Nos. 13-56310

In the United States Court of Appeals for the Ninth Circuit

JUDITH ROMO, ET AL.,

Plaintiffs and Appellees,

vs.

TEVA PHARMACEUTICALS USA, INC.,

Defendant and Appellant,

Appeal from the Judgment of the U.S. District Court
for the Central District of California
Honorable Philip S. Gutierrez, Case No. 5:12-CV-02036-PSG-(Ex)

PLAINTIFFS-APPELLEES' ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES AND RULES

STATE CASES

STATE STATUTES

JURISDICTIONAL STATEMENT

On November 20, 2012, Appellant removed this action under the Class Action Fairness Act of 2008 ("CAFA"), 28 U.S.C. §§ 1332(d) and 1453 and on other grounds.[1] ER 77-891. Plaintiffs' motion for remand was granted on February 20, 2013. ER 1-17. Appellant petitioned this Court pursuant to 28 U.S.C. § 1453(c) for permission to appeal (ER 18-1086), and this Court granted the petition on July 26, 2013.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

1. Does the "mass action" provision of the Class Action Fairness Act of 2005 ("CAFA"), which authorizes removal in cases "in which monetary relief claims of 100 or more persons are proposed to be tried jointly" [28 U.S.C. § 1332 (d)(11)], apply despite Plaintiffs' state court petition for coordination that neither explicitly nor substantively proposes a joint trial of the cases requested to be

[1]Appellant also based its removal on fraudulent joinder, fraudulent misjoinder, federal question jurisdiction, and supplemental jurisdiction under 28 U.S.C. § 1367. ER 88-102. The district court's order of remand also properly rejected these grounds (ER 8-17), and appellant did not challenge this portion of the order in its petition for permission to appeal.

coordinated?

STATEMENT OF THE PERTINENT STATUTES

An addendum of the pertinent statutes and rules is attached to the end of this brief. Ninth Cir. Rule 28-2.7.

STATEMENT OF THE CASE

I. THE ACTION.

On November 13, 2012, Plaintiffs commenced this action in the Superior Court of Los Angeles County, State of California. ER 117-220. All Plaintiffs allege injury from ingesting prescription pain medications containing the active ingredient propoxyphene. Propoxyphene-containing pain medications have been removed from the market. ER 119-121.

As the district court stated in its remand order, the present action is one of 26 cases currently pending before it that allege injuries relating to ingestion of propoxyphene ("Propoxyphene Actions"). There are also numerous other cases

relating to Darvocet, Darvon, and propoxyphene pending in a multidistrict litigation ("MDL") in the Eastern District of Kentucky. See In re Darvocet, Darvon & Propoxyphene Prods. Liab. Litig., 780 F. Supp. 2d 1379 (E.D. Ky. Aug. 16, 2011). The Propoxyphene Actions were brought against various entities that allegedly manufactured, marketed, distributed, and/or sold products containing propoxyphene that were defectively designed and failed to contain adequate warnings. ER 1.

Propoxyphene is a pain reliever used to treat mild to moderate pain. ER 133.[2] It is contained in the brand name drugs Darvocet and Darvon and is also available in generic form. ER 124-133. Products containing propoxyphene were available on the market in the United States from 1957 through November 2010, when the Food & Drug Administration ("FDA") requested the drug to be withdrawn due to concerns regarding safety risks. The FDA request was based on the conclusion that propoxyphene products were misbranded as "the safety risks of propoxyphene outweigh its benefits for pain relief at recommended doses." ER 133, 140.

Defendant Eli Lilly & Company ("Eli Lilly") originally introduced the drug

[2]The district court's order contains a concise summary of pertinent allegations in Plaintiffs' complaint. ER 1-3.

in 1957. ER 125. Though it eventually sold Darvocet and Darvon to other entities, it maintained an ongoing role in the manufacture and marketing of the brands and also continued to manufacture generic propoxyphene products for generic drug companies. ER 125. Various companies at various times held rights to the brand name drugs containing propoxyphene (referred to in the complaint as the "Brand and Innovator Defendants"). ER 124-125.

McKesson Corp. ("McKesson"), a corporation organized under the laws of Delaware with its principal place of business in California, is a national distributor of prescription drugs, including propoxyphene. ER 122. McKesson engaged in marking, promoting, distributing, advertising, and merchandising propoxyphene products, including products with inaccurate and outdated labeling. ER 122. Plaintiffs ingested propoxyphene products distributed by McKesson and were harmed as a result. *Id.*

Teva Pharmaceuticals, U.S.A., Inc. ("Teva") held the rights to generic formation of Darvocet and Darvon. ER 130. Teva developed, designed, researched, tested, licensed, manufactured, labeled, advertised, promoted, marketed, sold, and distributed generic propoxyphene products. *Id.*

In 2009, due to concerns regarding propoxyphene's safety, the FDA ordered Xanodyne to include certain warnings on the label for propoxyphene products and

to distribute other information about the drug. ER 136-139. Xanodyne failed to comply with all of the requirements mandated by the FDA. ER 139. The distributors and producers of the generic form of the drug ("Generic Defendants") also did not comply with the labeling requirements mandated to Xanodyne by the FDA. ER 140.

Plaintiffs allege state law causes of action for: (1) strict products liability—design defect; (2) strict products liability—failure to warn; (3) strict liability in tort; (4) negligent design; (5) negligence; (6) negligent failure to warn; (7) fraudulent nondisclosure; (8) negligent misrepresentation; (9) fraudulent misrepresentation and concealment; (10) negligence per se; (11) breach of express warranty; (12) breach of implied warranty; (13) deceit by concealment—violation of California Civil Code §§ 1709-10; (14) violation of California Business & Professions Code § 17200; (15) violation of California Business & Professions Code § 17500; (16) violation of California Civil Code §§ 1750, et seq.; (17) negligence against the Innovator and Brand Defendants only; (18) fraudulent nondisclosure against the Innovator and Brand Defendants only; (19) negligent misrepresentation against the Innovator and Brand Defendants only; and (20) fraudulent misrepresentation and concealment against the Innovator and Brand Defendants only. ER 156-216. Plaintiffs' claims parallel the FDA's determination

that propoxyphene products were misbranded. Plaintiffs' complaint also thoroughly addresses generic drug defendants' failures to timely and properly correct misstatements and misrepresentations in labeling, *inter alia*, in their state law failure to update claims.

