Nos. 13-6287, 13-6288, 13-6289, 13-6290, 13-6291
13-6292, 13-6293, 13-6294, 13-6295, 13-6206, 13-6297

# In the United States Court of Appeals for the Tenth Circuit

In re: JOHNSON & JOHNSON, *et. al*.,

Nos. 13-832-L, 13-833-L, 13-834-L, 13-836-L, 13-838-L,
13-839-L, 13-840-L, 13-841-L, 13-844-L, 13-845-L, 13-846-L

On Appeal from the United States District Court
for the Western District of Oklahoma
(Leonard, J.)

## PLAINTIFFS-APPELLEES RESPONSE IN OPPOSITION TO MOTION FOR REHEARING EN BANC

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### I. There are no grounds for en banc review.

Rule 35(a) states that an en banc hearing or rehearing "is not favored" and that it ordinarily will be ordered only when (1) "en banc consideration is necessary to secure or maintain uniformity of the court's decisions" or (2) "the proceeding involves a question of exceptional importance." Fed R. App. P. 35(a).

Here, there is no conflicting opinion in this Circuit. Thus, in order for en banc review to be appropriate, the "exceptional importance" standard must be met. "En banc review should be limited generally to only those cases that raise issues of important systemic consequences for the development of the law and the administration of justice." *Watson v. Geren*, 758 F.3d 156, 160 (2nd Cir. 2009).

In an attempt to meet this "exceptional importance" standard, Defendant-Appellants incorrectly argue that the rulings from other circuits are not distinguishable on the facts, as accurately recognized by the Panel. Slip. Op. at 22. Further, potential circuit split is not a reason to grant en banc review under the Tenth Circuit local rules. *See* 10th Cir. R. 35.1(A) ("En banc review is an extraordinary procedure intended to focus the entire court on an issue of exceptional public importance, or on a panel decision that conflicts with a decision of the United States Supreme Court or of this court." (emphasis added)).

The Panel correctly concluded that the filing of eleven cases in the same court is not a request to have 100 or more claims tried jointly; and therefore correctly concluded that the district court properly ruled that there was no jurisdiction under the Class Action Fairness Act of 2005 (CAFA), and therefore correctly concluded that there was no jurisdiction under CAFA. Defendants-Appellants' petition for en banc rehearing should therefore be denied.

## II. The Panel correctly concluded that Plaintiffs-Appellees' separately filed lawsuits did not propose that their claims were to be "tried jointly."

The essential basis for the petition for rehearing en banc is that the Panel's conclusion that the separately filed cases, each of less than 100 plaintiffs, did not fall with CAFA somehow subverts CAFA to such a degree that extraordinary step of an en banc review is warranted. However, the Panel opinion is legally correct, and certainly does not minimize or degrade CAFA. Instead, the opinion applies both the words used by Congress and fulfills the purpose of CAFA.

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. § 1332(d)(11)(B). Defendants-Appellants' assertions aside, this provision is clear and unambiguous. If Plaintiffs-Appellees propose a trial in which the claims of 100 or more are to be resolved at the same time, then the action sufficiently resembles a class action as to be subject to removal under

CAFA. According to Defendants-Appellees, when Congress used the words "tried jointly," it did not really mean a joint trial. Rather, according to Defendants-Appellants, Congress apparently meant some undefined type of joint trial even though that is not what Congress said.

Defendants-Appellants' position is in conflict with the recent Supreme Court opinion noted by the Panel. Slip Op. at 20. *See Miss. ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 744 (2014) (interpreting the term "plaintiffs" as used in CAFA "in accordance with its usual meaning," leading to an easy-to-apply rule, and noting that "when judges must decide jurisdictional matters, simplicity is a virtue.").

Given that Plaintiffs-Appellants' cases were all separately filed actions of less than 100 and each petition specifically stated that the "[j]oinder of Plaintiffs' claims is for the purpose of pretrial discovery and proceedings only and not for trial," the Panel properly found that Plaintiffs-Appellants had not "proposed" a joint trial within the meaning of the plain language of the statute, as supported by the legislative history and authority from the Supreme Court and the other circuits.

Defendants-Appellants continue to argue that by filing all eleven actions (each with claim of less than 100) in a single court, Plaintiffs-Appellees have made an implicit proposal for a joint trial. In support, Defendants-Appellants rely on *In re Abbott Labs., Inc.*, 698 F.3d 568 (7th Cir. 2012). However, as correctly noted by

the Panel, the examples of an implicit proposal for a joint trial – the filing of a single complaint containing more than 100 plaintiffs; a proposal for a trial involving exemplary plaintiffs, to be followed by application of issue or claim preclusion to more than 100 claims; or an express request for consolidation through trial – do not exist in this case. Slip Op. at 22.

Further, the Panel noted correctly that a mass action cannot result from a proposal for joinder by the defendants. Slip Op. at 22. *See* 28 U.S.C. § 1332(d)(11)(B)(ii)(II); *Anderson v. Bayer Corp*., 610 F3d 390, 393-94 (7th Cir. 2010)("[Defendant's] argument that these separate lawsuits be treated as one action is tantamount to a request to consolidate them – a request that Congress has explicitly stated cannot become a basis for removal as a mass action"); *Tanoh v. Dow Chem. Co*., 651 F.3d 945 (9th Cir. 2009)(noting that defendant, "while never formally moving to consolidate plaintiffs' claims -- urges us to treat those claims as if they should have been consolidated for purposes of removal under CAFA….[This] request precisely fits the statutory limitation [in § 1332(d)(11)(B)(ii)(II)]."

