

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - X
FORD MOTOR COMPANY and :
CITIBANK (South Dakota), N. A. , :
Petitioners :
v. : No. 01-896
JOHN B. McCAULEY, ET AL. :

Washington, D. C.

Monday, October 7, 2002

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:04 a. m

APPEARANCES:

SETH P. WAXMAN, ESQ., Washington, D. C.; on behalf of the
Petitioners.
STEVE W. BERMAN, ESQ., Seattle, Washington; on behalf of
the Respondents.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
SETH P. WAXMAN, ESQ.	
On behalf of the Petitioners	3
STEVE W. BERMAN, ESQ.	
On behalf of the Respondents	24
REBUTTAL ARGUMENT OF	
SETH P. WAXMAN, ESQ.	
On behalf of the Petitioners	48

1 PROCEEDINGS

2 (11:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 01-896, the Ford Motor Company and Citibank v.
5 John B. McCauley.

6 Mr. Waxman. The Court would appreciate hearing
7 argument on, I'm sure, not just on the question presented
8 in the petition for certiorari, but on the question posed
9 in the supplemental briefing about whether there is
10 appellate jurisdiction where a nominally prevailing party
11 in the district court can -- can appeal, and also about
12 whether the question of -- under 1447(d), if this was an
13 order of remand, whether the -- the thing was appealable
14 to the Ninth Circuit at all.

15 ORAL ARGUMENT OF SETH P. WAXMAN

16 ON BEHALF OF THE PETITIONERS

17 MR. WAXMAN: Mr. Chief Justice, and may it
18 please the Court:

19 Perhaps with that observation, I would -- it
20 would behoove me to address the quest -- the appellate
21 jurisdiction of this Court first, as much as I would like
22 to rush into why there clearly is subject matter
23 jurisdiction in this case, regardless of whether the
24 plaintiffs' claims for injunctive relief are viewed as
25 separate and distinct or common and then divide it.

1 So let me first address why I think the Ninth
2 Circuit and this Court had appellate jurisdiction, and it
3 is straightforward. That is, there is an appeal in this
4 case from the dismissal with prejudice of a consolidated
5 complaint which was filed voluntarily by the plaintiffs in
6 this case seeking -- as against plaintiffs that are
7 different than any -- than the constituent State court
8 actions, including different plaintiffs seeking different
9 causes of action and seeking a different form of relief,
10 that is, specific performance of the Ford rebate program

11 And it is very clear, both from the cont -- the
12 --the four corners of the consolidated complaint and from
13 an express representation that my friend, Mr. Berman, made
14 at the oral argument in the class certification stage,
15 that the consolidated complaint was filed for the purpose
16 of obtaining, in front of Judge Dwyer in the Northern Dis
17 -- the Western District of Washington, a judgment on the
18 merits in the case. That is, it was different than the
19 treatment, the maximum treatment, that he would have been
20 permitted to provide under the multi-district litigation
21 panel's reference. That is --

22 QUESTION: What's sort of unusual, though, is
23 that you didn't suffer the dismissal. I mean, yes, a
24 dismissal is -- is usually a final -- a final action, and
25 it's usually the person whose suit was dismissed who

1 appeals --

2 MR. WAXMAN: That is --

3 QUESTION: -- not -- not the person who
4 benefitted by the dismissal and that --

5 MR. WAXMAN: Indeed, and that, Justice Scalia,
6 is the -- is the question I believe, the specific
7 question, that the Court directed the parties' attention
8 to in its request for supplemental briefs.

9 Now, it is clear that a prevailing party
10 normally cannot appeal, but the operative word that this
11 Court has recognized, at least since the Electrical
12 Fittings case, is normally. And this Court and the lower
13 courts have applied a rather particular test to determine
14 when normally doesn't apply, and that is, is the nominally
15 prevailing party sufficiently aggrieved by a decision in
16 its favor that it retains a, quote, stake in the appeal?
17 And that's -- that test was articulated by this Court in
18 Guaranty Trust v. Roper --

19 QUESTION: Mr. Waxman.

20 MR. WAXMAN: -- and in Forney v. Apfel.

21 QUESTION: Mr. Waxman, a defendant who removes a
22 case and then is remanded is surely aggrieved but,
23 nonetheless, cannot appeal. And the problem I have with
24 an answer that you went by too fast for me is this case is
25 in -- was in the Washington district court for pretrial

1 purposes only under 1407. The transfer from the several
2 district courts to which these cases were initially
3 removed -- that transfer under the statute was for
4 pretrial purposes only, not for trial. And after the
5 pretrial, under the statute, the cases, unless all the
6 parties consent, would go back to the district courts from
7 whence they came.

8 So I don't understand how the Western District
9 which is dealing with a complaint for pretrial purposes
10 only -- I mean, the -- the request that a complaint --
11 consolidated complaint be filed was for pretrial
12 processing. How do you get from that an action that
13 displaces all of the other actions that had been removed
14 from the State court?

15 MR. WAXMAN: Justice Ginsburg, the appealability
16 of the dismissal with prejudice of the consolidated
17 complaint does not depend on whether the consolidated
18 complaint, quote, did away with the other actions. The
19 reason -- we would, of course, readily concede that under
20 1447(d), if all that had happened was a removal of the six
21 State court actions, a transfer for pretrial purposes to a
22 multi-district litigation court and a determination by
23 that court that it lacked subject matter jurisdiction over
24 the complaints, there would be no appeal because the
25 remand of removed State court actions for lack of subject

1 matter jurisdiction, Congress has decided, is not a
2 determination that may be reviewed by Federal appellate
3 courts.

4 But here -- and this, I think, is the salient
5 point. Here, the judge did not require the plaintiffs'
6 lawyers in the six cases to file some sort of concordance
7 or a consolidating document that often is ordered so as to
8 facilitate pretrial proceedings. What the judge said is
9 if anybody wants to file a consolidated complaint, they
10 may.

11 The consolidated complaint that was filed in
12 this case avowedly invoked this Court's 13 -- the Federal
13 court's 1332 jurisdiction and sought not just pretrial
14 consolidated proceedings on discovery and motions, they
15 wanted a full trial or a full resolution on the merits.

16 In other words, it's -- it's as if the judge,
17 having had the six cases transferred, said expressly,
18 look, I'm going to deal with all of the pretrial matters
19 that are the subject of this transfer order, but if you
20 all like me --

21 QUESTION: Mr. Waxman, may I stop you at that
22 point? Because the pretrial consolidated -- the order --
23 this is -- I'm looking at the appendix, page 35. It says,
24 by order of the multi-district panel, the cases have been
25 consolidated for pretrial purposes only.

1 Now, you're saying that there is something --
2 something that I don't see in the written orders that says
3 they -- no, it's going to be now for trial purposes.

4 MR. WAXMAN: No, no, no. I'm -- I'm not
5 explaining myself correctly. The -- the order doesn't say
6 these six removed cases are here for trial purposes, and
7 if it did, it would exceed the court's authority under
8 1407 and this Court's specific holding in Lexecon.

