No. 13-56310

In the
United States Court Of Appeals
for the Ninth Circuit

JUDITH ROMO,

Plaintiff-Appellee,

v.

TEVA PHARMACEUTICALS USA, INC.

Defendant-Appellant.

On Appeal from the United States District Court
for the Central District of California

MOTION FOR LEAVE TO FILE BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

Of Counsel:
HUGH F. YOUNG, JR.
PRODUCT LIABILITY
ADVISORY COUNCIL, INC.
1850 Centennial Park Drive, Suite 510
Reston, Virginia 20191
(703) 264-5300

JOHN H. BEISNER
JESSICA DAVIDSON MILLER
GEOFFREY M. WYATT
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7000

Attorneys for Amicus Curiae

The Product Liability Advisory Council, Inc. ("PLAC") respectfully submits this motion for leave to file a brief as *amicus curiae* in support of appellant Teva Pharmaceuticals USA, Inc.

1. PLAC is a nonprofit association with over 100 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of product manufacturers. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product-liability defense attorneys in the country are sustaining (nonvoting) members of PLAC.

2. Since 1983, PLAC has filed more than 1,000 briefs as *amicus curiae* in both state and federal courts, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability.

3. PLAC's members have an interest in this case because the district court's unduly narrow interpretation of the Class Action Fairness Act of 2005 ("CAFA") runs counter to congressional intent and Supreme Court precedent by constricting the right of defendants to litigate interstate cases of national

importance in federal court. Two fundamental conceptual mistakes contributed to the district court's error. First, the court erroneously adopted a "strong presumption" against removal and a "strict construction" of CAFA. This mode of analysis, typically applied in cases removed under traditional diversity jurisdiction, has no place in the application of CAFA, under which Congress intended to establish federal courts as the default forum for sprawling national actions like this one. Second, and relatedly, the district court applied an overly formalistic analysis, again thwarting Congress's clear intent that CAFA be applied in a functional way to achieve Congress's purposes in adopting the statute. Reliance on formalism caused the court to reward the very sort of gamesmanship that Congress expressly sought to eliminate.

4. For the foregoing reasons, PLAC respectfully submits that it is well-qualified to assist the Court in evaluating the arguments raised by the parties in this case.

WHEREFORE, PLAC respectfully requests that the Court grant it leave to appear as *amicus curiae* and to file a brief in support of appellant. If the motion is granted, PLAC requests that the Court file and consider the attached brief.[1]

---

[1] Pursuant to Ninth Circuit Rule 29-3, PLAC states that it endeavored to obtain the consent of all parties to the filing prior to moving the Court for permission to file the proposed brief. Defendant-Appellant consented, but Plaintiff-Appellee did not respond to PLAC's request for consent.

Respectfully submitted,

/s/ John H. Beisner

JOHN H. BEISNER
JESSICA DAVIDSON MILLER
GEOFFREY M. WYATT
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7000

Of Counsel:
HUGH F. YOUNG, JR.
PRODUCT LIABILITY ADVISORY COUNCIL, INC.
1850 Centennial Park Drive, Suite 510
Reston, Virginia 20191
(703) 264-5300

Attorneys for Amicus Curiae

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that the Motion of the Product Liability Advisory Council, Inc. For Leave to File Brief as *Amicus Curiae* in Support of Appellant and Reversal was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 3, 2014

March 3, 2014

/s/ John H. Beisner

John H. Beisner
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7000
John.Beisner@skadden.com

No. 13-56310

In the
United States Court Of Appeals
for the Ninth Circuit

JUDITH ROMO,

Plaintiff-Appellee,

v.

TEVA PHARMACEUTICALS USA, INC.

Defendant-Appellant.

