

1 Corporation; and Does 1 through 100, inclusive. Plaintiffs, who have been divided,
2 alphabetically and by country, into several cases such that each case has less than 100
3 plaintiffs, allege claims for (1) products liability – negligence; (2) strict products
4 liability; (3) products liability – defect in design, manufacture, and chemical
5 composition; (4) products liability – breach of warranty; (5) fraudulent management; (6)
6 intentional misrepresentation; (7) fraud by concealment; (8) general negligence; and (9)
7 conspiracy.

8 On December 10, 2008, defendants were served with the summons and
9 complaint. On January 9, 2008, defendants removed this action to this Court pursuant
10 to the Class Action Fairness Act of 2005 (“CAFA”), 28 U.S.C. §§ 1332(d) and 1453.
11 Defendants argue that these actions should be considered one action for the purposes of
12 CAFA because plaintiffs have divided their claims solely for the purpose of avoiding
13 federal court jurisdiction under CAFA. Notice of Removal at 3 (citing Freeman v. Blue
14 Ridge Paper Products, Inc., 2008 WL 5396249, at *1 (6th Cir. Dec. 29, 2008)).

15 On February 9, 2009, plaintiffs filed the instant motion to remand this case to Los
16 Angeles County Superior Court pursuant to 28 U.S.C. § 1447(c). On February 23,
17 2009, defendant Dow Chemical filed an opposition. A hearing was held on March 9,
18 2009. After carefully considering the parties’ arguments, the Court finds and concludes
19 as follows.

20 **II. BACKGROUND**

21 Plaintiffs allege that they were injured by exposure to 1, 2-Dibromo-3-
22 chloropropane (“DBCP”), a toxic chemical sold under the brand names “Nemagon” and
23 “Fumazone.” Plaintiffs allege that defendants have manufactured, marketed, and
24 distributed DBCP. Plaintiffs further allege that they were exposed to DBCP as a
25 consequence of working on banana plantations in Costa Rica, Panama, Honduras, and
26 Guatemala, owned or operated by defendants. Plaintiffs allege that as a result of
27 exposure to DBCP, they have “suffered sterility and other serious injuries.”
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1 **III. LEGAL STANDARD**

2 A motion for remand is the proper procedure for challenging removal. Remand
3 may be ordered either for lack of subject matter jurisdiction or for any defect in removal
4 procedure. See 28 U.S.C. § 1447(c). The Court strictly construes the removal statutes
5 against removal jurisdiction, and jurisdiction must be rejected if there is any doubt as to
6 the right of removal. See Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992). The
7 party seeking removal bears the burden of establishing federal jurisdiction. See Prize
8 Frize, Inc. v. Matrix, Inc., 167 F.3d 1261, 1265 (9th Cir. 1999). The defendant also has
9 the burden of showing that it has complied with the procedural requirements for
10 removal. Judge William W. Schwarzer, et al., California Practice Guide: Federal Civil
11 Procedure Before Trial § 2:609 (The Rutter Group 2007).

12 Under 28 U.S.C. § 1446(b), the defendant must file the notice of removal within
13 30 days after being served with a complaint alleging a basis for removal. When there
14 are multiple defendants, all defendants named in the complaint and who have been
15 properly joined and served in the action must also join in the removal. Hewitt v. City of
16 Stanton, 798 F.2d 1230, 1232 (9th Cir. 1986). This is known as the rule of unanimity.
17 See Chicago, Rock Island & Pacific Railway v. Martin, 178 U.S. 245 (1900); see also
18 Schwarzer, *supra*, § 2:905.2.

19 If the defendant’s removal notice fails to meet the procedural requirements of §
20 1446(b), the court may remand the action based on the plaintiff’s timely motion.
21 McAnally Enterprises, Inc. v. McAnally, 107 F. Supp. 2d 1223, 1226 (C.D. Cal. 2000).
22 Pursuant to 28 U.S.C. § 1447(c), a motion to remand based on any defect other than
23 subject matter jurisdiction must be made within 30 days after the filing of the notice of
24 removal.

