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 FOLLOWING GRANT OF PETITION FOR PERMISSION TO APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
PHILLIP S. GUTERREZ, DISTRICT JUDGE • CASE NO. 5:12-CV-02036-PSG-(EX)

AMICI CURIAE BRIEF IN SUPPORT OF PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, disclosure is hereby made by amici curiae Chamber of Commerce of the United States of America and PhRMA of the following corporate interests:

a. Parent companies of the corporation/association:

None.

b. Any publicly held company that owns ten percent (10%) or more of the corporation/association:

None.

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INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations, which represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size, in every economic sector, and from every geographic region of the country. The Chamber was involved—on behalf of its members—in organizing support for the much-needed class action and mass action reforms embodied in the Class Action Fairness Act of 2005 (CAFA). The Chamber's members are often defendants in such

lawsuits and thus are the intended beneficiaries of the reforms Congress memorialized in CAFA. In light of this historical background, the Chamber has a strong interest in, and a wealth of experience relevant to, interpreting CAFA's jurisdictional requirements. It is also uniquely suited to provide the Court with significant guidance in addressing the policy goals and intent of the legislation.

PhRMA is a voluntary, nonprofit association representing the nation's leading research-based pharmaceutical and biotechnology companies. PhRMA's member companies are dedicated to discovering medicines that enable patients to lead longer, healthier, and more productive lives. In 2012 alone, PhRMA's members invested an estimated $48.5 billion in efforts to discover and develop new medicines. PhRMA has frequently filed amicus curiae briefs in cases raising matters of significance to its members. This is such a case; like the Chamber's members, PhRMA's members are often defendants in class actions and mass actions of national importance that—under CAFA—should be heard in a federal forum.

For these reasons and for those stated in more detail in their accompanying motion for leave to file this brief, the Chamber and PhRMA

filed an amicus brief on the merits in this appeal before the panel and now file this amicus brief in support of the petition for rehearing en banc.

INTRODUCTION

The Supreme Court recently confirmed that removal jurisdiction under CAFA turns on the substance of the plaintiffs' filings, and that plaintiffs' counsel may not artificially or formalistically structure their cases so as to evade CAFA removal.[1] *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013). The Court held that courts must interpret CAFA to stop jurisdictional gamesmanship to effectuate Congress's purpose in passing CAFA: ensuring that interstate cases of national importance are heard in Federal court. *Id.* This Court should rehear this case en banc because the panel majority here facilitates such gamesmanship by elevating a plaintiff's characterization of its actions over the actual substance of its requests. It permitted plaintiffs' counsel to file multiple identical claims in state court and petition to have them

[1] This brief is submitted pursuant to Circuit Rule 29-2, accompanied by a motion for leave to file. No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except amici curiae, their members, or their counsel contributed money intended to fund the preparation or submission of this brief.

coordinated for "all purposes," yet to evade CAFA jurisdiction by claiming the "focus" of their coordination request was merely on pre-trial activities. That exemplifies the artificial maneuvering condemned in *Knowles* that defeats CAFA's purpose. As Judge Gould's dissent explained, "[r]ecourse to the general principle that doubts on removal should be resolved by favoring the plaintiffs' forum choice simply does not answer that this case fits CAFA removal like a glove under a reasonable assessment of what is a proposal for joint trial." (Dissent op. 5.[2])

The panel majority's holding relied on this Court's prior decision in *Tanoh v. Dow Chemical Co.*, 561 F.3d 945 (9th Cir. 2009). *Tanoh* held that because plaintiffs are "masters of their complaint," plaintiffs' counsel could defeat CAFA with formalistic pleading that superficially disguises but does not substantively alter the nature of the litigation. *Id.* at 952-53. But *Knowles* limited the application of the doctrine that plaintiffs are masters of their complaint in the CAFA context, particularly where formalistic pleading is concerned, thus undermining *Tanoh*'s reasoning. Indeed, a Ninth Circuit panel has already overruled another pre-*Knowles*

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[2] Citations to "Op." and "Dissent op." are to the panel majority and dissenting opinions in *Romo v. Teva Pharmaceuticals USA*, No. 13-56310, upon which the panel majority and dissent in this case relied.

