No.

IN THE

Supreme Court of the United States

CORDIS CORPORATION,

Petitioner,

v.

JERRY DUNSON, *ET AL.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 1332(d)(11) of Title 28 grants defendants a right to remove a "mass action" from state to federal court.

> When hundreds of plaintiffs from around the country file cases in a single state court, and propose to consolidate those cases for legal and evidentiary rulings, and bellwether trials that may bind defendants through issue preclusion, is this a removable "mass action," or can *defendants*' right to remove be defeated by *plaintiffs* simply electing not themselves to be so bound?

PARTIES TO THE PROCEEDINGS

Cordis Corporation (Cordis) was appellant in the Ninth Circuit. Cordis and Confluent Medical Technologies, Inc. were defendants in the proceedings before the United States District Court for the Northern District of California below.

Appellees before the Ninth Circuit and plaintiffs in the Northern District of California were Jerry Dunson, Cheryl Grech, Robert Flanagan, Carol Flanagan, Joseph Gieber, Mary Eldeb, Dayna Currie, and Harlowe Currie.

RULE 29.6 STATEMENT

Cordis Corporation is wholly-owned by Cardinal Health, Inc., which is a publicly-traded company.

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PETITION FOR A WRIT OF CERTIORARI

Cordis Corporation respectfully petitions for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion is reported as *Dunson v. Cordis Corp.*, 854 F.3d 551 (9th Cir. 2017), and is reprinted at Appendix 1a. The order denying *en banc* review is reprinted at App. 27a. The district court's decision is unreported and is reprinted at App. 12a. The district court's order denying Defendant's motion to stay is reprinted at App. 30a. The order granting the petition for permission to appeal is reprinted at App. 28a.

JURISDICTION

This is one of dozens of multi-plaintiff lawsuits filed on behalf of hundreds of plaintiffs in the Superior Court of the State of California for the County of Alameda. After plaintiffs proposed to consolidate the cases, Petitioner Cordis removed the cases to the United States District Court for the Northern District of California, pursuant to the mass action removal provisions of the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §§ 1332(d) and 1453. The district court ordered remand of all the cases, including this one.

The United States Court of Appeals for the Ninth Circuit had jurisdiction over Cordis' appeal of this case because, Cordis applied to appeal the remand orders pursuant to 28 U.S.C. § 1453(c), and on February 13, 2017, the Ninth Circuit accepted the appeal. The Ninth Circuit ordered that the other

removed and remanded cases, then subject to Cordis' applications to appeal, be held in abeyance pending the resolution of this case. Those cases will be the subject of a separate petition, which will suggest that this Court hold that petition pending disposition of this one.

The Ninth Circuit affirmed the district court decision in this case on April 14, 2017. App. 1a. Cordis' petition for rehearing *en banc* was denied on May 23, 2017. App. 27a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Provisions of the Class Action Fairness Act ("CAFA"), codified at 28 U.S.C. § 1332(d)(1)-(11), are reprinted at App. 39a-44a, for the Court's convenience. CAFA's procedures for removing class and mass actions from state court to federal district court are codified at 28 U.S.C. § 1453, and are reprinted at App. 45a-46a.

This Petition focuses on CAFA's "mass action" removal provision, 28 U.S.C. § 1332(d)(11). That section provides in relevant part that:

> (11)(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.
>
> (B)(i) As used in subparagraph (A), the term "mass action" means any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve

common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

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

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

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

* * *

; or

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

STATEMENT

A. Introduction

The issue presented here is whether 28 U.S.C. § 1332(d)(11), CAFA's mass action removal provision, allows defendants to remove cases in the common situation when hundreds of plaintiffs from around the country have concentrated their case filings in a single state, and then propose to consolidate their claims before a single state court judge for legal and evidentiary rulings, and to implement a "bellwether

trial process." Courts of appeals in at least two Circuits hold that the answer to the question is yes.

Only the Ninth Circuit diverges, positing an additional, insurmountable prerequisite to removal of such cases. The Ninth Circuit holds that plaintiffs can defeat *defendants*' right to remove simply by declaring their intent that preclusion be a one-way street, namely, that adverse factual determinations in the bellwether trials will bind defendants but not *plaintiffs* not party to those trials. For defendants to overcome the Ninth Circuit's prerequisite, plaintiffs would have to agree to be bound. Since that will not happen—why would plaintiffs agree to that?—defendants' statutory right of mass action removal is now rendered a dead letter in the Ninth Circuit. The Ninth Circuit panel offered no rationale for its ruling as a matter of statutory interpretation or legislative purpose.

By expanding federal court jurisdiction over class and mass actions, Congress granted defendants recourse to federal court as a form of relief from abuses arising from the consolidation of cases in state courts of plaintiffs' choosing. Congress viewed cases of "nationwide significance" as properly adjudicated in federal court. *See Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. ---, 135 S. Ct. 547, 554 (2014). Thus CAFA provides that a "mass action [is] deemed to be a class action removable" to federal court. 28 U.S.C. § 1332(d)(11)(A). A "mass action" is one in which, *inter alia*, claims of 100 or more persons are proposed to be tried jointly on the ground that they involve common questions of law and fact. 28 U.S.C. § 1332(d)(11)(B)(i). Consolidation "*solely* for pretrial

proceedings" does not qualify for removal. 28 U.S.C. § 1332(d)(11)(B)(ii)(IV) (emphasis added).

The rule adopted by the Ninth Circuit here turns the protective purposes of mass action removal—a removal right granted to defendants for defendants' protection—on its head. Worse, it doubles down on the prejudicial impact to defendants by citing the lack of parallelism in the application of issue preclusion as a reason for rejecting removal: So long as plaintiffs propose a trial process under which only defendants can be bound by adverse results, they (a) get to remain in the state court they chose, (b) with that court administering a trial process that provides plaintiffs all the benefits of preclusion with none of the downsides. The potential for such consolidated actions to be administered to the prejudice of defendants is just the concern that prompted Congress to grant defendants a right to have the process placed within the control of a federal judge. Yet without any grounding in either the language of the law or its purposes, the Ninth Circuit invokes that lack of parallelism in issue preclusion as a basis for *denying* defendants the ability to remove.

This Court should grant this Petition, resolve the circuit conflict, and reaffirm defendants' statutory right to remove cases of national significance to federal court.

B. Statutory Background

CAFA creates federal jurisdiction based on minimum diversity for certain class and mass actions. Its central protection is a right of removal that offers defendants a federal forum as an alternative to the state forum chosen by plaintiffs.

That removal right is construed broadly to ensure defendants a federal forum for "interstate cases of national importance." *See Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. ---, 135 S. Ct. 547, 554 (2014). "[N]o anti-removal presumption attends cases invoking CAFA." *Id*.

Before CAFA, there had been "abuses of the class action device," including by "State and local courts" that "demonstrated bias against out-of-State defendants." 151 Cong. Rec. H723-01, H723, 2005 WL 387992. CAFA makes "it harder for plaintiffs' counsel to 'game the system' by trying to defeat diversity jurisdiction." S. Rep. No. 109-14 (2005), 2005 WL 627977, at *5, *as reprinted in* 2005 U.S.C.C.A.N. 3, 6. CAFA's removal provisions, allowing defendants to remove qualifying cases from state to federal court, are central to CAFA's protections. As Chairman Sensenbrenner of the House Judiciary Committee observed: "The removal provisions in Section 5 of [CAFA] . . . attempt to put an end to the type of gaming engaged in by plaintiffs' lawyers to keep cases in State court. They should thus be interpreted with this intent in mind." 151 Cong. Rec. H723-01, H729, 2005 WL 387992.

CAFA provides that "a mass action shall be deemed to be a class action removable under" 28 U.S.C. § 1453. *See* 28 U.S.C. § 1332(d)(11). With this provision, Congress granted defendants the right to remove to federal court an entire group of cases where plaintiffs elect to file more than 100 claims in a state court of their choosing, and then "propose" that the claims be "tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." *Id.* The circuit courts, including the Ninth Circuit, uniformly hold that

"tried jointly" does not require that plaintiffs propose that 100 or more claims be tried simultaneously, with a single verdict rendered. To the contrary, it may encompass proposals to consolidate cases for legal and evidentiary rulings, and sequential trials.

It is a *proposal* for "tried jointly" status that renders cases removable. That proposal must be plaintiffs': a "mass action" does not include claims joined "upon motion of a defendant." 28 U.S.C. § 1332(d)(11)(B)(ii)(II). Moreover, a "mass action" does not include claims "consolidated or coordinated *solely* for pretrial proceedings." 28 U.S.C. § 1332(d)(11)(B)(ii)(IV) (emphasis added).

C. The Removed Cases

This Petition arises from dozens of multi-plaintiff lawsuits filed by various law firms on behalf of hundreds of plaintiffs in the Superior Court of the State of California for the County of Alameda. There were at least 32 such multi-plaintiff lawsuits, each with less than 100 plaintiffs, but taken together totaling more than 300 plaintiffs, filed at the time of Cordis' opening brief in the Ninth Circuit. Many more have been filed since.

Plaintiffs in these cases are residents of at least 35 different states and the District of Columbia. They allege varied injuries from the use of Cordis inferior vena cava filters—the TRAPEASE® permanent filter, designed for permanent implantation, and the OPTEASE® retrievable filter, designed to allow retrieval within a brief time after implantation. The filters are designed for implantation in high-risk surgical patients by trained interventional radiologists and vascular surgeons, pursuant to specific indications, to assist

in preventing pulmonary emboli from reaching the heart or lungs. These filters save lives of those who cannot use common medication regimens.

Plaintiffs in this case, *Dunson v. Cordis Corp., et al.*, are eight individuals who allege separate surgical procedures in different surgical locations, presumably with various doctors, at different times (or who allege loss of consortium arising from such procedures). They have no more relationship to one another than they have to the plaintiffs in the many other cases comprising this mass litigation.

The events immediately precipitating removal began on May 27, 2016, soon after plaintiffs began filing their cases in Alameda County. On that date, plaintiffs in one of the pending Alameda County cases moved under California Code of Civil Procedure § 1048(a) to consolidate that case with the other multi-plaintiff actions then pending in that court (including this case, *Dunson*), along with "any similar actions filed with this court or that may be filed with this court in the future." The petition thus embraced claims of more than 100 plaintiffs, and "anticipated that other Plaintiffs will file additional California state actions in Alameda County against the Defendants based on the same or similar legal theories." The consolidation petition represented that "[a]ll of the plaintiffs in the Related Actions, and their respective attorneys and counsel of record, [] are in support of this motion."

CCP § 1048(a), under which plaintiffs sought consolidation, addresses joinder of actions "involving a common question of law or fact" for "a joint hearing or trial of any or all the matters in issue in the actions." Plaintiffs asserted that the cases

specifically identified in their motion arose "out of the same set of operative facts" and contained numerous common issues, as CCP § 1048(a) consolidation requires. Plaintiffs explained that they sought consolidation "for all pretrial purposes, including discovery and other proceedings."

