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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSEPH W. GILBERT, a single individual; LINDA DOWNING, a single individual; JOYCE M. McQUEEN, a single individual; WILLIAM K. STACY, a single individual; DOLORES L. WALTERS, a single individual; DOROTHY J. WHITLOCK, a single individual; KATHY M. TOMBERLIN and STEVE TOMBERLIN, wife and husband; KRISHRAM GOBERDHAN and DHANDAI GOBERDHAN, wife and husband; and NICOLAS MARQUEZ and SANDRA MARQUEZ, husband and wife,

Plaintiffs,

v.

ASTRAZENECA PHARMACEUTICALS LP; ASTRAZENECA, LP; MCKESSON CORPORATION, and DOES 1-50,

Defendants.

Case No. 2:14-cv-4012

NOTICE OF REMOVAL

28 U.S.C. § 1332(d)(2), (d)(11)(B)(i) (CLASS ACTION FAIRNESS ACT)

Defendants AstraZeneca Pharmaceuticals LP and AstraZeneca LP (collectively, "AstraZeneca" or "Defendants"), by their undersigned attorneys, hereby file this Notice of Removal of this action from the Superior Court of California, County of Los Angeles to the United States District Court for the Central District of California, Western Division.

Subject matter jurisdiction exists under the Class Action Fairness Act of 2005 (28 U.S.C. §§ 1332(d), 1453 ("CAFA")) as a mass action because plaintiffs propose trying jointly the claims of more than 100 persons and the amount in controversy is met. This Notice of Removal is filed pursuant to 28 U.S.C. §§ 1332(d), 1446, and 1453 on the facts stated below.

I. FACTUAL BACKGROUND

1. Plaintiffs sued AstraZeneca and McKesson in the Superior Court of the State of California in the County of Los Angeles alleging that either they or their spouse sustained injuries as a result of ingesting Crestor®. *See* Complaint, attached as Exhibit 1 to this Notice of Removal.

2. On April 30, 2014, Co-Lead Counsel for Plaintiffs filed a request to add this action ("Add-on Request") to the "*Crestor Product Liability Cases*, JCCP No. 4713" ("Crestor® Coordinated Proceeding"), which was established in California state court so that one judge could handle for all purposes all coordinated cases involving allegation of injury from the ingestion of Crestor®. *See* Add-on Request, attached as Exhibit A to the Declaration of Steven D. Park ("Park Decl."). By way of this request to add these cases to a coordinated proceeding before one Coordination Trial Judge, these twelve (12) plaintiffs propose to try jointly their claims with the claims of five-hundred, ninety-three (593) other coordinated Crestor® claimants. *See id*.

3. The Add-on Request, which is supported by Co-Lead Counsel for Plaintiffs' declaration under oath, seeks coordination of this action before "[o]ne judge . . . **for all purposes** . . . [to] promote the ends of justice." *See id*. at 3

(emphasis added). Under California Code of Civil Procedure § 404.1, coordination is appropriate only when "one judge hear[s] all of the actions for all purposes." Plaintiffs confirm that "[t]he Add-On Case . . . involves many of the same questions of fact and law" as in the Crestor® Coordinated Proceeding, as "[t]he factual allegations, causes of action, and alleged damages are . . . similar, if not identical, with the exception of the plaintiffs' names and injury details." *See id.* at 4.

4. Specifically, the Add-on Request identifies eight (8) "common questions of law and fact which plaintiffs assert predominate and are of critical significance in all of the Crestor cases" including whether:

- Crestor was defectively designed or manufactured;
- defendants failed to adequately warn;
- defendants' conduct fell below the applicable duties of care;
- defendants intentionally concealed or suppressed risks;
- defendants breached any warranties;
- defendants' conduct constituted negligence;
- plaintiffs are entitled to damages; and
- defendants are liable for punitive damages.

Id.

