UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: GUIDANT CORP. IMPLANTABLE DEFIBRILLATORS PRODUCTS LIABILITY LITIGATION

MDL No. 05-1708 (DWF/AJB)

This Document Relates to:

Case No. 07 CV 01487

EMMETT DAVID BROWN,

Plaintiff,

vs.

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

Defendants.

DEFENDANTS GUIDANT CORPORATION, ENDOVASCULAR TECHNOLOGIES, INC., AND GUIDANT SALES CORPORATION'S OPPOSITION TO PLAINTIFF'S MOTION TO REMAND

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INTRODUCTION

On January 22, 2007, Defendants Guidant Corporation, Guidant Sales Corporation (collectively "Guidant"), and Endovascular Technologies, Inc. ("EVT") removed this action from California Superior Court, County of Santa Clara to the United States District Court, Northern District of California based on diversity of citizenship between the parties. 28 U.S.C. §§ 1332, 1441(a), 1446. Following removal, Guidant sought transfer of this case to MDL No. 1708, *In re Guidant Corp. Implantable Defibrillators Products Liability Litigation* ("MDL" or "MDL-1708"). At the time, *Brown* was one of more than 1,221 cases pending in federal courts throughout the country against Guidant that alleged defects in highly-complex implantable cardiac devices, and thus its inclusion in the MDL was proper. On February 16, 2007, the Judicial Panel on Multidistrict Litigation ("JPML") filed Conditional Transfer Order 25, which conditionally transferred this action to MDL-1708. On February 21, 2007, Plaintiff Emmett Brown filed a motion to remand in the United States District Court, Northern District of California.

Before Plaintiff's motion to remand was heard, on March 6, 2007, the JPML issued a final order transferring this case to MDL-1708. Because of the transfer, Guidant and EVT did not file an opposition to Plaintiff's motion to remand. Now, Plaintiff again moves to remand this action.

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OPPOSITION ARGUMENT

This is the second motion to remand filed in the MDL in a case naming a non-diverse healthcare provider. In the first, *Alexander v. Boston Scientific Corporation et al.*, No. 07-1129, this Court severed and remanded the plaintiff's medical negligence claims while retaining the plaintiff's product-defect claims against Guidant in the MDL. The facts of this case are similar to *Alexander*, and if this Court does not deny Plaintiff's motion in its entirety, it should sever Plaintiff's medical-negligence claims and deny remand of the claims against Guidant and EVT.

First, diversity of citizenship exists between the parties. For the purpose of determining whether diversity jurisdiction exists, Dr. Housman's citizenship should be disregarded because he was improperly joined as a defendant. As this Court found on June 4, 2007 in the *Alexander* case, medical negligence claims like the ones asserted here do not arise out of the same transaction or occurrence as those asserted against Guidant, and do not involve a question of law or fact common to all parties. Because Plaintiff's claims against Dr. Housman are separate and severable from his claims against Guidant, this Court should exercise its discretion to grant remand with regard to Dr. Housman, and retain jurisdiction over the claims against Guidant and EVT.[1]

The presence of EVT in this case also does not defeat diversity. EVT is a

[1] *See* Fed. R. Civ. Proc. 21. Defendant Dr. Leland Housman has a motion to sever currently pending and the Court has indicated that it will rule on the motion without oral argument.

wholly-owned subsidiary of Guidant Corporation and, contrary to Plaintiff's contentions, is not a citizen of the state of California. Rather, EVT is a Delaware corporation with its principal place of business in St. Paul, Minnesota. And regardless of where EVT is based, its citizenship should be disregarded because EVT has been fraudulently joined as a defendant. EVT does not and has not manufactured, developed, marketed, or distributed automatic implantable ICDs.

Second, Guidant's Notice of Removal was procedurally proper and timely. All properly-joined Defendants consented to removal. Because Dr. Housman was improperly joined, his consent to removal was unnecessary and service on him did not trigger the 30-day deadline for removal.[2]

Finally, Guidant has met its burden in showing that this case meets the requisite amount in controversy. Plaintiff's motion to remand should be denied.

