No. 18-1578

IN THE

Supreme Court of the United States

PFIZER, INC.,

Petitioner,

v.

ALIDA ADAMYAN, *et al.*,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The district court based its order granting Plaintiffs'[1] remand motion on two grounds, either of which standing alone would have been sufficient to conclude that jurisdiction does not lie under the mass action provision of the Class Action Fairness Act (CAFA): (1) a state court's *sua sponte* order is not a "proposal" for a "joint trial"; and (2) even if it can be, it wasn't here, because the state court made clear that coordination of the cases almost certainly would not result in the "joint trial" of the claims of even two plaintiffs, much less 100 or more.

Pfizer's petition fails to address the second ground for the district court's remand order. This omission is critical in light of *Dart Cherokee v. Owens*, 135 S. Ct. 547 (2014).

Thus, the questions presented are:

1. Where the district court's CAFA remand order is grounded in two distinct bases and the court of appeals summarily denies an application for a discretionary appeal, should this Court assume that the circuit court necessarily adopted the district court's ruling on just one of the bases for the court's remand order?

2. Assuming that a state court's *sua sponte* order can ever be a "proposal" for a "joint trial," where that court's orders make clear that its *sua sponte* coordination of multiple cases will

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[1] Respondents are referred to as Plaintiffs throughout this brief in opposition.

not result in a joint trial of the claims of even two persons, much less 100 or more, has there been a "proposal" to "jointly try" of the "claims of 100 or more persons" such that CAFA mass action jurisdiction is triggered?

3. Can a state court's *sua sponte* orders ever be a "proposal" for a joint trial of the claims of 100 or more persons? And are the Courts of Appeals "divided" on this question, where only one circuit has answered it (and then, only in dicta) and only a handful of circuits have even mentioned the issue?

PARTIES TO THE PROCEEDING AND RELATED CASES

The parties to the proceeding are listed in the petition for a writ of certiorari.

The following proceeding is directly related to this case:

- *Lipitor Cases*, No. JCCP 4761, in the Superior Court of the State of California for the County of Los Angeles, judgment not yet entered.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Statutes

INTRODUCTION

The issue on which Pfizer stakes its petition – whether a state court's *sua sponte* order(s) can be a "proposal" for purposes of CAFA's mass action provision – is an interesting question that has been raised (but not decided) in a handful of decisions from a few courts of appeals.[2] But this Court's consideration of the Ninth Circuit's exercise of its discretionary jurisdiction in this matter does not turn on that issue. Why? Simple. Even assuming a state court's *sua sponte* order(s) can be a "proposal" under CAFA, the question remains: Did the court's *sua sponte* order(s) here propose a *joint trial* of the claims of 100 or more persons? The district court below held they didn't, and that decision was correct.

The district court also correctly held that a court's *sua sponte* orders are not "proposals" under CAFA's mass action provision. But that decision wasn't necessarily endorsed by the Ninth Circuit when it denied Pfizer's petition for permission to appeal, because even if court orders can be proposals for joint trials, they weren't here. *Sua sponte* coordination orders do not trigger mass action jurisdiction (assuming they ever can) unless they "propose" to "jointly try" of the "claims of 100 or more persons." Because the coordination order(s) at issue here did not do so, they did not trigger mass action jurisdiction. And because the Ninth Circuit's denial of review very likely

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[2] 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).

rested on that basis, the court of appeals' action does not stand or fall on the correctness of the district court's alternative holding that *sua sponte* orders are not proposals under CAFA.

Pfizer tried to obscure this critical point by focusing its petition for certiorari on the sole issue of whether a court's *sua sponte* coordination order can trigger CAFA mass action jurisdiction. Having so limited the issue, Pfizer then claims that *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547 (2014), mandates this Court's review of the Ninth Circuit's summary denial of Pfizer's petition for permission to appeal.

That is just not so. Unlike in *Dart Cherokee*, here there is no basis for the Court to conclude that the Ninth Circuit's denial of Pfizer's petition to appeal necessarily rested on agreement with the holding that a state court judge's *sua sponte* coordination order can never be a "proposal" for a joint trial under CAFA. To the contrary, it is likely the Ninth Circuit would have granted Pfizer's petition to appeal if that were the sole issue presented. Just two years ago (and less than a year before Pfizer petitioned the Ninth Circuit for permission to appeal in this case), the Ninth Circuit granted the defendant's petition to appeal in *Alexander v. Bayer*, 17-55828 (9th Cir.),[3] a case in which the sole issue was whether a *sua sponte* coordination order could trigger CAFA mass action jurisdiction. That the Ninth Circuit granted permission to appeal in a case that presented the issue

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[3] The petition for permission to appeal (and the order granting it) were under a different docket number – 16-80176 (9th Cir.).

cleanly contradicts the implication that the court is attempting to duck the issue or resolve it implicitly by denying review. Rather, one can assume the Ninth Circuit would have granted review here, too, if the case's posture warranted it.

Instead, there is every reason to think that the Ninth Circuit chose to exercise its discretion to deny Pfizer's appeal because the state court's orders cannot be plausibly read to contemplate a joint trial of *any* claims, much less those of 100 or more persons. Accordingly, this Court should deny Pfizer's petition for writ of certiorari.

STATEMENT OF THE CASE

I. The previous removal and remand – less than 100 plaintiffs "proposed" a "joint trial."

For most of the cases at issue, this is the second time Pfizer unsuccessfully removed them on CAFA mass action grounds. The first time, Plaintiffs moved to remand because, even assuming the petition for coordination was a "proposal" for a "joint trial," far less than 100 plaintiffs made that proposal. No. 8:17-mc-00005-CJC, *In re: Pfizer* (C.D. Cal.), Dkt. 8. The district court agreed and remanded the cases back to state court. *Id.*, Dkt. 20. The Ninth Circuit summarily denied Pfizer's petition for permission to appeal. No. 17-80094, Dkt. 17. Pfizer neither petitioned for *en banc* reconsideration nor filed a petition for writ of certiorari to this Court.

The issue of whether a judge's order can be a "proposal for a joint trial" was raised in the prior remand proceeding. There, the district court's rejected

Pfizer's contention that an order from JCCP court[4] regarding add-ons to the coordination[5] created CAFA jurisdiction:

> Finally, Pfizer suggests that Judge Johnson[6] 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." . . . 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 jurisdic-

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[4] In California state court, cases sharing common questions of fact or law can be coordinated by the California Judicial Council into so-called Judicial Council Coordination Proceedings, or JCCPs. *See generally* Cal. Code Civ. Pro. §§ 404-404.9; Cal. Rules of Court, Rule 3.501(8)-(9).

[5] *See* Cal. Rules of Court, Rule 3.501(2) ("'Add-on case' means an action that is proposed for coordination, under Code of Civil Procedure section 404.4, with actions previously ordered coordinated.").

[6] Judge Johnson was the JCCP judge before Judge Kuhl.

> tion.[7] . . . 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." . . . By the express terms of Judge Johnson's order, the additional cases will not be part of the JCCP or subject to the terms of the coordination petition unless and until they are added by an add-on petition and not subject to a notice of opposition. Indeed, Judge Johnson has only granted two add-on petitions thus far, bringing the total number of plaintiffs in the JCCP to just nine. . . . **Moreover, at the status conference, Judge Johnson repeatedly stated that the JCCP cases "can be sent back for trial," so it is far from clear whether Judge Johnson's order is even proposing a joint trial, let alone one involving 100 or more plaintiffs.**

No. 8:17-mc-00005-CJC, Dkt. 20 at 15:9-16:2 (emphasis added and citations omitted).[8] Thus, the dis-

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[7] Citing *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 956 (9th Cir. 2009).

[8] Pfizer could not have been surprised by this conclusion, as Pfizer had acknowledged in its opposition to Plaintiffs' first remand motion that, under the Ninth Circuit's decision in *Briggs v. Merck Sharp & Dohme*, 796 F.3d 1038 (9th Cir. 2015), where the trial court has provided in prior orders that coordination does not necessarily result in joint trials, such "limiting language" informs the analysis of whether a court's *sua sponte* co-

(*Footnote continued*)

trict court properly recognized in its first remand order that a "proposal" to coordinate, even from a JCCP judge in an "all purposes" coordination, still must be analyzed to see if it proposes a "joint trial."

II. Plaintiffs asked the JCCP court to amend the add-on procedure to make clear that no "joint trial" was being "proposed" via any plaintiff-initiated add-ons.

Upon remand following Pfizer's first removal, Plaintiffs knew (from the meet-and-confer process) that Pfizer intended to remove a second time as soon as the claims of all Plaintiffs were added on to the existing JCCP. Having already lost three years as a result of the previous removal and remand, Plaintiffs wanted to prevent this from happening again. Accordingly, Plaintiffs asked the JCCP court to amend the add-on procedure to make unmistakably clear that Plaintiffs were *not* proposing joint trials of any individual plaintiff's claims with those of any other plaintiffs. Plaintiffs' Submission of Proposed Amended Order Re Add On Procedures, Ex. O.[9] Plaintiffs made their intentions transparent to both Pfizer and the JCCP court: Plaintiffs believed they could seek to add their cases to the JCCP without triggering CAFA mass action jurisdiction by using an add-on pleading like the one the Ninth Circuit considered in *Briggs* (where the Ninth Circuit held that an add-on request that expressly states it is limited to adding on for

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ordination order proposes a "joint trial." No. 8:17-mc-00005-CJC, Dkt. 13, at 22:6-15.

[9] References to "Ex. _" are to Exhibits as attached to the parties' briefs in the Ninth Circuit, which comprise the record in this interlocutory CAFA remand appeal.

pretrial procedures only and does not request a joint trial does not trigger CAFA mass action jurisdiction, *Briggs*, 796 F.3d at 1050-51). And, wanting to avoid a second removal entirely, Plaintiffs hoped that amendments to the add-on order that made clear no joint trial is contemplated by add-on might cause Pfizer to refrain from removing.[10]

Before the hearing on Plaintiffs' motion to amend the add-on procedure, Judge Kuhl issued a tentative order[11] explaining her views regarding the court's role vis-à-vis the parties' jurisdictional battle over CAFA's mass action provision and regarding her anticipated ruling on Plaintiffs' request to amend the add-on procedure. Tentative Ruling, Ex. R. In this tentative ruling, Judge Kuhl recognized that the parties "have been transparent regarding their respective concerns that the coordination proceeding should be able to be removed to federal court (Defendant's desire) or should be able to be remanded to state court even if removed (Plaintiff's desire)." *Id.* at 1. Judge Kuhl noted that she did not believe she had any role in the battle over federal jurisdiction, which she left to the federal courts to resolve, and she therefore was not going to make the substantive changes to the add-on order and procedure that Plaintiffs requested. *Id.* at 2.

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[10] Predictably, Pfizer opposed Plaintiffs' request to amend the add-on procedure. Pfizer's Memorandum in Opposition to Plaintiffs' Proposed Amended Order, Ex. P.

[11] California courts often issue "tentative rulings" before motion hearings explaining how the court anticipates resolving the motion at issue. This is done to assist the parties in framing their arguments during the hearing.

Judge Kuhl did, however, undertake "to explain [her] understanding of California coordination procedures generally, and in the context of this coordinated proceeding." *Id.* Specifically, Judge Kuhl noted that JCCPs differ from federal Multi-District Litigation (MDL) proceedings in that MDLs are limited by statute to pretrial proceedings only, while JCCPs involve coordination "for all purposes, not merely for pretrial proceedings." *Id.* Critically for the issues here, however, Judge Kuhl explained that "all purposes" coordination does not mean any coordinated cases will be tried jointly:

> [T]he fact that the coordination trial judge has the authority to try coordinated cases herself does not mean that the coordination trial judge will conduct the trial in all (or even some) of the coordinated cases, and assuredly does not mean that the coordinated cases will be tried together, either at the same time or before one jury.

Id. Judge Kuhl also noted that she is "unaware of any instance [in the history of California's complex litigation program] in which the claims of more than one party allegedly injured by taking a pharmaceutical product have been tried at the same time or to the same jury, except in wrongful death cases where the claims of the survivors of one injured person have been tried together." *Id.* at 3.

During the hearing on Plaintiffs' motion, Judge Kuhl stated that she "do[esn't] care if [the cases] are [removed and] remanded or not. When I read the

Corber case,[12] though, my concern was that the federal courts should at least know what we do." Transcript, 8/4/17 status conference, Ex. S at 4. Having so clarified, Judge Kuhl declined to amend the add-on order or forms as requested by Plaintiffs. But she converted her tentative ruling into a minute order that made clear that joint trials simply do not happen in pharmaceutical personal injury JCCPs and are very unlikely to happen here. Ex. C; App. 59a-66a. This order incorporates, without change, the tentative ruling, including the language regarding the fact that coordination assuredly does not mean any joint trial necessarily will ensue and that no joint trial of the claims of *any* pharmaceutical injury plaintiffs has occurred in the history of California's Complex Litigation Program. *Id.*; App. 62a-63a; 64a. As Plaintiffs will show *infra*, this minute order is critical to understanding why this case is not like *Dart Cherokee*.

III. Plaintiffs tried something else: quasi-coordination through California's related case procedure.

Having been thwarted in their efforts to amend the add-on procedure, Plaintiffs decided to move the JCCP court to act on pending notices of related cases. Plaintiffs staked this position out in a joint status report filed with the JCCP court on October 12, 2017. Joint Status Report, Ex. U.

Shortly after this joint statement was filed, Plaintiffs filed their Motion to Act on Pending Notices of Related Case. Ex. V. Plaintiffs asserted that the JCCP court could use the related-case process to

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[12] *Corber v. Xanodyne Pharmaceuticals, Inc.*, 771 F.3d 1218 (9th Cir. 2014) (en banc).

bring all the Lipitor cases filed in Los Angeles County, which comprised the majority of the California state court Lipitor cases, into Department 309 (Judge Kuhl's department), which would enable the Court to achieve most, if not all, of the efficiencies that adding the cases to the JCCP would entail. *Id.* at 3:3-6.

Defendants opposed this motion. Ex. W. Again, Defendants argued that the only proper way for the cases to be coordinated was for Plaintiffs to use "the add-on procedure ordered by this Court on March 4, 2014, as amended on October 13, 2017, which [Plaintiffs] resist due to their stated desire to avoid federal jurisdiction pursuant to the 'mass action' provisions of [CAFA]." *Id.* at 2:3-7. Defendant further acknowledged Plaintiffs' repeated efforts not to propose a joint trial: "Plaintiffs' desire to avoid triggering a mass action removal and federal court does not excuse their attempt to tactically avoid the applicable rules." *Id.* at 4:20-21.

The JCCP court denied Plaintiffs' related case motion. Ex. E.

IV. The JCCP court *sua sponte* added cases to the coordinated proceeding.

On November 17, 2017, the Supervising Judge of Civil Departments for Los Angeles County, the Honorable Debre K. Weintraub, entered an order in the Lipitor JCCP styled, "Request that Coordination Trial Judge Include in this Coordinated Proceeding Certain Cases Sharing Common Questions of Fact and Law." Ex. F; App. 67a-90a. In this order, the Supervising Judge urged Judge Kuhl to "exercise the authority granted by [the California rules] and add the cases listed in Attachment A to the Lipitor JCCP, after notice and hearing pursuant to [the California

rules]." *Id.* at 3:12-16. Judge Weintraub attached Judge Kuhl's minute order to her order, reflecting that Judge Weintraub was fully aware of how Judge Kuhl intended to manage this JCCP. *Id.* at Attachment C; App. 83a-90a. (Pfizer included Judge Weintraub's order in the Appendix to its petition for certiorari with Attachment A to that order only; Pfizer omitted Attachments B and C of Judge Weintraub's order from its appendix. This omission is important, because Attachment C makes clear Judge Weintraub's understanding, at the time she issued this order, of Judge Kuhl's views on *Corber* and that *sua sponte* coordination was very unlikely to result in any joint trials of any coordinated claims.)

The following Monday, November 20, Judge Kuhl entered her own order giving the parties ten days to object to *sua sponte* coordination and, if any party objected, noting that a hearing would be set. Ex. G.

Thereafter, on November 29, the plaintiffs whose cases had been coordinated[13] filed a notice with the JCCP court listing other California state court cases that shared common questions of fact and law. Ex. H. This plain vanilla notice sought no relief, but merely alerted Judge Kuhl that not all of the California Lipitor cases were part of Judge Weintraub's order. *Id.* at 1:22-23.

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[13] The total number of plaintiffs whose claims had been coordinated into the JCCP at this time was 49. It remains the case today, as it was when these cases were previously removed and remanded, that only 65 plaintiffs have ever requested that their cases be coordinated, either via the coordination petition or by way of add-on petitions. All other plaintiffs in the JCCP were added-on by way of the state court's *sua sponte* coordination orders.

On December 15, Judge Kuhl entered an order adding the cases listed in Judge Weintraub's order to the Lipitor JCCP. Ex. I. Judge Kuhl also ordered the parties to file a status report addressing the parties' positions regarding the propriety of the JCCP court similarly ordering the *sua sponte* coordination of the cases listed in Plaintiffs' notice. *Id.* at 2-3.

After extensive meet-and-confer, the parties filed a joint status report on January 16, 2018 advising the JCCP court that, "in furtherance of party and Court efficiencies, [the Court] may *sua sponte* add-on to [the Lipitor JCCP]" both the list of cases included in Plaintiffs' notice and six other state court cases that were not included in either Judge Weintraub's order or Plaintiffs' notice. Joint Status Report, Ex. X at 2:9-21. The parties reserved all rights regarding jurisdiction, stipulating that the joint status report neither waived any party's rights to remove under CAFA nor served as a triggering event for CAFA jurisdiction or otherwise as a "proposal" for a "joint trial." *Id.* at 2:22-25.

V. Pfizer again removed, the district court again remanded, and the Ninth Circuit again denied Pfizer's petition for permission to appeal.

After Judge Kuhl *sua sponte* coordinated all the California state court Lipitor cases, Pfizer again removed them. Ex. L. Plaintiffs moved to remand, arguing that there is no CAFA mass action jurisdiction because (1) judges issue orders, not proposals, and (2) even if a trial judge's *sua sponte* orders could be a "proposal" within the meaning of CAFA's mass action provision, the coordination orders here did not propose a "joint trial." Ex. N; App. 1a-35a. Pfizer's opposition argued that the original proposal by 21 plain-

tiffs for an unqualified "all purposes" JCCP somehow transformed the coordination proceeding into what Pfizer called a "joint trial proceeding." Ex. Y. Pfizer's position apparently was that the coordination petition filed in September 2013 by 21 plaintiffs combined with Judge Weintraub's request that Judge Kuhl *sua sponte* add-on cases to the JCCP and Judge Kuhl's two *sua sponte* coordination orders to form a single "proposal" for a "joint trial" of the claims of all California state court Lipitor plaintiffs under California law. Ex. Y at 14; *see also* Ex. L (notice of removal) at 3:17-19. Plaintiffs' reply noted that there is no such beast as a "joint trial proceeding" under California law or in any federal CAFA jurisprudence and urged the district court instead to evaluate whether the California state court had "proposed" a "joint trial" based on the actual substance of what the court said. Ex. Z.