Ninth Circuit CAFA opinion for this reason. *See Rodriguez v. AT&T Mobility Servs. LLC*, ___ F.3d ___, No. 13-56149, 2013 WL 4516757 (9th Cir. Aug. 27, 2013), *overruling Lowdermilk v. U.S. Bank Nat'l Ass'n,* 479 F.3d 994, 999 (9th Cir. 2007). In any event, *Tanoh* involved plaintiffs who had filed separate actions, but who, according to the panel, never tried to bring them together in any fashion; thus, to the extent *Tanoh* remains good law, it must be on those unique and distinguishable facts.

This Court should also hear this case en banc because the panel majority created a circuit split with the Seventh Circuit. *See In re Abbott Labs., Inc.*, 698 F.3d 568, 572 (7th Cir. 2012). In *Abbott*, the Seventh Circuit held that plaintiffs who invoked Illinois' consolidation statute and requested to consolidate their cases "'through trial'" and to avoid "'inconsistent adjudication'" had requested to try their claims jointly and were thus subject to CAFA removal. *Id.* at 571-72. Here, the plaintiffs invoked California's coordination statute and requested to have one judge hear all claims "for all purposes" to avoid inconsistent judgments. (Op. 9-10.) As Judge Gould's dissent correctly recognized, the two statutes are similar, and there is no way to reconcile the majority's holding with *Abbott*. (Dissent op. 9-10.) Thus, this Court should rehear this case en

banc because the majority decision conflicts not only with the United States Supreme Court's recent decisions, but also with *Rodriguez* and with Seventh Circuit precedent. Even if the Court does not want to reconsider *Tanoh*, rehearing is also justified for the reasons set forth in the petition for rehearing—this case and *Tanoh* are factually dissimilar and this Court should recognize that under the facts of this case, CAFA removal applies.

ARGUMENT

I. THE PANEL'S OPINION CONTRADICTS THE SUPREME COURT'S RECENT HOLDING IN *KNOWLES*, WHICH UNDERMINES *TANOH*'S SUPPORT FOR THE PANEL OPINION HERE.

A. The panel majority's opinion cannot be reconciled with the Supreme Court's recent decision in *Knowles*.

Just months before the panel issued its opinion, the Supreme Court unanimously rejected the suggestion that a plaintiff can evade CAFA jurisdiction through gamesmanship. *Knowles*, 133 S. Ct. at 1350. In so doing, the Court confirmed that CAFA jurisdiction turns on the substance of a plaintiff's filings, rather than on their form or on procedural maneuvers.

The plaintiff in *Knowles* filed a class-action complaint in Arkansas state court alleging that Standard Fire had improperly failed to include a

general contractor fee in homeowner's insurance loss payments to its insureds. *Id.* at 1347. If certified, Knowles's class might have included thousands of Arkansas plaintiffs, making the case ripe for adjudication in federal court under CAFA jurisdiction. But in his complaint, the plaintiff "stipulate[d]" that he and the class would "seek to recover total aggregate damages of less than five million dollars"—below CAFA's jurisdictional amount-in-controversy threshold—and he further attached an affidavit stipulating that he would "not at any time during this case . . . seek damages for the class . . . in excess of $5,000,000 in the aggregate." *Id.* (internal quotation marks omitted).

The Supreme Court held that Knowles could not evade the federal court's CAFA jurisdiction based on his stipulation. *Id.* Knowles's stipulation was not binding on absent class members because the class had not yet been certified; as a result, Knowles could not have "reduced the value of the putative class members' claims" below the jurisdictional threshold. *Id.* at 1349.

In so holding, the Court squarely rejected the notion that CAFA forbids federal courts to evaluate the potential or practical consequences of the stipulation. To the contrary, federal courts examining CAFA mass-

action jurisdiction should "consider, for purposes of determining the amount in controversy, the very real possibility that a nonbinding, amount-limiting, stipulation may not survive the class certification process." *Id.* at 1350. To hold otherwise would "exalt form over substance, and run directly counter to CAFA's primary objective: ensuring 'Federal court consideration of interstate cases of national importance.'" *Id.* And a contrary ruling—that federal courts must in effect be willfully blind to the practical effects of a plaintiff's procedural maneuvers—"would also have the effect of allowing the subdivision of a $100 million action into 21 just-below-$5-million state-court actions simply by including nonbinding stipulations." *Id.* Such an intolerable "outcome would squarely conflict with [CAFA's] objective." *Id.* As such, the Court "believe[d] [that] the District Court, when following the statute to aggregate the proposed class members' claims, should have ignored that stipulation." *Id.*

