No. 13-56306

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARGALIT CORBER, et al.,
Plaintiffs-Appellees,

v.

XANODYNE PHARMACEUTICALS, INC.,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
CASE NO. CV 2:12-CV-09986 PSG-E

SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLANT XANODYNE PHARMACEUTICALS, INC.

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CORPORATE DISCLOSURE STATEMENT

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

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INTRODUCTION

This en banc Court is considering whether coordination "for all purposes" of more than 40 multi-plaintiff lawsuits – each of which includes dozens of plaintiffs and each of which includes a demand for jury trial – under state-court coordination procedures, falls within the "mass action" removal provision of the Class Action Fairness Act ("CAFA"), 28 U.S.C. §1332(d)(11). In a decision that directly conflicts with decisions of the United States Court of Appeals for the Seventh and Eighth Circuits, the panel majority found it did not.

The vast majority of plaintiffs in this and the other lawsuits are not California residents. The defendants, save one nominal distributor defendant, are not California residents (i.e., they are not incorporated in California and they do not have a principal place of business in California). The injuries alleged by the vast majority of plaintiffs did not occur in California and the products they allege caused their injuries were not bought, sold, or used in California. Nevertheless, plaintiffs' counsel filed lawsuits in California state courts and, through plaintiffs' action under California's court procedures, joined them in one court, before one judge for "all purposes." The panel majority concluded that was not a proposal that the claims be tried jointly and that CAFA's mass action provision did not apply. To reach that conclusion, it focused on references to pre-trial matters (e.g., "[u]se of committees and standardized discovery," avoid "duplicate discovery") in

plaintiffs' coordination petition, while ignoring references to resolution of the claims (e.g., "danger of inconsistent judgments and conflicting determinations of liability"). The majority, however, did not explain why language regarding pretrial matters took precedence over language proposing coordination for trial. In fact, the majority's recognition and erroneous balancing of the pre-trial and trial proposals in the coordination petition demonstrates that plaintiffs' proposal was not "only" or "solely" for pre-trial purposes, but rather was a proposal that the claims of more than 1,500 plaintiffs be "tried jointly." The panel majority's decision should be vacated and the district court's decision should be reversed.

ARGUMENT

A. CAFA AND ITS PURPOSE

Congress enacted the CAFA "[t]o assure fair and prompt recoveries for [plaintiffs] with legitimate claims"; to "restore the intent of the framers of the United States Constitution 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." P.L. 109-2, §2(b). The legislation was necessary to curb rampant abuses of the class action device of litigation. Forum shopping was chief among the abuses Congress sought to end. It was common for plaintiffs' counsel to seek out receptive state-court judges. The result was always the same − counsel benefitted, plaintiffs received

little to no compensation; defendants' due process rights were trampled and they were forced to spend exorbitant amounts defending and settling lawsuits with little to no merit; and, the American public paid the price.

But "class actions" in the classical sense were not the only lawsuits riddled with abuses. Congress recognized that oftentimes plaintiffs' counsel amassed multiple unrelated plaintiffs in a single lawsuit resulting in the same, or worse, abuses as those that plagued class actions. As the Committee noted,

> 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, 2005 U.S.C.C.A.N. 44, 47.

To end "class action" and "mass action" abuses, Congress broadened federal diversity jurisdiction. It expanded 28 U.S.C. §1332 to permit actions filed in state court to be removed to federal court if the requirements in the statute were satisfied. More importantly for purposes here, Congress included a provision in §1332 allowing for removal of "mass actions" in the same manner as class actions. 28 U.S.C. §1332(d)(11)("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.").

A "mass action" is "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). Congress was careful to preserve for state-court adjudication lawsuits involving "local controversies." Congress also was careful to ensure the legislation did not turn the tables in favor of defendants by excluding from the definition of "mass action," "any civil action in which…the claims are joined upon motion by a defendant." *Id*. §1332(d)(11)(B)(ii)(II). Finally, so as not to infringe state courts from efficiently handling numerous lawsuits properly filed in their courts, Congress excluded from the definition of "mass action" those actions in which the claims are consolidated or coordinated "solely for pretrial purposes." *Id*. §1332(d)(11)(B)(ii)(IV).

B. THIS CASE FITS CAFA REMOVAL LIKE A GLOVE

"Mass actions" under CAFA must (1) involve 100 or more persons, (2) whose monetary relief claims are "proposed to be tried jointly," (3) on the grounds that the plaintiffs' claims involve "common questions of law or fact." There is no dispute that this and the other 40 lawsuits involve claims of more than 100 persons and plaintiffs sought coordination stating common questions existed. Only the "proposed to be tried jointly" factor is at issue.