On Appeal from the United States District Court
for the Central District of California

BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

Of Counsel:
HUGH F. YOUNG, JR.
PRODUCT LIABILITY
ADVISORY COUNCIL, INC.
1850 Centennial Park Drive, Suite 510
Reston, Virginia 20191
(703) 264-5300

JOHN H. BEISNER
JESSICA DAVIDSON MILLER
GEOFFREY M. WYATT
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7000

Attorneys for Amicus Curiae

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION 2

ARGUMENT 4

I. THE DISTRICT COURT'S CRAMPED INTERPRETATION OF CAFA, UPHELD BY THE PANEL, IS AT ODDS WITH THE STATUTE'S SWEEPING REMEDIAL PURPOSE. 4

II. CONDUCTING A FUNCTIONAL INQUIRY, AS REQUIRED BY CAFA, ESTABLISHES THAT PLAINTIFFS' ACTION IS REMOVABLE. 8

CONCLUSION 16

TABLE OF AUTHORITIES

CASES **PAGE(S)**

In re Abbott Labs, Inc.,
698 F.3d 568 (7th Cir. 2012) 11-12, 14

Abraham v. American Home Mortgage Servicing, Inc.,
947 F. Supp. 2d 222 (E.D.N.Y. 2013) 11

Abrego Abrego v. Dow Chemical Co.,
443 F.3d 676 (9th Cir. 2006) 6, 8

Acosta v. Master Maintenance & Construction Inc.,
452 F.3d 373 (5th Cir. 2006) 5

Atwell v. Boston Scientific Corp.,
740 F.3d 1160 (8th Cir. 2013) 7, 13, 14, 15

Brannen v. Ethicon,
No. 4:13CV1251 JAR, 2013 WL 6858496
(E.D. Mo. Dec. 30, 2013) 14

Breuer v. Jim's Concrete of Brevard, Inc.,
538 U.S. 691 (2003) 5

Bullard v. Burlington Northern Santa Fe Railway Co.,
535 F.3d 759 (7th Cir. 2008) 7, 10, 11

Romo v. Teva Pharmaceuticals USA, Inc.,
731 F.3d 918 (9th Cir. 2013) 5, 7, 15, 16

Shamrock Oil & Gas Corp. v. Sheets,
313 U.S. 100 (1941) 5

Standard Fire Insurance Co. v. Knowles,
133 S. Ct. 1345 (2013) 6, 10

Tanoh v. Dow Chemical Co.,
561 F.3d 945 (9th Cir. 2009) 15

In re Texas Eastern Transmission Corp. PCB Contamination Insurance Coverage Litigation, 15 F.3d 1230 (3d Cir. 1994) 5

Visendi v. Bank of America, N.A., 733 F.3d 863 (9th Cir. 2013) 11

Westerfeld v. Independent Processing, LLC, 621 F.3d 819 (8th Cir. 2010) 6

STATUTES

28 U.S.C. § 1332(d)(11)(B)(i) 3

28 U.S.C. § 1332(d)(11)(A) 9

S. Rep. No. 109-14 (2005) 6, 7, 9, 16

OTHER AUTHORITIES

Enrique Schaerer, *A Rose By Any Other Name: Why a Parens Patriae Action Can Be a "Mass Action" Under the Class Action Fairness Act*, 16 N.Y.U. J. Legis. & Pub. Pol'y 39 (2013) 7, 9

Sara S. Vance, *A Primer on the Class Action Fairness Act of 2005*, 80 Tul. L. Rev. 1617 (2006) 6

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

The Product Liability Advisory Council, Inc. ("PLAC") respectfully submits this brief as *amicus curiae* in support of appellant Teva Pharmaceuticals USA, Inc.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

PLAC is a nonprofit association with over 100 corporate members representing a broad cross-section of American and international product manufacturers.[2] These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of product manufacturers. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product-liability defense attorneys in the country are sustaining (nonvoting) members of PLAC.

