

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 CHRISTINA MENDEZ, individually and
12 on behalf of all others similarly situated,

13 Plaintiff,

14 v.

15 GLOBAL INSTITUTE OF STEM CELL
16 THERAPY AND RESEARCH, USA, et
al.,

17 Defendants.
18
19

Case No.: 20cv915-LL-BLM

**ORDER DISMISSING COMPLAINT
WITH LEAVE TO AMEND AND
DENYING MOTION TO DISMISS
AS MOOT**

[ECF Nos. 15, 16]

20 In this putative consumer class action, Plaintiff Christina Mendez alleges federal
21 jurisdiction on the basis of the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d)
22 (“CAFA”). ECF No. 15. Pending before the Court is Plaintiff’s operative First Amended
23 Complaint (“FAC”), *id.*, and a Motion to Dismiss the FAC filed by Global Institute of Stem
24 Cell Therapy and Research, USA (“Giostar”), Giostar Labs, Inc. (“Giostar Labs”), Anand
25 Srivastava, Deven Patel, Siddharth Bhavsar, and Scott Kirkpatrick (together,
26 “Defendants”), ECF No. 16. For the reasons discussed below, this action is **DISMISSED**
27 **WITHOUT PREJUDICE** for failure to sufficiently allege federal subject matter
28 jurisdiction. Defendants’ motion to dismiss is therefore **DENIED WITHOUT**

1 **PREJUDICE** as moot. Plaintiff is granted leave to amend her complaint pursuant to
2 28 U.S.C. § 1653.

3 **I. BACKGROUND**

4 Plaintiff filed this putative consumer class action complaint on May 15, 2020. ECF
5 No. 1. The operative FAC was filed on July 27, 2020. ECF No. 15. The FAC asserts the
6 following claims: (1) violation of California’s Unfair Competition Law (“UCL”), Cal. Bus.
7 & Prof. Code §§ 17200 *et seq.*; (2) violation of California’s False Advertising Law
8 (“FAL”), Cal. Bus. & Prof. Code §§ 17500 *et seq.*; (3) violation of California’s Consumers
9 Legal Remedies Act (“CLRA”), Cal. Civ. Code. §§ 1750 *et seq.*; (4) breach of express
10 warranty; (5) quasi contract; (6) breach of fiduciary duty; (7) fraudulent concealment; (8)
11 intentional misrepresentation; and (9) negligent misrepresentation. *Id.* Defendants’ motion
12 to dismiss was filed on August 31, 2020. ECF No. 16.

13 **II. LEGAL STANDARD**

14 “It is to be presumed that a cause lies outside [of federal courts’] limited jurisdiction,
15 and the burden of establishing the contrary rests upon the party asserting jurisdiction.”
16 *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted).
17 Federal courts are constitutionally required to raise issues related to federal subject matter
18 jurisdiction and may do so sua sponte. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006).
19 A federal court must satisfy itself of its jurisdiction over the subject matter before
20 proceeding to the merits of the case. *Ruhrigas AG v. Marathon Oil Co.*, 526 U.S. 574, 577,
21 583 (1999); *Snell v. Cleveland*, 316 F.3d 822, 826 (9th Cir. 2002) (“Federal Rule of Civil
22 Procedure 12(h)(3)[] provides that a court may raise the question of subject matter
23 jurisdiction, sua sponte, at any time during the pendency of the action”) (footnote
24 omitted). “A plaintiff suing in a federal court must show in his pleading, affirmatively and
25 distinctly, the existence of whatever is essential to federal jurisdiction, and, if he does not
26 do so, the court, on having the defect called to its attention or on discovering the same,
27 must dismiss the case, unless the defect be corrected by amendment.” *Tosco Corp. v.*
28

1 *Cmtys. for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001) (citation omitted), abrogated
2 on other grounds by *Hertz Corp. v. Friend*, 559 U.S. 77, 82-83 (2010).

3 **III. DISCUSSION**

4 “CAFA vests the federal courts with ‘original’ diversity jurisdiction over class
5 actions [of 100 or more persons] if: (1) the aggregate amount in controversy exceeds
6 \$5,000,000, and (2) any class member is a citizen of a state different from any defendant.”
7 *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1020-21 (9th Cir. 2007) (citing 28 U.S.C.
8 § 1332(d)). The enactment of CAFA did not alter the longstanding rule that the proponent
9 of federal jurisdiction bears the burden of establishing that jurisdiction. *Abrego v. Dow*
10 *Chem. Co.*, 443 F.3d 676, 686 (9th Cir. 2006).