9 On page 41 of the joint appendix, the court
10 under a heading say -- entitled consolidated complaint
11 says, should plaintiffs in all or some of the consolidated
12 actions decide to file a consolidated complaint, you have
13 to do so within a certain period of time.

14 Now, that raises the question, since they did it
15 voluntarily, whether what they were filing was something
16 that, in essence, sort to -- as I said, to be a
17 concordance, to consolidate in one document all of the
18 various parties and all the various claims and all various
19 theories so that a court can meaningful and --
20 meaningfully and efficiency -- efficiently manage the
21 pretrial proceedings.

22 QUESTION: But ordinarily you wouldn't go -- go
23 about it that way. You'd have a memorandum, not a
24 consolidated complaint.

25 MR. WAXMAN: That -- that's true, Mr. Chief

1 Justice, although there are instances where the court --
2 where the transferee court has ordered the filing of
3 something called a consolidated complaint.

4 But here, there are two salient -- at least two
5 salient differences. One is this complaint has different
6 parties. It has different causes of action. It seeks a
7 different type of relief. And at the motion -- and -- and
8 it seeks quite clearly, based on the conduct of the
9 parties and the representations, this is, in essence,
10 saying thank you very much for having -- having us here
11 for consolidated proceedings on our underlying state court
12 actions, but we have decided we like you, Judge Dwyer, and
13 we want you to try a case, and we're going to file a brand
14 new Federal action that is docketed in the Western
15 District.

16 QUESTION: Mr. Waxman, things like that,
17 juris -- basic jurisdictional thing, agreeing -- this
18 would be a consent to have a court that has no authority
19 to adjudicate a case to adjudicate it. Usually such a
20 major step is done not by inference, not by implication.
21 This is saying, court, even though you have no authority
22 under the Federal statutes to proceed without our consent,
23 we are consenting, so go ahead. We're waiving any
24 questions of venue or anything else.

25 The fact that this is labeled consolidated

1 complaint is simply what the multi-district statute says.
2 It says that the actions may be transferred for
3 consolidated pretrial proceedings. So why couldn't this
4 consolidated complaint be simply for pretrial proceedings,
5 the only thing that the multi-district panel transferred
6 the case to Western District of Washington for?

7 MR. WAXMAN: Justice Ginsburg, it certainly
8 could have been, and if it were ordered by the court, that
9 is the most that it could have been.

10 But in this case, that's not what it was. There
11 are parties, claims, and requests for relief, and
12 particularly the -- what is really the object of the
13 litigation, the request for specific performance of the
14 Ford rebate program --

15 QUESTION: Mr. Waxman, can I interrupt you with
16 a question? It seems to me you're, in effect, arguing
17 that the Federal consolidated complaint was kind of a
18 brand new lawsuit, and we forget about everything else
19 that happened before.

20 Now, if that were the case and you just had that
21 complaint filed against you and you filed a motion to
22 dismiss and you prevailed and they dismissed the
23 complaint, it clearly would not be appealable. In order
24 for you to find reasons to appeal, you got to go back and
25 say, well, now we're going to have to face a lot of other

1 lawsuits.

2 MR. WAXMAN: That -- I think your premise -- the
3 premise of your question, Justice Stevens, with respect,
4 is incorrect, which is if we had asked for a dismissal on
5 subject matter jurisdiction grounds and prevailed -- that
6 is, we would have --

7 QUESTION: No. They asked for dismissal on
8 subject matter jurisdiction. No. I'm sorry. I'm sorry.
9 You're right. You're right.

10 MR. WAXMAN: If we had asked for it, then we
11 would have gotten all that we could possibly have
12 expected. What we asked for -- what happened in this case
13 was they voluntarily filed it. They asked for trial and
14 judgment on the merits. The court sua sponte said, I
15 don't think I have subject matter jurisdiction, and we
16 have the right to appeal that because we are sufficiently
17 aggrieved that we have a stake in the case. And the --

18 QUESTION: Why did the district court say it had
19 no subject matter? Because of the amount in controversy?

20 MR. WAXMAN: Yes, because of the amount in
21 controversy. It refused to apply -- it followed prior
22 Ninth Circuit precedent and refused to apply the
23 defendants' viewpoint in a class action seeking
24 injunctive --

25 QUESTION: Or you have a brand new --

1 QUESTION: You would not have been aggrieved --
2 if -- if that was the only case pending and so -- and if
3 it was dismissed, how would you have been aggrieved?

4 MR. WAXMAN: We would have been aggrieved in the
5 same way -- because what we sought was -- what we wanted
6 was litigation in a single forum, in a forum which had
7 already conducted substantial pretrial proceedings and a
8 Federal forum. We sought judgment in our favor on the
9 merits. What we -- which would have produced a dismissal
10 or a judgment with prejudice. What we received, but did
11 not ask for, was a result that permits the -- either these
12 plaintiffs or anybody else in the country to continue this
13 litigation in State court. And -- and their-- the lower
14 courts in the cases that we've cited are --

15 QUESTION: Do you -- do you argue that in just
16 an ordinary case if a -- you file -- a defendant files a
17 motion to dismiss both on the grounds of no cause of
18 action and so forth and so on and also no jurisdiction,
19 you win on no jurisdiction, you can appeal that?

20 MR. WAXMAN: Well, I think, this Court's
21 decision in Forney v. Apfel stands for that proposition.
22 But it would -- this is an easier case because we did not
23 seek to dismiss this for subject matter jurisdiction
24 grounds. We wanted to be in Federal court. We were the
25 ones who removed the underlying State court actions here.

1 As it turns out, they decided they wanted to be in Federal
2 court too.

3 But there are a long line of cases, and really
4 an uninterrupted line of cases, in the lower courts that
5 have interpreted this Court's jurisprudence in Forney and
6 Guaranty Trust and Electrical Fittings to mean that where
7 there is a dismissal on -- of State law claims, not on the
8 merits, but for lack of jurisdiction, defendants are
9 aggrieved in a practical sense. And we've discussed a --

10 QUESTION: Mr. Waxman, I think the problem is
11 those six State court actions that haven't vanished.
12 Nobody ever dismissed them. And as aggrieved as you are
13 -- and I agree that you're aggrieved -- you could not
14 appeal from the remand. It seems to me these two, the
15 dismissal of the consolidated complaint, the return of the
16 actions from which this consolidation originated, that
17 those two are inextricably tied together. And you would
18 like to cut them off and say, Court, just look at the
19 consolidated complaint. Forgot about those separate
20 actions. Somehow they vanished.

21 MR. WAXMAN: Not -- with respect, Justice
22 Ginsburg, maybe I -- perhaps I'm not understanding you. I
23 -- there's an interesting epistemological question in this
24 case whether the underlying State court actions continue
25 to exist or whether they had been, in fact, superseded but

1 the --

2 QUESTION: Let -- let me ask you about one
3 solution to the epistemological question. Let's assume --
4 let's assume that on the remand the State courts think
5 they are still alive. Are you going to the State courts,
6 let's try them now? Hear us immediately. We want a
7 trial.

