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9 TECHNOLOGIES, INC. and GUIDANT SALES
CORPORATION.

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA

12
13 EMMETT DAVID BROWN,

14 Plaintiff,

15 vs.

16 GUIDANT CORPORATION; an Indiana
17 Corporation; ENDOVASCULAR
18 TECHNOLOGIES, INC., a California
19 Corporation and a Division of GUIDANT
20 CORPORATION; GUIDANT SALES
CORPORATION, an Indiana Corporation; DR.
LELAND B. HOUSMAN, M.D.; and DOES
ONE through SIXTY, inclusive,

21 Defendants.
22

Case No. C07-00409 JF

NOTICE OF REMOVAL OF ACTION
BY DEFENDANTS GUIDANT
CORPORATION, GUIDANT SALES
CORPORATION, and ENDOVASCULAR
TECHNOLOGIES, INC. UNDER 28 U.S.C.
§§ 1441, 1446 AND 1332 (DIVERSITY)
AND REQUEST FOR JURY TRIAL

Complaint filed: October 24, 2006

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1 Pursuant to 28 U.S.C. § 1441(a) and 28 U.S.C. § 1446, defendants Guidant Corporation
2 and Guidant Sales Corporation (collectively "Guidant") and defendant Endovascular
3 Technologies, Inc. ("EVT") file this Notice of Removal of this case from the California Superior
4 Court for the County of Santa Clara to the United States District Court for the Northern District
5 of California. In support of this Notice of Removal, Guidant states the following:

6 **GUIDANT MDL**

7 1. This action is one of over 950 products liability actions against Guidant that have
8 recently been brought in or removed to federal courts across the country. As a result of these
9 numerous suits, on November 7, 2005, pursuant to 28 U.S.C. § 1407, the Judicial Panel on
10 Multi-District Litigation entered a transfer order establishing an MDL entitled *In re Guidant*
11 *Corporation Implantable Defibrillators Products Liability Litigation*, MDL-1708, and
12 transferring and consolidating a number of cases to the United States District Court, District of
13 Minnesota ("MDL Court" or "MDL 1708").¹ Among the primary purposes of consolidating
14 these cases cited by the JPML was to conserve judicial resources and avoid inconsistent rulings.²
15 More than 900 cases are currently pending in the MDL, and many more are in the process of
16 being transferred to the MDL. Once removed, Guidant intends to seek inclusion of the instant
17 case within the MDL proceeding. Once transferred, all pretrial issues will be governed by
18 scheduling orders entered by the Honorable Donovan W. Frank, who presides over MDL 1708.

19 **REMOVAL PROCEDURES**

20 2. On October 24, 2006, this action, entitled *Emmett David Brown v. Guidant*
21 *Corporation, an Indiana Corporation; Endovascular Technologies, Inc., a California*
22 *Corporation and a Division of Guidant Corporation, Guidant Sales Corporation, an Indiana*
23 *Corporation; Dr. Leland B. Housman, M.D.; and Does One Through Sixty, inclusive*, was filed
24 in the Superior Court for the State of California in and for the County of Santa Clara, Case No.
25 106-CV-073640.

26 _____
27 ¹ A true and correct copy of the transfer order establishing MDL 1708 and transferring and
consolidating a number of cases to the District Court of Minnesota is attached as Exhibit A.

28 ² *Id.* at 2.

1 3. To date, none of the defendants Guidant Corporation, Guidant Sales Corporation,
2 and EVT has yet been served.

3 4. Under 28 U.S.C. §1446(b), the notice of removal of a civil action shall be filed
4 within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the
5 initial pleading setting forth the claim for relief upon which such action or proceeding is based.
6 In order to trigger the thirty-day removal period, receipt of the summons and complaint must be
7 by proper service. *See Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 354
8 (1999). Thus, this removal is timely.

9 5. There have been no proceedings in this action in the Santa Clara County Superior
10 Court involving Guidant or EVT, nor have any of these defendants filed responsive pleadings or
11 otherwise responded to Plaintiff's complaint.³ Guidant and EVT hereby reserve any and all
12 rights to assert any and all defenses to Plaintiff's complaint.

13 6. Venue is proper pursuant to 28 U.S.C. § 1391 because this action was pending in
14 Santa Clara County Superior Court.

