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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-80059

[Filed August 22, 2018]

ALIDA ADAMYAN; et al.,	)
	)
Plaintiffs-Respondents,	)
	)
v.	)
	)
PFIZER, INC.,	)
	)
Defendant-Petitioner.	)
	)

D.C. No. 2:18-cv-01725-CJC-JPR
Central District of California, Los Angeles

ORDER

Before: SCHROEDER and SILVERMAN, Circuit Judges.

The petition for permission to appeal pursuant to 28 U.S.C. § 1453(c) is denied. *See Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096, 1100 (9th Cir. 2010).

FG/MOATT

APPENDIX B

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Case No.: CV 18-01725-CJC(JPRx)

[Filed May 10, 2018]

IN RE LIPITOR)
)
)

ORDER GRANTING PLAINTIFFS' MOTION TO REMAND

I. INTRODUCTION

This action involves 156 lawsuits filed in California state court by more than 4,300 Plaintiffs who allege that use of the drug Lipitor caused them to suffer from Type II diabetes. On March 1, 2018, Defendant Pfizer, Inc. ("Pfizer"), removed the lawsuits to this Court based on "mass action" jurisdiction pursuant to the Class Action Fairness Act ("CAFA"). This was Pfizer's second removal of many of the lawsuits to federal court. Pfizer first removed the cases beginning on March 12, 2014, but on May 23, 2017, the Court found that removal was improper under CAFA and remanded the cases back to state court. Specifically, the Court found that 100 or more Plaintiffs had not proposed that their cases be

tried jointly as is required for mass action jurisdiction. (*See In re: Pfizer*, Case No. SAMC 17-00005-CJC-JPRx at Dkt. 20 [hereinafter, "May 23, 2017 Order"].)

Pfizer claims that since the Court remanded the lawsuits, new developments have occurred that justify another removal of the cases to federal court based on mass action jurisdiction. (Dkt. 1 [Notice of Removal] at 2.) Plaintiffs disagree and have filed a motion to remand. (Dkt. 56 [hereinafter, "Mot."].) After considering the record and arguments presented by the parties, the Court GRANTS Plaintiffs' motion to remand. Again, there has been no proposal for a joint trial involving 100 or more plaintiffs as required under CAFA.[1]

II. BACKGROUND

A. Original Remand

Plaintiffs are 4,321 individuals who are party to 156 separate lawsuits filed in California state court. (Dkts. 1 at 1, 1-2 at Ex. A.) Plaintiffs allege that Lipitor, a prescription drug developed and manufactured by Pfizer, and marketed and distributed by McKesson Corporation, caused them to suffer from Type II diabetes. (*See* Dkt. 1-2 at Ex. B-1.)

Beginning in March 2014, Pfizer removed the lawsuits to this Court, invoking the mass action

---

[1] Having read and considered the papers presented by the parties, the Court finds this matter appropriate for disposition without a hearing. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set for May 21, 2018, at 1:30 p.m. is hereby vacated and off calendar.

provision of CAFA. (Mot. at 2.) The mass action provision extends federal removal jurisdiction to civil cases where the claims of 100 or more plaintiffs "are proposed to be tried jointly." 28 U.S.C. § 1332(d)(11)(B)(i). On May 23, 2017, the Court found that removal under the mass action provision was improper, and granted Plaintiffs' motion to remand. (May 23, 2017 Order.) The Court explained that only 65 Plaintiffs had proposed a joint trial by joining or seeking to join a petition to coordinate their cases in a Joint Council Coordinated Proceeding ("JCCP") pursuant to California Code of Civil Procedure section 404. (*Id*. at 11.) The Court held that the 65 Plaintiffs who voluntarily sought to join the JCCP had proposed a joint trial, but because 100 Plaintiffs had not done so, the requirements of mass action jurisdiction were not met. (*Id*. at 10–11.) Pfizer appealed this order, but the Ninth Circuit denied review.

B. Plaintiffs Attempt to Amend the JCCP Procedure

On June 27, 2017, back in California state court, Plaintiffs made a request to amend the procedure by which Plaintiffs could join the JCCP. (Mot. at 3.) Plaintiffs wanted to clarify that by joining the JCCP, they sought to coordinate pretrial proceedings but were not proposing a joint trial. (*Id*.) Pfizer opposed this request and argued that it conflicted with California's coordination statute, California Code of Civil Procedure section 404. (Dkt. 56-5.) On August 4, 2017, the JCCP court, Judge Carolyn Kuhl, issued an order declining to implement Plaintiffs' requests. (*See* Dkt. 56-11.) In her order, Judge Kuhl explained that she "does not have

. . . a stake in how the federal courts interpret CAFA." (*Id.* at 3.) Nevertheless, she noted that it was appropriate to explain the coordination procedures of her court to aid federal courts "seek[ing] to understand California state court coordination procedures in order to apply federal law." (*Id.* at 3–4.) Judge Kuhl then proceeded to explain the following procedures:

> California law contemplates that cases will be coordinated for all purposes, not merely for pretrial proceedings. (Code of Civil Procedure section 404.1.) California procedure for coordinated cases differs in this respect from federal multidistrict litigation procedures. In MDL proceedings, cases must be returned to the federal district where they were originally filed when the case is ready to begin trial. (28 U.S.C. section 1407.) [. . .] Nevertheless, the fact that the [state court] coordination trial judge has the authority to try coordinated cases herself does not mean that the coordination trial judge will conduct the trial in all (or even some) of the coordinated cases, and assuredly does not mean that the coordinated cases will be tried together, either at the same time or before one jury. Coordination is a very flexible structure for case management. The ultimate goal for the coordination trial judge is to manage the coordinated complex cases in accordance with the complex case management rules so as to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties and counsel. (CRC 3.400(a).) [. . .] The ultimate determination of which cases in a

> coordinated proceeding will be tried by the coordination trial judge is dictated by promotion of the ends of justice.

(*Id*. at 3–5.) Judge Kuhl then explained that where, as here, the cases involved thousands of plaintiffs alleging injuries against pharmaceutical manufacturers, coordinated proceedings have never led to joint trials:

> In the 17 years since the Complex Litigation Program has been in place in California, this court is unaware of any instance in which the claims of more than one party allegedly injured by taking a pharmaceutical product have been tried at the same time or to the same jury, except in wrongful death cases where the claims of the survivors of one injured person have been tried together. Coordinated proceedings involving cases against pharmaceutical manufacturers have included more than 10,000 plaintiffs in some instances. If bellwether trials (as well as pretrial definition of issues) are unsuccessful in guiding the parties to inventory settlements, it has always been clear to the judges of the Complex Litigation Program that the coordination trial judge will have to remand cases for trial by the court in which the action was pending at the time of coordination. No single judge can conduct so many trials, and to attempt to do so would deprive plaintiffs of timely adjudication of their claims.

(*Id*. at 7–8.)

C. Plaintiffs Attempt to Relate Cases

After Judge Kuhl declined to amend the procedure for Plaintiffs to join the JCCP, Plaintiffs tried a different approach to coordinate the cases. On October 25, 2017, Plaintiffs filed a motion to relate 62 of the cases in which a Notice of Related Case had been filed. (Dkt. 56-13.) Plaintiffs argued that relating the cases would allow Judge Kuhl to coordinate the cases without formally adding them to the JCCP. (*Id*. at 3.) Plaintiffs also requested that Judge Kuhl decline to order *sua sponte* that the cases be coordinated, as doing so would cause Pfizer to remove the cases to federal court. (*Id*. at 3 n.5.) On November 21, 2017, Judge Kuhl denied Plaintiffs' motion, in part because a JCCP had already been established for the cases. (Dkt. 58-1.)

D. The JCCP Court *Sua Sponte* Adds Cases to the JCCP

A few days before Judge Kuhl denied Plaintiffs' motion, on November 17, 2017, Judge Debra Weintraub, the Supervising Judge of the Civil Department of the Los Angeles County Superior Court, entered an order requesting that Judge Kuhl add 62 of the cases—the same 62 that Plaintiff wanted to relate—to the JCCP. (Dkt. 56-15.) Judge Weintraub noted that no party has requested the cases be added to the JCCP, but recommended coordination because it would be "extremely burdensome" for the state court to handle the cases outside of a coordinated proceeding. (*Id*. at 3.)

On November 20, 2017, following Judge Weintraub's order, Judge Kuhl directed the parties, pursuant to

California Rule of Court 3.544, to serve any opposition to Judge Weintraub's request within 10 days. (Dkt. 56-17.) On November 29, 2017, Plaintiffs filed a response. (Dkt. 56-19.) Plaintiffs did not indicate whether they objected to Judge Weintraub's request. (*Id*.) Instead, Plaintiffs informed Judge Kuhl that "Judge Weintraub's request included only a partial list of all pending California state court Lipitor cases," and attached a list of 81 additional cases. (*Id*.) Plaintiffs claim that they did not expressly oppose Judge Weintraub's order because they considered the order a "de facto denial" of their request to refrain from *sua sponte* coordination. (Mot. at 12–13.) Pfizer did not file any response.

On December 15, 2017, Judge Kuhl issued an order granting Judge Weintraub's request, noting no opposition had been filed, and adding the 62 cases to the JCCP. (Dkt. 56-20.) Judge Kuhl also directed the parties to address whether the additional cases Plaintiffs had identified could be added to the JCCP. (*Id*. at 2.) On January 16, 2018, the parties filed a joint status report stating that they do not oppose adding the cases Plaintiffs identified to the JCCP. (Dkt. 56-21.) The parties clarified, however, that "[n]othing in this agreement shall be construed as a waiver of a party's right to remove under CAFA's mass action provision, nor shall this filing in and of itself be construed as a triggering event for CAFA mass action jurisdiction or otherwise as a 'proposal' for a 'joint trial.'" (*Id*. at 2.) On January 30, 2018, Judge Kuhl issued an order *sua sponte* adding an additional 88 cases to the JCCP. (Dkt. 58-3.)

Based on these *sua sponte* orders, Pfizer re-removed the JCCP to this Court on March 1, 2018. (Dkt. 1.) Pfizer's position is that the state court orders, which joined the cases of more than 4,000 Plaintiffs to the JCCP, resulted in a proposal for a joint trial and triggered mass action removal under CAFA. (*See generally* Dkt. 58 [Opposition, hereinafter "Opp."].) Plaintiffs contend that re-removal of the cases was improper because a judge's *sua sponte* order can never constitute a proposal for a joint trial, and even if a *sua sponte* order could constitute a proposal for a joint trial, the orders at issue here did not make such a proposal.[2] (*See generally* Mot.)

III. ANALYSIS

CAFA confers federal subject matter jurisdiction over "mass actions," which are defined as "any civil action . . . in which monetary relief claims of *100 or more persons are proposed to be tried jointly* on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d) (emphasis added). "The statute excludes from the 'mass action' definition actions in which 'the claims are joined upon motion of a defendant,' or in which 'the claims have

---

[2] Plaintiffs also attempt to invoke 28 U.S.C. § 1332(d)(11)(B)(ii)(II), which excludes defendant-initiated proposals for joint trials from "mass actions." Plaintiffs contend that Pfizer, the defendant, proposed the coordination of the lawsuits here because it failed to object to Judge Kuhl's orders. (Mot. at 27–30.) This argument is without merit. A "proposal" is a "voluntary and affirmative act." *Briggs v. Merck Sharp & Dohme*, 796 F.3d 1038, 1048 (9th Cir. 2015). Pfizer's mere failure to object does not constitute an "affirmative" act.

been consolidated or coordinated solely for pretrial proceedings.'" *Briggs*, 796 F.3d at 1042 (citing 28 U.S.C. § 1332(d)(11)(B)(ii)).

Plaintiffs in a mass action, unlike in a class action, do not seek to represent the interests of parties not before the court. *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 953 (9th Cir. 2009). However, a mass action "shall be deemed to be a class action" removable to federal court, as long as the rest of CAFA's jurisdictional requirements, including an aggregate amount in controversy above $5 million and minimal diversity, are met. *Id.* "Although CAFA[]extends federal diversity jurisdiction to both class actions and certain mass actions, the latter provision is fairly narrow. As noted above, CAFA's 'mass action' provision applies only to civil actions in which the 'monetary relief claims of 100 or more persons are proposed to be tried jointly.'" *Id.*

A. A Court's *Sua Sponte* Order is Not a Proposal for a Joint Trial

The parties dispute *who* must propose a joint trial so as to trigger mass action jurisdiction. Specifically, the parties dispute whether a judge, who acts *sua sponte* to coordinate cases, can trigger the jurisdictional requirement. Plaintiffs contend that only a proposal by *the plaintiffs*, and not a judge's *sua sponte* order, can trigger the jurisdictional requirement. On the other hand, Pfizer argues that a judge's *sua sponte* order can trigger mass action jurisdiction. The Ninth Circuit has so far declined to resolve this question. *Tanoh*, 561 F.3d at 956 ("We express no opinion as to whether a state court's *sua sponte* joinder of claims might allow a defendant to remove separately filed actions to federal

court as a single 'mass action' under CAFA."); *see also Briggs*, 796 F.3d at 1048 (declining to decide whether "a proposal by a state court for a joint trial would qualify as a 'proposal' under [CAFA]").

The Court finds that a state court's *sua sponte* order cannot "propose" a joint trial to trigger mass action jurisdiction. The Court's interpretation of a statute starts with the text. *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) ("The starting point in discerning congressional intent is the existing statutory text."). "[B]y its plain language, CAFA's 'mass action' provisions apply only to civil actions in which 'monetary relief claims of 100 or more persons are *proposed* to be tried jointly.'" *Tanoh*, 561 F.3d at 956 (quoting 28 U.S.C. § 1332(d)(11)(B)(i))(emphasis added). To "propose," in its ordinary sense, means "to offer for consideration, discussion, acceptance, or adoption." *Briggs*, 796 F.3d at 1048 (quoting Webster's Third New International Dictionary 1819 (2002)). A judge's *sua sponte* order does not make a proposal—it does not make an offer to be accepted or rejected. Instead, an "order" is "a command or direction authoritatively given." Black's Law Dictionary online (2nd ed.). To say that a court order constitutes a "proposal" distorts and unjustifiably broadens the straightforward meaning of that word.

The Court's interpretation is also supported by the cases that have addressed this issue. For example, in *Koral v. Boeing Co.*, 628 F.3d 945, 946–47 (7th Cir. 2011), the Seventh Circuit indicated that a "state court's deciding on its own initiative to conduct a joint trial would not enable removal" under CAFA, because

"[t]hat would not be a proposal." The Seventh Circuit expressly acknowledged that it was answering the question left open by the Ninth Circuit of who could make a "proposal" for a joint trial to confer mass action jurisdiction. *Id*. (citing *Tanoh*, 561 F.3d at 956). At least one district court in this District, relying on the Seventh Circuit's opinion in *Koral* and the plain language of the statute, has reached the same result. *Alexander v. Bayer Corp.*, No. CV-16-6822-MWF (MRW), 2016 WL 6678917, at *3 (C.D. Cal. Nov. 14, 2016), *appeal dismissed*, No. 17-55828, 2017 WL 6345791 (9th Cir. July 10, 2017) ("[T]he Court agrees with Plaintiffs that a state court's *sua sponte* consolidation of cases should not automatically entitle Defendants to federal jurisdiction notwithstanding Plaintiffs' attempts to remain in state court.").

Pfizer points to the Tenth Circuit decision in *Parson v. Johnson & Johnson*, 749 F.3d 879 (10th Cir. 2014), and the Eleventh Circuit decision in *Scimone v. Carnival Corp.*, 720 F.3d 876, 881 (11th Cir. 2013), to support its contrary interpretation. (Opp. at 10.) But those cases are inapposite. The Tenth Circuit and the Eleventh Circuit merely indicate, like the Ninth Circuit has, that the issue remains an open question. *Parson*, 749 F.3d at 887 ("CAFA . . . does not specify who can make such a proposal—the plaintiffs only, or the district court through an order of consolidation or coordination."); *Scimone*, 720 F.3d at 881 ("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 [CAFA]."). The Court does not construe these cases,

which expressly decline to decide the issue, as supporting Pfizer's position.

B. The Coordinated Proceeding is Not a Proposal for a Joint Trial

Plaintiffs argue that the state court's *sua sponte* orders here cannot confer mass action jurisdiction for a separate reason—they do not contemplate a joint trial. (Mot. at 20–27.) Plaintiffs claim that, in light of Judge Kuhl's prior orders and statements describing how the coordinated cases would proceed, she clearly was not contemplating a joint trial. (*Id.*) The Court agrees.

The sequence of events that occurred prior to Pfizer's re-removal of the cases demonstrates that the state court's orders to coordinate the cases are not orders for a joint trial. Shortly after this Court remanded the cases to state court on May 23, 2017, Plaintiffs repeatedly attempted to clarify that their desire to coordinate their cases was for pretrial purposes only and not a request for a joint trial. Plaintiffs tried to amend the procedure for joining the JCCP and when they failed on that front, Plaintiffs tried to coordinate the cases through notices of related cases. All along, Plaintiffs represented to Judge Kuhl that they wanted to avoid taking any action that could be construed as a proposal for a joint trial. Although Judge Kuhl did not grant Plaintiffs' requests to amend the JCCP procedure or to relate the cases, she indicated in her orders deep skepticism that the cases here would be jointly tried. She explained that "the fact that the coordination trial judge has the authority to try coordinated cases herself does not mean that the

coordination trial judge will conduct the trial in all (or even some) of the coordinated cases, and assuredly does not mean that the coordinated cases will be tried together, either at the same time or before one jury." She stated that where, as here, the claims arise out of injuries from pharmaceutical products, there has never been "any instance in which the claims of more than one party . . . have been tried at the same time or to the same jury." And, she noted that in coordinated proceedings involving thousands of plaintiffs, "[n]o single judge can conduct so many trials, and to attempt to do so would deprive plaintiffs of timely adjudication of their claims."

Given this backdrop, it defies common sense to suggest that Judge Kuhl's subsequent coordination of the cases constituted a proposal for a joint trial. "A proposal for purposes of CAFA's mass action jurisdiction, even an implicit proposal, is a voluntary and affirmative act, and an intentional act. It is not a mere suggestion, and it is not a mere prediction." *Briggs*, 796 F.3d at 1048 (citations and quotations omitted). When Judge Kuhl *sua sponte* ordered the cases be coordinated, she gave no indication that the coordination would be for purposes of a joint trial. In other words, there was no "voluntary and affirmative act" demonstrating that she was now deciding to rule against Plaintiffs and to deviate from her own prior statements expressing doubt that a joint trial of these cases would, or could, be held.

Pfizer claims that, because Judge Kuhl granted coordination of the cases pursuant to California Code of Civil Procedure section 404.1, which provides that

actions can be coordinated "for all purposes," the cases were coordinated for purposes of trial. (Opp. at 16.) But this argument invokes the California procedural rule in a vacuum and ignores the series of events that occurred before the state court. The mere presence of the phrase "for all purposes" in the rule providing for coordination does not mean Judge Kuhl was reversing her prior position that a joint trial of these coordinated cases was unlikely, and does not constitute a "voluntary and affirmative" act necessary to make a "proposal."

IV. CONCLUSION

Because the state court's orders coordinating the cases in this action are not a proposal for a joint trial, the Court does not have subject matter jurisdiction under CAFA. Accordingly, Plaintiffs' motion to remand is GRANTED.

DATED: May 10, 2018

/s/Cormac J. Carney
CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-80059

[Filed January 22, 2019]

ALIDA ADAMYAN; et al.,	)
	)
Plaintiffs-Respondents,	)
	)
v.	)
	)
PFIZER, INC.,	)
	)
Defendant-Petitioner.	)
	)

D.C. No. 2:18-cv-01725-CJC-JPR
Central District of California, Los Angeles

ORDER

Before: SCHROEDER and SILVERMAN, Circuit Judges.

The motion for clarification of docket entry is denied as unneccessary (Docket Entry No. 8). *See* 9th Cir. Gen. Ord. 6.11.

The motion of the Chamber of Commerce of the United States of America and the Pharmaceutical Research and Manufacturers of America for leave to

file a brief in support of the petition for rehearing en banc is granted (Docket Entry No. 11). The brief has been filed.

The petition for rehearing en banc is denied on behalf of the court (Docket Entry No. 7). *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

FG/MOATT

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed November 17, 2017]

No. 17-80094

D.C. No. 8:17-mc-00005-CJC-JPR
Central District of California, Santa Ana

JOSEPHINE ABRAMS, et. al. Plaintiffs in DC #: 2:14-cv-01872-CJC-JPR; et al.,	)
Plaintiffs-Respondents,	)
v.	)
PFIZER, INC.,	)
Defendant-Petitioner.	)

No. 17-80129

D.C. No. 2:17-cv-00123-CJC-JPR

NORMA ADATAN; et al.,	)
Plaintiffs-Respondents,	)
v.	)

PFIZER, INC.,

Defendant-Petitioner.

No. 17-80130

D.C. No. 2:17-cv-03781-CJC-JPR

PATSY WOOD; et al.,

Plaintiffs-Respondents,

v.

PFIZER, INC.,

Defendant-Petitioner.

No. 17-80133

D.C. No. 2:17-cv-02993-CJC-JPR

CAROLYN DAVIS; et al.,

Plaintiffs-Respondents,

v.

PFIZER, INC.,

Defendant-Petitioner.

No. 17-80135

D.C. No. 2:17-cv-00113-CJC-JPR

JOAN ALSTON; et al.,

Plaintiffs-Respondents,

v.

PFIZER, INC.,

Defendant-Petitioner.

No. 17-80136

D.C. No. 2:17-cv-00657-CJC-JPR

SYLVIA ALVARADO; et al.,

Plaintiffs-Respondents,

v.

PFIZER, INC.,

Defendant-Petitioner.

No. 17-80137

D.C. No. 2:17-cv-00272-CJC-JPR

DENA BLACKMORE; et al.,

Plaintiffs-Respondents,

v.

PFIZER, INC.,

Defendant-Petitioner.

No. 17-80153

D.C. No. 2:17-cv-05364-CJC-JPR

VENICIA AVILA, an individual and LINDA JEFFERS, an individual,

Plaintiffs-Respondents,

v.

PFIZER, INC.,

Defendant-Petitioner.

No. 17-80158

D.C. No. 2:17-cv-05327-CJC-JPR

PATRICIA ALEXANDER; et al.,

Plaintiffs-Respondents,

v.

PFIZER, INC.,

Defendant-Petitioner.

No. 17-80169

D.C. No. 2:17-cv-05708-CJC-JPR

ANGELA BROWN, individually; et al.,

Plaintiffs-Respondents,

v.

PFIZER, INC.,

Defendant-Petitioner.

No. 17-80170

D.C. No. 3:14-cv-01204-EMC

KATHLEEN DAVIS,

Plaintiff-Respondent,

v.

PFIZER, INC.,

Defendant-Petitioner.

No. 17-80171

D.C. No. 3:14-cv-01196-EMC

ANNETTE PETERS,

Plaintiff-Respondent,

v.

PFIZER, INC.,

Defendant-Petitioner.

No. 17-80172

D.C. No. 3:14-cv-01488-EMC

PATRICIA STARK,

Plaintiff-Respondent,

v.

PFIZER, INC.,

Defendant-Petitioner.

No. 17-80173

D.C. No. 3:14-cv-01195-EMC

MARILYN S. ROUDA,

Plaintiff-Respondent,

v.

PFIZER, INC.,

Defendant-Petitioner.

No. 17-80178

D.C. No. 3:14-cv-01177-EMC

LORETTA LITTLE; et al.,

Plaintiffs-Respondents,

v.

PFIZER, INC.,

Defendant-Petitioner.

No. 17-80179

D.C. No. 2:17-cv-01254-CJC-JPR

AMAL JONES, individually and as wife; et al.,

Plaintiffs-Respondents,

v.

PFIZER, INC.,

Defendant-Petitioner.

No. 17-80180

D.C. No. 2:17-cv-02841-CJC-JPR

RACHEL LESSEM, an individual; et al.,

Plaintiffs-Respondents,

v.

PFIZER, INC.,

Defendant-Petitioner.

No. 17-80181

D.C. No. 2:17-cv-01259-CJC-JPR

MARLENE TILLERY, individually; et al.,

Plaintiffs-Respondents,

v.

PFIZER, INC.,

Defendant-Petitioner.

No. 17-80182

D.C. No. 2:17-cv-01841-CJC-JPR

MARIA XOCHRHUA, an individual; et al.,	)
Plaintiffs-Respondents,	)
v.	)
PFIZER, INC.,	)
Defendant-Petitioner.	)

No. 17-80183

D.C. No. 1:17-cv-00663-LJO-MJS

SYLVIA WEAVER, an individual,	)
Plaintiff-Respondent,	)
v.	)
PFIZER, INC.,	)
Defendant-Petitioner.	)

No. 17-80184

D.C. No. 1:14-cv-00365-LJO-MJS

MARIA ALANIS; et al.,	)

Plaintiffs-Respondents,

v.

PFIZER, INC.,

Defendant-Petitioner.

No. 17-80229

D.C. No. 2:17-cv-07685-CJC-JPR
Central District of California, Los Angeles

ANTONIA BATISTA, an individual,

Plaintiff-Respondent,

v.

PFIZER, INC.,

Defendant-Petitioner.

No. 17-80230

D.C. No. 2:17-CV-07795-CJC-JPR
Central District of California, Los Angeles

DORTHY BYRD-HARRIS, individually; and LINDA MCMURRAY, individually,

Plaintiffs-Respondents,

v.	)
	)
PFIZER, INC.,	)
	)
Defendant-Petitioner.	)
	)

ORDER

Before: TASHIMA, W. FLETCHER, and TALLMAN, Circuit Judges.

The petitions for permission to appeal pursuant to 28 U.S.C. § 1453(c) are denied. *See Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096, 1100 (9th Cir. 2010).

IHP/MOATT

APPENDIX E

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Case No.: SAMC 17-00005-CJC(JPRx)
Case No.: *SEE* ATTACHED LIST

[Filed May 23, 2017]

IN RE: PFIZER	)
	)
	)

ORDER GRANTING PLAINTIFFS' MOTION TO REMAND

I. INTRODUCTION

This proceeding involves over 100 cases that were previously filed in California state court by thousands of women alleging that use of the drug Lipitor caused them to suffer from Type II diabetes. The cases were removed to federal court based on "mass action" jurisdiction pursuant to the Class Action Fairness Act ("CAFA") and then consolidated under a master case number for administrative purposes. (*See* Attached List.) Before the Court is Plaintiffs' consolidated motion to remand the cases back to state court on the ground that 100 or more plaintiffs have not proposed that their cases be tried jointly as is required for mass action

jurisdiction. (Dkt. 8 [Motion, hereinafter "Mot."].) After considering the evidence and the arguments presented by the parties, the Court GRANTS Plaintiffs' motion to remand. Although many plaintiffs have proposed a joint trial, 100 plaintiffs have not done so.

II. BACKGROUND

In their original complaints filed in California state court, Plaintiffs alleged that Lipitor, a prescription drug developed and manufactured by Pfizer, Inc., and marketed and distributed by McKesson Corporation, caused them to suffer from Type II diabetes. (*Id.* at 3.) On August 16, 2013, three such plaintiffs filed a petition with the California Judicial Council to have their individual cases coordinated in a Joint Council Coordinated Proceeding ("JCCP") pursuant to California Code of Civil Procedure Section 404. (Dkt. 9 [Declaration of Charles G. Orr, hereinafter "Orr Decl."] ¶ 2; *id.* Ex. A.) After additional plaintiffs filed similar state court actions, a group of twenty-one plaintiffs from eight state court cases, including the three from the original petition, filed an amended coordination petition on September 25, 2013. (*Id.* ¶ 3; *id.* Ex. B Pt. 1 at 2–10 [hereinafter "Am. Pet."].) The amended petition stated that it was "based upon the criteria codified in California Code of Civil Procedure § 404.1. That is, in the LIPITOR® cases sought to be coordinated herein:

> *One judge hearing all of the actions for all purposes* in a selected site or sites will promote the ends of justice taking into account whether common questions of fact or law are predominating and significant to the litigation; the convenience of parties, witnesses, and

> counsel; the relative development of the actions and the work product of counsel; the efficient utilization of judicial facilities and manpower; the calendar of the courts; *the disadvantages of duplicative and inconsistent rulings, orders, or judgments*; and, the likelihood of settlement of the actions without further litigation should coordination be denied."

(Am. Pet. at 6–7 (quoting almost verbatim the requirements of Cal. Civ. Proc. Code § 404.1) (emphasis added).) The amended petition specified that coordination would "promote the ends of justice because there are common issues of fact and law, namely the adequacy of the . . . LIPITOR® warning labels, and coordination will avoid duplicative and inconsistent rulings, orders, and judgments." (*Id.* at 8.) It also stated that counsel for those twenty-one plaintiffs named in the amended petition "is informed and believes that additional LIPITOR® injury cases will be filed within the next weeks. Petitioners will seek to join these additional cases via Add-On Petitions." (*Id.* at 7.)

The memorandum of points and authorities supporting the amended petition further explained that the cases will "involve duplicative requests for the same defendant witness depositions and the same documents related to the development, manufacturing, testing, marketing and sale of LIPITOR®. Absent coordination of these actions by a single judge, there is a significant likelihood of duplicative discovery, waste of judicial resources and possible inconsistent judicial rulings on legal issues." (Orr Decl. Ex. B Pt. 1 at 11–19

[hereinafter "MPA"] at 3; *see also id.* at 7 ("[T]here will be duplicative discovery obligations upon the common defendants unless coordination is ordered. Coordination before initiation of discovery in any of these cases will eliminate waste of resources and will facilitate economy.").) It reiterated the concern of preserving judicial resources and avoiding "duplicative and inconsistent rulings, orders, or judgments." (*Id.* at 7–8.) It further represented that "issues likely to be raised in this action include issues pertaining to liability, allocation of fault and contribution, as well as the same wrongful conduct of defendants. Such difficult issues may ultimately be addressed by the California Court of Appeal. Coordination is required in order to avoid duplicative efforts and inconsistent rulings." (*Id.* at 8.) The amended petition was also accompanied by an attorney declaration which stated that "[w]ithout coordination, two or more separate courts will decide essentially the same issues and may render different rulings on liability and other issues." (Orr Decl. Ex. B. Pt. 1 at 27–32 [hereinafter "Finson Decl."] ¶ 11.)

On December 6, 2013, the Judicial Council granted the request for coordination and created a JCCP with the special title of "Lipitor Cases," but only included the three cases from the original petition in the JCCP. (*Id.* ¶ 4; *id.* Ex. C.) The JCCP was assigned to Judge Kenneth R. Freeman of Los Angeles Superior Court. (*Id.* ¶ 5; *id.* Ex. D.) On January 13, 2014, Judge Freeman entered an order granting an add-on petition whereby four plaintiffs in another state court action sought to be added to the JCCP, bringing the total number of plaintiffs in the JCCP to seven. (Orr Decl. ¶ 6; *id.* Ex. E.)

The next day, Pfizer exercised an automatic peremptory challenge to Judge Freeman's assignment as coordination judge for the JCCP, (*id.* ¶ 7; *id.* Ex. F), so the JCCP was reassigned to Judge Jane Johnson, (*id.* ¶ 8; *id.* Ex. G). Judge Johnson entered orders granting add-on petitions filed by two plaintiffs who had been named in the amended coordination petition but not included in the initial order creating the JCCP, bringing the total number of plaintiffs in the JCCP to nine. (*Id.* ¶¶ 9–10; *id.* Exs. H, I.) Fifty-three more plaintiffs sought to be added to the JCCP through add-on petitions, including fifteen more plaintiffs who had been named in the amended coordination petition but not included in the initial order creating the JCCP. (*Id.* ¶¶ 11–13; *id.* Exs. J, K, L.) These petitions are still pending. Thus, to date only sixty-five plaintiffs have sought to be coordinated in the JCCP—nine were actually coordinated, fifty-three still have pending petitions, and three more were named in the amended coordination petition but have not filed add-on petitions to be coordinated after they were left out of the initial order creating the JCCP.

On February 24, 2014, the parties had their first and only status conference in state court before Pfizer started removing the cases to federal court. (Orr Decl. Ex. M.) At the conference, counsel for the JCCP plaintiffs (hereinafter "JCCP Counsel") provided Judge Johnson with a chart demonstrating that at that point in time, there were at least fifty-four cases concerning similar effects of Lipitor filed in California, which encompassed 1,855 plaintiffs. (*Id.* at 5:20–6:4; 6:16–17.) JCCP Counsel explained that they have "had total transparency with respect to communications of

lawyers both in California and nationally who had any interest in or doing anything [sic] litigation involving Lipitor," (*id.* at 7:2–5), and presented Judge Johnson with a proposed "leadership structure" comprising of an executive committee and a steering committee to handle the rapidly-expanding litigation, (*id.* at 7:15–18). JCCP Counsel had also "given every lawyer who's interested at all in participating in the organizational structure and leadership, the opportunity to contact [them] and . . . enter their willingness or interest in being part of the leadership structure," and had not turned down a single lawyer who expressed such interest. (*Id.* at 11:7–17.) They further represented that they "know lawyers that are filing the cases," "know who is interested in participating in leadership and who's not," and hoped "to get the cases that have been filed obviously added on [to the JCCP] as soon as possible." (*Id.* at 11:19–21, 15:22–23.) Counsel for both parties then sought clarification regarding the details of coordination, and the following exchange took place:

> MR. KIESEL: And that's for discovery purposes; that they are coordinated together for discovery.
>
> THE COURT: Right.
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> MR. CHEFFO: Well, would they be sent back?
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> THE COURT: They can be sent back. They can be sent back for trial. Yes, they can be sent back.
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> MR. CHEFFO: So the coordination order is with respect to discovery?

> THE COURT: Everything is sort of bundled here for case management and discovery. And they can be tried here, but they can be sent back for trial.

(*Id.* at 17:13–23.)

On March 4, 2014, Judge Johnson signed a proposed order to streamline the procedures for adding new cases to the JCCP through additional add-on petitions. (Dkt. 13-1 [Declaration of Marshall Searcy, hereinafter "Searcy Decl."] at Ex. C.) The order regarding add-on procedures stated that "[a]ll cases filed in California state court against Pfizer, Inc. or McKesson Corporation, alleging injuries related to the development of Type II diabetes, and seeking damages, injunctive relief, or restitution arising from the investigation of Lipitor®, are assigned to the Honorable Jane L. Johnson," and the "parties to such actions, however, are still required to comply with the stipulation or notice add-on procedures set forth in this Order." (*Id.* at 1.) The order further explained that after the parties filed either stipulated or noticed add-on petitions, any party named in such a petition would have ten days from the date of service to file a notice of opposition to the coordination. (*Id.* at 3.) If no notice of opposition was filed, the cases identified in such add-on petitions would be automatically added to the JCCP. (*Id.* at 3–4.)

Beginning on March 12, 2014, Pfizer began removing the state court actions, including cases that had not been named in the amended coordination petition or add-on petitions, to federal court on the grounds of diversity jurisdiction (fraudulent joinder)

and mass action jurisdiction pursuant to CAFA. (Orr Decl. ¶ 15; Dkt. 13 [Opposition, hereinafter "Opp."] at 9–10.) Pfizer also requested a stay in federal district court pending transfer of the cases to Multi-District Litigation ("MDL") court in South Carolina. (*Id.* ¶ 16.) "While some removed plaintiffs acquiesced in the transfer of their cases to the MDL and chose at that time not to seek remand to California state court, many removed plaintiffs immediately advised the MDL court that they would be seeking remand to California and asked the MDL court to stay their actions pending determination of the threshold question of federal subject matter jurisdiction." (*Id.*) The MDL court did so, (*id.* Ex. N), and then in June 2014 determined that diversity jurisdiction did not exist, *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prod. Liab. Litig.*, No. 2:14-CV-01810, 2016 WL 7335738, at *6 (D.S.C. Nov. 7, 2016). Because the only remaining basis for federal subject matter jurisdiction was CAFA's mass action provision, and because a majority of plaintiffs did not consent to transfer to MDL, the MDL court recommended that the Judicial Panel on Multidistrict Litigation remand the cases. (*Id.* at *7–*8.) The cases were then transferred back to this Court. By the last count, Plaintiffs have filed more than 140 California state court actions involving 4,800 plaintiffs, which have been removed to federal courts in all four districts of California. (*Id.* at 10.) Plaintiffs now ask this Court to remand the cases to state court on the grounds that the mass action removal requirements of CAFA are not met. (*See generally* Mot.)

