IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

HEIDI BROWN, and HEIDI BROWN as Parent and Next Friend of TREVOR BROWN, Individually and on Behalf of All Others Similarly Situated, Plaintiffs, vs. DR. PAUL KERKHOFF, and KERKHOFF CHIROPRACTIC, THE MASTERS CIRCLE, INC., DR. LARRY MARKSON, DR. BOB HOFFMAN, DR. DENNIS PERMAN, and JOHN DOES, Defendants.	**No. 4:05-cv-00274-JEG** **O R D E R**

This matter comes before the Court on Defendants' Motions to Dismiss for Lack of Personal Jurisdiction (Clerk's No. 12) and Failure to State a Claim Upon Which Relief Can Be Granted (Clerk's No. 11), and Plaintiffs' Motions to Remand to State Court (Clerk's No. 10) and for Leave to File Second Amended Complaint (Clerk's No. 24). Plaintiffs are represented by Kimberley Baer and Steven Wandro. Defendants are represented by Mary M. Brockington, Sean P. Moore, James H. Gilliam, Frank B. Strickland, and Russell C. Ford. A hearing on all matters was held on September 13, 2005. The pending motions are fully submitted and ready for disposition.

FACTS

Defendant Paul Kerkhoff is a chiropractor in Waukee, Iowa, and an Iowa resident. Kerkhoff Chiropractic is an Iowa corporation with its principal place of business in Waukee, Iowa. Kerkhoff is currently a member of Defendant The Masters

Circle, Inc. (the Masters Circle),[1] a New York corporation with its principal place of business in Jericho, New York. The other named defendants are Dr. Larry Markson, CEO Emeritus of the Masters Circle and a New York resident;[2] Dr. Bob Hoffman, President of the Masters Circle and a New York resident; and Dr. Dennis Perman, Executive Vice President of the Masters Circle and a New York resident.[3] Plaintiff Heidi Brown and her minor son, Plaintiff Trevor Rhiner, are residents of Urbandale, Iowa (collectively, Plaintiffs).

Kerkhoff has been a chiropractor for thirteen years, practicing the last ten years at Kerkhoff Chiropractic. It was in that capacity that he met Plaintiffs in late 2001. At the time, Trevor was suffering from leg pain, lower back pain, and headaches. Kerkhoff diagnosed a reverse curvature of the cervical spine and scoliosis and recommended a course of treatment that included adjustments and traction. Although Trevor's condition improved, Kerkhoff recommended Trevor continue to undergo treatment. Plaintiffs

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[1] On some occasions, Plaintiffs have alleged Kerkhoff's membership in an organization known as the Members Circle. On other occasions, Plaintiffs contend Kerkhoff is a member of the Masters Circle. Calling references to the Members Circle "typos," they now claim all references should have been to the Masters Circle.

[2] Defendant Markson indicated on June 8, 2005, that he would be moving from New York to Florida "shortly." He resides there now. However, since diversity of citizenship is determined when a lawsuit is filed, Markson's subsequent move to Florida is irrelevant for jurisdictional purposes. See Altimore v. Mount Mercy College, 420 F.3d 763, 768 (8th Cir. 2005) (citing Yeldell v. Tutt, 913 F.2d 533, 537 (8th Cir. 1990)).

[3] Collectively, all defendants are "Defendants". Defendants Masters Circle, Markson, Hoffman, and Perman are the "Masters Circle Defendants". Plaintiffs have also sued individuals identified as "John Does", who are yet unknown employees of Masters Circle.

decided to seek a second opinion from an orthopedic surgeon, who found a slight curvature of the spine he believed could not be addressed with chiropractic treatment and recommended physical therapy.

Plaintiffs filed an action against Kerkhoff and Kerkhoff Chiropractic in the Iowa District Court for Dallas County on December 26, 2003. In that action, they brought medical malpractice, fraudulent misrepresentation, negligent misrepresentation, and intentional infliction of emotional distress claims. During discovery in that state court action, Plaintiffs learned Kerkhoff was a member of the Masters Circle.[4]

The Masters Circle is an organization comprised of chiropractors that helps its members "discover exactly who [they] have to be and what [they] have to do to create the Chiropractic practice and lifestyle of [their] dreams." The Masters Circle, http://www.themasterscircle.com (last visited Oct. 17, 2005). To facilitate this goal, the organization sponsors seminars and conferences and provides access to electronic, print, and audiovisual materials to its members. In addition, the Masters Circle employs "coaches" to teach members principles of patient acquisition, patient compliance, and scripts to use when treating patients. To arrange a coaching session, members call a Masters Circle number to set up an appointment. Sessions are then held over the telephone at a later time. Membership in the organization costs $650 to $695 per month

[4] Plaintiffs allege Kerkhoff was a member of the Masters Circle during Trevor's treatment. Kerkhoff denies this, claiming his membership began on July 1, 2004, well after he stopped treating Trevor.

depending on the duration of membership, which ranges from eighteen to twenty-four months.

Plaintiffs contend Kerkhoff used tactics and polices devised by the Masters Circle while treating his patients, including the use of pre-set "scripts" and other techniques designed to attract and keep patients. Plaintiffs claim that in accordance with Masters Circle's policies, Kerkhoff did not reduce the frequency of patients' visits when their symptoms improved. They state that this policy was in accordance with Kerkhoff's goal of selling patients a long-term care plan, where they would "pre-buy" a year's regimen of chiropractic treatment, even if those services turned out to be unneeded. Plaintiffs allege that treatment changes occurred annually, even if patients' conditions dictated a change in treatment at an earlier date. They believe these tactics were perpetuated by the Masters Circle through its newsletters, website, conferences, and coaching sessions. They allege this conduct amounted to a nationwide conspiracy to require patients to pay for unneeded chiropractic services on their way to becoming life-long supporters of member chiropractors' dream lifestyles.

Plaintiffs submitted by facsimile several pages of a document styled as a Petition and National Class Action (Petition) to the Dallas County Clerk's Office on February 17, 2005.[5] The Petition sets forth negligent and fraudulent misrepresentation claims.

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[5] Although this action is styled as a class action and was filed pursuant to Iowa Rule of Civil Procedure 1.261, which governs class actions, this action has not been certified as a class action under either Iowa Rule of Civil Procedure 1.262 or Federal Rule of Civil Procedure 23. Consequently, only the claims of the named plaintiffs shall be considered when analyzing the pending motions. See Baxter v. Palmigiano, 425 U.S. 308, 310 n.1 (1976) ("Without . . . certification and identification of the class, the action

The file stamp on the Petition's first page indicates it was filed on February 17, 2005, at 4:29 p.m., one minute before the Clerk's office closed for business. On February 18, 2005, Plaintiffs' counsel learned the last page was not attached to the Petition.[6] Later on February 18, Plaintiffs counsel delivered the last page of the Petition to the Clerk's office. The last page included a jury demand and the signature and contact information of Plaintiffs' counsel. It brandishes a file stamp indicating a filing date of February 18, 2005. That same day, Plaintiffs dismissed their medical malpractice lawsuit against Kerkhoff and Kerhoff Chiropractic.

Also on February 18, 2005, President George W. Bush signed the Class Action Fairness Act (CAFA) into law. Pursuant to its terms, it became effective that day.

On February 22, 2005, the Plaintiffs filed a First Amended Petition and National Class Action (Amended Petition). They added as defendants a number of Masters Circle coaches (Removal Defendants). The Amended Petition sets forth civil conspiracy, ongoing criminal conduct, breach of fiduciary duty *per se*, and unjust

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is not properly a class action."); Cruz v. Farquharson, 252 F.3d 530, 534 (1st Cir. 2001) ("Only when a class is certified does the class acquire a legal status independent of the interest asserted by the named plaintiffs . . . ."); McKenzie v. City of Chicago, 118 F.3d 552, 555 (7th Cir. 1997) ("Because a class has not been certified, the only interests at stake are those of the named plaintiffs." (citing Baxter, 425 U.S. at 310 n.1)).

[6] Defendants contend that more than one page was missing from the Petition as submitted by facsimile, noting the absence of a TSI string on the top of some pages. The lack of such data is not evidence that they were not submitted to the Clerk's office on February 17, 2005, and it is Defendants who bear the burden of proof on this matter. Additionally, these pages, unlike the signature page, do not contain a file stamp indicating their submission to the Dallas County Clerk's office the following day.

enrichment claims, but does not reassert the legal theories of recovery contained in the Petition.

On May 16, 2005, the Removal Defendants filed a Notice of Removal in the United States District Court for the Southern District of Iowa. They argued removal was proper because the Court could have exercised original jurisdiction over the claims set forth against them based on diversity of citizenship under CAFA. On July 11, 2005, Plaintiffs dismissed the Removal Defendants without prejudice.