Plaintiffs' proposal was not, however, limited to pretrial. As the Ninth Circuit explained, if plaintiffs' proposal had been so limited, this case would have been "easy," App. 6a, because consolidation "solely" for pretrial purposes is not a "mass action." 28 U.S.C. § 1332(d)(11)(B)(ii)(IV). Instead, employing a tactic familiar in mass actions around the country, plaintiffs asked that the consolidation of their cases before a single judge include that judge's "institution of a bellwether-trial process."

In seeking consolidation and implementation of a bellwether trial process, plaintiffs stated that they sought to avoid "inconsistent adjudications," which their consolidation petition defined as "different results because tried before different judge and jury, etc." As they explained, their proposed "[c]onsolidation of the Related Actions for purposes of pretrial discovery proceedings, and the formation of a bellwether-trial process will avoid unnecessary duplication of evidence and procedures in all of the actions; avoid the risk of inconsistent adjudications and avoid many of the same witnesses testifying on common issues in all actions . . ."

On June 6, 2016, taking the consolidation motion at face value, Cordis removed eight cases,

including this one, to the Northern District of California, under 28 U.S.C. § 1332(d)(11).[1]

Certain plaintiffs moved to remand. The cases originally removed on June 6, as well as numerous others subsequently removed by Cordis, were deemed related and transferred to the Honorable Edward M. Chen.

D. The Decisions Below

Judge Chen remanded 14 of the cases then pending before him on September 23, 2016. App. 26a. He reasoned that the consolidation petition focused primarily on pretrial. While plaintiffs stated that they sought to avoid inconsistent adjudications, Judge Chen posited that "adjudication" might mean something other than trial. As to plaintiffs' explicit request for a bellwether trial process, he found a prior Ninth Circuit decision—*Briggs* v. *Merck Sharp & Dohme*, 796 F.3d 1038 (9th Cir. 2015)—to be controlling. In that case, a Ninth Circuit panel stated that a bellwether trial, "without more," does not provide a basis for CAFA removal because a bellwether trial typically serves an informational purpose. 796 F.3d at 1051.

Cordis petitioned to appeal the remand orders. The Ninth Circuit granted Cordis' petition in this case, *Dunson*, App. 28a, and held the petitions in 13

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[1] Over the next several months, Cordis removed a total of 32 additional actions, all filed—as plaintiffs had "predicted"—in the same Alameda County court as components of this mass action.

other cases in abeyance pending disposition of *Dunson*. After expedited briefing and argument, the panel affirmed. *Dunson v. Cordis Corp.*, 854 F.3d 551, 557 (9th Cir. 2017); *see* App. 11a.[2]

The Ninth Circuit panel noted at the outset that all parties agreed that "the jurisdictional requirements for removal under CAFA's mass action provision are met, with one exception," whether "plaintiffs' claims have been 'proposed to be tried jointly.'" App. 4a. Plaintiffs had sought consolidation in part for purposes of pretrial discovery, but also for a range of binding rulings on legal and evidentiary issues. The Ninth Circuit panel treated all those matters as "pretrial."

The panel explained that *if* plaintiffs had sought consolidation *solely* for pretrial proceedings, "and stopped there," the case would be easy. App. 6a. However, plaintiffs had gone beyond pretrial proceedings to propose consolidation to allow the state court to implement a bellwether-trial process—thus setting up the question ultimately presented by this Petition—whether plaintiffs' request for a consolidated bellwether trial process qualifies the actions for removal, or whether removal obtains only where *plaintiffs agree (inexplicably) to bind themselves* by bellwether findings.

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[2] On the basis of that decision, in separate orders, the Ninth Circuit then denied the applications to appeal in the cases that it had been holding in abeyance. Those cases are the subject of a separate petition to be filed shortly. Petitioner Cordis suggests that the Court hold that petition, in accordance with this Court's practices, pending disposition of this one.

The Ninth Circuit panel acknowledged that "a verdict favorable to the plaintiff in the bellwether trial might be binding on the defendant under ordinary principles of issue preclusion." But, the panel held, that "is not enough." App. 7a. For plaintiffs' consolidation request to trigger defendants' right to remove under CAFA, said the panel, "the results of the bellwether trial must have preclusive effect on the plaintiffs in the other cases as well." App. 7a. Ordinary preclusion principles would not produce that result. Since mutual preclusion would happen only with plaintiffs' consent, plaintiffs' request here did not provide a basis for removal.

The Ninth Circuit panel offered no analysis of the statutory language, or underlying congressional purpose, to justify this crippling prerequisite to mass action removal. Nor did the panel suggest why any plaintiff would ever agree that the results of a bellwether trial involving one plaintiff or group of plaintiffs would have preclusive effect on plaintiffs in other cases. The Ninth Circuit thus failed to address the fact that its ruling would effectively end removal of mass actions in that Circuit.

The request for *en banc* review was rejected. This Petition follows.

REASONS TO ISSUE THE WRIT

The Ninth Circuit's ruling eviscerates the mass action removal provisions of 28 U.S.C. § 1332(d)(11) by creating an illogical prerequisite to mass action removal that will never be met. In so doing, it creates a conflict with the Seventh and Eighth Circuits, which hold removal to be available in the common situation where hundreds of plaintiffs

concentrate their cases in a single state forum, and then propose to consolidate those cases before a single judge for legal and evidentiary rulings and for a "bellwether trial process"—the very scenario presented here.

Mass action removal was designed to offer a measure of protection to *defendants* from potentially unfair consolidations extending through trial, as administered in state courts of plaintiffs' choosing. To allow plaintiffs to select the court that will issue rulings, manage a process of trial selection, and conduct those trials provides plaintiffs with significant leverage and advantage. Mass action removal levels the playing field somewhat by offering defendants recourse to a federal court to administer the cases.

The application of preclusion principles in the bellwether trial process only magnifies the potential for unfairness to defendants—and thus the reasons why defendants should have resort to federal court to preside over the consolidated cases. By virtue of issue preclusion, a bellwether trial may produce binding determinations adverse to *defendants* in all consolidated cases. But issue preclusion principles will not bind *plaintiffs* who do not participate in the bellwether trials, absent their consent. The Ninth Circuit's ruling means that plaintiffs get the venue result they want—remaining in state court—by proposing the preclusion result they want—preclusion that cuts only one way, against defendants. To bar *defendants* from removing because *plaintiffs* do not agree to be bound by adverse factual determinations in a bellwether trial process they propose turns the underlying rationale

of mass action removal, as a means of protecting defendants, back upon itself.

The Ninth Circuit decision stands in stark conflict with those Circuits holding that a proposed consolidation that extends to bellwether trials triggers defendants' removal right. *See Ramirez* v. *Vintage Pharmaceuticals LLC*, 852 F.3d 324, 332 (3d Cir. 2017) (observing that "[s]everal circuits have also held that a 'bellwether trial' is a form of a joint trial. . . ."). Those Circuits have not conditioned defendants' removal right on plaintiffs' affirmative agreement to be bound by adverse factual determinations in bellwether trials—something that will never happen.

It is important to resolve the conflict. Congress allowed for the appeal of CAFA remand decisions in order to ensure consistency in the standards used to determine when and which class and mass actions can make their way to federal court. A circuit split on so central a jurisdictional question undermines Congress' intention to foster consistency and uniformity in the standards used to judge mass action removal. Moreover, the issue presented by this Petition is unlikely ever to arise again in the Ninth Circuit because in the face of this precedent, defendants will be unable to remove cases in which plaintiffs have proposed to consolidate for rulings and bellwether trials. And even if some defendant were intrepid enough to try to remove in the face of this precedent, with the issue now settled for that Circuit, the Ninth Circuit would simply decline to accept an appeal. This is the appropriate time and case in which to address and resolve the important question presented.

I. THE NINTH CIRCUIT'S RULING DECIMATES MASS ACTION REMOVAL.

The Ninth Circuit's ruling turns mass action removal's protective purpose on its head. Removal is intended to help protect *defendants* from unfair state court consolidations orchestrated by plaintiffs, who file cases from around the country in a single state court, and then move to consolidate. That type of consolidation, under the control of the state court, and which includes a process of sequential trials under the control of the state court, may place unfair pressure on defendants to settle. The removal right allows defendants to opt for a federal court to monitor and control such a sensitive process.

By statute, "mass actions" are "deemed" class actions removable to federal district court when plaintiffs propose that "monetary relief claims of 100 or more persons . . . be *tried jointly* on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i) (emphasis added). A "'mass action' shall not include any civil action in which . . . the claims have been consolidated or coordinated *solely* for pretrial proceedings." 28 U.S.C. § 1332(d)(11)(B)(ii) (emphasis added).

Every Court of Appeals to address the issue—including the Ninth Circuit—has held that "tried jointly" does not require that 100 plaintiffs' claims be simultaneously tried before a judge or jury. Stated affirmatively, the Courts of Appeal are unanimous in holding that the "tried jointly" requirement can be

satisfied by consolidations that contemplate multiple trials, each involving fewer than 100 claims.[3]

"A proposal to hold multiple trials in a single suit . . . does not take the suit outside [CAFA]." *Bullard v. Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759, 762 (7th Cir. 2008). As the Seventh Circuit explains:

> A proposal to hold multiple trials in a single suit (say, 72 plaintiffs at a time, or just one trial with 10 plaintiffs and the use of preclusion to cover everyone else) does not take the suit outside § 1332(d)(11). Recall the language of § 1332(d)(11)(B)(i): any "civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly" is treated as a "class action" (emphasis added). The question

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[3] *See In re Abbott Labs., Inc.*, 698 F.3d 568, 573 (7th Cir. 2012) (finding plaintiffs' claims would be "tried jointly" if a trial court held "an exemplar trial with the legal issues applied to the remaining cases" rather than a single trial on all plaintiffs' claims; "a joint trial can take different forms so long as the plaintiffs' claims are being determined jointly"); *Atwell v. Bos. Sci. Corp*., 740 F.3d 1160, 1165 (8th Cir. 2013) ("we conclude that construing the statute to require a single trial of more than 100 claims would render 28 U.S.C. § 1332(d)(11) 'defunct'" and finding assignment to a single judge and "a process in which to select the bellwether case to try" . . . qualified a case for removal) (internal quotation marks omitted)); *Corber v. Xanodyne Pharmaceuticals, Inc.*, 771 F.3d 1218, 1224 (9th Cir. 2014) (*en banc*) (proposal to coordinate for all purposes or through trial is a proposal to try the cases jointly and creates federal jurisdiction); *Ramirez* v. *Vintage Pharmaceuticals LLC*, 852 F.3d 324, 332 (3d Cir 2017) (noting that a "joint trial can take a variety of other forms" than a single trial of all plaintiffs, and citing the Seventh Circuit's standards).