I. Plaintiff's Motion to Remand Should be Denied Because the Parties are Diverse.

When a case is removed based on diversity jurisdiction, only the citizenship of properly-joined defendants must be considered for purposes of removal. 28 U.S.C. § 1441(b). Here, neither Dr. Housman nor EVT are properly joined.

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[2] 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." 28 U.S.C. § 1441(b) (emphasis added). *See also United Computer Sys., Inc. v. AT&T Corp.*, 298 F.3d 756, 762 (9th Cir. 2002) (holding that the usual rule that all defendants in an action in state court join in a petition for removal does not apply to "nominal, unknown, or fraudulently-joined parties"). *See* Affidavit of Timothy A. Pratt ("Pratt Aff."), Exhibit A, Notice of Removal.

A. Plaintiff Has Improperly Joined Medical Negligence Claims Against Dr. Housman with Product Liability Claims Against Guidant.

1. Severance and remand of medical-negligence claims has been ordered in other Guidant cases.

Plaintiff has improperly joined the medical-negligence claims asserted against Defendant Dr. Housman with the products-liability claims asserted against Guidant. This Court recently addressed this issue in a similar action pending in MDL-1708: *Alexander v. Boston Scientific Corporation et al.*, No. 07-1129. In *Alexander*, the plaintiff joined a non-diverse hospital defendant, St. Anthony's Medical Center, in an action against Boston Scientific Corporation and Guidant Subsidiary of Boston Scientific Corporation ("Guidant"). The plaintiff alleged that St. Anthony's committed medical negligence because it knew or had reason to know that his Guidant device was potentially defective and because it did not advise him of these facts prior to the implantation.[3] The plaintiff also alleged that some of St. Anthony's nurses and staff assisted in the implant.[4]

In severing the claim against St. Anthony and remanding it to state court, this Court found that the joinder of the malpractice claim against St. Anthony's with the other product liability claims was inappropriate. Specifically, "the claims d[id] not both involve common questions of law or fact and assert joint, several, or alternative liability 'arising out of the same transaction, occurrence, or series of

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[3] Pratt Aff., Exhibit B, *Alexander v. Boston Scientific Corporation et al.*, (No. 07-1129) MSL No. 05-1708 (DWF/AJB) Memorandum Opinion and Order, June 4, 2007, at 4.

[4] *Id.* at 2.

transactions or occurrences.'"[5] This Court also noted that any liability that may be found against either Boston Scientific, Guidant, or St. Anthony's would not be a basis for liability as to the other, and that liability as to each could be found separately.[6] Finally, this Court recognized that, where a non-diverse party cannot be properly joined, "other interests, such as the Defendants' statutory right of removal, prevail over that of permitting a plaintiff's choice of forum."[7] Consequently, this Court severed the medical negligence claim against St. Anthony's to "preserve BSC and Guidant's right to removal in the remaining action and to preserve the interests of judicial expediency and justice."[8]

In a similar case currently pending against Guidant, the United States District Court for the Southern District of Texas also found that joinder of non-diverse medical-negligence defendants was improper. In *Hardin v. Guidant Corporation, et al.*, Case No. G-05-430 (S.D. Tex.), the court issued an order severing and remanding to state court medical negligence claims against the non-diverse doctor and hospital defendants similar to those alleged against Dr. Housman here.[9] The court allowed the product liability claims against Guidant to

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[5] *Id.* at 12 (citing Fed. R. Civ. P. 20(b)).

[6] Pratt Aff., Exhibit B, *Alexander v. Boston Scientific Corp. et al.*, (No. 07-1129) MSL No. 05-1708 (DWF/AJB), Memorandum Opinion and Order, June 4, 2007, at 12.

[7] *Id.* at 14.