15 **DIVERSITY JURISDICTION EXISTS**

16 7. This lawsuit is an action of which this Court has original jurisdiction under 28
17 U.S.C. § 1332, and is one that may be removed to this Court under 28 U.S.C. §§ 1441 and 1446.
18 Suits that do not arise under federal law are removable "if none of the parties in interest *properly*
19 *joined* and served as defendants is a citizen of the State in which such action is brought." 28
20 U.S.C. § 1441(b) (emphasis added). The only further requirement for diversity jurisdiction is
21 that the amount in controversy exceed \$75,000.

22 8. Plaintiff is a citizen and resident of California.⁴

23 9. Guidant Corporation is an Indiana corporation with its principal place of business
24 in Indianapolis, Indiana. For purposes of diversity of citizenship, a corporation is deemed to be a
25 citizen of both the state of its incorporation and of the state where it has its principal place of
26

27 ³ To date, none of these defendants has been served with a summons or Complaint. A true and
28 correct copy of the Complaint is attached as Exhibit B

⁴ Plaintiff's Complaint ("Compl.") at ¶ 1.

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

3 10. Guidant Sales Corporation is a wholly-owned subsidiary of Cardiac Pacemakers,
4 Inc., which is a wholly-owned subsidiary of Guidant Corporation. It is also an Indiana
5 corporation with its principal place of business in Indianapolis, Indiana. Thus, pursuant to 28
6 U.S.C. § 1332(c)(1), Guidant Sales Corporation is a citizen of Indiana.

7 11. Fraudulently-joined Defendant EVT is a Delaware corporation with its principal
8 place of business in St. Paul, Minnesota.⁵ EVT is a wholly-owned subsidiary of Guidant
9 Corporation.⁶ EVT is therefore a citizen of the states of Delaware and Minnesota.

10 12. Upon information and belief, improperly-joined Defendant Dr. Leland B.
11 Housman is a citizen and resident of California.

12 13. The fact that Dr. Housman is a citizen of California, and the fact that Plaintiff
13 alleges that EVT is a California citizen, are irrelevant for removal purposes. As set forth in more
14 detail below, both EVT and Dr. Housman are improperly joined. Thus, no properly-joined
15 defendant is a resident of California, and complete diversity of citizenship exists between
16 Plaintiff and Guidant.

17 14. All properly-joined defendants consent to this Notice of Removal. Defendants
18 who are not properly joined, or who are nominal parties or remain un-served, need not consent to
19 removal. 28 U.S.C. § 1332; *Hewitt v. City of Stanton*, 798 F.2d 1230, 1232 (9th Cir. 1986);
20 *Salveson v. Western States Bankcard Assoc.*, 731 F.2d 1423, 1429 (9th Cir. 1984).

21 **EVEN ASSUMING FOR THE SAKE OF ARGUMENT THAT EVT WERE A**
22 **RESIDENT DEFENDANT, WHICH IT IS NOT, IT HAS BEEN**
23 **FRAUDULENTLY JOINED IN THIS LAWSUIT**

24 15. As outlined above, EVT is a citizen of Delaware and Minnesota.⁷ Plaintiff
25 incorrectly alleges that EVT is a California citizen. But even if EVT were a California citizen,

26 ⁵ Declaration of Jeffrey A. Kruse ("Kruse Decl.") at ¶ 3, attached as Exhibit C. Plaintiff
27 erroneously alleges that EVT is a California citizen. Compl. at ¶ 6.

28 ⁶ Kruse Decl. at ¶ 3.

⁷ *Id.*

1 which it is not, that citizenship must be disregarded for purposes of diversity analysis because
2 EVT is fraudulently joined in this action. *See United Computer Sys., Inc. v. AT&T Corp.*, 298
3 F.3d 756, 762 (9th Cir. 2002) (citizenship of fraudulently-joined defendant is not relevant for
4 purposes of diversity jurisdiction).

5 16. EVT's inclusion in this action is for the sole purpose of preventing the other
6 diverse defendants from exercising their right to remove this case to federal court. It is well-
7 settled law that where a non-diverse defendant has been fraudulently joined, lack of diversity
8 will not prevent removal. *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1988).
9 Removal of this suit under complete diversity of citizenship should not be thwarted by Plaintiff's
10 attempt to improperly join EVT to defeat diversity.

