Court of Appeals No. 13-56310

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUDITH ROMO, ET AL.,

Plaintiffs - Appellees,

v.

MCKESSON CORPORATION, ET AL.,

Defendants – Appellant, TEVA PHARMACEUTICALS USA, INC.

Appeal Following Grant Of Petition for Permission to Appeal from the United States District Court For the Central District of California, District Court No. 5:12-CV-2036-PSG

Honorable Philip S. Gutierrez, Presiding

APPELLANT'S PETITION FOR REHEARING EN BANC

GREENBERG TRAURIG, LLP
Ginger Pigott (CA SBN 162908)
Amy B. Alderfer (CA SBN 205482)
Karin L. Bohmholdt (CA SBN 234929)
1840 Century Park East, Suite 1900
Los Angeles, CA 90067
Telephone: 310-586-7700
Facsimile: 310-586-7800

GREENBERG TRAURIG, LLP
Lori G. Cohen
Victoria D. Lockard
Terminus 200, 3333 Piedmont Road, NE, Suite 2500
Atlanta, GA 30305
Telephone: 678-553-2100
Facsimile: 678-553-2212

GREENBERG TRAURIG, PA
Elliot H. Scherker
333 Avenue Of The Americas, Suite 4400
Miami, FL 33131
Telephone: 305-579-0579
Facsimile: 305-579-0717

CORPORATE DISCLOSURE STATEMENT

Appellant Teva Pharmaceuticals USA, Inc. ("TUSA") is an indirect wholly owned subsidiary of Teva Pharmaceutical Industries Ltd. through the following parent companies: (i) Orvet UK Unlimited (Majority Shareholder), which in turn is directly owned by TEVA Pharmaceuticals Europe B.V., which in turn is directly owned by Teva Pharmaceutical Industries Ltd.; (ii) Teva Pharmaceutical Holdings Coöperatieve U.A. (Minority Shareholder), which in turn is directly owned by IVAX LLC, a direct subsidiary of TUSA. Teva Pharmaceutical Industries Ltd. is the only publicly traded direct or indirect parent company of TUSA, and no other publicly traded company owns more than 10% of its stock.

October 8, 2013

Respectfully submitted,
GREENBERG TRAURIG, LLP

By: /s/ Karin L. Bohmholdt
Attorneys for Appellant
Teva Pharmaceuticals USA, Inc.

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I. THE DECISION INVOLVES QUESTIONS OF EXCEPTIONAL IMPORTANCE, AND THE MAJORITY'S OPINION DIRECTLY CONFLICTS WITH THE SEVENTH CIRCUIT'S DECISION IN *IN RE ABBOTT LABS., INC.*

We provide first this concise statement as to the propriety of en banc review. En banc rehearing is appropriate for three reasons, each of which is elaborated upon in the body of this Petition. Specifically, this Petition seeks rehearing en banc of a decision under the Class Action Fairness Act of 2005 ("CAFA") that (1) is of exceptional importance, (2) directly conflicts with *In re Abbott Laboratories, Inc.*, 698 F.3d 568 (7th Cir. 2012), and (3) conflicts with rules established in *Bullard v. Burlington Northern Santa Fe Railway Co.*, 535 F.3d 759 (7th Cir. 2008)—which this Court 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).

First, because this Court granted Appellant Teva Pharmaceuticals USA's ("TUSA") Petition for Permission to Appeal under 28 U.S.C. § 1453(c), this Court already has recognized that this case ("*Romo*") presents an important question of first impression for this Court under CAFA. *See* Slip. Op. at 6 (recognizing issue first impression); ER 20 (order granting permission to appeal);[1] *Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096, 1100-01 (9th Cir. 2010) (holding that "key factor" for determining whether to grant CAFA petition is presence of "an

[1] Excerpts of Record ("ER") are filed at Docket 12-2.

important CAFA-related issue"). More specifically, *Romo* presents this exceptionally important CAFA-related question:

> Does CAFA's "mass action" provision, which grants jurisdiction to federal courts in cases "in which monetary relief claims of 100 or more persons are proposed to be tried jointly,"[2] apply when a plaintiff files a state-court petition to coordinate more than 40 state court cases, with more than one thousand plaintiffs, before a single state court judge, "for all purposes"?

The issue is critical, sure to repeat, and will impact mass action litigation throughout this Circuit.

Second, the Majority's Opinion ("Majority")[3] answered that important question in the negative, creating a sharp circuit split. As the Dissenting Opinion ("Dissent") correctly put it: "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 *[In re] Abbott [Labs., Inc.*, 698 F.3d 568 (7th Cir. 2012)]." Slip. Op., Gould, J. dissenting, Dissenting Opinion at 2. And, while the Majority suggested that *Abbott* is distinguishable because the *Abbott* plaintiffs sought to consolidate the actions "through trial," there is no reasonable distinction between a request to consolidate "through trial" and one that is made "for all

[2] 28 U.S.C. § 1332(d)(11).

[3] The Majority decision was authored by the Honorable Johnnie Rawlinson, Circuit Judge, and was joined by the Honorable Ivan L.R. Lemelle, United States District Court Judge for the Eastern District of Louisiana, sitting by designation. The Honorable Ronald M. Gould, Circuit Judge, authored the Dissent.

purposes." *Abbott* is materially indistinguishable; the Majority's decision to depart from *Abbott* has created a circuit split.[4] (Cir. Rule 35-1 (en banc rehearing appropriate where decision conflicts with decisions of other Circuits).)