[8] *Id.*

[9] Pratt Aff., Exhibit C, *Hardin v. Guidant Corp., et al.*, Case No. G-05-430 (S.D. Tex.), Order of Feb. 1, 2006. *See also Hammond v. Health Management Associates, Inc., d/b/a Medical Center of Southeastern Oklahoma*, No. CIV 06-527-RAW (E.D. Okla), Order, Feb. 6, 2007 (severing and remanding all non-

remain in federal court. On June 26, 2006, the JPML ordered transfer of the *Hardin* case to the MDL Court for coordinated pretrial proceedings.[10]

2. The medical negligence claims against Dr. Housman should be severed because they are both factually and legally distinct from the products liability claims against Guidant and EVT.

California law provides that:

> All persons may be joined in one action as defendants if any right to relief is asserted against them in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these person will arise in the action.

Cal. Civ. Proc. Code. § 379(a)(1). But "[a]lthough the modern joinder statutes are to be liberally construed and applied, neither the statutes nor the case law in California permit unlimited joinder." *Hoag v. Superior Court*, 207 Cal. App. 2d 611, 618 (1962). In fact, "[t]he existence of possible common questions of law and fact is insufficient in itself to permit joinder." *Id.* at 620. Instead, there must be a factual nexus connecting or associating the claims pleaded against the defendants. *Id.* at 618. In *Hoag*, for example, the plaintiff alleged that all four defendants invaded the privacy of plaintiffs by independently obtaining mug-shots of the plaintiffs and showing them at separate public audiences at different locations and on different dates. *Id.* The court held that four defendants were

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diverse defendants and permitting product-liability claims against Guidant to proceed in federal court).

[10] Pratt Aff., Exhibit D, *In re Guidant Corp. Implantable Defibrillators Products Liability Litigation*, MDL Docket No. 1708 (D. Minn.) (June 13, 2006, Transfer Order).

misjoined because they acted in four entirely different transactions independently of each other. *Id.*

Here, Plaintiff argues that Dr. Housman, Guidant, and EVT are all properly joined because the "allegations against Dr. Housman stem from the very surgery that gives rise to Plaintiff's allegations against Guidant, Guidant Sales, and EVT."[11] Plaintiff further contends that "this same surgery . . . shares common questions of law and/or fact with Plaintiff's product liability claims against Guidant . . . ."[12] It is not enough, however, to state that the claims share a factual or legal nexus. Instead, the Plaintiff must show how the claims alleged arise "out of the same transaction, occurrence, or series of transactions or occurrences" *and* that a "question of law or fact common to all these person will arise in the action." Cal. Civ. Proc. Code. § 379(a)(1). Plaintiff's allegations do not support joinder here.

Legally, Plaintiff's Complaint separates his claims against Guidant and EVT from his claims against Dr. Housman. Plaintiff states only medical negligence against Dr. Housman.[13] The remaining claims – strict liability for design defect and failure to warn, negligence, breach of warranties, fraud, and

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[11] Plaintiff's Motion to Remand at 8. Plaintiff also argues that "Guidant raises the learned intermediary defense and blames others, the operating physician, as negligent in causing Plaintiff's damages." Notice of Removal, attached as Exhibit 2 to the Conditional Transfer Order, filed on March 19, 2007." Plaintiff's Motion to Remand at 8. Guidant did not raise the learned intermediary defense in its Notice of Removal (*see* Pratt Aff., Exhibit A), and it is unclear what pleading Plaintiff is referring to here.