The district court held that the JCCP court's *sua sponte* orders are not a "proposal" for CAFA mass action purposes because under the plain meaning of the word "proposal" a court order is not a proposal. Remand Order, Ex. A at 8:9-9:8. The court further examined the substance of what Judge Kuhl said would happen upon coordination of the cases and determined that she had not proposed a "joint trial." To the contrary, her statements during the 8/4/17 status conference and the substance of her Minute Order of that same date describing (for the federal courts as well as the parties) how JCCPs generally work in California and how this particular JCCP would be managed demonstrated that she did not anticipate a "joint trial" of even two plaintiffs, much less 100. *Id.* at 9:22-11:12.

Pfizer then filed its petition for permission to appeal. Like its petition for certiorari here, Pfizer's Ninth Circuit petition for permission to appeal was limited to the single issue of whether a trial court's *sua sponte* order can be a "proposal." Plaintiffs' opposition to Pfizer's Ninth Circuit petition strenuously urged the court not to grant leave to appeal to decide that question because the district court's order had an alternative basis – i.e., that the state court's orders didn't contemplate that a joint trial of any plaintiffs' claims would occur – that rendered it unnecessary for the Ninth Circuit to decide here (as it was set to decide in *Alexander v. Bayer*) whether a *sua sponte* court order could ever qualify as a proposal for a joint trial. App. 36a-58a. The Ninth Circuit summarily denied Pfizer's petition. No. 18-80059, Dkt. 5. Pfizer moved for rehearing *en banc*, and that motion too was summarily denied. *Id.*, Dkt. 13.

Pfizer then filed its petition for writ of certiorari to this Court.

REASONS FOR DENYING THE WRIT

There are at least three reasons the Court should deny the writ in this matter:

1. Whether phrased in terms of jurisdiction or discretion, there is no reason for this Court to assume that the Ninth Circuit agreed with the district court that a state court's *sua sponte* order cannot be a proposal for a joint trial. Any such assumption would be unfounded because the district court also held, correctly, that even if a *sua sponte* order can be a "proposal" for a "joint trial," it wasn't here. Pfizer's petition is silent on this critical point. Moreover, there is good reason to think the Ninth Circuit based

its decision on the alternate ground (i.e., that the *sua sponte* order(s) at issue here did not propose a joint trial of the claims of 100 or more persons) because just a year earlier, the Ninth Circuit granted a petition for permission to appeal that squarely presented the issue of whether a *sua sponte* order can be a proposal. Far from ducking that issue, the Ninth Circuit was and presumably remains prepared to address it in a case where it would be dispositive.

2. The alleged "division" in the courts of appeals that Pfizer claims doesn't exist. No court of appeals has ever actually decided the issue Pfizer raises. Three courts (the Ninth, Tenth, and Eleventh Circuits) have suggested that a *sua sponte* order *might* be a proposal for a joint trial, but none has so held. And even the one case that stated that a *sua sponte* order cannot be a "proposal" (from the Seventh Circuit) did so only in dicta – there was no *sua sponte* coordination order in that case. Accordingly, there is no circuit split for this Court to resolve. Indeed, the issue hasn't even really begun to percolate in the circuit courts, except as one bookmarked for future cases where it is squarely presented.

3. In any event, the district court was correct in holding that courts do not *propose*, they *order*, and therefore the plain language in the CAFA mass action provision does not create federal jurisdiction based on a court's *sua sponte* orders.

I. The underlying sua sponte coordination order(s) did not propose a joint trial of the claims of 100 or more persons.

A. *Dart Cherokee* is inapposite.

Pfizer struggles mightily to frame this case as if it were in an identical posture to the petition for certiorari this Court granted in *Dart Cherokee*. But this case is nothing like *Dart*.

In *Dart*, there were "many signals that the [court of appeals] relied on the legally erroneous premise that the District Court's decision was correct" on the legal issue concerning which the petitioner sought review. 135 S. Ct. at 555. The parties had joined issue on a single legal question in their submissions regarding the petition for permission to appeal, and the court had denied that petition based on review of those submissions and "the applicable law." *Id.* at 556. And the "applicable law" in the Tenth Circuit as set forth in prior decisions appeared to support the district court's ruling and thus suggest that the denial of review was based on the court's conclusion that that ruling was correct. *Id.* Moreover, there were no apparent "vehicle concerns" that would have been an obstacle to decision by the court of appeals of the legal issue the district court had decided and the petition for permission to appeal sought to raise. *Id.* at 556 n.6. Thus, the Court concluded that, "[f]rom all signals once can discern . . . , the Tenth Circuit's denial of Dart's request for review of the remand order was infected by legal error," *id.* at 556-57 – that is, by its endorsement of the district court's legal ruling.

Accordingly, in *Dart*, the respondent "never suggested in his written submissions to this Court that anything other than the question presented [in

Dart's certiorari petition] accounts for the Court of Appeals' disposition [i.e., denial of a petition for permission to appeal a CAFA remand order]." *Id.* at 557. That is, the parties agreed that the Court of Appeals based its denial on its conclusion that the issue on which Dart's petition for certiorari was based – whether a removing party must present evidence of the amount in controversy – was correctly resolved by the district court. *Id.*

Not so here. Pfizer's petition for certiorari masks that there were two independent bases on which the district court granted remand: (1) *Sua sponte* orders are not "proposals" within the meaning of CAFA's mass action provision [Remand Order, Ex. A at 8:9-9:8]; ***and*** (2) Even if they can be, the order(s) at issue here did not propose a joint trial of the claims of any plaintiffs, much less those of 100 or more. *Id.* at 9:22-11:12. The Ninth Circuit could have (1) agreed with Pfizer that Judge Carney erred in his determination that a *sua sponte* order can never be a proposal, but (2) still exercised its discretion to deny Pfizer's petition for permission to appeal because Judge Carney's remand order was proper on the alternative ground that a *sua sponte* coordination order does not invoke CAFA mass action jurisdiction unless it proposes a joint trial of the claims of 100 or more persons, which the order(s) here didn't.

Returning to *Dart Cherokee*, this Court stated, "If [respondent] believed that the Tenth Circuit's denial of leave to appeal rested on some other ground, he might have said so in his brief in opposition or, at least, in his merits brief." *Dart*, 135 S. Ct. at 557. Respondents here flag this point for the Court. And although Pfizer's petition for certiorari implies otherwise, Plaintiffs have been emphatic since this case

was removed that the *sua sponte* orders at issue here did not propose a joint trial of the claims of 100 or more persons and, therefore, don't support CAFA jurisdiction.[14] The only place one doesn't see this is in Pfizer's briefing.

The four Justices who dissented in *Dart Cherokee* on the grounds that the Court lacked jurisdiction in that case likely would reach the same conclusion here, particularly on this record. But whether this Court views the issue as one of jurisdiction or of discretion, *Dart Cherokee* is inapposite. Unlike *Dart*, this case offers no reason to believe that the court of appeals rested its denial of permission to appeal in this case on agreement with the district court on the legal question Pfizer's petition presents. So even if Pfizer's arguments on that issue were correct, this Court could not conclude that the court of appeals abused its discretion by resting its denial of permission to appeal on an "erroneous view of the law." *Cf. Dart Cherokee*, 135 S. Ct. at 555. Notably, Pfizer makes no effort to suggest that the district court's alternative ground for its decision (that the coordination orders in this case did not contemplate joint trials) is either legally erroneous or presents an issue that would merit consideration by this Court. And it

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[14] *See* Plaintiffs' Remand Motion, Ex. N, App. 1a-35a; Plaintiffs' Reply in Support of Remand, Ex. Z; Plaintiffs' Opposition to Pfizer's Petition for Permission to Appeal, No. 18-80059, Dkt. 1-1, App. 36a-58a; and Plaintiffs' Response to Motion of the Chamber of Commerce of the United States of America and the Pharmaceutical Research and Manufacturers of America to File a Brief as *Amici Curiae* in Support of Petition for Rehearing En Banc, No. 18-80059, Dkt. 10.

is too late for Pfizer to try to add that question to the case in its reply. Pfizer's petition should be denied.

B. The Ninth Circuit isn't ducking the question.

Pfizer also resorts to impugning the integrity of the Ninth Circuit to try to persuade this Court to take this case, implying that the Ninth Circuit routinely ducks important CAFA appeals and, presumably, must be doing so here. Pet. at 21-22. Yet, as Pfizer reluctantly acknowledges, just one year before denying the appeal in this matter, "the Ninth Circuit granted CAFA review to decide this question [i.e., whether a *sua sponte* order can be a proposal under CAFA], only to have that appeal voluntarily dismissed by the parties before the court issued a decision. *See Alexander v. Bayer*, 17-55828 (9th Cir.)." Pet. at 16.

There is no reason for this Court to conclude that the Ninth Circuit is evading the issue Pfizer predicates its entire appeal on. In *Alexander*, the issue was squarely presented, and the Ninth Circuit took the appeal and was prepared to decide it. 17-55828 (9th Cir.) at Dkt. 2. This, less than one year before Pfizer petitioned the Ninth Circuit for permission to appeal the remand order in this case (Pfizer filed its petition in the Ninth Circuit on May 18, 2018).

If the issue was as clean in this case as it was in *Alexander*, it is reasonable to think that the Ninth Circuit would have granted Pfizer's petition here, as it granted Bayer's in *Alexander*. The fact that the Ninth Circuit didn't suggests that the presence of alternate grounds for the remand order here was the determinative factor in the court's decision to exercise its discretion to deny permission to appeal, not

any systematic ducking of CAFA remand issues, let alone of the issue Pfizer raises here.

C. Assuming (without conceding) that Pfizer is correct that a court's sua sponte order can be a "proposal" under CAFA, there still was no proposal for a "joint trial" here.

1. This case isn't *Corber*.

Pfizer argues that *any* coordination of the claims of 100 or more persons into the existing California state court Lipitor JCCP necessarily "proposed" a "joint trial" of 100 or more claims because the original coordination order from 2013 coordinated the claims of three plaintiffs "for all purposes." Pet. at 10. Pfizer's argument is predicated on a misreading of the Ninth Circuit's decision in *Corber v. Xanodyne Pharmaceuticals, Inc.*, 771 F.3d 1218 (9th Cir. 2014) (en banc). There, more than 100 plaintiffs asked the California Judicial Council to coordinate their cases into a single JCCP "for all purposes" without specifying, e.g., that the coordination would be for pretrial purposes only or that the parties did not seek a joint trial of any of their claims. *Id.* at 1221-22. Focusing on the actual words used in the coordination petition, the Ninth Circuit held that "all purposes" coordination, without any qualification, necessarily entails trial, and because more than 100 plaintiffs made the request for such coordination, CAFA mass action jurisdiction was triggered. *Id.* at 1223-24.[15]

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[15] Pfizer claims *Corber* held "that plaintiffs' proposal to join a coordinated proceeding like the one at issue here is a proposal for a joint trial." Pet. at 6 (citing *Corber*, 771 F.3d at 1223-25). This misstates *Corber*'s holding. *Corber* did not involve analysis of requests to *join* a coordinated proceeding. *Corber* involved a

(*Footnote continued*)

This case differs from *Corber* in two critical respects. First, far less than 100 plaintiffs sought to have their cases coordinated into the Lipitor JCCP. Indeed, this is why Pfizer lost in the first remand proceedings. No. 8:17-cv-00005, Dkt. 20 (C.D. Cal.). Pfizer petitioned for permission to appeal from Judge Carney's first remand order (issued in May 2017) and the Ninth Circuit summarily denied. Pfizer did not appeal to this Court. Second, *Corber* did not involve *sua sponte* coordination, like happened here.

2. The state court did not "propose" a "joint trial" of the claims of even two persons, much less of 100 or more.

Like all cases construing CAFA's mass action provision, *Corber* utilized an objective test, analyzing the plaintiffs' coordination petition to determine whether the plaintiffs had "proposed a joint trial" of their claims. *Corber*, 771 F.3d at 1223 ("We will carefully assess the language of the petitions for coordination to see whether, in language or substance, they

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petition to coordinate in the first instance, filed by well over 100 plaintiffs. *Id.* at 1223. The focus in *Corber*, then, was on the language used in the petition, and "all purposes" was significant in that context because it meant the plaintiffs filing the coordination request were thereby seeking a joint trial of their claims. *Id.* ("We will carefully assess the language of the petitions for coordination to see whether, in language or substance, they proposed a joint trial."). *Corber* did not hold that any California coordinated proceeding involving 100 or more plaintiffs necessarily entails a joint trial of the claims of 100 or more persons. And the Ninth Circuit later held in *Briggs* that a plaintiff may qualify her add-on request to specify that she does not seek to try her claims jointly with any other plaintiff(s) and thereby avoid invoking CAFA mass action jurisdiction. *Briggs*, 796 F.3d at 1050.

proposed a joint trial."). Pfizer identifies no reason why a judge-initiated coordination should be analyzed under CAFA's mass action provision any differently than a plaintiff-initiated coordination. Under *Corber* (and other CAFA authorities), courts considering whether a proposal for a joint trial has been made must carefully assess the language used by the alleged proposer (whether plaintiff or court) to see whether, in language or substance, they made a "voluntary and affirmative act" to propose a joint trial. *Corber*, 771 F.3d at 1223; *Briggs*, 796 F.3d at 1048.

The district court in this case did just that. It evaluated what the state court judge said, on the record during the 8/4/17 status conference and in her minute order of the same date (as well as the *sua sponte* coordination orders) and correctly determined that, "[g]iven this backdrop, it defies common sense to suggest that Judge Kuhl's [*sua sponte*] coordination of the cases constituted a proposal for a joint trial." Remand Order, Ex. A at 10:22-23.

Judge Kuhl's coordination orders were preceded by her detailed explanation of how JCCPs generally operate and how the Lipitor JCCP was likely to proceed. During the 8/4/17 status conference, Judge Kuhl stated that her tentative ruling on that request was intended to "describe what a coordinated proceeding is and what it does. . . When I read the Corber case, . . . my concern was that the federal courts should at least know what we do." Transcript, Ex. R at 4:15-20. Judge Kuhl has been involved with California's Complex Litigation Program since its inception over 18 years ago and, with the cases likely to end up again in federal court, she was well-positioned "to say [to the federal courts] this is how

we manage cases here, and make of that what you will." *Id.* at 6:16-26.

Judge Kuhl's ensuing Minute Order followed through on this theme. She wrote: "[I]nsofar as the federal courts seek to understand California state court procedures in order to apply federal law . . . , it is appropriate for this court to explain its understanding of California coordination procedures generally, and in the context of this coordinated proceeding." Minute Order, Ex. C at 3-4; App. 62a. Importantly, Judge Kuhl proceeded to explain:

> [*T*]*he fact that*[,] [unlike a federal MDL judge,] *the* [*California*] ***coordination trial judge has the authority to try coordinated cases herself*** does not mean that the coordination judge will conduct the trial in all (or even some) of the coordinated cases, and ***assuredly does not mean that the coordinated cases will be tried together, either at the same time or before one jury***. Coordination is a very flexible structure for case management. . . . The coordination trial judge has significant flexibility to decide whether or not she will try individual cases.

Id. at 5 (emphasis added); App. 62a-63a. Judge Kuhl continued:

> Under California Rule of Court 3.542, the coordination trial judge may remand a coordinated action to the court in which the action was pending at the time coordination of that action was ordered. The ultimate determination of

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

Id. at 6; App. 63a. Finally, Judge Kuhl described how coordinated proceedings involving pharmaceutical products, like Lipitor, have traditionally proceeded in JCCPs:

> In coordinated proceedings involving claimed defective pharmaceuticals or failure to adequately warn of a pharmaceutical product's side effects, the coordination trial judge typically has handled one or more bellwether trials. ***In the 17 years since the Complex Litigation Program has been in place in California, this court is unaware of any instance in which the claims of more than one party allegedly injured by taking a pharmaceutical product have been tried at the same time or to the same jury***, except in wrongful death cases where the claims of the survivors of one injured person have been tried together.
>
> Coordinated proceedings involving cases against pharmaceutical manufacturers have included more than 10,000 plaintiffs in some instances. If bellwether trials (as well as pretrial definition of issues) are unsuccessful in guiding the parties to inventory settlements, it has always been clear to the judges of the Complex Litigation Program that the coordination trial judge will have to re-

> mand cases for trial by the court in which the action was pending at the time of coordination. No single judge can conduct so many trials, and to attempt to do so would deprive plaintiffs of timely adjudication of their claims. The coordination trial judge will strive to establish a set of jury instructions and rulings on motions in limine that can serve to guide the trial of the cases after they are remanded, but no one (parties, counsel or the court) anticipates that every case can be tried by the coordination trial judge if the cases in a coordinated proceeding against a pharmaceutical manufacturer do not settle in large numbers.

Id. at 6-7 (emphasis added); App. 64a-65a.

Further buttressing the conclusion that Judge Kuhl envisioned something other than "joint trials" when she entered the coordination orders are additional remarks she made during the 8/4/17 status conference. At that conference, Judge Kuhl instructed the parties, regarding the initial "case management order" she expected the parties to be developing, that the order should not purport to detail procedures and rules for every step of the Lipitor litigation, start to finish; rather, she wanted to work in a more piecemeal fashion so that the court and the parties could pivot if needed for efficiency purposes:

> Let me just give you a kind of an indication of my philosophy on these things.
>
> I generally prefer not to have a Case Management Order that's going to try to

> govern the whole case from beginning to end. I generally try to think about what needs to happen in the next definable period of time. And I find that that's generally conducive to getting things done.
>
> The old-fashioned case management orders that tried to write a new Code of Civil Procedure for a particular case are in many instances a waste of time.
>
> So what I like to do is to say: Okay, there are going to be plaintiff fact sheets, here's what they're going to be, here's the timeframe for responding to them.
>
> On the defense side, the most important thing, whatever it is, I'm assuming the first thing is to get the documents to come over from the MDL, make sure that happens; okay, what's the next thing that the plaintiffs want from the defendants, and sort of go from there, as opposed to trying to lay everything out. Because things change. As you do things and get information, you should be and always are evaluating.

Transcript, Ex. S at 27:25-28:17. Far from anticipating that coordination would result in "joint trials" of the claims of 100 or more plaintiffs, Judge Kuhl contemplated that coordination would allow the parties to begin to efficiently work the cases up, bit by bit, such that the court and the parties would have flexibility to determine, as the cases developed, how best to get them to completion.

It is hard to imagine a court drawing a clearer road map of what will happen once cases are coordinated than Judge Kuhl did here. And it could not be more clear that, in *sua sponte* coordinating the cases, Judge Kuhl did *not* propose a "joint trial" of *any* cases, much less of the claims of 100 or more plaintiffs.