11 17. To assert fraudulent joinder, the defendant must demonstrate that there is "no
12 *reasonable* basis in fact or colorable ground supporting the claim against the joined defendant."
13 *Batoff v. State Farm Ins. Co.*, 977 F.2d 848, 851 (3d Cir. 1992) (emphasis added). "The heavy
14 burden placed upon [defendant] to establish fraudulent joinder does not mean [the court] must
15 accept blindly whatever plaintiff may assert no matter how incredible or contrary to the
16 overwhelming weight of evidence." *In re Diet Drugs (Phentermine, Fenfluramine, and*
17 *Dexfenfluramine) Prods. Liab. Litig.*, 352 F. Supp. 2d 533, 537 (E.D. Pa. 2004). Plaintiff's
18 complaint fails to make any claim that offers a reasonable basis to impose state law legal liability
19 on EVT.

20 18. In his complaint, Plaintiff has asserted products liability causes of action against
21 Guidant for failure to warn, design defect, negligence, breach of implied and express warranties,
22 fraud, fraudulent concealment, negligent misrepresentation, violations of the California Legal
23 Remedies Act § 1750 ("CLRA"), and negligence. Each cause of action is based on allegations
24 that "the ICD manufactured by Guidant that was implanted in Plaintiff was unreasonably
25 dangerous...."⁸

26 19. Plaintiff alleges that he was implanted with a Guidant ICD.⁹ EVT has never

27 ⁸ Compl. at ¶ 43.

28 ⁹ *Id.* at ¶ 1.

1 developed, manufactured, marketed or distributed ICDs.¹⁰ The only allegations in Plaintiff's
2 complaint relating to EVT involve a 2003 Corporate Integrity Agreement ("CIA") regarding
3 different medical devices.¹¹ EVT, however, has nothing to do with the device involved in this
4 lawsuit. EVT's involvement in the CIA concerns the ANCURE® ENDOGRAFT® System, a
5 system for the treatment of abdominal aortic aneurysms. But Plaintiff has not alleged that he
6 received an ANCURE® ENDOGRAFT® device or was in any way injured by an ANCURE®
7 ENDOGRAFT® device. Instead, Plaintiff alleges that he was implanted with an ICD (that was
8 later replaced with another ICD on August 17, 2005¹²), a device not manufactured by EVT.

9 20. Moreover, of the over 950 cases pending against Guidant involving these devices,
10 only *four* name EVT as a defendant. Of those four cases, three (including this case) were filed
11 by Plaintiff's counsel here in California. In addition to the instant case, Plaintiff's counsel has
12 filed the *Kocol*¹³ and *Kostrach*¹⁴ cases, both of which name EVT as a defendant, in California
13 state courts. *Kostrach* has already been successfully removed to federal court and transferred to
14 the MDL,¹⁵ despite attempts by Plaintiff to prevent removal. Additionally, upon removal, *Kocol*
15 was stayed by the Honorable Jeremy Fogel, United States District Judge, Northern District of
16 California, and has been conditionally transferred to the MDL.¹⁶ Both cases involve allegations
17 against EVT identical to those raised here. The only other case naming EVT as a defendant

18 ¹⁰ Kruse Decl. at ¶ 2.

19 ¹¹ Compl. at ¶¶ 33, 99. On June 12, 2003, EVT entered into a Settlement Agreement with the
20 United States and the CIA was incorporated into that Settlement Agreement.

21 ¹² *Id.* at ¶ 1.

22 ¹³ *Kocol v. Guidant Corp. et al.*, (originally filed in San Jose County Superior Court on Sept. 8,
2006, and later removed to the United States District Court, Northern District of California (San
23 Jose Division), Case No. C-06-06537 JF).

24 ¹⁴ *Kostrach v. Guidant Corp. et al.*, (originally filed in Los Angeles Superior Court on July 6,
2006, and later removed to the United States District Court, Central District of California, Case
25 No. CV-06-6391 AHS).

26 ¹⁵ A true and correct copy of Conditional Transfer Order No. 20, filed November 27, 2006, is
attached as Exhibit D. Plaintiffs did not oppose transfer of *Kostrach* to the MDL by filing an
27 opposition to Conditional Transfer Order No. 20.

28 ¹⁶ True and correct copies of the *Kocol v. Guidant Corp. et al.*, No. C-06-06537 JF, Order
Clarifying Order of December 22, 2006, entered on December 27, 2006, and Conditional
Transfer Order No. 22, are attached as Exhibits E and F.