II. REMOVAL AND REMAND.

On November 20, 2012, Teva removed the action to federal court. ER 77-891. Teva asserted three grounds for removal: (1) 28 U.S.C. § 1332(d)(11), which permits removal of mass actions; (2) federal question jurisdiction under 28 U.S.C. § 1331; and (3) diversity jurisdiction pursuant to 28 U.S.C. § 1332. ER 88-102. Teva's argument for removal based on CAFA was based on Plaintiffs' filing on October 23, 2012 of a petition in the Superior Court of California to coordinate the propoxyphene actions pursuant to California Code of Civil Procedure section 404.1 and corresponding California court rules.[3]

On December 18, 2012, the Court issued an Order to Show Cause ("OSC") why the action should not be remanded to state court for lack of federal subject

[3]The plaintiffs' Petition to Coordinate was granted on April 19, 2013. *Rentz, et al. v. McKesson Corp., et al.*, Superior Court California Case No. BC483765; removed then remanded in C.D. Cal. No. 2:12-cv-9945-PSG-E.

matter jurisdiction. Dkt. 17.[4] On January 14, 2013, Defendant filed a response to the Court's OSC, Dkt. 18, and on January 15, 2013, Plaintiffs filed a motion to remand (ER 892-999). After considering the parties' arguments in support of and in opposition to the remand motion, as well as Teva's response to the Court's OSC, the Court entered its order remanding the action to state court. ER 1-17.

Judge Gutierrez has remanded numerous other similar cases on the basis of its remand order in this case.[5] Several other district court judges have also remanded actions on similar grounds, and no judge that has considered the issue has denied remand.[6]

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[4]As the district court states in its remand order, the court issued an OSC because "upon review of the Notice of Removal, the Court was not persuaded that any of the stated grounds for removal were proper." ER 3.

[5]Two dozen other cases in which Judge Guiterrez has granted remand for the reasons stated in his order in this case were listed in the Defendant's mediation questionnaire that the Defendant attempted to file in the *Corber* appeal. See Dkt. Entry 4-1 in *Corber*, No. 13-80084; see also ER 47-51 [statement of related cases filed by Defendant in *Romo*, No. 13-80036].

[6]E,g, (1) Judge Otis D. Wright, II, *L.B.F.R. by Laws v. Eli Lilly, et al.*, Case No. 2:12-cv-10025-ODW (CWx), by Remand Order dated December 6, 2012; (2) Judge William Alsup, *Rice, et al. v. McKesson Corp., et al.*, Case No. C 12-05949 WHA, by Order granting Remand, dated January 7, 2013; (3) Judge Richard Seeborg, *Posey, et al. v. McKesson Corp*., et al. Case No. C 12-05939 RS, by Order granting Remand, dated January 29, 2013; (4) Judge Samuel Conti, *Freitas et al. v. McKesson Corp., et al.* Case No. 12-5948 SC, by Order granting Remand, dated February 25, 2013; (5) Judge Claudia Wilken, *Gutowski, et al. v. McKesson Corp., et al.*, Case No. C 12-6056 CW, by Order granting Remand,

Defendant petitioned for permission to appeal pursuant to 28 USC § 1453. ER 18-1086. This Court granted the petition on July 26, 2013.

SUMMARY OF THE ARGUMENT

As the title suggests, when Congress enacted the *Class Action* Fairness Act of 2005 ("CAFA"), it was primarily concerned with Class Actions where defendants faced representative trials brought by classes consisting of hundreds and sometimes thousands of plaintiffs. Congress recognized these same concerns sometimes existed with respect to "mass actions" that were not labeled as class actions. Accordingly, Congress provided for removal under CAFA of mass actions, but only those that resembled class actions. Thus, Congress expressly provided for removal of actions in which "monetary relief claims of 100 or more persons are proposed to be tried jointly." 28 U.S.C.A. § 1332(d)(11)(B).

This provision is clear and unambiguous. If the plaintiffs propose a trial in which the claims of 100 or more plaintiffs are to be resolved at the same time, then the action sufficiently resembles a class action as to be subject to removal under

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dated February 25, 2013, and (6) Judge Jon S. Tigar, *Keene, et al. v. McKesson Corp.*, et al., Case No. 3:12-cv-5924-JST, by Order granting Remand, dated May 29, 2013.

CAFA. But according to defendants, when Congress used the word "tried jointly" it really did not mean a joint trial. Rather, it apparently meant some undefined type of joint litigation even though that is not what Congress said.

As the district court explained in its thorough and well-reasoned opinion remanding this action to state court, when Congress used the term tried jointly that is precisely what it meant. Numerous other district courts considering the same issue have reached the very same result.

Under the well-recognized rule that removal statutes should be strictly construed and under the general rule that the words Congress uses should be interpreted in their ordinary and popular sense, this Court should agree with the district court. As explained below, the text, purpose and Congressional intent of the mass action provision of CAFA as well as case law in this and other Circuits all support the district court's conclusion that unless the plaintiffs actually propose a joint trial of 100 or more plaintiffs – and that was certainly not done here, as plaintiffs' petition to coordinate made clear – CAFA does not justify removal. Accordingly, plaintiffs respectfully urge this Court to affirm the remand order.

ARGUMENT

I. CONTRARY TO DEFENDANTS' APPROACH OF LIBERALLY CONSTRUING CAFA'S REMOVAL PROVISION ALMOST BEYOND RECOGNITION, IT IS WELL-ESTABLISHED THAT REMOVAL STATUTES ARE STRICTLY CONSTRUED AGAINST REMOVAL.

A defendant may remove an action filed in state court to federal court only if the federal court would have original subject matter jurisdiction over the action. 28 U.S.C. § 1441. *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 83 (2005); *Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 679-80 (9th Cir. 2006). Federal courts are courts of limited jurisdiction and are presumptively without jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). Federal subject matter jurisdiction is satisfied through removal if the case could have originally been filed in federal court based on either federal question jurisdiction or diversity jurisdiction. *Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 163 (1997).