III. DISCUSSION

CAFA provides federal district courts with original jurisdiction over "mass actions," which are defined as "any civil action . . . in which monetary relief claims of *100 or more persons are proposed to be tried jointly* on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d) (emphasis added). Plaintiffs in a mass action, unlike in a class action, do not seek to represent the interests of parties not before the court. *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 953 (9th Cir. 2009). However, a mass action "shall be deemed to be a class action" removable to federal court, as long as the rest of CAFA's jurisdictional requirements, including an aggregate amount in controversy above $5 million and minimal diversity, are met. *Id.* "Although CAFA[]extends federal diversity jurisdiction to both class actions and certain mass actions, the latter provision is fairly narrow. As noted above, CAFA's 'mass action' provision applies only to civil actions in which the 'monetary relief claims of 100 or more persons are proposed to be tried jointly.'" *Id.*

A. A Proposal for a Joint Trial Was Made

Plaintiffs' motion explains that "at the time the amended coordination petition was filed, the attorneys who drafted the petition believed they were proposing coordination for pretrial proceedings only."[1] (Dkt. 15

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[1] In *Romo v. Teva Pharm. USA, Inc.*, 731 F.3d 918 (9th Cir. 2013), *rehearing en banc granted and decision vacated*, 742 F.3d 909 (Feb. 10, 2014), the Ninth Circuit considered whether, as a matter of first impression, a coordination petition pursuant to California Code of Civil Procedure Section 404 constituted a proposal for a

[hereinafter "Reply"] at 3n.1.) However, Plaintiffs do not seriously challenge Pfizer's position that the amended coordination petition proposed a joint trial, (*see generally id.*; Mot.). Nor could they.

As "masters of their complaints," plaintiffs are permitted to structure actions to avoid federal jurisdiction under CAFA. *Corber v. Xanodyne Pharm., Inc.*, 771 F.3d 1218, 1223 (9th Cir. 2014). But they are "also the masters of their petitions for coordination. Stated another way, when we assess whether there has been a proposal for joint trial, we hold plaintiffs responsible for what they have said and done." *Id.* Here, JCCP Counsel requested a joint trial on behalf of the plaintiffs named in the amended coordination petition and add-on petitions. The amended petition incorporated the language of Section 404.1 and requested coordination *"for all purposes."* (Am. Pet. at 6–7 (emphasis added).) It explained that plaintiffs sought to avoid not only duplicative and inconsistent rulings and orders, but also *judgments*. (*Id.* at 8.) The

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joint trial, and concluded that it did not. *Id.* at 921–23. *Romo* was issued the day before Plaintiffs filed their amended petition. *Romo* analyzed the coordination petitions and supporting memorandum of points and authorities and concluded that although the memorandum encouraged coordination of "all of the actions for all purposes" and sought to avoid "inconsistent judgments" and "conflicting determinations of liability," the "obvious focus" of the petition was on "pretrial proceedings, *i.e.*, discovery matters." *Id.* at 922–23. On February 10, 2014, however, the Ninth Circuit granted rehearing *en banc* and vacated the decision. *Romo v. Teva Pharm. USA, Inc.*, 742 F.3d 909 (9th Cir. 2014). In *Corber v. Xanodyne Pharm., Inc.*, 771 F.3d 1218 (9th Cir. 2014), described below, the Ninth Circuit reexamined the coordination petitions in *Romo* and concluded that they did propose a joint trial. *Id.* at 1223.

accompanying memorandum of points and authorities contained considerable language about coordination for discovery purposes, (MPA at 3, 7), but again reiterated the need to avoid "duplicative and inconsistent rulings, orders, or *judgments*," (*id.* at 7–8 (emphasis added)). Notably, it explained the need to avoid "duplicative efforts and inconsistent rulings" on "issues pertaining to *liability*, allocation of fault and contribution, as well as the same wrongful conduct of defendants" because they might "ultimately be addressed by the California Court of Appeal." (MPA at 8 (emphasis added).) Finally, the accompanying attorney declaration expressed the desire to avoid inconsistent "rulings on *liability* and other issues." (Finson Decl. ¶ 11 (emphasis added).) The amended petition clearly stressed a need for coordination beyond pre-trial proceedings.

The language of the amended petition and supporting documents is substantially similar to that in *Corber*, in which the Ninth Circuit *en banc* considered whether coordination petitions constituted a proposal for a joint trial. *Corber*, 771 F.3d 1218. *Corber* focused heavily on the text of the petitions and supporting documents and explained that while the petitions did not expressly request a "joint trial," they sought coordination "for all purposes," just as the petition in this case does. *Id.* at 1223. *Corber* reasoned that read literally, "'[a]ll purposes' must include the purposes of trial." *Id.* The Court also noted that the petitions' stated reasons for coordination, namely the danger of inconsistent judgments and conflicting determinations of liability, further supported the conclusion that they sought a joint trial. *Id.* at 1223–24.

The *Corber* plaintiffs had not simply recited the factors articulated in Section 404.1, but asserted that "'[t]he inevitability of realizing the inconsistency and duplication factor of California Code of Civil Procedure Section 404.1[ ] weighs heavily in favor of coordination,'" that "'issues pertaining to liability, allocation of fault and contribution, as well as the same wrongful conduct of defendants,' would require coordination," and "repeatedly stated that the factors catalogued in section 404.1 all supported coordination, including the fact that '[o]ne judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice.'" *Id.* at 1224. Here too, the amended petition did not simply recite the Section 404.1 factors, but rather it repeatedly noted the need to avoid inconsistent judgments and rulings on issues of liability, which could ultimately come before the California Court of Appeal. (Am. Pet. at 8; MPA at 7–8; Finson Decl. ¶ 11.)

Corber clarified that not all petitions for coordination under Section 404 are "*per se* proposals to try cases jointly for the purposes of CAFA's mass action provision." *Corber*, 771 F.3d at 1224. A coordination petition that "expressly seeks to limit its request for coordination to pre-trial matters" would align with the CAFA carve-out for claims that have been consolidated or coordinated solely for pretrial proceedings.[2] *Id.*

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[2] *Corber* also noted that "[i]t is not clear whether the California Judicial Council would grant coordination for less than 'all purposes.' However, if Plaintiffs had qualified their coordination

Although JCCP Counsel represented at the February 25, 2014, status conference in state court that their primary concern was coordination for purposes of discovery, the language of the amended coordination petition was not limited to pre-trial matters. (Orr Decl. Ex. M at 17:13–23.) It clearly proposed coordination for judgments and proceedings that would involve issues of liability, and the Court must hold the plaintiffs who submitted the amended petition and accompanying add-on petitions responsible for this proposal of a joint trial. *Corber*, 771 F.3d at 1223.

B. 100 or More Plaintiffs Did Not Propose a Joint Trial

The real dispute among the parties is whether there was a proposal that *100* plaintiffs' cases be tried jointly. The Ninth Circuit has so far declined to specify exactly who must make a proposal for a joint trial to trigger CAFA's mass action provision, which encompasses cases "in which monetary relief claims of 100 or more persons *are proposed* to be tried jointly." *Briggs v. Merck Sharp & Dohme*, 796 F.3d 1038, 1047 (9th Cir. 2015) (emphasis added) (citing 28 U.S.C. § 1332(d)(11)(B)(i)) (declining to decide whether a proposal for a joint trial could come from a judge). The Ninth Circuit has only held that it is insufficient for a proposal for a joint trial to come from a defendant. *Id.* at 1048. However, in *Briggs,* the Ninth Circuit recently clarified that although "implicit proposals may trigger

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request by saying that it was intended to be solely for pre-trial purposes, then it would be difficult to suggest that Plaintiffs had proposed a joint trial." *Corber*, 771 F.3d at 1224–25.

CAFA's removal jurisdiction," a "proposal for purposes of CAFA's mass action jurisdiction, *even an implicit proposal*, is a '*voluntary and affirmative act*' . . . and an '*intentional act*.'" *Id.* at 1048 (emphasis added) (quoting *Corber*, 771 F.3d at 1224 and *Parson v. Johnson & Johnson*, 749 F.3d 879, 888 (10th Cir. 2014)). "It is 'not a mere suggestion'" or "a mere prediction." *Id.* (quoting *Scimone v. Carnival Corp.*, 720 F.3d 876, 883 (11th Cir. 2013)).[3]

Plaintiffs insist that at most only sixty-five plaintiffs proposed that their cases be jointly tried, because that is the maximum number of plaintiffs that ever attempted to join the JCCP. (Mot. at 21.) They maintain that the rest of the plaintiffs did nothing more than file their complaints in state court, and the plaintiffs in the JCCP cannot bind other plaintiffs who have not yet been added through an add-on petition or other means. (*Id.* at 16–19 (citing *Tanoh*, 561 F.3d at 953–54 and *Briggs*, 796 F.3d at 1049).) The Court agrees.

Only the sixty-five plaintiffs who were named in the amended coordination petition or add-on petitions have

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[3] *Briggs* also explained that "[w]hile *Corber* held that an initial petition for a JCCP can constitute a proposal, it is not clear whether an add-on petition can constitute a proposal as well—particularly where, as here, the claims in the add-on petition would not meet CAFA's hundred-person threshold unless added to claims that had previously been joined 'upon motion of a defendant.'" *Briggs*, 796 F.3d at 1050. *Briggs* did not reach this issue, however, because "even if the . . . plaintiffs' add-on petition could be construed as a proposal, it was not a proposal for a joint trial." *Id.*

acted voluntarily and affirmatively to propose a joint trial. While most of these plaintiffs' add-on petitions are still pending, and a few who were included in the amended petition and left out of the initial order creating the JCCP did not subsequently file an add-on petition, these sixty-five plaintiffs each proposed, in some form or another, that their cases be tried jointly. This number, however, falls short of the required 100 plaintiffs in CAFA's mass action provision.

Pfizer argues that JCCP Counsel proposed joining thousands of plaintiffs to the coordinated action by "repeatedly stat[ing] that they would seek to add 'all subsequent LIPITOR actions.'" (Opp. at 2–3, 7.) Contrary to Pfizer's assertion, JCCP Counsel's statements are insufficient to trigger CAFA mass action jurisdiction, because they are merely suggestions or predictions—not voluntary and affirmative acts proposing a joint trial on behalf of the remaining plaintiffs. Although JCCP Counsel provided Judge Johnson with a list of all known Lipitor actions filed in California State Court at the time of the February 25, 2014, status conference, this did not "unambiguously inform[] [Pfizer] to a substantial degree of specificity" that the claims of at least 100 Plaintiffs had been proposed to be tried jointly. (*See* Opp. at 14–15 (citing *Portnoff v. Janssen Pharm., Inc.*, 2017 WL 708745, at *6 (E.D. Pa. Feb. 22, 2017).) It merely alerted Judge Johnson and Pfizer to additional cases that could *potentially* be coordinated. Pfizer is correct that the statutory question is whether a joint trial has been proposed, not whether it will actually take place. (Opp. at 14.) However, absent add-on petitions or similar affirmative actions or definitive commitments by the

remaining plaintiffs or their attorneys, they have not proposed a joint trial.[4]

Pfizer also notes that JCCP Counsel represent at least 2,823 plaintiffs in 77 Lipitor actions, and have stated that they are in close communication with the attorneys working on the rest of the Lipitor cases. (Opp. at 2–3.) Pfizer apparently believes that the fact that JCCP Counsel are working on additional cases that have not yet filed add-on petitions and are cooperating with other plaintiffs' attorneys is enough to impute the joint trial proposal of the sixty-five plaintiffs onto remaining plaintiffs. This is unpersuasive, because it is the identities and actions of the clients, not that of the attorneys, that matters. JCCP Counsel have not acted on *behalf* of any plaintiffs beyond the aforementioned sixty-five —JCCP Counsel have merely represented that they anticipate many additional, unspecified cases will be coordinated. Neither the actions of the sixty-five plaintiffs nor JCCP Counsel can be imputed to the remaining plaintiffs here.

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[4] It is important to note that the legislative history of the mass action provision supports the view that it is the 100 or more plaintiffs themselves who must propose the joint trial. The legislative history provides that "subsection 1332(d)(11) expands federal jurisdiction over mass actions–suits that are brought on behalf of numerous named plaintiffs *who claim* that their suits present common questions of law or fact that should be tried together even though they do not seek class certification status. . . . Under subsection 1332(d)(11), any civil action in which 100 or more *named parties seek to try their claims* for monetary relief together will be treated as a class action for jurisdictional purposes." S. Rep. 109-14, at 46, 2005 U.S.C.C.A.N. 3, at 43–44 (emphasis added).

The Court also finds Pfizer's attempts to minimize the effects of *Briggs* unavailing. (*See* Opp. at 18–19.) The Court is aware that in *Briggs*, it was the defendants who had initiated coordination proceedings, and the plaintiffs had only represented to the district judge that their cases would likely be joined for trial in the state court JCCP if they were remanded. *Briggs*, 796 F.3d. at 1049. *Briggs* reasoned that the plaintiffs had not made proposals that could trigger CAFA mass action jurisdiction simply by "filing their cases in the California state court system, when a consolidated proceeding covering similar claims, initiated by defendants, was underway in California court," or by representing to the federal district court "what would or might happen to their cases, if they were remanded to the state court," especially since the district court lacked authority to add cases to the state court JCCP. *Id*. In this case, unlike in *Briggs*, plaintiffs initiated the JCCP and had made representations to the JCCP court regarding their desire to coordinate additional cases. Nevertheless, *Briggs'* holding that a "proposal" is a "voluntary and affirmative" act clearly applies here. And only sixty-five plaintiffs have proposed a joint trial. No other plaintiff has acted voluntarily and affirmatively to be part of or be bound by that proposal.

Pfizer also contends that the remaining plaintiffs took other affirmative steps in their complaints to propose a joint trial. Apparently, more than 100 Lipitor cases involving 3,400 plaintiffs have civil cover sheets attached to their complaints indicating that the cases are "complex" pursuant to California Rules of Court 3.400 because they are subject to "[c]oordination with related actions pending in one or more courts in other

counties, states, or countries, or in federal court;" fifty-nine state court complaints included notices of related cases stating that the case was related to the JCCP before Judge Johnson; twenty-five attached copies of an order entered by Judge Johnson limiting Plaintiffs' complex case fees for "all new add-on cases joined to this coordinated proceeding;" and four identified the JCCP in their case captions. (Opp. at 3, 8–9; 9 n.5.) However, these actions are all administrative in nature and merely alert the clerk's office to the *possibility* of coordination in order to assist with case sorting and management. They do not constitute voluntary and affirmative acts by each plaintiff to be part of and bound by a proposal for a joint trial.[5] *See Briggs*, 796 F.3d. at 1049 (The plaintiffs had not made a proposal for a joint trial by simply "filing their cases in the California state court system, when a consolidated proceeding covering similar claims . . . was underway in California court.").

Nor can the Court assume that at least thirty-five more plaintiffs will be coordinated in this action because of the sheer number of plaintiffs that have filed Lipitor cases. Plaintiffs are free to structure

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[5] The parties debate whether the coordination petitions in *Corber* explicitly encompassed at least 100 plaintiffs or whether the effects of the coordination petitions were merely imputed onto other plaintiffs. (*See* Opp. at 15–16; Reply at 3–5, 4 n.2.) This fact was not discussed in *Corber* and its implications were not argued or addressed in the opinion. *See generally Corber*, 771 F.3d 1218. *Corber* only analyzed the narrow question of whether the coordination petitions were sufficient to constitute proposals, not whether they could bind plaintiffs that were not explicitly named in the coordination petitions or add-on petitions. *Id.* at 1222.

actions to avoid CAFA jurisdiction. *Corber*, 771 F.3d at 1223 ("[P]laintiffs are the 'masters of their complaint' and do not propose a joint trial simply by structuring their complaints so as to avoid the 100-plaintiff threshold."). The plaintiffs who are not yet part of the JCCP could have many legitimate reasons for not wanting a joint federal trial. For example, some plaintiffs might seek to distance themselves from those with seemingly weaker claims or from those who will be preoccupied with defenses unique to them. Other plaintiffs who have suffered more severe injuries or consequences, such as stroke, blindness, and amputation, or who are bringing suit on behalf of a deceased family member, may not wish to have their claims tried jointly with patients who have had milder injuries or consequences. The Court will not speculate, nor base its jurisdictional decision, on whether thirty-five or more plaintiffs will likely take voluntary and affirmative action to be part of and bound by a proposal for a joint trial. All that matters for the Court's decision now is that at least thirty-five additional plaintiffs have not yet taken such voluntary and affirmative action.

Finally, Pfizer suggests that Judge Johnson herself has proposed a joint trial of 100 or more plaintiffs because her order regarding add-on procedures states that "[a]ll cases filed in California state court against Pfizer, Inc. or McKesson Corporation, alleging injuries related to the development of Type II diabetes . . . are assigned to the Honorable Jane L. Johnson, Los Angeles Superior Court for purposes of coordination." (Opp. at 14 (citing Searcy Decl. Ex. C at 1).) Pfizer submits that because the Ninth Circuit has left open

the possibility that "a state court's *sua sponte* joinder of claims might allow a defendant to remove separately filed actions to federal court as a single 'mass action' under CAFA," Judge Johnson's order should give rise to mass action jurisdiction. (*Id.* at 14 n.7 (citing *Tanoh*, 561 F.3d at 956).) The Court disagrees. The sentence immediately following the one Pfizer cites clarifies that "[t]he parties to such actions, however, *are still required to comply* with the stipulation or notice add-on procedures set forth in this Order." (Searcy Decl. Ex. C at 1 (emphasis added).) By the express terms of Judge Johnson's order, the additional cases will not be part of the JCCP or subject to the terms of the coordination petition unless and until they are added by an add-on petition and not subject to a notice of opposition. Indeed, Judge Johnson has only granted two add-on petitions thus far, bringing the total number of plaintiffs in the JCCP to just nine. (Orr Decl. Exs. H, I.) Moreover, at the status conference, Judge Johnson repeatedly stated that the JCCP cases "can be sent back for trial," so it is far from clear whether Judge Johnson's order is even proposing a joint trial, let alone one involving 100 or more plaintiffs. (Orr Decl. Ex. M at 17:13–23.)

IV. CONCLUSION

Since less than 100 plaintiffs have proposed that their cases be tried jointly, the Court does not have jurisdiction under CAFA's mass action provision and all Lipitor cases presently before this Court must be remanded to state court. Accordingly, Plaintiffs' motion to remand is GRANTED.

DATED: May 23, 2017

/s/Cormac J. Carney
CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE

Pamela McKenzie et al v. Pfizer Inc et al	2:14-cv-01800 CJC (JPRx)
Wanda Dearmore et al v. Pfizer Inc et al	2:14-cv-01801 CJC (JPRx)
Juana Garcia et al v. Pfizer Inc et al	2:14-cv-01804 CJC (JPRx)
Judy Miller et al v. Pfizer Inc et al	2:14-cv-01805 CJC (JPRx)
Bernadette Fernandez et al v. Pfizer Inc et al	2:14-cv-01806 CJC (JPRx)
Segalilt Siegel et al v. Pfizer Inc et al	2:14-cv-01807 CJC (JPRx)
Luretta Alexander-Jackson et al v. Pfizer Inc et al	2:14-cv-01808 CJC (JPRx)
Willie Sims-Lewis et al v. Pfizer Inc et al	2:14-cv-01809 CJC (JPRx)
Bonnie Kessner et al v. Pfizer Inc et al	2:14-cv-01811 CJC (JPRx)
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Deberah Rivington et al v. Pfizer Inc et al	2:14-cv-01814 CJC (JPRx)
Phyllis Beima et al v. Pfizer Inc et al	2:14-cv-01815 CJC (JPRx)
Nina Obuch et al v. Pfizer Inc et al	2:14-cv-01816 CJC (JPRx)
Adelle Calabretta et al v. Pfizer Inc et al	2:14-cv-01817 CJC (JPRx)

Alida Adamyan et al v. Pfizer Inc et al	2:14-cv-01818 CJC (JPRx)
Maria Carbajal et al v. Pfizer Inc et al	2:14-cv-01819 CJC (JPRx)
Dorothy M Andres et al v. Pfizer Inc et al	2:14-cv-01820 CJC (JPRx)
Donna Kruenegel et al v. Pfizer Inc et al	2:14-cv-01822 CJC (JPRx)
Mattie King et al v. Pfizer Inc et al	2:14-cv-01823 CJC (JPRx)
Patricia Banks et al v. Pfizer Inc et al	2:14-cv-01824 CJC (JPRx)
Rose A Williams et al v. Pfizer Inc et al	2:14-cv-01828 CJC (JPRx)
Vicky Avila et al v. Pfizer Inc et al	2:14-cv-01829 CJC (JPRx)
Maizy Benons et al v. Pfizer Inc et al	2:14-cv-01831 CJC (JPRx)
Linda Roy et al v. Pfizer Inc et al	2:14-cv-01832 CJ C(JPRx)
Brenda Johnson et al v. Pfizer Inc et al	2:14-cv-01836 CJC (JPRx)
Blanca Mejia et al v. Pfizer Inc et al	2:14-cv-01837 CJC (JPRx)
Lori Ann Weisman et al v. Pfizer Inc et al	2:14-cv-01841 CJC (JPRx)
Sylvia Alvardo v. Pfizer Inc et al	2:14-cv-01843 CJC (JPRx)
Lena Whitaker et al v. Pfizer Inc et al	2:14-cv-01844 CJC (JPRx)

Martha Bowser v. Pfizer Inc et al	2:14-cv-01846 CJC (JPRx)
Patricia Lewis et al v. Pfizer Inc et al	2:14-cv-01848 CJC (JPRx)
Emma Fields et al v. Pfizer Inc et al	2:14-cv-01850 CJC (JPRx)
Fiette Williams et al v. Pfizer Inc et al	2:14-cv-01853 CJC (JPRx)
Pallavi Mehta et al v. Pfizer Inc et al	2:14-cv-01854 CJ C(JPRx)
Theresa Medina et al v. Pfizer Inc et al	2:14-cv-01857 CJC (JPRx)
Deborah McClain et al v. Pfizer Inc et al	2:14-cv-01858 CJC (JPRx)
Valerie Davis v. Pfizer Inc et al	2:14-cv-01860 CJC (JPRx)
Tonisha Powell et al v. Pfizer Inc et al	2:14-cv-01861 CJC (JPRx)
Zurita Gray et al v. Pfizer Inc et al	2:14-cv-01862 CJC (JPRx)
Clara Bagdasarian et al v. Pfizer Inc et al	2:14-cv-01863 CJC (JPRx)
Clara Owens v. Pfizer Inc et al	2:14-cv-01865 CJC (JPRx)
Deloris Ann Richard et al v. Pfizer Inc et al	2:14-cv-01866 CJC (JPRx)
Mazal Azzam et al v. Pfizer Inc et al	2:14-cv-01867 CJC (JPRx)
Imelda Diaz et al v. Pfizer Inc et al	2:14-cv-01869 CJC (JPRx)

Shahla Owhady et al v. Pfizer Inc et al	2:14-cv-01872 CJC (JPRx)
Ouida Valentine et al v. Pfizer Inc et al	2:14-cv-01874 CJC (JPRx)
Loretta Curley et al v. Pfizer Inc et al	2:14-cv-01876 CJC (JPRx)
Regina Feberdino et al v. Pfizer Inc et al	2:14-cv-01889 CJC (JPRx)
Ruth English et al v. Pfizer Inc et al	2:14-cv-01892 CJC (JPRx)
Cheri Lubenko v. Pfizer Inc et al	2:14-cv-01894 CJC (JPRx)
Jessie Hill et al v. Pfizer Inc et al	2:14-cv-01895 CJC (JPRx)
Doris Choate et al v. Pfizer Inc et al	2:14-cv-01896 CJC (JPRx)
Susan Kelley et al v. Pfizer Inc et al	2:14-cv-01897 CJC (JPRx)
Charlene Tate et al v. Pfizer Inc et al	2:14-cv-01898 CJC (JPRx)
Mary Adamian et al v. Pfizer Inc et al	2:14-cv-01899 CJC (JPRx)
Candacy Roberts-Anderson et al v. Pfizer Inc et al	2:14-cv-01904 CJC (JPRx)
Louise Harris et al v. Pfizer Inc et al	2:14-cv-01906 CJC (JPRx)
Shirley Reynolds et al v. Pfizer Inc et al	2:14-cv-01907 CJC (JPRx)
Juanita Banks et al v. Pfizer Inc et al	2:14-cv-01908 CJC (JPRx)

Ruby Hare et al v. Pfizer Inc et al	2:14-cv-01910 CJC (JPRx)
Marion Constant v. Pfizer Inc et al	2:14-cv-01911 CJC (JPRx)
Janice S Robinson et al v. Pfizer Inc et al	2:14-cv-01912 CJC (JPRx)
Joy Zullo et al v. Pfizer Inc et al	2:14-cv-01914 CJC (JPRx)
Donna Willis v. Pfizer Inc et al	2:14-cv-01916 CJC (JPRx)
Frankie Brown et al v. Pfizer Inc et al	2:14-cv-01921 CJC (JPRx)
Jocelyn Clemente Salvo et al v. Pfizer Inc et al	2:14-cv-01924 CJC (JPRx)
Gladys Anderson et al v. Pfizer Inc et al	2:14-cv-01925 CJC (JPRx)
Darlene Jordan et al v. Pfizer Inc et al	2:14-cv-01928 CJC (JPRx)
Deann Pierce v. Pfizer Inc et al	2:14-cv-01929 CJC (JPRx)
Denelle Bailey et al v. Pfizer Inc et al	2:14-cv-01930 CJC (JPRx)
Edith Wakabayashi v. Pfizer Inc et al	2:14-cv-01931 CJC (JPRx)
Maye Alberstone et al v. Pfizer Inc et al	2:14-cv-01932 CJC (JPRx)
Rose Hodges v. Pfizer Inc et al	2:14-cv-01936 CJC (JPRx)
Marilyn Williams et al v. Pfizer Inc et al	2:14-cv-01937 CJC (JPRx)

Linda Franzone et al v. Pfizer Inc et al	2:14-cv-01940 CJC (JPRx)
Joyce Lubniewski v. Pfizer Inc et al	2:14-cv-01942 CJC (JPRx)
Tomie Isrel et al v. Pfizer Inc et al	2:14-cv-01943 CJC (JPRx)
Elizabeth Ann Watts et al v. Pfizer Inc et al	2:14-cv-01997 CJC (JPRx)
Jewel Williams et al v. Pfizer Inc et al	2:14-cv-03477 CJC (JPRx)
Kim Collins et al v. Pfizer Inc et al	2:14-cv-05792 CJC (JPRx)
Linda Watson et al v. Pfizer Inc et al	2:14-cv-06226 CJC (JPRx)
Helen Elliott et al v. Pfizer Inc et al	2:14-cv-06617 CJC (JPRx)
Eliane Scott et al v. Pfizer Inc et al	2:14-cv-07432 CJC (JPRx)
Michelle Bradley et al v. Pfizer Inc et al	2:14-cv-07649 CJC (JPRx)
Granieta Johnson-Wilson et al v. Pfizer Inc et al	2:14-cv-08261 CJC (JPRx)
Judy Kloss et al v. Pfizer Inc et al	2:14-cv-09567 CJC (JPRx)
Ann Sanchez et al v. Pfizer Inc et al	2:15-cv-01211 CJC (JPRx)
Judith Smalley et al v. Pfizer Inc et al	2:15-cv-01483 CJC (JPRx)
Julie Williams et al v. Pfizer Inc et al	2:15-cv-01626 CJC (JPRx)

Robyn Whitney et al v. Pfizer Inc et al	2:15-cv-01638 CJC (JPRx)
Gloria Wilson et al v. Pfizer Inc et al	2:15-cv-03525 CJC (JPRx)
Amy Caro et al v. Pfizer Inc et al	2:15-cv-03880 CJC (JPRx)
Shari Beneda et al v. Pfizer Inc et al	2:15-cv-04267 CJC (JPRx)
Magda Santiago et al v. Pfizer Inc et al	2:15-cv-04299 CJC (JPRx)
Shary Stegall et al v. Pfizer Inc et al	2:15-cv-05013 CJC (JPRx)
Michelle Davis et al v. Pfizer Inc et al	2:15-cv-05188 CJC (JPRx)
Pauline St Jean et al v. Pfizer Inc et al	2:15-cv-06068 CJC (JPRx)
Anita Perlhefter et al v. Pfizer Inc et al	2:15-cv-06555 CJC (JPRx)
Priscilla Garcia et al v. Pfizer Inc et al	2:15-cv-07257 CJC (JPRx)
Ruth Yaker et al v. Pfizer Inc et al	2:15-cv-7258 CJC (JPRx)
Nadine Smith et al v. Pfizer Inc et al	2:15-cv-08138 CJC (JPRx)
Gloria Ashley et al v. Pfizer Inc et al	2:15-cv-08604 CJC (JPRx)
Betty Stevens et al v. Pfizer Inc et al	2:15-cv-08845 CJC (JPRx)
Mixdalia Taime et al v. Pfizer Inc et al	2:15-cv-09495 CJC (JPRx)

Pari Jamshidi et al v. Pfizer Inc et al	2:16-cv-00586 CJC (JPRx)
Jonna Roberts et al v. Pfizer Inc et al	2:16-cv-01400 CJC (JPRx)
Emilya Yudson et al v. Pfizer Inc et al	2:16-cv-01762 CJC (JPRx)
Aleene M Queen et al v. Pfizer Inc et al	2:16-cv-01924 CJC (JPRx)
Theresa Bagliere et al v. Pfizer Inc et al	2:16-cv-02996 CJC (JPRx)
Teresa Brooks et al v. Pfizer Inc et al	2:16-cv-03811 CJC (JPRx)
Genevieve Monreal et al v. Pfizer Inc et al	2:16-cv-04007 CJC (JPRx)
Elizabeth DeBay et al v. Pfizer Inc et al	2:16-cv-04015 CJC (JPRx)
Myrle Jackson et al v. Pfizer Inc et al	2:16-cv-04678 CJC (JPRx)
Sharon Campbell et al v. Pfizer Inc et al	2:16-cv-05156 CJC (JPRx)
Lawana Smith et al v. Pfizer Inc et al	2:16-cv-05560 CJC (JPRx)
Mildred Lois Brown et al v. Pfizer Inc et al	2:16-cv-06157 CJC (JPRx)
Barbara Gibson et al v. Pfizer Inc et al	2:16-cv-06592 CJC (JPRx)
Rose A Carpenter et al v. Pfizer Inc et al	2:16-cv-07084 CJC (JPRx)
Cynthia Faye Davis et al v. Pfizer Inc et al	2:16-cv-07118 CJC (JPRx)

Sharal Scully et al v. Pfizer Inc et al	2:16-cv-07478 CJC (JPRx)
Patricia Williams et al v. Pfizer Inc et al	2:16-c-v07762 CJC (JPRx)
Vicky Chaffee et al v. Pfizer Inc et al	2:16-cv-07977 CJC (JPRx)
Tonya Baker et al v. Pfizer Inc et al	2:16-cv-08542 CJ C(JPRx)
Vivia Artz et al v. Pfizer Inc et al	2:16-cv-08694 CJC (JPRx)
Join Boles et al v. Pfizer Inc et al	2:16-cv-08710 CJC (JPRx)
Josefina Allison et al v. Pfizer Inc et al	2:16-cv-08721 CJC (JPRx)
Bessie Barringer et al v. Pfizer Inc et al	2:16-cv-09091 CJC (JPRx)
Mary Baker et al v. Pfizer Inc et al	2:16-cv-09532 CJC (JPRx)
Alma Richards v. Pfizer Inc et al	5:14-cv-00485 CJC (JPRx)
Chasa Williams v. Pfizer Inc et al	5:14-cv-00493 CJC (JPRx)
Sharon Parker et al v. Pfizer Inc et al	5:14-cv-00496 CJC (JPRx)

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION
HONORABLE CORMAC J. CARNEY, U.S. DISTRICT JUDGE

Case No. 8:17-mc-00005-CJC-JPR

[Dated February 1, 2017]

IN RE: PFIZER)
)
)

Certified

REPORTER'S TRANSCRIPT OF
STATUS CONFERENCE
WEDNESDAY, FEBRUARY 1, 2017
9:12 A.M.
SANTA ANA, CALIFORNIA

DEBBIE HINO-SPAAN, CSR 7953, CRR
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Thomas Sims, Esq.

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SANTA ANA, CALIFORNIA; WEDNESDAY, FEBRUARY 1, 2017

9:12 A.M.

- - -

THE COURT: Good morning. All right. Well, I want to thank all of you for being here. I thought it would be productive if we had a brief chat and I gave you some of my thoughts about how I think we should proceed, and then I'd like to hear from any of you. There's not that many people here. I was preparing for over 30 lawyers, I guess.

How many do we have right now on the docket, Melissa?

THE COURTROOM DEPUTY: I don't know. 30, 40, maybe.

THE COURT: Looks like about 30 or 40 lawyers, but looks like we only have about eight or nine on the plaintiff's side. What I thought needs to be done is I have to decide the jurisdictional issue, whether I have jurisdiction over any of these cases. And I think the total now is up to about 130 cases. And so what I want to do is focus on that issue. If I have jurisdiction, I have jurisdiction. And then we can talk about case management of the case. If I don't have jurisdiction

over any of these cases, they're going back to State Court.

So I guess maybe my question is more for the plaintiffs' group, is how best can we tee up the jurisdictional issue? Can we have one consolidated motion, or do we have to have a few motions because depending on the case, the jurisdictional

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analysis is different? And I don't profess to say I know the plaintiffs' cases very well, and so I'll be looking for guidance. And what I thought I would do is just tee that issue up to you and then give you a few moments to chat among yourselves, and then you can let me know how best to proceed.

I assume, based on the status report submitted by Pfizer, that the simpler, the fewer motions, the better, that you would prefer to do consolidated opposition. But I need to know on the plaintiff's side are we talking about one motion, two motions, three motions, four motions?

MR. ROBINS: May I address the Court, Your Honor?

THE COURT: Please. If you could just say who you are and who you represent.

MR. ROBINS: Thank you, Your Honor. I'm Bill Robins, Santa Monica. And by way of background, I was appointed by Judge Johnson as one of the members of the executive committee in the JCCP when these cases were first -- early on when these cases were

filed. The reason you don't have 30 lawyers here is because we've organized ourselves. And I'm here speaking on behalf of all the plaintiffs that have made their way here so far.

THE COURT: Oh, great.

MR. ROBINS: And we will suggest to Your Honor that the orderly way to handle this is through consolidated, and I'm going to say most likely two motions.

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THE COURT: Okay.

MR. ROBINS: And the reason for that is there is a distinction between those plaintiffs who originally moved for the JCCP and then sort of everybody else who did nothing more than file the lawsuit and got removed. And there is a distinction, we think, in that, and there's also some distinctions concerning waiver that we think apply to the first group that don't apply to the second. And so when we originally filed our motions way back when and they were -- most of the cases Your Honor knows are here in front of you, but there were cases in the Eastern District. There's some cases up in the Northern District.

The way that it was teed up in most of the districts was with three groups because of some distinctions that no longer exist because of Judge Gergel's order. We're now down, I think, to two groups from the way I can tell in looking at his order and what's left for Your Honor to decide on the question of subject matter jurisdiction. So our suggestion would be that it is a

consolidated briefing, that we will file -- and I think we'll be able to get to a point of having an agreement on every single plaintiff that is coming here.

One comment I would make is that we've been watching closely the orders that have been coming out of Judge Gergel and getting back to the JPML and making their way back here to Your Honor. There are a few cases that, you know, have not

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quite landed at LAX, made their way -- I guess here would be John Wayne, but they haven't made it here yet. They'll be here soon.

Judge Gergel just signed another remand order, I'm told, this morning on a case of somebody that was still up there. And there are a few lawyers that are in that group that were not part of the original JCCP leadership, were not part of the steering committee that we formed. I have every expectation that we'll get control over those cases as well and those lawyers will be willing to allow leadership team to, you know, bring them in under the tent. But I would ask the Court within your consideration as we're setting the briefing schedule to give us a little bit of time to let those cases come in here.

There may be a few left that for whatever reason still end up in front of Judge Gergel and don't get completely looped in, but just in terms of the efficiency of things, we think that it would be best if we can get all of the cats herded in sort of one or two motions as I'm saying. We're not looking for a lot of time. I was going to suggest to Your Honor 45 days from today for

us to file opening briefs. The defense and I have already conferred about this. I think we're in agreement on this. They would file a response 30 days after that; we would file a reply two weeks later. You know, they asked me about a surreply, and I know those are generally discouraged in the Central District. It's up to Your Honor as to how you want to

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handle that, but this is a schedule that we were going to suggest to you.

