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
PHILIP S. GUTIERREZ, DISTRICT JUDGE • CASE NO. 2:12-CV-09986-PSG-(EX)

AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANT-APPELLANT XANODYNE PHARMACEUTICALS, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 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. One important Chamber function is to represent the interests of its members in matters before the court, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's businesses.

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). As discussed below, CAFA expanded federal jurisdiction to ensure that class actions and mass actions of national importance would be heard in federal courts. 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—issues not addressed in detail in the parties' briefs that might otherwise escape the Court's attention.

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. During 2011 alone, PhRMA members invested an estimated $49.5 billion in efforts to research and develop new medicines. PhRMA's mission is to advocate public policies that encourage the discovery of life-saving and life-enhancing 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.

STATEMENT OF COMPLIANCE WITH FED. R. APP. P. 29(c)(5)

This brief is submitted pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure, 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.

SUMMARY OF ARGUMENT

CAFA provides a federal forum for mass actions—that is, "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that plaintiffs' claims involve common questions of law and fact," 28 U.S.C. § 1332(d)(11)(B)(i), and that meet other specified jurisdictional thresholds. CAFA's text and legislative history make clear that Congress enacted CAFA to end the practice of concentrating interstate litigation of national importance in a few state courts favored by plaintiffs' lawyers. Indeed, CAFA expanded federal court jurisdiction specifically to facilitate the removal of such cases to federal court.

Despite CAFA's enactment, plaintiffs continue to repeatedly file separate but related complaints in state court that, because they are theoretically separate actions, fall just shy of the number of plaintiffs or damages thresholds necessary to support CAFA jurisdiction. Nevertheless, they then seek the benefits of a mass action by asking the state court to coordinate the separate cases before a single judge to ensure that the common issues of law and fact raised by these cases are uniformly decided. This venue-skewing practice relies on semantics to assert that cases that are functionally equivalent to a CAFA mass action nonetheless must remain in state court simply because they have avoided saying the phrase "joint trial" when seeking coordination.

Those practices run afoul of CAFA's plain text, as appellant's opening brief ably explains. (*See* Xanodyne AOB 22-37.) Amici do not repeat those textual arguments here, but instead show that such practices are also inconsistent with CAFA's policies and recent precedent on this issue. Indeed, under unanimous Supreme Court precedent decided just months ago, CAFA jurisdiction turns on the substance of the plaintiffs' tactics—not on the form. *See Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013) (plaintiffs cannot gerrymander their claims by entering into

stipulations designed solely to evade CAFA); *see also In re Abbott Labs., Inc.*, 698 F.3d 568 (7th Cir. 2012) (the Seventh Circuit rejected plaintiffs' argument that they could avoid removal under CAFA simply by omitting the magic words "joint trial" from the form of their consolidation request where the motion for consolidation *implicitly* proposed a joint trial). Indeed, *In re Abbott Laboratories* is instructive here. There, the Seventh Circuit focused on the substance of the plaintiffs' request: they sought a coordinated proceeding based on common law and facts, common discovery, and either a multi-plaintiff trial or a single-plaintiff trial—a "'bellwether'" trial—that would have had preclusive effect on the remaining plaintiffs. *Id.* at 571. The Seventh Circuit thus properly acknowledged that the plaintiffs' motion for consolidation sought the functional equivalent of a CAFA mass action—the plaintiffs' refusal to invoke the magic words notwithstanding. *Id.* at 573.

This Court should adopt that substance-over-form approach here because it best effectuates Congress's intent and adheres to the Supreme Court's reasoning in *Knowles*. To hold otherwise would reward the ingenuity of artful pleading and would countenance procedural maneuvering that concentrates thousands of claims from around the

nation before a single state-court judge—the precise end that CAFA was designed to avoid. Amici thus urge the Court to hold that the state-court petition for coordination in this case proposed a joint trial that qualifies as a CAFA mass action.

I. CAFA'S TEXT, LEGISLATIVE HISTORY, AND STRUCTURE ESTABLISH THAT CONGRESS INTENDED CAFA REMOVAL JURISDICTION TO BE CONSTRUED BROADLY

Congress enacted CAFA to address the problem of local courts "keeping cases of national importance out of Federal court" and to develop a jurisdictional regime that would "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." Class Action Fairness Act of 2005, Pub. L. No. 109-2, §§ 2(a)(4)(A), 2(b)(2), 119 Stat 4 (2005). That course correction became necessary because abusive state-court practices that kept important cases out of federal court had harmed both plaintiffs "with legitimate claims and defendants that have acted responsibly," "undermined public respect for our judicial system," and interrupted "the free flow of interstate commerce." *Id.* §§ 2(a)(2)(A), 2(a)(2)(C) & 2(a)(4), 119 Stat 4. CAFA's text thus eliminates any doubt that Congress intended it to broaden—not restrict—federal jurisdiction.