Third, *Abbott* applied earlier Seventh Circuit decisions in which that court established clear rules as to the meaning of the phrase "proposed to be tried jointly" in CAFA. *See Bullard*, 535 F.3d at 762 ("[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 point if plaintiffs seek to join the claims for

[4] On the same days *Romo* was heard and decided, the same Panel heard and decided a companion case, *Corber v. Xanodyne*, Case No. 13-56306. The *Corber* decision is a memorandum disposition incorporating *Romo*. *Romo* and *Corber* arose from the same coordination petition. TUSA understands that the *Corber* appellant will be seeking en banc review; it would therefore be appropriate to grant rehearing en banc in both cases to ensure uniformity.

trial."[5] *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 Majority never directly articulates a definition for the phrase "proposed to be tried jointly," the practical effect is to create still more conflict with the definitions established by these other courts.

In short, there are many reasons why en banc review is appropriate. The Majority 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.

II. BRIEF SUMMARY OF CASE

Romo 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. Slip. Op. at 4. Although initially filed as separate actions (each brought by scores of plaintiffs grouped together arbitrarily), these plaintiffs soon sought to join them together in a single coordinated action.

[5] The 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 one hundred 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 is in conflict with every other Circuit decision to address the mass action provisions of CAFA.

To provide some background for the Court, California has established statutes and rules for coordinating and consolidating cases. "Consolidation" arises under California law when cases with common questions are pending in the *same* court; the corollary for cases pending in *different* courts is "coordination." *See, e.g.*, Cal. Civ. Proc. Code § 1048; 4 Bernard E. Witkin, *Cal. Proc.*, Pleading § 352, p. 4 (5th ed. 2008) (explaining the essence of the procedure as being the 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); ER 161 (Coordination Petition); ER 175 (Memorandum In Support of Coordination Petition, so requesting).

Because the cases here were pending in different courts, Plaintiffs sought to join them before a single "coordination trial judge" "for all purposes" pursuant to Code of Civil Procedure sections 404 et seq. (ER 161 (Coordination Petition); ER 175 (Memorandum In Support of Coordination Petition).)[6] The Coordination Petition argued, "[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*." (ER 175 (Memorandum (emphasis added)).) The Coordination Petition repeatedly urged that coordination *for all purposes* before a single judge is

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

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* ER 177 (Memorandum in Support of Coordination Petition at ln. 1-21 (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* ER 175 at ln. 7-8 ("[c]ommon questions of fact or law are predominating and significant to the litigation"); *id*. at ln. 16-19 (cases purportedly involve the "same" facts and issues); ER 184 (Declaration 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 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)(B)(i). Because that was precisely what Plaintiffs' Coordination Petition had proposed, on November 20, 2012, TUSA removed *Romo* under the "mass action" provisions of CAFA, as well as on federal question and diversity grounds. (ER 27, 33, 36 (Notice of Removal, ¶¶ 6, 36).)

Following briefing, the district court remanded *Romo* to state court. (ER 1-17.) Although the Majority accords great deference to the district court decisions in this and various other related cases, review here is de novo and, regardless, the district court here followed other district court decisions on related cases that all arose from the same coordination petition. *See* Slip. Op. at 13. TUSA timely petitioned this Court for permission to appeal, pursuant to 28 U.S.C. § 1453, which petition this Court granted on July 26, 2013. (ER 20.)

III. THE CAFA ISSUE HERE IS OF EXCEPTIONAL IMPORTANCE.

In 2005, Congress "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). In that regard, in addition to traditional class actions, CAFA covers certain other cases involving large numbers of plaintiffs, called "mass actions." *Id.* at 677-78; 28 U.S.C. § 1332(d)(11). The reason for this inclusion was 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*.

This Court recognized the importance of the issues presented here when it granted TUSA's Petition for Permission to Appeal. *Coleman*, 627 F.3d at 1100-01. And, the mass action provisions at issue here have been infrequently interpreted 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 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.*, Slip. Op. at 7), and (2) Congress's expressly stated intent that plaintiffs must not be permitted to avoid federal jurisdiction by filing individual, non-class actions and then, using state procedural devices such as California's coordination procedures, to weave them back together again to create the very class action in disguise the *Romo* Plaintiffs have proposed, and created, here.

This case presents exceptional issues that require en banc review.

IV. THE MAJORITY OPINION CONFLICTS WITH *ABBOTT* AND OTHER PRECEDENT.

The Seventh Circuit has addressed the issue presented here in a materially indistinguishable case, but it reached the opposite conclusion from that of the *Romo* Majority. *See In re Abbott Labs., Inc.*, 698 F.3d 568, 573 (7th Cir. 2012). Specifically, *Abbott* involved a series of individual plaintiffs who had filed individual actions but then sought to bring them together under Illinois' equivalent to the California coordination statues. *Id*. at 571. The only distinction – one that, if it makes any difference, makes *Romo* the even stronger case for CAFA removal – is that, while Illinois procedures require a plaintiff to specify whether it is seeking consolidation "through trial" or solely for "pre-trial," California's procedures do not provide a "pre-trial only" option and instead *only* contemplate coordination for all purposes. Ill. Sup. Ct. R. 384(a); *In re Abbott Labs, Inc.*, 698 F.3d at 571; *see also* Slip. Op., Dissent at 9. Thus, in *Abbott*, the plaintiffs sought consolidation "through trial," and in *Romo*, the Plaintiffs sought coordination "for all purposes." (ER 161(Coordination Petition).) There is no material distinction, and the Seventh Circuit's reasoning makes the identity of these two cases all the more clear.

Relying on *Bullard* and *Koral*, the *Abbott* Court 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 put it, "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*.

