

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

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| BAY AREA SURGICAL MANAGEMENT, LLC, A California limited liability company, |) | Case No.: 12-CV-0848-LHK |
| |) | |
| Plaintiff, |) | ORDER GRANTING PLAINTIFF'S MOTION TO REMAND |
| v. |) | |
| |) | |
| BLUE CROSS BLUE SHIELD OF MINNESOTA INC., a Minnesota corporation and DOES 1 through 25, inclusive |) | |
| |) | |
| Defendants. |) | |

Before the Court are Plaintiff Bay Area Surgical Management, LLC's ("Bay Area") motion to remand and Defendant Blue Cross Blue Shield of Minnesota, Inc.'s ("Blue Cross") motion to dismiss Bay Area's First Amended Complaint ("FAC"). Pursuant to Civil Local Rule 7-1(b), the Court deemed these motions suitable for decision without oral argument and vacated the July 12, 2012 motion hearing and case management conference. For the foregoing reasons, the Court GRANTS Bay Area's motion to remand, and accordingly, need not address Blue Cross's motion to dismiss the FAC.

I. Background

Dr. Camran Nezhat, a doctor with Bay Area, a medical care provider, performed surgery on a patient insured by Blue Cross, a medical insurance provider. Blue Cross paid only \$36,767 of the \$107,862 Bay Area bill. As a result, on January 4, 2012, Bay Area filed a lawsuit against Blue

1 Cross in the Superior Court of California in Santa Clara County to recover an additional
2 \$49,522.14 plus attorneys' fees and punitive damages. The patient had assigned her benefits to
3 Bay Area, and Bay Area filed its initial complaint "stand[ing] in the shoes of the patient who
4 underwent the unpaid surgery in pursuing each Cause of Action against [Blue Cross]." *See* Compl.
5 ¶ 4.

6 On February 21, 2012, Blue Cross removed the case to federal court based on both subject
7 matter jurisdiction under the Employee Retirement Income Security Act of 1974 ("ERISA") and on
8 diversity jurisdiction. ECF No. 1. In its Notice of Removal, Blue Cross asserted that Bay Area's
9 lawsuit "stand[ing] in the shoes of the patient" was an ERISA action because Blue Cross insured
10 the patient under an employer-provided health insurance plan covered by ERISA. *Id.*

11 On February 28, 2012, Blue Cross moved to dismiss Bay Area's complaint on grounds of
12 federal preemption under ERISA. ECF No. 6. On March 9, 2012, Bay Area moved to remand.
13 ECF No. 11. On March 16, 2012, Bay Area amended its complaint. ECF No. 14. On March 23,
14 2012, Blue Cross filed its opposition to Bay Area's motion to remand (ECF No. 16), and on March
15 30, 2012, Bay Area filed its reply (ECF No. 17). Also, on March 30, 2012, Blue Cross withdrew
16 its motion to dismiss Bay Area's original complaint and moved to dismiss Bay Area's FAC. ECF
17 Nos. 18 and 19. On April 13, 2012, Bay Area filed its opposition to Blue Cross's motion to
18 dismiss the FAC (ECF No. 21), and on April 20, 2012, Blue Cross filed its reply (ECF No. 23).

19 **II. Legal Standard**

20 A suit may be removed from state court to federal court only if the federal court would have
21 had subject matter jurisdiction over the case. 28 U.S.C. § 1441(a). There are two bases for federal
22 subject matter jurisdiction: (1) federal question jurisdiction under 28 U.S.C. § 1331, and (2)
23 diversity jurisdiction under 28 U.S.C. § 1332. If it appears at any time before final judgment that
24 the federal court lacks subject matter jurisdiction, the federal court must remand the action to state
25 court. 28 U.S.C. § 1447(c). The party seeking removal bears the burden of establishing federal
26 jurisdiction. *Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1087 (9th Cir.
27 2009). "The removal statute is strictly construed, and any doubt about the right of removal requires
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1 resolution in favor of remand.” *Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1244 (9th
2 Cir. 2009) (citing *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992)).

3 **III. Discussion**

4 Blue Cross removed Bay Area’s state court action to federal court based on federal question
5 jurisdiction and diversity jurisdiction. 28 U.S.C. §§ 1331(a), 1332(a), 1441(a). Bay Area moves to
6 remand on the grounds of lack of subject matter jurisdiction. The Court finds that it had federal
7 question jurisdiction over Bay Area’s original removed complaint because two causes of action
8 arose under federal law. Accordingly, removal was proper. However, the FAC does not include
9 any causes of action arising under federal law. Thus, the Court no longer has federal question
10 jurisdiction. Furthermore, the Court does not have diversity jurisdiction because the amount in
11 controversy requirement is not met. Accordingly, the Court declines to exercise supplemental
12 jurisdiction over the state law causes of action in the FAC, and GRANTS Bay Area’s motion to
13 remand.

