No. 13-56306

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

MARGALIT CORBER, et al.,
Plaintiffs-Appellees,

v.

MCKESSON CORPORATION, et al.,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
CASE NO. CV 12-9986 PSG (EX)

DEFENDANT-APPELLANT XANODYNE PHARMACEUTICALS, INC.'S PETITION FOR REHEARING EN BANC

Karen Woodward
Hall R. Marston
Christopher P. Norton
SEDGWICK LLP
801 S. Figueroa Street, 19th Floor
Los Angeles, CA 90017
Tel: (213) 426-6900
Fax: (213) 426-6921

Linda E. Maichl
Michael J. Suffern
ULMER BERNE LLP
600 Vine Street, Suite 2800
Cincinnati, OH 45202
Tel: (513) 698-5000
Fax: (513) 698-5001

Attorneys for Xanodyne Pharmaceuticals, Inc.

CORPORATE DISCLOSURE STATEMENT

Appellant Xanodyne Pharmaceuticals, Inc., does not have a parent corporation and there is no publicly held corporation that owns ten percent or more of its stock.

TABLE OF CONTENTS

STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 35(b) 1

BRIEF SUMMARY OF CASE 4

ARGUMENT 8

A. THE CAFA ISSUE IS OF EXCEPTIONAL IMPORTANCE 8

B. THE PANEL MAJORITY OPINION CONFLICTS WITH *ABBOTT* AND OTHER PRECEDENT 10

C. THE PANEL MAJORITY DECISION DOES NOT FIT NEATLY INTO THE "MASS ACTION" JURISPRUDENCE OF THIS, OR ANY OTHER, CIRCUIT 14

D. THIS COURT SHOULD GRANT REHEARING EN BANC AND CONTINUE TO HOLD THE RELATED CASES IN ABEYANCE TO ENSURE UNIFORM TREATMENT OF THESE CASES AND TO ENSURE THAT THE TIMING REQUIREMENTS OF CAFA DO NOT LIMIT THIS COURT'S ABILITY TO ISSUE AN EN BANC RULING 16

CONCLUSION 17

CERTIFICATION OF COMPLIANCE 19

TABLE OF AUTHORITIES

Cases

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

Anderson v. Bayer Corp.,
610 F.3d 390 (7th Cir. 2010) 14, 15

Bliski v. Kappos,
130 S. Ct. 3218 (2010) 14

Bullard v. Burlington Northern Santa Fe Ry. Co.,
535 F.3d 759 (7th Cir. 2008) 1, 3, 4

Coleman v. Estes Express Lines, Inc.,
627 F.3d 1096 (9th Cir. 2010) 1, 9

Freeman v. Blue Ridge Paper Products, Inc.
551 F.3d 405 (6th Cir. 2008) 17

Hart v. FedEx Ground Package Syst. Inc.,
457 F.3d 675 (7th Cir. 2006) 17

Hertz Corp. v. Friend,
130 S. Ct. 1181 (2010) 16

In re Abbott Labs, Inc.,
698 F.3d 568 (7th Cir. 2012) .... passim

Koral v. Boeing Co.,
628 F.3d 945 (7th Cir. 2011) 1, 3

Scimone v. Carnival Corp.,
720 F.3d 876 (11th Cir. 2013) 14

Serrano v. 180 Connect, Inc.,
478 F.3d 1018 (9th Cir. 2007) 13

Standard Fire v. Knowles,
568 U.S. —, 133 S. Ct. 1345 (2013) 13

Tanoh v. Dow Chemical Co.,
561 F.3d 945 (9th Cir. 2009) 1, 4, 14, 15

Statutes

28 U.S.C. §1332(d)(11) 7, 8

28 U.S.C. §1453(3)(A)....................17
28 U.S.C. §1453(c)....................1, 8, 16
California Civil Procedure Code §1048.................... 5
California Civil Procedure Code §404.1.................... 6