Here, precisely as in *Abbott*, a proposal that the claims be "tried jointly"[7] is found in the Coordination Petition's unbounded request for coordination "for all purposes," without any attempt at limitation. Moreover, just as in *Abbott*, the Coordination Petition expressly proposes coordination to avoid the "risk of inconsistent adjudication," and repeatedly argues that the "[f]ailure to coordinate these actions will result in the disadvantages of duplicate and inconsistent rulings,

[7] It is easy to unintentionally confuse the phrase "tried jointly" with "joint trial," which the 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 cases are "proposed to be tried jointly." TUSA offered an expansive discussion in its Panel Briefing as to how those words must be interpreted in light of rules of statutory construction, dictionary definitions, and statutory intent and context. We do not repeat that discussion at length here, because the focus of this petition is on the propriety of en banc review, and because the Majority never expressly defines the phrase.

orders, or judgments." Also, like in *Abbott*, the Coordination Petition seeks to avoid inconsistent determinations of "issues pertaining to liability, allocation of fault and contribution, as well as the same wrongful conduct of defendants." (ER 177 (Memorandum in Support of Coordination Petition); *see also* ER 173, 175.)

The Majority here declined to follow *Abbott*, while the Dissent concluded that the failure to do so created a circuit split. The Majority's distinction of *Abbott* is illusory. To begin with, the Majority concludes that the cases involved different procedures (consolidation versus coordination). But, as explained above and more thoroughly in the briefing, the use of these 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 Majority concludes that, because the *Romo* Coordination Petition seemed to be more focused on pre-trial items and less focused on "trial," this perceived focus somehow meant that Appellant did not meet its burden to show a proposal that the cases be tried jointly was made. Yet, as the Dissent correctly recognizes: (1) these 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 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." Slip. Op., Dissent at 3-5. And, whatever effort Plaintiffs may have made to characterize their request, (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, 185 L. Ed. 2d 439 (2013), the Supreme Court restricted the ability of plaintiffs to try to evade federal jurisdiction by purporting to offer stipulations that are not effective. 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, the Plaintiffs' request is not so restricted).

Finally, the 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 Majority 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)). And, as the Dissent correctly recognizes, to adopt the Plaintiffs' view that a proposal for claims to be "tried jointly" must mean only a case in which all plaintiffs present their cases to a single trier of fact would render

the exception superfluous. Slip. Op., Dissent at 8 (citing *Bliski v. Kappos*, 130 S. Ct. 3218, 3228 (2010)).

V. *ROMO* DOES NOT FIT NEATLY INTO THE "MASS ACTION" JURISPRUDENCE OF THIS, OR ANY OTHER, CIRCUIT.

This Court held in *Tanoh* that, where plaintiffs have filed separate actions, each having fewer than 100 plaintiffs who *never sought to join together in any manner*, the actions were not subject to CAFA removal. *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 bring them together, the Seventh and Eleventh Circuits have held, like *Tanoh*, that the mass action provisions were not triggered. Similarly, in *Koral v. Boeing Co.*, where the plaintiffs' counsel had opined about the likely progression of individual cases, but had stopped "just short" of actually taking action to bring them together for any sort of coordinated proceeding, the Seventh Circuit concluded that the mass action provisions were not triggered. 628 F.3d 945, 947 (7th Cir. 2011).

Abbott does not disagree with those rulings, nor does TUSA 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 recognizes, and most particularly this Court's *Tanoh* decision recognizes, that when plaintiffs start with separate uncoordinated proceedings, and then begin to take action to bring 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 provisions. As the *Romo* Dissent 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." Slip. Op., Dissent, at 3-4. The Majority simply fails to properly apply *Tanoh* and *Abbott*. Yes, a plaintiff may generally plead to avoid federal jurisdiction; but, when plaintiffs seek coordination before a single judge for all purposes to avoid inconsistent judgments, they place the cases squarely within the federal courts' jurisdiction. *See* Slip. Op., Dissent, at 5-6. The Majority's failure to so hold puts *Romo* in conflict with all relevant mass action jurisprudence.

VI. 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.

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 TUSA'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. *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1187 (2010). Likewise, although CAFA requires judgment to be rendered in the court of appeal within 60 days, (1) judgment was timely rendered here when the *Romo* opinion was issued, and (2) 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 long after the 60-day expiration of CAFA's time limit, but neither appears to have entertained the issue of 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 issue to be a close and important one, TUSA proposes a number of solutions to the ambiguity that would allow this Court to ensure proper resolution of these issues of exceptional importance, 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. *See* 28 U.S.C. § 1453(c)(3)(A). Second, in all events, TUSA respectfully suggests that this Court not vacate the Panel decision unless and until these important issues are first vetted by the en banc Court, to ensure that *Romo* does not somehow unintentionally become a source of confusion in the caselaw. Third, to ensure that this Court can review these important issues, TUSA 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 of those related cases – each of which arises from the same coordination petition and shares a procedural history identical to that of either *Romo* or *Corber*.

VII. CONCLUSION

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

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

October 8, 2013

Respectfully submitted,
GREENBERG TRAURIG, LLP

By: /s/ Karin L. Bohmholdt
Attorneys for Defendant-Appellant Teva Pharmaceuticals USA, 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 typeface of 14 points or more and contains 4,197 words.

☐ In compliance with Fed. R. App. P. 32(c) and does not exceed 15 pages.

October 8, 2013

Respectfully submitted,
GREENBERG TRAURIG, LLP

By: /s/ Karin L. Bohmholdt
Attorneys for Defendant-Appellant
Teva Pharmaceuticals USA, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I submitted the foregoing **APPELLANT'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 on October 8, 2013.

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.

