Court of Appeals No. 13-56310

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUDITH ROMO, ET AL.,

Plaintiffs – Appellees,

v.

MCKESSON CORPORATION, ET AL.,

Defendants – Appellant, TEVA PHARMACEUTICALS USA, INC.

Appeal Following Grant Of Petition for Permission to Appeal from the United States District Court For the Central District of California, District Court No. 5:12-CV-2036-PSG

Honorable Philip S. Gutierrez, Presiding

APPELLANT TEVA PHARMACEUTICALS USA, INC.'S OPENING BRIEF

GREENBERG TRAURIG, LLP
Ginger Pigott (CA SBN 162908)
Amy B. Alderfer (CA SBN 205482)
Karin L. Bohmholdt (CA SBN 234929)
1840 Century Park East, Suite 1900
Los Angeles, CA 90067
Telephone: 310-586-7700
Facsimile: 310-586-7800

GREENBERG TRAURIG, LLP
Lori G. Cohen
Victoria D. Lockard
Terminus 200, 3333 Piedmont Road, NE, Suite 2500
Atlanta, GA 30305
Telephone: 678-553-2100
Facsimile: 678-553-2212

GREENBERG TRAURIG, PA
Elliot H. Scherker
333 Avenue Of The Americas, Suite 4400
Miami, FL 33131
Telephone: 305-579-0579
Facsimile: 305-579-0717

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES AND RULES

OTHER AUTHORITIES

CORPORATE DISCLOSURE STATEMENT

Appellant Teva Pharmaceuticals USA, Inc. ("TUSA") is an indirect wholly-owned subsidiary of Teva Pharmaceutical Industries Ltd. through these parent companies: (i) Orvet UK Unlimited (Majority Shareholder), which in turn is directly owned by TEVA Pharmaceuticals Europe B.V., which in turn is directly owned by Teva Pharmaceutical Industries Ltd.; (ii) Teva Pharmaceutical Holdings Coöperatieve U.A. (Minority Shareholder), which in turn is directly owned by IVAX LLC, a direct subsidiary of TUSA. Teva Pharmaceutical Industries Ltd. is the only publicly traded direct or indirect parent company of TUSA, and no other publicly traded company owns more than 10% of its stock.

August 5, 2013

Respectfully submitted,
GREENBERG TRAURIG, LLP

By: s/ Karin L. Bohmholdt
Attorneys for Defendant-Appellant
Teva Pharmaceuticals USA, Inc.

I. STATEMENT OF JURISDICTION

As discussed more fully below, the district court had jurisdiction on three bases: (1) as a "mass action" under the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d)(11); (2) federal question and supplemental jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367; and (3) an action between citizens of different states in which the amount in controversy exceeds $75,000, pursuant to 28 U.S.C. § 1332(a). (*See generally* ER 27-32 (Notice of Removal).)

Appellant Teva Pharmaceuticals USA, Inc. ("TUSA") removed this action to federal court pursuant to 28 U.S.C. §§ 1441, 1446, and 1453. (ER 27 (Notice of Removal, ¶ 6).) The district court remanded the case on February 20, 2013, concluding that it did not have subject matter jurisdiction (ER 1-17 (Remand Order)), and TUSA timely petitioned this Court on March 4, 2013, for permission to appeal, pursuant to 28 U.S.C. § 1453(c). (Ninth Circuit Docket, Case No. 13-80036.) This Court granted TUSA's Petition on July 26, 2013, and set a briefing schedule. (ER 20-21.) Thus, this Court has jurisdiction pursuant to 28 U.S.C. § 1453(c).

II. ISSUES PRESENTED

1. Does CAFA's "mass action" provision, which grants jurisdiction to federal courts in cases "in which monetary relief claims of 100 or more persons are

proposed to be tried jointly,"[1] apply when more than 100 plaintiffs file a state-court petition to coordinate multi-plaintiff state court cases "for all purposes," as the Seventh Circuit held was the case in *In re Abbott Labs., Inc.*, 698 F.3d 568 (7th Cir. 2012)?[2]

2. Alternatively, is there diversity jurisdiction where (i) Plaintiffs have not stated any valid, non-preempted claims against the only non-diverse defendant in this action, and (ii) the complaint seeks to frustrate complete diversity by joining fifty individual plaintiffs whose claims do not arise out of the same transaction, occurrence, or series of transactions or occurrences?

3. Alternatively, is there federal question jurisdiction where Plaintiffs' state-law claims necessarily raise a substantial and disputed question of federal law regarding whether the generic sellers of prescription medication breached their duty to meet the same federal labeling requirements as the brand manufacturer?

III. PERTINENT STATUTES

As instructed by Cir. Rule 28-2.7, we set forth 28 U.S.C. §§ 1331, 1332, and 1367, in an addendum to this brief. Because the language of § 1332(d)(11) is directly at issue, we set forth pertinent excerpts from that subsection here:

---

[1] 28 U.S.C. § 1332(d)(11)

[2] "Coordination" is the joining of cases pending in different courts before a single "coordination trial judge" in a single court. Cal. Civ. Proc. Code § 404 et seq.; Cal. Rules of Court 3.501 et seq.

28 U.S.C. § 1332(d)(11)

(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B)

(i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2)) 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, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which—

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

IV. STATEMENT OF THE CASE

This case, "*Romo*," is one of more than 40 multi-plaintiff lawsuits originally filed in California state court, alleging injuries from the ingestion of propoxyphene-containing pain products. (ER 57; *see also* Statement of Related Cases, *infra*.) *Romo* was originally filed on November 13, 2012. (ER 55.) There also are many other cases relating to Darvocet, Darvon, and generic propoxyphene products pending in state court after remand from federal district courts in California or from the Propoxyphone MDL proceeding in the Eastern District of Kentucky. (ER 1; *see also* Statement of Related Cases, *infra*.)

On October 23, 2012, attorneys from four law firms representing plaintiffs in a majority of the more than 40 actions now pending invoked California's coordination statutes and asked the California Judicial Council to (i) deem the then-pending cases and the ones still to be filed (which would include this action) as "complex";[3] and (ii) establish a coordinated proceeding for all California propoxyphene actions before a single trial judge "for all purposes," to avoid, among other things, the risk of "inconsistent judgments" on issues including "liability, allocation of fault" and others. (ER 161-62; *see also* ER 177

[3] A case is "complex" if it "requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel." Cal. Rules of Court, Rule 3.400(a).

(Memorandum In Support of Coordination Petition).)[4] It is undisputed that the Coordination Petition embraces the claims of more than 100 Plaintiffs.[5]

CAFA vests the federal courts with jurisdiction and permits removal whenever a plaintiff proposes that the monetary relief claims of 100 or more plaintiffs be "tried jointly." 28 U.S.C. § 1332(d)(11). Accordingly, on November 20, 2012, TUSA removed *Romo* under the "mass action" provisions of CAFA, and on federal question and diversity grounds. (ER 27, 48 (Notice of Removal, ¶¶ 6, 57).)

The district court issued an Order to Show Cause Re Remand, and Plaintiffs immediately moved to remand. (ER 18-19 (OSC); Docket # 25-1 (Motion).) The district court ordered remand. (ER 1-17.) In the main, the district court followed other district court decisions on related cases and concluded that the action did not fall within CAFA's "mass action" provisions and that the court need not to follow the Seventh Circuit's decision in *In re Abbott Labs*. (ER 5.) The district court also concluded that (1) there was no substantial federal question concerning FDA

[4] California's Coordination procedures are discussed in greater detail below.

[5] Although the Coordination Petition expressly identified the cases pending at the time of filing, it also stated an intent to seek coordination of additional, but then-unfiled cases, which included this action. (ER 162 (Coordination Petition).) Coordination Counsel confirmed that they intended all cases filed in California state court to become part of the Petition. (ER 5 at n.1.) Thus, the district court correctly held, and Plaintiffs have not disputed, that this action is properly included by the Coordination Petition in determining whether the present action qualifies as a mass action. (*Id.*)

labeling requirements, and (2) there was no fraudulent joinder or procedural misjoinder to provide traditional diversity jurisdiction. (ER 8-17.)

TUSA petitioned this Court for permission to appeal, pursuant to 28 U.S.C. § 1453, which this Court granted on July 26, 2013.

V. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Because the question of how the single, coordinated "super-lawsuit" came to be drives the question of whether the federal courts now have jurisdiction under CAFA's mass action provisions, we provide here the procedural history and an overview of California's coordination rules.

A. Plaintiffs' Counsel Originally File Separate State Court Actions.

Prescription pain products containing propoxyphene were available on the market in the United States from 1957 through November of 2010, at which point they were voluntarily withdrawn from the U.S. market. (ER 78, ¶¶ 136-37.)[6] Plaintiffs allege that in 2009, the FDA ordered Xanodyne (which had acquired rights in Darvocet and Darvon in 2005) to include certain warnings on the label for propoxyphene products and to distribute other information about the drugs. (ER 74-77, ¶¶ 119-25.)

At least 40 multi-plaintiff lawsuits, each with less than 100 plaintiffs, but all

[6] The district court's Remand Order indicated that the FDA ordered the drug withdrawn (ER 1), but this is incorrect and Plaintiffs do not so allege. (ER 78 (Complaint, ¶¶ 136-37).)

combining to total more than 1,500 plaintiffs, were originally filed in California state court, alleging unspecified cardiovascular injuries from the alleged ingestion of propoxyphene pain medications. (*See* ER 1; *see also* Statement of Related Cases, *infra*.)[7] *Romo* is one of those California propoxyphene actions and was originally filed on November 13, 2012. (ER 55.) The *Romo* Plaintiffs are 50 individuals, who appear to have no more relationship to each other than they do to the entire pool of plaintiffs in all of the California propoxyphene actions. (ER 55.)

Plaintiffs asserted claims against numerous entities they allege are or were involved in the manufacture of brand name and generic prescription pain medications containing propoxyphene (ER 62-71, ¶¶ 25-89) and also against one purported distributor of prescription medications, McKesson Corporation, which Plaintiffs alleged is a California citizen (ER 60-61, ¶¶ 18-24). The other defendants all are non-California citizens. (*See* ER 37 (Notice of Removal, ¶ 37).) Plaintiffs alleged McKesson engaged in marketing, promoting, distributing, advertising, and merchandising propoxyphene products. (ER 60, ¶ 19.) As to

[7] Certain related cases were previously removed on diversity grounds and remanded by the district court in the MDL proceedings. *See In re Darvocet, Darvon & Propoxyphene Prods. Liab. Litig.*, 889 F. Supp. 2d 931 (E.D. Ky. 2012). The decision was heralded as a "roadmap for keeping propoxyphene cases in state court.'" *See* Steven M. Sellers, *Plaintiffs win remand to state court in drug labeling case, despite Mensing*, American Association for Justice (Aug. 2, 2012) (quoting Louis Bograd, Esq.), *available at* http://www.justice.org/cps/rde/xchg/justice/hs.xsl/18936.htm (last accessed Aug. 5, 2013).

TUSA, Plaintiffs alleged TUSA developed, designed, researched, tested, licensed, manufactured, labeled, advertised, promoted, marketed, sold, and distributed generic propoxyphene products. (ER 68, ¶ 72.)

Plaintiffs failed to allege where Plaintiffs reside, except to state that Plaintiff Judith Romo is a California resident. (ER 59, ¶ 14.) Plaintiffs also failed to allege which form of propoxyphene they took, which defendant manufactured it, or what cardiovascular injury they allegedly experienced. (*See generally* ER 57-94.)

Plaintiffs alleged twenty causes of action varying from strict products liability, to failure to warn, to fraud, as well as various claims under California Business and Professions Code sections. (ER 94-154, ¶¶ 230-523.) Plaintiffs seek to recover compensatory and punitive damages against all Defendants under numerous theories, including that manufacturers of generic prescription medications containing propoxyphene (the "Generic Defendants") breached their duty to use the same FDA-approved labeling ordered to be used by the manufacturers of brand name medications containing propoxyphene. (ER 58, ¶¶ 5-7.)

B. California's Coordination Statutes And Rules

California has established statutes and rules for coordinating and consolidating complex cases. "Consolidation" arises under California law when cases with common questions are pending in the same court; the corollary for cases

pending in different courts is "coordination." *See, e.g.*, Cal. Civ. Proc. Code § 1048; 4 Bernard E. Witkin, *Cal. Proc.*, Pleading § 352, p. 4 (5th ed. 2008) (explaining the essence of the procedure as being the ability to coordinate actions filed in different courts (*e.g.*, different counties) when they share common questions on principles similar to those governing consolidation of actions filed in a single court); Eric E. Younger & Donald E. Bradley, *Younger on Cal. Motions* § 22:14 (2012 ed.) ("coordination is the equivalent of consolidation (Cal. Code Civ. Proc. § 1048) of cases pending in different counties"). Because the cases here were pending in different courts, Plaintiffs sought to join them before a single "coordination trial judge" for all purposes pursuant to Code of Civil Procedure sections 404 et seq. (ER 160 (Coordination Petition); ER 175 (Memorandum In Support of Coordination Petition).) "Coordination trial judge" means a judge designated under Code of Civil Procedure section 404.3 "to hear and determine" coordinated actions. Cal. Rule of Court 3.501(9).