8 MR. WAXMAN: You mean --

9 QUESTION: You're not going to do that. What
10 you're going to say is, defer any action here, if you win
11 on this -- on your point here. You're going to say, defer
12 any action so we can try the Federal case.

13 MR. WAXMAN: Well --

14 QUESTION: And -- and that it seems to me,
15 unless I am missing the point of what you are necessarily
16 going to do, it follows that -- that the -- that the
17 Federal case is, in fact, simply the alter ego of the
18 State cases, and if you win here, you are functionally
19 doing nothing but eliminating subsection (d).

20 MR. WAXMAN: I -- with respect, Justice Souter,
21 if -- there are plaintiffs in two of the State cases who
22 are not even named plaintiffs in the Federal case. There
23 are defendants. There is a defendant.

24 QUESTION: Are they within the class?

25 MR. WAXMAN: Well, the -- all of the cases seek

1 a nationwide class.

2 QUESTION: Sure, and don't you think those non-
3 named plaintiffs would be happy to let somebody else carry
4 the ball for them in -- in the Federal action?

5 MR. WAXMAN: Well --

6 QUESTION: They're -- they're not going to fight
7 you when you say to the State courts, just let them sit
8 here until we get the Federal case taken care of.

9 MR. WAXMAN: There are -- I'll go to door number
10 two. There are claims. There are causes of action in the
11 underlying State cases that are not included in the
12 consolidated complaint and vice versa. In short, the --
13 the -- from a case management perspective, whether both a
14 Federal case and a State case that are both in existence
15 can go forward simultaneously or whether one should follow
16 the other is something that happens all the time, and it
17 has never been understood to divest one court or the other
18 of jurisdiction. And our submission here is that we have
19 something that is distinctly new. It was --

20 QUESTION: The consolidated complaint?

21 MR. WAXMAN: Yes.

22 QUESTION: No, but I mean, you -- but our point
23 is if functionally you are going to treat this as the alt
24 -- the equivalent, the alternative to all of these State
25 actions -- and you have told me nothing to suggest that

1 you're not going to do that -- then it seems to me that
2 the -- the -- the argument has got to prevail that
3 functionally this in -- in fact is nothing but an end run
4 around the non-appealability of the remand.

5 MR. WAXMAN: Well, in point of fact, Justice
6 Souter, if this Court reverses the Ninth Circuit for the
7 -- for -- for one of the two errors of law that it
8 committed, and on remand, the conclusion is made that
9 there is subject matter jurisdiction and the case can
10 proceed, we will be in precisely the same posture that we
11 were in at the time that the plaintiffs filed the
12 consolidated complaint.

13 QUESTION: No, because at that time the --
14 the -- the State cases had been remanded.

15 MR. WAXMAN: And -- well, the State cases have
16 not yet been remanded, but if the State --

17 QUESTION: I -- I mean -- I'm sorry. They had
18 been -- they had been removed. I misspoke.

19 MR. WAXMAN: They had been removed.

20 QUESTION: They had been removed.

21 MR. WAXMAN: And they will remain removed if
22 this -- if a Federal court concludes that there is subject
23 matter jurisdiction.

24 QUESTION: I thought that the order of the
25 Western District of Washington was that the State cases

1 are remanded.

2 QUESTION: That's what I thought.

3 QUESTION: And that the Ninth Circuit did not
4 touch that, that the Ninth Circuit dealt only with the
5 consolidated complaint.

6 MR. WAXMAN: There is a single order in the case
7 that says there is no jurisdiction. And it's in the -- in
8 the joint appendix. There is no subject matter
9 jurisdiction over the consolidated complaint or over the
10 six removed actions. And therefore, the consolidated
11 complaint is dismissed, and the clerk is directed to
12 remand the underlying State actions back to the States.
13 Now, that order was stayed by the Ninth Circuit at our
14 request pending the outcome of this case. That is, if --

15 QUESTION: Well, but stayed by the Ninth Circuit
16 prior to argument there?

17 MR. WAXMAN: No. After -- yes, it was stayed
18 prior to argument there and --

19 QUESTION: Well, didn't that stay expire with
20 the decision of the court of appeals?

21 MR. WAXMAN: It would have except that we moved
22 for a stay of the mandate. The mandate issued before the
23 court ruled on it, and the court then recalled the mandate
24 and directed that the remand of the underlying State
25 actions not proceed until this Court -- at least until

1 this Court -- has resolved the question. But
2 ultimately --

3 QUESTION: But I still think -- I still think
4 you're in trouble because even if we accept your -- your
5 reading of what the -- the court ordered and what it's
6 likely to do if you prevail here, it simply changes the
7 characterization of what's going on. You're -- you're
8 saying that the -- that if the -- if the consolidated case
9 stays in the Federal court, it does not die, and in fact,
10 because of that, there is no remand. Then it simply
11 follows that the consolidated course is a trump to the
12 remand and you're excluding the operation of subsection
13 (d) in a slightly different way.

14 MR. WAXMAN: Not true, Justice Souter, for two
15 reasons. I'll give the broader one first.

16 If we had filed as all parties in the case and
17 the Solicitor General as well agree is the complete
18 functional equivalent of the consolidated complaint -- if
19 Ford and Citi had filed a declaratory judgment action in
20 Federal court, even after the State cases had been filed,
21 before or after they had been removed, and we asked for a
22 declaration that we can terminate the Ford rebate program,
23 there would be no question that --

24 QUESTION: Mr. Waxman, give me an example of any
25 case in which a defendant in a product liability suit, in

1 a credit suit like this one, a defendant has said I want
2 to preempt the class action and so I am going to bring
3 this declaratory suit against all the credit card holders
4 of this plan all over America in the forum that I choose,
5 and that's going to be where the class action is going to
6 proceed. Can you give me any precedent for a defendant
7 being able to take over what would have ordinarily been
8 the plaintiff's product liability claim, credit card
9 claim? I -- I don't know of any such case where a
10 defendant has been allowed to make such a case its show
11 rather than the plaintiff's show.

12 MR. WAXMAN: I -- as I'm standing here, Justice
13 Ginsburg, I -- I can't bring any cases to mind. I'll --
14 I'll -- I'll -- I'll try and bring one to mind prior to my
15 rebuttal.

16 But I don't understand what the objection would
17 be if, before terminating the program, we said, we're
18 going to terminate this program --

19 QUESTION: Because you have --

20 MR. WAXMAN: -- and we want a declaration
21 that --

22 QUESTION: Because, Mr. Waxman, you have
23 potential plaintiffs from all over the country. Normally
24 a lawsuit is begun by a plaintiff and the plaintiff's
25 choice of forum is respected. Here you are saying a

1 defendant, not dealing with one plaintiff, but dealing
2 with hundreds, maybe thousands -- I don't know how many
3 credit card holders there are -- across the country can
4 start the lawsuit and a Federal court would listen to
5 that, would, at the defendant's urging, somehow certify
6 the plaintiff class. I don't know of any such action. I
7 don't know of any district judge who has done that at the
8 urging of a defendant.

