No. 18-80059

United States Court of Appeals
for the Ninth Circuit

IN RE: LIPITOR, JCCP 4761

ALIDA ADAMYAN, et al.,
Plaintiffs-Respondents,

v.

PFIZER INC.,
Defendant-Petitioner.

On Petition for Permission to Appeal From United States District Court, Central District of California, Hon. Cormac J. Carney, District Judge, Case No. 2:18-cv-01725-CJC (JPRx)

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR REHEARING EN BANC

JAMES C. STANSEL
MELISSA B. KIMMEL
THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA
950 F Street, N.W.
Washington, D.C. 20004

STEVEN P. LEHOTSKY
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JOHN H. BEISNER
Counsel of Record
GEOFFREY M. WYATT
JORDAN M. SCHWARTZ
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000

Attorneys for Amici Curiae The Chamber of Commerce of the United States of America and The Pharmaceutical Research and Manufacturers of America

The Chamber of Commerce of the United States of America (the "Chamber") and the Pharmaceutical Research and Manufacturers of America ("PhRMA") respectfully move this Court to grant them leave to file a brief as *amici curiae* in support of the petition for rehearing en banc in this case.[1] In support of this motion, *amici* state as follows:

1. The Chamber is the world's largest business federation, representing 300,000 direct members and representing indirectly the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every geographic region of the United States. An important function of the Chamber is to represent the interests of its members by participating as *amicus curiae* in cases involving issues of concern to business, such as this one. PhRMA is a voluntary, nonprofit association of the country's leading research-based pharmaceutical and biotechnology companies. PhRMA's mission is to advocate public policies encouraging the discovery of life-saving and life-enhancing new medicines. PhRMA's member companies are devoted to inventing medicines that allow patients to live longer, healthier, and more productive lives, and have led the way in the search for new cures. In just 2017

[1] Pursuant to Circuit Rule 29-3, *amici* endeavored to obtain the consent of all parties to the filing of a brief in support of the petition for rehearing. However, plaintiffs/respondents were unwilling to give consent, necessitating the instant motion for leave.

alone, member companies invested approximately $71.4 billion in research and development into medical innovations.[2]

2. The Chamber and PhRMA have a strong interest in this case because their members are increasingly the targets of sprawling multi-plaintiff lawsuits in state courts that are designed to evade federal diversity jurisdiction. In addition, their participation as *amici curiae* is desirable because the law in this area remains unsettled, and the Chamber's and PhRMA's unique perspective and expertise can help elucidate the significant statutory and public-policy issues raised by the parties' briefing.

WHEREFORE, the Chamber of Commerce of the United States of America and the Pharmaceutical and Research Manufacturers of America respectfully request that this Court grant them leave to appear as *amici curiae* and to file a brief in support of rehearing en banc. If the motion is granted, *amici* request that the Court file and consider the accompanying brief.

Dated: September 17, 2018

Respectfully submitted,

JAMES C. STANSEL
MELISSA B. KIMMEL
THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA

/S/ JOHN H. BEISNER
JOHN H. BEISNER
GEOFFREY M. WYATT
JORDAN M. SCHWARTZ
SKADDEN, ARPS, SLATE,

[2] *See* Pharmaceutical Research and Manufacturers of America, *PhRMA Annual Member Survey* (Washington, DC: PhRMA, 2018), https://www.phrma.org/report/2018-phrma-annual-membership-survey.

950 F Street, N.W.
Washington, D.C. 20004

STEVEN P. LEHOTSKY
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000
John.Beisner@skadden.com

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed electronically via the Court's ECF system, which caused one copy to be delivered via electronic mail to all counsel of record.

/s/John H. Beisner
John H. Beisner

No. 18-80059

United States Court of Appeals
for the Ninth Circuit

IN RE: LIPITOR, JCCP 4761

ALIDA ADAMYAN, et al.,
Plaintiffs-Respondents,

v.

PFIZER INC.,
Defendant-Petitioner.

