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February 21, 2014

VIA ELECTRONIC FILING

Molly Dwyer, Clerk of Court
Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *Romo v. Teva Pharmaceuticals USA, Inc.* Case No. 13-56310

Dear Ms. Dwyer:

We write on behalf of Petitioner Teva Pharmaceuticals USA, Inc. ("Teva"), with respect to the above-captioned case, for which this Court will be holding en banc oral argument in June, 2014. We respectfully request that this letter be transmitted to the en banc panel members.

Enclosed is a copy of the Protective Petition for Writ of Certiorari ("Protective Cert Petition") Teva has filed with the United States Supreme Court in connection with this matter. As Teva advised this Court in its petition for rehearing en banc, there is a remote possibility that – although Plaintiffs never have so argued – someone might argue that the timing provisions of the Class Action Fairness Act impact en banc review and the deadline by which Teva would have to seek certiorari, even though this Court properly is holding en banc proceedings.

Teva strongly believes that (1) this Court retains jurisdiction to rehear and modify the panel decision en banc, and (2) no Cert Petition is required until this Court concludes these en banc proceedings. However, out of extreme caution and to ensure that Teva's rights may not ever be argued as having been waived, the Protective Cert Petition has been filed, and the Supreme Court has been asked to hold it in abeyance.

We thank the Court for its consideration and would be pleased to provide any further information the Court may desire on these issues.

Respectfully submitted,

s/Karin Bohmholdt

Karin L. Bohmholdt

No. _____

In The
Supreme Court of the United States

TEVA PHARMACEUTICALS USA, INC.,

Petitioner,

v.

JUDITH ROMO; VINCENT TALDONE; ROBIN TAYLER; MARGARET TAYLOR; RANDY TAYLOR; RAY TEETS; LAWRENCE TELLS; KATHRYN TEMCHACK; CHARLES TERRY; VERONICA TERRY; ROBERTA THORNE; MARGARET TIVIS; LINDA TODD; DELORES TOOHEY; DEBRA TOURVILLE; DENA TSOUALS; ALLEN TURNER; CAROLYN TURNER; WANDA TURNER; STARLET TYRONE; GLORIA UNDERWOOD; HENRY UNDERWOOD; JANICE VANISON; WILLIAM VERHEYEN; CHARLES VILDIBILL; SHARON WALLGREN; PAM WALSH; SHARON WALSH; KEESHA WARRIOR; LATANGA WASHINGTON; DARLENE WATT; JAMES WEISS; WESLEY WELBORNE, III; DEBRA WHEELER; MARSHA WHITT; CAROLYN WHYNO; CECILIA WILCKENS; SANDRA WILEMON; STELLA WILKERSON-CLARK; JOANN WILLIAMS; JOYCE WILLIAMS; ROSE WILLIAMS; SHANTAS WILLIAMS; MARY WILSON; ROSE WILSON; PATSY WINZEY; JIMMIE WISE; RUTH WOLFSON; JUANITA WOODSON; LYNNE WYSOCKY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Class Action Fairness Act of 2005 ("CAFA") authorizes removal to federal court if plaintiffs' claims "are proposed to be tried jointly." The question presented here is whether a motion by plaintiffs to coordinate or consolidate their cases before a single trial judge to avoid inconsistent judgments and promote judicial economy constitutes such a proposal.

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioner Teva Pharmaceuticals USA, Inc. ("Teva") is an indirect wholly owned subsidiary of Teva Pharmaceutical Industries Ltd. through the following parent companies: (i) Orvet UK (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 Teva. Teva Pharmaceutical Industries Ltd. is the only publicly traded direct or indirect parent company of Teva, and no other publicly traded company owns more than 10% of its stock.

Respondents are individuals.

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MISCELLANEOUS:

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals is reported at 731 F.3d 918. App. 1. The decision of the district court is unreported. App. 25.

JURISDICTION

The court of appeals issued its opinion on September 24, 2013. On December 19, 2013, this Court granted an application for an extension of time to file this petition up to and including February 21, 2014.[1] This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE AND REGULATIONS

28 U.S.C. § 1332 is set forth in the Appendix at App. 57.

28 U.S.C. § 1453 is set forth in the Appendix at App. 66.

[1] The enlargement was requested and this petition is filed as a protective filing because the Ninth Circuit has now granted rehearing en banc. Oral argument will take place during the week of June 16, 2014. Thus, as explained more fully in Section II, Teva is filing this petition at this time in order to preserve its right to review by this Court.

STATEMENT OF THE CASE

A. Introduction

This case presents an important question of mass action law under the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4, § 2 (Feb. 18, 2005). The dispute concerns whether a motion by plaintiffs to coordinate their state court cases "for all purposes" constitutes a proposal for the cases to be tried jointly thereby triggering federal diversity jurisdiction. A divided panel of the Ninth Circuit Court of Appeals held that even where plaintiffs seek to have actions coordinated in a single court before a single judge "for all purposes," they have not proposed that the cases be tried jointly and therefore the actions are not a "mass action" subject to removal under CAFA. App. 15. The dissenting member of the panel emphasized that the "majority here misinterprets CAFA and does so in a way that creates a circuit split, for practical purposes, with the Seventh Circuit's decision in *Abbott*." App. 17, *citing In Re Abbott Labs., Inc.*, 698 F.3d 568 (7th Cir. 2012). The Seventh Circuit, in *Abbott Labs.,* had earlier addressed a similar issue in resolving an intra-circuit split, and concluded that when plaintiffs request that their cases "be coordinated through trial" they have at least implicitly proposed that the cases be tried jointly and therefore are subject to CAFA. *Id.* at 573. The Eighth Circuit recently weighed in on the side of the Seventh and the dissenting opinion in this case, further amplifying the circuit split. *Atwell v. Boston*

Scientific Corp., ___ F.3d ___, 2013 WL 6050762 (8th Cir. 2013).

Review is warranted because this dispute presents a significant issue of national importance in the law governing mass actions and federal jurisdiction. Congress enacted CAFA to ensure that mass actions that meet CAFA's statutory criteria be removable to federal court and to address a history of abusive and costly mass actions in state courts. The Ninth Circuit's decision below is contrary to that objective. It allows plaintiffs to avoid federal jurisdiction through artful drafting of state court coordination requests. The current circuit split between the Ninth Circuit on the one hand and the Seventh and Eighth Circuits on the other may encourage plaintiffs to file more cases in the many States covered by the Ninth Circuit in order to further avoid federal jurisdiction. This Court's review is thus needed to ensure uniformity among the circuits on a matter of exceptional importance.

The Ninth Circuit itself has recognized that the decision below warrants further consideration. The court ordered rehearing en banc of that decision on February 10, 2014, and will hear argument in June 2014. Teva therefore is filing this petition for certiorari purely as a protective matter to avoid any argument that the provisions in CAFA that require judgment by the court of appeals within sixty days of accepting an appeal might prevent the Ninth Circuit from considering this matter en banc. Teva believes that such an argument is without merit, but to avoid

any question about the timeliness of a petition for writ of certiorari on the underlying question in this case, Teva is filing this petition at this time, but respectfully requests that the petition be held in abeyance pending the Ninth Circuit's completion of en banc proceedings.

B. The Class Action Fairness Act

CAFA amended the procedures that apply to certain types of civil actions to permit cases of "national importance" to be considered in federal rather than state court. It vests "original jurisdiction" to hear "class actions" or "mass actions" in federal district courts if the litigation has more than 100 members, there is minimal diversity, and the amount in controversy exceeds $5,000,000. 28 U.S.C. § 1332(d)(2), (5)(B). CAFA defines "class action" as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure." 28 U.S.C. § 1332(d)(1)(B). A "mass action" is defined as "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i). CAFA expanded the jurisdiction of federal courts for both class actions and mass actions, first, by replacing the ordinary requirement of complete diversity among all plaintiffs and defendants, and second, by eliminating the $75,000 threshold value for each plaintiff's claim.

See Mississippi ex rel. Hood v. AU Optronics Corp., 571 U.S. ___, 134 S. Ct. 736, 740 (2014).

CAFA also provides an exception to the ordinary rule against interlocutory appeals by permitting a court of appeals to accept an immediate appeal from a district court's order granting or denying a motion to remand a class or mass action to state court. 28 U.S.C. § 1453(c). Under CAFA, if a court of appeals accepts such an appeal, "the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed. . . ." *Id.*, § 1453(c)(2). Finally, CAFA states that "[i]f a final judgment on the appeal . . . is not issued before the end of the [sixty-day] period . . . , the appeal shall be denied." *Id.*, § 1453(c)(4).

C. The Proceedings Below

This case is one of more than forty actions involving more than 1,500 plaintiffs from throughout the United States, originally filed separately in California state courts. Each action alleges injuries relating to the use of prescription pain medications containing propoxyphene, which was available in the United States from 1957 until November 2010, and was indicated for relief of mild to moderate pain.

The California Code of Civil Procedure establishes various rules for "coordination" and "consolidation" of cases but they are functional equivalents. Eric E. Younger & Donald E. Bradley, *Younger on Cal. Motions* § 22:14 (2012 ed.) ("coordination is the

equivalent of consolidation . . . of cases pending in different counties"). Cases with common questions that are pending in the same court (*i.e.*, same county) may be consolidated under California law. *See* Cal. Civ. Proc. Code § 1048(a) ("When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."). Cases with common questions that are pending in different courts (*i.e.*, different counties) may be coordinated before a single judge. *See* Cal. Civ. Proc. Code § 404.1 ("Coordination of civil actions sharing a common question of fact or law is appropriate if one judge hearing all of the actions for all purposes . . . will promote the ends of justice 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; the efficient utilization of judicial facilities and manpower; the calendar of the courts; the disadvantages of duplicative and inconsistent rulings, orders, or judgments; and, the likelihood of settlement of the actions without further litigation should coordination be denied.").

On October 23, 2012, a group of attorneys who filed many of the separate propoxyphene law suits petitioned the California Judicial Council under

section 404.1 of the California Code of Civil Procedure to coordinate all California propoxyphene actions before a single trial judge for all purposes. In support of their request, after noting that the actions would involve similar discovery, such that coordination would avoid inconsistent results, plaintiffs proposed the following:

> One judge hearing all of the actions *for all purposes* in a selected site or sites will promote the ends of justice; Common questions of fact or law are predominating and significant to the litigation; Coordination may serve the convenience of parties, witnesses and counsel the relative development of the actions and the work product of counsel; Coordination may facilitate the efficient utilization of judicial facilities and manpower; Coordination may enhance the orderly calendar of the courts; Without coordination, the parties may suffer from disadvantages caused by duplicative and *inconsistent* rulings, orders or *judgments*. . . .

App. 11-12 (emphases added). Based on this proposal, Teva removed the case to federal district court.

The district court declined to hold that the petition for coordination proposed that the cases be tried jointly. App. 25. It declared that the statement that "[o]ne judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice" was simply repeating the standard by which the petition should be analyzed. App. 35. Although the Seventh Circuit had recently held that a request

that cases be tried jointly could be inferred from plaintiffs' request for consolidation "through trial," the district court declined to follow the Seventh Circuit's approach in *Abbott Labs.,* 698 F.3d 568. App. 34. The district court concluded that Seventh Circuit precedent was not binding on it and that the cases were factually distinguishable, eliminating concern about creating a circuit conflict. App. 34, 38.

The Court of Appeals for the Ninth Circuit granted Teva permission to appeal from the district court's remand order. Then, in a divided opinion, the court affirmed the district court's order. The Ninth Circuit decided that plaintiffs' request for a single trial judge to hear the actions "for all purposes" was not a proposal that the cases be tried jointly because the prior paragraph emphasized the need for coordinated discovery. App. 12. And, although "coordination" and "consolidation" are functionally indistinguishable in California state courts, the Ninth Circuit decided that *Abbott Labs*. did not require a different result because *Abbott Labs.* addressed "consolidation," and this case involved "coordination." App. 13.