Under these circumstances, even if it can be said that the JCCP court's *sua sponte* coordination orders are "proposals" for purposes of CAFA's mass action provision, the JCCP court did not propose a "joint trial" of the claims of "100 or more plaintiffs." Accordingly, this Court should deny Pfizer's petition.

II. The lower courts are not "divided" over whether a *sua sponte* coordination order is a "proposal" under CAFA's mass action provision.

Pfizer claims that "[t]he lower courts are divided on whether a state court's *sua sponte* proposal to try cases jointly can qualify as a removable mass action under CAFA." Pet. at 14. If this were true, it might provide a reason for this Court to take a case posing the issue (though not this one, where the question isn't dispositive). But it's not true.

Far from being divided, the courts of appeals have not actually decided the issue – not even once. Pfizer lifts statements from a couple of opinions and tries to convert them into endorsements of Pfizer's view that *sua sponte* coordination orders are "proposals." Pet. at 15 (citing *Scimone v. Carnival Corp.*, 720 F.3d 876, 881 (11th Cir. 2013), and *Parson v. Johnson & Johnson*, 749 F.3d 879, 887 (10th Cir. 2014)). But neither case involved a *sua sponte* coordination order; both simply noted that the issue – whether a state court's *sua sponte* order could be a proposal under CAFA – exists. *Scimone*, 720 F.3d at 881 ("We leave open the

possibility that the state trial judge's *sua sponte* consolidation of 100 or more persons' claims could satisfy [CAFA's] jurisdiction requirements . . . . Since neither party has suggest that the state court ordered or even raised the possibility of a joint trial, we have no occasion to, and do not decide that question."); *Parson*, 749 F.3d at 887 ("CAFA . . . does not specify who can make such a proposal – the plaintiffs only, or the district court through an order of consolidation or coordination. . . . Nevertheless, we have little difficulty under the circumstances presented here [i.e., plaintiffs filed 11 separate actions involving 650 total plaintiffs in the same state court but neither they nor the court specifically coordinated or consolidated the actions] in determining that neither the plaintiffs, nor the state court, have 'proposed' a 'joint trial' within the meaning of [CAFA]."[16]

Against these non-decisions, Pfizer places this remark from the Seventh Circuit: "We can assume (answering a question left open in [two earlier court of appeals cases] that the state court's deciding on its own initiative to conduct a joint trial would not enable removal . . . [because] [t]hat would not be a proposal." *Koral v. Boeing Co.*, 628 F.3d 945, 947 (7th

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[16] Although not cited by Pfizer, there are similar ruminations about the issue, without decision because the issue wasn't presented, from the Ninth Circuit. *See Briggs*, 796 F.3d at 1048 ("It is possible that a proposal by a state court for a joint trial would qualify as a 'proposal' under [CAFA]. But we need not reach that question, for at no point did the state court move *sua sponte* to add any of these five cases to the Byetta JCCP."); *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 956 (9th Cir. 2009) ("We express no opinion as to whether a state court's *sua sponte* joinder of claims might allow a defendant to remove separately filed actions to federal court as a single 'mass action' under CAFA.").

Cir. 2011). Just as in *Scimone* and *Parson*, though, this was *not* the issue being decided in *Koral*. Judge Posner's remark was dicta, not a decision. An assumption is not a dispositive holding.

Six years after *Koral*, the Ninth Circuit granted permission to appeal on the issue in *Alexander*. Had the parties not voluntarily dismissed that appeal shortly before oral argument, *Alexander* would have been the *first* court of appeals' opinion to squarely decide the issue. Instead, we still have not a single court of appeals opinion in which the issue was presented and decided.

The existence of references to the existence of an issue in a handful of opinions is not the sort of "division" among the courts of appeals on which this Court typically bases its election to exercise its discretion to take cases.[17] Far from a hot-button issue that has divided the circuit courts, this is one best left to percolate in those courts, until some of them actually decide it and reach either consensus or disagreement. No guidance is needed at this time from this Court.

III. A *sua sponte* coordination order is not a "proposal" under CAFA's mass action provision.

In any event, the district court got it right on the issue Pfizer cares about. That is, a court's *sua sponte*

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[17] Plaintiffs are aware of only four district court cases that have decided the issue where such decision was germane to the outcome of the case. Two of these are this case and *Alexander*. The other two are cited in Pfizer's Petition at 16 n.3; neither of these cases resulted in a circuit decision that addressed the issue.

coordination order is not a "proposal" under CAFA's mass action provision.

Pfizer invokes an array of irrelevant statutory construction rules and non-CAFA removal statutes to assert that Congress's use of passive voice in the mass action provision, coupled with an "exception" for defendant-initiated coordinations, somehow evidences that "proposal" means something different in CAFA than it does in ordinary, everyday English. Petition at 23-28. But this Court has made clear that construction of CAFA's mass action provision turns on the plain meaning of the terms used there. *See Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 742-43 (2014) (refusing to stretch meaning of word "plaintiffs" in CAFA mass action provision beyond its ordinary plain meaning); *see also Tanoh*, 561 F.3d at 953 (noting that, "[a]lthough CAFA . . . extends federal diversity jurisdiction to both class actions and certain mass actions, the latter provision is fairly narrow"). Applying the clear, common-sense understanding of the word "proposal" that the Ninth Circuit adopted in *Briggs*, the district court held that judges don't propose – they order:

> To "propose," in its ordinary sense, means "to offer for consideration, discussion, acceptance, or adoption." *Briggs*, 796 F.3d at 1048 (quoting Webster's Third New International Dictionary 1819 (2002)). A judge's *sua sponte* order does not make a proposal – it does not make an offer to be accepted or rejected. Instead, an "order" is "a command or direction authoritatively given." Black's Law Dictionary online (2nd ed.). To say that a court order consti-

> tutes a "proposal" distorts and unjustifiably broadens the straightforward meaning of that word.

Remand Order, Ex. A at 8.

Judge Carney is correct. His decision on this issue is consistent with the three earlier district court opinions that decided the issue (as opposed to merely noting that it exists). The plain meaning of "proposal" excludes judge-initiated coordination orders.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed 04/16/18]

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Case No.: 2:18-cv-1725

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IN RE LIPITOR, JCCP 4761

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PLAINTIFFS' MOTION TO REMAND

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Plaintiffs move to remand their actions to California state court. There are three reasons this Court should remand:

- A court's *sua sponte* order bringing cases into a California Joint Council Coordinated Proceeding (JCCP) is not a "proposal" for a joint trial within the meaning of the mass action provision of the Class Action Fairness Act (CAFA);
- Even if a court's *sua sponte* order could be a "proposal" for a joint trial, the *sua sponte* orders at issue here are not proposals for a "joint trial," which we know because the JCCP court laid out in great detail both how JCCPs generally proceed and how this particular JCCP will proceed and the JCCP court did not propose any joint trials, much less a "joint trial" involving the claims of 100 or more plaintiffs; and
- Even if there was a proposal for a joint trial, Defendants acquiesced in that proposal but still removed, which means this case falls within an exception to CAFA mass action jurisdiction for Defendant-proposed joint trials.

BACKGROUND

This is the second time most of these cases have been removed on CAFA grounds by Defendant Pfizer. This Court previously ordered that the cases be remanded to California state court because less than 100 plaintiffs had either petitioned the California Judicial Council to create the Lipitor JCCP or filed a pleading asking for their cases to be added on to the JCCP. *See* Order Granting Plaintiffs' Motion to Remand, *In Re: Pfizer*,

Document 20, No. 8:17-mc-00005 (May 23, 2017).[1] Declaration of Charles G. Orr (Orr Decl.) at ¶ 2 and Ex. A (remand order). The Court should do the same now.

I. The previous removal and remand – less than 100 plaintiffs "proposed" a "joint trial."

Starting in March 2014, Pfizer removed the claims of thousands of California state court Lipitor plaintiffs on CAFA mass action grounds, even though CAFA's mass action provision requires that 100 or more plaintiffs propose to try their claims jointly but only 65 plaintiffs had either petitioned for an "all purposes" coordination or sought, without qualification, to add their cases on to an "all purposes" coordination. After being trapped in the Lipitor MDL for years and finally escaping back to the California forum Plaintiffs chose, Plaintiffs moved to remand on the grounds that, even assuming the Lipitor petition for coordination was a "proposal" for a "joint trial," far less than 100 plaintiffs made that proposal. This Court agreed and remanded the cases back to the California state courts in which Plaintiffs properly filed them in the first place.

There was a telling exchange during the May 22, 2017 hearing on the remand motion. This Court

[1] After this Court's remand order, courts in the Northern District and Eastern District entered similar orders remanding similarly situated California state court Lipitor cases for the same reasons that this Court ordered remand. *See Alanis v. Pfizer, Inc.*, No. 1:14-cv-00365-LJO-MJS, Docket # 42 (E.D. Cal. Aug. 16, 2017) (remand order); *Little v. Pfizer Inc.*, No. 3:14-cv-01177-EMC, Docket # 138 (N.D. Cal. Aug. 9, 2017) (remand order). The cases subject to those remand orders were *sua sponte* coordinated into the Lipitor JCCP and are now before this Court.

asked Pfizer's counsel, "[D]o you think that [Plaintiffs] will clarify [to the JCCP court on remand] whether this is going to be for joint trial or just coordinated for pretrial purposes? . . . If they do the former, I assume you're going to be back before me." Orr Decl. at ¶ 3, Ex. B at 19:7-9, 13-14. Pfizer's counsel agreed: "Well, that's probably true. But let's give [Plaintiffs] the benefit of the doubt that they're going to try and . . . change it or something." *Id.* at 19:15-17.

This exchange is telling precisely because that's what happened after remand.

II. Plaintiffs asked the JCCP court to amend the add-on procedure to make clear that no "joint trial" was being "proposed" via plaintiff-initiated add-ons, but were thwarted.

Upon remand, Plaintiffs' first order of business in the California state court Lipitor JCCP was to ask the JCCP court to amend the add-on procedure to make clear that Plaintiffs were *not* proposing joint trials of any individual plaintiff's claims with those of any other individual plaintiffs, but were proposing coordination for pretrial proceedings only. Orr Decl. at ¶ 4 and Ex. C (Plaintiffs' Submission of Proposed Amended Order Re Add On Procedures). In this pleading, filed June 27, 2017, Plaintiffs recognized the efficiencies that would be achieved through coordination of all California state court Lipitor actions, but candidly explained that, as masters of their complaints, they did not wish to risk removal from their properly chosen state forum simply by invoking the existing add-on process. Plaintiffs did not make this request in a vacuum – before filing it, they met and conferred with Defendant Pfizer to seek agreement on an add-on procedure, and Plaintiffs filed their request to amend the add-on procedure well in advance of a

scheduled July 11, 2017 status conference, so that the issue could be fully joined and (hopefully) resolved at that time.

Predictably, Defendants opposed Plaintiffs' request to amend the add-on procedure. Orr Decl. at ¶ 5 and Ex. D (Pfizer's Memorandum of Points and Authorities in Support of Defendant's Opposition to Plaintiffs' Proposed Amended Order Re Add-on Procedures). Defendants argued that a "pretrial proceedings only" coordination (or amendment to the existing coordination) would conflict with California Code of Civil Procedure § 404.1, which provides that "one judge" will handle coordinated actions for "all purposes." *Id.* at 2. Defendants staked out the position that the JCCP court should not take sides in the jurisdictional battle over CAFA's mass action provision, arguing that "the purpose of the coordination statute and the role of th[e] [Lipitor] coordination Court is not to prevent defendants from exercising their rights under the federal removal statutes." *Id.* at 8.

The parties learned during the July 11, 2017 status conference that Judge Ann Jones had recused herself and Judge Carolyn Kuhl was now going to be the coordination trial judge in the Lipitor JCCP. Orr Decl. at ¶ 6 and Ex. E at 4:25 5:11 (transcript from July 11, 2017 JCCP status conference). Having just gotten the JCCP assignment, Judge Kuhl was reluctant to act immediately on the Plaintiffs' request to amend the add-on procedure at that time; instead, she allowed Plaintiffs to submit a reply brief regarding their request. *Id.* at 26:8-11; 29:1-22. During the July 11 hearing, Pfizer's counsel at least twice indicated that Pfizer supported coordination of all California

state court Lipitor actions into the existing JCCP.[2] The JCCP court set a follow up status conference for August 4, 2017. It looked like things would move quickly.

In Plaintiffs' reply, filed July 18, 2017, Plaintiffs withdrew their request to amend the add-on procedure to the extent they sought an order and add-on forms that made clear add-ons would be for pretrial proceedings only. Orr Decl. at ¶ 7 and Ex. F (Plaintiffs' Reply to Defendant Pfizer's Memorandum of Points and Authorities in Support of Pfizer's Opposition to Plaintiffs' Proposed Amended Order Re Add On Procedures [with declarations in support]). Plaintiffs did not concede that the JCCP court lacked authority to coordinate for pretrial proceedings only, attaching pleadings from other coordination petitions and orders granting those petitions that did precisely that. *Id.* at 3:1-2 and note 2 and attached pleadings. To the contrary, Plaintiffs noted that there are two ways they can show that they are not "proposing" a "joint trial": (1) by seeking coordination for pretrial proceedings only (which Plaintiffs were willing to forego in the interest of moving things along) (*see* 28 U.S.C. § 1332(d)(11)(B)(ii)(IV)); and (2) by making clear that Plaintiffs do not seek any joint trials by way of adding on to the existing JCCP. *Id.* at 3:11-14 ("Nothing in Pfizer's opposition to the Proposed Amended Order re Add On Procedures suggests that this Court cannot make clear that coordination – even all purposes coordination – does not entail any joint trial or trials of the claims of any plaintiffs and that trials shall be of

[2] Orr Decl. at ¶ 6 and Ex. E at 12:16-18 ("[Pfizer's] view is that we fully support the coordination petition. It makes sense. We think there's a lot of reasons to have coordination."); *Id.* at 25:6-8 ("[The parties] have a different view of what coordination would be like. We all agree with coordination.").

individual plaintiff's claims only."). Again, Plaintiffs provided their proposed revisions to the add-on order to Pfizer well in advance and, again, Pfizer would not agree. *Id.* at 4:6-5:14.

The JCCP court issued a tentative order the day of the August 4, 2017 status conference explaining the court's views regarding its role vis-à-vis the parties' jurisdictional battle over CAFA's mass action provision and regarding its anticipated ruling on Plaintiffs' request to amend the add-on procedure. Orr Decl. at ¶ 8 and Ex. G (Tentative Ruling on Plaintiffs' Submission of Proposed Amended Order re Add-on Procedures). The import of the tentative, which the JCCP court incorporated into a subsequent minute order, is explained in more detail below, but suffice it to say, the Court indicated that it did not believe it had any role in the battle over federal jurisdiction, which it left to the federal courts to resolve if and when the time came, and it therefore was not going to make the substantive changes to the add-on order and procedure that Plaintiffs requested. *Id.* at 2. The Court did, however, undertake "to explain its understanding of California coordination procedures generally, and in the context of this coordinated proceeding." *Id.*

The JCCP court further explained during the August 4 status conference that the court "do[esn't] care if [the cases] are [removed and] remanded or not. When I read the Corber case,[3] though, my concern was that the federal courts should at least know what we do." Orr Decl. at ¶ 9 and Ex. H at 4:18-20 (transcript of August 4, 2017 status conference in Lipitor JCCP). The Court further explained that "one of [the Court's]

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[3] *Corber v. Xanodyne Pharmaceuticals, Inc.*, 771 F.3d 1218 (9th Cir. 2014) (en banc).

concerns about the Corber case actually was the emphasis on what was in the parties' petition [for coordination] . . . [F]rankly, what the parties' request is initially, that may not be the way we manage the case once it's coordinated." *Id.* at 10:28-11:2; 11:17-19.[4]

Having so clarified, the Court declined to amend the add on order or forms as requested by Plaintiffs. Orr Decl. at ¶ 10 and Ex. I (Amended Order re Add-On Procedures); Orr Decl. at ¶ 11 and Ex. J (Minute Order re Ruling on Plaintiffs' Submission of Proposed Amended Order Re Add-on Procedures).

III. Plaintiffs tried something else – quasi-coordination through California's related case procedure – but were again thwarted.

Having been thwarted in their efforts to amend the add-on procedure, Plaintiffs went back to the drawing board. Like Pfizer (*see supra* notes 2 and 4), Plaintiffs

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[4] During this status conference, an interesting colloquy took place between the Court and Pfizer's counsel:

The Court: Well, once the order comes out, that is the add-on order, once we get that done, why don't you all [Pfizer – the judge was looking directly at Pfizer's counsel when she posed this question] just move to coordinate?

Mr. Cheffo: Well, I think it will depend on where they are. . . . We do want coordination, your Honor.

Orr Decl. at ¶ 9 and Ex. H at 15:26-16:6. Pfizer's counsel was unwilling to state on the record that Pfizer would move to coordinate or seek add-on orders precisely because that would bring the cases within an exception to CAFA mass action jurisdiction for situations where the defendant proposes the joint trial. *See* 28 U.S.C. § 1332(d)(11)(B)(ii)(II). Pfizer's strategy was transparent: Try to force Plaintiffs to seek add on so that Pfizer could remove again.

wanted the cases to be brought together in a coordinated action. And also like Pfizer, Plaintiffs did not want the claims of 100 or more of them to be "tried jointly." But Plaintiffs, having worked very hard and waited a long time to get back to state court, wanted to make sure they didn't make any mistakes.

So rather than employing the add-on process, Plaintiffs instead decided to move the JCCP court to act on pending notices of related cases and to prepare a new petition for coordination for presentation to the California Judicial Council. Plaintiffs staked this position out in a Joint Status Report Regarding Status of Add-On Petitions and Plan for Case Management Order to Move Forward on Discovery, which was filed with the JCCP court on October 12, 2017. Orr Decl. at ¶ 11 and Ex. K (joint status report). Plaintiffs noted in this joint pleading that, given the parties' seeming stand-still regarding the add-on process, if the JCCP court were to conclude that *sua sponte* coordination was appropriate to bring the cases into the JCCP, Plaintiffs opposed such coordination:

> Pfizer has already taken the position that it will not request add-on of any Lipitor cases to the existing JCCP, and given Plaintiffs' desire to prosecute their claims in their properly chosen forum, Plaintiffs also will not be requesting add-on to the existing JCCP. Plaintiffs anticipate that, should this Court *sua sponte* coordinate the cases, Pfizer would remove them to federal court. *See, e.g.*, *Briggs v. Merck Sharp & Dohme*, 796 F.3d 1038, 1048 (9th Cir. 2015) (noting that it is an open question whether trial judge's *sua sponte* coordination or consolidation order can be a proposal for a joint trial under

> CAFA's mass action provision). While Plaintiffs are confident that they would secure remand if this were to occur – *see Alexander v. Bayer Corp.*, Dkt. 42, No. 2:16-cv-06822 (C.D. Cal. Nov. 14, 2016) (Minute Order Granting Plaintiffs' Motion to Remand) (holding that court order *sua sponte* consolidating pharmaceutical claims does not create CAFA mass action jurisdiction because "courts issue orders, not proposals") – such a process would add additional delay to what has already been an unduly delayed litigation. Accordingly, Plaintiffs respectfully request that this Court refrain from any *sua sponte* coordination of any Lipitor cases.

