No.

IN THE

Supreme Court of the United States

CORDIS CORPORATION,

Petitioner,

v.

MICHAEL BARBER, *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

KEVIN C. MAYER
CROWELL & MORING LLP
3 Embarcadero Center,
26th Floor
San Francisco, CA 94111
Tel: (415) 986-2800

CLIFTON S. ELGARTEN
Counsel of Record
SCOTT L. WINKELMAN
ANDREW D. KAPLAN
REBECCA BADEN CHANEY
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 624-2500
celgarten@crowell.com

Counsel for Petitioner

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

Petitioner in Ninth Circuit No. 16-80140 was Cordis Corporation. In the Northern District of California below, Cordis Corporation, Johnson & Johnson, and Cardinal Health, Inc. were defendants. Respondents in the Ninth Circuit and plaintiffs below were Michael Barber, Andrew Clos, Jacquelyn Hanson, Rhonda Hernandez, Donald Hernandez, Sr., James Lewis, Connie Patterson, Carolyn Simmons, Walter Simmons, Michael Donlin, David Hamilton, Stephen Vandall, Heather Vandall, Dorothy Mills, Lakisha Hooks, Deborah Jarvis, Caroline Carr, Geraldine Clark, Robert Spishak, Reina Jones, Venesia Johnson, Darnell Kilgore, Joseph Hershberger, Russell Zukrigil, and Brian Zukrigil.

Petitioner in Ninth Circuit No. 16-80141 was Cordis Corporation. In the Northern District of California below, Cordis Corporation and Confluent Medical Technologies, Inc. were defendants. Respondents in the Ninth Circuit and plaintiffs below were Stacey Elliot, Pamela Montez, Michael Jones, and Mary Ann Moritz.

Petitioner in Ninth Circuit No. 16-80142 and defendant in the Northern District of California below was Cordis Corporation. Respondents in the Ninth Circuit and plaintiffs below were David Garry, Joann Judy, and Christopher Sims.

Petitioner in Ninth Circuit No. 16-80144 was Cordis Corporation. In the Northern District of California below, Cordis Corporation and Johnson & Johnson were defendants. Respondents in the Ninth Circuit and plaintiffs below were Geanice Grant, Violet Elaine Kern, Russell Hopkins, Anthony Burbine, Courtney Comer, William Gouge, Rhonda

Gail Schenk, Jennifer Alison, Bobby Fuller, Robert Edward Becker, Terry Ann Fountain, Marguerite Norton, James Franklin Williams, Sr., Betty Reed, Clint Hurtado, Mark Wehmeier, Jennifer Schock, and Jordan Deed.

Petitioner in Ninth Circuit No. 16-80145 was Cordis Corporation. In the Northern District of California below, Cordis Corporation and Confluent Medical Technologies, Inc. were defendants. Respondents in the Ninth Circuit and plaintiffs below were Helen Hall and Sammy Hall.

Petitioner in Ninth Circuit No. 16-80146 was Cordis Corporation. In the Northern District of California below, Cordis Corporation, Johnson & Johnson, Cardinal Health, Inc., and Confluent Medical Technologies, Inc. were defendants. Respondents in the Ninth Circuit and plaintiffs below were Walter Herbert, Russell Anderson, Martha Graham, Frank Graham, Tamarra Grayson, Timothy Howard, Ted Michael Martinez, Cynthia Martinez, Judy Shaffer, John Shaffer, Jr., Clarice Stepp, and Allison Fisher.

Petitioner in Ninth Circuit No. 16-80147 was Cordis Corporation. In the Northern District of California below, Cordis Corporation, Confluent Medical Technologies, Inc., and Nitinol Devices and Components, Inc. were defendants. Respondents in the Ninth Circuit and plaintiffs below were Wanda Holden, Tambra Shifflet, Lanora Barrett, Marcello Coogan, Willie P. Cook, John Dawson, Fredderick Hall, Thomas Husted, Sabrina Jackson, Juan Nelle Jeanes, Steven Johnson, Kendall McCoy, Michelle Montoya, Karen Neal, Debra Porter, Tommy Porter,

Carl Rexing, Hazel Webb, Cheryl Wright, Evelyn Wright, and Thomas Yaudas.

Petitioner in Ninth Circuit No. 16-80148 was Cordis Corporation. In the Northern District of California below, Cordis Corporation, Johnson & Johnson, Cardinal Health, Inc., and Confluent Medical Technologies, Inc. were defendants. Respondents in the Ninth Circuit and plaintiffs below were Thelma Lesch, Santosh Singh, George Withrow, Justin David Dehart (individually and as successor in interest of Shannon Jean Dehart, Decedent), Tiffany Autumn Begley Brown (individually and as successor in interest of Mark Niel Begley), Samantha Hope Begley (individually and as successor in interest of Mark Niel Begley), David P. Rentz, Jr., Kimberly L. Peterson, Jacqueline Whitaker, Porter Harris, Deborah Harris, and Grace Wright.