October 8, 2013

Respectfully submitted,
GREENBERG TRAURIG, LLP

By: /s/ Karin L. Bohmholdt
Attorneys for Defendant-Appellant
Teva Pharmaceuticals USA, Inc.

APPENDIX
(ROMO V. MCKESSON CORP.)

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TAB 1

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JUDITH ROMO; VINCENT TALDONE; ROBIN TAYLER; MARGARET TAYLOR; RANDY TAYLOR; RAY TEETS; LAWRENCE TELLS; KATHRYN TEMCHACK; CHARLES TERRY; VERONICA TERRY; ROBERTA THORNE; MARGARET TIVIS; LINDA TODD; DELORES TOOHEY; DEBRA TOURVILLE; DENA TSOUALS; ALLEN TURNER; CAROLYN TURNER; WANDA TURNER; STARLET TYRONE; GLORIA UNDERWOOD; HENRY UNDERWOOD; JANICE VANISON; WILLIAM VERHEYEN; CHARLES VILDIBILL; SHARON WALLGREN; PAM WALSH; SHARON WALSH; KEESHA WARRIOR; LATANGA WASHINGTON; DARLENE WATT; JAMES WEISS; WESLEY WELBORNE, III; DEBRA WHEELER; MARSHA WHITT; CAROLYN WHYNO; CECILIA WILCKENS; SANDRA WILEMON; STELLA WILKERSON-CLARK; JOANN WILLIAMS; JOYCE WILLIAMS; ROSE WILLIAMS; SHANTAS WILLIAMS; MARY WILSON; ROSE WILSON; PATSY WINZEY; JIMMIE WISE; RUTH WOLFSON; JUANITA WOODSON; LYNNE WYSOCKY, single individuals,

No. 13-56310

D.C. No. 5:12-cv-02036-PSG-E

OPINION

Plaintiffs - Appellees,

v.

TEVA PHARMACEUTICALS USA, INC.,

Defendant - Appellant.

Appeal from the United States District Court
for the Central District of California
Philip S. Gutierrez, District Judge, Presiding

Argued and Submitted August 30, 2013
Pasadena, California

Before: GOULD and RAWLINSON, Circuit Judges, and LEMELLE, District Judge.*

Opinion by Judge Rawlinson

RAWLINSON, Circuit Judge:

This case presents the issue of whether removal was proper under the "mass action" provision of the Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4 (2005), when plaintiffs moved for coordination pursuant to California Code of Civil Procedure section 404. CAFA authorizes federal removal for mass actions when "monetary relief claims of 100 or more persons are

* The Honorable Ivan L.R. Lemelle, District Judge for the U.S. District Court for the Eastern District of Louisiana, sitting by designation.

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). Because we conclude that this CAFA jurisdictional requirement was not met under the totality of the circumstances in this case, we affirm the district court's remand order.

I

Defendant-Appellant Teva Pharmaceuticals USA, Inc. (Teva) appeals the district court's order remanding this case to state court. This case was one of twenty-six pending before the district court alleging injuries related to the ingestion of propoxyphene, an ingredient found in the Darvocet and Darvon pain medications, as well as in their generic brand counterparts. There are additional propoxyphene cases pending in multidistrict litigation in the Eastern District of Kentucky. *See In re Darvocet, Darvon & Propoxyphene Prods. Liab. Litig.*, 780 F. Supp. 2d 1379 (E.D. Ky. 2011).

Propoxyphene is a pain reliever that was used in the United States to treat mild to moderate pain from 1957 through November, 2010, when drugs containing propoxyphene were taken off the market because of the Food & Drug Administration's safety concerns. Teva held the rights to the generic formulary of Darvocet and Darvon, and Plaintiffs allege that Teva was involved in all aspects of the creation, distribution, and sale of generic propoxyphene products.

To date, more than forty actions have been filed in California state courts regarding products containing propoxyphene. On October 23, 2012, a group of attorneys responsible for many of the propoxyphene actions filed a petition asking the California Judicial Council to establish a coordinated proceeding for all California propoxyphene actions pursuant to California Code of Civil Procedure section 404. Section 404.1 provides:

> Coordination of civil actions sharing a common question of fact or law is appropriate 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; the efficient utilization of judicial facilities and manpower; the calendar of the courts; 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.

After Plaintiffs' petition for coordination was filed, Teva removed the case to federal district court under CAFA's mass action provision.

CAFA provides federal district courts with original jurisdiction over "mass actions" if the actions meet all of the statutory requirements. 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) (emphasis added). The only disputed issue in this case is whether Plaintiffs' petition for coordination constitutes a proposal to be tried jointly under CAFA.

The district court found that there was no federal jurisdiction under CAFA because Plaintiffs' petition for coordination did not constitute a proposal to try the cases jointly, and remanded the case back to state court. The district court distinguished this case from the Seventh Circuit's decision in *In re Abbott Laboratories, Inc.*, 698 F.3d 568 (7th Cir. 2012), explaining that Plaintiffs' petition for coordination differed from the Plaintiffs' consolidation request in *Abbott* because Plaintiffs' petition focused on pretrial matters while the Plaintiffs' consolidation request in *Abbott* specifically sought consolidation "through trial."

Defendants sought permission to appeal the district court's remand order, which we granted on July 26, 2013. We review the district court's remand order *de novo*. *See Abrego Abrego v. The Dow Chemical Co.*, 443 F.3d at 676, 679 (9th Cir. 2006).

II

The statutory issue for us to decide is whether the petition seeking coordination of the California propoxyphene actions was a proposal in substance for those actions to be tried jointly. This is a question of first impression in our circuit, as it was for the Seventh Circuit in *Abbott*.