California Code of Civil Procedure section 404 provides, in relevant part: "[w]hen civil actions sharing a common question of fact or law are pending in different courts, a petition for coordination may be submitted to the … Judicial Council, by" a party or the presiding judge under various circumstances. Coordination is appropriate if the actions "shar[e] a common question of fact or law" and "if 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 the common question of fact or law is 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; [judicial efficiency]; 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." Cal. Civ. Proc. Code § 404.1.

In turn, the Judicial Council is required to promulgate rules governing coordination, and it has done so. Cal. Civ. Proc. Code § 404.7 (authorizing rules); Cal. Rules of Court, Title 3, Chapter 7 (rules). The rules provide for, among other things, a procedure for petitioning for coordination, appointment of "liaison counsel," service of papers, and duties of "the coordination trial judge." Cal. Rule of Court 3.501. Article 4 governs pre-trial and trial proceedings in coordinated actions, and it provides that a coordination trial judge is required to manage the proceedings in an active role with an eye toward, among other things, "expedit[ing] the disposition of the coordinated actions." *Id.*, Rule 3.541(a)(4). The judge is permitted to "[o]rder any issue or defense to be tried separately and before trial of the remaining issues" to expedite matters. *Id.*, Rule 3.541(b)(3).

In short, coordination trial judges are assigned "for all purposes," and while they enjoy wide latitude to resolve cases in the most expeditious fashion, the

statutes and Plaintiffs here contemplate coordinated efforts through trial. *See also* S. Amy Spencer, *Once More into the Breach, Dear Friends: The Case for Congressional Revision of the Mass Action Provisions in the Class Action Fairness Act of 2005*, 39 Loy. L.A. L. Rev. 1067, 1096-97 (2006); ER 160 (Coordination Petition); ER 175 (Memorandum In Support of Coordination Petition, so requesting).

C. Plaintiffs' Counsel Asks The California Judicial Council To Coordinate All Actions Before A Coordination Trial Judge "For All Purposes".

On October 23, 2012, attorneys from four law firms representing plaintiffs in a majority of the more than 40 actions now pending invoked California's coordination statutes and asked the Judicial Council to establish a coordinated proceeding before a single trial judge "for all purposes." (ER 160-62.) It is undisputed that the Coordination Petition embraces the claims of more than 100 plaintiffs.[8]

The Coordination Petition's theme was that coordination *for all purposes* before a single judge was necessary because common questions allegedly predominate and one judge should decide key issues to avoid inconsistent "liability" rulings, including on issues such as "allocation of fault and contribution." (*See* ER 177 (Memorandum in Support of Coordination Petition at

[8] *See* note 5, *supra*.

ln. 1-21 (urging that, without coordination, inconsistent rulings may result, including on appeal, as well as on issues such as "liability, allocation of fault and contribution"); *see also* ER 175 at ln. 7-8 ("[c]ommon questions of fact or law are predominating and significant to the litigation"); *id*. at ln. 16-19 (cases purportedly involve the "same" facts and issues); ER 184 (Declaration of Elise Sanguinetti in Support of Coordination Petition at ¶¶ 11-12 ("Without coordination, two or more separate courts will decide essentially the same issues and may render different rulings *on liability and other issues* …. [O]nly if the defendants are able to settle these claims in a coordinated action is there any realistic possibility of settlement." (emphasis added)).) And, making a plea to policy, the Coordination Petition argues, "One judge hearing all of the actions *for all purposes*" would "promote the ends of justice," and that, "[w]ithout coordination, the parties may suffer from disadvantages caused by duplicative and inconsistent *rulings, orders, or judgments*." (ER 175 (Memorandum (emphasis added)).)

D. Removal Proceedings And Remand Order

TUSA removed *Romo* to the district court under the "mass action" provisions of CAFA, federal question, diversity jurisdiction (fraudulent joinder and procedural misjoinder), and supplemental jurisdiction. (ER 27-48 (Notice of Removal).) The district court issued an Order to Show Cause Regarding Remand, and the Plaintiffs moved to remand *Romo*, claiming for the first time that their

coordination request would be limited to pre-trial proceedings. (ER 18-19 (OSC); Docket # 25-1 (Motion to Remand).)

The district court remanded, concluding that Plaintiffs' Coordination Petition did not expressly propose a "joint trial" and thus did not fall within CAFA's ambit. (ER 7.) In the main, the district court followed other district court decisions on related cases and concluded that it need not follow *Abbott*. (ER 5.) As for federal question, the district court concluded that Plaintiffs' failure-to-warn claim was not based exclusively upon a violation of federal labeling requirements and thus did not present a substantial federal question. (ER 10-11.) Finally, as to diversity, the district court (1) relied upon a decision by the MDL court in *In re Darvocet* and concluded that a defense of federal preemption did not permit a finding of fraudulent joinder, and (2) decided that the individual plaintiffs were properly joined because the court concluded that Plaintiffs all "are members of the same group, allege the same injuries … and bring claims pursuant to the same legal theories." (ER 16.)

TUSA timely filed a petition for permission to appeal, which was granted by this Court. 28 U.S.C. § 1453(c). Most of the other California propoxyphene actions are now pending in California state court following remand orders issued by district courts in California or in the MDL proceeding in the Eastern District of Kentucky; however, petitions for permission to appeal from those remand orders

were filed in this Court, or, with respect to the actions remanded from the MDL proceeding, in the Sixth Circuit.[9] (*See* Statement of Related Cases, *infra*.)

VI. SUMMARY OF ARGUMENT

The district court erred as to each aspect of federal jurisdiction. First, CAFA's "mass action" provision is not so limited as to provide for federal jurisdiction only when Plaintiffs propose that they all appear at roll call on day one of a jury trial and call witnesses together. Instead, the phrase "tried jointly" in CAFA is intended to mean something more, and the proposal here absolutely meets it in the same way the plaintiffs' request in *In re Abbot Labs* did. CAFA was intended to prevent these very types of cases from evading federal jurisdiction merely because the plaintiffs did not label their action a "class action," yet to read the statute as Plaintiffs do here would defeat that core purpose. Second, there is traditional diversity here because (i) no valid, non-preempted claim is asserted against the only non-diverse defendant (McKesson), and (ii) these plaintiffs are misjoined, because, although there may be certain overlapping issues, the alleged injuries do not arise from the same transaction or occurrence. Third, there is federal question jurisdiction here because the core of Plaintiffs' failure-to-warn

[9] This Court has ordered that all the related matters in this Circuit, in which Section 1453(c) petitions are pending, be held in abeyance pending resolution of this case and *Corber v. Xanodyne*, Case No. 13-56306. (*See* Statement of Related Cases, *infra*.)

claim is that the Generic Defendants, like TUSA, failed to follow federal labeling requirements that apply to the brand name makers.

VII. STANDARD OF REVIEW

The district court's Remand Order is reviewed de novo, as is CAFA's construction. *E.g.*, *Roth v. CHA Hollywood Medical Center, L.P.*, No. 13-55771, __ F.3d __, 2013 WL 3214941, at * 2 (9th Cir. June 27, 2013).

Having accepted this appeal, this Court also may review non-CAFA issues encompassed by the remand order. *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 672-73 (9th Cir. 2012); *accord Anderson v. Bayer Corp.*, 610 F.3d 390, 394 (7th Cir. 2010) (Court, under § 1453(c)(1), is "'free to consider any potential error in the district court's decision, not just a mistake in application of [CAFA]'" (citation omitted, alteration original)).

VIII. ARGUMENT

A. The District Court's Conclusion That This Is Not A Mass Action Under CAFA Is Contrary To Rules Of Statutory Interpretation, Seventh Circuit Precedent, And Congressional Intent.

In 2005, Congress "alter[ed] the landscape for federal court jurisdiction over class actions." *Abrego Abrego v. Dow Chemical Co.*, 443 F.3d 676, 677 (9th Cir. 2006). In that regard, in addition to traditional class actions, CAFA covers certain other cases involving large numbers of plaintiffs, called "mass actions." *Id.* at 677-

78; 28 U.S.C. § 1332(d)(11). The reason for this inclusion was to "expand[] federal jurisdiction over mass actions—suits that are brought on behalf of numerous named plaintiffs who claim that their cases present common questions of law or fact that should be tried together even though they do not seek class certification status. Mass action cases function very much like class actions and are subject to many of the same abuses." S. Rep. No. 14, S. REP. 109-14, 46, reprinted in 2005 U.S.C.C.A.N. 3, 43. "Mass actions are simply class actions in disguise. They involve a lot of people who want their claims adjudicated together and they often result in the same abuses as class actions." *Id.* at 44-45.

Thus, "a mass action shall be deemed to be a class action [and] removable," and a "mass action" is defined to be "[a]ny 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, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a)." 28 U.S.C. § 1332(d)(11)(A) and (d)(11)(B)(i). Certain types of actions are expressly excepted from the mass action definition. As relevant here, cases joined "solely for pretrial proceedings" are excepted from the definition. 28 U.S.C. § 1332(d)(11)(B)(ii)(IV). Plaintiffs bear the burden to demonstrate by a preponderance of the evidence any jurisdictional exceptions. *See Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1024

(9th Cir. 2007). Although mass action removal cannot be achieved "upon motion of a defendant" to join individual actions, 28 U.S.C. § 1332(d)(11)(B)(ii)(II), the opposite is true where plaintiffs propose to join individual actions totaling more than 100 individual plaintiffs. *See, e.g.*, *Tanoh v. Dow Chemical Co.*, 561 F.3d 945, 956 (9th Cir. 2009).

Here, there is no dispute that the requirements for numerosity and amount in controversy are satisfied. Instead, the only dispute is over whether Plaintiffs made a request to have the cases "tried jointly" when they requested coordination of all cases for all purposes before a single trial judge. (*See* Docket # 25-1 at pp. 3, 6-10 (Motion to Remand); Docket # 32 at pp. 3-8 (Reply).) In that regard, the statutes do not define what is meant by "tried jointly," or what is meant by "solely for pretrial proceedings," nor does anything in the statute suggest how the two provisions work together. *See Aburto v. Midland Credit Mgmt.*, 3:08-cv-1473-K, 2009 WL 2252518, at *3-4 (N.D. Tex. July 27, 2009) (determining what is meant by "proposal for joint trial" and holding that it would defeat CAFA's purposes to await a final pretrial conference to determine whether an express joint trial request will take place). And, although the removing party bears the burden to demonstrate that jurisdiction exists, *Abrego Abrego*, 443 F.3d at 678, Plaintiffs bear the burden to demonstrate by a preponderance of the evidence any jurisdictional exceptions, *Serrano*, 478 F.3d at 1024.

1. "Proposed To Be Tried Jointly" Is Broader Than The District Court's Interpretation.

Plaintiffs and the district court assume that "tried jointly" must mean, rent an auditorium, and "Plaintiffs 1 through 141, call your first witness" and that everything before that moment is "pretrial." Yet, neither a fair reading of CAFA nor basic common sense warrants such a restrictive interpretation. As Chief Judge Easterbrook explained for the unanimous panel in *Bullard v. Burlington Northern Santa Fe Ry. Co.*, 535 F.3d 759 (7th Cir. 2008), "[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 (quoting 28 U.S.C. § 1332(d)(11)(B)(i)), *cited with approval in Tanoh v. Dow Chemical Co.*, 561 F.3d 945, 956 (9th Cir. 2009); *accord Koral v. Boeing Co*., 628 F.3d 945, 947 (7th Cir. 2011); *In re Abbott Labs., Inc.,* 698 F.3d 568, 573 (7th Cir. 2012).