[12] *Id.*

[13] Plaintiff's Complaint at ¶¶ 125-131.

violations of the CLRA – are asserted against only Guidant, and to some extent, EVT. Plaintiff alleges, however, that Dr. Housman was "negligent in [his] provision of care, treatment, and services to Plaintiff. . . ."[14] This claim is premised solely on Dr. Housman's alleged medical negligence. In contrast, Plaintiff's claims against Guidant and EVT are product liability claims premised on alleged manufacturing and design defects, alleged failure to properly warn, and alleged misrepresentation of the health risks allegedly associated with cardiac medical devices. For example, Plaintiff alleges that Guidant – and not Dr. Housman – "designed, developed, manufactured, distributed, marketed, supplied and sold ICDs . . . ," and that Guidant "widely marketed its ICDs across the world . . . ."[15] Plaintiff also alleges that Guidant "had a duty to properly manufacture, compound, test, inspect, package, label, distribute, market, examine, maintain, and prepare for use and sell" the ICDs."[16]

Plaintiff's claims are factually separable as well. The crux of Plaintiff's claims against Dr. Housman arise from the alleged breach of duty of care that Dr. Housman owed to Plaintiff in treating him as a patient. And Plaintiff's claims against Guidant involve the design, testing, and manufacturing of the device at issue. The evidence on these claims will also be separate – evidence regarding the development, manufacture, and testing of Plaintiff's ICD on one hand, and

[14] *Id.* at ¶ 126.
[15] *Id.* at ¶¶ 15, 26.
[16] *Id.* at ¶ 59.

evidence regarding Plaintiff's "care, treatment, and services" on the other.[17] *See Crockett v. R.J. Reynolds Tobacco Co., et al.*, 436 F.3d 529, 533 (5th Cir. 2006) (agreeing with the state court's severance of medical negligence claims against health care defendants from product liability claims against product manufacturer because the burdens of proof to establish the claims are "totally different"). Thus, Plaintiff's claims about Dr. Housman's care and treatment of him do not arise out of the same "transaction or occurrence" as his claims against Guidant for the design, manufacture, and distribution of cardiac medical devices and, thus, are improperly joined.

Where plaintiffs have improperly joined parties in a lawsuit pursuant to Rule 20,[18] it is appropriate to sever the claims against the misjoined parties to preserve a removing party's right to removal. Federal Rule of Civil Procedure 21 provides that "[p]arties may be dropped or added by order of the court . . . at any stage of the action and on such terms are just." Courts may sever misjoined parties when their claims do not arise out of the same transaction, occurrence, or series of transactions or occurrences, and the claims will not involve a question of law or fact common to all parties. *Hamilton v. Signature Flight Support Corp.*, 2005 WL 1514127, No. C-05-490 CW, at *3 (N.D. Cal. June 21, 2005). In *In re*

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[17] *Id.* at ¶ 127.

[18] Federal Rule of Civil Procedure 20 relates to the "permissive joinder" of parties. "All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of 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).

Rezulin Products Liability Litigation, the Southern District of New York severed the plaintiff's misjoined claim against a home health care provider for the negligent administration of the drug Rezulin, finding that it did not arise from "the same transaction or occurrence" as the claims against the drug manufacturers for negligent marketing and distribution and failure to warn. 168 F. Supp. 2d 136, 144-45 (S.D.N.Y. 2001). In a later ruling in the same litigation, the court held that it was improper to join a malpractice claim – based on the physician's failure to diagnose the plaintiff's alleged liver dysfunction – with a breach of warranty and other claims – that went principally to the safety and efficacy of Rezulin and had "little if anything to do with the malpractice claim." *In re Rezulin Prods. Liab. Litig.*, No. 00 Civ. 2843, 2003 WL 21276425, at *1 (MDL 1348) (S.D.N.Y. June 2, 2003). The court affirmed the magistrate's order severing a medical malpractice claim against a physician, and holding that the joinder of the claim with the others was "inappropriate because the claims do not both involve common questions of law or fact and assert joint, several, or alternative liability . . . arising from the same transaction, occurrence, or series of transactions or occurrences." *Id.* (internal citations omitted).