5. Plaintiffs, who hail from forty-eight (48) states and Puerto Rico, are proposing that all of the individuals' claims included in the cases listed below be tried jointly in California state court:

	Case Name (Lead Plaintiff)	No. of California Plaintiffs	No. of Non-California Plaintiffs (States/Terr. of Residence)	Total Plaintiffs
1.	*Albitre*	2	14—PA, VA, WA, WV	16
2.	*Austin*	0	2—LA	2
3.	*Bartal*	2	4—AZ, PR, WA	6

	Case Name (Lead Plaintiff)	No. of California Plaintiffs	No. of Non-California Plaintiffs (States/Terr. of Residence)	Total Plaintiffs
4.	*Bhojani*	0	14—AL, AR, FL, GA, NC, OK, SC, WV	14
5.	*Chacon*	2	9—KY, NM, OH, UT, SC	11
6.	*Cirillo*	1	48—AL, CO, FL, GA, IN, KY, LA, MO NC, OK, SC, TN, WV	49
7.	*Enriquez*	1	33—CO, IO, KY, LA, MS, OH, TN, TX	34
8.	*Estrada*	1	48—AL, KY, LA, PR	49
9.	*Forrester*	2	29—AZ, AR, CT, IA, MI, MO, MS, NM, OH, OK, SC, TX, VA	31
10.	*Gilbert*	3	9—CO, FL, MT, NC	12
11.	*Golden*	2	15—HI, IA, NJ, NM, NV, NY, OH	17
12.	*Heller*	1	34—AL, KY, LA, PR	35
13.	*Herrera*	1	11—AL, AR, GA, MN, NC, OR, TX	12
14.	*Macias*	1	44—AL, CO, FL, KS, MS, OK, MT, NC, TX, VA, WV	45
15.	*Mendez*	1	20—AL, AZ, OR, WA	21
16.	*Mendikian*	66	1—FL	67
17.	*Miniz*	2	8—IL, IN, OR, TX	10
18.	*Nestande*	2	0	2
19.	*Newman, D.*	1	30—AL, DE, ID, KY, NC, NY, VA	31
20.	*Norris*	1	0[1]	1
21.	*Rivera*	1	20—AL, PR	21
22.	*Sawyer*	1	8—AL, AR, CA, GA, WV	9
23.	*Schultz*	1	15—AL, AZ, FL, KY	16
24.	*Taylor*	3	11—LA, OK, TN, TX, UT	14

[1] The eight non-California plaintiffs in *Norris* have been dismissed based on *forum non-conveniens*. *See* Norris Dismissal Order, attached as Exhibit C to Park Decl.

	Case Name (Lead Plaintiff)	No. of California Plaintiffs	No. of Non-California Plaintiffs (States/Terr. of Residence)	Total Plaintiffs
25.	*Walker*	2	59—KY, LA, TN	61
26.	*Webb*	3	16—GA, MI, MO, MS, NC	19
	Totals / Category	103 (California)	502 (Non-California)	605

II. RELEVANT STATUTORY AND CASE LAW

A. CAFA Allows Removal of Cases When 100 or More Persons Propose to Try Their Cases Jointly

6. By enacting CAFA, Congress authorized the removal of certain class actions from state to federal court. Congress's primary objective was to ensure "Federal court consideration of interstate cases of national importance." *Standard Fire Ins. Co. v. Knowles*, 133 S.Ct. 1345, 1350 (2013) (internal quotation marks omitted). To this end, CAFA also provides for the removal of "mass actions" that do not qualify as traditional class actions, *see* Fed.R.Civ.P. 23, but which otherwise meet CAFA's criteria. *See Visendi v. Bank of Am., N.A.*, 733 F.3d 863, 867 (9th Cir.2013); *see also* 28 U.S.C. § 1332(d)(11)(A), (B). Specifically, a matter is removable as a mass action if:

a. It involves the monetary relief claims of 100 or more persons that are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact (*see* 28 U.S.C. § 1332(d)(11)(B)(i));

b. The aggregate amount in controversy exceeds $5,000,000, although jurisdiction exists only as to those plaintiffs whose claims exceed $75,000 (*see* §§ 1332(a), (d)(2), (d)(11)(B)(i)); and

c. Any plaintiff is a citizen of a State different from any defendant (*see* 28 U.S.C. § 1332(d)(2)A)).