9 MR. WAXMAN: Well, Justice Ginsburg, if we were
10 to have filed such a case -- and my submission is it would
11 be the functional equivalent of a consolidated complaint
12 -- it would not disempower plaintiffs or plaintiffs'
13 representatives from filing their own class actions in
14 State or Federal court. And if that were the case, there
15 would then -- there would be -- thereafter be a
16 determination made by the courts involved --

17 QUESTION: Well, in any case you said it --

18 MR. WAXMAN: -- as to whether it makes sense --

19 QUESTION: It doesn't occur to you that there is
20 such a case, but --

21 MR. WAXMAN: I am -- I am sure that there are
22 many such cases. I can't cite you one as I'm standing
23 here.

24 QUESTION: Where defendant starts the action as
25 a declaratory action and a class gets certified on the

1 plaintiff's side.

2 MR. WAXMAN: That's correct. I -- I know that
3 our brief and the red brief and the Solicitor's General
4 brief all address this scenario, but I can't bring to mind
5 the cases.

6 But just to get back to Justice Souter's
7 question again, let me give you the ex -- in terms of
8 whether, if we proceed here, a State case could go forward
9 and -- and would go forward, If you take, for example,
10 the Alabama case where there's no Alabama plaintiff here,
11 they have not only not sought specific performance, they
12 have disavowed any specific performance and brought
13 separate claims on different theories. Since they haven't
14 sought specific performance, there is no subject matter
15 jurisdiction over the claim because we are -- and this
16 Court basing subject matter jurisdiction on the cost of
17 providing that performance -- the Alabama case can and
18 presumably will go forward.

19 QUESTION: Will it go forward without your
20 objection? Are you representing that -- that you will
21 walk into the Alabama court and say, sure, we're ready to
22 go ahead?

23 MR. WAXMAN: Under this -- yes. Under this
24 Court's -- under the Court's current jurisprudence, yes,
25 we would. The only -- it would only be if this Court were

1 to resolve the question it left open in Free v. Abbott
2 Labs that we would then have some argument, or that the
3 Court determined that punitive damages could be
4 accumulated. But since they aren't asking for a specific
5 performance -- and neither, by the way, are I think four
6 other of the six cases. Since they're not asking for a
7 specific performance, we don't have an argument under this
8 Court's existing case law for keeping the cases there.
9 And they could --

10 QUESTION: How many -- how many -- I'm sorry,
11 but how many other cases like the Alabama case are there?
12 In other words, you -- you say, okay, we'll litigate in
13 Alabama. Any others?

14 MR. WAXMAN: I -- I don't know that I have the
15 -- all of the details of the underlying cases in mind.
16 But if they are simply a claim for damages and punitive
17 damages in which the amount in controversy is not \$75,000,
18 and they aren't asking for specific performance, I don't
19 think, consistent with the law of this case, we would have
20 any basis for objecting to them going forward.

21 QUESTION: They all ask for compensation. There
22 are none of them that ask just for specific performance,
23 and -- and even in this consolidated complaint, the first
24 thing that they ask for is compensatory damages.

25 MR. WAXMAN: Well, it's -- it is clear, Justice

1 Ginsburg -- and if it isn't clear from the complaint, it
2 is utterly clear from the -- from the plaintiffs' red
3 brief in this case at page 45 that what they -- the object
4 of this litigation is reinstatement of the national Ford
5 credit rebate program under which they can earn credits
6 toward the purchase of a Ford vehicle.

7 They -- they're -- they don't -- none of these
8 plaintiffs have a liquidated claim for damages because
9 they're not asking that they be paid rebates that they
10 earned and weren't paid. Those were credited to them.
11 They are all asking for reinstatement of a program, which
12 doesn't exist, that will allow them to earn credits, based
13 on purchases, toward the purchase of a vehicle.

14 And on the -- on the question of subject matter
15 jurisdiction, the court below made two errors of law.
16 First, it held incorrectly that class actions joining
17 separate and distinct claims for injunctive relief cannot
18 be viewed from the defendants' -- cannot be valued from
19 the defendants' viewpoint. And secondly, it erred in
20 concluding that the plaintiffs' interest in specific
21 performance cannot be viewed as common and undivided.

22 And if the Court has no questions at this time,
23 I'd like to reserve the balance of my time and perhaps
24 address the merits on rebuttal.

25 QUESTION: Very well, Mr. Waxman.

1 Mr. Berman, we'll hear from you.

2 ORAL ARGUMENT OF STEVE W. BERMAN
3 ON BEHALF OF THE RESPONDENTS

4 MR. BERMAN: Mr. Chief Justice, and may it
5 please the Court:

6 I will turn to the question that's taken the
7 balance of the argument so far and that is whether this
8 Court has jurisdiction. And I do so with the same
9 reluctance that Mr. Waxman did because the underlying
10 question is an important question that has troubled courts
11 dealing with class actions for some time now.

12 But despite the fact that I'd like the Court to
13 answer that question, I don't think there was jurisdiction
14 on appeal or -- or before this Court because it's quite
15 clear that no matter how you artfully look at this, this
16 is a simple situation that's subject to 1407(c) and (d)
17 which this Court has said commands -- and that's in the
18 Grauded case -- unmistakably commands that where there is
19 a remand, based on the lack of subject matter
20 jurisdiction, that that's not reviewable.

21 QUESTION: I -- it was your clients, Mr. Berman,
22 who filed the consolidated complaint in the Western
23 District, I take it.

24 MR. BERMAN: That's correct, Your Honor.

25 QUESTION: And who was it that moved to dismiss

1 that complaint?

2 MR. BERMAN: No one moved to dismiss that
3 complaint. The court, after consideration of class
4 certification, wrestling with -- I think with the laws of
5 the various different States that were invoked by that
6 motion, said to us, I'm issuing an order to show cause why
7 I shouldn't, on my own motion, dismiss this case for lack
8 of jurisdiction.

9 QUESTION: And did he -- on the subject matter
10 ground that there's not -- not \$75,000 in controversy?

11 MR. BERMAN: That's correct, Mr. Chief Justice.

12 QUESTION: Thank you.

13 MR. BERMAN: And then we briefed that issue and
14 the judge dismissed the case in response to the briefing
15 on the order to show cause.

16 QUESTION: And that was before there was any
17 certification. You didn't get up to any certification of
18 any class, did you?

19 MR. BERMAN: Justice Ginsburg, that was -- the
20 answer is yes. It was before. We were in the midst of
21 the class certification hearings. We had two or three
22 hearings. No class had been certified, and I think, as I
23 said earlier, that in the process of wrestling with the
24 various State laws, the district court scratched his head
25 and said, why is this case before me?

