

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: : MDL-07-1871

AVANDIA MARKETING, SALES : Philadelphia, Pennsylvania
PRACTICES and PRODUCTS : April 23, 2014
LIABILITY LITIGATION : 10:37 a.m.

TRANSCRIPT OF REMAND HEARINGS
BEFORE THE HONORABLE CYNTHIA M. RUFÉ
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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1 (The following was heard in open court at
2 10:37 a.m.)

3 THE COURT: Good morning.

4 MR. RESTAINO: Good morning, Your Honor.

5 THE COURT: Please be seated, everyone. All
6 right. Here we are with multiple motions to remand
7 Avandia cases that three different groups, grouped by
8 law firms by this Court.

9 We're addressing these motions, which all add
10 a defendant, that is McKesson, a distributor in
11 California, and the allegation common to these motions
12 is that the Foreign Defendant Rule should apply because
13 McKesson is a California resident and destroys
14 diversity. We need to address this.

15 This has be handled in like motions in the
16 Avandia MDL before several years ago, early in the
17 MDL's existence. Some of this territory is not new.
18 What is being raised now are two primary issues.

19 One being when GSK continued to remove these
20 cases that McKesson is fraudulently joined. Pure and
21 simple, the allegation is that nobody, that means
22 McKesson, does anything about moving forward to
23 prosecute those claims against McKesson, however they
24 may be filed and, however, they may be framed in the
25 complaints.

1 The other is a violation of CAFA. There are
2 circuits that are looking at that issue. One has
3 already opined on it, the Eighth. I think the Ninth
4 has a case right now. We did not rule on that issue.
5 That was raised by GSK in the earlier opinion because
6 it we thought had been abandoned, but that doesn't mean
7 it had been ruled on. So we will deal with that if
8 it's appropriate. But I really think that our focus
9 has got to be on the fraudulent joinder issue, and I
10 would like to begin there.

11 So let me first find out exactly who is here.
12 On behalf of the Restaino Siler motions, who is here?

13 MR. RESTAINO: Good morning, Your Honor, John
14 Restaino.

15 THE COURT: Good morning. Nice to meet you.

16 MR. RESTAINO: Nice to meet you.

17 THE COURT: And you have two such motions but
18 with multi-plaintiff cases?

19 MR. RESTAINO: That is correct.

20 THE COURT: Thank you, Mr. Restaino. We'll
21 get to that in a moment. I'm looking at those numbers
22 trying to go somewhat numerically. I don't think I
23 have anybody here from Napoli Bern. What would be the
24 problem? We certainly filed notice in that case as
25 well as the others. Have you heard anything addressing

1 GSK? Mr. Fahey?

2 MR. FAHEY: Your Honor, I had a brief
3 conversation with Mr. Shkolnik when we had a hearing in
4 California maybe three weeks ago, and we were talking
5 about the fact that this argument was coming up. I
6 know he started a trial in another matter in Chicago,
7 but I assume he has people from his firm that's going
8 to cover this argument.

9 THE COURT: We've received no correspondence
10 or inquiries and we know of no filing. Do you?

11 MS. BEASLEY: Well, actually, last week they
12 did file a notice of supplemental authority on a Tenth
13 Circuit case, the Parson case. So, I mean obviously
14 are aware --

15 THE COURT: But they have to be here.

16 MR. RESTAINO: Right.

17 MS. BEASLEY: Right.

18 THE COURT: I mean even when you're in
19 transit and your plane is late you contact the Court.
20 I don't wish to make any judgments about their ignoring
21 my court order, I don't think they are.

22 They know that this is an active briefing and
23 argument and hearing. This is actually a hearing.
24 It's not just oral argument. So we need to hear
25 evidence, and they would be losing their opportunity to

1 do that. But we'll check into that until we know more.
2 And we will then address Sail (ph) and Beasley motions,
3 and you are here on behalf of?

4 MS. BEASLEY: Barrett Beasley, yes.

5 THE COURT: Yes, thank you. All right. I
6 think that in terms of filing dates, Mr. Restaino, I
7 think we're going to ask you to address these first.
8 You have earlier dates, not that that really means
9 anything except I have to have some kind of order. So
10 we'll address your motions first.

11 MR. RESTAINO: Sure.

12 THE COURT: All right. And you did refile
13 your motions to remand that had been stayed in the
14 other district court?

15 MR. RESTAINO: Yes, Your Honor.

16 THE COURT: Okay. What would you like to
17 present today?

18 MR. RESTAINO: Well, Your Honor, I think
19 taking the lead of the Court, the seminal question is
20 the issue of the fraudulent joinder of McKesson. And
21 Restaino Siler cannot truly comment upon what was done
22 nor not done before we filed our cases regarding
23 discovery of McKesson.

24 But, now that we are involved and actively
25 involved in litigation, as others have done, we will be

1 conducting discovery of McKesson. I know such
2 discovery, in fact, has been done in other matters, and
3 my previous law firm of Lopez, Hodes, Restaino, Milman
4 & Sikos in Newport Beach, my ex-partner and good
5 friend, Ramon Lopez, has recently taken a deposition of
6 individuals from McKesson in another matter. It might
7 be the Predoxa (ph) matter, but I'm not 100 percent
8 sure it's Predoxa MDL.

9 So pending upon the ruling of the Court, it
10 is our intention to actively conduct discovery against
11 McKesson regarding what was known, when it was known,
12 what was shared and what was not shared. So we feel at
13 a little bit of a disadvantage in coming to the party
14 late and there being the --

15 THE COURT: That happens.

16 MR. RESTAINO: Yes.

17 THE COURT: The drinks are gone, you know,
18 the candy is decimated.

19 MR. RESTAINO: And in that situation,
20 forgiving the language, but someone has to make an
21 extra run to the liquor store. And I guess that, you
22 know, we are the late ones to the party, so if I have
23 to drive to get the fresh beer, then I will do that,
24 Your Honor.

25 THE COURT: Well, I admire good intentions.

1 GSK doesn't believe this because they have been told
2 that so many times. They have never seen it happen in
3 these cases where the McKesson entities are held to any
4 accountability as it is alleged in all of the
5 plaintiffs' complaints that come out of California. I
6 know that they're -- you know, California's permissive
7 Rules of Civil Procedure certainly permit that. We
8 have reviewed that thoroughly and opined on it a long
9 time ago.

10 But how old is this litigation? 2007 the MDL
11 was formed. Avandia cases existed prior to the fall of
12 2007 when we were appointed. We got things running in
13 early 2008 and now it's 2014, we still don't see
14 evidence of it. So you're saying that they're doing it
15 in California, but I don't know that.

16 MS. BEASLEY: Could I --

17 THE COURT: Not in the MDL.

18 MS. BEASLEY: Could I add something, Your
19 Honor? Actually, discovery has been propounded by
20 Napoli Bern in the JCCP recently.

21 THE COURT: Well, they're not here. Okay?

22 MS. BEASLEY: Okay. I'm just saying that --

23 THE COURT: I don't really want you to argue
24 for --

25 MS. BEASLEY: Okay.

1 THE COURT: -- your brethren.

2 MS. BEASLEY: I apologize.

3 THE COURT: There may come a time when that's
4 appropriate, Ms. Beasley, but not right now. And I
5 think I know who just walked in.

6 MR. BERMAN: Yes, I'm very sorry, Your Honor,
7 for being late. I got, unfortunately stuck on the
8 bridge and I couldn't call the port. My name is Steve
9 Berman. I'm from Napoli Bern Ripka & Shkolnik, and my
10 colleague is correct. We have not only propounded
11 discovery in the California litigation, but there's a
12 pending discovery motion before the Court to compel
13 production because McKesson has refused to respond to
14 our interrogatories and document demand and request for
15 admissions.

16 THE COURT: Well, that's very nice. Now I'm
17 going to let Mr. Restaino get back to arguing his own
18 cases, okay?

19 MR. BERMAN: Thank you. I'm sorry, Your
20 Honor.

21 THE COURT: Why don't you have a seat? And
22 I'm glad you're here.

23 MR. BERMAN: Thank you.

24 THE COURT: So is it a question of good
25 intentions or is it a question of late filers who

1 expect to reap -- let me be perfectly clear here. GSK
2 holds the position, as I read their papers and as I
3 have listened to these arguments before, if you expect
4 to reap the benefits of prior discovery and walk
5 yourselves into a trial here or in California -- well,
6 we wouldn't be trying your case without a lexicon
7 problem.

8 I'm just saying, how do you expect to
9 proceed? Since I've heard this evidence now, filing
10 interrogatories and propounding discovery doesn't
11 answer that because that can be prophylactic only and
12 that could be superficial. Nobody has settled with
13 McKesson and McKesson has not been held liable in any
14 court, have they, on any Avandia case?

15 MR. RESTAINO: I do not --

16 THE COURT: Right, Mr. Restaino?

17 MR. RESTAINO: I believe you are correct. I
18 do not believe there's been a trial, Your Honor.

19 THE COURT: And there hasn't been a
20 settlement involving them either, has there?

21 MR. RESTAINO: I don't know that.

22 THE COURT: Well, I'm sure that would be a
23 matter of record in California if nowhere else. I
24 think that would be very telling as to how valid a
25 defendant they really are to most people that are

1 filing against them in multiple cases in California.

2 MR. RESTAINO: Well, Your Honor --

3 THE COURT: Not just limited to this MDL?

4 MR. RESTAINO: Yes, and there are -- there
5 have been many, many cases filed previously, as the
6 Court has just gone through the chronology. And those
7 cases have either been dispensed with in one form or
8 another or they're still all pending. And it's not our
9 belief that they're all pending. So if they've been
10 dispensed with in some form, then either they have all
11 been just dismissed or they've been settled.

12 THE COURT: Right. And I'm not aware.

13 MR. RESTAINO: And --

14 THE COURT: I'm simply saying I'm not aware,
15 so if anybody has any evidence about how that they were
16 resolved, I'd like to hear it because this is the time
17 for me to not only hear your good intentions, Mr.
18 Restaino, and I accept that, but also what practical
19 steps are being taken to make your cases different from
20 every other one that this MDL has witnessed in the last
21 eight years.

22 MR. RESTAINO: Again, all I can really do is
23 reiterate, Your Honor, that there has been discovery
24 propounded, as Mr. Berman has shared. I know there
25 have been depositions taken in the past, and I am

1 meeting with that individual who took those depositions
2 next week.

3 It is our intention to drive to that
4 proverbial liquor store and bring back enough for the
5 party to continue in order for us to show our belief
6 that, in fact, there is still scientific evidence for
7 these cases to go forward.

8 THE COURT: I will give GSK the opportunity
9 to respond to each of these motions in a moment. I did
10 want to cover that there are certain of your plaintiffs
11 that have been identified as Delaware citizens?

12 MR. RESTAINO: I don't have first-hand
13 knowledge of that.

14 THE COURT: Oh, no plaintiffs have been
15 identified as citizens of Delaware. Okay. So all of
16 your plaintiffs are --

17 MR. RESTAINO: In various --

18 THE COURT: -- citizens of California?

19 MR. RESTAINO: In various jurisdictions.

20 THE COURT: Or two plaintiffs?

21 MR. RESTAINO: Some are in California.

22 THE COURT: You have two motions?

23 MR. RESTAINO: Yes, Your Honor.

24 THE COURT: And in each motion you have one
25 plaintiff that's a citizen of California?

1 MR. RESTAINO: Yes, Your Honor.

2 THE COURT: Okay. But the rest are citizens
3 of where?

4 MR. RESTAINO: Various different
5 jurisdictions, but I don't believe there are any in
6 Delaware.

7 THE COURT: Okay. Why don't you address the
8 class action argument now?

9 MR. RESTAINO: Well, Your Honor, as has been
10 handled many times in the past, these are the type of
11 cases that can be remanded back. The Class Action
12 Fairness Act has its specific requirements that we
13 don't feel and completely met with in this particular
14 case.

15 That has been raised and argued against, and
16 cases have been remanded back indicating that mass
17 torts like this do not necessarily fall under that. We
18 believe that, as put in our papers, that the Class
19 Action Fairness Act does not apply in this particular
20 case and these kind of cases do, in fact, belong in
21 California.