CAFA's legislative history confirms that Congress intended the statute to be construed broadly. Congress recognized that plaintiffs' lawyers were "'gam[ing] the system'" to avoid removal of class actions in order to remain in "'lawsuit-friendly'" state courts. S. Rep. No. 109-14, at 10-12 (2005). In a House-floor colloquy that occurred just before CAFA's passage, then-House Judiciary Committee chairman F. James Sensenbrenner said: "The bottom line is that [CAFA] is intended to substantially expand Federal court jurisdiction over class actions" and its provisions "should be read broadly, with a strong preference that interstate class actions should be heard in a Federal court if properly removed by a defendant." 151 Cong. Rec. H723, H730 (daily ed. Feb. 17, 2005). Likewise, the Senate Judiciary Committee Report states the Committee's "belie[f] that the federal courts are the appropriate forum to decide most interstate class actions because these cases usually involve large amounts of money and many plaintiffs, and have significant implications for interstate commerce and national policy." S. Rep. No. 109-14, at 27, *reprinted in* 2005 U.S.C.C.A.N. 3, 27.[1] *See also* S. Rep. No. 109-

[1] A prior panel of this Court thought that the Senate Judiciary Committee Report was "of minimal, if any, value in discerning (continued...)

14, at 35, *reprinted in* 2005 U.S.C.C.A.N. at 34 (Congress intended CAFA "to strongly favor the exercise of federal diversity jurisdiction over class actions with interstate ramifications"); S. Rep. No. 109-14, at 6, *reprinted*

(...continued)
congressional intent" because it was issued after CAFA's enactment, *Tanoh v. Dow Chem. Corp.*, 561 F.3d 945, 954 n.5 (9th Cir. 2009), but a later panel reached the opposite conclusion, *see Westwood Apex v. Contreras*, 644 F.3d 799, 806 (9th Cir. 2011) ("The report of the Senate Judiciary Committee confirms Congress's intent to remove . . . longstanding barriers to removal."). Other Circuits have relied on the Senate Committee Report to discern congressional intent because it was submitted to the Senate while that body was considering the bill. *See Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1205-06 & n.50 (11th Cir. 2007) ("[C]ourts have taken pains to discuss the fact that S. Rep. 109-14 is dated February 28, 2005, ten days after CAFA was signed into law. . . . While the report was issued ten days following CAFA's enactment, it was submitted to the Senate on February 3, 2006—while that body was considering the bill."); *Estate of Pew v. Cardarelli*, 527 F.3d 25, 32-33 (2d Cir. 2008) ("[A]s the Eleventh Circuit has pointed out, the Report 'was *submitted* to the Senate on February 3, 200[5]—while that body was [still] considering the bill.' We therefore think it appropriate in this case to examine the legislative history of these particularly knotty provisions." (emphasis in original; internal citations omitted)). This Court's reasoning in *Westwood Apex* is consistent with those two decisions and others that rely on the Committee Report. *See, e.g.*, *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 424 (5th Cir. 2008) ("Congress emphasized that the term 'class action' should be defined broadly to prevent 'jurisdictional gamesmanship.'"); *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1163 (11th Cir. 2006) ("Congress intended the local controversy exception to be a narrow one, with all doubts resolved 'in favor of exercising jurisdiction over the case.'"); *Hart v. FedEx Ground Package Sys. Inc.*, 457 F.3d 675, 681 (7th Cir. 2006) ("The Senate Judiciary Committee unambiguously signaled where it believed the burden should lie" regarding CAFA's exceptions).

in 2005 U.S.C.C.A.N. at 7 ("This Committee believes that the current diversity and removal standards as applied in interstate class actions have facilitated a parade of abuses, and are thwarting the underlying purpose of the constitutional requirement of diversity jurisdiction"); 151 Cong. Rec. S1225, S1235 (daily ed. Feb. 10, 2005) (statement of Sen. Sessions) (arguing that CAFA is consistent with the Founders' views that out-of-state defendants should be protected from the "home cooking" of state courts).