14 **A. Bay Area’s original complaint was properly removed because it included state law
15 causes of action that ERISA completely preempted.**

16 Bay Area argues that removal was improper because the Court lacked federal question
17 jurisdiction and diversity jurisdiction. Mot. at 2. The Court will first analyze whether removal was
18 proper based on the original complaint. Second, the Court will address whether it has federal
19 question jurisdiction over the FAC.

20 For the Court to have federal question jurisdiction over a complaint, the complaint must
21 arise under federal law. 28 USC § 1331. Generally speaking, “[a] cause of action arises under
22 federal law only when the plaintiff’s well-pleaded complaint raises issues of federal law.” *Hansen*
23 *v. Blue Cross of Cal.*, 891 F.2d 1384, 1386 (9th Cir. 1989). “The well-pleaded complaint rule is
24 the basic principle marking the boundaries of the federal question jurisdiction of the federal district
25 courts.” *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 63 (1987) (internal quotation
26 marks omitted). Bay Area’s FAC, like its original complaint, asserts only state law claims.
27 Generally, a complaint that asserts only state law claims does not arise under federal law. *Id.*
28

1 For the reasons discussed below, Blue Cross’s defense to the original complaint would
2 include a federal preemption defense. Ordinary “conflict” preemption simply recognizes that when
3 federal and state law conflict, federal law has primacy. *Altria Group, Inc. v. Good*, 555 U.S. 70, 76
4 (2008). For example, 29 U.S.C. § 1144(a) of ERISA, which the parties discuss, provides that
5 “[e]xcept as provided in subsection (b) of this section [ERISA] . . . supersede[s] any and all State
6 laws insofar as they may now or hereafter relate to any employee benefit plan . . .” *Id.* Under §
7 1144(a), a defendant in a state law action that relates to an employee benefit plan has a defense:
8 that the state law action is preempted because it conflicts with ERISA. *Marin General Hospital v.*
9 *Modesto & Empire Traction Co.*, 581 F.3d 941, 945 (9th Cir. 2009). However, the existence of a
10 federal preemption defense normally does not create federal question jurisdiction because a defense
11 does not fall within the “well-pleaded complaint.” *Metropolitan Life Insurance*, 481 U.S. at 63.
12 Consequently, preemption under § 1144(a) does not confer federal question jurisdiction. *Marin*
13 *General Hospital*, 581 F.3d at 945. The Supreme Court explained, “29 U.S.C. § 1144(b)(2)(A),
14 makes clear that Congress did not intend to pre-empt entirely every state cause of action relating to
15 such [employee benefit] plans . . . [by stating] ‘nothing in this subchapter shall be construed to
16 exempt or relieve any person from any law of any State which regulates insurance, banking, or
17 securities.’” *Franchise Tax Board of State of Cal. v. Construction Laborers Vacation Trust for*
18 *Southern Cal.*, 463 U.S. 1, 25 (1983) (quoting 29 U.S.C. § 1144(b)(2)(A)).

19 However, in rare circumstances, “Congress may so completely pre-empt a particular area
20 [of law]” that a state law claim arising from this area of law “is necessarily federal in character”
21 (“complete preemption.”) *Metropolitan Life Insurance*, 481 U.S. at 63-64. Thus, a completely
22 preempted state law claim inherently arises under federal law, conferring federal question
23 jurisdiction and allowing removal from state court to federal court.

24 ERISA completely preempts state law under 29 U.S.C. § 1132(a). ERISA is a
25 comprehensive legislative scheme intended to protect the interests of participants in employee
26 benefit plans and their beneficiaries. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004). One
27 distinctive feature of ERISA is the integrated enforcement mechanism provided under 29 U.S.C. §
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1 1132(a), which provides ten “carefully integrated civil enforcement provisions.”¹ *Id.* (quoting *Pilot*
2 *Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987)). Congress “clearly manifested an intent” to
3 completely preempt causes of action within the scope of § 1132(a), thereby making such causes of
4 action removable to federal court. *Metropolitan Life Insurance*, 481 U.S. at 66.

