Vicky Chaffee et al v. Pfizer Inc. et al

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UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

IN RE: PFIZER

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

ORDER GRANTING PLAINTIFFS' MOTION TO REMAND

I. INTRODUCTION

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

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

II. BACKGROUND

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

One judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice taking into account whether common questions of fact or law are predominating and significant to the litigation; the convenience of parties, witnesses, and counsel; the relative development of the actions and the work product of counsel; the efficient utilization of judicial facilities and manpower; the calendar of the courts; the disadvantages of duplicative and inconsistent rulings, orders, or judgments; and, the likelihood of settlement of the actions without further litigation should coordination be denied."

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

The memorandum of points and authorities supporting the amended petition further explained that the cases will "involve duplicative requests for the same defendant witness depositions and the same documents related to the development, manufacturing, testing, marketing and sale of LIPITOR®. Absent coordination of these actions by a single judge, there is a significant likelihood of duplicative discovery, waste of judicial resources and possible inconsistent judicial rulings on legal issues." (Orr Decl. Ex. B Pt. 1 at 11–19 [hereinafter "MPA"] at 3; see also id. at 7 ("[T]here will be duplicative discovery obligations upon the common defendants unless coordination is ordered. Coordination before initiation of discovery in any of these cases will eliminate waste of resources and will facilitate economy.").) It reiterated the c oncern of preserving judicial resources and avoiding "duplicative and incons istent rulings, orders, or judgments." (Id. at 7–8.) It further represented that "issues likel y to be raised in this action include issues pertaining to liability, allocation of fault and contribution, as

well as the same wrongful conduct of defendants. Such difficult issues may ultimately be addressed by the California Court of Appeal. Coordination is required in order to avoid duplicative efforts and inconsistent rulings." (Id. at 8.) The amended petition was also accompanied by an attorney declaration which stated that "[w] ithout coordination, two or more separate courts will decide essentially the same issues and may render different rulings on liability and other issues." (Orr Decl. Ex. B. Pt. 1 at 27–32 [hereinafter "Finson Decl."] ¶ 11.)

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

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

On February 24, 2014, the parties had their first and only status conference in state court before Pfizer started removing the cases to federal court. (Orr Decl. Ex. M.) At the conference, counsel for the JCCP plaintiffs (hereinafter "JCCP Counsel") provided Judge Johnson with a chart demonstrating that at that point in time, there were at least fifty-four cases concerning similar effects of Lipitor filed in California, which encompassed 1,855

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plaintiffs. (Id. at 5:20–6:4; 6:16–17.) JCCP Counsel e xplained that they have "had total transparency with respect to communications of lawyers both in California and nationally who had any interest in or doing anything [sic] litigation involving Lipitor," (id. at 7:2– 5), and presented Judge Johnson with a proposed "leadership structure" comprising of an executive committee and a steering committee to

handle the rapidly-expanding litigation, (id. at 7:15–18). JCCP Counsel had also "given every lawyer who's in terested at all in participating in the organizational structure and leadership, the opportunity to contact [them] and . . . enter their willingness or interest in being part of the leadership structure," and had not turned down a single lawyer who expressed such interest. (Id. at 11:7–17.) They further represented that they "know lawy ers that are filing the cases," "know who is interested in participating in leadership and who's not," and hoped "t o get the cases that have been filed obviously added on [to the JCCP] as soon as possible." (Id. at 11:19–21, 15:22–23.) Counsel for both parties then s ought clarification regarding the details of coordination, and the following exchange took place:

MR. KIESEL: And that's for disc overy purposes; that they are coordinated together for discovery. THE COURT: Right. MR. CHEFFO: Well, would they be sent back? THE COURT: They can be sent back. They can be sent back for trial. Yes, they can be sent back. MR. CHEFFO: So the coordination order is with respect to discovery? THE COURT: Everything is sort of bundled here for case management and discovery. And they can be tried here, but they can be sent back for trial.

(Id. at 17:13–23.)

