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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

IN RE: INCRETIN-BASED
THERAPIES PRODUCTS LIABILITY
LITIGATION

Lead Case No. 13md2452 AJB (MDD)
ORDER DENYING PLAINTIFFS’
MOTIONS TO REMAND
Briggs, Case No. 14cv1677 AJB
(MDD) (Doc. No. 28)
Kelly, Case No. 14cv2066 AJB (MDD)
(Doc. No. 14)
Johnson, Case No. 14cv2070 AJB
(MDD) (Doc. No. 13)
Martinez, Case No. 14cv2071 AJB
(MDD) (Doc. No. 13)
Kreis, Case No. 14cv2072 AJB (MDD)
(Doc. No. 13)

I. BACKGROUND

Before the Court are motions to remand in five separate but similar cases, all of which were removed to federal court by Defendant Merck Sharp & Dohme Corp. (“Merck”). Immediately after removing the above cases to federal court, Merck filed motions to stay consideration of jurisdictional issues pending the Ninth Circuit’s decision in *Romo v. Teva Pharmaceuticals USA, Inc.*¹ After the parties had fully briefed Merck’s motions to stay and Plaintiffs’ motions to remand, the Court stayed the cases as to the

¹ The Ninth Circuit’s en banc decision in *Romo* was issued together with the case of *Corber v. Xanodyne Pharm., Inc.*, 771 F.3d 1218 (9th Cir. 2014). Accordingly, the Court will now refer to the decision as “*Corber*.”

1 motions to remand and vacated the October 30, 2014, hearing date. (Case No. 14cv2066,
2 Doc. Nos. 21, 24.) A status conference was set for December 11, 2014, at which time the
3 Court would consider the stay of jurisdictional issues and the status of Plaintiffs' motions
4 to remand. On November 18, 2014, the Ninth Circuit issued a decision in *Corber* and on
5 November 25, 2014, the Court lifted the stay of jurisdictional issues. (Doc. No. 25.) At
6 the status conference on December 11, 2014, the Court asked counsel questions regarding
7 the practical implications of remand if granted and then took the motions under
8 submission. For the reasons set forth below, the Court **DENIES** Plaintiffs' motions to
9 remand.

10 Procedural History

11 Plaintiffs initiated suit in *Kelly, Kreis, and Johnson* in San Diego Superior Court.
12 Each complaint includes between thirty to forty plaintiffs with citizenship from over a
13 dozen states. (*See* Case No. 14cv1086, Doc. No. 1-2.) Plaintiffs in each case allege
14 injury of pancreatic cancer against Defendants Merck, Novo Nordisk Inc., Amylin
15 Pharmaceuticals, LLC, Eli Lilly and Co., and McKesson Corp. (*Id.*) Merck removed the
16 three cases to this Court asserting that diversity jurisdiction existed over the claims of
17 diverse Plaintiffs and the Court should sever non-diverse Plaintiffs as necessary. (*See id.*,
18 Doc. No. 1.) Merck premised removal on the contention that California-based Defendant
19 McKesson Corp. was fraudulently joined and should not be considered for purposes of
20 determining diversity jurisdiction. (*Id.*)

21 Plaintiffs also filed suit in *Martinez and Briggs* in San Diego Superior Court. (*See*
22 Case No. 14cv1677, Doc. No. 1-3.) These cases also alleged instances of pancreatic
23 cancer against the same Defendants and involved claims of between twenty to thirty
24 plaintiffs in each case. (*Id.*) Merck removed *Briggs* to federal court asserting the same
25 grounds for removal. (*Id.* at Doc. No. 1.) Plaintiffs filed motions to remand *Kelly, Kreis,*
26 *and Johnson* to state court. (*See* Case No. 14cv1086, Doc. No. 10.) In support of
27 remand, Plaintiffs argued McKesson Corp. was a properly joined Defendant and the
28 Court should not utilize Rule 21 to sever the non-diverse parties and retain jurisdiction.

1 (*Id.*)

2 The Court heard oral arguments on the motions to remand in *Kelly, Kreis, and*
3 *Johnson* on August 7, 2014. At the hearing, Plaintiffs’ counsel informed the Court that if
4 remanded the cases would be transferred to Judicial Counsel Coordinated Proceeding No.
5 4574 (hereinafter referred to as the “JCCP”) and handled by Judge Highberger “for all
6 purposes.” (*Id.* at Doc. No. 29.) In reliance, at least in part, on this representation, the
7 Court remanded the cases to state court.² (*Id.* at Doc. No. 20.)