11 **A. Amount in Controversy**

12 Plaintiff’s prayer for relief is silent as to what amount of damages or restitution she
13 seeks and the FAC otherwise fails to calculate or explain how the \$5,000,000 bar will be
14 met in light of the injuries alleged. ECF No. 15 at 40. Plaintiff alleges that that cost of her
15 disputed treatment, \$22,500, is representative and typical of the amount charged by
16 Defendants for stem cell therapy and that “the claims of the proposed class members exceed
17 \$5,000,000 in the aggregate.” *Id.* ¶¶ 13, 16. Plaintiff’s allegations of class numerosity state
18 that “upon information and belief,” there are “thousands of patients, dispersed throughout
19 the United States, who received Treatment from Defendants,” and “hundreds or thousands
20 of patients from California, who received Treatment from Defendants.” *Id.* ¶ 119.
21 Plaintiff’s allegations appear to rest solely on Defendants claim that “they ‘successfully
22 treated’ 4,000 patients between 2011 and 2016.” *Id.* Plaintiff does not provide any basis
23 for the claim that there are thousands or hundreds of putative class members, either in
24 California or in other states, or that the combined amount in controversy would meet the
25 jurisdictional threshold.

26 Plaintiff’s conclusory allegation that the amount in controversy exceeds \$5,000,000
27 is insufficient, without supporting factual allegations, to establish that the amount in
28 controversy requirements under CAFA has been met. *Ibarra v. Manheim Invs., Inc.*, 775

1 F.3d 1193, 1197 (9th Cir. 2015) (the proponent of federal jurisdiction “has the burden to
2 put forward evidence showing that the amount in controversy exceeds \$5 million, to satisfy
3 the requirements of CAFA, and to persuade the court that the estimate of damages in
4 controversy is a reasonable one.”). A party seeking federal jurisdiction needs only to put
5 forward a “plausible allegation that the amount in controversy exceeds the jurisdictional
6 threshold,” if their allegation is not challenged by the opposing party or questioned by the
7 court. *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 89 (2014).
8 Furthermore, a party “is permitted to rely on ‘a chain of reasoning that includes
9 assumptions.’” *Arias v. Residence Inn*, 936 F.3d 920, 925 (9th Cir. 2019) (quoting *Ibarra*,
10 775 F.3d at 1199). However, “those assumptions cannot be pulled from thin air but need
11 some reasonable ground underlying them.” *Ibarra*, 775 F.3d at 1199. Because the Court
12 has reservations about whether the amount in controversy meets the CAFA threshold,
13 Plaintiff must support her allegation with evidence establishing the amount in controversy.
14 *Dart Cherokee*, 574 U.S. at 89. *See also Petkevicius v. NBTY, Inc.*, No. 3:14-cv-02616-
15 CAB-(RBB), 2017 WL 1113295, at *4 (S.D. Cal. Mar. 24, 2017) (“[S]imply stating that
16 the amount in controversy exceeds \$5,000,000, without any specific factual allegations as
17 to the actual amount sought by the plaintiffs does not constitute a good faith allegation of
18 the amount in controversy any more than an allegation that ‘the parties are diverse’ would
19 be sufficient to establish the requisite diversity absent specific factual allegations of the
20 citizenship of the parties.”).

21 **B. Minimal Diversity**

22 Irrespective of whether the amount in controversy requirement can be met, the Court
23 finds that Plaintiff has failed to allege that minimal diversity exists, as required by CAFA.
24 *See* 28 U.S.C. § 1332(d)(2). Plaintiff asserts claims against two corporations: Giostar and
25 Giostar Labs, and against four individuals: Anand Srivastava, Deven Patel, Siddharth
26 Bhavsar, and Scott Kirkpatrick. Plaintiff alleges that: she is a resident of Orange County,
27 Giostar is a California Corporation that is headquartered in California, Giostar Labs is a
28

1 California Corporation that is headquartered in California, and that defendants Srivastava,
2 Patel, Bhavsar, and Kirkpatrick reside in California. ECF No. 15 at 6.