Petitioner in Ninth Circuit No. 16-80149 was Cordis Corporation. In the Northern District of California below, Cordis Corporation, Johnson & Johnson, Cardinal Health, Inc., and Confluent Medical Technologies, Inc. were defendants. Respondents in the Ninth Circuit and plaintiffs below were Charles Henry Lewis, Patrick Ozenne, Glenn Stephens, Bridget Stephens, Nathaniel Barnes, Voncile Davis, William Harris, and Carolyn Harris.

Petitioner in Ninth Circuit No. 16-80150 was Cordis Corporation. In the Northern District of California below, Cordis Corporation, Johnson & Johnson, and Cardinal Health, Inc. were defendants. Respondents in the Ninth Circuit and plaintiffs below were Lisa Oehring, Luther Leatham, Sonji

Hutchinson, Sandra Sutter, Lynda Smith, Alan Goldberg, Benito Brown, Lupe Brown, Patricia Bunker, Carmen Burgess, Travis Burkhart, Kimberly Burkhart, Philip Faciana, Louise Hill, Keith Hunter, Ellen Juvera-Saiz, Brandi Kirk, Lisa Kumbier, Jessica Larimore, Herman Malone, Dorothy May, Dustin Merritt, Cindy Seymore, Freddie Wilson, Donald Holland, James McCord, Billy Richard, Melanie Richard, John Rogers, Sean Maguire, Laura Maguire, Gilda Southerland, Vincent Southerland, Chad Southerland, and Duke Southerland.

Petitioner in Ninth Circuit No. 16-80151 and defendant in the Northern District of California below was Cordis Corporation. Respondents in the Ninth Circuit and plaintiffs below were Heather Quinn, Brian Quinn, Kathrynn Kirby, Allison Brauer, Edward Brown and Patricia Brown (individually and as husband and wife), Michael Hickson, Christina Jones, Nancy Folz, Edward Chizek, and Andrew Chapman.

Petitioner in Ninth Circuit No. 16-80152 was Cordis Corporation. In the Northern District of California below, Cordis Corporation, Confluent Medical Technologies, Inc., and Nitinol Devices and Components, Inc. were defendants. Respondents in the Ninth Circuit and plaintiffs below were David Resovsky, George Todd, David Brown, and Gwen Kramer.

Petitioner in Ninth Circuit No. 16-80153 was Cordis Corporation. In the Northern District of California below, Cordis Corporation, Johnson & Johnson, Cardinal Health, Inc., and Confluent Medical Technologies, Inc. were defendants.

Respondents in the Ninth Circuit and plaintiffs below were Leslie-Elaine Sutton, Richard E. Harris, and Theresa Harris.

RULE 29.6 STATEMENT

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

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
PARTIES TO THE PROCEEDINGS ii
RULE 29.6 STATEMENT....................................... vii
TABLE OF AUTHORITIES x
OPINIONS BELOW.. 1
JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3
STATEMENT 4
A. Introduction.. 4
B. Statutory Background................................ 7
C. The Removed Cases 8
D. The Decisions Below 11
REASONS TO ISSUE THE WRIT 14
CONCLUSION 14

TABLE OF CONTENTS (CON'T)

APPENDIX

Appendix A
Orders Denying Petitions for
Permission to Appeal 1a

Appendix B
Orders Holding Petitions for
Permission to Appeal in Abeyance Pending
Resolution of *Dunson* 14a

Appendix C
District Court Opinion 27a

Appendix D
Ninth Circuit Opinion in *Dunson* 42a

Appendix E
Ninth Circuit Order Denying
En Banc Rehearing in *Dunson* 53a

Appendix F
Ninth Circuit Order Granting Petition
for Appeal in *Dunson* 54a

Appendix G
District Court Order Denying
Motion to Stay 56a

Appendix H
28 U.S.C. § 1332(d)(1)-(11) 65a

Appendix I
28 U.S.C. § 1453 .... 71a

Appendix J
Cal. Civ. Proc. Code § 1048 .... 73a

TABLE OF AUTHORITIES

Page(s)

CASES

Briggs v. *Merck Sharp & Dohme*,
796 F.3d 1038 (9th Cir. 2015)........................11, 12

Dart Cherokee Basin Operating Co. v. Owens,
547 U.S. ---, 135 S. Ct. 547 (2014)................3, 5, 7

Dunson v. Cordis Corp.,
854 F.3d 551 (9th Cir. 2017)........................1, 9, 12

STATUTES

28 U.S.C. § 1254(1)...2

28 U.S.C. § 1332(d)...*passim*

28 U.S.C. § 1453..2, 3, 7

Cal. Civ. Proc. Code § 1048(a) 9, 10

OTHER AUTHORITIES

151 Cong. Rec. H723-01, 2005 WL 387992 7

S. Rep. No. 109-14 (2005), 2005 WL 627977..............7

PETITION FOR A WRIT OF CERTIORARI

Cordis Corporation respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit denying permission to appeal various district court decisions remanding the 13 cases that are the subject of this Petition to state court following removal of these cases from state court to the district court.