---

[1] PLAC submits this brief in accordance with Federal Rule of Appellate Procedure 29 and Circuit Rule 29-2. PLAC simultaneously submits a Motion for Leave to File. Pursuant to Circuit Rule 29-3, PLAC states that it endeavored to obtain the consent of all parties to the filing of the brief before moving the Court for permission to file the proposed brief. *Amicus* certifies that no party's counsel authored this brief in whole or in part, and that no party, party's counsel, or other person or entity contributed money that was intended to fund preparing or submitting this brief.

[2] A list of PLAC's current corporate membership is attached to this brief as Appendix A.

Since 1983, PLAC has filed more than 1,000 briefs as *amicus curiae* in both state and federal courts, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability.

PLAC's members have an interest in this case because the district court adopted an unduly narrow interpretation of the Class Action Fairness Act of 2005 ("CAFA"), contrary to express congressional intent that federal courts should constitute the default forum for interstate cases of national importance that involve 100 or more plaintiffs. Below, PLAC focuses on two aspects of the remand ruling that were improper: (1) application of a presumption against removal that has no place in CAFA cases; and (2) an overly formalistic approach to defining mass actions that is inconsistent with congressional intent.

INTRODUCTION

More than 1,500 plaintiffs have joined together in various lawsuits, many brought by the same counsel, all alleging substantially identical claims arising out of the ingestion of propoxyphene, a prescription drug. Plaintiffs have sought to avoid federal jurisdiction over these cases by dividing themselves in such a way that no suit has 100 people, the threshold for jurisdiction under CAFA's mass

action provision.[3] The problem is that these separate lawsuits are separate in name only. While their suits are ostensibly separate, Plaintiffs seek coordination of their cases "for all purposes," in order to "prevent inconsistent judgments" on issues including "liability" and "allocation of fault."

This request for coordination renders the cases below a mass action, as the U.S. Courts of Appeals for the Seventh and Eighth Circuits have already held in similar circumstances. Because the Petition explicitly seeks court action that would go as far as entering "judgment" and determining issues like "liability," it proposes that the claims be "tried jointly" within the meaning of CAFA.

The district court erred in holding otherwise. Appellant's brief articulates the bases of this error and the ground for reversal, and PLAC submits this amicus brief to elaborate on two conceptual mistakes that contributed to the district court's error. First, the district court erroneously adopted a "strong presumption" against removal and a "strict construction" of CAFA. Even if such restrictive approaches were appropriate in cases removed under traditional diversity jurisdiction, Congress made clear that CAFA was intended to establish federal courts as the default forum for cases like this one, which involve more than 100 plaintiffs and

[3] CAFA defines a "mass action" as "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i).

are national in dimension. Second, and relatedly, the district court applied an overly formalistic analysis, again thwarting Congress's clear intent that CAFA be applied in a functional way to achieve Congress's purposes in adopting the statute. In so doing, the district court rewarded the very sort of gamesmanship that Congress expressly intended to eliminate.

These mistakes led the district court to apply the wrong frame of analysis to the sprawling state proceeding at issue here and to reach the wrong conclusion on federal jurisdiction. The Court should reverse, clarify the proper analytical framework for CAFA removals and hold that when 100 or more plaintiffs seek coordination for matters in a proceeding that could resolve those claims on the merits, it is a mass action over which CAFA confers federal jurisdiction.

ARGUMENT

I. THE DISTRICT COURT'S CRAMPED INTERPRETATION OF CAFA, UPHELD BY THE PANEL, IS AT ODDS WITH THE STATUTE'S SWEEPING REMEDIAL PURPOSE.