Finally, in *Greene v. Wyeth*, the district court held that, although the parties were not fraudulently joined, Rule 21 authorized the court to sever the claims and to remand. 344 F. Supp. 2d 1674, 1685. (D. Nev. 2004). The plaintiffs joined medical malpractice claims against a non-diverse doctor who prescribed the Fen-phen with product liability claims against the manufacturer and a non-diverse sales

representative. *Id.* at 1683. The court held that the claims were improperly joined, and, because the plaintiffs engaged in forum manipulation, justice was best served by severance. *Id.* at 1684-85. *See also Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360) (11th Cir. 1996) (affirming district court's severance of improperly-joined parties); *Lee v. Mann*, No. LE-424-1, 2000 WL 724046, at *1-2 (Va. Cir. Ct. Apr. 5, 2000) (upholding finding of misjoinder of claims against physician and pharmaceutical manufacturer for injuries allegedly received from the use of a diet medication).

By tacking the claims against Dr. Housman onto his complaint, Plaintiff is attempting to rely on the unrelated claims for medical negligence against Dr. Housman to stay in state court and bypass 28 U.S.C. § 1441. As this Court held in *Alexander*, and as the courts in *In re Rezulin* and *Greene* also properly recognized, the medical malpractice and negligence claims asserted against the health care providers were improperly joined with product-liability claims against the drug manufacturers. Similarly, here, the medical-negligence claims asserted by Plaintiff against Dr. Housman are both factually and legally distinct from the products-liability claims against Guidant. The Court should sever Plaintiff's claims against Dr. Housman under Federal Rule of Civil Procedure 21 and retain jurisdiction over the claims against defendants Guidant and EVT.

3. Severance of the medical negligence claims against Dr. Housman will promote the efficient administration of justice.

Courts may also sever parties for the "efficient administration of justice."

In re Diet Drugs Prods. Liab. Litig., MDL No. 1203, Civ. A. 04-20099, 2004 WL 2095451, *1 (E.D. Pa. Sept. 20, 2004) (citing *Moore's Federal Practice* § 21.02(1); *Official Comm. Of Unsecured Creditors v. Shapiro, et al.*, 190 F.R.D. 352, 355 (E.D. Pa. 2000)). The "efficient administration of justice" would best be served here by transferring the product liability claims asserted against Guidant to the MDL Court in Minnesota. In its initial Transfer Order, the JPML defined the spectrum of cases comprising MDL No. 1708 as "actions shar[ing] allegations that certain implantable defibrillator devices manufactured by Guidant were defective and caused injury, or the threat of injury, to the plaintiffs . . . ." Transfer Order, *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, Docket No. 1708 (J.P.M.L. Nov. 7, 2005) ("JPML Transfer Order"). The JPML created MDL 1708 to coordinate pretrial activities, to avoid duplicative discovery, and to promote the just and efficient conduct of the litigation. Because Plaintiff asserts allegations similar to those in the more than 1,768 cases already transferred to MDL-1708, discovery in his case will be duplicative and a hardship on Guidant. In contrast, Plaintiff's counsel in this case represents numerous other plaintiffs with cases already pending in the MDL,[19] including *Kostrach v. Guidant Corporation*, and

[19] *See, e.g., Ettinger v. Guidant Corp., et al.*, No. 3:05-CV-03279 WHA (N.D. Cal.) (transferred to MDL on January 20, 2006); *Bauman v. Guidant Corp., et al.*, No. 06-02183 (originally filed in the MDL on May 31, 2006); *Hebert v. Dutton., et al.*, No. 07-cv-01275 (originally filed in the MDL on May 24, 2007); *Clark v. Guidant Corp., et al.*, No. 06-cv-04323 (originally filed in the MDL on Oct. 26, 2006); *Edgecomb v. Guidant Corp., et al.*, No. 07-cv-00253 (originally filed in the MDL on Jan. 19, 2007).

Kocol v. Guidant Corporation,[20] which also include allegations against EVT. More importantly, Plaintiff's counsel currently has access to more than 14 million pages of documents produced in the MDL. Any duplication of effort that will come with severance is far outweighed by the benefits of allowing this case to remain in the MDL.