OPINIONS BELOW

The orders of the Ninth Circuit denying the petitions for permission to appeal in each of the 13 cases that are the subject of this Petition are unreported and set forth at Appendix ("App.") 1a-13a. The district court order that remanded these cases to the state court is set forth at App. 27a. The orders holding these 13 cases in abeyance pending resolution of *Dunson* are included at App. 14a-26a.

The Ninth Circuit's opinion in *Dunson v. Cordis Corp.*, which controlled the disposition of the 13 cases that are the subject of this Petition, is published at 854 F.3d 551 (9th Cir. 2017), and is reprinted here beginning at App. 42a. The order denying *en banc* review in *Dunson* is reprinted at App. 53a. The district court's decision is unreported and is reprinted at App. 27a. The district court's order denying defendant's motion to stay is reprinted at App. 56a. The order granting the petition for permission to appeal in *Dunson* is reprinted at App. 54a.

JURISDICTION

These cases are among dozens of multi-plaintiff lawsuits, totaling hundreds of plaintiffs, filed in the

Superior Court of the State of California for the County of Alameda. After plaintiffs moved to consolidate various of these cases, Petitioner Cordis Corporation removed these 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.

Cordis timely petitioned for permission to appeal the remand orders pursuant to 28 U.S.C. § 1453. On February 13, 2017, the Ninth Circuit granted Cordis' petition for permission to appeal in the case captioned by the Ninth Circuit as *Dunson v. Cordis Corporation*, No. 17-15257 (formerly petition No. 16-80139), and issued orders holding in abeyance each of the 13 cases that are the subject of this Petition, pending the resolution of *Dunson*.

In *Dunson*, the Ninth Circuit ultimately affirmed the district court decision remanding the case to the state court. App. 42a. Cordis' timely petition for rehearing *en banc* was denied on May 23, 2017. App. 53a. Following denial of the petition for rehearing *en banc*, the Ninth Circuit issued orders rejecting Cordis' petitions for permission to appeal in each of these 13 cases. App. 1a.

The decision in *Dunson* is now the subject of a Petition for Certiorari, docketed on August 17, 2017, No. 17-257, and it is suggested that this Petition be held pending this Court's disposition of No. 17-257, which is dispositive of the issues here.

This Court's jurisdiction over the orders of the Ninth Circuit declining to hear the appeals in these cases is invoked under 28 U.S.C. § 1254(1) in that

this Court has jurisdiction over petitions for certiorari from cases in the courts of appeal, including cases involving petitions for permission to appeal. *See Dart Cherokee Basin Operating Co. v. Owens*, 547 U.S. ---, 135 S. Ct. 547, 555 (2014) (so holding).

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. 65a-70a 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 (a) and (b), and the right to apply to appeal from an order granting a motion to remand is set forth at 28 U.S.C. §1453(c). Those sections are reprinted at App. 71a-72a.

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

This Petition presents the same question presented by the Petition in No. 17-257, docketed on August 17, 2017. No. 17-257 is the case in which the Ninth Circuit addressed that question on the merits, by written published opinion, while holding the requests for permission to appeal in these 13 cases in abeyance. Therefore, Petitioner suggests that this Petition be held, in accordance with this Court's procedures, pending final disposition of No. 17-257.

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 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 and the Petition in No. 17-257, resolve the circuit conflict, and reaffirm defendants' statutory right to remove such 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 <u>not</u> 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.

Dunson v. Cordis Corp., et al., became the "lead case" because the Ninth Circuit ultimately granted the petition for permission to appeal in that case and rendered a decision on the merits, while holding the cases presented by this Petition in abeyance. Plaintiffs in *Dunson* 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 to federal court 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 *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. 47a, 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 to the Northern District of California, under 28 U.S.C. § 1332(d)(11). 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.

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—the 13 cases that are now the subject of this Petition, and the case that is the subject of the Petition in No. 17-257—on September 23, 2016. App. 27a. 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 *Dunson*, App. 54a, and held the petitions in these 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. 42a.

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. 45a. 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. 47a. 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 and No. 17-257—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.

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. 48a. 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. 48a. 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. App. 53a.

On the basis of the decision in *Dunson*, the Ninth Circuit issued separate orders in each of the 13 cases that are the subject of this Petition, each denying the petition for permission to appeal. *See* App. 1a-13a. The Ninth Circuit also rejected Cordis' motion to continue to hold each of the petitions for permission to appeal in abeyance. *Id.*

The Petition addressing the *Dunson* case is No. 17-257. This Petition addresses the 13 cases, which on petition for permission to appeal were held in abeyance by the Ninth Circuit pending resolution of *Dunson*.

