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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

LANETTE LOUISE LOPEZ, et al.,  
Plaintiffs,  
v.  
ALLIED PACKING & SUPPLY INC., et al.,  
Defendants.

Case No. 16-cv-00371-JSC

**ORDER GRANTING PLAINTIFFS’  
MOTION FOR REMAND**

Re: Dkt. No. 15

Federal law prohibits diversity jurisdiction removal more than one year after “the commencement of the action.” 28 U.S.C. § 1446(c). The pending motion to remand asks whether amendment of a personal injury complaint in California state court to add a wrongful death cause of action upon the death of the original plaintiff constitutes “commencement of [a new] action” resetting the one-year clock. After considering the parties’ submissions, and having had the benefit of oral argument on March 24, 2016, the Court concludes that it does not. Defendants’ removal more than 20 months after this case was commenced in state court was thus untimely and Plaintiffs’ motion to remand must be granted.<sup>1</sup>

**BACKGROUND**

Mark Lopez filed a personal injury lawsuit against 10 Defendants, including Hillshire Brands Company (“Hillshire”), on April 15, 2014 alleging injuries, including mesothelioma, arising from asbestos exposure. (Dkt. No. 1-1 ¶¶ 12-16.) Two weeks later, he amended the

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<sup>1</sup> The parties have consented to the jurisdiction of a magistrate judge pursuant to 28 U.S.C. § 636(c). (Dkt. Nos. 9, 11, 16.)

1 complaint to add his wife, Lanette Louise Lopez, as a plaintiff alleging loss of consortium. (Dkt.  
2 No. 1-2 at ¶¶ 34-36.) Plaintiffs thereafter dismissed their claims against three of the defendants  
3 (Dkt. Nos. 17-14, 17-15, 17-16) and agreed with five other defendants that “the matter would be  
4 handled under previously arranged asbestos case processing agreements.” (Dkt. No. 17 at ¶ 7).  
5 According to Plaintiffs, as of August 5, 2014 Hillshire and Honeywell International, Inc.  
6 (“Honeywell”) were the only defendants remaining in the case. (*Id.* at ¶ 8.)

7 Mr. Lopez died on July 7, 2015. (*Id.* at ¶ 14.) Ms. Lopez then moved for leave to file a  
8 second amended complaint to make claims for wrongful death and survival and to accordingly add  
9 the Lopez children, Pilar Elann Lopez, and Seth Vincent Lopez, as plaintiffs. (*Id.*) The court  
10 granted the motion to amend over the defendants’ objection (Dkt. No. 18-1) and Plaintiffs filed the  
11 now operative Second Amended Complaint (“SAC”) on October 28, 2015. The SAC named four  
12 defendants: Hillshire, Honeywell, Allied Packing & Supply Inc., and Basco Drywall & Painting  
13 Company. (Dkt. No. 1-1 at 35<sup>2</sup>.) Plaintiff filed a notice of voluntary dismissal as to Allied  
14 Packing & Supply Inc. on January 12, 2016. Plaintiffs have not yet served Basco Drywall &  
15 Painting Company. (Dkt. No. 1 at ¶ 7.) Also on January 12, Plaintiffs filed a case management  
16 conference statement stating that Hillshire and Honeywell are the two “active defendants” in the  
17 action. (Dkt. No. 1-1 at 58.) Ten days later, Hillshire removed the action to this Court with  
18 Honeywell’s consent based on diversity jurisdiction. (Dkt. Nos. 1; 1-1 at 63.)

19 **LEGAL STANDARD**

20 A district court must remand a removed action “if at any time before final judgment it  
21 appears that the district court lacks subject matter jurisdiction.” 28 U.S.C. § 1447(c). Courts must  
22 “strictly construe the removal statute against removal jurisdiction.” *Gaus v. Miles, Inc.*, 980 F.2d  
23 564, 566 (9th Cir. 1992). “Th[is] ‘strong presumption’ against removal jurisdiction means that the  
24 defendant always has the burden of establishing that removal is proper.” *Id.*

25 Generally, a notice of removal must be filed within 30 days after service of the complaint,  
26 28 U.S.C. §§ 1446(b)(2)(A); however, if it is unclear from the face of the complaint that diversity

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28 <sup>2</sup> Record citations are to material in the Electronic Case File (“ECF”); pinpoint citations are to the  
ECF-generated page numbers at the top of the documents.

1 jurisdiction exists, the notice of removal shall be filed within 30 days after receipt of a paper “from  
2 which it may first be ascertained that the case is one which is or has become removable.” 28  
3 U.S.C. § 1446(b)(3). A case “may not be removed under subsection (b)(3) . . . more than 1 year  
4 after commencement of the action, unless the district court finds that the plaintiff has acted in bad  
5 faith in order to prevent a defendant from removing the action.” 28 U.S.C. § 1446(c)(1).