In particular, the Committee decried "[t]he ability of plaintiffs' lawyers to evade federal diversity jurisdiction" that had "helped spur a dramatic increase in the number of class actions litigated in state courts—an increase that is stretching the resources of the state court systems." S. Rep. No. 109-14, at 13, *reprinted in* 2005 U.S.C.C.A.N. at 13. "To make matters worse, current law enables lawyers to 'game' the procedural rules and keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests." 2005 U.S.C.C.A.N. at 4. The Committee identified specifically two such games:

> [T]he two most common tactics employed by plaintiffs' attorneys in order to guarantee a state court tribunal are:

> adding parties to destroy diversity and shaving off parties with claims for more than $75,000. It is not rare to see complaints in which plaintiffs sue several major corporations and then add one local supplier or dealer as a defendant merely to defeat diversity. Other complaints seek $74,999 in damages on behalf of each plaintiff or explicitly exclude from the proposed class anybody who has suffered $75,000 or more in damages.
>
> *Id.* at 26-27 (footnotes omitted).

Federal judges also acknowledged such troubling plaintiffs' tactics before CAFA was passed. For example, former Judge Nangle—who at the time chaired the Judicial Panel on Multidistrict Litigation—recorded his observations about "a growing trend in class action litigation in this country":

> Plaintiffs' attorneys are increasingly filing nationwide class actions in various state courts, carefully crafting the language in the petitions or complaints in order to avoid the amount in controversy requirement of the federal courts. Existing federal precedent . . . mandates that this practice be permitted, although most of these cases in actuality will be disposed of through "coupon" or "paper" settlements. Actual monetary compensation rarely reaches the class members. Concurrently, and perhaps coincidentally, such settlements are virtually always accompanied by munificent grants of or requests for attorneys' fees for class counsel.
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> *Davis v. Carl Cannon Chevrolet-Olds, Inc.*, 182 F.3d 792, 798 (11th Cir. 1999) (Nangle, J., concurring) (footnotes omitted).

To end the abuses identified by Congress, CAFA created a new set of jurisdictional rules that would provide for federal jurisdiction over large-scale class and mass actions, thereby "ensur[ing] that class actions that are truly interstate in character can be heard in federal court." 2005 U.S.C.C.A.N. at 27. Those new rules eliminated or reduced hurdles to federal jurisdiction that had animated plaintiffs' gamesmanship. For example, where the prior diversity jurisdiction statute had been interpreted to require each class member separately to meet the $75,000 amount-in-controversy requirement, *see, e.g., Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973), *overruled by statute*, 28 U.S.C. § 1367, *as recognized in Exxon Mobil Corp. v. Allapattah Servs. Inc.*, 545 U.S. 546 (2005), under CAFA the claims of putative class members are aggregated to determine if the new $5,000,000 jurisdictional threshold is met, *see* 28 U.S.C. § 1332(d)(6) (2012). CAFA also replaced the requirement of complete diversity of citizenship between all plaintiffs and all defendants with a rule requiring only minimal diversity between any member of the putative class and any defendant. 28 U.S.C. § 1332(d)(2)(A) - (C).

CAFA likewise established an entirely new removal provision that applies only to the removal of diversity class actions and mass actions. *See*

28 U.S.C. § 1453 (2012). This provision allows a defendant to remove a class action without obtaining consent from any co-defendant, eliminates the one-year time bar on removal in 28 U.S.C. § 1446(c)(1), and authorizes removal without regard to whether any defendant is a citizen of the state in which the suit was originally filed. *See id.* § 1453. These amendments were designed to "make it harder for counsel to 'game the system' and keep class actions in state court." 2005 U.S.C.C.A.N. at 27.