Plaintiffs seek to have this case remanded to state court, arguing this Court lacks subject matter jurisdiction. Defendants' resist, arguing this action was not commenced until after CAFA became effective. Alternatively, they argue that the action was commenced for CAFA purposes when Plaintiffs filed their Amended Petition to add the Removal Defendants and additional claims. The Defendants further contend that this action was not commenced until after CAFA became effective because Kerkhoff and Kerkhoff Chiropractic were not served with a copy of the Petition, and were only served with a copy of the Amended Petition.

Defendants also claim Plaintiffs' action should be dismissed because this Court lacks personal jurisdiction over each out-of-state Defendant, and because Plaintiffs have failed to state causes of action upon which relief can be granted. Plaintiffs resist both of these motions. Plaintiffs have also filed a Motion for Leave to File Second Amended Complaint, wherein they add an additional named plaintiff and refine their factual allegations.

DISCUSSION

I. The Sequence in Which to Resolve the Pending Motions.

Defendants urge the Court to resolve their motions first. They then claim that because neither this Court nor an Iowa state court could exercise personal jurisdiction over any of the Masters Circle Defendants, and because the Amended Petition fails to a state a claim upon which relief can be granted, the Court should dismiss Plaintiffs' action.

A court may not proceed in a case unless it has jurisdiction over the case or controversy. Ex Parte McCardle, 74 U.S. (7 Wall.) 506, 514 (1868). A federal district court may not dismiss a case on the merits by hypothesizing subject matter jurisdiction. Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 101 (1998). As a result, it would be improper for the Court to consider Defendant's Motion to Dismiss for Failure to State a Claim prior to resolving the pending jurisdictional motions.[7]

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[7] Defendants rely on Johnson v. Jumelle, 359 F. Supp. 361 (S.D.N.Y. 1973) for the proposition that analysis on their Motion to Dismiss for Failure to State a Claim should precede any jurisdictional analysis. This case does not stand for that proposition. In Johnson, the plaintiffs conditioned a motion to remand on the court's grant of a motion to dismiss for failure to state a claim filed by a number of the defendants. Id. at 362. Unlike the present case, the plaintiffs did not argue that the case had been improperly removed all along; they merely asserted that the case should be remanded if the motion to dismiss was granted. Id. The court noted that jurisdiction existed under 28 U.S.C. section 1343(3). See id. (noting "no question of lack of jurisdiction to hear the case under 28 U.S.C. § 1343(3)"). There, because the court could have originally exercised subject matter jurisdiction under that section, removal was proper. The court recognized that "[w]hen the case was properly removed . . ., the jurisdiction of the state court ceased . . . ." Id. at 363. There are two key differences between that case and the

In some cases, certain threshold issues, such as personal jurisdiction, may be resolved without a finding of subject matter jurisdiction, so long as the threshold issue is simple compared to the subject matter jurisdiction issue. See Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 587-88 (1999). The United States Supreme Court has provided the following guidance where motions raising subject matter jurisdiction and personal jurisdiction issues are pending simultaneously:

> [I]n most instances subject-matter jurisdiction will involve no arduous inquiry. In such cases, both expedition and sensitivity to state courts' coequal stature should impel the federal court to dispose of that issue first. Where, . . . however, a district court has before it a straightforward personal jurisdiction issue presenting no complex question of state law, and the alleged defect in subject-matter jurisdiction raises a difficult and novel question, the court does not abuse its discretion by turning directly to personal jurisdiction.

Id. (citations omitted). Thus, while the Court recognized that "there is no unyielding jurisdictional hierarchy" when resolving simultaneously pending motions, it endorsed the customary practice of "first resolv[ing] doubts about . . . jurisdiction over the subject matter." Ruhrgas, 526 U.S. at 578; see also Ross v. Thousand Adventures of Iowa, Inc., 178 F. Supp. 2d 996, 998 n.2 (S.D. Iowa 2001) (refusing to classify the case before it as "exceptional," and reverting to the customary practice of resolving subject matter jurisdiction issues first).

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present one. First, Plaintiffs have not made their Motion to Remand conditional on a grant of Defendants' Motion to Dismiss. Second, the only way to determine whether this case was properly removed is to analyze the Plaintiffs' Motion to Remand first.

The personal jurisdiction issues presented in this case are hardly "straight-forward." See Ruhrgas, 526 U.S. at 588. For example, Plaintiffs rely in part on a "conspiracy jurisdiction" argument to demonstrate sufficient contacts between all Defendants and Iowa exist to make the exercise of personal jurisdiction over them proper in an Iowa court. Conspiracy jurisdiction is "a form of long-arm jurisdiction in which the defendant's 'contact' with the forum consists of the acts of the defendant's co-conspirators within the forum." Youming Jin v. Ministry of State Sec., 335 F. Supp. 2d 72, 78 (D.D.C. 2004). In Remmes v. International Flowers & Fragrances, Inc., the United States District Court for the Northern District of Iowa noted that "[t]he Iowa appellate courts . . . have not yet addressed" "[w]hether personal jurisdiction can be obtained under a state long-arm statute on a conspiracy rationale." Remmes v. Int'l Flowers & Fragrances, Inc., — F. Supp. 2d — , 2005 WL 2253824, at *12 (N.D. Iowa Sept. 16, 2005). The court predicted that Iowa courts would eventually adopt the theory, id. at *13, but correctly noted that the issue "is a question of state law," id. at *12. This Court expresses no opinion regarding whether Iowa courts will ultimately embrace a "conspiracy jurisdiction" theory; the Court merely notes that the introduction of such a theory complicates the personal jurisdiction analysis of the present case.

The Plaintiffs also rely on the Master's Circle's use of a website to interact with and sell products and services to Iowa residents as a basis for their personal jurisdiction argument. This analysis requires placing the Masters Circle's website on a sliding scale and necessarily involves the application of a multi-pronged, fact-intensive test. See

Lakin v. Prudential Sec., Inc., 348 F.3d 704, 710-13 (8th Cir. 2003) (analyzing the framework pioneered by Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997),[8] in general and specific personal jurisdiction contexts).

The personal jurisdiction analysis is not straightforward. There certainly exist cases where the personal jurisdiction issues are uncomplicated compared to the subject matter jurisdiction issues, warranting reversal of the customary method of resolving subject matter jurisdiction issues first. E.g., Ruhrgas, 526 U.S. at 588; Zermeno v. McDonnell Douglas Corp., 246 F. Supp. 2d 646 (S.D. Tex. 2003); Foslip Pharmaceuticals, Inc. v. Metabolife Int'l, Inc., 92 F. Supp. 2d 891 (N.D. Iowa 2001). This case is not one of them.

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[8] In Zippo, the court measured the nature and quality of the commercial activity by fashioning a "sliding scale" to gauge the likelihood of personal jurisdiction:

> At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

Zippo Mfg., 952 F. Supp. at 1124 (citations omitted), quoted in Lakin, 348 F.3d at 710-11.

The Court is also mindful that should it conclude remand is proper, a ruling on personal jurisdiction matters "may preclude the parties from relitigating the very same personal jurisdiction issue in state court." Ruhrgas, 526 U.S. at 585 (citing Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 524-27 (1931), for the proposition that "personal jurisdiction has issue-preclusive effect"). Should remand occur, whether personal jurisdiction exists over the out-of-state Defendants should be decided by an Iowa state court, particularly in light of the novel theories of personal jurisdiction this case presents.

Because, as later discussion will show, the subject-matter jurisdiction question does not involve an "arduous inquiry," and because the personal jurisdictional issue is not "straightforward," the Court declines Defendants' invitation to address personal jurisdiction first and instead turns to the subject matter jurisdiction issue encapsulated in Plaintiffs' Motion to Remand. See Ruhrgas, 526 U.S. at 588.[9]

II. Motion to Remand.

Plaintiffs have filed a motion to remand, arguing this Court cannot exercise subject matter jurisdiction over the present controversy. It is undisputed that if this

[9] This line of reasoning is consistent with Arizona v. Maypenny, where the Supreme Court noted that "if the state court lacks jurisdiction over the subject matter or the parties, the federal court acquires none on removal." Arizona v. Maypenny, 451 U.S. 232, 242 n.17 (1981). The Maypenny Court merely pointed out that if either personal jurisdiction or subject matter jurisdiction is lacking, a federal court may not proceed to the merits of a case. The Maypenny Court offered no further guidance on the order in which to resolve those issues.

Court has subject matter jurisdiction over the present controversy, jurisdiction would rest solely on the diversity of the parties. See 28 U.S.C. § 1332.