1 QUESTION: Now, as I understand Mr. Waxman's
2 position, it is that the consolidated complaint is a new
3 Federal action. To be sure, the effect of the district
4 court's order being appealed here and being reversed may
5 affect -- may control the remand of the cases that were
6 being held. But this action must be looked at on its own
7 as a Federal action. True, one of the proximate causes of
8 our retaining the action by saying that there is
9 jurisdiction may defer the remand of those other cases.
10 True, that looks like something of an end around the no
11 appealability for remand, which is the express command of
12 the Congress. But we have here a separate case and we
13 have to look just at that separate case.

14 Number one, am I understanding his argument
15 correctly? And number two, what is your response?

16 MR. BERMAN: I think you are understanding his
17 argument correctly, but I submit that he's incorrect.
18 It's not a new case. As one of the Justices pointed out,
19 there's no authority under the MDL rules for us to just
20 say this is a whole new case.

21 QUESTION: Well, who filed the -- the
22 consolidated complaint? Your -- presumably you did.

23 MR. BERMAN: I did, Your Honor, and if you read
24 Judge --

25 QUESTION: And it had different parties and

1 different complaints than -- than the separate State
2 actions.

3 MR. BERMAN: That's correct.

4 QUESTION: Why did you file that consolidated
5 complaint in that fashion? It was before the district
6 court as part of a pretrial situation in a multi-court
7 jurisdiction problem

8 MR. BERMAN: It is not uncommon in MDL practice
9 for pretrial purposes to try to organize the pleadings for
10 the district judge in a consolidated complaint. In fact,
11 I -- I can't think of any MDL case I handle --

12 QUESTION: But didn't it do more than just
13 organize the pleadings? Didn't it change parties and
14 causes of action and look like a whole new ball of wax?

15 MR. BERMAN: Well, there were some
16 representative changes because after all the lawyers
17 across the country got together for the first time,
18 because we were thrown together, some of those lawyers
19 said, if you're going to move for class certification of a
20 nationwide class in one of these State court cases, maybe
21 my representative doesn't need to be there because there's
22 five other representatives. So for consolidation purposes
23 and for organizational purposes, we streamline and we try
24 to be as organized as we can. That doesn't mean we've
25 abandoned the cases underlying below. We -- we did not.

1 QUESTION: It's not a question of abandonment.
2 It's a question of which one takes precedence. There's
3 now a Federal case which Mr. Waxman's argument is takes
4 precedent. We just hold everything else until this one is
5 done.

6 MR. BERMAN: Well, there's a Federal case for
7 pretrial purposes, and the judge, Judge Dwyer of the lower
8 court, found he had no jurisdiction anymore over that case
9 which is proceeding in Federal court. But it's a
10 diversity case asserting State law claims. So it's not,
11 quote, a Federal case. It's been removed, and once a
12 court determines that there's no jurisdiction, it's no
13 longer a Federal case.

14 QUESTION: Mr. Berman, Mr. Waxman points out
15 that you have submitted an entire complaint. It doesn't
16 look like a pretrial-only complaint. It's a -- it's a
17 complete complaint that has a prayer for relief. So it
18 looks like a different action. And he said by filing such
19 a complaint, you in effect waived any objection to the --
20 to the multi-district forum going on to dispose of the
21 whole case, not just pretrial.

22 MR. BERMAN: Well, to answer that, Justice
23 Ginsburg, the pretrial order that Mr. Waxman cited to and
24 I think that you cited to as well said that the
25 consolidated complaint was to be filed for pretrial

1 purposes only. There was no waiver in the record that we
2 filed. The judge didn't order that we submit such a
3 waiver. And I don't know that I have the authority as a
4 lawyer to alter the MDL rules. The MDL rules don't
5 provide that I can decide on my own that the case will
6 proceed for all purposes forever in front of Judge Dwyer.

7 And -- and yes, the complaint --

8 QUESTION: Where does it say that? For pretrial
9 purposes only.

10 MR. BERMAN: It's in the --

11 QUESTION: I mean, the judge says on page 41,
12 should plaintiffs in all or some actions decide to file a
13 consolidated complaint, that complaint shall be filed
14 within 15 days. And then the complaint itself doesn't say
15 it's for pretrial purposes only.

16 MR. BERMAN: No, it does not, Your Honor, and
17 the judge didn't mandate that we do it. He said, should
18 you.

19 QUESTION: But in Lexecon, we said that the
20 judge who -- to whom it was referred for pretrial --
21 couldn't try the case unless both parties consented,
22 didn't we?

23 MR. BERMAN: Yes, you did. And there's --
24 there's nothing in this record other than the complaint.
25 If you read from the complaint consent, that's the only

1 thing in the record that you could draw that we consented
2 to Judge Dwyer trying this case for all purposes.

3 QUESTION: Could -- could you come back to my
4 question? Where -- you -- you say that the complaint was
5 only filed for pretrial purposes. On -- on what do you
6 base that?

7 MR. BERMAN: I base that on my understanding of
8 MDL practice. I mean, we didn't say we're filing this for
9 trial purposes. We didn't say we're filing it for
10 pretrial purposes.

11 QUESTION: You filed a complaint. I mean, you
12 file a complaint --

13 MR. BERMAN: In MDL practice, I submit, Justice
14 Scalia, that you do file a complaint of some form that
15 brings all these plaintiffs from all over the country
16 together. I can't think of an -- an MDL case, whether it
17 Brand Name Prescription Drugs or the various cases that
18 are pending involving the pharmaceutical industry, for
19 example, where a consolidated complaint of -- of removed
20 State court cases is not put together in some fashion.

21 QUESTION: That's true, but does it normally --
22 is it normally just look like an ord -- your complaint
23 looks like an ordinary complaint. It names four people.
24 It says we're bringing a case. It's diversity
25 jurisdiction. It's quite clear, I think, there's venue.

1 And -- and that's it. It looks like a normal complaint.

2 So is it ordinary MDL practice that what happens
3 when you transfer things for pretrial proceedings, the
4 lawyers get together and file what to the naked eye looks
5 exactly like a normal complaint, as if they marched into
6 Federal court on day one and filed a complaint? Is that
7 normal MDL practice?

8 MR. BERMAN: I think it is very typical --

9 QUESTION: How do I verify that?

10 MR. BERMAN: I could submit my supplemental
11 record --

12 QUESTION: No, no. Not your -- I mean, is there
13 some -- I guess I could look it up in a book on MDL
14 practice.

15 Now, on MDL practice, when you finish, as I read
16 the rules, it says the transferee judge can reach a
17 judgment. But if he doesn't get to a judgment that
18 finishes the case, he's supposed to send it back to the
19 transferor districts, not the State court, but back to
20 several transferor districts. Is that what happened here?

21 MR. BERMAN: It never got there because --

22 QUESTION: Why?

23 MR. BERMAN: -- that -- the order of remand,
24 both by the district judge and the Ninth Circuit, was
25 stayed.

1 QUESTION: No, but was the order of remand the
2 -- an order to send it back not to the States but to the
3 Federal transferor districts?