THE COURT: Sounds great. I'm delighted that you're on top of this and it's coordinated and organized. I really want to proceed as efficiently as possible, and it sounds like you got a head start. So I'm very comfortable with that.

What I would ask, then, is if you could submit a proposed briefing and hearing schedule in an order that I can sign, and then that will be the order of the Court. One question I need a moment to talk to the clerk of this courthouse as well as my own clerk is whether we should set up a new case where these are filed in as opposed to filing the motions in 130 cases, if you follow me. That's more an internal. I want to make it as simple for you as possible. So I imagine it would be easier -- it's a question, not an argument -- if you just had to file in one case the two motions or do you see it differently?

MR. ROBINS: Your Honor, we conferred. I conferred with Mr. Cheffo's colleague about that exact issue yesterday, and we completely agree with that. That would be the most logical way to do it, you know,

with, you know, an exhibit that picks up all the case numbers that apply. That -- you know, that makes the most sense. And we would certainly ask Your Honor if we can do that feasibly here, that would be the best approach. Because otherwise, we're just -- we have 140 filings and all that and it doesn't really make any logical sense to

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have to do that, Your Honor. It's going to be a me too motion on everything behind it.

And frankly, it may confuse things a little bit because of the fact that we have -- what I said before, you know, some distinctions in terms of just which buckets each one goes in. So if we could sort of handle it exactly the way you're suggesting, I think it's going to make it a lot easier at the end of the day for everyone.

THE COURT: Okay. So then I guess the question that I have for you to follow up, should we have one case that you file it on or two cases that you file it on?

MR. ROBINS: I think if we can file it in one case, that would make the most sense and we cross-reference the cases by case number that it would apply to. I don't see the necessity. Maybe Mr. Cheffo will disagree. Yeah, I think that's easiest for us.

THE COURT: Okay. Could you give me a moment and I'll talk to Terri and Melissa here.

(A discussion was held off the record.)

THE COURT: All right. I think the proposal is going to work. What I think I'll have to do is issue a minute order indicating what the new case number is and indicating in each individual case all 130, or if that's going to be 140 that all filings need to be in this new case number. So if you see that type of minute order, now you know why.

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So I guess the ball, then, is in your court; right? You're going to submit a stipulation and Proposed Order about the briefing and hearing schedule?

MR. ROBINS: Yes, Your Honor.

THE COURT: And I'll get an order -- minute order out with a new case number. And all filings should be in this new case number.

Okay. Tell me, is there anything else you'd like to talk about?

MR. ROBINS: Your Honor, Bill Robins, again, for the plaintiff. Just as a clarification, you know, I don't -- I can't imagine, as I'm sitting here, anything that would get filed as, you know, the next filing other than the motion, other than you may get CTOs coming back from the JPML for these individual cases. And so I think -- you know, I'd just make one caveat to what you're saying about this whole organization of one case number. You know, in a sense, we need to treat this as a mini MDL in that you don't want 140 cases filing -- I don't think you do anyway, because later it would be a problem for things that are unrelated to a common issue.

THE COURT: Right.

MR. ROBINS: And so my suggestion on the minute order would be that it, you know, addresses that it is for matters that are -- you know, have common issues applicable to the entire, you know, cases or something like that so that as

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there may be other case-specific things that theoretically could come up, you know, I would leave it to you obviously on how you want to handle pro hac for this, maybe it makes sense to put that in the general.

But for things coming from the JPML initially or perhaps -- I don't know what, but there may be something that a lawyer in an individual case or for some reason, you know, Pfizer needs to file an individual case, I would just leave that possibility open.

THE COURT: You're right.

MR. ROBINS: Rather than put everything in one number.

THE COURT: You are right. You are right. And plus I wouldn't want to -- we're trying to streamline and have this new case number have the important stuff. And I don't want to bog it down with pro hac vice or conditional transfer orders. I don't want that. So I agree.

MR. ROBINS: Okay.

THE COURT: I'll work with the wording and hopefully it's going to be acceptable. And if anybody has a problem with it, you can just let me know.

MR. ROBINS: Certainly, Your Honor.

THE COURT: Okay.

MR. CHEFFO: Good morning, Your Honor. Mark Cheffo for Pfizer. I'm going to be brief. I think you'll also hear

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what I have to say is that, you know, we're in kind of violent agreement, I think, on most of these issues. We are fortunate to have good lawyers on the plaintiff's side at least, and we've been coordinating well on what makes sense.

So I think what you've heard is something that we second in terms of an orderly process that's kind of most efficient for the Court and for the parties. And thank you for that, and thank you for granting my pro hac.

So with that, I think the only thing -- and I should, just as a housekeeping matter, maybe say it once and get it out of the way, we have a personal jurisdiction affirmative defense that it's not something -- we think it will be moot frankly to the extent that we're here before Your Honor in this Court, as we think we should be under CAFA. But to the extent we're not in State Court, I don't want there to be any confusion that we have waived that issue. But that's not something I think this Court is going to need to take up.

THE COURT: And I saw that in the briefing, and I don't mean to suggest that you've waived any of your other defenses or arguments or issues that might be there, but all I'm saying is I don't want to do anything about the case until I've decided this CAFA is a jurisdictional issue.

MR. CHEFFO: And we couldn't agree more. The jurisdictional issue goes away to the extent that Your Honor determines that there's CAFA jurisdiction.

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So with that, I think that we are prepared to -- you know, I think the one or the two briefs makes some sense. We've talked about that. We will do that within 30 days. I think we had just talked about, you know, a surreply frankly. That's something we'll wait and see whether you think we need it, you need it, but we'll take that as it comes, Your Honor.

THE COURT: I appreciate it. I'm not trying to curry anybody's favor, but I appreciate the civility and professionalism. I haven't had that in a while. It's been very contentious lately for whatever reason, and it's not productive. So I appreciate everybody trying to be coordinated and efficient, and I think we have a game plan on how to proceed. And it sounds like I'll be resolving this jurisdictional issue, it sounds like, in the next 90 days if you're going to be filing in 45 days and with that briefing schedule you talked about.

MR. CHEFFO: Thank you, Your Honor.

THE COURT: Okay. Thank you.

THE COURTROOM DEPUTY: All rise.

(Proceedings concluded at 9:32 a.m.)

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CERTIFICATE OF OFFICIAL REPORTER

COUNTY OF LOS ANGELES)
)
STATE OF CALIFORNIA)

I, DEBBIE HINO-SPAAN, FEDERAL OFFICIAL REALTIME COURT REPORTER, in and for the United States District Court for the Central District of California, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Date: February 16, 2017

/S/ DEBBIE HINO-SPAAN

Debbie Hino-Spaan, CSR No. 7953
Federal Official Court Reporter

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

MDL No. 2:14-mn-02502-RMG

[Filed November 7, 2016]

IN RE: LIPITOR (ATORVASTATIN CALCIUM) MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION	)

CASE MANAGEMENT ORDER NO. 87

This Order relates to cases:

2:14-cv-01810	**2:14-cv-02326**
2:14-cv-02231	**2:14-cv-02327**
2:14-cv-02241	**2:14-cv -02328**
2:14-cv-02256	**2:14-cv-02330**
2:14-cv-02257	**2:14-cv-02339**
2:14-cv-02263	**2:14-cv-02340**
2:14-cv-02273	**2:14-cv-02341**
2:14-cv-02274	**2:14-cv-02342**
2:14-cv-02287	**2:14-cv-02343**
2:14-cv-02289	**2:14-cv-02344**
2:14-cv-02290	**2:14-cv-02345**
2:14-cv-02291	**2:14-cv-02346**

2:14-cv-02296	**2:14-cv-02349**
2:14-cv-02297	**2:14-cv-02350**
2:14-cv-02298	**2:14-cv-02351**
2:14-cv-02299	**2:14-cv-02352**
2:14-cv-02300	**2:14-cv-02353**
2:14-cv-02301	**2:14-cv-02354**
2:14-cv-02302	**2:14-cv-02355**
2:14-cv-02303	**2:14-cv-02356**
2:14-cv-02304	**2:14-cv-02357**
2:14-cv-02305	**2:14-cv-02358**
2:14-cv-02306	**2:14-cv-02359**
2:14-cv-02308	**2:14-cv-02361**
2:14-cv-02309	**2:14-cv-02362**
2:14-cv-02310	**2:14-cv-02364**
2:14-cv-02311	**2:14-cv-02365**
2:14-cv-02316	**2:14-cv-02366**
2:14-cv-02317	**2:14-cv-02370**
2:14-cv-02318	**2:14-cv-02372**
2:14-cv-02320	**2:14-cv-02373**
2:14-cv-02321	**2:14-cv-02374**
2:14-cv-02322	**2:14-cv-02376**
2:14-cv-02323	**2:14-cv-02377**
2:14-cv-02324	**2:14-cv-02379**
2:14-cv-02325	**2:14-cv-02380**

Motions to Remand (Dkt. Nos. 267, 268, 269)

For the reasons stated below, Plaintiffs' Motions to Remand (Dkt. Nos. 267, 268, 269) are GRANTED IN PART.[1]

A. Background

Each of these cases was originally filed in California state court against Defendants Pfizer, Inc. ("Pfizer") and McKesson Corp. ("McKesson"). Plaintiffs allege that Lipitor caused them to develop Type II diabetes and that, among other things, Defendants did not properly disclose the risks associated with Lipitor. Defendants removed these actions to federal district courts in California, asserting (1) diversity jurisdiction and (2) federal jurisdiction under the Class Action Fairness Act of 2005 (CAFA). While complete diversity is lacking on the face of the Complaints, Pfizer contends that (a) McKesson was fraudulently joined and should be disregarded for the purposes of determining whether diversity jurisdiction exists and (b) that non-California Plaintiffs are fraudulently misjoined and that their claims should be severed.

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[1] This order does not address the motions with regard to *Banks, et al. v. Pfizer Inc., et al.,* 2:14-cv-1811; *Bowser v. Pfizer Inc., et al.,* 2:14-cv-2329; *Constant v. Pfizer Inc., et al.,* 2:14-cv-2360; *Hodges v. Pfizer Inc. et al.,* 2:14-cv-2375; *Lubniewski v. Pfizer Inc., et al.,* 2:14-cv-2378; *Owens v. Pfizer Inc., et al.,* 2:14-cv-2307; *Pierce v. Pfizer Inc., et al.,* 2:14-cv-2371; and *Willis v. Pfizer Inc., et al.,* 2: 14-cv-2363. In these eight cases, there are no California Plaintiffs. Therefore, complete diversity exists on the face of the Complaints. The Court will address these eight cases by separate order.

After removal, these cases were transferred to this MDL by the JPML, and Plaintiffs' filed motions to remand. (Dkt. No. 267, 268, 269). In addition to lack of subject matter jurisdiction, Plaintiffs also argue that the forum defendant rule bars removal, that Pfizer's removal of certain cases was untimely, and that the Court should remand the cases to California federal courts in accordance with CAFA. The Court referred these motions to remand to the Magistrate Judge. (Dkt. No. 292).

The Magistrate Judge issued an order granting the motions to remand and ordering that these actions be transferred to the federal district courts in California from which they came. (Dkt. No. 715). However, because it has not been definitively established whether an order of remand is dispositive such that it must be ruled on by a District Judge absent consent of the parties, Judge Marchant ordered that the parties were allowed to file objections to the order of remand and that if any objections were filed, the case be forwarded to this Court for de novo review and final disposition. (*Id.*). Defendants filed objections, Plaintiffs responded, and the parties have filed several notices of supplemental authority and additional briefing. (*See* Dkt. Nos. 755, 796, 829, 845, 867, 889, 894, 1654, 1664, 1673). This matter is now before the Court for de novo review.

B. Fraudulent Joinder of McKesson

Pfizer makes three arguments that McKesson is fraudulently joined: (1) the state law claims against McKesson are preempted by federal law so there is no possibility they can establish a cause of action in state

court against McKesson, (2) Plaintiffs have failed to state a claim against McKesson, and (3) Plaintiffs lack a genuine intent to prosecute claims against McKesson. The Court takes each of these arguments in turn and ultimately finds that McKesson is not fraudulently joined with regard to California Plaintiffs.

1. Legal Standard

The fraudulent joinder doctrine "effectively permits a district court to disregard, for jurisdictional purposes, the citizenship of certain nondiverse defendants, assume jurisdiction over a case, dismiss the nondiverse defendants, and thereby retain jurisdiction." *Johnson v. Am. Towers, LLC,* 781 F.3d 693, 704 (4th Cir. 2015) (quotations omitted). To establish that a nondiverse defendant has been fraudulently joined, the removing party must establish either: (1) that there has been outright fraud in the plaintiff's pleading of jurisdictional facts or (2) that there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court. *E.g., Johnson,* 781 F.3d at 704; *Marshall v. Manville Sales Corp.*, 6 F.3d 229, 232 (4th Cir. 1993).

This is a heavy burden. *Johnson,* 781 F.3d at 704. The defendant must show the plaintiff cannot establish a claim against the nondiverse defendant "even after resolving all issues of law and fact in the plaintiff's favor." *Id.* The standard "is even more favorable to the plaintiff than the standard for ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6)." *Id.* (quotations marks omitted). "[T]here need be only a slight possibility of a right to relief to defeat a claim of fraudulent joinder." *Mayes v. Rapoport,* 198 F.3d 457,

466 (4th Cir. 1999) (internal quotations marks omitted).

2. Preemption

Pfizer argues that the claims against McKesson are preempted by Federal Drug and Cosmetic Act (FDCA). The U.S. Supreme Court has held that a generic drug manufacturer cannot change its label without FDA approval and, thus, any state law claims alleging that the manufacturer should have changed its label are preempted by federal law. *PLIVA, Inc. v. Mensing,* 131 S. Ct. 2567, 2571 (2011); *see also Mut. Pharm. Co. v. Bartlett,* 133 S. Ct. 2466 (2013) (holding that when a defendant's only option to comply with both state and federal law is to stop selling a drug, federal law preempts state law claims, i.e., defendants are not required to stop selling the drug). Pfizer argues that as a distributor, McKesson also cannot unilaterally change the label of prescription medicines it distributes under federal law, and, thus, any state law claims are preempted.

Courts outside the Fourth Circuit, applying the fraudulent joinder doctrine, have held that even though this argument has some logic to it, until *Mensing* and *Barlett* are explicitly extended to distributors, "it is not obvious" that plaintiffs have "absolutely no claim" against McKesson, and remand is appropriate. *See, e.g., Smith v. Amylin Pharm.,* LLC, No. 13CV1236 AJB MDD, 2013 WL 3467442, at *4 (S.D. Cal. July 10, 2013); (*see also* Dkt. No. 1580 at 12-13 (citing cases)). Pfizer argues that the Fourth Circuit's decision in *Johnson v. Am. Towers, LLC*, 781 F.3d 693 (4th Cir. 2015), requires the Court to squarely address the

preemption issue on the merits. In *Johnson,* the Fourth Circuit held that the defendant was fraudulently joined where "the Communications Act ***clearly*** preempts the [plaintiffs'] state-law tort claim against [the non-diverse defendant] as a matter of law." *Id.* at 705-06, 706 (emphasis added). This finding was based on prior, binding Fourth Circuit authority. *Id.* at 706. Therefore, *Johnson* stands for the proposition that where state causes of action are clearly preempted by federal law, there is no possibility of a plaintiff's success on these claims. *Johnson* did not change the standard for fraudulent joinder or the fact that the Court must "resolve all legal and factual issues" in favor of Plaintiffs. *Id.* at 704.

Turning to the issue at hand, the Court holds that the claims against McKesson based on Lipitor's label are clearly preempted by federal law. *See In re Fosamax (Alendronate Sodium) Prod Liab. Litig.* (No. II), No. MDL 2243 JAP-LHG, 2012 WL 181411, at *4 (D.N.J. Jan. 17, 2012) (holding label claims against distributor preempted). As a result of the scheme set forth by the FDCA, McKesson has no authority to unilaterally change Lipitor's label. *Id.* at *3. That authority lies with the FDA and/or with Pfizer. *See* 21 C.F.R. 314.70 (limiting label changes to those approved by the FDA and "Changes Being Effected" or "CBE" changes by the "applicant," which is the manufacturer).

However, Plaintiffs' labeling claims are not their only claims. Plaintiffs have alleged claims based on McKesson's advertising and marketing of Lipitor as well as claims for fraudulent concealment of information. (*See* Dkt. No. 347-14). Pfizer has not

provided any authority that these claims are preempted by federal law but attempts to lump all claims together and paint them with the same brush. (*See* Dkt. No. 347 at 28 n.9 ("[Plaintiffs'] claims are, at heart, product liability claims relating to labeling and design.")). Because Plaintiffs allege distinct causes of action, not solely based on the labeling of Lipitor, the Court cannot say there is no possibility of success on Plaintiffs' other claims.

3. Failure to State a Claim

In all of the cases at issue here, at least one Plaintiff in each case is a California resident. Therefore, the Court starts with an analysis under California law. Pfizer argues that Plaintiffs have not adequately pled causation. Plaintiffs plead that McKesson was "the largest single distributor of Pfizer's pharmaceutical products," that it sold and distributed Lipitor in California, and that "[u]pon information and belief," McKesson distributed the Lipitor that Plaintiffs ingested. (Dkt. No. 347-14 at 3, 4, 6). Pfizer complains that Plaintiffs have not alleged any information about the pharmacies where they obtained Lipitor or the relationship between these pharmacies and McKesson and argue Plaintiffs have not adequately alleged facts showing that McKesson did in fact distribute the Lipitor that they ingested. (Dkt. No. 755 at 31).

However, under California law, "[w]hen a plaintiff lacks knowledge and the means of obtaining knowledge of facts material to his or her cause of action because the matters are peculiarly within the knowledge of the adverse party, and the pleader can learn of them only from statements of others, the pleader may plead what

he or she believes to be true as a result of information (hearsay) the pleader has received." *JF. ex rel. Moore v. McKesson Corp.,* No. 1:13-CV-01699-LJO, 2014 WL 202737, at *5 (E.D. Cal. Jan. 17, 2014) (quoting *Dey v. Cont'l Cent. Credit,* 170 Cal. App. 4th 721, 725 n. 1 (2008)); *accord* 4 Witkin, Cal. Proc. 5th Plead § 398 (2008). While there is a split of authority, at least one court has held the type of pleading at issue here to be sufficient: "Whether McKesson distributed the pills which caused the alleged injuries is not information within the Plaintiffs' knowledge. Instead, they must obtain this information from McKesson, the pharmacy or other third party. Thus, the allegation that McKesson distributed the drug at issue, based upon information and belief, is sufficient." *J.F. ex rel. Moore v. McKesson Corp.,* 2014 WL 202737 at *5. It is at least possible that California allows information and belief pleading in this situation, and the Court finds the "glimmer of hope" standard set by the Fourth Circuit met. *See D.A. ex rel. Wilson v. McKesson Corp.,* No. 1: 13-CV-01700-LJO, 2014 WL 202738, at *5 (E.D. Cal. Jan. 17,2014) ("The fact that Plaintiff's allegations [are] based on information and belief does not make it obvious according to the settled rules of the state that the complaint fails to state a claim.") (internal quotations omitted). Thus, the Court finds that McKesson is not fraudulently joined as to California Plaintiffs.

In the multi-plaintiff California cases, Plaintiffs from multiple other jurisdictions are named. Pfizer argues that, under choice-of-law rules, the law of those Plaintiffs' home states would apply to their claims and that fifteen (15) of those jurisdictions categorically

rejects distributor product liability claims. (*See* Dkt. No. 347 at 32). Plaintiffs disagree that any law other than the law of California would apply, (Dkt. No. 386 at 12 n.11), but the Court need not decide the issue. Because there is at least one California Plaintiff in each of these cases and the Court has found McKesson is not fraudulently joined as to the California Plaintiffs, as long as all the Plaintiffs are properly joined in the actions, diversity jurisdiction is lacking. In other words, Pfizer's fraudulent joinder arguments with regard to non-California Plaintiffs are only relevant if the Court severs Plaintiffs' claims under the fraudulent misjoinder doctrine. Because the Court finds Plaintiffs are not fraudulently misjoined, as explained below, diversity jurisdiction is lacking, and the Court need not consider whether McKesson is fraudulently joined with regard to non-California Plaintiffs.

4. Plaintiffs Alleged Bad Faith

Pfizer relies on *In re Avandia Mktg., Sales Practices & Prod Liab. Litig.,* No. 07-MD-1871, 2014 WL 2011597 (E.D. Pa. May 15, 2014) ("*Avandia II*"), for its final argument. In the Avandia MDL, a number of California Plaintiffs named McKesson as a defendant. The fraudulent joinder issue was initially raised early in the MDL, in 2008. At that time, the *Avandia* court found that the plaintiffs could have colorable claims against McKesson under California law and, thus, McKesson was not fraudulently joined. *See id* at *2; *see also In re: Avandia Mktg., Sales Practices and Products Liability Litig.,* 624 F. Supp. 2d 396 (E.D.Pa. 2009) (*"Avandia I*"). However, the issue was raised again, five years later, in 2014.

In 2014, the *Avandia* court held that plaintiffs had "no real intention in good faith to prosecute the action against the defendant or seek a joint judgment," and, thus, held that McKesson was fraudulently joined. *Avandia I*, 2014 WL 2011597 at *2 (quoting *Boyer v. Snap-on Tools Corp.,* 913 F.2d 108, 111 (3d Cir. 1990)). The court noted that not a single plaintiff sought any discovery from McKesson in the intervening five years and that, at a hearing on the matter, counsel could not explain why they had not done so despite the fact that discovery of the other defendant (the manufacturer) had long been completed. *Id.* at 3.

Pfizer argues that Plaintiffs' actions in this MDL are analogous to those of the plaintiffs in *Avandia II* and that the Court should find that Plaintiffs have "no real intention" to proceed against McKesson. While Plaintiffs have not conducted discovery of McKesson in this MDL, the Court stayed discovery in these actions (with very limited exceptions) pending its ruling on the motions to remand. (*See, e.g.,* CMO 10, Dkt. No. 292). Thus, Plaintiffs were not ***allowed*** to conduct discovery of McKesson.

Pfizer also argues that Plaintiffs' opposition to jurisdictional discovery exhibits a lack of intent to prosecute its claims against McKesson. (Dkt. No. 755 at 25). In other words, Pfizer argues that the existence of federal subject matter jurisdiction turns on whether Plaintiffs have opposed jurisdictional discovery. This is not the law. Opposing jurisdictional discovery, by itself, does not amount to a lack of intent to pursue one's claims. Therefore, the Court finds *Avandia II* inapplicable here.

C. Fraudulent Misjoinder

The fraudulent misjoinder doctrine asserts that while all the claims pled may be viable, the claims of a non-diverse plaintiff (or against a non-diverse defendant) are so unrelated to the remaining causes of action that they cannot be joined in a single suit under Fed. R. Civ. P. 20 or a similar state rule. *Wyatt v. Charleston Area Med. Ctr., Inc.,* 651 F. Supp. 2d 492, 496 (S.D.W. Va. 2009); *see also In re Prempro Products Liab. Litig.,* 591 F.3d 613, 620 (8th Cir. 2010) (stating that fraudulent misjoinder occurs "when a plaintiff sues a diverse defendant in state court and joins a viable claim involving a nondiverse party . . . even though the plaintiff has no reasonable procedural basis to join them in one action because the claims bear no relation to each other."). The doctrine asserts that these claims must be severed and only the claims of the non-diverse plaintiff (or against the non-diverse defendant) be remanded.

In CMO 83, this Court adopted the fraudulent misjoinder doctrine and adopted a standard analogous to the fraudulent joinder standard in the Fourth Circuit, holding that to establish fraudulent misjoinder, the removing party must show (1) outright fraud or (2) that there is no possibility that plaintiffs would be able to properly join the claims involving a non-diverse party in state court.[2] (*See* CMO 83, Dkt. No. 1681). Thus, the Court must determine whether there is any

[2] The Court does not repeat its reasoning and analysis for adopting the fraudulent misjoinder doctrine and this standard but incorporates Sections B and C of CMO 83 by reference here.

possibility that Plaintiffs' claims would be properly joined in California state court.

Under California law, "[a]ll persons may join in one action as plaintiffs if . . . [t]hey assert any right to relief jointly, severally, or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action." Cal. Civ. Proc. Code § 378 (West 2016). While Defendants concede that "the 'common question' requirement may in some cases be satisfied by plaintiffs who allege the same injury from ingestion of the same medicine,"[3] they argue that the same transaction or series of transactions requirement cannot be met in such an instance. (Dkt. No. 759 at 14).[4]

California courts interpreting California's joinder rule have allowed the joinder of plaintiffs alleging individualized injuries due to a common scheme by a defendant. For example, in *State Farm Fire & Cas. Co. v. Superior Court,* 165 individual homeowners whose homes were damaged in an earthquake brought an action against their insurer. 45 Cal. App. 4th 1093, 1113 (1996), *abrogated on unrelated grounds by Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.,* 973 P.2d 527 (Cal. 1999). The court found that the

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[3] Indeed, the creation of this MDL was based in part on the JPML's finding that "these actions involve common questions of fact." (Dkt. No.1 at 3).

[4] Pfizer incorporated its briefing from the *Hoffman* case. (Dkt. No. 755 at 33).

claims were properly joined despite the fact that plaintiffs each had separate insurance policies entered into on different dates, noting that plaintiffs "alleged that State Farm engaged in a systematic practice to deceive its policy holders with respect to their purchase of earthquake insurance" and "[t]hose allegations clearly reflect a claim containing common facts central to the alleged deception." *Id.* In *State Farm,* plaintiffs also alleged 15 different types of improper claims handling processes, but these differences were not enough to constitute improper joinder. *Id.* at 1099, 1113-14.

Similarly, in *Anaya v. Superior Court,* over 200 employees and their family members claimed injuries resulting from exposure to hazardous chemicals over a period of years at their place of employment. 160 Cal. App. 3d 228, 231, 233 (1984). The court found these claims properly joined, stating that "[t]he fact that each employee was not exposed on every occasion any other employee was exposed does not destroy the community of interest linking these petitioners." *Id.* at 233.

Finally, in *Petersen v. Bank of America,* the court found joinder of 965 mortgage borrowers proper where they alleged the lender used inflated real estate appraisals to increase the amount of the loans and misled the borrowers as to their ability to repay. 232 Cal. App. 4th 238, 252 (2014), *review denied* (Mar. 25, 2015). The court found that "[w]hile the individual damages among these 965 plaintiffs of course vary widely, that is not the salient point . . . The salient point is that *liability* is amenable to mass action treatment." *Id.* at 253 (emphasis in original). The court

went on to state policy reasons for its decision. First "[t]o require these plaintiffs to file separately not only clogs up the courts, but also deprives them of economies of scale otherwise available . . ., particularly in regard to the clearly common proof bearing on [defendant's actions]." *Id.* Second, the court found mass joinder conserved judicial resources. *Id.* at 253-54.

While each of these cases might be able to be distinguished factually in some way, given this precedence, the Court finds that there is at least a possibility that Plaintiffs in this action are properly joined under California law. Therefore, Plaintiffs are not fraudulently misjoined.

D. Forum Defendant Rule

Plaintiffs also argue that the forum defendant rule barred removal of these actions. Title 28 U.S.C. § 1441(b)(2), known as the "forum defendant rule" or "home-state defendant rule," provides that "[a] civil action otherwise removable solely on the basis of [diversity jurisdiction] may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." By its own terms the rule only applies where diversity jurisdiction exists.[5] *See, e.g., Lively v. Wild Oats Markets, Inc.,* 456 F.3d 933, 939 (9th Cir. 2006) ("Separate and apart from the statute conferring diversity jurisdiction, 28 U.S.C. § 1332, § 1441(b) confines removal on the basis of diversity jurisdiction

[5] The rule specifically also does not apply to cases removed under the Class Action Fairness Act, which Defendants have also asserted as a basis for jurisdiction. *See* 28 U.S.C. § 1453(b).

to instances where no defendant is a citizen of the forum state."); *Aguayo v. AMCO Ins. Co.,* 59 F. Supp. 3d 1225, 1248 (D.N.M. 2014) ("The forum-defendant rule applies only to cases removed under diversity jurisdiction."). Because the Court has found diversity jurisdiction lacking, the rule is inapplicable, and the Court does not address it further.

E. CAFA

Defendants assert federal jurisdiction under the Class Action Fairness Act (*CAFA*). Under CAFA, federal courts have jurisdiction over class actions if there is minimal diversity and the amount in controversy, when aggregated, exceeds $5 million.[6] CAFA specifically provides that, for the purposes of the statute, "a mass action shall be deemed to be a class action," removable under the statute if it meets the other requirements of the statute. *Id* at § 1332(d)(11)(A). The term "mass action" is defined as "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." *Id.* at § 1332(d)(II)(B)(i). The term specifically does not include actions in which "claims have been consolidated or coordinated solely for pretrial proceedings." *Id.* at § 1332(d)(11)(B)(ii)(IV). The parties dispute whether the cases removed here are a "mass action" within the meaning of CAFA.

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[6] There are additional requirements not relevant here, such as the proposed class must have at least 100 members. *See* 28 U.S.C. § 1332(d).

However, Plaintiffs argue that the Court need not reach the issue because even if the cases are mass actions, the CAFA statute prevents their transfer to an MDL and the cases should be remanded back to district courts in California. (Dkt. No. 796 at 7-9). This Court agrees.

CAFA explicitly provides that any "mass actions" removed under CAFA "shall not thereafter be transferred to any other court pursuant to section 1407 [the MDL statute], or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407." 28 U.S.C. § 1332(d)(11)(C)(I). The JPML has held that this statute only restricts the transfer of mass actions "made removable only pursuant to CAFA." *In re Darvocet, Darvon & Propoxyphene Prod Liab. Litig.,* 939 F. Supp. 2d 1376, 1381 (JPML 2013). In other words, CAFA "does not prohibit Section 1407 transfer of an action removed pursuant to CAFA's mass action provision so long as another ground for removal is asserted." *Id.* at 1381. Thus, the JPML transferred these actions to the MDL because Defendants asserted diversity jurisdiction as well as CAFA jurisdiction. *See In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prod Liab. Litig. (No. II),* No. MDL 2502, 2015 WL 7769022, at *1 (JPML June 8, 2015) (transferring similarly situated California actions to this MDL). However, this Court has now held that diversity jurisdiction is lacking, and the only possible basis for federal jurisdiction is CAFA.

The question, then, is what happens to a case when the transferee Court (the MDL court) determines that

no basis for jurisdiction exists other than (possibly) CAFA. Plaintiffs argue that the case should be remanded back to transferor court, in accord with Congressional intent. Defendants argue that statute only restricts initial transfer and that once the case is in the MDL, the issue is moot, and that any attempt to transfer the case back would be "overruling" the JPML.

The Magistrate Judge found that transfer of the cases back to California district courts was proper. "Otherwise, the Defendants in any case would be able to circumvent the consent requirement of § 1332(d)(11)(C)(I) simply by adding non-CAFA grounds for removal that are frivolous." (Dkt. No. 715 at 23). Thus, the Magistrate Judge found that the Court should suggest remand of these actions back to California district courts.

After the Magistrate Judge's recommendation in this MDL, the Darvocet MDL court reached the same conclusion in a well-reasoned opinion. *In re Darvocet,* 106 F. Supp. 3d 849 (E.D. Ky. 2015), *appeal dismissed* (Nov. 17, 2015), *motion to certify appeal granted,* No. 2:11-MD-2226-DCR, 2015 WL 4385926 (E.D. Ky. July 14, 2015), *leave to appeal denied* (Nov. 17, 2015). The *Darvocet* court reasoned:

> Without the benefit of precedent, this Court must determine the better of two potential outcomes. The first outcome is that the cases remain in the transferee court, despite being removed solely on the basis of CAFA's mass action provision. Although more efficient for pretrial proceedings, this cannot be the correct result, as it would allow parties to bypass

§ 1332(d)(II)(C)(I) simply by asserting meritless grounds for removal. Just as cases are "not transferrable merely because the defendant has cited to the mass action provision as an additional ground in its notice of removal," (MDL Record No. 2596, p. 4] cases are not bound to adjudication in a transferee court merely because the defendant has cited to additional grounds that later prove insufficient.

The second potential outcome is JPML remand of mass actions to their original federal courts following a transferee court's finding that removal was proper solely on CAFA grounds. This result, although less efficient, preserves the effect of CAFA's prohibition on transfers. It does not require the JPML panel to impermissibly consider the validity of jurisdictional grounds asserted, but merely affords the transferee court an opportunity to determine jurisdiction and, where appropriate, relinquish cases that are not subject to transfer under CAFA. The JPML has noted and the parties agree that "the language of Section 1332(d)(11)(C)(i) clearly circumscribes the Panel's authority to transfer an action removed solely as a mass action." [MDL Record No. 2596, p. 2] Nothing in the JPML's decision in *In re Darvocet* suggests that a case that would otherwise have been precluded from MDL transfer under CAFA must be retained by a transferee court merely because the defendant has cited additional, meritless grounds in its notice of removal. *See* 939 F.Supp.2d at 1381. Moreover, if the grounds for removal had

> originally been determined by the transferor courts, § 1332(d)(II)(C)(I) would have precluded transfer to this Court. The undersigned finds no reason to reach a different result simply because of the cases' procedural posture at the time of transfer.

Id. at 858-59.

This Court agrees with the reasoning of *In re Darvocet*. Congress struck a compromise in CAFA: federal courts would have jurisdiction over mass actions but these actions could not be transferred to an MDL unless a majority of the plaintiffs so requested. Under Defendants' theory, a defendant could add a frivolous jurisdictional ground to evade this statute, and ***no court could review it***. Because the JPML, the only body with authority to transfer a case, also lacks authority to address the merits of subject matter jurisdiction, a defendant's assertion of non-CAFA jurisdiction, no matter how frivolous, requires transfer to an MDL without court review and then, once in the MDL, the case must stay there regardless of the transferee court's determinations regarding subject matter jurisdiction. The Court finds such machinations contrary to Congressional intent. Therefore, this Court will suggest that the JPML remand these cases to the federal district courts in California. Furthermore, the Court's suggestion of remand will provide the JPML with an opportunity to address this question directly, as it is the final arbiter of whether cases should be remanded to the transferor courts. *See, e.g., Pinney v. Nokia, Inc.,* 402 F.3d 430, 452 (4th Cir. 2005) (noting

that only the JPML has the authority to remand a case to the transferor court).

F. Timeliness

Plaintiffs contend that nine of the California cases (the ones at issue in the motion to remand at Dkt. No. 269) were not timely removed by Defendants because they were not removed within 30 days of being served with the Complaint. Defendants argue that the removal was timely under the "revival" rule because the grant of the coordination petition by the California Judicial Council, followed by the filing of an additional 3,000 claims substantially changed the nature of the suit and triggered the ability to remove the case under CAFA. The Court does not reach this issue. The Court has left the ultimate decision of whether CAFA jurisdiction exists to the California district courts and, therefore, leaves this related issue to those courts as well.

G. Conclusion

For the reasons stated above, the Court **GRANTS IN PART** Plaintiffs' Motions to Remand (Dkt. Nos. 267, 268, 269). The Court finds that it lacks diversity jurisdiction over these actions and that the only possible ground for federal jurisdiction is CAFA. Therefore, for the reasons stated above, the Court **SUGGESTS** to the JPML that these actions be remanded to their transferor courts for further proceedings.

AND IT IS SO ORDERED.

/s/Richard Mark Gergel
Richard Mark Gergel
United States District Court Judge

November 7, 2016
Charleston, South Carolina

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

2:14 MN 2502

[Dated October 21, 2016]

IN RE: LIPITOR :)
)
)

Motion Hearing in the above-captioned matter held on Friday, October 21, 2016, commencing at 10:04 a.m., before the Honorable Richard M. Gergel, in Courtroom III, United States Courthouse, 83 Meeting Street, Charleston, South Carolina, 29401.

REPORTED BY DEBRA LEE POTOCKI,
RMR, RDR, CRR
Official Reporter for the U.S. District Court
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[p.2]

A P P E A R A N C E S

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APPEARED FOR DEFENDANTS:

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[p.3]

THE COURT: Do we have folks on the telephone as well?

THE CLERK: Yes, sir.

THE COURT: And they're there?

THE CLERK: They're there.

THE COURT: Very good. Okay. Folks, we have something which I've never done, try to handle ten appeals at the same time, right? That's a challenge for all of us, I'm sure, counsel as well as the Court. And I presume everyone saw my order of yesterday in which I was trying to create some sanity to this process and rationality.