1 remains un-served. Thus, to date, both attempts by Plaintiff's counsel to defeat removal of
2 actions to federal court by naming EVT as a defendant have failed thus far.

3 21. Having failed to accomplish their goal of staying out of the MDL in those cases
4 by adding EVT as an alleged resident defendant, Plaintiff's counsel in this case have now sued
5 not only EVT, but also a resident physician as an additional defendant. This new tactic should
6 be no more successful in keeping this case from being transferred to where it belongs – in the
7 MDL.

8 22. "Joinder of a non-diverse defendant is deemed fraudulent, and the defendant's
9 presence in the lawsuit is ignored for purposes of determining diversity, if the plaintiff fails to
10 state a cause of action against a resident defendant, and the failure is obvious according to the
11 settled rules of the state." *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001)
12 (internal citation omitted). In California, there is no cause of action where, as here, there is no
13 "reasonable basis for imposing liability" on the resident defendant. *TPS Utilicom Servs., Inc. v.*
14 *AT&T Corp.*, 223 F. Supp. 2d 1089, 1102 (C.D. Cal. 2002) (citing *Parks v. N.Y. Times Co.*, 308
15 F.2d 474, 477 (5th Cir. 1962)). Plaintiff's claims against EVT are defective as a matter of law
16 and, accordingly, EVT should be disregarded for purposes of removal.

17 23. Furthermore, aside from Plaintiff's medical-negligence claim against Dr.
18 Housman,¹⁷ Plaintiff's complaint is void of specific facts against any particular defendant except
19 "Guidant," or instead alleges generic causes of action against all "defendants" collectively. This
20 is insufficient to establish a basis of recovery against any of the non-diverse defendants. In
21 *Badon v. R.J.R. Nabisco, Inc.*, fraudulent joinder was found because plaintiff's claims simply
22 referred to "defendants" collectively and failed to allege any particular or specific activity on the
23 part of any of the non-diverse defendants. 224 F.3d 382, 391–93 (5th Cir. 2000). Similarly, an
24 MDL judge in the Rezulin cases denied remand where "plaintiffs made no specific allegations
25 against [the non-diverse defendant] at all, instead [they] attribut[e] wrongdoing to the collective
26 'defendants.'" *In re Rezulin Prods. Liab. Litig.*, 168 F. Supp. 2d 136, 140, n.10 (S.D.N.Y. 2001).

27
28 ¹⁷ Compl. at ¶¶ 38-40, 125-131.

1 *Accord In re Rezulin Prods. Liab. Litig. (Rezulin I)*, 133 F. Supp. 2d 272, 291 (S.D.N.Y. 2001)
2 (denying remand in action naming non-diverse pharmacy defendants where “plaintiffs ... make
3 no allegations specifically against the [non-diverse] defendant pharmacies, but instead lump
4 them together with the manufacturers and attribute the acts alleged ... to the ‘defendants’
5 generally” and plaintiffs had “no way of showing that the pharmacy defendants’ acts proximately
6 caused the alleged injuries”).

7 24. For the reasons stated above, even if EVT were a California citizen, which it is
8 not, it has been fraudulently joined and its citizenship must be disregarded.

9 **PLAINTIFF HAS IMPROPERLY JOINED A MEDICAL-NEGLIGENCE**
10 **CLAIM WITH PRODUCTS LIABILITY CLAIMS**

11 **A. Severance and Remand of Medical-Negligence Claims Has Been Ordered in**
12 **Another Guidant Case.**

13 25. Plaintiff has improperly joined the medical-negligence claim asserted against
14 Defendant Dr. Leland B. Housman with the products-liability claims asserted against Guidant.

15 26. In a similar case that is currently pending against Guidant, the United States
16 District Court for the Southern District of Texas found that joinder of non-diverse, medical-
17 negligence defendants was improper. The United States District Judge Samuel B. Kent issued an
18 order severing and remanding to state court the medical negligence claims against non-diverse
19 doctor and hospital defendants in *Hardin v. Guidant Corp., et al.*, Case No. G-05-430 (S.D.
20 Tex.).¹⁸ Judge Kent allowed the product liability claims, which are similar to those alleged in
21 this case, to remain in federal court. On June 26, 2006, the JPML ordered transfer of the *Hardin*
22 case to the MDL Court for coordinated pretrial proceedings.¹⁹

23 **B. Defendant Dr. Leland B. Housman Has Been Improperly Joined.**

24 27. Federal Rule of Civil Procedure 21 provides that “[p]arties may be dropped or
25 added by order of the court . . . at any stage of the action and on such terms are just.” Courts
26 may sever misjoined parties when their claims do not arise out of the same transaction,

27 ¹⁸ A true and correct copy of the *Hardin v. Guidant Corp., et al.*, Case No. G-05-430 (S.D. Tex.),
28 Order of Feb. 1, 2006, is attached as Exhibit G.