The district court first erred in applying a "strong presumption" against removal and a "strict[] construc[tion]" of CAFA (District Court Opinion at 3-4) because these limitations do not apply where, as here, Congress has stated a strong desire for certain categories of cases to be adjudicated in federal court.[4]

[4] PLAC acknowledges that the district court found support for this presumption in this Court's precedent, and that the panel applied a similar

(cont'd)

Congressional intent determines the appropriate mode of interpreting a removal statute. *See Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 697-98 (2003). Hence, while strictly construing a removal statute is appropriate when that restrained approach dovetails with the intent of the enacting Congress, *see, e.g.*, *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941) (relying on the "Congressional purpose to restrict the jurisdiction of the federal courts on removal" to justify strictly construing the general removal statute), "an expansive interpretation of the nature of the right to remove" should accompany a statute evincing an "unusually strong preference for adjudication of [certain claims] in the federal court system," *In re Tex. E. Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 15 F.3d 1230, 1243 (3d Cir. 1994); *see also Acosta v. Master Maint. & Constr. Inc.*, 452 F.3d 373, 377 (5th Cir. 2006) ("[T]he general rule of construing removal statutes strictly against removal cannot apply" to statutes that contain a "generous . . . removal provision.") (internal quotation marks and citation

---

(cont'd from previous page)

approach. *See Romo v. Teva Pharm. USA, Inc.*, 731 F.3d 918, 921 (9th Cir. 2013) ("We start from the well-established premise that the removal statutes are to be strictly construed. A corollary precept is that we apply a presumption against removal and construe any uncertainty as to removability in favor of remand.") (citation omitted). But PLAC respectfully submits that this precedent is erroneous as applied in CAFA cases and that the en banc Court should clarify this point of law.

omitted) (construing the removal provision of the act codifying the Convention on the Recognition and Enforcement of Foreign Arbitral Awards).

It is clear that Congress expressed an "unusually strong preference for adjudication of" class and mass action claims of interstate dimension and national importance "in the federal court system." CAFA "alter[ed] the landscape for federal court jurisdiction over class actions," *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 677 (9th Cir. 2006) (per curiam), and "represents the largest expansion of federal jurisdiction in recent memory," Sara S. Vance, *A Primer on the Class Action Fairness Act of 2005*, 80 Tul. L. Rev. 1617, 1643 (2006). Achieving CAFA's "primary objective" of "ensuring 'Federal court consideration of interstate cases of national importance,'" *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013) (citation omitted), requires recognition that the statute'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," S. Rep. No. 109-14, at 43 (2005). At bottom, "[t]he language and structure of CAFA indicate that Congress contemplated broad federal court jurisdiction with only narrow exceptions." *Westerfeld v. Indep. Processing, LLC*, 621 F.3d 819, 822 (8th Cir. 2010) (internal quotation marks and citation omitted).

The same analysis applies to the "mass action" concept specifically. As one commentator has explained, "CAFA's broad mass action definition reveals a

congressional intent to bestow a liberal grant of jurisdiction." Enrique Schaerer, *A Rose By Any Other Name: Why a Parens Patriae Action Can Be a "Mass Action" Under the Class Action Fairness Act*, 16 N.Y.U. J. Legis. & Pub. Pol'y 39, 58 (2013). "[A]n overly restrictive interpretation of the mass action provision makes little sense," moreover, as it would detract from Congress's aim "to prevent litigants from keeping cases of national importance out of federal court." *Id.* at 58-59. For this reason – and because "mass actions are simply class actions in disguise" – Congress decreed that it was the *exceptions* to the mass-action provision there were to "be interpreted strictly by federal courts." S. Rep. No. 109-14, at 47.

The district court violated the clearly expressed intent of Congress in ignoring the context of CAFA's enactment and as a result adhered to an unduly narrow interpretation of the statute, an error repeated by the Panel's decision. *See, e.g.*, *Romo*, 731 F.3d at 921 (referring to the mass-action provision as "fairly narrow"). This cramped approach to CAFA's mass-action provision operated to "render 28 U.S.C. § 1332(d)(11) 'defunct'" in these cases. *Atwell v. Bos. Sci. Corp.*, 740 F.3d 1160, 1163 (8th Cir. 2013) (quoting *Bullard v. Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759, 762 (7th Cir. 2008)). The Court should reverse

and in doing so clarify that CAFA is not to be construed strictly or with any presumption against federal jurisdiction.[5]

