Court of Appeals No. 13-56310

United States Court of Appeals for the Ninth Circuit

JUDITH ROMO, ET AL.,

Plaintiffs-Appellees,

v.

TEVA PHARMACEUTICALS USA, INC.,

Defendant-Appellant, Teva Pharmaceuticals USA, Inc.

Appeal from the United States District Court for the Central District of California, District Court No. 5:12-CV-2036-PSG

APPELLANT TEVA PHARMACEUTICALS USA, INC.'S SUPPLEMENTAL BRIEF ON REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

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

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INTRODUCTION

The plaintiffs in this case filed a motion to coordinate "for all purposes" before a single California trial court over forty different lawsuits brought in various counties on behalf of over 1,500 personal-injury claimants concerning the same pain medication. The question is whether this coordination request was a "propos[al]" for these claims "to be tried jointly," and thus whether it qualifies as a removable "mass action" under the Class Action Fairness Act of 2005 (CAFA). 28 U.S.C. § 1332(d)(11)(A), (B)(i).

It certainly does. California's coordination statute only allows proposals for coordination "for all purposes," which necessarily includes trial. By seeking coordination, plaintiffs are thus proposing that the coordination judge conduct a coordinated trial, which may be accomplished in a variety of ways, including one trial involving all plaintiffs' claims, a series of exemplar trials featuring several plaintiffs, or many individual trials conducted under the auspices of the coordination process. Under any of these scenarios, plaintiffs' claims are "proposed to be tried jointly," *i.e.*, simultaneously or in conjunction

with one another. By invoking California's coordination statute, plaintiffs triggered the defendants' right to removal under CAFA.

ARGUMENT

I. THIS CASE QUALIFIES AS A "MASS ACTION" THAT IS REMOVABLE TO FEDERAL COURT UNDER CAFA.

A. A Request To Coordinate "For All Purposes" Under California Law Is A Proposal That The Claims "Be Tried Jointly."

By filing a coordination request under California law, plaintiffs necessarily proposed that their claims be combined "for all purposes," including for trial, and thus "proposed" that their claims "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).[1] In California, coordination can *only* be sought for *both* pretrial and trial proceedings. California Civil Procedure Code § 404.1 permits "[c]oordination of civil actions sharing a common question of fact or law" if "one judge hearing all of the actions *for all purposes* in a selected site or sites will promote the ends of justice." Cal. Civil Proc. Code § 404.1 (emphasis added). Among other things, coordination is deemed appropriate to avoid "the

[1] It is undisputed that the other prerequisites for removal under CAFA have been met here.

disadvantages of duplicative and inconsistent rulings, orders, or *judgments*," underscoring that coordination extends through trial. *Id.* (emphasis added). Thus, the coordination statute "provid[es] for the unified management of both the pretrial and trial phases of the coordinated cases." *Citicorp N. Am., Inc. v. Superior Court*, 213 Cal. App. 3d 563, 565 n.3 (1989).

The California Rules of Court governing coordination actions confirm this. As those Rules provide, the coordination judge: (1) "may *exercise all the powers* over each coordinated action that are available to a judge of the court in which th[e] action is pending," Cal. Rules of Court, R. 3.540(b); (2) "must assume an active role in managing all steps of the pretrial[] discovery[] *and trial proceedings*," *id.* R. 3.541(b) (emphasis added); and (3) "may . . . *schedule and conduct hearings, conferences, and a trial or trials* at any site within th[e] state," *id.* (emphasis added). Coordination in California is thus a wholesale takeover of the litigation by the coordination judge, through trial.