Other Authorities

Bernard E. Witkin, *Cal. Proc.*, Pleading §352 (5th ed. 2008).................... 5
Eric E. Younger & Donald E. Bradley, *Younger on Cal. Motions* §22:14 (2012 ed.).................... 5
Paul D. Rheingold, *Litigating Mass Tort Cases*, §2:4 (2012).................... 9
S. Amy Spencer, *Once More into the Breach, Dear Friends: The Case for Congressional Revision of the Mass Action Provisions in the Class Action Fairness Act of 2005*, 39 Loy. L.A. L. Rev. 1067 (2006).................... 6
S. Rep. No. 14, S. REP. 109-14, 46, reprinted in 2005 U.S.C.C.A.N. 3, 43.................... 9

Rules

California Rule of Court 3.501(9).................... 6
Illinois Supreme Court Rule 384(a)....................10
Ninth Circuit Rule 35-1....................3, 9

STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 35(b)

Defendant Xanodyne Pharmaceuticals, Inc., petitions this Court for rehearing en banc, which is appropriate under the standards in Federal Rule of Appellate Procedure 35. The panel majority's decision involves a question of exceptional importance and directly conflicts with the Seventh Circuit Court of Appeals' decision in *In re Abbott Labs, Inc.*, 698 F.3d 568 (7th Cir. 2012). It also conflicts with the Seventh Circuit's decisions in *Bullard v. Burlington Northern Santa Fe Ry. Co.*, 535 F.3d 759 (7th Cir. 2008) (cited with approval in *Tanoh v. Dow Chemical Co.*, 561 F.3d 945, 956 (9th Cir. 2009)), and *Koral v. Boeing Co.*, 628 F.3d 945, 947 (7th Cir. 2011).

This case, *Corber v. McKesson Corp.*, is one of two cases[1] in which this Court granted permission to appeal pursuant to 28 U.S.C. §1453(c), from the district court's order remanding the cases to state court following removal under the Class Action Fairness Act of 2005 ("CAFA"). That this Court granted permission to appeal demonstrates that the issue presented by the appeal is one of exceptional importance. *See Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096, 1100-01 (9th Cir. 2010) (noting "key factor" in determining whether to grant petition to appeal under CAFA is presence of an important CAFA-related issue). The issue presented also is one of first impression for this Court as the panel

---

[1] The other case is *Romo v. McKesson Corp.*, Case No. 13-56310.

acknowledged, *see Romo v. McKesson Corp.*, Case No. 13-56310 (Sept. 24, 2013) ("*Romo*"), slip op. at 6, because unlike the situation in *Tanoh*, where the defendants attempted to join various actions each having fewer than 100 plaintiffs by removing them under CAFA's "mass action" provision, here, plaintiffs joined more than 40 actions through California's coordination proceedings. Thus, the issue presented by this appeal is whether CAFA's mass action removal provision is met where plaintiffs in more than 40 state-court lawsuits, involving more than 1,000 individual plaintiffs, join those cases under the state's coordination proceedings before a single judge "for all purposes." That issue is of critical importance as more and more lawsuits are filed in California state courts by plaintiffs from around the country forum-shopping for a favorable forum and to avoid federal court jurisdiction.

The panel majority's conclusion that plaintiffs' request to coordinate the claims of over 1,000 plaintiffs in more than 40 lawsuits before a single judge for "all purposes," does not satisfy the "mass action" provision of CAFA, directly conflicts with the Seventh Circuit's decision in *Abbott*. *See Romo*, Gould J. dissent at 2 ("I regret that the majority here misinterprets CAFA and does so in a way that creates a circuit split, for practical purposes, with the Seventh Circuit's decision in *Abbott*."). The panel majority distinguished *Abbott* because there the plaintiffs sought to consolidate the actions "through trial." There is no reasonable

distinction, however, between a request to consolidate "through trial" and one that is made "for all purposes." Given *Abbott* is materially indistinguishable; the panel majority's disagreement with *Abbott* created a circuit split.[2] (Cir. Rule 35-1 (petition for en banc rehearing appropriate where decision conflicts with decisions of other circuits).)