In statutory construction, the Court's starting point is the plain language of the statute: "'[W]e look first to the plain language of the statute, construing the provisions of the entire law, including its object and policy, to ascertain the intent of Congress.'" *Carson Harbor Vill., Ltd. v. Unocal Corp.,* 270 F.3d 863, 877 (9th Cir. 2001) (en banc) (citation omitted). "When determining the plain meaning of language, [the Court] may consult dictionary definitions." *Af-Cap, Inc. v. Chevron*

Overseas (Congo) Ltd., 475 F.3d 1080, 1088 (9th Cir. 2007) (citing *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004)). In addition, a statute's plain meaning may not be viewed in isolation, but rather, in the context of the entire statutory scheme, including its object and policy. *See Roberts v. Sea-Land Services, Inc.*, 132 S. Ct. 1350, 1357 (2012); *United States v. Williams*, 659 F.3d 1223, 1225 (9th Cir. 2011), *cert. denied,* 132 S. Ct. 1951 (2012) ("'[W]e examine not only the specific provision at issue, but also the structure of the statute as a whole, including its object and policy.'" (citation omitted)). If the statutory language is ambiguous, then the Court also may consult legislative history. *United States v. Daas,* 198 F.3d 1167, 1174 (9th Cir.1999).

a. "Tried Jointly" Does Not Require A Roll Call.

Even a brief glance at various statutes and dictionary definitions reveals that "trial" does not necessarily equate with "call your first witness," and that adding the modifier "jointly" to the mix, along with "100 or more plaintiffs" only cements the point. Commentators agree. *See* S. Amy Spencer, *Once More into the Breach, Dear Friends: The Case for Congressional Revision of the Mass Action Provisions in the Class Action Fairness Act of 2005*, 39 Loy. L.A. L. Rev. 1067, 1096-97 (2006) (concluding that California's coordination and consolidation statutes do not permit consolidation for "pretrial only" such that a Plaintiff's request for consolidation under the statutes necessarily risks treatment as a mass action);

Guyon Knight, *The CAFA Mass Action Numerosity Requirement: Three Problems with Counting to 100*, 78 Fordham L. Rev. 1875, 1894 (2010) (noting difficultly with defining "tried jointly" in the statute).

For example, the California Code Commission long ago explained that "[a] trial is the examination before a competent tribunal, according to the law, of the facts, or a question of law put in issue in a cause for the purpose of determining such issue." Cal. Civ. Proc. Code § 591, Code Commission Notes. Likewise, Black's Law Dictionary defines "trial" to include "a formal judicial examination of evidence and determination of claims in an adversary proceeding." *Black's Law Dictionary* (9th ed. 2009). Similarly, "jointly" does not necessarily mean "at literally the same time." Instead, it means something broader such as "in conjunction, combination, or concert." *Oxford English Dictionary*, http://www.oed.com (search "jointly") (last visited February 6, 2013). Putting these basic definitions together—and against the backdrop of Congress's stated intent to bring class action type cases within the ambit of CAFA even when they are not truly class actions—"tried jointly" means to include formal judicial examination of issues, facts, or questions of law in conjunction with one another.

Here, there is no doubt that Plaintiffs proposed such a proceeding.[10] The

[10] The ordinary meaning of the term "propose" is "to offer or suggest … for consideration, acceptance, or action." *Random House Webster's Unabridged Dictionary* 1551 (2d ed. 2001); *American Heritage Dictionary of the English*

Plaintiffs proposed coordination of all California propoxyphene cases "for all purposes" and claim that, without coordination, these cases would be subject to "inconsistent rulings or judgments" on issues such as liability, allocation of fault, and contribution. (See Discussion, *supra*, at 11-12.) As the Seventh Circuit explained with regard to a similar proposal in *Abbott*, "it is difficult to see how a trial court could consolidate the cases as requested by plaintiffs and not hold a joint trial or an exemplar trial with the legal issues applied to the remaining cases. In either situation, plaintiffs' claims would be tried jointly." *Abbott*, 698 F.3d at 573.

And, indeed, the remanded cases are being coordinated and a single state court judge will be proceeding over all aspects. It may well be that an auditorium is not rented, but Plaintiffs absolutely have suggested that there be "a formal examination of evidence and claims" by a single trial judge, had "in conjunction" with one another, for the purpose of avoiding inconsistent rulings or judgments on issues such as liability, allocation of fault, and contribution. (*See* Section V.C, *supra*.) That is precisely the type of "joint trial" proceeding that makes this a "mass action." For this reason alone, reversal is required.

Language 1413 (5th ed. 2011) ("propose: To put forward for consideration, discussion, or adoption; suggest"); *Black's Law Dictionary* (9th ed. 2009) ("Proposal: Something offered for consideration or acceptance").

b. To Read "Tried Jointly" As Including Only The Moment Upon Which Pre-Trial Proceedings Are Completed Would Render The Statutory Exception For "Pre-Trial Only" Superfluous.

Although a fair reading of "tried jointly" is sufficient to warrant reversal, delving further into the statute also cements the conclusion. Initially, it is axiomatic that courts may not read statutes in a manner that renders any portion of them superfluous. *E.g.*, *Bilski v. Kappos*, 130 S. Ct. 3218, 3228-29 (2010). Yet, to read "tried jointly" as including only the literal moment after pretrial proceedings are completed would render the express exclusion for cases consolidated "for pretrial only" superfluous, in violation of the rules of statutory construction. In other words, if "tried jointly" exclusively means "call your first witness because pre-trial proceedings are over," then no case ever will arise in which the exclusion listed in 28 U.S.C. § 1332(d)(11)(B)(ii) would apply. This reading is forbidden.[11]

c. TUSA's Reading Comports With Congressional Intent, While Plaintiffs' Reading Defeats It.

It is beyond dispute that, in including the "mass action" provisions of

[11] Not only are statutes to be construed to give effect to all provisions, but also literal interpretations leading to an absurd result must be rejected in favor of contextual interpretations. *See, e.g.*, *Commodity Futures Trading Comm'n v. P.I.E., Inc.*, 853 F.2d 721, 725 (9th Cir. 1988).

CAFA, Congress intended to curb the same types of abuses found in class actions in cases where plaintiffs avoided pleading an actual class action under state law. As for the phrase "tried jointly" in the statute, apart from indicating that Congress plainly intended to curb the same types of abuses that come with class actions in cases where a plaintiff simply avoids pleading an actual class action, there is not much history that bears directly on those exact words.[12] But as one court explained, "[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." *Bullard v. Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759, 762 (7th Cir. 2008). Judge Posner, writing for a unanimous panel in *Koral v. Boeing Co.*, agreed: "The [mass action] joint trial

[12] In *Tanoh v. Dow Chemical Co.*, 561 F.3d 945, 954 n.5 (9th Cir. 2009), this Court limited its focus to the Senate Report, but gave the Report little weight. There are questions about the timing of the Senate Report, which indicates the intent to curb abuses, because the circulation of the Report seems to have come after passage of the Legislation. *See* S. Rep. No. 109-14, at 79 (2005), *reprinted in* 2005 U.S.C.C.A.N. at 73 (additional views of Sen. Leahy). However, the Eleventh Circuit in *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1205-06 (11th Cir. 2007), noted that the Senate Report was formally submitted to the Senate during its consideration of CAFA—on February 3, 2005. 483 F.3d at 1206 n.50; *accord* 151 Cong. Rec. S978 (daily ed. Feb. 3, 2005) (noting that a committee report was introduced regarding "a bill to amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants, and for other purposes"). This history suggests that the Report actually was circulated in advance of the bill's passage. In any event, while the history may be of more limited value in interpreting the specific language, the reflected intent certainly comports with TUSA's interpretation.

could be limited to one plaintiff (or a few plaintiffs) and the court could assess and award him (or them) damages. Once the defendant's liability was determined in that trial, separate trials on damages brought by the other plaintiffs against the defendants would be permissible under Illinois law; it is not unusual for liability to be stipulated or conceded, or otherwise determined with binding effect, and the trial limited to damages." 628 F.3d 945, 947 (7th Cir. 2011).

Moreover, the context within which the statute was passed lends further support to TUSA's reading here. While many states have various coordination procedures, many are different from California's and contemplate a more flexible procedure by which certain pretrial procedures may be completed in a coordinated fashion, but never are tried in any coordinated fashion. For example, in Arizona, Rule of Civil Procedure section 42 provides for a much more flexible mechanism in which actions may be consolidated or coordinated in many different ways. Separate or consolidated trials on particular issues may be had; consolidation may be had as to discovery only; certain issues may be consolidated, and the like.[13]

California's coordination procedures are decidedly different from many other states' because California does not contemplate remands to individual trial

[13] *See also, e.g.*, Tex. Gov't Code §§ 74.161-164 and Texas Rules of Judicial Administration, Rules 13.6-13.7 (governing consolidated proceedings in which a "Pretrial Court" may be established for certain pretrial proceedings, but ultimately transferring the individual cases back to their originating courts for individual trial proceedings).

courts to conduct completely uncoordinated trials. But that does not mean that a set of plaintiffs never can subject their cases to federal jurisdiction when they ask for coordination in California. Instead, it means that a group of 100 or more plaintiffs, who seek coordination in California, will likely be subject to federal jurisdiction. *See* S. Amy Spencer, *Once More into the Breach, Dear Friends: The Case for Congressional Revision of the Mass Action Provisions in the Class Action Fairness Act of 2005*, 39 Loy. L.A. L. Rev. 1067, 1096-97 (2006). Plaintiffs have a choice not to seek coordination; but, when they do, if the other jurisdictional requirements are met, then they must submit to jurisdiction in these courts. In other words, Congress had in mind various stages of procedures present in various state courts and—rather than deal with each individual state's procedures—enacted the mass action provision to ensure that, where the plaintiff asks for a coordinated joint proceeding through trial, it be treated as a class action and subject to the federal courts' jurisdiction.

2. The Seventh Circuit's *Abbott* Analysis Should Be Applied Here.

All of the foregoing is sound analysis that comports with Congressional intent and statutory construction principles, but this Court will not be writing on a blank slate because the Seventh Circuit has addressed this issue in a materially indistinguishable case. *See In re Abbott Labs., Inc.*, 698 F.3d 568, 573 (7th Cir. 2012). *Abbott* correctly held that mass action removal is proper where a plaintiff's

motion proposes in substance that the action be tried jointly with the claims of more than 100 other persons, even if it does not explicitly so request. *Id*. Relying on *Bullard*, 535 F.3d at 762, and on *Koral*, 628 F.3d at 947, the Seventh Circuit correctly concluded that the "proposed to be tried jointly" requirement was satisfied by the plaintiffs' state court request for consolidation "through trial," which was brought on the grounds that such consolidation would "'facilitate the efficient disposition of a number of universal and fundamental substantive questions applicable to all or most Plaintiffs' cases *without the risk of inconsistent adjudication* in those issues between various courts.'" *Abbott*, 698 F.3d at 573 (emphasis in original).

Here, as in *Abbott*, a joint trial proposal is found in the Coordination Petition's unbounded request for coordination "for all purposes," without limitation. Moreover, and critically, the Coordination Petition also proposes coordination to avoid the "risk of inconsistent adjudication," and repeatedly argues that the "[f]ailure to coordinate these actions will result in the disadvantages of duplicate and inconsistent rulings, orders, or judgments." (*See* Section V.C, *supra*.) Also, like in *Abbott*, the Coordination Petition here seeks to avoid inconsistent determinations of "issues pertaining to liability, allocation of fault and contribution, as well as the same wrongful conduct of defendants." (ER 177 (Memorandum in Support of Coordination Petition); *see also* ER 173, 175.)

Again, similar statements in *Abbott* demonstrated a proposal for the matters to be "tried jointly" under CAFA. *Abbott*, 698 F.3d at 573. As the *Abbott* court put it, "it is difficult to see how a trial court could consolidate the cases as requested by plaintiffs and not hold a joint trial or an exemplar trial with the legal issues applied to the remaining cases. In either situation, plaintiffs' claims would be tried jointly." *Id*. at 573.[14]

The district court here declined to follow *Abbott*, holding the *Abbott* petition was distinguishable because the Petition here did not expressly request coordination "'through trial'" and "'not solely for pretrial proceedings,'" and instead, according to the district court, "focuse[d] on coordination for pretrial purposes." (ER 5, 6 (Remand Order).)[15] Of course, the CAFA statute does not speak to whether a proposal "to be tried jointly" must be so explicit, as erroneously suggested by the district court's ruling, and *Abbott* correctly held that it need not be. Moreover, the consolidation motion in *Abbott* did not explicitly propose a joint trial, but rather proposed "consolidation through trial," which the *Abbott* court correctly read as an implicit proposal for a joint trial that suffices to permit

[14] "[A] sister circuit's reasoned decision deserves great weight and precedential value." *In re Miller*, 276 F.3d 424, 428-29 (8th Cir. 2002).

[15] To the extent Plaintiffs wish to somehow backtrack from the Petition, "post-filing developments do not defeat jurisdiction if jurisdiction was properly invoked as of the time of filing." *United Steel v. Shell Oil Co.*, 602 F.3d 1087, 1091-92 (9th Cir. 2010).

removal. 698 F.3d at 573. The Coordination Petition here is no less explicit – as it must be under California law – because it justifies the need for coordination *for all purposes* on the very same expressed interest in avoiding inconsistent liability determinations.