> is not whether 100 or more plaintiffs answer a roll call in court, but whether the "claims" advanced by 100 or more persons are proposed to be tried jointly. A trial of 10 exemplary plaintiffs, followed by application of issue or claim preclusion to 134 more plaintiffs without another trial, is one in which the claims of 100 or more persons are being tried jointly, and § 1332(d) thus brings the suit within federal jurisdiction.

Id.

This understanding reflects the plain meaning of "tried jointly." "Joint" connotes "in conjunction, combination, or concert." Oxford English Dictionary (Feb. 6, 2013); *see also* FreeDictionary, www.thefreedictionary.com (defining "joint" as, *inter alia*, "allied, amalgamated, associated, coalitional, collaborative").[4] And that is exactly what happens when cases are consolidated for legal and evidentiary rulings and a process of coordinated bellwether trials as administered by a single judge. Indeed, there would have been no need to clarify that "tried jointly" does not include consolidations "solely for pretrial proceedings" unless "tried jointly" was to be given a broad interpretation, extending well beyond trying cases simultaneously.

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[4] *See, e.g.*, *Baker v. Fresenius USA, Inc.*, No. CV 14-9698-JGB AGRX, 2015 WL 846854, at *3 (C.D. Cal. Feb. 26, 2015) ("Plaintiffs may not have agreed that the bellwether cases would be binding on other plaintiffs, but they cannot prevent the results of those trials from having preclusive effect on the other litigants").

The Ninth Circuit panel noted at the outset that the parties agreed that all of the statutory requirements for a properly removable mass action were met here, except potentially the "tried jointly" requirement. App. 4a. There was no dispute that the diversity and amount in controversy requirements were met, 28 U.S.C. § 1332(d)(11)(A) (incorporating such requirements), as was the numerosity requirement of 28 U.S.C. § 1332(d)(11)(B)(i) ("claims of 100 or more persons"), and there was no suggestion that these cases had the kind of geographic connection to California that would preclude removal. *See* 28 U.S.C. § 1332(d)(11)(B)(ii)(1) (specifying that if the claims have a specified geographic connection to the state or contiguous states, the collected cases are not a "mass action").[5]

Plaintiffs' consolidation proposal contemplated a single judge ruling on legal issues in a manner that

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[5] The requirement that the consolidation be based on "common questions of law or fact," 28 U.S.C. §1332(d)(11)(B)(ii), was also readily met. As the Ninth Circuit observed, the cases involved common questions and that was the basis for plaintiffs' motion to consolidate. App. 4a. The "common questions" formulation is, of course, familiar: It is the basis, for example, for consolidation under Fed. R. Civ. P. 42(a). The California statute under which plaintiffs proposed consolidation here—CCP § 1048(a)—is also premised explicitly on claims featuring common questions. These provisions expressly contemplate consolidation through trial—whether a single trial or separate trials—though the Ninth Circuit held that plaintiffs' invocation of this consolidation rule was not itself sufficient to warrant removal because nothing precludes consolidation solely for pretrial purposes. *See* App. 8a ("nothing in the text of § 1048(a) precludes consolidation for pretrial purposes only").

would bind all parties. Plaintiffs also specifically proposed that the judge issue evidentiary rulings binding in the trials of the consolidated cases—including *Daubert*-type rulings on the expert evidence—that would likewise apply in all cases.[6]

But plaintiffs' proposal went further. It included a frequent plaintiff request in such cases: to have the state court judge presiding over the cases "implement a bellwether trial process." That process, they explained, would be used to address questions regarding alleged product failure and defendants' knowledge thereof. Plaintiffs explained that their consolidation proposal would "avoid the risk of inconsistent adjudications," a danger they defined as "different results because tried before different judge and jury, etc."

That type of proposal warrants removal—and in fact permits removal in other Circuits. *See* Part II. These Circuits recognize what should be a truism: a bellwether trial process is not pretrial, but trial. Implementation of a coordinated bellwether trial process, under the control of the state court judge, takes consolidation beyond mere "pretrial proceedings." And the risks of unfairness in the state court judge's selection and structuring of cases as it implements a bellwether trial process are great, both because of the way in which cases may be selected for trial, and because plaintiffs are likely to

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[6] Even without a bellwether trial process, issuing consolidated evidentiary and legal rulings binding and applicable across all cases for trial should take consolidated cases over the line from "solely for pretrial proceedings" to removable mass action.

seek to apply factual determinations adverse to defendants in the bellwether across the board in all cases through issue preclusion. By granting defendants a removal right, Congress sought to ensure that defendants would have recourse to the federal courts to administer cases proposed to be tried jointly, rather than allow plaintiffs to choose their preferred state court to preside over such a sensitive process. Other Circuits have had little difficulty concluding that a consolidation that extends through implementation of a bellwether trial process meets the "tried jointly" requirement. In so holding, those courts have *emphasized* that a bellwether trial process may bind *defendants* through issue preclusion—a fact augmenting plaintiffs' request to jointly try their claims.

The Ninth Circuit held otherwise. It acknowledged that if the bellwether trials produced factual determinations against defendants, issue preclusion might allow those determinations to be applied against defendants in the other cases. App. 7a. However, citing one earlier Ninth Circuit precedent, the panel held that for removal to be available, "the results of the bellwether trial must have preclusive effect on the plaintiffs in the other cases as well."[7] App. 7a (citing *Briggs* v. *Merck*

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[7] *Briggs* did not actually involve a proposal for a "bellwether trial process." All that happened in *Briggs* was that one group of plaintiffs mentioned, in passing, the utility of bellwether trials. *Briggs*, 796 F.3d at 1043. And *Briggs* then stated that a bellwether trial "without more" would not give rise to removal. *Id.* *Briggs* is the only other circuit court case to suggest that a bellwether trial process in consolidated cases would not trigger removal. 796 F.3d at 1051. Indeed, the Third Circuit's recent

(continued...)

Sharp & Dohme, 796 F.3d 1038 (9th Cir. 2015)). A bellwether trial would not have those effects under accepted preclusion principles. App. 20a. And plaintiffs did not here, and would not (insofar as can be imagined) anywhere accept voluntarily that the results of the bellwether trial would bind them.

The Ninth Circuit panel did not purport to derive its holding from statutory language. And it conceived no statutory purpose furthered by adopting such a rule. There is, in fact, no statutory language, legislative purpose, or logical basis for the requirement that the Ninth Circuit created as a prerequisite to removal.

Plaintiffs' consolidation tactic here engenders the very unfairness that led Congress to provide a right of removal. It is not a coincidence that more than 300 plaintiffs from around the country, represented by many different attorneys, all brought their claims in a single state court jurisdiction, rather than in their home states where their alleged injuries occurred. After concentrating their case filings in a single jurisdiction, plaintiffs then proposed a consolidation that contemplated a single judge ruling on legal and evidentiary issues, and managing and implementing a bellwether trial process that—in plaintiffs' view—would allow

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(continued...)
opinion in *Ramirez*, with its "*but cf.*" citation to *Briggs*, highlighted that *Briggs* was outside the mainstream. *See, e.g.*, *Ramirez*, 852 F.3d at 332 ("Several circuits have also held that a 'bellwether trial' is a form of joint trial. . . . *but cf. Briggs*. . . ." (citation omitted)).

factual findings adverse to defendants to be applied in all the cases.

It would be one thing if plaintiffs' ability to thwart removal were conditioned on their giving up something of value. The opposite is true: plaintiffs need only act in their self-interest—and not consent to two-way preclusion that binds them as well—to remain in state court. The panel thus lets plaintiffs have their cake and eat it too. And we are back in the world as it stood before CAFA. Plaintiffs achieve a consolidation with the potential to be maximally prejudicial to defendants by having a single state court selected by plaintiffs make all rulings, and structure and select cases for bellwether trials, with adverse results potentially binding on defendants. And then, merely by disclaiming preclusion against themselves, plaintiffs defeat defendants' right to a federal forum.

II. THIS IS A PROPER CASE IN WHICH TO ADDRESS THE ISSUES AND RESOLVE THE CONFLICT.

Congress has provided for federal appellate review of orders remanding class and mass action removal cases to state court—an exception to the rule that remand orders are not reviewable. 28 U.S.C. § 1453(c). *Cf.* 28 U.S.C. § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable . . ."). It did so to create a "body of clear and consistent guidance for district courts." 151 Cong. Rec. H723-01, H729, 2005 WL 387992 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner). A circuit conflict on an important issue of mass action removal thus

undermines a core congressional objective underlying CAFA.

Other Circuits considering "whether [in connection with a consolidation for legal and evidentiary rulings] the plaintiffs' proposal for a bellwether-trial process amounts to a proposal to try their claims jointly," App. at 6a, have held that it does. The Seventh and Eighth Circuits have both explicitly concluded that when plaintiffs propose to consolidate 100 or more claims before a single judge, and that proposal encompasses an explicit or implicit request for bellwether trials that may bind defendants under ordinary preclusion principles, defendants may remove. And the Third Circuit, which addressed the issue collaterally, noted that the Ninth Circuit's unwillingness to treat a bellwether trial process as sufficient to warrant removal reflects a "but cf" departure from the law of other Circuits.

Seventh Circuit: In *Abbott Laboratories*, the Seventh Circuit held that when the natural consequence of plaintiffs' consolidation request is a joint or exemplar trial with resulting legal rulings applied to other consolidated cases, removal was proper. The *Abbott* consolidation petition sought to join lawsuits "through trial" and "not solely for pretrial proceedings." 698 F.3d at 571. The petition asserted that consolidation would "'facilitate the efficient disposition of a number of universal and fundamental substantive questions applicable to all or most Plaintiffs' cases without the risk of inconsistent adjudication in those issues between various courts.'" *Id.* at 573 (citation omitted).

Although plaintiffs did not explicitly "propose that . . . the cases be tried jointly or that all parties would be bound by the findings of one trial," the Seventh Circuit found the natural consequence of plaintiffs' request to be a joint trial. *Id.* at 572-73 (emphasis added). It "is difficult to see how a trial court could consolidate the cases as requested by plaintiffs and not hold a joint trial or an exemplar trial with the legal issues applied to the remaining cases." *Id.* at 573. Thus, defendants could remove the cases to federal court. *Id.* at 572.

Abbott built upon the Seventh Circuit's earlier ruling in *Koral v. Boeing Company*, 628 F.3d 945, 947 (7th Cir. 2011). *Koral* emphasized a crucial point about bellwether trials that takes a consolidation that includes bellwether trials into the realm of joint trial—the potential binding effect of the bellwether trial *on defendant*. *Koral* explained:

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

Id. (citations omitted).