And, folks, for those -- I want to hear from everybody who has something important to say, but there's obviously an element of repetition here after awhile, on -- there's, you know, obviously some distinct issues in certain states, which I expect those state counsel to address. But we need not relitigate over and over again, the same issues. If you have something you need to point out that maybe somebody else didn't, I want to hear that. This argument is not an empty exercise; I'm trying to make sure I've considered everything.

For those of you who have not had the opportunity to previously appear before me, let me start with some premises. I read everything. I have read every Magistrate Judge order, I have read every brief, and I'm embarrassed to say I've read every case, okay? So somebody giving me a factual background

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or a legal standard, it's not that helpful. I kind of know where we are.

Mr. Cheffo, are you going to argue on behalf of the appellant here?

MR. CHEFFO: I am, Your Honor.

THE COURT: Very good. And we're going to begin with the California cases. Do you wish to reserve anything in reply?

MR. CHEFFO: I do, Your Honor, thank you. Thanks for the order. It was actually very helpful to get that guidance.

I would like to reserve three minutes. I would just say this, too, Your Honor, I'll be guided however you want to proceed. I took to heart a lot of what you said, and as you can see, frankly, if there are four or five arguments that would apply to California, frankly, those -- four of them, if you will, will apply to Illinois and Missouri.

THE COURT: Correct.

MR. CHEFFO: So I, again, with your indulgence, I don't think I need a lot more time. If I had an extra five minutes, I could probably cover those, and then basically when we get to Illinois, say see what I told you a little earlier.

THE COURT: That would be helpful. I just want to -- Illinois counsel may have a particular twist on something, and I want to give you both a chance to address those and to reply to that, if you feel like you need to. But you've appeared in

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front of me enough to know that there's certain things that are kind of a waste of time and some things that are useful in terms of oral argument.

So let's start with -- we're going to reserve three minutes. And why don't you come to the podium, if you might.

MR. CHEFFO: Yes, Your Honor.

THE COURT: And I'll be glad to hear from you on the California remand issues.

MR. CHEFFO: Thank you, Your Honor. And I also did -- I thought this one lent itself -- hopefully you'll find it helpful, some Power Points. We don't use them every time, but maybe this is as helpful for me as it is for you.

THE COURT: Well, it always sends my staff into uncontrollable laughter when anyone tries to do a Power Point with me, but I'm glad to hear you out on that.

MR. CHEFFO: I think I've tried to helpfully get to the point here, and we'll leave obviously copies for counsel and for Your Honor.

So the four issues, and again, really at any time obviously this is for Your Honor, so you tell me, as you will, I know, if things -- First going to talk about the Magistrate Judge's ruling, just to determine, as you know, he determined that there's essentially no jurisdiction to hear that, so I was going to talk a little bit about that, and then move specifically into the reasons, assuming that you agree or

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you're going to entertain that, to hear CAFA, why we think there is CAFA jurisdiction. Frankly, beyond that, as Your Honor probably knows, we wouldn't need to probably get to fraudulent joinder and misjoinder and severance, if you determine CAFA, at least as to the California cases, but I'm prepared to at least --

THE COURT: I think you ought to be prepared to argue all of those, because they do -- the last two obviously have something to do with other states.

MR. CHEFFO: They do.

THE COURT: And they're important issues. Let me start with you, just to disrupt your planned presentation here.

MR. CHEFFO: That's okay.

THE COURT: That we start with this -- let's just assume for purposes of this argument that with the Ninth Circuit cases, this would be a mass action, okay? Just the sort of unique aspects of Ninth Circuit law interplaying with the California law about saying for all purposes. Let's just assume for purposes of that, we've got a mass action.

Here's where it's confusing to me. The JPML has taken the position it won't look at the reasonableness of removal, that that's something for the transferring court. It said that in the Darvocet case, it said it in my very case, there were 91 California plaintiffs who asserted this and were told, go to

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South Carolina. I understand the defendant argument to be I can't look at it. And it strikes me, Mr. Cheffo, that just can't be the law that you can -- that a defendant can remove a case, and no court can review that. That just can not be the law.

And I agree with you, and I think y'all kind of straightened out my Magistrate Judge, that he couldn't -- we could not remand cases directly to the District Court of California; that is a unique prerogative of the

JPML. But there can be a recommendation of that from my court.

And so I have trouble understanding how, number one, I can't look at it, which doesn't make sense to me. And then, you know, when we get down to looking squarely at the issue, I've dug a little bit into the legislative history of CAFA, and there was obviously this huge debate going on about class actions that were sticking in the state courts because of the very issue y'all are raising about fraudulent joinder. Okay? I mean, they weren't winning because the case law is so terrible. And defendants like your clients were urging the Court to -- the Congress, because they weren't winning in the courts, to provide some federal jurisdiction. And Congress looks like to me it reached a compromise, as Congress, when it works, does. And agreed, A, we're going to let, with minimal diversity, not complete diversity, we're going to allow federal jurisdiction, but we are not going to let 407

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transfers, we're not going to have MDL transfers. That's what I sort of understood to be the deal. Unless, unless, the plaintiffs consented.

So yes, I mean, the way I read -- and I got into the legislative history a little bit -- was yes, we're going to allow federal jurisdiction in the districts where these cases were removed, but the plaintiffs are going to have to consent to join an MDL.

What I see your argument is that I should basically, for one reason or another, ignore what seems to me a central part of the deal under CAFA, and force the

plaintiffs who do not wish to be here, to join this MDL. And I understand the policy argument that it would be, in a perfect world, it would be wonderful to have everybody here at the party, right? I mean, that's a rational orderly way of doing things. But it just appears that's not what the law is. And if I were in Congress, I might vote differently.

But tell me, as a judge, how, when I'm trying to apply the rule of law in a neutral way, how I'm able to overcome these problems, and force this group of plaintiffs who don't want to be here, under CAFA, how I can make them be here.

MR. CHEFFO: Let me see if I can answer. I understand those points and I think they're fair points, or they're fair questions, mainly because you asked them.

THE COURT: Kind of important. You know, I try not

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to hide the ball here, I kind of want to let people know where my concerns are. And if I were your client, I would have sympathy for your view. I can understand the plaintiffs' view as well.

MR. CHEFFO: Actually I think I have answers to both of them.

THE COURT: Good, I want to hear that.

MR. CHEFFO: Let's see if I can skip ahead, you'll get a preview.

THE COURT: I always make you do this on your Power Point, you have to go skipping around.

MR. CHEFFO: Pretty much. Good thing I looked at these before today.

So the first issue really is kind of like what the -- Where is the Darvocet cases? Is that earlier on? So here's -- I think as the --

THE COURT: We're talking about the Darvocet JPML cases?

MR. CHEFFO: Correct. And really yours. This is the issue. So as I hear Your Honor saying, look, you know, how is it that these cases, you know, can be transferred, and what's the remedy, right, is there a remedy for appeal, and I think there is a remedy. So the Darvocet JPML and the JPML in connection with these cases essentially said we understand plaintiffs' position on CAFA, that you can't transfer these

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based on the CAFA rules; however, we are reading that consistent with the MDL rules, that if there are other bases for --

THE COURT: First of all, let me say I agree with that, but then you have to win the fraudulent joinder issue to get there.

MR. CHEFFO: Again, that's -- I'll address that, too, Your Honor, but here's the issue. Let me get first, if I could, what's the way to address this? There is a way. If any case -- forget about CAFA -- if a case is transferred improperly or somebody believes it's been

transferred improperly, there is a provision, to take an extraordinary writ to the Fourth Circuit in this case. That's what people can do if they think that the case is improperly transferred.

THE COURT: That is not what the JPML thinks is going to happen, and how they interpret the rule as a practical matter, requiring some extraordinary -- I mean, there's always in every case the ability to go to a court in an extraordinary writ, regardless what the rules are. We've had that come up in a variety of areas. But there is -- listen, it is very clear that my colleagues on that panel, A, do not feel they have the authority or really the capacity, with their limited staff, to get into these cases, and they expect a transferring court to deal with it. I'm just going to tell you that. I'm just telling you, that's reality.

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MR. CHEFFO: Sure.

THE COURT: And so I'm going to review it. I'm sorry, Mr. Cheffo, I'm going to look at it. But then I've got to look at this, you know, this provision that says I -- first of all, I'm going to assume -- I'm asking a question I know the answer, but let's just put it on the record -- the plaintiffs do not consent to be here, the majority; am I correct?

MR. CHEFFO: I think that's fair.

THE COURT: Okay. So I see a nod.

MR. CHEFFO: Any of them, I think. I think --

THE COURT: So I mean, I think there's a procedure better than the one that always exists, which is you can seek an extraordinary writ.

I don't believe that the -- that there was an intention to create a situation where no court responsible for the case could review your action in removal. That just can not be the law.

MR. CHEFFO: And that's not really our position. So there's a few things. One is the idea was you remove it, you have multiple causes of action. Certainly you have the good faith provisions and when the cases are removed if there's something obviously egregious. Then the cases get tagged and they go to the JPML. Now, JPML's job is not to look at the merits, we all agree with that, but they've determined, based

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on 1407, that they're going to transfer them to you, just like they would any remand motion.

THE COURT: There's like no filter there. I'm telling you, there is no -- Let me say this. There is both the law, there is the interpretation, and there's a certain knowledge that those of us who are handling these major cases have acquired, okay? And there's a famous Fourth Circuit case that says, "You seek to persuade us as judges what we know to be untrue as men." Okay? I mean, there just can't be the law that you could just sort of bring them all there, there's no filter there, it's just a mechanical process.

MR. CHEFFO: On that one I would disagree, Your Honor.

THE COURT: They do not. They don't have the -- their staff -- I don't know if you know about their staff, it's very limited staff.

MR. CHEFFO: It is.

THE COURT: I have one person assigned to this case.

MR. CHEFFO: And they do a fantastic job --

THE COURT: I don't criticize them, I'm just telling you there's one staff member assigned to the Lipitor case.

MR. CHEFFO: But there is a process, right? So there's things, once you get tagged, and I know Your Honor knows this, but sometimes there's also a provision to file objections, and they get briefed. And these issues were

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briefed. So --

THE COURT: And they said, under Darvocet, we don't review this. They're expecting me to do it. I'm going to do the job that the transferring court has responsibility to do, which is to take a look at this, and to say, hold it a minute, CAFA jurisdiction -- Now, you know, if it's CAFA plus something else, and there's otherwise jurisdiction, diversity, for instance, as you assert, no problem. No problem. Okay? That's not an issue. But if there's no other jurisdiction but CAFA, you can't make the plaintiffs be here.

MR. CHEFFO: So there's two issues, right? Let's see what Judge Reeves did in Darvocet. Judge Reeves basically had the cases transferred -- I was involved in that litigation, too, and he --

THE COURT: There's a famous story that Thurgood Marshall, arguing at that very podium, was arguing a major civil rights case, and somebody said, what about this case? And he said, I handled that case. What about this case? I handled that case. And every case, he handled the case.

MR. CHEFFO: Let's be clear, this is not Thurgood Marshal arguing remand issues, just so we're very clear today.

But so with respect to Darvocet, what Judge Reeves did was he basically said, you know, I think he shared a similar view. But what he did do was he decided CAFA. Right? And then what he said -- so he first -- he took the case, he decided it.

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Because look, there's --

THE COURT: When you say decided CAFA, what do you mean by that?

MR. CHEFFO: He said there is CAFA jurisdiction. He decided the ultimate issue. So I just want to make sure we're clear on this. To me, there's like three or four different set issues. One is, you know, can this essentially be an appeal or correction of the issues before you? The second issue is, once you have

them, can you ultimately look at them? You know, we think the magistrate judge --

THE COURT: You've got one issue is, does this appear to be a mass action? I think you're right. I think under the fourth -- the Ninth Circuit cases, I think it's -- I might not have logically reached that conclusion, but I understand how they did it, makes sense to me, I'm going to apply their law.

MR. CHEFFO: That's what Judge Reeves did.

THE COURT: But then I've got to say this has been transferred, so I'm assuming the Federal District Court in California -- now, there is one issue I haven't addressed, timeliness. Okay? The question is, who should do that, we'll talk about that in a second.

But yes, I think there is likely CAFA jurisdiction in the Federal District Courts of California. Okay? But the next question is, is it subject to removal, with that the only basis of jurisdiction, to the In Re: Lipitor MDL in the

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District of South Carolina? That is the problem.

MR. CHEFFO: There's two remedies. So if we get -- potential remedies, right? Three. One is you've now, let's assume you decide there is CAFA jurisdiction here, you then can say I'm going to -- these cases, essentially the venue transfer provisions are really a one-way street, and there was colorable claims -- and of course I'm not, you know, throwing away the other

claims, because you may also agree with us on some of these others.

THE COURT: We're going to get to that.

MR. CHEFFO: Assume for argument sake you said I've looked at everything, I find CAFA, I don't find anything else, right?

THE COURT: Yes.

MR. CHEFFO: You then can say, well, because there was a good faith, these are not frivolous arguments, I'm going to keep the case. That's one.

The other thing you could do is you could certify the question to the Fourth Circuit. Not appeal, I'm not suggesting appeal, but you could say, hey, I now have this case --

THE COURT: I don't feel the need to do that.

MR. CHEFFO: And you may not. Or what you could do is you could then do a suggestion of remand to the MDL panel. Right? And you could do that. And then probably what would

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happen at that point is that this issue may get briefed with that, and they may not, they may --

THE COURT: They avoided it in the Darvocet case.

MR. CHEFFO: They did, but what happened ultimately in Darvocet, once it got back to California, you know what the judges did?

THE COURT: No.

MR. CHEFFO: 1404'ed it back to the MDL.

THE COURT: And that may be what they do here. And you know, one of the things you have -- counsel has asked, lead counsel has asked me not to close down the MDL after these orders. And I am, you know, inclined not to do that. For one reason, the Fourth Circuit might not agree with me, and second reason is there could be issues like this that they could come back.

The question is, what's the right court to do -- I mean, let me just say this, Mr. Cheffo. I don't want to blow past this timeliness issue. It's not a small issue. And I've looked at it. I think it's better for the District Courts in California who have, you know, they know that -- they apply that California state law regarding the consolidation of cases, Ninth Circuit's their circuit, I think they're the better court, frankly, to look at this issue. But it's not a small issue, Mr. Cheffo. I'm going to tell you, it's not a small issue. And I think I'm probably doing you a favor not

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to rule on it, frankly. If you pressed me, I might, but I think you're probably better served let the district judges.

My general practice -- I want to talk to you about this. Is like these fraudulent joinders, there's some issues that have been raised in this MDL no District Judge in America has ever seen. I mean, they're just unique, interesting issues. Fraudulent joinder is like

something we get like seven times a day. Okay? I mean, we have these counties in South Carolina where the plaintiffs love to try cases, and they're always looking for the conductor or, you know, the pharmacist or whoever it would be, the random state party of the defendant to defeat diversity. And we get these cases constantly. And our practice here is that we remand them. And many times my defendants go back there and immediately do discovery. I mean, they don't mess around, when that thing is -- there's a challenged remand, they take it right back, because they have that one year, they get back there, they do discovery, they get summary judgment against the defendant who, as they asserted, there's no real claim, and they come back. I see that all the time. Y'all elected not to do that. You had your own strategic reasons, I don't question it. Some defendants don't do that, I mean, I don't question the strategy. But that was an option your client had to do. But I don't keep those cases. I don't sit there and dig into whether there's -- I mean, my circuit, you know, glimmer of

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hope, whoever heard of such a legal standard, right? Who could invent a glimmer of hope standard. I don't think there's any other area of the law that has a lower legal bar or standard than fraudulent joinder. I mean, it is --

MR. CHEFFO: I agree.

THE COURT: It is the lowest standard that I have ever encountered in any area of the law.

And you can -- I mean, I have the occasion to deal with capital cases which, you know, people's lives are in jeopardy. Higher standard, okay? I mean, this is like the lowest standard known. And it's not a new issue, Mr. Cheffo. This has been a century of this stuff, right? This is 1913 is the original case.

MR. CHEFFO: There's no question. And everything you said, I frankly agree with. I think there are a few different issues here, right, there are issues here of fraudulent joinder, but there's also issues here of procedural misjoinder, which is not quite as clear.

THE COURT: Let me say this, and to make it easy for you, I think y'all's various variations of the fraudulent joinder theory are interesting, and in the right case are credible. I found them pretty interesting. But they're all going to have the glimmer of hope, no possibility standard. Because they're joinder issues.

MR. CHEFFO: No, well --

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THE COURT: I believe that's the standard. And --

MR. CHEFFO: I would say -- I'm sorry to interrupt, Your Honor, but the only thing I would say is we've actually approached this from two ways. So we approached it the -- it's not egregiousness, but I would give you the standard is high. But here's what most courts, there's a Benicar court just did this in New Jersey. The Court basically looked at this and said, you know, probably similar to much of what you're saying, this is kind of complicated, there's a lot of different

ways of dealing with this; however, I don't need to get there, I can basically decide this by just good old Rule 21 severance. Right? I'm going to look at these cases. And frankly, when you do that, you basically -- all of the issues that we've been talking about. So here, so the Benicar case, and there are others, said I have CMOs in place that essentially disaggregate this. Well, we do, too, we have short form complaints. No one has ever suggested that, you know, you could even file a multi-person complaint. You have been, you know, kind of in this litigation, you know what the claims are, what the differences are, right? So from a joinder perspective in severance, look at -- these are just a few of them, different pharmacies, different purposes, different doses, conversations --

THE COURT: My Magistrate Judge pointed out, same drug, same research, same marketing. I mean --

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MR. CHEFFO: But those are not severance.

THE COURT: I mean, I think these very -- I call them the variations of the fraudulent joinder theory which you apply to defense claims, you apply to plaintiffs, are interesting ideas. I don't think they are particularly persuasive in this particular set of facts.

MR. CHEFFO: Your Honor, I mean here's where -- I would just urge you to think differently about fraudulent joinder of plaintiffs and defendants, and procedural misjoinder. They make my kind of head spin, but those are different contexts, there's some law on them, and they talk about very high standards, and there is -- some courts have adopted them, many courts

have not. But when you look at the basic severance, there is a huge number of cases that I think sometimes people try and make this too hard. Right? They basically, look, this is the Benicar case, the issue of complete diversity is mooted by virtue of the management order requiring severance of the plaintiffs. So when they got there they had to be severed.

There's actually this Propecia case, "If plaintiffs can escape the MDL by joining multiple, unconnected and nondiverse parties in a State Court of their choice, they defeat the purposes of the MDL and deny defendants their rights."

Most of -- this is Propecia is a hair loss -- most of these, if you look at these, these are all medical device

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pharmaceutical cases, same exact issues, they go on and on.

THE COURT: Let me tell you something. I know y'all disagree with the State Courts that -- I mean, in Missouri, for instance, you know, there is these -- my colleagues in Missouri are all over the place about -- and there's no appellate court case in Missouri. But there's at least an Eighth Circuit case that hasn't been reversed and still followed as recently as this year, in which it says, you know, that these -- that the defendant has consented to personal jurisdiction in the -- to jurisdiction in the state by registering -- and I mean, I -- listen, I know that argument, okay? That's not the law in South Carolina, but I'm saying -- I'm looking at is there no possibility that they're going to be

successful there? I would say, depending on the judge they get, they may have 100 percent chance of winning; depends who the judge is.

MR. CHEFFO: So I look at this -- Can I step over here, Your Honor?

THE COURT: Absolutely.

MR. CHEFFO: A few things. So we have CAFA, right? First. Then we basically -- let me look at my note here -- we have -- before we even get into fraudulent joinder or misjoinder -- Can you see that?

THE COURT: I can.

MR. CHEFFO: We basically have this idea of

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severance, right, so you don't even need to get into these first.

THE COURT: Why would I sever it?

MR. CHEFFO: Because if you looked at severance, you would have a number of cases that would have just straight -- and this applies, frankly, in the Missouri cases as well -- it's what -- and this is what the Federal Courts do. And I think this is like setting the table. It's not a substantive merits issue. So you'd say wait a minute, let's say someone came into Federal Court and they filed a 97-person complaint from all over the place. Right? If the clerk would even accept that, without doing it, you know, most -- in this case, forget the other one --

THE COURT: These are not direct file cases, these are coming out of a State Court in which the clerk in the State Court allowed it.

MR. CHEFFO: I understand.

THE COURT: And the court in that state permitted it. I agree with you, we wouldn't allow it.

MR. CHEFFO: Okay. But here's what the point is. We are investigating, you are investigating determining whether my client, right, has Federal Court jurisdiction, a very important, you know, issue for us and for you and for the courts. And when you set the table to make these decisions, you have to use the tools that you have. Just like you'd

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apply Daubert here if the state had jurisdiction.

So before you get all these things, you should, like all of these other cases do, say, wait a minute, you could file -- I recognize there may be in St. Louis or in California, if you did it, you could do it, but we're not in St. Louis or California, we are trying to determine if there's Federal Court jurisdiction here.

So you have to look, I believe --

THE COURT: Under CAFA. Under CAFA.

MR. CHEFFO: Well, under CAFA, now we're actually on -- probably under fraudulent joinder and misjoinder.

THE COURT: Okay. Okay.

MR. CHEFFO: Okay? So CAFA is easy for California, you decide it, and if you keep it, we're all --

THE COURT: I'm with you.

MR. CHEFFO: But in terms of severance, this has very significant implication, because if you first sever, there's frankly hundreds of cases where just by the virtue of severance, you don't even have to reach fraudulent joinder. There's cases, for example, where you have a Wisconsin person in one of those, you know, 97-person California claims -- and there's complete diversity, right -- the only issue there, and, in fact, some of those, they've waived the forum defendant rule. So let's say there's two, 300 cases where, if you had basically -- if you sever and you broke them up and

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look at them individually, say okay, Mrs. Smith versus Pfizer here and McKesson. Some of them would automatically be in this court. Not all of them, in fact, the majority would not. The majority then, once you sever it, then you would have to go through and do a fraudulent joinder analysis.

So whether you want to call this severance under Rule 21, or you want to call it procedural misjoinder, those are important issues. Then I think what you would look at, and I understand Your Honor's -- your point on some of the fraudulent joinder issues. But McKesson is a unique animal. This is not like, you know, a local defendant who actually you're suing a big company and someone actually did something. There's three cross-cutting arguments as to McKesson, that I think are incredibly powerful, particularly here.

The first is preemption, right? And, you know, very simply, in Mensing and Bartlett, if you can't change the label and you can't redesign it, how can you respect McKesson, all they are is the distributor of the medicine.

THE COURT: Of course, they allege marketing, sales, representations.

MR. CHEFFO: No, and we'll talk about that, I'll go back to the podium in a second, but there is essentially failure on the pleadings. So basically what they say is they say McKesson distributes one-third of all medicines in America, and on information and belief, you know, all the

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people in this complaint did it. So that doesn't meet any standard.

And then there's actually this intent issue. And I will give you, as to people, some of the plaintiffs will talk about, that's a harder argument for us, but as to a number of them, it's a pretty easy argument. Because the Lopez firm, for example, filed motions to remand. So let me just take them one at a time.

THE COURT: I mean, you acknowledge that the sort of egregious circumstances of Avantia are not here.

MR. CHEFFO: I do and I don't. Okay? So, for example, and I don't in any way mean to pick on Mr. Lopez, but these cases -- So what happened -- you probably remember this -- very back in 2014 -- so, you know, Mr. Lopez is one of the executive committee

members, as Your Honor knows, and he had some cases, right? And he said, I am going to keep all these cases here, right? And he -- not only is he an executive committee member, he had three discovery pool cases, was intimately involved in discovery, they have not served a single document request. I haven't even heard McKesson in any of these depositions use -- they've never attended.

So then -- and basically this is what they did, remember we were talking about all kind of minutia about adverse events, and they pursued all that; they did not pursue anything versus McKesson.

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So when you talk about intent -- and these were discovery pool cases. So I would argue two things on that, Your Honor. The first is, at least as to all of the cases that are in -- and this is -- these remand motions --

THE COURT: But if McKesson was a party in some of the pool cases, we would not have tried McKesson, would we have? I mean, my MDL is --

MR. CHEFFO: No, but here's why, right, and this goes to the intent point. They only filed motions to remand hundreds of cases, after your Daubert ruling came out. So they basically -- this is Avantia --

THE COURT: Let my say this.

MR. CHEFFO: -- on steroids.

THE COURT: We all know that everybody games jurisdiction. No one is free of that. My friend,

Andre Davis, a Fourth Circuit case which he dissents from an en banc case, and he, in a great dissent, he said, listen, everybody games jurisdiction. Start looking at people's ethics, because everybody does it, and there's nothing wrong with it, it's just the defendants want to be in Federal Court, the plaintiffs want to be in State Court, that's just the way it is. And they all use the rules, and it's just -- the court's trying to be neutral in these things and apply the rules. So --

MR. CHEFFO: Your Honor, this is not about ethics.

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THE COURT: So when you say -- I mean, I stayed all the remand cases, so they didn't do any discovery in those cases. They moved to stay, you consented to it, so I mean, they weren't going to do discovery in those cases. And I wasn't going to try McKesson cases if they were in my pool, right?

MR. CHEFFO: Right. Well, that's why I said there are two issues. Right? And I'm not -- just to be clear, I'm not in any way challenging ethics, I think this was the right choice. Basically what happened -- and let me put aside the non -- let me only talk about Mr. Lopez' cases and then we'll talk about the state California cases.

These are cases that are in your court that are not stayed. Okay? He filed in the -- for hundreds of them. He filed motions to remand, after Your Honor ruled on Daubert. Based on the cases that are already here. So that's what I'm talking about right now, right? So those, when you want to look at did he have an intent,

this is not ethics; he was right, he said, look, I don't really need McKesson in these cases, I want to stay in Federal Court, they don't add any value, and I'm not going to really pursue them. And that's what he did all through the litigation, and then after the Daubert rulings come down, he says, oh, by the way we have a subject matter jurisdiction here and there's no diversity. So that's one.

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THE COURT: But you want me to reach down and point out in these thousands of cases, one lawyer, and focus on his intent. You know, there are practical limitations on an MDL management of reaching down like this.

MR. CHEFFO: I agree.

THE COURT: I mean --

MR. CHEFFO: I agree.

THE COURT: And you know, this is not like a single case which we could -- we wouldn't have the time -- I mean, one of my great disappointments in this MDL is we never found a case to try. And, you know, I -- you know, I went to great lengths --

MR. CHEFFO: You did.

THE COURT: -- to try to get one tried. And lo and behold, after we did all that, that the new theory is they don't need an expert, right? I mean, I would have loved one of them to step forward and we'd have tried the case.

But, you know, I can't be -- it's just not practical to be reaching down and trying to get the measure of the intent of a lawyer, of a lawyer, when most of his cases were stayed, the remand cases, he later did this, listen, I get it, I saw what he did, I mean, you know, wasn't any secret to me, I saw. He was -- everybody's gaming the system, just like somebody would say, well, what is Pfizer reaching in California and transferring these cases to the MDL? I don't fault you for

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it. That's a reasonable effort, whether you succeed or not, it's done in good faith, I don't question your good faith. It might have been pushing the limits of the law, but what's wrong with that? That's what good lawyers do.

So I think what's good for the goose here is good for the gander. I'm not big on trying to examine the bad faith of lawyers.

MR. CHEFFO: Let's me say this. There's no question, as to all of the others, I think we raised the argument, that's not our strongest argument. When you look at the issues here, once you -- if you do sever, or frankly, even if you don't, when you look at the fraudulent joinder, I think the preemption argument as to McKesson is the strongest, and I think also this issue of intent, failure to state a claim.

So plaintiff's complaint must allege causation. McKesson was in some way responsible for the pills that caused plaintiffs' alleged injury. The fact the pleadings are liberally construed does not dispense with this requirement. And Your Honor, I'm sure, has

and will go back, but I went back and looked at the complaints --

THE COURT: I went back, I have them in my notebook. I didn't read obviously every one, but I did read several.

MR. CHEFFO: Sure. And we understand liberal pleading, but I think this is a very strong and very fair argument that when you're basically trying to look at

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putting -- if you get past preemption, then you have the pleading issues in terms of fraudulent joinder.

I think there's two other quick arguments that we have that are actually a little more specific.

So here's kind of the wrinkle. Upon, you know, upon information and belief, then you have maybe one --

THE COURT: Then you have 15 states that don't have it. But here's my point on that. I can understand it's a strategy call in complex litigation you have to make. Am I going stay here and fight for jurisdiction here, or am I going to go back to the State Court and move for summary judgment in those states that have -- obviously there's no liability to the distributor. You make the call to do that. I don't question it. There's not a right or wrong answer to this, there's a strategic calls you make.

But having me get into the weeds on these individual cases doesn't make a lot of sense to me. What we do here is we send them back and we try it. You know, we have these like really sound practices,

and you can't always follow them all in an MDL, but you try to use sound practices.

When we have a removal and there's this -- there's fraudulent joinder issues, we remand it, and some defendants aggressively jump on it and whack them good, there's no claim, and -- you know, before I even know they're gone, they're back.

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MR. CHEFFO: Judge, here's the difference, I think, in this, right, just so we're clear what's been going on. I would understand if we were kind of selectively around the country saying, okay, we're not going to remove cases from Wisconsin because there's some tactical advantage, right? We have removed and tagged every case --

THE COURT: But that doesn't make it right. If you don't have jurisdiction, you don't have jurisdiction.

MR. CHEFFO: No, I understand that, but you were saying why don't you just kind fight these battles out. And I think the difference is in the one off cases is that's the whole point of the MDL. Our position when, you know, when the first MDL was -- once the Court established it, was we want to have all of these issues. You know, we didn't remove after Your Honor's Daubert ruling or after this or that, we basically said we think these cases have jurisdiction, you should not be able to file, you know, 3000 plus cases in California, of which four or -- 400 something of them are California residents, right, lump them together, they have nothing to do, they maybe could find California on a map, probably most people have never been to

California or done anything, and we basically said, we're entitled to this thing called federal jurisdiction, there's an MDL. So our efforts from the very beginning were to move. In fact, we asked for jurisdictional discovery. So we --

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THE COURT: And I wasn't going to get into the weeds on these individual cases.

MR. CHEFFO: Right.

THE COURT: You see, if I put my hat on as the MDL judge and say I want -- you know, my preference would be to have every case here, have it in one place, and then all these different courts wouldn't have to tackle, and all these parties wouldn't have to run around the country litigating these issues. I get that. But that's not what Congress provided with CAFA. I mean, that's not what Congress did. And I can't rewrite the deal that Congress -- the compromise Congress wrote about that.

And similarly, this issue about the, you know, defense, this is not a secret that many defendants have loudly complained with the manipulation of jurisdiction. And one of the solutions could be to do something about fraudulent joinder, not to -- reverse somehow in the rules, establish a statutory basis that's higher than, you know, glimmer of hope. Okay? Congress could do that, they could --

MR. CHEFFO: But severance does that, Your Honor.

THE COURT: Well, I'm not -- I frankly think that these -- if I took down an individual case, these parties would have -- I wouldn't sever them, I just wouldn't do it. And it's not something we normally do. And I think it's creative, it's interesting. It's not practical. It's not

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practical how we apply the rules, and I don't think we ought to be trying to defeat what seems to be the policy in CAFA, your jurisdiction under CAFA is very limited, and you're trying to, through different devices, to turn it into general jurisdiction.

And if I were in Congress, I might have voted that way, but that's not my hat I'm wearing here.

MR. CHEFFO: So, Your Honor, I only want to be up here as long as it's helpful.

THE COURT: By the way, I'm giving the other side as long a time as you get.

MR. CHEFFO: They may not need it, depending on how Your Honor comes out.

So is it Your Honor's view, and again, just so I know kind of what may be helpful and may not be helpful, is your view that this CAFA decision is not something that you believe you should be ruling on, and --

THE COURT: Yeah, I think that there's -- it seems to me that the issue of whether this is a mass action is largely settled by the Ninth Circuit decision. So I don't think that's the question. There is a timeliness question that needs -- about whether

removal was timely, but I feel like the right decision on my part is to send to my colleagues in California whether that initial removal was proper, allow them to rule on that issue and litigate that issue. And then if it

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wasn't timely, and/or otherwise they determined there's not CAFA jurisdiction, they could send it back to State Court. If they determine no, it was timely and there is CAFA jurisdiction, then they can consolidate them within each of the districts where these cases are pending, and can have their sort of mini MDL within those individual districts.

Listen, I wouldn't design that as a system, but that's what Congress, as I read the CAFA statute, to provide for that. That was the deal. And there were benefits to that, because if you didn't have that, you couldn't even argue you had federal jurisdiction without complete diversity, but it came with strings. And I can't shed those strings.

I've got to say, I started considering all this remand issue, saying, gee, wouldn't it be nice to keep everybody here, I'll be honest with you, that's sort of the MDL judge, that's sort of your idea is you want all the cases here. But that's not what the law is. I have to apply the law.

And as I read each of the MDL -- each of the remand orders that my Magistrate Judge did, Judge Marchant, I began to -- every time they came in, I read them, I would look at the underlying cases, and then eventually in preparation of this argument I looked at everything again. And I went back and read the

legislative history of CAFA. And I know it's not a result that you particularly endorse, but I think it's the proper application of the law. I really do.

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Now, you might go back to the JPML and urge them, you know, to send it back to me, I mean, I can't remand. Okay? I don't have the authority. I could make a suggestion, and my colleagues at the JPML will make a decision about what to do. And if they send it back in the District of California, you can contest this issue about whether you have even CAFA jurisdiction.

You know, it's not a perfect solution, but that's -- we have this rule of law in America, you know, we follow the rules, and those are the rules, as I read them.

MR. CHEFFO: Okay, Your Honor. And I understand that. And just so then the only other issue, right, is all of this other severance, fraudulent joinder, is that something that -- because we do have a report and recommendation, we have the ruling here, is that something -- because we do have some other arguments that if your point is they're better positioned on timeliness. So, for example, right, when the cases first came in, we said, look, you know, we don't want a lot of discovery, but we know most of these people are not going to have proof of it, so why don't you give us some limited jurisdiction. And what Your Honor said was -- you didn't say no, you said, I'm going defer on that, because if there ever comes a time where that is relevant, which is a reasonable position --

THE COURT: Let me just say my thoughts about that,

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because this issue was raised, is the idea that we were going to go find -- How many California cases are there?

MR. CHEFFO: Cases or plaintiffs?

THE COURT: I mean how many plaintiffs.

MR. CHEFFO: Three thousand plus.

THE COURT: Okay. We were going to take thousands of people who had tens of thousands, maybe hundreds of thousands of prescriptions, and we were going to somehow dig into where every one of those prescriptions came from. Now, in a perfect world one person would go to the same pharmacy. You're now the world's expert that that's not what happens, right? They go to all kinds of pharmacies. And it was going to be a, you know, huge confusing -- I mean, this was not like anything you could briefly do. I know y'all said, oh, we can tell McKesson and who these pharmacies are. Just the process of figuring all that, that just seemed to me a complete diversion. Some of them were going to stay, there was no question McKesson was a substantial number, we didn't know what percentage, but some substantial number was going to stay. That's just not the way we do these issues. We don't do all of the discovery here, when there's -- we send it back to the remand court to do that. And you will have the opportunity at some point to raise that issue. And I understand your client's view is that we fight here for federal jurisdiction, we don't go back and fight in every state. I get that strategy. But that strategy

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comes with some pluses and some negatives. And one of the negatives is you don't get to go back there and whack these cases out of the -- you know, removing those defendants that -- in which there is no legal basis for them.

Listen. You know, we could have a conference on this issue in which parties could discuss -- we could have a thing, what are the areas of the law which, you know, over the years involved adoptions that if we ever were starting over, we wouldn't adopt, this might be near the top of the list. But that's the law.

MR. CHEFFO: Your Honor, I have been before the Court enough to know that you give everything a full and fair opportunity. We may not agree on this issue, but I hear what you're saying.

The last thing I will just say is I would -- the law doesn't change in an MDL per se, but there are different considerations.

THE COURT: There are different, I agree with that.

MR. CHEFFO: That's what I think all of these other courts, there's about 15 or 20 of them, Benicar, Fosamax, because what every court says is I do not have to basically be the victim of someone's creative lawyer's word processor. And I'm able to basically set the table and look at this under the Federal Rules and find out what's really going on here.

And I think if you do that, I don't want to be

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presumptuous, but we all know exactly what's going on here, is that people are trying to basically -- See, we're looking at it from Pfizer trying to get jurisdiction, but this is frankly, as I see it, an affirmative effort to deny Pfizer the jurisdiction that it deserves under both diversity and under CAFA. And that is an affirmative effort.