3. *Abbott* Is Consistent With This Court's Precedent In *Tanoh*.[16]

This Court held in *Tanoh* that, where plaintiffs have strategically filed separate actions, each having fewer than 100 plaintiffs that *never sought to join in any manner*, the actions were not subject to CAFA removal. *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 950 (9th Cir. 2009). *Abbott* does not disagree with that ruling under that set of facts, nor does TUSA disagree here. To the contrary, the *Abbott* court expressly recognized and harmonized with the ruling in *Tanoh*, noting that it was consistent with prior Seventh Circuit precedent, because "[a]s long as plaintiffs had not proposed a joint trial, '[t]he mass action provision gives plaintiffs the choice to file separate actions that do not qualify for CAFA jurisdiction.'" *Abbott*, 698 F.3d at 572 (citing *Tanoh*, 561 F.3d at 953, and quoting *Anderson v. Bayer Corp.*, 610 F.3d 390, 393 (7th Cir. 2010)). And, it was only because of the *Abbott* plaintiffs' decision to seek consolidation through trial that the reasoning of

[16] This Court only has directly addressed the "mass action" provisions in two cases: *Tanoh* and *Abrego Abrego*. As explained in this section, *Tanoh* did not involve the facts of this case but is nevertheless consistent with removal here. And, *Abrego Abrego* decided only who bore the burden of demonstrating jurisdiction. *See generally Abrego Abrego*, 443 F.3d 676.

Anderson (and, likewise, *Tanoh*) no longer applied, and removal under CAFA then became possible. *Abbott*, 698 F.3d at 572 ("[P]laintiffs were not in danger of having their cases removed when they filed eleven similar complaints in state court. But when they moved … to consolidate their cases through trial—reasonably construed by Abbott as a proposal for a joint trial—*Anderson* no longer controlled."). That is exactly this case, and even *Tanoh* appears to have foreseen the outcome in *Abbott*, which also should be the outcome here, i.e., removal under CAFA. *See Tanoh*, 561 F.3d at 956 (noting that "separate state court actions may, of course, become removable at [some] later point if plaintiffs seek to join the claims for trial"); *accord Bullard*, 535 F.3d at 761-62 (request may be implicit); *Abbott*, 698 F.3d at 572 (same).[17]

4. Cases Plaintiffs Can Be Expected To Cite Here Are Inapposite.

Various district court decisions have been issued in many of the related cases here, and the district court cited to a handful. (ER 5, citing *Posey v. McKesson Corp.,* No. C 12-5939 RS, 2013 WL 361168 (N.D. Cal. Jan. 29, 2013); *Rice v. McKesson Corp.*, No. C 12-05949 WHA, 2013 WL 97738 (N.D. Cal. Jan.

[17] Although Plaintiffs urged *Tanoh* supported remand here because of a statement in *Tanoh* that "the 'mass action' provisions of CAFA are narrowly drawn," that statement in *Tanoh* is irrelevant here, as it concerned CAFA's express prohibition of mass action removal where the proposal for joint trial originates with the defendant, which is not the case here. Further, even a general proposition for "narrow construction" does not support remand here.

7, 2013); *L.B.F.R. v. Eli Lilly & Co.*, No. 12-CV-10025 (C.D. Cal. Dec. 6, 2012).) Because those district court decisions all arise from the same Coordination Petition and are similar in analysis, all of the foregoing discussion applies to those decisions and need not be addressed further.

There is just one other case Plaintiffs may be expected to cite, however, which does not arise from these same set of related cases. The case is inconsequential. In the related MDL proceeding, the court relied on a recent Eleventh Circuit decision for the proposition that "something more than a 'mere suggestion' is required to support a finding that the plaintiffs have proposed a joint trial." *In re Darvocet, Darvon & Propoxyphene Prods. Liab. Litig.*, 2:11-MD-2226-DCR, 2013 WL 3872230, at *5 (E.D. Ky. July 25, 2013) (citing *Scimone v. Carnival Corp.*, No. 13-12291, ___ F.3d ___, 2013 WL 3287065 (11th Cir. July 1, 2013)). Of course, this holding is wrong given the dictionary definitions of "proposal" discussed above. *See* note 10, *supra*. Regardless, the "mere suggestion" in *Scimone* was simply that two similar suits were filed by the same plaintiffs' counsel in the same court and together involved more than 100 plaintiffs. There was no affirmative request made there—as has been made here—that the cases be resolved together in any way. They simply were two cases filed in the same Court. *Scimone* is therefore readily distinguishable, while *Abbott*, on the other hand, is directly on point.

* * *

Because this action is a "mass action" under CAFA, this Court should reverse the order of remand and direct the district courts to accept jurisdiction over this case and all of the related cases.

B. Traditional Diversity Jurisdiction Exists Here.

Even if, as Plaintiffs allege, Judith Romo and Defendant McKesson are both citizens of California, that does not frustrate diversity here, because the doctrines of fraudulent joinder and procedural misjoinder apply.[18] These doctrines are related but distinct. Fraudulent joinder concerns a substantively unsupported joinder of parties that frustrates complete diversity, while procedural misjoinder concerns a procedurally improper joinder of parties that frustrates complete diversity.

[18] All but one of the Plaintiffs in this action fails to specifically allege his or her state of citizenship. But Plaintiffs cannot rely on their failure to allege their citizenship to frustrate diversity and avoid stating the obvious: complete diversity would exist here, but for Plaintiffs' joinder of McKesson, a California citizen, as a defendant. *Cf. McCabe v. Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987) ("The presence of the one hundred Doe defendants could prevent diversity jurisdiction, but in this case the Does are unidentified. We have no information as to who they are or where they live or their relationship to the action. It was proper for the district court to disregard them."). Regardless, should the Court find it necessary, it should reverse for further proceedings or discovery. *See, e.g., Blue Ridge Ins. Co. v. Stanewich*, 142 F.3d 1145, 1148 (9th Cir. 1998) ("A plaintiff may be required to submit additional affidavits with respect to the citizenship of the parties to the appellate court.").

1. McKesson Is Fraudulently Joined.

McKesson is fraudulently joined for two reasons.[19] First, McKesson "cannot be liable on any theory" asserted by Plaintiffs here, because those claims are preempted by the Supreme Court's decision in *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011). Second, Plaintiffs fail to allege sufficient facts to state a claim against McKesson.

a. The McKesson claims are preempted.

All claims against McKesson are barred by impossibility preemption, which teaches that a party cannot be held liable under state law for failing to take action that was prohibited by federal law. *See Mensing*, 131 S. Ct. at 2577-79. In *Mensing*, the Supreme Court held that claims challenging warnings issued by manufacturers of generic drugs are preempted by the Hatch-Waxman amendments to the FDCA and accompanying regulations, which require that the warning labels for a prescription generic drug be the same as the branded version. *See id.* at 2573-75. Because federal law made it impossible for generic manufacturers to independently change the label to provide the additional warnings that the plaintiffs alleged were required by state law, the plaintiffs' claims were preempted. *Id.* Following *Mensing*, this Court, at least four other Circuit Courts, and a host of

[19] As a "sham defendant," McKesson's citizenship must be disregarded for jurisdictional purposes. *See McCabe v. Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987); *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998).

district courts have granted or affirmed dismissal of products liability claims against generic drug defendants.[20]

Additionally, the Supreme Court recently reaffirmed the scope of *Mensing* preemption, in *Mutual Pharmaceutical Co., Inc. v. Bartlett*, where the Court held that design-defect claims brought under state law against generic drug defendants, like warning-based claims, are preempted. *Bartlett*, 133 S. Ct. 2466, 2470 (2013). This is so, because generic drug defendants are no more permitted to change the design of the product than they are to change the labeling, and the theoretical possibility that they could comply with state and federal law by removing their products from the market altogether is insufficient to avoid preemption. *Id.*

Here, *Mensing* and *Bartlett* make equally clear that Plaintiffs' claims against McKesson, seeking to hold McKesson liable for the warnings and design of propoxyphene products (ER 58-59, ¶¶ 8-13), are conclusively barred. Just like the generic defendants in *Mensing* who were prohibited by federal law from using

---

[20] *Gaeta ex rel. A.G. v. Perrigo Pharms. Co.*, 469 F. App'x 556, 557 (9th Cir. 2012); *Guarino v. Wyeth, LLC*, No. 12-13263, ___ F.3d ___, 2013 WL 3185084, at *3 (11th Cir. June 25, 2013); *Mensing v. Wyeth, Inc.*, 658 F.3d 867, 867 (8th Cir. 2011); *Smith v. Wyeth, Inc.*, 657 F.3d 420, 423 (6th Cir. 2011); *Demahy v. Schwarz Pharma, Inc.*, 702 F.3d 177, 186-87 (5th Cir. 2012); *Morris v. PLIVA, Inc.*, 713 F.3d 774, 777-78 (5th Cir. 2013); *see also, e.g.*, *Lashley v. Pfizer, Inc.*, 877 F. Supp. 2d 466, 478 (S.D. Miss. 2012); *Eckhardt v. Qualitest Pharms., Inc.*, 858 F. Supp. 2d 792, at *passim* (S.D. Tex. 2012); *Brinkley v. Pfizer, Inc.*, No. 10-0274-CV-W-SOW, 2012 WL 1564945, at *5 (W.D. Mo. Apr. 12, 2012); *Gross v. Pfizer, Inc.*, 825 F. Supp. 2d 654, 658 (D. Md. 2011).

different labeling than the brand defendant, *see Mensing*, 131 S. Ct. at 2578, McKesson was prohibited by federal law from giving a different warning for propoxyphene. Indeed, were McKesson to change the FDA-approved labeling, it would render the subject products misbranded under the FDCA. *See* 21 U.S.C. § 352. Nor could McKesson change the design of those medications, as that too would result in an unapproved new drug. *Id.* § 321(p)(1); *see also* § 331(a), (d) (prohibiting misbranded products or unapproved new drugs); *id.* § 333(a) (establishing penalties). And, as in *Bartlett*, the possibility that McKesson could have simply stopped selling propoxyphene products is insufficient to avoid preemption. *See Bartlett*, 133 S. Ct. at 2470 (expressly rejecting argument that a generic drug defendant could have stopped selling the drug to comply with both state and federal law, because "adopting the … stop-selling rationale would render impossibility pre-emption a dead letter and work a revolution in this Court's pre-emption case law").

Thus, because McKesson "could not 'independently do under federal law what state law [allegedly] requires of it,'" courts have recognized that claims against distributors of prescription medications are barred by impossibility preemption. *See In re Fosamax (Alendronate Sodium) Prods. Liab. Litig. (No. II)*, MDL No. 2243, 2012 WL 181411, at *4 (D.N.J. Jan. 17, 2012) (citation omitted); *Stevens v. Cmty. Health Care, Inc.*, No. ESCV200702080, 2011 WL 6379298, at

*1 (Mass. Super. Ct. Oct. 5, 2011). McKesson therefore "cannot be liable on any theory," *Ritchey*, 139 F.3d at 1318, and it is fraudulently joined.

In ruling otherwise, the district court relied upon a prior ruling in the Propoxyphene MDL proceedings, which, in turn, relied upon and misconstrued this Court's ruling in *Hunter v. Philip Morris USA*, 582 F.3d 1039 (9th Cir. 2009). In *Hunter*, this Court applied the common defense rule from the Fifth Circuit's ruling in *Smallwood v. Illinois Cent. R.R. Co.*, 385 F.3d 568, 574 (5th Cir. 2004), holding that an in-state seller of tobacco was not fraudulently joined because the defendants' preemption arguments would have "'effectively decided the entire case'" as to all defendants, and therefore "should have been brought in the context of attacking the merits of [the plaintiff's] case, rather than as a basis for removing the case to federal court." *Hunter*, 582 F.3d at 1044-45. Neither *Hunter* nor *Smallwood* was so broad as to prevent invoking fraudulent joinder on the basis of preemption. Rather, those cases addressed only the narrow situation where the preemption argument could not be used as a basis for invoking fraudulent joinder because the argument would have resolved the "entire case" as to *all* defendants. *Hunter*, 582 F.3d at 1045; *Smallwood*, 385 F.3d at 576 ("[O]ur holding today is narrow. It applies only in that limited range of cases where the allegation of improper joinder rests only on a showing that there is no reasonable basis for predicting that state law would allow recovery against the in-state defendant *and*

that showing is equally dispositive of all defendants." (emphasis added)); *see also McDonal v. Abbott Labs.*, 408 F.3d 177, 184 (5th Cir. 2005) (*Smallwood* "is implicated only when the common defense asserted would be equally dispositive as to *all* of the defendants."). Here, in contrast, *Mensing* preemption is not equally applicable to all defendants, as it does not dispose of claims against the Brand Defendants. *See, e.g.*, *Wyeth v. Levine*, 555 U.S. 555, 573 (2009). Thus, jurisdiction exists on this basis alone as well.

b. Plaintiffs did not allege facts sufficient to state a claim against McKesson.