B. The Seventh and Eighth Circuits Have Upheld Removal Under CAFA Where There is a Request to Consolidate or Coordinate Separate Cases Through Trial

7. The Seventh and Eighth Circuits recently held that claimants who file separate lawsuits with fewer than 100 plaintiffs in each complaint, but then seek to coordinate or consolidate their cases through trial such that they combine to involve 100 or more plaintiffs, are requesting to try their claims jointly and are subject to removal under CAFA. *See In re Abbott Labs., Inc.*, 698 F.3d 568, 572 (7th Cir. 2012); *see also Atwell v. Boston Scientific Corp.*, 740 F.3d 1160, 1163 (8th Cir. 2013).

8. In *Abbott*, the Seventh Circuit found that the plaintiffs requested the actions to be tried jointly because they sought consolidation "through trial" and asserted that consolidation "through trial 'would also facilitate the efficient disposition of a number of universal and fundamental substantive questions applicable to all or most Plaintiffs' cases *without the risk of inconsistent adjudication* in those issues between various courts.'" *Abbott*, 698 F.3d at 573 (citation omitted). The Seventh Circuit rejected the argument that jurisdiction under CAFA requires a proposal for a single trial of the claims of 100 or more persons. It concluded that "it is difficult to see how a trial court could consolidate the case as requested by plaintiffs and not hold a joint trial or an exemplar trial with the legal issues applied to the remaining cases." *Id.* "In either situation, plaintiffs' claims would be tried jointly." *Id.*

9. The Eighth Circuit in *Atwell*, 740 F.3d at 1163, a medical device products liability case, also recognized mass action jurisdiction where plaintiffs in three separate Missouri state court actions of less than 100 plaintiffs each, but more than 100 in the aggregate, moved to transfer their cases "to a single Judge for purposes of discovery and trial." The Eighth Circuit found that plaintiffs had proposed the actions be tried jointly by urging transfer "to a single judge who could 'handle these cases for consistency of rulings, judicial economy, [and]

administration of justice.'" *Id.* at 1164-65. The Eighth Circuit concluded that, "[a]s in *Abbott Labs*, 'it is difficult to see how a trial court could consolidate the cases as requested by plaintiffs and not hold a joint trial or an exemplar trial with the legal issues applied to the remaining cases,'" and the cases were therefore removable as a mass action. *Id.* at 1165-66 (quoting *Abbott*, 698 F.3d at 573).

C. The Order to Rehear the *Romo* Case *En Banc* Signals that the Ninth Circuit May Reverse Earlier Precedent and Align Itself With the Seventh and Eighth Circuits

10. Although the Ninth Circuit's earlier interpretation of CAFA is in stark contrast to the Seventh and Eighth Circuits, the Ninth Circuit may reverse and align itself with its sister circuits when it rules *en banc* in *Romo v. Teva Pharm. USA, Inc.*, No. 13-56310, Dkt. 74 (9th Cir. Feb. 10, 2014).

11. From 2009, the Ninth Circuit has interpreted CAFA to confer removal jurisdiction only when plaintiffs propose that the claims of 100 or more persons be tried simultaneously in a single trial. *See Tanoh v. Dow Chem. Co.*, 561 F.3d 945 (9th Cir. 2009). In *Tanoh*, the defendant, Dow Chemical, removed seven actions—each with fewer than one hundred plaintiffs—arguing that federal jurisdiction was appropriate under the mass action provision of CAFA. *See Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 951 (9th Cir. 2009). The Ninth Circuit, however, held that the seven cases could not be removed believing that CAFA excludes cases consolidated or coordinated when the trial itself would not address the claims of at least one hundred plaintiffs simultaneously. *See id.* at 954.