We start from the well-established premise that the removal statutes are to be strictly construed. *See Scimone v. Carnival Corp*., 720 F.3d 876, 882 (11th Cir. 2013). A corollary precept is that we apply a presumption against removal and construe any uncertainty as to removability in favor of remand. *See id*.; *see also Tanoh v. Dow Chemical Corp*., 561 F.3d 945, 953 (9th Cir. 2009); *Abrego Abrego* 443 F.3d at 685. We have correctly observed that CAFA's mass action provision is "fairly narrow," *Tanoh*, 561 F.3d at 953, given that a qualifying mass action will only be present if there is an aggregate amount in controversy of five million dollars or more, at least one plaintiff who is a citizen of a state or foreign state different from that of any defendant, and "monetary relief claims of 100 or more persons [that] are proposed to be tried jointly." *Id.*; *see also* 28 U.S.C. § 1332(d). We expressly observed in *Tanoh* that CAFA "includ[es] only actions in which the trial itself would address the claims of at least one hundred plaintiffs" and excludes "any civil action in which . . . (IV) the claims have been consolidated or coordinated solely for pretrial proceedings." 561 F.3d at 954; 28 U.S.C. §

1332(d)(11)(B)(ii)(IV). And *Tanoh* makes clear, consistent with the plain language of CAFA, that the proposal to try claims jointly must come from the plaintiffs. 561 F.3d at 953-54. Further, if the statutory requirements under CAFA are not met, *Tanoh* rejects the idea that we can avoid these statutory terms merely by recourse to general statements in CAFA's legislative history, or to the theory that plaintiffs should not be able to "game" jurisdictional statutes to remain in state court. *Id*. at 954.

Tanoh also instructs that plaintiffs are the "masters of their complaint," and do not propose a joint trial simply by structuring their complaints so as to avoid the one hundred-plaintiff threshold. 561 F.3d at 953, 956; *see also Anderson v. Bayer Corp*., 610 F.3d 390, 393 (7th Cir. 2010); *Scimone*, 720 F.3d at 883-84. Under this

view, plaintiffs can structure actions in cases involving more than one hundred potential claimants so as to avoid federal jurisdiction under CAFA.[1]

Plaintiffs argue, and the district court agreed, that their analogous petition for coordination was not a proposal to try the cases jointly. We also agree. California Code of Civil Procedure section 404 allows the coordination of "all of the actions for all purposes." However, the plaintiffs' petition for coordination stopped far short of proposing a joint trial. This fact is important because, as discussed, both the Supreme Court and our court recognize that the plaintiff is, and should be, in control of selection of the litigation forum. *See Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013) (reiterating in the CAFA context, that plaintiffs are the "masters of their complaints"); *see also Tanoh*, 561 F.3d at

[1] Amicus curiae Chamber of Commerce of the U.S.A. and amicus curiae PhRMA essentially argue that we should revisit *Tanoh* and that it has lost its precedential value, urging that plaintiffs should not be able to structure their complaints to avoid federal jurisdiction in light of the purposes of CAFA to curb class action and mass action abuses that have occurred in state courts. We reject this argument because we agree with the reasoning of *Tanoh*, because as a three-judge panel we do not have authority to overrule a prior circuit precedent, and because the Chamber of Commerce's position would put us at odds with the Seventh Circuit, which cited *Tanoh* approvingly in *Abbott*, and the Eleventh Circuit, which did so in *Scimone*. *See Abbott*, 698 F.3d at 572; *Scimone*, 720 F.3d at 884.

953 (referencing "the well-established rule that plaintiffs as masters of their complaint, may choose their forum by selecting state over federal court . . .").

Plaintiffs asked for coordination under section 404, and submitted a Memorandum of Points and Authorities in support of the petition for coordination. We now turn to that memorandum to discern whether plaintiffs proposed that the claims of 100 or more persons were "to be tried jointly." 28 U.S.C. § 1332(d)(11)(B)(i).

On page 6 of the Memorandum of Points and Authorities, plaintiffs gave the following explanation for seeking coordination:

> Petitioners' counsel anticipates that the actions will . . . involve duplicative requests for the same defendant witness depositions and the same documents related to development, manufacturing, testing, marketing, and sale of the Darvocet Product. Absent coordination of these actions by a single judge, there is a significant likelihood of duplicative discovery, waste of judicial resources and possible inconsistent judicial rulings on legal issues.

One would be hard pressed to parse a proposal for a joint trial from this language. Rather, the obvious focus was on pretrial proceedings, *i.e.*, discovery matters.

On page 7 of the memorandum, plaintiffs informed the court that coordination was also sought because "[u]se of committees and standardized

discovery in a coordinated setting will expedite resolutions of these cases, avoid inconsistent results, and assist in alleviating onerous burdens on the courts as well as the parties." Again, we see emphasis on pretrial proceedings with no mention of a joint trial.

On page 8, the plaintiffs urged coordination on the following bases:

> One judge hearing all of the actions *for all purposes* in a selected site or sites will promote the ends of justice; Common questions of fact or law are predominating and significant to the litigation; Coordination may serve the convenience of parties, witnesses and counsel the relative development of the actions and the work product of counsel; Coordination may facilitate the efficient utilization of judicial facilities and manpower; Coordination may enhance the orderly calendar of the courts; Without coordination, the parties may suffer from disadvantages caused by duplicative and *inconsistent* rulings, orders or *judgments* . . .

(Emphases added).