THE COURT: That's an argument that is a hundred years in the making. This approach of naming parties is done every day in the courts of America. You're laying out an argument that defendants complain about every day. But that's the law.

MR. CHEFFO: Well --

THE COURT: And you may not like it, and you might want me to find some work around to avoid what I believe is the law of the country. And I'm just not going to -- you know, I understand if I was sitting at one of these seminars and you were talking about how we might change the rule, we might talk about it. But I don't have that freedom, and I don't believe I should manipulate the rules.

You know, you talk about your client's interests; there's also issues of state comity between State Courts and Federal Courts. These aren't single factors here in which there's only -- all good is on one side and all the other -- there are arguments, some would say you overreached pulling these cases, California has this system, they consolidate cases and you

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snatched it out. I don't fault you for it, I think it was, you know, why not try it. But in the end we all have to work out these things, and the only way I know how to do it is to neutrally apply the rules in a way that I think is reasonable, and then whatever happens, happens.

MR. CHEFFO: So are you going to rule, Your Honor, on the -- all these fraudulent joinder issues, or is that something that you're going to allow the District Courts in --

THE COURT: I'm going to have the district courts do it. I really think there's enough -- you know, I've looked at these several -- this is like, you know, something that's so -- as much baked into what we do every day as different judges, we see these things. And you're not from here, but there are certain counties here, I could tell Mr. Cole could look at it, we could name the counties where everybody -- all these plaintiffs' lawyers are trying to, every time somebody stubs a toe in the county, they're bringing major lawsuits. And there are all these devices to avoid federal jurisdiction. And it takes a fairly unskilled plaintiff's lawyer not to get it back. I mean, I'm just saying to you, the ones who know what they're doing, it's not heavy lifting. Now, should that be the law? I mean, that's my circuit's law, it's the country's law, and -- but, you know, you're preaching to the choir a little bit here, but I think under the limits of what I can do about it.

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MR. CHEFFO: Thank you, Your Honor.

THE COURT: Thank you.

Okay. How about my California counsel; who's going to argue that?

MR. CHEFFO: Thank you, Your Honor.

MR. KAUFMAN: I don't know if I'm that plaintiff.

THE COURT: What is your name?

MR. KAUFMAN: My name is Justin Kaufman.

THE COURT: Yes, sir, Mr. Kaufman. Where are you from?

MR. KAUFMAN: I am from New Mexico, but I am here on behalf of the California, Missouri --

THE COURT: Mr. Cheffo would say that's part of the conspiracy that -- even the lawyers have no California connection. Have you ever been to -- By the way, have you ever been to California?

MR. KAUFMAN: I have been, Your Honor. There is a good reason for that. We're here out of the Lipitor JCPP. My law partner, Bill Robbins, who is on the executive committee, had a conflict, I drew the short straw, so here I am.

And based on your conversation with Mr. Cheffo, you know, our position, as you've read, is very clear. We think the Magistrate Judge was correct in his orders,

we think he eventually came around to the right decision with respect to the JPML. And unless you have any other questions for us, we

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agree with everything you've said so far this morning.

THE COURT: Well, many lawyers will get up after I questioned the other lawyer and try to buy it back, they want to give me other arguments.

Yeah, it just seems to me, Mr. Kaufman, that y'all adequately pled it to -- the claims to survive a claim on fraudulent joinder. That I have no doubt if the Court digs into these that many of the claims might go away, would go away. But I'm not able, I don't think it's proper for me to do that, that's for the traditional practices for the remand court to do it. And I don't ascribe any bad motives to anybody, it's just the gamesmanship of jurisdiction that both parties practice. But if you don't have anything further, we'll move on to another state.

MR. KAUFMAN: That's it, Your Honor. We've actually touched on. Obviously I'm here for Missouri and Illinois as well, so I'll have the same thing to say.

THE COURT: Okay.

MR. KAUFMAN: But we've touched on really all the issues from those states as well.

THE COURT: Thank you, sir.

MR. KAUFMAN: Thank you, Your Honor.

THE COURT: Okay. Mr. Cheffo, do you want to proceed to Missouri?

MR. CHEFFO: Yes, Your Honor.

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THE COURT: Yeah.

MR. CHEFFO: I think this filing was helpful that we had, because a lot of what we've been talking about, I think are, you know, arguments that we've made here. There are some differences.

THE COURT: There are some Missouri twists.

MR. CHEFFO: Yeah, there are. So there are three cases, right, each has one Missouri and one or more plaintiffs. I won't make the argument again, other than to encourage you to look at these through severance and misjoinder, because I think that, frankly, when you set the table like that it really makes many of these cases diverse and you don't need to go, because there's not a fraudulent joinder issue here. These are just basically putting a bunch of folks together with one nondiverse plaintiff, and were you to --

THE COURT: Missouri law, I mean, I know Judge Perry very well, who is a St. Louis judge who ruled most recently in -- she's like a really serious judge, I know her very well from the MDL conferences and so forth, and she -- I don't remember which of the cases, but in one of them she, you know, basically said the Eighth Circuit in Nolton said you can bring these, you know, that an out-of-state defendant which has

registered to do business and designated an agent for service, has consented to service -- I mean, that's one view of the

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law. There are other colleagues there who have a different view. And I've got to look at it and say is there like no possibility that they would -- that that's -- is there no possibility? No, there is a possibility. I mean, the split in the law basically answers the question. And so --

MR. CHEFFO: I guess -- I am sorry.

THE COURT: Go ahead.

MR. CHEFFO: Two things. One is, which I will get to the personal jurisdiction argument I think you're referencing, but the rules of severance would be governed by this circuit, and I think you looked at them, basically just Rule 21, and then you then look at them kind of differently.

THE COURT: But it's the same -- my Magistrate Judge, I thought, made a lot of sense on this. Same drug, same research. I mean, yeah, you know, that there are some differences, but we wouldn't, in a normal case, sever this case. We wouldn't sever it and try separately. No, we'd never do that. We'd try them together. So just practically speaking, I'm telling you we would.

MR. CHEFFO: If people filed, I mean, a-hundred-person complaint here --

THE COURT: Well, I wouldn't do that, but Missouri apparently does that.

MR. CHEFFO: But if you -- again, I would just argue, Your Honor, that for severance issues, we're not talking

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substantive law here. It's the what would happen if. If someone came in --

THE COURT: It's just a device. I mean, these cases came to us from Missouri. Arguably, that procedure is allowed in Missouri. And I'm supposed to come in and carve out the New York person, I mean, it's just a more intense involvement than we would normally do in these cases. And I'm just not persuaded that's the role for us to do.

And there was a method -- you've elected not to do it -- to go back and get the Missouri courts to rule on that. God knows somebody needs to get them to rule on it, right? And you elected not do that. And then if you were right on that, there's just -- that the New York plaintiff was improperly in the case, you know, you would have had complete diversity and you'd have -- I just -- you know, you're asking me to now use the Rule 21 as sort of this device that is a work around, and I just think that's a proper -- we wouldn't normally do that.

MR. CHEFFO: I don't want to be presumptuous --

THE COURT: Go right ahead.

MR. CHEFFO: No, no, just a practicality, because you don't, you know, I mean, I don't think this district wants to become a place where people come and start filing, you know, thousands cases from all over the country. So I would actually just -- I think --

THE COURT: Usually the JPML has some role, and I

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have kind of consent over whether we're going to --

MR. CHEFFO: But let's assume now they decide, okay, well, we can go down to South Carolina and we can file one complaint, you know, 80 people. Lipitor is all over the world, all over the country, right, and pay one filing fee. I actually disagree. I think that, one, your clerk would do it, and I think if you had seven or eight of those cases and you had 800 cases and you would say, wait a minute, you're putting these all in the same complaint, you're not telling me anything about these cases, you would say wait a minute, you have to break these up. These are individual cases. Like you did in your case management order here, you have to file single party, you have to do a fact sheet, you have to look at them individually.

So no one is suggesting that you couldn't have mechanisms to combine them. But in terms of whether these -- the standard, do they all arise out of the same transaction or occurrence. You know certainly as well as I do the differences in these cases. And that's the issue here. This is not a work around. This is what would happen if you had people who said, you know, I drank Coke-a-Cola and I think there's a problem, and

I'm coming from Wisconsin and I drank it eight years ago, and then I'm coming from New Mexico and I drank it yesterday, and this person drank it for one day and I drank it for ten years, I think any court, and most courts

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and --

THE COURT: You're talking about a direct file.

MR. CHEFFO: Well, right, and essentially that's what's before the Court. You'd say if that was the case, if that was filed today, this case direct file, what you would do, and I think any court in this circuit would do, is to say wait a minute, do these satisfy the Rule 21 standards? Is this appropriate?

THE COURT: But you're talking about a direct file case versus a case which is arguably, you know, properly filed in Missouri, pulled out of Missouri, where there is not complete diversity, brought here --

MR. CHEFFO: Right.

THE COURT: -- on the basis there is complete diversity, and you're asking me now to drill down into the cases, which would be proper in Missouri, arguably proper in Missouri. The normal way we would deal with that is I'd send it back to the Missouri court, and if it's not proper, that would be addressed within the year, and they could come back. That's the way we do it. And to ask me now, using the device of severance to separate something that under Missouri law is proper,

it just -- You talk about being on steroids; you'd be turning removal on steroids.

MR. CHEFFO: But, Your Honor, there is a difference here. And the real difference is this is not a single-person

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case where you send it back and you come back. This is a situation where people are putting hundreds of cases that on their face, right, I mean there's three complaint --

THE COURT: You say on their face? Apparently Missouri courts don't feel that way. At least some Missouri courts don't feel that way.

MR. CHEFFO: What we're asking you to do, Your Honor, is determine if this court has Federal Court jurisdiction. How the procedural findings, you may issue a Daubert ruling, and the Court may says that's Daubert, I have Frye or Kemp, so there may be differences, and that's even more substantive. I believe this court and every court in the Federal Courts has to look at -- I mean -- there are times when you look, and I'll talk about with jurisdiction, whether you look at what the underlying law is. But frankly, this is a relatively -- I don't want to lean on the Court, but it's a mechanical federal look, under the law of this circuit. It doesn't matter what, you know, what happened before and how they put their word processor. Once we get in court we say, Judge Gergel, we'd like you to look at this and put your -- the real world glasses on, and if someone did file this same case for the first time here,

I believe that every court would sever it. And if that's the answer, then that's the way for something as --

THE COURT: But removal cases, the practice is to

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send it back to the State Court to address that issue. You elected, for your own reasons, I understand them, not to do that. There is a procedure; you elected not to use it, Mr. Cheffo, that's the problem. Is you could go back to -- Let's look at the practical thing. They moved to remand. You say, listen, I think I got the right position, this is not proper under Missouri law. I go back to Missouri, I immediately move, explain to the court we're trying to do this within the year, we want to do expedited discovery and get this issue, and then we want a definitive determination. There is a method; you elected not to pursue that. And now you're asking me to drill down into these cases, which arguably under the fraudulent joinder standard are properly before me, and you want me to drill down and start applying Rule 21 severance to those cases. That's just not -- that is a role in the process on removal and remand we don't do.

MR. CHEFFO: Judge --

THE COURT: That's just not what we do.

MR. CHEFFO: Look, I'm going to -- I hear you, and I am just going to make one other point, just because the fact that there may be procedural rules in a particular state that allow people to file multi-party complaints, okay, that really has -- someone should not

be able to take something as important as diversity -- now, you're saying maybe if we go back, they allow it, and I would probably agree with you, and

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if we do go back, we'll make those motions, may or may not win, depending whether somebody can file the complaint. But assuming they can, that doesn't change the court's look here, again, that's just the fact that someone --

THE COURT: But the plaintiff started their case in Missouri. They filed it in Missouri. We give some deference, and we say under very limited circumstances, very limited, we let the defendant remove the case, not just because we don't like the venue in St. Louis or -- We have certain rights under federal law to remove. Very limited rights. And now we're, you know, we're really, under fraudulent joinder status, we couldn't really remove it, but now we want the Court to come and put a surgical knife, go in and cut out all those people, sever them into another case, and then say, voila, we now have complete diversity. I'm not going to do that. In all due respect to you, I'm not going to do that.

And I think that's a manipulation of jurisdiction that I wouldn't feel comfortable doing.

MR. CHEFFO: Okay, Your Honor.

THE COURT: Different from it was a direct file to me. Different status of direct file versus --

MR. CHEFFO: Respectfully, I think they're the same, but I'm going to move on because you told me where you are on this. And, you know, we'll talk about the jurisdiction, and you may be in the same place. But basically our argument on

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jurisdiction is really twofold. Right?

And just to be clear, this is -- I am not arguing now for the kind of jurisdictional type discovery and documents, I mean, so this one is -- you know, you don't even need to do anything, right, we're talking about if you sever or even look at them separately, all you have to say, is this guy from New York or Delaware, they're not, Michigan, you know, so this is not -- you don't need to know anything more than where their complaint is, and you can make your determination. So it's a relatively easy one.

THE COURT: I understand that.

MR. CHEFFO: But so for -- you know, and this goes to, you know, the Supreme Court cases and Daimler, and really our argument is straightforward. And they're flip side. First is they're fraudulently joined because there's no personal jurisdiction.

THE COURT: Yes.

MR. CHEFFO: Right? And you've talked about, you know, some of the issues there. But the other side, frankly, is under the Ruhrgas decision, Supreme Court decision, I think it's 1999, Your Honor can address the personal jurisdiction separately. Because we did file

motions there, and there is some, you know, some precedent in this case that actually might work well, because it's -- rather than sending all these cases back, you could address it. That's essentially our --

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THE COURT: But obviously the Supreme Court case, the Ruhrgas case, talks about the general preference when we do subject matter, there are circumstances where it would be judicial economy to do personal first. Couple of my colleagues in MDLs had very definitive answers where they thought the subject matter jurisdiction was complicated, personal jurisdiction was simple.

Personal jurisdiction here is like really complicated in Missouri. It doesn't really accomplish -- first of all, I have to rule on the subject matter elsewhere, so I'm not avoiding subject matter, I've got to rule on. And the personal here is, I mean, I've read every one of those cases I could find. I went and Shepardized the -- I went and looked up cases that they cite. I mean, I was amazed what the division, and it seems to me on such a major issue, how there could be no State Court. And then I found like State Court trial court says, please, Missouri Supreme Court, reach a decision, you know.

MR. CHEFFO: There is an appeal of one of them, there's an --

THE COURT: Thank goodness. It's ridiculous. But you're asking me to get in there and try to figure out something that has confounded the Missouri judges? No. That's exactly one I would stay on subject

matter, which I think is fairly clear, versus what is very unclear.

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So it's my call under Ruhrgas, and I looked at that hard. And I mean, listen, let's face it, Mr. Cheffo, that Missouri thing is a little unusual, right? I mean, allowing these folks to come in and -- it's an unusual thing. But apparently it's sort of allowed in Missouri. And part of our Federal Court State Court system is that we have some respect for the State Court processes, that we respect that. That we aren't sort of like the super court, that everybody just has to follow our tune. We try to respect State Court processes. And sometimes it's easier than others. Sometimes we just feel like the federal interests are so great we just have to do that. I mean, look, I grant habeases, right? But we do it sparingly.

MR. CHEFFO: Is that an option here?

THE COURT: You don't want to be a criminal defendant in my court.

MR. CHEFFO: No, again, I do appreciate the opportunity to present this to the Court. I don't think on this one I have anything else, Your Honor.

THE COURT: Thank you very much. Mr. Kaufman, you have Missouri?

MR. KAUFMAN: Thank you, Your Honor. Very briefly, we, again, agree with everything you said. The only additional point I wanted to make, you talked

about how, you know, this is really a State Court issue, you have the ability

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to send it back to State Court, Pfizer knows well. So the two cases that -- the two later filed Missouri cases, Scotino and Allen, at the time that those were filed, there were actually two other cases that didn't make it here, that's Polk -- and the other case was called -- let me grab it here.

THE COURT: Wasn't there a case set for trial that got settled?

MR. KAUFMAN: No, this is different, Your Honor. Four complaints were filed at the same time.

THE COURT: Okay.

MR. KAUFMAN: And the Clark versus Pfizer case and the Polk versus Pfizer case, they were both remanded before they were transferred to the MDL.

Okay. And the same arguments were made there by Pfizer as were made here, and the Federal Judge in Missouri rejected all those arguments and sent it back to State Court. Now, Pfizer in the State Court in Clark argued personal jurisdiction, which they have a right to do in the State Court in Missouri. And the State Court in Missouri denied that as well. So they found that there was personal jurisdiction over the non-Missouri plaintiffs in that State Court case. Pfizer took it up on a writ, the writ was denied.

So there is a procedure in place, I think Your Honor's identified it; that's the procedure that we think is applicable.

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THE COURT: Obviously, Mr. Kaufman, when we do this mass tort situation, it stresses -- it creates complications from our ability to normally drill down in an individual case and focus. It's just a weakness inherent in this, and we have to design procedures. And if I've got 5000 cases up here, I just can't drill down on 5000 cases. We couldn't manage it in that way.

And so it's not a perfect system. If I had the time and the resources, but we'd need, you know, four times the law clerks, and I mean, it's the same reason my colleagues on the joint panel, they have like minimal staff. They don't have any ability. They have their arms full just transferring the cases to us. I mean, they are just -- they're doing all they can do.

So I have some, frankly, some personal sympathy for the defendant's inability to get a quick ruling. I wish I could do it. There's just not a practical way to do that. And the process is, as you described, you go back to the State Court, you address it in State Court, and frankly, I think the defendant didn't do it here because they didn't think -- they thought they had more chance of winning here. I respect their strategic call, these are good lawyers, they make their call. And maybe the experience in Missouri validated that they didn't have very good options either way.

So I think the right decision is to send it back and allow

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the State Court in Missouri to address these issues.

MR. KAUFMAN: We agree, Your Honor, and that's all I need to say on that.

THE COURT: Very good.

Okay. The next is Illinois related cases. Anyone want to speak with regard to Illinois?

MR. CHEFFO: I think I've said our -- It's the same argument, Your Honor.

THE COURT: Very good. How about Michigan? Anything, Mr. Cheffo?

MR. CHEFFO: Yeah, I'll be very brief, because again, I do think --

THE COURT: By the way, I'm not allowing attorneys' fees. They asked for attorneys' fees. No. No.

MR. CHEFFO: Thank you.

THE COURT: I thought you might like that. You can call your client and say the bad news is they sent you the 700 jurisdiction, but good news is I didn't get tagged for attorney fees.

MR. CHEFFO: I'm going to flip them actually. I have some good news for you today.

So again, I just wanted to make sure that there's nothing kind of specific. I think the issues here, if you

don't get to severance, you don't get to our arguments, Your Honor, so you'd have to sever, and then --

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THE COURT: Same thing with the pharmacy defendant. Same situation.

MR. CHEFFO: And it's a fraudulent joinder argument which I think we've talked about.

THE COURT: Yes.

MR. ALTMAN: Your Honor, Keith Altman on behalf of the Michigan plaintiffs. I think everything has pretty much been said. If Your Honor has any questions I can address --

THE COURT: I don't. I think these issues largely overlap with these others. Thank you, sir.

MR. CHEFFO: Not to go back, but this is from Missouri on one second. Again, I know you have lots of things going on and -- but you probably already worked on your order. So one thing I would ask you to consider is the Eighth Circuit is actually addressing that issue of personal jurisdiction. I think it's pretty soon, it's been briefed fully, so, you know, you may or may not want to --

THE COURT: I just think let the -- I mean, you can go back and try to -- having me drill down on these individual states, I just think that's just more than the MDL court ought to be doing. But I've got the law as it is now, I have to apply the law. On every issue, believe me, there's court cases coming in, and y'all have been very good about supplementing, I think we have like

multiple surreplies. I don't know what you call the eighth surreply, but you know, I

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fear for the future of trees in America, they're all killed in this case. But, of course, you can accuse me of contributing to that by allowing all that discovery, right?

MR. CHEFFO: We're not going to go there today, Your Honor. No. Okay. I just wanted to bring that to your attention.

THE COURT: Thank you.

Okay. We are working on an order. I did, frankly, come here with a certain sort of view of the legal and factual issues here. And I largely agree with my Magistrate Judge, certainly on the result. There might be a twist or two in terms of how I get there. But I am going to deny the appeals in all nine cases and remand those cases to the districts where they came, other than California. And I intend to have a suggestion of remand to the JPML as to the California cases.

Are there other matters to come before the Court now, Mr. Hahn? I'm stunned with your silence up to this point.

MR. HAHN: Your Honor, on behalf of the plaintiff steering committee we have no position on --

THE COURT: I thought that would be your view.

MR. HAHN: However, to the extent that any of the remanded cases either have used or will use in the future any of the discovery of the plaintiff steering committee, we would like the Court to protect us as far as the confidential assessment.

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THE COURT: I thought we tried to address that issue. Remind me, what CMO is it? I thought we tried to address that in anticipation that that might happen.

MR. HAHN: There is an order out there. The plaintiffs that are being remanded back, I'm not sure that they've all signed the document recognizing. And that it may come back around, Your Honor.

THE COURT: Listen, I think the work the plaintiffs did, both sides did in discovery, is just remarkable. And I don't think it's proper for counsel to come in, and in their capacity as part of this case, take that work product and then go back and basically, without compensation, not contribution to all these lawyers participating in this, I think that's wrong. And if I need to address it, I will. I think y'all have done a yeoman's work in pulling together that.

So if you see that we need to address the issue, I need to bring all the parties here, I want to give everybody notice, so I can hear from all sides here. But obviously I am very aware of extraordinary efforts that the litigation team for the plaintiff undertook here. And the understanding was that they were to receive this information as part of a share or a cost, that there was a collective effort, and I would -- unless you can

show me law I don't have the authority to do that, I would intend to enforce that, Mr. Hahn.

MR. HAHN: Thank you, Your Honor.

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THE COURT: Any other matters to come before the Court? Very good. With that, the hearing is adjourned.

(Court adjourned at 11:30 a.m.)

REPORTER'S CERTIFICATION

I, Debra L. Potocki, RMR, RDR, CRR, Official Court Reporter for the United States District Court for the District of South Carolina, hereby certify that the foregoing is a true and correct transcript of the stenographically recorded above proceedings.

S/Debra L. Potocki

Debra L. Potocki, RMR, RDR, CRR

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17- 80094

[Filed June 2, 2017]

IN RE: PFIZER

JOSEPHINE ABRAMS, et al.,*
Plaintiffs-Respondents,

v.

PFIZER INC.,
Defendant-Petitioner.

Petition for Permission to Appeal From United States District Court, Central District of California, Hon. Cormac J. Carney, District Judge, Case No. 8:17-MC-00005-CJC

PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1453(C)

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**Full list of Plaintiffs-Respondents and related proceedings set forth in Addendum.*

CORPORATE DISCLOSURE STATEMENT

Defendant-Petitioner Pfizer Inc. hereby states that it has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Dated: June 2, 2017

/s/ Mark S. Cheffo
Mark S. Cheffo

Attorney for Defendant-Petitioner Pfizer Inc.

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Defendant-Petitioner Pfizer Inc. respectfully petitions under FRAP 5 and 28 U.S.C. § 1453(c) for permission to appeal from, and for summary reversal of, the May 23, 2017 Order of the Central District of California (Carney, J.) remanding 132 cases to state court ("Remand Order," Ex. A).

QUESTION PRESENTED

In the Class Action Fairness Act (CAFA), Congress authorized removal of "mass actions," which are minimally diverse civil actions "in which monetary relief claims of 100 or more persons are proposed to be tried jointly." 28 U.S.C. § 1332(d)(11)(B)(i). In *Corber v. Xanodyne Pharmaceuticals, Inc.*, 771 F.3d 1218 (9th Cir. 2014) (*en banc*), this Court held mass actions do not require an express request for joint trial, but are created where plaintiffs propose claims be tried jointly "in language or substance"—there, a California state-court petition to coordinate cases for all purposes. Here, Pfizer removed a coordination identical to *Corber* where leadership represented 3,000 Plaintiffs and proposed to join cases involving nearly 5,000. Yet the district court remanded, holding that only Plaintiffs who took a "formal legal act of significance" by filing a petition or add-on petition for coordination counted toward the 100-plaintiff mass action threshold. (Hr'g Tr. at 15, Ex. B.) The question presented is:

> Whether a petition that proposes coordination of filed cases involving thousands of plaintiffs for "all purposes" is removable as a mass action under 28 U.S.C. § 1332(d)(11), even if less than 100 plaintiffs whose claims were subject to that

proposal filed a petition or add-on petition for coordination.

RELIEF SOUGHT

The Court should grant review, answer the question presented in the affirmative, and summarily reverse the decision below as contrary to this Court's *en banc* ruling in *Corber*.

STATEMENT OF FACTS

A. The California Lipitor Coordination

The 4,867 Plaintiffs in these cases[1] allege they developed type 2 diabetes due to their use of Lipitor, a prescription medication manufactured by Pfizer. Plaintiffs hail from around the country and have filed their claims in multi-plaintiff actions in the California Superior Courts.

The coordinated proceeding (or JCCP) in these cases arose in the shadow of the litigation that led to this Court's *en banc* decision in *Corber*. In that litigation, the defendants invoked CAFA's mass action provisions to remove a proposed coordination of California products liability actions concerning the drug propoxyphene. This Court granted review under section 1453(c) of remand orders entered in two of the cases proposed to be included in that coordination: *Romo v. Teva Pharmaceuticals USA, Inc.*, 13-56310,

[1] Although the Plaintiffs moved to remand 139 cases, the Remand Order remanded only 132 cases. Unless otherwise noted, numbers of cases and Plaintiffs in this petition refer to numbers associated with the cases in Plaintiffs' motion to remand.

and *Corber v. Xanodyne Pharmaceuticals, Inc.*, 13-56306 (9th Cir. July 26, 2013). On review of those companion cases, a divided panel of this Court held that the petition to coordinate all actions "for all purposes" and to avoid inconsistent judgments was not a proposal that the constituent claims "be tried jointly," and thus did not give rise to mass action removal under CAFA. 731 F.3d 918 (9th Cir. 2013), *vacated*, 742 F.3d 909, *and rev'd sub nom. Corber v. Xanodyne Pharms., Inc.*, 771 F.3d 1218 (9th Cir. 2014) (*en banc*).

Using that panel decision as a roadmap, Plaintiffs here filed a similar coordination petition with regard to Lipitor cases in California. As in *Romo* and *Corber*, they requested coordination of all Lipitor cases in California before "[o]ne judge … for all purposes" to "avoid duplicative and inconsistent rulings, orders, and judgments" on "issues pertaining to liability, allocation of fault and contribution, as well as the same wrongful conduct of the defendants." (Am. Pet. at 7-8, Ex. C; Mem. of Points and Auth. in Supp. of Am. Pet. at 8, Ex. D.)

Also as in *Romo* and *Corber*, Plaintiffs requested that the coordinated proceeding include "all subsequent Lipitor actions." (Am. Pet. at 7.) Their petition stated that "Petitioners' counsel is informed and believes that additional LIPITOR injury cases will be filed within the next weeks. Petitioners will seek to join these additional cases via Add-On Petitions." (*Id.*) The California Judicial Council granted coordination on December 6, 2013, when approximately ten cases involving some 26 Plaintiffs had been filed. (Order Assigning Coordination Trial Judge, Ex. E.)

The pace of filings soon quickened. At a February 25, 2014 conference, Plaintiffs' counsel handed the coordination trial judge a table of over 1,000 claims to be joined to the newly formed coordinated proceeding. They explained that "[a]s of 6:00 o'clock last night there were 54 cases filed in California" with "1,855 plaintiffs in those complaints," which they intended to be "encompassed by the JCCP." (2/25/2014 Hr'g Tr. at 5:25-6:21, Ex. F; Table of Cases, Ex. G.) The Plaintiffs represented to the court that "we'd like to get the cases that have been filed obviously added on as soon as possible" (2/25/2014 Hr'g Tr. at 6:16-17 at 15:22-23), and "make sure that those cases get over to your courtroom" (*id.* at 16:20- 21).

At the status conference, Plaintiffs' counsel also proposed, and the court adopted, appointment of a leadership structure involving ten firms, who had filed claims for the vast majority of the Plaintiffs in the table of cases proffered to the court. (*See* Order of Appointment of Plaintiffs' Counsel, Ex. H; Case Chart, Ex. I.) Plaintiffs' leadership represented to the court that "[w]e've had total transparency with respect to communications of lawyers both in California and nationally who had any interest in or doing … litigation involving Lipitor." (2/25/2014 Hr'g Tr. at 7:2-5.)

Thereafter, Plaintiffs' leadership submitted a proposed order to streamline the addition of cases to the coordinated proceeding. The proposed order included a form stipulation that "***All cases*** filed in California state court against Pfizer, Inc. … alleging injuries related to the development of Type II diabetes

… arising from the ingestion of Lipitor®, are assigned to the Honorable Jane L. Johnson … for coordination purposes." (Ex. 1 to Proposed Am. Order re Add-On Procedures at 1, Ex. J (emphasis added).) That proposed order was entered by the coordination trial judge without modification. (Am. Order re: Add-On Procedures, Ex. K.)

B. Removal Of The California Lipitor Cases

Around the same time, however, this Court granted rehearing *en banc* in *Romo* and *Corber*, and vacated the panel opinion that had rejected mass action jurisdiction. *See Romo v. Teva Pharms. USA, Inc.*, 742 F.3d 909 (9th Cir. 2014). Based on that decision and Plaintiffs' proposals to join thousands of claims to the JCCP, Pfizer began removing the California Lipitor cases to federal court as a CAFA mass action and under traditional diversity jurisdiction. Although actions were removed to all four federal district courts in California, the bulk of the California Lipitor cases were filed in Los Angeles Superior Court and removed to the Central District of California (Carney, J.).

Even after Pfizer began removing cases under the mass action theory, Plaintiffs have continued to file actions in California state court. They have taken affirmative steps to join the JCCP, as summarized in Pfizer's case chart (Ex. I):

- 4 actions comprising a total of 46 Plaintiffs specifically identified the coordinated proceeding in the caption of the Complaint. (*See*, *e.g.*, Excerpt of Complaint, *Debay v. Pfizer, Inc.*, Ex. L.)

- 59 complaints involving 2,080 Plaintiffs also included notices of related cases stating that the case was related to the coordination. (*See*, *e.g.*, *Monreal v. Pfizer Inc.,* Notice of Related Cases, Ex. M at 40-41.)

- 25 complaints involving 959 Plaintiffs attached an order from the coordination judge limiting Plaintiffs' payment of otherwise required complex filing fees. (*See Monreal*, Order Limiting Plaintiffs' Complex Case Fees, Ex. M at 28-29.)

- More than 100 cases involving approximately 3,400 Plaintiffs have attached civil cover sheets to their complaints that stated that they were "complex" pursuant to Rule 3.400 of the California Rules of Court because they were subject to "[c]oordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court." (*See*, *e.g.*, *Monreal*, Civil Cover Sheet, Ex. M at 23.)

C. MDL Proceedings

Following Pfizer's removal of the California Lipitor actions, the Judicial Panel on Multi-district Litigation (JPML) transferred the cases to the Lipitor MDL in the District of South Carolina (Gergel, J.). At Plaintiffs' request, the MDL court stayed the bulk of the cases pending resolution of Plaintiffs' motions to remand, in which they argued that their coordination petition had not proposed their claims be tried jointly. (*See* MDL Mot. to Remand at 20-23, 25-26, Ex. N.)

While these cases were in the MDL, this Court issued its 9-2 *en banc* decision in *Corber*, which settled the questions raised in Plaintiffs' motion to remand. This Court expressly "reject[ed] the rule urged by Plaintiffs that a petition to evoke CAFA must expressly request a 'joint trial' in order to be a proposal to try the cases jointly." 771 F.3d at 1225. Rather, a court must "carefully assess" the facts "to see whether, in language or substance," claims have been proposed to be tried jointly. *Id.* at 1223. The Court concluded that a petition to coordinate all cases before one judge "for all purposes" and to avoid inconsistent judgments constituted such a proposal. *See id.* at 1223-25. That proposal provided jurisdiction over all subject cases, including cases like *Romo* and *Corber* that were not listed on the petition, and even cases filed by counsel who did not appear on the petition at all. (*See, e.g.*, *Cohen-Feris v. McKesson Corp.*, 2:12-cv-09976-PSG-E, [Dkt. 27] (C.D. Cal. Jan. 23, 2015), Ex. O.)

Unable to defend their primary arguments following their rejection in *Corber*, Plaintiffs pivoted to a theory they had raised obliquely in their remand motion—that even if there were a proposal to try claims jointly, it applied to fewer than 100 claims. (MDL Obj. Resp. [796] at 7-12, Ex. P.) Thus, the same Plaintiffs' leadership that had promised to work expeditiously to join cases with thousands of plaintiffs to the JCCP sought to avoid federal court by arguing they never proposed to join those other plaintiffs.

At the MDL hearing on Plaintiffs' remand motions, the MDL court observed that "I think [Pfizer is] right" that these cases "appear to be a mass action," and

"there is likely CAFA jurisdiction in the Federal District Courts of California." (10/21/16 MDL Hr'g Tr. at 14:11-12, 14:22-23, Ex. Q.) However, the MDL court concluded that it lacked jurisdiction to decide the existence of CAFA jurisdiction. *In re Lipitor Prods. Liab. Litig.*, 2016 WL 7335738, at *6-7 (D.S.C. Nov. 7, 2016). The JPML then remanded the California Lipitor actions to the California federal courts to determine the existence of mass action jurisdiction.

D. The District Court's Order

Following the return of these cases from the MDL to the California federal courts, the district court consolidated the 139 actions assigned to him under a new docket number (8:17-MC-00005-CJC) for purposes of deciding CAFA jurisdiction.[2]

On May 23, 2017, the district court issued the Remand Order. Instead of focusing on which claims were "proposed to be tried jointly," the court focused on which Plaintiffs proposed joint trial. The district court held that Plaintiffs had proposed a joint trial by requesting coordination of cases for all purposes. (Remand Order 8-10.) Nonetheless, the court ruled that there was no removal jurisdiction under CAFA because, it ruled, the petition's proposal, though

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[2] Courts adjudicating the Lipitor actions in the Northern and Eastern Districts both abstained from decision pending a ruling by the Central District, where the majority of cases were pending. *See* Joint Stip. and Order to Stay, [Dkt. 121], *Little v. Pfizer Inc.*, 3:14-cv-01177 (N.D. Cal. Mar. 1, 2017); Minute Order, [Dkt. 36], *Alanis v. Pfizer Inc.*, 1:14-cv-365 (E.D. Cal. Mar. 1, 2017); Minute Order, [Dkt. 33], *Weaver v. Pfizer Inc.*, 1:17-cv-663 (E.D. Cal. May 17, 2017).

directed to all cases, applied to "at most only sixty-five plaintiffs," which was "the maximum number of plaintiffs that ever attempted to join the JCCP" by filing a petition or add-on petition for coordination. (Remand Order at 11.)

In so doing, the district court disregarded Plaintiffs' counsel's submission of a table of cases with over 1,000 claims, their request for a leadership structure of 10 firms, and their filing of cases that informed the Superior Court they were related to the coordinated proceeding. The district court distinguished those acts from petitions and add-on petitions for coordination, characterizing the former as merely "administrative in nature" and alerting the clerk's office only of "the *possibility* of coordination." (Remand Order at 14.)

Pfizer now timely petitions for leave to appeal, and requests that the Court summarily reverse under *Corber*.

REASONS FOR GRANTING REVIEW

I. THESE CASES PRESENT AN IMPORTANT ISSUE CONCERNING WHEN A PROPOSED COORDINATION CONSTITUTES A REMOVABLE MASS ACTION UNDER CAFA

Orders to remand actions removed under CAFA are excepted from the general rule against appellate review of remand orders, *see* 28 U.S.C. § 1447(d), and a court of appeals therefore may grant a timely application to review the remand of cases removed under CAFA, *id.* § 1453(c). The "key factor" in determining whether to grant review is the presence of an important issue concerning CAFA. *Coleman v. Estes Express Lines, Inc.*,

627 F.3d 1096, 1100 (9th Cir. 2010). The district court's rejection of CAFA jurisdiction as to 139 cases involving 4,867 Plaintiffs presents such an issue concerning when "the real substance" of a proposed coordinated proceeding constitutes a proposal that claims of 100 persons be tried jointly, thereby triggering mass action removal. *Corber*, 771 F.3d at 1225.