REASONS TO ISSUE THE WRIT

The cases that are the subject of this Petition present precisely the same issue as is presented by the Petition in *Dunson*, No. 17-257. These cases are all part of a group of cases removed from state court to federal district court by Petitioner Cordis. In holding the petitions for permission to appeal in abeyance pending the resolution of *Dunson*, the Ninth Circuit necessarily recognized that the disposition of *Dunson* would properly control the disposition of the 13 cases at issue in this Petition.

The reason why this Petition should be granted is fully detailed in the Petition in No. 17-257.

Therefore, Petitioner respectfully suggests that this Petition be held, in accordance with this Court's procedures, pending final disposition of No. 17-257, including any disposition of the Writ on the merits, and then addressed, as appropriate, in light of the final disposition in No. 17-257.

CONCLUSION

This Petition should be held pending this Court's final disposition of the Petition in No. 17-257, including any disposition of the Writ on the merits, and then should be disposed of as appropriate in light of that final disposition.

Respectfully submitted,

CLIFTON S. ELGARTEN
Counsel of Record
SCOTT L. WINKELMAN
ANDREW D. KAPLAN
REBECCA BADEN CHANEY
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 624-2500
celgarten@crowell.com

KEVIN C. MAYER
CROWELL & MORING LLP
3 Embarcadero Center, 26th Floor
San Francisco, CA 94111
(415) 986-2800

Counsel for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: June 14, 2017]

No. 16-80140
D.C. No. 3:16-cv-03086-EMC
Northern District of California, San Francisco

MICHAEL BARBER; *et al.*,
Plaintiffs-Respondents,

v.

CORDIS CORPORATION,
Defendant-Petitioner.

ORDER

Before: CANBY and MURGUIA, Circuit Judges.

On February 13, 2017, the court held this petition for permission in abeyance pending the resolution of appeal No. 17-15257 (formerly petition No. 16-80139), *Jerry Dunson, et al. v. Cordis Corporation*. The mandate has issued in that appeal, and this court's decision affirming the district court's remand order is final. *See Dunson v. Cordis Corp.*, 854 F.3d 551, 557 (9th Cir. 2017). Accordingly, the stay of proceedings in this petition is lifted.

Petitioner's motion to continue to hold this petition for permission to appeal in abeyance (Docket Entry No. 6) is denied.

The petition for permission to appeal pursuant to 28 U.S.C. § 1453(c) is denied. *See Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096, 1100 (9th Cir. 2010).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: June 13, 2017]

No. 16-80141
D.C. No. 3:16-cv-05055-EMC
Northern District of California, San Francisco

STACEY ELLIOT; *et al.*,

Plaintiffs-Respondents,

v.

CORDIS CORPORATION,

Defendant-Petitioner.

ORDER

Before: CANBY and MURGUIA, Circuit Judges.

On February 13, 2017, the court held this petition for permission in abeyance pending the resolution of appeal No. 17-15257 (formerly petition No. 16-80139), *Jerry Dunson, et al. v. Cordis Corporation*. The mandate has issued in that appeal, and this court's decision affirming the district court's remand order is final. *See Dunson v. Cordis Corp.*, 854 F.3d 551, 557 (9th Cir. 2017). Accordingly, the stay of proceedings in this petition is lifted.

Petitioner's motion to continue to hold this petition for permission to appeal in abeyance (Docket Entry No. 5) is denied.

The petition for permission to appeal pursuant to 28 U.S.C. § 1453(c) is denied. *See Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096, 1100 (9th Cir. 2010).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: June 13, 2017]

No. 16-80142
D.C. No. 3:16-cv-04409-EMC
Northern District of California, San Francisco

DAVID GARRY; *et al.*,

Plaintiffs-Respondents,

v.

CORDIS CORPORATION,

Defendant-Petitioner.

ORDER

Before: CANBY and MURGUIA, Circuit Judges.

On February 13, 2017, the court held this petition for permission in abeyance pending the resolution of appeal No. 17-15257 (formerly petition No. 16-80139), *Jerry Dunson, et al. v. Cordis Corporation*. The mandate has issued in that appeal, and this court's decision affirming the district court's remand order is final. *See Dunson v. Cordis Corp.*, 854 F.3d 551, 557 (9th Cir. 2017). Accordingly, the stay of proceedings in this petition is lifted.

Petitioner's motion to continue to hold this petition for permission to appeal in abeyance (Docket Entry No. 4) is denied.

The petition for permission to appeal pursuant to 28 U.S.C. § 1453(c) is denied. *See Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096, 1100 (9th Cir. 2010).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: June 13, 2017]

No. 16-80144
D.C. No. 3:16-cv-03083-EMC
Northern District of California, San Francisco

GEANICE GRANT; *et al.*,

Plaintiffs-Respondents,

v.