4 MR. BERMAN: Actually I think the language of
5 the order is that the cases are remanded back to the State
6 courts.

7 QUESTION: To the State courts.

8 MR. BERMAN: Yes.

9 QUESTION: That must be wrong, mustn't it?

10 MR. BERMAN: That's correct.

11 QUESTION: It should go to the transferor
12 districts.

13 MR. BERMAN: That's correct.

14 QUESTION: And there also -- it says
15 specifically and that is pursuant to the MDL order, which
16 we can review, can we not?

17 MR. BERMAN: Yes, you can.

18 QUESTION: Okay. So we would have the power in
19 this case to review what should have been the Ninth
20 Circuit's order remanding the case to the transferor
21 districts, even though they said it wrong.

22 MR. BERMAN: If you -- if you took jurisdiction
23 under that scenario --

24 QUESTION: Yes.

25 MR. BERMAN: -- in all due respect, you would be

1 violating both the spirit and the intent --

2 QUESTION: Not at all. After all --

3 MR. BERMAN: -- of 1407.

4 QUESTION: Not at all. Not at all. If, after
5 all, an order of the MDL panel were to have an underlying
6 theory that there wasn't jurisdiction in some court or
7 other under 1447, I don't see why we couldn't by writ, as
8 provided, review it. And our reason for doing it would be
9 to solve an important and serious problem of jurisdiction
10 that is plaguing the lower courts. In other words --

11 QUESTION: Mr. Berman, you don't want us to
12 review an order that never existed, do you?

13 MR. BERMAN: I'm not sure --

14 QUESTION: You wouldn't want us to -- to review
15 an order that should have issued but didn't issue. How
16 could we review an order that never issued?

17 QUESTION: No, it did issue.

18 MR. BERMAN: There was -- there was an erroneous
19 order of the district court. And -- and I submit that --

20 QUESTION: I think we can review -- the -- the
21 erroneous order is nonreviewable.

22 MR. BERMAN: That's correct.

23 QUESTION: No. There is an order dismissing.
24 There is an order that says remand it to the courts.

25 QUESTION: It says remand to the State --

1 QUESTION: To the State courts. But that --
2 that isn't what they meant.

3 MR. BERMAN: That is -- that is not what he
4 meant.

5 QUESTION: All right. That is a problem I see
6 that as a problem, but I don't know if it's an insuperable
7 problem --

8 (Laughter.)

9 MR. BERMAN: And the problem I have, Justice
10 Breyer, is that I would like to agree with your argument
11 because, as you pointed out, this is something that's
12 plaguing the courts.

13 QUESTION: All right. The way it would have
14 worked if they had gotten -- hadn't said remand to State
15 courts, is they would have sent it back to transferor
16 districts. Some transferor districts would have agreed
17 with this judge, some would have come to other
18 conclusions, and we plainly could have reviewed the ones
19 that came to other conclusions so we could have decided
20 the issue. So is that what you think should happen? What
21 should happen?

22 MR. BERMAN: Well, I would like the Court to
23 review the underlying merits, but to do so, I think you
24 have to do some gamesmanship and do injustice to 1407.

25 QUESTION: Isn't, Mr. Berman, what --

1 QUESTION: Justice Breyer told you that -- said
2 that it would have to go back to the State courts. But
3 the question is what is the it. You have to first dispose
4 of the action that was instituted by the consolidated
5 complaint.

6 MR. BERMAN: That was disposed of.

7 QUESTION: But that's the only thing we're
8 arguing about here, and the arg -- and the contention is
9 it was improperly disposed of and that it was disposed of
10 on a basis that injures the defendants and that they can
11 appeal that because they're aggrieved under the cases that
12 Mr. Waxman cites. And that's all we're talking about.

13 MR. BERMAN: And I understand that, Justice
14 Kennedy, but the case that Mr. Waxman cites and the cases
15 he cites for the proposition that an aggrieved party can
16 appeal, I don't quarrel with that.

17 The problem with that authority in this case is
18 that none of those cases that he cites are cases where
19 there's been a dismissal, which there was in this case, of
20 the consolidated complaint on the grounds of a lack of
21 subject matter jurisdiction. And --

22 QUESTION: Mr. Berman, I think something needs
23 clarification here. When a district judge in a multi-
24 district case like this makes a pretrial order,
25 determination, decision, and on the basis of that, those

1 cases go back to the district courts from whence they
2 came, that ruling is not up for grabs in the individual
3 district courts. That is the law of the case that they
4 all must follow. And as I understand the Western District
5 of Washington decision, that there was no subject matter
6 jurisdiction, that would not be open for contest in the
7 district courts.

8 MR. BERMAN: I -- I agree with that. It would
9 go to the district courts pursuant to proper MDL practice.
10 We would move for enforcement of the judge's order
11 remanding the case, but we couldn't fight that issue of
12 subject matter jurisdiction because it would have been
13 decided --

14 QUESTION: Okay. So -- so that if that had
15 happened -- going back to an answer you gave earlier, if
16 that had happened, and -- and the -- the missing step had
17 been included and it said, back to the transferor court,
18 the only thing that could have happened with the
19 transferor court, the jurisdictional issue having been
20 decided in the Western District of Washington, would be to
21 remand.

22 MR. BERMAN: That's correct.

23 QUESTION: Yeah, okay.

24 MR. BERMAN: And -- and because of that --

25 QUESTION: May -- may I ask? Mr. Waxman pointed

1 out to us that this order was actually stayed by the
2 district court and by the Ninth Circuit, and I don't find
3 the stay order in the appendix. I'm sure it's in the
4 record, as he points out. But in connection with getting
5 that stay and the -- the both -- in both the district
6 court and the court of appeals, did anyone point out to
7 either of those courts that the order was defective for --
8 for failing to -- to include the transferor court rather
9 than going direct to the State court?

10 MR. BERMAN: No.

11 QUESTION: So that just surfaced today.

12 MR. BERMAN: It just surfaced today. And -- and
13 the jurisdictional issue just surfaced in response to your
14 question. No one raised the 1407 issue in any of the
15 courts below.

16 I had originally had come to talk about the
17 important issue.

18 (Laughter.)

19 MR. BERMAN: And I -- I don't know that Mr. --

20 QUESTION: Us too.

21 (Laughter.)

22 MR. BERMAN: Mr. Waxman hasn't had time to
23 address that issue. I don't know if the Court wants me to
24 go into that. I have some time remaining.

25 QUESTION: I think the Court would like to.

1 MR. BERMAN: Very briefly then. This Court has,
2 since the Judiciary Act of 1789 was passed, consistently
3 construed diversity jurisdiction so as to avoid expanding
4 the Federal caseload. That's the teaching of Snyder v.
5 Harris. The proposition that's asserted here today by the
6 petitioners that you can use administrative costs in
7 satisfying the amount in controversy would vastly expand
8 the Federal caseload in two ways.

9 QUESTION: Is your objection just to the concept
10 of administrative costs, Mr. Berman, or to the idea that
11 it can be compute -- the amount in controversy can be
12 computed at all from the defendants' point of view?