To highlight the depth of Congress's concern—and "prevent plaintiffs from evading federal jurisdiction by hiding the true nature of their case," *id.* at 10—CAFA even instructs district courts to evaluate removal petitions in cases that might appear to implicate only local interests with an eye to whether the action "has been pleaded in a manner that seeks to avoid Federal jurisdiction," 28 U.S.C. § 1332(d)(3)(C). This inquiry includes "determin[ing] whether the plaintiffs have proposed a 'natural' class—a class that encompasses all of the people and claims that one would expect to include in a class action, as opposed to a class that appears to be gerrymandered solely to avoid federal jurisdiction by leaving out certain potential class members or claims." 2005 U.S.C.C.A.N. at 36. "If

the federal court concludes evasive pleading is involved, that factor would favor the exercise of federal jurisdiction." *Id.*

Those CAFA amendments apply equally to both class and mass actions. *See* 28 U.S.C. §§ 1332(d) & 1453 (requirements for jurisdiction and removal of class and mass actions). Indeed, the Senate Judiciary Committee saw no difference between class actions and mass actions for CAFA purposes. 2005 U.S.C.C.A.N. at 44 ("The Committee find [sic] that mass actions are simply class actions in disguise. They involve a lot of people who want their claims adjudicated together and they often result in the same abuses as class actions."). In fact, according to the Committee, "the abuses [in mass actions] 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." *Id.*

In sum, CAFA's enactment simply furthers the important rationale for diversity jurisdiction. S*ee, e.g.*, *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 305 (3d Cir. 1998) ("From a policy standpoint, it can be argued that national (interstate) class actions are the paradigm for federal diversity jurisdiction because, in a

constitutional sense, they implicate interstate commerce, foreclose discrimination by a local state, and tend to guard against any bias against interstate enterprises. Yet there are strong countervailing arguments that, at least under the current jurisdictional statutes, such class actions may be beyond the reach of the federal courts."). As Chief Justice Marshall observed, the Constitution "established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states" because of the Framers' "apprehensions" that "the tribunals of the states will administer justice as impartially as those of the nation." *Bank of the U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809); *see also Burgess v. Seligman,* 107 U.S. 20, 34 (1883) ("[T]he very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals, which, it might be supposed, would be unaffected by local prejudices and sectional views."); Joseph Story, *Commentaries on the Constitution of the United States* § 1684 (1833) (diversity jurisdiction provides noncitizens with "national and impartial" tribunal). Class and mass actions with national significance belong in federal court, notwithstanding artful pleading or other gamesmanship designed to keep

them in state court. In other words, courts were *not* to exalt form over substance in determining removal or jurisdiction under CAFA.

II. THIS COURT SHOULD FOLLOW RECENT PRECEDENT FROM THE SUPREME COURT AND OTHER CIRCUIT COURTS THAT FAITHFULLY IMPLEMENTS CAFA'S "SUBSTANCE OVER FORM" MANDATE.

Notwithstanding CAFA's clear text, purpose, and legislative history, plaintiffs continue to employ a host of creative devices to skirt CAFA's mandates and funnel disputes of national importance toward plaintiff-friendly state-court venues. Those devices have included artificially structuring the time periods of alleged wrongs—or the geographic location, quantity, or damages of putative class members—to avoid CAFA's jurisdictional thresholds. *See, e.g.*, *Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 407 (6th Cir. 2008) ("CAFA was clearly designed to prevent plaintiffs from artificially structuring their suits to avoid federal jurisdiction."); *Proffitt v. Abbott Labs.*, No. 2:08-CV-151, 2008 WL 4401367, at *2, *5 (E.D. Tenn. March 27, 2009) ("It is apparent to the court that the time divisions are a deliberate attempt to circumvent the CAFA" and "the court sees the intent of the CAFA being undermined by the device of filing multiple lawsuits based on completely arbitrary time periods."); *Brook v.*

UnitedHealth Grp. Inc., No. 06 CV 12954(GBD), 2007 WL 2827808, at *4 (S.D.N.Y. Sept. 27, 2007) ("Plaintiffs cannot simply evade federal jurisdiction by defining the putative class on a state-by-state basis, and then proceed to file virtually identical class action complaints in various state courts."); *Shappell v. PPL Corp.*, Civil No. 06-2078 (AET), 2007 WL 893910, at *3 (D.N.J. March 21, 2007) ("The Court is concerned that Plaintiffs may attempt, as Defendants argue, to use this voluntary dismissal as a means of 'gerrymandering' smaller class sizes in state court, which fall beyond the purview of CAFA.").[2]

Courts—including the Supreme Court—have forcefully rejected such renewed gamesmanship designed to evade CAFA jurisdiction by focusing on the substance, rather than the form, of a plaintiff's filings or procedural maneuvers. The Supreme Court's recent decision in *Standard Fire Insurance Co. v. Knowles*, 133 S. Ct. 1345 (2013) is instructive. There, the plaintiff Knowles filed a class action complaint in Arkansas's Miller

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[2] *See generally* 2 William B. Rubenstein & Alba Conte, *Newberg on Class Actions* § 6:17 (5th ed. 2012) ("Some plaintiffs have explicitly attempted to limit their actions to less than $5 million in controversy while others have created suits of fewer than 100 class members, and still, others appear to have structured classes so as to fit a CAFA exception. The circuit courts have adopted different approaches depending on the particular maneuver attempted.").