5 Under *Davila*, a state law claim is completely preempted by ERISA under 29 U.S.C. §
6 1132(a)’s comprehensive legislative scheme if the state law claim meets a two-prong test. *See*
7 *Marin General Hospital*, 581 F.3d at 947 (9th Cir. 2009) (citing *Davila*, 542 U.S. at 210-12). A
8 state law cause of action is completely preempted, and therefore removable, “only if *both* prongs of
9 the [*Davila*] test are satisfied.” *Marin General Hospital*, 581 F.3d at 947 (emphasis added).

10 The first *Davila* prong asks “whether a plaintiff seeking to assert a state law claim ‘at some
11 point in time, could have brought [the] claim under [29 U.S.C. § 1132(a)(1)(B)].” *Marin General*
12 *Hospital*, 581 F.3d at 947 (quoting *Davila*, 542 U.S. at 210). Section 1132(a)(1)(B) provides: “A
13 civil action may be brought—(1) by a participant or beneficiary—... (B) to recover benefits due to
14 him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his
15 rights to future benefits under the terms of the plan.” 29 U.S.C. § 1132(a)(1)(B). The second
16 *Davila* prong asks whether there is no other legal duty, independent of ERISA, that is implicated
17 by a defendant's actions.” *Marin General Hospital*, 581 F.3d at 949 (quoting *Davila*, 542 U.S. at
18 210). For example, an employer-sponsored health insurance plan between a patient and a medical
19 insurer generally does not create legal duties independent of ERISA, but a contract between a
20 medical service provider and a medical insurer creates legal duties independent of ERISA. *Id.* at
21 950. In sum, if a state law cause of action could have been brought under 29 U.S.C. §
22 1132(a)(1)(B) and does not create a legal duty independent of ERISA, the state law cause of action
23 is completely preempted.

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26 ¹ For example, 29 U.S.C. § 1132(a)(3)(A) provides that “(a) [a] civil action may be brought . . . (3)
27 by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any
28 provision of this subchapter or the terms of the plan . . .” *Id.* 29 U.S.C. § 1132(a)(3)(A). Another
provision, 29 U.S.C. § 1132(a)(7), provides that, “(a) [a] civil action may be brought . . . (7) by a
State to enforce compliance with a qualified medical child support order (as defined in section
1169 (a)(2)(A) of this title.)” *Id.*

1 In the original removed complaint, Bay Area’s first and second causes of action arose
2 from the medical insurance contract between the patient and Blue Cross. The parties do not
3 dispute that the medical insurance contract between the patient and Blue Cross is an employee
4 benefit plan covered under ERISA.²

5 Bay Area’s first cause of action in its original complaint was for breach of contract. Compl.
6 ¶¶ 29-37. Bay Area alleged breach by Blue Cross of the written medical insurance contract
7 between the patient and Blue Cross. Compl. ¶¶ 30, 34-35 (“As a result of the breach of Defendant
8 [Blue Cross], in the obligations pursuant to the written contract with the patient, who has assigned
9 her rights to Bay Area . . . \$49,522.14 is now due, owing, and unpaid.”). Bay Area’s second cause
10 of action in its original complaint was for violation of Cal. Business & Professions Code § 17200.
11 Bay Area alleged that Blue Cross “unlawfully refused to honor the terms of its written contract
12 with the patient . . . giving rise to [Bay Area’s] claim to damages . . .” Compl. ¶ 40. Thus, in the
13 original removed complaint, Bay Area’s breach of contract and Cal. Business & Professions Code
14 § 17200 causes of action arose from the written contract between the patient and Blue Cross, an
15 ERISA plan agreement.

16 Bay Area’s breach of contract and Cal. Business & Professions Code § 17200 causes of
17 action meet the first prong of the *Davila* test because the patient could have brought these causes of
18 action to recover her benefits due under the ERISA medical insurance contract, pursuant to §
19 1132(a)(1)(B). Indeed, Bay Area only brought these causes of action in the original complaint
20 pursuant to the patient’s assignment of her ERISA plan rights to Bay Area. These causes of action
21 also meet the second prong of the *Davila* test because they arise from Blue Cross’s legal duty to
22 comply with the terms of its ERISA plan agreement with the patient, and do not implicate any
23 ERISA-independent legal duty. Accordingly, Bay Area’s original causes of action for breach of
24 contract and violation of Cal. Business & Professions Code § 17200 were completely preempted
25 under § 1132(a) of ERISA.

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27 ² The provisions of ERISA “apply to any employee benefit plan if it is established or maintained--
28 (1) by any employer engaged in commerce or in any industry or activity affecting commerce; or (2)
by any employee organization or organizations representing employees engaged in commerce or in
any industry or activity affecting commerce; or (3) by both.” See 29 U.S.C. § 1003(a).

