

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

In re: GUIDANT CORP.
IMPLANTABLE DEFIBRILLATORS
PRODUCTS LIABILITY LITIGATION

MDL No. 05-1708 (DWF/AJB)

This pleading relates to:

Case No. 07CV1125 (DWF/AJB)

ALFRED MARTINEZ and IRO
TSAKOYIAS, individually and as
successor in interest to decedent
ERNEST TSAKOYIAS,

AMENDED NOTICE OF REMOVAL

Plaintiffs,

vs.

GUIDANT CORPORATION;
GUIDANT SALES CORPORATION;
CARDIAC PACEMAKERS, INC.;
BOSTON SCIENTIFIC
CORPORATION; THE PERMANENTE
MEDICAL GROUP, INC.; and DOES 1
through 100, inclusive,

Defendants.

AMENDED NOTICE OF REMOVAL

Defendants Guidant Corporation, Guidant Sales Corporation, Cardiac Pacemakers, Inc. and Boston Scientific Corporation (collectively “Guidant”) file this amended notice of removal out of an abundance of caution following Plaintiffs’ voluntary dismissal of non-diverse defendant, The Permanente Medical Group, Inc. (“Permanente”). Assuming for the sake of argument that this hospital was not fraudulently joined, which Guidant denies, this case is still removable because there is pure diversity between the remaining parties.

Guidant filed an original Notice of Removal on August 25, 2006, alleging diversity jurisdiction and fraudulent joinder of Permanente.¹ Following Guidant's removal, Plaintiffs moved to remand the action. Prior to a hearing on Plaintiffs' motion to remand, this matter was transferred to *In re Guidant Corporation Implantable Defibrillators Products Liability Litigation* (MDL No. 1708), before the Honorable Donovan W. Frank, in the United States District Court, District of Minnesota. Since no decision has been made on Plaintiffs' remand motion, Guidant files this amended notice of removal to assert an additional ground for removal because the Court's order granting Plaintiffs' voluntary dismissal of the resident defendant constitutes an "other paper" from which it can be ascertained that this case has become removable.

Guidant files this Amended Notice of Removal pursuant to the provisions of 28 U.S.C. § 1441(a) and 28 U.S.C. § 1446.

PROCEDURAL HISTORY

1. On June 15, 2006, an action entitled *Alfred Martinez and Iro Tsakoyias, individually and as successor in interest to decedent Ernest Tsakoyias vs. Guidant Corporation; Guidant Sales Corporation; Cardiac Pacemakers, Inc.; Boston Scientific Corporation; The Permanente Medical Group, Inc.; and Does 1 through 100, inclusive* was filed in the Superior Court for the State of California in and for the County of Santa Clara, Case No. 106 CV 065562. Pratt Aff., at Exhibit B, Complaint.

2. On August 25, 2006, Guidant filed a Notice of Removal to the Northern District of California, San Jose Division. This removal was based on diversity jurisdiction as complete diversity existed between Plaintiffs and Guidant,

¹ Guidant maintains that Permanente was fraudulently joined in this action solely to defeat diversity jurisdiction and, therefore, incorporates the arguments in its original Notice of Removal regarding the fraudulent joinder of Permanente. Affidavit of Timothy A. Pratt ("Pratt Aff."), at Exhibit A, Notice of Removal.

and the resident defendant, Permanente, was fraudulently joined in the action to defeat diversity. On or about September 6, 2006, Plaintiffs filed a motion to remand. On September 25, 2006, Guidant filed an opposition to Plaintiffs' motion.

3. On or about September 7, 2006, Guidant identified this matter as a potential tag-along action to MDL No. 1708 in Guidant's 39th Notice of Potential Tag-Along Action filed with the Judicial Panel on Multidistrict Litigation ("JPML"). On October 6, 2006, the JPML issued CTO-19, which included this case. On October 11, 2006, Plaintiffs filed a notice of opposition to CTO-19.

4. On or about January 25, 2007, the JPML held a Hearing Session to consider, without oral argument, Plaintiffs' opposition to CTO-19.

5. On or about February 7, 2007, after considering Plaintiffs' opposition, the JPML issued a Transfer Order transferring this matter to the instant court from the United States District Court, Northern District of California.

6. On or about February 23, 2007, Plaintiffs voluntarily dismissed resident hospital defendant Permanente from this action. Pratt Aff., at Exhibit C, Notice of Voluntary Dismissal. On March 20, 2007, Judge Ware of the Northern District of California signed the order for voluntary dismissal. *Id.*, at Exhibit D, Order.

