape meaningful appellate review." *Leflar v. Target Corp.*, 57 F.4th 600, 603 (8th Cir. 2023) (quoting *College of Dental Surgeons of P.R. v. Conn. Gen. Life Ins.*, 585 F.3d 33, 38 (1st Cir. 2009)). "Uncertainty" among district courts "is also a factor that cuts in favor of an affirmative exercise of discretion"; so are instances where "the question, at first glance, appears to be incorrectly decided or at least fairly debatable." *College of Dental Surgeons*, 585 F.3d at 38.

REASONS FOR GRANTING PETITION

The Court should grant Kroger's Petition for several reasons.

First, Kroger raises the unsettled and important question whether this circuit should adopt the Sixth Circuit's approach to aggregating splintered class actions for purposes of CAFA jurisdiction, as set forth in *Freeman*, 551 F.3d 405. There, the Sixth Circuit "read[] CAFA not to permit the splintering of lawsuits solely to avoid federal jurisdiction[.]" *Id.* at 406. As the District Court noted here, the Eighth Circuit has yet to "sanction[]" this approach (Ex. A at 4), and district courts are left without its answer.

Second, the District Court incorrectly applied the standard here, as the court required Kroger to submit "proof" of actual damages, rather than satisfy the Eighth Circuit's "pleading standard" to show the amount in controversy "might" exceed $5 million. The District Court thus erred in finding Kroger did not satisfy the jurisdictional threshold based on Missouri sales alone, in two ways, all of which are important and recurring. (A) The district court incorrectly concluded Kroger's declaration of total sales was not the correct figure to establish the jurisdictional amount for MMPA claims under CAFA, directly contrary to *Brunts*, 68 F.4th at 1094–95 and *Raskas*, 719 F.3d at 887. (B) The order incorrectly limited the amount in controversy to the single

product Plaintiff purchased, rather than all products her complaint placed at issue. (C) The district court failed to consider and include her claims for punitive damages and attorneys' fees, which also implicate unsettled law.

A. This Petition Raises the Important and Unsettled Question Whether Plaintiffs Can Evade CAFA by Artificially Splintering Nationwide Class Actions.

First, the Court should grant this Petition to answer the important, novel, and unsettled question: Will the Eighth Circuit adopt the Sixth Circuit's aggregation rule in *Freeman* to prevent Plaintiff's counsel—like Mr. Sheehan here—from forum-shopping in violation of CAFA by splintering nationwide class actions across multiple states. The Court should grant this Petition, and answer yes.

In *Freeman*, the Sixth Circuit reversed remand under CAFA where the case was one of five class actions plaintiff's counsel filed against defendants asserting the same claims but for different time periods. 551 F.3d at 406. The Sixth Circuit held the district court's "remand" based on just the damages in *Freeman* alone "was not proper," as plaintiffs had "identified" "no colorable basis for dividing the claims … other than to avoid the clear purpose of CAFA." *Id.* at 406. Rather, it

held CAFA must be read to aggregate amounts in controversy among such splintered actions to satisfy its $5 million jurisdictional threshold:

> If such pure structuring permits class plaintiffs to avoid CAFA, then Congress's obvious purpose in passing the statute—to allow defendants to defend large interstate class actions in federal court—can be avoided almost at will, as long as state law permits suits to be broken up on some basis. …
> CAFA provides defendants with access to the federal courts, making it harder for plaintiffs' counsel to 'game the system' by trying to defeat diversity jurisdiction, creating efficiencies in the judicial system by allowing overlapping and 'copycat' cases to be consolidated in a single federal court, and placing the determination of more interstate class action lawsuits in the proper forum—the federal courts.

Id. at 407–08 (citations omitted and cleaned up).

This Court has yet to answer the question whether it will adopt *Freeman*'s reading of CAFA.[2] But the class action policy considerations that let to the Sixth Circuit's holding are the same the Eighth Circuit endorses. *E.g.*, *Westerfield v. Indep. Processing, LLC*, 621 F.3d 819, 822

[2] This Court has declined to apply the *Freeman* doctrine only in the unique instance where a removing defendant's "own litigation decisions" caused the cases to be filed as separate matters. *See Marple v. T-Mobile Cent. LLC*, 639 F.3d 1109, 1111 (8th Cir. 2011). The Eighth Circuit did not address outside of that inapposite circumstance.

(8th Cir. 2010) (explaining Congress enacted CAFA to curb "perceived 'abuses of the class action device'"). This Court similarly counsels that "CAFA's 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." *Id*. Permitting multi-state class actions to be splintered into "copycat" lawsuits to forum-shop and force CAFA cases into state courts—as Mr. Sheehan does here—contravenes CAFA, and justifies the Eighth Circuit's adoption of the *Freeman* rule.

The circumstances here are more compelling than in *Freeman*. Mr. Sheehan has splintered what is essentially a multi-state class action against Kroger into several cases asserting the same claims based on the same products for overlapping time periods across multiple states. *Supra* 8–10. Lest there be any doubt about Mr. Sheehan's intent in structuring his actions in this manner, as one court explained, "Sheehan … file[s] and re-files complaints in jurisdictions around the nation" "seeking a different result from the same claims"—a practice for which he has been sanctioned. *Durant*, 2024 WL 3321879, at *5. He regularly files claims in multiple courts to forum-shop and evade CAFA jurisdiction. Indeed, the first three of the copycat cases here were filed

in federal courts—an admission that they exceed the $5 million threshold, and are class actions of national import. Sheehan apparently sought a more favorable forum for his latter two actions—state courts in California and Missouri. *Supra* 8–10. But this case is part and parcel of those earlier CAFA actions, and CAFA should be read to include such intentionally divided cases.