On Petition for Permission to Appeal From United States District Court, Central District of California, Hon. Cormac J. Carney, District Judge, Case No. 2:18-cv-01725-CJC (JPRx)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR REHEARING EN BANC

JAMES C. STANSEL
MELISSA B. KIMMEL
THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA
950 F Street, N.W.
Washington, D.C. 20004

STEVEN P. LEHOTSKY
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JOHN H. BEISNER
Counsel of Record
GEOFFREY M. WYATT
JORDAN M. SCHWARTZ
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000

Attorneys for Amici Curiae The Chamber of Commerce of the United States of America and The Pharmaceutical Research and Manufacturers of America

TABLE OF CONTENTS

Table of Authorities

CASES

STATUTE

OTHER AUTHORITY

STATEMENT OF INTEREST

The Chamber is the world's largest business federation, representing 300,000 direct members and representing indirectly the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every geographic region of the United States. An important function of the Chamber is to represent the interests of its members by participating as *amicus curiae* in cases involving issues of concern to business, such as this one. PhRMA is a voluntary, nonprofit association of the country's leading research-based pharmaceutical and biotechnology companies. PhRMA's mission is to advocate public policies encouraging the discovery of life-saving and life-enhancing new medicines. PhRMA's member companies are devoted to inventing medicines that allow patients to live longer, healthier, and more productive lives, and have led the way in the search for new cures. In just 2017 alone, member companies invested approximately $71.4 billion in research and development into medical innovations.[1]

The Chamber and PhRMA have a strong interest in this case because their members are increasingly the targets of sprawling multi-plaintiff lawsuits in state courts that are designed to evade federal diversity jurisdiction. In addition, their

[1] *See* Pharmaceutical Research and Manufacturers of America, *PhRMA Annual Member Survey* (Washington, DC: PhRMA, 2018), https://www.phrma.org/report/2018-phrma-annual-membership-survey.

participation as *amici curiae* is desirable because the law in this area remains unsettled, and the Chamber's and PhRMA's unique perspective and expertise can help elucidate the significant statutory and public-policy issues raised by the parties' briefing.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should grant en banc review to resolve a recurring issue of exceptional importance that both this Court and other federal appeals courts have repeatedly left open: whether *sua sponte* orders by state courts consolidating the claims of 100 or more plaintiffs for a joint trial support removal under the mass action provision of the Class Action Fairness Act ("CAFA"). As elaborated in the petition, the plain language of the statutory text requires that this fundamental question be answered in the affirmative.

First, en banc review is appropriate because the panel's summary denial of the petition not only let stand a district court ruling that misapplied the plain text of CAFA's mass action provision, but also flouted the Supreme Court's command that discretionary review of remand orders under CAFA is "not rudderless." *Dart*

[2] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), counsel for *amici curiae* states that no counsel for a party in this case authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to the brief's preparation or submission. *Amici curiae* have moved for leave to file this brief. *Amici* sought consent of all parties but plaintiffs/respondents did not consent.

Cherokee Basin Operating Co., LLC v. Owens, 135 S. Ct. 547, 555 (2014). The clear import of *Dart* is that a summary denial of a petition for review involving a recurring, unsettled and important CAFA-related question constitutes an abuse of discretion unless there is *no* colorable argument supporting removal. The panel's summary denial here constitutes such an abuse of discretion because this Court and several other courts of appeals have repeatedly left open the interpretation of CAFA's mass action provision advanced in the petition—namely, that CAFA's plain language and purpose support removal based on *sua sponte* state-court proposals. Indeed, this Court previously *agreed* to resolve this fundamental question in another case prior to the appeal being voluntarily dismissed. The Court should grant review now to address the standard governing the grant of discretionary review in appeals like this one and in the process make clear that review should be granted to address important and recurring CAFA issues like the one at issue here.

Second, en banc review is all the more warranted because the result below contravenes Congress's intent in enacting CAFA. The purpose of CAFA was to provide for expansive federal jurisdiction over interstate cases of national importance and to make it easier to remove such cases to federal court. The district court's decision contravenes this plain congressional intent to expand federal jurisdiction over such cases as well as its overarching goal of eliminating

abusive plaintiff practices that evade federal jurisdiction. For this reason, too, review and reversal are warranted.