A. Standard for Removal.

Defendants filed a notice of removal on May 16, 2005, arguing that under 28 U.S.C. sections 1446 and 1453, removal to this Court is proper. When deciding whether removal is properly effected and, consequently, whether the Court has subject matter jurisdiction over the present controversy, the Court must look to Plaintiffs' pleading at the time of removal. Am. Fire & Cas. Co. v. Finn, 341 U.S. 6, 14 (1951). Therefore, it is inappropriate for the Court to resolve Plaintiffs' Motion for Leave to File Second Amended Complaint at this point in the analysis.

As the party opposing remand, the burden of showing removal was proper is upon Defendants. Altimore v. Mount Mercy College, 420 F.3d 763, 768 (8th Cir. 2005); In re Bus. Men's Assurance Co. of Am., 992 F.2d 181, 183 (8th Cir. 1993); Bor-Son Bldg. Corp. v. Heller, 572 F.2d 174, 181 n.13 (8th Cir. 1978). If Defendants fail to show removal was proper by a preponderance of the evidence, Altimore, 420 F.3d at 768, remand, not dismissal, is required, Bor-Son Bldg., 572 F.2d at 181 n.13.

The governing provision of the federal removal statute allows defendants to remove "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a).[10] Generally, federal

[10] 28 U.S.C. § 1453(b), the section relied on by Defendants, applies to class action matters. Section 1453(b) incorporates 28 U.S.C. § 1446 (with the exception of an inapplicable limitations period set forth in sub-section 1446(b)).

district courts may exercise original jurisdiction over civil actions where a federal question is absent if the parties' citizenship is diverse. See 28 U.S.C. § 1332(a). That is, a court can exercise jurisdiction "only if diversity of citizenship among the parties is complete, i.e., only if there is no plaintiff and no defendant who are citizens of the same State." Wisconsin Dep't of Corrections v. Schacht, 524 U.S. 381, 388 (1998) (citing Carden v. Arkoma Assocs., 494 U.S. 185, 187 (1990); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806)); see also Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S. Ct. 2611, 2617 (2005) ("In a case with multiple plaintiffs and multiple defendants, the presence in the action of a single plaintiff from the same State as a single defendant deprives the district court of original jurisdiction over the entire action."). Complete diversity does not exist because the named Plaintiffs, and Kerkhoff and Kerkhoff Chiropractic, are all Iowa residents. Therefore, Defendants must point to a different basis for this Court's exercise of subject matter jurisdiction. They identify CAFA as such a basis.

B. Diversity Under the Class Action Fairness Act.

Complete diversity is not a constitutional requirement, see Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373 n.13 (1978); State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530-31 (1967), and has not been required in class action cases for some time, e.g., Sweat Pea Marine, Ltd. v. APJ Marine, Inc., 411 F.3d 1242, 1247 (11th Cir. 2005) ("Diversity jurisdiction requires complete diversity between named plaintiffs and defendants."); Gibson v. Chrysler Corp., 261 F.3d 927, 940-41 (9th Cir. 2001) (examining only the named plaintiffs for satisfaction of diversity jurisdiction

requirements). CAFA's enactment significantly expanded the types of cases over which federal district courts may exercise jurisdiction. See Class Action Fairness Act, Pub. L. No. 109-2, § 4(a), codified at 28 U.S.C. § 1332(d). Instead of requiring complete diversity, CAFA allows federal court jurisdiction over a class action if "any member of a class of plaintiffs is a citizen of a State different from any defendant," so long as a $5-million amount in controversy requirement is met. See 28 U.S.C. § 1332(d)(2)(A).[11] The parties meet this diversity requirement: the named plaintiffs (the Browns) are from a different state than at least one Defendant (e.g., the Masters Circle). For CAFA to authorize jurisdiction, however, it must actually apply.

The statute became effective on February 18, 2005, and is not retroactive. Exxon Mobil, 125 S. Ct. at 2628; Class Action Fairness Act § 9, 119 Stat. 4, 14 (2005) ("The amendments made by this Act shall apply to any civil action commenced on or after the date of enactment of this Act." (emphasis added)). Thus, the Court cannot exercise jurisdiction if this action were commenced before CAFA became effective because only minimal diversity exists; if the action were commenced after CAFA became effective, the Court may exercise jurisdiction. See Pritchett v. Office Depot, Inc., 420 F.3d 1090, 1094-96 & n.4 (10th Cir. 2005) (holding that the date of commencement in state court

[11] The parties do not appear to dispute the satisfaction of the $5-million amount in controversy requirement.

governs applicability of CAFA, not the date of removal); accord Pfizer, Inc. v. Lott, 417 F.3d 725, 726-27 (7th Cir. 2005).[12]

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[12] CAFA's legislative history, an "instructive" interpretive tool, Pritchett, 420 F.3d at 1095-96, is in accord. The Tenth Circuit recently summarized:

> When the Act was originally introduced in the House, the removal provision applied both to cases "commenced" on or after the enactment date and to cases in which a class certification order is entered on or after the enactment date. See H.R. 516, 109th Cong. § 7 (2005). In contrast, neither the Senate version of the bill nor the final statute passed by both houses of Congress provided for removal of actions certified on or after the enactment date. See S. 5, 109th Cong. § 9 (2005); § 9, 119 Stat. at 14. The Senate version and the final statute provided only for application of the Class Action Fairness Act to civil actions "commenced" on or after the date of the Act. S. 5; § 9, 110 Stat. at 14. It is thus clear that Congress initially started out with broader language that could have included a number of then-pending lawsuits in state courts. By excising the House provision, Congress signaled an intent to narrow the removal provisions of the Act to exclude currently pending suits.
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> Further, we note that the Congressional Record contains two statements from sponsoring legislators indicating that the bill was not designed to apply to currently pending lawsuits. See 151 Cong. Rec. S1080 (daily ed. Feb. 8, 2005) (statement of Sen. Dodd) ("[The Act] does not apply retroactively, despite those who wanted it to. A case filed before the date of enactment will be unaffected by any provision of this legislation."); 151 Cong. Rec. H753 (daily ed. Feb. 17, 2005) (statement of Rep. Goodlatte) ("Since the legislation is not retroactive, it would have absolutely no effect on the 75 class actions already filed against Merck in the wake of the Vioxx withdrawal."). Ordinarily, individual floor statements are entitled to little weight, but here, where they are consistent with and cast light upon the meaning of a specific change in the language between an earlier version of the bill and the final Act, the statements confirm our construction of the Act.

Id. (footnotes omitted). This choice infers Congress wished the statute to apply to cases actually begun after CAFA became effective. Thus, while legislative history often contains posturing and political explanations which impair its accuracy, here it allows for some precision.

Defendants contend this action was not "commenced" until after CAFA's effective date for four reasons. First, they argue that because Kerkhoff and Kerkhoff Chiropractic were not served with a copy of the Petition, CAFA is applicable to those Defendants. Second, they argue that because Plaintiffs had an action pending against Kerkhoff and Kerkhoff Chiropractic at the time the Petition was submitted to the Dallas County Clerk on February 17, 2005, and that action was not dismissed until the next day, CAFA applies to those Defendants. Third, they argue that defects in the documents submitted to the Clerk's office on February 17, 2005, render that document insufficient to commence this action. Finally, they claim that Plaintiffs' decision to amend the action on February 22, 2005, by adding parties and substituting claims rendered CAFA applicable to all Defendants. These arguments are addressed seriatim.

C. Service of the Petition Was Properly Effected.

Defendants contend this action was not commenced until February 18, 2005, because Kerkhoff and Kerkhoff Chiropractic were not served with the Petition. Instead, they claim only the Amended Petition was served. They then conclude that Plaintiffs' action against those Defendants was not "commenced" until after CAFA became effective, making remand improper.

Plaintiffs counter by submitting the affidavit of Larry Dorsey, Jr., a process server. See Iowa R. Civ. P. 1.308(1) (stating that personal service effected by a person who is not an Iowa officer "shall be proved by the affidavit of the person making the service"). Dorsey claims to have personally served both Kerkhoff and Kerkhoff

Chiropractic on April 15, 2005. Attached to the affidavit are returns of service indicating Kerkhoff and Kerkhoff Chiropractic were served with an original notice, the Petition, and the Amended Petition. Even though the Petition was filed in February, personal service in April was timely. See id. R. 1.302(5) (requiring service of an original notice within 90 days from the filing of the petition). Defendants have not presented any evidence, much less "clear and convincing" evidence, contesting the presumed verity of the affidavit and return of service. Guiterrez v. Wal-Mart Stores, Inc., 638 N.W.2d 702, 705 (Iowa 2002) ("[O]ur court has long accorded return-of-service affidavits presumptive validity, noting that they are impeachable upon only clear and convincing proof of falsity."). Therefore, Defendants' contention that this action was not "commenced" until after CAFA's effective date for this reason cannot prevail.