25 **IV. DISCUSSION**

26 **A. Amount-in-Controversy Requirement**

27 Plaintiffs argue that defendant has not demonstrated that the amount in
28 controversy requirement exceeds \$5,000,000, in the aggregate, or \$75,000 for any

1 individual plaintiff. Mot. at 7. Plaintiffs contend that defendant’s Notice of Removal
2 merely alleges that “[a] review of plaintiffs’ complaint indicates that the total ‘matter in
3 controversy [at the time of removal] exceeds the sum or value of \$5,000,000, exclusive
4 of interest and costs,’ 28 U.S.C. § 1332(d)(2), and further indicates that the matter in
5 controversy at the time of removal for each plaintiff ‘exceeds the sum or value of
6 \$75,000.00.’” Id. at 7-8. Plaintiffs argue that this “mere averment” is “wholly
7 inadequate to overcome the presumption against removal jurisdiction.” Id. at 8.
8 Plaintiffs further argue that CAFA “does not alter the longstanding rule that the party
9 seeking federal jurisdiction on removal bears the burden of establishing that
10 jurisdiction.” Id. at 9 (citing Abrego Abrego v. The Dow Chemical Co., 443 F.3d 676,
11 686 (9th Cir. 2006)).

12 Defendant responds that it has “plausibly” demonstrated that the amount-in-
13 controversy requirement has been met. Opp’n at 12 (citing Twombly, 550 U.S. at 549).
14 Defendant argues that the instant case is distinguishable from Abrego because (1) after
15 Abrego was remanded to state court, 95 out of 1,160 plaintiffs in that case admitted that
16 they were seeking more than the jurisdictional minimum; (2) in a recent case in Los
17 Angeles Superior Court, Tellez v. Dole Food Company, Inc. L.A. S.Ct. Case No. BC
18 312852, foreign banana farm workers alleging injury as a result of occupational
19 exposure to DBCP were awarded damages between \$166,800 and \$550,400; and (3)
20 plaintiffs paid \$26,000 in total filing fees for the 30 actions rather than \$870 for a single
21 action. Id. at 14-15.

22 Defendant further responds that plaintiffs’ complaint confirms that the aggregate
23 amount-in-controversy exceeds \$5,000,000. Id. at 16. Defendant argues that the 2,485
24 plaintiffs filed this action as one of “unlimited jurisdiction” in Los Angeles County
25 Superior Court and that the “minimum jurisdictional limit” for such cases is \$25,000.
26 Id. (citing Cal. Code Civ. P. §§ 85, 86(a)(1)). Therefore, defendant argues that the
27 aggregate amount-in-controversy in these actions exceeds \$62 million. Id. at 17.
28 Defendant further argues that the dispute over amount-in-controversy can be answered

1 conclusively if the Court allows defendant leave to serve two requests for admission to
2 each plaintiff asking “(1) Admit or deny that, in this lawsuit, you are seeking at
3 least \$75,000 in damages” and “(2) Admit or deny that, in this lawsuit, you are not
4 seeking at least \$75,000 in damages.” Id.

5 Defendant has failed to demonstrate that “even one plaintiff satisfies the \$75,000
6 jurisdictional amount requirement of § 1332(a), applicable to mass actions by virtue of
7 § 1332(d)(11)(B)(i).” Abrego Abrego v. The Dow Chemical Co., 443 F.3d 676, 686
8 (9th Cir. 2006). In Abrego, the Ninth Circuit held that defendant failed to overcome the
9 “strong presumption” against removal jurisdiction and did not meet its burden of setting
10 forth the underlying facts supporting its assertion that the amount in controversy
11 exceeded \$75,000. Id. at 689.¹ In Abrego, the notice of removal alleged

12 A review of plaintiffs’ complaint indicates that the total “matter in
13 controversy [at the time of removal] exceeds the sum or value of
14 \$5,000,000, exclusive of interests and costs,” 28 U.S.C. § 1332(d)(2),
15 and further indicates that the matter in controversy at the time of
16 removal for each plaintiff “exceeds the sum or value of \$75,000.”

17 ...

18 Given the nature of the injuries claimed by Plaintiffs and the request
19 for punitive damages as a multiple of each plaintiff’s compensatory
20 damages, this Court has jurisdiction over each and every plaintiff
21 because each plaintiff satisfies the “jurisdictional amount
22 requirements under subsection(a).” 28 U.S.C. § 1332(d)(11)(B)(i).