6 **DISCUSSION**

7 Hillshire removed this action more than 20 months after it was originally commenced in  
8 state court. It nonetheless argues that the one-year limitation of section 1446(c)(1) does not defeat  
9 removal because the amendment of the state court complaint to add the wrongful death cause of  
10 action constitutes “commencement of the action” restarting the one-year time limitation.<sup>3</sup> In light  
11 of California law defining “commencement” of a case and Ninth Circuit caselaw applying that  
12 state law, the Court concludes that it does not.

13 “Commencement [under 1446(c)] refers to when the action was initiated in state court,  
14 according to state procedures.” *Bush v. Cheaptickets, Inc.*, 425 F.3d 683, 688 (9th Cir. 2005).  
15 Under California law, “[a]n action is commenced . . . when the complaint is filed.” Cal. Code Civ.  
16 Proc. § 350; *see also Orr v. City of Stockton*, 150 Cal. App. 4th 622, 629 (2007) (“A civil lawsuit  
17 is generally commenced by the filing of a complaint, asserted by one party against another,  
18 alleging facts sufficient to state a cause of action.”). Thus, the filing of the original complaint  
19 commences an action under California law. The Ninth Circuit has squarely held that amendment  
20 of the complaint does not change this analysis: “a California state court action is commenced . . .  
21 when the original complaint is filed. Any amendment of that complaint-whether to add new  
22 causes of action, to add or replace plaintiffs, or to add or replace defendants-does not change that  
23 commencement date.” *McAtee v. Capital One, F.S.B.*, 479 F.3d 1143, 1148 (9th Cir. 2007)  
24 (internal citation and quotation marks omitted); *see also Brookler v. Radioshack Corp.*, No. 2:13-  
25 CV-06034-CAS, 2013 WL 5741918, at \*3 (C.D. Cal. Oct. 21, 2013) (concluding the filing of a  
26 second amended complaint following decertification to add a subclass did not commence a new  
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28 <sup>3</sup> Hillshire does not argue that the bad faith exception to the one-year removal requirement applies here.

1 action for purposes of Section 1446(c)).

2 In *McAtee*, the issue was whether the Class Action Fairness Act (“CAFA”), which permits  
3 removal of certain state law class actions, applied to the complaint. CAFA applies to actions  
4 “commenced” after its February 2005 enactment. Pub. L. 109-2, § 9, Feb. 18, 2005, 119 Stat. 14.  
5 Although the original complaint was filed prior to that date, the removing defendants argued that  
6 the action was newly “commenced” when the plaintiffs amended the complaint to substitute the  
7 removing defendants for the doe defendants. The Ninth Circuit disagreed. Instead, it held that  
8 under California law an action is commenced “the date on which the original complaint in the  
9 action was filed.” *Id.* End of discussion. Hillshire does not dispute the applicability of *McAtee*’s  
10 reasoning to removal under 1446(c). Nor can it. The question in *McAtee* and under 1446(c)(1) is  
11 the same: under California law when is an action commenced? And regardless of the purpose of  
12 the question-- whether CAFA applies or the one-year limitation of section 1446(c)(1) bars  
13 removal--the answer is the same: when the original complaint was filed.

14 Hillshire nonetheless insists that the amendment of a complaint to allege wrongful death  
15 causes of action following a plaintiff’s death commences a new action. In support of this  
16 argument, Hillshire relies upon cases which it contends hold that a wrongful death action is a new  
17 cause of action that arises on the death of the original plaintiff. *See, e.g., Groom v. Bangs*, 153  
18 Cal. 456, 459 (1908) (concluding that a husband’s filing of an amended and supplemental  
19 complaint alleging a cause of action for wrongful death following his wife’s death during the  
20 pendency of their personal injury action “was, in effect, a discontinuance of the previous action  
21 and the beginning of a new action for a new cause.”). However, as Plaintiffs note, nearly all of the  
22 cases Hillshire cites pre-date amendments to California law which provided that a personal injury  
23 action did not abate on a person’s death, *see Cty. of Los Angeles v. Superior Court*, 21 Cal. 4th  
24 292, 295 (1999), and establishing the right of a spouse to make a loss of consortium claim in a  
25 personal injury action, *see Boeken v. Philip Morris USA, Inc.*, 48 Cal. 4th 788, 794 (2010).<sup>4</sup> None