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

Beginning on March 12, 2014, Pfizer began removing the state court actions, including cases that had not been named in the amended coordination petition or add-on petitions, to federal court on the grounds of diversity jurisdiction (fraudulent joinder) and mass action jurisdiction pursuant to CAFA. (Orr Decl. ¶ 15; Dkt. 13 [Opposition, hereinafter "Opp."] at 9–10.) Pfi zer also requested a stay in federal district court pending transfer of the cases to Multi-District Litigation ("MDL") court in South Carolina. (Id. ¶ 16.) "While some removed plaintiffs acquies ced in the transfer of their cases to the MDL and chose at that time not to seek remand to California state court, many removed plaintiffs immediately advised the MDL court that they would be seeking remand to California and

asked the MDL court to stay their actions pending determination of the threshold question of federal subject matter jurisdiction." (Id.) The MDL court did so, (id. Ex. N), and then in June 2014 determined that diversity jurisdiction did not exist, In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prod. Liab. Litig., No. 2:14- CV-01810, 2016 WL 7335738, at *6 (D.S.C. Nov. 7, 2016). Because the only remaining

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basis for federal subject matter jurisdiction was CAFA's mass action provision, and because a majority of plaintiffs did not consent to transfer to MDL, the MDL court recommended that the Judicial Panel on Multidistrict Litigation remand the cases. (Id. at *7–*8.) The cases were then tran sferred back to this Court. By the last count, Plaintiffs have filed more than 140 California state court actions involving 4,800 plaintiffs, which have been removed to federal courts in all four districts of California. (Id. at 10.) Plaintiffs now ask this Court to remand the cases to state court on the grounds that the mass action removal requirements of CAFA are not met. (See generally Mot.)

III. DISCUSSION

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

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A. A Proposal for a Joint Trial Was Made

Plaintiffs' motion explains that "at th e time the amended coordination petition was filed, the attorneys who drafted the petition believed they were proposing coordination for pretrial proceedings only."

1 (Dkt. 15 [hereinafter "Reply "] at 3n.1.) However, Plaintiffs do not seriously challenge Pfizer's

position that the amended coordination petition proposed a joint trial, (see generally id.; Mot.). Nor could they.

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

1 In Romo v. Teva Pharm. USA, Inc., 731 F.3d 918 (9th Cir. 2013), rehearing en banc granted and decision vacated, 742 F.3d 909 (Feb. 10, 2014), the Ninth Circuit considered whether, as a matter of first impression, a coordination petition pursuant to California Code of Civil Procedure Section 404 constituted a proposal for a joint trial, and concluded that it did not. Id. at 921–23. Romo was issued the day before Plaintiffs filed their amended petition. Romo analyzed the coordination petitions and supporting memorandum of points and authorities and concluded that although the memorandum encouraged coordination of "all of the actions for all purposes" a nd sought to avoid "inconsistent judgments" and "conflicting determinations of liabil ity," the "obvious focus" of the petition was on "pretrial proceedings, i.e., discovery matters." Id. at 922–23. On February 10, 2014, however, the Ninth Circuit granted rehearing en banc and vacated the decision. Romo v. Teva Pharm. USA, Inc., 742 F.3d 909 (9th Cir. 2014). In Corber v. Xanodyne Pharm., Inc., 771 F.3d 1218 (9th Cir. 2014), described below, the Ninth Circuit reexamined the coordination petitions in Romo and concluded that they did propose a joint trial. Id. at 1223.

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

The language of the amended petition and supporting documents is substantially similar to that in Corber, in which the Ninth Circuit en banc considered whether coordination petitions constituted a

proposal for a joint trial. Corber, 771 F.3d 1218. Corber focused heavily on the text of the petitions and supporting documents and explained that while the petitions did not expressly request a "joint trial," they sought coordination "for all purposes," just as the petition in this case does. Id. at 1223. Corber reasoned that read literally, "'[a]ll purposes ' must include the purposes of trial." Id. The Court also noted that the petitions' stated r easons for coordination, namely the danger of inconsistent judgments and conflicting determinations of liability, further supported the conclusion that they sought a joint trial. Id. at 1223–24. The Corber plaintiffs had not simply recited the factors articulated in Section 404.1, but asserted that "'[t]he inevitability of realizing the inconsistency and duplication factor of California Code of Civil Procedure Section 404.1[ ] weighs heavily in favor of coordination,'" that "'issues pertaining to liability, allocation of fault and contribution, as well as the same wrongful conduct of defendants,' would require coordination," and "repeatedly stated that the factors catalogued in section 404.1 all supported coordination, including the fact that '[o]ne judge hearing all of the actions for a ll purposes in a selected site or sites will promote the ends of justice.'" Id. at 1224. Here too, the amended petition did not simply recite the Section 404.1 factors, but rather it repeatedly noted the need to avoid

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inconsistent judgments and rulings on issues of liability, which could ultimately come before the California Court of Appeal. (Am. Pet. at 8; MPA at 7–8; Finson Decl. ¶ 11.)