II. CONDUCTING A FUNCTIONAL INQUIRY, AS REQUIRED BY CAFA, ESTABLISHES THAT PLAINTIFFS' ACTION IS REMOVABLE.

Because of its strict interpretative approach, the district court ultimately adopted a rule tantamount to a magic-words test: unless the plaintiffs expressly request a "joint trial" and make that trial the "focus[]" of their coordination petition, no mass action exists. (*See* District Court Opinion at 6.) This formalistic analysis again clashes with congressional intent; indeed, a unanimous Supreme Court recently made clear in *Standard Fire* that CAFA should be read functionally to prevent the sort of gamesmanship that Congress intended to eliminate in adopting the statute. When analyzed under such a functional interpretation of CAFA, it becomes clear that the underlying litigation was properly removed to federal court.

In describing how CAFA should be interpreted, Congress made clear that courts should look past magic words in determining whether an action qualifies as a class or mass action. For example, Congress provided that the definition of

---

[5] This is not to say that CAFA altered the burden of proof. "[U]nder CAFA the burden of establishing removal jurisdiction remains, as before, on the proponent of federal jurisdiction." *Abrego Abrego*, 443 F.3d at 685. But that burden was impermissibly amplified by the strict approach to the statute taken by the district court.

"class action" should be interpreted liberally and that "[i]ts application should not be confined solely to lawsuits that are labeled 'class actions' by the named plaintiff." S. Rep. No. 109-14, at 35. This interpretive guideline necessarily extends to the definition of "mass action," which is deemed a class action for purposes of CAFA, 28 U.S.C. § 1332(d)(11)(A), "function[s] very much like class actions[,] and [is] subject to many of the same abuses," S. Rep. No. 109-14, at 46; *see also* Schaerer, *supra* at 59 ("A narrow reading of the mass action provisions would . . . contradict congressional intent to avoid loopholes in the exercise of CAFA jurisdiction."). "Generally speaking, lawsuits that resemble a purported class action should be considered class actions for the purpose of applying these provisions." S. Rep. No. 109-14, at 35.

Congress further made clear that such a functional interpretive approach is necessary to ensure that the broad federal jurisdiction intended over class and mass actions cannot easily be subverted by gamesmanship through careful pleading by plaintiffs' lawyers. *E.g.*, *id.* at 10 ("[C]urrent law enables plaintiffs' lawyers who prefer to litigate in state courts to easily 'game the system' and avoid removal of large interstate class actions to federal court."). Consistent with this purpose, the Supreme Court in *Standard Fire* rejected a rule offered by the plaintiff that federal courts determining the amount in controversy in a class action should be barred from considering "the very real possibility that a nonbinding, amount-limiting,

stipulation may not survive the class certification process." 133 S. Ct. at 1350. "To hold otherwise," the Court explained, "would, for CAFA jurisdictional purposes, . . . exalt form over substance and run directly counter to CAFA's primary objective: ensuring 'Federal court consideration of interstate cases of national importance.'" *Id.* (citation omitted). The plaintiff's proffered rule would also promote gamesmanship because it would permit plaintiffs to subdivide "a $100 million action into 21 just-below-$5-million state-court actions simply by including nonbinding stipulations," which would "squarely conflict with the statute's objective." *Id.*

Other courts have conducted this sort of functional inquiry when interpreting CAFA's mass-action provision – and, in particular, in determining whether the plaintiffs' claims "are proposed to be tried jointly" within the meaning of 28 U.S.C. § 1332(d)(11)(B)(i) of the mass-action rule. The Seventh Circuit, for instance, applied such an approach to the argument by a group of 144 plaintiffs that the mere filing of a complaint in state court did not create a mass action because the complaint did not explicitly propose a joint trial. *Bullard*, 535 F.3d at 761-62. There, the plaintiffs argued that any trial would likely proceed with just a few of them who would "take the lead, just as in a class action," and in any event, "they'd be happy to win by summary judgment or settlement." *Id.* at 761.