Critically, in holding that courts should not exalt form over substance, the Supreme Court considered but rejected the plaintiff's contention that he could rely on his stipulation to avoid CAFA removal because plaintiffs are "masters of their complaints." *Id.* Whatever force that doctrine retains outside the CAFA context, it does not empower

plaintiffs' counsel to artificially structure mass cases at the preliminary stages so as to obstruct Congress's objective in passing CAFA.

But that is precisely what the panel majority's opinion permits—even encourages—plaintiffs to do. Here, the majority acknowledged that after "more than forty actions [were] filed in California state courts regarding products containing propoxyphene, . . . a group of attorneys responsible for many of the propoxyphene actions filed a petition asking the California Judicial Council to establish a coordinated proceeding." (Op. 4.) Yet the majority accepted at face value plaintiffs' counsel's claim that the "focus" of the coordination petition was on coordinating pre-trial proceedings—notwithstanding the petition's clear request for "[o]ne judge hearing all of the actions *for all purposes*" to prevent inconsistent judgments. (Op. 9-10 (emphasis added).)

This Court should grant en banc rehearing to bring this case back in line with the Supreme Court's recent precedent. As Judge Gould explained, "[w]e should be looking at the reality of joint trial proposal, not at how a party may characterize its own actions." (Dissent. op. 3.)

B. *Knowles* undermines this Court's prior decision in *Tanoh*—which supports the panel majority's opinion here—by limiting a plaintiff's ability to elevate form over substance.

The panel majority's refusal to follow *Knowles* appears to be based on its belief that this Court's prior decision in *Tanoh* dictates the outcome it reached. (*See* Op. 6-8.) To the extent the panel majority relied on that belief, it was twice erroneous. First, as explained below—and as another panel of this Court has effectively acknowledged—*Knowles*'s reasoning undermines *Tanoh*'s reasoning and holding. *Knowles* thus implicitly overrules *Tanoh*; or, at a minimum, confines *Tanoh*'s holding to its unique facts. *See Davis v. HSBC Bank Nev., N.A.*, 557 F.3d 1026, 1030 (9th Cir. 2009) (Kleinfeld, J., concurring). Second, even if *Tanoh* could be read to survive *Knowles*, it is factually and materially distinguishable from this case, and thus cannot properly be read to require the majority's result.

In *Tanoh*, this Court considered whether plaintiffs could evade CAFA's mass-action provision by filing seven separate actions—each of which included fewer than one hundred plaintiffs and raised identical claims against the same defendants in the same court. *Tanoh*, 561 F.3d at 951. The defendant invoked the federal court's CAFA jurisdiction and removed the cases as a mass action. It argued that plaintiffs' counsel had

used a formalistic device—splitting an interstate case of national importance into multiple cases, each of which just barely avoided CAFA's removal requirements—to keep a paradigmatic CAFA case festering in state court.[3] *Id.*

The *Tanoh* panel adopted a restrictive interpretation of CAFA's mass action provision. *Tanoh* described CAFA as "fairly narrow," *id.* at 953, aimed only at what it termed the "*perceived* abuses of the class action device . . . *in the view of CAFA's proponents*," *id.* at 952 (emphases added), and concluded that "Congress intended to limit the numerosity component of mass actions quite severely," *id.* at 954. To support this interpretation, the *Tanoh* panel championed "the well-established rule that plaintiffs, as masters of their complaint, may choose their forum by selecting state over federal court and . . . the equally well-established presumption against federal removal jurisdiction." *Id.* at 953. It also rejected the defendant's claim that CAFA should be construed to prevent plaintiffs' counsel from gaming the system by artificially structuring their suits so as to avoid

[3] The plaintiffs had also allegedly fraudulently joined California defendants with no meaningful relation to the case and claimed that the amount in controversy was less than the $5,000,000 amount required under CAFA's mass action provision. *Id.*

CAFA jurisdiction. *Id.* at 956. Based on those two premises, *Tanoh* concluded that because the plaintiffs had not expressly proposed to try their claims jointly and had filed separate actions, the cases could not be removed to federal court under CAFA. *Id.* at 950.