22 THE COURT: Well, when you file multiple
23 plaintiff cases in the numbers that you have --

24 MR. RESTAINO: Yes.

25 THE COURT: -- how are those cases actually

1 tried? How do they proceed to trial? Whether I remand
2 them en masse to California state court or whether I
3 don't, how are they tried, because in the MDL they
4 would be severed and proceed individually. But as you
5 filed it, the objective is apparently to proceed
6 together in discovery, together in motions, and at some
7 point how do you proceed to trial? What's the
8 mechanics of that?

9 MR. RESTAINO: The process in California,
10 which typically leads to a consolidation of cases, is
11 very much akin to what we see in the various MDLs in
12 which we've read, and that is the selection of a
13 bellwether process by which both sides can present
14 representative cases to the jury, to the judge, and the
15 decision can be made as to which one or more would go
16 forward first.

17 THE COURT: So you're saying that there are
18 mini MDLs created in California and they treat them as
19 organized state groups of trial?

20 MR. RESTAINO: That is correct. The acronym
21 is JCCP over the joint commission for the
22 consolidation. And the process works very, very
23 similar to the MDL process.

24 For example, in the recently concluding DePuy
25 ASR hip process we worked with the MDL and were

1 involved with the development there of which bellwether
2 cases were selected.

3 At the same time, on a similar track in San
4 Francisco there was the consolidated process for those
5 cases and cases were selected for trial and, in fact,
6 the trial process was begun. That has happened
7 throughout the history.

8 As I recall, going back to the mid-1990s
9 there was a separate track in California for the diet
10 pill litigation. Again, a JCCP was formed while some
11 of us worked in the MDL, including Diane and myself. I
12 won't say it in front of the -- Your Honor and say in
13 every case but -- gees, I'm hard pressed to find a case
14 where there was not a concurrent track in California or
15 elsewhere, but specifically in California, involving
16 the consolidation with a very similar process, not
17 Daubert per se, but Frye hearings, and then the
18 bellwether selection. Invariably, that has led to the
19 cases going away.

20 THE COURT: Yes, cases proceeding en masse
21 often end that way. However, the class action is a
22 slightly different animal, and collecting cases and
23 filing them together, collecting plaintiffs and filing
24 them together, looks like one thing but can be another.
25 And GSK is saying that this should be considered as a

1 potential class action, and thus must meet the
2 criteria.

3 MR. RESTAINO: And most courts have begun to
4 look with disfavor against class actions involving
5 personal injury because, putting aside numerosity, the
6 similarity of the injuries and/or damages is often held
7 to be so different in each particular case, therefore,
8 there are the two different legal animals, the classic
9 class action and the recognized mass tort, which would
10 lead to, as Your Honor understands, the multi-district
11 litigation. But they are very different.

12 In the mass tort world we do not have a
13 representative whose case is being tried that would
14 then lead to a settlement involving others with those
15 similar types of damages.

16 THE COURT: But how do you separate your
17 cases, because you only have one California resident
18 per motion. Per group --

19 MR. RESTAINO: Yes.

20 THE COURT: -- when you file you have one
21 California resident. How do you sever them out and
22 still maintain jurisdiction?

23 MR. RESTAINO: Well, under the Rules of
24 Procedure in California, we are allowed to file and
25 bundle the cases as we did.

1 THE COURT: To file it. But how do you try
2 those cases?

3 MR. RESTAINO: Again, with the judge during
4 the process of discovery and leading up to the
5 hearings, evidentiary hearings, and the trial
6 selection, then the group typically of plaintiff
7 lawyers and defense lawyers pick and select bellwether
8 cases that we submit to the judge and the judge then
9 makes the decision of how many will be tried at one
10 time, who shall go first, and then specific, case
11 specific discovery is conducted on that case as it gets
12 ready to go forward to trial. And a schedule can be
13 put forth, the first one would be July 1st. The next
14 bellwether will be September 1st with the various
15 Daubert-like Frye hearings, as it's referred to in
16 California, scheduled.

17 THE COURT: Well, I'm pretty familiar with
18 California in the Avandia MDL because Judge Burrell,
19 and before him, Judge Carolyn Kull, did coordinate with
20 my MDL and me in particular quite often. So, we know
21 the communication and the coordination issues, and we
22 felt that we worked very well together.

23 But, this is a separate issue that I'm
24 talking to you about. And I really do want to close
25 this particular argument by asking if you have any

1 documents or witnesses or any evidence you would like
2 to present at this time, Mr. Restaino.

3 MR. RESTAINO: I do not, Your Honor.

4 THE COURT: All right. Thank you very much.
5 Is there anything else you would like to tell me?

6 MR. RESTAINO: Not at this moment.

7 THE COURT: All right. I'll give you a
8 rebuttal after I hear from GSK. Thank you.

9 MR. RESTAINO: Thank you.

10 THE COURT: Mr. Fahey?

11 MR. FAHEY: Your Honor, I think we can
12 proceed in any way you wish. We put together a
13 PowerPoint just to organize our thoughts and it
14 addresses all of the plaintiffs' arguments together.
15 And so if it's okay with you, maybe they can all finish
16 and then we can speak and then they can do rebuttal?

17 THE COURT: That's probably very sensible.

18 MR. FAHEY: Okay.

19 THE COURT: Unless there's something in
20 particular you need to respond to now.

21 MR. FAHEY: I think we have all the issues
22 Mr. Restaino covered --

23 THE COURT: Okay.

24 MR. FAHEY: -- in our response already.

25 THE COURT: Would counsel agree?

1 COUNSEL: Fine.

2 THE COURT: All right. And as I repeated,
3 you will be given rebuttal time if you desire it. So,
4 Ms. Beasley, why don't you address your cases and your
5 motion?

6 MS. BEASLEY: Okay. Well, I'll just answer
7 the questions you had asked Mr. Restaino since
8 obviously those are issues that you find important.

9 For the fraudulent joinder, like Mr.
10 Restaino, I can't really speak to the strategy of the
11 JCCP leadership in the last few years. They might have
12 a legitimate reason for not doing discovery against
13 McKesson, I don't know. Their trial pool was rather
14 small. I think it was six. And maybe the plaintiffs
15 that were involved in those six trials did not have
16 Avandia that was distributed by McKesson. So I don't
17 know --

18 THE COURT: But McKesson was named in those
19 cases.

20 MS. BEASLEY: Right. But even at the time in
21 2009 when the motions to remand were in front of you
22 there was the possibility, because that was just the
23 pleading stage, that evidence would come out that
24 Avandia was not the distributor for every single
25 plaintiff and that was not reason enough to deny the

1 motion to remand.

2 So, out of the 12,000 plus plaintiffs that
3 had been involved in the Avandia JCCP, maybe not all of
4 them, and I don't know, I'm just speculating. I'm
5 trying to find a legitimate reason for the leadership
6 in the JCCP to not have done discovery against
7 McKesson. I don't know.

8 THE COURT: Well --

9 MS. BEASLEY: We have a JCCP in Plavix
10 pending in San Francisco Superior Court right now.
11 McKesson was named as a distributor. We're already
12 doing discovery on them. We're doing discovery on them
13 at the same time we're doing discovery on the
14 manufacturer.

15 THE COURT: But, that is a separate MDL and
16 has a separate course or a separate life, and each MDL
17 is very, very unique. And in Avandia we have a track
18 record. So we actually have to deal with Avandia here.
19 It's interesting to hear about other MDLs and some of
20 them going after McKesson aggressively early, but not
21 here. It simply hasn't happened here.

22 MS. BEASLEY: And I don't know why.

23 THE COURT: There's got to be a reason for
24 that.

25 MS. BEASLEY: I don't know why because I

1 wasn't involved. I wasn't in leadership. Personally,
2 I would have asked the same question if I was a
3 plaintiff attorney involved in the JCCP because
4 California law does permit products liability,
5 culpability for every entity in the chain of
6 distribution, including distributors. So, for strict
7 liability and negligence, so I'm baffled.

8 THE COURT: Well, it allows them to be named
9 as a defendant. It doesn't allow them to be scooped up
10 on and named in every single product liability
11 pharmaceutical. There's got to be a time when the
12 truth be told. And we don't sit here and defend
13 McKesson, we just wonder why other than a pleading
14 arrangement, it is done.

15 MS. BEASLEY: Well, I'm wondering why
16 McKesson hasn't responded to the discovery from Napoli
17 Bern. Why is there a motion to compel? I mean if
18 they're not liable --

19 THE COURT: Well --

20 MS. BEASLEY: -- you know, if --

21 THE COURT: -- there might be a good many
22 reasons why.

23 MS. BEASLEY: Okay.

24 THE COURT: Possibly, one of those could be a
25 similar question as to what I'm asking. Are they a

1 real defendant? Do they have to go through the
2 expense --

3 MS. BEASLEY: Well, they can prove it.

4 THE COURT: -- or do they have to pretend,
5 along with other plaintiffs who have named them?

6 MS. BEASLEY: They why haven't they got it
7 dismissed?

8 THE COURT: Now, really we have to get to it.
9 We have to get to that issue.

10 MS. BEASLEY: Right.

11 THE COURT: Is this a convenient way to stay
12 in your choice of forum? I don't know that this is
13 necessarily each individual plaintiff's choice of forum
14 because you grouped your cases. You have 33
15 multi-plaintiff cases filed in 2013 for the most part,
16 right?

17 MS. BEASLEY: Yes, ma'am. But if there is a
18 choice of forums, the plaintiff is entitled under the
19 law to choose. I mean we do have a choice. We are the
20 masters of the complaint. And under the California
21 joinder rules, all the plaintiffs that were in there
22 and all their claims to and as well as both defendants
23 were properly joined under California Code of Civil
24 Procedure, as you yourself determined in 2009.

25 THE COURT: But as I started out this today,

1 we have to bring 2009 and the record that was developed
2 there up to the present, and that is not something that
3 plaintiffs today can hang their hat on unless they can
4 show me a change and show me that it is not a
5 fraudulent joinder, as I saw no evidence of that
6 before.

7 But, as I said, I'm looking at the progress
8 of this litigation as a whole, not necessarily holding
9 any one of you attorneys and your law firms to the same
10 strategies, but we understand the right. We've held
11 that way. Then it gets to be a question of is this
12 real or is this just rotations or rote. I think that's
13 the proper road.

14 MS. BEASLEY: I agree with you and I'm just
15 asking that you give us a chance to find out through
16 discovery.

17 THE COURT: Thank you. Do you have any
18 evidence you would like to present today?

19 MS. BEASLEY: No, Ma'am.

20 THE COURT: Okay. And I did not see in your
21 particular --

22 MS. BEASLEY: Misjoinder? Are you about to
23 ask about --

24 THE COURT: No. No. How do you respond to
25 the GSK argument involving the class actions?

1 MS. BEASLEY: Well, our argument is actually
2 pretty narrow. It comes down to the numerosity
3 requirement of the Class Action Fairness Act. The
4 definition of mass action requires that the plaintiffs
5 request a joint trial of more than 100 claimants, and
6 that just hasn't occurred here.

7 You know, all we did is file our complaints
8 in San Francisco Superior Court with fewer than 100
9 claimants each. It's the road map that Congress gave
10 us when they enacted CAFA.

11 Basically, they said if you to deal with the
12 hassle of filing multiple complaints, as long as there
13 are fewer than 100 claimants, then you can avoid
14 federal jurisdiction under CAFA.

15 So we did that. And we haven't -- we didn't
16 file anything since then, we haven't moved to
17 consolidate, you know, nothing has been filed to show
18 our intent, request, or proposal to jointly try any of
19 our cases together in more than 100. So the plain
20 language of the act hasn't been met.

21 THE COURT: Well, the Eighth Circuit didn't
22 seem to think that was very important --

23 MS. BEASLEY: The Eighth --

24 THE COURT: -- did they?

25 MS. BEASLEY: The Eighth Circuit and also the

1 Seventh Circuit in Abbott are factually completely
2 distinguishable because in those cases the exact
3 opposite happened. You had several plaintiffs filing
4 complaints of fewer than 100 claimants each.

5 THE COURT: 99.

6 MS. BEASLEY: Right. Then all of those
7 plaintiffs involved in all those cases moved for a
8 motion to consolidate in one county and they
9 specifically requested through trial. So that's why.