23 Id. Defendant’s allegations in this case are nearly identical

24 A review of plaintiffs’ identical complaints indicates that the total
25 “matter in controversy exceeds the sum or value of \$5,000,000,

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27 ¹ In Abrego, the plaintiffs were 1,160 banana plantation workers from Panama whose
28 allegations of exposure to the pesticide “DBCP” are nearly identical to plaintiffs’
allegations in the instant case. 443 F.3d at 678.

1 exclusive of interest and costs,” 28 U.S.C. § 1332(d)(2), and further
2 indicates that the matter in controversy for each plaintiff “exceeds the
3 sum or value of \$75,000.”

4 Each plaintiff alleges that as a result of exposure to the chemical
5 pesticide DBCP, he “suffer[s] sterility and other serious injuries,” . . .
6 and seeks special, general and punitive damages Thus, this Court
7 has jurisdiction over each and every plaintiff because each plaintiff
8 satisfies the “jurisdictional amount requirements under subsection
9 (a).” 28 U.S.C. § 1332(d)(11)(B)(i).

10 Notice of Removal at 6-7. Therefore, the Court concludes that these allegations
11 “neither overcome [] the strong presumption against removal jurisdiction, nor
12 satisf[y][Dow]’s burden of setting forth, in the removal petition itself, the underlying
13 facts supporting its assertion that the amount in controversy exceeds \$75,000.”²

14 Abrego, 443 F.3d at 678.

15 **B. “Mass Action” pursuant to CAFA**

16 Plaintiffs further argue that this case is not a “mass action” pursuant to the Class
17 Action Fairness Act of 2005 (“CAFA”), 28 U.S.C. §§ 1332(d) and 1453, because their
18 complaint contains less than 100 plaintiffs. Id. at 11.

19 Defendant responds that plaintiffs may not “gerrymander their lawsuit to

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21 ² At oral argument, defense counsel argued that defendants have shown, by a
22 preponderance of the evidence that plaintiffs are seeking more than \$75,000 per plaintiff.
23 However, defendants have not shown that it is “more likely than not” that any plaintiff’s
24 claim satisfies the \$75,000 jurisdictional requirement. Abrego, 443 F.3d at 689. Although
25 95 plaintiffs in Abrego admitted that they were seeking more than \$75,000 after remand,
26 1,065 plaintiffs made no such admission. Furthermore, the Court cannot draw any
27 conclusions based on the filing fees that plaintiffs paid. Lastly, the Court cannot conclude
28 that the amount in controversy requirement is met based on a verdict won by six plaintiffs
in Tellez. While the defendants argue that Tellez similarly involves banana plantation farm
workers who were exposed to DBCP, they allege nothing else about the nature of the
claims or injuries that would allow the Court to conclude that it is “more likely than not”
that at least one of these plaintiff’s is seeking more than \$75,000 in damages.

1 circumvent CAFA.” Opp’n at 6 (citing Freeman v. Blue Ridge Paper Products, Inc.,
2 2008 WL 5396249, at *1 (6th Cir. Dec. 29, 2008); Proffitt v. Abbott Laboratories, No.
3 2:08-CV-151, 2008 WL 4401367, at *5 (E.D. Tenn. Sept. 23, 2008)). Defendant argues
4 that plaintiffs cannot artificially splinter their actions to avoid jurisdictional thresholds.
5 Id. at 8.

6 Defendant has failed to establish a basis for federal subject matter jurisdiction.
7 The removal statute is to be “strictly construed against removal jurisdiction and any
8 doubt must be resolved in favor of remand.” Hofler v. Aetna U.S. Healthcare of
9 California, Inc., 296 F.3d 764, 767 (9th Cir.2002). These actions do not constitute
10 “mass actions” under CAFA because each of these actions has been brought by less
11 than 100 plaintiffs. 28 U.S.C. § 1332(d)(11)(B); Tanoh v. AMVAC Chemical Corp.,
12 2008 WL 4691004, at *5 (C.D. Cal. Oct. 21, 2008). Nothing in CAFA suggests that
13 plaintiffs, as masters of their complaint, may not “file multiple actions, each with fewer
14 than 100 plaintiffs, to work within the confines of CAFA to keep their state-law claims
15 in state court.” Tanoh, 2008 WL 4691004 at *5. Furthermore, “Congress expressly
16 rejected the use of [defendants’] strategy by excluding actions in which claims have
17 been ‘joined upon motion of a defendant’ from the definition of ‘mass action.’” Id.
18 (citing 28 U.S.C. §1332(11)(B)(ii)(II)).