Eighth Circuit: In *Atwell*, the Eighth Circuit followed the Seventh Circuit's lead, addressing plaintiffs' requests to assign a group of cases to a single judge "for purposes of discovery and trial." 740 F.3d at 1163. By their terms, the requests

sought only assignment to a single judge (not a simultaneous trial) to "'handle the[] cases for consistency of rulings, judicial economy, [and] administration of justice.'" *Id.* at 1164-66. In fact, the *Atwell* plaintiffs were explicit in "disavowing a desire to consolidate cases for trial." *Id.* at 1165. Then, at a hearing on plaintiffs' motions, plaintiffs' counsel explained that their proposal included "a process in which to select the bellwether case to try." *Id.* Plaintiffs did not suggest any intent to bind themselves through the results of any bellwether trial. The Eighth Circuit nonetheless found that plaintiffs had proposed that their claims be "tried jointly" because that would be the "inevitable result" of the requested bellwether trial. *Id.* at 1165-66.

Third Circuit: Most recently, the Third Circuit discussed the varied forms a "joint trial" can take, including a "bellwether trial," and concluded that "a decision at trial regarding the manufacturers' liability may well be preclusive as to all Plaintiffs' claims . . . . Such a sequence of events would be regarded as a joint trial. . . ." *Ramirez v. Vintage Pharmaceuticals, LLC*, 852 F.3d 324, 332 (3d Cir. 2017) (citation omitted). And while the Third Circuit had no need to reach a holding on the issue in *Ramirez*, it confirmed that other Circuits regard a proposal for bellwether trials in consolidated cases as giving rise to a right to remove—but that the Ninth Circuit ("*but cf.*") in *Briggs*, discussed above, had hinted to the contrary. *See, e.g.*, *Ramirez*, 852 F.3d at 332.

Given the Ninth Circuit's diametrically divergent view, this Court should resolve this important issue of federal jurisdiction. The tactic of orchestrating the filing of hundreds of alleged

product defect lawsuits in a single state court, and then moving to consolidate for rulings and bellwether trials, represents a common scenario. The question whether federal courts have jurisdiction over such cases ought not vary by Circuit, lest the states within certain circuits become a haven for the unfair consolidations that Congress sought to remedy by enlarging opportunities for removal. Qualifying cases should be adjudicated in federal court precisely because Congress viewed them as "interstate cases of national importance."[8]

This is the proper case in which to resolve the issue—and now is the time to do so. To reach this Court, a defendant must have a *bona fide* basis to remove to federal district court, then address the issues in the district court, and then persuade the Ninth Circuit even to allow an appeal. With the issue presented here now settled in the Ninth Circuit, the issue will not arise again in that Circuit.

Moreover, the issue is exceptionally well-presented by the decision below. The Ninth Circuit itself noted that apart from the issue on which the ruling was based, plaintiffs conceded that this was a removable mass action; therefore, there are no diverting side issues to complicate this Court's review. And the Ninth Circuit squarely framed the controlling issue as one of law: "[W]hether [in connection with a consolidation for legal and evidentiary rulings] the plaintiffs' proposal for a

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[8] *See Standard Fire Ins. Co. v. Knowles,* 568 U.S. 588, 595 (2013) ("CAFA's primary objective" is to "ensur[e] 'Federal court consideration of interstate cases of national importance.'" (quoting § 2(b)(2), 119 Stat. 5))).

bellwether-trial process amounts to a proposal to try their claims jointly." App. 6a. Finally, the Ninth Circuit was equally explicit in describing its reason for holding "no": in order for defendants to remove, "the results of the bellwether trial must have preclusive effect on the plaintiffs in the other cases as well." App. 7a. This Court should determine whether that conclusion is correct.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 17-15257
D.C. No. 3:16-cv-03076-EMC

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JERRY DUNSON; CHERYL GRECH; ROBERT FLANAGAN; CAROL FLANAGAN; JOSEPH GIEBER; MARY ELDEB; DAYNA CURRIE; HARLOWE CURRIE; CHARLES HENRY LEWIS,

Plaintiffs-Appellees,

v.

CORDIS CORPORATION,

Defendant-Appellant.

———

Appeal from the United States District Court
for the Northern District of California
Edward M. Chen, District Judge, Presiding

———

Argued and Submitted March 13, 2017
San Francisco, California

———

Filed April 14, 2017

———

OPINION

Before: Ferdinand F. Fernandez and Paul J. Watford, Circuit Judges, and Josephine L. Staton,[*] District Judge.

Opinion by Judge Watford

SUMMARY[**]

Class Action Fairness Act

The panel affirmed the district court's order remanding the action to state court due to lack of federal removal jurisdiction, on the ground that the action could not be removed to federal court under the Class Action Fairness Act's ("CAFA") mass action provision.

A CAFA "mass action" is a civil action, other than a class action, "in which monetary relief claims of more than 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i).

The panel held that the district court correctly held that removal jurisdiction did not exist in this case under CAFA's mass action provision because the plaintiffs' consolidation motion did not propose a joint trial of their claims. Specifically, the panel held that the plaintiffs requested consolidation for purposes of pretrial proceedings, which standing alone did not trigger removal jurisdiction under CAFA's mass action provision. The panel further held that the plaintiffs also requested consolidation for purposes of establishing a

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[*] The Honorable Josephine L. Staton, United States District Judge for the Central District of California, sitting by designation.

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

bellwether-trial process, but nothing they said indicated that they were referring to a bellwether trial whose results would have preclusive effect on the plaintiffs in the other cases, and did not amount to a proposal to try their claims jointly.

COUNSEL

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OPINION

WATFORD, Circuit Judge:

Under the Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4, large multi-state class actions may be removed to federal court under requirements more permissive than those governing the removal of other civil actions. To prevent plaintiffs from evading CAFA's relaxed jurisdictional requirements, Congress made "mass actions" removable to federal court on largely the same basis as class actions. *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 744 (2014). A "mass action" is defined as a civil action, other than a class 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).

In this case, Cordis Corporation invoked CAFA's mass action provision as the basis for removing to federal court eight products liability suits filed against it in the Superior Court for Alameda County, California. (The district court's order also remanded a number of other related cases, but those cases are not specifically before us.) Each of the eight actions has fewer than 100 plaintiffs, but together they involve more than 100 named plaintiffs. The actions raise common questions of law and fact because they all seek damages for injuries caused by the same allegedly defective medical devices manufactured by Cordis. The parties agree that the jurisdictional requirements for removal under CAFA's mass action provision are met, with one exception: They dispute whether the plaintiffs' claims have been "proposed to be tried jointly."

Cordis argues that the plaintiffs proposed to try their claims jointly when they moved in state court to consolidate the eight actions. In their motion, the plaintiffs requested consolidation of the actions "for all pretrial purposes, including discovery and other proceedings, and the institution of a bellwether-trial process." The motion noted that, because the actions involve the same allegedly defective medical devices, both the discovery sought from Cordis and the majority of the expert discovery will be identical in each case. As a result, the plaintiffs stated, consolidation of the actions "for purposes of pretrial discovery and proceedings, along with the formation of a bellwether-trial process, will avoid unnecessary duplication of evidence and procedures in all of the actions, avoid the risk of inconsistent adjudications, and avoid many

of the same witnesses testifying on common issues in all actions, as well as promote judicial economy and convenience."

The district court held that the plaintiffs' consolidation motion did not propose a joint trial of their claims, as required under § 1332(d)(11)(B)(i). The cases therefore could not be removed under CAFA's mass action provision. Because Cordis asserted no other basis for federal jurisdiction, the district court granted the plaintiffs' motion to remand the cases to the Alameda County Superior Court. We granted Cordis' petition for permission to appeal that ruling under 28 U.S.C. § 1453(c).

We can begin with two propositions that neither side disputes. First, the fact that more than 100 plaintiffs have sued Cordis in eight separate actions filed in the same court is not by itself sufficient to trigger removal jurisdiction under CAFA. Plaintiffs' lawyers are free to file multiple lawsuits with fewer than 100 plaintiffs based on the same factual allegations, even if their purpose in doing so is to avoid federal jurisdiction. *Corber v. Xanodyne Pharmaceuticals, Inc.*, 771 F.3d 1218, 1223 (9th Cir. 2014) (en banc). Before separate actions may be removed to federal court as a "mass action," 100 or more plaintiffs must take the affirmative step of proposing to try their claims jointly, such as by requesting assignment to a single judge "for purposes of discovery and trial," *Atwell v. Boston Scientific Corp.*, 740 F.3d 1160, 1163 (8th Cir. 2013), or by requesting consolidation "through trial" and "not solely for pretrial proceedings," *In re Abbott Laboratories, Inc.*, 698 F.3d 568, 573 (7th Cir. 2012). Second, if 100 or more plaintiffs in separate actions propose consolidating their cases solely for pretrial pur-

poses, that too is insufficient to trigger removal jurisdiction. CAFA's definition of "mass action" expressly excludes any civil action in which the plaintiffs' claims "have been consolidated or coordinated solely for pretrial proceedings." § 1332(d)(11)(B)(ii)(IV).

This appeal would be easy to resolve if the plaintiffs had stated that they sought consolidation "for all pretrial purposes, including discovery and other proceedings," and stopped there. Proposing consolidation for those purposes alone would bring this case squarely within the exclusion just quoted, particularly if the plaintiffs had also expressly disclaimed any desire for a joint trial. But the plaintiffs complicated things by proposing consolidation for the additional purpose of creating "a bellwether-trial process." The question before us is whether the plaintiffs' proposal for a bellwether-trial process amounts to a proposal to try their claims jointly.

The answer to that question depends on which kind of "bellwether-trial process" the plaintiffs had in mind. Two types of bellwether trials can be held when a large number of plaintiffs assert the same or similar claims against a common defendant or defendants. In the first type, the claims of a representative plaintiff (or small group of plaintiffs) are tried, and the parties in the other cases agree that they will be bound by the outcome of that trial, at least as to common issues. *See* ALI, Principles of the Law of Aggregate Litigation § 2.02, cmt. b, p. 87 (2010); Restatement (Second) of Judgments § 40, cmt. a, p. 390 (1980). In the second (and far more common) type of bellwether trial, the claims of a representative plaintiff or plaintiffs are tried, but the outcome of the trial is binding only as to the parties involved in the trial itself. The results of the trial are used in the other cases purely for

informational purposes as an aid to settlement. *See Briggs v. Merck Sharp & Dohme*, 796 F.3d 1038, 1051 (9th Cir. 2015).

If 100 or more plaintiffs propose holding a bellwether trial of the first type, in which the results of the trial will be binding on the plaintiffs in the other cases, they have proposed a joint trial of their claims for purposes of § 1332(d)(11)(B)(i). *Bullard v. Burlington Northern Santa Fe Railway Co.*, 535 F.3d 759, 762 (7th Cir. 2008). However, a proposal to hold a bellwether trial of the second type does *not* constitute a proposal to try the plaintiffs' claims jointly, for the verdict will not be binding on the other plaintiffs and will not actually resolve any aspect of their claims. True, a verdict favorable to the plaintiff in the bellwether trial might be binding on the *defendant* under ordinary principles of issue preclusion, but that is not enough. *See Briggs*, 796 F.3d at 1051. To constitute a trial in which the plaintiffs' claims are "tried jointly" for purposes of § 1332(d)(11)(B)(i), the results of the bellwether trial must have preclusive effect on the plaintiffs in the other cases as well.