1 At the time of the removal, the Court had federal question jurisdiction because the
2 complaint contained two causes of action that were completely preempted by ERISA. Accordingly
3 removal was proper.

4 In Bay Area's motion to remand, Bay Area alleges that Blue Cross removed this action in
5 bad faith because this action "clearly is not subject to removal." Mot. at 7-8. Bay Area therefore
6 requests attorney's fees incurred as a result of the alleged bad faith removal. *Id.* Specifically, Bay
7 Area states that it incurred \$1750 in attorney's fees incurred preparing and filing Bay Area's
8 motion to remand. *Id.* at 8. As stated above, the Court finds that removal was proper.
9 Accordingly, Blue Cross did not act in bad faith when it exercised its removal right and chose a
10 federal forum for the adjudication of federal law. Thus, the Court DENIES Bay Area's request for
11 attorney's fees associated with this motion to remand.

12 **B. The Court may consider Bay Area's FAC for purposes of determining federal**
13 **question jurisdiction.**

14 Blue Cross argues that the Court may not consider Bay Area's FAC in determining federal
15 question jurisdiction. Opp. at 4. The Court notes that Blue Cross does not allege that Bay Area
16 amended its complaint in bad faith. Indeed, "[a] plaintiff is entitled to file both state and federal
17 causes of action in state court. The defendant is entitled to remove. The plaintiff is entitled to
18 settle certain claims or dismiss them with leave of the court. The district court has discretion to
19 grant or deny remand." *Baddie v. Berkeley Farms, Inc.*, 64 F.3d 487, 490 (9th Cir. 1995).
20 Abandoning claims to avoid federal jurisdiction is not a manipulative pleading practice, but is
21 instead a "straight-forward tactical decision." *Id.* at 490-91.

22 The cases Blue Cross cites do not indicate that the Court must ignore the FAC and deny
23 remand simply because the original complaint was properly removed. *Williams* addressed a
24 plaintiff who had amended his complaint to dismiss federal claims and allege new state court
25 causes of action. *Id.*, 471 F.3d at 976. The district court exercised its discretion to remand where
26 no federal question remained. *Id.* The Ninth Circuit held that removal was improper because
27 diversity jurisdiction existed. *Id.*

1 *Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 159 F.3d 1209, 1213 (9th Cir.
2 1998), addressed whether a plaintiff had a right to remand when federal claims in the removed
3 complaint had been dismissed. *Sparta* held that no right to remand existed, but did not address
4 whether the court could have remanded by exercising its discretion to decline supplemental
5 jurisdiction over the remaining state court claims. *Id.*

6 In sum, an amendment of claims effects federal question jurisdiction, and it is proper for
7 this Court to consider Bay Area's FAC for purposes of determining federal question jurisdiction.
8 Accordingly, the Court now considers whether it has federal question jurisdiction over the FAC.

9 **C. The Court does not have federal question jurisdiction over Bay Area's FAC.**

10 Bay Area's FAC includes five state law causes of action, none of which are completely
11 preempted by ERISA under 29 U.S.C. § 1132(a). Bay Area's amended first cause of action for
12 breach of contract and amended second cause of action for violation of Cal. Business &
13 Professions Code § 17200 do not arise from the ERISA medical insurance contract between Blue
14 Cross and the patient. Instead, these amended causes of action arise from an alleged contract
15 between Blue Cross and Bay Area. FAC ¶¶ 34, 40. Similarly, Bay Area's amended third cause of
16 action for negligent misrepresentation, amended fourth cause of action for promissory estoppel,
17 and amended fifth cause of action for equitable estoppel, all arise from representations made by
18 Blue Cross to Bay Area, rather than from the ERISA medical insurance contract. FAC ¶¶ 47, 54,
19 62. Because all five causes of action in Bay Area's FAC arise from representations that fall outside
20 the scope of ERISA, all five causes of action fail the two-prong *Davila* test for complete
21 preemption under ERISA 29 U.S.C. § 1132(a). *See Marin General Hospital*, 581 F.3d at 949-50.
22 Accordingly, Bay Area's FAC includes no claims arising under federal law, and the Court lacks
23 federal question jurisdiction over the FAC.

24 1. Bay Area's amended first cause of action for breach of contract.