10 It's not that they filed the complaints that
11 triggered CAFA. It's their subsequent motion to
12 consolidate through trial that triggered CAFA, and that
13 meets the plain languages of the mass action provision.
14 That hasn't happened here.

15 So, basically, what the defendant is saying
16 is that just filing cases, even if there's fewer than
17 100 plaintiffs in them, in a state where the JCCP is
18 pending, just your knowledge that a JCCP happens to be
19 pending in that state, that triggers CAFA. But that's
20 not what the act says.

21 THE COURT: I thought the larger part of the
22 defendant's argument was that in your case you filed 33
23 multi-plaintiff cases. You broke them out.

24 MS. BEASLEY: Well --

25 THE COURT: And is that a strategy to defeat

1 CAFA?

2 MS. BEASLEY: That is a strategy that
3 Congress allowed us when they enacted CAFA. They said
4 if you file a complaint with fewer than 100 plaintiffs,
5 you can avoid this trigger of federal jurisdiction.
6 And if you look at the new Tenth Circuit case that was
7 just noticed by Napoli Bern, Parson Simone, the
8 Eleventh Circuit case, there's also Anderson, that was
9 out of the Seventh Circuit, and it's the opposite of
10 the Abbott Case, and Tano, the Ninth Circuit case.
11 That's a little bit older, but it's still good law in
12 the Ninth Circuit, which is where we filed. And also,
13 the Third Circuit case, Abramson. We cited it in our
14 brief. It's 503 Federal Appendix 157. It's
15 unpublished, but it's also on point.

16 It's saying that just because you filed the
17 complaints, if there are fewer than 100 plaintiffs, you
18 know, you can avoid triggering federal jurisdiction
19 under CAFA.

20 The defendants, they specifically exclude the
21 defendants from being able to file a motion or
22 aggregate separate complaints to get the numerosity
23 requirement, and that's what they're trying to do.
24 They're saying yeah, but if you put all those 33 cases
25 together, it's more than 100. But I'm saying well, we

1 didn't file them together. They're separate
2 complaints.

3 THE COURT: Well, it is an interesting
4 development of case law decisions in the appellate
5 courts that I think you're getting your cases involved
6 in by filing this way, regardless of whether California
7 permits it or not.

8 And the class action doesn't necessarily
9 equal mass action, but for practical purposes, they're
10 handled very similarly and similarly to an MDL. So I
11 think that there is a reason why there is developing
12 law here, and I haven't decided yet how your case falls
13 into it or your cases fall into it.

14 But, it always seems to me when you see
15 multi-plaintiff cases filed, and they usually come from
16 limited jurisdictions where that's permitted, and we've
17 seen a number of those, but not a lot. When you have
18 them it is very interesting to see how they are parsed
19 into separate case filings. Usually, it's a strategy
20 that I don't always have the opportunity or even
21 interest to look into, but I think I have to now. I
22 think I'm being asked to do that, which means that you
23 have been required automatically to respond. I
24 understand your argument on that.

25 MS. BEASLEY: Okay.

1 THE COURT: I won't be ruling on the cuff
2 today, but I do think that we cannot ignore the growing
3 body of case law that is looking at this type of
4 multi-plaintiff filing as a mass action which could
5 actually qualify as a class action, even though that's
6 not how any of you intended it.

7 MS. BEASLEY: Well, just one more thing. The
8 Tenth Circuit case that just came out this month is
9 right on point, and they analyze exactly the issue that
10 you're talking about and they do it very well and it's
11 favorable to our position that --

12 THE COURT: Well, if I decide the same way or
13 differently, the Third Circuit is going to opine on
14 this one way or another.

15 MS. BEASLEY: I understand.

16 THE COURT: So I better know everything
17 that's out there. And then maybe the U.S. Supreme
18 Court will accept cert and try to define this because
19 this is where it's going. So we have to have a full
20 record here. And on the CAFA claims I think the record
21 will speak for itself. The arguments are necessary and
22 the case law that we can review is all very helpful,
23 although not dispositive.

24 MS. BEASLEY: There is the Abramson case from
25 the Third Circuit.

1 THE COURT: Well, not exactly the same.

2 MS. BEASLEY: Well, there is no exact.

3 THE COURT: So --

4 MS. BEASLEY: There never is it seems.

5 THE COURT: Well, that's the lovely nature of
6 being in law, isn't it, to be judges and lawyers, to
7 always --

8 MS. BEASLEY: Sometimes.

9 THE COURT: -- find something different.
10 First impressions are an opportunity to put our
11 thinking caps on and see where we are, but I want to do
12 what's right here, so I will consider your arguments.
13 Thank you.

14 MS. BEASLEY: Thank you. I don't have any
15 evidence.

16 THE COURT: All right. And Mr. Berman.

17 MR. BERMAN: Thank you. It is always a
18 pleasure to be here, Your Honor, and I, unfortunately,
19 was attempting to print some of the California
20 discovery and the motion pending in California to be
21 able to hand it up to the Court which, unfortunately, I
22 only found out about last night in preparation for
23 today's oral argument, and I would request permission
24 to be able --

25 THE COURT: Because that's not your motion,

1 it's someone else's?

2 MR. BERMAN: It's my firm's motion. My
3 office is in California and sometimes the right hand,
4 which I'll refer to as myself, being from the east
5 coast, doesn't necessarily know in time what the left
6 hand in California is doing. But I don't think it can
7 be disputed that discovery in these 2013 --

8 THE COURT: Don't they know how important you
9 are? I mean your firm.

10 MR. BERMAN: I wish they knew. But, more to
11 the point, Your Honor, our cases were filed in 2013,
12 but then the cases that are in state court in
13 California, there were procedural attempts to get them
14 to this jurisdiction through the MDL. Some succeeded,
15 some did not, and so we propounded discovery in those
16 litigations.

17 McKesson has refused to respond to it and
18 there is a pending motion, and I would respectfully
19 request permission by the end of today, before the end
20 of today, to supplement the record with copies of those
21 documents so that the Court can consider those.

22 THE COURT: I think I could give you longer
23 than the end of today. As soon as you can is fine with
24 me.

25 MR. BERMAN: Thank you, Your Honor. I

1 appreciate the Court's graciousness. With regard to
2 the Delaware plaintiff, that is my case. It was in the
3 Alaimalo case, and I'm sorry for destroying the Spanish
4 name.

5 THE COURT: A-L-A-I-M-A-L-O?

6 MR. BERMAN: That's correct.

7 THE COURT: Okay.

8 MR. BERMAN: And there is no difference
9 between that plaintiff and any other plaintiff. The
10 allegations are the same, that my client consumed
11 Avandia, and there's no reason why they should be
12 stricken from the California pleading in which they are
13 a party.

14 In my cases we have at a maximum of 84 I
15 believe plaintiffs. Some are much less. And we have
16 anywhere from two to six California plaintiffs in each
17 of our cases that we have pending.

18 I will not repeat the arguments of counsel
19 with regard to our intent, but I believe that our
20 actions speak louder than words, and the fact that we
21 are litigating these cases is evidence of our intent,
22 specifically at this procedural stage.

23 I don't know what else we can do. We were
24 not involved in the litigation prior to 2013. I do not
25 believe that whether or not McKesson actually paid

1 money in prior previously filed cases is evidence of an
2 intent to seriously pursue, generally, as the Court is
3 well aware.

4 THE COURT: I don't think that was my
5 inquiry.

6 MR. BERMAN: I understood that McKesson was
7 arguing that because the previously filed cases in
8 California resolved without McKesson paying anything in
9 settlement --

10 THE COURT: You mean GSK's argument?

11 MR. BERMAN: Yes, GSK's argument. That there
12 was no serious intent to proceed against McKesson, and
13 I would respectfully submit that's simply not true, In
14 any product liability litigation, and certainly within
15 my experience over several decades both as a defendant
16 and plaintiff's attorney, it is normal for all
17 defendants within the chain of distribution to be sued.

18
19 It is also normal or usual that it is the
20 upstream defendants who may end up paying money, but
21 that's a different issue as to whether the downstream
22 defendants can be liable and are proper parties at
23 the time that a suit is filed, which is the inquiry
24 here.

25 As the Court well knows, and I'm not going to

1 preach to the Court the standards that it is
2 well-familiar with. But at this particular point in a
3 remand proceeding where the statutes are to be
4 construed narrowly, and here it overlaps into CAFA a
5 little bit, but where the statutes are to be construed
6 narrowly in favor of remand, then our actions in
7 proceeding against this defendant pursuant to
8 California law as we have and demonstrate affirmatively
9 our intent to proceed as legitimately pled defendants
10 in the California litigation.

11 THE COURT: I understand your argument. What
12 about GSK's argument that this Court should just sever
13 that one suit into separate actions under the theory of
14 fraudulent misjoinder and remand your one case where
15 the Delaware citizen is the plaintiff?

16 MR. BERMAN: Well, I'm sure that counsel for
17 the defendants would love to rewrite our complaints.
18 But we, as counsel has said, are masters of our
19 complaint.

20 The plaintiff has properly pled within the
21 complaint pursuant to California law, as this Court has
22 previously held, and there is no reason to sever a
23 defendant from a case where they have been properly
24 included simply to create or to destroy non-diversity
25 jurisdiction so that -- for remand purposes.

1 THE COURT: All right. Back to your other
2 argument, Mr. Berman. Do you think that when the
3 California rules were written to permit a strict
4 liability, negligence, secondary defendant, such as a
5 drug distributor, to be sued despite the lack of
6 residence of multiple plaintiffs, do you think that
7 when that was permitted in the consumer rights era that
8 California adopted some time ago that they meant for
9 this to happen, name McKesson in everything and then
10 just forget about it, because that's the history of
11 this litigation.

12 I don't care about another type of
13 pharmaceutical right now, but I do think that's the
14 history and the reality. And because I believe that,
15 because I find that is so up until now, how does the
16 filing of a motion to compel or serving interrogatories
17 against McKesson change that?

18 MR. BERMAN: It changes it because we have to
19 approach this step-by-step. I mean one can't come in
20 to a general conclusion and do so by skipping the
21 individual factual predicates.

22 In this litigation in California, which has
23 been pending for eight years, as the Court has said, it
24 has it's own rhythms and methods. I can't speculate
25 specifically on it.

1 We have only been involved since 2013. But
2 certainly there's been no evidence other than counsel's
3 ipsa dixit representations that there has been no
4 significant or serious effort to litigate against
5 McKesson in that litigation.

6 THE COURT: Well, when --

7 MR. BERMAN: I know that in --

8 THE COURT: Wouldn't the defendant know
9 precisely what has happened before in this MDL since
10 this particular defendant and this particular law firm
11 has represented in every case this issue?

12 MR. BERMAN: One would think that they do,
13 and I don't doubt that they do not in this MDL. My
14 reference is, of course, to the California litigation
15 and the implication that because something didn't
16 happen in the prior cases in California, that we are to
17 be somehow tarred and feathered.

18 THE COURT: Well, that's a different issue
19 and that's a different argument, but if anybody's going
20 to know what happened in California State cases
21 involving GSK and Avandia, it's those people sitting at
22 the table next to you.

23 MR. BERMAN: As well as -- they would be
24 among those, Your Honor, as well as the Court and as
25 well as counsel who were involved, including the

1 leadership on the plaintiff's side.

2 However, we are proceeding, we have been
3 proceeding against McKesson in that litigation. Where
4 it will lead I don't know yet. But, I do know that at
5 least for CAFA purposes, motions can be made closer to
6 trial. We're at a specific stage now. We're in the
7 pleading stage.

8 And the analysis of the Court must be to what
9 is not before the record at this procedural stage. And
10 as the recent court decisions have said, if something
11 happens later to trigger the potential right to remove
12 under CAFA, then it might give counsel and the
13 defendants a right to remove at that particular point
14 in time, but we're not there now.

15 Now, we are at the stage of simply analyzing
16 the pleadings, and under the pleadings we have
17 established well pled facts, as this Court has
18 previously found, and the plaintiffs are appropriate in
19 terms of the purposes of California law.

20 I mean if counsel wants to argue before a
21 California court that these cases are not proper --
22 that these plaintiffs are not properly joined in a
23 single proceeding or the proceeding for the cases that
24 are now before this Court, they're certainly free to do
25 so.

1 But, that analysis ought not to determine
2 whether or not we properly pled those pleadings --
3 those plaintiffs within the complaints for purposes of
4 remand now.

5 THE COURT: All right. Let me ask you this
6 because it has to do with, again, that thing called
7 attorney strategy.

8 When the briefing was completed you had not
9 addressed GSK's argument that in the 412 plaintiffs'
10 cases you had already proceeding in California you
11 hadn't yet done anything about discovery requests.

12 So is this late filing because of this
13 motion? Is the late propounding or the motion to
14 compel not concurrent, it's consecutive to this issue
15 being raised by the MDL?

16 MR. BERMAN: Well, I can only, quite frankly,
17 speculate to some extent because I didn't file that
18 discovery. It's being litigated by my firm's counsel
19 in California, but I can say several things.

20 One, the cases in California that were not
21 removed ultimately to federal court and transferred
22 here were in a different procedural state because of
23 the procedural litigation that was ongoing.

24 So, whether or not the discovery was
25 propounded at the earliest possible time under the

1 California rules based upon the remand that occurred in
2 California, or whether or not it was propounded during
3 the course of the discovery at a later point, I can't
4 specifically say or speculate on.

5 However, even if for the sake of argument we
6 propounded the discovery during the six or seven months
7 that these motions were first made, it does not
8 de-legitimatize it in any way. And even if it was
9 influenced by the arguments, then it's still fair game.
10 It doesn't -- it's not untoward on our part to propound
11 the discovery.

12 THE COURT: But, you didn't respond to this
13 argument in your briefing. So I have to ask the
14 question why not?

15 MR. BERMAN: I understand, Your Honor. But
16 the discovery was made and whether or not it was made
17 -- I seriously doubt that it was made simply because a
18 motion is pending before this Court to remand.

19 Whether or not the discovery was propounded
20 with a mind to the fact that there was a motion to
21 remand pending does not de-legitimatize in any way or
22 make untoward our discovery request. In other words, I
23 can't be in the position where I'm damned if I do and
24 damned if I don't.

25 THE COURT: Yes, you can.

1 MR. BERMAN: Well, hopefully not in this
2 courtroom, Your Honor.

3 THE COURT: No, not in this courtroom.

4 MR. BERMAN: So we certainly proceeded in
5 good faith. And we have proceeded in good faith, and
6 we are proceeding in good faith, and we are doing what
7 litigants have to do and should do in the discovery
8 process, and I think that speaks louder than any
9 supposed or hypothetical intent argued by the
10 defendants.

11 THE COURT: So you're not quite ready to
12 concede that the prior history of not pursuing claims
13 against a named defendant, in California cases,
14 McKesson, is detrimental to your position?

15 MR. BERMAN: I don't know that there was no
16 proceeding against McKesson. I can only state that my
17 position is that they are a legitimate defendant in the
18 litigation pursuant to California law and that looking
19 to an ultimate result is not an appropriate analysis of
20 whether a party is fraudulently joined or not and
21 whether remand should be granted or not.

22 THE COURT: All right. Thank you.

23 MR. BERMAN: Thank you, Your Honor.

24 THE COURT: And you may submit that
25 documentation as evidence supplementing the record and

1 any other case that you wish, and I guess if there are
2 any, you can submit them by Friday, and that is
3 extended to all three counsel.

4 MR. BERMAN: Thank you, Your Honor.

5 MS. BEASLEY: Thank you, Your Honor.

6 MR. RESTAINO: Thank you, Your Honor.

7 THE COURT: All right. Now it's GSK's turn.

8 MS. GUSSACK: Good morning, Your Honor.

9 THE COURT: Good morning, Ms. Gussack.

10 MS. GUSSACK: Thank you for having us this
11 morning. First, let me clarify and confirm what Your
12 Honor has already stated. Pepper Hamilton has been
13 counsel to GSK since the outset of the Avandia
14 litigation and counsel to McKesson. And so the
15 representations that we make to the Court this morning,
16 Your Honor, are based on our knowledge from that early
17 date of 2007.

18 Mr. Fahey can address the fraudulent joinder
19 issues. I want to introduce to the Court our colleague
20 Ray Cardozo from Reed Smith who has --

21 THE COURT: Hello.

22 MS. GUSSACK: -- and Reed Smith has been
23 involved in the California litigation along with Pepper
24 Hamilton so that we can both accurately and
25 comprehensively represent to the Court today all of the

1 information and activity that has occurred with respect
2 to McKesson from the outset both in the MDL and the
3 California proceedings.

4 THE COURT: And I do note that your client is
5 present. Mr. Bill Reale and Ms. Diaz are here for GSK.

6 THE COURT: Nice to see you again. Thank
7 you. All right, Mr. Fahey?

8 MR. FAHEY: Good morning, Your Honor. I have
9 copies of this PowerPoint presentation so everyone
10 can --

11 THE COURT: That will be very helpful.

12 MR. FAHEY: I'll just distribute them before
13 we start.

14 THE COURT: I found after two weeks of
15 Daubert in the Zolof cases that the five screens in
16 the room, including --

17 MR. FAHEY: Yeah.

18 THE COURT: -- my iPhone and iPad and three
19 others really made me go home with a headache.

20 MS. GUSSACK: I noted in the record --

21 THE COURT: I don't know how I drove on 95.

22 MS. GUSSACK: -- that you mentioned you were
23 using an iPad and I was impressed that you were
24 navigating. Is that new technology for the Court?

25 THE COURT: Very new. But I started to

1 utilize it instead of getting another backache because
2 the paperwork in these cases is amazing.

3 MS. GUSSACK: Well done.

4 THE COURT: So thank you. I'm feeling a
5 little less old.

6 MR. FAHEY: Your Honor, I just want to pick
7 up on something Mr. Berman said because I think we all
8 agree and it really is what this -- at least my portion
9 of the argument comes down to, it's that actions speak
10 louder than words.

11 I think if you look at the actions that have
12 occurred with regard to McKesson, it really only leads
13 to one conclusion, and that is that they were
14 fraudulently joined in 2007 based on the record that
15 developed after Your Honor's ruling, and they have been
16 fraudulently joined again now.

17 We have some additional evidence that we
18 wanted to give Your Honor to provide you with some
19 background of what these firms have been doing in the
20 time that they've been involved in litigation.

21 We do think it's highly instructive to what
22 their true intent is, which is what the Third Circuit
23 has told us to look at. Is there a true intent to
24 prosecute a claim against the defendant?

25 THE COURT: So what is the true intent here

1 and can this Court assess that true intent by
2 incorporating other attorneys' or firms' actions, and
3 that is a real "if" to me.

4 So, to bridge that gap, I cannot ascribe, and
5 I think they're right, I cannot necessarily ascribe the
6 same motives and the same behavior and the same result.
7 I am concerned about that, so perhaps you can address
8 it.

9 MR. FAHEY: Yes and, Your Honor, I think we
10 have enough evidence with respect to these defendants
11 themselves that we don't necessarily need to look at
12 the past history. Although I think that when you look
13 at their complaints they are following the same model
14 that has been followed since 2007 in the allegations
15 that they're bringing against GSK. They, in fact,
16 probably have even more parsimonious claims against
17 McKesson than have been made in the past, and we'll go
18 through some of that record. But I do think that they
19 are building on the evidence that has been developed
20 for seven years here.

21 Frankly, with all the discovery against GSK
22 done through the good work that this Court has done and
23 that Judge Burrell has done, there really should be
24 nothing other than to pursue the claims against
25 McKesson.

1 Yet when you look at what they've done for
2 various times in this litigation, they haven't really
3 pursued McKesson at all until Your Honor issued your
4 order on February 20th saying you wanted to see
5 evidence that they really meant to go forward. That's
6 the first time after that order came out that discovery
7 came out from the Napoli Firm., and I'll get into that
8 issue. And I think that really is a very good insight
9 into their true intent, what their actions were, not
10 what their words are today.

11 So, again, Your Honor, I think briefly talked
12 about these numbers before at the beginning of the
13 argument, but there is the Napoli firm, which has 837
14 plaintiffs with 18 complaints, the Restaino Group with
15 165 plaintiffs, two complaints, and then the
16 Salim-Beasley group, which has over 2000 plaintiffs in
17 33 complaints.

18 There are two separate and independent
19 grounds why we believe the removal is appropriate.
20 Either one of those would support the cases remaining
21 here in the MDL.

22 I will be addressing the issue relating to
23 McKesson, which is the first issue, as Ms. Gussack and
24 Mr. Cardozo will be addressing the CAFA issue.

25 THE COURT: Very well.

1 MR. FAHEY: And so why do we think that
2 McKesson was fraudulently joined? There's basically
3 two reasons. And we're looking at the Third Circuit
4 guidance in the Boyer case. And they said -- and the
5 plaintiff's briefing largely focused on whether a
6 McKesson argument could be theoretically made, which
7 was similar to the argument that we had in 2008. But
8 our argument, as you properly noted here, is different.

9 We're saying the second part of that Third
10 Circuit test, whether there's a true intent to
11 prosecute a defendant, we don't think that prong has
12 been met here because there is no real intention if you
13 look at the plaintiff's conduct to pursue a claim
14 against McKesson.

15 And we'll get to at the very end of my
16 argument some additional information that may cause
17 Your Honor to potentially reexamine the issue of
18 whether a valid claim can even be made against
19 McKesson, even in a theoretical way. But, certainly
20 our intent today is to focus on whether there's a true
21 intention to pursue a claim.

22 So, when you look at the evidence that the
23 Court has there's a couple of things that are present.
24 First, is the bare bones allegations that are void of
25 any factual support whatsoever relating to McKesson,

1 and we'll show you those.

2 There's also a failure to develop any
3 evidence connecting any individual plaintiff to
4 McKesson to demonstrate that, as Ms. Beasley said,
5 maybe they didn't distribute it.

6 There's been no effort by the plaintiffs
7 since they have been in this litigation to come forward
8 with the simple kind of product ID information that you
9 should have before you pursue a claim if you really
10 intend to pursue a real defendant.

11 The product ID thing that I'm talking about
12 with regard to McKesson is similar to the plaintiffs
13 having to come forward at the earliest opportunity and
14 prove that they ingested Avandia.

15 Here, the same issue with product ID for
16 McKesson is to show that McKesson distributed it. And
17 as we'll show you, some of these firms have been
18 involved in this litigation for 18 months and they're
19 still saying they have no evidence that McKesson
20 distributed the product to the plaintiffs.

21 THE COURT: Mr. Fahey, have any of these
22 cases that are instant here filed any type of fact
23 sheet, California or MDL?

24 MR. FAHEY: I'm glad you asked that question,
25 Your Honor, yes, they did. And we think that -- and

1 I'd be happy to hand this up to you. We're going to
2 introduce this as an exhibit as part of the evidence
3 that we believe shows there's no true intent to
4 prosecute McKesson. And I'll mark this as Defendant's
5 1, Your Honor, and offer it into evidence. Do you have
6 any objection?

7 COUNSEL: No.

8 THE COURT: Thank you.

9 (Pause in proceedings.)

10 MR. FAHEY: Your Honor, what you're looking
11 at here is a printout from our database. And I'll pop
12 ahead in the slides just to focus you on the numbers.
13 There have been -- well, actually, let me take one step
14 back because I think it's important to figure out how
15 long each of these defendants -- or plaintiffs have
16 been in the litigation.

17 The Napoli firm first filed a case against
18 McKesson in California in October of 2012, so that was
19 18 months ago. We did not remove that case because,
20 frankly, based on Your Honor's past ruling, we expected
21 a similar result.

22 But, when we saw absolutely no activity with
23 McKesson, just the way we saw the first time around
24 when the Napoli firm filed the next batch of cases
25 followed quickly by the Restaino and Beasley group, we

1 decided that we had a sufficient record to demonstrate
2 no true intent.

3 Those cases from Napoli-Bern had been sitting
4 in California for 18 months, almost two years. And so
5 there's fact sheets that they've provided, and if you
6 look at the column, the last column, the question is
7 asking the defendants to tell us -- I'm sorry -- the
8 plaintiffs to say, "Please identify and attach all
9 documents you claim establish that McKesson was the
10 distributor for the Avandia that you ingested."

