UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

IN RE: SYNGENTA AG MIR162 CORN LITIGATION MDL No. 2591

ORDER VACATING CONDITIONAL TRANSFER ORDER

Before the Panel: Plaintiffs in an action pending in the Southern District of Illinois move under Panel Rule 7.1 to vacate the Panel's order conditionally transferring their action (*Tweet*), which is listed on the attached Schedule A, to MDL No. 2591. Defendants Archer Daniels Midland Co. (ADM); Bunge North America, Inc.; Cargill, Inc.; and Louis Dreyfus Company LLC (collectively, the ABCD defendants or defendants), oppose the motion to vacate. The various Syngenta defendants did not respond to the motion.

After considering the argument of counsel, we find that, although this action involves common questions of fact with the actions previously transferred to MDL No. 2591, we cannot transfer *Tweet* to the MDL because the Class Action Fairness Act limits our ability to transfer removed mass actions in these circumstances. Like the actions in MDL No. 2591, *Tweet* concerns injuries allegedly arising from Syngenta's marketing and sale of genetically modified corn prior to the Chinese government's approval for import of corn with the MIR162 trait. Despite the undisputed factual overlap, transfer under 28 U.S.C. § 1407, is unavailable because *Tweet* is pending in federal court solely as a removed mass action under the Class Action Fairness Act. *See* 28 U.S.C. § 1332(d)(11). Subsequent transfers of such actions via Section 1407 are prohibited, absent a request by a majority of the plaintiffs. *See* 28 U.S.C. 1332(d)(11)(C)(i) ("Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.").

Tweet arrives before us with a complicated procedural history. The three original plaintiffs in *Tweet* were each plaintiffs in one of three other cases[1] removed from state court solely pursuant to the mass action provision of the Class Action Fairness Act, 28 U.S.C. § 1332(d)(11). When those three plaintiffs changed counsel and chose to pursue different claims against the ABCD defendants, the transferor court severed their claims from the consolidated *In re: Syngenta Mass Tort Actions* and created a separate case, *Tweet*. In early May 2016, plaintiffs filed their third amended complaint, adding over 700 additional plaintiffs.

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[1] *See Poletti, et al. v. Syngenta AG, et al.*, S.D. Illinois, C.A. No. 3:15-cv-01221; *Brase Farms, Inc., et al. v. Syngenta AG, et al.*, S.D. Illinois, C.A. No. 3:15-cv-01374; and *Wiemers Farms, Inc., et al v. Syngenta AG, et al.*, S.D. Illinois, C.A. No. 3:15-cv-01379.

In the order severing the three original *Tweet* plaintiffs from the consolidated *In re: Syngenta Mass Tort Actions*, the transferor court opined in a footnote that:

> The Court notes that this post-removal severance does not appear to divest the Court of CAFA jurisdiction. *See Cunningham Charter Corp. v. Learjet, Inc.*, 592 F.3d 805 (7th Cir. 2010) (CAFA jurisdiction continues despite post-removal denial of class certification); *Bullard v. Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759, 761 (7th Cir. 2008) (declining, in the context of a mass action, to allow a post-removal filing to affect the court's CAFA jurisdiction because the court "doubt[ed] that anything filed after a notice of removal can affect federal jurisdiction"); *Cooper v. R.J. Reynolds Tobacco Co.*, 586 F. Supp. 2d 1312 (M.D. Florida, Aug. 29, 2008) (Corrigan, J.) (discussing jurisdictional issues related to post-removal severance in actions removed under CAFA).

In re: Syngenta Mass Tort Actions, S.D. Illinois, C.A. No. 15-1221, doc. 63 at 3 n. 1. Plaintiffs' arguments before us largely parallel the transferor court's reasoning, arguing that while the amended complaint added parties and claims, it did not create a new civil action or change the nature of the action from being a removed mass action under CAFA.

Defendants counter that original federal diversity jurisdiction exists over the "overwhelming majority"[2] of the 709 plaintiffs who were added to the action via the third amended complaint in *Tweet* and that the action should be transferred, for purposes of efficiency, to the MDL. If CAFA's mass action removal transfer bar applies to the three original plaintiffs, defendants suggest that either the Panel or the transferee judge can separate and remand their claims to the transferee court under Section 1407(a).