Thus, "removal statutes are strictly construed against removal." *Luther v. Countrywide Home Loans Servicing LP*, 533 F.3d 1031, 1034 (9th Cir.2008); see *Lowdermilk v. U.S. Bank Nat'l Ass'n*, 479 F.3d 994, 998-99 (9th Cir.2007). If at any time before final judgment it appears a removing court lacks subject matter jurisdiction, the case must be remanded to state court. 28 U.S.C. § 1447(c). Further, any doubts regarding federal jurisdiction should be construed in favor of remanding the case to state court. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 109 (1941); *Moore–Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1244 (9th Cir.2009) This presumption against removal means also that "the defendant always has the burden of establishing that removal is proper." *Chapman v. Houston Welfare Rights Org.,* 441 U.S. 600, 612 n. 28 (1979); *Gaus v. Miles, Inc.* 980 F.2d 564, 566 (9th Cir. 1992).

Stated another way, there must be **no doubt** that jurisdiction exists. If doubt exists, remand is required. *Gaus v. Miles, Inc*., 980 F.2d 564, 566 (9th Cir. 1992) ("Federal jurisdiction must be rejected if there is *any doubt* as to the right of removal.") (emphasis added).

II. CAFA ALLOWS REMOVAL OF ONLY A "MASS ACTIONS" IN WHICH "MONETARY RELIEF CLAIMS OF 100 OR MORE PERSONS ARE PROPOSED TO BE *TRIED JOINTLY*."

"Congress enacted CAFA in 2005 to 'assure fair and prompt recoveries for class members with legitimate claims; [to] restore the intent of the framers . . . by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and [to] benefit society by encouraging innovation and lowering consumer prices.'" *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 952 (9th Cir. 2009), citing CAFA, Pub.L. No. 109-2, 119 Stat. at 5 (2005). Moreover, "[a]s this description of the Act's purposes makes clear, CAFA was designed primarily 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." *Ibid*.

In addition to actions expressly labeled as "class actions," CAFA also contains a limited removal provision for actions meeting its very narrow definition of a "mass action." 28 U.S.C.A. § 1332(d)(11)(B). The statute provides "'mass action' means any civil action (except a civil action within the scope of section 1711(2)) 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, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a)." 28 U.S.C. § 1332(d)(11)(B)(i), emphasis added.

The statute goes on to provide that "the term 'mass action' shall not include any civil action in which . . . ***the claims have been consolidated or coordinated solely for pretrial proceedings.***" 28 U.S.C. § 1332(d)(11)(B)(ii)(IV), emphasis added.

The principal issue raised by defendants' appeal is what Congress meant when it limited CAFA removal of "mass actions" to cases "proposed to be tried jointly."

In addition to being informed by the fundamental rule discussed above that removal statutes are strictly construed against removal, this analysis is also controlled by the general rules of statutory interpretation that (1) "when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms," *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000) (internal quotation marks omitted), and (2)

the Court "start[s], of course, with the statutory text," and proceeds from the understanding that "[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.' *BP America Production Co. v. Burton*, 549 U.S. 84, 91, 127 S.Ct. 638, 166 L.Ed.2d 494 (2006)." *Sebelius v. Cloer*, 133 S. Ct. 1886, 1893, 185 L. Ed. 2d 1003 (2013).

In *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 953 (9th Cir. 2009), this Court applied these principles to conclude that removal under CAFA's "mass tort" was improper. In *Tanoh*, the defendant removed seven state court actions involving over 600 foreign nationals, on the basis of a claim of diversity jurisdiction and under the "mass action" provisions of CAFA, who claimed that they had been injured by exposure to the chemical DBCP while working on banana and pineapple plantations in the Ivory Coast. *Id.* at 951. In each case, there were fewer than 100 plaintiffs named in the complaint. The defendant, Dow Chemical, argued that the seven complaints, taken together, "constituted" a mass action. Dow contended "that allowing plaintiffs to 'evade' CAFA by 'artificially structur[ing]' their lawsuits to avoid removal to federal court would be inconsistent with congressional purpose." *Id*.

This Court found Dow's arguments unpersuasive and noted that "Congress appears to have foreseen the situation presented in this case and specifically

decided the issue in plaintiffs' favor." *Id.* at 953; see also *Vanegas v. Dole Food Co., Inc.*, 2009 U.S. Dist. LEXIS 22885 (C.D. Cal. Mar. 9, 2009) (cases brought by an aggregate total of approximately 2500 plaintiffs remanded by court holding that "nothing in CAFA suggests that the plaintiffs, as the masters of their own complaint, may not file multiple actions each with fewer than 100 plaintiffs.")

As now explained, precisely the same result is warranted here. Because this is not a case where more than "100 or more persons are proposed to be tried jointly" by its express terms, CAFA's "mass tort" removal provision does not apply and the district court correctly remanded this matter to California state court.

III. CAFA'S REQUIREMENT THAT "100 OR MORE PERSONS ARE PROPOSED TO BE TRIED JOINTLY" MEANS JUST THAT. THE PLAINTIFF MUST ACTUALLY PROPOSE A JOINT TRIAL OF 100 PLAINTIFFS OR MORE. A PROPOSAL SHORT OF SUCH A JOINT TRIAL DOES NOT CONSTITUTE A "MASS TORT" UNDER CAFA.

Defendants have argued that in this action "100 or more persons are proposed to be tried jointly" based upon plaintiffs' petition to coordinate various

state court actions under California law. Code Civ. Proc., §§ 404, et seq. Defendants do not and cannot argue that plaintiffs have proposed that there be a joint trial where 100 or more plaintiffs concurrently present their claims to the trier of fact. Instead, defendants derisively argue that CAFA's "tried jointly" requirement does not mean "'rent an auditorium, and Plaintiffs 1 through 141, call your first witness.'" (Petition to Appeal, p. 14.)