Judge Gould dissented, concluding that the majority both misinterpreted CAFA and created a split in the circuits. App. 17. He found that the majority had focused on the part of the petition mentioning discovery to the exclusion of the part of the petition mentioning the desire to avoid inconsistent judgments and conflicting determinations of liability. App. 18. Judge Gould stated that "[w]hen Plaintiffs asked the California Judicial Council to coordinate their

cases for reasons that only a joint trial could address, they implicitly proposed a joint trial, bringing their cases within CAFA's mass action provision." App. 21. Finally, Judge Gould commented that *Abbott Labs.* "is both persuasive and relevant to this case." App. 23.

Teva filed a petition for rehearing en banc. The Ninth Circuit granted that petition on February 10, 2014.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE SPLIT AMONG THE CIRCUITS ON AN IMPORTANT ISSUE MERITS THIS COURT'S REVIEW

The Ninth Circuit's panel decision that a motion seeking coordination "for all purposes" is not a proposal that the cases be tried jointly conflicted with a decision of the Seventh Circuit. In dissenting, Judge Gould recognized that the majority's opinion "creates a circuit split." App. 17. And, since the issuance of the Ninth Circuit's opinion, the Eighth Circuit has sided with the Seventh and Judge Gould's dissenting opinion. The Ninth Circuit's decision undermines CAFA's plain language and purpose. Its break with the other courts of appeals warrants this Court's review on this important and recurring issue of national importance. Otherwise, the Ninth Circuit's decision will stand as a roadmap for plaintiffs to avoid CAFA.

A. The Ninth Circuit's Decision Conflicts with the Seventh and Eighth Circuits

The inconsistency between the Ninth Circuit's approach and that of the other two circuits is stark: the Ninth Circuit concluded that a request for consolidation or coordination can only support removal if it contains the word "trial." In contrast, the Seventh and Eighth Circuits and Judge Gould's dissent take a more reasoned approach that considers the overall nature and import of the request. The Ninth Circuit's decision placed form over substance. As Judge Gould framed it: "The majority apparently would require an explicit request for a joint trial, where I conclude that the substance of what was done is controlling." App. 19.

Abbott Labs. involved ten lawsuits brought by several hundred plaintiffs in two Illinois counties for injuries allegedly caused by a prescription drug, Depakote. *See Abbott Labs.*, 698 F.3d at 570. After the actions were filed, the plaintiffs filed a motion seeking consolidation and transfer of the cases pursuant to a rule of the Illinois Supreme Court permitting the transfer of civil actions involving one or more common questions of fact or law pending in different judicial circuits to one judicial circuit for consolidated pretrial, trial, or post-trial proceedings if the court determines that consolidation would serve the convenience of the parties and witnesses and would promote the just and efficient conduct of such actions. *See* Ill. Sup. Ct. R. 384(a). The plaintiffs asserted that the cases presented "common questions of fact and

law regarding Abbott's liability" and that consolidation would "eliminate duplicative discovery and pretrial litigation, prevent inconsistent pretrial and trial rulings, and thereby promote judicial efficiency." *Abbott Labs*., 698 F.3d at 571. In their memorandum in support of the motion, plaintiffs stated that they were requesting consolidation "through trial" and "not solely for pretrial proceedings." *Id*. Abbott removed the cases to federal court and the district courts that considered the plaintiffs' request for consolidation reached conflicting conclusions as to plaintiffs had proposed trying the cases jointly. *Id*.

The Seventh Circuit decided that notwithstanding plaintiffs' argument that they did not specifically ask that their cases be tried jointly, such a proposal was implicit. The court stated:

> Plaintiffs may not have explicitly asked that their claims be tried jointly, but the language in their motion comes very close. . . . [P]laintiffs requested consolidation of their cases "through trial" and "not solely for pretrial proceedings." They further asserted that consolidation through trial "would also 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" (emphasis added). We agree with Abbott that 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. Although plaintiffs assert that the transferee court will decide how their cases proceed to trial, "[i]t does not matter whether a trial covering 100 or more plaintiffs actually ensues; the statutory question is whether one has been proposed."

Abbott Labs., 698 F.3d at 573 (emphasis in original), *quoting Bullard v. Burlington No. Santa Fe Rwy. Co.*, 535 F.3d 759, 762 (7th Cir. 2008). The Seventh Circuit therefore affirmed the order denying plaintiffs' motion to remand and reversed the order granting remand. *See Abbott Labs.*, 698 F.3d at 573.

The Eighth Circuit reached a similar conclusion in *Atwell*. There, after three groups of plaintiffs filed product liability actions against various manufacturers of a medical device, the plaintiff groups filed motions proposing that the cases be assigned "to a single Judge for purposes of discovery and trial" pursuant to a local rule that permitted reassignment of three or more actions involving claims of personal injury by multiple plaintiffs against the same defendants if the presiding judge determines the administration of justice would be served by such a reassignment. *Atwell v. Boston Scientific Corp.*, 2013 WL 6050762, at *1. Each of the groups sought assignment to a single judge for both pretrial and trial matters to "avoid[ ] conflicting pretrial ruling," "provid[e] consistency in the supervision of pretrial

matters," and "judicial economy," but denied that they were seeking consolidation with other cases. *Id*. at *3.

The defendant then removed the cases to federal court, where two district judges granted plaintiffs' motions to remand on the ground that the plaintiffs had not proposed that the actions be "tried jointly." The Eighth Circuit reversed.

The Eighth Circuit surveyed the prior circuit court decisions on this question, contrasting *Abbott Labs.* with *Romo*. It concluded that the Seventh Circuit in *Abbott Labs.* and the dissenting opinion in *Romo* correctly construed CAFA's mass action provisions. *Id*. at *5. The Eighth Circuit found that notwithstanding the plaintiffs' effort to disavow a desire to consolidate the cases for trial, that is exactly what they had requested by suggesting that assignment to a single judge would permit consistent rulings, and promote judicial economy and "administration of justice." *Id.* According to the court, "[a]s in *Abbott Labs*, '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.'" *Id*. (quoting *Abbott Labs.*, 698 F.3d at 573). Thus the court stated: "We agree with *Abbott Labs* and with Judge Gould's interpretation of the statute and the *Abbott Labs* decision." *Id*.

Plaintiffs' proposal to coordinate their cases for all purposes is not meaningfully different from the proposals in both *Atwell* and *Abbott Labs*. In both this

case and *Abbott Labs.*, the plaintiffs asserted that their cases involved common questions of fact and law and sought to avoid inconsistent rulings or judgments. Here, the plaintiffs requested "coordination" for "all purposes," under a statute that so provides. "All purposes" necessarily includes both pretrial and a trial thereby triggering CAFA's mass action removal provision.

The Ninth Circuit distinguished this case from *Abbott Labs.* based on the fact that in *Abbott Labs.,* the plaintiffs requested consolidation, but here, they requested coordination. App. 13. This is a distinction without a difference. Under California law, cases are consolidated when they are all filed in the same court (*e.g.*, Los Angeles County), but "coordinated," when filed in different courts (*i.e.*, different counties). *Compare* Cal. Civ. Proc. Code § 1048(a), *with* Cal. Civ. Proc. Code § 404.1. Illinois does not draw this linguistic distinction: consolidation applies irrespective of where the cases are from. *See* Ill. Sup. Ct. R. 384(a).

Second, the Ninth Circuit held that plaintiffs in *Abbott Labs.* had expressly requested consolidation "not solely for pretrial proceedings," whereas here there was no explicit request for coordination through trial. App. 13. Again this is a distinction without meaning. Plaintiffs' request for coordination here invoked a provision that permits "one judge hearing all of the actions for all purposes," recognizing "the disadvantages of duplicative and inconsistent rulings, orders, or judgments." App. 6 (quoting Cal. Civ. Proc.

Code § 404.1). The plain language of CAFA requires this result by triggering federal diversity jurisdiction whenever plaintiffs or a court merely propose that claims be tried jointly. *See* App. 64. The proposal by plaintiffs here invoking California's coordination procedure and seeking to avoid inconsistent judgments is, under any objective measure, a proposal to have the cases tried jointly. As Judge Gould recognized, "the proviso in CAFA makes clear only that matters consolidated exclusively for pretrial purposes are not properly removed to federal court," but here, the petition for coordination was not limited to pretrial matters. App. 18.

B. The Question Presented Is of Substantial Importance

Congress enacted CAFA and expanded the jurisdiction of federal courts to include "mass actions" because such "[m]ass action cases function very much like class actions and are subject to many of the same abuses." S. Rep. No. 109-14 at 46. Since CAFA's passage, plaintiffs have attempted to avoid removal to federal court by artful pleading. This Court recently resolved the tension between the notion that plaintiffs are the masters of their complaint and Congress' express intent to curb plaintiffs' efforts to end-run CAFA by stipulating to the amount in controversy. *Standard Fire Ins. Co. v. Knowles*, 568 U.S. ___, 133 S. Ct. 1345 (2013). This case presents a variation on the same theme.

Virtually every state has a procedural statute or rule authorizing the consolidation or coordination of state court cases that raise similar issues of fact or law. *See* Mullenix, Linda S., *Class Actions Shrugged: Mass Actions and the Future of Aggregate Litigation*, University of Texas Law School, Public Law and Legal Theory Research Paper Series, No. 323 at 12 (2013) ("Most state courts, similarly, have joinder or other procedural mechanisms permitting aggregation of large numbers of individual claims in a single lawsuit."), *available at* http://ssrn.com/abstract=2211843 (last viewed Feb. 17, 2014). The California statute at issue here is no exception. Thus, clarification by the Court will avoid the uncertainty and costly removal battles that now occur whenever matters in state courts are consolidated or coordinated, and removed to federal court under CAFA.

This case highlights the circuit split created by the Ninth Circuit unless the Ninth Circuit corrects its error in the pending en banc proceedings. That circuit – in this case – stands alone in deciding that plaintiffs' request for coordination "for all purposes," including the desire to avoid inconsistent judgments, is not a proposal that the cases be "tried jointly" and therefore, not subject to removal under CAFA. The circumstances presented here are typical and there is nothing idiosyncratic about this case other than the result.

The Seventh and Eighth Circuits' approach as well as Judge Gould's dissent fosters judicial economy and certainty; the Ninth Circuit's approach does not. The Seventh and Eighth Circuits' approach as well as Judge Gould's dissent remains true to the words and the purposes of CAFA, 28 U.S.C. § 1332(d)(11)(B)(ii). *See* App. 17 ("Congress enacted CAFA in 2005 to 'curb perceived abuses of the class action device which, in the view of CAFA's proponents, had often been used to litigate multi-state or even national class actions in state courts.'") (citations omitted). The Ninth Circuit's approach does not.

II. THIS COURT SHOULD HOLD THE INSTANT PETITION IN ABEYANCE PENDING THE NINTH CIRCUIT'S EN BANC REVIEW

The Ninth Circuit has now recognized that further consideration of the panel's decision is warranted. Teva would ordinarily have waited to file any petition for writ of certiorari, if warranted, until after the rehearing petition had been resolved. However, to eliminate any potential uncertainty under 28 U.S.C. § 1453, and in an abundance of caution to protect Teva's right to seek certiorari on the underlying CAFA issue, Teva is filing this petition at this time.

Under CAFA, once an appeals court accepts an appeal from a removal order, it must render judgment within sixty days unless an extension for up to ten days is granted. *See* 28 U.S.C. § 1453(c)(1), (2) & (3);

App. 66-67. If the court fails to issue a decision within that period, "the appeal shall be denied." 28 U.S.C. § 1453(c)(4); App. 67.