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27 <sup>4</sup> Those cases that do not pre-date these amendments are procedurally distinguishable. *See, e.g.,*  
28 *Larcher v. Wanless*, 18 Cal. 3d 646, 657 (1976) (concluding that the statute of limitations period  
for a wrongful death claim accrues upon the death of the decedent and not with the filing of a  
personal injury action preceding the individual’s death); *Pac. Emp. Ins. Co. v. Hartford Steam*

1 of the cases Hillshire cites address the situation here: a surviving spouse who was herself already a  
2 plaintiff amends the action to make a wrongful death claim following the death of her co-plaintiff  
3 spouse and adds her children as plaintiffs—children whose cause of action was required to be  
4 added to that of their parent. *See Adams v. Superior Court*, 196 Cal. App. 4th 71, 75 (2011)  
5 (“California courts interpret the wrongful death statutes to authorize only a single action, in which  
6 all the decedent’s heirs must join.”).

7 Hillshire’s reliance on *Castaneda v. Dep’t of Corr. & Rehab.*, 212 Cal. App. 4th 1051,  
8 1063 (2013) is similarly misplaced. Although *Castaneda* noted that “it has long been the law in  
9 California, that ‘[a]n action for wrongful death is wholly distinct from an action by the decedent,  
10 in his lifetime, for the injuries which ultimately cause his death,’” *id.* at 1063 (quoting *Lewis v.*  
11 *City and County of San Francisco*, 21 Cal.App.3d 339, 341 (1971)), the court was addressing  
12 whether the decedent’s daughter could piggyback on her father’s tort claim for purposes of the  
13 exhaustion requirement for her wrongful death claim. In concluding that she could not, the court  
14 noted that under California law a claimant cannot rely on the tort claim presented by another  
15 claimant. *Id.* at 1062. *Lewis*, the case upon which the *Castaneda* court relied, likewise addresses  
16 a spouse’s failure to independently satisfy the claims presentation requirement following the death  
17 of his spouse and conversion of the claim into one for wrongful death. *Lewis*, 21 Cal.App.3d at  
18 341. These cases in no way suggest that when a plaintiff amends a complaint to allege a wrongful  
19 death claim, and also adds plaintiff heirs at the same time, a new action within the meaning of  
20 California Code of Civil Procedure section 350 is commenced. As *McAtee* unequivocally stated,  
21 under California law an action is commenced when the original action is filed and “[a]ny

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23 *Boiler Inspection & Ins. Co.*, 143 Cal. App. 2d 646, 649 (1956) (discussing whether an insurance  
24 company was estopped from seeking to recover amounts it paid to resolve wrongful death claims  
25 against the decedent’s former employer); *Secrest v. Pac. Elec. Ry. Co.*, 60 Cal. App. 2d 746, 751  
26 (1943) (concluding that “when the identical issues joined by the pleadings in the action for  
27 wrongful death were determined adversely to plaintiffs in the prior personal injury action, under  
28 facts and circumstances similar to those presented by the instant case, the defense of estoppel by  
judgment must be sustained.”); *Garcia v. State*, 247 Cal. App. 2d 814, 816 (1967) (relying in part  
on Section 377 [the wrongful death statute] to conclude although a prisoner is barred from  
recovering for an injury resulting from a dangerous condition on public property, a wrongful death  
action based on such an injury is not similarly barred). Hillshire’s reliance on *Draper Mortuary v.*  
*Superior Court*, 135 Cal. App. 3d 533, 541 (Cal. Ct. App. 1982), is even more problematic as the  
quoted language is from the dissent.

1 amendment of that complaint—whether to add new causes of action, to add or replace plaintiffs,  
2 or to add or replace defendants—does not change the commencement date.” 479 F.3d at 1148.

3 Further, Plaintiffs’ wrongful death action is not as distinct from the original complaint as  
4 Hillshire contends. In *Lamont v. Wolfe*, 142 Cal. App. 3d 375 (Cal. Ct. App. 1983), the court  
5 rejected an argument that a husband’s wrongful death claim was barred by the statute of  
6 limitations, concluding instead that the wrongful death claim related back to the filing date of his  
7 complaint for lack of consortium predicated on the same injuries. The court concluded that

8 [w]hile Code of Civil Procedure section 377 creates a cause of  
9 action for wrongful death, under the circumstances of this case it is  
10 not a wholly different cause of action but more a continuation under  
a different name of the original cause of action for loss of  
consortium.

11 *Id.* at 382. Likewise, in *McCarthy v. AstenJohnson, Inc.*, No. CV 03-3046PSGEX, 2009 WL  
12 577769, at \*2 (C.D. Cal. Mar. 4, 2009), the court concluded that res judicata barred a spouse’s  
13 wrongful death lawsuit given her prior recovery on a loss of consortium claim based on the same  
14 injury finding “that a claim for loss of consortium and a wrongful death claim for noneconomic  
15 damages constitute the same cause of action under California law.”