Here, the district court acknowledged that plaintiffs need "not expressly request a 'joint trial'" (Remand Order at 9) and "'implicit proposals may trigger CAFA's removal jurisdiction'" (*id.* at 11.) Nevertheless, it concluded that creating a mass action requires "some formal legal act of significance" (5/22/2017 Hr'g Tr. at 15:11-12), and held that only Plaintiffs who filed a petition or add-on petition for coordination count toward the 100 plaintiffs needed for a mass action under CAFA. (Remand Order at 8-11.) This ruling conflicts with *Corber* as well as the plain language and purpose of CAFA. The Remand Order warrants this Court's review and should be reversed.

A. Under CAFA, A Court Must Carefully Assess Whether, In Substance, Plaintiffs Proposed Claims Be Tried Jointly

The district court ignored that CAFA must be construed according to its "primary objective" of "ensuring 'Federal court consideration of interstate cases of national importance.'" *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013). As a favored basis of federal jurisdiction, "[n]o antiremoval presumption attends cases invoking CAFA." *Dart Cherokee Basin Operating Co., LLC v. Owens,* 135 S.Ct. 547, 554 (2014). Indeed, as this Court has recently

explained, "Congress and the Supreme Court have instructed us to interpret CAFA's provisions … ***broadly in favor of removal***." *Jordan v. Nationstar Mortg. LLC*, 781 F.3d 1178, 1184 (9th Cir. 2015) (emphasis added).

In light of this appropriately broad interpretation of CAFA, plaintiffs need not "expressly request a 'joint trial' in order [for there] to be a proposal to try the cases jointly." *Corber*, 771 F.3d at 1225; *accord Ramirez v. Vintage Pharms., LLC*, 852 F.3d 324, 329 (3d Cir. 2017); *Atwell v. Bos. Scientific Corp.*, 740 F.3d 1160, 1163 (8th Cir. 2013); *In re Abbott Labs., Inc.*, 698 F.3d 568, 572 (7th Cir. 2012). While "such a rule would be easy to administer, it would ignore the real substance of Plaintiffs' petitions." *Corber*, 771 F.3d at 1225. Mass action jurisdiction exists, then, where the "totality of the circumstances" shows that the claims of 100 or more persons have been proposed to be tried jointly. *Id.* at 1220. Accordingly, a court must "carefully assess … whether, in language or substance" claims have been proposed to be tried jointly. *Id.* at 1223.

B. The "Real Substance" of Plaintiffs' Actions and Representations Proposed That All California Lipitor Claims Be Tried Jointly

If the "real substance" of the *Corber* plaintiffs' actions gave rise to mass action removal under the "totality of the circumstances," then it necessarily did so here as well, where the record of Plaintiffs' proposal to coordinate thousands of claims is much more robust.

First, when Plaintiffs requested coordination, they asked that the coordination proceedings include "all

subsequent Lipitor actions," and stated that additional actions would be filed. (Am Pet. at 7.)

Second, when Plaintiffs' counsel first appeared before the coordination trial judge, they handed the judge a table of cases involving over 1,000 claims and represented that over 1,800 claims to be "encompassed by the JCCP" had been filed. (2/25/2014 Hr'g Tr. at 5:25-6:21; Table of Cases.) They told the court that they would like to have those new cases "obviously added on as soon as possible" and would "make sure that those cases get over to your courtroom." (2/25/2014 Hr'g Tr. at 6:16-17, 15:22-23, 16:20-21.)

Third, in anticipation of the administrative difficulties that would be created by this number of claims, Plaintiffs proposed a leadership structure of ten firms, which alone have filed cases involving 2,797 Plaintiffs. (Case Chart.)

Fourth, to facilitate the addition of cases to the JCCP, Plaintiffs submitted—and the coordination judge entered—a proposed order to streamline the add-on process, again stating the coordination was for "all purposes." (Am. Order re: Add-On Procedures.) The stipulation that they proposed in connection with this order stated that "***all cases filed in California state court*** … alleging injuries related to the development of Type II diabetes … from the ingestion of Lipitor® are assigned to the Honorable Jane L. Johnson, … for purposes of coordination." (*Id.* at Ex. 1 ¶ 2.)

Fifth, thousands of plaintiffs affirmatively and voluntarily indicated their intent to join the coordination proceedings on their complaints.

Approximately 3,400 plaintiffs indicated in their civil cover sheets that the cases are "complex" because they are subject to "[c]oordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court." (*See*, *e.g.*, Ex. M at 23.) Fifty-nine complaints involving 2,080 Plaintiffs include notices of related cases stating that they are related to the JCCP. (*See*, *e.g.*, Ex. M at 40-41.) Twenty-five complaints involving 959 Plaintiffs attached an order from the coordination judge limiting Plaintiffs' payment of complex filing fees. (*See, e.g.*, Ex. M at 28-29.) And four complaints comprising a total of 46 Plaintiffs specifically identified the JCCP in the caption. (*See*, *e.g.*, Ex. L.)

These factors plainly show that Plaintiffs intended to include in the coordination proceedings far more than the 65 plaintiffs who filed a petition or add-on petition. The record of Plaintiffs' intent to include thousands of claims in the coordination proceedings is far stronger than the record in *Corber*. In *Corber*, no coordinated proceeding was even established before the cases were removed, and most of those actions, including *Corber* itself, were not identified in the petition. (*See* Pet. for Coord., *Rentz v. McKesson Corp.*, (Cal. Jud. Council Oct. 23, 2012), Ex. R.) Nevertheless, this Court held that the petition's request to hear "'***all of the actions***' together 'for all purposes' … propose[d] a joint trial, triggering federal jurisdiction as a mass action under CAFA." *Corber*, 771 F.3d at 1225 (emphasis added). These petitions "were in legal effect proposals for ***those actions*** to be tried jointly." *Id.* at 1222 (emphasis added).

Because the proposal in the petition in *Corber* extended to "all of the actions," mass action removal also extended to all plaintiffs, "who in total number far more than 100." 771 F.3d at 1223. The only other basis of showing that these cases were part of the removal group was an email confirmation by plaintiffs' counsel that "Plaintiffs intend for all the recently filed CA cases to become part of the Petition for Coordination in Los Angeles." (*See* Decl. of Rachel Passaretti-Wu, [Dkt. 22-6], *Corber v. McKesson Corp.*, 12-cv-9986 (C.D. Cal. Feb. 26, 2013), Ex. S.) This Court implicitly found this sufficient to bring those plaintiffs within the petition's proposal. Indeed, it summarily reversed the remand orders not only in cases identified in the coordination petition, but also in ***all other related cases*** filed in California. That included *Romo* and *Corber* themselves, as well as cases filed by counsel who did not appear on the petition. (*See, e.g.*, *Cohen-Feris v. McKesson Corp.*, 2:12-cv-09976-PSG-E, [Dkt. 27] (C.D. Cal. Jan. 23, 2015).)

The same result occurred before the Sixth Circuit in seven additional cases that were removed based on the petition at issue in *Corber* and transferred to a related MDL proceeding in the Eastern District of Kentucky. When the issue of CAFA jurisdiction in those cases came before the Sixth Circuit, the plaintiffs argued just what Plaintiffs here argued: that removal was "premature" because "none of the seven cases before this Court was included in the … petition for coordination" or "included in any 'Add-on Petition' seeking to add these cases to the coordinated proceeding." (Opp. to Pet. for Permission to Appeal at 6, [Dkt. 27], *In re McKesson Corp.*, Nos. 13-504 et al.,

(6th Cir. Aug. 15, 2013).) Unpersuaded, the Sixth Circuit summarily vacated the remands in those cases (*see* Order, [Dkt. 81-1], *In re McKesson Corp.*, Nos. 13-504 et al. (6th Cir. Feb. 23, 2015), Ex. T), and the district court found subject matter jurisdiction under CAFA. *In re Darvocet, Darvon & Propoxyphene Prods. Liab. Litig.*, 2015 WL 858937 (E.D. Ky. Feb. 27, 2015).

In sum, if removal was proper in *Corber*, where there was nothing more than a petition for coordination of all actions and an e-mail from counsel concerning plaintiffs' intent, then it is plainly proper here. Plaintiffs requested coordination of all cases, specifically identified thousands of claims subject to the coordination, established a leadership structure to accommodate those claims, secured an order streamlining their addition to the coordination proceedings for all purposes, and included multiple references to the JCCP in numerous complaints. The "totality of the circumstances" admits of no other conclusion.

C. No "Formal Legal Act of Significance" Is Required For Mass Action Removal

Despite this record, the district court held that there was no mass action because fewer than 100 plaintiffs took a "formal legal act of significance" (5/22/2017 Hr'g Tr. at 15:11-12) by filing a petition or add-on petition for coordination. (Remand Order at 11-15.) The district court's requirement of a "formal legal act of significance" is flatly contrary to this Court's directive to look to the "real substance" of Plaintiffs' acts. *See Corber*, 771 F.3d at 1225. *Corber* found a mass action under CAFA in *all cases* based solely on the

coordination petition and email confirmation of counsel's intent. *See supra* at 6-7. And *Corber* endorsed the Eighth Circuit's decision in *Atwell*, which, it observed, found mass action jurisdiction where plaintiffs' counsel "***argued at the motions hearing***" for relief that would have required claims to be tried jointly. *Corber*, 771 F.3d at 1225 (quoting *Atwell,* 740 F.3d at 1164) (emphasis added). The trial court's demand for a "formal legal act of significance" is irreconcilable with this precedent.

The district court also erred in dismissing as merely "administrative in nature" the various other ways in which Plaintiffs sought joinder to the coordinated proceedings. (Remand Order at 14.) Indeed, a coordination petition itself is just an "administrative" act, which merely creates the "possibility of coordination" (*see id.*), subject to the determination of the California Judicial Council. *See* Cal. R. Ct. 3.521, 3.531. The only distinction between a coordination petition and these other affirmative acts by Plaintiffs is that a coordination petition is directed to the California Judicial Council, rather than the court where the cases are filed. That distinction is immaterial because the Los Angeles Superior Court also has power to assign the cases to the coordination judge "for all purposes," L.A. Super. Ct. R. 3.3(k), and has done so in cases where plaintiffs designated the JCCP in the caption and checked the civil cover sheet complex box. (*See, e.g.,* Ex. A to Not. of Removal at 28-29, *Wood v. Pfizer Inc.*, 2:17-cv-03781, [Dkt. 1-2] (C.D. Cal. May 19, 2017), Ex. U.)

It is equally immaterial to CAFA whether coordination ultimately occurs—in *Corber*, for instance, no coordination had been formed at the time of removal. "It does not matter whether a trial covering 100 or more plaintiffs actually ensues; ***the statutory question is whether one has been proposed***." *Bullard v. Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759, 762 (7th Cir. 2008) (emphasis added).

If the district court's interpretation stands, it will create more confusion with respect to the timing constraints on CAFA removals, which run 30 days from "when the defendant receives a document *from the plaintiff* from which the defendant can unambiguously ascertain CAFA jurisdiction." *Graiser v. Visionworks of Am., Inc.*, 819 F.3d 277, 285 (6th Cir. 2016); *Jordan*, 781 F.3d at 1184; *Walker v. Trailer Transit, Inc.*, 727 F.3d 819, 824 (7th Cir. 2013). At the time of removal, Pfizer had been served with complaints implicating over 100 claims, had attended a hearing before the coordination trial judge where Plaintiffs submitted a table of more than 1,000 to be joined, and had received the Plaintiffs' proposed "all cases" add-on protocol. Had Pfizer waited for Plaintiffs to further formalize their proposals to join the coordination, as the district court has suggested, Plaintiffs would have argued that removal was time-barred, as they have in other cases. *See, e.g.*, *Portnoff v. Janssen Pharms., Inc.*, 2017 WL 708745, at *2 (E.D. Pa. Feb. 22, 2017). The Court should therefore grant review and reverse to avoid further confusion and inconsistent results in the district courts as to both the timing and merits of mass action removal.

D. A Proposal To Coordinate "All Cases" Renders All Cases Removable

The district court also erroneously held that CAFA jurisdiction applied only to the Plaintiffs who proposed joint trial, rather than to those whose claims were "proposed to be tried jointly." 28 U.S.C. § 1332(d)(11)(B)(i). The district court found that the petition's proposal to coordinate "all cases" did not apply to those cases that had not yet joined the JCCP, reasoning that the petitioning Plaintiffs could not "bind other plaintiffs who have not yet been added through an add-on petition or other means." (Remand Order at 11.) In support, the district court cited *Briggs v. Merck Sharp & Dohme*, 796 F.3d 1038 (9th Cir. 2015), which stated that a "proposal for purposes of CAFA's mass action jurisdiction, *even an implicit proposal*, is a '*voluntary and affirmative act*' ... and an '*intentional act*.'" (Remand Order at 11 (quoting *Briggs*, 796 F.3d at 1048 (quotations omitted, alterations in Remand Order)).) This was error.

Contrary to the district court's view, none of this Court's precedents require a "voluntary and affirmative act" by each and every plaintiff. Rather, they require only that a proposal be a voluntary act by a party other than the defendant. Thus, in *Corber*, this Court held that "Plaintiffs' filing of the petitions for coordination" was a "voluntary and affirmative act" that gave rise to removal, 771 F.3d at 1224, even as to cases filed by other plaintiffs and other counsel. *See supra* at 6-7. *Corber* mentioned this "voluntary and affirmative act" only as a ground for distinguishing the case from *Tanoh v. Dow Chem. Co.,* 561 F.3d 945 (9th Cir. 2009),

where the plaintiffs took no action to join the "separate actions that the *defendant* sought to try jointly." *Corber*, 771 F.3d at 1224 (emphasis added). Similarly, this Court's references in *Briggs* to an "intentional act" that is "not a mere suggestion" drew on cases from other circuits that, as in *Tanoh*, rejected mass action removal due to the absence of *any* affirmative act by *any* plaintiff to join separately filed cases. *Briggs*, 796 F.3d at 1048 (quoting *Parson v. Johnson & Johnson*, 749 F.3d 879, 888 (10th Cir. 2014); *Scimone v. Carnival Corp.*, 720 F.3d 876, 883 (11th Cir. 2013)). No such affirmative act was present in *Briggs* because the *defendant* had filed the underlying petition for coordination. 796 F.3d at 1049.

CAFA does not limit jurisdiction to plaintiffs who "propose" a joint trial, but rather extends jurisdiction over claims that "are proposed" to be tried jointly. 28 U.S.C. § 1332(d)(11)(B)(i). Nor does CAFA contain any limitations on the source of the proposal, except that it cannot come from the defendant. 28 U.S.C. § 1332(d)(11)(B)(ii)(II); *see also Briggs*, 796 F.3d at 1038 ("It is possible that a proposal by a state court for a joint trial would qualify as a 'proposal.'"). In drafting CAFA, Congress could have conferred federal jurisdiction over only those plaintiffs who affirmatively proposed their claims be tried jointly—including through the specific application the district court required here. Instead, Congress conferred jurisdiction over the broader category of those whose claims "are proposed to be tried jointly." *Id.* The district court narrowed that grant of jurisdiction without any statutory basis for doing so.

Nor is there merit to the district court's concerns about whether one plaintiff "binds" another with a proposal. CAFA is not concerned with whether a proposal binds even the plaintiff that makes it: "[i]t does not matter whether a trial covering 100 or more plaintiffs actually ensues; the statutory question is ***whether one has been proposed***." *Bullard*, 535 F.3d at 762 (emphasis added). Nor are provisions where one 21 plaintiff's claims are affected by another plaintiff's acts unique to mass actions. For example, Congress requires plaintiffs who file claims subject to an MDL to litigate in the MDL even if they do not consent, *see* 28 U.S.C. § 1407, and the federal rules prescribe specific procedures for plaintiffs to opt out of the very class actions that CAFA makes removable. *See* Fed. R. Civ. P. 23; 28 U.S.C. § 1332(d). So it is hardly surprising that Congress has conferred jurisdiction over a plaintiff whose claims "are proposed to be tried jointly" with 99 others without any requirement that each plaintiff join in that proposal. 28 U.S.C. § 1332(d)(11)(B)(i).

Finally, while the district court failed to acknowledge CAFA's purpose of "ensuring 'Federal court consideration of interstate cases of national importance,'" *Knowles*, 133 S. Ct. at 1350, it instead based its holding on a narrow illustration from CAFA's legislative history describing mass actions as cases where "'numerous named plaintiffs … claim that their suits … should be tried together.'" (Remand Order at 12 n.4 (quoting S. Rep. 109-14, at 46, 2005 U.S.C.C.A.N. 3, at 43–44).) The citation of one example of mass action use—which does not address this issue at all—does not exclude its use in other circumstances.

The district court's extra-statutory limitation on mass action jurisdiction thus conflicts with CAFA's plain language, this Court's decision in *Corber*, and CAFA's purpose and legislative history.

II. THE COURT SHOULD GRANT REVIEW OF THE DISTRICT COURT'S OTHERWISE UNREVIEWABLE ORDER TO PREVENT PREJUDICE TO PFIZER FROM DUPLICATIVE AND INCONSISTENT PROCEEDINGS

Review is supported by additional factors as well. Although, as discussed above, the presence of an important issue concerning CAFA is the key factor in determining whether to grant review, "[t]he appellate court should also consider whether the record is sufficiently developed and the order sufficiently final to permit 'intelligent review.'" *Coleman*, 627 F.3d at 1100. The "likelihood that the question will 'evade effective review if left for consideration only after final judgment'" should be considered. *Id.* Finally, there is the "familiar inquiry into the balance of the harms." *Id.* Each of these factors supports review here.

First, the record is fully developed, and the Remand Order is final. The decision to remand was based on an unusually full three-year record of briefing of the issues in multiple district courts. Indeed, it is hard to imagine a better record on which to consider the important question presented here.

Second, as this Court noted in *Coleman*, in a case such as this one, "[t]he probability that a state court or the Supreme Court will review the federal jurisdictional question after the merits of the case have been decided is almost non-existent." *Id.* at 1101. If

these cases are remanded, the state courts lack jurisdiction to decide whether CAFA jurisdiction was proper after final judgment. This appeal represents Pfizer's only real opportunity to contest the district court's erroneous construction of CAFA, and if permission to appeal is denied, there is a very high "likelihood that the question will 'evade effective review.'" *Id.*

Third, the balance of hardships favors granting appeal. Pfizer will be irreparably harmed absent review because, as just noted, it "will lose almost any chance of litigating this case in a federal forum if it is not allowed to appeal the remand order." *Id.* at 1101. In addition, Pfizer will be subjected to duplicative proceedings and potentially inconsistent rulings in the related cases still proceeding in the Northern and Eastern Districts. Conversely, the only harm Plaintiffs will experience if appeal is permitted is delay, which will be limited because CAFA appeals are expedited. *See* 28 U.S.C. § 1453(c). That delay presumably will not prejudice Plaintiffs, who requested a three-year stay of litigation while these cases were pending in the MDL.

Thus, case-specific considerations also support review.

CONCLUSION

This Court should grant the Petition to review and summarily reverse the Remand Order.

Dated: June 2, 2017

Respectfully submitted,

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* * *

[*Certification of Compliance and Certificate of Service Omitted in the Printing of this Appendix*]

APPENDIX J

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO.: 2:18-cv-1725

[Filed March 1, 2018]

IN RE LIPITOR, JCCP 4761)
)
)

NOTICE OF REMOVAL

Defendant Pfizer Inc. ("Pfizer"), by its undersigned attorneys, hereby gives notice of the removal of this mass action, pursuant to 28 U.S.C. §§ 1332, 1441, 1446, and 1453, to the United States District Court for the Central District of California. As grounds for removal, Pfizer states as follows:

BACKGROUND

1. This civil action is a single mass action under the Class Action Fairness Act (CAFA) consisting of 156 California state-court lawsuits involving more than 4,300 Plaintiffs[1] from around the country who allege they developed type II diabetes as a result of their use of Lipitor, a prescription medication manufactured by Pfizer. (*See, e.g.*, Complaints, Ex. B-1 through B-156.)[2]

2. This is the second removal of many of these actions, but on new grounds and based on intervening developments. Pfizer previously removed several of these and other actions to this District (and others) under the "mass action" provisions of the Class Action Fairness Act on the basis that the proposed inclusion of thousands of Plaintiffs in the California coordinated proceeding for Lipitor cases, JCCP 4761, meant that the claims of more than 100 persons were "proposed to be tried jointly." 28 U.S.C. § 1332(d)(11). Judge Carney held that Plaintiffs' proposal to form and join the Lipitor JCCP was a proposal for joint trial, *see Corber v. Xanodyne Pharms., Inc.*, 771 F.3d 1218 (9th Cir. 2014), but determined that no mass action resulted for

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[1] A complete listing of all Plaintiffs involved in this mass action is attached hereto as Exhibit A. All exhibits are attached to the supporting Declaration of J.D. Horton.

[2] Two actions named additional defendants, including Greenstone (a subsidiary of Pfizer), Kaiser Permanente, and Kaiser Downey Pharmacy. *See Smith et al. v. Pfizer et al.* (BC617993); *Smith et al. v. Pfizer et al.* (BC594196). The presence of these additional defendants does not affect the minimal diversity on which mass action jurisdiction depends, nor is Pfizer required to obtain the consent of these co-Defendants prior to removal.

the California Lipitor cases because fewer than 100 plaintiffs joined that proposal by filing petitions or add-on petitions to join the JCCP. *In re Pfizer*, 2017 WL 2257635 (C.D. Cal. May 23, 2017). The Ninth Circuit declined to review the remand orders in those cases. *See Abrams v. Pfizer Inc.*, 17-80094 (9th Cir. Nov. 17, 2017).

3. After the Ninth Circuit declined to review the remand of the California Lipitor cases, the Hon. Debre K. Weintraub, the Supervising Judge of the Civil Department of the Los Angeles County Superior Court, entered an order invoking the add-on procedures for the JCCP and requesting that 62 actions involving thousands of Plaintiffs be added to the JCCP (Order, Ex. C), in which 7 actions involving 49 Plaintiffs were already pending. (List of JCCP Cases, Ex. D.) The coordination trial judge then entered an order inviting the parties to respond and object to that proposal for coordination. (Ex. E.) No Plaintiff objected to that proposal, and in fact, Plaintiffs' leadership affirmatively responded by identifying 81 additional actions that "share common questions of law or fact" with the cases in the JCCP. (Ex. F.)

4. The coordination trial judge then issued an Order granting Judge Weintraub's request and added the 62 actions identified by Judge Weintraub to the coordinated proceeding. (Order, Ex. G.) In that Order, the coordination trial judge also asked the parties to address whether additional pending Lipitor cases not already part of the JCCP could be added without a request from Judge Weintraub. The parties "agreed that [the JCCP], ***sua sponte***, may add on to th[e]

coordinated proceeding cases that raise similar issues involving the drug Lipitor." (Order, Ex. H) (emphasis added.) The JCCP then *sua sponte* ordered that an additional 88 cases, involving thousands of plaintiffs, be added into the JCCP. (Order, Ex. I.) Thus, the claims of more than 100 Plaintiffs have now been joined to the JCCP.

5. Plaintiffs' proposal to form the JCCP, together with Judge Weintraub's request, as well as both JCCP Orders, all constitute a proposal that the claims in these actions be tried jointly, thus rendering them removable as a mass action. CAFA authorizes mass action removal where 100 claims are "proposed to be tried jointly," unless the proposal is made by the Defendant. *See* 28 U.S.C. § 1332(d)(11)(B)(ii)(II). Thus, the Ninth Circuit has repeatedly recognized that a *sua sponte* action by a court may effect a "proposal" for claims to be tried jointly triggering CAFA removal. *See Briggs v. Merck Sharp & Dohme*, 796 F.3d 1038, 1048 (9th Cir. 2015); *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 953 (9th Cir. 2009). Here, the *sua sponte* actions of the California Superior Court in proposing addition of the claims of over 100 plaintiffs to the coordinated proceeding, which Judge Carney has already held constitutes a proposal for claims to be tried jointly, render these cases subject to mass action jurisdiction.

6. Pfizer therefore removes these actions to this District as a single mass action.

GROUNDS FOR REMOVAL

I. THESE CASES ARE REMOVABLE UNDER CAFA'S MASS ACTION PROVISIONS

7. These cases are removable pursuant to the mass action provisions of CAFA, enacted within the diversity jurisdiction statute at 28 U.S.C. § 1332(d)(11). CAFA authorizes removal of "mass actions," which it defines as a civil action that meets the following requirements:

a. It involves the monetary relief claims of 100 or more persons that are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, *see id.* § 1332(d)(11)(B)(i);

b. The aggregate amount in controversy exceeds $5,000,000 and the claims of the individual plaintiffs each exceed the amount of $75,000, *see id.* §§ 1332(a), (d)(2), (d)(11)(B)(i); and

c. Any plaintiff is a citizen of a State different from any defendant, *see id.* § 1332(d)(2)(A).

8. As set forth below, these actions satisfy all the jurisdictional requirements for a mass action. In addition, Pfizer has satisfied all procedural requirements for removal of a mass action pursuant to 28 U.S.C. §§ 1446 and 1453. Accordingly, mass action removal is proper.

A. The Court Proposed That the Claims of More Than 100 Persons Be Tried Jointly

9. These cases are removable as a mass action because Plaintiffs' proposal to form the JCCP, together with Judge Weintraub's proposal and the orders of the

coordination trial judge, which joined more than 4,300 Plaintiffs to the California Lipitor JCCP, constitute a proposal to try the claims of those Plaintiffs jointly.

10. CAFA expressly provides that a "mass action" is "any civil action ... in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i). The Ninth Circuit has held *en banc* that a petition to coordinate claims in California state court involving more than 100 Plaintiffs constitutes a proposal for joint trial that gives rise to mass action removal. *Corber v. Xanodyne Pharms., Inc.*, 771 F.3d 1218 (9th Cir. 2014). Consistent with *Corber*, Judge Carney previously held that a proposal to join the Lipitor JCCP constituted a proposal for joint trial. *In re Pfizer*, 2017 WL 2257635 (C.D. Cal. May 23, 2017).

11. While the statute makes clear that "the term 'mass action' shall not include any civil action in which ... the claims are joined upon motion of a defendant," the text and structure of CAFA also makes clear that a "propos[al]" to create a mass action can come from a state court as well as from Plaintiffs. Multiple courts of appeal, including the Ninth Circuit, have recognized the "possib[ility] that a proposal by a state court for a joint trial would qualify as a 'proposal' under § 1332(d)(11)(B)(i)." *See Briggs v. Merck Sharp & Dohme*, 796 F.3d 1038, 1048 (9th Cir. 2015); *see also Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 953 (9th Cir. 2009); *Parson v. Johnson & Johnson*, 749 F.3d 879, 887 (10th Cir. 2014); *Scimone v. Carnival Corp.*, 720 F.3d 876, 881 (11th Cir. 2013). Indeed, last year, the Ninth

Circuit granted interlocutory review under CAFA of a decision of this District that held that a state court's *sua sponte* consolidation does not qualify as a proposal for joint trial under CAFA. *See Alexander et al. v. Bayer Corp.*, No. 17-55828 (9th Cir.) (settled on appeal).

12. Here, Judge Weintraub *sua sponte* invoked the add-on procedures of the Lipitor JCCP and requested that 62 Lipitor actions, which comprise the claims of 2,335 individual Plaintiffs, "should be joined" to the Lipitor JCCP currently proceeding in Los Angeles County Superior Court, because "it would be extremely burdensome for the Los Angeles Superior Court to handle the cases ... individually and outside of a coordinated proceeding." (*See* Order, Ex. C.) No Plaintiff objected. The coordination trial judge then ordered that those 62 cases be coordinated and *sua sponte* ordered that an additional 88 cases, involving thousands of additional plaintiffs, be added into the JCCP. (*See* Ex. G.) Accordingly, these actions of the coordination trial judge constitute a proposal that the claims of more than 100 persons be tried jointly within the meaning of CAFA.

13. In addition, Plaintiffs' leadership's submission to the Lipitor JCCP stating that "Judge Weintraub's request included only a partial list of all pending California state court Lipitor cases," and identifying an additional 81 California state court Lipitor cases that "involve common questions of fact and law with the cases identified in Judge Weintraub's request" also constitutes an affirmative proposal for joint trial that triggers removal of those cases as well

under CAFA. As noted above, the coordination trial judge ordered these actions added to the Lipitor JCCP.

14. Accordingly, the first requirement of mass action removal is satisfied.

B. The Amount in Controversy Is Satisfied

15. Both the individual $75,000 and aggregate $5,000,000 amount in controversy requirements for mass action removal are readily satisfied. *See* 28 U.S.C. §§ 1332(a), (d)(2), (d)(11)(B)(i).[3]

16. First, it is apparent from the face of the Complaint, and the serious nature of the injuries alleged by each Plaintiff—type 2 diabetes—that the amount in controversy exceeds $75,000 for each Plaintiff, just as for the claims in the other actions embraced by the California Lipitor Coordination.

17. Where, as here, Plaintiffs allege serious bodily injuries, courts have readily found that the amount-in-controversy requirement is satisfied. *See In re Rezulin Prods. Liab. Litig.*, 133 F. Supp. 2d 272, 296 (S.D.N.Y. 2001). In addition, compensatory and punitive damages in excess of the jurisdictional amount of $75,000 have been awarded in products liability cases in California. *See, e.g.*, *Stewart v. Union Carbide Corp.*, 117 Cal. Rptr. 3d 791, 804 (Cal. Ct. App. 2010); *Karlsson v. Ford Motor Co.*, 45 Cal. Rptr. 3d 265, 282-83 (Cal. Ct. App. 2006); *Jones v. John Crane, Inc.*, 35 Cal. Rptr. 3d 144, 161 (Cal Ct. App. 2005). Other

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[3] Pfizer does not, however, concede that Plaintiffs would be entitled to any of the relief sought in the Complaint.

federal courts have thus concluded that the amount in controversy exceeded $75,000 in similar pharmaceutical cases. *See, e.g.*, *Smith v. Wyeth Inc.*, 488 F. Supp. 2d 625, 630-31 (W.D. Ky. 2007) (denying motion to remand); *accord Copley v. Wyeth, Inc.*, 2009 WL 1089663, at *2-3 (E.D. Pa. Apr. 22, 2009). In addition, because Plaintiffs' demands for punitive damages are also included in the amount in controversy, *see Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 700 (9th Cir. 2007), it is evident, from the face of the Complaint that the amount of recovery sought by each Plaintiff exceeds $75,000.

18. Second, because each individual Plaintiff's claim exceeds $75,000, the aggregate amount in controversy for this mass action, which embraces the claims of thousands of individual plaintiffs, necessarily exceeds $5,000,000.

19. Accordingly, the amount-in-controversy requirement is satisfied.

C. The Diversity Requirement Is Satisfied

20. The diversity requirements for mass action removal have been satisfied. *See* 28 U.S.C. § 1332(d)(2)(A). While diversity removal normally requires complete diversity between plaintiffs and defendants, for removal of a mass action, only "minimal diversity" is required—i.e., that at least one plaintiff be diverse from one defendant. *See id.* This requirement is readily satisfied here. Plaintiff Asmik Adetyan is a citizen of California and therefore diverse from Pfizer, a citizen of Delaware and New York. *See Adamyan* Compl. ¶¶ 2, 34 (attached within Ex. B).

21. Accordingly, all the jurisdictional requirements of mass action removal are satisfied.

II. PFIZER HAS SATISFIED THE PROCEDURAL REQUIREMENTS FOR REMOVAL

22. In order to efficiently litigate the issue of mass action jurisdiction, Plaintiffs have agreed to waive any argument that removal is untimely provided removal was accomplished within 30 days of the coordination trial judge's most recent order adding cases. The Ninth Circuit has held that "[t]he statutory time limit for removal petitions is merely a formal and modal requirement and is not jurisdictional." *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1212 (9th Cir. 1980). Therefore, "[a]lthough the time limit is mandatory and a timely objection to a late petition will defeat removal, a party may waive the defect or be estopped from objecting to the untimeliness by sitting on his rights." *Id. See also Smith v. Mylan Inc.*, 761 F.3d 1042, 1045 (9th Cir. 2014).

23. Where the Plaintiff has "waived any procedural defect in the removal ... the district court lack[s] the authority to remand *sua sponte*." *Corona-Contreras v. Gruel*, 857 F.3d 1025, 1030 (9th Cir. 2017) (specifically holding "that the district court exceeded its authority under § 1447(c) in *sua sponte* ordering a remand based on a procedural defect in the removal from state court."). Accordingly, the Court need not consider the timeliness of removal.

24. For purposes of mass action removal, consent to removal by other Defendants is not required. *See* 28 U.S.C. § 1453(b).

25. For purposes of mass action removal, McKesson's forum citizenship is not a bar to removal. *See* 28 U.S.C. § 1453(b).

26. These actions, pending in the California Superior Court of Los Angeles County, are being removed to the district and division embracing the place where the actions are pending. *See* 28 U.S.C. § 1441(a).

27. Pursuant to 28 U.S.C. § 1446(a), copies of all process, pleadings and orders served on Pfizer, including the Complaints in each affected action, are attached collectively as Exhibit B-1 through B-156.

28. Pursuant to 28 U.S.C. § 1446(d), a copy of this Notice of Removal is being served upon counsel for Plaintiffs and a copy is being filed with the Clerk of the Superior Court of the County of Los Angeles.

WHEREFORE, Pfizer respectfully removes to this Court as a single mass action the following actions pending in the coordinated proceeding in the Superior Court of the County of Los Angeles, in the State of California:

Case Name (Lead Plaintiff)	**State Court Docket Number**
Adamian, Mary	BC537296
Adamyan, Alida	BC538067
Adatan, Norma	BC637353
Alanis, Maria	13-CE-CG02977
Alberstone Maye	BC537393
Alexander, Patricia	BC659589

Case Name (Lead Plaintiff)	State Court Docket Number
Alexander-Jackson, Luretta	BC537893
Allison, Josefina	BC638755
Alston, Joan	BC630499
Alvarado, Sylvia	BC645073
Anderson, Gladys	BC538088
Andres, Dorothy	BC537635
Antonelli, Carole	BC655821
Artz, Vivia	BC635793
Ashley, Gloria	BC597288
Avila, Vicky	BC537532
Avila, Venicia	BC664367
Azzam, Mazal	BC537600
Bagdasarian, Clara	BC537311
Bagliere, Theresa	BC615571
Bailey, Denelle	BC536974
Baker, Tonya	BC635991
Baker, Mary	BC642382
Banks, Patricia	BC537645
Banks, Juanita	BC536936
Barringer, Bessie	BC640576
Batista, Antonia	BC669583
Beima, Phyllis	BC537770
Beneda, Shari	BC583448
Benons, Maizy	BC537848
Blackmore, Dena	BC643523

Case Name (Lead Plaintiff)	**State Court Docket Number**
Boles, Joni	BC632342
Bowser, Martha	BC537143
Bradley, Michelle	BC558396
Brooks, Teresa	BC619090
Brown, Angela	BC667266
Brown, Frankie	BC536012
Brown, Mildred Lois	BC627217
Calabretta, Adelle	BC537652
Campbell, Sharon	BC623414
Carbajal, Maria	BC538103
Caro, Amy	BC582062
Carpenter, Rose	BC631286
Chaffee, Vicky	BC629051
Choate, Doris	BC537844
Clemente Salvo, Jocelyn	BC536162
Collins, Kim	BC552092
Constant, Marion	BC537142
Curley, Loretta	BC536939
Davis, Kathleen	CGC-14-537611
Davis, Michelle	BC586171
Davis, Carolyn	BC648688
Davis, Cynthia Faye	BC631285
Davis, Valerie	34-2013-00151922
Dearmore, Wanda	BC536754
DeBay, Elizabeth	BC620597

Case Name (Lead Plaintiff)	**State Court Docket Number**
Diaz, Imelda	BC537248
Dow, Ravyne	BC533634
Elliott, Helen	BC554988
English, Ruth	BC536937
Feberdino, Regina	BC538066
Fernandez, Bernadette	BC537531
Franzone, Linda	BC538104
Frields, Emma	BC536932
Garcia, Juana	BC537846
Garcia, Priscilla	BC593065
Gibson, Barbara	BC627824
Gray, Zurita	BC536938
Hare, Ruby	BC537836
Harris, Dorthy-Byrd	BC674644
Harris, Louise	BC537346
Hill, Jessie	BC537845
Hodges, Rose	BC537348
Isrel, Tomie	BC536931
Jackson, Myrle	BC622449
Jamshidi, Pari	BC605794
Johnson, Brenda	BC537046
Johnson-Wilson, Granieta	BC560896
Jones, Amal	BC645186
Jordan, Darlene	BC536930
Kelley, Susan	BC537297

Case Name (Lead Plaintiff)	State Court Docket Number
Kessler, Jeri	BC537074
Kessner, Bonnie	BC537298
King, Mattie	BC537847
Kloss, Judy	BC564968
Kruenegel, Donna	BC537292
Lessem, Rachel	BC652140
Lewis, Patricia	BC535923
Little, Loretta	HG14-714753
Lorentzen, Susan	BC677995
Lubenko, Cheri	13-cv-8470
Lubniewski, Joyce	BC537410
McClain, Deborah	BC537313
McKenzie, Pamela	BC537271
Medina, Theresa	BC537314
Mehta, Pallavi	BC537045
Mejia, Blanca	BC537851
Miller, Judy	BC536855
Monreal, Genevieve	BC620308
Obuch, Nina	BC536974
Owens, Clara	BC537002
Owhady, Shahla	BC535854
Parker, Sharon	CIVDS1311371
Perlhefter, Anita	BC592059
Peters, Annette	CGC-14-537609
Pierce, DeAnn	BC537141

Case Name (Lead Plaintiff)	**State Court Docket Number**
Powell, Tonisha	BC537850
Queen, Aleene	BC611182
Quillin, Kay	BC666508
Reynolds, Shirley	BC537946
Richard, Deloris Ann	BC535893
Richards, Alma	CIVRS1306724
Rivington, Deberah	BC536942
Roberts, Jonna	BC609198
Roberts-Anderson, Candacy	BC536941
Robinson, Janice	BC536358
Rouda, Marilyn	CGC-14-537608
Roy, Linda	BC536940
Sanchez, Ann	BC568284
Santiago, Magda	BC576975
Scott, Elaine	BC556545
Scully, Sharal	BC625835
Siegel, Segalilt	BC536933
Sims-Lewis, Willie	BC537470
Smalley, Judith	BC571105
Smith, Nadine	BC594196
Smith, Lawana	BC617993
St. Jean, Pauline	BC589684
Stark, Patricia	RG14719217
Stegall, Shary	BC585392
Stevens, Betty	BC599866

Case Name (Lead Plaintiff)	**State Court Docket Number**
Taime, Mixdalia	BC595160
Tate, Charlene	37-2013-00067338
Tillery, Marline	BC645478
Valentine, Ouida	BC537052
Wakabayashi, Edith	BC518223
Watson, Linda	BC553501
Watts, Elizabeth Ann	BC538131
Weaver, Sylvia	FCS043259
Weisman, Lori Ann	BC536163
Whitaker, Lena	BC537924
Whitney, Robyn	BC573889
Williams, Chasa	CIVDS1312865
Williams, Julie	BC573918
Williams, Patricia	BC627979
Williams, Fiette	BC536934
Williams, Jewel	BC539180
Williams, Marilyn	BC536935
Williams, Rose	BC537852
Willis, Donna	BC537140
Wilson, Gloria	BC580553
Wood, Patsy	BC652781
Xochrhua, Maria	BC647065
Yaker, Ruth	BC593129
Yudson, Emilya	BC604980
Zullo, Joy	BC537849

Dated: March 1, 2018

Respectfully submitted,

QUINN EMANUEL URQUHART & SULLIVAN, LLP

By: /s/ J.D. Horton
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APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-80059

[Filed May 18, 2018]

IN RE: LIPITOR, JCCP 4761

ALIDA ADAMYAN, et al.,*
Plaintiffs-Respondents,

v.