As a result, plaintiffs rendered this action removable by seeking coordination. They had the option to file separate suits in different state courts, each with under 100 plaintiffs, and to never seek

coordination. This may not have given rise to CAFA removal. *See Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 953 (9th Cir. 2009). But where, as here, plaintiffs chose to propose coordination, by definition they proposed that it be "for all purposes," as delineated in the California coordination statute and accompanying rules. Those rules do not allow plaintiffs to cherry-pick certain aspects of their cases for coordination, or to seek coordination exclusively for pretrial proceedings. *See* 28 U.S.C. § 1332(d)(11)(B)(ii)(IV) (exempting from the definition of "mass action" claims that are "consolidated or coordinated solely for pretrial proceedings"). A request to coordinate in California is perforce a proposal to coordinate the cases from start to finish, and thus a proposal for the claims to be tried jointly.

The Supreme Court's recent decision in *Standard Fire Insurance Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013), underscores that removal here is proper. In *Standard Fire*, the Court considered whether a class-action plaintiff could defeat CAFA's jurisdictional amount requirement by stipulating that damages would not exceed $5 million. *Id.* at 1347. The Court held he could not because his stipulation was not binding on the putative class. *Id.* at 1349. Just as Knowles availed himself of the

class certification process, so too plaintiffs here voluntarily invoked California's coordination process. And just as Knowles could not alter the rules governing class certification, so too here plaintiffs lack the power to alter the scope of California's coordination statute.

To be sure, a given state's coordination or consolidation rule may not invariably result in "mass action" removal if invoked. There are various other prerequisites to mass action removal, such as the jurisdictional amount and 100-plaintiff requirements. 28 U.S.C. § 1332(d)(11)(B). And state coordination or consolidation statutes will themselves vary. For example, the Illinois rule at issue in *In re Abbott Labs., Inc.*, 698 F.3d 568 (7th Cir. 2012), gives a party the option to seek coordination for "pretrial, trial, *or* post-trial proceedings." Ill. R. Sup. Ct. 384(a) (emphasis added). By contrast, some states limit coordination to pre-trial matters only. *See, e.g.,* Ind. R. Trial P. 42; Tex. Gov't Code Ann. § 74.162. In some instances, therefore, a coordination provision may require further consideration of the particulars of the plaintiffs' request or may preclude CAFA "mass action" removal altogether.

That is not the case with California's coordination statute, however, because it only allows coordination "for all purposes." Focusing the CAFA inquiry on the state coordination statute makes good sense when possible, because "when judges must decide jurisdictional matters, simplicity is a virtue." *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 744 (2014). Delving into the subjective motivation behind plaintiffs' coordination proposal is precisely the type of "unwieldy inquir[y]" that the Supreme Court deemed "unlikely that Congress intended" in CAFA. *Id.* at 744.

Of course, removal here was proper even if the focus is on the content of plaintiffs' coordination petition itself. Plaintiffs' petition tracks the coordination statute by seeking coordination "for all purposes" to avoid "the disadvantages caused by duplicative and inconsistent rulings, orders or judgments." ER 175; *see also* ER 161. Plaintiffs clearly conveyed an intent to coordinate on all questions of liability, and therefore for trial (as required under California law). *See* ER 177. Indeed, plaintiffs' request to avoid "inconsistent judgments and conflicting determinations of liability . . . could only be addressed

through some form of joint trial." *Romo v. Teva Pharmaceuticals, USA, Inc.*, 731 F.3d 918, 927 (9th Cir. 2013) (Gould, J., dissenting).

Because plaintiffs necessarily sought coordination through trial, it is beside the point whether their coordination request also concerned pretrial matters. The panel in this case was thus mistaken to conclude that removal was inappropriate because the "obvious focus" of plaintiffs' coordination petition "was on pretrial proceedings, *i.e.*, discovery matters." *Romo*, 731 F.3d at 923; *see also id.* ("[W]e see emphasis on pretrial proceedings.").