Nothing in CAFA suggests that it eliminates the ability of courts of appeals to rehear matters or alters the settled rule that the courts of appeals retain jurisdiction until a mandate issues. *See* Fed. R. App. P. 41; Wright & Miller, 16AA *Federal Practice and Procedure* § 3987 (2008); *Carver v. Lehman*, 558 F.3d 869, 878-79 (9th Cir.) (court of appeals retains jurisdiction until the mandate issues), *cert. denied sub nom. Carver v. Vail*, 558 U.S. 973 (2009). Repeal by implication is as disfavored as permitting a panel to manipulate through timing whether its decision would be subject to rehearing. *See Hagen v. Utah*, 510 U.S. 399, 416 (1994). Were it otherwise, CAFA – a statute creating additional federal jurisdiction over mass actions and bolstering appellate review of such matters – would ironically deprive courts of appeals of their usual powers to rehear a panel decision. Indeed, this Court has already held that its own jurisdiction is not affected by section 1453's time limits. *See Hertz Corp. v. Friend*, 559 U.S. 77, 83-84 (2010) (holding that CAFA's sixty-day limit does not apply to review by this Court). Nevertheless, to avoid any argument, no matter how implausible, that the sixty-day period

includes the rehearing process, Teva is filing this protective petition for writ of certiorari now.[2]

As a result, Teva respectfully suggests that the Court hold the petition in abeyance until an en banc decision has been issued by the Ninth Circuit. *See* Gressman, Geller *et al., Supreme Court Practice* 339 (9th ed. 2007) (discussing this Court's practice of deferring consideration of petitions until a significant event occurs).

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[2] The Seventh and Eighth Circuits in *Abbott Labs.* and *Atwell*, respectively, avoided the question by holding the petitions for review in abeyance while the parties briefed the merits and then granting the petitions for review on the same day their opinions on the merits were issued. Both circuits apparently operated under the assumption that CAFA appeals are governed by Fed. R. App. P. 5 and that a discretionary appeal has not been filed and the sixty-day clock does not begin to run until the court grants the petition for review. *See, e.g., Patterson v. Dean Morris, LLP*, 444 F.3d 365, 368 (5th Cir. 2006); *Hart v. Fedex Ground Package Sys., Inc.*, 457 F.3d 675, 678 (7th Cir. 2006); *Evans v. Walter Indus., Inc.*, 449 F.3d 1159 (11th Cir. 2006).

CONCLUSION

This petition for writ of certiorari should be held in abeyance until the Ninth Circuit en banc issues its decision or granted, if necessary.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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v.

TEVA PHARMACEUTICALS USA, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California
Philip S. Gutierrez, District Judge, Presiding

Argued and Submitted
August 30, 2013 – Pasadena, California

Filed September 24, 2013

Before: Ronald M. Gould and Johnnie B. Rawlinson, Circuit Judges, and Ivan L.R. Lemelle, District Judge.*

Opinion by Judge Rawlinson; Dissent by Judge Gould

SUMMARY**

Class Action Fairness Act

The panel affirmed the district court's order remanding to state court a case that was originally removed to federal court under the Class Action Fairness Act's mass action provision.

* The Honorable Ivan L.R. Lemelle, District Judge for the U.S. District Court for the Eastern District of Louisiana, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The Class Action Fairness Act ("CAFA") authorizes federal removal for mass actions when "monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i). The panel held that a petition filed pursuant to California Code of Civil Procedure 404, in which a group of attorneys asked the California Judicial Council to establish a coordinated proceeding for all California state actions involving the pain reliever propoxyphene, was not a proposal in substance for those actions to be tried jointly under CAFA. The panel concluded, therefore, that this CAFA jurisdictional requirement was not met under the totality of the circumstances.

Dissenting, Judge Gould would conclude that CAFA's mass action jurisdictional requirements were met.

COUNSEL

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OPINION

RAWLINSON, Circuit Judge:

This case presents the issue of whether removal was proper under the "mass action" provision of the Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4 (2005), when plaintiffs moved for coordination pursuant to California Code of Civil Procedure section 404. CAFA authorizes federal removal for mass actions when "monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact. . . ." 28 U.S.C.

§ 1332(d)(11)(B)(i). Because we conclude that this CAFA jurisdictional requirement was not met under the totality of the circumstances in this case, we affirm the district court's remand order.

I

Defendant-Appellant Teva Pharmaceuticals USA, Inc. (Teva) appeals the district court's order remanding this case to state court. This case was one of twenty-six pending before the district court alleging injuries related to the ingestion of propoxyphene, an ingredient found in the Darvocet and Darvon pain medications, as well as in their generic brand counterparts. There are additional propoxyphene cases pending in multidistrict litigation in the Eastern District of Kentucky. *See In re Darvocet, Darvon & Propoxyphene Prods. Liab. Litig.*, 780 F. Supp. 2d 1379 (E.D. Ky. 2011).

Propoxyphene is a pain reliever that was used in the United States to treat mild to moderate pain from 1957 through November, 2010, when drugs containing propoxyphene were taken off the market because of the Food & Drug Administration's safety concerns. Teva held the rights to the generic formulary of Darvocet and Darvon, and Plaintiffs allege that Teva was involved in all aspects of the creation, distribution, and sale of generic propoxyphene products.

To date, more than forty actions have been filed in California state courts regarding products containing propoxyphene. On October 23, 2012, a group of

attorneys responsible for many of the propoxyphene actions filed a petition asking the California Judicial Council to establish a coordinated proceeding for all California propoxyphene actions pursuant to California Code of Civil Procedure section 404. Section 404.1 provides:

> Coordination of civil actions sharing a common question of fact or law is appropriate 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; the efficient utilization of judicial facilities and manpower; the calendar of the courts; the disadvantages of duplicative and inconsistent rulings, orders, or judgments; and, the likelihood of settlement of the actions without further litigation should coordination be denied.

After Plaintiffs' petition for coordination was filed, Teva removed the case to federal district court under CAFA's mass action provision.

CAFA provides federal district courts with original jurisdiction over "mass actions" if the actions meet all of the statutory requirements. CAFA defines a mass action as:

> any civil action . . . in which monetary relief claims of 100 or more persons are *proposed to be tried jointly* on the ground that the plaintiffs' claims involve common questions of law or fact, . . .

28 U.S.C. § 1332(d)(11)(B)(i) (emphasis added). The only disputed issue in this case is whether Plaintiffs' petition for coordination constitutes a proposal to be tried jointly under CAFA.

The district court found that there was no federal jurisdiction under CAFA because Plaintiffs' petition for coordination did not constitute a proposal to try the cases jointly, and remanded the case back to state court. The district court distinguished this case from the Seventh Circuit's decision in *In re Abbott Laboratories, Inc.*, 698 F.3d 568 (7th Cir. 2012), explaining that Plaintiffs' petition for coordination differed from the Plaintiffs' consolidation request in Abbott because Plaintiffs' petition focused on pretrial matters while the Plaintiffs' consolidation request in *Abbott* specifically sought consolidation "through trial."

Defendants sought permission to appeal the district court's remand order, which we granted on July 26, 2013. We review the district court's remand order *de novo*. *See Abrego Abrego v. The Dow Chemical Co.*, 443 F.3d at 676, 679 (9th Cir. 2006).

II

The statutory issue for us to decide is whether the petition seeking coordination of the California

propoxyphene actions was a proposal in substance for those actions to be tried jointly. This is a question of first impression in our circuit, as it was for the Seventh Circuit in *Abbott*.

We start from the well-established premise that the removal statutes are to be strictly construed. *See Scimone v. Carnival Corp.*, 720 F.3d 876, 882 (11th Cir. 2013). A corollary precept is that we apply a presumption against removal and construe any uncertainty as to removability in favor of remand. *See id.; see also Tanoh v. Dow Chemical Corp.*, 561 F.3d 945, 953 (9th Cir. 2009); *Abrego Abrego*, 443 F.3d at 685. We have correctly observed that CAFA's mass action provision is "fairly narrow," *Tanoh*, 561 F.3d at 953, given that a qualifying mass action will only be present if there is an aggregate amount in controversy of five million dollars or more, at least one plaintiff who is a citizen of a state or foreign state different from that of any defendant, and "monetary relief claims of 100 or more persons [that] are proposed to be tried jointly." *Id.*; *see also* 28 U.S.C. § 1332(d). We expressly observed in *Tanoh* that CAFA "includ[es] only actions in which the trial itself would address the claims of at least one hundred plaintiffs" and excludes "any civil action in which . . . (IV) the claims have been consolidated or coordinated solely for pretrial proceedings." 561 F.3d at 954; 28 U.S.C. § 1332(d)(11)(B)(ii)(IV). And *Tanoh* makes clear, consistent with the plain language of CAFA, that the proposal to try claims jointly must come from the plaintiffs. 561 F.3d at 953-54. Further, if the statutory

requirements under CAFA are not met, *Tanoh* rejects the idea that we can avoid these statutory terms merely by recourse to general statements in CAFA's legislative history, or to the theory that plaintiffs should not be able to "game" jurisdictional statutes to remain in state court. *Id.* at 954.

Tanoh also instructs that plaintiffs are the "masters of their complaint," and do not propose a joint trial simply by structuring their complaints so as to avoid the one hundred-plaintiff threshold. 561 F.3d at 953, 956; *see also Anderson v. Bayer Corp.*, 610 F.3d 390, 393 (7th Cir. 2010); *Scimone*, 720 F.3d at 883-84. Under this view, plaintiffs can structure actions in cases involving more than one hundred potential claimants so as to avoid federal jurisdiction under CAFA.[1]

Plaintiffs argue, and the district court agreed, that their analogous petition for coordination was not

[1] Amicus curiae Chamber of Commerce of the U.S.A. and amicus curiae PhRMA essentially argue that we should revisit *Tanoh* and that it has lost its precedential value, urging that plaintiffs should not be able to structure their complaints to avoid federal jurisdiction in light of the purposes of CAFA to curb class action and mass action abuses that have occurred in state courts. We reject this argument because we agree with the reasoning of *Tanoh*, because as a three-judge panel we do not have authority to overrule a prior circuit precedent, and because the Chamber of Commerce's position would put us at odds with the Seventh Circuit, which cited *Tanoh* approvingly in *Abbott*, and the Eleventh Circuit, which did so in *Scimone*. *See Abbott*, 698 F.3d at 572; *Scimone*, 720 F.3d at 884.

a proposal to try the cases jointly. We also agree. California Code of Civil Procedure section 404 allows the coordination of "all of the actions for all purposes." However, the plaintiffs' petition for coordination stopped far short of proposing a joint trial. This fact is important because, as discussed, both the Supreme Court and our court recognize that the plaintiff is, and should be, in control of selection of the litigation forum. *See Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013) (reiterating in the CAFA context, that plaintiffs are the "masters of their complaints"); *see also Tanoh*, 561 F.3d at 953 (referencing "the well-established rule that plaintiffs as masters of their complaint, may choose their forum by selecting state over federal court . . . ").

Plaintiffs asked for coordination under section 404, and submitted a Memorandum of Points and Authorities in support of the petition for coordination. We now turn to that memorandum to discern whether plaintiffs proposed that the claims of 100 or more persons were "to be tried jointly." 28 U.S.C. § 1332(d)(11)(B)(i).

On page 6 of the Memorandum of Points and Authorities, plaintiffs gave the following explanation for seeking coordination:

> Petitioners' counsel anticipates that the actions will . . . involve duplicative requests for the same defendant witness depositions and the same documents related to development, manufacturing, testing, marketing, and sale of the Darvocet Product. Absent coordination

> of these actions by a single judge, there is a significant likelihood of duplicative discovery, waste of judicial resources and possible inconsistent judicial rulings on legal issues.

One would be hard pressed to parse a proposal for a joint trial from this language. Rather, the obvious focus was on pretrial proceedings, *i.e.*, discovery matters.

On page 7 of the memorandum, plaintiffs informed the court that coordination was also sought because "[u]se of committees and standardized discovery in a coordinated setting will expedite resolutions of these cases, avoid inconsistent results, and assist in alleviating onerous burdens on the courts as well as the parties." Again, we see emphasis on pretrial proceedings with no mention of a joint trial.

On page 8, the plaintiffs urged coordination on the following bases:

> One judge hearing all of the actions *for all purposes* in a selected site or sites will promote the ends of justice; Common questions of fact or law are predominating and significant to the litigation; Coordination may serve the convenience of parties, witnesses and counsel the relative development of the actions and the work product of counsel; Coordination may facilitate the efficient utilization of judicial facilities and manpower; Coordination may enhance the orderly calendar of the courts; Without coordination, the parties may suffer from disadvantages

> caused by duplicative and *inconsistent* rulings, orders or *judgments* . . .

(Emphases added).

Isolation of the phrases "for all purposes," "inconsistent judgments," and "conflicting determinations of liability" to support a conclusion that the plaintiffs sought a joint trial completely ignores all references to discovery, including on the same page containing the reference to liability, where Plaintiffs stated: "[I]n light of the similarity of the actions, there will be *duplicate discovery obligations* upon the common defendants *unless coordination is ordered*. Coordination before initiation of discovery in any of the cases will eliminate waste of resources and will facilitate economy. . . ." (Emphases added). As we read the plaintiffs' petition for coordination, it is quite a stretch to discern a request for joint trial when the clear focus of the petition is on pretrial matters. Reliance on nine words in the petition to the exclusion of all else is inconsistent with the principle that any doubt about federal jurisdiction be resolved in favor of remand. *See Scimone*, 720 F.3d at 882; *see also Abrego Abrego*, 443 F.3d at 685. In particular, Defendants' reliance on the plaintiffs' reference to inconsistent judgments is on shaky ground because judgments may be rendered outside the confines of a trial. Default judgments and summary judgments come readily to mind. *See* Federal Rules of Civil Procedure 55 and 56 (providing for entry of judgment prior to trial).

Neither are we persuaded that we should reach the same result as the Seventh Circuit in *Abbott*. Not only did that case involve a completely different procedure, consolidation as opposed to coordination, *see* 698 F.3d at 570, the plaintiffs' request in that case explicitly and expressly referenced "consolidation of the cases through trial and not solely for pretrial proceedings," thereby removing any question of the plaintiffs' intent. *Id*. at 571 (footnote reference and internal quotation marks omitted).

This case also differs from *Mississippi ex rel. v. AU Optronics*, 701 F.3d 796 (5th Cir. 2012), where the Fifth Circuit concluded that federal jurisdiction existed under CAFA when the State of Mississippi brought an action under the Mississippi Consumer Protection Act and the Mississippi Antitrust Act against defendants who manufactured liquid crystal display panels and harmed consumers by charging artificially inflated prices. *See id.* at 798-800. The Fifth Circuit concluded that the real parties in interest included the State and the individual consumers who purchased the products. *See id.* at 802. Because there were more than one hundred consumer claims at issue in the single lawsuit filed by the State, the Fifth Circuit held that CAFA conferred jurisdiction upon the federal court over the "mass action." *Id.*

Unlike the *AU Optronics* case, the plaintiffs here have filed separate lawsuits, none of which have been initiated by the State, so the rationale articulated by

the Fifth Circuit is inapposite, even were we inclined to adopt it.[2]

Finally, we consider the rulings of three different district court judges in this circuit who have determined that similar requests for coordination under this California procedural rule were not the equivalent of a request for a joint trial. *See Gutowski v. McKesson Corp*., No. C 12-6056 CW, 2013 WL No. C 12-05939 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. 7, 2013). These eminent California judges were practitioners in California prior to taking the bench and their decisions, with their considerable knowledge of California procedural rules, reinforce our view of the appropriate disposition of this case. We would affirm this fourth California district court judge's decision to remand this case to state court.

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[2] Amicus curiae Washington Legal Foundation argues that "joint trial" includes cases resolved in conjunction with each other, relying on the dictionary definition of "joint" and the statute's plain language. We agree that "joint trial" does not mean everyone sitting in the courtroom at the same time. However, as made obvious in this opinion, we disagree that mere invocation of the California coordination provision is sufficient to constitute a proposal for joint trial. Rather, as we have done here, we look to Plaintiffs' petition and supporting documents to determine the extent of Plaintiffs' request for coordination.

III

Because we conclude that Plaintiffs' petition for coordination was not a proposal to try the cases jointly, we **AFFIRM** the district court's order granting Plaintiffs' motion to remand.[3]

GOULD, Circuit Judge, dissenting:

I respectfully dissent.

We must decide whether removal is proper under the "mass action" provision of the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4 (2005), when plaintiffs move for coordination pursuant to California Code of Civil Procedure section 404 **and justify their request in part by asserting**

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[3] We recognize that we have discretion to consider alternative bases for the exercise of federal jurisdiction, *see Nevada v. Bank of America Corporation*, 672 F.3d 661, 673 (9th Cir. 2012). We agree with the district court that there is a lack of federal question jurisdiction because Plaintiffs' state law claims do not "aris[e] under the Constitution, laws, or treaties of the United States. *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 805, 817 (1986).

We also agree with the district court's conclusion that complete diversity is lacking between the parties inasmuch as plaintiff Romo and defendant McKesson are both California citizens. *See Wisc. Dep't of Corr. v. Schacht*, 524 U.S. 381, 388 (1998) (requiring complete diversity of citizenship for federal jurisdiction).

a need to avoid inconsistent judgments.[1] CAFA extends federal removal jurisdiction for mass actions when "monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11). I would hold that these requirements are met, and would reverse the district court's remand order.

I

The issue before us is whether Plaintiffs' petition to coordinate actions under California Code of Civil Procedure section 404 constitutes a proposal for these actions in California state court to be tried jointly, making the actions a "mass action" subject to federal jurisdiction under CAFA. I agree with the majority that federal courts are courts of limited jurisdiction, and the general rule is that removal statutes are strictly construed against removal.[2] *Luther v.*

[1] In the petition Plaintiffs asked for coordination of their lawsuits for reasons including concerns that there could be potential "duplicate and inconsistent rulings, orders, or judgments," and that without coordination, "two or more separate courts . . . may render different rulings on liability and other issues." After this petition for coordination was filed, Teva removed the case to federal district court under CAFA's mass action provision.

[2] The Seventh Circuit has held that CAFA "must be implemented according to its terms, rather than in a manner that disfavors removal of large-stakes, multi-state class actions," and I agree. *Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830 (7th Cir. 2011).

Countrywide Home Loans Servicing LP, 533 F.3d 1031, 1034 (9th Cir. 2008). As such, I turn to the language and purpose of CAFA. The statutory issue for us is whether the petition that was filed in this case seeking coordination of the California propoxyphene actions was a proposal in substance for those actions to be tried jointly. I regret that the majority here misinterprets CAFA and does so in a way that creates a circuit split, for practical purposes, with the Seventh Circuit's decision in *Abbott*.

Congress enacted CAFA in 2005 to "curb perceived abuses of the class action device which, in the view of CAFA's proponents, had often been used to litigate multi- state or even national class actions in state courts." *Tanoh v. Dow Chemical Co*., 561 F.3d 945, 952 (9th Cir. 2009) (citation omitted). CAFA further extends federal jurisdiction over "mass action" cases when several requirements are met, although only the "proposed to be tried jointly" requirement is at issue here. *See* 28 U.S.C. § 1332(d)(2), (6), (11)(A).

Proposals for joint trials may be made implicitly, and a "joint trial" may "take different forms as long as the plaintiffs' claims are being determined jointly." *Abbott,* 698 F.3d at 573; *see Bullard v. Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759, 762 (7th Cir. 2008). For example, an "exemplary" or "bellwether" trial may only feature a small group of plaintiffs, but it is still a joint trial when the claims or issues of a larger group are precluded or otherwise decided by the results. *See Koral v. Boeing, Co*., 628 F. 3d 945, 947

(7th Cir. 2011). We should be looking at the reality of joint trial proposal, not at how a party may characterize its own actions.

What is critical is that this appeal concerns a set of actions filed in state court followed by a petition by Plaintiffs to coordinate, in part to avoid inconsistent judgments. And so it is on that aspect of this case, distinguishing it from *Tanoh*, that we should be focused.[3]

My disagreement with the majority is over the import of the coordination motion and the reasons given for it. The majority focuses on the part of the petition mentioning pretrial discovery and chooses to downplay that part of the petition urging that there be no inconsistent judgments. In doing this, the majority disregards that the proviso in CAFA makes clear only that matters consolidated exclusively for pretrial purposes are not properly removed to federal court. The majority does not try even to argue, nor could it do so correctly here, that the petition for coordination is *limited* to pretrial matters. Instead, it argues that the petition "stopped far short of

[3] The amicus curiae Chamber of Commerce of the U.S.A. and amicus curiae PhRMA want us to revisit *Tanoh*, to say that it has no vitality and that plaintiffs cannot structure their complaints to avoid federal jurisdiction in light of the purposes of CAFA to curb class action and mass action abuses that have occurred in state courts. Although this argument by the Chamber of Commerce has some weight, I agree with the majority that this argument misunderstands the power of a three-judge panel, which may not overrule a prior circuit precedent.

proposing a joint trial." But there is no applicable judicial precedent supporting the majority's proposition that the focus of a coordination petition mentioning pretrial matters in large part may override the reality of a plaintiff's proposal to try claims jointly when the petition seeks relief that would require joint trial. The majority apparently would require an explicit request for a joint trial, whereas I conclude that the substance of what was done is controlling. Recourse to the general principle that doubts on removal should be resolved by favoring the plaintiffs' forum choice simply does not answer that this case fits CAFA removal like a glove under a reasonable assessment of what is a proposal for joint trial.

Our Ninth Circuit precedent in *Tanoh* suggests that plaintiffs are the "masters of their complaint," and do not propose a joint trial simply by structuring their complaints so as to avoid the one hundred-plaintiff threshold. 561 F.3d at 953, 956; *see Anderson v. Bayer*, 610 F.3d 390, 393 (7th Cir. 2008); *Scimone v. Carnival Corp.*, 720 F.3d 876 (11th Cir. 2013). That is not surprising and is analogous to the fact that individuals and corporations can structure transactions so as to avoid statutory prohibitions or terms.

But the United States Supreme Court has recently pointed out that there are limits to how far plaintiffs may go in structuring their complaints to avoid federal jurisdiction. Thus in *Standard Fire v. Knowles*, the Supreme Court rejected the ability of a proposed class action plaintiff to stipulate that damages would not exceed five million dollars. 568 U.S.

___, 133 S. Ct. 1345, 1350, 185 L. Ed. 2d 439 (2013) ("[T]he stipulation at issue here can tie Knowles' hands, but it does not resolve the amount-in-controversy question in light of his inability to bind the rest of the class."). In that case, the plaintiff unsuccessfully attempted to stipulate an amount-in-controversy below five million dollars before his proposed class had been certified. *Id.* at 1347. *Standard Fire* arose in the context of a challenge to plaintiffs' counsel's attempt to limit damages before class certification, and the Court recognized that plaintiffs' counsel could not execute a damages stipulation binding class claimants not yet joined. So *Standard Fire* is in my view not necessarily controlling on the issue before us as to whether there has been a proposal for joint trial. Because in *Standard Fire* the Supreme Court appeared to reiterate that plaintiffs are the "masters of their complaint," *id.* at 1350, if Plaintiffs merely had structured separate actions with less than one hundred claimants, and did not seek to coordinate them, I must currently think that the Supreme Court would hold, as we did in *Tanoh*, that no mass action was presented. If plaintiffs are masters of their complaints and can plead in a way to avoid federal jurisdiction, they remain free to "game" the system to some degree, including by joining less than one hundred plaintiffs in many suits in state court, so long as those cases are separate. Nonetheless, we have in this case a request to California courts to coordinate the actions and reasons given for coordination, including to avoid inconsistent judgments. That leads me to recognize that the issue

here, stated more precisely, is whether when plaintiffs seek to coordinate under California law many state actions, and urge the state court that coordination is necessary to avoid inconsistent judgments, that is a proposal for joint trial within the meaning of CAFA.

Plaintiffs argue, and the majority agrees, that their petition for coordination was not a proposal to try the cases jointly. I must respectfully disagree. California Code of Civil Procedure section 404 allows the coordination of "all of the actions for all purposes," and presents a factor-based test to determine whether coordination is appropriate. Plaintiffs asked for coordination under section 404, and submitted a memorandum in support of the petition for coordination. Reasons Plaintiffs listed as supportive of their petition, including the danger of inconsistent judgments and conflicting determinations of liability, in my view could only be addressed through some form of joint trial. When Plaintiffs asked the California Judicial Council to coordinate their cases for reasons that only a joint trial could address, they implicitly proposed a joint trial, bringing their cases within CAFA's mass action provision.[4] That is how I see it and that is what impels my dissent.