The Seventh Circuit rejected this argument as too formalistic. The court began by noting that "[i]t does not matter whether a trial covering 100 or more plaintiffs actually ensues; the statutory question is whether one has been proposed." *Id.* at 762 (also noting that "[t]he question is not whether 100 or more plaintiffs answer a roll call in court, but whether the 'claims' advanced by 100 or more persons are proposed to be tried jointly"). Moreover, the court explained, even if a trial formally resolved the claims of only 10 of the 144 plaintiffs, it would be "one in which the claims of 100 or more persons are being tried jointly" as long as that ruling contributed to the resolution of the remaining claims without another trial. *Id.* Thus, § 1332(d) brought "the suit within federal jurisdiction." *Id.* Other courts – including this Court – have likewise recognized that a defendant need not demonstrate with metaphysical certainty that a trial of 100 or more persons will actually take place to justify removal. *See Visendi v. Bank of Am., N.A.*, 733 F.3d 863, 868 (9th Cir. 2013) ("Whether Plaintiffs' claims ultimately proceed to a joint trial is irrelevant."); *Abraham v. Am. Home Mortg. Servicing, Inc.*, 947 F. Supp. 2d 222, 232 (E.D.N.Y. 2013) ("[CAFA] does not require that a removing defendant or the court determine that plaintiffs' claims can *actually* be tried together.").

The Seventh Circuit later extended this analysis to requests by separate groups of plaintiffs seeking to coordinate more than 100 claims, again deeming such actions removable as mass actions under CAFA. In *In re Abbott Labs, Inc.*,

698 F.3d 568 (7th Cir. 2012), the plaintiffs had requested state coordination of their cases through trial, but argued that their proceeding did not constitute a mass action because the motion lacked an explicit request that a joint trial be conducted. *Id.* at 572. The Seventh Circuit again held in favor of federal jurisdiction. As the court explained, "a proposal for a joint trial can be implicit," and there is no magic words requirement to support federal jurisdiction. *Id.* Nor does CAFA require a particular type of trial to satisfy the requirement that a mass action include claims proposed to be tried jointly. Rather, "a joint trial can take different forms as long as the plaintiffs' claims are being determined jointly." *Id.* at 573. Turning to the language of the plaintiffs' motion, the court stressed that the plaintiffs sought consolidation to "'facilitate the efficient disposition of a number of universal and fundamental substantive questions applicable to all or most Plaintiffs' cases *without the risk of inconsistent adjudication* in those issues between various courts.'" *Id.* (citation omitted). The court explained that reducing the risk of inconsistent adjudication necessarily meant that the coordinating court would need either to conduct a joint trial or to decide common legal issues and apply that decision to all of the cases. *Id.* "In either situation, plaintiffs' claims would be tried jointly." *Id.*

This analysis has already been embraced by another sister circuit. In *Atwell v. Boston Scientific*, the Eighth Circuit considered requests for coordination by

three groups of plaintiffs alleging product-liability claims in state court. 740 F.3d at 1161-62. Each group included less than 100 plaintiffs, but in the aggregate, they exceeded the 100-plaintiff threshold. *Id*. The groups sought to coordinate their cases before a single judge in the interest of "'avoiding conflicting pretrial rulings,' 'providing consistency in the supervision of pretrial matters,' and 'judicial economy.'" *Id.* at 1164 (citation omitted). Although some of the requests explicitly sought coordination for discovery and trial matters, no submission explicitly requested a "joint trial," and the record made clear that the plaintiffs contemplated trial of "bellwether case[s]" rather than a mass trial. *Id.*

In deciding whether the plaintiffs' submissions in effect proposed that the cases be "tried jointly" within the meaning of the mass-action provision, the Eighth Circuit observed that the Seventh Circuit's decision in *Abbott Labs* conflicted with the panel's decision in this case. *Id.* at 1165. After discussing the analyses in both cases, the Eighth Circuit "agree[d] with *Abbott Labs* and with Judge Gould's interpretation of the statute and the *Abbott Labs* decision." *Id.* According to the court, the plaintiffs had implicitly proposed that their claims be tried jointly, because achieving their objectives would require either holding a joint trial or resolving legal issues for some claims and applying that decision to the remaining claims. *Id.* In reaching this conclusion, the court reasoned that the more formalistic approach of "construing the statute to require a single trial of more than