12. Based on the Ninth Circuit's decision in *Tanoh*, District Courts in both the Central and Northern Districts of California uniformly remanded cases where defendants removed after plaintiffs filed a petition seeking to coordinate their cases "for all purposes" before one judge. *See, e.g., Freitas v. McKesson Corp.*, 2013 WL 685200 (N.D. Cal.) ("No matter how convincing Defendants find the Seventh Circuit's reasoning [in *Abbott*], the Court is bound by . . . *Tanoh*"); *Brandle v. McKesson Corp.*, 2013 WL 1294630 (N.D. Cal.); *Rentz v. McKesson*

Corp., 2013 WL 645634 (C.D. Cal.); *Posey v. McKesson Corp.*, 2013 WL 361168 (N.D. Cal.); *Rice v. McKesson Corp.*, 2013 WL 97738 (N.D. Cal.); *Gutowski v. McKesson Corp.*, 2013 WL 675540 (N.D. Cal.); *Caouette v. Bristol-Myers Squibb Co.*, 2012 WL 1294630 (N.D. Cal.).

13. Similarly, a divided panel of the Ninth Circuit held that requests for coordination of cases that each have fewer than 100 plaintiffs but in the aggregate include claims of 100 or more persons do not constitute a proposal to try the cases jointly because its main focus was on pretrial matters. *See Romo v. Teva Pharm. USA, Inc.*, 731 F.3d 918, 921 (9th Cir. 2013) (no longer citable due to *Romo v. Teva Pharm. USA, Inc.*, No. 13-56310, Dkt. 74 (9th Cir. Feb. 10, 2014)).

14. The Ninth Circuit's February 10, 2014 order to rehear *en banc* the *Romo* panel decision may signal a forthcoming change in Ninth Circuit law to recognize the right to removal in circumstances such as presented in this case, when previous Ninth Circuit law foreclosed such removal. *See Romo*, No. 13-56310, Dkt. 74 (also ordering that the panel opinion "shall not be cited as precedent by or to any court of the Ninth Circuit"). The *Romo en banc* decision is set for hearing in the week of June 16, 2014. *See id.*

D. A Defendant Has 30 Days From Receipt of an "Other Paper" to Remove a Case

15. The thirty (30) day removal period starts to run upon defendant's receipt of an "amended pleading, motion, order or *other paper* from which it may first be ascertained that the case is . . . removable." 28 U.S.C. § 1446(b) (emphasis added).

16. A change in the law does not constitute an order or other paper except in limited circumstances not applicable here. Both the Fifth and Third Circuits explained that an unrelated court decision does not constitute an "order or other paper" and, instead, only carved out a limited exception which would not apply here—*viz.*, that an unrelated judicial decision can be an "order" for purposes of

removal if the case in which the decision was rendered "involve[ed] the same defendants, and a similar factual situation and legal issue." *Green v. R.J. Reynolds Tobacco Co.*, 274 F.3d 263, 268 (5th Cir.2001); *see also Doe v. American Red Cross*, 14 F.3d 196 (3d Cir.1993).

III. GROUNDS FOR REMOVAL

A. This Case is Removable Under CAFA as a Mass Action Because the Claims of More Than 100 Plaintiffs Are Proposed to be Tried Jointly

17. By filing the Add-on Request,[2] plaintiffs proposed that their claims be combined "for all purposes," including for trial, and thus proposed that their claims "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). CAFA does not require that claims be proposed to be tried jointly *at the same time* or *in a single trial*. 28 U.S.C. § 1332(d)(11)(B)(i). If it did, then it would be almost impossible for any case to qualify as a mass action because courts usually do not hold trials with 100 or more plaintiffs at a time. *See Atwell*, 740 F.3d at 1163 (concluding that "construing [CAFA] to require a single trial of more than 100 claims would render 28 U.S.C. § 1332(d)(11) 'defunct'").