CAFA exempts from the definition of "mass action" only those claims that are "consolidated or coordinated *solely* for pretrial proceedings." 28 U.S.C. § 1332(d)(11)(B)(ii)(IV) (emphasis added). This makes it irrelevant whether plaintiffs' request was more about pretrial matters. *See Romo*, 731 F.3d at 926 (Gould, J., dissenting) ("The majority does not try even to argue, nor could it do so correctly here, that the petition for coordination is *limited* to pretrial matters.") (emphasis in original). Indeed, there would be no need for CAFA to single out for exclusion cases coordinated "solely for pretrial proceedings" if coordination proposals with "a clear focus on pretrial

matters," *id.* at 923 (quotations omitted), were already beyond the scope of the term "mass actions" in the first place.

Nor is removal avoided, as the panel apparently believed, because plaintiffs' coordination petition did not explicitly make "mention of a joint trial." *Romo*, 731 F.3d at 923. By invoking California's coordination statute, plaintiffs sought coordination through trial. *See Abbott*, 698 F.3d at 572 (explaining that "a proposal for a joint trial can be implicit" and plaintiffs need not "specifically ask[] for a joint trial"). Were it otherwise, plaintiffs could easily evade removal through artfully-phrased coordination petitions.

Rather than defend the panel's reasoning, plaintiffs repeatedly insist that to constitute a proposal that claims "be tried jointly," plaintiffs must expressly propose a single trial in which 100 or more plaintiffs' claims are tried all at once. *See, e.g.*, Pls.' Response to Pet. for Rehearing En Banc ("Pls.' Response") at 4 (contending that "proposed to be tried jointly" means the claims "are to be resolved at the same time"). Plaintiffs are incorrect.

Plaintiffs' contention that a proposal for a single massive trial is required turns on an unduly narrow interpretation of the phrase "tried

jointly," an interpretation that has been uniformly rejected, including by the panel *in this case*. CAFA uses the more general phrasing "proposed to be tried jointly," 28 U.S.C. § 1332(d)(11)(B)(i), not "proposed to be tried jointly *at the same time*" or "proposed to be tried jointly *in a single trial*," as plaintiffs would have it. The word "jointly" includes the resolution of all claims in a single trial, but it is not so limited. Rather, jointly means "[i]n conjunction, combination, or concert." *Oxford English Dictionary* http://www.oed.com (last visited April 1, 2014). A series of exemplar trials or even individual trials of 1,500 persons meet this definition when conducted as part of the coordinated action, which is governed by uniformly applicable rulings from a coordination judge whose task is to prevent inconsistent judgments.

The CAFA statute as a whole strongly supports this broader reading of "tried jointly." The exception for claims that are "consolidated or coordinated solely for pretrial proceedings," 28 U.S.C. § 1332(d)(11)(B)(ii)(IV), shows that cases that are coordinated for trial—in whatever fashion—meet CAFA's definition of "mass action." Indeed, if plaintiffs' interpretation of "tried jointly" were accepted, there would

be little reason for Congress to have included an exception for claims that are "consolidated or coordinated solely for pretrial proceedings," 28 U.S.C. § 1332(d)(11)(B)(ii)(IV), because "a proposal for anything short of a single massive trial for all claimants would already fail the mass action requirement," *Romo*, 731 F.3d at 926 (Gould, J., dissenting).

Unsurprisingly, courts have rejected the narrow definition of "tried jointly" that plaintiffs advance. The panel itself dismissed it, "agree[ing] that 'joint trial' does not mean everyone sitting in the courtroom at the same time." *Romo*, 731 F.3d at 923-924 & n.2; *see also id.* at 927 n.4 (Gould, J., dissenting) (agreeing "with the majority" here). And every Circuit to have considered this argument has likewise rejected it. *See Teague v. Johnson & Johnson*, Case No. 13-6287 (10th Cir. Apr. 11, 2014) (Slip Op. at 23-24) ("We agree with the defendants that a '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) ("[C]onstruing the statute to require a single trial of more than 100 claims would render [it] defunct.") (quotations omitted); *Abbott*, 698 F.3d at 573 ("[A] joint

trial can take different forms as long as the plaintiffs' claims are being determined jointly.").