11 And if Your Honor looks at that column, many
12 of the answers are, "I don't now," or they object or
13 they say, "I don't have any records," or one of the
14 most common one is a vague, "See attached records" or
15 "See pharmacy records."

16 So when we go and look at those pharmacy
17 records all they do is demonstrate that a prescription
18 was made. There's no reference at all to a distributor
19 of the product.

20 And so we were expecting, frankly, for some
21 evidence to come forward to say here is the evidence
22 showing McKesson distributed my plaintiff's product,
23 but plaintiffs put on no evidence of that at all.

24 And you look at what they've said in their
25 responses to over 400 fact sheets, there's no a single

1 piece of evidence demonstrating that the plaintiffs
2 have done anything to establish that product ID that
3 you should have, frankly, before you filed suit, but if
4 you didn't have it before you filed suit, you should
5 certainly get it very quickly once you file suit. And
6 some of these cases have been pending, as we said, for
7 18 months without any product ID with regard to
8 McKesson.

9 And that's true of all the firms. We have no
10 evidence from any of the firms that they have
11 established that McKesson is the distributor with
12 regard to any single one of the plaintiffs.

13 The Restaino group has had their case on file
14 in one court or another for ten months. We've seen no
15 evidence in that ten months, even though they're
16 putting forward fact sheets to demonstrate that they've
17 made any connection between McKesson and the
18 plaintiffs. And Salim-Beasley has also had their cases
19 here on file for ten months. And, again, no evidence
20 that they've done anything to connect McKesson to
21 Avandia.

22 So the last thing that I wanted to talk
23 about, and I'll get to that in a second, is the failure
24 to really pursue claims against McKesson. Then that --

25 THE COURT: Before you go there --

1 MR. FAHEY: Sure.

2 THE COURT: -- as it relates to these cases
3 not producing basic fact sheets against this defendant,
4 basic information, do you happen to know what was
5 requested by this later filed discovery against
6 McKesson, which now has engendered a motion to compel?

7 MR. FAHEY: Yes, I do, Your Honor. What
8 they're asking for is information about certain
9 programs that McKesson may have run, certain broad
10 questions about what did you know and when did you know
11 it kinds of questions. It is not at least --

12 THE COURT: Not related to identification
13 of --

14 MR. FAHEY: I mean I think Mr --

15 THE COURT: -- their own clients' history.

16 MR. FAHEY: -- Mr. Berman -- we didn't -- we
17 didn't see that being the focus of that discovery. It
18 was certainly more of a trying to make out a warnings
19 claim against a distributor, frankly, that has no
20 ability to change the warning. But that's what we saw
21 the discovery related to. And so let me just hop into
22 the argument.

23 If you look at the bare bones allegations
24 that the various firms made, there really is no true
25 intent to pursue a claim. I mean in the Beasley

1 complaints there's three paragraphs out of hundreds of
2 paragraphs that specifically reference McKesson in any
3 way.

4 The first paragraph says at all times
5 defendant, McKesson, distributed to the plaintiffs as a
6 factual allegation that they, in fact, distributed.
7 The second paragraph is McKesson distributes to a lot
8 of people. And then the third paragraph is upon
9 information and belief, we think they distributed to
10 our plaintiff.

11 So the first and the third paragraph, one of
12 them is with certainty, the other one is upon
13 information and believe. But, frankly, there's really
14 no evidence whatsoever, at all, supporting any of these
15 allegations in this complaint and certainly nothing
16 that's come forward since the complaint was made.
17 They're the bare bones, enough to squeak by so they can
18 say that they have a claim against McKesson, but it
19 certainly is not evidence and a true intent to pursue
20 McKesson as a real defendant in the case.

21 Same is true with regard to the Restaino
22 complaints. In fact, their reference to McKesson is
23 actually the second part of a clause. And so it's
24 talking about McKesson was engaged in the business of
25 marketing, distributing, promoting, advertising, and

1 selling Avandia nationwide and in the State of
2 California. They don't even make an allegation that we
3 could see that McKesson actually distributed to their
4 plaintiffs in those cases.

5 But, they do very quickly at that last
6 sentence, which is designed to try to prevent us from
7 removing the case, they seem to be more focused their
8 efforts to prevent us from removing rather than to
9 demonstrate that they really, truly intend to pursue
10 McKesson in the case.

11 The Napoli-Bern plaintiffs, again, very, very
12 bare bones allegations, no factual support whatsoever
13 for the allegations, just that we marketed, sold, and
14 distributed, that's actually a half a sentence, Your
15 Honor. I mean it's about six words that they've
16 alleged against McKesson. If they truly had an intent
17 to pursue the defendant as a real defendant in the
18 case, I think you would see more allegations there.

19 So as I said to Your Honor before, no
20 plaintiffs have identified any specific documents
21 proving McKesson distributed their Avandia. That's
22 these plaintiffs. We're not even talking about what
23 happened in the past. That's these plaintiffs here.

24 Also, this is the data that I've just
25 described for you with regard to the chart. 404

1 plaintiffs responded, 193 did not answer or objected to
2 that question, 58 claimed to have no information, and
3 153 referred us to attached medical records, which,
4 after review, our associates could not find any
5 reference to a distributor. It was simply a printout
6 from a pharmacy demonstrating that Avandia was filled
7 but did not say how that Avandia got to the pharmacy
8 before the plaintiff picked it up.

9 So we see this kind of conduct as very
10 similar to the conduct we saw before in 2007 and '08.
11 And at that time, Your Honor, it had a much different
12 record.

13 And this is not a motion that we are bringing
14 in the first week of an MDL. This is a motion that
15 we're bringing eight years after litigation has started
16 where there's a true track record that is evidence to
17 Your Honor that really on points in one direction,
18 which has been carried forward by these new group of
19 plaintiffs' lawyers. So no matter how much they want
20 to kind of walk away from the past, they are continuing
21 in the past in their conduct.

22 The only thing that changed, Your Honor, it
23 wasn't even our brief where we put this issue squarely
24 at the center of our argument, which was we don't
25 really think they truly intend to pursue McKesson. It

1 wasn't until Your Honor issued your February 20th order
2 that said I want to see evidence. Forget about
3 arguments, you know, forget about words. I want to see
4 action. What action do you have that you're going to
5 really pursue a claim against McKesson?

6 Then after that order came out, then the
7 McKesson discovery came in. But the case -- there is
8 really no explanation other than a reaction to you
9 order as to why that discovery came out within a short
10 time after your order when the litigation had been
11 pending for 18 months in California with no such
12 discovery against McKesson.

13 So, before Your Honor's order came out this
14 was record, and I think this is the true record of the
15 parties' intent, not only these plaintiffs, but the
16 plaintiffs before them. There were never any
17 depositions of anyone from McKesson.

18 And so when Mr. Restaino was talking about
19 depositions Predaxa or Plavix it's certainly nothing
20 that happened here in Avandia. And you can look on the
21 left-hand column, GSK. That's what people do when they
22 have a true intent to prosecute a claim against a
23 defendant. You see 50 depositions on the right-hand
24 side with McKesson this year.

25 There were never any requests for production

1 before Your Honor's order against McKesson. There were
2 never any interrogatories issued against McKesson by
3 these plaintiffs or by any other plaintiff. There was
4 never any request for admission.

5 Millions and millions of pages, as Your Honor
6 know, have been produced. That number doesn't even
7 include the databases that GSK produced. Not a single
8 document in eight years has ever been produced by
9 McKesson.

10 Multiple expert reports that have been reused
11 and used, as Your Honor knows, imported into
12 California, none of them contain any allegations
13 against McKesson.

14 And, as Your Honor asked before in terms of
15 settlements, no one ever approached McKesson. Ms.
16 Gussack is here and can verify this. No one ever
17 approached McKesson about settlement. McKesson never
18 contributed to any settlement, whether the cases were
19 here or in California or any other jurisdiction.

20 In fact, the only time they treat McKesson
21 like a defendant is when they filed a complaint and
22 they're trying to keep it out of the federal court.
23 But with that exception there's really no evidence that
24 they truly intend to prosecute McKesson in these cases.

25 And, you know, Your Honor, there is a case

1 that's very similar to this with Judge Bartle. Again,
2 we're asking for a very narrow ruling here. We're not
3 saying forever more McKesson can't be sued, although
4 we, frankly, think that would be a good development of
5 the law. That's not what we're asking you today.

6 What we're asking you today is looking at the
7 history that is before you and the evidence we've
8 brought and, frankly, the lack of evidence that
9 plaintiffs have brought about their true intent, it
10 really leads to one unescapable vision, which is the
11 conclusion Judge Bartle reached. They don't really
12 have a true intent to prosecute this defendant. The
13 Third Circuit says you have to have that or it's a
14 fraudulent joinder.

15 And so we believe in this case the evidence
16 supports that McKesson has been fraudulently joined.
17 Now, unless Your Honor has questions, I'll turn it over
18 to Mr. Cardozo.

19 THE COURT: Do you think that this is on all
20 fours with Judge Bartle's phentermine decision in diet
21 drugs?

22 MR. FAHEY: I do think that it is because
23 what Judge Bartle was seeing was evidence of a lack of
24 real intent to prosecute. There was the constant
25 joining of the phentermine defendants, all this talk

1 about wanting to truly consider them to be real
2 defendants.

3 But when he kind of pulled back the curtain
4 and looked at the reality there was really no intent
5 that the plaintiffs demonstrated when they had the
6 opportunity, not when they're, you know, flying by a
7 police officer at 100 miles an hour and, you know, hit
8 the brakes and skid passed the cop, which is what this
9 discovery really is.

10 I mean they see the cop on the side of the
11 road, which is you, you issue the order saying I got a
12 radar gun, and then they go by at 100 miles an hour and
13 they slap the brakes on and say I wasn't speeding.

14 And so before Your Honor's February 20th
15 order that's what the real true intent. Everything
16 else is window dressing since then. It's hitting the
17 brakes when you see the cop. That's not -- you know,
18 the true intent was the person was speeding, and the
19 cop knows that and everybody knows that. And so that's
20 really what I think Judge Bartle saw and I think what
21 the evidence shows here.

22 I did want to just touch very, very briefly
23 on the second part of the legal plausibility argument
24 because -- and I know Your Honor addressed this in the
25 recent Zoloff decision, so I'm not trying to reargue

1 that.

2 I do -- I do want to just brief one issue
3 that -- and present it for consideration, which is that
4 after Mensing came down, it is true that preemption is
5 an affirmative defense. We're not going to quarrel
6 with that, and I know you said that was important for
7 Your Honor's ruling.

8 In this particular case though, and this is
9 true of all real preemption defenses, you know, you see
10 them in the medical device side, post-Regal, you see it
11 in Mensing, post-Mensing, it adds some pleading
12 requirements to the plaintiffs to demonstrate that they
13 have a non-preemptive claim.

14 It's true it's a defense, but the plaintiffs
15 have a pleadings requirement at the beginning of the
16 case to say yes, I understand preemption is an issue
17 here. Here's how I'm pleading a non-preemptive claim.
18 As you saw it from the allegation the plaintiffs made,
19 they made no attempt to plead a non-preemptive claim.

20 No California case since Mensing has said
21 that a pharmacy claim is still valid post-Mensing. And
22 the plaintiffs have not made any effort to plead an
23 non-preemptive claim and, frankly, no attempt to plead
24 a non-statute of limitations barred claim, which is a
25 whole other issue that we haven't really even got into

1 with these cases, but certainly is present and
2 underlying, perhaps the motivation to go away.

3 THE COURT: Well, you relate that to
4 motivation or intent, and I'm also seeing that you are
5 revealing that if these cases remain or even if they go
6 back to California, you'll be filing additional motions
7 to dismiss on those grounds, which is probably the best
8 use of them, although I think they are appropriate to
9 consider here as well.

10 MR. FAHEY: Yes, Your Honor. Thank you.

11 THE COURT: All right. Thank you.

12 (Pause in proceedings.)

13 MR. CARDOZO: Thank you, Your Honor. On the
14 CAFA issue I want to start with the question you led
15 with because it puts the heart on this argument here.
16 How are these cases going to be tried?

17 Now, Mr. Restaino made a very interesting
18 admission that, frankly, the intent here is to follow
19 the JCCP's established procedure and proceed with
20 bellwether trials. That's what's going to happen here.
21 There's no debate about that.