Orr Decl. at ¶ 11 and Ex. K, joint status report at 3 n.4 (emphasis added). Despite the fact that this was a joint pleading by Plaintiffs and Defendants, Defendants said nothing about *sua sponte* coordination.

Shortly after the filing of this joint statement by Plaintiffs and Defendants, Plaintiffs filed their Motion to Act on Pending Notices of Related Case. Orr Decl. at ¶ 12 and Ex. L (motion to act on notices of related case). Plaintiffs stated in this pleading that the JCCP court could use the related case process to bring all the Lipitor cases filed in Los Angeles County, which comprise the majority of the California state court Lipitor cases, into Department 309 (the department of the JCCP court), which would enable the Court to achieve most, if not all, of the efficiencies that adding the cases into the JCCP would entail. *Id.* at 3:3-6. Plaintiffs attached an exhibit to this motion listing all the cases in which they were certain a notice of related case had been filed, but advised the Court that they were not certain the list was complete and

that they would endeavor to ensure that any case in which a notice had not yet been filed would see such a notice promptly filed. *Id.* at 2:13-3:2 and Exhibit A. Plaintiffs also repeated their opposition to the JCCP court acting *sua sponte* to coordinate the cases. *Id.* at 3 n.5.

Defendants jointly opposed Plaintiffs' motion urging the JCCP court to act on the related case notices. Orr Decl. at ¶ 13 and Ex. M (Defendants' Opposition to Plaintiffs' Motion to Act on Pending Notices of Related Case). Again, Defendants argued strenuously that the only proper way for the cases to be coordinated was for Plaintiffs to use "the add-on procedure ordered by this Court on March 4, 2014, as amended on October 13, 2017, which [Plaintiffs] resist due to their stated desire to avoid federal jurisdiction pursuant to the 'mass action' provisions of [CAFA]." *Id.* at 2:3-7. Defendant further acknowledged Plaintiffs' repeated efforts not to propose a joint trial: "Plaintiffs' desire to avoid triggering a mass action removal and federal court does not excuse their attempt to tactically avoid the applicable rules." *Id.* at 4:20-21.

The JCCP court denied Plaintiffs' related case motion.

IV. With no add-on requests having been filed, and over Plaintiffs' objection, the JCCP court sua sponte added cases to the coordinated proceeding.

Although Plaintiffs twice had expressly asked the JCCP court not to coordinate the Lipitor cases *sua sponte*, the Supervising Judge of Civil Departments for Los Angeles County, the Honorable Debre K. Weintraub, entered an order in the Lipitor JCCP on November 17, 2017 entitled, "Request that Coordina-

tion Trial Judge Include in this Coordinated Proceeding Certain Cases Sharing Common Questions of Fact and Law." Orr Decl. at ¶ 14 and Ex. N (Weintraub order). This order noted that the cases listed on Attachment A to the order (about half of the Lipitor cases filed in California) "have not been added on to the Lipitor JCCP because no party has requested that they be classified as add-on cases pursuant to California Rules of Court, rule 3.544." *Id.* at 2:19-21. The order further stated that "it continues to be the case that no party has requested that the cases listed in Attachment A be added on to the Lipitor JCCP." *Id.* at 2:26-28. The Supervising Judge then requested that Judge Kuhl "exercise the authority granted by [the California rules] and add the cases listed in Attachment A to the Lipitor JCCP, after notice and hearing pursuant to [the California rules]." *Id.* at 3:12-16.

The following Monday, November 20, the JCCP court issued a "Notice of Entry of Order" advising the parties to the Lipitor JCCP of Judge Weintraub's order. Orr Decl. at ¶ 15 and Ex. O (notice). That same day, Judge Kuhl also entered her own order giving the parties ten days to object to *sua sponte* coordination and, if any party so objected, noting that a hearing would be set. Orr Decl. at ¶ 16 and Ex. P (Court Order Re Request that Coordination Trial Judge Include in this Coordinated Proceeding Certain Cases Sharing Common Questions of Fact and Law). Plaintiffs, having already twice requested that the JCCP *not* coordinate the cases *sua sponte*, considered the Supervising Judge's and the JCCP court's orders to be a de facto denial of their request.[5] Defendants failed to object at all,

[5] Ironically, Pfizer states in its Notice of Removal [Dkt. #1] that "[n]o Plaintiff objected." Notice of Removal at 6:4; *see also*

indicating that, unlike Plaintiffs, Defendants acquiesced in the Court's *sua sponte* coordination.

Thereafter, on November 29, the plaintiffs whose cases had been coordinated (by this time, Judge Kuhl had granted the over-three-year-old add-on request in *Lewis v. Pfizer, Inc.*, No. BC535923, *see* Orr Decl. at ¶ 17 and Ex. Q)[6] filed a notice with the JCCP court listing other California state court cases that shared common questions of fact and law. Orr Decl. at ¶ 18 and Ex. R (notice). This plain vanilla notice sought no relief, but Plaintiffs did note that Defendants had recently reminded them that not all of the California Lipitor cases were part of Judge Weintraub's order. *Id.* at 1:22-23. At the time Plaintiffs filed this one-sentence notice, the ten-day period for Defendants to object to *sua sponte* coordination had not yet ended. Plaintiffs were unaware of whether Defendants intended to object to *sua sponte* coordination or not but, in light of the Court's effective denial of Plaintiffs' request not to *sua sponte* coordinate, Plaintiffs wanted the JCCP court to have full information about the universe of cases that were implicated by the coordination proceedings. Defendants remained silent.

On December 15, over Plaintiffs' objections but with Defendants' acquiescence, the JCCP court entered an

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id. at 3:3-4. In fact, only Defendants failed to object to *sua sponte* coordination by the Court. The import of Defendants' acquiescence in the *sua sponte* coordination is explained *infra*, section III of Argument and Authorities.

[6] Plaintiffs note that there were 40 claimants in that case, bringing the total number of plaintiffs whose claims have been coordinated into the JCCP to 49. It remains the case, as it was when this Court last remanded these cases, that only 65 plaintiffs have requested that their cases be coordinated, either via the coordination petition or by way of add-on petitions.

order adding the cases listed in Attachment A to the Supervising Judge's order to the Lipitor JCCP. Orr Decl. at ¶ 19 and Ex. S (Court Order Re Add-on Cases). The Court also ordered the parties to file a status report addressing the parties' positions regarding the propriety of the JCCP court similarly ordering the *sua sponte* coordination of the cases listed in Plaintiffs' notice. *Id.* at 2-3.

After extensive meet-and-confer, all the parties filed a joint status report on January 16, 2018 advising the JCCP court that no further proceedings were needed and, "in furtherance of party and Court efficiencies, [the Court] may *sua sponte* add-on to [the Lipitor JCCP]" both the list of cases included in Plaintiffs' November 29 notice and six other California state court Lipitor cases identified by the parties that were not included in either Judge Weintraub's order or Plaintiffs' notice. Orr Decl. at ¶ 20 and Ex. T (Joint Status Report, filed January 16, 2018) at 2:9-21. The parties reserved all rights regarding both subject matter and personal jurisdiction, expressly noting that the joint status report neither waived any party's rights to remove under CAFA nor served as a triggering event for CAFA jurisdiction or otherwise as a "proposal" for a "joint trial." *Id.* at 2:22 25.

As Plaintiffs predicted when they twice asked the JCCP court not to *sua sponte* coordinate the cases, Pfizer removed the California state court Lipitor cases a second time. This motion to remand followed.

ARGUMENT AND AUTHORITIES

This Court should remand. A judge's *sua sponte* coordination order is not a "proposal" for purposes of CAFA's mass action provision. Even assuming it could be, the JCCP court's *sua sponte* coordination orders

in this case did not propose a "joint trial," as Judge Kuhl carefully explained how California JCCPs operate generally and historically, and how this JCCP would proceed, and it isn't a "joint trial" in any way, shape, or form. Finally, even if there were a proposal for a joint trial here, Plaintiffs opposed it while Defendants acquiesced, which brings this squarely within the CAFA mass action provision's exception for where Defendants are the proposers of a joint trial.

I. There is no "proposal" for a joint trial because a judge's sua sponte coordination order is not a "proposal" within the meaning of CAFA's mass action provision.

Pfizer's notice of removal mistakenly claims that "the Ninth Circuit has repeatedly recognized that a *sua sponte* action by a court may effect a 'proposal' for claims to be tried jointly[,] [thereby] triggering CAFA remova[bility]." Notice of Removal at 3:22-25 (emphasis added) (citing *Briggs v. Merck Sharp & Dohme*, 796 F.3d 1038, 1048 (9th Cir. 2015) and *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 953 (9th Cir. 2009)). In neither *Briggs* nor *Tanoh* did the Ninth Circuit "recognize" that a trial court's *sua sponte* coordination is a "proposal" for a joint trial for purposes of CAFA mass action jurisdiction. To the contrary, all the Ninth Circuit did in both of those cases is acknowledge that the issue of whether a *sua sponte* coordination order can be a "proposal" for a joint trial was not before the court so it offered no opinion on this issue. *See Tanoh*, 561 F.3d at 956 ("We express no opinion as to whether a state court's *sua sponte* joinder of claims might allow a defendant to remove separately filed actions to federal court as a single 'mass action' under CAFA."); *see also Briggs*, 796 F.3d at 1048 ("It is possible that a proposal by a

state court for a joint trial would qualify as a 'proposal' under [CAFA]. But we need not reach that question, for at no point did the state court move *sua sponte* to add any of these five cases to the Byetta JCCP.") (emphasis added).

But the courts that have reached the question have been uniform in their resolution of the issue: A court's *sua sponte* coordination order is not a "proposal" for a joint trial for CAFA mass action purposes. Most recently, another Central District judge so held. *Alexander v. Bayer Corp.*, No. 2:16-cv-06822-MWF-MRW (Dkt. # 42) (Nov. 14, 2016) (Orr Decl. at ¶ 21 and Ex. U (remand order) (appeal dismissed by voluntary stipulation and order) (No. 17-55828) (Dkt. # 31) (July 10, 2017) (Orr Decl. at ¶ 22 and Ex. V) (Ninth Circuit order). [7] Judge Posner also resolved the

[7] Pfizer's Notice of Removal suggests that Bayer's appeal was voluntarily dismissed because the parties "settled on appeal." Pfizer's Notice of Removal at 5:24-25. This is likely erroneous. Orr Decl. at ¶ 22 (noting that Alexander's appellate counsel advised Plaintiffs' counsel both at the time the *Alexander* appeal was dismissed and during the week before this Motion to Remand was filed that the cases had not settled). Ordinarily, appeal only happens after a final judgment, and ordinarily, voluntary dismissal of an appeal by the appealing party signals that the case resolved by settlement during the appeal. But here, the appeal was not of a final judgment, and the case was already remanded to the California state courts while Bayer pursued a voluntary interlocutory appeal. *See* No. 2:16-cv-06822, at Dkt. # 43 (Nov. 14, 2016) (letter to Los Angeles Superior Court providing remand order and advising that "the above-referenced case [*Alexander*] is hereby remanded to your jurisdiction"); *Id.* at Dkt. # 44 (December 2, 2016) (signed letter from Los Angeles County Superior Court acknowledging receipt of remand order). Pfizer probably extrapolated from the fact that Bayer's permissive appeal was voluntarily dismissed by stipulation less than a week before a scheduled oral argument that the case must have settled, as otherwise it might instead

question definitively against CAFA mass action jurisdiction in *Koral v. Boeing Co.*, 628 F.3d 945, 946 (7th Cir. 2011) ("We can assume (answering a question left open in . . . *Tanoh* . . .) that the state court's deciding on its own initiative to conduct a joint trial would not enable removal either. That would not be a proposal . . . . "); *see also Time Ins. Co. v. Astrazeneca AB*, 52 F. Supp. 3d 705, 715 (E.D. Pa. 2014) (cited in *Alexander*, Orr Decl. at ¶ 21 and Ex. U at 5).

This is not surprising, as this result is consistent with the litany of Ninth Circuit and other authorities holding that, as masters of their own complaints, plaintiffs are free to structure their complaints such that they are able to avoid creating CAFA mass action jurisdiction. Starting with *Tanoh* and continuing through *Corber*, *Briggs*, and *Dunson*, the Ninth Circuit has repeatedly emphasized this point.[8] This Court, in its remand order the last time these cases were before it, relied on this basic principle in rejecting Pfizer's contention that the actions of only

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appear that the defendants in that action (Bayer and other pharmaceutical defendants) did not expect a favorable result and wanted to avoid Ninth Circuit resolution against their position.

[8] *Tanoh*, 561 F.3d at 954 ("[T]he decision to try claims jointly and thus qualify as a 'mass action' under CAFA should remain, as we concluded above, with plaintiffs."); *Corber*, 771 F.3d at 1223 (rejecting request from an amicus to disavow *Tanoh* and reiterating that Plaintiffs are masters of their complaints and their petitions for coordination); *Briggs*, 796 F.3d at 1050-51 (extending concept that plaintiffs are masters of their complaints to add-on requests); *Dunson v. Cordis Corp.*, 854 F.3d 551, 554 (9th Cir. 2017) (favorably citing *Corber* for proposition that plaintiffs remain free to structure complaints to include less than 100 plaintiffs each in multiple similar complaints even where their sole purpose in doing so is to avoid CAFA mass action jurisdiction).

65 plaintiffs could somehow be attributed to other plaintiffs who did not propose a joint trial. Orr Decl. at ¶ 2 and Ex. A (remand order) at 14:15-15:7; *id.* at 13:20-23; *id.* at 12 n.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."). [9] It would be a strange construction of CAFA's mass action provision that suddenly pivoted away from this long, unbroken chain of precedents to hold that plaintiffs are masters of their own complaints, but only so long as no court decides to *sua sponte* coordinate or consolidate those complaints.

Simply put, a finding that CAFA mass action jurisdiction can be predicated on a *sua sponte* coordination order from a judge would necessarily entail a construction of CAFA at odds with the well-settled principle that plaintiffs are masters of their complaints and remain free to structure them so as to avoid CAFA mass action jurisdiction. Pfizer has offered no good reason for this Court to undertake such a radical reformulation of the mass action provision. Accord-

[9] Other courts have also emphasized that a plaintiff can only be held to have "proposed" that her case be "tried jointly" with those of 100 or more total plaintiffs when she herself undertakes some voluntary act to bind her case to other plaintiffs. *See, e.g.*, *Portnoff v. Janssen Pharms., Inc.*, No. 16-5955, 2017 WL 708745, *6 and n.8 (E.D. Pa. Feb. 22, 2017) (holding that plaintiffs who propose a joint trial for themselves do not thereby propose a joint trial for other plaintiffs, absent some showing of authority of those plaintiffs to bind the others); *In re Avandia Marketing, Sales Practice and Prods. Liab. Litig.*, No. 07-md-1871, 2014 WL 2011597, *8 (E.D. Pa. May 15, 2014) ("CAFA gives federal courts jurisdiction over plaintiffs in a mass action only where more than 100 plaintiffs are proposed – *by those plaintiffs* – to be tried jointly.") (emphasis added).

ingly, this Court should hold that Judge Kuhl's *sua sponte* coordination orders are not "proposals" for a joint trial under CAFA, and should therefore remand the cases to California state court.

II. There is no proposal for a "joint trial" because Judge Kuhl clarified what JCCPs are generally and what this one would be, and it does not entail any "joint trial."

Even assuming that a court's *sua sponte* coordination order could be a "proposal" for CAFA mass action purposes, there still is no CAFA mass action jurisdiction where the *sua sponte* coordination order does not propose a "joint trial." That is exactly the case here.

A. This Court already considered the issue (and got it right) in its prior remand order.

In its prior remand order regarding these cases, this Court examined the notion that a trial court's *sua sponte* joinder of claims could serve as a basis for CAFA mass action removal. Orr Decl. at ¶ 2 and Ex. A at 15:9-16:2. This Court's analysis bears repeating in full:

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

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

Orr Decl. at ¶ 2 and Ex. A at 15:9-16:2 (emphasis added). This analysis continues to be correct and its application is even more compelling now.

B. The Ninth Circuit's *Briggs* opinion supports the view that a JCCP court's prior orders describing how the JCCP will proceed informs the issue of whether a proposal to coordinate is a proposal for a "joint trial."

In *Briggs*, the Ninth Circuit noted that its conclusion that certain plaintiffs did not propose a joint trial though their add-on petition (which stated that, in seeking to join an existing JCCP, they were not asking for their claims to be tried jointly with any other plaintiffs) was "confirmed by the nature of the proceeding they sought to join. The August 2010 case management order in the Byetta JCCP, which explicitly applies to later filed add-on cases, states that the order 'does not constitute a determination that these actions should be consolidated for trial.'" *Briggs*, 796 F.3d at 1051.[10] Thus, although this Court did not cite

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[10] Defendants agree that *Briggs* so held. *See* Defendants' Memorandum in Opposition to Plaintiffs' Motion to Remand, *In re: Pfizer*, No. 8:17-mc-00005-CJC-JPR, Docket # 13, filed April 19, 2017:

> In *Briggs*, the court found that an add-on petition did not propose a joint trial because the add-on petition expressly stated that plaintiffs "do not seek joint trials of any cases or plaintiffs, but rather, all claims shall be tried individually." 796 F.3d at 1043. This determination was reinforced by "the nature of the proceeding" the plaintiffs sought to join. *Id.* at 1051. The JCCP court in *Briggs* had previously entered an order regarding add-on cases that included the disclaimer that the order "does not constitute a determination that these actions should be consolidated for trial." *Id.* Plaintiffs here never made a similar explicit disclaimer. Nor did the Lipitor JCCP court's order regarding add-on procedures contain similar limiting language.

Briggs in determining in its prior remand order that the JCCP court's description of how the JCCP would proceed in case management or other orders, *Briggs* fully supports this Court's implicit conclusion that, where the trial court has provided in prior orders that coordination does not necessarily result in joint trials, that informs the analysis of whether a court's *sua sponte* coordination order proposes a "joint trial."

> C. Before *sua sponte* coordinating any cases, Judge Kuhl made clear that the adding on of additional California state court Lipitor cases to the existing JCCP is very unlikely to result in the joint trial of *any* plaintiffs' claims, much less 100 or more.

Likewise here, the JCCP court's *sua sponte* coordination orders were preceded by that Court's detailed explanation of how JCCPs generally operate and how the Lipitor JCCP was likely to proceed. Specifically, Judge Kuhl helpfully described the history of pharmaceutical mass tort JCCPs in California's state courts and what would happen upon add-on of additional plaintiffs in this JCCP.