7. Guidant files this amended notice of removal because Plaintiffs' motion to remand has never been heard by any court and Guidant does not want to waive its opportunity to remove this action following the filing of an "other paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b).

THIS AMENDED NOTICE OF REMOVAL IS TIMELY

8. "[A] notice of removal may be filed within thirty days after receipt by the defendant, . . . of a copy of an . . . other paper from which it may be first be

ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.” 28 U.S.C. § 1446(b).

9. On or about February 23, 2007, Plaintiffs filed their voluntary dismissal of Permanente. On or about March 20, 2007, the Northern District Court of California ordered Permanente’s dismissal. Thus, this amended notice of removal is timely because it is filed within 30 days of Permanente’s dismissal.

10. This amended notice of removal is also brought within one year after commencement of this action. 28 U.S.C. § 1446(b).

COMPLETE DIVERSITY EXISTS BETWEEN THE PARTIES

11. This lawsuit is an action of which this Court has original jurisdiction under 28 U.S.C. § 1332, and is one that may be removed to the federal district court under 28 U.S.C. §§ 1441 and 1446. Pursuant to 28 U.S.C. § 1441(b), suits that do not arise under federal law are removable “if none of the parties in interest properly joined and served as Defendants is a citizen of the State in which such action is brought.” The only further requirement for diversity jurisdiction is that the amount in controversy exceed \$75,000.

12. Plaintiffs allege Alfred Martinez is a resident of California. Pratt Aff., at Exhibit B, Complaint, ¶ 1.

13. Guidant is informed and believes that Plaintiff Iro Tsakoyias was at the time of filing the Complaint, and at all intervening times, a citizen of the State of California.

14. Guidant Corporation is an Indiana corporation with its principal place of business in Indianapolis, Indiana. For purposes of diversity of citizenship, a corporation is deemed to be a citizen of both the state of its incorporation, and of the state where it has its principal place of business. 28

U.S.C. § 1332(c)(1). Thus, pursuant to 28 U.S.C. § 1332(c)(1), Guidant is a citizen of Indiana.

15. Guidant Sales Corporation is also an Indiana corporation with its principal place of business in Indianapolis, Indiana. Thus, pursuant to 28 U.S.C. § 1332(c)(1), Guidant Sales Corporation is a citizen of Indiana.

16. Cardiac Pacemakers, Inc. is a Minnesota corporation with its principal place of business in Minnesota. Thus, pursuant to 28 U.S.C. § 1332(c)(1), Cardiac Pacemakers, Inc. is a citizen of Minnesota.

17. Boston Scientific Corporation is a Delaware corporation with its principal place of business in Massachusetts. Thus, pursuant to 28 U.S.C. § 1332(c)(1), Boston Scientific Corporation is a citizen of Delaware and Massachusetts.

18. According to the Complaint, Permanente is a citizen and resident of California. Pratt Aff., at Exhibit B, Complaint, ¶ 3.

19. In its original Notice of Removal, Guidant argued that Permanente had been fraudulently joined in an attempt to destroy diversity and prevent removal. Plaintiffs later voluntarily dismissed Permanente, thus creating pure diversity of citizenship between Plaintiffs and Guidant.

20. “Voluntary dismissal by a plaintiff of all defendants whose citizenship is not diverse from that of the plaintiff, ... renders the case removable by a remaining defendant.” *Rowe v. Johns-Manville Corp.*, 658 F. Supp. 122, 123 (E.D. Pa. 1987). Because Plaintiffs voluntarily dismissed Permanente, complete diversity of citizenship now exists between all remaining parties, rendering this matter removable on an additional ground.²

² Guidant makes this additional argument in the unlikely event that Plaintiffs pursue their motion to remand and this Court determines that Permanente was not fraudulently joined.

21. For purposes of removal under 28 U.S.C. § 1441, *et seq.*, the citizenship of defendants sued under fictitious names must be disregarded. 28 U.S.C. § 1441(a).

AMOUNT IN CONTROVERSY

22. The amount in controversy in this case exceeds \$75,000, excluding interest and costs. A defendant can establish the amount in controversy by the allegations in a complaint, or by setting forth facts in the notice of removal that demonstrate that the amount in controversy exceeds \$75,000. *Green v. Party City Corp.*, No. CV-01-09681, 2002 WL 553219, at *2 (C.D. Cal. 2002) (noting that if the complaint is silent on the amount of damages claimed, the court may consider facts in the removed petition); *Gaus v. Miles, Inc.*, 980 F.2d 564, 576 (9th Cir. 1992); *accord Lockett v. Delta Airlines, Inc.*, 171 F.3d 295, 298 (5th Cir. 1999).