Defendants then argue that a "trial" is something less than a "trial" relying largely on a generalized definition from Black's Law Dictionary which defines "'trial' to include a 'formal judicial examination of evidence and determination of claims in an adversary proceeding.'" (Petition to Appeal, p. 14, citing *Bank of New York Mellon v. Walnut Place LLC*, 819 F. Supp. 2d 354, 361 (S.D.N.Y. 2011) rev'd sub nom. *BlackRock Fin. Mgmt. Inc. v. Segregated Account of Ambac Assur. Corp*., 673 F.3d 169 (2d Cir. 2012). Defendants proceed to argue that "'jointly' does not necessarily mean 'at literally the same time." (Petition to Appeal 15.) Instead, defendants argue, that "it too means something broader such as 'in conjunction, combination, or concert,'" citing to Oxford's English Dictionary. (Petition to Appeal 15.)

Adding these two strained interpretations together, defendants argue, with a straight face, that "tried jointly" does not really mean "tried jointly" but instead

includes cases which include a "formal judicial examination of issues, facts, or questions of law in conjunction with one another." (Petition to Appeal 15.) According to defendants, because plaintiffs have proposed that coordination of more than 100 plaintiffs was warranted to "promote the interest of justice," to avoid inconsistent rulings, and to facilitate settlement this was the equivalent of a proposal for "100 or more persons are proposed to be tried jointly."[7]

Defendants never get around to explaining just when there would be a joint trial under its out-of-context and strained interpretations of the isolated words used in CAFA. Indeed, under their interpretation it appears that each time there is a coordination consisting of 100 or more plaintiffs then a coordination would be treated identically to a class action and would be subject to removal unless it is expressly limited to only pretrial proceedings. There are a number of flaws which are fatal to defendants' argument:

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[7]In particular, in their petition to coordinate, plaintiffs explained: "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; and, without coordination, settlement of the actions without further litigation is unlikely." ER 241.

First, and perhaps most importantly, it is beyond credulity to assert that if CAFA's mass action removal provision is "strictly construed against removal" as it must be and if its terms are given its ordinary, common sense meaning, then "tried jointly" means what defendants argue. Even defendants must agree that the term "tried jointly" could mean precisely what the district court ruled: 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. Since that is at least "a" plausible meaning (and plaintiffs submit is the *only* reasonable meaning) of that term, then under the strict construction rule that must be the meaning that is ascribed to CAFA. Further, as explained, "'statutory terms are generally interpreted in accordance with their ordinary meaning.' [Citation]" *Sebelius v. Cloer*, 133 S. Ct. at p.1893, *supra*. Defendants' argument does just the opposite, placing an extraordinary meaning on the term "tried jointly" so that it takes over a page of text to even try and explain what is meant.

Second, defendants' interpretation would place two provisions of CAFA at war with each other in violation of the "'basic rule of statutory construction 'that one provision should not be interpreted in a way which is internally contradictory or that renders other provisions of the same statute inconsistent or meaningless.' *Hughes Air Corp. v. Public Util. Comm'n*, 644 F.2d 1334, 1338 (9th Cir.1981)."

United States v. Powell, 6 F.3d 611, 614 (9th Cir. 1993).

Here, as already explained, CAFA expressly excludes coordinated actions where "claims have been consolidated or coordinated solely for pretrial proceedings." 28 U.S.C. § 1332(d)(11)(B)(ii)(IV). Even defendants have not argued that when Congress used the term "pretrial" it meant something other than proceedings occurring before the case has been called for trial as that term is ordinarily used (i.e. witnesses called etc.). Thus, when Congress used the term "pretrial" it signified those proceedings before the plaintiffs' claims were presented to the trier of fact consistent with the popular and ordinary meaning of a "trial."

Yet, even though this is the unquestioned meaning of "pretrial," it appears to be defendants' position that the meaning of "trial" in that same statute also broadly encompasses pretrial proceedings. If that is in fact what defendants argue (and it is unclear from their argument exactly what they argue "trial" means) then that would render Congress' use of "trial" and "pretrial" at odds with each other. "Pretrial" would mean proceedings before submission of an action to a trier of fact while "trial" would inconsistently also include these same "pretrial" proceedings.

Third, it appears to be defendants' position that each and every time a petition to coordinate is filed in cases of 100 or more plaintiffs without being

expressly limited to pretrial proceedings only, then it is subject to removal under CAFA.[8] But if that is what Congress intended then it would have said as much and would not have included the "jointly tried" limitation. We know that because in the very same removal statute Congress specifically provided jurisdictions for class actions that meet certain criteria. 28 U.S.C.A. 1332, subdivision (d); *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1347, 185 L. Ed. 2d 439 (2013) Yet, as to class actions Congress did not include the tried jointly provision as one of the requirements for a class action to fall within CAFA. The fact that Congress included the "tried jointly" provision as to mass actions but not as to class actions should be given significance. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 578, 126 S. Ct. 2749, 2765, 165 L. Ed. 2d 723 (2006) (" A familiar principle of statutory construction . . . is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute.")

The Congressional history of CAFA sheds light on why Congress provided the "tried jointly" requirement for coordinated proceedings but not for class

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[8]This is evident because, as explained in the next section of this brief, plaintiffs Petition to Consolidate simply explained why these actions met the generalized standard for coordination under California law without any express request for a joint trial. Yet defendants argue that this petition nevertheless warrants removal under its strained interpretation of CAFA.

actions. The Senate Report explains: "The Committee find that 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. In fact, sometimes the abuses are even worse because the lawyers seek to join claims that have little to do with each other and confuse a jury into awarding millions of dollars to individuals who have suffered no real injury." S. REP. 109-14, S. REP. 109-14, 47, 2005 U.S.C.C.A.N. 3, 44. Of course, this risk of jury confusion exists only if the same jury hears the multiple claims at the same time. In other words – a joint trial as that term is ordinarily understood.

The report's explanation for the pretrial proceedings exception reinforces what Congress meant by the use of the term "tried jointly." The report explains: "The final exception would apply to claims that are consolidated or coordinated solely for pretrial proceedings. If a number of individually filed cases are consolidated solely for pretrial proceeding 'and not for trial' those cases have not truly been merged in a way that makes them mass actions warranting removal to federal court. On the other hand, if those same cases are consolidated exclusively for trial, or for pretrial and trial purposes, and the result is that 100 or more persons' claims will be tried jointly, those cases have been sufficiently merged to warrant removal of such a mass action to federal court." *Id.* at * 48.