CORDIS CORPORATION,

Defendant-Petitioner.

ORDER

Before: CANBY and MURGUIA, Circuit Judges.

On February 13, 2017, the court held this petition for permission in abeyance pending the resolution of appeal No. 17-15257 (formerly petition No. 16-80139), *Jerry Dunson, et al. v. Cordis Corporation*. The mandate has issued in that appeal, and this court's decision affirming the district court's remand order is final. *See Dunson v. Cordis Corp.*, 854 F.3d 551, 557 (9th Cir. 2017). Accordingly, the stay of proceedings in this petition is lifted.

Petitioner's motion to continue to hold this petition for permission to appeal in abeyance (Docket Entry No. 6) is denied.

The petition for permission to appeal pursuant to 28 U.S.C. § 1453(c) is denied. *See Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096, 1100 (9th Cir. 2010).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: June 13, 2017]

No. 16-80145
D.C. No. 3:16-cv-05199-EMC
Northern District of California, San Francisco

HELEN HALL AND SAMMY HALL,

Plaintiffs-Respondents,

v.

CORDIS CORPORATION,

Defendant-Petitioner.

ORDER

Before: CANBY and MURGUIA, Circuit Judges.

On February 13, 2017, the court held this petition for permission in abeyance pending the resolution of appeal No. 17-15257 (formerly petition No. 16-80139), *Jerry Dunson, et al. v. Cordis Corporation*. The mandate has issued in that appeal, and this court's decision affirming the district court's remand order is final. *See Dunson v. Cordis Corp.*, 854 F.3d 551, 557 (9th Cir. 2017). Accordingly, the stay of proceedings in this petition is lifted.

Petitioner's motion to continue to hold this petition for permission to appeal in abeyance (Docket Entry No. 6) is denied.

The petition for permission to appeal pursuant to 28 U.S.C. § 1453(c) is denied. *See Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096, 1100 (9th Cir. 2010).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: June 13, 2017]

No. 16-80146
D.C. No. 3:16-cv-03085-EMC
Northern District of California, San Francisco

WALTER HERBERT; *et al.*,

Plaintiffs-Respondents,

v.

CORDIS CORPORATION,

Defendant-Petitioner.

ORDER

Before: CANBY and MURGUIA, Circuit Judges.

On February 13, 2017, the court held this petition for permission in abeyance pending the resolution of appeal No. 17-15257 (formerly petition No. 16-80139), *Jerry Dunson, et al. v. Cordis Corporation*. The mandate has issued in that appeal, and this court's decision affirming the district court's remand order is final. *See Dunson v. Cordis Corp.*, 854 F.3d 551, 557 (9th Cir. 2017). Accordingly, the stay of proceedings in this petition is lifted.

Petitioner's motion to continue to hold this petition for permission to appeal in abeyance (Docket Entry No. 7) is denied.

The petition for permission to appeal pursuant to 28 U.S.C. § 1453(c) is denied. *See Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096, 1100 (9th Cir. 2010).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: June 14, 2017]

No. 16-80147
D.C. No. 3:16-cv-03087-EMC
Northern District of California, San Francisco

WANDA HOLDEN; *et al.*,

Plaintiffs-Respondents,

v.

CORDIS CORPORATION,

Defendant-Petitioner.

ORDER

Before: CANBY and MURGUIA, Circuit Judges.

On February 13, 2017, the court held this petition for permission in abeyance pending the resolution of appeal No. 17-15257 (formerly petition No. 16-80139), *Jerry Dunson, et al. v. Cordis Corporation*. The mandate has issued in that appeal, and this court's decision affirming the district court's remand order is final. *See Dunson v. Cordis Corp.*, 854 F.3d 551, 557 (9th Cir. 2017). Accordingly, the stay of proceedings in this petition is lifted.

Petitioner's motion to continue to hold this petition for permission to appeal in abeyance (Docket Entry No. 4) is denied.

The petition for permission to appeal pursuant to 28 U.S.C. § 1453(c) is denied. *See Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096, 1100 (9th Cir. 2010).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: June 14, 2017]

No. 16-80148
D.C. No. 3:16-cv-04608-EMC
Northern District of California, San Francisco

THELMA LESCH; *et al.*,

Plaintiffs-Respondents,

v.

CORDIS CORPORATION,

Defendant-Petitioner.

ORDER

Before: CANBY and MURGUIA, Circuit Judges.

On February 13, 2017, the court held this petition for permission in abeyance pending the resolution of appeal No. 17-15257 (formerly petition No. 16-80139), *Jerry Dunson, et al. v. Cordis Corporation*. The mandate has issued in that appeal, and this court's decision affirming the district court's remand order is final. *See Dunson v. Cordis Corp.*, 854 F.3d 551, 557 (9th Cir. 2017). Accordingly, the stay of proceedings in this petition is lifted.