During the August 4, 2017 status conference, at which the Court considered Plaintiffs' request to amend the add-on procedures, the Court stated that her tentative ruling on that request was intended to "describe what a coordinated proceeding is and what it does. . . When I read the Corber case, . . . my

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Id. at 22:6-15. Of course, as shown above, after this Court's prior remand order, Plaintiffs here repeatedly emphasized in the JCCP court that they did not seek any joint trials, and as shown in the very next subsection of this Motion, Judge Kuhl also made clear that add-on of cases to the Lipitor JCCP would not mean the cases would be tried jointly.

concern was that the federal courts should at least know what we do." Orr Decl. at ¶ 9 and Ex. H at 4:15-20. Judge Kuhl noted that she has been involved with California's Complex Litigation Program since its inception 18 years ago and, with the cases likely to end up again in federal court, she was therefore well-positioned "to say [to the federal courts] this is how we manage cases here, and make of that what you will." *Id.* at 6:16-26.[11]

Judge Kuhl's written order, entered later that day, followed through on this theme. She wrote: "[I]nsofar as the federal courts seek to understand California state court procedures in order to apply federal law ([citing *Corber*]), it is appropriate for this court to explain its understanding of California coordination procedures generally, and in the context of this coordinated proceeding." Orr Decl. at ¶ 11 and Ex. J (minute order). Importantly, Judge Kuhl proceeded to explain:

> [*T*]*he fact that*[,] [unlike a federal MDL judge,] *the* [*California*] *coordination trial judge has the authority to try coordinated cases herself* does not mean that the coordination judge will conduct the trial in all (or even some) of the coordinated cases, and *assuredly does not mean that the coordinated cases will be tried together, either at the same time or before one jury*. Coordination is a very flexible structure for case management. . . . The coordination

[11] The JCCP court also expressed "concern" about *Corber* that it seemed from that opinion that the federal courts may not understand how coordinated proceedings operate and, therefore, may place too much emphasis on the wording of the coordination petition to try to ascertain whether a joint trial is being proposed. *Id.* at 10:28-11:20.

> trial judge has significant flexibility to decide whether or not she will try individual cases.

Id. at 5 (emphasis added). Judge Kuhl continued:

> Under California Rule of Court 3.542, the coordination trial judge may remand a coordinated action to the court in which the action was pending at the time coordination of that action was ordered. The ultimate determination of which cases in a coordinated proceeding will be tried by the coordination trial judge is dictated by promotion of the ends of justice.

Id. at 6. Finally, Judge Kuhl described how coordinated proceedings involving pharmaceutical products, like Lipitor, have traditionally proceeded in California JCCPs:

> In coordinated proceedings involving claimed defective pharmaceuticals or failure to adequately warn of a pharmaceutical product's side effects, the coordination trial judge typically has handled one or more bellwether trials. *In the 17 years since the Complex Litigation Program has been in place in California, this court is unaware of any instance in which the claims of more than one party allegedly injured by taking a pharmaceutical product have been tried at the same time or to the same jury*, except in wrongful death cases where the claims of the survivors of one injured person have been tried together.
>
> Coordinated proceedings involving cases against pharmaceutical manufacturers have included more than 10,000 plaintiffs in some

> instances. If bellwether trials (as well as pretrial definition of issues) are unsuccessful in guiding the parties to inventory settlements, it has always been clear to the judges of the Complex Litigation Program that the coordination trial judge will have to remand cases for trial by the court in which the action was pending at the time of coordination. No single judge can conduct so many trials, and to attempt to do so would deprive plaintiffs of timely adjudication of their claims. The coordination trial judge will strive to establish a set of jury instructions and rulings on motions in limine that can serve to guide the trial of the cases after they are remanded, but no one (parties, counsel or the court) anticipates that every case can be tried by the coordination trial judge if the cases in a coordinated proceeding against a pharmaceutical manufacturer do not settle in large numbers.

Id. at 6-7 (emphasis added).

Further buttressing the conclusion that Judge Kuhl envisioned something other than "joint trials" of multiple plaintiffs' claims at the time she entered the *sua sponte* coordination orders are additional remarks she made during the August 4, 2017 status conference. At that conference, Judge Kuhl instructed the parties, with regard to the initial "case management order" that she expected the parties to be developing, that the order should not purport to detail procedures and rules for every step of the Lipitor litigation, start to finish; rather, she wanted to work in a more piecemeal fashion so that the court and the parties could pivot if needed for efficiency purposes:

> Let me just give you a kind of an indication of my philosophy on these things.
>
> I generally prefer not to have a Case Management Order that's going to try to govern the whole case from beginning to end. I generally try to think about what needs to happen in the next definable period of time. And I find that that's generally conducive to getting things done.
>
> The old-fashioned case management orders that tried to write a new Code of Civil Procedure for a particular case are in many instances a waste of time.
>
> So what I like to do is to say: Okay, there are going to be plaintiff fact sheets, here's what they're going to be, here's the timeframe for responding to them.
>
> On the defense side, the most important thing, whatever it is, I'm assuming the first thing is to get the documents to come over from the MDL, make sure that happens; okay, what's the next thing that the plaintiffs want from the defendants, and sort of go from there, as opposed to trying to lay everything out. Because things change. As you do things and get information, you should be and always are evaluating.

Orr Decl. at Ex. H (transcript) at 27:25-28:17. Far from anticipating that coordination would result in "joint trials" of the claims of 100 or more plaintiffs, Judge Kuhl contemplated that coordination would allow the parties to begin to efficiently work the cases up, bit by bit, with the idea that the court and the

parties would have flexibility to determine, as the cases developed, how to best get them to completion.

It is hard to imagine a court drawing a clearer road map of what will happen to California state court cases once they are coordinated than the JCCP court did here. And it could not be more clear that, in *sua sponte* coordinating the cases, Judge Kuhl did *not* thereby propose a "joint trial" of *any* cases, much less of the claims of 100 or more plaintiffs.

Under these circumstances, even if it can be said that the JCCP court's *sua sponte* coordination orders are "proposals" for purposes of CAFA's mass action provision, it cannot be reasonably argued that the JCCP court here proposed a "joint trial" of the claims of "100 or more plaintiffs." Accordingly, this Court should remand the cases back to California state court.

III. While Plaintiffs opposed *sua sponte* coordination, Defendants acquiesced but then still removed, which means this matter falls with the exception to CAFA mass action jurisdiction when the proposal for a joint trial comes from the defendants.

An additional reason that remand is warranted here is that this matter falls within the exception to CAFA mass action jurisdiction for cases where "the claims are joined upon motion of a defendant." 28 U.S.C. § 1332(d)(11)(B)(ii)(II). In *Tanoh*, the Ninth Circuit explained that the defendant need not have formally moved to coordinate for a case to fall within this exception. *Tanoh*, 561 F.3d at 953-54 ("The absence of a formal motion [by defendant Dow] cannot blink away the fact that Dow . . . is asking us to consolidate separate actions for purposes of applying the 'mass

action' provision."). There, the plaintiffs, who numbered over 600, had filed seven separate complaints with no complaint having more than 99 plaintiffs. No plaintiff sought coordination, but Dow removed anyway, arguing that it was improper for plaintiffs to "strategically" attempt to avoid CAFA mass action jurisdiction this way. The Ninth Circuit treated Dow's removal itself as the equivalent, for CAFA mass action purposes, of a "motion" to join the cases together. *Id.*

Likewise here, Defendants repeatedly advised the JCCP court that they supported coordination and tried to force plaintiffs to be the ones to seek to add on to the JCCP.[12] Then, after Plaintiffs twice asked the JCCP court *not* to *sua sponte* coordinate the cases, Defendants failed to object to such coordination, fully acquiescing in achievement of Defendants' stated desire for coordination. This is exactly the sort of gamesmanship by defendants that the Ninth Circuit in *Tanoh* held to bring a case within the exception to CAFA mass action jurisdiction for a defendant-proposed coordination.

Accordingly, as a separate basis for remanding these cases, this Court should hold that this matter falls within the "defendant-initiated" coordination to mass action jurisdiction.

CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons, Plaintiffs request that this Court promptly enter an order remanding these cases to California state court. Plaintiffs further seek such other relief, in law and equity, to which they may be justly entitled.

Dated: April 16, 2018

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[12] *See supra* notes 2, 4.

Respectfully submitted,

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed 5/29/18]

No. 18-80059

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

IN RE: LIPITOR, JCCP 4761

ALIDA ADAMYAN, *et al.*,

Plaintiff-Respondent,

v.

PFIZER, INC.,

Defendant-Petitioner.

PLAINTIFFS-RESPONDENTS' OPPOSITION
TO PFIZER'S PETITION FOR
PERMISSION TO APPEAL

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CORPORATE DISCLOSURE STATEMENT

A corporate disclosure statement is unnecessary because Plaintiffs-Respondents are individuals.

Dated: May 29, 2018

/s/ *Charles G. Orr*
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

PRELIMINARY STATEMENT

The issue on which Pfizer stakes its petition – whether a court's *sua sponte* order(s) can be a "proposal" for purposes of CAFA's mass action provision – is an open question in this Circuit. But that issue is not germane to this Court's exercise of its discretionary jurisdiction in this matter. Why? Simple. Even assuming a court's *sua sponte* order(s) can be a "proposal" under CAFA, the question remains: Did the court's *sua sponte* order(s) here propose a *joint trial*? Judge Carney held they didn't, and he was right.

Judge Carney also correctly decided that a court's sua sponte orders are not "proposals" under CAFA. But he didn't need to so decide, because Judge Kuhl's coordination orders did not propose a "joint trial."

Pfizer tries to obscure this by posing only a single question presented when there actually are two, and by treating the issue of whether a "joint trial" was proposed by the state court as occurring in a vacuum. But that is just not so. Judge Carney's conclusion that the JCCP court did not propose a "joint trial" not only is correct – it moots the issue of whether judges can "propose" a joint trial. Accordingly, the Court should deny Pfizer's request for a permissive appeal.[1]

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[1] *See College of Dental Surgeons of Puerto Rico v. Connecticut Gen. Life Ins. Co.*, 585 F.3d 33, 38 (1st Cir. 2009) (noting that important consideration in whether to accept permissive appeal under CAFA "is whether the question is consequential to the resolution of the particular case"). This Court placed heavy reliance on *College of Dental Surgeons* in *Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096, 1100 (9th Cir. 2010), the leading case in this Circuit on how the Court should exercise discretion to accept a CAFA permissive appeal.

STATEMENT OF THE CASE

I. The previous removal and remand – less than 100 plaintiffs "proposed" a "joint trial."

For most cases here, this is the second time Pfizer has unsuccessfully removed them on CAFA mass action grounds. The last time, Plaintiffs moved to remand because, even assuming the petition for coordination was a "proposal" for a "joint trial," far less than 100 plaintiffs made that proposal. No. 8:17-mc-00005-CJC, *In re: Pfizer* (C.D. Cal.), Dkt. 8. The district court agreed and remanded the cases back to state court. *Id.*, Dkt. 20. This Court summarily denied Pfizer's petition for permission to appeal. No. 17-80094, Dkt. 17.

While not dispositive, the issue of whether a judge's *sua sponte* coordination order can be a "proposal for a joint trial" figured into the prior remand proceeding. Specifically, Judge Carney's first remand order rejected Pfizer's contention that the JCCP court's order regarding add-ons to the coordination created CAFA jurisdiction because that order did not propose a joint trial:

> Finally, Pfizer suggests that Judge Johnson[2] 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." . . . Pfizer submits that because the Ninth Circuit has left open the possibility that "a state court's *sua sponte*

[2] Judge Johnson was the JCCP judge before Judge Kuhl.

> 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.[3] . . . 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." . . . By the express terms of Judge Johnson's order, the additional cases will not be part of the JCCP or subject to the terms of the coordination petition unless and until they are added by an add-on petition and not subject to a notice of opposition. Indeed, Judge Johnson has only granted two add-on petitions thus far, bringing the total number of plaintiffs in the JCCP to just nine. . . . Moreover, at the status conference, Judge Johnson repeatedly stated that the JCCP cases "can be sent back for trial," so it is far from clear whether Judge Johnson's order is even proposing a joint trial, let alone one involving 100 or more plaintiffs.

No. 8:17-mc-00005-CJC, Dkt. 20 at 15:9-16:2 (emphasis added and citations omitted).[4] Thus, unlike Pfizer

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[3] Citing *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 956 (9th Cir. 2009).

[4] Pfizer could not have been surprised by this, as Pfizer had acknowledged in its opposition to Plaintiffs' remand motion that, per this Court's decision in *Briggs v. Merck Sharp & Dohme*, 796 F.3d 1038 (9th Cir. 2015), where the trial court has provided in prior orders that coordination does not necessarily result in joint trials, such "limiting language" informs the analysis of whether a

in this appeal, Judge Carney properly recognized that a "proposal" to coordinate, even from a JCCP judge in an "all purposes" coordination, still must be analyzed to see if it proposes a "joint trial."

II. Plaintiffs asked the JCCP court to amend the add-on procedure to make clear that no "joint trial" was being "proposed" via plaintiff-initiated add-ons.

Upon remand, Plaintiffs asked the JCCP court to amend the add-on procedure to make unmistakably clear that Plaintiffs were *not* proposing joint trials of any individual plaintiff's claims with those of any other plaintiffs. Plaintiffs' Submission of Proposed Amended Order Re Add On Procedures, Ex. O.[5] Plaintiffs knew (from the meet-and-confer process before filing this pleading) that Pfizer was taking the position that the JCCP was what Pfizer later would call a "joint trial proceeding."[6] While Plaintiffs believed that this position was incorrect and Plaintiffs could seek to add-on to the JCCP without triggering CAFA mass action jurisdiction by using an add-on pleading like the one this Court considered in *Briggs*, Plaintiffs wanted to avoid a second removal entirely and believed that amendments to the add-on order that make clear no joint trial is contemplated by add-on would cause Pfizer to refrain from removing.

Predictably, Pfizer opposed Plaintiffs' request to amend the add-on procedure. Pfizer's Memorandum in Opposition to Plaintiffs' Proposed Amended Order, Ex.

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court's *sua sponte* coordination order proposes a "joint trial." No. 8:17-mc-00005-CJC, Dkt. 13, at 22:6-15.

[5] Pfizer did not include this pleading in the record it brought forth to this Court.

[6] Pfizer Opposition to Remand Motion at 1, 14. *See infra* n.20.

P.[7] Pfizer argued that a "pretrial proceedings only" coordination (or amendment to the existing coordination) would conflict with California Code of Civil Procedure § 404.1, which provides that "one judge" will handle coordinated actions for "all purposes." *Id.* at 2.

In their reply, Plaintiffs withdrew that portion of their request to amend the add-on procedure that sought an order and add-on forms that made clear add-ons would be for pretrial proceedings only. Plaintiffs' Reply in Support of Plaintiffs' Proposed Amended Order, Ex. Q.[8] Plaintiffs did not concede that the JCCP court lacked authority to coordinate for pretrial proceedings only, attaching other coordination petitions and orders granting those petitions that did precisely that. *Id.* at 3:1-2 and n.2; attached pleadings. To the contrary, Plaintiffs noted that there are two ways they can show that they are not "proposing" a "joint trial": (1) by seeking coordination for pretrial proceedings only (which Plaintiffs were willing to forego in the interest of moving things along) (*see* 28 U.S.C. § 1332(d)(11)(B)(ii)(IV)); and (2) by making clear that Plaintiffs do not seek any joint trials through add-ons to the existing JCCP. *Id.* at 3:11-14 ("Nothing in Pfizer's opposition to the Proposed Amended Order . . . suggests that this Court cannot make clear that coordination – even all purposes coordination – does not entail any joint trial or trials of the claims of any plaintiffs and

[7] Pfizer did not include this pleading in the record it brought forth to this Court.

[8] Pfizer did not include this pleading in the record it brought forth to this Court.

that trials shall be of individual plaintiff's claims only.").[9]

Judge Kuhl issued a tentative order before the 8/4/17 status conference explaining her views regarding the court's role vis-à-vis the parties' jurisdictional battle over CAFA's mass action provision and regarding her anticipated ruling on Plaintiffs' request to amend the add-on procedure. Tentative Ruling, Ex. R.[10] In this tentative, Judge Kuhl explained that she did not believe she had any role in the battle over federal jurisdiction, which she left to the federal courts to resolve, and she therefore was not going to make the substantive changes to the add-on order and procedure that Plaintiffs requested. *Id.* at 2. Judge Kuhl did, however, undertake "to explain [her] understanding of California coordination procedures generally, and in the context of this coordinated proceeding." *Id.*

Judge Kuhl stated during the August 4 status conference that she "do[esn't] care if [the cases] are [removed and] remanded or not. When I read the Corber case,[11] though, my concern was that the federal courts should at least know what we do." Transcript,

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[9] Pfizer's petition fails to acknowledge this sequence of events, treating it as if Plaintiffs had not withdrawn the "pretrial proceedings only" part of their motion. Petition at 4-5. As shown *infra*, although Judge Kuhl did not amend the add-on order as Plaintiffs requested, she did set forth her views, on the record and in writing, as to whether a "joint trial" was likely to ensue upon coordination of all the cases (it wasn't).

[10] Pfizer did not include this tentative ruling in the record it brought forth to this Court.

[11] *Corber v. Xanodyne Pharmaceuticals, Inc.*, 771 F.3d 1218 (9th Cir. 2014) (en banc).

8/4/17 status conference, Ex. S.[12] Having so clarified, Judge Kuhl declined to amend the add-on order or forms as requested by Plaintiffs. Amended Order re Add-On Procedures, Ex. T.[13] But she converted her tentative into a minute order that, as shown *infra*, made clear that joint trials simply do not happen in pharmaceutical personal injury JCCPs and are very unlikely to happen here. Ex. C.

III. Plaintiffs tried something else: quasi-coordination through California's related case procedure.

Having been thwarted in their efforts to amend the add-on procedure, Plaintiffs decided to move the JCCP court to act on pending notices of related cases. Plaintiffs staked this position out in a joint status report filed with the JCCP court on October 12, 2017. Joint Status Report, Ex. U.[14]

Shortly after this joint statement was filed, Plaintiffs filed their Motion to Act on Pending Notices of Related Case. Ex. V.[15] Plaintiffs asserted that the JCCP court could use the related-case process to bring all the Lipitor cases filed in Los Angeles County, which comprised the majority of the California state court Lipitor cases, into Department 309 (Judge Kuhl's department), which would enable the Court to achieve most, if not all, of

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[12] Pfizer did not include this transcript in the record it brought forth to this Court.

[13] Pfizer did not include this order in the record it brought forth to this Court.

[14] Pfizer did not include this joint status report in the record it brought forth to this Court.

[15] Pfizer did not include this motion in the record it brought forth to this Court.

the efficiencies that adding the cases to the JCCP would entail. *Id.* at 3:3-6.