This explanation should leave no doubt that Congress intended to distinguish between those cases where 100 or more plaintiffs have been merged for an actual trial and those cases which have not been merged for the actual trial. Defendants' position is directly at odds with this clear intent.

Fourth, yet another reason why defendants' interpretation fails is that it is based upon a misunderstanding of California procedure. Defendants have argued that because coordinated actions such as this often times involve trials of exemplary plaintiffs during "bellwether" trials, the practical effect will be to have joint trials because the results of those "bellwether" trials will result in the resolution of liability issues that will have preclusive effect in the coordinated trials that follow. Petition to Appeal p. 16. Thus, according to defendants, even if only the claims of a few plaintiffs are directly submitted to the trier of fact in an exemplar trial, that bellwether trial should nevertheless be considered a "trial" of 100 or more plaintiffs because all of the plaintiffs in the coordinated action will be affected they should be deemed to be part of that trial. To support this, defendants quote an opinion by Judge Posner interpreting Illinois law, explaining:

> The 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.

Koral v. Boeing Co., 628 F.3d 945, 947 (7th Cir. 2011).

The problem with defendants' argument – in addition to the fact that it is inconsistent with the express language of CAFA – is that it is not correct under California law. While in Illinois it is the case that once a judgment is rendered following the trial of a coordinated trial that judgment is binding on the remaining claims, the same is not true in California. For example, in *Abelson v. Nat'l Union Fire Ins. Co.*, 28 Cal.App.4th 776 (1994) the Court concluded that the trial court lacked authority in a coordinated action to use the judgment resulting from a test trial to bind the defendants in subsequent trials in that coordinated proceeding while the first judgment was on appeal.

Initially, the Court explained that "[t]he purposes of coordination include promoting the efficient use of judicial resources. [Citations.] As a general matter the rules implementing our coordination statutes vest the coordinating judge with flexible procedures and 'whatever great breadth of discretion may be necessary and appropriate to ease the transition through the judicial system of the logjam of cases which gives rise to coordination. . . .' [Citation.]) For example, rule 1541(b)

mandates that the coordination trial judge 'assume an active role in managing all steps of the pretrial, discovery and trial proceedings to expedite the just determination of the coordinated actions without delay....' Consistent with this mandate, the coordination judge may (3) order any issue or defense to be tried separately and prior to the trial of the remaining issues when it appears the disposition of any of the coordinated actions might thereby be expedited.'" *Id.* at p. 786.

The Court then went on to explain that this broad discretion did not include the power where the jury's findings following a test trial would be binding on the jury in subsequent trials: "The liability verdicts in [the first trial], on the assigned causes of action as well as the statutory cause, were bootstrapped into [the second trial] under a collateral estoppel concept while the [while the first] judgment was on appeal. But according to California law, a judgment is not final for purposes of collateral estoppel while open to direct attack, e.g., by appeal. (*National Union Fire Ins. Co. v. Stites Prof. Law Corp.* (1991) 235 Cal.App.3d 1718, 1726; [1 Cal.Rptr.2d 570]; Long *Beach Unified Sch. Dist. v. State of California* (1990) 225 Cal.App.3d 155, 169 [275 Cal.Rptr. 449]; *Sandoval v. Superior Court* (1983) 140 Cal.App.3d 932, 936-937 [190 Cal.Rptr. 29].)" *Id.* at p. 787.

Thus, while the Court of Appeal "commend[ed] the coordination trial judge for his willingness to explore innovative approaches" (*Ibid*.) the Court nevertheless concluded that the trial court lacked authority to use the test trial as a basis to resolve liability trials with respect to the trials that follow. Indeed, under California law, even when the appeal process is completed in a products liability action, a jury verdict in one action finding that a product either is or is not defective may not preclude an inconsistent verdict of a second jury with respect to that same product. *Sandoval v. Superior Court*, 140 Cal. App. 3d 932, 944 (Cal. Ct. App. 1983).

Accordingly, the premise of defendants' argument as to why a coordinated action should be treated as if the joined actions are "tried jointly" regardless of whether they are actually tried in the same time, fails under California law.

Further, the very fact that the laws of various states vary as to the spillover effect of judgments in exemplar trials, is itself a reason why Congress could not have intended the application of CAFA to turn on that spillover effect. As explained in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 103, 61 S. Ct. 868, 870, 85 L. Ed. 1214 (1941): "The removal statute which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied." It

would frustrate the uniform application of removal jurisdiction if the definition of a mass action was dependent on the law of the state where the plaintiffs filed suit, rather than the actions of those plaintiffs.

In short, fundamental rules of statutory construction prove that CAFA does not mean what defendants argue. As now explained, as CAFA is properly construed, nothing in plaintiffs' Petition to Coordinate justifies removal.

IV. IN THEIR PETITION FOR COORDINATION, PLAINTIFFS DID *NOT* "PROPOSE" THAT "100 OR MORE PERSONS . . . BE TRIED JOINTLY"

Under California law, coordination of civil actions 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. *Cal. Civ. Proc. Code* § 404.1.

Of note, coordination does not mean that the actions must be jointly tried or even tried in the same forum. See *McGhan Med. Corp. v. Superior Court*, 11 Cal.App.4th 804, 807-15 (1992) ("That these cases may be coordinated does not mean they need be tried in one forum; it does not even indicate that ultimate trial of the cases need be unified. The trial judge in his order extolled the benefits of 'the establishment of a steering committee wherein those courts would cooperate to facilitate discovery procedures and case management.' We see no reason why coordination need interfere with this vision of efficiency. Our concept is one of enhancing this outlook of cooperative administration by giving one judge central authority to make sure it occurs (not only with the four or five populous counties but in the twenty or so others which are not yet on the cooperative stream).")

Here, in their Petition for Coordination plaintiffs simply tracked the generalized language of the coordination statute without once proposing a joint trial. Plaintiffs' request to the California Judicial Council to establish a coordinated proceeding before a single state-court trial judge was comprised of the Petition for Coordination, ER 222-228; the Memorandum in Support of the Petition for Coordination, ER 234-244; and the Declaration of Elise Sanguinetti

in support of the Petition for Coordination, including exhibits, ER 246-884 (collectively, the "Coordination Documents"). Given that plaintiffs merely tracked the language of the Code provision authorizing coordinating actions, then this Court would have to find that *every* California action involving more than 100 plaintiffs must qualify as a mass action. This Court must reject this nonsensical result.