22 That is what makes this a clearer case than
23 all of the cases that are bubbling up in the circuit
24 court right now on CAFA, because in this case, unlike
25 in any of the others, there was an established up and

1 running California coordinated proceeding in which
2 bellwether trial procedures are already in place, and
3 these plaintiffs gathered up 3,000 plaintiffs, more
4 than 90 percent who do not live in the State of
5 California, and consciously chose to file in
6 California, where that existing JCCP was established.

7 The other cases are all grappling with the
8 question about where this case is headed. Is it headed
9 for a consolidated or coordinated trial? You don't
10 have to grapple with that question in this case because
11 there is no doubt that that's where it's headed because
12 the California law dictates that.

13 Here's the California statute that governs
14 the criteria for coordination. This is what you have
15 to show to get this thing up and running in the first
16 place, what their predecessors had to show, that a
17 single judge hearing all of the actions for all
18 purposes will promote the ends of justice for, among
19 other things, the disadvantages of duplicative and
20 inconsistent rulings, orders, or judgments.

21 So, to establish the coordination, Avandia
22 plaintiffs needed to show that a single judge should
23 hear all of the cases through trials. And once the
24 Court made the ruling that that criteria was met, that
25 meant that any case filed in California had to be

1 placed into that JCP, had to be assigned to that same
2 judge through trial. And that's not only in the
3 statute, but it's in the California Rules of Court.
4 Rule 330 --

5 THE COURT: The case being a non-severed case
6 file en masse?

7 MR. CARDOZO: Right. When you file in San
8 Francisco Superior Court it's just like an add on in
9 the MDL. It doesn't get to stay there. The next thing
10 you have to do under the rules of court is filing a
11 notice of related case. That hasn't happened in some
12 of these cases because of the removals. But the rules
13 require it.

14 So, where all the circuits are speculating
15 about well, did this motion -- is this motion sending
16 the case towards a coordinated proceeding or did this
17 step by the plaintiffs trigger that, you don't have to
18 speculate in this case because the rules of court and
19 the coordination statute in California are clear on
20 this. There is no scenario that I'm aware of in which
21 those cases could remain as stand alone, and no
22 scenario has been identified in the plaintiffs briefing
23 or evidence today. There's no scenario where it
24 wouldn't end up in a coordinated proceeding.

25 Now, with 3,000 plaintiffs from all 50 states

1 they could have filed in any state court. They chose
2 the state where the JCCP exists for the reason of the
3 bellwether trials, the joint trial procedures.

4 I heard Ms. Beasley argue that Congress gave
5 them the choice to choose their forum. It did, but it
6 said if you choose the mass adjudication route, we're
7 going to have a federal court supervise that because
8 the intent of this statute, as stated by the unanimous
9 Supreme Court decision in Knowles was to ensure federal
10 court consideration of interstate cases of national
11 importance.

12 There was an argument referenced to well,
13 this isn't really a class action. But Congress
14 inserted this mass action provision to extend the reach
15 of the statute beyond class actions to get these very
16 type of cases because if you don't, it prevents
17 plaintiffs' lawyers from making an egg run around CAFA.

18 Now, I'll take a moment with some of the
19 other circuit court cases, but, like I said, the much
20 muddier problem of early before a coordination
21 proceeding is established and you're kind of
22 speculating about where the case is headed, you don't
23 have a California statute like the one here that
24 dictates the cases land in the coordinated proceeding,
25 and nor do you have the coordination proceeding already

1 up and running with joint trial procedures already
2 established.

3 Now, Your Honor already remarked Abramson
4 isn't really on point, but it is interesting -- there
5 is an interesting passage in the case that points out
6 what was missing in that case that we now have here.

7 Despite the similarity of fair claims,
8 plaintiffs did not propose to try their claims jointly.
9 These plaintiffs did when they chose the state of the
10 JCCP. As Mr. Restaino admitted, the ideas were going
11 to go do bellwethers. That's the plan. And we don't
12 have to speculate about what's going to happen. The
13 law in California says that is exactly what's going to
14 happen.

15 Now, take a look at these three, the Seventh,
16 Eight, and pending en banc case in the Ninth Circuit,
17 what they're all grappling with. In the Abbott Labs
18 case we had a motion to consolidate the cases for all
19 purposes through trial.

20 The Court is, again, at the front end
21 speculating about what's going to happen from there.
22 And they pointed out a joint trial proposal may be
23 implicit, and when you're consolidating the case it's
24 almost a certainty we're going to end up with
25 bellwether or exemplar proceedings. It is a certainty

1 in this case because those bellwethers and exemplar
2 proceedings are already established and the California
3 law dictates that that's what's going to happen.

4 In the en banc Romo case they did have a
5 California coordination proceeding, but they had it at
6 the petition stage before it was up and running. And
7 so the majority in dissent were grappling about what
8 does this coordination proceeding in California really
9 mean? I think if you look at the statute I think it's
10 fairly clear the thing is headed for a joint trial.

11 Judge Gould said look, the natural and
12 probable consequences when you petition for a
13 coordination is you're going to end up in an exemplar
14 proceeding with bellwethers. Again, you have a much
15 clearer case here because that's what's already
16 happened in the JCCP and that's what's going to happen
17 with these cases if Congress hadn't passed the statute
18 that dictates the cases remain in this court.

19 Your Honor mentioned the Atwell case, and I
20 think that's one of the most interesting and on point
21 cases because there they simply asked the cases be
22 assigned for a single judge. And like the plaintiffs
23 in this case, they disclaimed any attempt to
24 consolidate them for trial. The Eighth Circuit said we
25 weren't born yesterday. The inevitable result of what

1 you've asked for is that they're going to be determined
2 together. It's not only an inevitable result, it's a
3 certainty under the California statute.

4 The other interesting thing about the Atwell
5 case is the motion for consolidation was somewhat
6 opaque. And so the defendants didn't remove the case
7 until after during the oral argument on the motion.
8 The plaintiffs' lawyers in that case made some
9 additions, just like Mr. Restaino made this morning.
10 They made clear what their objective and intent was.

11 So, there was an issue about whether the
12 defendants had timely removed because they only removed
13 within 30 days of the hearing and not within the
14 original motion. And the Eighth Circuit said those
15 admissions trigger the CAFA jurisdiction.

16 So I don't think there's any doubt, based
17 upon the California law, the established JCP, the
18 record you have, but if there were any doubt, the
19 admissions this morning seal the deal in my view.

20 It circles back to where we started. The
21 objective of this statute, why did Congress enact the
22 most significant expansion in the federal court's
23 diversity jurisdiction in over a century?

24 The unanimous Supreme Court, in rejecting an
25 attempt to stipulate around the jurisdictional minimum,

1 said to hold otherwise would run directly contrary to
2 CAFA for its primary objective, ensuring federal court
3 consideration of interstate cases of national
4 importance.

5 There is no doubt that what you have before
6 you is an interstate case of national importance. Mr.
7 Fahey had the stats up there, the 3,000 plaintiffs from
8 around the states, very little connection to
9 California.

10 This case burdens and impacts interstate
11 commerce, which is why Congress said we want the
12 federal court supervising it. And why the Supreme
13 Court said we're not going to permit this stipulation
14 practice, which would have the effect of allowing the
15 subdivision of a \$100 billion action into -- \$100
16 billion action, it's 21 different pieces.

17 That lines up here because if you think about
18 how these cases -- Your Honor asked the question, how
19 are they going to be tried? Does it make a difference
20 in how the JCP administers these cases that they're in
21 33 different complaints instead of one?

22 The JCP is going to do the exact same thing
23 with those 33 complaints as it would do with one. And
24 it would entirely frustrate the statutory objective if
25 a simple device of separating or reproducing the same

1 piece of paper 33 times is the difference between
2 whether this federal court may exercise jurisdiction or
3 not.

4 Which comes to my last point, this argument
5 doesn't make any sense and has no basis in the law.
6 They try to distance themselves from the existing JCP
7 by saying we just filed in San Francisco Superior
8 Court. We didn't ask to go into the JCCP. The law
9 dictates they end up there.

10 I like the reference to the Tenth Circuit
11 case. I also commend that to Your Honor because,
12 again, the case recognized that -- the case -- there's
13 a footnote in that case that's right on point in this
14 case. It says "There's an ancient principle in law
15 that a party is presumed to intend the necessary
16 consequences of their action."

17 In this case the Court held it's too early to
18 tell what the necessary consequence is of what the
19 plaintiffs did. All they had done was file 12
20 complaints in one Oklahoma State court. It's not too
21 early to tell in this case. You have seven years of
22 this litigation and a long, long running JCCP, and the
23 nub of the matter is you have a statute that says when
24 they filed in the San Francisco Superior Court the case
25 is going to be moved to the JCCP.

1 And in every one of these circuit court cases
2 considering the CAFA issue they look at the local law
3 involving consolidation and coordination to try to
4 figure out what the plaintiffs' actions meant under the
5 law. What did this motion to consolidate mean in
6 Illinois in the Abbott case? What did this request for
7 a single judge assignment mean in Missouri in the
8 Eighth Circuit case?

9 In this case it's crystal clear what it means
10 under California law. It means you're moving to a
11 procedure with a joint trial. And I heard Mr. Berman
12 say we're not there yet, if something happens, removal
13 can happen later. That also makes no sense at all when
14 it is a certain fact that these cases are going to the
15 JCCP.

16 Think about that. That would mean you have
17 to wait until they get transferred, then we re-remove
18 them again. And this Court sound management and
19 administration and the ability to finally wrap up this
20 long, long running MDL would be further hindered and
21 delayed.

22 Congress put a 30-day limitation on removal
23 because they wanted the trigger to be at the earliest
24 possible opportunity. Right now, that's right now when
25 it is a fact certain that these cases are going to be

1 in the JCCP.

2 This case is much easier than any of the
3 cases bubbling around in the circuit courts because
4 none of them have a long-running and established JCCP
5 in which bellwether trial procedures are already the
6 norm.

7 THE COURT: Thank you, Mr. Cardozo.

8 (Pause in proceedings.)

9 THE COURT: Is there anything else in the way
10 of evidence or argument from GSK on either issue?

11 MR. FAHEY: No, Your Honor.

12 THE COURT: All right. Then I will turn back
13 to counsel for plaintiffs and ask if there is any
14 additional rebuttal.

15 MR. RESTAINO: Your Honor, if I may. John
16 Restaino.

17 THE COURT: You may.

18 MR. RESTAINO: And I would like to clarify
19 what has been described as my mission. I believe the
20 record would denote that Your Honor and I were
21 discussing the history of JCCPs and how they follow the
22 MDLs with the similar evidentiary hearings before or
23 following discovery and then bellwether trials.

24 So, I believe I was speaking in the abstract
25 and not admitting to anything in this regard in

1 California. And, in addition, perhaps stepping on the
2 argument that will be made, what is continually just
3 being overlooked is the numerosity issue. And the
4 slide states that by filing claims of thousands of
5 non-Californians in state where JCCP with procedure for
6 trying claims jointly already exists, with emphasis,
7 plaintiffs explicitly "propose that the claim of 100 or
8 more persons be tried jointly."

9 Now, that is the rule that we must operate
10 under, and it is our right in California to file claims
11 of less than 100 to avoid that argument. So one, it
12 was not an admission as put forth. I believed I truly
13 was speaking with the Court in the historical sense of
14 the JCCP and MDLs.

15 THE COURT: Well, let's pick up on that.
16 Regardless of an interpretation, I mentioned when I
17 think one of your colleagues was arguing that all three
18 of you or your law firms have chosen to file multiple
19 plaintiff cases, each under 100. But where does that
20 land all your cases in California? That's the argument
21 that's being posed here by GSK, because your cases will
22 be consolidated. They will be bigger, and what does
23 California do in that case? Do they take all of the
24 cases together, en masse? I'm lead to believe that's
25 true, in a consolidated way, similar to this MDL.

1 However, your cases don't remain segregated.
2 They don't sever. So, they can't go lower than you
3 originally filed in each of the cases. They only go in
4 a consolidated higher number. So, that I thought was
5 where that argument was going.