This Court should grant the Petition to consider whether to follow the Sixth Circuit and other courts around the country adopting the CAFA aggregation rule here. *Simon v. Marriott Int'l, Inc.*, 2019 WL 4573415, at *3 (D. Md. Sept. 20, 2019); *Hubbard v. Elec. Arts, Inc.*, 2011 WL 2792048, at *7 (E.D. Tenn. July 18, 2011); *In re Kitec Plumbing Sys. Prods. Liab. Litig.*, 2010 WL 11618052, at *6 (N.D. Tex. Aug. 23, 2010); *Profitt v. Abbott Labs.*, 2008 WL 4401367, at *5 (E.D. Tenn. Sept. 23, 2008).

B. The District Court Incorrectly Applied the CAFA Standard in Ways that Implicate Important, Recurring, and in Some Instances Novel, Issues.

The Court should also grant this Petition because the District Court incorrectly applied the burden of proof here, in ways that contradict settled and binding Eighth Circuit authority, or that

implicate important, unsettled, and recurring questions for this circuit.

As an initial matter, "the 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 (quoting *Lewis v. Verizon Commc'ns, Inc.*, 627 F.3d 395, 400 (9th Cir. 2010)). Thus, "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.* (citation omitted). Thus, "[i]f the notice of removal plausibly alleges, and the [preponderance of] evidence shows, that the case *might* be worth more than $5 million (excluding interest and costs), then it belongs in federal court." *Leflar*, 57 F.4th at 603–04 (cleaned up). "[E]ven if it is highly improbable that the Plaintiffs will recover the amounts Defendants have put into controversy," the case still "belongs in federal court ***unless it is legally impossible for the plaintiff to recover that much***." *Raskas*, 719 F.3d at 888 (emphases added).

The District Court erred in applying this standard in three ways.

First, the District Court incorrectly refused to accept Kroger's declaration of the total sales at issue ($1.5 million), contending Kroger

was required to "submit[]" "proof" of the specific portion of the sales price Ms. Coburn claims forms her injury under the "price premium" damages theory (i.e., the difference between what she paid and what she would have paid absent the alleged misrepresentation). (Ex. A at 6.) But the Eighth Circuit recently reversed where a district court—as here—required defendant to submit proof of the price premium for an MMPA claim to establish CAFA jurisdiction. *Brunts*, 68 F.4th at 1094–95, *rev'g Brunts v. Walmart, Inc.*, 2022 WL 18664853 (E.D. Mo. Dec. 12, 2022); *see Raskas*, 719 F.3d at 888 (reversing where district court required defendant to prove portion of sales price plaintiffs sought to recover). As this Court has explained, the removing party's burden is "a pleading requirement, not a demand for proof. Discovery and trial come later." *Brunts*, 68 F.4th at 1094; *Raskas*, 719 F.3d at 888 (such requirement "would require the defendant to 'confess liability' for the entire jurisdictional amount").

This Court has confirmed a defendant's declaration of "total sales" is enough. *Raskas*, 719 F.3d at 887; *Brunts*, 68 F.4th at 1094 ("[Defendant's] declaration [stating total sales] was sufficient"). And, Ms. Coburn *did* plead the full sales price as an alternative damages

theory—and put the full amount at issue. Compl. ¶ 78; FAC ¶ 97.

Second, the District Court erred in limiting the amount in controversy to only the cheese product Plaintiff alleged she purchased, rather than all the Kroger products her complaints put at issue. The Plaintiff's FAC confirmed the breadth of products at issue. The District Court thus should have included the sales of these products in the amount in controversy and credited the full $1.5 million in sales.

Third, the District Court erred in failing to consider Ms. Coburn's requests for attorneys' fees and potential punitive damages, which together push the amount in controversy in this action over the $5 million threshold. (Ex. A at 5–6.) "While the Eighth Circuit has not yet addressed the issue, the majority of district courts within this circuit have held that attorney fees incurred post-removal are includable in the amount in controversy calculation so long as they are reasonable." *Stanley v. Lafayette Life Ins. Co.*, 2015 WL 2062568, at *3 (W.D. Mo. May 4, 2015). Thus, the attorneys' fees component raises yet another important, unsettled issue for the Eighth Circuit to resolve.

CONCLUSION

Kroger respectfully requests this Court permit this appeal.

Respectfully submitted this 7th day of October, 2024.

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COMBINED CERTIFICATE OF COMPLIANCE

Type-Volume. This brief complies with the type-volume limitation of Fed. R. App. P. 5(c) because it contains less than 4,034 words, not counting the parts of the brief excluded by rule from the calculation.

Typeface and Typestyle. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it was prepared in 14-point Century Schoolbook font.

Dated: October 7, 2024

/s/ Heather F. Canner
Heather F. Canner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Permission to Appeal is being served electronically on this 7th day of October, 2024, upon the following:

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