In *Briggs*, we held that when plaintiffs propose a bellwether trial without saying anything more, we presume that they mean a bellwether trial in which the results will not be binding on the plaintiffs in the other cases but will instead be used for informational purposes only. *Id.* We must decide whether the plaintiffs in this case said something more in their consolidation motion to indicate that when they referred to "a bellwether-trial process," they meant a process in which the results of the bellwether trial would have preclusive effect on the plaintiffs in the other cases.

Cordis contends that the plaintiffs did say something more, as *Briggs* requires, in several respects.

First, Cordis argues that the plaintiffs must have been proposing a bellwether trial whose results would have preclusive effect because they requested consolidation under California Code of Civil Procedure § 1048(a).[1] According to Cordis, § 1048(a) does not permit consolidation solely for pretrial purposes; thus, any request made under that statute must be construed as a proposal to try the plaintiffs' claims jointly. We reject that reading of the statute, as nothing in the text of § 1048(a) precludes consolidation for pretrial purposes only. The text of the statute was revised in 1971 to conform in substance to Federal Rule of Civil Procedure 42, which has long been interpreted to allow for consolidation for pretrial purposes only. *See MacAlister v. Guterma*, 263 F.2d 65, 68–69 (2d Cir. 1958); 9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2382, p. 19 & n.20 (3d ed. 2008). Nor have we found any California cases holding that § 1048(a) forbids consolidation for pretrial purposes only. The case Cordis cites to support its view admittedly states that § 1048(a) authorizes two types of consolidation, one involving consolidation for purposes of trial and the other involving consolidation for all purposes, including trial. *Hamilton v. Asbestos Corp.*, 22 Cal. 4th 1127, 1147 (2000). But in that case the parties agreed that the actions had been consolidated at least for purposes of trial; the only issue was whether the consolidation extended to all other proceedings in the case as well. The court was not called

[1] Section 1048(a) provides: "When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

upon to decide whether § 1048(a) permits consolidation for purposes of pretrial proceedings alone.

Second, Cordis contends that the plaintiffs' references in their consolidation motion to "a bellwether-trial process" must have meant a trial that would have preclusive effect, because the plaintiffs also stated in the motion that creating such a process would "avoid the risk of inconsistent adjudications." Cordis reads too much into the plaintiffs' statements. Whenever the plaintiffs mentioned avoiding the risk of inconsistent adjudications, they mentioned it as one among several benefits of consolidating the cases "for purposes of pretrial discovery and proceedings, along with the formation of a bellwether-trial process." We cannot tell from these statements whether avoiding the risk of inconsistent adjudications was deemed to be one of the benefits of creating a bellwether-trial process, or perhaps instead one of the benefits of consolidating the cases for pretrial proceedings. Consolidating the cases for pretrial proceedings could, on its own, avoid the risk of inconsistent adjudications by eliminating the prospect of different judges rendering conflicting rulings on motions for summary judgment or motions in limine concerning the admissibility of key evidence. Thus, the plaintiffs' references to the avoidance of inconsistent adjudications do not necessarily shed light on which type of bellwether trial they were proposing. Since Cordis bears the burden of showing that the plaintiffs proposed a joint trial of their claims, *see Scimone v. Carnival Corp.*, 720 F.3d 876, 882 (11th Cir. 2013), the inconclusive nature of the plaintiffs' statements cuts against its position.

In this respect, our case differs from *Corber*, the precedent most supportive of Cordis' argument. There, the plaintiffs requested coordination of their cases "for

all purposes," and in support of that request they stated that coordinating the cases would reduce the risk of inconsistent judgments and conflicting determinations of liability. 771 F.3d at 1223–24. We held that these statements confirmed that the plaintiffs' request for coordination "for all purposes" included for purposes of trial, because the risks they mentioned would likely be reduced only through some form of joint trial. *Id.* But we noted that the result would have been different had the plaintiffs limited their request for coordination to pretrial matters. *Id.* at 1224–25. In that event, the reference to the risk of inconsistent judgments and conflicting determinations of liability would not have conveyed an intention to propose a joint trial. That is the situation here: The plaintiffs requested consolidation for pretrial purposes, and because their references to the avoidance of inconsistent adjudications could have been tied to that aspect of their request alone, those references do not necessarily say anything about whether they were proposing a joint trial.

Finally, Cordis argues that any uncertainty regarding what the plaintiffs meant by "inconsistent adjudications" is dispelled by the plaintiffs' definition of that term: "different results because tried before different judge and jury, etc." That language, read in isolation, does suggest that a joint trial would be needed to avoid the risk of inconsistent adjudications. But the definition appears in a passage of the motion devoted to explaining the general purposes of consolidation, not the purposes for which the plaintiffs sought consolidation in this case. Moreover, the plaintiffs immediately followed the definition with this disclaimer: "To be clear, Moving Plaintiffs are not requesting a consolidation of Related Actions for purposes of a single trial to determine the outcome for all plaintiffs, but

rather a single judge to oversee and coordinate common discovery and pretrial proceedings." That statement negates any notion that the plaintiffs were speaking of a bellwether trial whose results would have preclusive effect in the other cases. And if further confirmation were needed that the plaintiffs proposed a bellwether trial to be used solely for informational purposes, it can be found in their subsequent statement that "consolidation of the Related Actions may create the opportunity for settlement of cases. Bellwether trials would likely prove an effective tool to resolution of the . . . cases."

In short, the plaintiffs requested consolidation for purposes of pretrial proceedings, which standing alone does not trigger removal jurisdiction under CAFA's mass action provision. The plaintiffs also requested consolidation for purposes of establishing a bellwether-trial process, but nothing they said indicated that they were referring to a bellwether trial whose results would have preclusive effect on the plaintiffs in the other cases. The district court therefore correctly held that removal jurisdiction does not exist under CAFA's mass action provision, and it properly remanded the cases to state court.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Filed 09/23/16]

Case No. 16-cv-03076-EMC
AND RELATED CASES
Case No. 16-cv-03080-EMC
Case No. 16-cv-03082-EMC
Case No. 16-cv-03083-EMC
Case No. 16-cv-03085-EMC
Case No. 16-cv-03086-EMC
Case No. 16-cv-03087-EMC
Case No. 16-cv-03088-EMC
Case No. 16-cv-04012-EMC
Case No. 16-cv-04409-EMC
Case No. 16-cv-04608-EMC
Case No. 16-cv-04819-EMC
Case No. 16-cv-05055-EMC
Case No. 16-cv-05199-EMC

JERRY DUNSON, et al.,

Plaintiffs,

v.

CORDIS CORPORATION, et al.,

Defendants.

ORDER REMANDING CASES TO STATE COURT

I. INTRODUCTION

Plaintiffs in each of these fourteen (14) related cases brought actions in state court seeking damages for

injuries they allege were caused by defective inferior vena cava (IVC) filters[1] produced by Defendant Cordis Corporation. Counsel for the plaintiffs in *Quinn v. Cordis Corp.*, C-16-3080 EMC, filed a motion in state court seeking to consolidate all of the cases "for purposes of pretrial discovery and proceedings" and also seeking "formation of a bellwether trial process." Memorandum of Points and Authorities in Support of Motion for Consolidation of Cases ("Consolidation Mem."), Docket No. 1 Ex. A at 1.[2] On the basis of that motion and prior to any ruling on it, Cordis removed eight of the cases then pending to federal court, asserting that jurisdiction was proper under the "mass action" provision of the Class Action Fairness Act ("CAFA") of 2005. *See* 28. U.S.C. § 1332(d)(11)(B)(i). Cordis subsequently removed six additional later-filed cases on the same ground. The Court concludes that it lacks subject matter jurisdiction over these cases, and accordingly remands them to state court.

II. FACTUAL AND PROCEDURAL HISTORY

Defendant Cordis Corporation is a medical device company. Plaintiffs are over 150 individuals who claim that they or their decedents were injured by one of two Cordis IVC filters alleged to be defective. Plaintiffs filed fourteen separate actions – all with fewer than 100 individuals – in California state court.

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[1] An IVC filter is a medical device implanted in the inferior vena cava and designed to prevent pulmonary embolism by catching blood clots and preventing them from travelling to the heart or lungs.

[2] Except where otherwise noted, all Docket citations refer to the docket in *Dunson v. Cordis Corp.*, C-16-3076 EMC.

On May 27, 2016, the plaintiffs in the *Quinn* action filed a Notice of Motion and Motion for Consolidation of Cases ("Consolidation Motion"), Docket No. 1 Ex. A, seeking to consolidate for pretrial purposes each of the cases related to the Cordis IVC filters under California Code of Civil Procedure § 1048(a), which provides that "[w]hen actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." In particular, the plaintiffs sought consolidation "for all pretrial purposes, including discovery and other proceedings, and the institution of a bellwether-trial process." The motion noted that each of the actions "contain common issues such that the oral and written discovery sought from Defendants in each Related Action will be the same[and] the majority of the expert discovery in each Related Action will also be the same" and argued that consolidation would "avoid unnecessary duplication of evidence and procedures, avoid the risk of inconsistent adjudications, and avoid many of the same witnesses testifying on common issues in all actions, as well as promote judicial economy and convenience." Consolidation Motion at 7.

In their Memorandum of Points and Authorities in support of the motion, the *Quinn* plaintiffs stated that "*[t]o be clear*, Moving Plaintiffs are *not* requesting a consolidation of Related Actions for purposes of a single trial to determine the outcome for all plaintiffs, but rather a single judge to oversee and coordinate *common discovery and pretrial proceedings*." Consolidation Mem. at 7 (emphasis added). The plaintiffs then explained in greater detail what discovery would be common to all of the actions, and noted that "[w]ithout

the efforts of a centralized court with authority to monitor and guide the discovery process for an already high number of Related Actions, the aggregate discovery efforts that would have to be undertaken by both Plaintiffs and Defendants in each individual action would be massive." *Id.* at 8. Finally, plaintiffs noted that consolidation "may create the opportunity for settlement of cases," as "[b]ellwether trials would likely prove to be an effective tool to resolution [sic] of the Cordis IVC filter cases." *Id.*

On June 6, 2016, Cordis removed eight of the related cases to federal court; it removed the remaining cases in the following weeks. *See* Notice of Removal, *Lesch v. Cordis*, C-16-4608-EMC Docket No. 1 at 5-6. The sole claimed basis for removal was the Consolidation Motion, which, Cordis claimed, "'proposes' a 'joint trial'" within the meaning of CAFA, thus triggering CAFA's mass action removal provision. *Id.* at 9-10.