Defendants-Appellees also urge CAFA applies based on *Standard Fire Insurance Company v. Knowles*, 133 S. Ct. 1345 (2013). However, as correctly noted by the Panel, in that case, the Court cautioned, when performing the CAFA analysis, against "treat[ing] a nonbinding stipulation as if it were binding,

exalt[ing] form over substance, and run[ning] directly counter to CAFA's primary objection: ensuring Federal court consideration of interstate cases of national importance." *Id*. at 1350 (internal quotation marks omitted). However, as also noted by the Panel, "'[t]he holding of *Knowles*, which concerns a different section of the statute, plainly does not address the issue presented in this case.'" Slip Op. p. 28; *Scimone v. Carnival Corp*., 720 F.3d 876, 886 (11th Cir. 2013). The Panel distinguished *Knowles* from this case because in *Knowles*, there was a stipulation regarding the amount in controversy that purported to bind absent class members that could not be legally bound before the class was certified. In comparison, the named plaintiffs in these cases specifically stated in their petitions that they do not intend to try their cases jointly. Thus, these cases are distinguishable. Slip Op. at 28.

The Panel accurately noted that there is no case that is factually identical to these cases: where multiple suits were filed, each with less than 100 plaintiffs, but in aggregate more than 100 plaintiffs, assigned to the same state-court judge, with each complaint noting that the claims within the petition would be consolidated for pretrial and discovery, but with an express disclaimer of any request for joint trial. Slip Op. at 28-30. After reviewing the applicable case law, the Panel accurately noted that in none of the potentially applicable cases, including *Romo*, had the court found that a proposal for joint trial existed solely because the plaintiffs have

filed multiple cases, each containing less than 100 claims. Slip Op. at 31. *See Romo v. Teva Pharms. USA, Inc.*, 731 F.3d 918 (9th Cir.2013). Thus, the Panel was correct in its decision that CAFA does not apply.

## III. The Panel decision not to reach the Fraudulent Misjoinder issue was properly made and is not a basis for re-hearing en banc.

It is undisputed that this court acquired jurisdiction over this appeal based on the specific jurisdiction to review a CAFA remand order that is provided in 28 U.S.C. § 1453(c). The decision to exercise jurisdiction over any non-CAFA basis for appeal is discretionary. *See Coffey v. Freeport McMoran Copper & Gold*, 581 F.3d 1240 (10th Cir. 2009)(per curium).

As noted by the Panel, the doctrine of fraudulent misjoinder of plaintiffs has not been recognized in this circuit.[1] Slip Op. at 32. Given that the doctrine has not

[1] In fact, no district court within the Tenth Circuit has applied the doctrine. *Magnuson v. Jackson*, 2012 U.S. Dist. LEXIS 101982 at *11 (N.D. Okla. July 23, 2012). Further, in similar pharmaceutical product liability litigation, district courts in other circuits have distinguished the case where the doctrine arose (*Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353 (11th Cir. 1996) abrogated on other grounds by *Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir. 2000) and declined to apply the doctrine. *See, e.g., Coleman v. Bayer Corp.*, No. 4:10CV01639 SNLJ, 2010 U.S. Dist. LEXIS 143673 (E.D. Mo. Dec. 9, 2010) (involving the prescription drug Trasylol); *Dickerson v. GlaxoSmithKline, LLC*, No. 4:10CV00972 AGF, 2010 U.S. Dist. LEXIS 69070 (E.D. Mo. July 12, 2010) (involving the prescription drug Avandia); *Aurillo v. GlaxoSmithKline, LLC*, No. 4:10CV968 SNLJ, 2010 U.S. Dist. LEXIS 68348 (E.D. Mo. July 9, 2010) (involving the prescription drug Avandia); *Hall v. GlaxoSmithKline, LLC*, 706 F. Supp. 2d 947 (E.D. Mo. 2010) (involving the prescription drug Avandia).

been recognized, and has been distinguished in similar cases in numerous courts, Defendants-Appellants' complaint that they are left without guidance is disingenuous. The decision not review the diversity issue is within the discretion of this court and not a proper issue for re-hearing en banc.

## IV. Conclusion.

For the foregoing reasons, the Petition for Rehearing en banc should be denied.

Date: May 2, 2014

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**CERTIFICATE OF COMPLIANCE WITH RULE 32**

1. This brief complies with the type-volume limitations of Fed.R.App.P. 32 (a)(7) (B) because this brief contains 1,676 words, excluding the parts of the brief exempted by Fed. R. App. P. 21(a) (7) (B) (iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a) (5) and type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in 2007 in 14-point Times New Roman font.

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**CERTIFICATE OF COMPLIANCE WITH RULE 25.5**

This brief complies with the privacy redaction requirements of 10th Cir.R. 25.5 because this brief contains no private data that is required to be redacted.

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## CERTIFICATE OF SERVICE

I hereby certify that I have filed the foregoing and served via the Court's CM/ECF system on May 2, 2014. A true and correct copy of the same was sent by Electronic Mail on May 2, 2014 and by Federal Express on May 2, 2014 to the following counsel of record:

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