Defendants opposed this motion. Ex. W.[16] Again, Defendants argued that the only proper way for the cases to be coordinated was for Plaintiffs to use "the add-on procedure ordered by this Court on March 4, 2014, as amended on October 13, 2017, which [Plaintiffs] resist due to their stated desire to avoid federal jurisdiction pursuant to the 'mass action' provisions of [CAFA]." *Id.* at 2:3-7. Defendant further acknowledged Plaintiffs' repeated efforts not to propose a joint trial: "Plaintiffs' desire to avoid triggering a mass action removal and federal court does not excuse their attempt to tactically avoid the applicable rules." *Id.* at 4:20-21.

The JCCP court denied Plaintiffs' related case motion. Ex. E.

IV. The JCCP court *sua sponte* added cases to the coordinated proceeding.

On November 17, 2017, the Supervising Judge of Civil Departments for Los Angeles County, the Honorable Debre K. Weintraub, entered an order in the Lipitor JCCP styled, "Request that Coordination Trial Judge Include in this Coordinated Proceeding Certain Cases Sharing Common Questions of Fact and Law." Ex. F. In this order, the Supervising Judge urged Judge Kuhl to "exercise the authority granted by [the California rules] and add the cases listed in Attachment A to the Lipitor JCCP, after notice and hearing pursuant to [the California rules]." *Id.* at 3:12-16. Judge Weintraub attached Judge Kuhl's 8/4/17 minute order to her order, reflecting that Judge Weintraub was fully

[16] Pfizer did not include this opposition in the record it brought forth to this Court.

aware of how Judge Kuhl intended to manage this JCCP. *Id.* at Attachment C.

The following Monday, November 20, Judge Kuhl entered her own order giving the parties ten days to object to *sua sponte* coordination and, if any party objected, noting that a hearing would be set. Ex. G.

Thereafter, on November 29, the plaintiffs whose cases had been coordinated[17] filed a notice with the JCCP court listing other California state court cases that shared common questions of fact and law. Ex. H. This plain vanilla notice sought no relief, but merely alerted Judge Kuhl that not all of the California Lipitor cases were part of Judge Weintraub's order. *Id.* at 1:22-23.

On December 15, Judge Kuhl entered an order adding the cases listed in Judge Weintraub's order to the Lipitor JCCP. Ex. I. Judge Kuhl also ordered the parties to file a status report addressing the parties' positions regarding the propriety of the JCCP court similarly ordering the *sua sponte* coordination of the cases listed in Plaintiffs' notice. *Id.* at 2-3.

After extensive meet-and-confer, the parties filed a joint status report on January 16, 2018 advising the JCCP court that, "in furtherance of party and Court efficiencies, [the Court] may *sua sponte* add-on to [the Lipitor JCCP]" both the list of cases included in Plaintiffs' notice and six other state court cases that were not included in either Judge Weintraub's order

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[17] The total number of plaintiffs whose claims had been coordinated into the JCCP at this time was 49. It remains the case, as it was when these cases were previously removed and remanded, that only 65 plaintiffs have ever requested that their cases be coordinated, either via the coordination petition or by way of add-on petitions.

or Plaintiffs' notice. Joint Status Report, Ex. X. at 2:9-21.[18] The parties reserved all rights regarding jurisdiction, stipulating that the joint status report neither waived any party's rights to remove under CAFA nor served as a triggering event for CAFA jurisdiction or otherwise as a "proposal" for a "joint trial." *Id.* at 2:22-25.

V. Pfizer again removed, and Judge Carney again remanded.

After Judge Kuhl *sua sponte* coordinated all the California state court Lipitor cases, Pfizer again removed them. Ex. L. Plaintiffs moved to remand, arguing that there is no CAFA mass action jurisdiction because (1) judges issue orders, not proposals, and (2) even if a trial judge's *sua sponte* coordination orders could be a "proposal" within the meaning of CAFA's mass action provision, the orders here did not propose a "joint trial." Ex. N.[19] Pfizer's opposition argued that the original proposal by 21 plaintiffs for an unqualified "all purposes" JCCP somehow transformed the coordination proceeding into what Pfizer called a "joint trial proceeding." Ex. Y.[20] Pfizer's position apparently was that the coordination petition filed in September 2013 by 21 plaintiffs combined with Judge Weintraub's request that Judge Kuhl *sua sponte* add-on cases to the JCCP and Judge Kuhl's two *sua sponte* coordination orders to form a single "proposal" for a "joint trial" under

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[18] Pfizer did not include this joint status report in the record it brought forth to this Court.

[19] Plaintiffs also made an argument that any proposal for a joint trial here was attributable to Pfizer, but Plaintiffs do not urge that ground here.

[20] Pfizer did not include its opposition in the record it brought forth to this Court.

California law. Ex. Y at 14; *see also* Ex. L (notice of removal) at 3:17-19.[21] Plaintiffs' reply noted that there is no such beast as a "joint trial proceeding" under California law or in any federal CAFA jurisprudence and urged Judge Carney instead to evaluate whether the California state court had "proposed" a "joint trial" based on the actual substance of what the court said. Ex. Z.[22]

Judge Carney held that the JCCP court's *sua sponte* orders are not a "proposal" for CAFA mass action purposes because under the plain meaning of the word "proposal" a court order is not a proposal. Remand Order, Ex. A at 8:9-9:8. Judge Carney further examined the substance of what Judge Kuhl said would happen upon coordination of the cases and determined that she had not proposed a "joint trial." To the contrary, her statements during the 8/4/17 status conference and the substance of her Minute Order of

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[21] Pfizer yanks a sentence from Judge Kuhl's 8/4/17 Minute Order (Ex. C) out of context to try to mislead this Court into thinking that Judge Kuhl necessarily "proposed" a "joint trial," irrespective of everything else she said. Petition at 4 (quoting Ex. C at 4) ("Judge Kuhl explained that . . . '[t]he shape of a coordinated proceeding is set when the coordination motion judge determines that the cases should be coordinated pursuant to the California rules."). But the next sentence clarifies that Judge Kuhl was referring to the sort of cases that should be included in the JCCP: "That is, the coordination motion judge determines the types of cases that should be brought together in a coordinated proceeding." *Id.* at 4 (citing *Ford Motor Warranty Cases* (2017) 11 Cal. App. 5th 626). Under *Ford*, Judge Kuhl retains broad discretion regarding trial of the coordinated cases. *Ford*, 11 Cal. App. 5th at 646 (noting that appellate court's holding "do[es] [not] in any way restrain the court's discretion to determine matters related to trial of the cases").

[22] Pfizer did not include this reply in the record it brought forth to this Court.

that same date describing (for the federal courts as well as the parties) how JCCPs generally work in California and how this particular JCCP would be managed demonstrated that she did not anticipate a "joint trial" of even two plaintiffs, much less 100. *Id.* at 9:22-11:12.

Pfizer then filed its petition for permission to appeal.

ARGUMENT AND AUTHORITIES

I. Judges don't propose – they order.

Courts that have reached the question of whether a court's *sua sponte* coordination order can be a proposal for a joint trial within the meaning of CAFA's mass action provision have been uniform in their resolution of the issue: A court's *sua sponte* coordination order is not a "proposal" for a joint trial for CAFA mass action purposes. *Alexander v. Bayer Corp.*, No. 2:16-cv-06822-MWF-MRW (Dkt. # 42) (Nov. 14, 2016) (appeal dismissed by voluntary stipulation and order) (No. 17-55828) (Dkt. # 31) (July 10, 2017); *Koral v. Boeing Co.*, 628 F.3d 945, 946 (7th Cir. 2011) (Posner, J.) ("We can assume (answering a question left open in . . . *Tanoh* . . .) that the state court's deciding on its own initiative to conduct a joint trial would not enable removal either. That would not be a proposal . . . ."); *see also Time Ins. Co. v. Astrazeneca AB*, 52 F. Supp. 3d 705, 715 (E.D. Pa. 2014).

Pfizer invokes an array of irrelevant statutory construction rules to assert that Congress's use of passive voice in the mass action provision, coupled with an "exception" for defendant-initiated coordinations, somehow evidences that "proposal" means something different in CAFA than it does in ordinary, everyday English. Petition at 11-13. But the Supreme Court has

made clear that construction of CAFA's mass action provision turns on the plain meaning of the terms used there. *See Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S.Ct. 736, 742-43 (2014) (refusing to stretch meaning of word "plaintiffs" in CAFA mass action provision beyond its ordinary plain meaning); *see also Tanoh*, 561 F.3d at 953 (noting that, "[a]lthough CAFA . . . extends federal diversity jurisdiction to both class actions and certain mass actions, the latter provision is fairly narrow"). Applying the clear, common-sense understanding of the word "proposal" that this Court adopted in *Briggs*, Judge Carney held that judges don't propose – they order:

> To "propose," in its ordinary sense, means "to offer for consideration, discussion, acceptance, or adoption." *Briggs*, 796 F.3d at 1048 (quoting Webster's Third New International Dictionary 1819 (2002)). A judge's *sua sponte* order does not make a proposal – it does not make an offer to be accepted or rejected. Instead, an "order" is "a command or direction authoritatively given." Black's Law Dictionary online (2nd ed.). To say that a court order constitutes a "proposal" distorts and unjustifiably broadens the straightforward meaning of that word.

Remand Order, Ex. A at 8.

Judge Carney is correct. His decision on this issue is consistent with all the courts that have actually decided the issue (as opposed to merely noting that the issue exists). The plain meaning of "proposal" excludes judge-initiated coordination orders.

But this Court need not resolve this issue to dispose of Pfizer's petition. Even if the Court were to disagree

with Judge Carney's holding on this issue, that would not resolve the matter, because the *sua sponte* coordination orders here did not propose a "joint trial."[23]

II. Even assuming a court can *sua sponte* propose a joint trial, there was no proposal for a "joint trial" here.

Like all cases construing CAFA's mass action provision, this Court's en banc decision in *Corber* utilized an objective test, analyzing the plaintiffs' coordination petition to determine whether the plaintiffs had "proposed a joint trial" of their claims. *Corber*, 771 F.3d at 1223 ("We will carefully assess the language of the petitions for coordination to see whether, in language or substance, they proposed a joint trial."). Pfizer identifies no reason why a judge-initiated coordination should be analyzed under CAFA's mass action provision any differently than a plaintiff-initiated coordination. Under *Corber* (and this Circuit's other CAFA authorities), courts considering whether a proposal for a joint trial has been made must carefully assess the language used by the alleged proposer (whether plaintiff or court) to see whether, in language or substance, they made a "voluntary and affirmative act" to propose a joint trial. *Corber*, 771 F.3d at 1223; *Briggs*, 796 F.3d at 1048.

This is precisely what Judge Carney did. He evaluated what Judge Kuhl said, on the record during the 8/4/17 status conference and in her minute order of the same date (as well as the *sua sponte* coordination orders) and correctly determined that, "[g]iven this backdrop, it defies common sense to suggest that Judge Kuhl's [*sua sponte*] coordination of the cases

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[23] *See supra* n.1.

constituted a proposal for a joint trial." Remand Order, Ex. A at 10:22-23.

Judge Kuhl's coordination orders were preceded by her detailed explanation of how JCCPs generally operate and how the Lipitor JCCP was likely to proceed. During the 8/4/17 status conference, Judge Kuhl stated that her tentative ruling on that request was intended to "describe what a coordinated proceeding is and what it does. . . When I read the Corber case, . . . my concern was that the federal courts should at least know what we do." Transcript, Ex. R at 4:15-20. Judge Kuhl has been involved with California's Complex Litigation Program since its inception 18 years ago and, with the cases likely to end up again in federal court, she was well-positioned "to say [to the federal courts] this is how we manage cases here, and make of that what you will." *Id.* at 6:16-26.

Judge Kuhl's 8/4/17 minute order followed through on this theme. She wrote: "[I]nsofar as the federal courts seek to understand California state court procedures in order to apply federal law . . . , it is appropriate for this court to explain its understanding of California coordination procedures generally, and in the context of this coordinated proceeding." Minute Order, Ex. C at 3-4. Importantly, Judge Kuhl proceeded to explain:

> [*T*]*he fact that*[,] [unlike a federal MDL judge,] *the* [*California*] *coordination trial judge has the authority to try coordinated cases herself* does not mean that the coordination judge will conduct the trial in all (or even some) of the coordinated cases, and *assuredly does not mean that the coordinated cases will be tried together, either at the same time or before one jury*. Coordination is a very flexible structure

> for case management. . . . The coordination trial judge has significant flexibility to decide whether or not she will try individual cases.

Id. at 5 (emphasis added). Judge Kuhl continued:

> Under California Rule of Court 3.542, the coordination trial judge may remand a coordinated action to the court in which the action was pending at the time coordination of that action was ordered. The ultimate determination of which cases in a coordinated proceeding will be tried by the coordination trial judge is dictated by promotion of the ends of justice.

Id. at 6. Finally, Judge Kuhl described how coordinated proceedings involving pharmaceutical products, like Lipitor, have traditionally proceeded in JCCPs:

> In coordinated proceedings involving claimed defective pharmaceuticals or failure to adequately warn of a pharmaceutical product's side effects, the coordination trial judge typically has handled one or more bellwether trials. *In the 17 years since the Complex Litigation Program has been in place in California, this court is unaware of any instance in which the claims of more than one party allegedly injured by taking a pharmaceutical product have been tried at the same time or to the same jury*, except in wrongful death cases where the claims of the survivors of one injured person have been tried together.
>
> Coordinated proceedings involving cases against pharmaceutical manufacturers have included more than 10,000 plaintiffs in some instances. If bellwether trials (as well as pretrial definition of issues) are unsuccessful in guiding the

> parties to inventory settlements, it has always been clear to the judges of the Complex Litigation Program that the coordination trial judge will have to remand cases for trial by the court in which the action was pending at the time of coordination. No single judge can conduct so many trials, and to attempt to do so would deprive plaintiffs of timely adjudication of their claims. The coordination trial judge will strive to establish a set of jury instructions and rulings on motions in limine that can serve to guide the trial of the cases after they are remanded, but no one (parties, counsel or the court) anticipates that every case can be tried by the coordination trial judge if the cases in a coordinated proceeding against a pharmaceutical manufacturer do not settle in large numbers.

Id. at 6-7 (emphasis added).

Further buttressing the conclusion that Judge Kuhl envisioned something other than "joint trials" when she entered the coordination orders are additional remarks she made during the 8/4/17 status conference. At that conference, Judge Kuhl instructed the parties, regarding the initial "case management order" she expected the parties to be developing, that the order should not purport to detail procedures and rules for every step of the Lipitor litigation, start to finish; rather, she wanted to work in a more piecemeal fashion so that the court and the parties could pivot if needed for efficiency purposes:

> Let me just give you a kind of an indication of my philosophy on these things.
>
> I generally prefer not to have a Case Management Order that's going to try to

> govern the whole case from beginning to end. I generally try to think about what needs to happen in the next definable period of time. And I find that that's generally conducive to getting things done.
>
> The old-fashioned case management orders that tried to write a new Code of Civil Procedure for a particular case are in many instances a waste of time.
>
> So what I like to do is to say: Okay, there are going to be plaintiff fact sheets, here's what they're going to be, here's the timeframe for responding to them.
>
> On the defense side, the most important thing, whatever it is, I'm assuming the first thing is to get the documents to come over from the MDL, make sure that happens; okay, what's the next thing that the plaintiffs want from the defendants, and sort of go from there, as opposed to trying to lay everything out. Because things change. As you do things and get information, you should be and always are evaluating.

Transcript, Ex. R at 27:25-28:17. Far from anticipating that coordination would result in "joint trials" of the claims of 100 or more plaintiffs, Judge Kuhl contemplated that coordination would allow the parties to begin to efficiently work the cases up, bit by bit, such that the court and the parties would have flexibility to determine, as the cases developed, how best to get them to completion.

It is hard to imagine a court drawing a clearer road map of what will happen once cases are coordinated than Judge Kuhl did here. And it could not be more

clear that, in *sua sponte* coordinating the cases, Judge Kuhl did *not* thereby propose a "joint trial" of *any* cases, much less of the claims of 100 or more plaintiffs.

Under these circumstances, even if it can be said that the JCCP court's *sua sponte* coordination orders are "proposals" for purposes of CAFA's mass action provision, it cannot be reasonably argued that the JCCP court here proposed a "joint trial" of the claims of "100 or more plaintiffs." Accordingly, this Court should summarily deny Pfizer's petition.

CONCLUSION AND REQUEST FOR RELIEF

Judge Kuhl clearly set forth what has happened in prior JCCPs and what will happen in this one, and she assuredly did not "propose" a "joint trial" of the claims of any Lipitor plaintiffs, much less 100 or more. Minute Order, Ex. C at 5 ("[T]he fact that the [California] coordination trial judge has the authority to try coordinated cases herself . . . assuredly does not mean that the coordinated cases will be tried together, either at the same time or before one jury."). Given that Judge Carney's remand order was the clear and inevitable result of straightforward application of CAFA's plain language and this Court's precedent, there is no reason for this Court to exercise its discretion to accept this appeal.

Accordingly, and for the foregoing reasons, Plaintiffs respectfully request that this Court summarily deny Pfizer's petition.

Dated: May 29, 2018.

Respectfully submitted,

/s/ *Charles G. Orr*
Charles G. Orr

APPENDIX C

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE: 08/04/17

HONORABLE CAROLYN B. KUHL JUDGE

HONORABLE JUDGE PRO TEM

#5

NONE Deputy Sheriff

DEPT. 309

J. MANRIQUE DEPUTY CLERK

E. MUNOZ, C.A.

ELECTRONIC RECORDING MONITOR

TIMOTHY J. MCCOY, CSR# 4745

PRO TEMPORE Reporter

2:15 pm JCCP4761

COORDINATION PROCEEDING
SPECIAL TITLE RULE (3.550)

LIPITOR CASES

Plaintiff Counsel SEE APPEARANCES ON PAGE 10

Defendant Counsel

NATURE OF PROCEEDINGS:

FURTHER STATUS CONFERENCE

ARGUMENT RE COURT'S ADD—ON ORDER

The Court issues its tentative ruling.

The matters are called for hearing.

The Order Appointing Court Approved Reporter as Official Reporter Pro Tempore is signed and filed this date (Timothy J. McCoy, CSR# 4745).

The Court, having read and considered the documents submitted and having heard oral argument, adopts its tentative ruling as the final order of the court as follows:

RULING ON PLAINTIFFS' SUBMISSION OF PROPOSED AMENDED ORDER RE ADD-ON PROCEDURES

The order of November 19, 2013 coordinating this case pursuant to California Code of Civil Procedure sections 404 et seq. and California Rules of Court 3.501 et seq. coordinates only three cases, each of which involved a single plaintiff. Thereafter, three cases involving a total of seven plaintiffs were added on to this coordinated proceeding. Although add-on requests have been filed in multiple additional cases, and other cases involving Lipitor personal injury claims have been filed in California, those cases have not been added to this coordinated proceeding because the cases were quickly removed to federal court. Moreover, the cases that were coordinated also were removed to federal court in early 2014 and were remanded only relatively recently (May 23, 2017). Hence, this coordinated proceeding has been quiescent for over three years.