Upon removal, the first nine cases were initially assigned to nine different judges in this district, and various motions were filed in the various actions, including a number of motions to remand. Despite Cordis's opposition, the cases were subsequently deemed related and assigned to Judge Illston, who stayed all of the pending motions and case management conferences in the nine cases and ordered that the parties submit supplemental briefing regarding the propriety of CAFA jurisdiction. Docket No. 33. After the cases were reassigned to the undersigned, the Court held a hearing on the jurisdictional issue on September 8, 2016.

III. DISCUSSION

A. Legal Framework

CAFA provides for federal removal jurisdiction over "mass action[s]" in which the amount in controversy exceeds $5,000,000 and the parties are minimally diverse, such that "any member of a class of plaintiffs is a citizen of a State different from any defendant."[3] *See* 28 U.S.C. § 1332(d)(2). The statute defines "mass action" as "any civil action (except [a Rule 23 class 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). The statute also specifically excludes certain actions, including, as relevant here, "any civil action in which . . . the claims have been consolidated or coordinated solely for pre-trial proceedings." 28. U.S.C. § 1332(d)(11)(B)(ii)(IV).

The Ninth Circuit has explained that CAFA's mass action provision is "fairly narrow." *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 953 (9th Cir. 2009). Notably, in accord with the "well-established rule that plaintiffs, as masters of their complaint, may choose their forum by selecting state over federal court and with the equally well-established presumption against federal removal jurisdiction," plaintiffs may defeat CAFA jurisdiction by structuring their complaints to avoid it, such as by filing multiple complaints each with fewer than 100 plaintiffs. *See id.*

At the same time, however, when plaintiffs request coordination of multiple cases, they need not "expressly

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[3] The parties do not dispute that the amount in controversy and minimal diversity requirements are satisfied in the present cases. No party has argued that this Court has jurisdiction on any basis other than CAFA's mass action removal provision.

request a 'joint trial'" for a court to determine that they have *implicitly* proposed to try their cases jointly. *Corber v. Xanodyne Pharm., Inc.*, 771 F.3d 1218, 1225 (9th Cir. 2014) (en banc). In determining whether a request for coordination in fact constitutes a request for a joint trial, the focus is on "the real substance of Plaintiffs'" petitions." *Id.* Thus "while plaintiffs are the masters of their complaints, they are also the masters of their petitions for coordination," and in "assess[ing] whether there has been a proposal for joint trial," courts should "hold plaintiffs responsible for what they have said and done." *Id.*

In *Corber*, the plaintiffs filed a petition for consolidation under California Code of Civil Procedure 404.1, which provides for coordination of multiple actions "if one judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice." Plaintiffs'" petitions echoed this language, reiterating that they sought coordination before one judge "hearing all of the actions for all purposes." *Corber*, 771 F.3d at 1221. They further maintained that coordination was appropriate in part because of the risk that without it, "there could be potential 'duplicate and inconsistent rulings, orders, or judgments,' and that . . . 'two or more separate courts . . . may render different rulings on liability and other issues.'" *Id.* The court focused on "the plain language of Plaintiffs' petitions and memoranda" and concluded that a request for coordination "for all purposes" was just that, and necessarily contemplated a joint trial. *Id.* at 1224. The court noted, however, that not "all petitions for coordination under section 404 are *per se* proposals to try cases jointly." *Id.* To the contrary, "if Plaintiffs had qualified their coordination request by saying that it was intended to be solely for pre-trial purposes, then

it would be difficult to suggest that Plaintiffs had proposed a joint trial." *Id.* at 1224-25.

Accordingly, when the Ninth Circuit next considered CAFA's "mass action" removal provision, it held that plaintiffs had not requested a joint trial where they had "qualified their petition in just this manner." *Briggs v. Merck Sharp & Dohme*, 796 F.3d 1038, 1050 (9th Cir. 2015). In *Briggs*, a group of plaintiffs proposed join an already-ongoing "Judicial Council Coordinated Proceeding (JCCP)." The JCCP plaintiffs had previously suggested the use of bellwether trials to test some of the issues in the consolidated cases. In the petition to join the JCCP filed by some of the *Briggs* plaintiffs, they stated that they "do not seek joint trials of any cases or plaintiffs, but rather, all claims shall be tried individually." *Id.* at 1050. They stated that coordination was appropriate to "avoid[] inconsistent rulings and promot[e] economy and efficiency for all parties, witnesses and counsel." In concluding that plaintiffs had not requested a joint trial for the purposes of CAFA jurisdiction, the Ninth Circuit stressed plaintiffs‟ explicit disavowal of that intent. The court also noted that whereas the *Corber* plaintiffs sought coordination in part to avoid "inconsistent judgments," the *Briggs* plaintiffs only sought to avoid "inconsistent *rulings*," a much "broader term than 'judgments,' including various dispositions of pre-trial motions." *Id.* As to the proposal to institute bellwether trials, the court held that "a bellwether trial is not, without more, a joint trial within the meaning of CAFA." *Id.* at 1051. Accordingly, even if the request for bellwether trials could be imputed to the *Briggs* plaintiffs, "that would not transform [their] petition into a proposal for a joint trial." *Id.*

B. The *Quinn* Motion

Against this legal background, the Court turns to the facts of this case. First, and most significantly, the *Quinn* motion clearly and emphatically disclaims any effort to seek a joint trial, stating that that "[t]o be clear, Moving Plaintiffs are not requesting a consolidation of Related Actions for purposes of a single trial to determine the outcome for all plaintiffs, but rather a single judge to oversee and coordinate common discovery and pretrial proceedings." Consolidation Mem. at 7. It is evident that the plaintiffs carefully attempted, by explicitly focusing their request on "pretrial proceedings," to hew to language that *Corber* and *Briggs* approved as a way to clarify intent. This emphasis on "pretrial proceedings" was repeated throughout the motion. In the face of such a clear statement, it is, as *Corber* noted, "difficult to suggest" that the plaintiffs here have proposed a joint trial. 771 F.3d at 1224.

Cordis's argument that Plaintiffs, notwithstanding their strenuous insistence to the contrary, in fact requested a joint trial is almost entirely predicated on Plaintiffs' request to institute a "bellwether trial process." Indeed, according to Cordis, the mere fact that "the word 'trial' [is] peppered throughout [the] consolidation motion" – albeit always in the context of the proposed bellwether trial process – belies the Plaintiffs' contention that their request is limited to pretrial matters since "'trial is by definition a step beyond 'pretrial.'" Cordis Opp. at 5. This argument is meritless.

As *Briggs* recognized, "[a] bellwether trial is a test case that is typically used to facilitate settlement in similar cases by demonstrating the likely value of a claim or by aiding in predicting the outcome of tricky questions of causation or liability." 796 F.3d at 1051. In other words, the bellwether trial typically serves

a purely informational purpose. As commentators have explained, in common practice, "[t]he results of [bellwether] trials are not binding on the other litigants in the group. The outcomes can be used by the parties to assist in settlement, but the parties can also ignore these results and insist on an individual trial." Alexandra D. Lahav, *Bellwether Trials*, 76 Geo. Wash. L. Rev. 576, 580–81 (2008); *see also In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1008 (9th Cir. 2008) ("We recognize that the results of the Hanford bellwether trial are not binding on the remaining plaintiffs.").[4] Because bellwether trials are typically nonbinding and serve a purely informational role, *Briggs* explained that the very "nature of the proceeding [plaintiffs] sought to join" – *i.e.*, a coordinated pretrial process featuring the use of bellwether trials –

[4] To be sure, "parties within the pool may agree to be bound by the outcome of the bellwether case, and courts *will* give effect to such agreements, though arguably on contract, not preclusion grounds." Newberg on Class Actions § 11:20 (5th ed.). There is no indication whatsoever that any of the plaintiffs in this case have agreed to be bound by the results of any bellwether trial. Cordis does cite two cases from the Central District of California in which the court appeared to assume that a bellwether trial would have preclusive effect on other litigants, and that a proposal to pursue a bellwether trial was therefore a proposal for a joint trial under CAFA. *See* Cordis Opp. at 10 (citing *Baker v. Fresenius USA, Inc.*, No. CV 14-9698-JGB AGRX, 2015 WL 846854, at *3 (C.D. Cal. Feb. 26, 2015); *Allen v. Wilson*, No. CV 14-9686-JGB AGRX, 2015 WL 846792, at *4 (C.D. Cal. Feb. 26, 2015)). The cited cases are easily distinguishable. First, the court in those cases relied in part on the fact that the plaintiffs there, unlike in the present case, had not included any explicit statements that they intended coordination only for pretrial purposes. Second, the decisions predate *Briggs*, which instructed that a request for a bellwether trial standing alone does not constitute a request for a joint trial.

"confirm[ed]" the court's "conclusion that [they] did not seek a joint trial." 796 F.3d at 1051.

The same is true here. The term bellwether trial refers to the traditional use of such trials as informational, not binding. Cordis is wrong to seize on Plaintiffs' statement that "[b]ellwether trials would likely prove to be an effective tool to *resolution* of the Cordis IVC filter cases" as evidence that Plaintiffs' really sought a joint trial. *See* Cordis Resp. at 7 (quoting Consolidation Mem. at 8) (emphasis added by Cordis). The immediately preceding sentence in the Consolidation Memorandum states that "consolidation of the Related Actions may create the opportunity for *settlement* of cases." Consolidation Mem. at 8 (emphasis added). It is perfectly apparent, in other words, that Plaintiffs contemplated "resolution" of the additional cases through settlement on the basis of information provided by the bellwether case, not a joint trial.

As noted, *Briggs* explained that "a bellwether trial is not, *without more*, a joint trial within the meaning of CAFA." *Briggs*, 796 F.3d at 1051 (emphasis added). Cordis maintains that here, unlike in *Briggs*, there is "much 'more' than just a mention of a bellwether trial," such that even under the reasoning in *Briggs* the plaintiffs in this case proposed a joint trial.[5] Cordis

[5] Cordis also attempts to dismiss the *Briggs* statement as mere dicta. First, given that *Briggs*'s discussion of bellwether trials directly supported its holding, it is not at all clear that those statements are dicta at all. *See* Frederick Schauer, *Giving Reasons*, 47 Stan. L. Rev. 633, 647 (1995) ("If a reason that can be narrower is for that reason dicta, then anything other than the announcement of an outcome is dicta."). In any case, it is not clear that this Court can or should ignore directly on point dicta from the Ninth Circuit. *See* David Klein & Neal Devins, *Dicta Schmicta*: *Theory Versus Practice in Lower Court Decision Making*, 54 Wm. & Mary L. Rev. 2021, 2042 (2013) (noting

Resp. at 12 n.4. But viewed in context, all of the statements Cordis relies upon are consistent with a request for coordination only for pretrial purposes.