100 claims would render 28 U.S.C. § 1332(d)(11) 'defunct.'" *Id.* at 1163 (citation omitted); *see also Brannen v. Ethicon*, No. 4:13CV1251 JAR, 2013 WL 6858496, at *1, *3 (E.D. Mo. Dec. 30, 2013) (applying *Atwell* and finding that motions for consolidation filed by three separate groups supported the actions' classification as a removable mass action – despite the groups' insistence that each case "proceed individually" – because achieving their objectives required resolving issues and applying the decision to all claims).

The coordinated proceeding at issue here is clearly a mass action under these sound analyses. Just like the plaintiffs in *Abbott Labs*, 698 F.3d at 573, and *Atwell*, 740 F.3d at 1164, Plaintiffs here sought to coordinate their actions to mitigate the "'significant likelihood of duplicative discovery, waste of judicial resources, and possible inconsistent rulings on legal issues'" (District Court Opinion at 6 (citation omitted)). The Petition explicitly states that the legal issues to be decided include matters relating to the merits, including liability and allocation of fault. (ER 177:1-21 (Memorandum in Support of Coordination Petition).) Accordingly, as in *Abbott Labs*, "it is difficult to see how a trial court could consolidate the cases as requested by [Plaintiffs] and not hold a joint trial or an exemplar trial with the legal issues applied to the remaining cases." 698 F.3d at 573. Indeed, just like the *Atwell* plaintiffs, Plaintiffs here candidly acknowledged that they anticipated conducting bellwether trials to resolve their claims, given their "assessment that

joint trials in cases such as this one are rare." (District Court Opinion at 7.) The fact that Plaintiffs did not expressly request a joint trial of more than 100 claims and that such a joint trial may not occur does not preclude a finding that their action qualifies as a removable mass action. *See Atwell*, 740 F.3d at 1163. Rather, as in *Atwell*, "counsel's statements revealed the purpose of their [Petition] – a joint assignment in which the 'inevitable result' will be that their cases are 'tried jointly.'" *Id.* at 1165 (quoting *Romo*, 731 F.3d at 928 (Gould, J., dissenting)).

This Court's prior decision in *Tanoh v. Dow Chemical Co.*, 561 F.3d 945 (9th Cir. 2009), does not support a different conclusion. The ruling in *Tanoh* was anchored in a conclusion that the mere filing of separate actions raising similar claims against a defendant, which separately number fewer than 100 but together total more than 100, does not mean that the defendant can remove the actions to federal court. *See id.* at 956. But as the panel dissent perceived, this is a different case because Plaintiffs not only filed separate complaints alleging substantially identical claims against Defendant, but also filed a Petition to Coordinate. 731 F.3d at 925 (Gould, J., dissenting). That Petition, which constitutes a request that the claims be "tried jointly," "distinguish[es] [this case] from *Tanoh*." *Id.* To the extent *Tanoh* has any broader meaning, it should be overruled by the en banc Court.

Any other conclusion would promote gamesmanship. By relying on *Tanoh* for the proposition that removal was improper because Plaintiffs did not label their suit a mass action or "focus[]" on a joint trial in their Petition (District Court Opinion at 6-7), the district court essentially marked a path by which future plaintiffs can easily craft "[mass] actions in disguise." S. Rep. No. 109-14, at 47.[6] Indeed, the likely result is the nonsensical one that virtually no mass actions are "mass actions" for CAFA purposes since joint trials involving 100 or more plaintiffs are so "rare." (District Court Opinion at 7.) Only an interpretation of the rule that requires the court to "look[] at the reality of [the] joint trial proposal, not at how a party may characterize its own actions," 731 F.3d at 925-26 (Gould, J., dissenting), can give proper effect to CAFA's purpose in abandoning the old regime in which "plaintiffs' lawyers who prefer[red] to litigate in state courts [could] easily 'game the system' and avoid removal of large interstate class actions to federal court," S. Rep. No. 109-14, at 10.