Isolation of the phrases "for all purposes," "inconsistent judgments,"and "conflicting determinations of liability" to support a conclusion that the plaintiffs sought a joint trial completely ignores all references to discovery, including on the same page containing the reference to liability, where Plaintiffs stated: "[I]n light of the similarity of the actions, there will be *duplicate discovery obligations* upon the common defendants *unless coordination is ordered*. Coordination before

initiation of discovery in any of the cases will eliminate waste of resources and will facilitate economy. . . ." (Emphases added). As we read the plaintiffs' petition for coordination, it is quite a stretch to discern a request for joint trial when the clear focus of the petition is on pretrial matters. Reliance on nine words in the petition to the exclusion of all else is inconsistent with the principle that any doubt about federal jurisdiction be resolved in favor of remand. *See Scimone*, 720 F.3d at 882; *see also Abrego Abrego*, 443 F.3d at 685. In particular, Defendants' reliance on the plaintiffs' reference to inconsistent judgments is on shaky ground because judgments may be rendered outside the confines of a trial. Default judgments and summary judgments come readily to mind. *See* Federal Rules of Civil Procedure 55 and 56 (providing for entry of judgment prior to trial).

Neither are we persuaded that we should reach the same result as the Seventh Circuit in *Abbott*. Not only did that case involve a completely different procedure, consolidation as opposed to coordination, *see* 698 F.3d at 570, the plaintiffs' request in that case explicitly and expressly referenced "consolidation of the cases through trial and not solely for pretrial proceedings," thereby removing any question of the plaintiffs' intent. *Id*. at 571 (footnote reference and internal quotation marks omitted).

This case also differs from *Mississippi ex rel. v. AU Optronics*, 701 F.3d 796 (5th Cir. 2012), where the Fifth Circuit concluded that federal jurisdiction existed under CAFA when the State of Mississippi brought an action under the Mississippi Consumer Protection Act and the Mississippi Antitrust Act against defendants who manufactured liquid crystal display panels and harmed consumers by charging artificially inflated prices. *See id*. at 798-800. The Fifth Circuit concluded that the real parties in interest included the State and the individual consumers who purchased the products. *See id*. at 802. Because there were more than one hundred consumer claims at issue in the single lawsuit filed by the State, the Fifth Circuit held that CAFA conferred jurisdiction upon the federal court over the "mass action." *Id*.

Unlike the *AU Optronics* case, the plaintiffs here have filed separate lawsuits, none of which have been initiated by the State, so the rationale articulated by the Fifth Circuit is inapposite, even were we inclined to adopt it.[2]

[2]Amicus curiae Washington Legal Foundation argues that "joint trial" includes cases resolved in conjunction with each other, relying on the dictionary definition of "joint" and the statute's plain language. We agree that "joint trial" does not mean everyone sitting in the courtroom at the same time. However, as made obvious in this opinion, we disagree that mere invocation of the California coordination provision is sufficient to constitute a proposal for joint trial. Rather, as we have done here, we look to Plaintiffs' petition and supporting documents to determine the extent of Plaintiffs' request for coordination.

Finally, we consider the rulings of three different district court judges in this circuit who have determined that similar requests for coordination under this California procedural rule were not the equivalent of a request for a joint trial. *See Gutowski v. McKesson Corp.*, No. C 12-6056 CW, 2013 WL 675540 (N.D. Cal. Feb. 25, 2013); *Posey v. McKesson Corp.*, No. C 12-05939 RS, 2013 WL 361168 (N.D. Cal. Jan. 29, 2013); *Rice v. McKesson Corp.*, No. C 12-05949 WHA, 2013 WL 97738 (N.D. Cal. Jan. 7, 2013). These eminent California judges were practitioners in California prior to taking the bench and their decisions, with their considerable knowledge of California procedural rules, reinforce our view of the appropriate disposition of this case. We would affirm this fourth California district court judge's decision to remand this case to state court.

III

Because we conclude that Plaintiffs' petition for coordination was not a proposal to try the cases jointly, we **AFFIRM** the district court's order granting Plaintiffs' motion to remand.[3]

[3] We recognize that we have discretion to consider alternative bases for the exercise of federal jurisdiction, *see Nevada v. Bank of America Corporation*, 672 F.3d 661, 673 (9th Cir. 2012). We agree with the district court that there is a lack of federal question jurisdiction because Plaintiffs' state law claims do not "aris[e] under the Constitution, laws, or treaties of the United States. *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 805, 817 (1986).

We also agree with the district court's conclusion that complete diversity is lacking between the parties inasmuch as plaintiff Romo and defendant McKesson are both California citizens. *See Wisc. Dep't of Corr. v. Schacht*, 524 U.S. 381, 388 (1998) (requiring complete diversity of citizenship for federal jurisdiction).

Counsel Listing

Karin Bohmholdt (argued), Ginger Pigott, Amy Alderfer, Greenberg Traurig, LLP, Los Angeles, California; Lori G. Cohen, Victoria D. Lockard, Greenberg Traurig, LLP, Atlanta, Georgia; Elliot H. Scherker, Greenberg Traurig, PA, Miami, Florida, for Defendant-Appellants.

Stuart B. Esner (argued), Esner, Chang & Boyer, Pasadena, California; Elise R. Sanguinetti, Khorrami Boucher Sumner, Oakland, California; J. Paul Sizemore, The Sizemore Law Firm, El Segundo, California; Matthew J. Sill, The Sill Law Group PLLC, Edmond, Oklahoma, for Plaintiffs-Appellee.

Kate Comerford Todd, Tyler R. Green, National Chamber Litigation Center, Inc., Washington, D.C., for Amicus Curiae Chamber of Commerce of the United States.

James M. Spears, Melissa B. Kimmel, PHRMA, Washington, D.C., Attorneys for Amicus Curiae PHRMA.