In addition, *Abbott* applied earlier Seventh Circuit decisions which established rules as to the meaning of the phrase "proposed to be tried jointly" in CAFA. *See Bullard*, 535 F.3d 759 ("[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"); *Koral*, 628 F.3d at 947 ("The [mass action] joint trial could be limited to one plaintiff (or a few plaintiffs) and the court could assess and award him (or them) damages. Once the defendant's liability was determined in that trial, separate trials on damages brought by the other plaintiffs against the defendants would be permissible under Illinois law; it is not unusual for liability to be stipulated or conceded, or otherwise determined with binding effect, and the trial limited to damages."). Indeed, in *Tanoh,* this Court recognized that "separate state court actions may, of course, become removable at [some] later

[2] On the same days *Corber* was heard and decided, the same panel heard and decided *Romo*. The panel relied on its decision in *Romo*, in its decision in *Corber*. *Romo* and *Corber* arose from the same coordination petition. Xanodyne understands that the *Romo* appellant will be seeking en banc review as well; given the posture of these cases, Xanodyne respectfully submits that it would be appropriate to grant rehearing en banc in both cases to ensure uniformity.

point if plaintiffs seek to join the claims for trial."[3] *Tanoh*, 561 F.3d at 956; *accord Bullard*, 535 F.3d at 761-62 (request may be implicit); *Abbott*, 698 F.3d at 572 (same). Although the panel majority did not articulate a definition for the phrase "proposed to be tried jointly" directly, the practical effect of the majority's decision is to create still more conflict with the definitions established by the other courts.

The foregoing demonstrates that without en banc review CAFA removal jurisprudence will become confused and rife with conflicting opinions. The panel majority decision creates a sharp circuit split on an issue of exceptional importance, and the thoroughly reasoned dissent correctly analyzes the merits of these important issues. Rehearing en banc should be granted.

BRIEF SUMMARY OF CASE

Corber is one of more than 40 multi-plaintiff lawsuits originally filed in California state court, alleging injuries from the ingestion of propoxyphene-containing pain products (i.e., Darvon, Darvocet, and generic equivalents). *Romo* at 4. Although initially filed as separate actions (each brought by scores of plaintiffs grouped together arbitrarily), plaintiffs soon sought to join the actions as a single coordinated action under California's coordination procedure.

[3] The panel majority also applies *Tanoh* to seemingly hold that CAFA's mass action provision only can apply where there is an indication that there will be an actual trial addressing the claims of at least 100 plaintiffs. *Tanoh* did not so hold, but if *Tanoh* and *Romo* are interpreted to now so hold, en banc rehearing is also appropriate to allow this Court to clarify or revisit that holding because it conflicts with every other Circuit decision to address CAFA's mass action provisions.

California has statutes and rules of court for coordinating and consolidating cases. "Consolidation" is used under California law when cases with common questions are pending in the *same* court (such as Los Angeles County Superior Court); the corollary for cases pending in *different* courts (that is, courts in multiple counties) is "coordination." *See, e.g.*, Cal. Civ. Proc. Code §1048; 4 Bernard E. Witkin, *Cal. Proc.*, Pleading §352, p. 4 (5th ed. 2008) (explaining essence of procedure as being ability to coordinate actions filed in different courts when they share common questions on principles similar to those governing consolidation of actions filed in a single court); Eric E. Younger & Donald E. Bradley, *Younger on Cal. Motions* §22:14 (2012 ed.) ("coordination is the equivalent of consolidation (Cal. Code Civ. Proc. §1048) of cases pending in different counties").

The coordination statutes provide that coordination is appropriate if the actions "shar[e] a common question of fact or law" and "if one judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice taking into account whether the common question of fact or law is predominating and significant to the litigation; the convenience of parties, witnesses, and counsel; the relative development of the actions and the work product of counsel; [judicial efficiency]; the disadvantages of duplicative and inconsistent rulings, orders, or judgments; and, the likelihood of settlement of the actions without further litigation should coordination be denied." Cal. Civ. Proc.

Code §404.1. While coordination trial judges enjoy wide latitude to resolve cases in the most expeditious fashion, the statutes and plaintiffs here contemplate coordinated efforts through trial. *See also* S. Amy Spencer, *Once More into the Breach, Dear Friends: The Case for Congressional Revision of the Mass Action Provisions in the Class Action Fairness Act of 2005*, 39 Loy. L.A. L. Rev. 1067, 1096-97 (2006) (concluding that request for coordination in California will trigger mass action statutes if other jurisdictional requirements are met); RE105 (Coordination Petition); RE112 (Memorandum In Support of Coordination Petition, so requesting).