Knowles's holding and reasoning directly undermine *Tanoh*'s holding and rationale. Where *Tanoh* deferred to plaintiffs as the masters of their complaint, *Knowles* declined to apply that doctrine in the context of CAFA removal. And where *Tanoh* permitted CAFA to be interpreted to tolerate plaintiffs' jurisdictional gamesmanship, *Knowles* instructs courts to examine substance over form precisely to avoid such tactics.

Amici argued as much in their merits brief below. The panel acknowledged amici's argument that *Tanoh* must be revisited in light of *Knowles*, (*see* Op. at 8 n.1), and the dissent believed amici's argument had merit, (*see* Dissent op. 4 n.3); but both the dissent and the majority stated the panel was powerless to overrule *Tanoh*.

However, a prior three-judge panel's opinion is not binding on a later three-judge panel if an intervening Supreme Court case has " 'undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable.'" *Rodriguez*, 2013 WL

4516757, at *3 (quoting *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc)). Indeed, the "issues presented in the two cases need not be identical in order for the intervening higher authority to be controlling." *Id.* Based on precisely that reasoning a three-judge panel of this Court has already overruled another pre-*Knowles* Ninth Circuit CAFA opinion, readily concluding that *Knowles* had undercut the theory supporting its holding. *Rodriguez*, 2013 WL 4516757, at *3 (holding that *Knolwes* effectively overruled *Lowdermilk*). Tellingly, *Tanoh* relied heavily on *Lowdermilk* for the proposition that utmost deference must be paid to the maxim that plaintiffs are masters of their complaint. *Lowdermilk*'s demise in *Rodriguez* further confirms that *Knowles* is irreconcilable with *Tanoh*.

Despite evidence both of *Tanoh*'s questionable validity in light of *Knowles* and of this panel's authority to acknowledge *Tanoh*'s invalidity or restricted application, the panel refused to act. It believed that only the en banc court could overrule *Tanoh*. Where it is unclear whether the Supreme Court's intervening precedent has sufficiently undermined a prior Ninth Circuit case for a three-judge panel to overrule it, this Court should take the case en banc to "do what . . . the panel could not." *Miller*,

335 F.3d at 902 (O'Scannlain, J., concurring). *Tanoh*'s formalistic approach is now irreconcilable with *Knowles*'s instruction to base CAFA removal on the substantive reality of the plaintiffs' case. This Court should use en banc rehearing to bring the Ninth Circuit's approach back in line with *Knowles* and maintain consistency with *Rodriguez*.

But even if the en banc court declines to revisit *Tanoh*, it should still acknowledge that *Tanoh* is distinguishable and thus does not mandate the panel majority's holding. In *Tanoh*, it was undisputed that the plaintiffs had made *no* request to coordinate proceedings; the court reasoned that the defendants had in essence requested to coordinate plaintiffs' claims, which implicated CAFA's provision that a mass action "'shall not include any civil action in which . . . the claims are joined upon motion of a defendant.'" *Tanoh*, 561 F.3d at 951. Here, in contrast, there is no dispute that plaintiffs did file a petition to coordinate their cases for "'all purposes.'" (Op. 10.) The panel majority's failure to distinguish *Tanoh* based on that crucial factual distinction improperly extends *Tanoh*'s holding beyond its rationale.

C. The panel majority's opinion creates a circuit split with the Seventh Circuit.

As Judge Gould's dissent correctly explained, the majority's holding creates a circuit split with *Abbott*. (*See* Dissent op. 2.) The panel majority held that plaintiffs can request coordination "'for all purposes'" under California's coordinated-proceeding statute without having proposed to try their claims jointly under CAFA. (Op. 6-10.) In *Abbott*, however, the Seventh Circuit held that plaintiffs' request to consolidate cases "'through trial' and 'not solely for pretrial proceedings'" under the Illinois consolidation statute *did* amount to a proposal for a joint trial that justified exercising CAFA jurisdiction. *Abbott*, 698 F.3d at 571.