County 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 would have included possibly thousands of Arkansas plaintiffs' claims, making the case ripe for adjudication in federal court under CAFA jurisdiction. But his complaint stated that he and the class members "stipulate[d] they will 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).

Standard Fire removed the case to federal court anyway, invoking its CAFA jurisdiction. *Id.* at 1348. The district court found that without Knowles's stipulation, the action would have exceeded CAFA's $5,000,000 jurisdictional threshold and removal would have been proper. *Id.* Yet in light of the stipulation, the district court concluded that the amount in controversy fell below CAFA's threshold and remanded the case to state court. *Id.*

The Supreme Court unanimously held that Knowles could not evade the federal court's CAFA jurisdiction on the basis of his stipulation. *Id.* at 1347. It reasoned that Knowles's stipulation was not binding on absent class members because the class had not yet been certified. *Id.* at 1349. As a result, Knowles could not have "reduced the value of the putative class members' claims" below the jurisdictional threshold. *Id.*

In so holding, the Court rejected the notion that, under CAFA, federal courts could not evaluate the potential or practical consequences of the stipulation. "We do not agree that CAFA forbids the federal court to 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.* (citation omitted). 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.*

Two Seventh Circuit cases also rejected the plaintiffs' attempts to circumvent CAFA's mass action removal provision, employing a substance-over-form analysis consistent with *Knowles* and CAFA's text and policy rationales to support its holdings. *See In re Abbott Labs., Inc.*, 698 F.3d 568, 570 (7th Cir. 2012); *Bullard v. Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759, 761 (7th Cir. 2008). The reasoning in these decisions applies equally here—where the same issue is presented—and supports a rejection of plaintiffs' remand request.

The district court failed to apply the above authority and instead relied on this Court's decision in *Tanoh v. Dow Chem. Corp.*, (9th Cir. 2011) 561 F.3d 945. But as appellants have explained, (*see* Xanodyne AOB 25-26), *Tanoh* held that a *defendant's* proposal to consolidate and jointly try cases did not support removal under CAFA's mass action provision. *Id.* at 956. That is not what happened here. In this case, *plaintiffs* sought to coordinate their state-court cases. And more to the point, *Tanoh* predated

not only the Seventh Circuit's contrary decision in *In re Abbott Labs., Inc.* in circumstances analogous to this case and the recent rapid increase in plaintiffs' procedural maneuvering to evade CAFA, but also the Supreme Court's decision in *Knowles*, which is fundamentally inconsistent with the district court's interpretation of *Tanoh*.

Even if *Tanoh* could be read to apply to the very different circumstances in this case, these intervening events undermine *Tanoh*'s precedential value and warrant this Court's taking a fresh look at the CAFA mass action issue presented here. Viewed through that sharpened lens, and the reasons in appellants' brief, the Court should hold that *plaintiffs*' petition for coordination gave rise to federal jurisdiction under CAFA.

III. A CALIFORNIA JUDICIAL COUNSEL COORDINATED PROCEEDING WITH MORE THAN ONE HUNDRED PLAINTIFFS IS A MASS ACTION UNDER CAFA.

In California, a Judicial Council Coordination Proceeding (JCCP) is by definition, "the joinder of two or more actions having a common question of fact or law pending in different courts." Darren L. Brooks, *California Practicum: A Guide to Coordination of Civil Actions in California*, 19 Pepp. L. Rev. 163, 165 (1991); Cal. Civ. Proc. Code § 404

(West 2004) (coordination petition is appropriate "[w]hen civil actions sharing a common question of fact or law are pending in different courts"); *Keenan v. Superior Court,* 111 Cal. App. 3d 336, 342 (1980) (the requirement of a common question of law or fact is the "threshold standard," since it must be satisfied at the outset of every coordination procedure); *Pesses v. Superior Court*, 107 Cal. App. 3d 117, 122-24 (1980) (sharing a common question of law or fact is fundamental to maintaining a coordinated action).