This uniform authority makes sense. If "tried jointly" really refers only to a single trial involving all claimants at once, then virtually no case would ever qualify as a mass action, as courts are not in the habit of conducting trials with 100 or more plaintiffs at a time. *See Atwell*, 740 F.3d at 1163. Indeed, not even class actions, after which the mass action definition is modeled, demand "100 or more plaintiffs answer[ing] a roll call in court." *Bullard v. Burlington N. Santa Fe Ry.*, 535 F.3d 759, 762 (7th Cir. 2008). Requiring an explicit request for one trial would also improperly "exalt form over substance," *Standard Fire*, 133 S. Ct. at 1350, allowing plaintiffs to evade removal through coordination petitions that obfuscate true proposals for claims "to be tried jointly."[2]

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2 Plaintiffs contend that exemplar or "bellwether" trials would not involve claims that are being "tried jointly" because the "results" of those trials would not have preclusive effect in future cases. *See* Pls.' Response at 12. But nothing in CAFA states that a "proposal" for claims to be "tried jointly" requires resolution of those claims to have future preclusive effect. Even in the class action context plaintiffs can opt out of Rule 23(b)(3) class actions and thereby avoid the preclusive effect of such judgments. The point is that when plaintiffs have sought coordination under California law "for all purposes," they are necessarily proposing that their claims be tried jointly; bellwether trials are simply a streamlined way of doing that, because they lead to

The foregoing interpretation of "tried jointly" is consistent with CAFA's purpose that a coordinated action such as this belongs in federal court. It is standard to "read statutory terms in light of the purpose of the statute." *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 953 (9th Cir. 2009). CAFA treats a mass action like a class action to capture for removal those cases that may lack the formal trappings of a class action but resemble one in practice. *See Koral v. Boeing Co.*, 628 F.3d 945, 947 (7th Cir. 2011). Regardless whether Congress's concerns about large-scale state court litigation were well-founded, this is precisely the type of case Congress envisioned as analogous to a class action. Indeed, if an action that proposes to combine "for all purposes" over 40 lawsuits by over 1,500 plaintiffs raising nearly identical allegations about the same medication is not a removable "mass action," few if any cases would so qualify.

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definitive rulings that will govern how later cases are tried in the coordinated action. In any event, plaintiffs have not identified a California case holding that a bellwether trial can never result in preclusion. Instead, they have primarily pointed to *Abelson v. National Union Fire Insurance Co.*, 28 Cal. App. 4th 776, 788 (1994), which only held that a test case *that is still pending on appeal* does not meet the final judgment requirement of collateral estoppel.

In any event, even if "tried jointly" means a single trial, by invoking California's coordination statute plaintiffs requested a procedure which could result in one combined trial involving all claimants. California's coordination statute allows the coordination judge to "conduct … *a trial* or trials." Cal. Rules of Court, R. 3.541(b) (emphasis added). Even plaintiffs concede that a single trial could occur. *See* Pls.' Response at 10 (acknowledging that the "coordination Judge has the abstract power to order the cases to be tried jointly"). Because "jurisdictional facts are assessed *at the time of removal*," *United Steel v. Shell Oil Co.*, 602 F.3d 1087, 1091 (9th Cir. 2010) (quotations omitted), it is sufficient that plaintiffs proposed a procedure by which the coordination judge has *the power* to order a single trial. As this Court has held, "[w]hether Plaintiffs' claims ultimately proceed to a joint trial is irrelevant." *Visendi v. Bank of America, N.A.*, 733 F.3d 863, 868 (9th Cir. 2013); *see also United Steel*, 602 F.3d at 1091-92 ("[P]ost-filing developments do not defeat jurisdiction if jurisdiction was properly invoked as of the time of filing.").