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

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

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

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

decide whether a proposal for a joint trial could come from a judge). The Ninth Circuit has only

2 Corber also noted that "[i]t is not clear whethe r the California Judicial Council would grant coordination for less than 'all purposes.' However, if Plaintiffs had qualified their coordination request by saying that it was intended to be solely for pre-trial purposes, then it would be difficult to suggest that Plaintiffs had proposed a joint trial." Corber, 771 F.3d at 1224–25.

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held that it is insufficient for a proposal for a joint trial to come from a defendant. Id. at 1048. However, in Briggs, the Ninth Circuit recently clarified that although "implicit proposals may trigger CAFA's removal ju risdiction," a "proposal for purposes of CAFA's mass action jurisdiction, even an implicit proposal, is a ' voluntary and affirmative act' . . . and an ' intentional act.'" Id. at 1048 (emphasis added) (quoting Corber, 771 F.3d at 1224 and Parson v. Johnson & Johnson, 749 F.3d 879, 888 (10th Cir. 2014)). "It is 'not a mere s uggestion'" or "a mere prediction." Id. (quoting Scimone v. Carnival Corp., 720 F.3d 876, 883 (11th Cir. 2013)). 3

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

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

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

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Pfizer argues that JCCP Counsel proposed joining thousands of plaintiffs to the coordinated action

by "repeatedly stat[ing] that they would seek to add 'all subsequent LIPITOR actions.'" (Opp. at 2 –3, 7.) Contrary to Pfizer's assertion, JCCP Counsel's statements are insufficient to trigger CAFA mass action jurisdiction, because they are merely suggestions or predictions—not volunta ry and affirmative acts proposing a joint trial on behalf of the remaining plaintiffs. Although JCCP Counsel provided Judge Johnson with a list of all known Lipitor actions filed in California State Court at the time of the February 25, 2014, status conference, this did not "unambiguously inform[] [Pfizer] to a substantial degree of specificity" that the claims of at least 100 Plaintiffs had been proposed to be tried jointly. (See Opp. at 14–15 (citing Portnoff v. Janssen Pharm., Inc., 2017 WL 708745, at *6 (E.D. Pa. Feb. 22, 2017).) It merely alerted Judge Johnson and Pfizer to additional cases that could potentially be coordinated. Pfizer is correct that the statutory question is whether a joint trial has been proposed, not whether it will actually take place. (Opp. at 14.) However, absent add-on petitions or similar affirmative actions or definitive commitments by the remaining plaintiffs or their attorneys, they have not proposed a joint trial. 4

Pfizer also notes that JCCP Counsel represent at least 2,823 plaintiffs in 77 Lipitor actions, and have stated that they are in close communication with the attorneys working on the rest of the Lipitor cases. (Opp. at 2–3.) Pfizer apparently believes that the fact that JCCP Counsel are working on additional cases that have not yet filed add-on petitions and are cooperating with other plaintiffs' attorneys is enough to impute the joint

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

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trial proposal of the sixty-five plaintiffs onto remaining plaintiffs. This is unpersuasive, because it is the identities and actions of the clients, not that of the attorneys, that matters. JCCP Counsel have not acted on behalf of any plaintiffs beyond the aforementioned sixty-five —JCCP Counsel have merely represented that they anticipate many additional, unspecified cases will be coordinated. Neither the actions of the sixty-five plaintiffs nor JCCP Counsel can be imputed to the remaining plaintiffs here.

The Court also finds Pfizer's atte mpts to minimize the effects of Briggs unavailing. (See Opp. at 18–19.) The Court is aware that in Briggs, it was the defendants who had initiated coordination proceedings, and the plaintiffs had only represented to the district judge that their cases would likely

be joined for trial in the state court JCCP if they were remanded. Briggs, 796 F.3d. at 1049. Briggs reasoned that the plaintiffs had not made proposals that could trigger CAFA mass action jurisdiction simply by "filing their cases in the California state court system, when a consolidated proceeding covering similar claims, initiated by defendants, was underway in California court," or by representing to the federal district court "w hat would or might happen to their cases, if they were remanded to the state court," es pecially since the district court lacked authority to add cases to the state court JCCP. Id. In this case, unlike in Briggs, plaintiffs initiated the JCCP and had made representations to the JCCP court regarding their desire to coordinate additional cases. Nevertheless, Briggs' holding that a "proposal" is a "voluntary and affirmative" act clearly applies here. And only sixty-five plaintiffs have proposed a joint trial. No other plaintiff has acted voluntarily and affirmatively to be part of or be bound by that proposal.

Pfizer also contends that the remaining plaintiffs took other affirmative steps in their complaints to propose a joint trial. Apparently, more than 100 Lipitor cases involving 3,400 plaintiffs have civil cover sheets attached to their complaints indicating that the cases are "complex" pursuant to Calif ornia Rules of Court 3.400 because they are

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subject to "[c]oordination with related actions pending in one or more courts in other counties, states, or countries, or in federal court;" fifty-nine state court complaints included notices of related cases stating that the case was related to the JCCP before Judge Johnson; twenty-five attached copies of an order entered by Judge Johnson limiting Plaintiffs' complex case fees for "all new add-on cases jo ined to this coordinated proceeding;" and four identified the JCCP in th eir case captions. (Opp. at 3, 8–9; 9 n.5.) However, these actions are all administrative in nature and merely alert the clerk's office to the possibility of coordination in order to assist with case sorting and management. They do not constitute voluntary and affirmative acts by each plaintiff to be part of and bound by a proposal for a joint trial. 5

See Briggs, 796 F.3d. at 1049 (The plaintiffs had not made a proposal for a joint trial by simply "filing their cases in the California state court system, when a consolidated proceeding covering similar claims . . . was underway in California court.").

Nor can the Court assume that at least thirty-five more plaintiffs will be coordinated in this action because of the sheer number of plaintiffs that have filed Lipitor cases. Plaintiffs are free to structure actions to avoid CAFA jurisdiction. Corber, 771 F.3d at 1223 ("[P]laintiffs are the 'masters of thei r complaint' and do not propose a joint trial simply by structuring their complaints so as to avoid the 100-plaintiff threshold."). The plaintiffs who are not yet part of the JCCP could have many legitimate reasons for not wanting a joint federal trial. For example, some plaintiffs might seek to distance themselves from those with seemingly weaker claims or from those who will be preoccupied with defenses unique to them. Other plaintiffs who have suffered more

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

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severe injuries or consequences, such as stroke, blindness, and amputation, or who are bringing suit on behalf of a deceased family member, may not wish to have their claims tried jointly with patients who have had milder injuries or consequences. The Court will not speculate, nor base its jurisdictional decision, on whether thirty-five or more plaintiffs will likely take voluntary and affirmative action to be part of and bound by a proposal for a joint trial. All that matters for the Court's decision now is that at least thirty-five additional plaintiffs have not yet taken such voluntary and affirmative action.

Finally, Pfizer suggests that Judge Johnson herself has proposed a joint trial of 100 or more plaintiffs because her order regarding add-on procedures states that "[a]ll cases filed in California state court against Pfizer, Inc. or McKesson Corporation, alleging injuries related to the development of Type II diabetes . . . are assigned to the Honorable Jane L. Johnson, Los Angeles Superior Court for purposes of coordination." (Opp. at 14 (citing Searcy Decl. Ex. C at 1).) Pfizer submits that because the Ninth Circuit has left open the possibility that "a state court's sua sponte joinder of claims might allow a defendant to remove separately filed actions to federal court as a single 'mass action' under CAFA," Judge Johnson's order should give rise to mass action jurisdiction. (Id. at 14 n.7 (citing Tanoh, 561 F.3d at 956).) The Court disagrees. The sentence immediately following the one Pfizer cites clarifies that "[t]he parties to such actions, however, are still required to comply with the stipulation or notice add-on procedures set forth in this Order." (Searcy Decl. Ex . C at 1 (emphasis added).) By the express terms of Judge Johnson's order, the a dditional cases will not be part of the JCCP or subject to the terms of the coordination petition unless and until they are added by an add-on petition and not subject to a notice of opposition. Indeed, Judge Johnson has only granted two add-on petitions thus far, bringing the total number of plaintiffs in the JCCP to just nine. (Orr Decl. Exs. H, I.) Moreover, at the status conference, Judge Johnson repeatedly stated that the JCCP cases " can be sent back for trial," so it is far from clear whether Judge

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Johnson's order is even proposing a joint tria l, let alone one involving 100 or more plaintiffs. (Orr Decl. Ex. M at 17:13–23.)

IV. CONCLUSION

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

DATED: May 23, 2017 _____ C O R M A C J . C A R N E Y UNITED STATES DISTRICT JUDGE Pamela McKenzie et al v. Pfizer Inc et al

2:14-cv-01800 CJC (JPRx) Wanda Dearmore et al v. Pfizer Inc et al

2:14-cv-01801 CJC (JPRx) Juana Garcia et al v. Pfizer Inc et al 2:14-cv-01804 CJC (JPRx) Judy Miller et al v. Pfizer Inc et al 2:14-cv-01805 CJC (JPRx) Bernadette Fernandez et al v. Pfizer Inc et al

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