3 The diversity jurisdiction statute and the specific CAFA subsections require
4 allegations of citizenship, not residency. 28 U.S.C. § 1332(a), (d)(2). For individuals, a
5 person must be a citizen of the United States, and their citizenship is determined by their
6 state of domicile rather than residence. *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857
7 (9th Cir. 2001). “A person residing in a given state is not necessarily domiciled there, and
8 thus is not necessarily a citizen of that state.” *Id.* (citation omitted). On the other hand, a
9 corporation has dual citizenship in the state of incorporation as well as the state where it
10 has its principal place of business. 28 U.S.C. § 1332(c)(1).

11 Plaintiff’s complaint fails to allege her own citizenship and fails to properly allege
12 the citizenship of defendants because she only alleges the residence of the individual
13 defendants and does not allege both the principal place of business and state of
14 incorporation of the two corporate defendants. Assuming, arguendo, that Plaintiff and the
15 Defendants are citizens of California, the minimal diversity requirement of CAFA would
16 not be met. As noted above, Plaintiff’s complaint seeks to certify a nationwide class of
17 plaintiffs who are “citizens of the United States” [ECF No. 15 ¶ 115], numbering in the
18 thousands, ECF *Id.* ¶ 119. However, a conclusory and prospective allegation that at least
19 one unknown member of a nationwide class will result in minimal diversity is not sufficient
20 to satisfy the pleading requirements for CAFA jurisdiction. *Valdez v. Asset Acceptance,*
21 *LLC*, No. 12-cv-1735-L(JMA), 2012 WL 2905715, at *2 (S.D. Cal. July 16, 2012).
22 Because Plaintiff has not properly alleged the citizenship of any named party, she has not
23 alleged minimal diversity as required for subject matter jurisdiction under CAFA.
24 Therefore, the FAC must be dismissed.

25 C. CAFA Jurisdictional Exceptions

26 The Court also has concerns about whether it must decline to assert jurisdiction
27 pursuant to the exceptions articulated in CAFA. Plaintiff has not made any more specific
28 allegations regarding the California and nationwide class members than the allegations

1 regarding numerosity and citizenship as noted above. Based on the allegations present in
2 the FAC, the Court is unable to determine whether it must abstain from exercising
3 jurisdiction under CAFA.

4 CAFA provides for both discretionary and mandatory abstentions to the Court's
5 jurisdiction. More specifically, "§ 1332(d)(3) describes situations where district courts *may*
6 'decline to exercise jurisdiction' 'in the interests of justice and looking at the totality of the
7 circumstances,' and § 1332(d)(4) sets out two circumstances that *require* district courts to
8 decline jurisdiction, the so-called 'local controversy' and 'home-state controversy'
9 exceptions." *Serrano*, 478 F.3d at 1022. Under the local controversy exception, the Court
10 must decline to exercise jurisdiction under CAFA if:

- 11 1. greater than two-thirds of the members of all proposed plaintiff classes in
12 the aggregate are citizens of the State in which the action was originally
filed;
- 13 2. at least one defendant is a defendant from whom significant relief is sought
14 by members of the plaintiff class, whose alleged conduct forms a
15 significant basis for the claims asserted by the proposed plaintiff class, and
who is a citizen of the State in which the action was originally filed;
- 16 3. the principal injuries resulting from the alleged conduct or any related
17 conduct of each defendant were incurred in the State in which the action
was originally filed; and
- 18 4. during the three-year period preceding the filing of the class action, no
19 other class action has been filed asserting the same or similar factual
20 allegations against any of the defendants on behalf of the same or same
persons.

21 28 U.S.C. § 1332(d)(4)(A). Under the home-state controversy exception, the Court must
22 decline to exercise jurisdiction under CAFA if:

- 23 1. two-thirds or more of the members of all proposed plaintiff classes in the
24 aggregate are citizens of the State in which the action was originally filed;
and
- 25 2. the primary defendants are citizens of the State in which the action was
26 originally filed.

27 28 U.S.C. § 1332(d)(4)(B).