25 Bay Area has amended its first cause of action for breach of contract, and no longer alleges
26 breach of the written ERISA medical insurance contract between Blue Cross and the patient.
27 Instead, Bay Area's FAC alleges breach of a contract created between Bay Area and Blue Cross
28 during phone conversation(s) between a Bay Area employee and a Blue Cross employee. FAC ¶

1 34 (citing FAC ¶¶ 20, 32). The Blue Cross employee allegedly (1) told Bay Area that the patient
2 was insured, (2) told Bay Area that the surgery did not require preauthorization, and (3) “verified
3 the terms of the patient’s insurance coverage.” FAC ¶ 20; *see also* FAC ¶ 21 (alleging that the
4 Blue Cross “provider self-service-eligibility and benefits details” portion of Blue Cross’s website
5 indicated that Blue Cross would cover “80% of the billed price of procedures.”).

6 Where a cause of action arises from an alleged contract between a provider and an insurer,
7 the first *Davila* prong is not satisfied, because at no point in time could the provider have brought
8 the claim as an ERISA plan “participant or beneficiary . . . to recover benefits . . . , to enforce . . .
9 rights . . . , or to clarify . . . rights to future benefits under the terms of the plan,” pursuant to 29
10 U.S.C. § 1132(a)(1)(B). *Id.*; *Marin General Hospital*, 581 F.3d at 947.

11 In *Marin General Hospital*, the hospital treated a patient who was medically-insured
12 through an employer-provided ERISA plan. *Id.* at 944. The hospital’s complaint alleged that prior
13 to treatment the ERISA plan administrator had “orally verified the patient’s coverage, authorized
14 treatment, and agreed to cover 90% of the patient’s medical expenses at the hospital.” *Id.* After the
15 plan paid only 26% of the billed expenses, the hospital filed a state court action for breach of an
16 implied contract, breach of an oral contract, negligent misrepresentation, quantum meruit, and
17 estoppel. *Id.* The Ninth Circuit held that because the hospital’s causes of action arose from the
18 alleged oral contract between the hospital and the ERISA plan, the causes of action could not have
19 been brought under 29 U.S.C. § 1132(a)(1)(B). *Id.* at 947. The fact that the patient had assigned
20 his ERISA rights to the hospital did not convert the hospital’s independent grounds for monetary
21 relief into ERISA claims. *Id.*

22 Similarly, in *Blue Cross of California v. Anesthesia Care Associates Medical Group, Inc.*,
23 187 F.3d 1045 (9th Cir. 1999), “the Providers [asserted] contractual breaches ... that their patient-
24 assignors could not assert [because] the patients simply [were] not parties to the provider
25 agreements between the Providers and Blue Cross.” *Id.* at 1051. The Ninth Circuit held that
26 causes of action arising out of the provider agreements were not preempted under § 1132(a), even
27 though Blue Cross could have chosen to bring different causes of action which would have been
28 subject to ERISA preemption. *Id.* at 1052.

1 A cause of action arising from contracts between medical service providers and insurance
2 companies also fails the second prong of the *Davila* test. “The question under the second prong of
3 *Davila* is whether the complaint relies on a legal duty that arises independently of ERISA.” *Marin*
4 *General Hospital*, 581 F.3d at 950. Legal obligations that arise from contracts between medical
5 service providers and medical insurers do not arise from ERISA, even when the insurer is acting as
6 an ERISA plan administrator. *Id.* It is immaterial that the plaintiff might seek the same monetary
7 relief to which a patient or patient-assignee might be entitled under ERISA. *Id.*; *see also Blue*
8 *Cross*, 187 F.3d at 1052. Accordingly, where a medical service provider’s cause of action arises
9 from the medical service provider’s agreement with an ERISA plan provider, the cause of action
10 fails both the first and second prongs of the *Davila* test and is not subject to ERISA complete
11 preemption under 29 U.S.C. § 1132(a).

12 Accordingly, Bay Area’s amended first cause of action for breach of contract is not
13 preempted under § 1132(a) of ERISA. This cause of action arises from a contract between the
14 Blue Cross and Bay Area. Therefore, this cause of action could not have been brought by the
15 patient against Blue Cross under § 1132(a)(1)(B), failing the first prong of the *Davila* test. *See*
16 *Marin General Hospital*, 581 F.3d at 947. Furthermore, this cause of action arises from ERISA-
17 independent legal duties created by Blue Cross’s alleged entry into a contract with Bay Area,
18 failing the second prong of the *Davila* test. *See id.* at 950. The fact that Bay Area could have
19 chosen to seek the same monetary relief it now seeks under the patient’s assigned ERISA rights
20 does not impinge Bay Area’s right to seek that relief on the independent grounds now before the
21 Court. *See id.*; *Blue Cross*, 187 F.3d at 1051. In consequence, Bay Area’s amended cause of
22 action for breach of contract is not completely preempted under § 1132(a) of ERISA and does not
23 arise under federal law.