Under the law of this Circuit, "[i]f the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state, the joinder of the resident defendant is fraudulent …." *Ritchey*, 139 F.3d at 1318 (internal quotation marks and citation omitted). Such is the case here, where, apart from the fact that Plaintiffs' claims against McKesson are preempted, McKesson also is fraudulently joined because Plaintiffs have alleged no *facts* showing any causal connection to their alleged injuries.

Specifically, applying federal or state pleading standards to this case,[21] Plaintiffs fail to plead a claim against McKesson, because Plaintiffs' only attempt

[21] Application of federal pleading standards to a removed action is well established. *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009); Fed. R. Civ. Proc. 81(c)(1) ("These rules apply to a civil action after it is removed

to plead causal connection between their alleged harm and McKesson is the allegation that McKesson distributed medications some (but not all) unidentified plaintiffs allegedly ingested. (ER 60, ¶¶ 19-20.) Beyond that bare conclusion, Plaintiffs provide no *facts* showing causation in their 100+ page Complaint.

Instead, Plaintiffs offer only vague allegations that McKesson is (and was) a national distributor of medications and maintains distributions agreements with large retail pharmacy chains. (ER 60-61, ¶¶ 18-20, 22-24.) These allegations alone cannot support a required legal finding that McKesson-distributed drugs were actually ingested by any of these Plaintiffs. And, even if there were *facts* alleged to show that McKesson, in fact, distributed to the pharmacies where

---

from a state court."). Accordingly, a fraudulent joinder analysis in federal court should be evaluated according to federal pleading standards, including the standard set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). *See Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004) (explaining that fraudulent joinder implicates "a Rule 12(b)(6)-type analysis … to determine whether the complaint states a claim under state law against the in-state defendant"); *Lovell v. United Airlines, Inc.*, No. CIV 09-00146, 2009 WL 3172729, at *3 (D. Haw. Oct. 2, 2009) (denying remand on ground of fraudulent joinder, and adopting *Smallwood* to hold, "[i]n evaluating the issue of fraudulent joinder, '[t]he court may conduct a Rule 12(b)(6)-type analysis"). Regardless, factual pleading is required in state court as well. *E.g.*, *Fisher v. San Pedro Peninsula Hospital*, 214 Cal. App. 3d 590, 604 (Ct. App. 1989); *Doheny Park Terrace Homeowners Ass'n, Inc. v. Truck Ins. Exchange,* 132 Cal. App. 4th 1076, 1099 (Ct. App. 2005) (pleading must "set forth the essential facts of his [or her] case with reasonable precision and with particularity sufficient to acquaint a defendant with the nature, source and extent of his [or her] cause of action"); *Animal Legal Def. Fund v. Mendes*, 160 Cal. App. 4th 136, 146 (Ct. App. 2008) (negligence pleading).

Plaintiffs went to fill their prescriptions, still missing from the Complaint are any *facts* alleged to show that the product distributed to those pharmacies was the same product purchased and ingested by Plaintiffs and not some other propoxyphene product distributed by different distributors.[22]

In short, and as several courts have held in strikingly similar cases, Plaintiffs allege, at best, the mere *possibility* of causation, which is insufficient to state a claim. *See In re Century Aluminum Co. Sec. Litig.*, No. 11-15599, ___ F.3d ___, 2013 WL 1633094, at *3 (9th Cir. Apr. 17, 2013) ("When faced with two possible explanations, only one of which can be true and only one of which results in liability, plaintiffs cannot offer allegations that are 'merely consistent with' their favored explanation but are also consistent with the alternative explanation. *Iqbal*, 556 U.S. at 678'"); *accord Patterson v. Novartis Pharms. Corp.*, 451 F. App'x 495, 497 (6th Cir. 2011) ("plausibility pleading standard set forth in *Twombly* and *Iqbal* requires that [plaintiff] have pled enough facts to state a claim for relief that is plausible on its face....The assertion that [plaintiff] received 'Aredia and/or generic Aredia (pamidronate)' means that [plaintiff] could have received only Aredia manufactured by Novartis. Or, she could have received both Aredia and

[22] The allegation that McKesson allegedly maintained "comprehensive distribution agreements" with certain retail pharmacies like CVS, Wal-Mart, or Rite Aid (ER 60, ¶ 20), still would not sufficiently plead that McKesson supplied Plaintiffs' medications, because Plaintiffs do not allege that McKesson was an *exclusive* distributor.

generic Aredia, which would be sufficient to state a claim against Novartis. However, as pled, it is also entirely plausible that [plaintiff] received infusions of only generic Aredia that Novartis did not manufacture: it is this possibility that is fatal to her complaint. Because the complaint only permits us to infer the possibility that [plaintiff] received infusions of Aredia manufactured by Novartis, it fails to satisfy the pleading standards set forth in *Twombly* and *Iqbal*.").[23]

In erroneously concluding that sufficient facts were pled against McKesson, the district court below failed to recognize the standard under *Twombly/Iqbal* and similar state court cases, which requires more than a mere *possibility* of causation, and instead relied on a pre-*Twombly*/*Iqbal* district court opinion. (ER 15, citing *Aaron v. Merck & Co., Inc.*, No. CV 05-4073, 2005 WL 5792361, at *2 (C.D. Cal. July 26, 2005).)

[23] California's pleading standard similarly requires *facts* in this instance. While California sometimes permits the "necessary causal connection" to be pled "from the juxtaposition of the allegations of wrongful conduct and harm," *Animal Legal Def. Fund v. Mendes*, 160 Cal. App. 4th 136, 146 (2008) (internal quotation marks and citations omitted), "where the pleaded facts of negligence and injury do not naturally give rise to an inference of causation" — such as this case, involving a complex chain of distribution — "'the plaintiff must plead specific facts affording an inference'" of causation. *Id.* (quoting *Christensen v. Super. Ct.*, 54 Cal. 3d 868, 900-01 (1991)). Because Plaintiffs have failed to allege any "specific facts" to tie themselves to a pharmacy, then to tie that pharmacy to McKesson, and then to tie the specific product they purchased at the pharmacy to McKesson, there is nothing to "afford[] an inference" that McKesson distributed the medications that Plaintiffs allegedly ingested. *See Mendes*, 160 Cal. App. 4th at 146.

The district court also erroneously relied upon the Propoxyphene MDL court's decision regarding fraudulent joinder, which was cited to the district court by Plaintiffs and which also had been amended and superseded by a later opinion. (*See* ER 15, citing *Freitas v. McKesson Corp.*, No. 2:212-cv-00050-DCR, MDL Docket No. 2226 (E.D. Ky., July 2, 2012), *amended and superseded by* 889 F. Supp. 2d 931 (E.D. Ky. 2012)).) In the amended order, the MDL court *did not* — as the district court's order below might suggest — conclude that the plaintiffs' allegations, which were virtually identical to those here, had sufficiently stated a claim against McKesson. Rather, the MDL court held that supplemental documentation submitted by the plaintiffs, *when combined with* the complaint's allegations, satisfied the court that McKesson was not fraudulently joined in that action. *Id.* at 942. Here, there was no supplemental documentation submitted by Plaintiffs to support their bald conclusion that McKesson somehow caused Plaintiffs' alleged harm.

In sum, it is equally plausible that other distributors sold the propoxyphene products to the unidentified pharmacies where Plaintiffs allegedly filled their prescriptions. Yet, McKesson—who happens to be the only California defendant—is the only distributor that Plaintiffs sued. McKesson is fraudulently joined.

2. Plaintiffs Are Procedurally Misjoined.

Even were this Court to find McKesson is not fraudulently joined (it is), the doctrine of procedural misjoinder (sometimes referred to as fraudulent misjoinder) would apply to support removal under diversity jurisdiction. The doctrine of procedural misjoinder, which was initially set forth by the Eleventh Circuit, ensures that a defendant's statutory right to remove cannot be subverted by procedural gamesmanship, where claims with no real connection to one another are misjoined to frustrate diversity. *See Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996) (doctrine applies where plaintiffs' claims are "egregious[ly]" misjoined to defeat federal jurisdiction and "have no real connection" to one another), *abrogated on other grounds by Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir. 2000). While the district court declined to adopt the procedural misjoinder theory, stating that this Circuit has not yet addressed it (ER 16), there are several reasons why this Circuit should adopt the doctrine and apply it to this case.

First, the facts of this case cry out for application of the doctrine. Although Plaintiffs have stated affirmatively that these claims all are similar, truly, they must necessarily be different. For example, each plaintiff (or plaintiff family) necessarily has a distinct medical history. Plaintiffs likely purchased propoxyphene products from different pharmacies, for different purposes, and after

different conversations with their individual healthcare providers. They likely would have used propoxyphene products at different doses, for different durations, for different conditions, and during different years, and Plaintiffs' vague allegations of "cardiovascular injuries" could encompass a wide variety of conditions, each of which is affected in different ways by a multitude of different causal factors. Under similar circumstances, numerous courts have found procedural misjoinder, because claims brought by pharmaceutical product-liability plaintiffs are highly individualized and cannot be joined to defeat jurisdiction, even where plaintiffs allegedly used the same product. *See, e.g.*, *In re Fosamax (Alendronate Sodium) Prods. Liab. Litig. (No. II)*, MDL No. 2243, Civil Action No. 11-3045, 2012 WL 1118780, at *4 (D.N.J. Apr. 3, 2012) (plaintiffs "allege such unspecific injuries as to make it impossible to determine how the Plaintiffs share any connection" and "given the complicated causation questions that pervade drug product liability claims, Plaintiffs' claims will require divergent questions of law and fact"); *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 294 F. Supp. 2d 667, 679 (E.D. Pa. 2003) ("the claims of the pharmaceutical plaintiffs who had drugs prescribed by different doctors for different time periods do not arise out of the same 'transaction, occurrence, or series of transactions or occurrences'"); *In re Baycol Prods. Litig.*, MDL No. 1431, Case No. 03-2931, 2003 WL 22341303, at *3-4 (D. Minn. 2003) (holding that a

plaintiff in a pharmaceutical product-liability action had "been fraudulently [mis]joined with the other plaintiffs, warranting severance and remand" of that plaintiff's claims and denial of the remaining plaintiffs' motion to remand); *In re Rezulin Prods. Liab. Litig.*, 168 F. Supp. 2d 136, 146 (S.D.N.Y. 2001) (plaintiffs did not "allege that they received [drug] Rezulin from the same source or that they were exposed to Rezulin for similar periods of time" and where they alleged "different injuries"); *In re Diet Drugs*, No. Civ.A. 98-20478, 1999 WL 554584, at *3 (E.D. Pa. July 16, 1999) (pleading went "well beyond mere misjoinder" where plaintiffs "attempt[ed] to join persons from seven different states into one civil action who have absolutely no connection to each other except that they each ingested fenfluramine, Redux (dexfenfluramine), phentermine or some combination of those drugs").

Second, this Court would not be alone in joining the Eleventh Circuit. The Fifth Circuit, while not reaching the question directly, also has acknowledged its applicability. *In re Benjamin Moore & Co.*, 318 F.3d 626, 630-31 (5th Cir. 2002); *see also In re Benjamin Moore & Co.*, 309 F.3d 296, 298 (5th Cir. 2002) (citing *Tapscott* and noting "it might be concluded that misjoinder of plaintiffs should not be allowed to defeat diversity jurisdiction"); *Crockett v. R.J. Reynolds Tobacco*

Co., 436 F.3d 529, 533 (5th Cir. 2006). Moreover, it appears no Court of Appeals has rejected the doctrine.[24]

Third, sound policy favors adopting the doctrine of procedural misjoinder in this type of action, where 50 individuals with no alleged or apparent connection to one another have joined together in a transparent effort to frustrate diversity and avoid adverse rulings in the MDL. *See In re Diet Drugs*, MDL No. 1203, No. 06-20042, 2007 WL 2458021, at *1 (E.D. Pa. Aug. 23, 2007) (holding that procedural misjoinder "impede[s] the efficient administration of MDL" proceedings); *see also In re Diet Drugs*, 1999 WL 554584, at *5 ("This case, with eleven Plaintiffs selected from seven different states where, coincidentally, a number of Defendants also have citizenship[,] seems to have been an innovative, but unwise, pleading strategy that interferes with the court's ability to administer this case for pretrial purposes."). Otherwise, a defendant's right to remove to the federal forum would be fatally undermined.[25]

---

[24] The Eighth and Tenth Circuits have acknowledged the doctrine but declined to either adopt or reject it, because they determined that its adoption would not have conferred jurisdiction in those cases. *See In re Prempro Prods. Liab. Litig.*, 591 F.3d 613, 622, 624 (8th Cir. 2010); *Lafalier v. State Farm Fire & Cas. Co.*, 391 F. App'x 732, 739 (10th Cir. 2010).