19 The Sixth Circuit’s holding in Freeman is distinguishable from the instant case.
20 2008 WL 5396249, at *1. In Freeman, the plaintiffs divided their suit into five separate
21 suits with identical parties and claims, each covering distinct, sequential six-month time
22 periods. Id. By contrast, each of the cases at issue here involves distinct plaintiffs.
23 Moreover, the Sixth Circuit explicitly noted that its “holding is limited to the situation
24 where there is no colorable basis for dividing up the sought-for retrospective relief into
25 separate time periods, other than to frustrate CAFA.” Id. (emphasis added).

26 **C. Judicial Estoppel**

27 Plaintiffs argue that defendant is judicially estopped from arguing that this is a
28 “mass action” under CAFA. Id. at 13 (citing Rissetto v. Plumbers & Steamfitters Local

1 343, 94 F.3d 591, 603-604 (9th Cir. 1996)). Plaintiffs contend that “[b]y insisting that
2 CAFA applies to these cases, Dow necessarily claims these cases are to be tried
3 ‘jointly.’” Plaintiffs argue that this position contradicts the position that defendants,
4 including Dow Chemical, took in Abarca v. Dole Food Company, Inc. L.A. S.Ct. Case
5 No. BC 322412, which also involved Central American banana farm workers who
6 alleged injury as a result of occupational exposure to DBCP. Mot. at 4. In Abarca,
7 defendants argued that

8 this Court has ruled – and Defendants agree – that any DBCP trial
9 should include only Plaintiffs who are similarly situated as to by
10 whom they were employed; whether they were allegedly DBCP
11 applicators or had other banana farm jobs; whether they claim sterility
12 or some other injury; and whether they claim exposure to DBCP from
13 overhead irrigation or from other methods of application.

14 Pl.’s Resp. to OSC, Ex. 1 at 23. Plaintiffs further argue that in Tellez, defendants,
15 including Dow Chemical, argued that “[t]hirteen plaintiffs being tried at one time
16 plainly creates almost certainty of jury confusion and thus chance of mistrial. The only
17 way to assure the jury will not confuse facts related to each plaintiff is to try their cases
18 individually.” Pl.’s Resp. to OSC, Ex. 2 at 4.

19 Defendant responds that it is not judicially estopped from arguing that plaintiffs’
20 claims “are proposed to be tried jointly” under CAFA because in Tellez, its requests for
21 individual trials were denied. Opp’n at 18. Defendant further argues that a district
22 court in the Middle District of Florida denied a motion for remand where the removing
23 defendants had “the premeditated intent of contending that the case should be severed
24 and each plaintiff’s case should be tried individually.” Id. at 20 (quoting Cooper v. R.J.
25 Reynolds Tobacco Co., 586 F. Supp. 2d 1312, 1318 (M.D. Fla. 2008)).

26 The Court concludes that defendant is not judicially estopped from arguing that
27 plaintiffs’ claims constitute a “mass action” under CAFA. Defendant’s representations
28 in Tellez and Abarca do not preclude it from arguing before this Court that these cases

1 should be tried jointly. See Arizona v. Shamrock Foods Co., 729 F.2d 1208, 1215 (9th
2 Cir. 1983). Furthermore, at least one federal court has held that removal under the
3 “mass action” provision of CAFA “with the strategic intent to seek severance of
4 plaintiffs’ claims” has no effect on subject matter jurisdiction. Cooper, 586 F. Supp. 2d
5 at 1322.

6 **V. CONCLUSION**

7 In accordance with the foregoing, the Court hereby GRANTS plaintiffs’ motion
8 to remand this case to Los Angeles County Superior Court.

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10 IT IS SO ORDERED.

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12 Dated: March 9, 2009

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15 CHRISTINA A. SNYDER
16 UNITED STATES DISTRICT JUDGE
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