D. The Doctrine of Abatement Does Not Apply.

Defendants contend that because Plaintiffs had a lawsuit pending against Kerkhoff and Kerkhoff Chiropractic relating to subject matter similar to this action, the doctrine of "prior pending action" means this action did not commence until the pending action was dismissed on February 18, 2005. Plaintiffs respond by arguing that abatement is available only if a second lawsuit is filed involving the same parties and claims as a pending action. They conclude that because this action has both different parties and different claims than their action pending against Kerkhoff and Kerkhoff Chiropractic, abatement is unavailable.

A "court will not entertain at the same time two or more suits between the same parties and for the same subject-matter, and the one that was commenced will be given preference and the others abated." Ohden v. Abels, 266 N.W. 24, 25 (Iowa 1936); see also Boone v. Boone, 137 N.W. 1059, 1061 (Iowa 1912) (stating the "elementary proposition that the court will not entertain at the same time two or more suits between the same parties for the settlement of the same identical right or liability"), overruled on other grounds, Bates v. Nichols, 274 N.W. 32, 34-35 (Iowa 1937); Watson v. Richardson, 80 N.W. 416, 417 (Iowa 1899) ("The fact that the action depends upon the same right or title will not suffice to sustain a plea in abatement. It must involve the same cause of action."); Chicago & Southwest R.R. Co. v. Heard, 44 Iowa 358, 1876 WL 733, at *3 (1876) (holding that abatement is unnecessary where the plaintiff in one action seeks the equitable remedy of specific performance and another action involves the legal question of whether an agreement was properly executed). Despite differences in parties and claims, Defendants contend abatement prevents the Petition from commencing Plaintiffs' action until their pending action was dismissed.

Relying on two antediluvian (but analogous) cases, Moorman v. Gibbs, 39 N.W. 832 (Iowa 1888), and Rush v. Frost, 49 Iowa 183, 1878 WL 418 (1878), Plaintiffs argue that abatement is not available if a plaintiff dismisses a prior action before abatement is raised as a defense. Plaintiffs overstate the holdings of both cases. In Moorman, the plaintiff had two actions pending but dismissed one of them before trial. Moorman, 39 N.W. at 832. The court held that "[t]he prior action . . . having been dismissed before

trial in [the second] case, does not affect [the plaintiff's] rights, nor will this suit abate by reason thereof." Id. The court did not state whether the defense of abatement was raised, or if it was, whether the plaintiff dismissed the first action before then. See id. Likewise, in Rush, the court announced that "if one action has been dismissed before the court has determined the sufficiency of the plea, it is sufficient to prevent abatement of the action." Rush, 1878 WL 418, at *1. There, also, the court did not state whether abatement was raised as a defense before the plaintiff dismissed the first action. See id. The teaching of these cases is not, as Plaintiffs state, that abatement is unavailable if the prior action is dismissed before abatement is raised, but instead that the first action must not have reached trial, as in Moorman, or reached the point where the court must determine the sufficiency of the plaintiff's plea, as in Rush.

Defendants' reliance upon Capital Fund 85 Limited Partnership v. Priority Systems, LLC is similarly unavailing. In that case, an apartment complex owner brought a forcible entry and detainer action against the assignee of a cable television service provider who refused to remove a satellite dish which used the complex's electricity from one of the complex's buildings. Capital Fund 85 Ltd. P'ship v. Priority Sys. LLC, 670 N.W.2d 154, 155-56 (Iowa 2003). After a trial, the district court dismissed the forcible entry and detainer action, noting that if it allowed the action to proceed, it "would be required to rule on the rights of the parties to [an] underlying contract" between the parties. Id. at 156. On appeal, the Iowa Supreme Court held that Iowa's forcible entry and detainer statute did not bar a district court from interpreting a contract that was the subject of another lawsuit. Id. at 156, 158-59. The court noted

that "[t]he pendency of another action is not necessarily a bar to a forcible entry and detainer action." Id. at 158. Although the court wrote in dicta that "[a] pending prior action at law usually abates a later forcible entry and detainer action," id. n.3, it does not follow that it necessarily does so. In any event, the causes of action there were not the same. See id. at 155-56, 158-59.

Comparing the action pending against Kerkhoff and Kerkhoff Chiropractic when the Petition was filed with the present action reveals differences in the parties and claims. These differences are dispositive. For abatement to apply, the parties and claims must be the same. They are not.

Moreover, even if abatement applied, there is no authority for Defendants' contention that the Petition would have laid dormant until February 18, 2005, and then sprung to life without court intervention. The obvious aim of Defendants' argument is to delay the effective date of the Petition until the effective date of CAFA. Principles of abatement simply do not buttress this argument.

E. Defects in Plaintiffs' Filing Did Not Render it Ineffective.

Next, Defendants contend that because the document submitted by Plaintiffs to the Clerk's office on February 17, 2005, was incomplete, that document did not "commence" this action. They argue that because Plaintiffs' Petition was "insufficient or incomplete," it was not effective on that date. Instead, Defendants proffer, this action was commenced the following day when Plaintiffs delivered the last page of the Petition to the Clerk's office.

Plaintiffs contend that even if the Petition was defective when it was submitted on February 17, 2005, the defect does not change the filing date or invalidate the

pleading. Instead, they argue that the February 18, 2005, filing amended an action already begun. Defendants suggest that because the Iowa Rules of Civil Procedure do not countenance interlined or interpolated pleadings, the document filed on February 18, 2005, did not amend a pleading but completed a filing, thus commencing this action.

Whether an action has commenced is governed by state law. Weekley v. Guidant Corp., — F. Supp. 2d — , 2005 WL 2348476, at *2 n.1 (E.D. Ark. Sept. 23, 2005) (citing Winkels v. George A. Hormel & Co., 874 F.2d 567, 570 (8th Cir. 1989)); cf. Walker v. Armco Steel Corp., 446 U.S. 740, 751 (1980) (holding that state law determines when an action commences for statute of limitations purposes); Burham v. Humphrey Hospitality Reit Trust, Inc., 403 F.3d 709, 712 (10th Cir. 2005); Wisland v. Admiral Beverage Corp., 119 F.3d 733, 735 (8th Cir. 1997). Thus, the Iowa Rules of Civil Procedure and their interpretation by Iowa courts govern.

Iowa Rule of Civil Procedure 1.301 provides that "a civil action is commenced by filing a petition with the court." Iowa R. Civ. P. 1.301(1); see also Knudsen v. Liberty Mut. Ins. Co., 411 F.3d 805, 806 (7th Cir. 2005) ("Equating filing with commencement is the norm in civil practice." (citing Fed. R. Civ. P. 3)). A petition must "be captioned with the title of the case, naming the court, parties, and instrument, and shall bear the signature, personal identification number, address, telephone number, and, if available, the facsimile transmission number of the party or attorney filing it." Iowa R. Civ. P. 1.411(1). If a pleading is not signed, "it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader." Id. R. 1.413(1).

Plaintiffs assert their February 18, 2005, filing constituted an amendment. Under Iowa Rule of Civil Procedure 1.402(5), if a party chooses to amend a pleading, it "must

be on a separate paper, duly filed, without interlining or expunging prior pleadings." Id. R. 1.402(5). Here, Plaintiffs did not "interline" or "expunge" a prior pleading. They merely added to one. By submitting the last page "on a separate paper" and ensuring it was "duly filed," Plaintiffs complied with the Iowa rule governing amended pleadings. See id. Defendants have identified no authority requiring the re-submission of the complete document; indeed, by arguing that this action was "commenced" on February 18, 2005, with the delivery of the last page, they appear to agree that re-submission of the entire document is unnecessary.