Because the cases were pending in different courts in diverse counties, plaintiffs sought to join them before a single "coordination trial judge" "for all purposes" pursuant to Code of Civil Procedure §404 *et seq*. (RE106 (Coordination Petition); RE119 (Memorandum In Support of Coordination Petition).)[4] Making a plea to policy, plaintiffs argued in their Coordination Petition that "[o]ne judge hearing all of the actions *for all purposes*" would "promote the ends of justice," and that, "[w]ithout coordination, the parties may suffer from disadvantages caused by duplicative and inconsistent rulings, orders, *or judgments*." (RE119 (Memorandum (emphasis added)).) Plaintiffs repeatedly urged in their

[4] "Coordination trial judge" is the judge designated under Code of Civil Procedure section 404.3 "to hear and determine" coordinated actions. Cal. Rule of Court 3.501(9).

Coordination Petition that coordination *for all purposes* before a single judge is necessary because common questions allegedly predominate and one judge should decide key issues to avoid inconsistent "liability" rulings, including on issues such as "allocation of fault and contribution." (*See* RE121 (Memorandum in Support of Coordination Petition (urging that, without coordination, inconsistent rulings may result, including on appeal, as well as on issues such as "liability, allocation of fault and contribution"); *see also* RE119 ("[c]ommon questions of fact or law are predominating and significant to the litigation"); *id*. (cases purportedly involve the "same" facts and issues); RE127 (Declaration of Elise Sanguinetti in Support of Coordination Petition at ¶¶ 11-12 ("Without coordination, two or more separate courts will decide essentially the same issues and may render different rulings *on liability and other issues*. … [O]nly if the defendants are able to settle these claims in a coordinated action is there any realistic possibility of settlement." (emphasis added)).)

CAFA creates federal jurisdiction and permits removal whenever the "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). As that was precisely what plaintiffs proposed through their Coordination Petition, on November 20, 2012, Xanodyne removed *Corber* under

the "mass action" provisions of CAFA, as well as on federal question grounds. (RE 92, 97 (Notice of Removal).)

Following briefing, the district court remanded *Corber* to state court. (RE1.) Although the panel majority accords great deference to the district court decisions in this and other related cases, review here is de novo and, regardless, the district court merely followed decisions from other district courts in related cases that all arose from the same coordination petition. *See Romo* at 13. Xanodyne timely petitioned this Court for permission to appeal, pursuant to 28 U.S.C. §1453, which petition this Court granted on July 26, 2013. (RE21.)

ARGUMENT

A. THE CAFA ISSUE IS OF EXCEPTIONAL IMPORTANCE

In 2005, Congress "alter[ed] the landscape for federal court jurisdiction over class actions." *Abrego Abrego v. Dow Chemical Co.*, 443 F.3d 676, 677 (9th Cir. 2006). In addition to traditional class actions, CAFA expanded diversity jurisdiction to also cover cases involving large numbers of plaintiffs, called "mass actions" under CAFA's terminology. *Id.* at 677-78; 28 U.S.C. §1332(d)(11). Congress did so to "expand[] federal jurisdiction over mass actions—suits that are brought on behalf of numerous named plaintiffs who claim that their cases present common questions of law or fact that should be tried together even though they do not seek class certification status. Mass action cases function very much like class

actions and are subject to many of the same abuses." S. Rep. No. 14, S. REP. 109-14, 46, reprinted in 2005 U.S.C.C.A.N. 3, 43. "Mass actions are simply class actions in disguise. They involve a lot of people who want their claims adjudicated together and they often result in the same abuses as class actions." *Id.* at 44-45.