[25] *See* Laura J. Hines & Steven S. Gensler, *Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction*, 57 Ala. L. Rev. 779, 809 (2006) ("[F]ederal courts are in the best position to respond to the problem of misjoined parties and removal," and "requiring defendants to seek [severance] in state court

Fourth, while the doctrine of procedural misjoinder does not require a finding that the misjoinder is "egregious,"[26] there is abundant evidence here to establish egregious misjoinder for the purpose of forum shopping. Namely, despite their leadership role in the MDL, Plaintiffs' counsel began the practice of filing multi-plaintiff complaints in California state court to avoid adverse rulings by the MDL court, culminating in a coordinated filing of claims by hundreds of individuals that was structured in an attempt to avoid federal jurisdiction. If such blatant forum shopping is not egregious, it is unclear what is.

Fifth, to the extent the district court below held that California joinder standards would permit the joinder of these plaintiffs (ER 17), that holding was error. Whether the Court applies California or federal joinder standards, the

---

puts the diversity removal docket in jeopardy and fails adequately to protect defendants' access to federal court.").

[26] *See, e.g., Greene v. Wyeth*, 344 F. Supp. 2d 674, 685 (D. Nev. 2004); *Grennell v. W.S. Life Ins. Co.*, 298 F. Supp. 2d 390, 395-97 (S.D. W. Va. 2004). An egregiousness standard inappropriately adds "what would be in essence a state-of-mind element to the procedural misjoinder inquiry," thus "overly complicat[ing] what should be a straightforward jurisdictional examination." *Burns v. W.S. Life Ins. Co.*, 298 F. Supp. 2d 401, 403 (S.D.W. Va. 2004). Nor would an analogy to fraudulent joinder support an egregiousness standard, because "fraudulent joinder is a term of art which does not impugn the integrity of plaintiffs or their counsel and does not refer to an intent to deceive." *Greene*, 344 F. Supp. 2d at 685 (quotation omitted). Indeed, the standard to prove fraudulent joinder is appropriately heightened, *see Ritchey*, 139 F.3d at 1318, because a finding of fraudulent joinder has preclusive effect on the claim against the fraudulently joined party, *see Carey v. Sub Sea Int'l, Inc.*, 121 F. Supp. 2d 1071, 1075 (E.D. Tex. 2000), *aff'd*, 285 F.3d 347, 348 (5th Cir. 2002), while procedural misjoinder simply results in a severance and a change in forum.

outcome still requires severance here, because both standards require not merely the existence of common questions, but also that joined claims arise out of the same transaction, occurrence, or series of transactions or occurrences — a standard that Plaintiffs here cannot meet, for the reasons explained above. *See* Cal. Civ. Proc. Code § 378(a)(1); Fed. R. Civ. Proc. 20(a)(1)(A); *Adams v. I-Flow Corp.*, No. CV09-09550, 2010 WL 1339948, at *8 (C.D. Cal. Mar. 30, 2010) ("The California rule on joinder of parties plaintiff is practically identical to [the federal rule].").[27]

The district court erred in concluding that the procedural misjoinder doctrine could not be applied, and reversal is required on this independent basis.

[27] Indeed, under similar circumstances, this Court has previously affirmed dismissals with prejudice in a products liability MDL where similar multi-plaintiff complaints "did not seek relief arising from the same transaction or occurrence," after the plaintiffs failed to file individual complaints as required by the district court's order. *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1244 (9th Cir. 2006); *see also Coughlin v. Rogers*, 130 F.3d 1348, 1351 (9th Cir. 1997) (affirming district court's severance of immigration claims by 48 unrelated individuals as "square with Federal Rules of Civil Procedure 20 and 21 and the precedent on severance"). A host of district courts also are in accord. *See Adams v. I-Flow Corp.*, No. CV09-09550, 2010 WL 1339948, at *8 (C.D. Cal. Mar. 30, 2010); *see also, e.g.*, *Boschert v. Pfizer, Inc.*, No. 4:08-CV-1714, 2009 WL 1383183, at *3 (E.D. Mo. May 14, 2009); *Cumba v. Merck & Co., Inc.*, No. 08-CV-2328, 2009 WL 1351462, at *1 (D.N.J. May 12, 2009); *In re Baycol*, MDL No. 1431, 2002 WL 32155269, at *2 (D. Minn. July 5, 2002); *Stinnette v. Medtronic, Inc.*, No. H-09-03854, 2010 WL 767558, at *2 (S.D. Tex. Mar. 3, 2010); *Warner v. Stryker Corp.*, No. 08-6368, 2009 WL 1773170, at *1-2 (D. Or. June 22, 2009).

C. The District Court Erroneously Concluded That There Is No Federal Question Here, Because All Of The Failure-To-Update Claims Necessarily Arise From Federal Labeling Requirements.

Plaintiffs' failure-to-update claims against the Generic Defendants provide for federal question jurisdiction because they necessarily raise a substantial and disputed question of federal law – namely whether Generic Defendants failed "to update their labels with certain label changes that the FDA approved and/or ordered for use by the … Brand Defendants." (ER 83, ¶ 160.k.) The Supreme Court has long recognized that, "in certain cases federal question jurisdiction will lie over state-law claims that implicate significant federal issues," which "justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). Federal question jurisdiction thus exists over state-law claims (1) that "necessarily raise a stated federal issue," (2) that are "actually disputed and substantial," and (3) which a federal court may "entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Id.* at 314. This test is satisfied here with respect to Plaintiffs' failure-to-update claims, and there is supplemental jurisdiction over all other claims under section 1367.

1. Plaintiffs' Failure-To-Update Claims Against Generic Defendants Necessarily Raise A Federal Issue.

"[T]he question whether a claim 'arises under' federal law must be determined by reference to the 'well-pleaded complaint.'" *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 808 (1986). Here, having filed their Complaint after the Supreme Court's landmark ruling in *Mensing*, Plaintiffs assert failure-to-update allegations as an attempt to plead around preemption. But, in doing so, Plaintiffs necessarily raise a federal issue concerning whether Generic Defendants complied with their federal duty to use the same labeling as the Brand Defendants for propoxyphene. In a refrain they repeat at the end of nearly every cause of action, Plaintiffs allege that Generic Defendants are liable under three essential factual theories:

1. Failure to warn ("defective and inappropriate warnings");
2. Design defect ("the unreasonably dangerous and defective characteristics of propoxyphene"); and
3. Failure to update labeling ("failure to comply with federal standards and requirements").

(ER 95, 99, 100, 108, 118, 126, 128, 129, 131, 132, 134, 136 (Complaint, ¶¶ 241,

260, 265, 310, 352, 384, 395, 403, 410, 419, 428, 437).)[28]

The first two theories—failure-to-warn and design defect—are preempted by *Mensing*, 131 S. Ct. at 2577-78. *See also Bartlett*, 133 S. Ct. 2466, 2470 (2013). The third theory, Plaintiffs' failure-to-update claim, is Plaintiffs' apparent attempt to plead a non-preempted claim, in what they (erroneously) view as a narrow window between the requirements of federal and state law. In other words, Plaintiffs' assertion that the Generic Defendants "fail[ed] to comply with federal standards and requirements" forms the basis of their claim that "Generic Defendants failed to update their labels with certain label changes that the FDA approved and/or ordered for use by the … Brand Defendants." (ER 83, ¶ 160.k; *see also* ER 78, 106, 98, ¶¶ 130, 253, 302 (alleging that the FDA "effectively required the Generic Defendants to issue the Black Box warning and label changes,

[28] Because nearly every count asserted against Generic Defendants is based on the same alleged course of conduct, determining whether a federal issue is essential to Plaintiffs' state-law "claims" is best viewed through the lens of the three factual theories they allege. And, to the extent the district court below ruled that Plaintiffs' allegations do not rest on the federal label mandate, that ruling was error. For example, the district court noted that Plaintiffs allege that Defendants "'failed to adequately warn the general public or the community—including Plaintiffs and their treating physicians.'" (ER 9-11.) *Mensing*, however, makes clear that such allegations invoke federal law issues, because *Mensing* preemption still applies to allegations that are "cloth[ed] … as 'failure-to-communicate' claims rather than failure-to warn claims." *Guarino v. Wyeth, LLC*, No. 12-13263, ___ F.3d ___, 2013 WL 3185084, at *3 (11th Cir. June 25, 2013); *see also Morris v. PLIVA, Inc.*, 713 F.3d 774, 777 (5th Cir. 2013) ("*Mensing* forecloses such claims because failure to 'communicate' extends beyond just a label change.").

but … Generic Defendants … did not timely implement the Black Box warning or revise the labels for their Propoxyphene").)

But in attempting to plead around preemption, Plaintiffs invoke a substantial federal question, i.e., whether Generic Defendants breached their federal duty to use the same labeling as the Brand Defendants. Notably, another recent district court opinion correctly recognized federal question jurisdiction over such materially indistinguishable claims, holding that "[a] question of federal law is a necessary element of Plaintiffs' state law causes of action. Plaintiffs allege Defendants failed to meet their ongoing duty of sameness by failing to … update their FDA-approved labeling to mirror updated [brand name] labeling. … [T]he boundaries of Plaintiffs' claims sounding in the ongoing federal duty of sameness are established by the FDCA and the Hatch-Waxman Amendments. Therefore, while Plaintiffs' causes of action arise under state law, resolving them necessarily raises a federal question." *Bowdrie v. Sun Pharm. Indus. Ltd.*, 909 F. Supp. 2d 179, 184 (E.D.N.Y. 2012) (citing *Grable*, 545 U.S. at 315; *W. 14th St. Commercial Corp. v. 5 W. 14th Owners Corp.*, 815 F.2d 188, 195-96 (2d Cir. 1987)).

Here, as in *Bowdrie*, Plaintiffs' Complaint in this action also asserts violations of federal labeling regulations, including a failure-to-update claim, and, as in *Bowdrie*, Plaintiffs cannot establish their failure-to-update claims without resorting to federal law. Thus, having chosen to repeatedly insert federal issues

into their claims, Plaintiffs cannot avoid the consequence of their pleading.[29]

In rejecting federal question jurisdiction, the district court below principally concluded that *Merrell Dow* required remand here because the Plaintiffs' failure-to-update claims supposedly "do not necessarily depend on federal law." (ER 10.) The district court was not only wrong on the facts, *see supra* note 28, but *Merrell Dow* also is readily distinguishable.