Petitioner's motion to continue to hold this petition for permission to appeal in abeyance (Docket Entry No. 6) is denied.

The petition for permission to appeal pursuant to 28 U.S.C. § 1453(c) is denied. *See Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096, 1100 (9th Cir. 2010).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: June 14, 2017]

No. 16-80149
D.C. No. 3:16-cv-04819-EMC
Northern District of California, San Francisco

CHARLES HENRY LEWIS; *et al.*,

Plaintiffs-Respondents,

v.

CORDIS CORPORATION,

Defendant-Petitioner.

ORDER

Before: CANBY and MURGUIA, Circuit Judges.

On February 13, 2017, the court held this petition for permission in abeyance pending the resolution of appeal No. 17-15257 (formerly petition No. 16-80139), *Jerry Dunson, et al. v. Cordis Corporation*. The mandate has issued in that appeal, and this court's decision affirming the district court's remand order is final. *See Dunson v. Cordis Corp.*, 854 F.3d 551, 557 (9th Cir. 2017). Accordingly, the stay of proceedings in this petition is lifted.

Petitioner's motion to continue to hold this petition for permission to appeal in abeyance (Docket Entry No. 6) is denied.

The petition for permission to appeal pursuant to 28 U.S.C. § 1453(c) is denied. *See Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096, 1100 (9th Cir. 2010).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: June 14, 2017]

No. 16-80150
D.C. No. 3:16-cv-03088-EMC
Northern District of California, San Francisco

LISA OEHRING; *et al.*,

Plaintiffs-Respondents,

v.

CORDIS CORPORATION,

Defendant-Petitioner.

ORDER

Before: CANBY and MURGUIA, Circuit Judges.

On February 13, 2017, the court held this petition for permission in abeyance pending the resolution of appeal No. 17-15257 (formerly petition No. 16-80139), *Jerry Dunson, et al. v. Cordis Corporation*. The mandate has issued in that appeal, and this court's decision affirming the district court's remand order is final. *See Dunson v. Cordis Corp.*, 854 F.3d 551, 557 (9th Cir. 2017). Accordingly, the stay of proceedings in this petition is lifted.

Petitioner's motion to continue to hold this petition for permission to appeal in abeyance (Docket Entry No. 6) is denied.

The petition for permission to appeal pursuant to 28 U.S.C. § 1453(c) is denied. *See Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096, 1100 (9th Cir. 2010).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: June 14, 2017]

No. 16-80151
D.C. No. 3:16-cv-03080-EMC
Northern District of California, San Francisco

HEATHER QUINN; *et al.*,

Plaintiffs-Respondents,

v.

CORDIS CORPORATION,

Defendant-Petitioner.

ORDER

Before: CANBY and MURGUIA, Circuit Judges.

On February 13, 2017, the court held this petition for permission in abeyance pending the resolution of appeal No. 17-15257 (formerly petition No. 16-80139), *Jerry Dunson, et al. v. Cordis Corporation*. The mandate has issued in that appeal, and this court's decision affirming the district court's remand order is final. *See Dunson v. Cordis Corp.*, 854 F.3d 551, 557 (9th Cir. 2017). Accordingly, the stay of proceedings in this petition is lifted.

Petitioner's motion to continue to hold this petition for permission to appeal in abeyance (Docket Entry No. 6) is denied.

The petition for permission to appeal pursuant to 28 U.S.C. § 1453(c) is denied. *See Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096, 1100 (9th Cir. 2010).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: June 14, 2017]

No. 16-80152
D.C. No. 3:16-cv-03082-EMC
Northern District of California, San Francisco

DAVID RESOVSKY; *et al.*,

Plaintiffs-Respondents,

v.

CORDIS CORPORATION,

Defendant-Petitioner.

ORDER

Before: CANBY and MURGUIA, Circuit Judges.

On February 13, 2017, the court held this petition for permission in abeyance pending the resolution of appeal No. 17-15257 (formerly petition No. 16-80139), *Jerry Dunson, et al. v. Cordis Corporation*. The mandate has issued in that appeal, and this court's decision affirming the district court's remand order is final. *See Dunson v. Cordis Corp.*, 854 F.3d 551, 557 (9th Cir. 2017). Accordingly, the stay of proceedings in this petition is lifted.

Petitioner's motion to continue to hold this petition for permission to appeal in abeyance (Docket Entry No. 4) is denied.

The petition for permission to appeal pursuant to 28 U.S.C. § 1453(c) is denied. *See Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096, 1100 (9th Cir. 2010).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: June 14, 2017]

No. 16-80153
D.C. No. 3:16-cv-04012-EMC
Northern District of California, San Francisco

LESLIE-ELAINE SUTTON; *et al.*,

Plaintiffs-Respondents,

v.