ARGUMENT

First, the Court should grant en banc review because the summary denial of the petition to appeal effectively signaled that the district court had decided the removal issue correctly. Thus, the ruling erroneously "froze the governing rule in this Circuit" with regard to an "important, unsettled, and recurrent" CAFA-related question. *Dart*, 135 S. Ct. at 555, 557 (citation omitted). As the Court made clear in *Dart*, although CAFA review is discretionary, that discretion should be exercised in favor of review in cases like this one, lest erroneous district court rulings interpreting CAFA be allowed to stand and become the governing law. As such, the panel abused its discretion in denying review, a fact this Court should make clear on en banc review.

The Supreme Court stressed in *Dart* that "[d]iscretion to review a remand order [under CAFA] is not rudderless." *Id.* at 555. Rather, "'[t]he decision whether to grant leave to appeal' under § 1453(c) . . . calls for the exercise of the reviewing court's correctly '*informed* discretion.'" *Id.* at 557 (quoting *BP America, Inc. v. Oklahoma ex rel. Edmondson*, 613 F.3d 1029, 1035 (2010)); *see also id.* ("caution[ing] against casual rulings" denying petitions to appeal). Such careful consideration is necessary to effectuate "the purpose" of the interlocutory appeal

provision, which is to "develop a body of appellate law interpreting CAFA." *Id.* at 556 (citation omitted). The Court further recognized that a circuit court "would necessarily abuse its discretion if it based its ruling [denying a petition to appeal a remand order] on an erroneous view of the law." *Id.* at 555 (citation omitted).

Applying this framework, the Supreme Court reasoned that because the issue in *Dart* (whether a defendant must submit evidence supporting CAFA's $5 million amount-in-controversy requirement in its notice of removal) was "important, unsettled, and recurrent," the Tenth Circuit's summary denial of the petition for review "strongly suggest[ed] that the panel thought the [d]istrict [c]ourt got it right in requiring proof of the amount in controversy in the removal notice." *Id.* at 556. But as the Supreme Court ultimately made clear, the district court's order remanding the case actually "misstated the law" and was "fatally infected by legal error." *Id.* at 557-58. As a result, the Supreme Court vacated the judgment of the Tenth Circuit "to correct the erroneous view of the law the Tenth Circuit's" "casual ruling[]" had "fastened on district courts within the Circuit's domain." *Id.*

This case calls for the same result. In remanding the cases below, the district court reasoned that "a state court's *sua sponte* order cannot 'propose' a joint trial to trigger mass action jurisdiction" under CAFA. *In re Lipitor*, No. CV 18-01725-CJC(JPRx), 2018 U.S. Dist. LEXIS 80284, at *163 (C.D. Cal. May 10, 2018). For the reasons set forth in the petition, however, CAFA's plain language

and purpose compel a contrary conclusion. (*See* Pet. for Rehearing En Banc at 10-12 (explaining that the only limit "Congress *did* place on the proposal" for a joint trial is that "it cannot come from the defendant") (citing 28 U.S.C. 1332(d)(11)(B)(ii)(II)).) Indeed, *this* Court previously observed that a "state court's *sua sponte* joinder of claims might" support removal under these circumstances. *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 953, 956 (9th Cir. 2009) ("By its plain terms, § 1332(d)(11) therefore does not apply to plaintiffs' claims in this case, as . . . neither the parties *nor the trial court* has proposed consolidating the actions for trial.") (emphasis added). Other courts of appeals have made similar statements. *See Scimone v. Carnival Corp.*, 720 F.3d 876, 881 (11th Cir. 2013) ("We leave open the possibility that the state trial judge's *sua sponte* consolidation of 100 or more persons' claims could satisfy the jurisdictional requirements of § 1332(d)(11)(B)(i)."); *Parson v. Johnson & Johnson*, 749 F.3d 879, 887 (10th Cir. 2014) (similar); *Anderson v. Bayer Corp.*, 610 F.3d 390, 394 (7th Cir. 2010) (similar). Notably, this Court was poised to resolve this fundamental question just last year, but the appeal was voluntarily dismissed, once again leaving the fundamental question at hand undecided. *See Alexander v. Bayer Corp.*, No. 17-55828, 2017 WL 6345791 (9th Cir. July 10, 2017).