This Court recognized the importance of the issues presented here when it granted Xanodyne's Petition for Permission to Appeal. *See Coleman*, 627 F.3d at 1100-01. Although not every CAFA decision necessarily is of exceptional importance warranting en banc review, the mass action provisions at issue here have been interpreted infrequently and now are the subject of a sharp split of authority. *See* Paul D. Rheingold, *Litigating Mass Tort Cases*, §2:4 (2012) (mass action language, including "proposed to be tried jointly" has not been the subject of great appellate determination); Cir. Rule 35-1 (en banc criteria satisfied by circuit split). The panel majority also identified conflicting policies that are of exceptional importance: (1) A plaintiff's traditional ability to be a so-called "master" of his complaint to plead around federal jurisdiction (*see, e.g.*, *Romo* at 7), and (2) Congress's express intent that plaintiffs not be permitted to skirt federal jurisdiction by filing individual, non-class actions and then use state procedural devices such as California's coordination procedures to weave them back together again to create the very class action in disguise the *Corber* plaintiffs proposed, and created, here.

This case and *Romo* present the rare and unique cases where exceptional issues require this Court's en banc review.

B. THE PANEL MAJORITY OPINION CONFLICTS WITH *ABBOTT* AND OTHER PRECEDENT

The Seventh Circuit addressed the issue presented here in a materially indistinguishable case, but reached the opposite conclusion from that of the panel majority. *See Abbott*, 698 F.3d at 573. Like this case, *Abbott* involved a series of individual plaintiffs who, after filing individual actions, sought to join them under Illinois' equivalent to the California coordination statues. *Id.* at 571. The only distinction – one that, if it makes any difference, makes the cases before this Court even stronger cases for CAFA removal – is that while Illinois procedures require a plaintiff to specify whether he or she is seeking consolidation "through trial" or solely for "pre-trial," California's procedures do not include a "pre-trial only" option and instead *only* contemplate coordination for all purposes. Ill. S. Ct. R. 384(a); *Abbott,* 698 F.3d at 571; *see also Romo*, dissent at 9. Thus, in *Abbott*, the plaintiffs sought consolidation "through trial," and in *Corber*, plaintiffs sought coordination "for all purposes." (RE106 (Coordination Petition).) There is no material distinction. But, the Seventh Circuit's reasoning makes the identity of these cases clearer.

Relying on *Bullard* and *Koral*, the Seventh Circuit correctly concluded that the "proposed to be tried jointly" requirement was satisfied by the plaintiffs'

request for consolidation "through trial," which was brought on the grounds that such consolidation would "'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.'" *Abbott*, 698 F.3d at 573 (emphasis in original). As the *Abbott* Court aptly noted, "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. In either situation, plaintiffs' claims would be tried jointly." *Id*. at 573.

Here, precisely as in *Abbott*, a proposal that the claims be "tried jointly"[5] is found in plaintiffs' unbounded request for coordination "for all purposes." (RE106 (Coordination Petition).) Moreover, just as in *Abbott*, plaintiffs here expressly proposed coordination to avoid the "risk of inconsistent adjudication," and repeatedly argued that the "[f]ailure to coordinate these actions will result in the disadvantages of duplicate and inconsistent rulings, orders, or judgments." (RE106

[5] It is easy to unintentionally switch these words to "joint trial," which both the panel majority, the dissent, and even the parties sometimes have done. But the choice of wording is critical, particularly in the context of the statutory scheme, and Congress did not say "cases in which there will be a joint trial"; instead, it said cases in which the claims are "proposed to be tried jointly." Xanodyne offered an expansive discussion in its panel brief regarding the interpretation of that phrase in light of rules of statutory construction, dictionary definitions, and statutory intent and context. That discussion is not repeated here because the focus of this petition is on the propriety of en banc review and the panel majority never expressly defines the phrase.

(Coordination Petition).) Also, as in *Abbott*, plaintiffs here seek to avoid inconsistent determinations of "issues pertaining to liability, allocation of fault and contribution, as well as the same wrongful conduct of defendants." (RE121 (Memorandum in Support of Coordination Petition); *see also* RE117, 119.)

The panel majority declined to follow *Abbott*, while the dissent concluded that the failure to do so created a circuit split. Indeed, the panel majority's distinction of *Abbott* is illusory. To begin with, the panel majority concludes that the cases involved different procedures (consolidation versus coordination). But, as explained above and more thoroughly in the merits briefing, the use of those different words is meaningless – the procedure is precisely the same, and the powers of the single trial judge under both procedures are no different.

Moreover, the panel majority concludes that, because plaintiffs' Coordination Petition seemed more focused on pre-trial items and less focused on "trial," that somehow meant that Appellant had not met its burden to show a proposal was made that the cases be tried jointly. Yet, as the dissent correctly recognizes, (1) those proposals may be "implicit"; (2) proposals that cases be tried jointly "may 'take different forms as long as the plaintiffs' claims are being determined jointly'"; and (3) the panel majority's decision to "focus[] on the part of the petition mentioning pretrial discovery and [choosing] to downplay that part of the petition urging that there be no inconsistent judgments…disregards that the

provision in CAFA makes clear only that matters consolidated exclusively for pretrial purposes are not properly removed to federal court." *Romo*, dissent at 4. And, whatever effort plaintiffs may have made to characterize their request by disguising it, (1) California's coordination procedures have no "pre-trial only" option, and (2) as the dissent correctly recognizes, in *Standard Fire v. Knowles,* 568 U.S. —, 133 S. Ct. 1345, 1350 (2013), the Supreme Court restricted the ability of plaintiffs to try to evade federal jurisdiction by purporting to offer stipulations that are not effective to oust jurisdiction. In *Standard Fire*, the stipulation pertained to the amount in controversy; here, any perceived effort by plaintiffs to focus on "pre-trial" would be ineffective (and truly, plaintiffs' request is not so restricted).

Finally, the panel majority also fails to analyze the interplay between CAFA's primary mass action provision and its express exception for those cases proposed to be consolidated for pre-trial purposes only. In so doing, and by focusing on the aspects of the Coordination Petition involving pre-trial issues to the exclusion of all else, the panel majority analysis fails to apply well-established Circuit law requiring that jurisdictional exceptions be proven by the party resisting removal by a preponderance of the evidence. *See Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1024 (9th Cir. 2007). Further, as the dissent correctly recognizes, to adopt plaintiffs' view that only a case in which all plaintiffs present their cases to

a single trier of fact would render the exception superfluous. *Romo*, dissent at 8, *citing Bliski v. Kappos*, 130 S. Ct. 3218, 3228 (2010).

C. THE PANEL MAJORITY DECISION DOES NOT FIT NEATLY INTO THE "MASS ACTION" JURISPRUDENCE OF THIS, OR ANY OTHER, CIRCUIT

This Court held in *Tanoh* that where plaintiffs strategically filed separate actions, each having fewer than 100 plaintiffs but *never sought to join the actions together in any manner*, the cases were not removable under CAFA. *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 950 (9th Cir. 2009). Likewise, in *Anderson v. Bayer Corp.*, 610 F.3d 390, 393 (7th Cir. 2010), and *Scimone v. Carnival Corp.*, 720 F.3d 876, 887 (11th Cir. 2013), where individual actions had been filed and no action taken to join the actions in any manner, the Seventh and Eleventh Circuits held, like *Tanoh*, that CAFA's mass action provisions were not triggered. Similarly, in *Koral*, where the plaintiffs' counsel opined regarding the likely progression of individual cases, but stopped "just short" of actually taking action to join them together in any coordinated proceeding, the Seventh Circuit concluded that the mass action provisions were not triggered.

Abbott does not disagree with those rulings, nor does Xanodyne disagree here. To the contrary, *Abbott* expressly recognized and harmonized the ruling in *Tanoh*, noting that it was consistent with prior Seventh Circuit precedent, because "[a]s long as plaintiffs had not proposed a joint trial, '[t]he mass action provision gives plaintiffs the choice to file separate actions that do not qualify for CAFA

jurisdiction.'" *Abbott*, 698 F.3d at 572 (citing *Tanoh*, 561 F.3d at 953, and quoting *Anderson*, 610 F.3d at 393).

But each case, and most particularly this Court's *Tanoh* decision, recognizes that when plaintiffs start with separate uncoordinated proceedings, and then act to join them together for "trial" or – here, "for all purposes" – the substance of such a request fits the "proposed to be tried jointly" language of CAFA and triggers the mass action removal provisions. As the *Romo* dissent so carefully reasons, "[w]hat is critical is that this appeal concerns a set of actions filed in state court followed by a petition by Plaintiffs to coordinate, in part to avoid inconsistent judgments. And so it is on that aspect of this case, distinguishing it from *Tanoh*, that we should be focused." *Romo*, dissent, at 3-4.