8 Plaintiffs subsequently moved to remand *Briggs* and argued similarly that if
9 remanded, *Briggs* would be transferred to the JCCP. (*See* Case No. 14cv1677, Doc. No.
10 9-1, n.9.) On September 2, 2014, prior to the Court ruling on the motion to remand in
11 *Briggs*, Merck filed an amended notice of removal relying on the representation that
12 *Briggs* would be included in the JCCP to assert that *Briggs*, in conjunction with *Kelly,*
13 *Kreis, Johnson, and Martinez* constitute a mass action under CAFA. (*Id.* at Doc. No. 15.)
14 Merck also removed *Martinez* to federal court on September 2, 2014. (*See* Case No.
15 14cv2071, Doc. No. 1.) Merck argues that *Martinez*, like *Briggs, Kelly, Kreis, and*
16 *Johnson* was intended to be transferred to the JCCP and handled by Judge Highberger.
17 On October 2, 2014, Plaintiffs filed motions to remand in each of the five cases. (Case
18 No. 14cv2066, Doc. No. 14.) Merck filed oppositions in each case on October 16, 2014,
19 (*Id.* at Doc. No. 18), and Plaintiffs filed reply briefs on October 23, 2014 (*Id.* at Doc. No.
20 19). Given that the motions to remand and related briefing in each individual case is
21 largely identical, the Court considers the motions together and issues this single order in
22 disposition of all five motions.

23 **II. LEGAL STANDARD**

24 Under 28 U.S.C. § 1441(a), a case can be removed from state to federal court,
25 provided it could originally have been brought in federal court. This statute is construed
26 strictly against removal, and “[f]ederal jurisdiction must be rejected if there is any doubt
27 as to the right of removal in the first instance.” *Gaus v. Miles, Inc.*, 980 F.2d 564, 566

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² The parties did not raise and thus the Court did not address the applicability of the mass action provision of CAFA in ruling on the prior motions to remand.

1 (9th Cir. 1992); *see also Boggs v. Lewis*, 863 F.2d 662, 663 (9th Cir. 1988). The
2 removing party bears the burden of establishing that the court has subject matter
3 jurisdiction. *Abrego Abrego v. The Dow Chemical Co.*, 443 F.3d 676, 685 (9th Cir.
4 2006). The right to remove a case to federal court is entirely a creature of statute. *See*
5 *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979). The removal
6 statute, 28 U.S.C. § 1441, allows defendants to remove an action when a case originally
7 filed in state court presents a federal question, or is between citizens of different states
8 and involves an amount in controversy that exceeds \$75,000. *See* 28 U.S.C. §§ 1441(a)
9 and (b); 28 U.S.C. §§ 1331, 1332(a). Removal is also permitted in class action cases
10 pursuant to 28 U.S.C. Section 1453, and for cases that constitute a “mass action” under
11 the Class Action Fairness Act (“CAFA”).

12 **III. DISCUSSION**

13 At issue in the current motions to remand is whether Plaintiffs proposed to try
14 jointly the claims of 100 or more plaintiffs as required to trigger the mass action
15 provision of CAFA. CAFA’s mass action provision has been defined as “fairly narrow,”
16 as it applies only if there is an aggregate amount in controversy of five million or more,
17 minimal diversity, and the “monetary relief claims of 100 or more persons are proposed
18 to be tried jointly.” 28 U.S.C. § 1332(d)(11)(B)(I); *see Tanoh v. Dow Chemical Co.*, 561
19 F.3d 945, 952–53 (9th Cir. 2009). The proposal to try claims jointly must come from the
20 plaintiff to satisfy the mass action requirements. *Corber v. Xanodyne Pharm., Inc.*, 771
21 F.3d 1218, 1224 (9th Cir. 2014).

22 Merck relies heavily on the statements of Plaintiffs’ counsel at the motion hearing
23 on August 7, 2014, which represented that the cases at issue would be transferred to the
24 JCCP upon remand.³ Plaintiffs rebut the alleged proposal to try claims jointly by arguing
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26 ³ Disposition of *Martinez* and *Briggs* was not specifically addressed by counsel or
27 the Court at the August 7 hearing. However, in the prior motion to remand set in *Briggs*,
28 (Case No. 14cv1677, Doc. No. 9), Plaintiffs brief represented that *Briggs* would be
transferred to the JCCP along with *Kelly*, *Kreis*, and *Johnson* if remanded. (*Id.* at n. 9.)
Merck relies on this representation as the proposal to try *Briggs* jointly with *Kelly*, *Kreis*,
and *Johnson*. Merck relies on the fact that *Martinez* was filed in San Diego Superior
Court as the basis for *Martinez* being joined to the JCCP along with the other four cases
at issue.