Finally, to rule for plaintiffs here would create a split of authority with the Seventh and Eighth Circuits. The panel refused to follow the

Seventh Circuit's decision in *Abbott*, which held that removal under CAFA was proper in a substantially identical case, where plaintiffs sought coordination "through trial." 698 F.3d at 571. The language of plaintiffs' motion clarified their request because plaintiffs had the option under the pertinent Illinois rule to seek coordination solely for pretrial purposes. *See* Ill. R. Sup. Ct. 384(a) (permitting a party to coordinate civil actions for "pretrial, trial, or post-trial proceedings"). It was unnecessary for plaintiffs here specifically to propose coordination "through trial" because the statute they voluntarily invoked makes clear that any coordination proposal will be "for all purposes," including trial.[3]

In addition, the Eighth Circuit explicitly rejected the panel decision in this case. In *Atwell*, the plaintiffs had invoked a process that, despite their "disavowing a desire to consolidate cases for trial," nonetheless proposed that the cases be assigned to a single judge

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3 The panel decision distinguished *Abbott* on the ground that it "involve[d] a completely different procedure, consolidation as opposed to coordination." *Romo*, 731 F.3d at 923. In fact, *Abbott* concerned a request that is the same as that governed by California's coordination statute: a proposal to transfer lawsuits filed in different counties to a single county. *Abbott*, 698 F.3d at 570-71.

through the trial process. 740 F.3d at 1165. The Eighth Circuit held the case was removable. *Id.* at 1162. Given the proposed assignment to a single judge, the Court expressly "agree[d] with *Abbott Labs* and with Judge Gould[]," because "'it is difficult to see how a trial court could consolidate the cases as requested by plaintiffs and not hold a joint trial or an exemplar trial with the legal issues applied to the remaining cases.'" *Id.* at 1165-66 (quoting *Abbott*, 698 F.3d at 573).

The Tenth Circuit's very recent decision in *Johnson & Johnson*, Case No. 13-6287, is entirely consistent with these cases. In *Johnson & Johnson*, several hundred plaintiffs filed twelve identical actions each with less than 100 plaintiffs; these actions were filed before the same state court judge, but the plaintiffs "within" each complaint (and not across all complaints) sought joinder for pretrial purposes only, while expressly disclaiming joinder for trial. Slip Op. at 15-16, 28. The Tenth Circuit held that "the mere act of *filing* separate but similarly-worded complaints against a common defendant in the same court" was not a "proposal" for the claims to be "tried jointly," *id.* at 23 (emphasis in original), particularly when plaintiffs "*explicitly disclaimed*" joinder for trial purposes, *id.* at 21 (emphasis added).

Johnson & Johnson presents a fundamentally different situation than this case: rather than simply "filing" separate cases in a single court without more, plaintiffs here affirmatively moved to coordinate their cases "for all purposes." *See* Concurring Op. at 3 (Anderson, J.) (noting that the plaintiffs in *Abbott*, *Atwell*, and *Romo* all "fil[ed] motions to assign, consolidate or coordinate cases before a single judge," and "find[ing] Judge Gould's reasoning to be persuasive" in that scenario). In *Johnson & Johnson*, the mere fact of filing separate actions before a single judge meant it was "too early to tell whether a joint trial will be … a 'necessary consequence' of the plaintiffs'" filings. Slip Op. at 22 n.5. That is not the case here: by proposing coordination "for all purposes," plaintiffs were necessarily proposing coordination through trial, under which any trial proceedings would by definition involve claims "tried jointly." And unlike the plaintiffs in *Johnson & Johnson* (who did not request any kind of joinder across all twelve cases), plaintiffs here certainly did not limit their global coordination request to pretrial proceedings only—which would not have met the standard for coordination under California law.

B. A Presumption Against Removal Is At Odds With CAFA's Expansion Of Federal Jurisdiction.

The panel decision was driven by the misguided "premise that the removal statutes are to be strictly construed." *Romo*, 731 F.3d at 921; *see also id.* (applying a "presumption against removal"). But it makes no sense to tip the scales *against* removal when interpreting a statute that explicitly *expands* federal jurisdiction.