CONCLUSION

For the foregoing reasons, and those stated by appellant Teva Pharmaceuticals USA, Inc., this Court should reverse the judgment below.

---

[6] The panel's recitation that Plaintiffs are "masters of their complaint," 731 F.3d at 922, is to similar effect. As the Supreme Court held in *Standard Fire*, this principle cannot be construed so as to promote the gamesmanship that Congress intended to eliminate under CAFA.

Respectfully submitted,

/s/ John H. Beisner

Of Counsel:
HUGH F. YOUNG, JR.
PRODUCT LIABILITY
ADVISORY COUNCIL, INC.
1850 Centennial Park Drive, Suite 510
Reston, Virginia 20191
(703) 264-5300

JOHN H. BEISNER
JESSICA DAVIDSON MILLER
GEOFFREY M. WYATT
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7000

Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 13-56310

I certify that, pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less.

March 3, 2014

/s/ John H. Beisner

John H. Beisner
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7000
John.Beisner@skadden.com

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that the Brief of Product Liability Advisory Council, Inc. as *Amicus Curiae* in Support of Appellant was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 3, 2014

March 3, 2014

/s/ John H. Beisner
John H. Beisner
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7000
John.Beisner@skadden.com

APPENDIX A

Corporate Members Of The Product Liability Advisory Council

3M
Altec, Inc.
Altria Client Services Inc.
AngioDynamics, Inc.
Ansell Healthcare Products LLC
Astec Industries
Bayer Corporation
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
Boehringer Ingelheim Corporation
The Boeing Company
Bombardier Recreational Products, Inc.
Bridgestone Americas, Inc.
Brown-Forman Corporation
Caterpillar Inc.
CC Industries, Inc.
Celgene Corporation
Chrysler Group LLC
Cirrus Design Corporation
CNH America LLC
Continental Tire the Americas LLC
Cooper Tire & Rubber Company
Crane Co.
Crown Cork & Seal Company, Inc.
Crown Equipment Corporation
Daimler Trucks North America LLC
Deere & Company

Delphi Automotive Systems
Discount Tire
The Dow Chemical Company
E.I. duPont de Nemours and Company
Eisai Inc.
Eli Lilly and Company
Emerson Electric Co.
Exxon Mobil Corporation
Ford Motor Company
General Electric Company
General Motors LLC
Georgia-Pacific Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
The Home Depot
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works Inc.
Isuzu North America Corporation
Jaguar Land Rover North America, LLC
Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Kawasaki Motors Corp., U.S.A.
KBR, Inc.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Lincoln Electric Company
Lorillard Tobacco Co.

Magna International Inc.
Mazak Corporation
Mazda Motor of America, Inc.
Medtronic, Inc.
Merck & Co., Inc.
Meritor WABCO
Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Mueller Water Products
Novartis Pharmaceuticals Corporation
Novo Nordisk, Inc.
PACCAR Inc.
Panasonic Corporation of North America
Peabody Energy
Pella Corporation
Pfizer Inc.
Pirelli Tire, LLC
Polaris Industries, Inc.
Porsche Cars North America, Inc.
RJ Reynolds Tobacco Company
SABMiller Plc
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Stanley Black & Decker, Inc.
Subaru of America, Inc.

TASER International, Inc.
Techtronic Industries North America, Inc.
Teva Pharmaceuticals USA, Inc.
TK Holdings Inc.
Toyota Motor Sales, USA, Inc.
TRW Automotive
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen Group of America, Inc.
Volvo Cars of North America, Inc.
Wal-Mart Stores, Inc.
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.