¹⁹ See *In re Guidant Corp. Implantable Defibrillators Products Liability Litigation*, MDL Docket
No. 1708 (D. Minn.) (June 13, 2006, Transfer Order), attached as Exhibit H.

1 occurrence, or series of transactions or occurrences, and the claims will not involve a question of
2 law or fact common to all parties. *Hamilton v. Signature Flight Support Corp.*, 2005 WL
3 1514127, No. C-05-490 CW, at *3 (N.D. Cal. June 21, 2005); *In re Diet Drugs Prods. Liab.*
4 *Litig.*, MDL No. 1203, No. Civ. A. 04-20099, 2004 WL 2095451 (E.D. Pa. Sept. 20, 2004)
5 (citing, *inter alia*, Fed. R. Civ. P. 20).

6 28. Where plaintiffs have improperly joined parties in a lawsuit pursuant to Rule 20,²⁰
7 courts have severed the claims against the misjoined parties to preserve a removing party's right
8 to removal. *See, e.g., In re Rezulin Prod. Liab. Litig.*, No. 00 Civ. 2843, 2003 WL 21276425, at
9 *1-2 (S.D.N.Y. June 2, 2003); *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360) (11th
10 Cir. 1996).

11 29. Here, Plaintiff has misjoined Dr. Leland Housman because his medical-
12 negligence claim is both factually and legally distinct from the products-liability claims against
13 Guidant.

14 30. Legally, Plaintiff's Complaint separates his claims against Guidant from his claim
15 against Dr. Housman. Plaintiff states only medical negligence against Dr. Housman.²¹ The
16 remaining claims – strict liability for design defect and failure to warn, negligence, breach of
17 warranties, fraud, and violations of the CLRA – are asserted against only Guidant.

18 31. Plaintiff's claims are factually separable as well. The crux of Plaintiff's claim
19 against Dr. Housman arises from the alleged breach of duty of care that Dr. Housman owed to
20 Plaintiff in treating him as a patient. In contrast, Plaintiff's claims against Guidant involve the
21 design, testing, and manufacturing of the device at issue in Plaintiff' Complaint. The evidence
22 on these claims will be separate – evidence regarding the development, manufacture, testing, etc.
23 of Plaintiff's ICD on one hand, and Plaintiff-specific and health care provider-specific evidence
24

25 ²⁰ Federal Rule of Civil Procedure 20 relates to the “permissive joinder” of parties. “All persons
26 may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the
27 alternative in respect of or arising out of the same transaction, occurrence, or series of
28 transactions or occurrences and if any question of law or fact common to all these persons will
arise in the action....” Fed. R. Civ. P. 20(a).

²¹ Compl. at ¶¶ 125-131.

1 regarding Plaintiff's "care, treatment, and services" on the other.²² See *Crockett v. R.J. Reynolds*
2 *Tobacco Co., et al.*, 436 F.3d 529, 533 (5th Cir. 2006) (agreeing with the state court's severance
3 of medical negligence claims against health care defendants from product liability claims against
4 product manufacturer because the burdens of proof to establish the claims are "totally
5 different"); *Greene v. Wyeth*, 344 F. Supp. 2d 1674, 1683 (D. Nev. 2004) (severing medical-
6 malpractice claims against non-diverse doctor who prescribed Fen-phen from the product
7 liability claims against the manufacturer because the claims were improperly joined).

8 32. Because Plaintiff's claim against Dr. Housman is separate and severable from his
9 claims against Guidant, this Court has the discretion to grant remand with regard to
10 Dr. Housman, but to retain jurisdiction over the claims against Guidant. Guidant urges that this
11 Court sever Plaintiff's claim against Dr. Housman, and that this claim either be dismissed
12 without prejudice or remanded while the claims against Guidant remain in federal court.