TAB 2

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Romo v. Teva-Pharmaceuticals, 13-56310

GOULD, Circuit Judge, dissenting:

I respectfully dissent.

We must decide whether removal is proper under the "mass action" provision of the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4 (2005), when plaintiffs move for coordination pursuant to California Code of Civil Procedure section 404 **and justify their request in part by asserting a need to avoid inconsistent judgments**.[1] CAFA extends federal removal jurisdiction for mass actions when "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). I would hold that these requirements are met, and would reverse the district court's remand order.

I

The issue before us is whether Plaintiffs' petition to coordinate actions under California Code of Civil Procedure section 404 constitutes a proposal for these

[1] In the petition Plaintiffs asked for coordination of their lawsuits for reasons including concerns that there could be potential "duplicate and inconsistent rulings, orders, or judgments," and that without coordination, "two or more separate courts . . . may render different rulings on liability and other issues." After this petition for coordination was filed, Teva removed the case to federal district court under CAFA's mass action provision.

actions in California state court to be tried jointly, making the actions a "mass action" subject to federal jurisdiction under CAFA. I agree with the majority that federal courts are courts of limited jurisdiction, and the general rule is that removal statutes are strictly construed against removal.[2] *Luther v. Countrywide Home Loans Servicing LP*, 533 F.3d 1031, 1034 (9th Cir. 2008). As such, I turn to the language and purpose of CAFA. The statutory issue for us is whether the petition that was filed in this case seeking coordination of the California propoxyphene actions was a proposal in substance for those actions to be tried jointly. 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*.

Congress enacted CAFA in 2005 to "curb perceived abuses of the class action device which, in the view of CAFA's proponents, had often been used to litigate multi-state or even national class actions in state courts." *Tanoh v. Dow Chemical Co.*, 561 F.3d 945, 952 (9th Cir. 2009) (citation omitted). CAFA further extends federal jurisdiction over "mass action" cases when several requirements

[2] The Seventh Circuit has held that CAFA "must be implemented according to its terms, rather than in a manner that disfavors removal of large-stakes, multi-state class actions," and I agree. *Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830 (7th Cir. 2011).

are met, although only the "proposed to be tried jointly" requirement is at issue here. *See* 28 U.S.C. § 1332(d)(2), (6), (11)(A).

Proposals for joint trials may be made implicitly, and a "joint trial" may "take different forms as long as the plaintiffs' claims are being determined jointly." *Abbott*, 698 F.3d at 573; *see Bullard v. Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759, 762 (7th Cir. 2008). For example, an "exemplary" or "bellwether" trial may only feature a small group of plaintiffs, but it is still a joint trial when the claims or issues of a larger group are precluded or otherwise decided by the results. *See Koral v. Boeing, Co.*, 628 F. 3d 945, 947 (7th Cir. 2011). We should be looking at the reality of joint trial proposal, not at how a party may characterize its own actions.

What 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.[3]

My disagreement with the majority is over the import of the coordination motion and the reasons given for it. The majority focuses on the part of the petition mentioning pretrial discovery and chooses to downplay that part of the petition urging that there be no inconsistent judgments. In doing this, the majority disregards that the proviso in CAFA makes clear only that matters consolidated exclusively for pretrial purposes are not properly removed to federal court. The majority does not try even to argue, nor could it do so correctly here, that the petition for coordination is *limited* to pretrial matters. Instead, it argues that the petition "stopped far short of proposing a joint trial." But there is no applicable judicial precedent supporting the majority's proposition that the focus of a coordination petition mentioning pretrial matters in large part may override the reality of a plaintiff's proposal to try claims jointly when the petition seeks relief that would require joint trial. The majority apparently would require an explicit

[3] The amicus curiae Chamber of Commerce of the U.S.A. and amicus curiae PhRMA want us to revisit *Tanoh*, to say that it has no vitality and that plaintiffs cannot structure their complaints to avoid federal jurisdiction in light of the purposes of CAFA to curb class action and mass action abuses that have occurred in state courts. Although this argument by the Chamber of Commerce has some weight, I agree with the majority that this argument misunderstands the power of a three-judge panel, which may not overrule a prior circuit precedent.

request for a joint trial, whereas I conclude that the substance of what was done is controlling. Recourse to the general principle that doubts on removal should be resolved by favoring the plaintiffs' forum choice simply does not answer that this case fits CAFA removal like a glove under a reasonable assessment of what is a proposal for joint trial.

Our Ninth Circuit precedent in *Tanoh* suggests that plaintiffs are the "masters of their complaint," and do not propose a joint trial simply by structuring their complaints so as to avoid the one hundred-plaintiff threshold. 561 F.3d at 953, 956; *see Anderson v. Bayer*, 610 F.3d 390, 393 (7th Cir. 2008); *Scimone v. Carnival Corp.*, 720 F.3d 876 (11th Cir. 2013). That is not surprising and is analogous to the fact that individuals and corporations can structure transactions so as to avoid statutory prohibitions or terms.