6 MR. RESTAINO: Well, if we're taking --

7 THE COURT: By your total number of cases.

8 MR. RESTAINO: Yes, Your Honor, I think I
9 understand what the bench is asking. However, taking
10 that to the next step, therefore, in each case where
11 there are filings of consolidated matters in California
12 that ultimately result in 100 or 101, then they should
13 all be sucked up underneath the CAFA.

14 And that, in fact, does not happen and has
15 not been held to be the necessary process for it, that
16 as long as the cases individually are filed with less
17 than 100, that they do not fall under the CAFA ruling.

18 THE COURT: Does it make any sense to do it
19 that way? What is your purpose --

20 MR. RESTAINO: Sense --

21 THE COURT: -- in doing it that way?

22 MR. RESTAINO: I'm sorry?

23 THE COURT: When you have how many? Where's
24 that chart?

25 MR. FAHEY: It's I think the second slide of

1 our presentation, Your Honor.

2 THE COURT: Yes, 165 plaintiffs, right?

3 MR. RESTAINO: Yes.

4 THE COURT: For your firm. 837 for
5 Napoli-Bern, 837. 2,008 plaintiffs for
6 Salim-Beasley. So break them up as you will, that's
7 what one of the PowerPoint slides is pointing out, you
8 can't get under the cap. You can't divide it up and
9 say this is how we're going to proceed when you know
10 that you're going to be consolidated in California
11 State court. Isn't that the argument?

12 MR. FAHEY: Your Honor, can I just make one
13 point for the record?

14 THE COURT: Yes.

15 MR. FAHEY: Mr. Restaino's original complaint
16 was 165 plaintiffs. He then promptly amended it to
17 bring it under the 100. And so the original complaint
18 filed in this case had all of his plaintiffs in one
19 complaint.

20 MR. CARDOZO: And I would add, Your Honor,
21 that is exactly the argument. All of the cases,
22 Abbott, Atwell, exact thing, complaints individually
23 have less.

24 But, it was clear from the motion to
25 consolidate request for a single assignment judge that

1 they would then be processed from there together, which
2 is what's going to happen as a matter certainty in this
3 JCCP. And the individual complaints are going to be
4 irrelevant.

5 THE COURT: Because they could not proceed in
6 California any other way.

7 MR. CARDOZO: Exactly.

8 THE COURT: Not these claims.

9 MR. CARDOZO: Exactly.

10 THE COURT: So, I guess that's one of the
11 practical realities in terms of evidence of where this
12 is going to be, that is I'm being asked to infer
13 counsels' intent because when you file in California
14 you know this is going to happen. You know this is
15 going to happen if you have a product liability claim
16 and you're filing multiple plaintiff complaints.

17 It's already been determined that this will
18 be swept into the JCCP and you aren't asking for
19 anything different. So you know you're going to be
20 there. So, how is filing multiple similar complaints
21 evidence that you don't intend to be there? You're
22 going to proceed that way.

23 MR. RESTAINO: And it has been held as such
24 for many, many years without CAFA coming in.
25 California does establish or did establish its JCCP for

1 the same reason as the federal court system has the
2 MDL, efficiency, moving the cases forward.

3 It is our right as an attorney to look at
4 each particular case and decide what is the best
5 interest of this particular plaintiff. Is it our best
6 interest as we do 95 percent of the time of our work,
7 to file within the MDL, or in this particular case is
8 it in this particular plaintiff's interest to file it
9 in a state jurisdiction?

10 And taking advantage of the rules that we did
11 not establish, which exist in California, enables us to
12 have state courts consolidated with all the efficiency
13 that goes with that without it being sucked up by the
14 Claims Act.

15 THE COURT: Well, one way to do that is to
16 make sure you name McKesson so you can destroy
17 diversity and not get swept up into the MDL. That's
18 what most people have done. Most attorneys have done
19 that --

20 MR. RESTAINO: As --

21 THE COURT: -- in the past in this MDL.

22 MR. RESTAINO: As is their right.

23 THE COURT: But, they haven't pursued it with
24 the honest intent of pursuing a claim against McKesson.
25 They have not. We heard that evidence. Do you have

1 any evidence contrary to that?

2 MR. RESTAINO: I do not.

3 THE COURT: No. And I trust GSK's lawyers
4 representing both entities that they know what they're
5 talking about, like I said before. So, I see this as a
6 right that is being utilized, but in contravention of
7 GSK's right to have their clients treated fairly as
8 well.

9 So, that's the context and the conflict, a
10 balance of rights. And there are a number of circuits
11 and district courts looking at this same issue right
12 now in terms of CAFA. And I think we have to also.
13 Okay, thank you. Ms. Beasley, did you want to add
14 anything?

15 MS. BEASLEY: Yes, I did. I just wanted to
16 say again, you know, for the mass action provision,
17 which is 28, USC 1332 D11, the first part of the
18 definition of mass action is that plaintiffs must
19 request the joint trial.

20 And, again, if you go back to removal rules,
21 you take the complaint or the case as it was at the
22 time that removal was noticed. So, at the time removal
23 was noticed in these cases all we had done is filed
24 separate complaints with fewer than 100 plaintiffs, as
25 Congress allows us to do under CAFA to avoid federal

1 jurisdiction, nothing more. We did nothing more.

2 THE COURT: Are you saying that you were not
3 going to be joined into the JCCP? Do you have --

4 MS. BEASLEY: Well --

5 THE COURT: -- an opt-out provision that is a
6 matter of right in California when you file a matter
7 with mass plaintiffs?

8 MS. BEASLEY: I don't know. If we did, we
9 would probably lose. I'm sure we could object to their
10 -- they are the ones in the four cases that were in the
11 JCCP. They're the ones that filed a notice that it was
12 related to the JCCP. And that's the whole point of
13 having a JCCP. If you follow the logic --

14 THE COURT: But that's a strategic move on
15 your part. That's only really an attempt to bolster
16 your position that you really do have the right intent
17 here. You know what's going to happen. We all know
18 what's going to happen. How do you have a right to
19 opt-out of the mass tort program in California?

20 MS. BEASLEY: But there's no provision in
21 CAFA that says the inference or the knowledge that
22 there's a JCCP pending in the state where you file your
23 complaint is enough to trigger federal jurisdiction.
24 It's very explicit.

25 And as I was saying before, if you follow

1 defendant's logic, there would be no more JCCPs or
2 consolidated actions in any state court because every
3 time after one is filed, every time --

4 THE COURT: You mean in California because
5 they are one of the few states that allow non-residents
6 to file as plaintiffs there connected to another
7 plaintiff. That doesn't happen in Pennsylvania.

8 MS. BEASLEY: It happens in Illinois. We
9 have --

10 THE COURT: Well, yes, it does.

11 MS. BEASLEY: So some states do --

12 THE COURT: But that's not common.

13 MS. BEASLEY: It's --

14 THE COURT: It is a breed unto itself. You
15 can't say that's the way it is all over the country.

16 MS. BEASLEY: But it's practical and it
17 functions and it's efficient the same way that the MDL
18 is. And, in fact, my experience, the MDLs --

19 THE COURT: Am I allowed to con --

20 MS. BEASLEY: -- in the JCC --

21 THE COURT: Am I allowed to consider that,
22 Ms. Beasley, at all, how efficient it may be?

23 MS. BEASLEY: Well, what's the point of
24 having a JCCP if any case that a plaintiff files in the
25 whole state of California would trigger CAFA?

1 THE COURT: I can't answer that question. I
2 don't --

3 MS. BEASLEY: No, but I --

4 THE COURT: I'm not sure anybody would. I
5 don't understand it.

6 MS. BEASLEY: But that's what defendant's
7 saying. Defendant's saying simply because you file a
8 case in a state where there is otherwise a coordinated
9 proceeding, whether it's Illinois, California, or any
10 other, that's there log, that's there argument, just
11 because you file a case there CAFA will be triggered
12 and you go to an MDL, an existing MDL.

13 It requires no other action on our part,
14 despite what that mass action provision says, that we
15 must request joint trial, not we request recovery or we
16 file a complaint. We have to, the plaintiffs, in those
17 complaints, just like in Abbott, those plaintiffs that
18 filed the complaints asked the court to consolidate
19 through trial. So that's what that holding was based
20 on.

21 THE COURT: And you're doing the same.

22 MS. BEASLEY: And that one is sometimes --

23 THE COURT: You're doing the same.

24 MS. BEASLEY: We haven't asked anything.

25 THE COURT: That's why you want to remain in

1 California, so you can keep your cases together in the
2 mass tort program there. You're doing that.

3 MS. BEASLEY: We haven't asked. That's what
4 I'm saying. We have -- we were not part of the motion
5 to consolidate.

6 THE COURT: That's really hard for me to
7 accept, that -- not that you haven't asked, but that
8 you weren't going to ask. That makes no sense to me
9 whatsoever, okay, because you herald the opportunity to
10 be there, and what is the premise, what is the statute,
11 what is the rule that says that once you do that you
12 can opt-out of a mass tort program? You're either in
13 or you're out, and it's the Court that decides that,
14 whether you ask or not.

15 MS. BEASLEY: All I'm saying is that their
16 interpretation expands federal jurisdiction, which is
17 supposed to be narrowly construed because they go
18 outside of the definition of mass action in CAFA.

19 I also would like to address --

20 THE COURT: All right.

21 MS. BEASLEY: -- something Mr. Fahey said.

22 THE COURT: Yes.

23 MS. BEASLEY: He criticized our bare bones
24 complaints, which I would like to add comply with
25 California's notice pleading rules. They're -- you

1 know, we're allowed -- we don't have to plead ultimate
2 facts. We are allowed to plead enough to put
3 defendants on notice as to what the nature of our
4 claims are, and there's obviously not doubt about that.

5 The other thing is they talk about product ID
6 like it's something easy to find, you know, that's not
7 part of our clients' medical records. We're not always
8 able to track down that information. If we were, we
9 would provide it.

10 That is the whole point of doing discovery,
11 which is something we would want to ask McKesson in
12 discovery because they have the information of what
13 pharmacies that they distributed Avandia to. We would
14 like to get that information from them, and that was --

15 THE COURT: Shouldn't you do that before you
16 file a notice pleading or not? Shouldn't you have an
17 idea before you file and name a defendant that you have
18 a claim against them?

19 MS. BEASLEY: The basis of our claim against
20 McKesson is that they're a nationwide distributor of
21 Avandia. But, what I'm saying is the information to
22 document whether a specific distributor distributed to
23 a specific pharmacy is actually very hard information
24 to get, especially from our clients or their medical
25 records because it's not part of the records that are

1 generated from their healthcare.

2 Also, a lot of them, they don't know. That's
3 all I'm saying is that we would like that information
4 too, and it's something we should be entitled to get in
5 discovery with McKesson, is what pharmacies did you
6 distribute to. We provided them with the pharmacies
7 where our clients got the Avandia from. They should be
8 able to tell us did you distribute to that one.

9 THE COURT: Well, it seems to me that if you
10 did provide the particular specific clients'
11 information about where they got their Avandia, you
12 already know where to go to find if McKesson
13 distributed there. You already know that. So why do
14 you need that from McKesson again?

15 MS. BEASLEY: That's -- that's -- I'm talking
16 about --

17 THE COURT: Except to corroborate what you
18 should already know?

19 MS. BEASLEY: Well, just because we found out
20 -- we were able to track down the pharmacy records from
21 where say one particular client got their Avandia
22 filled, those records do not say oh, by the way, an
23 asterisk, we got this distributed to us by McKesson?

24 THE COURT: Are you sure about that? Because
25 I've seen McKesson's label on a number of --

1 MS. BEASLEY: Some --

2 THE COURT: -- scripts.

3 MS. BEASLEY: Sometimes. And in those
4 situations then we know for those clients, but not
5 always.

6 THE COURT: But you haven't put it -- well,
7 you haven't put it down anywhere on a fact sheet?

8 MS. BEASLEY: When we have the information
9 and we are asked for it we do provide it. That's all
10 I'm saying is that we can't always get the information
11 from a source other than the defendant themselves as to
12 what pharmacies that they've distributed to.

13 THE COURT: And I'm going to go back to this.
14 When you have a plaintiff, and I'm not speaking as if
15 I've never been an attorney, when you have a client you
16 get all your information in order before you file and
17 name a defendant.