13 33. Courts may also sever parties for the "efficient administration of justice." *In re*
14 *Diet Drugs Prods. Liab. Litig.*, MDL No. 1203, Civ. A. 04-20099, 2004 WL 2095451, * 1 (E.D.
15 Pa. Sept. 20, 2004) (citing *Moore's Federal Practice* § 21.02(1); *Official Comm. Of Unsecured*
16 *Creditors v. Shapiro, et al.*, 190 F.R.D. 352, 355 (E.D. Pa. 2000)). Here, the "efficient
17 administration of justice" would best be served by transferring the product liability claims
18 asserted against Guidant to the MDL Court in Minnesota.

19 34. In its initial Transfer Order, the JPML defined the spectrum of cases comprising
20 MDL No. 1708 as "actions shar[ing] allegations that certain implantable defibrillator devices
21 manufactured by Guidant were defective and caused injury, or the threat of injury, to the
22 plaintiffs" Transfer Order, *In re Guidant Corp. Implantable Defibrillators Prods. Liab.*
23 *Litig.*, Docket No. 1708 (J.P.M.L. Nov. 7, 2005) ("JPML Transfer Order"). The JPML created
24 MDL 1708 to coordinate pretrial activities, to avoid duplicative discovery, and to promote the
25 just and efficient conduct of the litigation. Because Plaintiff asserts allegations similar to those
26 in the more than 900 cases already transferred to MDL 1708, discovery in his case will be
27

28 ²² *Id.* at ¶ 127.

1 duplicative and a hardship on Guidant. In contrast, Plaintiff's counsel in this case represents
2 other plaintiffs with cases already pending in the MDL,²³ including *Kostrach v. Guidant*
3 *Corporation, et al.*,²⁴ which includes allegations against EVT. More importantly, Plaintiff's
4 counsel currently has access to more than 10.4 million pages of documents produced in the
5 MDL. Plaintiff's action belongs in the MDL. Plaintiff should not be allowed to avoid the
6 MDL's jurisdiction by improperly and fraudulently joining in-state defendants.

7 35. Upon severance of Defendant Dr. Leland Housman from this action, and
8 dismissal of fraudulently-joined Defendant EVT, this Court has diversity jurisdiction over the
9 remaining defendants in this action pursuant to 28 U.S.C. § 1332.

10 **C. Similar Attempts To Avoid The MDL By Other Plaintiffs in California Have**
11 **Also Failed.**

12 36. Plaintiff's counsel here are not unique in their attempts to join non-diverse
13 defendants in an effort to keep these cases out of the MDL. Plaintiffs' counsel in other Guidant
14 cases in California have included claims against resident hospitals in 19 cases in a similar
15 attempt to avoid federal court and transfer to the MDL. All of those cases were removed, and
16 plaintiffs filed motions to remand in all of them. In every one of those 19 cases, the federal
17 district judges declined to rule on the plaintiffs' remand motions pending a decision by the JPML
18 on whether to transfer the cases. Last month, 10 of those cases were transferred to the MDL over
19 plaintiffs' objections, and there is no reason to suspect that the remaining nine will not also be
20 transferred shortly following the upcoming January 25, 2007, hearing by the JPML.

21 **AMOUNT IN CONTROVERSY**

22 37. The amount in controversy in this case exceeds \$75,000, excluding interest and
23 costs. A defendant can establish the amount in controversy by the allegations in a complaint, or
24 by setting forth facts in the notice of removal that demonstrate that the amount in controversy

25 _____
26 ²³ See, e.g., *Ettinger v. Guidant Corp., et al.*, No. 3:05-CV-03279 WHA (N.D. Cal.) (transferred
27 to MDL on January 20, 2006); *Bauman v. Guidant Corp., et al.*, No. 06-02183 (originally filed in
the MDL on May 31, 2006).

28 ²⁴ *Kostrach v. Guidant Corp., et al.*, No. 06-4606 (C.D. Cal.) (transferred to MDL on November
27, 2006).

1 exceeds \$75,000. *Green v. Party City Corp.*, No. CV-01-09681, 2002 WL 553219, at *2 (C.D.
2 Cal. 2002) (noting that if the complaint is silent on the amount of damages claimed, the court
3 may consider facts in the removed petition); *Gaus v. Miles, Inc.*, 980 F.2d 564, 576 (9th Cir.
4 1992).