Given the recurring nature of the question presented and this Court's prior recognition of its importance by granting the petition to appeal in *Alexander*, the

panel should have granted review. By summarily denying review, the panel "strongly suggest[ed] that [it] thought the [d]istrict [c]ourt got it right" on a disputed and recurring issue that this Court has yet to finally resolve. *Dart*, 135 S. Ct. at 556. Because the very "purpose of § 1453(c)(1) is to develop a body of appellate law interpreting CAFA," *id.* at 556, 557 (citation omitted); *see also Bullard v. Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759, 761 (7th Cir. 2008) (construing mass action provision and noting that "[t]he statute's meaning should be settled, to avoid the risk that lengthy and expensive efforts in one judicial system or the other will be wasted."), the panel should have granted review. The Court should therefore grant the en banc petition and "correct the erroneous view of the law the [Ninth] Circuit's decision fastened on district courts within the Circuit's domain." *Dart*, 135 S. Ct. at 558.

Second, the panel's denial of review—and the resulting implicit statement on the merits that remand was properly granted—is particularly troubling because the remand ruling undermines CAFA's goals of creating expansive federal jurisdiction and making removal easier. "CAFA's primary objective" is "ensuring Federal court consideration of interstate cases of national importance." *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 595 (2013) (citation omitted). Thus, as the Supreme Court explained in *Dart*, "no antiremoval presumption attends cases invoking CAFA." 135 S. Ct. at 554. Consistent with this principle, the Supreme Court has

repeatedly sought to limit the "strategies a plaintiff may use to avoid federal jurisdiction under CAFA" by refusing to "'exalt form over substance' for 'CAFA jurisdictional purposes.'" *Corber v. Xanodyne Pharm., Inc.*, 771 F.3d 1218, 1223 n.3 (9th Cir. 2014) (quoting *Knowles*, 568 U.S. at 595) (rejecting a proposed class action plaintiff's attempt to stipulate that damages would not exceed $5 million and preclude satisfaction of $5 million amount in controversy).

Efforts to evade mass-action removal should be subject to even greater scrutiny since mass actions are prone to even greater abuse than class actions. According to CAFA's legislative history:

> [M]ass 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 . . . .

S. Rep. No. 109-14, at 47 (2005). Congress sought to define the term "class action" broadly to avoid "jurisdictional gamesmanship"; hence, it follows perforce that the "potentially more-abusive mass actions should be construed just as liberally." Jacob Durling, *Waltzing Through a Loophole: How Parens Patriae Suits Allow Circumvention of the Class Action Fairness Act*, 83 U. Colo. L. Rev. 549, 569 (2012) (footnotes and citation omitted).

The approach taken by the district court cannot be reconciled with that broad view. Instead, by taking a narrow view of removable mass actions, the district

court's ruling threatens to foment precisely the sort of jurisdictional gamesmanship that Congress sought to eliminate when it enacted CAFA. After all, if the district court's determination is left to stand, plaintiffs' lawyers will be able to evade mass action removal by filing disparate product-liability lawsuits involving 100 or more plaintiffs and waiting for the state court to propose trying the claims jointly. The upshot is that *plaintiffs* would be creating the very kinds of multi-plaintiff interstate cases Congress sought to make removable under CAFA but subverting federal jurisdiction by outsourcing the proposal of joinder to the state courts. *Cf. Lester v. Exxon Mobil Corp.*, 879 F.3d 582, 592 (5th Cir. 2018) (rejecting another theory that would permit plaintiffs to "evade" mass action removal and "[c]onstruing CAFA to permit this procedural gamesmanship is at odds with CAFA's intent to curb abuses of the judicial system"). For this reason as well, the petition for rehearing en banc should be granted.

CONCLUSION

For the foregoing reasons, and those stated by petitioner Pfizer Inc., the petition for rehearing en banc should be granted.

Dated: September 17, 2018

Respectfully submitted,

JAMES C. STANSEL
MELISSA B. KIMMEL
THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA
950 F Street, N.W.

/S/ JOHN H. BEISNER
JOHN H. BEISNER
GEOFFREY M. WYATT
JORDAN M. SCHWARTZ
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

Washington, D.C. 20004

STEVEN P. LEHOTSKY
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000
John.Beisner@skadden.com

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed electronically via the Court's ECF system, which caused one copy to be delivered via electronic mail to all counsel of record.

/s/John H. Beisner
John H. Beisner