It is now time to resume management of this coordinated proceeding. To do so, this court must establish an expeditious procedure to handle petitions to add additional cases onto this proceeding.

The Honorable Jane Johnson, who previously served as coordination trial judge (see CRC 3.540), entered an Order to govern add-on procedures on March 4, 2014 (hereinafter "2014 Add-on Order"). Plaintiffs' counsel

now seek to amend the 2014 Add-on Order primarily in order to position this proceeding so as to avoid removal based on the Class Action Fairness Act's ("CAFA's") creation of federal jurisdiction for actions in which "monetary relief claims of 100 or more persons are proposed to be tried jointly . . . ." (28 U.S.C. section 1332(d)(11)(B)(i).) Both sides in this litigation have been transparent regarding their respective concerns that the coordination proceeding should be able to be removed to federal court (Defendant's desire) or should be able to be remanded to state court even if removed (Plaintiff's desire).

Initially, Plaintiffs sought to amend the 2014 Add-on Order to include language stating that the cases were to be coordinated "for pretrial proceedings." Defendants strongly objected to this amendment, and the parties have submitted substantial briefs concerning the amendments sought by Plaintiffs. In their Reply Brief, Plaintiffs stated that they no longer seek to add language stating that coordination was only for purposes of pretrial proceedings, but rather seek to add the following language to the 2014 Add-on Order: "This Order does not constitute a determination that these cases should be tried jointly or otherwise consolidated for trial. In addition, for purposes of assignment, reassignment, and/or trial venue, the parties expressly reserve their rights to petition the Court to determine the appropriate venue for transfer of any and all coordinated actions."

This court does not have, and the Complex Litigation Program never has had, a stake in how the federal courts interpret CAFA. It is emphatically the province of the federal courts to interpret Congress' meaning in creating federal jurisdiction when the monetary relief claims of 100 or more persons are "proposed to be tried

jointly . . . ." However, insofar as the federal courts seek to understand California state court coordination procedures in order to apply federal law (see, e.g., Corber v. Xanodyne Pharms., Inc. (9th Cir. 2014) 771 F.3d 1218, 1222) it is appropriate for this court to explain its understanding of California coordination procedures generally, and in the context of this coordinated proceeding.

The shape of a coordinated proceeding is set when the coordination motion judge determines that cases should be coordinated pursuant to the California rules for coordination of individual complex cases. That is, the coordination motion judge determines the types of cases that should be brought together in a coordinated proceeding. (See generally Ford Motor Warranty Cases (11 Cal.App.5th 626.)

California law contemplates that cases will be coordinated for all purposes, not merely for pretrial proceedings. (Code of Civil Procedure section 404.1.) California procedure for coordinated cases differs in this respect from federal multidistrict litigation procedures. In MDL proceedings, cases must be returned to the federal district where they were originally filed when the case is ready to begin trial. (28 U.S.C. section 1407.) This restriction has created some difficulty in MDL proceedings where the MDL judge has found it important to conduct early bellwether trials. Indeed, some federal MDL judges have endured the inconvenience of relocating temporarily to other federal districts so as to ensure consistent rulings in the trials of bellwether cases.

Nevertheless, the fact that the coordination trial judge has the authority to try coordinated cases herself does not mean that the coordination trial judge will conduct the trial in all (or even some) of the

coordinated cases, and assuredly does not mean that the coordinated cases will be tried together, either at the same time or before one jury. Coordination is a very flexible structure for case management. The ultimate goal for the coordination trial judge is to manage the coordinated complex cases in accordance with the complex case management rules so as to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties and counsel. (CRC 3.400(a).) In order to accomplish these goals, the coordination trial judge attempts to direct the litigation toward early resolution of key issues of law and toward discovery of central issues of fact. Thus the coordination trial judge, for example, may decide early motions that eliminate claims, that define the law that will apply to the claims, that determine whether expert witnesses will or will not be permitted to testify at trial and that direct discovery.

The coordination trial judge has significant flexibility to decide whether or not she will try individual cases. In the Asbestos Coordinated Proceedings for Los Angeles, Orange and San Diego Counties, the coordination trial judge does not conduct any trials. Under California Rule of Court 3.542, the coordination trial judge may remand a coordinated action to the court in which the action was pending at the time coordination of that action was ordered. The ultimate determination of which cases in a coordinated proceeding will be tried by the coordination trial judge is dictated by promotion of the ends of justice. (California Rule of Court 3.542, referencing Code of Civil Procedure section 404.1.) In the Asbestos Coordinated Proceeding, trial of bellwether cases does not lead to overall settlements of an inventory of cases. The current number of asbestos cases in the coordinated proceeding is over 500. In order to allow cases to proceed promptly to trial when

they are trial-ready, the parties do not object to remand of asbestos cases for trial. In the Asbestos Coordinated Proceeding, the ends of justice and the goals of case management for complex cases are promoted by streamlining pretrial processes. Indeed, it has been estimated that the number of motions filed and heard in asbestos cases has decreased by two-thirds since asbestos cases in Southern California were coordinated.

In coordinated proceedings involving claimed defective pharmaceuticals or failure to adequately warn of a pharmaceutical product's side effects, the coordination trial judge typically has handled one or more bellwether trials. In the 17 years since the Complex Litigation Program has been in place in California, this court is unaware of any instance in which the claims of more than one party allegedly injured by taking a pharmaceutical product have been tried at the same time or to the same jury, except in wrongful death cases where the claims of the survivors of one injured person have been tried together.

Coordinated proceedings involving cases against pharmaceutical manufacturers have included more than 10,000 plaintiffs in some instances. If bellwether trials (as well as pretrial definition of issues) are unsuccessful in guiding the parties to inventory settlements, it has always been clear to the judges of the Complex Litigation Program that the coordination trial judge will have to remand cases for trial by the court in which the action was pending at the time of coordination. No single judge can conduct so many trials, and to attempt to do so would deprive plaintiffs of timely adjudication of their claims. The coordination trial judge will strive to establish a set of jury instructions and rulings on motions in limine that can serve

to guide the trial of the cases after they are remanded, but no one (parties, counsel or the court) anticipates that every case can be tried by the coordination trial judge if the cases in a coordinated proceeding against a pharmaceutical manufacturer do not settle in large numbers.

It bears mention that a plaintiff does not control the conduct of proceedings once a coordination motion has been granted. The coordination trial judge conducts the proceedings and makes case management decisions after hearing from all counsel and in accordance with Code of Civil Procedure sections 404 et seq. and the Rules of Court governing complex cases and coordinated proceedings.

Having outlined the parameters within which complex cases are litigated in coordinated proceedings, this court feels no need to indicate in amendments to the 2014 Add-on Order how case management will move forward in this particular coordinated proceeding. However, amendments to the 2014 Add-on Order are necessary for other administrative purposes that this court will discuss with the parties.

Counsel shall provide to the Court a Word version of the operative Add-On Order and an Excel version of the Table of California Lipitor Cases attached as Exhibit A to the July 31, 2017, Joint Status Report.

The parties shall file any objections or propose alternative language within five (5) days of the Court issuing a Revised Proposed Add-on Order.

The Court has read and considered the Joint Status Report Filed on July 31, 2017.

A Further Status Conference is held.

The parties shall meet and confer with regard to a briefing schedule for the motion for personal jurisdic-

tion remembering to allow three (3) weeks from the filing of the reply to the hearing date.

Within twenty (20) days, the parties shall meet and confer with regard to a stipulated protective order. If the parties cannot agree, a JOINT request for Court guidance may be posted on the electronic service message board.

A Non-Appearance Case Review re Filing of a Stipulated Protective Order is set for August 29, 2017, at 4:30 p.m. in Department 309.

Within thirty (30) days, the parties shall inform the the Court by joint posting on the electronic service message board of:

1. Their progress with regard to a case management order for factual development; and,
2. When the next status conference should be.

A Non-Appearance Case Review re Progress of Case Management Conference is set for September 11, 2017, at 4:30 p.m. in Department 309.

Counsel for the Plaintiff shall give notice.

APPEARANCES

FOR PLAINTIFFS	FOR DEFENDANTS
Charles G. "Chip" Orr	Mark Cheffo
Donald S. Edgar	J.D. Horton
Bill Robins	
Cherisse H. Cleofe	

via CourtCall

Thomas Sims	Sally Hosn
	Emma Garrison
	Amorina P. Lopez
	Rachel Passaretti-Wu

APPENDIX D

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

[Filed 11/17/2017]

Case No. JCCP 4761

Coordinated Proceeding Special Title (Rule 3.550)

LIPITOR CASES

REQUEST THAT COORDINATION TRIAL JUDGE INCLUDE IN THIS COORDINATED PROCEEDING CERTAIN CASES SHARING COMMON QUESTIONS OF FACT AND LAW

Whereas California Code of Civil Procedure section 404.4 provides that: "The presiding judge of any court in which there is pending an action sharing a common question of fact or law with actions coordinated pursuant to Section 404, on the court's own motion . . . may request the judge assigned to hear the coordinated actions for an order coordinating the action."

Whereas the Presiding Judge of the Los Angeles Superior Court has delegated his authority to the Supervising Judge of the Civil Departments with respect to assignment of all civil matters throughout the Superior Court of the State of California for the County of Los Angeles.

Whereas JCCP 4761, Lipitor Cases (hereinafter "Lipitor JCCP"), was created by order of the Honorable Emilie Elias on November 19, 2013. On formation, the coordinated proceeding included three cases. Each of these cases involved plaintiffs who brought claims against Pfizer, Inc., et al. (hereinafter "Pfizer Defendants"). All coordinated cases alleged that the Plaintiffs took the drug Lipitor, and that in consequence they developed Type II diabetes.

Whereas, prior to March 2014, add-on requests were filed in three additional cases against the Pfizer Defendants. Subsequently, these cases were removed to federal court before the coordination trial judge acted on the add-on requests.

Whereas this Court is informed that, starting in early 2014, approximately 1800 additional Plaintiffs filed cases in California against the Pfizer Defendants contending that Lipitor caused their Type II diabetes. Beginning in March 2014, the Lipitor Defendants removed all cases in the Lipitor JCCP and all other similar California cases to federal court. Such cases were further transferred to a Multidistrict Litigation ("MDL") proceeding in South Carolina. These cases eventually were returned from the MDL to the Central District of California. On May 23, 2017 the federal district court remanded all cases in the Lipitor JCCP and all other California cases against the Pfizer Defendants involving the drug Lipitor to the California state courts in which Plaintiffs had filed them.

Whereas the cases listed on Attachment A hereto are currently pending in the Los Angeles Superior Court after remand from the Federal District Court for the Central District of California. In each case Plaintiffs brought suit against the Pfizer Defendants alleging that the drug Lipitor caused their Type II

diabetes. Such cases currently are assigned to the Honorable Carolyn B. Kuhl, but they have not been added on to the Lipitor JCCP because no party has requested that they be classified as add-on cases pursuant to California Rules of Court, rule 3.544.

Whereas, following briefing from all sides, Judge Kuhl issued an Order prescribing a procedure the parties should follow in requesting that cases be added-on to the Lipitor JCCP. A copy of Judge Kuhl's Order is Attachment B hereto, and a copy of the minute order of August 4, 2017 referenced therein is Attachment C hereto.

Whereas subsequent to the issuance of Judge Kuhl's August 4 and October 13, 2017 Orders, it continues to be the case that no party has requested that the cases listed in Attachment A be added on to the Lipitor JCCP.

Whereas each of the cases listed in Attachment A is a complex case as defined in California Rules of Court, rule 3.400. Moreover, each case listed in Attachment A is brought by a Plaintiff or Plaintiffs against the Pfizer Defendants alleging that the drug Lipitor caused them to develop Type II diabetes. In order meet the goals of California Rules of Court, rule 3.400(a) – avoiding unnecessary burdens on the Court, reducing litigation costs, moving the cases toward resolution expeditiously, and improving the quality of decision making for the parties, counsel and the Court – these cases, which share common facts and issues of law, should be joined to the Lipitor JCCP.

Whereas it would be extremely burdensome for the Los Angeles Superior Court to handle the cases listed in Attachment A individually and outside of a coordinated proceeding.

Now therefore, on behalf of the Presiding Judge and acting as the Supervising Judge of the Civil Departments, pursuant to Code of Civil Procedure section 404.4, I hereby request that Judge Kuhl, as coordination trial judge assigned to the Lipitor JCCP, should exercise the authority granted by California Rules of Court, rule 3.544 and add the cases listed in Attachment A to the Lipitor JCCP, after notice and hearing pursuant to the procedures set forth in California Rules of Court, rule 3.554.

Dated: November 17, 2017

/s/ Debre K. Weintraub
Honorable Debre K. Weintraub
Supervising Judge of the Civil Departments

ATTACHMENT A

Candacy Roberts-Anderson, et al. v. Pfizer Inc., et al.	BC536941
Darlene Jordan, et al. v. Pfizer Inc., et al.	BC536930
Deberah Rivington, et al. v. Pfizer Inc., et al.	BC536942
Emma Frields, et, al. v. Pfizer Inc., et al.	BC536932
Fiette Williams, et al. v. Pfizer Inc., et al.	BC536934
Juanita Banks, et al, v. Pfizer Inc., et al	BC536936
Linda Roy, et al. v. Pfizer Inc., et al.	BC536940
Loretta Curley, et al. v. Pfizer Inc., et al.	BC536939
Marilyn Williams, et al., v Pfizer Inc., et al.	BC536935
Ouida Valentine, et al. v. Pfizer Inc., et al,	BC537052
Ruth English, et al. v. Pfizer Inc., et al,	BC536937
Segalilt Siegel, et al. v. Pfizer Inc., et al.	BC536933
Tomie Isrel, et al. v. Pfizer Inc., et al.	BC536931
Zurita Gray, et al. v. Pfizer Inc., et al.	BC536938
Denelle Bailey, et al v. Pfizer Inc., et al	BC537407
Blanca Mejia, et al. v. Pfizer Inc., et al.	BC537851
Lena Whitaker, et al. v. Pfizer Inc., et al..	BC537924
Maria Carbajal, et al v. Pfizer Inc., et al.	BC538103
Rose A. Williams, et al. v. Pfizer	BC537852
Tonisha Powell, et al. v. Pfizer Inc., et al.	BC537850
Ahda Adamyan, et al. v. Pfizer Inc., et al	BC538067

Linda Franzone, et al v. Pfizer Inc., et al	BC538104
Regina Ferberdino, et al. v. Pfizer Inc., et al.	BC538066
Ruby Hare, et al. v. Pfizer Inc., et al	BC537836
Shirley Reynolds, et al. v. Pfizer Inc., et al	BC537946
Elizabeth Ann Watts, et al. v Pfizer Inc., et al	BC538131
Williams, Jewel, et al v. Pfizer Inc., et al	BC538131
Helen Elliott, et al, v. Pfizer, Inc., et al.	BC554988
Bessie Barringer, et al. v. Pfizer, Inc., et al.	BC640576
Elizabeth Debay et al. v, Pfizer, Inc. et al.	BC620597
Genevieve Monreal, et al. v. Pfizer, Inc., et al.	BC620308
Gloria Ashley, et al. v. Pfizer, Inc. et al.	BC597288
Joni Boles, et al. v. Pfizer, Inc., et al.	BC632342
Jonna Roberts, et al. v. Pfizer, Inc., et al.	BC609198
Josefina Allison, et al. v. Pfizer, Inc., et al.	BC638755
Judith Smalley, et al. v. Pfizer, Inc., et al.	BC571105
Mary Baker, et al. v. Pfizer Inc., et al.	BC642382
Mildred Lois Brown, et al. v. Pfizer, Inc., et al.	BC627217
Mixdalia Taime, et al. v. Pfizer, Inc., et al.	BC595160
Myrle Jackson, et al. v. Pfizer, Inc., et al.	BC622449
Lawana Smith, et al. v. Pfizer, Inc. et al.	BC617993
Robyn Whitney, et al. v. Pfizer Inc., et al.	BC573889
Rose Carpenter, et al. v. Pfizer, Inc., et al.	BC631286

Ruth Yaker, et al. v. Pfizer, Inc. et al	BC593129
Sharal Scully, et al. v. Pfizer, Inc., et al.	BC625835
Shari Beneda, et al. v. Pfizer, Inc, et al.	BC583448
Joan. Alston, et al. v. Pfizer, Inc., et al.	BC630499
Cynthia, Davis, et al. v. Pfizer, Inc., et al.	BC631285
Sharon Campbell, et at v. Pfizer, Inc., et al.	BC623414
Shary Stegall, et al v. Pfizer, Inc., et al.	BC585392
Theresa Bagliere, et al. v. Pfizer, Inc, et al.	BC615571
Norma Adatan, et al. v. Pfizer, Inc., et al.	BC637353
Vivia Artz, et aL v. Pfizer, Inc., et al.	BC635793
Dena Blackmore, et al. v. Pfizer, Inc, et al.	BC643523
Sylvia Alvarado, et al. v. Pfizer. Inc., et al	BC645073
Amal Jones, et al. v. Pfizer, Inc., et al.	BC645186
Marline Tillery, et al. v. Pfizer, Inc., et al.	BC645478
Maria Xochrhua, et al. v. Pfizer, Inc., et al.	BC647065
Patsy Wood, et al. v. Pfizer, Inc., et al.	BC652781
Patricia Alexander, et al. v. Pfizer Inc., et al.	BC659589
Venicia Avila, et al v. Pfizer Inc., et al.	BC664367
Carolyn Davis, et al. v. Pfizer, Inc, et al	BC648688

ATTACHMENT B

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES,
CENTRAL CIVIL WEST

[Filed 10/13/2017]

Judicial Council Coordination Proceeding No. 4761

Coordination Proceeding Special Title [Rule 3.550]

LIPITOR CASES

This Document Relates To: *ALL CASES*

AMENDED ORDER RE ADD-ON PROCEDURES

The order of November 19, 2013 coordinating this case pursuant to California Code of Civil Procedure sections 404 *et seq.* and California Rules of Court 3.501 *et seq.* coordinates only three cases, each of which involved a single plaintiff. Thereafter, three cases involving a total of seven plaintiffs were added on to this coordinated proceeding. Although add-on requests have been filed in multiple additional cases, and other cases involving Lipitor personal injury claims have been filed in California, those cases have not been added to this coordinated proceeding because the cases were quickly removed to federal court. Moreover, the cases that were coordinated also were removed to federal court in early 2014 and were remanded only relatively recently (May 23, 2017). Hence, this coordinated proceeding has been quiescent for over three years.

It is now time to resume management of this coordinated proceeding. To do so, this court must establish an expeditious procedure to handle petitions to add additional cases onto this proceeding.