18. Here, like in *Abbott* and *Atwell*, it is difficult to see how a trial court could coordinate the Crestor® cases and not hold an exemplar trial with the legal issues applied to the remaining cases. Plaintiffs raise many common questions of law and fact in the Crestor cases, such as whether "there are design and/or manufacturing defects" and whether "defendants failed to adequately warn." Add-on Request, at p. 4-5 (listing 8 common questions of law and fact). A finding in one case that a design or manufacturing defect existed or that Defendants failed to warn would apply to the trials of all other cases involving the same time period.

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[2] California Rules of Court require that a request to coordinate an add-on case must comply with the same requirements of a petition for coordination. *See* Cal. R. Court 3.544(a).

Plaintiffs' proposal to join these cases for all purposes before one coordination trial judge for consistent adjudication of these ultimate issues is, thus, a request that the actions be tried jointly.

19. Removal of coordinated actions manifests CAFA's objectives of ensuring "Federal Court consideration of interstate cases of national importance." *Standard Fire Insurance Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013). These Crestor® matters are of national importance as evidenced by the fact that plaintiffs hail from forty-eight (48) states and Puerto Rico. Thus, these cases are exactly the type of large-stakes, multi-state actions, affecting significant number of individuals that CAFA seeks to confer Federal Court consideration.

B. This Removal is Timely

20. On April 30, 2014, Co-Lead Counsel for Plaintiffs served Defendants with the Add-on Request—i.e., the "other paper." Defendants filed this Notice of Removal within thirty (30) days after receiving the Add-on Request thereby complying with the requirement to file a Notice of Removal within thirty (30) days of receipt of an "other paper." *Id.*

21. Defendants also could not have removed any action already included in the Crestor® Coordinated Proceeding prior to February of 2014 when the Ninth Circuit issued its order granting the *en banc* rehearing of Romo. As discussed *supra* in ¶¶ 10-14, prior to the Feb. 10, 2014 order from the Ninth Circuit granting an *en banc* rehearing in *Romo*, Ninth Circuit precedent was clear that Defendants could not remove any of the actions included in the Crestor® Coordinated Proceeding. *See e.g.*, *Tanoh*, 561 F.3d at 945; *Freitas*, 2013 WL 685200; *Brandle*, 2013 WL 1294630; *Rentz*, 2013 WL 645634; *Posey*, 2013 WL 361168; *Rice*, 2013 WL 97738; *Gutowski*, 2013 WL 675540; *Caouette*, 2012 WL 1294630. The Add-on Request is the first "other paper" received since February 2014.

C. This Court Should Wait Until the Ninth Circuit Issues Its *En Banc* Decision In *Romo* Before Determining Any Issue of Subject Matter Jurisdiction inThis Case

22. Given the split of the Ninth Circuit panel in *Romo* and the grant of *en banc* review, this Court should stay this matter pending the outcome of the Ninth Circuit *en banc* decision in *Romo.*[3]

23. Indeed, courts have commented that Judge Ronald Gould's analysis in his *Romo* dissent—that a petition of 100 or more claimants seeking coordination of their cases "for all purposes" subjects those cases to CAFA jurisdiction—is more persuasive. *See In re: Avandia Marketing, Sales Practices and Products Liability Litigation*, MDL No. 1871 (May 15, 2014) (the Avandia MDL Court stating that it "was more persuaded by the reasoning of [Judge Gould's] dissent [in *Romo*] as it applies to a case where plaintiffs actually proposed a joint trial."); *see also Atwell*, 740 F.3d at 1165 ("We agree with Abbott Labs and with Judge Gould's interpretation of the statute and the *Abbott Labs* decision.").

D. The Amount in Controversy is Satisfied

24. Both the individual $75,000 and aggregate $5,000,000 amount in controversy requirements for mass action removal are satisfied. *See* 28 U.S.C. §§ 1332(a), (d)(2), (d)(11)(B)(i).