In *Merrell Dow*, the plaintiffs asserted six causes of action arising under state law, one of which implicated a violation of federal law. 478 U.S. at 805-06. Thus, "[i]n *Merrell Dow* the federal statute was merely incorporated by reference as a standard of conduct in a state negligence action," but here, in contrast, "the federal issue is decisive." *W. 14th St.*, 815 F.2d at 196. In other post-*Mensing* decisions, federal law also is found to be essential to failure-to-update claims. *See, e.g., Morris v. PLIVA, Inc.*, 713 F.3d 774, 777 (5th Cir. 2013) (addressing plaintiffs' claim that the generic defendant failed to adopt a 2004 FDA-approved

[29] Plaintiffs' Complaint is replete with citations to federal statutes and regulations. (*See, e.g.*, ER 58, 124-25 (Complaint, ¶¶ 5 (citing 21 C.F.R. § 314.70(c)), 6 (citing 21 C.F.R. § 314.94(a)(8)(iv)), 378 (citing 21 C.F.R. § 310.303), 379 (citing 21 U.S.C. § 301, et seq.), 379.a-e (citing 21 U.S.C. 351-352), 379.f-k (citing 21 C.F.R. §§ 201.56, 201.57, 310.303).) Such "extensive use" of federal statutes and regulations "in the complaint establishes that" Defendants' "alleged violations of federal law [are] essential to [the] case," and that federal question jurisdiction is therefore proper. *See In re Zyprexa Prods. Liab. Litig.*, Nos. 04-MD-1596, 07-CV-1933, 2008 WL 398378, at *5 (E.D.N.Y. Feb. 12, 2008); *accord N.Y.C. H. & Hosp. Corp. v. WellCare of N.Y., Inc.*, 769 F. Supp. 2d 250, 257 (S.D.N.Y. 2011).

warning label, and holding that "a claim that [the generic defendant] breached a federal labeling obligation sounds exclusively in federal (not state) law, and is preempted"); *Abicht v. PLIVA, Inc.*, Nos. 12-1278, 12-2172, 2013 WL 141724, at *2 (D. Minn. Jan. 9, 2013) ("Federal law is the gravamen of Plaintiffs' failure-to-update claim here."); *Huck v. Trimark Physicians Grp.*, No. 12-0596, 2013 WL 1749774, at *3 (Iowa Ct. App. Apr. 24, 2013) (holding that the plaintiff's claim that a generic defendant "failed to update its label to conform" to drug labeling changes "arises under federal law").[30]

The district court also erred to the extent it held that the lack of a private right of action under federal law further bolstered its decision to remand. (ER 10.) In affirming federal question jurisdiction in *Grable*, the Supreme Court explained that the "broad language in *Merrell Dow*" cannot be read as making the existence of a federal cause of action a "necessary condition" for federal question jurisdiction. *Grable*, 545 U.S. at 317. Rather, *Merrell Dow* should be understood as seeking to avoid "a potentially enormous shift of traditionally state cases into

[30] Likewise, the Sixth Circuit in *Fulgenzi v. PLIVA, Inc.*, 711 F.3d 578 (6th Cir. 2013), held that the "violation of the federal duty of sameness is *essential*" to a failure-to-update theory. *Id.* at 587 (emphasis added). To the extent the *Fulgenzi* court also held that the failure-to-update theory is not preempted by *Mensing*, that holding was error. *Cf. Morris*, 713 F.3d at 777. Nevertheless, the viability of such claims is immaterial to whether they give rise to federal jurisdiction. Indeed, the *Bowdrie* court recognized federal jurisdiction over purported failure-to-update claims and then dismissed them as preempted. *See Bowdrie*, 909 F. Supp. 2d at 190.

federal courts . . . . 'solely because the violation of the federal statute is said to [create] a rebuttable presumption [of negligence] … under state law.'" *Grable*, 545 U.S. at 319 (alterations in original) (quoting *Merrell Dow*, 478 U.S. at 811-12). Indeed, as the *Bowdrie* court correctly recognized, *Merrell Dow* "did not foreclose the possibility that a state law cause of action utilizing a federal standard could raise a substantial issue of federal law," but rather that "the need for 'principled, pragmatic distinctions' and 'careful judgments about the exercise of federal judicial power in an area of uncertain jurisdiction.'" *Bowdrie*, 909 F. Supp. 2d at 184-85.

Here, again, Plaintiffs' allegations that Generic Defendants breached their federal duty of sameness by not updating their warnings are not simply one of many bases for establishing breach of a duty, but rather, they are *essential* to Plaintiffs' claims.

2. The Federal Issue Is Disputed And Substantial.

Initially, the federal issue is disputed because Generic Defendants deny that they breached the duty of sameness. Likewise, the federal issue is substantial because it involves "a serious federal interest in claiming the advantages thought to be inherent in a federal forum." *Grable*, 545 U.S. at 313. Whether Generic Defendants adhered to their duty to use the same labeling as the Brand Defendants is a matter of significant federal concern—indeed, this "duty of sameness"

undergirds the Hatch-Waxman amendments to the FDCA, which serve the important federal purpose of lowering the cost of medications by "allow[ing] manufacturers to develop generic drugs inexpensively." *Mensing*, 131 S. Ct. at 2574. As the *Bowdrie* court explained, "the federal issue involved goes far beyond simply incorporating a federal standard into a state law cause of action. To the extent they invoke the 'federal duty of sameness,' Plaintiffs' causes of action implicate the labeling requirements for generic drug manufacturers nationwide. The federal question present in this case involves a responsibility that is in the first instance, and primarily, federal: regulation of the manufacture, marketing, and distribution of drugs." 909 F. Supp. 2d at 184-85.

The federal issues presented by Plaintiffs' Complaint also are particularly significant following *Mensing*, which clarified the complex federal rules and regulations that govern the manufacture and distribution of generic drugs. Where, as here, plaintiffs seek to plead a state-law claim that they urge can survive in the interstices of this comprehensive regulatory scheme, the importance of federal adjudication of this federal regulatory question is even more apparent. *See WellCare*, 769 F. Supp. 2d at 259 (holding federal question jurisdiction appropriate given the "'intricate federal regulatory scheme including detailed federal provisions,'" which "calls for the hope of uniformity that a federal forum offers on federal issues" (citations omitted)).

3. Federal Jurisdiction Will Not Disturb The Congressionally Approved Balance Of Federal And State Judicial Responsibilities.

Where, as here, a party purposefully and repeatedly injects federal law into its claims, a federal forum is entirely consistent with the congressionally approved balance of federal and state judicial responsibilities and does not "herald[] a potentially enormous shift of traditionally state cases into federal courts." *See Grable*, 545 U.S. at 319. Indeed, federal courts are already home to a significant volume of cases involving claims against manufacturers and distributors of generic drugs, and an MDL was established for the purpose of adjudicating the numerous federal propoxyphene cases. The efficiency of coordinated resolution that gave rise to that MDL (originally requested by Plaintiffs) thus warrants resolution of similar cases in a federal forum.

4. There Is Supplemental Jurisdiction Over All Other Claims.

District courts have "supplemental jurisdiction over all other claims that are so related to claims in the action within [the court's] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). Plaintiffs' failure-to-update claims against Generic Defendants are within the Court's original jurisdiction pursuant to 28 U.S.C. § 1331. And, as to each plaintiff, all other claims in this action arise out of the same case or controversy because they seek relief in connection with personal

injuries allegedly incurred from ingesting propoxyphene. Therefore, there is supplemental jurisdiction over all such claims.

IX. CONCLUSION

For the foregoing reasons, TUSA requests that this Court reverse the district court's Remand Order.

August 5, 2013

Respectfully submitted,
GREENBERG TRAURIG, LLP

By: s/ Karin L. Bohmholdt
Attorneys for Defendant-Appellant
Teva Pharmaceuticals USA, Inc.

STATEMENT OF RELATED CASES

Defendant-Appellant Teva Pharmaceuticals USA, Inc. is aware of the following related cases, which also were encompassed by Plaintiffs' Coordination Petition, and which are now pending in this Court:

Case Name	District Court/Case No./District Judge	Status	9th Cir. Case No.
1. *Arnel, et al. v. McKesson Corporation, et al.*	C.D. Cal. Case No. 5:12-cv-02040-PSG-E Hon. Philip S. Gutierrez	Remanded Feb. 21, 2013; petition for permission to appeal pending; held in abeyance per Court Order pending resolution of this action and of the appeal in *Corber v. Xanodyne Pharmaceuticals, Inc.*, No. 13-56306	13-80059
2. *Ashby, et al. v. McKesson Corporation, et al.*	C.D. Cal. Case No. 5:12-cv-02055-PSG-E Hon. Philip S. Gutierrez	Remanded Feb. 21, 2013; petition for permission to appeal pending; held in abeyance per Court Order pending resolution of this action and of the appeal in *Corber v. Xanodyne Pharmaceuticals, Inc.*, No. 13-56306	13-80061

3. *Brandle, et al. v. McKesson Corporation, et al.*	N.D. Cal. Case No. 3:12-cv-05970-WHA Hon. William Alsup	Remanded March 28, 2013; petition for permission to appeal pending; held in abeyance per Court Order pending resolution of this action and of the appeal in *Corber v. Xanodyne Pharmaceuticals, Inc.*, No. 13-56306	13-80093
4. *Brown, et al. v. McKesson Corporation, et al.*	C.D. Cal. Case No. 2:12-cv-09977-PSG-E Hon. Philip S. Gutierrez	Remanded Feb. 21, 2013; petition for permission to appeal pending; held in abeyance per Court Order pending resolution of this action and of the appeal in *Corber v. Xanodyne Pharmaceuticals, Inc.*, No. 13-56306	13-80048
5. *Castellanos, et al. V. McKesson Corporation, et al.*	C.D. Case No. 2:12-cv-09974-PSG-E Hon. Philip S. Gutierrez	Remanded Feb. 21, 2013; petition for permission to appeal pending; held in abeyance per Court Order pending resolution of this action and of the appeal in *Corber v. Xanodyne Pharmaceuticals, Inc.*, No. 13-56306	13-80049

6. *Cohen-Feris, et al. v. McKesson Corporation, et al.*	C.D. Cal. Case No. 2:12-cv-09976-PSG-E Hon. Philip S. Gutierrez	Remanded Feb. 22, 2013; petition for permission to appeal pending; held in abeyance per Court Order pending resolution of this action and of the appeal in *Corber v. Xanodyne Pharmaceuticals, Inc.*, No. 13-56306	13-80050
7. *Corber, et al. v. McKesson Corporation, et al.*	C.D. Cal. Case No. 2:12-cv-09986-PSG-E Hon. Philip S. Gutierrez	Remanded March 12, 2013; petition for permission to appeal granted; appeal currently pending	13-80084; 13-56306
8. *Corser, et al. v. McKesson Corporation, et al.*	C.D. Cal. Case No. 5:12-cv-02057-PSG-E Hon. Philip S. Gutierrez	Remanded Feb. 21, 2013; petition for permission to appeal pending; held in abeyance per Court Order pending resolution of this action and of the appeal in *Corber v. Xanodyne Pharmaceuticals, Inc.*, No. 13-56306	13-80068

9. *Crawford, et al. v. McKesson Corporation, et al.*	C.D. Cal. Case No. 5:12-cv-02189-PSG-E Hon. Philip S. Gutierrez	Remanded March 13, 2013; petition for permission to appeal pending; held in abeyance per Court Order pending resolution of this action and of the appeal in *Corber v. Xanodyne Pharmaceuticals, Inc.*, No. 13-56306	13-80083
10. *Cohen-Feris, et al. v. McKesson Corporation, et al.*	C.D. Cal. Case No. 2:12-cv-09976-PSG-E Hon. Philip S. Gutierrez	Remanded Feb. 22, 2013; petition for permission to appeal pending; held in abeyance per Court Order pending resolution of this action and of the appeal in *Corber v. Xanodyne Pharmaceuticals, Inc.*, No. 13-56306	13-80050
11. *Garcia, et al. v. McKesson Corporation, et al.*	C.D. Cal. Case No. 2:12-cv-09964-PSG-E Hon. Philip S. Gutierrez	Remanded Feb. 21, 2013; petition for permission to appeal pending; held in abeyance per Court Order pending resolution of this action and of the appeal in *Corber v. Xanodyne Pharmaceuticals, Inc.*, No. 13-56306	13-80032

12. Gettman, et al. v. McKesson Corporation, et al.	C.D. Cal. Case No. 5:12-cv-02054-PSG-E Hon. Philip S. Gutierrez	Remanded Feb. 21, 2013; petition for permission to appeal pending; held in abeyance per Court Order pending resolution of this action and of the appeal in *Corber v. Xanodyne Pharmaceuticals, Inc.*, No. 13-56306	13-80051
13. Hage, et al. v. McKesson Corporation, et al.	C.D. Cal. Case No. 2:12-cv-09998-PSG-E Hon. Philip S. Gutierrez	Remanded Feb. 22, 2013; petition for permission to appeal pending; held in abeyance per Court Order pending resolution of this action and of the appeal in *Corber v. Xanodyne Pharmaceuticals, Inc.*, No. 13-56306	13-80033
14. Hollabaugh, et al. v. McKesson Corporation, et al.	C.D. Cal. Case No. 2:12-cv-10000-PSG-E Hon. Philip S. Gutierrez	Remanded Feb. 21, 2013; petition for permission to appeal pending; held in abeyance per Court Order pending resolution of this action and of the appeal in *Corber v. Xanodyne Pharmaceuticals, Inc.*, No. 13-56306	13-80034

15. Keene, et al. v. McKesson Corporation, et al.	N.D. Cal. Case No. 2:12-cv-5924-JST Hon. Jon S. Tigar	Remanded May 29, 2013; petition for permission to appeal pending; held in abeyance per Court Order pending resolution of this action and of the appeal in *Corber v. Xanodyne Pharmaceuticals, Inc.*, No. 13-56306	13-80141
16. Murillo, et al. v. McKesson Corporation, et al.	C.D. Cal. Case No. 12-cv-10143-PSG-E Hon. Philip S. Gutierrez	Remanded Feb. 21, 2013; petition for permission to appeal pending; held in abeyance per Court Order pending resolution of this action and of the appeal in *Corber v. Xanodyne Pharmaceuticals, Inc.*, No. 13-56306	13-80043
17. Posey, et al. v. McKesson Corp., et al.	N.D. Cal. Case No. 3:12-cv-05939-RS Hon. Richard Seeborg	Remanded Jan. 29, 2013; direct appeal from remand order is pending in this Court; appellees' motion to dismiss appeal is pending in this Court	13-15236

18. Posey, et al. v. McKesson Corp., et al.	N.D. Cal. Case No. 3:12-cv-05939-RS Hon. Richard Seeborg	Remanded Jan. 29, 2013; petition for permission to appeal pending; held in abeyance per Court Order pending resolution of this action and of the appeal in *Corber v. Xanodyne Pharmaceuticals, Inc.*, No. 13-56306	13-80019
19. Reichel, et al. v. McKesson Corporation, et al.	N.D. Cal. Case No. 3:12-cv-05945-RS Hon. Richard Seeborg	Remanded March 25, 2013; petition for permission to appeal pending; held in abeyance per Court Order pending resolution of this action and of the appeal in *Corber v. Xanodyne Pharmaceuticals, Inc.*, No. 13-56306	13-80092
20. Rentz, et al. v. McKesson Corp., et al.	C.D. Cal. Case No. 2:12-cv-9945-PSG-E Hon. Philip S. Gutierez	Remanded Feb. 20, 2013; petition for permission to appeal pending; held in abeyance per Court Order pending resolution of this action and of the appeal in *Corber v. Xanodyne Pharmaceuticals, Inc.*, No. 13-56306	13-80042

21. *Reynolds, et al. v. McKesson Corporation, et al.*	C.D. Cal. Case No. 5:12-cv-02050-PSG-E Hon. Philip S. Gutierrez	Remanded Feb. 12, 2013; petition for permission to appeal pending; held in abeyance per Court Order pending resolution of this action and of the appeal in *Corber v. Xanodyne Pharmaceuticals, Inc.*, No. 13-56306	13-80085
22. *Rice, et al. v. McKesson Corp., et al.*	N.D. Cal. Case No. 3:12-cv-05949-WHA Hon. William Alsup	Remanded Jan. 7, 2013; petition for permission to appeal pending; held in abeyance per Court Order pending resolution of this action and of the appeal in *Corber v. Xanodyne Pharmaceuticals, Inc.*, No. 13-56306	13-80007
23. *Romero, et al. v. McKesson Corporation, et al.*	C.D. Cal. Case No. 5:12-cv-02051-PSG-E Hon. Philip S. Gutierrez	Remanded Feb. 21, 2013; petition for permission to appeal pending; held in abeyance per Court Order pending resolution of this action and of the appeal in *Corber v. Xanodyne Pharmaceuticals, Inc.*, No. 13-56306	13-80046

24. *Ruiz, et al. v. McKesson Corporation, et al.*	C.D. Cal. Case No. 2:12-cv-09987-PSG-E Hon. Philip S. Gutierrez	Remanded Feb. 21, 2013; petition for permission to appeal pending; held in abeyance per Court Order pending resolution of this action and of the appeal in *Corber v. Xanodyne Pharmaceuticals, Inc.*, No. 13-56306	13-80035
25. *Stigall, et al. v. McKesson Corporation, et al.*	C.D. Cal. Case No. 5:12-cv-02037-PSG-E Hon. Philip S. Gutierrez	Remanded Feb. 21, 2013; petition for permission to appeal pending; held in abeyance per Court Order pending resolution of this action and of the appeal in *Corber v. Xanodyne Pharmaceuticals, Inc.*, No. 13-56306	13-80045
26. *Stocks, et al. v. McKesson Corporation, et al.*	C.D. Cal. Case No. 8:12-cv-02020-PSG-E Hon. Philip S. Gutierrez	Remanded Feb. 21, 2013; petition for permission to appeal pending; held in abeyance per Court Order pending resolution of this action and of the appeal in *Corber v. Xanodyne Pharmaceuticals, Inc.*, No. 13-56306	13-80041

27. *Stucker, et al. v. McKesson Corporation, et al.*	C.D. Cal. Case No. 8:12-cv-02033-PSG-E Hon. Philip S. Gutierrez	Remanded Feb. 21, 2013; petition for permission to appeal pending; held in abeyance per Court Order pending resolution of this action and of the appeal in *Corber v. Xanodyne Pharmaceuticals, Inc.*, No. 13-56306	13-80047
28. *Thomas, et al. v. McKesson Corporation, et al.*	C.D. Cal. Case No. 5:12-cv-02039-PSG-E Hon. Philip S. Gutierrez	Remanded Feb. 21, 2013; petition for permission to appeal pending; held in abeyance per Court Order pending resolution of this action and of the appeal in *Corber v. Xanodyne Pharmaceuticals, Inc.*, No. 13-56306	13-80044
29. *Tipton, et al. v. McKesson Corporation, et al.*	C.D. Cal. Case No. 5:12-cv-02056-PSG-E Hon. Philip S. Gutierrez	Remanded Feb. 21, 2013; petition for permission to appeal pending; held in abeyance per Court Order pending resolution of this action and of the appeal in *Corber v. Xanodyne Pharmaceuticals, Inc.*, No. 13-56306	13-80069

30. *Tribbey, et al. v. McKesson Corporation, et al.*	C.D. Cal. Case No. 8:12-cv-02048-PSG-E Hon. Philip S. Gutierrez	Remanded Feb. 21, 2013; petition for permission to appeal pending; held in abeyance per Court Order pending resolution of this action and of the appeal in *Corber v. Xanodyne Pharmaceuticals, Inc.*, No. 13-56306	13-80038
31. *Wallace, et al. v. McKesson Corporation, et al.*	C.D. Cal. Case No. 5:12-cv-02038-PSG-E Hon. Philip S. Gutierrez	Remanded Feb. 21, 2013; petition for permission to appeal pending; held in abeyance per Court Order pending resolution of this action and of the appeal in *Corber v. Xanodyne Pharmaceuticals, Inc.*, No. 13-56306	13-80039
32. *Warne, et al. v. McKesson Corporation, et al.*	C.D. Cal. Case No. 5:12-cv-02048-PSG-E Hon. Philip S. Gutierrez	Remanded Feb. 21, 2013; petition for permission to appeal pending; held in abeyance per Court Order pending resolution of this action and of the appeal in *Corber v. Xanodyne Pharmaceuticals, Inc.*, No. 13-56306	13-80037

TUSA also is aware of the following additional California Propoxyphene case, which also was encompassed by Plaintiffs' Coordination Petition and is not presently pending before the Ninth Circuit. Although a motion for remand is pending, the district court ordered that the action be stayed pending resolution of the appellate proceedings in the related cases now before this Court:

Case Name	**District Court/Case No./District Judge**	**Status**
33. *Witthauer, et al. v. McKesson Corporation, et al.*	N.D. Cal. Case No. 4:12-cv-05937-YGR Hon. Yvonne Gonzalez Rogers	Motion for Remand pending; action stayed per district court order pending resolution of the appellate proceedings in this Court

TUSA also is aware of the following additional Propoxyphene cases, which also were encompassed by Plaintiffs' Coordination Petition, but which have been transferred to the Multidistrict Litigation Proceeding pending in the Eastern District of Kentucky, the Honorable Danny C. Reeves presiding, MDL No. 2226. These actions were remanded by Judge Reeves by his order issued on July 25,

2013, and petitions for permission to appeal from that remand order were filed with the Sixth Circuit Court of Appeals on August 2, 2013:

Case Name	**Transferor District Court/Case No./District Judge**	**Transferee District Court/ Case No.**	**Status**
34. *Baltazar, et al. v. McKesson Corporation, et al.*	E.D. Cal. Case No. 1:12-cv-01917-AWI-BAM Hon. Anthony W. Ishii	E.D. Ky. Case No. 2:13-cv-061-DCR	Remanded July 25, 2013; petition for permission to appeal to the Sixth Circuit filed August 2, 2013
35. *Bowen, et al. v. McKesson Corporation, et al.*	E.D. Cal. Case No. 1:12-cv-01906-LJO-SKO Hon. Lawrence J. O'Neill	E.D. Ky. Case No. 2:13-cv-058-DCR	Remanded July 25, 2013; petition for permission to appeal to the Sixth Circuit filed August 2, 2013
36. *Dadoush, et al. v. McKesson Corporation, et al.*	S.D. Cal. Case No. 3:12-cv-02815-WQH-NLS Hon. William Q. Hayes	E.D. Ky. Case No. 2:13-cv-073-DCR	Remanded July 25, 2013; petition for permission to appeal to the Sixth Circuit filed August 2, 2013
37. *Gomez, et al. v. McKesson Corporation, et al.*	S.D. Cal. Case No. 3:12-cv-02816-AJB-RBB Hon. Anthony J. Battaglia	E.D. Ky. Case No. 2:13-cv-074-DCR	Remanded July 25, 2013; petition for permission to appeal to the Sixth Circuit filed August 2, 2013

38. *Jasmin, et al. v. McKesson Corporation, et al.*	S.D. Cal. Case No. 3:12-cv-02820-WQH-NLS Hon. William Q. Hayes	E.D. Ky. Case No. 2:13-cv-076-DCR	Remanded July 25, 2013; petition for permission to appeal to the Sixth Circuit filed August 2, 2013
39. *Mitchell, et al. v. McKesson Corporation, et al.*	E.D. Cal. Case no. 1:12-cv-01907-LJO-BAM Hon. Lawrence J. O'Neill	E.D. Ky. Case No. 2:13-cv-060-DCR	Remanded July 25, 2013; petition for permission to appeal to the Sixth Circuit filed August 2, 2013
40. *Saunders, et al. v. McKesson Corporation, et al.*	S.D. Cal. Case No. 3:12-cv-02817-GPC-DHB Hon. Gonzalo P. Curiel	E.D. Ky. Case No. 2:13-cv-075-DCR	Remanded July 25, 2013; petition for permission to appeal to the Sixth Circuit filed August 2, 2013

August 5, 2013

Respectfully submitted,

GREENBERG TRAURIG, LLP

By: s/ Karin L. Bohmholdt
Karin L. Bohmholdt
Attorneys for Defendant-Appellant Teva Pharmaceuticals USA, Inc.

CERTIFICATION OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 13,780 words according to the word processing program used by counsel, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010, in Times New Roman 14-point font.

August 5, 2013

Respectfully submitted,

GREENBERG TRAURIG, LLP

By: s/ Karin L. Bohmholdt
Attorneys for Defendant-Appellant
Teva Pharmaceuticals USA, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I submitted the foregoing APPELLANT TEVA PHARMACEUTICALS USA, INC.'S OPENING BRIEF with the Clerk of the Court for the United States Court of Appeal for the Ninth Circuit by using the appellate CM/ECF system on August 5, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

August 5, 2013

Respectfully submitted,

GREENBERG TRAURIG, LLP

By: s/ Karin L. Bohmholdt
Attorneys for Defendant-Appellant
Teva Pharmaceuticals USA, Inc.

Court of Appeals No. 13-56310

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUDITH ROMO, ET AL.,

Plaintiffs – Appellees,

v.

MCKESSON CORPORATION, ET AL.,

Defendants – Appellant, TEVA PHARMACEUTICALS USA, INC.

Appeal from the United States District Court For the Central District of California, District Court No. 5:12-CV-2036-PSG

APPELLANT TEVA PHARMACEUTICALS USA, INC.'S ADDENDUM OF PERTINENT STATUTES

GREENBERG TRAURIG, LLP
Ginger Pigott (CA SBN 162908)
Amy B. Alderfer (CA SBN 205482)
Karin L. Bohmholdt (CA SBN 234929)
1840 Century Park East, Suite 1900
Los Angeles, CA 90067
Telephone: 310-586-7700
Facsimile: 310-586-7800

GREENBERG TRAURIG, LLP
Lori G. Cohen
Victoria D. Lockard
Terminus 200, 3333 Piedmont Road, NE, Suite 2500
Atlanta, GA 30305
Telephone: 678-553-2100
Facsimile: 678-553-2212

GREENBERG TRAURIG, PA
Elliot H. Scherker
333 Avenue Of The Americas, Suite 4400
Miami, FL 33131
Telephone: 305-579-0579
Facsimile: 305-579-0717

TABLE OF CONTENTS

ADDENDUM OF PERTINENT STATUTES

PURSUANT TO CIR. RULE 28-2.7

28 U.S.C. § 1331 – Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1332 – Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

* * *

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of—

(A) every State and foreign state of which the insured is a citizen;

(B) every State and foreign state by which the insurer has been incorporated; and

(C) the State or foreign state where the insurer has its principal place of business; and

* * *

(d)

(1) In this subsection—

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

(C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was

originally filed based on consideration of—

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

* * *

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

* * *

(11)

(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B)

(i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2)) 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, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which—

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State

statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C)

(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

(ii) This subparagraph will not apply—

(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

28 U.S.C. § 1367 – Supplemental Jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.