5 38. Plaintiff claims damages for the surgical placement and replacement of an
6 allegedly defective defibrillator in him. The face of the complaint makes clear that Plaintiff
7 seeks damages in excess of \$75,000. Plaintiffs' prayer for relief includes requests for general
8 damages, including costs for medical care and treatment, special damages, restitution and
9 disgorgement of profits, compensatory damages, punitive damages, expert fees and attorneys'
10 fees, and such other relief as the Court deems just and proper.²⁵

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

19 40. Plaintiff also seeks punitive damages,²⁶ which are included in the calculation of
20 the amount in controversy. *See Bell v. Preferred Life Assurance Soc'y*, 320 U.S. 238, 240
21 (1943).

22 41. The totality of these factors establishes that the amount in controversy meets the
23 jurisdictional requirement.

24 CONCLUSION

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

27 ²⁵ Compl. at ¶¶ 124, 130, p. 24.

28 ²⁶ Compl. at p. 24.

1 43. Pursuant to 28 U.S.C. § 1446 (d), Guidant and EVT are providing written notice
2 to Plaintiff.

3 WHEREFORE, Guidant Corporation, Guidant Sales Corporation, and EVT hereby
4 remove the action now pending against them in the Superior Court of the State of California,
5 County of Santa Clara, to this Honorable Court, and request that this Court retain jurisdiction for
6 all further proceedings.

7
8 DATED: January 22, 2007

Respectfully submitted,

9
10 SHOOK, HARDY & BACON L.L.P.

11 By: 
12 DANA NGWALTNEY
13 SARA L ROMANO

14 Attorneys for Defendants GUIDANT
15 CORPORATION, GUIDANT SALES
16 CORPORATION, and ENDOVASCULAR
17 TECHNOLOGIES, INC.
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6 Attorneys for Defendants
GUIDANT CORPORATION, ENDOVASCULAR
7 TECHNOLOGIES, INC. and GUIDANT SALES
CORPORATION

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10 EMMETT DAVID BROWN,

11 Plaintiff,

12 vs.

13 GUIDANT CORPORATION; an Indiana
14 Corporation; ENDOVASCULAR
TECHNOLOGIES, INC., a California
15 Corporation and a Division of GUIDANT
CORPORATION; GUIDANT SALES
16 CORPORATION, an Indiana Corporation; DR.
LELAND B. HOUSMAN, M.D.; and DOES
17 ONE through SIXTY, inclusive,

18 Defendants.

Case No. C 07-00409 JF

CERTIFICATE OF SERVICE

RECEIVED

FEB 05 2007

McFall, Dymott, Frank, Harrison & McFall
Professional Law Corporation

1 CERTIFICATE OF SERVICE VIA U.S. MAIL

2 I, Andrea Moresco, am employed in the City and County of San Francisco in the State of
3 California. I am over the age of eighteen years and not a party to the within action. My business
4 address is Shook, Hardy & Bacon L.L.P., 333 Bush Street, Suite 600, San Francisco, California
5 94104.

6 I am readily familiar with the business practices of this office for collection and
7 processing of documents for mailing with the United States Postal Service, which is that
8 correspondence for mailing is collected and deposited, with postage pre-paid, on the same day in
9 the ordinary course of business.

10 On January 31, 2007, I caused the following to be served:

11 NOTICE OF FIFTY-SIXTH NOTICE OF POTENTIAL TAG ALONG ACTIONS FOR
12 JUDICIAL PANEL ON MULTIDISTRICT LITIGATION
13

14 on the parties in this action by placing a true copy thereof in a sealed envelope addressed as
15 follows:

16 **COUNSEL FOR PLAINTIFF (Served via Court's e-filing distribution, no hard copy sent):**

17 Nancy Hersh
18 Mark E. Burton
19 Rachel Abrams
20 HERSH & HERSH
21 A Professional Corporation
22 2080 Opera Plaza
23 601 Van Ness Avenue
24 San Francisco, California 94102-6388
25 Telephone: (415) 441-5544
26 Facsimile: (415) 441-7586

27 **COUNSEL FOR DEFENDANT DR. LELAND HOUSEMAN:**

28 David P. Burke
NEIL, DYMOTT, FRANK, HARRISON & MCFALL
A Professional Law Corporation
1010 Second Avenue, Suite 2500
San Diego, California 92101-4959
Telephone: (619) 238-1712
Facsimile: (619) 238-1562

1 I declare under penalty of perjury that the foregoing is true and correct. Executed at San
2 Francisco, California on January 31, 2007.

3 
4 _____
5 ANDREA MORESCO

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