But the United States Supreme Court has recently pointed out that there are limits to how far plaintiffs may go in structuring their complaints to avoid federal jurisdiction. Thus in *Standard Fire v. Knowles*, the Supreme Court rejected the ability of a proposed class action plaintiff to stipulate that damages would not exceed five million dollars. 568 U.S. —, 133 S. Ct. 1345, 1350, 185 L. Ed. 2d 439 (2013) ("[T]he stipulation at issue here can tie Knowles' hands, but it does not resolve the amount-in-controversy question in light of his inability to bind the rest

of the class."). In that case, the plaintiff unsuccessfully attempted to stipulate an amount-in-controversy below five million dollars before his proposed class had been certified. *Id.* at 1347. *Standard Fire* arose in the context of a challenge to plaintiffs' counsel's attempt to limit damages before class certification, and the Court recognized that plaintiffs' counsel could not execute a damages stipulation binding class claimants not yet joined. So *Standard Fire* is in my view not necessarily controlling on the issue before us as to whether there has been a proposal for joint trial. Because in *Standard Fire* the Supreme Court appeared to reiterate that plaintiffs are the "masters of their complaint," *id.* at 1350, if Plaintiffs merely had structured separate actions with less than one hundred claimants, and did not seek to coordinate them, I must currently think that the Supreme Court would hold, as we did in *Tanoh*, that no mass action was presented. If plaintiffs are masters of their complaints and can plead in a way to avoid federal jurisdiction, they remain free to "game" the system to some degree, including by joining less than one hundred plaintiffs in many suits in state court, so long as those cases are separate. Nonetheless, we have in this case a request to California courts to coordinate the actions and reasons given for coordination, including to avoid inconsistent judgments. That leads me to recognize that the issue here, stated more precisely, is whether when plaintiffs seek to coordinate under California law many

state actions, and urge the state court that coordination is necessary to avoid inconsistent judgments, that is a proposal for joint trial within the meaning of CAFA.

Plaintiffs argue, and the majority agrees, that their petition for coordination was not a proposal to try the cases jointly. I must respectfully disagree. California Code of Civil Procedure section 404 allows the coordination of "all of the actions for all purposes," and presents a factor-based test to determine whether coordination is appropriate. Plaintiffs asked for coordination under section 404, and submitted a memorandum in support of the petition for coordination. Reasons Plaintiffs listed as supportive of their petition, including the danger of inconsistent judgments and conflicting determinations of liability, in my view could only be addressed through some form of joint trial. When Plaintiffs asked the California Judicial Council to coordinate their cases for reasons that only a joint trial could

address, they implicitly proposed a joint trial, bringing their cases within CAFA's mass action provision.[4] That is how I see it and that is what impels my dissent.

Plaintiffs further contend that we should interpret the phrase "joint trial" to mean "a joint trial where more than one party (and for purposes of CAFA 100 or more parties) simultaneously present their claims to a trier of fact." I would reject this interpretation because it violates the canon against reading a statutory provision in such a way as to render another provision superfluous. *See Bilski v. Kappos*, 130 S. Ct. 3218, 3228, 177 L. Ed. 2d 792 (2010) (citation omitted). If our court were to adopt Plaintiffs' interpretation of "joint trial," the mass action statutory exception for "claims [that] have been consolidated or coordinated solely for pretrial proceedings" would be meaningless because a proposal for anything short of a single massive trial for all claimants would already fail the mass action

[4] Amicus curiae Washington Legal Foundation argues that "joint trial" includes cases resolved in conjunction with each other, relying on the dictionary definition of "joint" and the statute's plain language. This argument has some weight, and with the majority I would say that "joint trial" does not mean everyone sitting in the courtroom at the same time. Washington Legal Foundation also asserts that whenever the California coordination provision is invoked, that in itself will be enough to constitute a proposal for joint trial. I would not need to go so far to resolve this case because I rely in part on Plaintiffs' petition's explanation that there was concern to avoid inconsistent judgments, and because this case does not factually present as one where only coordination of pretrial matters was requested.

requirement. 28 U.S.C. § 1332(d)(11)(B)(ii).[5] I would reject Plaintiffs' narrow interpretation of "joint trial" to give meaning to the exception above.

Although Plaintiffs argue that the Seventh Circuit decision in *Abbott* is inapplicable here, and the majority accepts this argument, I would conclude that *Abbott* is both persuasive and relevant to this case. *Abbott* addresses a consolidation request "through trial" under Illinois Supreme Court Rule 384.[6] Plaintiffs correctly note that the Illinois rule differs from the language of California Code of Civil Procedure section 404, but still I would conclude that the Seventh Circuit's reasoning is persuasive here. Similar to the Seventh Circuit in *Abbott*, we are examining a request for coordination or consolidation that lists certain goals that could only be accomplished through a joint trial. *See Abbott*, 698 F.3d at 573. As the Seventh Circuit did, we should have concluded that Plaintiffs were

[5] I agree with Chief Judge Easterbrook of the Seventh Circuit that "[c]ourts do not read statutes to make entire subsections vanish into the night." *Bullard v. Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759, 762 (7th Cir. 2008).

[6] Illinois Supreme Court Rule 384(a) says: "When civil actions involving one or more common questions of fact or law are pending in different judicial circuits, and the supreme court determines that consolidation would serve the convenience of the parties and witnesses and would promote the just and efficient conduct of such actions. The supreme court may . . . transfer all such actions to one judicial circuit for consolidated pretrial, trial, or post-trial proceedings."

proposing a joint trial, and that federal jurisdiction under the CAFA mass action provision is proper.

In light of the specific reasons given for coordination of the California actions that involve propoxyphene, it is a natural and probable consequence of the grant of the petition seeking coordination, indeed it seems an inevitable result, that these varied actions must be tried together, or coordinated in a way to avoid inconsistent results as with bellwether trials, which amounts to the same thing. If the natural and probable consequence of coordination of separate actions has an impact indistinguishable from joint trial, then it is sensible to treat such a petition for coordination as a proposal for joint trial. I conclude that the circumstances presented here are a proposal for a joint trial within the meaning of what Congress said and intended in CAFA, and for that reason would reverse the district court's order granting Plaintiffs' motion to remand.[7]

[7] In light of what I would decide, I would not need to reach Defendants' alternative arguments that federal subject-matter jurisdiction exists on other grounds.