Contrary to Defendants' claim, nowhere in the Coordination Documents do Plaintiffs request a joint trial or even discuss trial at all, and this is consistent with the fact that the California Code of Civil Procedure and California court rules under which the Coordination Documents were brought concern the conduct of pre-trial proceedings, settlement, and discovery, and do not even contemplate how trial will be conducted, much less whether trial will be conducted separately or jointly.

The Petition for Coordination simply quoted in full the language of California's coordination statute, Cal. Code Civ. Proc. 404.1, arguing:

"This petition for coordination is based upon the criteria codified in *California Code of Civil Procedure* § 404.1. That is, in the Darvocet cases sought to be coordinated herein:

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. (*California Code of Civil Procedure* § 404.1)."

ER 223.

Thus, the petition to coordinate here was carefully tailored to the statute (CCP 404.1) and the California court rules (Cal. Rules of Court, rules 3.400 et seq.) relating to coordination. These statutes and rules in turn are not concerned with the manner in which the coordinated proceeding is to be tried. Rather, that issue is specifically left for the judge assigned to preside over the coordinated proceeding to decide.

The declaration by counsel Elise Sanguinetti filed in support of the Petition,

ER 246-251, describes in great specificity what pre-trial specific goals Plaintiffs intended to accomplish by coordinating these cases. Counsel declared that, pursuant to the factors set out in California Code of Civil Procedure 404.1 and California Rule of Court 3.400(b) and (c), that the purpose for seeking coordination of the cases was to prevent duplication of efforts on numerous pretrial motions raising difficult or novel legal issues and the pretrial management of a large amount of oral and documentary discovery in this mass pharmaceutical case:

> The subject cases are complex pursuant to California Rule of Court 3.400(b) and (c). Not only are these cases a mass tort, they will include the following: (1) *Numerous pretrial motions* raising difficult or novel legal issues that will be time-consuming to resolve; (2) Management of a large number of witnesses or a substantial amount of documentary evidence; and (3) Coordination with related actions pending in one or more courts in other counties, states or countries, or in federal court. The subject cases arise out of injuries sustained by plaintiffs due to their exposure to the Product, therefore, the cases will include complex scientific and medical issues which consistently trigger *numerous pre-trial motions*. The subject cases assert claims

> against large pharmaceutical companies and will, therefore, necessarily involve several corporate witnesses, scientific researchers, advertising and marketing consultants as well as multiple treating physicians for each plaintiff. In addition, cases involving manufacture, marketing and sale of a prescription drug often result in the production of large amounts of documentary evidence. The cases were not originally filed as complex cases. However, pursuant to California Rule of Court (c) (5), the cases are complex as they are claim involving mass tort.

ER 247-248. Counsel's declaration proceeds to emphasize that coordination is sought specifically to prevent duplicative, burdensome pre-trial proceedings and most importantly, discovery, which in cases involving pharmaceutical drugs is particularly arduous, requiring great expenditure of time and resources by all parties involved:

> Coordination of these related actions will serve the convenience of the parties, witnesses and counsel because discovery in these overlapping actions is likely to be duplicative if they proceed separately. Coordination of these actions will prevent repetitive and redundant depositions regarding the same issues by witnesses. In

> addition, without coordination, duplicative motions concerning the adequacy of the pleadings, the admissibility of scientific evidence and other matters are sure to arise.

ER 249. In turn, avoiding duplication would result in enormous economical savings for the parties and the court:

> Absent coordination, redundant duplicative discovery and motion practice in these overlapping actions would waste litigant and judicial resources. Duplicative discovery will result in unnecessary copying costs, expert costs, depositions costs and filing fees. In addition, the need to take the same depositions in each of these actions will likely increase travel costs for all the litigants' counsel.

ER 250.

Plaintiffs' Memorandum of Points and Authorities in Support of the Petition for Coordination also makes clear that, pursuant to the California coordination statute and rules, plaintiffs were proposing coordination for pre-trial purposes, including pre-trial motions, discovery, settlement, and avoiding inconsistent pre-trial rulings:

> Petitioners' counsel anticipates that the actions will, therefore, 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.

ER 239. Plaintiffs' memorandum also states "Use of committees and standardized discovery in a coordinated setting will expedite resolution of these cases, avoid inconsistent results, and assist in alleviating onerous burdens on the courts as well as the parties. . . ." and "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. ER 240, 243.

Thus, at no point did plaintiffs "propose" that "100 or more persons . . . be tried jointly." Defendants nevertheless argue that under the reasoning of the Seventh Circuit in *In re Abbott Labs., Inc.*, 698 F.3d 568 (7th Cir. 2012), this Court should nevertheless construe the Petition for Coordination as requesting 100 or more plaintiffs to have their claims jointly tried. As now explained, defendants reliance on *Abbott* is misplaced.

V. AS EXPLAINED BY THE DISTRICT COURT IN ITS THOROUGH ORDER, FOR A NUMBER OF REASONS, DEFENDANTS' RELIANCE ON *ABBOTT* IS MISPLACED.

In arguing that this Court should infer into plaintiffs' Petition for Coordination a request for a joint trial, defendant relies on the Seventh Circuit's decision in *In re Abbott Labs., Inc.*, 698 F.3d 568 (7th Cir. 2012). In *Abbott*, the Seventh Circuit held that plaintiffs' motion to consolidate and transfer in Illinois state court was sufficient to confer federal jurisdiction as a mass action pursuant to 28 U.S.C. § 1332(d), making removal of the action proper. *Abbott*, 698 F.3d at 573. As the district court in our case correctly observed, "[a]s a Seventh Circuit case, *Abbott* is not binding on this Court. See *Boyd v. Benton Cnty.*, 374 F.3d 773, 781 (9th Cir. 2004)." ER 5.