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[4] Amicus curiae Washington Legal Foundation argues that "joint trial" includes cases resolved in conjunction with each other, relying on the dictionary definition of "joint" and the statute's plain language. This argument has some weight, and with the majority I would say that "joint trial" does not mean

(Continued on following page)

Plaintiffs further contend that we should interpret the phrase "joint trial" to mean "a joint trial where more than one party (and for purposes of CAFA 100 or more parties) simultaneously present their claims to a trier of fact." I would reject this interpretation because it violates the canon against reading a statutory provision in such a way as to render another provision superfluous. *See Bilski v. Kappos*, 130 S. Ct. 3218, 3228, 177 L. Ed. 2d 792 (2010) (citation omitted). If our court were to adopt Plaintiffs' interpretation of "joint trial," the mass action statutory exception for "claims [that] have been consolidated or coordinated solely for pretrial proceedings" would be meaningless because a proposal for anything short of a single massive trial for all claimants would already fail the mass action requirement. 28 U.S.C. § 1332(d)(11)(B)(ii).[5] I would reject Plaintiffs' narrow interpretation of "joint trial" to give meaning to the exception above.

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everyone sitting in the courtroom at the same time. Washington Legal Foundation also asserts that whenever the California coordination provision is invoked, that in itself will be enough to constitute a proposal for joint trial. I would not need to go so far to resolve this case because I rely in part on Plaintiffs' petition's explanation that there was concern to avoid inconsistent judgments, and because this case does not factually present as one where only coordination of pretrial matters was requested.

[5] I agree with Chief Judge Easterbrook of the Seventh Circuit that "[c]ourts do not read statutes to make entire subsections vanish into the night." *Bullard v. Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759, 762 (7th Cir. 2008).

Although Plaintiffs argue that the Seventh Circuit decision in *Abbott* is inapplicable here, and the majority accepts this argument, I would conclude that Abbott is both persuasive and relevant to this case. *Abbott* addresses a consolidation request "through trial" under Illinois Supreme Court Rule 384.[6] Plaintiffs correctly note that the Illinois rule differs from the language of California Code of Civil Procedure section 404, but still I would conclude that the Seventh Circuit's reasoning is persuasive here. Similar to the Seventh Circuit in Abbott, we are examining a request for coordination or consolidation that lists certain goals that could only be accomplished through a joint trial. *See Abbott*, 698 F.3d at 573. As the Seventh Circuit did, we should have concluded that Plaintiffs were proposing a joint trial, and that federal jurisdiction under the CAFA mass action provision is proper.

In light of the specific reasons given for coordination of the California actions that involve propoxyphene, it is a natural and probable consequence of the grant of the petition seeking coordination, indeed it seems an inevitable result, that these varied actions

[6] Illinois Supreme Court Rule 384(a) says: "When civil actions involving one or more common questions of fact or law are pending in different judicial circuits, and the supreme court determines that consolidation would serve the convenience of the parties and witnesses and would promote the just and efficient conduct of such actions. The supreme court may . . . transfer all such actions to one judicial circuit for consolidated pretrial, trial, or post-trial proceedings."

must be tried together, or coordinated in a way to avoid inconsistent results as with bellwether trials, which amounts to the same thing. If the natural and probable consequence of coordination of separate actions has an impact indistinguishable from joint trial, then it is sensible to treat such a petition for coordination as a proposal for joint trial. I conclude that the circumstances presented here are a proposal for a joint trial within the meaning of what Congress said and intended in CAFA, and for that reason would reverse the district court's order granting Plaintiffs' motion to remand.[7]

[7] In light of what I would decide, I would not need to reach Defendants' alternative arguments that federal subject-matter jurisdiction exists on other grounds.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

#17/25 (025 hrg off)
JS-6

CIVIL MINUTES – GENERAL
ED

Case No. CV 12-2036 (Ex) Date February 20, 2013

Title *Romo et al. v. McKessen Corp., et al*

Present: The Honorable Philip S. Gutierrez United States District Judge

Wendy Hernandez	Not Reported
Deputy Clerk	Court Reporter/Recorder

Attorneys Present for Plaintiffs	Attorneys Present for Defendants
Not Present	Not Present

Proceedings: (In Chambers): Order REMANDING action and RENDERING MOOT motion to dismiss

Before the Court is Plaintiffs' motion to remand the action to state court and Defendant's motion to dismiss. *See* Dkts. # 17, 25. The Court finds the matters appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15. After considering the arguments in support of and in opposition to remand, the Court GRANTS the motion to remand and REMANDS the action to the Superior Court of Riverside County. Because the Court finds that it

does not have subject matter jurisdiction over the action, the motion to dismiss is RENDERED MOOT.

I. Background

The present action is one of 26 cases currently pending before this Court that allege injuries relating to ingestion of the drug ingredient propoxyphene, which is found in the brand drugs Darvocet and Darvon as well as generic brand pain relievers ("Propoxyphene Actions"). There are also many other cases relating to Darvocet, Darvon, and propoxyphene pending in a multidistrict litigation ("MDL") in the Eastern District of Kentucky. *See In re Darvocet, Darvon & Propoxyphene Prods. Liab. Litig.*, 780 F. Supp. 2d 1379 (E.D. Ky. Aug. 16, 2011). The Propoxyphene Actions were brought against various entities that allegedly manufactured, marketed, distributed, and/or sold products containing propoxyphene that were defectively designed and failed to contain adequate warnings.

Propoxyphene is a pain reliever used to treat mild to moderate pain. *Compl.* ¶ 92. It is contained in the brand name drugs Darvocet and Darvon and is also available in generic form. *Id.* ¶¶ 25-89. Products containing propoxyphene were available on the market in the United States from 1957 through November 2010, when the Food & Drug Administration ("FDA") ordered the drug to be withdrawn due to concerns regarding safety risks. *Id.* ¶¶ 96, 136-37. Defendant Eli Lilly & Company ("Eli Lilly") originally

introduced the drug in 1957. *Id.* ¶ 34. Though it eventually sold Darvocet and Darvon to other entities, it maintained an ongoing role in the manufacture and marketing of the brands and also continued to manufacture generic propoxyphene products for generic drug companies. *Id.* ¶ 35. Defendant Xanodyne Pharmaceuticals, Inc. ("Xanodyne") acquired rights in Darvocet and Darvon in 2007, the time frame that is most relevant to the present suit. *Id.* ¶ 36. The Complaint refers to the companies who at various times held rights to the brand name drugs containing propoxyphene as the "Brand and Innovator Defendants." *Id.* ¶ 32.

In 2009, due to concerns regarding propoxyphene's safety, the FDA ordered Xanodyne to include certain warnings on the label for propoxyphene products and to distribute other information about the drug. *Id.* ¶¶ 119-125. Though it appears that Xanodyne complied with the labeling requirements, Plaintiffs allege that Xanodyne failed to comply with all of the requirements mandated by the FDA. *Id.* ¶ 126-28. Plaintiffs also allege that the distributors and producers of the generic form of the drug ("Generic Defendants") did not comply with the labeling requirements mandated to Xanodyne by the FDA. *Id.* ¶ 130.

On November 13, 2012, several Plaintiffs ("Plaintiffs") filed the present action in the Superior Court of Riverside County. *See* Dkt. # 1. The action named several Defendants allegedly responsible for the manufacturing and/or distribution of products containing

propoxyphene. The Defendants relevant to the present motion are McKesson Corp. ("McKesson") and Teva Pharmaceuticals, U.S.A., Inc. ("Defendant" or "Teva"). McKesson, a corporation organized under the laws of Delaware with its principle place of business in California, is a national distributor of prescription drugs, including propoxyphene. *Compl.* ¶ 18. Plaintiffs allege that McKesson engaged in marking [sic], promoting, distributing, advertising, and merchandising propoxyphene products, including products with inaccurate and outdated labeling. *Id.* ¶ 19. Multiple Plaintiffs in the action allege that they ingested propoxyphene products distributed by McKesson and were harmed as a result. *Id.* The Complaint refers to McKesson as a "Distributor Defendant." Teva and Teva Biopharmaceuticals, Inc. ("Teva Defendants) held the rights to generic formation of Darvocet and Darvon. *Id.* ¶¶ 68-72. Plaintiffs allege that the Teva Defendants developed, designed, researched, tested, licensed, manufactured, labeled, advertised, promoted, marketed, sold, and distributed generic propoxyphene products.

Plaintiffs allege state law causes of action for: (1) strict products liability – design defect; (2) strict products liability – failure to warn; (3) strict liability in tort; (4) negligent design; (5) negligence; (6) negligent failure to warn; (7) fraudulent nondisclosure; (8) negligent misrepresentation; (9) fraudulent misrepresentation and concealment; (10) negligence per se; (11) breach of express warranty; (12) breach of implied warranty; (13) deceit by concealment – violation of

California Civil Code §§ 1709-10; (14) violation of California Business & Professions Code § 17200; (15) violation of California Business & Professions Code § 17500; (16) violation of California Civil Code §§ 1750, *et seq.*; (17) negligence against the Innovator and Brand Defendants only; (18) fraudulent nondisclosure against the Innovator and Brand Defendants only; (19) negligent misrepresentation against the Innovator and Brand Defendants only; and (20) fraudulent misrepresentation and concealment against the Innovator and Brand Defendants only. *Id.* ¶¶ 230-523.

On November 20, 2012, Defendant removed the action to this Court. Defendant asserted three grounds for removal: (1) 28 U.S.C. § 1332(d)(11), which permits removal of mass actions; (2) federal question jurisdiction under 28 U.S.C. § 1331; and (3) diversity jurisdiction pursuant to 28 U.S.C. § 1332. *See Not.* 6:3-10. Upon review of the Notice of Removal, the Court was not persuaded that any of the stated grounds for removal were proper. Accordingly, on December 18, 2012, the Court issued an Order to Show Cause ("OSC") why the action should not be remanded to state court for lack of federal subject matter jurisdiction. *See* Dkt. # 24. When the Court issued the OSC, a motion to dismiss was then pending and is currently scheduled for hearing simultaneously with the present motion to remand. *See* Dkt. # 17. On December 20, 2012, Plaintiffs filed a motion to remand, *see* Dkt. # 25, and on January 13, 2013, Defendant filed a response to the Court's OSC, *see*

Dkt. # 28. After considering the arguments in the papers in support of and in opposition to the remand motion, as well as Defendant's response to the Court's OSC, the Court REMANDS the action to state court. The motion to dismiss is RENDERED MOOT.

II. Legal Standard

Federal courts are courts of limited jurisdiction. See *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Under 28 U.S.C. § 1441, a defendant may remove a civil action from state court to federal district court only if the federal court has subject matter jurisdiction over the case. See *Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 679-80 (9th Cir. 2006). Federal subject matter jurisdiction is satisfied through removal if the case could have originally been filed in federal court based on either federal question jurisdiction or diversity jurisdiction. *Chicago v. Int'l Coll. of Surgeons,* 522 U.S. 156, 163 (1997) ("The propriety of removal thus depends on whether the case originally could have been filed in federal court."). If at any time before final judgment it appears a removing court lacks subject matter jurisdiction, the case must be remanded to state court. 28 U.S.C. § 1447(c). Moreover, there is a strong presumption against removal jurisdiction, and the party seeking removal always has the burden of establishing that removal is proper. *See Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992); *Mattel, Inc. v. Bryant*, 441 F. Supp. 2d 1081, 1089 (C.D. Cal. 2005). The removal statute is "strictly construe[d]" against

removal jurisdiction and "federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance. *See Gaus*, 980 F.2d at 566.

III. Discussion

Defendant asserts three grounds upon which it contends removal is proper. First, Defendant contends that the action is removable as a mass action pursuant to 28 U.S.C. § 1332(d)(11). *Not.* 6:11-27. Defendant argues that the action meets the requirements for a mass action because several related cases have been coordinated in state court. *Id.* 7:3-5. Second, Defendant contends that the action is removable based on federal question jurisdiction, pursuant to 28 U.S.C. §1331. *Id.* 12:1-5. Though Plaintiffs claims are not brought pursuant to any federal law, Defendant contends that federal question jurisdiction exists because the claims against the generic defendants, including Teva, necessarily raise a substantial and disputed question of federal law. *Id*. 12:9-12. Third and finally, Defendant contends that there is diversity jurisdiction pursuant to 28 U.S.C. §1332 because McKesson, the only California Defendant that would destroy complete diversity, is fraudulently joined. *Not*. 15:13-25:5. Defendant also contends that, to the extent that any Plaintiff is not diverse from any Defendant other than McKesson, Plaintiffs have been fraudulently misjoined and the nondiverse Plaintiffs' claims should be severed. *Id.* 25:7-29:25.