1 On the face of the FAC, it appears possible that Plaintiff and all Defendants may be
2 citizens of California, where this action was filed. However, given that Plaintiff has not
3 properly alleged the citizenship of any named party, the Court is unable to determine
4 whether CAFA’s mandatory exceptions would apply. If Plaintiff amends her complaint
5 following this Order, her renewed allegations should also address whether the local
6 controversy or home-state controversy exceptions would apply.

7 **D. Common Law Claims**

8 Recognizing that the issues of diversity, amount in controversy, and the applicability
9 of CAFA’s jurisdictional exceptions may be intertwined with Plaintiff’s claims on behalf
10 of the putative nationwide class, the Court also notes that Plaintiff’s fourth through ninth
11 causes of action allege claims for “breach of express warranty,” “quasi-contract,” “breach
12 of fiduciary duty,” “fraudulent concealment,” “intentional misrepresentation,” and
13 “negligent misrepresentation,” on behalf of herself and all members of the proposed
14 nationwide class and California subclass, without citation to law. *See* ECF No. 15 at 33-
15 40. Plaintiff’s failure to identify which state laws govern the claims brought on behalf of
16 the putative nationwide class means that the Court cannot determine whether those claims
17 have been adequately pled. *Augustine v. Talking Rain Bev. Co.*, 386 F. Supp. 3d 1317, 1333
18 (S.D. Cal. 2019). “Even if the basic elements of the [common law claims] are unlikely to
19 differ much from state to state, ‘there may be (and likely are) differences from state to state
20 regarding issues such as [sic] applicable statute of limitations and various equitable
21 defenses.’” *Id.* (quoting *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 781 F. Supp. 2d 955,
22 966 (N.D. Cal. 2011)). Therefore, any amended complaint should assert the applicable state
23 law(s).

24 Relatedly, the absence of specific state law claims for a putative nationwide class
25 implicates issues of Article III standing, because “[i]n the absence of a named Plaintiff who
26 has purchased a product within the relevant state—even if there are sufficient allegations
27 of injury under other States’ or federal law—there can be no determination that an interest
28 was harmed that was legally protected under the relevant state’s laws.” *In re Packaged*

1 *Seafood Prods. Antitrust Litig.*, 242 F. Supp. 3d 1033, 1095 (S.D. Cal. 2017); *see also Gen.*
2 *Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160 (1982) (noting that examining the propriety
3 of class representation based on the pleadings may be appropriate); *Carpenter v. PetSmart,*
4 *Inc.*, 441 F. Supp. 3d 1028, 1039 (S.D. Cal. 2020) (finding that a California plaintiff
5 seeking to represent a nationwide class did not have standing to assert claims under any
6 other states' laws; addressing standing prior to class certification). Accordingly, any claims
7 set forth in an amended complaint should include jurisdictional allegations that do more
8 than permit the Court to infer the mere possibility of jurisdiction.

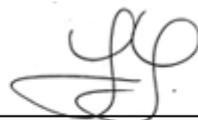
9 **IV. CONCLUSION**

10 Accordingly, the FAC [ECF No. 15] is **DISMISSED WITHOUT PREJUDICE**.
11 Pursuant to 28 U.S.C. § 1653, Plaintiff is granted leave to file an amended complaint to
12 cure the deficiencies identified by this Order. If Plaintiff chooses to file an amended
13 complaint, she must do so no later than **August 29, 2022**. Any amended complaint must
14 make a plausible showing that CAFA's jurisdictional thresholds for minimal diversity and
15 amount in controversy have been met and must permit the Court to assess whether CAFA's
16 mandatory exceptions apply. Failure to file an amended complaint will result in a final
17 order dismissing this civil action either for want of subject matter jurisdiction or for failure
18 to prosecute in compliance with a court order requiring amendment. *See Lira v. Herrera*,
19 427 F.3d 1164, 1169 (9th Cir. 2005) ("If a plaintiff does not take advantage of the
20 opportunity to fix his complaint, a district court may convert the dismissal of the complaint
21 into dismissal of the entire action.").

22 Defendants' motion to dismiss [ECF No. 16] is **DENIED WITHOUT**
23 **PREJUDICE** as moot.

24 **IT IS SO ORDERED.**

25 Dated: July 29, 2022



26
27
28
Honorable Linda Lopez
United States District Judge