CORDIS CORPORATION,

Defendant-Petitioner.

ORDER

Before: CANBY and MURGUIA, Circuit Judges.

On February 13, 2017, the court held this petition for permission in abeyance pending the resolution of appeal No. 17-15257 (formerly petition No. 16-80139), *Jerry Dunson, et al. v. Cordis Corporation*. The mandate has issued in that appeal, and this court's decision affirming the district court's remand order is final. *See Dunson v. Cordis Corp.*, 854 F.3d 551, 557 (9th Cir. 2017). Accordingly, the stay of proceedings in this petition is lifted.

Petitioner's motion to continue to hold this petition for permission to appeal in abeyance (Docket Entry No. 6) is denied.

The petition for permission to appeal pursuant to 28 U.S.C. § 1453(c) is denied. *See Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096, 1100 (9th Cir. 2010).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: February 13, 2017]

No. 16-80140
D.C. No. 3:16-cv-03086-EMC
Northern District of California, San Francisco

MICHAEL BARBER; *et al.*,

Plaintiffs-Respondents,

v.

CORDIS CORPORATION,

Defendant-Petitioner.

ORDER

This petition for permission to appeal pursuant to 28 U.S.C. § 1453(c) and all pending motions shall be held in abeyance pending resolution of *Jerry Dunson, et al. v. Cordis Corporation*, No 16-80139.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Tamara Fisher
Deputy Clerk
Ninth Circuit Rule 27-7

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: February 13, 2017]

No. 16-80141
D.C. No. 3:16-cv-05055-EMC
Northern District of California, San Francisco

STACEY ELLIOT; *et al.*,

Plaintiffs-Respondents,

v.

CORDIS CORPORATION,

Defendant-Petitioner.

ORDER

This petition for permission to appeal pursuant to 28 U.S.C. § 1453(c) and all pending motions shall be held in abeyance pending resolution of *Jerry Dunson, et al. v. Cordis Corporation*, No 16-80139.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Tamara Fisher
Deputy Clerk
Ninth Circuit Rule 27-7

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: February 13, 2017]

No. 16-80142
D.C. No. 3:16-cv-04409-EMC
Northern District of California, San Francisco

DAVID GARRY; *et al.*,

Plaintiffs-Respondents,

v.

CORDIS CORPORATION,

Defendant-Petitioner.

ORDER

This petition for permission to appeal pursuant to 28 U.S.C. § 1453(c) and all pending motions shall be held in abeyance pending resolution of *Jerry Dunson, et al. v. Cordis Corporation*, No 16-80139.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Tamara Fisher
Deputy Clerk
Ninth Circuit Rule 27-7

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: February 13, 2017]

No. 16-80144
D.C. No. 3:16-cv-03083-EMC
Northern District of California, San Francisco

GEANICE GRANT; *et al.*,

Plaintiffs-Respondents,

v.

CORDIS CORPORATION,

Defendant-Petitioner.

ORDER

This petition for permission to appeal pursuant to 28 U.S.C. § 1453(c) and all pending motions shall be held in abeyance pending resolution of *Jerry Dunson, et al. v. Cordis Corporation*, No 16-80139.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Tamara Fisher
Deputy Clerk
Ninth Circuit Rule 27-7

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: February 13, 2017]

No. 16-80145
D.C. No. 3:16-cv-05199-EMC
Northern District of California, San Francisco

HELEN HALL AND SAMMY HALL,

Plaintiffs-Respondents,

v.

CORDIS CORPORATION,

Defendant-Petitioner.

ORDER

This petition for permission to appeal pursuant to 28 U.S.C. § 1453(c) and all pending motions shall be held in abeyance pending resolution of *Jerry Dunson, et al. v. Cordis Corporation*, No 16-80139.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Tamara Fisher
Deputy Clerk
Ninth Circuit Rule 27-7

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: February 13, 2017]

No. 16-80146
D.C. No. 3:16-cv-03085-EMC
Northern District of California, San Francisco

WALTER HERBERT; *et al.*,

Plaintiffs-Respondents,

v.

CORDIS CORPORATION,

Defendant-Petitioner.

ORDER

This petition for permission to appeal pursuant to 28 U.S.C. § 1453(c) and all pending motions shall be held in abeyance pending resolution of *Jerry Dunson, et al. v. Cordis Corporation*, No 16-80139.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Tamara Fisher
Deputy Clerk
Ninth Circuit Rule 27-7

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: February 13, 2017]

No. 16-80147
D.C. No. 3:16-cv-03087-EMC
Northern District of California, San Francisco

WANDA HOLDEN; *et al.*,

Plaintiffs-Respondents,

v.

CORDIS CORPORATION,

Defendant-Petitioner.