A. Removal as a Mass Action

The Class Action Fairness Act ("CAFA") establishes federal jurisdiction over interstate class actions in which there are at least 100 class members and the combined claims of the members exceed $5 million. 28 U.S.C. 1332(d)(2), 1332(d)(5)(B). Federal jurisdiction under CAFA also includes "mass actions," in which monetary claims of 100 or more persons are to be jointly tried because they involve common questions of law or fact. 28 U.S.C. 1332(d)(11). Accordingly, under CAFA, removal is proper in "mass action" suits if the following elements are satisfied: (1) the amount in controversy exceeds $5 million; (2) there is minimal diversity, meaning at least one plaintiff is diverse from at least one defendant; (3) 100 or more plaintiffs have proposed to try their case jointly on the ground that their claims involve common questions of law and fact; and (4) at least one plaintiff's claim exceeds $75,000. 29 U.S.C. § 1332(d); *Abrego*, 443 F.3d at 681, 689; *Rice v. McKesson Corp.*, No. C 12-05949 WHA, 2013 WL 97738, at *1 (N.D. Cal. Jan. 7, 2013) (remanding a case related to the present case after rejecting arguments for mass action jurisdiction that were identical to the ones before the Court in the present motion).

Resolution of the present motion turns on whether the third element is satisfied – *i.e.*, whether 100 or more plaintiffs have proposed to try their case jointly. Defendant contends that this element is satisfied because plaintiffs in several of the California Propoxyphene Actions filed a Petition for Coordination

("Petition") in state court.[1] *Opp.* 1:11-23:5. In support of this argument, Defendant relies on a recent case from the Seventh Circuit, *In re Abbott Labs., Inc.*, 698 F.3d 568 (7th Cir. 2012). In *Abbott*, the Seventh Circuit held that plaintiffs' motion to consolidate and transfer in Illinois state court was sufficient to confer federal jurisdiction as a mass action pursuant to 28 U.S.C. § 1332(d), making removal of the action proper. *Abbott*, 698 F.3d at 573. Because the Illinois rule

[1] In its OSC, the Court expressed concern regarding whether CAFA jurisdiction was proper given that the present case was not included in the Petition for Coordination ("Petition"), which specifically sought to coordinate seven *other* Propoxyphene Actions. *See* Dkt. # 24 at 2. Accordingly, the Court ordered Defendant to explain why the Court should consider this case part of the coordinated actions. *Id.* In response, Defendant noted that the Petition stated that counsel for the plaintiffs ("Coordination Counsel") proposed to coordinate the seven identified Propoxyphene Actions "as well as other such cases that may be filed." *Opp.* 1:22-23 (quoting *Petition for Coordination* at 7, attached as Exhibit B to Defendant's Notice of Removal). Defendant also contends that the reasoning of the Petition demonstrates that it applies to all the California Propoxyphene Actions, including the present action. Specifically, the Coordination Counsel argued that "[c]oordination of all the California Propoxyphene cases makes sense." *Id.* 1:24-26. Moreover, it appears that Coordination Counsel confirmed in an email that they intended for all the cases filed in California state court to become part of the Petition and Plaintiffs in the present case have not contested that they should be considered as included in the Petition. *See Mot.*; *Passaretti-Wu Decl.* ¶¶ 3-5, Ex. 1. Based on these reasons, the Court is persuaded that Plaintiffs in the present case should be considered part of the Petition for the purposes of determining whether the present action qualifies as a mass action.

for consolidation is substantially identical to the California rule pursuant to which Plaintiffs in the cases related to the present case moved for consolidation, Defendant argues that the Court should follow the Seventh Circuit and find that federal jurisdiction is proper as a mass action in this case as well.

The Court is neither persuaded that it should follow *Abbott* nor that *Abbott* applies to the facts of the present case. As a Seventh Circuit case, *Abbott* is not binding on this Court. *See Boyd v. Benton Cnty.*, 374 F.3d 773, 781 (9th Cir. 2004). Moreover, several district courts within the Ninth Circuit have already declined to follow *Abbott* in ruling on motions to remand in other Propoxyphene Actions, reducing *Abbott's* persuasive value. *See Posey v. McKesson Corp.*, No. C 12-5939 RS, 2013 WL 361168, at *2-3 (N.D. Cal. Jan. 29, 2013); *Rice*, 2013 WL 97738, at *1; *L.B.F.R. v. Eli Lilly & Co.*, No. 12-CV-10025 (C.D. Cal. Dec. 6, 2012), Dkt. # 8, attached as Exhibit 2 to the Sizemore Declaration ("When the state court joins plaintiffs from other cases and the number exceeds 100 – and not simply coordinates the cases – then mass- action removal is proper.").

Further, even if the Court were inclined to follow *Abbott*, the present case is factually distinguishable from Abbott and so the Court is not persuaded that the Seventh Circuit's reasoning applies here. In *Abbott,* the plaintiffs' request for consolidation specifically stated they were requesting consolidation "through trial" and "not solely for pretrial proceedings." *Abbott*, 698 F.3d at 571. In contrast, here, the

Petition contains no such language. Rather, the language in the petition focuses on coordination for pretrial purposes. For example, the Petition states that counsel for the coordinating plaintiffs ("Coordination Counsel") anticipates that the actions will "involve duplicative requests for the same defendant witness depositions and the same documents related to development, manufacturing, testing, marketing, and sale of [the product.]" *Sizemore Decl.*, Ex. 8 at 62. The Petition goes on to state that "[a]bsent coordination of these actions by a single judge, there is a significant likelihood of duplicative discovery, waste of judicial resources, and possible inconsistent rulings on legal issues." *Id.* The language in the Petition – as well as the complete lack of any mention of joint trial in the Petition – suggests that the Petition is not a request for a joint trial such that CAFA jurisdiction is proper. Moreover, the quotes that Defendant identifies to suggest otherwise appear to be taken out of context. For example, Defendant contends that the Petition requests trial "for all purposes." *Opp.* 2:15. However, the "for all purposes" quote appears in the Petition in the section in which Coordination Counsel is merely reciting the factors to be considered in evaluating a Petition for Coordination. The full quote reads: "The following factors, catalogued in section 404.1 and discussed in more detail below, all demonstrate that coordination of these included actions is appropriate: One judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice." *Sizemore Decl.*, Ex. 8 at 64. This quote is drawn directly from the California Code of

Civil Procedure section that sets out the standards for evaluating whether coordination is appropriate. *See* Cal. Civ. Proc. Code § 404.1. Plaintiffs in this action should not be penalized because Coordination Counsel provided the court reviewing the Petition with the standard by which the Petition should be analyzed. Moreover, Defendant's attempt to characterize this quote as a request for a joint trial appears to the Court to be disingenuous.

Permitting Defendant to remove based on the Petition, as prepared by Coordination Counsel, would be contrary to precedent in the Ninth Circuit. *See Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 954 (9th Cir. 2009). In *Tanoh*, the Ninth Circuit concluded that "Congress intended to limit the numerosity component of mass actions quite severely by including *only* actions in which the *trial itself* would address the claims of at least one hundred plaintiffs." *Id.* (emphasis added). Moreover, the Ninth Circuit made clear that "the decision to try claims jointly and thus qualify as a 'mass action' under CAFA should remain . . . with plaintiffs." *Id.* Based on the Petition, it does not appear to the Court that Plaintiffs have made the decision to *try* the case jointly or that the *trial itself* would address the claims collectively.

Defendant contends that the Court should find that a request for joint trial is implicit in Plaintiffs' Petition. *Opp.* 7:4-6. However, "[c]onstruing plaintiffs' petition for coordination as the functional equivalent of an express request for a joint trial would conflict with both the guidance prov[ided] by our court of

appeals in *Tanoh,* as well as with the general canon of strict construction of removal statues [sic]." *See Rice*, 2013 WL 97738, at *1; *see also Posey*, 2013 WL 361168, at *3. Moreover, the Court is sympathetic to Plaintiffs' assessment that joint trials in cases such as this one are rare, while the more common practice – which is also the approach Plaintiffs indicate they may take – is to conduct bellwether trials. *See Reply* 5:11-21. Given the posture of the case and the content of Plaintiff's Petition, the Court does not find it reasonable to construe the Petition as a request for a joint trial. Because Plaintiffs have not sought to join their claims *for trial*, their action is not removable as a mass action. *See Tanoh*, 561 F.3d at 956. Plaintiffs' separate state court actions may become removable at some later point if they seek to join their claims for trial. *See id.* However, unless and until that happens, they do not constitute a mass action and removal under CAFA is improper. *See id*; *Posey*, 2013 WL 361168, at *3; *Rice*, 2013 WL 97738, at *1.[2]

[2] Defendant's attempt to distinguish the present case from *Tanoh* is unpersuasive. Defendant argues that *Tanoh* is inapplicable to the present case because the plaintiffs in *Tanoh* had not filed *any* motion for coordination whatsoever and it was the defendants that sought to coordinate the actions. *Opp*. 5:1-6:4. While Defendant is correct that *Tanoh* is factually distinguishable on this basis, the reasoning in *Tanoh* focused on whether the case would be *tried* jointly and held that the decision regarding whether to *try* cases jointly should remain with the plaintiffs. *See Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 954 (9th Cir. 2009). The present case is analogous to *Tanoh* because here, as in

(Continued on following page)

Finally, the Court is not persuaded that declining to follow *Abbott* would improperly create a circuit split, as Defendant contends. *See Opp*. 14:1-8. For the reasons discussed above, the Court finds the facts of the present case distinguishable from the facts of *Abbott*. If the facts presently before the Court were more closely analogous to *Abbott*, the Court may be concerned about creating an inter-circuit conflict, but given that the cases may be easily distinguished on the facts, the Court does not find this to be a compelling reason to find jurisdiction proper.

B. Removal Based on Federal Question Jurisdiction

Defendant also seeks to remove based on federal question jurisdiction. *See Not.* 12:1- 14:28. Generally, courts may hear cases based on federal question jurisdiction if the action arises under the Constitution, laws, or treaties of the United States. *See* 28 U.S.C. § 1331. However, federal question jurisdiction may also exist for state law claims that "implicate significant federal issues." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). To invoke federal question jurisdiction for a state law claim, the removing defendant must do more than show that there is some federal issue that underlies the state claim. "[T]he mere presence of a

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Tanoh, plaintiffs have not moved for a joint *trial* and so the case does not qualify as a mass action under CAFA.

federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 813 (1986). Rather, a state law claim implicates significant federal issues when "it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state law claims." *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 13 (1983). In the Ninth Circuit, this inquiry focuses on whether the question of federal law is "pivotal" as opposed to "merely incidental;" "direct and essential" as opposed to "attenuated." *Lippit v. Raymond James Fin. Servs.*, 340 F.3d 1033, 1045-46 (9th Cir. 2003).

In *Merrell Dow*, the Supreme Court addressed precisely the issue before the Court in the present motion: "whether the incorporation of a federal standard in a state-law private action, when Congress has intended that there not be a federal private action for violations of that federal standard, makes the action one 'arising under the Constitution, laws, or treaties of the United States.'" 478 U.S. at 805 (quoting 28 U.S.C. § 1331). In *Merrell Dow*, the Supreme Court addressed this question in the context of precisely the federal standard at issue in the present case: the labeling requirements of the Food, Drug, and Cosmetic Act ("FDCA"), which does not confer a private right of action. *Id.*; *see also In re Epogen & Aranesp Off-Label Mkg. & Sales Practices Litig.*, 590 F. Supp. 2d 1282, 1287 (C.D. Cal. 2008) ("'[N]o private right of action exists to redress alleged

violations of the FDCA." (quoting *Summit Tech., Inc. v. High-Like Med. Instruments Co., Inc.*, 922 F. Supp. 299, 305 (C.D. Cal. 1996)). The Supreme Court answered the question before it in the negative: "We conclude that a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim 'arising under the Constitution, laws, or treaties of the United States.'" *Merrell Dow*, 478 U.S. at 817 (quoting 28 U.S.C. § 1331). The Supreme Court based this holding on the conclusion that "the congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction." *Id.* at 814.