The Honorable Jane Johnson, who previously served as coordination trial judge (see CRC 3.540), entered an Order to govern add-on procedures on March 4, 2014 *(hereinafter* "2014 Add-on Order"). Plaintiffs' counsel recently sought to amend the 2014 Add-on Order to address the scope of this coordinated proceeding, and the parties submitted substantial briefs concerning the amendments sought by Plaintiffs. This court's discussion of the differences between the parties with respect to the scope of the coordinated proceeding and the court's resolution of this matter are reflected in a Minute Order dated August 4, 2017.

Pursuant to Rule 3.531 of the California Rules of Court, and good cause appearing:

IT IS HEREBY ORDERED:

I. FILING OF COMPLAINTS

A. Coordinated Proceeding: This coordinated proceeding is intended to encompass 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 ingestion of Lipitor®. The parties to such actions, however, are still required to comply with the stipulation or notice add-on procedures set forth in this Order.

B. Plaintiffs' Complex Case Fees: The fees required by California Government Code section 70616 apply to each case within a complex coordinated proceeding, and, as such, the fees required by that section are

required to be paid at the time of filing each case as to which there will be an add-on petition or stipulation subject to this Order.

C. Venue: Complaints in actions that potentially qualify for coordination in *Lipitor Cases,* JCCP 4761, shall be filed in accordance with the venue requirements of the California Code of Civil Procedure.

D. Cases Filed in Los Angeles County: Complaints in actions that potentially qualify for coordination in *Lipitor Cases,* JCCP No. 4761, and that are properly venued in Los Angeles County, shall be filed in the Stanley Mosk Courthouse of the Superior Court of California for the County of Los Angeles, at the following address:

Stanley Mosk Courthouse
111 North Hill St.
Los Angeles, CA 90012

Direct filing in Department 309 will not be accepted.

II. ADD-ON PROCEDURES

A. Add-on Procedures in General. The stipulated add-on procedure in Section II(A)(1) hereof is intended to expedite the identification of actions that potentially qualify for coordination and the determination of whether those actions should be coordinated. The notice procedure set forth in Section II(A)(2) shall apply in cases where one party believes a case should be coordinated, but the parties fail to reach a stipulation.

1. By Stipulation. Wherever practicable, the parties should identify potential add-on cases by filing in *Lipitor Cases,* JCCP No. 4761, a document titled "Stipulation and [Proposed] Order to Add-On and Transfer Related Case to Coordinated Proceeding," attached hereto as Exhibit 1. This Stipulation shall

be signed by Defendants' Liaison Counsel and counsel for the plaintiff in each identified case. This court orders that when the parties have stipulated to coordination and have filed in the originating court a Notice of Submission of Stipulation and a Notice of Stay attaching this Order, all proceedings in the originating court are stayed pursuant to Code of Civil Procedure section 404.5.

2. By Notice. Where stipulation is impracticable, *any* party may identify a potential add-on case by filing in *Lipitor Cases,* JCCP No. 4761, a document titled "Notice of Potential Add-On Cases and Request for Coordination; Notice of Stay." Such Notice shall also be filed in the originating court for such case together with a copy of this Order. The Notice shall include the complete caption of each potential add-on case that the party is requesting be transferred into *Lipitor Cases,* JCCP No. 4761; the California state court in which each case was originally filed; the initial case number; a copy of the complaint in such case if the case is filed in a County other than Los Angeles County; and the following two notices:

> NOTICE IS HEREBY GIVEN that plaintiff is asserting a claim or claims for damages that generally involved Lipitor and that, accordingly, this case is eligible for statewide coordination pursuant to Sections 404 et seq. of the California Code of Civil Procedure and for inclusion in *Lipitor Cases,* Judicial Council Coordinated Proceeding No. 4761, now pending before the Honorable Carolyn B. Kuhl, Judge of the Superior Court of the State of California for the County of Los Angeles.
>
> NOTICE IS ALSO GIVEN that pursuant to Section 404.5 of the California Code of Civil Procedure, and by order of the Coordination Trial Judge,

upon submission of this case to the Coordination Trial Judge as a potential add-on case and upon filing of this Notice, this action is ordered stayed until such time as the Coordination Trial Judge orders otherwise.

a. Opposition to Coordination. After a Notice of Potential Add-On Cases is filed and served, any party named in any action identified in the Notice shall have a period of ten (10) calendar days from the date of service to file and serve a Notice of Opposition to Coordination, including points and authorities and other relevant materials with respect to that party's action. The Court may, but need not, set a hearing for determination whether the case should be coordinated and, if so, will provide notice of the hearing, including a date for responsive briefs, to all Liaison Counsel. A party's failure to file and serve a Notice of Opposition within the ten-day period of time will be deemed a statement of non-opposition to coordination as to that action.

B. Service of Add-On Notification Documents. All Stipulations and [Proposed] Orders to Add-On and Transfer Related Case to Coordinated Proceeding and Notices of Potential Add-On Cases shall be filed and served in accordance with the requirements for filing and service in place in this coordinated proceeding. The party filing the Stipulation or Notice shall submit a copy of same to the Judicial Council at the following address:

Chair, Judicial Council of California
Administrative Offices of the Courts
Attn: Appellate & Trial Court Judicial Services
(Civil Case Coordination)
455 Golden Gate Avenue
San Francisco, CA 94102-3688

The party filing the Stipulation and [Proposed] Order to Add-On and Transfer Related Case to Coordination Proceeding or Notice of Potential Add-On Cases shall also file a Notice of Submission and a Notice of Stay of Case in each court in which the actions sought to be added were initially filed. The party filing the Stipulation and [Proposed] Order to Add-On and Transfer Related Case to Coordination Proceeding or Notice of Potential Add-On Cases shall serve all parties to the add-on actions with a copy of the Stipulation or Notice; a copy of all Case Management Orders entered in *Lipitor Cases,* JCCP No. 4761; and the Notice of *Stay* of Case.

C. Effect of Stay of Add-on Case: Notwithstanding any stay, upon coordination, any case that this court has ordered added-on to this coordinated proceeding shall be subject to all Case Management Orders entered in *Lipitor Cases,* JCCP No. 4761, including any deadlines and obligations included in those CMOs.

D. Scope of Order. To the extent permitted under California law, the procedures and protocols contained in this Order shall supersede any conflicting provisions in the California Code of Civil Procedure, the Rules of Court, the local rules of the various counties, and any other conflicting statutory, judicial, or regulatory provisions.

IT IS SO ORDERED.

Dated: Oct. 13, 2017

/s/ Carolyn B. Kuhl
Hon. Carolyn B. Kuhl
Judge of the Superior Court

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES,
CENTRAL CIVIL WEST

Judicial Council Coordination Proceeding No. 4761

Coordination Proceeding Special Title [Rule 3.550]

LIPITOR CASES

This Document Relates To: *ALL CASES*

STIPULATION AND [PROPOSED] ORDER TO ADD-ON AND TRANSFER RELATED CASE TO COORDINATED PROCEEDING

Pursuant to Section II(A)(1) of the Amended Order re Add-On Procedures, counsel for Plaintiff(s) _____, and Defendants' Liaison Counsel, hereby enter into and submit the following stipulation to add-on and transfer a Lipitor case to Judicial Council Coordinated Proceeding No. 4761.

1. Judicial Council Coordinated Proceeding No. 4761, *Lipitor Cases,* now pending before the Honorable Carolyn B. Kuhl, involves California state court actions brought by or on behalf of persons alleging injuries and seeking damages, injunctive relief, or restitution, relating to Lipitor®.

2. The signatories to *this* Stipulation agree that [CASE NAME], which is now pending in the California

Superior Court for the County of _____ (Case No. _____), meets the requirements of California Code of Civil Procedure Section 404.1 and Rule 3.544, and should be added-on and transferred to this Coordinated Proceeding.

3. Plaintiff(s) in the above-captioned case allege(s) personal injuries related to the use of Lipitor that are the subject of this coordinated proceeding, and allege(s) similar causes of action and theories of liability.

4. The above captioned case meets the standards for coordination as it is a complex case and shares common questions of law and fact with actions included in the Coordinated Proceeding. The convenience of plaintiff, witnesses, and counsel, the efficient use of judicial resources, the advantages of comprehensive and consistent rulings, and the interests of justice are best served if this case is transferred to this Coordinated Proceeding. The signatories to this Stipulation believe that, in the interests of judicial efficiency, the above captioned case should be added on and transferred to the Coordinated Proceeding.

5. Based on these considerations, the parties hereby stipulate that the above captioned case should be added on to JCCP 4761 and transferred to this Court. IT IS SO STIPULATED.

Dated: _____

[Plaintiff's Counsel]

By: _____
Attorney Name

Dated:

[Defense Counsel]

By: _____

Attorney Name

IT IS SO ORDERED.

Dated: _____

_____
Hon. Carolyn B. Kuhl
Judge of the Superior Court

ATTACHMENT C

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE: 08/04/17

HONORABLE CAROLYN B. KUHL JUDGE

HONORABLE JUDGE PRO TEM

#5

NONE Deputy Sheriff

DEPT. 309

J. MANRIQUE DEPUTY CLERK

E. MUNOZ, C.A.

ELECTRONIC RECORDING MONITOR

TIMOTHY J. MCCOY, CSR# 4745

PRO TEMPORE Reporter

2:15 pm JCCP4761

COORDINATION PROCEEDING
SPECIAL TITLE RULE (3.550)

LIPITOR CASES

Plaintiff Counsel SEE APPEARANCES ON PAGE 10

Defendant Counsel

NATURE OF PROCEEDINGS:

FURTHER STATUS CONFERENCE

ARGUMENT RE COURT'S ADD—ON ORDER

The Court issues its tentative ruling.

The matters are called for hearing.

The Order Appointing Court Approved Reporter as Official Reporter Pro Tempore is signed and filed this date (Timothy J. McCoy, CSR# 4745).

The Court, having read and considered the documents submitted and having heard oral argument, adopts its tentative ruling as the final order of the court as follows:

RULING ON PLAINTIFFS' SUBMISSION OF PROPOSED AMENDED ORDER RE ADD-ON PROCEDURES

The order of November 19, 2013 coordinating this case pursuant to California Code of Civil Procedure sections 404 et seq. and California Rules of Court 3.501 et seq. coordinates only three cases, each of which involved a single plaintiff. Thereafter, three cases involving a total of seven plaintiffs were added on to this coordinated proceeding. Although add-on requests have been filed in multiple additional cases, and other cases involving Lipitor personal injury claims have been filed in California, those cases have not been added to this coordinated proceeding because the cases were quickly removed to federal court. Moreover, the cases that were coordinated also were removed to federal court in early 2014 and were remanded only relatively recently (May 23, 2017). Hence, this coordinated proceeding has been quiescent for over three years.

It is now time to resume management of this coordinated proceeding. To do so, this court must establish an expeditious procedure to handle petitions to add additional cases onto this proceeding.

The Honorable Jane Johnson, who previously served as coordination trial judge (see CRC 3.540), entered an Order to govern add-on procedures on March 4, 2014 (hereinafter "2014 Add-on Order"). Plaintiffs' counsel

now seek to amend the 2014 Add-on Order primarily in order to position this proceeding so as to avoid removal based on the Class Action Fairness Act's ("CAFA's") creation of federal jurisdiction for actions in which "monetary relief claims of 100 or more persons are proposed to be tried jointly . . . ." (28 U.S.C. section 1332(d)(11)(B)(i).) Both sides in this litigation have been transparent regarding their respective concerns that the coordination proceeding should be able to be removed to federal court (Defendant's desire) or should be able to be remanded to state court even if removed (Plaintiff's desire).

Initially, Plaintiffs sought to amend the 2014 Add-on Order to include language stating that the cases were to be coordinated "for pretrial proceedings." Defendants strongly objected to this amendment, and the parties have submitted substantial briefs concerning the amendments sought by Plaintiffs. In their Reply Brief, Plaintiffs stated that they no longer seek to add language stating that coordination was only for purposes of pretrial proceedings, but rather seek to add the following language to the 2014 Add-on Order: "This Order does not constitute a determination that these cases should be tried jointly or otherwise consolidated for trial. In addition, for purposes of assignment, reassignment, and/or trial venue, the parties expressly reserve their rights to petition the Court to determine the appropriate venue for transfer of any and all coordinated actions."

This court does not have, and the Complex Litigation Program never has had, a stake in how the federal courts interpret CAFA. It is emphatically the province of the federal courts to interpret Congress' meaning in creating federal jurisdiction when the monetary relief claims of 100 or more persons are "proposed to be tried

jointly . . . ." However, insofar as the federal courts seek to understand California state court coordination procedures in order to apply federal law (see, e.g., Corber v. Xanodyne Pharms., Inc. (9th Cir. 2014) 771 F.3d 1218, 1222) it is appropriate for this court to explain its understanding of California coordination procedures generally, and in the context of this coordinated proceeding.

The shape of a coordinated proceeding is set when the coordination motion judge determines that cases should be coordinated pursuant to the California rules for coordination of individual complex cases. That is, the coordination motion judge determines the types of cases that should be brought together in a coordinated proceeding. (See generally Ford Motor Warranty Cases (11 Cal.App.5th 626.)

California law contemplates that cases will be coordinated for all purposes, not merely for pretrial proceedings. (Code of Civil Procedure section 404.1.) California procedure for coordinated cases differs in this respect from federal multidistrict litigation procedures. In MDL proceedings, cases must be returned to the federal district where they were originally filed when the case is ready to begin trial. (28 U.S.C. section 1407.) This restriction has created some difficulty in MDL proceedings where the MDL judge has found it important to conduct early bellwether trials. Indeed, some federal MDL judges have endured the inconvenience of relocating temporarily to other federal districts so as to ensure consistent rulings in the trials of bellwether cases.

Nevertheless, the fact that the coordination trial judge has the authority to try coordinated cases herself does not mean that the coordination trial judge will conduct the trial in all (or even some) of the

coordinated cases, and assuredly does not mean that the coordinated cases will be tried together, either at the same time or before one jury. Coordination is a very flexible structure for case management. The ultimate goal for the coordination trial judge is to manage the coordinated complex cases in accordance with the complex case management rules so as to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties and counsel. (CRC 3.400(a).) In order to accomplish these goals, the coordination trial judge attempts to direct the litigation toward early resolution of key issues of law and toward discovery of central issues of fact. Thus the coordination trial judge, for example, may decide early motions that eliminate claims, that define the law that will apply to the claims, that determine whether expert witnesses will or will not be permitted to testify at trial and that direct discovery.

The coordination trial judge has significant flexibility to decide whether or not she will try individual cases. In the Asbestos Coordinated Proceedings for Los Angeles, Orange and San Diego Counties, the coordination trial judge does not conduct any trials. Under California Rule of Court 3.542, the coordination trial judge may remand a coordinated action to the court in which the action was pending at the time coordination of that action was ordered. The ultimate determination of which cases in a coordinated proceeding will be tried by the coordination trial judge is dictated by promotion of the ends of justice. (California Rule of Court 3.542, referencing Code of Civil Procedure section 404.1.) In the Asbestos Coordinated Proceeding, trial of bellwether cases does not lead to overall settlements of an inventory of cases. The current number of asbestos cases in the coordinated proceeding is over 500. In order to allow cases to proceed promptly to trial when

they are trial-ready, the parties do not object to remand of asbestos cases for trial. In the Asbestos Coordinated Proceeding, the ends of justice and the goals of case management for complex cases are promoted by streamlining pretrial processes. Indeed, it has been estimated that the number of motions filed and heard in asbestos cases has decreased by two-thirds since asbestos cases in Southern California were coordinated.

In coordinated proceedings involving claimed defective pharmaceuticals or failure to adequately warn of a pharmaceutical product's side effects, the coordination trial judge typically has handled one or more bellwether trials. In the 17 years since the Complex Litigation Program has been in place in California, this court is unaware of any instance in which the claims of more than one party allegedly injured by taking a pharmaceutical product have been tried at the same time or to the same jury, except in wrongful death cases where the claims of the survivors of one injured person have been tried together.

Coordinated proceedings involving cases against pharmaceutical manufacturers have included more than 10,000 plaintiffs in some instances. If bellwether trials (as well as pretrial definition of issues) are unsuccessful in guiding the parties to inventory settlements, it has always been clear to the judges of the Complex Litigation Program that the coordination trial judge will have to remand cases for trial by the court in which the action was pending at the time of coordination. No single judge can conduct so many trials, and to attempt to do so would deprive plaintiffs of timely adjudication of their claims. The coordination trial judge will strive to establish a set of jury instructions and rulings on motions in limine that can serve

to guide the trial of the cases after they are remanded, but no one (parties, counsel or the court) anticipates that every case can be tried by the coordination trial judge if the cases in a coordinated proceeding against a pharmaceutical manufacturer do not settle in large numbers.

It bears mention that a plaintiff does not control the conduct of proceedings once a coordination motion has been granted. The coordination trial judge conducts the proceedings and makes case management decisions after hearing from all counsel and in accordance with Code of Civil Procedure sections 404 et seq. and the Rules of Court governing complex cases and coordinated proceedings.

Having outlined the parameters within which complex cases are litigated in coordinated proceedings, this court feels no need to indicate in amendments to the 2014 Add-on Order how case management will move forward in this particular coordinated proceeding. However, amendments to the 2014 Add-on Order are necessary for other administrative purposes that this court will discuss with the parties.

Counsel shall provide to the Court a Word version of the operative Add-On Order and an Excel version of the Table of California Lipitor Cases attached as Exhibit A to the July 31, 2017, Joint Status Report.

The parties shall file any objections or propose alternative language within five (5) days of the Court issuing a Revised Proposed Add-on Order.

The Court has read and considered the Joint Status Report Filed on July 31, 2017.

A Further Status Conference is held.

The parties shall meet and confer with regard to a briefing schedule for the motion for personal jurisdic-

tion remembering to allow three (3) weeks from the filing of the reply to the hearing date.

Within twenty (20) days, the parties shall meet and confer with regard to a stipulated protective order. If the parties cannot agree, a JOINT request for Court guidance may be posted on the electronic service message board.

A Non-Appearance Case Review re Filing of a Stipulated Protective Order is set for August 29, 2017, at 4:30 p.m. in Department 309.

Within thirty (30) days, the parties shall inform the the Court by joint posting on the electronic service message board of:

1. Their progress with regard to a case management order for factual development; and,
2. When the next status conference should be.

A Non-Appearance Case Review re Progress of Case Management Conference is set for September 11, 2017, at 4:30 p.m. in Department 309.

Counsel for the Plaintiff shall give notice.

APPEARANCES

FOR PLAINTIFFS	FOR DEFENDANTS
Charles G. "Chip" Orr	Mark Cheffo
Donald S. Edgar	J.D. Horton
Bill Robins	
Cherisse H. Cleofe	
via CourtCall	
Thomas Sims	Sally Hosn
	Emma Garrison
	Amorina P. Lopez
	Rachel Passaretti-Wu