The key word in the statutory language is "proposed" – not "intended," not "requested," and not "determined" or "actually." While the panel majority acknowledged that the statute required only that plaintiffs "propose" a "joint trial," its decision turned on its conclusion that plaintiffs did not "request" or "intend" the claims "to be tried jointly." *Romo v. Teva Pharms. USA, Inc.*, 731 F.3d 918, 922 (9th Cir. 2013) ("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." (emphasis added)); *id.* at 923 (distinguishing *In re Abbott Labs, Inc.*, 698 F.3d 568 (7th Cir. 2012) based on the *Abbott* plaintiffs' "*request*…explicitly and expressly" to consolidate "'cases through trial and not solely for pretrial proceedings,' thereby removing any question of the plaintiffs' *intent*" (emphasis added).) CAFA, however, does not require a "request," which means to "formally ask," that the claims be "tried jointly"; it requires a "proposal," which means "to suggest," that the claims be "tried jointly." Merriam-Webster Online Dictionary. Surely, moving to coordinate actions "for all purposes" under a procedure that, as plaintiffs candidly admit, vests plenary authority in the coordination judge to determine how the proceedings will be conducted (*see* Plaintiffs-Appellees' Response to Petition for Rehearing En Banc ("Plaintiffs' En Banc Resp."), p. 6 ("it is left to the discretion of the coordination Judge whether there will be one trial"), DktEntry78), constitutes a "proposal" for the claims to be

tried jointly. Plaintiffs petitioned for coordination for "all purposes." "All" means "all" – regardless of whether plaintiffs now, post-removal, argue that it does not.

Moreover, the panel majority did not explain how plaintiffs' purported "intent" alters California's coordination statute and rules. The reason is simple – it does not. The propriety of removal under CAFA here turns on the definition of "mass action" and the consequences of coordination under the California statute. In short, what is relevant is the substance of what occurred: *Plaintiffs* proposed the actions be coordinated (not calling in to play CAFA's exception that it not be *defendants* who sought joinder of the actions); California's coordination procedures provide that lawsuits will be coordinated for all purposes (satisfying CAFA's requirement that the claims are proposed to be tried jointly); and the number of plaintiffs in the coordinated lawsuits exceeds 100 (satisfying CAFA's "100 or more persons" requirement).

That Congress recognized state court coordination and consolidation procedures can, and will, result in the creation of "mass actions" within the meaning of CAFA is indisputable and evidenced in 28 U.S.C. §1332(d)(11)(B)(ii)(IV) (emphasis added), which excludes from the definition of "mass action" claims that are "consolidated or coordinated *solely* for pretrial purposes." Here, California's coordination statute and rules provide coordination is, by definition, "for all purposes" and not solely for pre-trial proceedings. The

panel majority skimmed over the unambiguous word "solely," concluding instead that the "*focus* of [plaintiffs] petition is on pretrial matters." The panel majority did not, and could not, find that the petition sought coordination *solely* for pretrial proceedings. That distinction is important, as it is only the latter that is an exception to removal under the "mass action" provision. That plaintiffs' petition may have "focused" on pretrial matters (which Xanodyne disputes) does not alter the fact that plaintiffs "proposed" the claims be coordinated before one judge for all purposes; i.e., plaintiffs "proposed" the claims "be tried jointly." In fact, plaintiffs now concede that through coordination of these actions "the risks of inconsistent rulings and judgments would be reduced [] because one judge would preside over the pretrial proceedings of all of the actions and would ultimately preside over the trial or the multiple trials of those actions." (Plaintiffs' En Banc Resp., p. 8.)

Notwithstanding that concession, plaintiffs persist in arguing that there is no proposal for the claims to be tried jointly unless and until it is determined that there actually will be a single trial of all claims of all plaintiffs. (*See id.*, p. 7 ("[I]t is only upon an order coordinating multiple actions for trial, which does not exist in this case, that it is *determined* whether there will be one trial…." (emphasis added).) However, as is true of the terms "request," and "intend," "determine" (i.e., to decide) is not synonymous with "propose," and CAFA does not require a

"determination" that the claims will be tried jointly, only a proposal. And, plaintiffs' argument has been rejected not only by the panel majority here, but also other appellate courts. *See Romo*, 731 F.3d at 924, n.2 (agreeing "'joint trial' does not mean everyone sitting in the courtroom at the same time"); *Teague v. Johnson & Johnson,* Case No. 13-6287, pp. 23-24 (10th Cir. Apr. 11, 2014) (slip op.) (agreeing "'joint trial' need not involve all 650 plaintiffs being seated together in the same courtroom at the same time"); *Atwell v. Boston Scientific Corp.*, 740 F.3d 1160, 1163 (8th Cir. 2013) (finding construction of CAFA to require single trial would render it defunct); *Abbott*, 698 F.3d at 573 (noting joint trial can take different forms).