Judge Gould correctly reasoned that *Abbott*'s holding is instructive here because the California and Illinois statutes are similar. (Dissent op. 9-10.) So too are the nature of the different plaintiffs' requests—the plaintiffs here requested "'one judge hearing all of the actions for all purposes'" to prevent "'inconsistent . . . judgments,'" (op. 10), just as the *Abbott* plaintiffs requested to consolidate cases "'through trial'" to avoid "'the risk of inconsistent adjudication.'" *Abbott*, 698 F.3d at 571, 573. The disparate outcome between this case and *Abbott* despite such similar legal

and factual circumstances creates a circuit split that warrants the en banc court's correction.

II. THE PLAINTIFFS' PETITION FOR A CALIFORNIA COORDINATED PROCEEDING HERE NECESSARILY CONSTITUTED A PROPOSAL TO TRY THEIR CLAIMS JOINTLY.

The panel majority also contravened Supreme Court precedent when it justified its holding on the ground that it was consistent with the rulings of three "eminent" district judges who were "practitioners in California prior to taking the bench" and have "considerable knowledge of California procedural rules." (Op. 13.) The Supreme Court has held that such reliance on the supposed special knowledge of district judges about state practice in their home states is not only "founded fatally on overbroad generalizations," but also improper because "[t]he very essence of the *Erie* doctrine is that the bases of state law are presumed to be communicable by the parties to a federal judge no less than to a state judge," and "equally communicable to the appellate judges as they are to the district judge." *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991). This approach also violates the principle of "independent appellate review" of legal issues. *Id.* at 234.

That approach poses particular problems when district courts are wrong, as they were here. In California, plaintiffs petitioning to coordinate their claims must represent that it would "promote the ends of justice" to have "one judge hearing all of the actions for all purposes," because it would, inter alia, prevent "inconsistent rulings, orders, or judgments." Cal. Civ. Proc. Code §§ 404, 404.1 (West 2013). The California Judicial Council has explained that the coordination procedure was designed "to reduce the risk of inconsistent rulings in actions involving common issues." Judicial Council of Cal., Coordination of Civil Actions 7 (2d ed. 2000). The California Court of Appeal explains that coordination "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) (emphases added).

Here the panel majority acknowledged that the plaintiffs represented in state court that they sought coordination "for all purposes" with the goal of avoiding inconsistent judgments, but held that "it is quite a stretch to discern a request for joint trial when the clear focus of the petition [was] on pretrial matters." (Op. 10-11.) The majority's holding wrongly permits plaintiffs to take diametrically conflicting positions in different venues—

telling a state court whatever it takes to get a motion to coordinate granted (i.e., as here, that plaintiffs want coordination for "all purposes" to ensure uniform decisions), but then telling a federal court just the opposite to defeat CAFA jurisdiction (i.e., as here, that they really did not mean it when they asked for coordination for "all purposes"). This precedent is at odds with the theory of judicial estoppel, which "'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase,'" *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001), and is sure to defeat Congress's intent for CAFA which requires that mass actions like this one be heard in federal court.

Furthermore, once coordination is granted, the claims *must* be adjudicated within the coordinated proceeding unless the court grants a motion permitting remand—a development within the superior court's discretion and outside plaintiffs' counsel's control. *See Pesses v. Superior Court*, 107 Cal. App. 3d 117, 119-24 (1980) (denying plaintiff's motion to remand case from coordinated proceedings to local court, notwithstanding that most common issues had now been resolved and local forum would be significantly more convenient for plaintiff's witnesses). Thus, plaintiffs'

contention here that they sought coordination for pretrial purposes only is as legally unenforceable as was Knowles's stipulation not to seek more than $5,000,000 in damages. It resembles perfectly the same sort of fictitious attempt to disguise a mass action to avoid CAFA's reach that the Supreme Court rejected in *Knowles*. This Court should hear this case en banc to correct a precedent permitting plaintiffs' counsel to obstruct Congress's objective in passing CAFA.

CONCLUSION

For the reasons stated above, in amici's merits brief, and in appellant's petition for rehearing, this Court should grant rehearing en banc.

October 18, 2013

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STATEMENT OF RELATED CASES

This Court decided this case by citing to *Romo v. Teva Pharmaceuticals USA*, No. 13-56310.

CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS [FED R. APP. P. 32(a)(7)(C); 9TH CIR. R. 29-2]

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October 18, 2013
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