First, Cordis argues that Plaintiffs' concern with "avoid[ing] many of the same witnesses testifying on common issues in all actions" can only be a reference to joint trial testimony. Cordis Resp. at 7 (quoting Consolidation Mem. at 1). But that statement appears in a sentence describing the benefits of consolidation "for purposes of pretrial discovery and proceedings." Consolidation Mem. at 1. Elsewhere in the Memorandum, Plaintiffs explain in more detail that their focus is on securing "the deposition of corporate employees" and reports from expert witnesses. *Id.* at 7-8. Next, Cordis points to the fact that Plaintiffs propose consolidation in part "to eliminate the risk of inconsistent adjudications" and argue that this indicates they must have contemplated a joint trial. Cordis Resp. at 7. But, as in *Briggs*, "adjudications," like "rulings," is a term broad enough to encompass "various dispositions of pre-trial motions." *Briggs*, 796 F.3d at 1051. In contrast, the *Corber* petition was concerned with "the danger of inconsistent *judgments* and conflicting determinations of liability," issues "that would be addressed only through some form of joint trial." *Corber*, 771 F.3d at 1223-24 (emphasis added). Finally, Cordis notes that Plaintiffs at one point describe the "danger of inconsistent adjudications" as consisting of "different results because tried before different judge and jury." Consolidation Mem. at 7. While this language does appear to describe a trial, the statement appears in a description of the benefits of consolidation *in general*, not the specific benefits sought in this case. Viewed in

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that in practice, "the holding-dictum distinction seems largely irrelevant").

its context, therefore, the statement does not contravene the clear and explicit thrust of the Consolidation Motion, which is limited to pretrial proceedings and exemplary, not binding, bellwether trial(s).

By contrast, *Briggs* gave examples of cases in which a request for a bellwether trial *was* part of a request for a joint trial. *See Briggs*, 796 F.3d at 1051. In *Atwell v. Boston Scientific Corp.*, plaintiffs' counsel discussed bellwether case selection at a hearing in state court, but also filed motions requesting the court to assign all three cases "to a single Judge for purposes of discovery and trial." 740 F.3d 1160, 1163-66 (8th Cir. 2013). In *In re Abbott Labs.*, the Seventh Circuit characterized plaintiffs request as including a request for a bellwether trial, but plaintiffs specifically moved for consolidation "through trial" and "not solely for pretrial proceedings." 698 F.3d 568, 573 (7th Cir. 2012). Finally, in *Bullard v. Burlington Northern Santa Fe Ry. Co.*, the Seventh Circuit explained that "a trial of 10 exemplary plaintiffs, *followed by application of issue or claim preclusion to 134 more plaintiffs without another trial*, is one in which the claims of 100 or more persons are being tried jointly." 535 F.3d 759, 762 (7th Cir. 2008) (emphasis added). In each of these cases, the request for coordination plainly encompassed both pretrial *and* trial proceedings. Thus, unlike the present case, there was sufficiently "more," in addition to a bellwether trial request, to warrant jurisdiction under CAFA.

Lastly, at the hearing on this question, counsel for Cordis argued that Plaintiffs' petition constituted a request for a joint trial because it admittedly contemplated consolidation of some pretrial proceedings, such as a *Frye* hearing, that might involve receiving evidence in the form of live testimony and which could

potentially bind all parties as to certain issues. Relying in part on a broad definition of the word "trial" to mean "a formal judicial examination of evidence and determination of claims in an adversary proceeding," Black's Law Dictionary (9th ed. 2009), Cordis argues that any evidentiary hearing with potentially preclusive effect constitutes a trial within the meaning of CAFA. The Court disagrees. CAFA specifically distinguishes between trial and pretrial proceedings, as it specifically exempts from the definition of "mass action" a "civil action in which . . . the claims have been consolidated or coordinated solely for pretrial proceedings." 28 U.S.C. § 1332(d)(11)(B)(ii)(IV). Cordis's definition of "trial" would render this provision a virtual nullity, as it would sweep in quintessentially pretrial proceedings such as summary judgment hearings or evidentiary hearings on admissibility of expert testimony. Indeed, the Ninth Circuit has indicated that summary judgment does not constitute a "trial" for CAFA purposes, and Cordis concedes as much. *See Corber*, 771 F.3d at 1224 n.4. The Court cannot accept a definition of "trial" that not only flies in the face of common usage, but also reads a key exception out of CAFA's jurisdictional provision.

The Court therefore concludes that it lacks jurisdiction under CAFA's mass action provision, and hereby REMANDS these cases to state court.

C. Attorneys' Fees

In their briefing, the *Quinn* plaintiffs assert that they are entitled to "an award of their actual expenses, including reasonable attorneys' fees, because of defendant's removal and refusal to agree to remand." *Quinn* Docket No. 26.

Title 28 U.S.C. § 1447(c) provides that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." A finding of bad faith on the part of the removing party is not required for a court to award fees under this provision. *Moore v. Permanente Med. Grp., Inc.*, 981 F.2d 443, 446 (9th Cir. 1992). "Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005).

Whether the Court should award fees in this case, therefore, turns on whether Cordis had an objectively reasonable basis for seeking removal. While the Court rejects Cordis's arguments in favor of removal, even if "[t]here is no question that [Cordis]'s arguments were losers, removal is not objectively unreasonable solely because the removing party's arguments lack merit." *Lussier v. Dollar Tree Stores, Inc.*, 518 F.3d 1062, 1065 (9th Cir. 2008). In *Lussier*, the Ninth Circuit explained that in determining whether removal was objectively unreasonable, a court should determine "whether the relevant case law clearly foreclosed the defendant's basis of removal" taking into account "clarity of the law at the time of removal." *Id.* at 1066.

The Court concludes that while *Briggs* forecloses Cordis's arguments, enough ambiguity remains, though barely so, to make Cordis's petition reasonable. *Briggs* made clear that "a bellwether trial is not, *without more*, a joint trial within the meaning of CAFA,"

Briggs, 796 F.3d at 1051, but it does not clearly explain what "more" would suffice to convert a request for a bellwether trial into a request for a joint trial. While ultimately incorrect, Cordis's argument that *Briggs*'s requirement for "more" is satisfied by a pretrial evidentiary proceeding is not wholly unreasonable; nor is its citation to language in the Consolidation Motion that refers to the benefit of avoiding different results flowing from trials before different judges and juries. The Court therefore will not award fees.

Accordingly, the Court remands these cases (listed below) to the Alameda County Superior Court for lack of federal jurisdiction. Plaintiffs' request for attorneys' fees and costs is DENIED.

C-16-3076	C-16-3086	C-16-4608
C-16-3080	C-16-3087	C-16-4819
C-16-3082	C-16-3088	C-16-5055
C-16-3083	C-16-4012	C-16-5199
C-16-3085	C-16-4409	

IT IS SO ORDERED.

Dated: September 23, 2016

/s/ EDWARD M. CHEN
EDWARD M. CHEN
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed 05/23/2017]

No. 17-15257

D.C. No. 3:16-cv-03076-EMC
Northern District of California, San Francisco

JERRY DUNSON; et al.,

Plaintiffs-Appellees,

v.

CORDIS CORPORATION,

Defendant-Appellant.

ORDER

Before: FERNANDEZ and WATFORD, Circuit Judges, and STATON,* District Judge.

Judge Watford votes to deny the petition for rehearing en banc, and Judges Fernandez and Staton so recommend. The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc, filed April 28, 2017, is DENIED.

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* The Honorable Josephine L. Staton, United States District Judge for the Central District of California, sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed 02/13/2017]

No. 16-80139
D.C. No. 3:16-cv-03076-EMC
Northern District of California, San Francisco

JERRY DUNSON; *et al.*,

Plaintiffs-Respondents,

v.

CORDIS CORPORATION,

Defendant-Petitioner.

ORDER

Before: CANBY and McKEOWN, Circuit Judges.

The petition for permission to appeal pursuant to 28 U.S.C. § 1453(c) is granted. *See Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096, 1100 (9th Cir. 2010) (per curiam). Within 7 days after the filing date of this order, petitioner shall perfect the appeal pursuant to Federal Rule of Appellate Procedure 5(d).

Pursuant to 28 U.S.C. § 1453(c)(2), the court shall complete all action on this appeal, including rendering judgment, not later than 60 days after the date on which the appeal was filed. *See also Bush v. Cheaptickets, Inc.*, 425 F.3d 683, 685 (9th Cir. 2005) (stating that 60-day time period begins to run when the court accepts the appeal). The parties shall submit, via electronic

filing, simultaneous briefs and excerpts of record within 10 days after the filing date of this order. No reply briefs will be accepted.

Also, within 10 days after the filing date of this order, by 5:00 p.m. (Pacific time), the parties shall submit to the Clerk's Office in San Francisco 10 copies of the briefs and 4 copies of the excerpts of record in paper format, accompanied by certification that the briefs are identical to the versions submitted electronically.

Any motion to extend time to file the briefs shall strictly comply with the requirements set forth in 28 U.S.C. § 1453(c)(3).

The Clerk shall calendar this case during the week of March 13, 2017 in San Francisco, California.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Filed 11/08/16]

Case No. 16-cv-03076-EMC

AND RELATED CASES

Case No. 16-cv-03080-EMC
Case No. 16-cv-03082-EMC
Case No. 16-cv-03083-EMC
Case No. 16-cv-03085-EMC
Case No. 16-cv-03086-EMC
Case No. 16-cv-03087-EMC
Case No. 16-cv-03088-EMC
Case No. 16-cv-04012-EMC
Case No. 16-cv-04409-EMC
Case No. 16-cv-04608-EMC
Case No. 16-cv-04819-EMC
Case No. 16-cv-05055-EMC
Case No. 16-cv-05199-EMC
Case No. 16-cv-05455-EMC
Case No. 16-cv-05934-EMC

JERRY DUNSON, et al.,

Plaintiffs,

v.

CORDIS CORPORATION, et al.,

Defendants.

ORDER DENYING DEFENDANT'S MOTION TO STAY

For the reasons stated on the record during the October 27, 2016 hearing, the Court DENIES Defendant Cordis Corporation's motion to stay these proceedings pending appeal of the Court's prior Order remanding these related cases to state court for lack of subject matter jurisdiction. This order is intended to memorialize and supplement that ruling.

Supreme Court case law has "distilled" the legal principles that guide courts' discretion in issuing stays "into consideration of four factors: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). "The first two factors of the traditional standard are the most critical." *Id.*

In applying these factors, the Ninth Circuit employs a "sliding scale" approach whereby "the elements of the . . . test are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011); *see also Leiva-Perez v. Holder*, 640 F.3d 962, 964-66 (9th Cir. 2011) (noting that the sliding scale test for preliminary injunctions described in *Alliance for the Wild Rockies* is the "essentially the same" as the test used in the stay context, and holding that this approach "remains in place" following the Supreme Court"s decision in *Nken*). In other words, "the required degree of irreparable harm increases as the probability of success decreases." *Nat. Res. Def. Council, Inc. v. Winter*, 502 F.3d 859, 862 (9th Cir. 2007).