18 MS. BEASLEY: And I agree. And that's what
19 we spend about --

20 THE COURT: Because you didn't just do it in
21 McKesson. You named plaintiffs and included them in
22 your complaints from all over the country.

23 MS. BEASLEY: Because --

24 THE COURT: So because they are national
25 distributor doesn't necessarily mean that they

1 distributed this Avandia in that case. So it seems to
2 me --

3 MS. BEASLEY: But that's the information --

4 THE COURT: -- that they're not being treated
5 like the equal or defendant that they should be. It
6 didn't matter. It just didn't matter because that
7 isn't prepared.

8 I've never seen a case in Avandia where it
9 was, never, because nobody went after them. Nobody
10 said we have proof here that McKesson is a distributor.
11 That is why we named them. And I'm not aware that they
12 did that in California either when I remanded those
13 cases.

14 MS. BEASLEY: I'm not aware.

15 THE COURT: So, you have that history to
16 deter. You have that history to overcome. I think you
17 have to. I don't think you can stand here and say you
18 can't get that information except from McKesson or you
19 would have done some sleuthing before. That's what
20 attorneys are supposed to do, in my opinion, not just
21 name parties because it's the way you choose to file.
22 I think that's a serious flaw. And the conjuncture of
23 the California rules and the MDL rules is an
24 interesting one, but it's not in conflict.

25 Let's go back to basic filing against your

1 defendants on behalf of a client. You do your work up.
2 You get your ducks in a row. That's the problem I see
3 here because that is evidence of intent. And it's not
4 just you, Ms. Beasley, and your firm's cases, it's
5 everyone's. You're in the same position I think. So
6 that really has to be answered, and it probably has to
7 be answered now, not later, not after remand to
8 California and then removal again.

9 When you end up having to, if the California
10 court ever decides to make you, prove a case against
11 McKesson, that's too late. So if I'm going to do
12 justice here, if I'm going to follow the rules and make
13 them sensible, I have to do it at the right moment.
14 I'm not sure if this is the right moment, but it might
15 have to be.

16 MS. BEASLEY: Well, I mean we didn't name
17 McKesson because they were some random, (inaudible)
18 distributor for Avandia. There's no doubt, there's no
19 dispute, they're the nationwide distributor for
20 Avandia, and that's why we named them.

21 THE COURT: Okay. Thank you.

22 MR. RESTAINO: Thank you, Your Honor

23 THE COURT: Mr. Berman.

24 MR. BERMAN: To get into a different aspect
25 of this same argument that I'll begin with, we have to

1 remember that for purposes of remand and for the issue
2 of whether a defendant has been fraudulently joined,
3 which is the context within which this issue arises,
4 it's the defendant who has the burden of proof, not the
5 plaintiff. It is the defendant who has asserted
6 fraudulent joinder who must prove a heavy burden to
7 meet its obligation.

8 What they have not come forward with, other
9 than speculation, and what we have not come forward yet
10 with in the underlying California litigation, for
11 instance, is they have not come forward with any
12 evidence that any single plaintiff in any of the cases
13 now before this Court and before this motion, could not
14 have had a product distributed by McKesson. They have,
15 as they have indicated in their chart E1 I think it is
16 or Plaintiff 1 or Defendant 1, Exhibit 1 --

17 THE COURT: Twombly wouldn't allow that.
18 Twombly would not allow you to allege that they must
19 have been the distributor. It's not enough. It's not
20 good enough.

21 MR. BERMAN: I understand that allegation,
22 Your Honor, but this is the defendants' motion to prove
23 fraudulent joinder, and they have not come --

24 THE COURT: No, but you're mixing it in to a
25 pleading and a notice -- just like Ms. Beasley did, a

1 notice pleading right as in California. Go passed the
2 pleadings and deal with the chart that was put up.

3 MR. BERMAN: All right, let's deal with the
4 chart. There's nothing --

5 THE COURT: D1.

6 MR. BERMAN: The defendant has not come
7 forward with any evidence saying that any evidence
8 saying that any of the plaintiffs on their chart could
9 not have had their product distributed or did not have
10 their product distributed by McKesson.

11 They have records in this chart showing,
12 apparently the identification of pharmacies. They have
13 records in their possession which could show that's not
14 our product, we didn't distribute it, and they could
15 have made that record here before this Court and they
16 didn't do so.

17 THE COURT: So you're saying they have to
18 produce discovered facts because, obviously, that would
19 put them in the position that they say you're supposed
20 to be in the position, but you have the clients.

21 MR. BERMAN: We have the clients and we have
22 the burden to prove certain --

23 THE COURT: And they have to prove a negative
24 of the entire case, the affirmative defense, on a
25 removal? Is that what you're saying? I want to

1 understand this argument.

2 MR. BERMAN: What I'm saying is that while we
3 have the underlying burden before the court in
4 California to prove our case prior to trial, for
5 purposes of this motion, to prove that we have
6 fraudulently joined and thus cannot prove the case
7 against this defendant, they have within their
8 possession the documents that could or should show that
9 we could not prove a case against any individual
10 plaintiff.

11 THE COURT: Their documents would not
12 necessarily show your intent or lack thereof.

13 MR. BERMAN: It may not necessarily show our
14 intent, but it would show that we could not prove a
15 case against any individual plaintiff by -- against
16 any -- against McKesson.

17 THE COURT: Easier done -- easier said and
18 easier done if you file individual plaintiff cases and
19 not group them.

20 MR. BERMAN: Well, if you look at their
21 argument, Your Honor, and as my colleague had said, it
22 would be the death knell of mass tort litigation
23 anywhere in the country because in California, as this
24 Court knows, when the cases are consolidated for
25 purposes of discovery they're really coordinated, they

1 don't lose their individual docket case-hood, so to
2 speak.

3 THE COURT: Neither do they in the MDL.

4 MR. BERMAN: Neither do they in New Jersey or
5 in the mass tort complex litigation center in
6 Philadelphia.

7 However, if merely filing individual cases
8 could somehow be conglomerated with the other cases
9 that are being heard by a single mass tort judge,
10 whether it's Judge New in Philadelphia or Judge Higbee,
11 now with the appellate division temporarily, or of any
12 of the judges in New Jersey or any other mass tort
13 judge around the country, that would be the end of mass
14 tort litigation, which clearly was not the
15 congressional intent by putting a numerosity limit
16 within the statute.

17 The fact that, as well, certain cases may be
18 grouped together for bellwether purposes for trial does
19 not necessarily confer CAFA jurisdiction either because
20 it could be that the cases are grouped not from within
21 the same mass tort filing group of say Cruz versus
22 McKesson where we have 60 plaintiffs. There is nothing
23 that says that the cases that are being grouped are for
24 bellwether purposes are from --

25 THE COURT: That's what I asked before.

1 MR. BERMAN: -- are from that group as
2 opposed to all of the groups that are before the Court.

3 THE COURT: It's not the bellwether trial
4 selection process that's at issue here.

5 MR. BERMAN: It was raised by counsel.

6 THE COURT: No, no, not in that context,
7 Counsel. It was raised to say that they would all be
8 grouped and move forward together and be tried
9 together. Nobody cares which case is the bellwether.

10 MR. BERMAN: I don't know that they would
11 be -- there's nothing in what was presented to us in
12 the filing and on the exhibits today that shows that
13 all of the cases would be tried together.

14 What was presented to us indicates the
15 opposite. When there is a request that a few cases be
16 tried together for bellwether purposes that suggests
17 that all of the other cases are not going to be tried
18 together. It's on page I believe 25.

19 THE COURT: No, I don't go there, not when
20 you're dealing with mass groupings. I do not think you
21 can draw that conclusion. Either way, you can't draw
22 that conclusion because you can't say because a couple
23 of cases would be tried together as bellwethers that
24 all the other ones are separate and single. It doesn't
25 work.

1 MR. BERMAN: It simply depends upon
2 circumstances that we can't predict right now.

3 THE COURT: Right. I agree with that.

4 MR. BERMAN: So those decisions that were
5 cited as an indication that because they're going to be
6 removed to the JCCP, for instance --

7 THE COURT: But you forgot something,
8 counsel.

9 MR. BERMAN: I'm sorry.

10 THE COURT: There's no move to sever these
11 plaintiffs in any of the cases. You file them in
12 California jointly for a reason and it's not to sever
13 them for trial. So let's be clear. I know that.

14 MR. BERMAN: I understand that and I'm not
15 arguing that.

16 THE COURT: Okay.

17 MR. BERMAN: What I'm saying is the fact that
18 they're filed together, perhaps 60 plaintiffs in a
19 case, does not mean that the 60 plaintiffs go to one
20 single trial.

21 There are like -- there is likely to be
22 individual trials or, as the Court may see fit,
23 grouping some together or not. But, it cannot be
24 implied, as counsel has suggested, that because cases
25 are going into a JCCP even in large multi-plaintiff

1 groups that they are all going to be tried together.
2 The suggestion from the exhibit on page 25 is that the
3 opposite happens. That's my interpretation of their
4 exhibit.

5 When there was indication of an application
6 that certain numbers of cases be tried in a bellwether
7 fashion indicates that all of them are not being tried
8 together. At least that's my inference from that
9 exhibit. And there is no evidence before this Court
10 that they are all going to be tried together and,
11 again, that's the defendant's burden. Thank you, Your
12 Honor.

13 THE COURT: Thank you.

14 MS. GUSSACK: Your Honor, briefly.

15 THE COURT: Ms. Gussack.

16 MS. GUSSACK: First of all, thank you for
17 affording us this robust argument.

18 THE COURT: I'm really enjoying this. We've
19 been at this for two hours and I didn't even look at
20 the clock until just now --

21 MS. GUSSACK: Well, we appreciate --

22 THE COURT: -- because I'm getting hungry.

23 MS. GUSSACK: Well, then I'll be brief
24 because I simply want to return to the comments the
25 Court made at the outset of this argument because I'm

1 very troubled by something Ms. Beasley suggested.

2 There has been an unfortunate suggestion by
3 plaintiffs' counsel and by conduct that the cost and
4 burden should shift to the defendant to prove basic
5 elements of plaintiffs' case. And the Court at the
6 outset made the observation that that is an expensive
7 and problematic proposition.

8 It is not GSK's job to fill in the gaps of
9 plaintiffs' proof in basic issues like product
10 identification or exposure or prescription records.
11 And yet that has been far too often the case with great
12 cost to GSK.

13 Now, the plaintiff suggests that it is
14 McKesson's burden to shift the burden to us to incur
15 the cost to demonstrate what the plaintiffs have failed
16 to do at the outset of their litigation, investigate
17 the facts and make a showing and then act on it.

18 And I think the Court is well aware of our
19 view that there has been an absence of evidence of any
20 action intending to prosecute those claims. Thank you,
21 Your Honor.

22 THE COURT: Thank you. Thank you. Mr.
23 Fahey? Mr. Cardozo, any sur-rebuttal?

24 MR. FAHEY: I have learned not to speak after
25 Ms. Gussack does so I have nothing further, Your Honor.

1 MR. CARDOZO: And I'll concur unless you have
2 any questions.

3 THE COURT: Very wise men. Okay. No, I
4 don't have any more questions. I do appreciate the
5 rigorous explanations and proffers of positions here.
6 I think this is very serious a motion. I do think it
7 has impact on mass actions, class actions, MDLs, and
8 CCPs, JCCPs, all over the country.

9 However, it's not the only case that's doing
10 that, so we're going to take all of your finely made
11 arguments and evidence and submit what you want. But
12 if you filed against McKesson, I believe that the
13 discovery request or the motion to compel is known to
14 or will be shortly known to the defendants, and I am
15 the only one that doesn't know what it says. So please
16 forward same, and I will take this under advisement. I
17 do appreciate it very much.

18 You came from a long distance, many of you.
19 And the rest of you, I think I'll see you all again.
20 In one context or another I will. Thank you.

21 ALL: Thank you, Your Honor.

22 (Proceedings adjourned, 12:35 p.m.)

23 * * *

CERTIFICATION

I, Michael Keating, do hereby certify that the foregoing is a true and correct transcript from the electronic sound recordings of the proceedings in the above-captioned matter.

4-27-14
Date

Michael T. Keating
Michael Keating