16 The same reasoning that led the courts in *Lamont* and *McCarthy* to conclude that the  
17 spouse’s claim for wrongful death was a continuation of the spouse’s previously filed claim for  
18 loss of consortium applies here. As the *Lamont* court noted, “[t]he fact that Mr. Lamont now sues  
19 in a different capacity does not prejudice the defendants nor does it alter the operative facts on  
20 which the original and amended complaints are based.” *Lamont*, 142 Cal. App. 3d at 380. Indeed,  
21 “the injuries suffered by [plaintiff] as husband suing for loss of consortium and as heir suing for  
22 wrongful death are personal to him and include the same elements of loss of love, companionship,  
23 affection, society, sexual relations, and solace. *Id.*

24 Hillshire’s reliance on California Code of Civil Procedure Section 583.310 is also  
25 unpersuasive. Under that statute trial is required to occur within five years “after the action is  
26 commenced against the defendant.” In *Brumley v. FDCC California, Inc.*, 156 Cal. App. 4th 312  
27 (2007), as modified on denial of reh’g (Nov. 19, 2007), the court held that a newly added wrongful  
28 death cause of action did not have to be tried within five years of the filing of the original

1 complaint because it did not relate back to the claims of the original complaint. *Id.* at 325. The  
2 court reasoned that the five-year rule operates like and shares the same purpose as a statute of  
3 limitations. *Id.* at 318, 319. “Both types of statutes promote the trial of cases before evidence is  
4 lost, destroyed, or the memory of witnesses becomes dimmed.” *Id.* at 320 (internal quotation  
5 marks and citation omitted).

6 This reasoning does not apply here. The only issue is whether the case will be tried in state  
7 court or federal court. Indeed, in *McAtee*, the Ninth Circuit specifically rejected a “relation back”  
8 approach to determine when a case is commenced for purposes of determining where the case will  
9 be tried. The court reasoned:

10 The relation back doctrine is formulated slightly differently from  
11 one jurisdiction to another, but the common premise of all the  
12 formulations is that, when the stakes involve the survival of the  
13 action, a defendant should not be ambushed by a late-filed or late-  
14 served action. Thus, for example, an amendment to the complaint  
15 that is filed or served after the running of the statute of limitations  
16 will be allowed to relate back to the date of the original complaint  
17 only when the defendant would not be unfairly surprised.

18 *Id.* at 1147. The stakes before the *McAtee* court were different.

19 By contrast to a case in which the statute of limitations is at issue,  
20 the stakes are lower when the question is whether a case is covered  
21 by CAFA. The case will be allowed to go forward, in some forum,  
22 whether CAFA applies or not. If CAFA applies, the action may go  
23 forward in federal court if a defendant files a timely motion for  
24 removal. If CAFA does not apply, the action must go forward in  
25 state court unless there is some other basis for removal to federal  
26 court.

27 *Id.* The stakes at issue under section 1446(c) are similar to those at issue in *McAtee*. If the  
28 amendment of the complaint did not “commence the action” the case stays in state court; if it did,  
the case moves to federal court assuming the other requirements of diversity jurisdiction are  
satisfied. Thus, as *McAtee* held, “the relation back doctrine should not be imported into the  
determination of when an action is commenced in state court. . . . Instead, at least in California, we  
simply look to the date on which the original complaint in the action was filed.” *Id.* at 1147.

Further, the *Brumley* approach to the five-year rule does not work in the circumstances  
here. *Brumley* held that the wrongful death claims did not relate back because “neither Mrs.

1 Brumley nor Brumley’s children filed claims in the original lawsuit, and their claims in the  
2 amended complaint alleged a different type of injury than those that had been alleged by Brumley  
3 in the original complaint.” *Id.* at 325. Not so here. Rather, as in *Lamont*, Ms. Lopez had a claim  
4 for loss of consortium which is based on the same injury as her now wrongful death claim and  
5 thus does relate back. To accept Hillshire’s argument would mean that Ms. Lopez’s wrongful  
6 death claim (and the survival claim) did not commence a new action, but that the wrongful death  
7 claim of her newly-added children did. This approach does not make sense.

8 **CONCLUSION**

9 The amendment of the state court complaint upon the death of Mr. Lopez did not  
10 commence a new action resetting the one-year clock for diversity jurisdiction removal. Plaintiffs’  
11 Motion for Remand (Dkt. No. 15) is GRANTED. This action is remanded to the Alameda County  
12 Superior Court.

13 **IT IS SO ORDERED.**

14 Dated: March 28, 2016

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17 JACQUELINE SCOTT CORLEY  
18 United States Magistrate Judge

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