We previously determined that actions removed pursuant to the mass action provision plus other jurisdictional grounds are transferrable under Section 1407. *In re: Darvocet, Darvon & Propoxyphene Products Liab. Litig.*, 939 F. Supp. 2d 1376, 1381 (J.P.M.L. 2013) ("Upon review of CAFA's overall purpose and its entire legislative history, we conclude that Congress did not intend that actions removed on multiple grounds, grounds which include the mass action provision, would be restricted from Section 1407 transfer.").[3] In arriving at that interpretation, we reasoned that "[r]eading Section 1332(d)(11)(C)(i) to restrict Section 1407 transfer only of actions removed exclusively as mass actions

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[2] Defendants fail to specify which of the 709 new plaintiffs are not diverse, instead stating that the "overwhelming majority of these 709 plaintiffs are completely diverse from defendants, Third. Am. Compl. ¶¶ 11-741, and each plaintiff individually pleaded that the $75,000 amount-in-controversy requirement was met, id. ¶¶ 13-723." Defs. Response at 4.

[3] Relatedly, we have rejected the argument that we should consider the reasonableness of the non-CAFA mass action grounds for removal. *See In re: Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig. (No. II)*, MDL No. 2502, ECF No. 443, at 1 (J.P.M.L. Jun. 6, 2014) (Transfer Order) ("Plaintiffs suggest . . . that in such a situation (*i.e.*, one in which an action has been removed on CAFA mass action and other grounds), we should assess the reasonableness of those other grounds. We lack such authority, and thus reject this suggestion.").

would not effect a major change in the Panel's jurisdiction or function, as the Panel previously had no authority to transfer such actions (because, pre-CAFA, they were not removable)." *Id.* at 1380. We have not been presented with the precise issue here: whether to transfer an action consisting of a few plaintiffs severed from actions removed solely on mass action grounds and claims brought by hundreds of newly-added plaintiffs. But we need not deviate from the analysis articulated in *In re: Darvocet*. *Tweet* remains "removed exclusively" as a CAFA mass action. As such, we are prohibited from transferring it due to CAFA's prohibition on the transfer of such actions. 28 U.S.C. 1332(d)(11)(C)(i).

The CAFA mass action transfer bar is simply insurmountable in these circumstances.[4] Removal of *Tweet* as a mass action triggered the ban on Section 1407 transfer. *See* 28 U.S.C. 1332(d)(11)(C)(i) ("Any action(s) removed to Federal court pursuant to this subsection..."). No further jurisdictional bases for removal have been offered by defendants in the underlying action. Despite the post-removal severance of plaintiffs from the original mass actions, CAFA provides mass action jurisdiction over *Tweet*. *See, e.g., Louisiana v. Am. Nat. Prop. Cas. Co.*, 746 F.3d 633, 635 (5th Cir. 2014) ("Because at the time of removal CAFA supplied federal subject matter jurisdiction over these cases . . . we hold that CAFA continues to provide jurisdiction over these individual cases notwithstanding their severance from the class."). The addition of one or even several hundred *claims* of new plaintiffs does not change the nature of the action itself.[5]

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[4] Relatedly, defendants' proposed separation and remand of the three original *Tweet* plaintiffs and transfer of the newly-added plaintiffs is similarly unavailable due to the mechanics of the Section 1407(a) separation and remand process, which first requires transfer of the *entire action* to the transferee court (as opposed to transfer of certain claims). *See* 28 U.S.C. § 1407(a) ("When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. . . the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded."); *see also, In re: 1980 Decennial Census Adjustment Litig.*, 506 F. Supp. 648, 650 (J.P.M.L. 1981) ("The Panel is empowered by statute to couple its order of transfer with a simultaneous separation and remand of any claims in an action."); Federal Judicial Center, Manual for Complex Litigation § 20.131 (4th ed. 2004) ("[S]ection 1407(a) . . .empowers the Panel to accomplish 'partial' transfer by (1) transferring an action in its entirety to the transferee district, and (2) simultaneously remanding to the transferor district any claims for which transfer was not deemed appropriate . . . .").

[5] Defendants, at times, appear to implicitly concede this by referencing the newly-added plaintiffs' "claims." *See In re: Syngenta*, MDL No. 2591, Defendants' Response, J.P.M.L. CM/ECF doc. 648 at 6 ("The 709 newly-joined Plaintiffs are properly subject to transfer pursuant to section 1407, because their *claims* were not "removed to Federal court" within the meaning of 28 U.S.C. § 1332(d)(11)(C)(i).") (emphasis added).

IT IS THEREFORE ORDERED that the Panel's conditional transfer order designated as "CTO-63" is vacated.

PANEL ON MULTIDISTRICT LITIGATION

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IN RE: SYNGENTA AG MIR162 CORN LITIGATION

MDL No. 2591

SCHEDULE A

Southern District of Illinois

TWEET, ET AL. v. SYNGENTA AG, ET AL., C.A. No. 3:16-255