Plaintiffs rely on In re Estate of Dull, 303 N.W.2d 402 (Iowa 1981), for the proposition that because defects in a petition do not deprive an Iowa district court of jurisdiction, their action was "commenced" on the date their (defective) Petition was filed. There, the Iowa Supreme Court held that the signature of a suspended attorney on a pleading, while rendering it defective, did not deprive the district court of subject matter jurisdiction. Id. at 407. The court construed the language requiring a signature as "merely directory." Id. at 406. Likewise, in First National Bank v. Stone, the court held that the absence of a signature on a petition was not fatal. First Nat'l Bank v. Stone, 98 N.W. 362, 363 (Iowa 1904). There, a plaintiff provided notice to a defendant that he would be filing a petition at a later date.[13] Id. at 363. After first filing an unsigned petition, the plaintiff submitted a signed petition outside the time window established in the notice. Id. The defendant moved to dismiss, a motion the district

[13] At the time, Iowa law required that "every pleading must be subscribed by the party or by his attorney," and that "[i]f a petition is not filed by the date . . . fixed [in the notice] and ten days before the term the defendant may have the action dismissed." Iowa Code §§ 3580, 3515 (1904).

court denied. Id. On appeal, the defendant claimed the absence of a signature was fatal. Id. The court disagreed. See id. While recognizing that the failure to sign some papers in light of a statutory command to do so renders them nullities, see id. (citing Hoitt v. Skinner, 68 N.W. 788 (Iowa 1896) (unsigned notice), Doer v. Southwestern Mut. Life Ass'n, 60 N.W. 225 (Iowa 1894) (unsigned notice of appeal), State Sav. Bank of Rolfe v. Radcliffe, 82 N.W. 1011 (same) (Iowa 1900)), the court held that in "non-jurisdictional" matters like compliance of a petition with the signature requirement, "strictness of interpretation [of a statute] is rarely indulged in." Id.[14] As a result, dismissal was improper. Id. at 363-64.

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[14] Accord In re Estate of Herring, 970 S.W.2d 583, 588 (Tex. App. Ct. 1998) ("The signature on a pleading is a formal requisite and the failure to comply with the requirement is not fatal to the pleading. The trial court may not treat an unsigned pleading . . . as a nullity merely because counsel failed to sign their names to it."); E. Air Lines, Inc. v. Phoenix Sav. & Loan Ass'n, Inc., 210 A.2d 515, 521 (Md. 1965); ("The weight of authority seems to be that the absence of a signature to a pleading does not make it void or a nullity but only irregular."); Canadian Bank of Commerce v. Leale, 111 P. 759, 760 (Cal. Dist. App. Ct. 1910) (collecting cases); cf. R.T.A. Int'l, Inc. v. Cano, 915 S.W.2d 149, 151 (Tex. App. Ct. 1996) ("A signature of either a party or his attorney is only a formal requirement of an answer and the lack thereof does not justify default in a normal case"). Contra McCain v. Courione, 527 A.2d 591, 593 (Pa. Commw. Ct. 1987) ("Generally, a pleading signed by neither a party nor an attorney-at-law is a nullity and may, upon motion, be stricken."); Browder v. Gaston, 30 Ala. 677, 677 (Ala. 1857) (recognizing it was erroneous for district court to, among other things, allow action to proceed when the complaint was not signed by either the plaintiff or his attorney); cf. Herring, 970 S.W.2d at 587-89 (deciding that an unsigned response amounted to a failure to respond to a request for admissions, rendered the requested admissions deemed admitted); Schuyler v. Yates, 11 Wend. (N.Y.) 185 (1834) ("A demurrer, whether general or special, must be signed by counsel, and if not so signed, the plaintiff may treat it as a nullity.").

Decisions in analogous settings reach similar conclusions. For example, in J.M. Batterton Estate, Inc., v. Edwards, the plaintiff filed an unsigned petition, but filed a signed copy nearly two months later. J.M. Batterton Estate, Inc. v. Edwards, 115 S.W.2d 1, 2 (Mo. Ct. App. 1938). In the interim, the statute of limitations for the plaintiff's cause of action expired. Id. The defendant argued that the action did not commence until a signed petition was filed, allowing the statute of limitations to bar the plaintiff's claims. Id. Rejecting this argument, the court held that even though the original petition was unsigned, it was not a nullity. See id. "The failure to sign it was a mere irregularity, resulting from oversight, which was promptly cured by the filing of the amended petition duly signed." Id.; see also Rowland v. Kellogg Brown & Root, Inc., 115 P.3d 124, 127-28 (Ariz. Ct. App. 2005) (ruling that even though a petition was deficient because, inter alia, it was unsigned upon expiration of statute of limitations, plaintiff could still proceed with his action); Save Our Creeks v. City of Brooklyn Park, 682 N.W.2d 639, 640-41 (Minn. Ct. App. 2004) (upholding district court's decision to allow amended pleading to relate back to unsigned pleading, forestalling running of statute of limitations).

Interpretations of the analogous Federal Rule of Civil Procedure 11(a), which requires a signature on documents presented to federal courts, provide additional guidance.[15] For example, in Becker v. Montgomery, the United States Supreme Court

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[15] The Advisory Committee notes that,

> [u]nsigned papers are to be received by the Clerk, but then are to be stricken if the omission of the signature is not corrected promptly after being called to the attention of the attorney or pro se litigant. . . . A court may require by local rule that papers contain additional identifying information regarding the parties or attorneys, such as telephone

considered whether an appellant's failure to sign a notice of appeal required dismissal of his appeal. Becker v. Montgomery, 532 U.S. 757, 760 (2001). In that case, a pro se plaintiff typed, but did not sign, his name to a filing. Id. at 759-60. The Sixth Circuit deemed the defect "jurisdictional" and did not allow him to cure it outside the time afforded him make his filing. Id. at 760. A unanimous Supreme Court reversed, noting that "Rule 11(a) permits [a litigant] to submit a duplicate containing his signature" to remedy noncompliance with the signature requirement. Id. at 765. His "lapse was curable," and "his initial omission was not a 'jurisdictional' impediment to pursuit of his appeal." Id.; see also Edelman v. Lynchburg Coll., 535 U.S. 106, 115-16 (2002) (while construing Becker to allow tardy verification to combine with a previously filed complaint to amount to a sufficient "charge" under Title VII, noting a "high degree of consistency in accepting later verification as reaching back to an earlier, unverified filing").

There is authority to the contrary. For example, in Wagner v. City of South Pasadena, a California Court of Appeal considered whether service of an incomplete initial pleading by facsimile constituted substantial compliance with a statute requiring personal service. Wagner v. City of S. Pasadena, 93 Cal. Rptr. 2d 91, 94-95, 96-97 (Cal. Ct. App. 2000). There, a petitioner had ninety days to effect service to preserve his appeal. Id. at 94-95. On the ninetieth day, he faxed a copy of the petition to the

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> numbers to facilitate facsimile transmissions, though, as for omission of a signature, the paper should not be rejected for failure to provide such information.

Fed. R. Civ. P. 11 Advisory Committee's Note. Thus, failing to comply with Rule 11's signature provision would not be fatal.

respondent's attorney but failed to attach a copy of the summons and exhibits as required. Id. at 93. Because "service of the incomplete initial pleading by facsimile [to the respondent's attorney] was not substantial compliance" with a statute requiring personal service upon the respondent, the court held that the 90-day period had expired before the action was commenced. See id. at 96-97. However, Wagner turned not on the incomplete pleading, but that the pleading was submitted to the wrong person in the wrong way. Id. That case is inapposite.[16]

To be sure, the Petition here is more defective than the documents in Stone, Dull, or Becker. In Stone, only the signature was missing; in Dull, a signature was present but was insufficient; and in Becker, the party's name was typed instead of signed. Without the last page of the Petition, Defendants did not know by whom it was signed,

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[16] Defendants contend that because Plaintiffs submitted the Petition via facsimile, that document should be rendered invalid because the Iowa Rules of Civil Procedure do not contemplate "fax filing". They argue that because the Iowa Rules of Appellate Procedure allow filing via facsimile, see Iowa R. App. P. 6.31(1)(b), the absence of such a rule in the Iowa Rules of Civil Procedure renders Plaintiffs' filing invalid. This expressio unius est exclusio alterius argument is unpersuasive. First, the drafters of the Iowa Rules of Civil Procedure have recognized that procedures that could be more efficiently conducted by facsimile should be. See, e.g., Iowa R. Civ. P. 1.422(2) comment ("[This rule] authorizes service by facsimile transmission and deletes archaic and unnecessary language regarding service by delivery to a clerk or person in charge of an office which is not closed."). Second, Defendants have not shown the Clerk of Court rejected Plaintiffs' transmission. Instead, all evidence indicates the Clerk's office advised the procedure would be allowed and, more importantly, the document was filed. Cf. id. R. 1.301(1) ("[A] civil action is commenced by filing a petition with the court."). Third, the inclusion of such a provision in the Iowa Rules of Appellate Procedure is irrelevant; those rules govern appellate practice – the Iowa Rules of Civil Procedure govern here. Although the Court does not conclude that filing by facsimile is allowed under the Iowa Rules of Civil Procedure, it merely concludes Defendants, who bear the burden of proof, have not proven it is not allowed.

if it was signed by anyone at all. However, the Iowa Supreme Court's flexible interpretation of the signature requirement suggests that a failure to include the last page of a pleading would not be fatal.