The panel majority fails to properly apply *Tanoh* and *Abbott*. Yes, a plaintiff is the master of his or her complaint and generally may plead to avoid federal jurisdiction; but, when plaintiffs seek coordination before a single judge for all purposes to avoid inconsistent judgments, they place their cases squarely within the federal courts' jurisdiction. *See Romo*, dissent, at 5-6. The panel majority's opposite conclusion conflicts with all relevant mass action jurisprudence.

D. This Court Should Grant Rehearing En Banc and Continue to Hold the Related Cases in Abeyance to Ensure Uniform Treatment of These Cases and to Ensure that the Timing Requirements of CAFA Do Not Limit This Court's Ability to Issue an En Banc Ruling

Xanodyne notes that there is, not surprisingly, some ambiguity in CAFA's timing requirements. Specifically, the statute provides that, once this Court accepts an appeal under 28 U.S.C. §1453(c)(2), "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)." This Court accepted Xanodyne's appeal on July 26, 2013, and thus, the 60-day deadline ran on the date judgment was entered in this case.

As the Supreme Court has recognized, that timeline does not apply to petitions to the Supreme Court because CAFA did not alter pre-existing federal statutes giving the Supreme Court jurisdiction to review by certiorari. *See Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1187 (2010). Likewise, although CAFA requires judgment to be rendered in the court of appeals within 60 days, judgment was timely rendered here when the *Romo* and *Corber* opinions were issued, and CAFA did not purport to alter the pre-existing rules governing en banc proceedings. At least two cases from other circuits have reviewed CAFA proceedings en banc after expiration of CAFA's 60-day time limit, but neither appears to have considered whether the time limit applied. *See Hart v. FedEx Ground Package Syst. Inc.*, 457

F.3d 675, 676 (7th Cir. 2006); *Freeman v. Blue Ridge Paper Products, Inc.,* 551 F.3d 405, 409-10 (6th Cir. 2008).

However, recognizing the importance of the issue and in an abundance of caution, Xanodyne proposes solutions that would allow this Court to ensure proper resolution of the issue in this appeal if the Court ultimately concludes that the timing provisions apply to en banc proceedings. First, the Court may extend the 60-day time limit for any period of time upon agreement of all parties. (28 U.S.C. §1453(3)(A)). If this Court grants en banc review, Xanodyne anticipates respondents may be amenable to provide the Court with that relief. Second, in all events, Xanodyne respectfully suggests that this Court not vacate the panel decision unless and until the important issues are first vetted by the full Court. Third, to ensure that this Court can review the issues, Xanodyne respectfully suggests that this Court (i) continue to hold all of the related cases in abeyance pending briefing and hearing in the en banc proceedings; and (ii) at the time this Court is prepared to issue an en banc decision on the merits, do so in each related case – each of which arises from the same coordination petition and shares a procedural history identical to that of *Romo* and *Corber*.

CONCLUSION

CAFA requires careful consideration because it contains confounding provisions with which this Court will continue to grapple. But the resulting

decision in *Corber* is erroneous and creates a sharp circuit split on issues of exceptional, independent importance. Rehearing en banc should be granted.

October 8, 2013

Respectfully submitted,
ULMER & BERNE LLP

By: /s/ Linda E. Maichl
Attorneys for Defendant-Appellant
Xanodyne Pharmaceuticals, Inc.

CERTIFICATION OF COMPLIANCE

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for rehearing en banc is proportionately spaced, has a Times New Roman typeface of 14 points and contains 4,183words.

Respectfully submitted,

ULMER & BERNE LLP

By: s/ Linda E. Maichl
Attorneys for Defendant-Appellant
Xanodyne Pharmaceuticals, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2013, I submitted the foregoing **DEFENDANT-APPELLANT XANODYNE PHARMACEUTICALS, INC.'S PETITION FOR REHEARING EN BANC** with the Clerk of the Court for the United States Court of Appeal for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Respectfully submitted,

ULMER & BERNE LLP

By: s/ Linda E. Maichl
Attorneys for Defendant-Appellant
Xanodyne Pharmaceuticals, Inc.