PFIZER INC.,
Defendant-Petitioner.

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)

PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1453(C)

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**Full list of Plaintiffs-Respondents set forth in Addendum.*

CORPORATE DISCLOSURE STATEMENT

Defendant-Petitioner Pfizer Inc. hereby states that it has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Dated: May 18, 2018

/s/ Mark S. Cheffo
Mark S. Cheffo

Attorney for Defendant-Petitioner Pfizer Inc.

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Pursuant to FRAP 5 and 28 U.S.C. § 1453(c), Defendant-Petitioner Pfizer Inc. requests leave to appeal the May 10, 2018 Order of the Central District of California (Carney, J.) remanding this coordinated proceeding of more than 4,300 Plaintiffs to state court ("Remand Order," Ex. A).

QUESTION PRESENTED

This Petition presents the following question: can a state court's *sua sponte* request that claims be added to a California coordinated proceeding trigger removal under the mass action provisions of the Class Action Fairness Act (CAFA)? This Court has previously determined that where ***plaintiffs*** make such a request, the claims are "proposed to be tried jointly" and thus removable as a mass action. *Corber v. Xanodyne Pharms., Inc.*, 771 F.3d 1218 (9th Cir. 2014) (en banc). Last year, this Court granted review in *Alexander v. Bayer*, 17-55828, to decide a related question it raised in two prior cases: whether "a proposal ***by a state court*** for a joint trial would qualify as a 'proposal'" under *CAFA*. *Briggs v. Merck Sharp & Dohme*, 796 F.3d 1038, 1048 (9th Cir. 2015) (emphasis added); *Tanoh v. Dow. Chem. Co.*, 561 F.3d 945, 956 (9th Cir. 2009). However, *Alexander* was dismissed by agreement before a decision.

This Petition presents an opportunity to decide what *Alexander* left open. The district court held categorically that a court's "order" can never be a "proposal," and therefore remanded more than 4,300 Lipitor claims that the Los Angeles Superior Court asked to be joined to a coordinated proceeding. Remand Order at 6-8. This Court should review and reverse.

RELIEF SOUGHT

The Court should grant review, answer the question presented in the affirmative, and reverse the decision below.

STATEMENT OF FACTS

Pfizer previously removed these cases, in which some 4,300 Plaintiffs from around the country allege the development of type 2 diabetes due to Lipitor, based on Plaintiffs' actions seeking joinder to the California Lipitor coordination, JCCP 4761. Pfizer contended the claims of more than 100 persons were thereby "proposed to be tried jointly," thus triggering removal under CAFA's mass action provisions. 28 U.S.C. § 1332(d)(11). The district court agreed that, under this Court's decision in *Corber*, a proposal to join the "all purposes" Lipitor coordination was a proposal for joint trial for CAFA purposes. *In re Pfizer*, 2017 WL 2257635, at *6 (C.D. Cal. May 23, 2017). However, it remanded because it found that less than 100 Plaintiffs had made such a proposal. *Id.* at *1.

On remand, Plaintiffs tried to avoid proposing coordination, but judges of the Los Angeles Superior Court *sua sponte* requested these cases be joined to the Lipitor coordination. *See* Remand Order at 5-6. Pfizer removed again on that basis. However, the district court again remanded, holding not only that a state-court order cannot be a proposal, but that proposed inclusion in the same Lipitor coordination was not a proposal for joint trial. *Id.* at 7-10. Pfizer now seeks review.

A. Pfizer Removes the California Lipitor Cases

The Lipitor coordination was created based on a plaintiff request to coordinate all Lipitor cases in California before "*[o]ne judge … for all purposes*" to "avoid duplicative and inconsistent rulings, orders, and judgments" on a variety of issues. *In re Pfizer*, 2017 WL 2257635, at *1. Other Plaintiffs took various actions to join cases to that proceeding, including identifying nearly 2,000 claims to the coordination judge; submitting a proposed order to join "[a]ll cases" to the proceeding; and identifying the coordinated proceeding in their captions, civil cover sheets, and notices of related cases. *See id.* at *2-3, 7. Based on those actions, Pfizer contended the claims of more than 100 persons were "proposed to be tried jointly," and removed all of these cases as a "mass action" under CAFA. 28 U.S.C. § 1332(d)(11). Plaintiffs moved to remand.

B. The District Court Remands the Cases

The district court agreed with Pfizer, and this Court in *Corber*, that a proposal to join a coordinated proceeding was a proposal for joint trial. 2017 WL 2257635, at *5. "The language of the amended petition and supporting documents is substantially similar to that in *Corber*," which this Court held constituted a proposal for joint trial. *Id.* (citing *Corber*, 771 F.3d 1218). As in *Corber*, Plaintiffs here had requested "coordination 'for all purposes'" and to avoid "inconsistent judgments and conflicting determinations of liability," which "supported the conclusion that they sought a joint trial." *Id.* However, the district court granted remand because it held that "[o]nly the sixty-

five plaintiffs who were named in the amended coordination petition or add-on petitions" had proposed joint trial, such that CAFA's 100-plaintiff numerosity requirement was not met. *Id.* at *6. Pfizer sought leave to appeal, which was denied. *See Abrams v. Pfizer Inc.*, 17-80094 (9th Cir. Nov. 17, 2017).

C. On Remand, Plaintiffs Avoid Seeking Coordination

Following remand, these cases were assigned to over 30 different judges in Los Angeles Superior Court and other counties. Because of the district court's holding that a petition to join the coordination would constitute a proposal for joint trial, Plaintiffs unsuccessfully attempted to achieve coordination by other means.

First, Plaintiffs requested that the coordination judge amend the procedure for adding cases to clarify that any additions were for pretrial purposes only, since CAFA exempts such proceedings from mass action removal. *See* 28 U.S.C. § 1332(d)(11)(B)(ii)(IV); *see also* Proposed Am. Order re Add-On Procedures (Ex. B). Pfizer opposed, and the coordination trial judge (Kuhl, J.) denied Plaintiffs' motion. Judge Kuhl explained that while she had no "stake in how the federal courts interpret CAFA," for purposes of California law, "[t]he shape of a coordinated proceeding is set when the coordination motion judge determines that cases should be coordinated pursuant to the California rules." *See* Minute Order at 3-4, *Lipitor Cases*, JCCP 4761 (Aug. 4, 2017) (Ex. C). Judge Kuhl observed that, while a single trial of all claims may not ultimately occur, "California law contemplates that

cases will be coordinated for all purposes, not merely for pretrial proceedings." *Id.* at 4-5 (citing Cal. Code. Civ. P. § 404.1). Thus, she could not grant coordination for pre-trial purposes only, and Plaintiffs' motion so requesting was denied.

Second, Plaintiffs then asked the coordination judge to relate 62 cases in which a Notice of Related Case had been filed. *See* Pls.' Mot. re Related Cases (Ex. D). Plaintiffs said they would also ask the California Judicial Council to limit the scope of the coordination, but because "it is not certain that the Judicial Council will grant the forthcoming petition," they asked Judge Kuhl to utilize California's related cases procedure instead. *Id.* at 2. Judge Kuhl denied Plaintiffs' request, explaining that the related cases procedure was "inapplicable," in part because a coordinated proceeding had been established. *See* Minute Order at 2, *Lipitor Cases*, JCCP 4761 (Nov. 21, 2017) (Ex. E). Plaintiffs ultimately never moved the California Judicial Council to amend the scope of the Lipitor coordination.

D. California Courts Request Coordination Sua Sponte

Following Plaintiffs' unsuccessful efforts to create *de facto* coordination, the Los Angeles Superior Court acted on its own.

First, the Hon. Debre K. Weintraub, the Supervising Judge of the Civil Department of the Los Angeles County Superior Court, entered a document captioned as a "Request." *See* Request, *Lipitor Cases*, JCCP 4761 (Cal. Sup. Ct. Nov. 17, 2017) (Ex. F). That

"Request" asked that the 62 actions Plaintiffs sought to relate be added to the coordination. *See id.* The "Request" was made pursuant to Cal. Code. Civ. P. § 404.4, which provides that "[t]he presiding judge of any court in which there is pending an action sharing a common question of fact or law with actions coordinated pursuant to Section 404, on the court's own motion … ***may request*** the judge assigned to hear the coordinated actions ***for an order*** coordinating the action." *See id.* at 1 (emphasis added). Judge Weintraub explained that, although no party had requested the cases be added on, "it would be extremely burdensome for the Los Angeles Superior Court to handle the cases … individually and outside of a coordinated proceeding." *Id.* at 3. Accordingly, she requested that Judge Kuhl "add the cases … to the Lipitor JCCP, after notice and hearing." *Id.*

Second, three days later, Judge Kuhl entered an Order stating that the parties had 10 days to "serve and submit a notice of opposition to [Judge Weintraub's] Request." *See* Order, *Lipitor Cases*, JCCP 4761 (Nov. 20, 2017) (Ex. G). Pfizer did not respond. Plaintiffs, however, filed a response that did not oppose, but instead stated that "Judge Weintraub's request included only a partial list of all pending California state court Lipitor cases" and attached a list of 81 additional cases involving thousands of additional Plaintiffs that shared "common questions of fact and law with the cases identified in Judge Weintraub's request but were not included in that request." *See* Pls.' Notice (Ex. H)

Judge Kuhl then issued an Order granting Judge Weintraub's Request. Order, *Lipitor Cases*, JCCP 4761 (Dec. 15, 2017) (Ex. I). In that Order, Judge Kuhl "note[d]" Plaintiffs' "listing" of additional cases, and asked the parties to address whether additional pending Lipitor cases not already part of the coordination could be added without a request from Judge Weintraub. *Id.* at 2. The parties agreed that Judge Kuhl, "***sua sponte***, may add on th[e] coordinated proceeding cases that raise similar issues involving the drug Lipitor." Order, *Lipitor Cases*, JCCP 4761 (Jan. 30, 2018) (Ex. J) (emphasis added). Judge Kuhl then *sua sponte* ordered that an additional 88 cases, involving thousands of plaintiffs, be added to the Lipitor coordination. Order, *Lipitor Cases*, JCCP 4761 (Jan. 30, 2018) (Ex. K).

E. The District Court Again Remands the Cases

Pfizer then removed the entire Lipitor coordination to federal court, contending that the California Superior Court's *sua sponte* actions coordinating the cases had now satisfied the numerosity requirement imposed by the district court's prior order. Notice of Removal (Ex. L). The district court entered a briefing schedule and a hearing date for Plaintiffs' motion to remand. Order re: Briefing Schedule (Ex. M). However, it granted remand before the hearing, based primarily on an argument that Plaintiffs raised for the first time in their reply brief.

First, the district court held that "a state court's *sua sponte* order cannot 'propose' a joint trial to trigger mass action jurisdiction." Remand Order at 8. Without

addressing the substance of the documents issued by the California Superior Court, the district court held that a court order cannot be a proposal because it is "'a command or direction authoritatively given,'" not "an offer to be accepted or rejected." *Id.* (quoting Black's Law Dictionary online (2nd ed.)).

Second, the district court found that, while a request by Plaintiffs to coordinate cases for all purposes proposed joint trial, the requests by the state courts for the same thing did not. Remand Order at 9-10. The district court based this conclusion on what it deemed Plaintiffs' purported "desire to coordinate their cases … for pretrial purposes only," and Judge Kuhl's "deep skepticism that the cases here would be jointly tried." *Id.* The district court did not address either Judge Weintraub's request or Judge Kuhl's observation that "California law contemplates that cases will be coordinated for ***all purposes***, not merely for pretrial proceedings." Minute Order at 4 (Ex. C) (emphasis added).

Pfizer now timely petitions for leave to appeal.

REASONS FOR GRANTING REVIEW

I. THIS PETITION PRESENTS AN IMPORTANT CAFA ISSUE THAT THIS COURT HAS PREVIOUSLY DEEMED WORTHY OF REVIEW

The net effect of the district court's remand orders is that federal jurisdiction exists over an "all purposes" coordinated proceeding if 100 plaintiffs formally ask to join it by filing add on petitions, but not if a court *sua sponte* adds cases that plaintiffs agree belong in the coordination. On its face, this draconian result is

contrary to CAFA's "primary objective"—never mentioned in the district court's order—of "ensuring 'Federal court consideration of interstate cases of national importance.'" *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013). As this Court has explained, "Congress and the Supreme Court have instructed us to interpret CAFA's provisions … ***broadly in favor of removal***." *Jordan v. Nationstar Mortg. LLC*, 781 F.3d 1178, 1184 (9th Cir. 2015) (emphasis added). The incongruous outcomes from the district court, in contrast, evince the "antiremoval presumption" that the Supreme Court has expressly directed courts to discard. *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S.Ct. 547, 554 (2014).

Because CAFA is a favored basis of removal, orders to remand actions removed under CAFA are excepted from the general rule against appellate review of remand orders. *See* 28 U.S.C. § 1447(d). A court of appeals therefore may grant a timely application to review the remand of cases removed under CAFA. *Id.* § 1453(c). The "key factor" in determining whether to grant review is the presence of an important issue concerning CAFA. *Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096, 1100 (9th Cir. 2010). This Court has already acknowledged the importance of the question presented by this Petition in granting review in *Alexander*. Since that question was not answered in *Alexander*, review is even more important here to resolve the issue of federal jurisdiction as to these thousands of Plaintiffs. The Petition should be granted.

A. The Court Should Review Whether a State Court May Propose Joint Trial Within the Meaning of CAFA

1. Review Should Be Granted to Decide the Question Left Open by *Alexander*

This Court should grant review to decide a question that it, and several other courts of appeals, have raised but never resolved: whether a *sua sponte* state court order can serve as a "proposal" that triggers mass action removal under CAFA. This Court has noted that possibility for nearly a decade, observing that a "state court's *sua sponte* joinder of claims might allow a defendant to remove separately filed actions to a federal court as a single 'mass action' under CAFA." *Tanoh*, 561 F.3d at 956. More recently, this Court noted that "[i]t is possible that a proposal by a state court for a joint trial would qualify as a 'proposal.'" *Briggs*, 796 F.3d at 1048. In *Alexander*, this Court granted review to decide the question it had identified in *Tanoh* and *Briggs*, but the appeal was dismissed before a decision was issued. This Petition now presents the appropriate vehicle to definitively resolve the question left open by *Alexander*.

A decision on this issue will not only answer an acknowledged open question in this Circuit, but will also provide guidance to the other courts of appeals. The Tenth Circuit, like this Court, has similarly noted that CAFA "does not specify who can make such a proposal—the plaintiffs only, or the district court through an order of consolidation or coordination." *Parson v. Johnson & Johnson*, 749 F.3d 879, 887 (10th Cir. 2014). Likewise, the Eleventh Circuit has observed

that CAFA's plenary grant of mass action jurisdiction "must be referring to a proposal made by the plaintiff, by the defendant, or perhaps by the state court acting *sua sponte*." *Scimone v. Carnival Corp.*, 720 F.3d 876, 881 (11th Cir. 2013). Only one court of appeals, the Seventh Circuit, has "assume[d]" to the contrary, in dicta without analysis. *Koral v. Boeing Co.*, 628 F.3d 945, 946 (7th Cir. 2011). This Petition thus presents the opportunity to decide what has previously been only assumed or suggested. Review should therefore be granted.

2. The Statutory Language Supports Removal Based on *Sua Sponte* State-Court Proposals

Not only does this Petition present an important CAFA-related question, but there is substantial doubt as to whether the district court's resolution of that question was correct. The language and structure of CAFA reflect that Congress contemplated mass action removal based on state-court proposals. The Supreme Court has long admonished that "in interpreting a statute a court should turn first to one, cardinal canon before all others"—it "must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). CAFA defines "mass action" to include "***any***" case in which 100 or more claims "are proposed to be tried jointly." 28 U.S.C. § 1332(d)(11)(B)(i) (emphasis added). By using the passive voice—"are proposed to be tried jointly"—Congress evinced an "agnosticism ... about who does the [prescribed action]." *Watson v. United*

States, 552 U.S. 74, 81 (2007). The passive voice indicates that "[i]t is whether something happened—not how or why it happened—that matters." *Dean v. United States*, 556 U.S. 568, 572 (2009).

The significance of that agnosticism is further clarified by the one limit Congress *did* place on the source of the proposal: it cannot come from the defendant. 28 U.S.C. § 1332(d)(11)(B)(ii)(II). Having specifically excepted only one source of proposal as a potential mass action trigger, Congress logically left all other sources of proposal available, including proposals by state courts. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acted intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quotation omitted). To read in another unwritten exception to the mass action provision would do violence to CAFA's plain language and subvert its purpose in favor of removal. *See Jordan*, 781 F.3d at 1184. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW v. Andrews*, 534 U.S. 19, 28 (2001). If a statute already contains an explicit exception, "the familiar judicial maxim *expressio unius est exclusio alterius* counsels against finding additional, implied, exceptions." *Syed v. M-I, LLC*, 853 F.3d 492, 501 (9th Cir. 2017). The statute "would have to be rewritten in order to carry

[Plaintiffs'] meaning." *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1028 (9th Cir. 2010).

"When the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Tanoh*, 561 F.3d at 953 (quotation omitted). There is no such absurdity here—to the contrary, CAFA quite sensibly allows removal of large, interstate joint-trial proceedings, whether proposed by plaintiffs or by the court, since the source of the proposal makes no difference to the federal interest in "ensuring 'Federal court consideration of interstate cases of national importance.'" *Knowles*, 133 S. Ct. at 1350. At the same time, CAFA understandably disallows removal based on a defendant's self-serving proposal, lest the plaintiffs become "servants of defendants' litigation strategy." *Briggs*, 796 F.3d at 1049; *accord Tanoh*, 561 F.3d at 954. Under this clear policy rationale and clearer statutory language, mass action removal was well supported here.

3. The District Court Erred in Categorically Holding That a Court Cannot Make a Proposal

The district court held that a court's order can never be a proposal because an order is "'a command or direction authoritatively given,'" not "an offer to be accepted or rejected." Remand Order at 8 (quoting Black's Law Dictionary online (2nd ed.)). Yet the district court reached this conclusion without evaluating any of the actions of the California Superior Court advanced by Pfizer as bases for removal. This

alone was contrary to CAFA's liberal construction as applied by this Court, which has instructed that a court evaluating mass action jurisdiction must consider "the real substance" of an alleged proposal, rather than its formalities. *Corber*, 771 F.3d at 1225. Mass action jurisdiction exists, then, where the "totality of the circumstances" shows that the claims of 100 or more persons have been proposed to be tried jointly. *Id.* at 1220.

Had the district court "carefully assess[ed] … whether, in language or substance" claims have been proposed to be tried jointly, *id.* at 1223, it would readily have found that the California Superior Court made "proposals" here. Indeed, the initial *sua sponte* action of Judge Weintraub was not an order at all, but was in fact explicitly captioned as a "Request." (Ex. F). Contrary to the district court's categorical holding that a court can only issue orders, California procedure in fact specifically provides for the ability of "'[t]he presiding judge of any court" to "***request*** the judge assigned to hear the coordinated actions for an order coordinating the action.'" *See id.* at 1 (quoting Cal. Code. Civ. P. § 404.4) (emphasis added). If this "request" was not a "proposal," it is unclear what is. Yet the district court failed to address it at all.

Likewise, the "totality of the circumstances" shows that Judge Kuhl's orders were also proposals within the meaning of CAFA. *Corber*, 771 F.3d at 1223. Initially, the district court's grudging interpretation that says an order is not a proposal because it is mandatory is contrary to the liberal construction to be afforded to CAFA. *See Dart Cherokee Basin*, 135 S.Ct.

at 554. Indeed, to the extent there is any substantive difference between an order for joint trial and a proposal for joint trial, that difference should cut in favor of jurisdiction, not against it. The federal interest in large interstate proceedings is even more substantial where joint trial is compelled than where it is merely requested.

Even more important here, focusing on the status of Judge Kuhl's actions as "orders" obscures "the real substance" of ***what Judge Kuhl ordered***. That is, Judge Kuhl ***suggested*** that adding the cases at issue was warranted, and then ***ordered*** the parties to respond with any opposition (which Plaintiffs declined to offer in their response). (Ex. G; Ex. I.) This too constitutes a proposal—an offering "for consideration, discussion, acceptance, or adoption," *Briggs*, 796 F.3d at 1048 (quotation omitted)—which the district court erroneously held could never come from a court. And as with Judge Weintraub's Request, California law specifically contemplates Judge Kuhl's approach (*see* Cal. R. Ct. 3.544), again refuting the district court's conclusion that courts cannot propose.

The only case cited by the district court that rejected removal based on a state-court proposal is distinguishable on these very grounds. In *Alexander v. Bayer Corp.*, 2016 WL 6678917 (C.D. Cal. Nov. 14, 2016), as to which this Court granted review, the district court rejected removal because the state court "did not propose consolidation and then ask for the parties' thoughts or responses." *Id.* at *2. Here, in contrast, that is precisely what happened: the supervising judge issued a "Request" to Judge Kuhl

that she add on 62 cases, subject to the notice and hearing requirements of Cal. R. Ct. 3.544, and Judge Kuhl then provided the parties with an opportunity to object. Plaintiffs not only failed to object, they affirmatively identified other cases that Judge Kuhl should coordinate. Pfizer noted this distinction to the district court as well, but the district court did not address it.

4. The "Master of the Complaint" Principle Does Not Apply

Plaintiffs' only remaining argument, which they abandoned in their reply brief in the district court, was that to allow mass action removal based on *sua sponte* proposals would be "at odds with the well-settled principle that plaintiffs are masters of their complaints and remain free to structure them so as to avoid [federal] jurisdiction." Mot. at 19 (Ex. N). That principle in no way precludes removal here.

The notion that plaintiffs are "masters of the complaint" is not an ironclad rule of jurisdiction, but rather a tautology used to express that where removal is based on the content of a plaintiffs' pleadings, that content defines the limits of removal. Thus, for example, in *Briggs*, the plaintiffs specifically disclaimed a proposal for joint trial, and this Court held that removal was not proper because plaintiffs were "masters of their complaints." *Briggs*, 796 F.3d at 1049. In contrast, in *Corber*, where the plaintiffs sought coordination "for all purposes" and to avoid "inconsistent judgments," this Court found subject matter jurisdiction pursuant to CAFA, observing that the plaintiffs were "masters of their petitions for

coordination," and therefore were held "responsible for what they have said and done." 771 F.3d at 1223.

The "master of the complaint" principle does not, however, mean what Plaintiffs suggest: that no case can become removable except by the affirmative action of the plaintiff. Indeed, Congress has repeatedly conferred removal jurisdiction based on actions of other parties not contemplated or authorized by the plaintiff. These removal mechanisms include, for example, the federal officer removal statute, 28 U.S.C. § 1442; *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247 (9th Cir. 2006); the Westfall Act, 28 U.S.C. § 2679(d)(1); *Wilson v. Drake*, 87 F.3d 1073 (9th Cir. 1996); the bankruptcy removal statute, 28 U.S.C. § 1452; *Security Farms v. Int'l Bhd. of Teamsters*, 124 F.3d 999 (9th Cir. 1997); and the federal contract claims removal statute. 28 U.S.C. § 1346(a)(2); *Olivier Plantation, LLC v. St. Bernard Parish*, 744 F. Supp. 2d 575 (E.D. La. 2010). Congress has thus frequently authorized removal of actions based on litigation events completely outside of plaintiffs' control, and was free to do so with CAFA's mass action provisions.

B. A Proposal to Join the Lipitor Coordination Is a Proposal for Joint Trial, No Matter the Source

In its prior remand order, the district court held that a petition to join the Lipitor coordination was a proposal for joint trial. *In re Pfizer*, 2017 WL 2257635, at *4-5. Yet with respect to the court actions here that would have identical effect to an add-on petition to join the coordination, the district court reached the opposite result. Specifically, it held there was no proposal for

joint trial because Judge Kuhl observed that a single joint trial of thousands of Plaintiffs' claims was unlikely. *See* Remand Order at 9-10. This too was error.

First, the district court only addressed certain of Judge Kuhl's statements, and ignored the "Request" issued by Judge Weintraub. Even if Judge Kuhl's statements about what might occur were relevant (and for the reasons that follow they are not), they are irrelevant to Judge Weintraub's proposal to add cases to the Lipitor coordination. Under both *Corber* and the district court's own prior ruling in this case, a proposal to join cases to that "all purposes" proceeding was a proposal for joint trial. *See Corber*, 771 F.3d at 1223; *In re Pfizer*, 2017 WL 2257635, at *5.

Second, the district court erroneously focused on whether joint trial "actually ensues" rather than "***the statutory question [of] whether one has been proposed***." *Bullard v. Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759, 762 (7th Cir. 2008) (emphasis added). This Court rejected this position in *Corber*, where the plaintiffs contended—as the district court held here—that they had not proposed joint trial because joint trial was unlikely to occur. 771 F.3d at 1224 n.5. As this Court explained, "[U]nder the plain language of CAFA, we must determine whether Plaintiffs *proposed* a joint trial, not whether one will occur at some future date. That a judge has discretion to limit coordination to pretrial matters does not weigh on whether Plaintiffs proposed a joint trial." *Id.* Because the plaintiffs had sought coordination for "all purposes" and to avoid "inconsistent judgments," they had

necessarily proposed a joint trial. The same is true here with respect to the scope of the Lipitor coordination, which, as the district court previously acknowledged, is identical to *Corber*. *See In re Pfizer*, 2017 WL 2257635, at *5. As Judge Kuhl observed, "[t]he shape of a coordinated proceeding is set" at its inception, when "the coordination motion judge determines that cases should be coordinated." (Ex. C at 4).

Third, the district court applied an untenably narrow definition of "joint trial" by focusing on the likelihood that the thousands of claims joined to the Lipitor coordination would all be tried together. As the Seventh Circuit has explained, "[t]he question is not whether 100 or more plaintiffs answer a roll call in court, but whether the 'claims' advanced by 100 or more persons are ***proposed to be tried jointly***." *Bullard*, 535 F.3d at 762 (emphasis added). Thus, for example, "[a] trial of 10 exemplary plaintiffs, followed by application of issue or claim preclusion to 134 more plaintiffs without another trial, is one in which the claims of 100 or more persons are being tried jointly." *Id.* Once again, such procedures are specifically contemplated by California law on coordination, which provides that the coordination judge may order "trial of one or more test cases, with appropriate provision being made concerning the res judicata or collateral estoppel effects of a judgment on plaintiffs and defendants." *Ford Motor Warranty Cases*, 11 Cal. App. 5th 626, 644–45 (2017). Thus, in *Corber*, this Court observed that plaintiffs' desire to coordinate to avoid "inconsistent judgments and conflicting determinations of liability" could "be addressed only through ***some form of joint trial***." 771 F.3d at 1223-24 (emphasis

added). The use of the identical language here warrants the same result.

II. ADDITIONAL CONSIDERATIONS SUPPORT REVIEW

Although the presence of an important issue concerning CAFA is the key factor in determining whether to grant review, "[t]he appellate court should also consider whether the record is sufficiently developed and the order sufficiently final to permit 'intelligent review.'" *Coleman*, 627 F.3d at 1100. The "likelihood that the question will 'evade effective review if left for consideration only after final judgment'" should be considered. *Id.* Finally, there is the "familiar inquiry into the balance of the harms." *Id.* Each of these factors supports review here.

First, the record is fully developed, and the Remand Order is final. The parties have briefed the issue of mass action jurisdiction over four years and in multiple district courts.

Second, as this Court noted in *Coleman*, in a case such as this one, "[t]he probability that a state court or the Supreme Court will review the federal jurisdictional question after the merits of the case have been decided is almost non-existent." *Id.* at 1101. If these cases are remanded, the state courts lack jurisdiction to decide whether CAFA jurisdiction was proper after final judgment. This appeal represents Pfizer's only real opportunity to contest the district court's erroneous construction of CAFA, and if permission to appeal is denied, there is a very high "likelihood that the question will 'evade effective review.'" *Id.* at 1100.

Third, the balance of hardships favors granting appeal. Pfizer will be irreparably harmed absent review because, as just noted, it "will lose almost any chance of litigating this case in a federal forum if it is not allowed to appeal the remand order." *Id.* at 1101. Conversely, the only harm Plaintiffs will experience if appeal is permitted is delay, which will be limited because CAFA appeals are expedited. *See* 28 U.S.C. § 1453(c). That delay presumably will not prejudice Plaintiffs, who have previously requested stays of litigation pending a decision on jurisdiction.

Thus, case-specific considerations also support review.

CONCLUSION

This Court should grant the Petition and reverse the Remand Order.

Dated: May 18, 2018

Respectfully submitted,

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[*Certification of Compliance and Certificate of Service Omitted in the Printing of this Appendix*]

APPENDIX L

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-80059

[Filed September 5, 2018]

IN RE: LIPITOR, JCCP 4761

ALIDA ADAMYAN, et al.,*
Plaintiffs-Respondents,

v.

PFIZER INC.,
Defendant-Petitioner.

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)

PETITION FOR REHEARING *EN BANC*

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**Full list of Plaintiffs-Respondents set forth in Addendum.*

CORPORATE DISCLOSURE STATEMENT

Defendant-Petitioner Pfizer Inc. hereby states that it has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Dated: September 5, 2018

/s/ Mark S. Cheffo
Mark S. Cheffo

Attorney for Defendant-Petitioner Pfizer Inc.

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INTRODUCTION AND RULE 35(b) STATEMENT

The panel decision conflicts with *Dart Cherokee Basin Operating Co. v. Owens*, 135 S.Ct. 547 (2014), because it erroneously denied review under the Class Action Fairness Act (CAFA) of a jurisdictional question of exceptional importance: Whether a state court's *sua sponte* action may constitute a proposal for joint trial that gives rise to "mass action" removal under CAFA, 28 U.S.C. § 1332(d)(11). The district court answered in the negative, holding that the state courts' requests to coordinate these claims by more than 4,200 products liability Plaintiffs categorically could not be a proposal. Remand Order, Dkt. 3-2 at 2. Pfizer petitioned for review under 28 U.S.C. § 1453(c), which the panel summarily denied. Rehearing *en banc* should be granted.

In *Dart*, the Supreme Court held that a summary denial of review of a CAFA question is reversible error if it can be attributed only to agreement with legal error by the district court. *Dart*, 135 S. Ct. at 555. Review of a CAFA remand order is warranted when it presents a CAFA question that is "'important, unsettled, and recurrent'" and will otherwise escape review. *Id.* (quotation omitted); *accord Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096, 1100 (9th Cir. 2010). Those criteria are indisputably satisfied here—this Court has repeatedly identified the question as important, *see, e.g.*, *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 956 (9th Cir. 2009); *Briggs v. Merck Sharp & Dohme*, 796 F.3d 1038, 1048 (9th Cir. 2015), and just last year granted review to decide it, but the appeal

was voluntarily dismissed. *See Alexander v. Bayer*, 17-55828. Three other courts of appeals have also identified or addressed the question, and with conflicting reasoning. *Scimone v. Carnival Corp.*, 720 F.3d 876, 881 (11th Cir. 2013); *Parson v. Johnson & Johnson*, 749 F.3d 879, 887 (10th Cir. 2014); *Anderson v. Bayer Corp.*, 610 F.3d 390, 394 (7th Cir. 2010); *Koral v. Boeing Co.*, 628 F.3d 945, 946 (7th Cir. 2011). And, as in *Dart*, the probability of later state-court review of federal jurisdiction "is almost non-existent." *Coleman*, 627 F.3d at 1101.

Thus, the only potential ground for the panel's summary denial of review is that it believed the remand order was correct. *See Dart*, 135 S. Ct. at 555. That determination cannot be squared with CAFA's plain language, much less its pro-removal purpose, *see id.* at 554, which the district court ignored entirely. CAFA broadly confers mass action jurisdiction in the passive voice over claims that "are proposed to be tried jointly," which has led several courts of appeals to acknowledge the possibility of removal based on *sua sponte* proposals by state courts. *See Tanoh*, 561 F.3d at 956; *Parson*, 749 F.3d at 887; *Scimone*, 720 F.3d at 881. The district court, however, followed the one decision to the contrary, which suggested in *dicta* that courts can issue only orders, not proposals. *Koral*, 628 F.3d at 946 (Posner, J.). That grudging interpretation ignores not only the many contexts in which orders can include proposals, but also that California law specifically empowers judges to issue a "request" to coordinate cases, which is just what the state court issued here. Cal. Code. Civ. P. § 404.4.

The district court's erroneous decision cannot sustain the panel's decision to deny review of this important question. *En banc* review should be granted.

BACKGROUND

Plaintiffs allege they developed type 2 diabetes due to their use of Lipitor, Pfizer's cholesterol-lowering medication. In the federal multi-district litigation established for such actions, the district court granted summary judgment as to all claims—more than 3,000 plaintiffs—due to lack of admissible expert testimony on causation, which the Fourth Circuit affirmed. *In re Lipitor Mktg., Sales Practices & Prod. Liab. Litig.*, 892 F.3d 624 (4th Cir. 2018). Here, these 4,200-some Plaintiffs seek to revisit that result in the largest parallel state-court proceeding to the federal Lipitor litigation.