California Code of Civil Procedure section 404.1 further requires the trial court resolving a motion for coordination to consider whether coordination "will promote the ends of justice" by "taking into account," among other things, "whether the common question of fact or law is predominating and significant to the litigation" and "the disadvantages of duplicative and inconsistent rulings, orders, or judgments." Cal. Civ. Proc. Code § 404.1 (West 2004). Commonality of issues is so essential that the court must also repeatedly assess this factor throughout the proceedings, including when deciding which appellate court will review the coordinated proceedings, and whether to coordinate an add-on proceeding.

Cal. Civ. Proc. Code § 404.2 (West 2004), Cal. R. Ct. 3.505(a), 3.542; *see Pesses*, 107 Cal. App. 3d at 123; *Keenan*, 111 Cal. App. 3d at 341-42 & n.2.

"Coordination is designed to avoid unnecessary duplication of judicial resources and 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 object of [coordination] is to promote judicial efficiency and economy by providing 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 joinder generally begins before or during the discovery stage and is effective through the final disposition of the cases." Brooks, *supra*, at 165 (footnote omitted). In this respect in California, "coordination is distinguishable from its federal counterpart, multidistrict litigation, which combines cases in different districts for pre-trial proceedings only, after which the cases are referred back to the transferor district for trial." *Id.* (footnote omitted).

Thus, section 404.1 of the California Code of Civil Procedure mandates that "[c]oordination of civil actions sharing a common question of fact or law is appropriate if one judge hearing all of the actions for all

purposes . . . will promote the ends of justice." Cal. Civ. Proc. Code § 404.1; *see also* Cal. R. Ct. 3.540(a) (a coordination trial judge must be assigned "to hear and determine the coordinated actions"). This "'[o]ne-[j]udge, [a]ll [p]urpose'" standard mandates that one judge will preside over the trial for the entire action, even over those plaintiff-specific issues that may remain after the common questions of fact or law (typically the liability issues) are resolved. Brooks, *supra*, at 167. For example, in *Pesses,* 107 Cal. App. 3d at 119-20, the California Court of Appeal held that a Los Angeles plaintiff in a coordinated action in San Diego who would have found it significantly more expedient to try his damages cases in Los Angeles was not permitted to transfer his damages trial to Los Angeles, even after the defendant had stipulated to liability in the San Diego proceedings.

By petitioning to coordinate their cases under California Code of Civil Procedure section 404, the plaintiffs have expressly proposed to try their claims jointly, and thus themselves concede they satisfy 28 U.S.C. § 1332(d)(11)(B)(i). *See Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1123, 1125 n.19 (1988) (California Supreme Court explained that plaintiffs with mass tort claims can use coordination proceedings under section 404 to implement "some of the benefits of the class action device"; in particular,

the court explained, coordination proceedings, like class actions, allow "common issues [to] be determined."). Notably, CAFA specifies that a "mass action" does not include any civil action in which "the claims have been consolidated or coordinated solely for pretrial proceedings." 28 U.S.C. § 1332(d)(11)(B)(ii); *Tanoh*, 561 F.3d at 951. Here, California's coordination scheme prohibits coordination solely for pretrial proceedings, permitting coordination only if "one judge hearing all of the actions for all purposes . . . will promote the ends of justice." Cal. Civ. Proc. Code § 404.1.

The district court erred in remanding this case because the JCCP procedure makes this case a mass action subject to removal under CAFA.

CONCLUSION

The decision under review is exceptionally important. It defies congressional intent by establishing strong incentives for gamesmanship by plaintiffs' attorneys. One of the primary goals of CAFA was to close loopholes in the federal diversity jurisdiction statute and thereby end the jurisdictional gamesmanship employed by plaintiffs' attorneys. The decision below creates a loophole allowing plaintiffs' attorneys to invoke the benefits of a CAFA mass action (such as coordinated discovery and pretrial rulings) but avoid federal CAFA jurisdiction merely by omitting

the words "joint trial" from their coordination motion. To avoid that outcome, which contravenes both CAFA's plain text (as explained in Petitioners' brief) and CAFA's animating policy concerns, amici urge the Court to reverse the district court order denying remand and keep these actions in federal court where they belong.

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CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA and PHRMA

STATEMENT OF RELATED CASES

This Court has ordered this appeal to be set for argument on the same calendar as *Romo v. Teva Pharmaceuticals USA, Inc.*, No. 13-56310.

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

☒ 1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

- ☒ this brief contains 5,122 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or
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s/Jeremy B. Rosen
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