Furthermore, neither the statutory language nor the legislative history support a conclusion that the "mass action" provision is satisfied only where all claims of all plaintiffs are tried simultaneously before a single trier of fact. And, in fact, that overly narrow view of the phrase "proposed to be tried jointly" conflicts with the stated intention of CAFA's sponsors who stressed that the "mass action" "provision is intended to mean a situation in which it is proposed or ordered that claims be tried jointly in any respect − *that is, if only certain issues are to be tried jointly* and the case otherwise meets the criteria set forth in this provision…." Class Action Fairness Act of 2005, Proceedings and Debates of the 109th Congress, First Session, February 17, 2005, 151 Cong. Rec. H723-01, 2005 WL

387992, at H729 (emphasis added). That is exactly what plaintiffs proposed through coordination of these lawsuits.

It is undeniable that when plaintiffs seek to coordinate or consolidate the claims of 100 or more persons for more than pre-trial purposes, and certainly for "all purposes," it is a proposal to try jointly the claims of those plaintiffs and is removable under CAFA where the other requirements are satisfied. The panel majority erred in holding otherwise.

C. THE PANEL DECISION DIRECTLY CONFLICTS WITH DECISIONS FROM OTHER CIRCUITS

As Judge Gould noted in this dissent, the panel majority's decision conflicts with decisions from other circuits. *Romo*, 731 F.3d at 925 (J. Gould dissenting) (noting the majority opinion "misinterprets CAFA and does so in a way that creates a circuit split…with the Seventh Circuit's decision in *Abbott*). *Abbott* preceded the panel majority's decision here and *Atwell* was issued after. Both involved facts substantively identical to those here and in both instances, the courts upheld removal under CAFA's mass action provision.

In *Abbott*, numerous multi-plaintiff cases were filed in different state courts in Illinois. The plaintiffs in those lawsuits alleged injuries from the same drug. As here, the plaintiffs then sought to bring those lawsuits to one court under one judge pursuant to a procedure termed "consolidation" in Illinois, citing common questions of fact in the cases. *Abbott*, 698 F.3d at 571. The defendant removed the

cases under CAFA's mass action provisions. *Id*. Relying on *Bullard v. Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759, 762 (7th Cir. 2008), and *Koral v. Boeing Co.*, 628 F.3d 945, 947 (7th Cir. 2011), the Seventh Circuit concluded CAFA's mass action requirements were satisfied based on the plaintiffs' request for consolidation in state court "through trial" because that consolidation "'would also 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,'" which the Seventh Circuit held necessarily proposes the claims be tried jointly. *Abbott*, 698 F.3d at 573.

Like the *Abbott* plaintiffs' efforts to avoid inconsistent adjudication, plaintiffs here moved for coordination to avoid "duplicate and inconsistent rulings, orders, or judgments." Plaintiffs' requested coordination "for all purposes" under California procedure includes coordination for trial. The distinction the panel majority attempts to draw between *Abbott* and this case based on the express request by the *Abbott* plaintiffs that their cases be consolidated "through trial" is illusory. First, the panel majority's attempt to distinguish this case from *Abbott* based on the consolidation of the cases (in *Abbott*) versus the coordination of cases (here) simply is a distinction without a difference. The nomenclature applied by states to their procedures does not render the procedures different in any way but name.

Second, the *Abbott* plaintiffs' use of the words "through trial" versus plaintiffs request for coordination "for all purposes" here are not materially different. Plaintiffs here invoked California's coordination procedure (and recited those provisions in their petition for coordination), which provides that the actions will be coordinated before one judge "for all purposes" where the factors for coordination are satisfied. There is no option to coordinate cases "solely for pretrial purposes." *See* Cal. Civil Proc. Code §404.1. Once coordinated, the coordination judge has the power to conduct the pre-trial, trial, and post-trial proceedings. Plaintiffs' petition to coordinate these actions under California's coordination procedures can be construed only as a "propos[al] [for the claims] to be tried jointly."

Finally, it is difficult to discern how a rule that provides that actions may be consolidated in one judicial circuit for pretrial, trial, and post-trial proceedings is different from a rule that provides actions may be coordinated "for all purposes." Where lawsuits are concerned, "pretrial, trial, and post-trial proceedings" are "all purposes." Regardless of whether other words can be quibbled with, "all" undeniably means "all."

The Eighth Circuit Court of Appeals in *Atwell* similarly found CAFA's "mass action" requirements satisfied under facts substantially similar to those here. *Atwell* involved three groups of plaintiffs who sued four medical device

manufacturers in Missouri state courts. *Atwell*, 740 F.3d 1160. The plaintiffs then moved to have the cases assigned "to a single Judge for purposes of discovery and trial" under the court's rule that permitted reassignment of three or more actions involving claims of personal injury by multiple plaintiffs against the same defendants if the presiding judge determines the administration of justice would be served by the reassignment.

After a hearing on the motion, the defendant removed the cases to federal courts, which subsequently remanded the cases finding the plaintiffs had not proposed the claims be "tried jointly." The Eighth Circuit reversed, finding the district courts erred in failing to follow or properly apply the Seventh Circuit's decision in *Abbott*. The Eighth Circuit expressly agreed with the *Abbott* decision and with Judge Gould's dissenting opinion interpreting CAFA and the *Abbott* decision in this case. *Id*. at 1165. The Eighth Circuit found the plaintiffs urged the state court to assign the claims of more than 100 plaintiffs to a single judge who could handle the cases for consistency of rulings, judicial economy, and administration of justice, notwithstanding that the plaintiffs tried to disavow a desire to consolidate the cases for trial. *Id*. The court explained that "it is difficult to see how a 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." *Id*. (*quoting Abbott*, 698 F.3d at 573). As a result, the court vacated the orders remanding the cases to state court.

The facts here are indistinguishable from those in *Abbott* and *Atwell*. As was true in *Abbott* and *Atwell*, plaintiffs assert their claims involve common questions of law and fact. As was true in *Abbott* and *Atwell*, plaintiffs sought to join the claims of all plaintiffs to avoid inconsistent judgments and rulings. As was true in *Abbott* and *Atwell*, plaintiffs sought to join the actions using state-court procedures. As was true in *Abbott* and *Atwell*, plaintiffs sought to have their claims "tried jointly." The panel majority erred to hold otherwise.

D. *MISSISSIPPI EX REL. HOOD V. AU OPTRONICS CORPORATION* DOES NOT SUPPORT PLAINTIFFS' ARGUMENTS

Since the panel decision was issued, the United States Supreme Court issued a decision addressing CAFA's mass action provision. *See Mississippi ex. Rel. Hood v. Au Optronics Corporation*, 134 S. Ct. 736 (2014). Pointing to a single phrase in the decision, plaintiffs contend that the decision supports the panel majority's decision that CAFA's mass action provision does not apply here. (*See* Plaintiffs' Notice of Supplemental Authority, Jan. 16, 2014, DktEntry 83.) Plaintiffs' reliance is misplaced.

In *Au Optronics*, the defendants argued that a lawsuit filed by a state that included restitution claims for unnamed residents of the state constituted a mass action removable under CAFA. The Supreme Court disagreed explaining that "the

'100 or more persons' referred to in the statute are not unspecified individuals who have no actual participation in the suit, but instead the very 'plaintiffs' referred to later in the sentence—the parties who are proposing to join their claims in a single trial." *Au Optronics*, 134 S. Ct. at 742. Plaintiffs hang their hat on the phrase, "the parties who are proposing to join their claims in a single trial." The phrase plaintiffs pluck from the decision does not, as they suggest, support the panel majority's decision.

First, the issue in *Au Optronics* is not the "proposed to be tried jointly" factor of the mass action provision, but rather the "100 or more persons" requirement, and whether it includes un-named, unspecified plaintiffs. Second, the Court does not elucidate or otherwise explain what is meant by a "single trial." Here, there are no un-named or unspecified plaintiffs. The lawsuits name over 1,500 plaintiffs whose claims were coordinated before "one judge [who will] preside over the pretrial proceedings of all of the actions and [will] ultimately preside over the trial or the multiple trials of those actions." (Plaintiffs' En Banc Resp., p. 8.)

Significantly, *Au Optronics* confirms that CAFA's mass action provisions operate as an exception to the general rule that plaintiffs, as the masters of their complaints, may plead to avoid federal jurisdiction. As the Court explained, there are numerous instances where courts look behind the pleadings to ensure

defendants are not improperly deprived of their right to a federal forum. *See AU Optronics*, 134 S. Ct. at 745 (citing fraudulent joinder and real party in interest principles as examples of situations in which the concept that plaintiffs are the masters of their complaints does not apply).

In fact, the Supreme Court did just that in *Standard Fire Insurance Co. v. Knowles*, 133 S. Ct. 1345 (2013), also addressing CAFA removal. In *Knowles*, the Supreme Court reasoned that being "masters of their complaints" did not justify the plaintiffs' attempt to limit the damages sought, through gamesmanship, in an effort to avoid CAFA's jurisdictional amount-in-controversy threshold. The named plaintiff in *Knowles* pled that the plaintiffs would seek to recover total damages of less than $5 million and filed an affidavit reiterating that stipulation. The Court rejected the attempt. Its reason was simple – the stipulation was not binding. *Id.*

The same is true here. After filing more than 40 multi-plaintiff lawsuits, plaintiffs sought to join them in a single proceeding before a single judge for all purposes. Their after-the-fact argument that they sought coordination for pre-trial purposes only is not binding; it is not their decision to make. As plaintiffs concede, how to conduct coordinated proceedings is solely within the discretion of the coordination judge and that judge has the attendant powers to conduct those proceedings through trial.

Both plaintiffs and the panel majority relied on the "masters of their complaint" principle to support their contentions that plaintiffs are free to join multiple, but less than 100, plaintiffs in a single lawsuit to avoid federal jurisdiction. While that is the conclusion this Court reached in *Tanoh v. Dow Chemical Co.*, 561 F.3d 945, 956 (9th Cir. 2009), and the conclusion reached a few days ago by the Tenth Circuit Court of Appeals in *Teague*, that is not the issue here. Unlike in *Tanoh* and *Teague*, where the plaintiffs did not take the additional step to coordinate their cases "for all purposes" after filing their multi-plaintiff complaints, plaintiffs here did. As this Court recognized in *Tanoh*, the Eleventh Circuit recognized in *Scimone v. Carnival Corp.*, and the Tenth Circuit recognized in *Teague*, plaintiffs' post-filing conduct may render actions removable that were not removable when filed. *See Tanoh*, 561 F.3d at 956 ("Plaintiffs' separate state court actions may, of course, become removable at [some] later point if plaintiffs seek to join the claims for trial.") *Scimone,* 720 F.3d 876 (11th Cir. 2013) (stating CAFA's plain meaning would support removal if plaintiffs moved for consolidation on the eve of trial); *Teague*, No. 13-6287, p. 31 (slip op.) (noting "plaintiffs have not yet taken this step, and thus there is no 'mass action' as yet that would support CAFA removal to federal court"); *Teague*, concurring op. p. 4 (noting "removal can occur at any time in the future within 30-days of a triggering event," and concluding "removals here simply [were] premature").

Defendants removed the lawsuits because *plaintiffs* sought to join these actions in a single coordinated proceeding before a single judge for all purposes. Just as the Supreme Court rejected the notion that the "master of the complaint" principle prevents a court from looking beyond the surface of the pleadings to determine whether federal jurisdiction exists in other contexts, it should be rejected here.

CONCLUSION

Congress's express intent in enacting CAFA was "[t]o assure fair and prompt recoveries for [plaintiffs] with legitimate claims"; to "restore the intent of the framers of the United States Constitution 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." P.L. 109-2, §2(b). There can be no dispute that these lawsuits are interstate cases of national importance. The overwhelming majority of plaintiffs have no nexus whatsoever to California. Plaintiff should not be permitted to deprive defendants of federal jurisdiction by filing individual, non-class action lawsuits, and then, through state procedural devices such as California's coordination procedures, weave them back together to create the very class-action–in-disguise that CAFA was intended to preclude. Plaintiffs' tactic should be recognized for what it is and rejected. The panel majority's decision

should be vacated, and the district court's order should be reversed.

April 14, 2014

Respectfully submitted,

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By: */s/ Linda E. Maichl*
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CERTIFICATION OF COMPLIANCE

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for rehearing en banc is proportionately spaced, has a Times New Roman typeface of 14 points and contains 3993 words.

Respectfully submitted,

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Attorneys for Defendant-Appellant
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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2014, I submitted the foregoing with the Clerk of the Court for the United States Court of Appeal for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Respectfully submitted,

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