As an initial matter, the Court notes that Cordis misstates the applicable test. Cordis argues that it is required to show *either* "a probability of success on the merits and the possibility of irreparable injury" *or* "that serious legal questions are raised and that the balance of hardships tips sharply in its favor." Docket No. 63 ("Reply") at 6 (quoting *Golden Gate Rest. Ass'n v. City & Cty. of San Francisco*, 512 F.3d 1112, 1115-16 (9th Cir. 2008)). In fact, the *Golden Gate* test upon which Cordis relies is no longer good law. As the Ninth Circuit has since explained, the Supreme Court's decision in *Nken* overruled prior Ninth Circuit law "that permitted a stay to issue upon the petitioner 'simply showing some *possibility* of irreparable injury.'" *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011) (quoting *Nken*, 556 U.S. at 434) (emphasis added in *Leiva-Perez*). Thus, while the sliding scale approach remains applicable (such that the robustness of the showing on the merits varies with how sharply the balance of hardship tips), "to obtain a stay . . . [a movant] must [in any event] demonstrate that irreparable harm is probable if the stay is not granted."[1] *Id.*

A. Likelihood of Success on the Merits

Cordis asserts that under *Leiva-Perez*, "all that must be shown to justify a stay is a 'fair prospect' of success, 'a substantial case on the merits,' or that serious legal questions are raised." Reply at 4 (quoting *Leiva-Perez*,

[1] Both *Leiva-Perez* and *Nken* arose in the context of noncitizens seeking stays of removal orders pending appeal. Accordingly, the decisions at times refer to the burden on "an alien" to obtain a "stay of removal." Both cases make clear, however, that the standards they set out apply to the issuance of stays pending appeal generally, not just in the immigration context.

640 F.3d at 966-68). That is not entirely accurate, as it does not take into account the sliding scale balancing with the irreparable harm prong. In fact, the language that Cordis quotes represents *Leiva-Perez*'s articulation of "the *minimum* quantum of likely success necessary to justify a stay." *Leiva-Perez*, 640 F.3d at 967 (emphasis added). In other words, to justify a stay on a showing merely of a "fair prospect" of success on appeal, a movant must show that the balance of hardship tips sharply in its favor. In any event, the Court finds that Cordis cannot satisfy either standard.

Cordis argues that it is likely to succeed on appeal for two reasons. First, Plaintiff reiterates the arguments it made previously that the *Quinn* consolidation motion constituted a request for a joint trial. Motion at 7-8. This argument fails for the reasons discussed in the Court's remand order including, most significantly, that Plaintiffs explicitly stated that they sought consolidation for pretrial purposes only. Cordis continues to insist that Plaintiffs never explicitly stated that they sought consolidation for pretrial purposes only. *See* Reply at 5 n.7. This contention is largely based on what can only be characterized as a willful misreading of the language of the petition. Cordis also continues to point to Plaintiffs request for a "bellwether trial process." But despite this Court's discussion in its remand order, Cordis still fails to recognize that unless the parties provide otherwise, a bellwether trial *is* a "pretrial" proceeding for every case other than the bellwether itself, as it functions typically only to provide information that will facilitate settlement, not to bind all subsequent cases. With respect to the Ninth Circuit's statement that "a bellwether trial is not, without more, a joint trial within the meaning of CAFA," *Briggs v. Merck Sharp & Dohme*, 796 F.3d 1038, 1051 (9th Cir. 2015), Cordis argues that what constitutes

sufficiently "more" remains unsettled, presenting a "serious legal question." *See Leiva-Perez*, 640 F.3d at 966-68. But no such question is presented by this case. Plaintiffs clearly and explicitly stated that they sought consolidation only for pretrial purposes; whatever "more" might suffice to create an implicit request for a joint trial of other cases was not present in this case.

Second, Cordis argues that it is likely to succeed on appeal because a motion for consolidation pursuant to Cal. Civ. Proc. Code § 1048 – the provision under which the *Quinn* Plaintiffs sought consolidation – is *per se* a request for a joint trial. *See* Motion at 8-10; Reply at 5. Cordis never raised this argument in its briefing on the jurisdictional question, and only made a brief reference to it during the hearing. It thus waived the argument. In any case, Cordis does not have a "fair prospect" of success with this argument on the merits. Most significantly, it contravenes the clear text of the statute. Section 1048 provides:

> When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay. Cal. Civ. Proc. Code § 1048(a) (emphasis added).

The statute explicitly provides for consolidation for the purpose of a "hearing" (as opposed to a "trial") on "any" (as opposed to "all") of the matters at issue. This plainly authorizes limited consolidation short of a full trial.

Cordis's argument to the contrary relies entirely on a single statement from the California Supreme Court. In *Hamilton v. Asbestos Corp.*, the court stated that:

> Code of Civil Procedure section 1048, subdivision (a), authorizes the trial court, when appropriate, to "order a joint hearing or trial" or to "order all the actions consolidated." Under the statute and the case law, there are thus two types of consolidation: a consolidation for purposes of trial only, where the two actions remain otherwise separate; and a complete consolidation or consolidation for all purposes, where the two actions are merged into a single proceeding under one case number and result in only one verdict or set of findings and one judgment. *Hamilton v. Asbestos Corp.*, 998 P.2d 403, 415 (Cal. 2000).

In context, it is apparent that the Court's reference to "consolidation for purposes of trial only" refers to the portion of the statute that allows a court to "order a joint hearing or trial." It was not necessary for the Court to decide whether the statute allows consolidation for *pretrial* purposes, because the parties in that case agreed that consolidation had at least been requested for trial. This stray comment, which did not focus or used to address the issue presented here, cannot be construed to contravene the clear statutory text.[2] The Court concludes that Cordis does not raise even a "serious legal question" on this point.

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[2] Cordis also relies on a statement from a student Note that California law "do[es] not permit consolidation [under § 1048(a)] purely for pretrial purposes." S. Amy Spencer, Note, *Once More Into The Breach, Dear Friends: The Case for Congressional Revision of the Mass Action Provisions in the Class Action Fairness Act of 2005*, 39 Loy. L.A. L. Rev. 1067, 1096 (2006). But the only

B. Irreparable Harm

A movant's "burden with regard to irreparable harm is higher than it is on the likelihood of success prong, as she must show that an irreparable injury is the more probable or likely outcome." *Leiva-Perez*, 640 F.3d at 968. As the Supreme Court has explained, the "key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." *Sampson v. Murray*, 415 U.S. 61, 90 (1974).

Cordis asserts that it faces irreparable harm only because, if a stay is denied, it may have to spend some amount of time litigating concurrently in both state and federal court. Motion at 10-11. This would create the possibility that Cordis would be forced to making filings that would ultimately "have served no purpose," as well as "add[ing] unnecessary expense for both sides." *Id.* at 11. But this is the sort of mere injury "in terms of money, time and energy necessarily expended" that the Supreme Court has found insufficient to constitute an irreparable harm. It is true that some district courts have nonetheless found these concerns sufficient to warrant a stay. *See* Reply at 6-7. But significantly, as Cordis itself notes, "[b]ecause 28 U.S.C. § 1453(c)(2) provides for expedited [appellate] review, any delay would be short lived." Reply at 7. Courts have accordingly denied stays on the ground that "no irreparable harm will result since review is

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source cited in the Note for this statement is the statute itself; as explained above, the text of the statute strongly indicates that the opposite is true.

expedited." *Manier v. Medtech Prod., Inc.*, 29 F. Supp. 3d 1284, 1288 (S.D. Cal. 2014); *see also Smith v. Am. Bankers Ins. Co. of Florida*, No. 2:11-CV-02113, 2011 WL 6399526, at *2 (W.D. Ark. Dec. 21, 2011). Any harm to Cordis would be similarly limited. This is especially true since there will be no further proceeding in the federal district court. The only parallel proceeding is briefing of Cordis's appeal to the Ninth Circuit. Cordis thus cannot meet its burden to show irreparable harm in the absence of a stay. Nor has it shown the balance of hardship tips sharply or otherwise in its favor. The plaintiffs in this case have already seen their efforts to seek redress for their injuries substantially delayed by Cordis‟s removal. Adding further delay would only compound their injuries.

C. Injury to Plaintiffs and Public Interest

As noted above, the Supreme Court has explained that the first two factors in the traditional stay test are the most important. Indeed, a Court need not consider the third and fourth factors unless it concludes that the moving party has made an adequate showing on the first two. *See Nken*, 556 U.S. at 435 ("Once an applicant satisfies the first two factors, the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest."). Because Cordis cannot carry its burden with respect to either of the first two prongs, it is unnecessary for the Court to reach these additional issues. In any event, Cordis has failed to articulate any real injury to the public in failing to stay the matter.

For the foregoing reasons, the Court DENIES Cordis's motion for a stay pending appeal[3] in the cases listed below.

C-16-3076	C-16-4012
C-16-3080	C-16-4409
C-16-3082	C-16-4608
C-16-3083	C-16-4819
C-16-3085	C-16-5055
C-16-3086	C-16-5199
C-16-3087	C-16-5455
C-16-3088	C-16-5934

IT IS SO ORDERED.

Dated: November 8, 2016

/s/ Edward M. Chen
EDWARD M. CHEN
United States District Judge

[3] The parties dispute whether the Court, having already remanded these cases, may properly exercise jurisdiction to consider a stay. But because the Court denies the request on the merits, it is unnecessary to decide this unsettled issue. The Court therefore assumes, without deciding, that jurisdiction is appropriate for the purpose of this motion.

APPENDIX F

28 U.S.C. § 1332(d)(1)-(11)

Diversity of citizenship; amount in controversy; costs

(1) In this subsection—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(A)

(i) over a class action in which—

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

(II) at least 1 defendant is a defendant—

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

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

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

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

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

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

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

(A) the primary defendants are States, State officials, or other governmental entities against whom

the district court may be foreclosed from ordering relief; or

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

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

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

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

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

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

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

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined

under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

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

(11)

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

(B)

(i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

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

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

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

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

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

(C)

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

(ii) This subparagraph will not apply—

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

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

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

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

APPENDIX G

28 U.S.C. § 1453

Removal of Class Actions

(a) Definitions.—

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

(b) In General.—

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

(c) Review of Remand Orders.—

(1) In general.—

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

(2) Time period for judgment.—

If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such

appeal was filed, unless an extension is granted under paragraph (3).

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

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

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

(4) Denial of appeal.—

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

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

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

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

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

APPENDIX H

Cal. Civ. Proc. Code § 1048

(a) When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action, including a cause of action asserted in a cross-complaint, or of any separate issue or of any number of causes of action or issues, preserving the right of trial by jury required by the Constitution or a statute of this state or of the United States.