A. First Removal Based on Plaintiffs' Requests to Coordinate

Although Plaintiffs hail from around the country, they all filed in California state court, where they took various actions to join their claims to the California coordinated proceeding for Lipitor actions, JCCP 4761. *See In re Pfizer*, 2017 WL 2257635, at *1-2 (C.D. Cal. May 23, 2017). In a previous *en banc* ruling, this Court held that a plaintiff request to join claims to a California coordinated proceeding—before "one judge," "for all purposes," and to avoid inconsistent judgments—was a proposal for joint trial within the meaning of CAFA. *Corber v. Xanodyne Pharms., Inc.*, 771 F.3d 1218 (9th Cir. 2014) (en banc); *accord In re Abbott Laboratories, Inc.*, 698 F.3d 568, 573 (7th Cir.

2012), *Atwell v. Bos. Scientific Corp.*, 740 F.3d 1160, 1163 (8th Cir. 2013); *Lester v. Exxon Mobil Corp.*, 879 F.3d 582, 588 (5th Cir. 2018). Plaintiffs used the same language here, and Pfizer accordingly removed these cases as a CAFA mass action—that is, a minimally diverse civil action in which the "claims of 100 or more persons are proposed to be tried jointly." 28 U.S.C. § 1332(d)(11)(B)(i).

The district court (Carney, J.) agreed with Pfizer that, under *Corber*, a proposal to join the Lipitor coordination was a proposal for joint trial. *In re Pfizer*, 2017 WL 2257635, at *6. However, the district court remanded because it found less than 100 Plaintiffs made such a proposal by filing a formal petition for coordination. *Id.* at *1. Pfizer sought leave to appeal, which this Court denied. *Abrams v. Pfizer Inc.*, 17-80094 (9th Cir. Nov. 17, 2017).

B. Second Removal Based on *Sua Sponte* Requests to Coordinate

Following remand, these actions were assigned to a large number of state-court judges. Citing logistical problems caused by these individual assignments, the Supervising Civil Judge of the Los Angeles Superior Court (Weintraub, J.) entered a "Request" under California Code of Civil Procedure section 404.4 that 62 of these actions be added to the Lipitor coordination. *See* Request, Dkt. 3-2 at 47. The Lipitor coordination judge (Kuhl, J.) offered the parties an opportunity to respond to the Request. Plaintiffs then identified 81 additional cases that shared "common questions of fact and law with the cases identified in Judge Weintraub's

request but were not included in that request." *See Notice*, Dkt. 3-2 at 77.

Judge Kuhl granted Judge Weintraub's Request and asked the parties to address whether the additional cases identified by Plaintiffs could also be joined. Order, Dkt. 3-2 at 87-88. The parties agreed that Judge Kuhl, "*sua sponte*, may add on th[e] coordinated proceeding cases that raise similar issues involving the drug Lipitor," and Judge Kuhl added 88 cases on her initiative. *See* Order, Dkt. 3-2 at 96-97. Based on these proposals, Pfizer removed the entire Lipitor coordinated proceeding to federal court as a mass action.

C. Remand and Petition for Permission to Appeal

The district court again remanded the cases, holding that "a state court's *sua sponte* order cannot 'propose' a joint trial to trigger mass action jurisdiction." Remand Order, Dkt. 3-2 at 9. Without addressing the substance of the documents issued by the state courts, the district court held that a court order categorically cannot be a proposal because it is "'a command or direction authoritatively given,'" not "an offer to be accepted or rejected." *Id.* (quotation omitted). In addition, the district court found that, while a request by Plaintiffs to coordinate cases for all purposes proposed joint trial, the requests by the state courts for the same thing did not. *Id.* at 10-11.

Pfizer timely sought leave to appeal. A two-member panel of this Court (Schroeder and Silverman, J.J.)

summarily denied review, citing *Coleman*, 627 F.3d 1096. Pfizer now seeks rehearing *en banc*.

REASONS FOR GRANTING REHEARING *EN BANC*

"Discretion to review a remand order is not rudderless," and a court of appeals "'would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.'" *Dart*, 135 S. Ct. at 555. This Court has held that a court of appeals should grant review of a CAFA question that "is 'important, unsettled, and recurrent'" and cannot otherwise be reviewed. *Coleman*, 627 F.3d at 1100; *accord Dart*, 135 S. Ct. at 555 (quoting *College of Dental Surgeons of Puerto Rico v. Connecticut Gen. Life Ins. Co.*, 585 F.3d 33, 39 (1st Cir. 2009)); *BP America, Inc. v. Oklahoma ex rel. Edmondson*, 613 F.3d 1029, 1034-1035 (10th Cir. 2010). In *Dart*, the Supreme Court held that where those criteria are clearly met, a summary denial of review may be understood to be predicated on agreement with the district court's resolution of the CAFA question. 135 S.Ct. at 555-56. Thus, if the district court's resolution of that question is incorrect, the decision to deny review is reversible error. *Id.* at 555.

That is precisely what occurred here. The panel summarily denied review of an exceptionally important and otherwise unreviewable CAFA question that this Court granted review to decide only a year ago. Consistent with the Supreme Court's holding in *Dart* and this Court's previous recognition of the issue's exceptional importance, the Court should grant rehearing *en banc*, accept the appeal, and reverse.

I. THIS CASE PRESENTS A CAFA ISSUE OF EXCEPTIONAL IMPORTANCE THAT WILL OTHERWISE ESCAPE REVIEW

Under the district court's remand orders, federal jurisdiction exists over an "all purposes" coordinated proceeding if 100 plaintiffs seek to join it, but not if a court *sua sponte* adds cases that plaintiffs agree belong in the coordination. That result cannot be squared with CAFA's plain text or its express purpose. If affirmed, it will invite plaintiffs to circumvent CAFA's mass action provisions by refraining from their own requests to coordinate mass litigation, and waiting for courts to do it themselves of necessity—just as Plaintiffs did here by "identifying" cases for *sua sponte* coordination. The district court's rulings authorizing this outcome thus embody the very "antiremoval presumption" that the Supreme Court has repeatedly directed courts to discard in CAFA cases, and which the district court ignored. *See Dart*, 135 S.Ct. at 554; *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013); *accord Jordan v. Nationstar Mortg. LLC*, 781 F.3d 1178, 1184 (9th Cir. 2015).

There can be no dispute that the district court's ruling concerns an exceptionally important CAFA question. Only a year ago, this Court granted review to decide whether a *sua sponte* state-court action can serve as a "proposal" that triggers mass action removal, but the parties voluntarily dismissed the case before a decision. *See Alexander*, 17-55828. This case presents the opportunity to definitively resolve the question left open by *Alexander*. This Court first raised that question nearly a decade ago, observing that a "state

court's *sua sponte* joinder of claims might allow a defendant to remove separately filed actions to a federal court as a single 'mass action' under CAFA." *Tanoh*, 561 F.3d at 956. And in 2015, it noted that "[i]t is possible that a proposal by a state court for a joint trial would qualify as a 'proposal.'" *Briggs*, 796 F.3d at 1048.

In addition to this Court, three other courts of appeals have identified or addressed this important CAFA issue. The Eleventh Circuit has noted that CAFA's plenary grant of mass action jurisdiction "must be referring to a proposal made by the plaintiff, by the defendant, or perhaps by the state court acting *sua sponte*." *Scimone*, 720 F.3d at 881. And the Tenth Circuit, like this Court, has observed that CAFA "does not specify who can make such a proposal—the plaintiffs only, or the district court through an order of consolidation or coordination." *Parson*, 749 F.3d at 887. The Seventh Circuit also suggested that "perhaps the state court" could "propose to try . . . cases jointly," and thus give rise to mass action removal. *Anderson v. Bayer Corp.*, 610 F.3d 390, 394 (7th Cir. 2010).

In dicta in a subsequent decision, the Seventh Circuit, per Judge Posner, "assume[d] (answering a question left open in the *Anderson* case, . . . and in *Tanoh* . . .) that the state court's deciding on its own initiative to conduct a joint trial would not enable removal." *Koral*, 628 F.3d at 946–47. But the issue was not presented in *Koral*, and the fact that the Seventh Circuit's *dicta* is being relied upon by district courts in this Circuit only heightens the need for appellate guidance.

This appeal is Pfizer's only opportunity to obtain review of this important question. As in *Dart*, if the "remand order remains undisturbed," the case will "'leave the ambit of the federal courts for good, precluding any other opportunity for [the defendant] to vindicate its claimed legal entitlement [under CAFA] . . . to have a federal tribunal adjudicate the merits.'" 135 S.Ct. at 555-56 (quoting *BP America*, 613 F.3d at 1035). Rehearing *en banc* is therefore warranted to preserve Pfizer's only opportunity for review.

II. THE PANEL'S DENIAL OF REVIEW IS CONTRARY TO *DART*

Because the criteria for granting review of the remand order were present, the only explanation for the panel's summary denial of review is agreement with the district court's resolution of the question. For the reasons set forth below, that determination was legal error, and thus the panel's denial of review was an abuse of discretion under *Dart*. If the district court's determination is not reviewed, it will sanction a perverse and judicially inefficient rule, where Plaintiffs may evade mass action removal simply by leaving to state courts the work of creating the multi-plaintiff interstate litigations over which Congress sought to confer federal jurisdiction. The Court should therefore grant rehearing *en banc*.

A. CAFA's Plain Language and Purpose Support Removal Based on *Sua Sponte* State-Court Proposals

CAFA's plain language and purpose indicate that Congress contemplated mass action removal based on

state-court proposals for joint trial. "[I]n interpreting a statute a court should turn first to one, cardinal canon before all others"—it "must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). CAFA defines "mass action" to include "*any*" case in which 100 or more claims "are proposed to be tried jointly." 28 U.S.C. § 1332(d)(11)(B)(i) (emphasis added). The breadth of this grant of jurisdiction is apparent from the use of both the capacious label "any," *see BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 93 (2006), as well as the passive "are proposed to be tried jointly," which evinces an "agnosticism . . . about who does the [prescribed action]." *Watson v. United States*, 552 U.S. 74, 81 (2007). The passive voice indicates that "[i]t is whether something happened—not how or why it happened—that matters." *Dean v. United States*, 556 U.S. 568, 572 (2009).

The significance of that agnosticism is further clarified by the one limit Congress *did* place on the proposal: it cannot come from the defendant. 28 U.S.C. § 1332(d)(11)(B)(ii)(II). Having specifically excepted only one source of proposal as a removal trigger, Congress logically left all other sources available, including proposals by state courts. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acted intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quotation omitted). To read in another unwritten exception to the mass action provision would do

violence to CAFA's plain language and subvert its pro-removal purpose. *See Jordan*, 781 F.3d at 1184. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW v. Andrews*, 534 U.S. 19, 28 (2001). If a statute already contains an explicit exception, "the familiar judicial *maxim expressio unius est exclusio alterius* counsels against finding additional, implied, exceptions." *Syed v. M-I, LLC*, 853 F.3d 492, 501 (9th Cir. 2017). The statute "would have to be rewritten in order to carry [Plaintiffs'] meaning." *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1028 (9th Cir. 2010).

This Court has previously held with respect to the mass action provision that "[w]hen the statute's language is plain," it must be enforced according to its terms, provided "the disposition required by the text is not absurd." *Tanoh*, 561 F.3d at 953 (quotation omitted). There is no such absurdity here. To the contrary, CAFA quite sensibly allows removal of large, interstate joint-trial proceedings, whether proposed by plaintiffs or by the court. At the same time, CAFA understandably disallows removal based on a defendant's self-serving proposal, lest the plaintiffs become "servants of defendants' litigation strategy." *Briggs*, 796 F.3d at 1049; *accord Tanoh*, 561 F.3d at 954. The Seventh Circuit's *dicta* in *Koral*, which narrowly construed the statute's purpose as "prevent[ing] plaintiffs from trying to circumvent the Class Action Fairness Act by bringing a class action as a mass action," 628 F.3d at 947, are flatly inconsistent with the Supreme Court's broad view of CAFA's

purpose as "ensuring 'Federal court consideration of interstate cases of national importance.'" *Knowles*, 133 S. Ct. at 1350 (quotation omitted). The district court's reliance on *Koral* conflicts with both Ninth Circuit and Supreme Court precedent.

B. The District Court Erred in Categorically Holding That a Court Cannot Make a Proposal

The district court held that a court's order can never be a proposal because an order is "'a command or direction authoritatively given,'" not "an offer to be accepted or rejected." Remand Order, Dkt. 3-2 at 9 (quoting Black's Law Dictionary online (2nd ed.)). At the outset, under CAFA's liberal construction, *see Dart*, 135 S.Ct. at 554, any difference between an order for joint trial and a proposal for joint trial should favor jurisdiction, not cut against it. Indeed, the federal interest in adjudicating large interstate proceedings is even more acute where joint trial is *compelled* by the court than where it is merely *requested*.

Moreover, the district court reached this categorical conclusion without evaluating the actual documents issued by the California Superior Court that led to removal. This too was contrary to CAFA's liberal construction, which this Court has instructed requires an evaluation of "the real substance" of an alleged proposal under the "totality of the circumstances." *Corber*, 771 F.3d at 1220, 1225. Had the district court "carefully assess[ed] … whether, in language or substance," claims have been proposed to be tried jointly, *id.* at 1223, it would readily have found that the California Superior Court made "proposals" here.

Indeed, the *sua sponte* action of Judge Weintraub was not an order at all, but was in fact explicitly captioned as a "Request." Dkt. 3-2 at 47. Contrary to the district court's categorical holding that courts can issue only orders, not proposals, California procedure in fact specifically allows "'[t]he presiding judge of any court" to "*request* the judge assigned to hear the coordinated actions for an order coordinating the action.'" *See id.* (quoting Cal. Code. Civ. P. § 404.4) (emphasis added). If Judge Weintraub's "request" was not a "proposal," it is unclear what is.

Likewise, "the real substance" of Judge Kuhl's orders shows that they too were proposals. *Corber*, 771 F.3d at 1223. That is, Judge Kuhl *suggested* that adding the cases at issue was warranted, and then ordered the parties to respond with any opposition (which Plaintiffs declined to offer). *See supra* at 4-5. This too constitutes a proposal under this Court's precedents—an offering "for consideration, discussion, acceptance, or adoption." *Briggs*, 796 F.3d at 1048 (quotation omitted). And as with Judge Weintraub's Request, California law specifically contemplates Judge Kuhl's approach, *see* Cal. R. Ct. 3.544, again refuting the district court's conclusion that courts cannot propose.

The only case cited by the district court that rejected removal based on a state-court proposal is distinguishable on these very grounds. In *Alexander v. Bayer Corp.*, 2016 WL 6678917 (C.D. Cal. Nov. 14, 2016), as to which this Court granted review, the district court rejected removal because the state court "did not propose consolidation and then ask for the

parties' thoughts or responses." *Id.* at *2. Here, in contrast, that is precisely what happened: the supervising judge issued a "Request" to Judge Kuhl that she add 62 cases, and Judge Kuhl provided the parties with an opportunity to object. Plaintiffs not only failed to object, they affirmatively identified other cases that Judge Kuhl should coordinate. The totality of the circumstances thus establishes that these orders also constituted proposals.

Finally, there is no merit to any suggestion that the "master of the complaint" principle precludes removal here. That principle applies where, as in *Briggs* and *Corber*, it is the allegations of the plaintiffs' pleadings that support removal. *Briggs*, 796 F.3d at 1049 (plaintiffs were "masters of their complaints"); *Corber*, 771 F.3d at 1223 (plaintiffs were "masters of their petitions for coordination"). It does not, however, stand for a generalized principle of jurisdictional autonomy for plaintiffs—indeed, Congress has often conferred federal jurisdiction based on actions other than the plaintiff's. *See, e.g.*, 28 U.S.C. § 1442 (federal officer removal); 28 U.S.C. § 2679(d)(1) (Westfall Act removal); 28 U.S.C. § 1452 (bankruptcy removal); 28 U.S.C. § 1346(a)(2) (federal contract claims removal). Congress did so here as well when it conferred mass action jurisdiction not over cases that "plaintiffs propose to be tried jointly," but cases that "are proposed to be tried jointly." 28 U.S.C. § 1332(d)(11). Indeed, a major purpose of CAFA was to prevent plaintiffs from keeping important interstate cases out of federal court through artful pleading. *See Knowles*, 133 S. Ct. at 1350.

C. A Proposal to Join a Coordinated Proceeding Is a Proposal for Joint Trial, No Matter the Source

Although the district court previously held that a request to join the Lipitor coordination was a proposal for joint trial, *In re Pfizer*, 2017 WL 2257635, at *4-5, it held here that the same request by the state court was not. *See* Remand Order, Dkt. 3-2, at 10-11. The district court so held based on statements by Judge Kuhl that a single joint trial of thousands of Plaintiffs' claims was unlikely. *Id.* This holding is contrary to the record, CAFA's plain language, the unanimous decisions of the courts of appeals, and California law. Were it the basis for the panel's order denying review, it would equally warrant *en banc* review.

First, the district court erred by focusing on whether joint trial "actually ensues" rather than "*the statutory question [of] whether one has been proposed*." *Bullard v. Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759, 762 (7th Cir. 2008) (emphasis added). This Court rejected the same position in *Corber*, where the plaintiffs contended they had not proposed joint trial because joint trial was unlikely to occur. 771 F.3d at 1224 n.5. As this Court explained, "[U]nder the plain language of CAFA, we must determine whether Plaintiffs *proposed* a joint trial, not whether one will occur at some future date. That a judge has discretion to limit coordination to pretrial matters does not weigh on whether Plaintiffs proposed a joint trial." *Id.* As the Fifth Circuit recently explained, "[w]hether CAFA applies does not and cannot depend on how a state trial court actually manages various claims within a larger

action," since CAFA's focus is "the consolidation that is proposed." *Lester*, 879 F.3d at 587. Thus, how these cases may ultimately be litigated is immaterial to the jurisdictional effect of the state courts' proposals.

Second, the district court erred by applying an untenably narrow definition of "joint trial." As the Seventh Circuit has explained, "[t]he question is not whether 100 or more plaintiffs answer a roll call in court, but whether the 'claims' advanced by 100 or more persons are *proposed to be tried jointly*." *Bullard*, 535 F.3d at 762 (emphasis added). Thus, "[a] trial of 10 exemplary plaintiffs, followed by application of issue or claim preclusion to 134 more plaintiffs without another trial, is one in which the claims of 100 or more persons are being tried jointly." *Id.*; *see also Ford Motor Warranty Cases*, 11 Cal. App. 5th 626, 644–45 (2017) (noting that California law authorizes "trial of one or more test cases, with appropriate provision being made concerning the res judicata or collateral estoppel effects of a judgment"). This Court also adopted this broad understanding of joint trial in *Corber*, observing that a request to coordinate to avoid "inconsistent judgments and conflicting determinations of liability" could "be addressed only through *some form of joint trial*." 771 F.3d at 1223-24 (emphasis added).

Third, the district court erred as to who made the proposals. The district court concerned itself with certain of Judge Kuhl's statements, ignoring that the first operative proposal was the "Request" issued by Judge Weintraub. Even if Judge Kuhl's statements about what might occur mattered (and as stated above they do not), they are irrelevant to Judge Weintraub's

proposal to add cases to the Lipitor coordination. Under both *Corber* and the district court's own prior ruling, Judge Weintraub's proposal to join cases to that "all purposes" proceeding was a proposal for joint trial. *See Corber*, 771 F.3d at 1223; *In re Pfizer*, 2017 WL 2257635, at *5.

CONCLUSION

This Court should grant rehearing *en banc*, accept the appeal, and reverse.

Dated: September 5, 2018

Respectfully submitted,

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* * *

[*Certificate of Compliance and Certificate of Service Omitted in the Printing of this Appendix*]

APPENDIX M

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

CASE NO. JCCP 4761

[Filed November 17, 2017]

Coordinated Proceeding	)
Special Title (Rule 3.550)	)
	)
LIPITOR CASES	)
	)

REQUEST THAT COORDINATION TRIAL JUDGE INCLUDE IN THIS COORDINATED PROCEEDING CERTAIN CASES SHARING COMMON QUESTIONS OF FACT AND LAW

Whereas California Code of Civil Procedure section 404.4 provides that: "The presiding judge of any court in which there is pending an action sharing a common question of fact or law with actions coordinated pursuant to Section 404, on the court's own motion . . . may request the judge assigned to hear the coordinated actions for an order coordinating the action."

Whereas the Presiding Judge of the Los Angeles Superior Court has delegated his authority to the Supervising Judge of the Civil Departments with respect to assignment of all civil matters throughout the Superior Court of the State of California for the County of Los Angeles.

Whereas JCCP 4761, **Lipitor Cases** (hereinafter "Lipitor JCCP"), was created by order of the Honorable Emilie Elias on November 19, 2013. On formation, the coordinated proceeding included three cases. Each of these cases involved plaintiffs who brought claims against Pfizer, Inc., et al. (hereinafter "Pfizer Defendants"). All coordinated cases alleged that the Plaintiffs took the drug Lipitor, and that in consequence they developed Type II diabetes.

Whereas, prior to March 2014, add-on requests were filed in three additional cases against the Pfizer Defendants. Subsequently, these cases were removed to federal court before the coordination trial judge acted on the add-on requests.

Whereas this Court is informed that, starting in early 2014, approximately 1800 additional Plaintiffs filed cases in California against the Pfizer Defendants contending that Lipitor caused their Type II diabetes. Beginning in March 2014, the Lipitor Defendants removed an cases in the Lipitor JCCP and all other similar California cases to federal court. Such cases were further transferred to a Multidistrict Litigation ("MDL") proceeding in South Carolina. These cases eventually were returned from the MDL to the Central District of California. On May 23, 2017 the federal district court remanded all cases in the Lipitor JCCP and all other California cases against the Pfizer Defendants involving the drug Lipitor to the California state courts in which Plaintiffs had filed them.

Whereas the cases listed on Attachment A hereto are currently pending in the Los Angeles Superior Court after remand from the Federal District Court for

the Central District of California. In each case Plaintiffs brought suit against the Pfizer Defendants alleging that the drug Lipitor caused their Type II diabetes. Such cases currently are assigned to the Honorable Carolyn B. Kuhl, but they have not been added on to the Lipitor JCCP because no party has requested that they be classified as add-on cases pursuant to California Rules of Court, rule 3.544.

Whereas, following briefing from all sides, Judge Kuhl issued an Order prescribing a procedure the parties should follow in requesting that cases be added-on to the Lipitor JCCP. A copy of Judge Kuhl's Order is Attachment B hereto, and a copy of the minute order of August 4, 2017 referenced therein is Attachment C hereto.

Whereas subsequent to the issuance of Judge Kuhl's August 4 and October 13, 2017 Orders, it continues to be the case that no party has requested that the cases listed in Attachment A be added on to the Lipitor JCCP.

Whereas each of the cases listed in Attachment A is a complex case as defined in California Rules of Court, rule 3.400. Moreover, each case listed in Attachment A is brought by a Plaintiff or Plaintiffs against the Pfizer Defendants alleging that the drug Lipitor caused them to develop Type II diabetes. In order meet the goals of California Rules of Court, rule 3.400(a) – avoiding unnecessary burdens on the Court, reducing litigation costs, moving the cases toward resolution expeditiously, and improving the quality of decision making for the parties, counsel and the Court – these

cases, which share common facts and issues of law, should be joined to the Lipitor JCCP.

Whereas it would be extremely burdensome for the Los Angeles Superior Court to handle the cases listed in Attachment A individually and outside of a coordinated proceeding.

Now therefore, on behalf of the Presiding Judge and acting as the Supervising Judge of the Civil Departments, pursuant to Code of Civil Procedure section 404.4, I hereby request that Judge Kuhl, as coordination trial judge assigned to the Lipitor JCCP, should exercise the authority granted by California Rules of Court, rule 3.544 and add the cases listed in Attachment A to the Lipitor JCCP, after notice and hearing pursuant to the procedures set forth in California Rules of Court, rule 3.554.

Dated: November 17, 2017

/s/Debre K. Weintraub
Honorable Debre K. Weintraub
Supervising Judge of the Civil Departments

- ATTACHMENT A -

Candacy Roberts-Anderson, et al. v. Pfizer Inc., et al.	BC536941
Darlene Jordan, et al. v. Pfizer Inc., et al	BC536930
Deberah Rivington, et al. v. Pfizer Inc., et al	BC536942
Emma Frields, et al. v. Pfizer Inc., et al.	BC536932
Fiette Williams, et al. v. Pfizer Inc., et al.	BC536934
Juanita Banks, et al. v. Pfizer Inc., et al	BC536936
Linda Roy, et al. v. Pfizer Inc., et al.	BC536940
Loretta Curley, et al. v. Pfizer Inc., et al.	BC536939
Marilyn Williams, et al. v. Pfizer Inc., et al.	BC536935
Ouida Valentine, et al. v. Pfizer Inc., et al.	BC537052
Ruth English, et al. v. Pfizer Inc., et al.	BC536937
Segalilt Siegel, et al. v. Pfizer Inc., et al.	BC536933
Tomie Isrel, et al. v. Pfizer Inc., et al.	BC536931
Zurita Gray, et al. v. Pfizer Inc., et al.	BC536938
Denelle Bailey, et. al v. Pfizer Inc., et al	BC537407

Blanca Mejia, et al. v. Pfizer Inc., et al.	BC537851
Lena Whitaker, et al. v. Pfizer Inc., et al.	BC537924
Maria Carbajal, et al v. Pfizer Inc., et al.	BC538103
Rose A. Williams, et al. v. Pfizer Inc., et al.	BC537852
Tonisha Powell, et al. v. Pfizer Inc., et al.	BC537850
Alida Adamyan, et al. v. Pfizer Inc., et al.	BC538067
Linda Franzone, et al v. Pfizer Inc., et al.	BC538104
Regina Ferberdino, et al. v. Pfizer Inc., et al.	BC538066
Ruby Hare, et al. v. Pfizer Inc., et al.	BC537836
Shirley Reynolds, et al. v. Pfizer Inc., et al.	BC537946
Elizabeth Ann Watts, et al v. Pfizer Inc., et al.	BC538131
Williams, Jewel, et al v. Pfizer Inc., et al.	BC539180
Helen Elliott, et al. v. Pfizer, Inc., et al.	BC554988
Bessie Barringer, et al. v. Pfizer, Inc., et al.	BC640576

Elizabeth Debay et al. v. Pfizer, Inc. et al.	BC620597
Genevieve Monreal, et al. v. Pfizer, Inc., et al.	BC620308
Gloria Ashley, et al. v. Pfizer, Inc. et al.	BC597288
Joni Boles, et al. v. Pfizer, Inc., et al.	BC632342
Jonna Roberts, et al. v. Pfizer, Inc. et al.	BC609198
Josefina Allison, et al. v. Pfizer, Inc., et al.	BC638755
Judith Smalley, et al. v. Pfizer, Inc., et al.	BC571105
Mary Baker, et al. v. Pfizer, Inc., et al.	BC642382
Mildred Lois Brown, et al. v. Pfizer, Inc., et al.	BC627217
Mixdalia Taime, et al. v. Pfizer, Inc., et al.	BC595160
Myrle Jackson, et al. v. Pfizer, Inc., et al.	BC622449
Lawana Smith, et al. v. Pfizer, Inc. et al.	BC617993
Robyn Whitney, et al. v. Pfizer Inc., et al.	BC573889
Rose Carpenter, et al. v. Pfizer, Inc., et al.	BC631286
Ruth Yaker, et al. v. Pfizer, Inc. et al.	BC593129

Sharal Scully, et al. v. Pfizer, Inc., et al.	BC625835
Shari Beneda, et al. v. Pfizer, Inc., et al.	BC583448
Joan Alston, et al. v. Pfizer, Inc., et al.	BC630499
Cynthia Davis, et al. v. Pfizer, Inc., et al.	BC631285
Sharon Campbell, et al. v. Pfizer, Inc., et al.	BC623414
Shary Stegall, et al. v. Pfizer, Inc., et al.	BC585392
Theresa Bagliere, et al. v. Pfizer, Inc., et al.	BC615571
Norma Adatan, et al. v. Pfizer, Inc., et al.	BC637353
Vivia Artz, et al. v. Pfizer, Inc., et al.	BC635793
Dena Blackmore, et al. v. Pfizer, Inc. et al.	BC643523
Sylvia Alvarado, et al. v. Pfizer Inc., et al.	BC645073
Amal Jones, et al. v. Pfizer, Inc.	BC645186
Marline Tillery, et al. v. Pfizer, Inc.	BC645478
Maria Xochrhua, et al. v. Pfizer, Inc.	BC647065
Patsy Wood, et al. v. Pfizer, Inc., et al.	BC652781
Patricia Alexander, et al. v. Pfizer Inc., et al	BC659589

Venicia Avila, et al. v. Pfizer Inc., et al.	BC664367
Carolyn Davis, et al. v. Pfizer, Inc., et al.	BC648688

APPENDIX N

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

JCCP4761

[Filed December 15, 2017]

Coordination Proceeding Special Title Rule (3.550)	)
	)
Lipitor Cases	)
	)

HONORABLE CAROLYN B. KUHL JUDGE

HONORABLE ADD-ON	JUDGE PRO TEM
NONE	Deputy Sheriff
	DEPT. 309
J. MANRIQUE E. MUNOZ, C.A.	DEPUTY CLERK

ELECTRONIC RECORDING MONITOR

NOT REPORTED	Reporter
Plaintiff Counsel	NO APPEARANCES
Defendant Counsel	

NATURE OF PROCEEDINGS:

COURT ORDER RE ADD-ON CASES

On November 20, 2017, the Supervising Judge of the Civil Departments, on behalf of the Presiding Judge, requested that certain cases sharing common questions of fact and law with cases coordinated in JCCP4761 be coordinated as "add-on cases."

On November 20, 2017, by minute order, this Court ordered that any party who objected to including such cases in the coordinated proceeding serve an opposition to the Supervising Judge's Request within 10 days of service of the Request.

This Court has received no such opposition.

This Court, as coordination trial judge, hereby grants the Request of the Supervising Judge of the Civil Departments to add on the cases listed in Attachment A to the Supervising Judge's Request to this coordinated proceeding. The Request of the Supervising Judge sets forth the reasons why the cases are appropriate add-on proceedings for JCCP 4761. The list of add-on cases subject to this order is also appended to this minute order.

The clerk shall serve this minute order on the Supervising Judge of the Civil Departments and on counsel for the Defendants. Defendants are ordered to comply with CRC 3.529(a) by filing the order in each included action, serving the order on each party appearing in an included action, and submitting it to the Chair of the Judicial Council.

A Status Conference in the JCCP proceeding is set for January 30, 2018, at 2:30 p.m. in Department 309. Five court days before the status conference, counsel shall file a joint status report addressing a discovery plan for this phase of the litigation and any legal issues that should be determined by motion early in the litigation.

The Court further notes that counsel for Plaintiffs in the JCCP proceeding has filed a Notice on November 29, 2017, listing additional cases (from Los Angeles Superior Court and from other counties) that share common questions of fact and law with the cases identified in the Nov. 17, 2017 Request of the Supervising Judge of the Civil Departments. The joint status report shall address the parties' respective positions as to whether it will be necessary for Judge Weintraub and the Presiding Judges of the other Superior Courts with pending Lipitor cases to file requests with this court to have the cases added-on to the proceeding, or whether this court by issuance of an order to show cause may solicit objections from the parties sufficient to allow the court to determine whether there is objection and, if none, to add on additional cases as this court deems appropriate

CERTIFICATE OF ELECTRONIC SERVICE
CODE OF CIVIL PROCEDURE 1010.6

I, the below named Executive Officer/Clerk of the above entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served one copy of the 12/15/17 Minute Order entered herein, on 12/15/17, upon each party or counsel of record in the above entitled action, by electronically serving the document on Case Anywhere at

www.CaseAnywhere.com on 12/15/17 from my place of business, Central Civil West Courthouse, 600 South Commonwealth Avenue, Los Angeles, California 90005 in accordance with standard court practices.

Dated: December 15, 2017

Sherri R. Carter, Executive Officer/Clerk

By: /s/J. Manrique, Deputy Clerk
J. Manrique

MINUTES ENTERED
12/15/17
COUNTY CLERK

- ATTACHMENT A -

Candacy Roberts-Anderson, et al. v. Pfizer Inc., et al.	BC536941
Darlene Jordan, et al. v. Pfizer Inc., et al	BC536930
Deberah Rivington, et al. v. Pfizer Inc., et al	BC536942
Emma Frields, et al. v. Pfizer Inc., et al.	BC536932
Fiette Williams, et al. v. Pfizer Inc., et al.	BC536934
Juanita Banks, et al. v. Pfizer Inc., et al	BC536936
Linda Roy, et al. v. Pfizer Inc., et al.	BC536940
Loretta Curley, et al. v. Pfizer Inc., et al.	BC536939
Marilyn Williams, et al. v. Pfizer Inc., et al.	BC536935
Ouida Valentine, et al. v. Pfizer Inc., et al.	BC537052
Ruth English, et al. v. Pfizer Inc., et al.	BC536937
Segalilt Siegel, et al. v. Pfizer Inc., et al.	BC536933
Tomie Isrel, et al. v. Pfizer Inc., et al.	BC536931
Zurita Gray, et al. v. Pfizer Inc., et al.	BC536938
Denelle Bailey, et. al v. Pfizer Inc., et al	BC537407

Blanca Mejia, et al. v. Pfizer Inc., et al.	BC537851
Lena Whitaker, et al. v. Pfizer Inc., et al.	BC537924
Maria Carbajal, et al v. Pfizer Inc., et al.	BC538103
Rose A. Williams, et al. v. Pfizer Inc., et al.	BC537852
Tonisha Powell, et al. v. Pfizer Inc., et al.	BC537850
Alida Adamyan, et al. v. Pfizer Inc., et al.	BC538067
Linda Franzone, et al v. Pfizer Inc., et al.	BC538104
Regina Ferberdino, et al. v. Pfizer Inc., et al.	BC538066
Ruby Hare, et al. v. Pfizer Inc., et al.	BC537836
Shirley Reynolds, et al. v. Pfizer Inc., et al.	BC537946
Elizabeth Ann Watts, et al v. Pfizer Inc., et al.	BC538131
Williams, Jewel, et al v. Pfizer Inc., et al.	BC539180
Helen Elliott, et al. v. Pfizer, Inc., et al.	BC554988
Bessie Barringer, et al. v. Pfizer, Inc., et al.	BC640576

Elizabeth Debay et al. v. Pfizer, Inc. et al.	BC620597
Genevieve Monreal, et al. v. Pfizer, Inc., et al.	BC620308
Gloria Ashley, et al. v. Pfizer, Inc. et al.	BC597288
Joni Boles, et al. v. Pfizer, Inc., et al.	BC632342
Jonna Roberts, et al. v. Pfizer, Inc. et al.	BC609198
Josefina Allison, et al. v. Pfizer, Inc., et al.	BC638755
Judith Smalley, et al. v. Pfizer, Inc., et al.	BC571105
Mary Baker, et al. v. Pfizer, Inc., et al.	BC642382
Mildred Lois Brown, et al. v. Pfizer, Inc., et al.	BC627217
Mixdalia Taime, et al. v. Pfizer, Inc., et al.	BC595160
Myrle Jackson, et al. v. Pfizer, Inc., et al.	BC622449
Lawana Smith, et al. v. Pfizer, Inc. et al.	BC617993
Robyn Whitney, et al. v. Pfizer Inc., et al.	BC573889
Rose Carpenter, et al. v. Pfizer, Inc., et al.	BC631286
Ruth Yaker, et al. v. Pfizer, Inc. et al.	BC593129

Sharal Scully, et al. v. Pfizer, Inc., et al.	BC625835
Shari Beneda, et al. v. Pfizer, Inc., et al.	BC583448
Joan Alston, et al. v. Pfizer, Inc., et al.	BC630499
Cynthia Davis, et al. v. Pfizer, Inc., et al.	BC631285
Sharon Campbell, et al. v. Pfizer, Inc., et al.	BC623414
Shary Stegall, et al. v. Pfizer, Inc., et al.	BC585392
Theresa Bagliere, et al. v. Pfizer, Inc., et al.	BC615571
Norma Adatan, et al. v. Pfizer, Inc., et al.	BC637353
Vivia Artz, et al. v. Pfizer, Inc., et al.	BC635793
Dena Blackmore, et al. v. Pfizer, Inc. et al.	BC643523
Sylvia Alvarado, et al. v. Pfizer Inc., et al.	BC645073
Amal Jones, et al. v. Pfizer, Inc.	BC645186
Marline Tillery, et al. v. Pfizer, Inc.	BC645478
Maria Xochrhua, et al. v. Pfizer, Inc.	BC647065
Patsy Wood, et al. v. Pfizer, Inc., et al.	BC652781
Patricia Alexander, et al. v. Pfizer Inc., et al	BC659589

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