24 2. Bay Area’s amended second cause for violation of Cal. Business and
25 Professions Codes § 17200

26 Like Bay Area’s amended first cause of action for breach of contract, Bay Area’s amended
27 second cause of action for violation of Cal. Business & Professions Code § 17200 appears to allege
28 breach of the telephone and website contracts between Bay Area and Blue Cross. *See* FAC ¶ 40

1 (“the contract described herein”); *see also* FAC ¶¶ 41-44 (alleging other illegal acts committed in
2 furtherance of the alleged breach of telephone contract). Thus, Bay Area’s amended second cause
3 of action arises from alleged contract terms to which Blue Cross and Bay Area agreed and does not
4 arise from the patient’s medical insurance contract (otherwise known as an employee benefit plan
5 covered under ERISA) with Blue Cross.

6 Accordingly, Bay Area’s amended second cause of action for violation of Cal. Business &
7 Professions Code § 17200 is not preempted under § 1132(a) of ERISA because this claim could not
8 have been brought by the patient against Blue Cross under § 1132(a)(1)(B), and also because this
9 claim arises from ERISA-independent legal duties created by Blue Cross’s alleged entry into a
10 contract with Bay Area. *See Marin General Hospital*, 581 F.3d at 947; *id.* at 950. Consequently,
11 Bay Area’s amended second cause of action for violation of Cal. Business & Professions Code §
12 17200 does not arise under federal law.

- 13 3. Bay Area’s amended third cause of action for negligent misrepresentation,
14 amended fourth cause of action for promissory estoppel, and amended fifth
cause of action for equitable estoppel.

15 Like Bay Area’s amended causes of action for breach of contract and violation of Cal.
16 Business & Professions Code § 17200, Bay Area’s amended third cause of action for negligent
17 misrepresentation, amended fourth cause of action for promissory estoppel, and amended fifth
18 cause of action for equitable estoppel all arise from representations made by Blue Cross to Bay
19 Area. In the original removed complaint, Bay Area’s causes of action for negligent
20 misrepresentation, promissory estoppel, and equitable estoppel also arose from representations
21 made by Blue Cross to Bay Area. In fact the relevant portions of these third, fourth, and fifth
22 causes of action are unchanged between the original complaint and the FAC, as demonstrated by
23 the citations to the original complaint and FAC below.

24 Bay Area’s cause of action for negligent misrepresentation alleges that during a telephone
25 call between Blue Cross and Bay Area, Blue Cross negligently misrepresented that “no pre-
26 authorization was necessary’ for the surgery that the patient was scheduled to undergo.” Compl. ¶
27 47; FAC ¶ 47. The negligent misrepresentation claim alleges that “[Bay Area] justifiably relied on
28 [Blue Cross’s] misrepresentation, and went forward with the procedure, reasonably expecting to be

1 reimbursed.” Compl. ¶ 49; FAC ¶ 49. Bay Area seeks to recover “80% of the billed price of the
2 surgery pursuant to the express statements from [Blue Cross],” (Compl. ¶ 49; FAC ¶ 49) apparently
3 relying on the “provider self-service-eligibility and benefits details” website promise to cover
4 “80% of the billed price of procedures” (Compl. ¶ 21; FAC ¶ 21).

5 Similarly, Bay Area’s cause of action for promissory estoppel and cause of action for
6 equitable estoppel arise from the same two statements that Blue Cross allegedly made to Bay Area
7 prior to the patient’s surgery: (1) that the surgery did not require pre-authorization, and (2) that
8 Blue Cross would pay “80% of the billed price.” *See* Compl. ¶¶ 54, 55; FAC ¶¶ 54, 55 (alleging
9 the pre-authorization and 80% payment promises that give rise to the promissory estoppel cause of
10 action); Compl. ¶¶ 62, 64; FAC ¶¶ 62, 64 (alleging statements and omissions giving rise to the
11 equitable estoppel cause of action). Thus, under the original complaint and the FAC, Bay Area’s
12 causes of action for negligent misrepresentation, promissory estoppel, and equitable estoppel all
13 arise from representations made by Blue Cross to Bay Area, stating or implying that Blue Cross
14 would pay for the surgery that Bay Area planned to perform.