The district court further observed that "several district courts within the Ninth Circuit have already declined to follow Abbott in ruling on motions to remand in other Propoxyphene Actions, reducing Abbott's persuasive value. See *Posey v. McKesson Corp.*, No. C 12-5939 RS, 2013 WL 361168, at *2-3 (N.D. Cal. Jan. 29, 2013); Rice, 2013 WL 97738, at *1; *L.B.F.R. v. Eli Lilly & Co.*, No. 12-CV-10025 (C.D. Cal. Dec. 6, 2012), Dkt. # 8, attached as Exhibit 2 to the

Sizemore Declaration ('When the state court joins plaintiffs from other cases and the number exceeds 100—and not simply coordinates the cases—then mass-action removal is proper.')." ER 5-6.

In any event, the district court went on to explain why *Abbott* is factually distinguishable from this case:

First, the court referenced the fact that in *Abbott*, the plaintiffs' request for consolidation specifically stated they were requesting consolidation "through trial" and 'not solely for pretrial proceedings." *Abbott*, 698 F.3d at 571. As the district court recognized, that was not the case here. Plaintiffs' petition for coordination does not contain any such language expressly stating that the coordination was through trial. Rather, as the district court observed:

> "the language in the petition focuses on coordination for pretrial purposes. For example, the Petition states that counsel for the coordinating plaintiffs ("Coordination 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 product.]' Sizemore Decl., Ex. 8 at 62. The Petition goes on to state that '[a]bsent coordination of these actions by a single judge, there is a significant likelihood of duplicative discovery, waste of judicial

resources, and possible inconsistent rulings on legal issues.' Id. The language in the Petition—as well as the complete lack of any mention of joint trial in the Petition—suggests that the Petition is not a request for a joint trial such that CAFA jurisdiction is proper. Moreover, the quotes that Defendant identifies to suggest otherwise appear to be taken out of context. For example, Defendant contends that the Petition requests trial 'for all purposes.' Opp. 2:15. However, the 'for all purposes" quote appears in the Petition in the section in which Coordination Counsel is merely reciting the factors to be considered in evaluating a Petition for Coordination. The full quote reads: "The following factors, catalogued in section 404.1 and discussed in more detail below, all demonstrate that coordination of these included actions is appropriate: One judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice." Sizemore Decl., Ex. 8 at 64. This quote is drawn directly from the California Code of Civil Procedure section that sets out the standards for evaluating whether coordination is appropriate. See Cal. Civ. Proc. Code § 404.1. Plaintiffs in this action should not be penalized because Coordination Counsel provided the court reviewing the Petition with the standard by which the Petition should be analyzed. Moreover, Defendant's attempt to

> characterize this quote as a request for a joint trial appears to the Court to be disingenuous.

ER 6.

Next, in declining to find that in the Petition for Coordination, there was an "implicit" request for a joint trial under *Abbott*, the district court reasoned:

> "[c]onstruing plaintiffs' petition for coordination as the functional equivalent of an express request for a joint trial would conflict with both the guidance prov[ided] by our court of appeals in *Tanoh*, as well as with the general canon of strict construction of removal statues." See Rice, 2013 WL 97738, at *1; see also Posey, 2013 WL 361168, at *3. Moreover, the Court is sympathetic to Plaintiffs' assessment that joint trials in cases such as this one are rare, while the more common practice—which is also the approach Plaintiffs indicate they may take—is to conduct bellwether trials. See Reply 5:11-21. Given the posture of the case and the content of Plaintiff's Petition, the Court does not find it reasonable to construe the Petition as a request for a joint trial. Because Plaintiffs have not sought to join their claims for trial, their action is not removable as a mass action. See Tanoh, 561 F.3d at 956. Plaintiffs' separate state court actions may become removable at some later point if they seek to join their claims for trial. See id. However, unless and

> until that happens, they do not constitute a mass action and removal under CAFA is improper. See id; Posey, 2013 WL 361168, at *3; Rice, 2013 WL 97738, at *1.

ER 7.

The district analysis is spot on. *Abbott* does not justify removal. And this district court is far from alone in reaching this conclusion with respect to virtually identical circumstances as presented here: See (1) Judge Otis D. Wright, II, *L.B.F.R. by Laws v. Eli Lilly, et al.*, Case No. 2:12-cv-10025-ODW (CWx), by Remand Order dated December 6, 2012; (2) Judge William Alsup, *Rice, et al. v. McKesson Corp., et al.*, Case No. C 12-05949 WHA, by Order granting Remand, dated January 7, 2013; (3) Judge Richard Seeborg, *Posey, et al. v. McKesson Corp., et al.* Case No. C 12-05939 RS, by Order granting Remand, dated January 29, 2013; (4) Judge Samuel Conti, *Freitas et al. v. McKesson Corp., et al.* Case No. 12-5948 SC, by Order granting Remand, dated February 25, 2013; (5) Judge Claudia Wilken, *Gutowski, et al. v. McKesson Corp., et al.,* Case No. C 12-6056 CW, by Order granting Remand, dated February 25, 2013; and (6) Judge Jon S. Tigar, *Keene, et al. v. McKesson Corp.*, et al., Case No. 3:12-cv-5924-JST, by Order granting Remand, dated May 29, 2013.

In short, since plaintiffs have not proposed that the claims of 100 or more plaintiffs be tried jointly, under the express terms of CAFA's mass tort provision removal was improper and the district court properly remanded this action to state court.

VI. THE DISTRICT COURT'S ALTERNATIVE GROUNDS FOR REMAND ARE NOT REVIEWABLE, AND IN ANY EVENT THE COURT'S THOROUGH REJECTION OF DEFENDANT'S ALTERNATIVE GROUNDS WAS ENTIRELY CORRECT.

As noted above, Defendant also based its removal on fraudulent joinder, fraudulent misjoinder, federal question jurisdiction, and supplemental jurisdiction under 28 U.S.C. § 1367. ER 88-102. The district court's order of remand properly rejected these non-CAFA grounds (ER 8-17), and appellant did not challenge this portion of the order in its petition for permission to appeal – understandably, since those remand decisions are not reviewable. See *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 673 (9th Cir. 2012), citing with approval *Anderson v. Bayer Corp.*, 610 F.3d 390, 394 (7th Cir. 2010), and *Patterson v. Dean Morris, L.L.P.*, 448 F.3d 736, 742 (5th Cir. 2006), in which the Fifth and Seventh Circuits

affirmed the district courts' remand orders and determined that they lacked jurisdiction to consider other jurisdictional bases for removal to federal court because orders granting remand are generally non-reviewable under 28 U.S.C. § 1447(d). This Court held, 672 F.3d at 673: "Each circuit decision reasoned that it would be statutorily prohibited from reviewing the non-CAFA issue if that had been the district court's sole basis for remand. See *Anderson*, 610 F.3d at 394 ('Typically, federal courts of appeal are barred from reviewing district court orders remanding removed cases to state court.'); *Patterson*, 448 F.3d at 742 (after concluding that CAFA is inapplicable, "[a]ll that remains is an order equitably remanding these actions under § 1452(b), which we cannot reach without contravening a plain statutory command)."

In any event, even assuming for the sake of argument that Defendant could challenge the District Court's remand order on non-CAFA grounds, Judge Guiterrez's thorough rejection of Defendant's non-CAFA arguments was entirely correct. See ER 8-17.

CONCLUSION

For all the foregoing reasons, the district court's order remanding this action to the state court should be affirmed.

Dated: August 5, 2013

Respectfully submitted,

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THE SIZEMORE LAW FIRM

SILL LAW GROUP PLLC

ESNER, CHANG & BOYER

By: s/ Andrew N. Chang

STATEMENT OF RELATED CASES

Corber, et al. V. Xanodyne Pharmaceuticals USA, Inc., No. 13-56306

s/ Stuart B. Esner

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Rule 32(a)(7)(b)(I) of the F.R.A.P., I hereby certify that the foregoing brief contains 8,406 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using WordPerfect in 14-point Times New Roman font.

S/ Stuart B. Esner

ADDENDUM OF PERTINENT STATUTES

California Code of Civil Procedure 404

When civil actions sharing a common question of fact or law are pending in different courts, a petition for coordination may be submitted to the Chairperson of the Judicial Council, by the presiding judge of any such court, or by any party to one of the actions after obtaining permission from the presiding judge, or by all of the parties plaintiff or defendant in any such action. A petition for coordination, or a motion for permission to submit a petition, shall be supported by a declaration stating facts showing that the actions are complex, as defined by the Judicial Council and that the actions meet the standards specified in Section 404.1. On receipt of a petition for coordination, the Chairperson of the Judicial Council may assign a judge to determine whether the actions are complex, and if so, whether coordination of the actions is appropriate, or the Chairperson of the Judicial Council may authorize the presiding judge of a court to assign the matter to judicial officers of the court to make the determination in the same manner as assignments are made in other civil cases.

California Code of Civil Procedure 404.1

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.

California Code of Civil Procedure 598

The court may, when the convenience of witnesses, the ends of justice, or the economy and efficiency of handling the litigation would be promoted thereby, on motion of a party, after notice and hearing, make an order, no later than the close of pretrial conference in cases in which such pretrial conference is to be held, or, in other cases, no later than 30 days before the trial date, that the trial of any issue or any part thereof shall precede the trial of any other issue or any part thereof in the case,

except for special defenses which may be tried first pursuant to Sections 597 and 597.5. The court, on its own motion, may make such an order at any time. Where trial of the issue of liability as to all causes of action precedes the trial of other issues or parts thereof, and the decision of the court, or the verdict of the jury upon such issue so tried is in favor of any party on whom liability is sought to be imposed, judgment in favor of such party shall thereupon be entered and no trial of other issues in the action as against such party shall be had unless such judgment shall be reversed upon appeal or otherwise set aside or vacated.

If the decision of the court, or the verdict of the jury upon the issue of liability so tried shall be against any party on whom liability is sought to be imposed, or if the decision of the court or the verdict of the jury upon any other issue or part thereof so tried does not result in a judgment being entered pursuant to this chapter, then the trial of the other issues or parts thereof shall thereafter be had at such time, and if a jury trial, before the same or another jury, as ordered by the court either upon its own motion or upon the motion of any party, and judgment shall be entered in the same manner and with the same effect as if all the issues in the case had been tried at one time.

California Code of Civil Procedure 1048(a)

(a) When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

28 U.S.C.A. § 1332

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between--

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts
shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title--

(1) a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of--

(A) every State and foreign state of which the insured is a citizen;

(B) every State and foreign state by which the insurer has been incorporated; and

(C) the State or foreign state where the insurer has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d)(1) In this subsection--

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

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

(C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall within

the definition of the proposed or certified class in a class action.

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

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

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

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

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of--

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2)--

(A)(i) over a class action in which--

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant--

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class

action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

(5) Paragraphs (2) through (4) shall not apply to any class action in which--

(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

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

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

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim--

(A) concerning a covered security as defined under 16(f)(3)1 of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)2) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

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

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1)

of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

(11)(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B)(i) As used in subparagraph (A), the term “mass action” means any civil action (except a civil action within the scope of section 1711(2)) 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, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term “mass action” shall not include any civil action in which--

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C)(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

(ii) This subparagraph will not apply--

(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

(e) The word “States”, as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C.A. § 1453

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

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

(c) Review of remand orders.--

(1) In general.--Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not more than 10 days after entry of the order.

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

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

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

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

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

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

(1) a claim concerning a covered security as defined under section 16(f)(3) of the

Securities Act of 1933 (15 U.S.C. 78p(f)(3)1) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

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

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

9th Circuit Case Number(s) **U.S.C.A. Docket Nos. 13-56310**

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CERTIFICATE OF SERVICE

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) August 5, 2013

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9th Circuit Case Number(s) **U.S.C.A. Docket Nos. 13-56310**

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3. **PLAINTIFFS-APPELLEES JUDITH ROMO, ET AL.,'S EXCERPTS OF RECORD VOLUME 3**
4. **PLAINTIFFS-APPELLEES JUDITH ROMO, ET AL.,'S EXCERPTS OF RECORD VOLUME 4**
5. **PLAINTIFFS-APPELLEES JUDITH ROMO, ET AL.,'S EXCERPTS OF RECORD VOLUME 5**

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