1 that: (1) Plaintiffs did not propose a joint trial; (2) JCCP was coordinated by Defendant
2 Eli Lily & Co.; (3) the JCCP was coordinated for pretrial purposes only; and (4) Plaintiffs
3 are the masters of their complaint and can structure their complaints so as to avoid
4 triggering federal jurisdiction.⁴ (Doc. No. 14, p. 4.)

5 First and foremost, the Court finds Plaintiffs did propose a joint trial when
6 Plaintiffs represented that the cases at issue would be transferred to the JCCP and handled
7 by Judge Highberger for all purposes. Plaintiffs referenced docket management, the
8 desire to obtain quicker trials, and prevention of inconsistent rulings as reasons for
9 including the cases in the JCCP. (*See* Case No. 14cv1086, Doc. No. 29, p. 5-6.) The
10 Court finds these straightforward representations indicative of Plaintiffs’ intentions as to
11 the handling the cases at issue. Subsequent arguments advanced by Plaintiff regarding
12 the scope of JCCP coordination as well as Plaintiffs intention for the future handling of
13 these cases are therefore unpersuasive. In reaching this conclusion, the Court is guided
14 by the Ninth Circuit’s decision in *Corber*, which provided that plaintiffs should be held
15 “responsible for what they have said and done” with respect to coordination. *Corber*, 771
16 F.3d at 1223. In *Corber*, the court analyzed a petition for coordination pursuant to
17 California Code of Civil Procedure Section 404, and focused on the petition being a
18 voluntary request by plaintiffs for coordination “of all actions . . . for all purposes.” *Id.* at
19 1224. While Plaintiffs did not file the initial petition for coordination of the JCCP,
20 Plaintiffs did voluntarily move to remand the instant cases arguing that the JCCP would
21 be the appropriate forum for litigation for the stated purpose of obtaining trials. Further,
22 as Merck does not rely on the initial petition for coordination as the basis for the joint
23 trial proposal, the fact Defendant Eli Lily and Co. filed the initial petition for
24 coordination is unavailing.

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26 ⁴ Plaintiffs raised two additional arguments in support of remand: (5) Merck’s
27 removal failed to include all properly joined and served defendants and (6) Merck’s
28 second notices of removal were akin to an appeal of a remand order in *Kelly, Kreis, and
Johnson*. (*See* Case No. 14cv2066, Doc. No. 21.) Because the Court finds CAFA
applicable, Merck was not required to obtain the consent of all defendants prior to
removal. *See* 28 U.S.C. § 1453(b). With respect to the notice of remand being “akin to
an appeal,” CAFA was not previously addressed by the parties or the Court and thus
presents a new basis for removal.

1 *Corber* also declined to adopt a rule requiring an express request for a joint trial in
2 order to trigger CAFA. *Id.* at 1225. Instead, the *Corber* court approvingly cited to the
3 Seventh Circuit’s decision in *Abbott*, where that court concluded that a proposal for a
4 joint trial within the meaning of CAFA could be implicit. *In re Abbott Labs., Inc.*, 698
5 F.3d 568, 572 (7th Cir. 2012). In *Abbott*, the plaintiffs petitioned for consolidation
6 “through trial” and “not solely for pretrial proceedings” which the court concluded could
7 only be construed as an implicit proposal for a joint trial. *Id.* at 573. Ultimately in
8 *Corber*, the court held that asking for coordination or consolidation “for all purposes” or
9 “through trial” to address common issues of law or fact is a proposal to try the cases
10 jointly as required under CAFA’s mass action provision. *Corber*, 771 F.3d at 1225.

11 Considering Plaintiffs representations that the cases would be transferred to the
12 JCCP “for all purposes,” in part for the specific reason of obtaining trials in the JCCP,
13 the Court concludes Plaintiffs’ representations amounted to a proposal for a joint trial
14 within the meaning of the mass action provision. This conclusion is not dependent on a
15 singular joint trial occurring. As the language of CAFA mandates, a court must consider
16 only whether plaintiffs have *proposed* a joint trial, not whether one will actually occur.
17 *Id.* at n.5. To suggest the claims of hundreds of Plaintiffs from across the country would
18 be resolved in one single mass trial is unreasonable. Likewise, the Court finds it
19 unreasonable for Plaintiffs to argue they sought individual trials for each Plaintiff in the
20 JCCP, as Plaintiffs now claim was intended. Instead, resolution of these cases by trial,
21 either in the multi-district litigation (the “MDL”) or the JCCP, will likely proceed by
22 implementation of a bellwether procedure, thereby potentially resolving numerous cases
23 through the trial(s) of a few select Plaintiffs.