> The filing of a petition that is merely defective in some manner of form, or even substance, so long as its purpose and intent are indicated with reasonable certainty, and the other party is not misled into a belief that the action is abandoned, should not be a cause for sending the plaintiff out of court . . . .

Dull, 303 N.W.2d at 406-07. The availability of a remedy short of immediately striking an unsigned pleading further complements an elastic interpretation of rules dictating pleading technicalities. Parties may promptly sign or amend unsigned pleadings once they know of the defect. See Iowa R. Civ. P. 1.413(1). Plaintiffs promptly availed themselves of that opportunity.

Upon the foregoing analysis, the Court must conclude this action was "commenced" on February 17, 2005, one day before CAFA became effective. That is just enough. See Lott, 417 F.3d at 726 (remanding class action filed on February 17, 2005, to state court); Bush v. Cheaptickets, Inc., 377 F. Supp. 2d 807, 809 (C.D. Cal. 2005) (same); Lander & Berkowitz, P.C. v. Transfirst Health Servs., Inc., 374 F. Supp. 2d 776, 776-77 (E.D. Mo. 2005) (same). CAFA is therefore not applicable to the claims set forth in the Petition against Defendants.

F. Plaintiffs' Amendments Did Not "Restart" This Action.

Defendants next argue that even if CAFA is not applicable to the claims made in the Petition, it is applicable to the claims Plaintiffs set forth in their Amended Petition. On February 22, 2005, Plaintiffs filed an Amended Petition, adding the Removal

Defendants and substituting four new causes of action for the two originally asserted. Defendants state that this amendment amounted "to a new commencement for the purposes of CAFA." They then argue that even though Plaintiffs have since dismissed the Removal Defendants, the action was properly removed under CAFA. Plaintiffs contend that because CAFA did not apply to the claims raised in the Petition, it does not apply to the claims raised in the Amended Petition either. They further argue that even if CAFA applies to the claims set forth against the Removal Defendants, their dismissal deprives the Court of a basis upon which to exercise subject matter jurisdiction.

If this action were commenced in state court before CAFA became effective, was not removable, and was not amended to make it so, and then removal were attempted, this Court would not have subject matter jurisdiction over the controversy. Courts are uniform in this regard. Pritchett, 420 F.3d at 1090; Schorsch v. Hewlett-Packard Co., 417 F.3d 748 (7th Cir. 2005); Lott, 417 F.3d 725; Knudsen, 411 F.3d at 805; In re Expedia Hotel Taxes & Fees Litig., 377 F. Supp. 2d 904 (W.D. Wash. 2005), Natale v. Pfizer, Inc., 379 F. Supp. 2d 161 (D. Mass. 2005), aff'd, — F.3d — , 2005 WL 2253622 (1st Cir. Sept. 16, 2005); Sneddon v. Hotwire, Inc., No. C 05-0951, 2005 WL 1593593 (N.D. Cal. June 29, 2005); Lander & Berkowitz, 374 F. Supp. 2d. 776; Bush, 377 F. Supp. 2d 807. This case poses a twist: whether subject matter jurisdiction exists if, after CAFA's effective date, plaintiffs join additional defendants, swap new claims for old, then, following removal, dismiss the newly-added defendants.

The Seventh Circuit recently noted that amendments to a complaint do not "commence" a new lawsuit under CAFA. Knudsen, 411 F.3d at 806. "Plaintiffs routinely amend their complaints, and proposed class definitions, without any

suggestion that they have restarted the suit." Id. However, in dicta, the court "hinted" at situations where a "restart" would occur, making removal proper.

> [a] new claim for relief (a new "cause of action" in state practice), the addition of a new defendant, or any other step sufficiently distinct that courts would treat it as independent for limitations purposes, could well commence a new piece of litigation for federal purposes even if it bears an old docket number for state purposes. Removal practice recognizes this point: an amendment to the pleadings that adds a claim under federal law (where only state claims had been framed before), or adds a new defendant, opens a new window of removal.

Id. at 807 (citations omitted). The court further noted that if a new party "should be added as a defendant, it could enjoy a right to remove under [CAFA], for suit against it would have been commenced after February 18, 2005." Id. at 808 (emphasis supplied). Thus, the court suggested that if additional defendants were joined after CAFA, those defendants could remove. See id.

This suggestion provided guidance to the United States District Court for the Western District of Kentucky in Adams v. Federal Materials Co. Adams v. Fed. Materials Co., No. 5:05CV-90-R, 2005 WL 1862378 (W.D. Ky. July 28, 2005). There, the plaintiffs commenced an action in state court on March 11, 2004. Id. at *1. On February 25, 2005, a defendant filed a third-party complaint against a new party. Id. On April 1, 2005, the plaintiffs filed an amended complaint adding the new party as a defendant. Id. The new defendant and the original defendants removed, relying on CAFA's minimal diversity provisions. Id. The court denied the plaintiffs motion to remand, holding,

> As suggested by the Knudsen court, [p]laintiffs' decision to add [the new] defendant presents precisely the situation where it can and should be said that a new action has "commenced" for the purposes of removal

> pursuant to . . . CAFA. This is both a logical extension of pre-existing removal practice and in keeping with the general intent of Congress in passing . . . CAFA – that is, extending the privilege of removal to federal district court to defendants in large class actions on the basis of minimal diversity.

Id. at *4. Here, following CAFA's effective date, Plaintiffs added the Removal Defendants, who then removed the action to federal court. The Removal Defendants had that right. See Knudsen, 411 F.3d at 807; Adams, 2005 WL 1862378 at *4.[17]

Anticipating this conclusion, perhaps, Plaintiffs then dismissed the Removal Defendants, leaving only Defendants. Although, as Defendants note, "a plaintiff 'may not manipulate the process' to defeat federal jurisdiction and force a remand once the case has been properly removed," Gould v. Artisoft, Inc., 1 F.3d 544, 547 (7th Cir. 1993) (quoting Shaw v. Dow Brands Inc., 994 F.2d 364, 368 (7th Cir. 1993)), that type of "manipulation" typically arises in diversity cases where an event subsequent to removal causes the amount in controversy to drop below the statutory threshold, e.g., St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289-90 (1938) ("Events occurring subsequent to the institution of a suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction."); Lynch v. Porter, 446 F.2d 225, 228 (8th Cir. 1971) ("[S]ubsequent events reducing the amount in controversy will not affect the jurisdiction of this court." (collecting cases)); State Farm Mut. Auto. Ins. Co. v. American Cas. Co., 433 F.2d 1007, 1009 (8th Cir. 1970) ("[J]urisdiction, once properly

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[17] This line of reasoning does not make CAFA retroactive; it "construe[s] the commencement date in such a way as to bring the case within the prospective reach of . . . CAFA" by viewing the commencement date from the perspective of each defendant, rather than each plaintiff. Adams, 2005 WL 1862378, at *2 n.1 (emphasis supplied).

vested, is not lost by subsequent events which reduce the amount in controversy to less than the jurisdictional amount." (citing St. Paul Mercury Indem., 303 U.S. at 292-93)), and where a plaintiff fraudulently or improperly joins a defendant to either defeat, e.g., Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97 (1921) ("[The] right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy." (citation omitted)); BP Chems. Ltd. v. Jiangsu Sopo Corp., 285 F.3d 677, 685 (8th Cir. 2002) ("[A] plaintiff may not defeat a defendant's right of removal based on diversity of citizenship jurisdiction by fraudulently joining a non-diverse defendant."), or manufacture jurisdiction, see 28 U.S.C. § 1359. This case presents a different question: whether Plaintiffs' decision to add parties or change claims allows all Defendants, new and old, to avail themselves of CAFA's removal provisions. If CAFA is not and never has been applicable to Defendants, they cannot say Plaintiffs "manipulated the process" by dismissing the Removal Defendants because Defendants cannot be harmed by the subsequent unavailability of a right (e.g., removal) they never possessed.[18]

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[18] Plaintiffs' argument that claims in the Amended Petition relate back to the Petition for the Removal Defendants is unavailing. Federal Rule of Civil Procedure 15(c) governs amended pleadings and allows relation back for a change of party if (1) "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading," (2) the party brought in "has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits," (3) the party "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party," and (4) the requirements in (2) and (3) are met within the applicable time period. See Fed. R. Civ. P. 15(c)(2)-(3). Plaintiffs have not alleged that the Removal Defendants either "knew or should have known" they would have been sued but for a mistake concerning their identity. See id.

1. Plaintiffs' Change in Claims Does Not Make CAFA Applicable.

If Plaintiffs' change in claims constituted a "step sufficiently distinct that courts would treat it as independent for limitations purposes," permitting a "restart," CAFA would apply to the newly commenced action. Knudsen, 411 F.3d at 807. Plaintiffs seek to avoid this outcome by arguing that the claims asserted in their Amended Petition relate back to the date of filing of the Petition (which the Court has concluded pre-dates CAFA). Plaintiffs rely on the relation back rule contained in Federal Rule of Civil Procedure 15(c)(2).

Although Rule 15(c) is typically used to determine whether claims will relate back to a time before the expiration of a statute of limitations, it has recently been used to determine whether an action has been "commenced" before CAFA by allowing claims asserted after its effective date to relate back to a time preceding its enactment. E.g., Eufaula Drugs, Inc. v. ScripSolutions, No. 2:05CV370-A, 2005 WL 2465746, at *3-*4 (M.D. Ala. Oct. 6, 2005); Siew Hian Lee, Citimortgage, Inc., No. 4:05CV1216JCH, 2005 WL 2456955, at *2 (E.D. Mo. Oct. 5, 2005); Judy v. Pfizer, Inc., No. 4:05CV1208RWS,

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R. 15(c)(3). Therefore, even if the Amended Petition claims arose from the same conduct, transaction, or occurrence as the claims in the Petition, and the Removal Defendants had notice of the action, the Amended Petition claims do not relate back. Compare Eufaula Drugs, Inc. v. Scripsolutions, No. 2:05CV370-A, 2005 WL 2465746, at *4 (M.D. Ala. Oct. 6, 2005) (allowing relation back when the plaintiff initially sued "ScripSolutions," but later amended its complaint to state claims against "ScriptSolutions"); New Century Health Quality Alliance, Inc. v. Blue Cross and Blue Shield of Kansas City, Inc., No. 05-0555-CVWSOW, 2005 WL 2219827, at *4-*5 (W.D. Mo. Sept. 13, 2005) (allowing relation back when plaintiffs amended their complaint after CAFA became effective to assert claims against Ingenix, Inc., rather than Ingenix Health Intelligence, Inc. because of a "mistake in identity").

2005 WL 2240088, at *3 (E.D. Mo. Sept. 14, 2005); New Century Health Quality Alliance, Inc. v. Blue Cross and Blue Shield of Kansas City, Inc., No. 05-0555-CVWSOW, 2005 WL 2219827, at *3-*4 (E.D. Mo. Sept. 13, 2005); see also Knudsen, 411 F.3d at 807 ("imagin[ing]" that Rule 15(c) would apply to cases brought under CAFA).

Under that rule, amended claims relate back to the date of filing of an original complaint when the "claim . . . asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c)(2).[19] "Since the purpose of Rule 15(c) is to permit cases to be decided on their merits, it has been liberally construed." Alpern v. UtiliCorp United, Inc., 84 F.3d 1525, 1543 (8th Cir. 1996) (citation omitted). A plaintiff's choice to add a new legal theory does not usually remove Rule 15(c)'s applicability. See Maegdlin v. Int'l Ass'n of Machinists & Aerospace Workers, 309 F.3d 1051, 1053 (8th Cir. 2002) ("[A] change in legal theory is not fatal to [Rule 15(c)(2)]'s application."); Tho Dinh Tran v. Alphonse Hotel Corp., 281 F.3d 23, 36 (2d Cir. 2002) (insinuating that a claim will relate back if it "merely add[s] a new legal theory based on the same facts as those presented in the original complaint"); Hopkins v. Saunders, 199 F.3d 968, 973 (8th Cir. 1999) ("[I]t is the facts well pleaded, not the theory of recovery or legal conclusions, that state a cause of action and put a party on notice." (quotation marks omitted)); Alpern, 84 F.3d at 1543 ("[R]elation back has been permitted of amendments that change the legal theory of the action [and] add other claims arising out of the same

[19] Iowa Rule of Civil Procedure 1.402(5), which governs when amended pleadings relate back when a claim or defense is amended, contains substantially the same language. Therefore, the outcome of the following analysis would be the same, regardless of which rule is applied.

transaction or occurrence . . . .” (citations omitted)); cf. Mayle v. Felix, 125 S. Ct. 2562, 2566 (2005) (holding that an amended habeas petition does not relate back “when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth” (emphasis added)). Claims amplifying or clarifying previously-pled material will still relate back. Bensel v. Allied Pilots Ass’n, 387 F.3d 298, 310 (3d Cir. 2004); Sivulich-Boddy v. Clearfield City, 365 F. Supp. 2d 1174, 1182 (D. Utah 2005); Kidwell v. Bd. of County Commr’s of Shawnee County, 40 F. Supp. 2d 1201, 1217 (D. Kan. 1998).

In Judy v. Pfizer, Inc., the United States District Court for the Eastern District of Missouri considered whether a plaintiff “effectively ‘commenced’ a new case which was removable” under CAFA when the plaintiff amended her petition to “add[] additional factual allegations which elaborate[d] her original claims,” “refined” the class allegations, and added new claims. Judy, 2005 WL 2240088, at *1. The plaintiff’s original petition set forth fraud, breach of warranty claims, and alleged a violation of a state deceptive marketing statute. Id. at *3. Her amended complaint added negligence and negligence per se claims, and divided the breach of warranty claim into a breach of express and implied warranty count. Id. The court held that even though completely new claims appeared in the plaintiff’s amended petition, those amendments did not commence a new action “because the[] claims clearly [arose] out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.” Id. The conduct there was the marketing of a prescription medication undertaken by the defendant. Id. at *1.

The conduct here is the practice of the Masters Circle in disseminating and encouraging chiropractors to use certain treatment techniques. The claims Plaintiffs assert in their Amended Petition arise out of the same conduct set forth in the Petition. Compare, e.g., Pet., at ¶¶ 1-4 (setting forth the general purposes of the action), 16-25 (setting forth the general allegations of the proposed plaintiff class) with, e.g., Am. Pet., at ¶¶ 1-5 (setting forth the general purposes of the action), 32-44 (clarifying the general allegations of the proposed plaintiff class). Although the Amended Petition contains more specific factual claims and changes the legal theories set forth, that does not prevent the claims made therein from relating back. See Bensel, 387 F.3d at 310; Sivulich-Boddy, 365 F. Supp. 2d at 1182; Kidwell, 40 F. Supp. 2d at 1217. From the facts presented in the Petition, Defendants had adequate notice of claims of the type brought in the Amended Petition.[20]

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[20] It is for this reason that Defendants' reliance on Senterfitt v. SunTrust Mortgage, Inc. is unavailing. In that case, the plaintiff filed a second amended complaint on March 21, 2005 – after CAFA became effective. Senterfitt v. SunTrust Mortgage, Inc., — F. Supp. 2d — , 2005 WL 2100594, at *2 (S.D. Ga. Aug. 31, 2005). The second amended complaint included claims expanding the prospective class to include individuals whose claims arose over a sixteen-year period not included in the first amended complaint. Id. at *1. The court held that "the [s]econd [a]mended [c]omplaint [could not] relate back because the prior pleadings did not adequately put [the defendant] on notice of the enlarged class." Id. at *2. Additionally, the court concluded that the defendant would be prejudiced by being forced to defend against a much larger class after preparing to defend "against a much smaller class." Id. at *3. As a result, the court concluded that the second amended complaint commenced an entirely new action, rendering the applicability of CAFA's minimum diversity provisions appropriate, consequently allowing removal. See id. at *2-*4.

Defendants' reliance on Popp Telecom, Inc. v. American Sharecom, Inc. is unavailing. There, dissenting shareholders amended their complaint to add RICO claims more than a year after the enactment of the Private Securities Litigation Reform Act (PSLRA). Popp Telecom v. American Sharecom, Inc., 361 F.3d 482, 489 (8th Cir. 2004). PSLRA barred RICO claims in the type of lawsuit before the court. Id. at 490. The court held that the RICO claims were barred because the dissenting shareholders "had no right to expect that their RICO claims would survive any change in the law merely because the conduct underlying the claim had already occurred." Id.[21] There, a change in law affected the claims the plaintiffs could bring. Id. at 489-90. CAFA has only affected the forum where claims can be heard.

Because the claims asserted in Plaintiffs' Amended Petition arise out of the same conduct set forth in their Petition, their claims against Defendants relate back to the Petition. Fed. R. Civ. P. 15(c). Consequently, Plaintiffs' decision to alter the claims in the Amended Petition do not make CAFA applicable to Defendants: Plaintiffs' causes of action set forth in the Amended Petition "commenced" before CAFA became effective.