23. Plaintiffs seek general damages, all medical, hospital, funeral, burial and incidental expenses, loss of financial support and consortium damages, loss of earnings and earnings capacity, punitive damages, and costs of suit, for the surgical placement and explantation of an allegedly defective pacemaker, and wrongful death of decedent Ernest Tsakoyias. Pratt Aff., at Exhibit B, Complaint, Prayer, pp. 78-79. The face of the Complaint makes clear that Plaintiffs seek damages in excess of \$75,000, as they allege the following:

Plaintiff Martinez has and may sustain serious, severe and permanent personal injuries and damages; serious and severe emotional distress; severe distress about present and future injuries from the defective device, the explant surgery, the fact that Plaintiff can only have so many replacement surgeries, and the risk of further thrombosis, heart attacks, strokes, and/or further complications. *Id.* ¶ 207.

Plaintiff Martinez was compelled to and did employ the services of hospitals, physicians, surgeons, nurses, and the like to care for and treat Plaintiff Martinez and did incur hospital, medical, professional and incidental expenses, and Plaintiff Martinez is informed and believes and therein alleges that Plaintiff Martinez will unnecessarily, by reason of Plaintiff Martinez's injuries, incur

additional like expenses for an indefinite period of time in the future. *Id.* at ¶ 208.

Plaintiff Martinez has been prevented from attending to his usual occupation, thereby sustaining a loss of income, the duration and extent of which is yet undetermined ... he will be prevented from attending said occupation for an indefinite period of time in the future and will incur additional loss of income; and ... has sustained a loss of earning capacity. *Id.* at ¶ 209.

All of the foregoing injuries and damages have substantially reduced Plaintiff Martinez's ability to enjoy life, and have caused and continue to cause Plaintiff Martinez great mental, physical and nervous pain and suffering. *Id.* at ¶ 211.

Decedent Tsakoyias did sustain serious, severe and permanent personal injuries and damages; serious and severe emotional distress and death. *Id.* at ¶ 212.

The damage amounts sought to be recovered by Plaintiff are well in excess of the jurisdictional minimum for this Court. *Id.* at ¶ 215.

24. Complaints seeking damages such as those alleged by the Plaintiffs have been held to establish, on their face, that the amount in controversy exceeds the jurisdictional requirement. *See, e.g., Quinn v. Kimble*, 228 F. Supp. 2d 1038 (E.D. Mo. 2002) (holding that the amount in controversy was satisfied where plaintiff sought compensation for past and future medical expenses, lost wages, and damages for loss of enjoyment of life); *In re Rezulin Prods. Liab. Litig.*, 133 F. Supp. 2d 272, 296 (S.D.N.Y. 2001) (holding that the amount in controversy was satisfied where plaintiffs alleged economic loss, medical and health expenses, and serious medical conditions). Accordingly, the amount in controversy here exceeds the jurisdictional threshold.

25. Plaintiffs also seek punitive damages,³ which are included in the calculation of the amount in controversy. *See Bell v. Preferred Life Assurance Soc'y*, 320 U.S. 238, 240 (1943).

26. The totality of these factors establishes that the amount in controversy meets the jurisdictional requirement.

³ *See Pratt Aff.*, at Exhibit B, Complaint, Prayer, pg. 76.

CONCLUSION

27. Pursuant to 28 U.S.C. § 1446 (d), a copy of this Amended Notice of Removal is being filed with the clerk of the Superior Court of California, County of Santa Clara.

28. Pursuant to 28 U.S.C. § 1446 (d), Guidant is providing written notice to Plaintiffs.

WHEREFORE, Guidant Corporation, Guidant Sales Corporation, Cardiac Pacemakers, Inc. and Boston Scientific Corporation hereby file this amended notice of removal of the action pending against it in *In re Guidant Corporation Implantable Defibrillators Products Liability Litigation* (MDL No. 1708), before the Honorable Donovan W. Frank, in the United States District Court, District of Minnesota, and requests that this Court retain jurisdiction for all further proceedings.

Dated: March 27, 2007

Respectfully submitted,

SHOOK, HARDY & BACON L.L.P.

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