In *Merrell Dow*, the Supreme Court adopted and affirmed the reasoning of the Sixth Circuit, which is highly instructive in the present case:

> "Federal question jurisdiction would, thus, exist only if plaintiffs' right to relief *depended necessarily* on a substantial question of federal law. Plaintiffs' causes of action referred to the FDCA merely as one available criterion for determining whether Merrell Dow was negligent. Because the jury could find negligence on the part of Merrell Dow without finding a violation of the FDCA, the plaintiffs' causes of action did not depend

> necessarily upon a question of federal law. Consequently, the causes of action did not arise under federal law and, therefore, were improperly removed to federal court."

Merrell Dow, 478 U.S. at 807 (quoting 766 F.2d 1005, 1006 (1985)).

Here, as in *Merrell Dow*, Plaintiffs causes of action refer to the FDCA – specifically compliance with the labeling requirements mandated by the FDA in 2007 – as merely one available criterion for determining whether the various defendants are liable for the violations alleged. *See generally Compl.* For example, in support of their cause of action for strict liability for failure to warn, for which the allegations regarding compliance with the 2007 mandate is particularly relevant, Plaintiffs allege a general failure to warn of the risks of the drug in addition to failure to comply with the FDA mandate. *See id.* ¶¶ 243-260. After outlining the various risks of propoxyphene, Plaintiffs allege that "Defendants failed to adequately warn the general public or the community – including Plaintiffs and their treating physicians – about any of the risks outlined above, or about the availability of practical and medically-feasible alternatives." *Id.* 249. Plaintiffs identify several pieces of information that they allege Defendants should have disclosed but did not: that a 1971 trial showed that propoxyphene alone was not significantly superior to placebo in managing pain; that the drug was withdrawn in Great Britain and Europe in 2005 and 2009, respectively, based on findings that

the risks of the drug outweighed its benefits; that in 2009 the FDA ordered Xanodyne to provide certain warnings and conduct clinical studies on the drug; and that in 2009 Xanodyne conducted a study that concluded that propoxyphene can cause significant changes to the heart, even when taken at the recommended doses. *Id.* ¶ 250. In addition to these allegations, Plaintiffs also support their cause of action for strict liability for failure to warn with allegations that neither the Innovator and Brand Defendants nor the Generic Defendants timely complied with the 2007 labeling mandates. *Id.* ¶¶ 251-53. The allegations in support of this claim are illustrative of the allegations in each of Plaintiffs' causes of action: Throughout the Complaint, Plaintiffs include allegations relating to the failure to comply with the labeling mandate in addition to various other factual allegations.

Accordingly, it appears that the alleged failure to comply with the FDA's labeling mandate is merely one of several allegations upon which Plaintiffs base their claim. Thus, Plaintiffs' causes of action do not depend necessarily on compliance with the federal standards. Rather, as in *Merrell Dow*, the allegations relating to compliance with federal regulations are included "merely as one available criterion for determining whether" Defendants are liable for the various state law violations alleged. *See Merrell Dow*, 478 U.S. at 807 (quoting 766 F.2d at 1006). Based on the allegations in the Complaint, a jury could find Defendants liable without finding a violation of any

federal law. Therefore, as in *Merrell Dow*, Plaintiffs' causes of action do not necessarily depend on federal law and, consequently, they do not arise under federal law. This conclusion is bolstered by the fact that the FDCA does not confer a private right of action, providing further support for the conclusion that the inclusion of the federal allegations is "insufficiently 'substantial' to confer federal-question jurisdiction." *Id.* at 814.

Defendant's reliance on *Bowdrie v. Sun Pharmaceutical Industries, Ltd.* is unavailing. In *Bowdrie*, a court in the Eastern District of New York concluded that removal based on federal question jurisdiction was proper when the plaintiffs brought state law causes of action based on the generic brand defendants' failure to make their generic version of a drug bioequivalent to and have the same labeling as the brand name drug. *Bowdrie v. Sun Pharm. Indus., Ltd.*, No. 12- CV-853 (WKF) (MDG), 2012 WL 5465994, at *3-4 (E.D.N.Y. Nov. 9, 2012). Plaintiffs in *Bowdrie* alleged that they suffered injuries because of the differences between the generic and the brand name versions of the drug – in other words, they suffered injuries because the generic defendants had failed to comply with the federal duty to make the generic drugs the same as the brand name equivalents. *Id.* at *1. The crux of the *Bowdrie* plaintiffs' claim was that the generic brand defendants had failed to comply with their federal statutory duty to make their drugs the same as the brand name versions. *Id.* at 4. The Court concluded that "[t]o the

extent they invoke the 'federal duty of sameness,' Plaintiffs' causes of action implicate the labeling requirements for generic drug manufacturers nationwide," which made federal question jurisdiction proper. *Id.*

The Court is not persuaded by Defendant's analogy to *Bowdrie*. In addition to being an out-of-circuit, unpublished district court case, *Bowdrie* is factually distinguishable from the present case. The *Bowdrie* plaintiffs based their claim specifically on the generic defendants' failure to make their drug the same as the brand drug, which defendants alleged was a violation of federal regulations. *See id.* at *1 (citing 21 U.S.C. § 355(j); 21 C.F.R. 314.94). Here, in contrast, Plaintiffs do not base their claims on the Generic Defendants' failure to make the generic version of propoxyphene the same as the brand version, nor do they allege that their claims are based on any of the defendants' failure to comply with any other federal statutes. *See generally Compl.* Plaintiffs allege that the Generic Defendants did not timely implement the labeling requirements or revise their labels according to the 2007 mandate as one of several reasons that they are liable to Plaintiffs. This is not the sole, or even primary, allegation in support of their claims, and Plaintiffs do not allege a cause of action based on the breach of the duty of sameness. *See generally id.* As such, *Bowdrie* is inapposite.

In sum, in accordance with the holding and reasoning of the Supreme Court in *Merrell Dow*, the Court concludes that Plaintiffs' reference to the

federal standards of the FDCA and the FDA's labeling mandate does not create federal question jurisdiction over the case. Moreover, in ruling on a motion to remand, all doubts as to the right of federal jurisdiction must be resolved in favor of remand. *Gaus*, 980 F.2d at 566. Resolving all doubts in Plaintiffs' favor, the Court cannot say that federal jurisdiction is proper. *See Merrell Dow*, 478 U.S. at 807, 817; *Gaus*, 980 F.2d at 566.

C. *Removal Based on Diversity Jurisdiction*

Finally, Defendant contends that removal is proper pursuant to diversity jurisdiction. Under 28 U.S.C. § 1441, a defendant may remove to federal court any state court action between citizens of different states where the amount in controversy exceeds $ 75,000. 28 U.S.C. § 1441(a); 28 U.S.C. § 1332(a). It is well established that a case falls within the district court's jurisdiction pursuant to diversity jurisdiction only if there is complete diversity between the parties. *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 388 (1998). Complete diversity exists only when all plaintiffs are diverse from all defendants; if any plaintiff is a citizen of the same state as any defendant, diversity is not complete and diversity jurisdiction is improper. *Id.* A corporation is a "citizen of any State by which it has been incorporated and of the State where it has its principal place of business." 28 U.S.C. § 1332(c)(1). In all cases, the proponent of federal jurisdiction bears the burden of showing the

statutory jurisdictional requirements are met. *See Abrego*, 443 F.3d at 685.

Only the "complete diversity" requirement is at issue here. McKesson is a corporation organized and existing under the laws of the State of Delaware that maintains its principal place of business in San Francisco, California. Accordingly, McKesson is a citizen of California and Delaware for the purposes of determining diversity. *See* 28 U.S.C. § 1332(c)(1). Neither Plaintiffs nor Defendant alleges the citizenship or residence of all 50 Plaintiffs. However, at least Judith Romo, the first named Plaintiff, is alleged to be a citizen of California, meaning that there is not complete diversity. *See Compl*. ¶ 14. Nonetheless, Defendant contends that there is complete diversity because McKesson's citizenship may be disregarded under the doctrine of fraudulent joinder. *Not.* 20:25-25:5. Defendant also contends that Plaintiffs are fraudulently misjoined and their claims should be severed to the extent that they destroy complete diversity from with [sic] Defendant. *Id.* 25:17-19.

i. Fraudulent Joinder

Under the doctrine of fraudulent joinder, "the defendant seeking removal to the federal court is entitled to present the facts showing the joinder [of a non-diverse defendant] to be fraudulent. *McCabe v. Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987). "Fraudulent joinder is a term of art." *Id.* When 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." *Id*.

There is a presumption against finding fraudulent joinder and a defendant seeking to invoke the doctrine carries a heavy burden, especially given the strong presumption against removal jurisdiction. *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1045 (9th Cir. 2009); *Hamilton* Materials*, Inc. v. Dow Chem. Corp.*, 494 F.3d 1203, 1206 (9th Cir. 2007); *Plute v. Roadway Package Sys., Inc.*, 141 F. Supp. 2d 1005, 1008 (N.D. Cal. 2001) ("There is a presumption against finding fraudulent joinder, and defendants who assert that a plaintiff has fraudulently joined a party carry a heavy burden of persuasion."). A claim of fraudulent joinder should be denied if there is *any possibility* that the plaintiffs may prevail on the cause of action against the resident defendant. *See Hunter*, 582 F.3d at 1044 (citing *Florence v. Crescent Res., LLC*, 484 F.3d 1292, 1299 (11th Cir. 2007)); *Plute*, 141 F. Supp. 2d at 1008. When the Court addresses fraudulent joinder on removal, all disputed questions of fact and ambiguities in the controlling state law must be resolved in favor of the non-removing party. *See Gaus*, 980 F.2d at 566 (discussing general presumption against removal); *Alibi v. Street & Smith Publ'ns*, 140 F.2d 310, 312 (9th Cir. 1944) ("In borderline situations, where it is doubtful whether the complaint states a cause of action against the resident defendant, the doubt is ordinarily resolved in favor of the retention of the cause in state court.");

Aaron v. Merck & Co., Inc., No. CV 05-4073-JFW (MANx), 2005 WL 5792361, at *2 (C.D. Cal. July 26, 2005). "Moreover, any doubts concerning the sufficiency of a cause of action due to inartful, ambiguous, or technically defective pleading must be resolved in favor of remand." *Id.*; *see also Mandernach v. Bayer Corp.*, 09-CV-2306-JHN-OPx, 2010 WL 5232537, at *2 (C.D. Cal. Feb. 8, 2010).

Defendant raises three arguments as to why McKesson's joinder is fraudulent. First, Defendant argues that each of Plaintiffs' causes of action against McKesson is barred by federal preemption under *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011). *See Not.* 21:13-22:17. The Supreme Court in *Mensing* held that claims challenging the labeling for generic prescription medications are preempted because "it [is] impossible for [generic defendants] to comply with both their state-law duty to change the label and their federal law duty to keep the label the same" as the brand name version of the medication. *Id.* at 2578.

