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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PETER JAY GERBER, et al.

Plaintiffs,

No. C 07-05918 JSW

v.

BAYER CORPORATION, et al.,

Defendants.

**ORDER (1) GRANTING
PLAINTIFF'S MOTION TO
REMAND AND (2) DENYING
MOTION TO STAY AS MOOT**

Now before the Court are the motions to remand and to stay this action pending a ruling on a motion to transfer the action by the Judicial Panel on Multidistrict Litigation ("MDL"). Having considered the parties' arguments, relevant legal authority, and having had the benefit of oral argument, the Court GRANTS the motion to remand and DENIES AS MOOT the motion to stay.¹

BACKGROUND

On October 26, 2007, plaintiffs Peter Jay Gerber and Miriam Goldberg ("Plaintiffs") filed this action in San Francisco Superior Court against Bayer Corporation and Bayer Healthcare Pharmaceuticals, Inc. (collectively, "Bayer"), BMC Diagnostics, Inc. and California Pacific Medical Center (collectively, "Imaging Facility Defendants"), General Electric

¹ Defendants' request for judicial notice is granted. *See* Fed. R. Evid. 201. Plaintiffs objected to and moved to strike paragraphs 2 and 3 and the exhibits A and B to the Declaration of Carol Sleeth. At the hearing on the pending motions, the parties informed the Court that they reached a stipulation to strike paragraph 3 and exhibit B to the Sleeth Declaration. Based on the parties' stipulation, the Court GRANTS the motion to strike in part as to paragraph 3 and exhibit B to the Sleeth Declaration. However, because the Court did not need to consider the remainder of the Sleeth Declaration in resolving the pending motions to remand and to stay, the Court DENIES in part as MOOT the motion strike as to paragraph 2 and Exhibit A to the Sleeth Declaration.

1 Company, GE Healthcare, Inc., and GE Healthcare Bio-Sciences Corp. (collectively, “GE”),
2 McKesson Corporation and Merry X-Ray Chemical Corporation (collectively, “Distributor
3 Defendants”). Plaintiffs assert the following causes of action: (1) strict liability against Bayer
4 and GE (collectively, “Manufacturing Defendants”) and the Distributor Defendants;
5 (2) negligence against the Manufacturing Defendants and the Distributor Defendants; (3)
6 negligence against the Imaging Facility Defendants; (4) breach of express warranty against the
7 Imaging Facility Defendants; (5) breach of implied warranty against the Imaging Facility
8 Defendants; (6) fraud and misrepresentation against the Manufacturing Defendants; (7) fraud
9 and concealment or omission the Manufacturing Defendants; (8) negligent misrepresentation
10 against the Manufacturing Defendants; (9) violation of the Consumers Legal Remedy Act
11 (“CLRA”), California Civil Code section 1750 *et seq.* against all defendants; and (10) loss of
12 consortium against all defendants.

13 On November 21, 2007, the Manufacturing Defendants removed on the basis of
14 diversity jurisdiction. They asserted that diversity jurisdiction exists because the Imaging
15 Facility and Distributor Defendants were fraudulently joined and thus should be disregarded for
16 purposes of determining diversity jurisdiction.

17 Plaintiffs now move to remand this action and Manufacturing Defendants move to stay
18 this action pending a ruling on a motion to transfer the action by the MDL. Both parties argue
19 that the Court should address their motion first.

20 ANALYSIS

21 “Generally, jurisdiction is a preliminary matter that should be resolved before all
22 others.” *Leeson v. Merck & Co., Inc.*, 2006 WL 3230047, *2 (E.D.Cal. Jan. 27, 2006); *see also*
23 *Villarreal v. Chrysler Corp.*, 1996 WL 116832, at *1 (N.D.Cal. Mar.12, 1996) (“Judicial
24 economy will best be served by addressing the remand issue [before a party’s motion to stay]
25 because a determination on this issue will facilitate litigation in the appropriate forum.”).
26 However, some courts have held that “the calculus changes somewhat when deference to a
27 MDL court will further ‘the uniformity, consistency, and predictability in litigation that
28 underlies the MDL system.’” *Leeson*, 2006 WL 3230047, *2 (quoting *Conroy v. Fresh Del*

1 *Monte Produce Inc.*, 325 F. Supp. 2d 1049, 1053 (N.D.Cal.2004)). “In deciding whether to rule
2 on the motion to remand, courts consider whether the motion raises issues likely to arise in
3 other actions pending in the MDL transferee court.” *Conroy*, 325 F. 2d 1053. Here, the Court
4 finds that the pending motion to remand has not raised issues that are likely to arise in other
5 actions even if the MDL grants the motion to transfer. Therefore, the Court will address the
6 motion to remand first.

7 **A. Legal Standards Relevant to Removal.**

8 “[A]ny civil action brought in a State court of which the district courts of the United
9 States have original jurisdiction, may be removed by the defendant ... to the district court of the
10 United States for the district and division embracing the place where such action is pending.”
11 *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 7-8 (1983) (citation
12 omitted); *see also* 28 U.S.C. § 1441. However, federal courts are courts of limited jurisdiction.
13 *See, e.g., Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Accordingly,
14 the burden of establishing federal jurisdiction for purposes of removal is on the party seeking
15 removal, and the removal statute is strictly construed against removal jurisdiction. *Valdez v.*
16 *Allstate Ins. Co.*, 372 F.3d 1115, 1117 (9th Cir. 2004); *see also Gaus v. Miles, Inc.*, 980 F.2d
17 564, 566 (9th Cir. 1992). “Federal jurisdiction must be rejected if there is any doubt as to the
18 right of removal in the first instance.” *Gaus*, 980 F.2d at 566.