13 MR. BERMAN: Mr. Chief Justice, my answer to
14 that is I think that the Court could adopt a rule allowing
15 the amount in controversy to be determined from either
16 viewpoint, both from the plaintiffs' viewpoint or from the
17 defendants' viewpoint. But that doesn't answer the
18 question.

19 The -- the question really presented then is how
20 do we value that amount. And this Court's teachings I
21 think have answered that question, and that is in the Hunt
22 case, the Court has ruled and has consistently followed
23 this proposition, that it is well established that the
24 amount in controversy is measured by the value of the
25 object of the litigation. And so, another way the Court

1 has put it is what right does the plaintiff seek to have
2 enforced here. The --

3 QUESTION: In a -- in a couple of those quotes,
4 you know, taken out of context, they seem to support your
5 position. They certainly don't controvert your position.
6 But the Court wasn't really faced with the issue here.

7 MR. BERMAN: I -- I think the Court has never
8 squarely been faced with the issue of should the
9 plaintiff's rule be adopted or not. There is suggestions
10 that it should be, but I think what the Court has been
11 consistent on is looking at the value of the object of
12 litigation from the point of view, what is it that the
13 plaintiff wants, not what are the incidental costs to the
14 defendant. In fact, there is a case -- and I -- I know
15 it's an old case, but the Ross case and the Elliott case
16 squarely hold that jurisdiction does not depend upon any
17 contingent injuries or damage to a defendant in a case.

18 And if the rule is otherwise -- and by the way,
19 I think there's a big difference, for the purposes of this
20 Court's review, of an administrative cost versus
21 injunctive relief. So let me first focus on
22 administrative cost.

23 The mischief, I think, of allowing
24 administrative cost to be considered is illustrated by an
25 earlier Ninth Circuit decision in Snow v. Ford. And there

1 the plaintiff sought an injunction because Ford had sold a
2 trailer package without an \$11 wiring kit. And Ford
3 argued then, as it does now, that because it would have to
4 incur substantial costs in supplying this \$11 kit, that
5 there was Federal jurisdiction.

6 Well, the value of the object of litigation from
7 the plaintiffs' point of view, if you can't aggregate,
8 which under Snyder v. Harris you can't, is \$11. If the
9 Court is going to allow administrative cost to be
10 considered, then this Court is going to have hundreds --
11 Federal courts are going to have hundreds of \$11 cases in
12 front of them.

13 And I think Judge Posner hit the nail right on
14 the head in the Brand Name Prescription Drug case, in
15 which he said that if the costs of compliance were
16 considered, then every case, virtually every case, quote,
17 however trivial would cross the threshold.

18 QUESTION: Why shouldn't they have it if in fact
19 it really does cost the defendant the \$75,000, however you
20 categorize it? Why shouldn't the Federal courts hear
21 those cases?

22 MR. BERMAN: Because consistently this Court has
23 looked at the value of the right to be protected and
24 excluded such incidental costs. The value of the right
25 there --

1 QUESTION: There might be a legal argument
2 there, but I thought you were making a policy argument
3 that it was a bad thing.

4 MR. BERMAN: Well, I do -- I do --

5 QUESTION: And I don't see why that's so if in
6 fact in most cases I think that if it's going to cost
7 \$75,000 for an \$11 claim, if it's really just one claim,
8 the defendant will settle it. And, of course, if it's not
9 really just one claim, but really involves class actions
10 involving many hundreds of claims, that's just what's
11 supposed to be in the Federal court.

12 MR. BERMAN: Well, then you'd have to overrule
13 Snyder and the non-aggregation --

14 QUESTION: There's a legal -- you're making a
15 purely legal argument then.

16 MR. BERMAN: Yes, which -- which they're not
17 advocating. But from a policy argument, my argument is
18 that you would suddenly thrust the Federal courts in
19 determination of what basically are State -- routine State
20 law matters.

21 QUESTION: But that's what -- that's what this
22 Class Action Fairness Act, which has considerable support,
23 that's pending in Congress -- it's still pending, isn't
24 it?

25 MR. BERMAN: That's correct.

1 QUESTION: That's what it would do. It would
2 allow -- if -- if the price tag of all these small claims
3 for the defendant was more than the amount in controversy
4 -- well, I think it puts a much higher price tag than
5 \$75,000. But anyway, that -- that's the idea of the class
6 action bill that's pending in Congress, to put all these
7 cases, to aggregate them if the total dollar amount for
8 the defendant is very high.

9 MR. BERMAN: That's correct. That -- it's \$2
10 million, the new proposed limit, and it would allow
11 aggregation, which this Court so far has not allowed. So
12 Congress realizes under existing precedent that what the
13 -- Ford wants to do here is not permitted.

14 QUESTION: Well, is -- is -- is there a -- is
15 there a distinction to be made along these lines? And I
16 -- I may not be able to -- to state what I'm trying to
17 work out in my mind, but here -- here's -- here's the
18 distinction I'm trying to -- to get at.

19 Let's assume that the -- that the only issue is
20 -- is an issue in one case. They didn't give the \$11
21 taillight or whatever it was. And because of the
22 bureaucracy of a big company, in order to provide the one
23 \$11 tail light, it's going to cost \$100,000 to galvanize
24 everybody into action and get the tail light. I see your
25 argument in that case.

1 There's a difference, though, in this case
2 because what they're saying in this case is they promised
3 that they would have a kind of administrative system in
4 place that would take account of all these various credit
5 charge card -- credit card charges and -- and would --
6 would ultimately result in -- in this -- this credit of up
7 to \$3,500 for our benefit. The various people who are
8 aggrieved by their failure to do it aren't all claiming
9 \$3,500. You know, they may be claiming everything from \$5
10 to \$3,500. The only way to satisfy our -- our -- the
11 claims of all these people who are in the class is to put
12 the system in place.

13 If that's the essence of their claim, they're
14 not saying we want you to incur a lot of administrative
15 costs in order to get to a particular result, which is
16 jurisdictionally insufficient. They're saying, we want
17 you to put the system in the place -- in place that you
18 agreed you would do. The system is not an administrative
19 cost. It's what you promised in the first place. The
20 system is the tail light.

21 Is that a fair distinction, and does -- does
22 that count against you?

23 MR. BERMAN: That's their argument, and I don't
24 think it counts against my position for two reasons. In
25 order to make that argument, what they're really doing is

1 aggregating what it would cost to reinstitute the system
2 as if they were going to pay all 6 million class --

3 QUESTION: But the system is not an aggregated
4 system. There's either a system or there isn't a system.
5 If there is a system, it produces different results
6 depending on the kind of business that individuals do.
7 But the system is not a separate system for all of the
8 members of the class which is being aggregated. It's a
9 system to fulfill one promise which was made in common
10 form to the entire class. And isn't that a distinction
11 which removes it from this notion simply of administrative
12 cost?

13 MR. BERMAN: No, because right now there are
14 just six plaintiffs. This is not a class. And those six
15 plaintiffs may have a total of \$20,000 at stake. All Ford
16 has to do to satisfy their claim in this case is to give
17 those six people the rebates.