25. Although Defendants dispute any liability, it is apparent on the face of the Complaints that Plaintiffs seek an amount in excess of $75,000, exclusive of interest and costs.

26. Plaintiffs allege that, as a result of their ingestion of Crestor®, they suffer from one or more of four types of injuries: (a) diabetes mellitus, type 2; (b) cardiovascular injuries; (c) rhabdomyolysis; and (d) kidney and liver damage. *See* Park Decl., ¶ 5. Plaintiffs characterize these diseases as "life-threatening side of effects" of ingesting Crestor®. *See* Park Decl. ¶ 6.

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[3] Defendants therefore intend to file a motion to stay on this basis.

27. All Plaintiffs allege that their injuries are "permanent and will continue into the future." *See* Park Decl. ¶ 6.

28. All Plaintiffs seek compensatory and punitive damages. *See* Park Decl. ¶ 7. Punitive damages are included in the calculation of the amount in controversy. *See Bell v. Preferred Life Assurance Society*, 320 U.S. 238, 240 (1943).

29. Given the allegations set forth above, the face of each Complaint makes clear that each Plaintiff seeks in excess of $75,000, exclusive of interest and costs. *See Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir. 1996). Indeed, of the plaintiffs who have answered discovery on the amount-in-controversy prior to the state court stay, every one of them has admitted that they seek more than $75,000, exclusive of interests and costs. *See* Park Decl. ¶ 8; *see also* Plaintiffs' Answers to Requests for Admissions, attached as Exhibit D to Park Decl.

30. Further, because each individual Plaintiff's claim exceeds $75,000, the aggregate amount in controversy for this mass action, which embraces the claims of more than 605 individual plaintiffs, necessarily exceeds $5,000,000 because $75,000 multiplied by 605 is $45,375,000.

E. The Minimum Diversity Requirement Is Satisfied

31. The diversity requirements for mass action removal are met. *See* 28 U.S.C. § 1332(d)(2)(A). Unlike the traditional diversity removal, which requires complete diversity between plaintiffs and defendants, only "minimal diversity" is required to remove a mass action—i.e., that any one plaintiff be a citizen of a State different from any defendant. *See id*. Under CAFA, unincorporated associations are deemed to be citizens of the state where it maintains its principle place of business and the state under whose laws it is organized. *See* 28 U.S.C. § 1332(d)(10).

32. Defendant AstraZeneca Pharmaceuticals LP is a Delaware limited

partnership that has its principal place of business in Delaware. Thus, for jurisdictional purposes under CAFA, AstraZeneca Pharmaceuticals LP is a citizen of Delaware.

33. Plaintiff Linda Downing is a citizen and resident of the State of Montana.

34. Accordingly, the minimum diversity requirements of mass action removal are satisfied.

IV. DEFENDANTS HAVE SATISFIED THE PROCEDURAL REQUIREMENTS FOR REMOVAL

35. This action was coordinated as part of the Crestor® Coordinated Proceeding and is pending in the Superior Court of California, County of Los Angeles. Defendants are removing this action to the district and division embracing the place where the action is pending. *See* 28 U.S.C. §1441(a).

36. Pursuant to 28 U.S.C. § 1446(a), copies of all process, pleadings, and orders served on Defendants are attached to this Notice of Removal.

37. Pursuant to 28 U.S.C. § 1446(d), a Notice to Adverse Parties that includes a copy of this Notice of Removal is being served on counsel for all adverse parties and a copy is being filed with the Clerk of the Superior Court of California, County of Los Angeles.

WHEREFORE, Defendants respectfully remove this action from the Superior Court of the State of California, County of Los Angeles, to this Court. For the foregoing reasons, Defendants respectfully request that the Court stay any determination of whether remand is proper in this matter until a decision by the Ninth Circuit in the *en banc* proceedings in *Romo* is published.

DATED: May 26, 2014

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