19 While diversity jurisdiction under 28 U.S.C. § 1332 ordinarily requires complete
20 diversity of the parties, removal is proper despite the presence of a non-diverse defendant when
21 that defendant was fraudulently joined, in other words, where that defendant is merely a “sham”
22 defendant. *See Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996). In this circuit, a non-diverse
23 defendant is deemed a sham and will not defeat jurisdiction if, after all disputed questions of
24 fact and all ambiguities in the controlling state law are resolved in the plaintiff’s favor, the
25 plaintiff could not possibly recover against the party whose joinder is questioned. *Kruso v.*
26 *International Telephone & Telegraph Corp.*, 872 F.2d 1416, 1426 (9th Cir. 1989). The failure
27 to state claim against the non-diverse defendant must be “obvious according to the well-settled
28 rules of the state.” *United Computer Systems v. AT&T Corp.*, 298 F.3d 756, 761 (9th Cir.

1 2002). The party asserting the fraudulent joinder bears the burden of proof and remand must be
2 granted unless the defendant can show that there is no possibility that the plaintiff could prevail
3 on any cause of action it brought against the non-diverse defendant. *See Levine v. Allmerica*
4 *Financial Life Ins. & Annuity Co.*, 41 F. Supp. 2d 1077, 1078 (C.D. Cal. 1999).

5 **B. Manufacturing Defendants Fail to Demonstrate Other Defendants Were**
6 **Fraudulently Joined.**

7 Manufacturing Defendants argue that all of Plaintiffs' claims against the Imaging
8 Facility and Distributor Defendants are time-barred and that Plaintiffs' CLRA claims are
9 jurisdictionally barred based on Plaintiffs' failure to comply with the statutory notice
10 provisions. The Court will address each argument in turn.

11 **1. Statute of Limitations.**

12 To demonstrate at the pleading stage that a statute of limitations has run, a defendant
13 must show that the assertions of the complaint, read with the required liberality, would not
14 permit the plaintiff to prove that the statute was tolled. *Jablon v. Dean Witter*, 614 F.2d 677,
15 682 (9th Cir. 1980). Under California law, a statute of limitations can be tolled by the
16 discovery rule which delays the accrual of the date of a cause of action until the plaintiff is
17 aware of her injury and its negligent cause. *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116, 1120
18 (9th Cir. 1994) (citing *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1109 (1988)). Under the
19 discovery rule, the statute of limitations begins to run when the plaintiff suspects or should
20 suspect that her injury was caused by wrongdoing. *Jolly*, 44 Cal. 3d at 1110.

21 Plaintiffs plead that the "nature of Plaintiffs' injuries and damages, and their relationship
22 to gadolinium-based contrast agents used in conjunction with MRIs and MRAs, was not
23 discovered, and through reasonable care and due diligence could not have been discovered, by
24 Plaintiffs until a time less than two years before the filing of this Complaint." (Compl., ¶ 67.)
25 Manufacturing Defendants contend that Plaintiffs failed to plead specific facts regarding the
26 circumstances of their delayed discovery. However, assuming, without deciding, that Plaintiffs
27 have not sufficiently alleged facts to establish that the discovery rule applies, Manufacturing
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1 Defendants have not shown that Plaintiffs could not as a matter of law allege such facts if given
2 an opportunity to amend their complaint.

3 Plaintiffs also argue that Defendants’ violations of the CLRA are ongoing, and that
4 therefore, these claims are not time-barred. (Mot. to Remand at 4.) Manufacturing Defendants
5 failed to address this argument and, thus, for this additional reason, fail to demonstrate that all
6 of Plaintiffs’ claims are time-barred.

7 **2. Compliance with CLRA’s Statutory Notice Provisions.**

8 Section 1782 of the California Civil Code provides that a plaintiff shall provide notice of
9 his or her claims at least thirty days before filing an “an action for damages” under the CLRA.
10 Cal. Civ. Code § 1782(a). The statute clarifies that such notice is not required for claims
11 seeking only injunctive relief. Cal. Civ. Code § 1782(d). As Plaintiffs highlight, they only seek
12 injunctive relief pursuant to their CLRA claim. (Compl., ¶¶ 120-122.) Accordingly, the notice
13 provisions of the CLRA are inapplicable.

14 Manufacturing Defendants did not argue in opposition to the motion to remand that
15 Plaintiffs did not allege fact sufficient to state a CLRA claim against the Imaging Facility and
16 Distributor Defendants. Instead, they merely asserted that Plaintiffs’ CLRA claim is time-
17 barred and failed to satisfy the statutory notice provisions. Because the Court finds that
18 Manufacturing Defendants have failed to show that the CLRA claim is time-barred or deficient
19 based on the statutory notice requirements, they have not demonstrated that there is no
20 possibility that Plaintiffs could prevail on any cause of action it brought against the non-diverse
21 defendants. *See Levine*, 41 F. Supp. 2d at 1078. Accordingly, the Court GRANTS Plaintiffs’
22 motion to remand.

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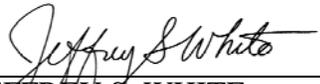
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CONCLUSION

For the foregoing reasons, Plaintiffs' motion to remand is GRANTED and this matter shall be remanded to the Superior Court for the City and County of San Francisco. Because this Court is remanding the case, Defendants' motion to stay is DENIED AS MOOT.

Dated: February 6, 2008



JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE