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

|                                 |   |                          |
|---------------------------------|---|--------------------------|
| RANDALL RAY MITCHELL,           | ) | Case No. 11-752 SC       |
|                                 | ) |                          |
| Plaintiff,                      | ) | <u>ORDER RE: MOTIONS</u> |
|                                 | ) |                          |
| v.                              | ) |                          |
|                                 | ) |                          |
| ACUMED, LLC; and DOES 1 through | ) |                          |
| 100, inclusive,                 | ) |                          |
|                                 | ) |                          |
| Defendants.                     | ) |                          |
|                                 | ) |                          |
|                                 | ) |                          |

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**I. INTRODUCTION**

Plaintiff Randall Ray Mitchell ("Plaintiff") commenced this action in Marin County Superior Court against Acumed, LLC ("Defendant"), pleading eight causes of action relating to injuries Plaintiff allegedly sustained after a device manufactured by Defendant was surgically inserted into his body. ECF No. 1 ("Notice of Removal") Ex. E ("FAC"). Three fully briefed motions are now before the Court. Plaintiff moves to remand the case to state court. ECF Nos. 19 ("MTR"), 25 ("MTR Opp'n"), 28 ("MTR Reply"), 35 ("MTR Supp. Opp'n"), 36 ("MTR Supp. Reply").<sup>1</sup> Defendant moves to dismiss Plaintiff's FAC. ECF Nos. 7 ("MTD"), 23 ("MTD Opp'n"), 30 ("MTD Reply"). Defendant additionally moves to

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<sup>1</sup> The Court required supplemental briefing on Plaintiff's MTR. ECF No. 32.

1 strike references in the FAC to the allegedly defective design of  
2 Defendant's device. ECF Nos. 8 ("MTS"), 24 ("MTS Opp'n"), 31 ("MTS  
3 Reply"). For the following reasons, the Court DENIES Plaintiff's  
4 Motion to Remand, GRANTS IN PART and DENIES IN PART Defendant's  
5 Motion to Dismiss, and GRANTS Defendant's Motion to Strike.

6

7 **II. BACKGROUND**

8 As it must on a Federal Rule of Civil Procedure 12(b)(6)  
9 motion, the Court assumes the truth of the well-pleaded facts in  
10 Plaintiff's' FAC. Around January 2, 2008, Plaintiff underwent  
11 surgery. FAC ¶ 7. During the procedure, an Articulating Scaphoid  
12 Lunate Fixation device ("the device") was implanted into his wrist.  
13 Id. Subsequent X-rays revealed that the device had fractured,  
14 necessitating removal of the device and additional surgery. Id. ¶¶  
15 7, 14. Plaintiff alleges in his FAC that Defendant "design[ed],  
16 research[ed], develop[ed], manufacture[d], test[ed], market[ed],  
17 advertise[d], promote[d], distribute[d], warrant[ed] and [sold]"  
18 the device. Id. ¶ 8. Plaintiff alleges that Defendant knew at the  
19 time of Plaintiff's surgery that it was unsafe and defective  
20 because it "could not withstand the stresses placed as a patient's  
21 mobility increased and would fracture and break under the stresses  
22 that foreseeably accompanied increased mobility while bone union  
23 and growth . . . was occurring in patients." Id. ¶ 10. Plaintiff  
24 alleges that Defendant falsely represented the strength and use of  
25 the device in brochures provided to Plaintiff's doctors, and that  
26 Defendant failed to disclose that the device would fracture. Id. ¶  
27 11. Plaintiff claims that Defendant represented the device to be  
28 "safe and effective even when used as directed [even though] no

1 clinical trials had been done supporting long or short-term  
2 efficacy." Id. ¶ 12. Plaintiff claims that Defendant concealed  
3 known risks about the device, and failed to provide sufficient  
4 warnings and instructions that would have put the general public on  
5 notice of the possibility of dangers and adverse effects. Id. ¶  
6 13, 15. Plaintiff argues that at the time of Plaintiff's surgery,  
7 it was "reasonably scientifically knowable" that the device would  
8 fracture and break, and hence Defendant acted with malice in  
9 failing to warn the public of this danger. Id. ¶ 21.

10 On January 4, 2010, Plaintiff filed his Initial Complaint in  
11 California Superior Court for the County of Marin. See Notice of  
12 Removal Ex. A ("Initial Complaint"). In his Initial Complaint,  
13 Plaintiff did not plead the state citizenship of Plaintiff or  
14 Defendant. Defendant was served with the Initial Complaint on  
15 August 12, 2010. Notice of Removal at 3. Defendant demurred on  
16 September 13, 2010; on December 29, 2010, the court sustained the  
17 demurrer, giving Plaintiff leave to amend his complaint. Id. at 3-  
18 4. On January 28, 2011, Plaintiff filed his First Amended  
19 Complaint in state court. See FAC. Included in the FAC was a  
20 section entitled "Identity and Capacity of Parties" in which  
21 Plaintiff pleaded that he was a resident of California. Id. ¶¶ 3-  
22 6. Plaintiff also named sixty Doe Defendants, writing: "Plaintiff  
23 is informed and believed that each of the fictitiously named  
24 defendants is responsible in some manner for the occurrences herein  
25 alleged, and that plaintiff's damages as herein alleged were and  
26 continue to be proximately caused by such occurrences." Id. ¶ 4.  
27 Plaintiff brings eight causes of action against Defendant and Doe  
28 Defendants: (1) strict product liability -- failure to warn; (2)

1 strict liability; (3) negligence; (4) breach of implied warranty;  
2 (5) breach of express warranty; (6) fraud; (7) fraud by  
3 concealment; and (8) negligent misrepresentation. See FAC.

4 On February 18, 2011, Defendant removed the action to federal  
5 court. See Notice of Removal. Defendant based removal on  
6 diversity of the parties, noting that the FAC identified Plaintiff  
7 as a citizen and resident of California while alleging that  
8 Defendant is a Delaware corporation with its principal place of  
9 business in Hillsboro, Oregon. Id. at 2.

10  
11 **III. LEGAL STANDARDS**

12 **A. Motion to Remand**

13 Any civil action brought in a state court may be removed to  
14 federal court if there is complete diversity of citizenship and  
15 where the amount in controversy exceeds \$75,000. 28 U.S.C. §§  
16 1332, 1441. As a general rule, the court must strictly construe  
17 the removal statute, "and any doubt about the right of removal  
18 requires resolution in favor of remand." Moore-Thomas v. Alaska  
19 Airlines, Inc., 553 F.3d 1241, 1244 (9th Cir. 2009) (citation  
20 omitted). "The presumption against removal means that the  
21 defendant always has the burden of establishing that removal is  
22 proper." Id. (internal quotations omitted).

23 **B. Motion to Dismiss**

24 A motion to dismiss under Federal Rule of Civil Procedure  
25 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.  
26 Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal can be based  
27 on the lack of a cognizable legal theory or the absence of  
28 sufficient facts alleged under a cognizable legal theory.

1 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.  
2 1990). "When there are well-pleaded factual allegations, a court  
3 should assume their veracity and then determine whether they  
4 plausibly give rise to an entitlement to relief." Ashcroft v.  
5 Iqbal, 129 S. Ct. 1937, 1950 (2009). However, "the tenet that a  
6 court must accept as true all of the allegations contained in a  
7 complaint is inapplicable to legal conclusions. Threadbare  
8 recitals of the elements of a cause of action, supported by mere  
9 conclusory statements, do not suffice." Iqbal, 129 S. Ct. at 1950  
10 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). The  
11 allegations made in a complaint must be both "sufficiently detailed  
12 to give fair notice to the opposing party of the nature of the  
13 claim so that the party may effectively defend against it" and  
14 sufficiently plausible such that "it is not unfair to require the  
15 opposing party to be subjected to the expense of discovery." Starr  
16 v. Baca, 633 F.3d 1191, 1204 (9th Cir. 2011).

17 **C. Motion to Strike**

18 Rule 12(f) provides that "[t]he court may strike from a  
19 pleading an insufficient defense or any redundant, immaterial,  
20 impertinent, or scandalous matter." Fed. R. Civ. P. 12(f).  
21 Motions to strike are generally regarded with disfavor. Ganley v.  
22 County of San Mateo, No. 06-3923, 2007 WL 902551, at \*1 (N.D. Cal.  
23 Mar. 22, 2007). The essential function of a Rule 12(f) motion is  
24 to "avoid the expenditure of time and money that must arise from  
25 litigating spurious issues by dispensing with those issues prior to  
26 trial." Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir.  
27 1993), rev'd on other grounds, 510 U.S. 517 (1994).

28

1 **IV. DISCUSSION**

2 **A. Plaintiff's Motion to Remand**

3 While Plaintiff does not challenge the state citizenship of  
4 Defendant or the satisfaction of the amount-in-controversy, he  
5 makes two arguments in favor of remanding the action to state  
6 court. First, he argues that Defendant filed the Notice of Removal  
7 more than thirty days after Defendant was served with the Initial  
8 Complaint, and thus Defendant's removal was untimely under 28  
9 U.S.C. § 1446(b). Second, he argues that remand is proper because  
10 he intends to join a non-diverse Doe defendant. See MTR.

11 Under 28 U.S.C. § 1446(b),

12 The notice of removal of a civil action or  
13 proceeding shall be filed within thirty days  
14 after the receipt by the defendant, through  
15 service or otherwise, of a copy of the initial  
16 pleading setting forth the claim for relief  
17 upon which such action or proceeding is based,  
or within thirty days after the service of  
summons upon the defendant if such initial  
pleading has then been filed in court and is  
not required to be served on the defendant,  
whichever period is shorter.

18 Plaintiff argues that Defendant "was aware of the  
19 circumstances surrounding the allegations of the original complaint  
20 as early as January 2010," and hence Defendant's February 2011  
21 removal was beyond the thirty-day removal period provided by §  
22 1446(b). Id. at 4.

23 Defendant counters that Plaintiff did not plead his  
24 citizenship in the Initial Complaint, and the first time  
25 Plaintiff's citizenship was pleaded was in the FAC filed January  
26 28, 2011. MTR Opp'n at 2-3. Defendant argues that as such, the  
27 thirty-day deadline for removal was not triggered until the FAC was  
28 filed, and so removal was timely. Plaintiff responds that

1 Defendant should have surmised Plaintiff's citizenship from the  
2 facts alleged in the Initial Complaint -- namely, that Plaintiff  
3 underwent surgery in San Rafael, California. Reply at 2.  
4 Plaintiff writes: "Patients on a Kaiser plan rarely travel out of  
5 their area for common medical services and there is no indication  
6 so far that Kaiser San Rafael was or is a Mecca for wrist surgery  
7 at the time of surgery." Id.

8 "[N]otice of removability under § 1446(b) is determined  
9 through examination of the four corners of the applicable  
10 pleadings, not through subjective knowledge or a duty to make  
11 further inquiry." Harris v. Bankers Life & Cas. Co., 425 F.3d 689,  
12 694 (9th Cir. 2005). Defendant could not have known from the  
13 location of the hospital where Plaintiff's surgery took place that  
14 Plaintiff was a California resident. Therefore, Plaintiff's first  
15 argument fails.

16 Plaintiff's second argument is that the action should be  
17 remanded because Plaintiff intends to join a non-diverse Doe  
18 defendant, defeating diversity. MTR at 7. Defendant calls this  
19 "nothing more than a thinly disguised attempt to defeat diversity  
20 jurisdiction," and notes, "Plaintiff has cited to no case law which  
21 allows a court to consider a prospective defendant in determining  
22 whether to remand." MTR Opp'n at 4.

23 The Court finds this argument to fail as well; the Court looks  
24 to the pleadings, not the speculation of the parties, to determine  
25 whether removal was proper, and finds that removal was proper here.

26 The Court ordered supplemental briefing on this motion in  
27 light of language within 28 U.S.C. § 1446(b) prohibiting removal on  
28 the basis of diversity jurisdiction more than one year after

1 commencement of the action. ECF No. 32. Defendant argued that  
2 this was a procedural limitation and challenged both its  
3 applicability and what it perceived as the Court's sua sponte  
4 raising of it. MTR Supp. Opp'n at 1-2. Defendant argued that  
5 § 1446(b)'s one-year bar "only bars removal of actions which were  
6 not originally removable," and claims that while the Initial  
7 Complaint failed to put Defendant on notice of Plaintiff's  
8 California citizenship, it did not change the "underlying fact that  
9 Plaintiff was a resident of California." Id. at 3. Plaintiff used  
10 his supplemental brief to restate law cited by the Court and the  
11 arguments made in his MTR.

12 The Court is persuaded by Defendant, and finds removal of this  
13 action to be timely and proper. Accordingly, Plaintiff's MTR is  
14 DENIED.

15 **B. Defendant's Motions to Dismiss and Strike**

16 In its MTD, Defendant argues that Plaintiff's two strict  
17 liability claims fail to state a claim upon which relief can be  
18 granted because "claims of design defect of an implantable medical  
19 device" are barred by law. MTD at 1. Defendant also argues that  
20 Plaintiff's sixth and seventh claims sound in fraud and are not  
21 pleaded with the required specificity. Id.

22 1. Design Defects

23 In California, it has long been the law that implanted medical  
24 devices are exempted from strict liability for design defects.  
25 Brown v. Super. Ct., 44 Cal. 3d 1049, 1069 (1988); Artiglio v.  
26 Super. Court, 22 Cal. App. 4th 1388, 1393 (Ct. App. 1994).  
27 Plaintiff's response is that the present case is factually  
28 distinguishable because it involves a "surgical screw," whereas



1 Brown involved a drug taken internally and Artiglio involved breast  
2 implants. MTD at 3. The Court finds Plaintiff's argument to be  
3 wholly devoid of merit; Plaintiff makes no logical argument that  
4 Brown and Artiglio should not cover the surgical screw at issue  
5 here. Because Plaintiff's first and second claims still recite  
6 valid strict liability claims premised on Defendant's failure to  
7 warn or a manufacturing defect, the Court does not dismiss them in  
8 their entirety. Rather, it DISMISSES, with PREJUDICE, any cause of  
9 action premised on defective design of the device. Likewise, it  
10 STRIKES all references to the allegedly defective design of the  
11 device as immaterial under Rule 12(f).

12 2. Fraud Claims

13 Defendant additionally argues that Plaintiff has failed to  
14 plead his fraud claims with the requisite specificity. See MTD at  
15 1. Where plaintiffs allege fraud, or conduct that is sufficiently  
16 "grounded in fraud," they must plead their claim with particularity  
17 as required by Rule 9(b) of the Federal Rules of Civil Procedure.  
18 See Edwards v. Marin Park, Inc., 356 F.3d 1058, 1065-66 (9th Cir.  
19 2004); Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir.  
20 2003). Plaintiffs must include "the who, what, when, where, and  
21 how" of the fraud. Vess, 317 F.3d at 1106 (citations omitted). A  
22 plaintiff satisfies the particularity requirement only if his or  
23 her allegations are "specific enough to give defendants notice of  
24 the particular misconduct which is alleged to constitute the fraud  
25 charged so that they can defend against the charge and not just  
26 deny that they have done anything wrong." Bly-Magee v. California,  
27 236 F.3d 1014, 1019 (9th Cir. 2001) (citation and internal  
28 quotation marks omitted).

1 Plaintiff does not argue that his fraud claims satisfy Rule  
2 9(b) -- rather, he requests leave to amend his complaint.  
3 Defendant argues that if the Court allows Plaintiff to amend its  
4 FAC, Defendant "will be severely prejudiced because it will be  
5 forced to engage in further motion practice before the court,  
6 incurring additional fees and costs to strike baseless and  
7 frivolous claims." Reply at 3.

8 The Court finds Plaintiff's fraud claims to be extremely  
9 poorly pleaded. Plaintiff fails to identify the "who, what, when,  
10 where," or "how" of the alleged fraud. Nor does he allege facts in  
11 his MTD Opposition that would tend to support his fraud claims.  
12 For these reasons, the Court DISMISSES Plaintiff's claims for fraud  
13 and fraudulent concealment WITHOUT PREJUDICE. However, because  
14 Plaintiff has made no attempt to justify his fraud claims, the  
15 Court does not grant Plaintiff leave to amend his Complaint at this  
16 time. Should Plaintiff desire to amend his Complaint to include  
17 claims sounding in fraud, he must first seek leave of the Court.  
18 Should Plaintiff amend his FAC to include "baseless and frivolous  
19 claims," he will face appropriate sanctions under Federal Rule of  
20 Civil Procedure 11, 28 U.S.C. § 1927, and/or the Court's inherent  
21 authority.

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**V. CONCLUSION**

For the foregoing reasons, Plaintiff Randall Ray Mitchell's Motion to Remand is DENIED. Defendant Acumed, LLC's Motion to Dismiss is GRANTED IN PART and DENIED IN PART. The Court DISMISSES WITH PREJUDICE any strict liability cause of action premised on design defect and DISMISSES WITHOUT PREJUDICE Plaintiff's sixth and seventh causes of action for fraud and fraud (concealment). Defendant's Motion to Strike is GRANTED: the Court STRIKES all references in Plaintiff's FAC to the allegedly defective design of the Articulating Scaphoid Lunate Fixation device.

IT IS SO ORDERED.

Dated: June 13, 2011

  
UNITED STATES DISTRICT JUDGE