The central function of CAFA is to broaden federal jurisdiction to cover class actions with minimal diversity, *see* 28 U.S.C. § 1332(d)(2), and to enable more removals of class actions, *see id.* § 1453; *see also Tanoh*, 561 F.3d at 952 (CAFA was enacted to "curb perceived abuses of the class action device which … had often been used to litigate … national class actions in state courts"). A presumption against removal in the CAFA context defies Congress's intent by presuming Congress did not intend to expand federal jurisdiction when Congress enacted a statute that did just that.

A presumption against removal in the CAFA context also lacks precedential support. In *Standard Fire*, the Supreme Court rejected an argument against removal that ran "directly counter to CAFA's primary objective: ensuring 'Federal Court consideration of interstate cases of

national importance.'" 133 S. Ct. at 1350. There is thus no basis to interpret CAFA using an interpretative "presumption" that runs counter to CAFA's stated objective. Simply stated, "[t]here is no presumption against federal jurisdiction in general, or removal in particular. The Class Action Fairness Act must be implemented according to its terms, rather than in a manner that disfavors removal of large-stakes, multi-state class actions." *Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830 (7th Cir. 2011); *see also Johnson & Johnson*, Slip Op. at 20 (disagreeing that CAFA "should be strictly construed against removal").

The origins of any presumption against removal appear to lie in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), but that case demonstrates why such a presumption is improper in the CAFA context. In *Shamrock*, the Court interpreted the Judiciary Act of 1887, which had *contracted* the scope of diversity removal. *Id.* at 104-06. The revision demonstrated a "Congressional purpose to narrow the federal jurisdiction on removal," and the Court referenced in dicta a "strict construction" approach to the statute. *Id.* at 107-08. As the Supreme Court has since indicated, however, where a statute makes removal

easier, any purported "federal policy of construing removal jurisdiction narrowly" has no "apparent force." *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 697-98 (2003).

In any event, even with a presumption against removal the district court should be reversed, because any presumption is overcome by a coordination request that clearly triggers CAFA mass action removal.

II. THE 60-DAY RULE IN 28 U.S.C. § 1453 DOES NOT DEPRIVE THIS COURT OF *EN BANC* JURISDICTION.

CAFA provides that an appellate court reviewing an order to remand a class action to state 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." 28 U.S.C. § 1453(c)(2). This does not deprive this Court of *en banc* jurisdiction in this case.

The 60-day rule controls only when a court of appeals "accepts an appeal under paragraph (1)." *Id.* Paragraph (1), in turn, provides that "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." *Id.*

§ 1453(c)(1). In this case, the *en banc* Court is not the first court to "accept an appeal from an order of a district court." Rather, the Court agreed to "rehear[]" a case that was already "heard and determined by a court or panel of not more than three judges." 28 U.S.C. § 46. Section 1453(c)(2) thus does not apply to these *en banc* proceedings. Indeed, we are aware of no case where rehearing *en banc* was denied because of § 1453(c)(2).

To that point, the Supreme Court has already held that § 1453(c)(2) does not limit its own review. *See Hertz Corp. v. Friend*, 559 U.S. 77, 84 (2010). The Court explained that it does not "normally . . . read statutory silence as implicitly modifying or limiting Supreme Court jurisdiction that another statute specifically grants." *Id.* at 83. There is likewise nothing to suggest that CAFA overrides existing rules for *en banc* review, *see* 28 U.S.C. § 46; Fed. R. App. P. 35.

CONCLUSION

The district court's remand order should be reversed.

April 14, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the brief is proportionately spaced, has a typeface of 14 points or more, and contains 3,996 words.

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2014, I served the foregoing supplemental brief of Defendant-Appellant Teva Pharmaceuticals USA, Inc. through the ECF system.

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