15 Accordingly, Bay Area’s causes of action for negligent misrepresentation, promissory
16 estoppel, and equitable estoppel are not preempted under § 1132(a) of ERISA for the same reasons
17 discussed with respect to Bay Area’s amended first cause of action for breach of contract and
18 amended second cause of action for violation of Cal. Business & Professions Code § 17200.

19 In sum, all of the FAC’s five causes of action assert state law claims, and none of these five
20 state law causes of action is completely preempted by ERISA. Accordingly, the FAC does not
21 arise under federal law, and the Court lacks federal question jurisdiction over the FAC.

22 **D. The Court lacks diversity jurisdiction over the action.**

23 The Court has diversity jurisdiction in all civil actions where the amount in controversy
24 exceeds \$75,000 and is between citizens of different States. 28 U.S.C. § 1332(a). Bay Area is a
25 citizen of California, and Blue Cross is a citizen of Minnesota. Consequently, it is undisputed that
26 the parties are diverse.

1 Bay Area seeks only \$49,522.14 in consequential damages plus interest. FAC, Prayer for
2 Relief ¶¶ 1-2. However, Bay Area’s original complaint also sought unspecified punitive damages³
3 and attorney’s fees. Compl., Prayer for Relief, ¶¶ 3-4. Blue Cross’s removal was supported by an
4 expert declaration stating that attorney’s fees would most likely exceed \$30,000, presuming an
5 hourly rate of \$200. *See* ECF No. 2 ¶ 10 (Geibelson Decl. in Support of Removal). In fact, the
6 Bay Area attorney who prepared Bay Area’s Motion to Remand bills at \$350 per hour. *See* ECF
7 No. 12 ¶ 2 (Gibson Decl. in Support of Motion to Remand). Bay Area argues that other attorneys
8 who do not bill at \$350 per hour are involved in litigating this action, but has not cited any
9 supporting evidence. Remand Reply at 8.

10 Bay Area’s FAC does not include a prayer for attorney’s fees. *See* FAC, Prayer for Relief.
11 However, unlike removal based on federal question jurisdiction, when removal is based on
12 diversity jurisdiction, “events occurring subsequent to removal which reduce the amount
13 recoverable, whether beyond the plaintiff’s control or the result of his volition, do not oust the
14 district court’s jurisdiction once it has attached.” *St. Paul Mercury Indemnity Co. V. Red Cab Co.*,
15 303 U.S. 283, 293 (1938). “In the law of diversity jurisdiction . . . jurisdiction is not destroyed by
16 subsequent events that reduce the amount recoverable below the statutory limit.” *In re Scovis*, 249
17 F.3d 975, 986 (9th Cir. 2001); *see also Barcume v. Cortes*, 24 F. App’x 754, 756 (9th Cir. 2001)
18 (“Moreover, under *St. Paul*, Barcume’s later decision to pursue a single claim for less than \$75,000
19 did not divest the district court of jurisdiction.”). Accordingly, the Court may not consider Bay
20 Area’s FAC in determining whether more than \$75,000 is in controversy.

21 However, attorney’s fees can only be included in the amount in controversy when they are
22 authorized by statute or contract. *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1155 (9th Cir.
23 1998) (citing *Goldberg v. CPC International Inc.*, 678 F.2d 1365 (9th Cir.1982), *cert. denied*, 459
24 U.S. 945 (1982)); *see also Lowdermilk v. U.S. Bank Nat’l Ass’n*, 479 F.3d 994, 1000 (9th Cir. 2007)
25 (“where an underlying statute authorizes an award of attorneys’ fees, either with mandatory or
26

27 ³ Blue Cross has never argued that possible punitive damages should be aggregated to determine
28 the amount in controversy and has made no showing as to the possible amount of punitive
damages. Accordingly, the Court disregards the possibility of a punitive damage award in its
analysis.

1 discretionary language, such fees may be included in the amount in controversy”) (quoting *Galt*
2 *G/S*, 142 F.3d at 1155-56 (9th Cir. 1998)).

3 Although the original removed complaint was silent as to the basis of Bay Area’s request
4 for attorney’s fees, Blue Cross, in its notice of removal, alleged that Bay Area’s prayer for
5 attorney’s fees was based upon Cal. Code Civ. Proc. § 1021.5, *See* ECF No. 1 ¶ 12 (notice of
6 removal); *see also* Opp. to Remand at 11 (“[Bay Area] does not dispute that the Complaint relies
7 upon Cal. Code. Civ. Proc. § 1021.5 as the basis for recovery of attorneys’ fees.”).