The MDL Court hearing the *Darvocet* cases has held that *Mensing* preemption extends to claims challenging the design of generic prescription medications, which generic defendants are likewise powerless to change under federal law. *See In re Darvocet, Darvon & Propoxyphene Prods. Liab. Litig.*, MDL No. 2226, No. 2:11-md-2226-DCR, 2012 WL 718618, at *5 (E.D. Ky. Mar. 5, 2012). Defendants argue that these principles extend to distributors of prescription medications such as McKesson, who are also barred

by federal law from changing the label or design of the products they distribute. *See Not.* 22:4-17. Accordingly, because all claims against McKesson purportedly are barred by federal law, Defendants submit that McKesson has been fraudulently joined. *Id.*

However, the MDL Court already held that preemption does not provide a basis for invoking fraudulent joinder as to McKesson. *See In re Darvocet, Darvon & Propoxyphene Prods. Liab. Litig.*, No. 11-md-2226-DCR, 2012 WL 2919270, at *4 (E.D. Ky. 2012) ("Preemption is a federal defense that goes to the merits of the claim. As such, it does not support a finding of fraudulent joinder." (citing *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1045 (9th Cir. 2009)). The Court joins the *Darvocet* MDL Court in holding that Defendant's preemption argument does not provide a basis for invoking fraudulent joinder. The Ninth Circuit has noted that preemption "goes to the merits of the plaintiff's case." *Hunter*, 582 F.3d at 1045. Where, as here, the "preemption question requires an inquiry into the merits of the plaintiff's claims against all defendants and an analysis of federal law," it is properly treated as an attack on the merits of Plaintiffs' case a [sic] whole, rather than on the joinder of a particular defendant. *See id*. Indeed, were the Court to deny Plaintiffs' motion for remand, the *Mensing* preemption defense would be asserted by the other Defendants that are alleged to have manufactured generic versions of propoxyphene products. *See In re Darvocet*, 2012 WL 2919270, at *4. As the Ninth Circuit clearly explained in *Hunter*:

> "[W]hen, on a motion to remand, a showing that compels a holding that there is no reasonable basis for predicting that state law would allow the plaintiff to recover against the in-state defendant necessarily compels the same result for the nonresident defendant, there is no improper joinder; there is only a lawsuit lacking in merit. In such cases, it makes little sense to single out the in-state defendants as 'sham' defendants and call their joinder improper. In such circumstances, the allegation of improper joinder is actually an attack on the merits of plaintiff's case as such – an allegation that, as phrased by the Supreme Court in *Chesapeake & O.R. Co. v. Cockrell*, [232 U.S. 146], 'the plaintiff's case [is] ill founded as to all the defendants.'"

Hunter, 582 F.3d at 1044-45 (adopting the reasoning announced in *Smallwood v. Illinois Central Railroad Co.*, 385 F.3d 568 (5th Cir.2004) (en banc), and holding that the defendants' preemption argument "should have been brought in the context of attacking the merits of Hunter's case, rather than as a basis for removing the case to federal court.").

Further, preemption defenses involve an analysis of federal law. *See id*. at 1045. "When a defendant asserts that the plaintiff's claim is impliedly preempted by federal law, it cannot be said that the plaintiff's failure to state a claim against the resident defendant is 'obvious according to the settled rules of the state.' Rather, the preemption question requires

an inquiry into the merits of the plaintiff's claims against all defendants and an analysis of federal law. In such a case, the defendant has failed to overcome the 'strong presumption against removal jurisdiction.'" *Id.* (quoting *Gaus*, 980 F.2d at 566).

Defendant next argues that pharmaceutical distributors are exempt from strict products liability under California law due to the "learned intermediary" doctrine and the California Supreme Court's adoption of Comment k of the Restatement (Second) of Torts Section 402A. *Not.* 22:18-23:7. Comment k "provides that the producer of a properly manufactured prescription drug may be held liable for injuries caused by the product only if it was not accompanied by a warning of dangers that the manufacturer knew or should have known about." *Brown v. Superior Court*, 44 Cal. 3d 1049, 1058 (1988). In *Brown*, the California Supreme Court concluded that the test in comment k, not strict liability, is the appropriate test for determining liability for drug manufacturers. *Id.* at 1061-61. Pursuant to *Brown*, Defendant argues that Plaintiffs' design defects claims against McKesson fail as a matter of law. *Not.* 22:18-20.

"This precise issue has received extensive treatment by other district courts in this jurisdiction, with the overwhelming weight of authority supporting McKesson's joinder." *See Rivera v. AstraZeneca Pharms., LP*, No. CV 12-2921 GAF (JEMx), 2012 WL 2031348, at *4 (C.D. Cal. June 5, 2012) (collecting cases and noting that "[a]s numerous other courts have found, the scope of liability for distributors of

pharmaceutical products has not been clearly established under California law."); *Maher v. Novartis Pharms. Corp.*, No. 07-CV-852 WQH, 2007 WL 2330713, at *4 (S.D. Cal. Aug. 13, 2007) ("This Court has been unable to find, nor has either party cited, a case under California law which creates an exception in strict liability for distributors in prescription drug cases. This Court cannot conclude that it is obvious that the general rule of distributor liability does not apply under the allegations in this case.") (citation omitted); *Mendez v. AstraZeneca Pharms. LP*, No. 1:12-CV-00535-LJO-DLB, 2012 WL 1911382, at *1 (E.D. Cal. May 25, 2012).

Defendants do not cite any California cases holding that the learned intermediary doctrine and Comment k of the Restatement (Second) of Torts Section 402A preclude all liability on the part of McKesson. While Defendant's arguments are not unpersuasive, they nonetheless essentially urge this Court to adopt an interpretation of California law that has never been addressed by a California state court. It is well established, however, that all ambiguities in the controlling state law must be resolved in favor of remand. *See Plute*, 141 F. Supp. 2d at 1008; *see also Gaus*, 980 F.2d at 566. In fact, "a federal court should hesitate before pronouncing a state claim frivolous, unreasonable, and not even colorable in an area yet untouched by the state courts," regardless of how logical or persuasive an argument may be. *Mendez*, 2012 WL 1911382, at *2 (citation omitted). The Court agrees with other courts in this jurisdiction

that "even if such claims were later found to fail as a matter of law, that failure would not, in light of the above authorities, be so 'obvious' as to support a finding that the Defendant against which they are brought was fraudulently joined." *See Rivera*, 2012 WL 2031348, at *5.

Finally, Defendants' argument that McKesson was fraudulently joined because Plaintiffs have not pleaded any viable causes of action against McKesson is rejected. As noted, "any doubts concerning *the sufficiency of a cause of action* because of inartful, ambiguous, *or technically defective* pleading must be resolved in favor of remand." *Aaron*, 2005 WL 5792361, at *2 (emphasis added). McKesson is a national distributor of prescription drugs, including propoxyphene. *Compl.* ¶ 18. Plaintiffs allege that McKesson has been integrally involved in marking [sic], promoting, distributing, advertising, and merchandising propoxyphene products, including products with inaccurate and outdated labeling, in California, where Plaintiffs reside. *Id.* ¶ 19. Multiple Plaintiffs in the action allege that they ingested propoxyphene products distributed by McKesson and were harmed as a result. *Id.* ¶ 20. Without reaching the merits of the claims, the Court concludes that the Complaint is sufficiently detailed such that the Court cannot say that there is *no possibility* that Plaintiffs will ultimately be able to state a valid claim. *See Aaron*, 2005 WL 5792361, at *2 (holding that purported pleading deficiencies did not support McKesson's fraudulent joinder on these facts); *accord Freitas v.*

McKesson Corp., No. 2:12-cv-00050-DCR, MDL Docket No. 2226 (E.D. Ky., July 2, 2012 Order).

In sum, in light of the rule that all doubts as to the right of federal jurisdiction must be resolved in favor of rejection and remand to state court, Defendant has not met its "heavy burden" of showing that McKesson has been fraudulently joined. *See Gaus*, 980 F.2d at 566. McKesson's citizenship therefore is taken into account, defeating complete diversity and the Court's jurisdiction. *See* 28 U.S.C. § 1332(a); 28 U.S.C. § 1441.

ii. Fraudulent Misjoinder

Finally, Defendant contends that the Court should sever Plaintiffs' claims, so that jurisdiction may be determined for each Plaintiff family individually. *Not.* 25:17-19. In support of this contention, Defendant cites to the doctrine of fraudulent misjoinder, which permits the Court to disregard the citizenship of Plaintiffs whose joinder is "so egregious as to constitute fraudulent joinder." *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996). The Court rejects Defendant's final attempt to establish federal subject matter jurisdiction for several reasons. First, the Ninth Circuit has not yet addressed or adopted the Eleventh Circuit's fraudulent joinder doctrine and many district courts within the Ninth Circuit have declined to adopt and apply the theory in similar situations. *See Aaron*, 2005 WL 5792361, at *3; *HVAC Sales, Inc. v. Zurich Am. Ins. Group*, No.

C-04-3615 RMW, 2005 WL 2216950, at *4-6 (N.D. Cal. July 25, 2005); *Osborn v. Metro Life Ins. Co.*, 341 F. Supp. 2d 1123, 1128 (E.D. Cal. 2004); *Brazina v. Paul Revere Life Ins. Co.*, 271 F. Supp. 2d 1163, 1172 (N.D. Cal. 2003). Second, *Tapscott* addressed the joinder of two groups of plaintiffs that sued separate groups of defendants based on a different set of transactions on almost entirely separate legal grounds. *Tapscott*, 77 F.3d at 1360. That is simply not the situation that this Court is presented with here, where all Plaintiffs are members of the same group, allege the same injuries with respect to ingestion of the same drugs, and bring claims pursuant to the same legal theories. Therefore, the Court declines to adopt and apply the theory set forth in *Tapscott* to this case.

Further, to the extent that Defendant seeks to assert mere improper joinder, rather than fraudulent misjoinder, that argument would be unavailing as well. In general, plaintiffs may be joined if their claims arise from the same transaction or occurrence and a court may sever claims if it concludes that the claims did not arise from the same transaction or occurrence. *See Coughlin v. Rogers*, 130 F.3d 1348, 1350 (9th Cir. 1997). If a court concludes that multiple plaintiffs are improperly joined, it may drop the improperly named plaintiffs by dismissing without prejudice all plaintiffs except the first named plaintiff. *See* Fed. R. Civ. P. 21; *Coughlin*, 130 F.3d at 1351. The Court does not, however, find it appropriate at this time to address whether Plaintiffs have been improperly joined. First and foremost, the Court does

not have jurisdiction over the matter, making it inappropriate to decide the joinder issue. Further, a finding of improper joinder would not confer jurisdiction in this case. Such a finding would only permit the Court to dismiss all but the first named Plaintiff, Judith Romo; because Judith Romo and McKesson are both California citizens, there would still not be complete diversity and the Court would be required to remand the case. Finally, California joinder rules have been applied somewhat more liberally than federal joinder rules. *See Palma v. Prudential Ins. Co.*, 791 F. Supp. 2d 790, 800 (N.D. Cal. 2011) (noting that California's "rule permitting joinder is broader than the federal rule"); *Osborn v. Metro Life Ins. Co.*, 341 F. Supp. 2d 1123, 1128 (E.D. Cal. 2004) (same). Given that California courts apply joinder rules somewhat differently than federal courts and that Court has concluded that this case is not properly in federal court, it would be improper to discuss the merits of the joinder issue further.

IV. Conclusion

For the foregoing reasons, the Court concludes that it does not have subject matter jurisdiction over the action and REMANDS the action to the Superior Court of Riverside County. Additionally, Defendant's motion to dismiss is RENDERED MOOT.

IT IS SO ORDERED.

28 U.S.C. § 1332

(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;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(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

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(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.

(4) A district court shall decline to exercise jurisdiction under paragraph (2) –

(A)

(i) over a class action in which –

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant –

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the

defendants on behalf of the same or other persons; or

(B) two-thirds or more 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.

(5) Paragraphs (2) through (4) shall not apply to any class action in which –

(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(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.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim –

(A) concerning a covered security as defined under 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

(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.

(e) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

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28 U.S.C. § 1453

(a) Definitions. – In this section, the terms "class", "class action", "class certification order", and "class member" shall have the meanings given such terms under section 1332(d)(1).

(b) In General. – A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(c)(1) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

(c) Review of Remand Orders. –

(1) In general. – Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not more than 10 days after entry of the order.

(2) Time period for judgment. – If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3).

(3) Extension of time period. – The court of appeals may grant an extension of the 60-day period described in paragraph (2) if –

(A) all parties to the proceeding agree to such extension, for any period of time; or

(B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.

(4) Denial of appeal. – If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied.

(d) Exception. – This section shall not apply to any class action that solely involves –

(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act

of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Notice of Filing Protective Petition for Writ of Certiorari with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 21, 2014.

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.

/s/ Karin L. Bohmholdt