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[21] Defendants state that the Popp Telecom court affirmed because the defendant did not have adequate notice of the potential claims in the original complaint. Def. Br. at 12. In dicta, the Popp Telecom court wrote that the "original complaint [did not] provide[] sufficient notice to [the defendant] of any RICO claim." Popp Telecom, 360 F.3d at 490 n.8. The core holding of Popp Telecom, however, turned on the fact that the plaintiffs could not expect their claims to survive a change in law, not that the original complaint did not give notice to the defendant of a potential cause of action against it. See id. at 490.

2. Plaintiffs' Change in Parties Does Not Make CAFA Applicable.

The remaining question is whether Plaintiffs' decision to add the Removal Defendants, making removal to federal court proper for them, allows the Court to exercise jurisdiction over all Defendants.

Because CAFA is not applicable to Defendants, the only way the Court could exercise jurisdiction over them is as pendant parties. See 28 U.S.C. § 1367. It is safe to say Plaintiffs' actions against the Removal Defendants are "so related" to their claims against Defendants that the actions are the same. See id. § 1367(a). However, federal courts do not have supplemental jurisdiction over pendant-party claims if original jurisdiction is "founded solely on" diversity and the pendant party is joined in the action pursuant to, among other rules, Federal Rule of Civil Procedure 20. Id. § 1367(b). Because (1) CAFA is not applicable to both Defendants and the Removal Defendants, and (2) Defendants and the Removal Defendants are defendants in the same action, Plaintiffs must invoke diversity jurisdiction over both Defendants and the Removal Defendants. If Plaintiffs proceeded on this theory, original jurisdiction would exist over claims against the Removal Defendants "founded solely on" diversity, and claims against Defendants would exist under the Iowa equivalent of Rule 20. In this setting, the Court cannot exercise jurisdiction over the claims against Defendants. See 18 U.S.C. § 1367(b). Defendants cannot ride the Removal Defendants' coattails to federal court as pendant parties.

This conclusion does not ignore the principle that whether a federal district court may exercise removal jurisdiction is determined when the matter is removed, not at a

later time, such as upon an amendment. See, e.g., Sewell v. J.E. Crosbie, Inc., 127 F.2d 599, 600 (8th Cir. 1942) ("Whether the trial court erred in retaining jurisdiction must be determined from the complaint as it was at the time the defendant . . . petitioned for the removal of the suit, and not as it was subsequently amended."); Colorado Life Co. v. Steele, 95 F.2d 535, 537-38 (8th Cir. 1938) ("[An] amendment cannot affect the jurisdiction of the federal court. That jurisdiction is determined by the petition as it was at the time of the removal from the state court."). Instead, this conclusion recognizes CAFA has never applied to Defendants – not when the action was commenced, not when the action was amended, not when the action was removed, and not now. See Adams, 2005 WL 1862378, at *4 (applicability of CAFA determined "from the point of view of each defendant" (emphasis added)).

It therefore follows that this Court does not have subject matter jurisdiction over Plaintiffs' claims against Defendants. Removal was therefore improper.

III. Dismissal Versus Remand.

Having concluded that the Court lacks subject matter jurisdiction, it is now faced with the task of concluding whether the case must be remanded or dismissed.

The governing statute, 28 U.S.C. section 1447(c) provides as follows: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c) (emphasis added). This language leaves no room for discretionary dismissal on personal jurisdiction grounds once a court concludes it lacks jurisdiction over the subject matter of a case. Instead it "mandates a remand of the case (to the state court from which it was removed)

whenever the district court concludes that subject-matter jurisdiction is nonexistent." Filla v. Norfolk S. Ry. Co., 336 F.3d 806, 809 (8th Cir. 2003); accord Cont'l Cablevision of St. Paul, Inc. v. United States Postal Serv., 945 F.2d 1434, 1441 n.3 (8th Cir. 1991) ("When a federal court to which a case has been removed from a state court determines that it lacks jurisdiction, the proper action is not dismissal of the complaint, but remand to the state court."); First Nat'l Bank of Salem v. Wright, 775 F.2d 245, 246 (8th Cir. 1985) ("If the federal court determines that no federal jurisdiction exists, it must remand the case back to state court."). Remand is therefore required. See Int'l Primate Prot. League v. Admin. of Tulane Ed. Fund, 500 U.S. 72, 89 (1991) (noting that "the literal words of § 1447(c) . . . give . . . no discretion to dismiss rather than remand an action" (quotation marks omitted; second omission in the original)), superceded on other grounds 28 U.S.C. § 1442(a)(1); accord Cunningham v. BHP Petroleum Great Britain PLC, 414 F.3d 1169, 1175 (10th Cir. 2005); Virginia v. Banks, 120 F. App'x 973, 973 (4th Cir. 2005); Green v. Vickery, 108 F. App'x 86, 86 (4th Cir. 2004). Dismissal is not permitted.

Defendants correctly note that the jurisdiction of a federal court over actions removed from state court under 28 U.S.C. section 1441 (like the present one) depends on the jurisdiction of the state court before removal. They then cite cases such as Wamp v. Chattanooga Housing Authority, 384 F. Supp. 251 (E.D. Tenn. 1974), and Friedr. Zoellner Corp. v. Tex Metals Co., 396 F.2d 300, 301 (2d Cir. 1968), and argue that because state court jurisdiction is a prerequisite to removal of a lawsuit to federal

court and because an Iowa court could not exercise personal jurisdiction over the out-of-state Defendants, dismissal of Plaintiffs' claims against those Defendants, instead of remand, is the proper outcome. They correctly note that "[i]f the state court lacked jurisdiction, the federal court acquire[s] none" upon remand. Friedr. Zoellner, 396 F.2d at 301. The error in this argument is that it begs the question: Defendants assume this Court will conclude personal jurisdiction over the out-of-state Defendants is lacking here, when that is a question the Court will not (and cannot) reach.

The Court expresses no opinion on whether an Iowa court may eventually conclude it "lack[s]" jurisdiction over each Defendant. See id. The Court merely holds that – regardless of the outcome of any personal jurisdiction battle staged on remand – this Court does not have subject matter jurisdiction over the claims made against Defendants.[22] Remand is therefore required. See 28 U.S.C. § 1447(c).

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[22] Contrary to Defendants' assertions, this Court does not find it has the "duty" to entertain their personal jurisdiction argument in cases like this one. Their reliance on McShan v. Omega Louis Brant Et Frere, S.A., 536 F.2d 516 (2d Cir. 1976) is unpersuasive in this regard. In McShan, the plaintiff argued that the district court should have remanded to state court "for a determination of 'what is above all a question of [state] law.'" Id. at 519. The court noted that if "the defense [raised] is lack of personal jurisdiction under state law, the federal court has the same power and duty to entertain the defense," and rule on it "as it would with respect to any other question of state law." Id. (citing Meredith v. Winter Haven, 320 U.S. 228, 237 (1943)). This Court would not shy away from resolving what is sure to be a difficult personal jurisdiction question if this matter were properly removed. However, unlike in McShan, Plaintiffs do not seek remand because this case contains difficult issues of state law: they seek remand because removal was improper. Even the McShan court recognized that "[r]emand is proper when a federal court concludes that it lacks subject-matter jurisdiction of a removed case." Id. That is precisely the course taken here.

IV. Remaining Motions.

Because the Court lacks subject matter jurisdiction over this controversy, resolution of any further motions is improper. See Bailey v. Wal-Mart Stores East, L.P., No. Civ.A. 2:05-CV00552, 2005 WL 2405948, at *1, *3 n.1 (S.D. W. Va. Sept. 29, 2005) (concluding remand is proper, then refusing to rule on defendants' Rule 12(b)(6) motion once subject matter jurisdiction was shown lacking); Hofmann v. Fasig-Tipton New York, Inc., No. 90-CV-1074, 1991 WL 5867, at *6 (N.D.N.Y. Jan. 18, 1991) (requiring parties to renew remaining motions in state court after concluding remand was proper); Fromknecht v. Brayson Develop. Corp., 734 F. Supp. 508, 511 (N.D. Ga. 1990) (summarily disposing of other motions after concluding remand was proper). Therefore, Plaintiffs' Motion for Leave to Amend, Defendants' Motion to Dismiss for Lack of Personal Jurisdiction, as well as Defendants' Motion to Dismiss for Failure to State a Claim must be denied as moot. The parties are free to pursue these motions in state court following remand.

V. Conclusion.

Plaintiffs' Motion to Remand (Clerk's No. 10) must be **granted**. The remaining motions (Clerk's Nos. 11, 12, and 24) must all be **denied as moot**. The above-entitled action is **remanded** to the Iowa District Court for Dallas County pursuant to 28 U.S.C. section 1447(c).

IT IS SO ORDERED.

Dated this 19th day of October, 2005.

JAMES E. GRITZNER, JUDGE
UNITED STATES DISTRICT COURT