ORDER

This petition for permission to appeal pursuant to 28 U.S.C. § 1453(c) and all pending motions shall be held in abeyance pending resolution of *Jerry Dunson, et al. v. Cordis Corporation*, No 16-80139.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Tamara Fisher
Deputy Clerk
Ninth Circuit Rule 27-7

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: February 13, 2017]

No. 16-80148
D.C. No. 3:16-cv-04608-EMC
Northern District of California, San Francisco

THELMA LESCH; *et al.*,

Plaintiffs-Respondents,

v.

CORDIS CORPORATION,

Defendant-Petitioner.

ORDER

This petition for permission to appeal pursuant to 28 U.S.C. § 1453(c) and all pending motions shall be held in abeyance pending resolution of *Jerry Dunson, et al. v. Cordis Corporation*, No 16-80139.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Tamara Fisher
Deputy Clerk
Ninth Circuit Rule 27-7

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: February 13, 2017]

No. 16-80149
D.C. No. 3:16-cv-04819-EMC
Northern District of California, San Francisco

CHARLES HENRY LEWIS; *et al.*,

Plaintiffs-Respondents,

v.

CORDIS CORPORATION,

Defendant-Petitioner.

ORDER

This petition for permission to appeal pursuant to 28 U.S.C. § 1453(c) and all pending motions shall be held in abeyance pending resolution of *Jerry Dunson, et al. v. Cordis Corporation*, No 16-80139.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Tamara Fisher
Deputy Clerk
Ninth Circuit Rule 27-7

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: February 13, 2017]

No. 16-80150
D.C. No. 3:16-cv-03088-EMC
Northern District of California, San Francisco

LISA OEHRING; *et al.*,

Plaintiffs-Respondents,

v.

CORDIS CORPORATION,

Defendant-Petitioner.

ORDER

This petition for permission to appeal pursuant to 28 U.S.C. § 1453(c) and all pending motions shall be held in abeyance pending resolution of *Jerry Dunson, et al. v. Cordis Corporation*, No 16-80139.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Tamara Fisher
Deputy Clerk
Ninth Circuit Rule 27-7

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: February 13, 2017]

No. 16-80151
D.C. No. 3:16-cv-03080-EMC
Northern District of California, San Francisco

HEATHER QUINN; *et al.*,

Plaintiffs-Respondents,

v.

CORDIS CORPORATION,

Defendant-Petitioner.

ORDER

This petition for permission to appeal pursuant to 28 U.S.C. § 1453(c) and all pending motions shall be held in abeyance pending resolution of *Jerry Dunson, et al. v. Cordis Corporation*, No 16-80139.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Tamara Fisher
Deputy Clerk
Ninth Circuit Rule 27-7

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: February 13, 2017]

No. 16-80152
D.C. No. 3:16-cv-03082-EMC
Northern District of California, San Francisco

DAVID RESOVSKY; *et al.*,

Plaintiffs-Respondents,

v.

CORDIS CORPORATION,

Defendant-Petitioner.

ORDER

This petition for permission to appeal pursuant to 28 U.S.C. § 1453(c) and all pending motions shall be held in abeyance pending resolution of *Jerry Dunson, et al. v. Cordis Corporation*, No 16-80139.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Tamara Fisher
Deputy Clerk
Ninth Circuit Rule 27-7

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: February 13, 2017]

No. 16-80153
D.C. No. 3:16-cv-04012-EMC
Northern District of California, San Francisco

LESLIE-ELAINE SUTTON; *et al.*,

Plaintiffs-Respondents,

v.

CORDIS CORPORATION,

Defendant-Petitioner.

ORDER

This petition for permission to appeal pursuant to 28 U.S.C. § 1453(c) and all pending motions shall be held in abeyance pending resolution of *Jerry Dunson, et al. v. Cordis Corporation*, No 16-80139.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Tamara Fisher
Deputy Clerk
Ninth Circuit Rule 27-7

APPENDIX C

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.

---

[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

---

[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

---

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 D

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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

---

* 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

Andrew D. Kaplan (argued) and Rebecca Baden Chaney, Crowell & Moring LLP, Washington, D.C.; Kevin C. Mayer, Crowell & Moring LLP, San Francisco, California; for Defendant-Appellant.

Troy A. Brenes (argued), Brenes Law Group P.C., Aliso Viejo, California, for Plaintiffs-Appellees.

Richard A. Samp and Mark S. Chenoweth, Washington, D.C., as and for Amicus Curiae Washington Legal Foundation.

Alan J. Lazarus, Drinker Biddle & Reath LLP, San Francisco, California; Hugh F. Young, Jr., Product Liability Advisory Council, Reston, Virginia; for Amicus Curiae Product Liability Advisory Council, Inc.

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 E

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.

---

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

APPENDIX F

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 G

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.

---

[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

---

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 H

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 I

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 J

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.