18 QUESTION: Okay.

19 MR. BERMAN: And the only way to get around that
20 is to aggregate this case, which they can't do. And so
21 the danger --

22 QUESTION: There is -- there is no claim for
23 specific performance?

24 MR. BERMAN: There is as to each plaintiff.

25 QUESTION: But not as to a class.

1 MR. BERMAN: That's right, because what we have
2 here and the --

3 QUESTION: So they -- so they could multiply
4 3,500 by 6 and that would be the end of the case.

5 MR. BERMAN: That's right, because prior to this
6 litigation -- this gets to the common and undivided
7 interest. Prior to this litigation, these plaintiffs,
8 these 6 million people, were completely unrelated. They
9 had no common interest in this issue, and therefore, you
10 can't follow -- you can't aggregate. They have to be
11 treated --

12 QUESTION: Let me ask you a philosophical
13 question. Mr. Waxman got into epistemology a minute ago.
14 Let me ask you a contrary-to-fact question.

15 If in fact the Federal action were a class
16 action and it included everybody who had been included in
17 the State class actions and specific performance had been
18 requested in the form that I suggested, would that not
19 take it out of the aggregation problem and -- and --
20 and -- and satisfy the jurisdictional amount, even on your
21 own theory?

22 MR. BERMAN: No, because under the analysis of
23 -- of this Court and the Gilman court in the Second
24 Circuit and the Ninth Circuit, again because each person
25 had a separate right, as they've admitted. They've

1 admitted that for damage purposes each person had a
2 separate and distinct claim

3 QUESTION: Yeah, but that's not the same as for
4 specific performance purposes.

5 MR. BERMAN: It is. If -- if I -- if one of my
6 plaintiffs decides he no longer wants to be in this
7 litigation, they have don't have to up the specific
8 performance to someone else. Each person only has the
9 right to the rebates they were entitled to. So they're
10 separate and distinct no matter what the relief is.

11 QUESTION: Were these class actions -- were
12 these actions certified as class actions in the State
13 court before they were removed?

14 MR. BERMAN: No. They -- they were removed
15 before anything happened.

16 QUESTION: So we have -- you need the
17 aggregation of the class action.

18 MR. BERMAN: That's correct. You have an -- you
19 have an uncertified class here.

20 The other danger I'll touch on in my last minute
21 of allowing the injunctive -- amount it would cost the
22 defendant, either by way of injunction or administrative
23 cost, is that plaintiffs could use this new theory to
24 invoke Federal court jurisdiction. The amici seem to
25 suggest that plaintiffs never want to be in Federal court.

1 That's not correct. If you adopt the petitioners' rule,
2 anytime I have a case where I want to be in Federal court,
3 where I normally could not be in Federal court -- and I
4 have many such cases right now -- I would just simply have
5 to say in my prayer for relief that the -- the injunction
6 would cost the defendant more than \$75,000. And bingo, I
7 have a whole new rule and there's a whole new group of
8 Federal cases that suddenly would arise.

9 So in closing, unless there's any questions, the
10 problem with the defendants' -- the petitioners' position
11 in this case is that it would open up the flood gates of
12 litigation to the Federal court system. We cited a RAND
13 Institute study that about 65 percent of the country's
14 class actions are in State courts, and to adopt their rule
15 would mean that many of those, probably thousands of
16 cases, that are now residing in State courts would
17 suddenly find their way into Federal courts. That I think
18 is not consistent with this Court's policy of strictly
19 construing the diversity statute and giving deference to
20 State courts and State governments with respect to laws
21 that they have the power to enact and to have those cases
22 heard in State courts.

23 Thank you, Mr. Chief Justice.

24 QUESTION: Thank you, Mr. Berman.

25 Mr. Waxman, you have 3 minutes remaining.

1 REBUTTAL ARGUMENT OF SETH P. WAXMAN

2 ON BEHALF OF THE PETITIONERS

3 MR. WAXMAN: Thank you, Your Honor. I'll use 1
4 minute on appellate jurisdiction and I hope 2 minutes on
5 subject matter jurisdiction.

6 On appellate jurisdiction, there is no doubt
7 whatsoever that what was intended here was a new complaint
8 about new things to proceed to judgment at trial. At page
9 11 of the transcript of oral argument before the district
10 judge on the class certification issue, the court says,
11 "if a nationwide class were to be certified" -- he's
12 talking about the consolidated complaint -- "would there
13 be any need for further MDL proceedings, or would the
14 whole litigation just be there in this one case for trial
15 or other disposition?

16 "Mr. Berman: That is my understanding. There
17 would be no further -- everyone has consented. All the
18 plaintiffs' counsel and defendants have consented to have
19 this case here."

20 Justice Ginsburg, in response to your question
21 about cases in which a declaratory judgment action was
22 filed where it -- the case could have been litigated by a
23 plaintiff class in a consumer case, that was the case in
24 the Greenwood Trust case filed by a bank in the First
25 Circuit that ultimately produced this Court's decision in

1 Smiley which was a consumer class action that came up out
2 of California.

3 Now, with respect to specific performance,
4 specific performance is the object of this complaint. It
5 is what they want. It is the thing they need in order for
6 any of them to be able to realize the benefits. And as
7 this Court said in Mississippi & Missouri River Bridge v.
8 Ward -- in that case, it involved removing a bridge
9 obstruction -- the removal of the obstruction is the
10 matter of the controversy and the value of the object must
11 govern.

12 The complaint itself says they want specific
13 performance of the national rebate program, and if there
14 were any clarification needed, you look at page 45 of the
15 red brief and they explain that that's just what they
16 want. If there were any --

17 QUESTION: They don't -- they don't need that
18 for their relief. And wouldn't that be a frivolous
19 complaint? Wouldn't that be conferring jurisdiction by --
20 by making an assertion that goes way beyond what anybody
21 would consider reasonable?

22 MR. WAXMAN: It's -- it would not if -- the
23 Court may or may not grant specific performance of the
24 national program in response to a particular plaintiff,
25 but it would certainly not be a frivolous claim. Cases

1 like that are brought all the time.

2 QUESTION: Why -- Mr. -- Mr. Waxman, if you --
3 if the test is one plaintiff -- if it's Judge Posner's
4 test, you assume there's one plaintiff, what will it cost
5 the defendant. Injunctive relief for one plaintiff would
6 only involve tracking that particular plaintiff's
7 purchases, and that wouldn't add up to \$75,000.

8 MR. WAXMAN: Justice Ginsburg, first, the cost
9 is -- the test is the cost of supplying the relief
10 requested in the complaint to any one plaintiff, and that
11 is class-wide relief. It would also cost a sufficient
12 amount even if it were only one plaintiff.

13 QUESTION: Thank you, Mr. Waxman.

14 MR. WAXMAN: Thank you.

15 CHIEF JUSTICE REHNQUIST: The case is submitted.

16 (Whereupon, at 12:02 p.m., the case in the
17 above-entitled matter was submitted.)

18
19
20
21
22
23
24
25