8 Cal. Code Civ. Proc. § 1021.5, California’s private attorney general statute, does not
9 provide for an award of attorney’s fees in the removed action. *See* Remand Reply at 8-9. Section
10 1021.5 provides in pertinent part: “Upon motion, a court may award attorneys’ fees to a successful
11 party against one or more opposing parties in any action which has resulted in the enforcement of
12 an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or
13 nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity
14 and financial burden of private enforcement, or of enforcement by one public entity against another
15 public entity, are such as to make the award appropriate, and (c) such fees should not in the interest
16 of justice be paid out of the recovery, if any.” *Id.*

17 Although “the public always derives a ‘benefit’ when illegal private or public conduct is
18 rectified, [b]oth the statutory language (‘Significant benefit’) and prior case law . . . indicate that
19 the Legislature did not intend to authorize an award of attorney fees in every case involving a
20 statutory violation.” *Woodland Hills Residents Assn., Inc. v. City Council*, 23 Cal. 3d 917, 939
21 (1979). Section 1021.5 recognizes “that privately initiated lawsuits are often essential to the
22 effectuation of the fundamental public policies embodied in constitutional or statutory provisions,
23 and that, without some mechanism authorizing the award of attorney fees, private actions to
24 enforce such important public policies will as a practical matter frequently be infeasible.” *Graham*
25 *v. DaimlerChrysler Corp.*, 34 Cal. 4th 553, 565 (2004).

26 However, “[w]here the enforcement or advancement of any public interest with the defense
27 of the action was secondary and incidental to achieving personal business goals, an award of fees
28 under Code of Civil Procedure section 1021.5 is not warranted.” *DiPirro v. Bondo Corp.*, 153 Cal.

1 App. 4th 150, 200 (Cal. Ct. App. 2007). “Section 1021.5 was not designed as a method for
2 rewarding litigants motivated by their own pecuniary interests who only coincidentally protect the
3 public interest.” *Flannery v. California Highway Patrol*, 61 Cal. App. 4th 629, 635 (Cal. Ct. App.
4 1998) (quoting *Beach Colony II v. California Coastal Com.*, 166 Cal.App.3d 106, 114 (Cal. Ct.
5 App. 1985)). Thus, for example, an employee who initiated an action “to reinstate his
6 employment”, rather than “in the interest of the general public” was not entitled to attorney's fees
7 even though the action might “have conveyed a cautionary message” or caused his employers
8 “to change their practices in the future.”⁴ *LaGrone v. City of Oakland*, 202 Cal. App. 4th 932, 946
9 (Cal. Ct. App. 2011), as modified (Jan. 11, 2012) (citing *Pacific Legal Found. v. California*
10 *Coastal Com.*, 33 Cal. 3d 158, 167 (1982)).

11 As discussed above, Bay Area’s original removed complaint sought a limited monetary
12 award, \$49,522.14, for itself, based on Blue Cross’s alleged actions with regard to Bay Area and
13 the patient. Bay Area has not alleged a broad pattern of wrongful conduct by Blue Cross. Bay
14 Area has not requested any injunctive relief that might benefit a large class of persons such as a
15 change of policy by Blue Cross. Bay Area has not pled any class allegations or filed on behalf of
16 others similarly situated. Accordingly, the Court finds that Bay Area’s original complaint was
17 motivated by Bay Area’s individual pecuniary interests.

18 Consequently, because Bay Area’s suit could not have conferred “a significant benefit . . .
19 on the general public or a large class of persons,” § 1021.5 attorney’s fees could not have been
20 awarded based upon the allegations in the removed complaint. Cal. Code Civ. Proc. § 1021.5.
21 Thus, the amount in controversy is \$49,522.14, well below the \$75,000.01 necessary for diversity
22 jurisdiction. Therefore, the Court does not have diversity jurisdiction over this action.

23
24
25 ⁴ The bar on § 1021.5 attorney’s fees for individual plaintiffs “motived by their own pecuniary
26 interests” does not extend to class actions motivated by pecuniary interests. *Graham*, 34 Cal. 4th
27 553, 578 (2004) (“It is well settled that attorney fees under section 1021.5 may be awarded for
28 consumer class action suits benefiting a large number of people.”). Furthermore, a plaintiff
primarily motivated by her own non-pecuniary interests may receive attorney’s fees under §
1021.5. *In re Conservatorship of Whitley*, 50 Cal. 4th 1206, 1211 (2010) (“We conclude that a
litigant's personal nonpecuniary motives may not be used to disqualify that litigant from obtaining
fees under Code of Civil Procedure section 1021.5.”).