24 Finally, the Court has considered whether Plaintiffs’ counsels’ representations at
25 the August 7, 2014, hearing were merely cursory remarks in response to the Court’s
26 questions regarding future handling upon remand. Plaintiffs, however, advanced the
27 same position regarding inclusion of these cases in the JCCP in subsequent briefing in the
28 *Briggs* motion to remand. Plaintiffs also attempted to file add-on petitions to include

1 *Johnson* and *Kreis* in the JCCP following the initial remand order. Thus, the Court is not
2 dissuaded from reliance on Plaintiffs’ counsels’ representations. *See Atwell v. Boston*
3 *Scientific Corp.*, 740 F.3d 1160 (8th Cir. 2013) (concluding that motions for assignment
4 to a single judge combined with plaintiffs’ candid explanation of their objectives required
5 denial of remand where defendants asserted federal subject matter jurisdiction under the
6 mass action provision).

7 Alternatively, Plaintiffs’ claim their intention to have the cases transferred to the
8 JCCP could not have been a proposal to try claims jointly because the JCCP was
9 coordinated for pretrial purposes only. (Case No. 14cv2066, Doc. No. 14, p. 9.) Despite
10 contradicting Plaintiffs’ stated reason for adding the claims to the JCCP, this argument is
11 unsupported by the nature and progress of the JCCP. Although CAFA does recognize an
12 exception for cases that have been coordinated or consolidated for pretrial proceedings
13 only, that exception is not applicable to the JCCP. *See* 28 U.S.C. §
14 1332(d)(11)(B)(ii)(IV). By way of background, the JCCP petition for coordination was
15 sought pursuant to California Code of Civil Procedure Section 404 which contemplates
16 coordination of actions sharing common questions of fact or law when one judge hearing
17 all of the actions for all purposes will promote the ends of justice. Cal. Code Civ. Proc. §
18 404.1. While not a *per se* proposal to try claim jointly, Plaintiffs cannot support their
19 contention that the JCCP was coordinated solely for pretrial proceedings. *Cf. Corber*,
20 771 F.3d at 1224 (“[W]e can envision a section 404 petition expressly seeking to limit its
21 request for coordination to pretrial matters . . .”).

22 Plaintiffs rely on the initial case management order governing the JCCP to argue
23 the pretrial coordination exception is applicable, (*See* Case No. 14cv2066, Doc. No. 14,
24 p. 9), yet a review of subsequent case management orders suggests the reference to
25 pretrial proceedings in the initial order was only representative of the scope of that *order*
26 as opposed to the scope of the JCCP *coordination*. More recent case management orders
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1 in the JCCP discuss discovery and selection of bellwether cases.⁵ Additionally, a status
2 report recently filed in the JCCP indicates JCCP Plaintiffs’ view that “a small group of
3 bellwether[] [trials] provide an extremely useful and practical backdrop and context for
4 many issues that will arise as the case progresses, including generic causation.” (Case
5 No. 14cv2066, Doc. No. 18-2, Exhibit H, p. 38.) Though the Court does not attribute
6 these orders or statements to Plaintiffs counsel in the instant cases, the Court does charge
7 Plaintiffs counsel with general knowledge of the JCCP proceedings, specifically as it
8 relates to the request to have these cases transferred to the JCCP. While Plaintiffs are
9 permitted to structure their complaint to avoid federal jurisdiction, Plaintiffs cannot
10 retreat from an acted upon course of conduct if that conduct falls within the purview of
11 federal courts in an attempt to divest the Court of jurisdiction. *See e.g. Williams v.*
12 *Costco Wholesale Corp.*, 471 F.3d 975, 976 (9th Cir. 2006) (noting jurisdiction is
13 analyzed on the basis of the pleadings filed at the time of removal without reference to
14 subsequent amendments); *Abada v. Charles Schwab & Co.*, 300 F.3d 1112, 1117 (9th
15 Cir. 2002) (discussing post-removal pleadings that have no bearing on whether the
16 removal was proper.); *Strotek Corp. v. Air Transport Ass’n of America*, 300 F.3d 1129,
17 1131–32 (9th Cir. 2002) (noting jurisdiction under CAFA is determined at the time of
18 removal.). By proposing to include the cases at issue in the JCCP, Plaintiffs satisfied the
19 requirement of a proposal for a joint trial as required by the mass action provision of
20 CAFA.

21 Aside from finding the requirements of a mass action satisfied, the Court finds it
22 notable that Plaintiffs initiated the MDL proceedings in federal court, recognizing that the

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24 ⁵ Bellwether trials have also been contemplated from the beginning of the MDL
25 proceedings, in Case No. 13md2452 (“The parties also agree that a bellwether process
26 could help facilitate, and focus the management of this litigation.” (Doc. No. 122, p. 5)
27 (October 17, 2013); “Counsel for Plaintiffs and the Defense will meet and confer to
28 continue to develop a plan for ‘Bellwether’ trials in this action.” (Doc. No. 143, p. 2)
(October 18, 2013); “The parties will submit a Joint Motion for Entry of a Case
Management Scheduling Order detailing the utilization of Bellwether trials in this action,
and proposed deadlines for filing dispositive motions, *Daubert* motions, and any other
related motions.” (Doc. No. 200, p. 2) (November 25, 2013.)). This Court has since
focused the proceedings on motions regarding federal preemption and general causation
with other proceedings to be scheduled thereafter.

1 interests of the parties and the judiciary were served by the designation of one forum for
2 the resolution of pancreatic cancer cases. CAFA was enacted in 2005 and aimed at
3 “assur[ing] fair and prompt recoveries for class members with legitimate claims; [to]
4 restore the intent of the framers . . . by providing for Federal court consideration of
5 interstate cases of national importance under diversity jurisdiction; and [to] benefit
6 society by encouraging innovation and lowering consumer prices.” Class Action Fairness
7 Act, Pub. L. No. 109–2, 119 Stat. 4, 5 (2005). CAFA was aimed at curbing perceived
8 abuses of the class action device which, in the view of CAFA’s proponents, had often
9 been used to litigate multi-state or even national class actions in state courts. *Tanoh*, 561
10 F.3d at 952 (9th Cir. 2009).

11 The policy underlying CAFA is served by finding the mass action provision
12 triggered in relation to the instant cases which involve claims of Plaintiffs from around
13 the country, the majority of which have claims already pending before this Court.
14 Federal courts are better situated to handle discovery on a national scale and otherwise
15 adequately meet then needs a cases of this magnitude.⁶ Despite Plaintiffs varied positions
16 on where these cases should be handled, the Court is convinced, and Plaintiffs have
17 conceded, the cases should be handled in either the JCCP or the MDL. The fact Plaintiffs
18 triggered federal jurisdiction under the mass action provision of CAFA vests the Court
19 with jurisdiction. The proper inquiry is whether Plaintiffs proposed a joint trial, not
20 whether a joint trial will actually occur, or whether Plaintiffs have since changed their
21 position on the handling of these cases. Having found Plaintiffs did propose a joint trial
22 the Court concludes the five cases at issue constitute a mass action and as such, Merck
23 has met its burden in establishing federal jurisdiction.⁷

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25 ⁶ See *e.g.* Fed. Rule Civ. Proc. 45(b)(2) which permits nationwide service of
26 process.

27 ⁷ As noted previously, the only disputed issue with respect to the requirements of a
28 mass action is whether there was a proposal for a joint trial by Plaintiffs. Thus, given that
minimal diversity exists between the parties and the amount is controversy requirement is
satisfied, the cases constitute a mass action. That McKesson Corp. is a Defendant to
these proceedings does not alter this conclusion and McKesson’s inclusion in this matter

1 **IV. CONCLUSION**

2 For the reasons set forth above, the Court **DENIES** Plaintiffs' motions to remand
3 in the following cases: (1) *Briggs v. McKesson Corp.* (Case No. 14cv1677); (2) *Kelly v.*
4 *Amylin Pharmaceuticals, LLC* (Case No. 14cv2066); (3) *Johnson v. McKesson Corp.*
5 (Case No. 14cv2070); (4) *Martinez v. Amylin Pharmaceuticals LLC* (Case No.
6 14cv2071); and (5) *Kreis v. McKesson Corp.* (Case No. 14cv2072).

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DATED: December 23, 2014



Hon. Anthony J. Battaglia
U.S. District Judge

_____ was not addressed by any of the parties as it relates to CAFA's mass action provision.