Because Plaintiff's claims against Dr. Housman are separate and severable from his claims against Guidant, this Court has the discretion to grant remand with regard to Dr. Housman, but to retain jurisdiction over the claims against Guidant. Therefore, Guidant urges that this Court sever Plaintiff's claims against Dr. Housman, and that these claims either be dismissed without prejudice or remanded while the claims against Guidant remain in federal court. Upon severance of Defendant Dr. Leland Housman from this action, this Court has diversity jurisdiction over the remaining defendants pursuant to 28 U.S.C. § 1332.

B. EVT Is Not a California Citizen.

Plaintiff also argues that the parties are not diverse because "[i]n other proceedings, Guidant has admitted that EVT maintains its principal place of business in California. . . ."[21] In support, Plaintiff cites to pleadings that are

[20] *Kostrach v. Guidant Corp., et al.*, No. 06-4606 (C.D. Cal.) (transferred to the MDL on November 27, 2006); *Kocol v. Guidant Corp. et al.*, No. C-06-06537 JF (N.D. Cal.) (transferred to the MDL on April 19, 2007).

[21] Plaintiff's Motion to Remand at 4.

several years old, dating back to 2002 and 2003 when EVT's principal place of business *was* in California.[22] That is no longer true.

For purposes of diversity jurisdiction, a court must analyze citizenship as of the date the complaint was filed – here, October 24, 2006 – and at the time of removal – January 22, 2007. *Gradetech, Inc. v. Am. Employers Group*, No. C 06 02991 WHA, 2006 WL 1806156, at *4 (N.D. Cal. Jun. 29, 2006) (noting that, for purposes of diversity jurisdiction, the court must analyze citizenship as of the date the complaint was filed) (citing *Grupo Dataflux v. Atlas Global Group, LP,* 541 U.S. 567, 571 (2004)); *Miller v. Grgurich*, 763 F.2d 372, 373 (9th Cir. 1985). Prior citizenship is irrelevant.

EVT is a wholly-owned subsidiary of Guidant Corporation and is no longer a citizen of California.[23] It has been a Delaware corporation since June 30, 1989.[24] And since approximately April 2006, months before this lawsuit was filed on October 24, 2006, EVT's headquarters and business operations have been located in St. Paul, Minnesota.[25] In April 2006, when Abbott Laboratories acquired part of Guidant's business, EVT remained a separate, wholly-owned subsidiary of

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[22] Plaintiff cites to two answers filed by Guidant, EVT, and a number of other entities in two other actions filed by Plaintiff's counsel in California: *McQuillan v. Guidant Corporation et al.*, No. C 01-21017 (N.D. Cal.) (answer filed March 11, 2002), and *Walker et al. v. Guidant Corporation et al.*, No. C 01-21108 (N.D. Cal.) (answer filed June 9, 2003).

[23] Pratt Aff., Exhibit E, Declaration of Jeffery A. Kruse filed in support of Defendants' Notice of Removal ("Kruse Decl.") at ¶ 3.

[24] *Id.*

[25] *Id.*

Guidant.[26] At the time this lawsuit was filed, as well as at the time of removal, EVT had no business operations in California, and continues to have none since.[27] Tellingly, Plaintiff's motion says nothing about EVT's citizenship at the time of filing and removal.

EVT is not a California citizen. And because Guidant Corporation and Guidant Sales Corporation are citizens of Indiana, and Dr. Housman's citizenship must be ignored because he was improperly joined,[28] diversity of the parties exists. Plaintiff's motion to remand must therefore be denied.

C. Plaintiff Cannot State A Claim Against The Fraudulently-Joined Defendant, EVT.

Even if EVT were a California citizen, Plaintiff's motion should still be denied because Plaintiff has fraudulently joined EVT in an attempt to avoid litigating in federal court. First, of the over 2,010 cases pending against Guidant in federal and state courts, only *five* name EVT as a defendant. Of those five cases, *three* (including this case) were filed by Plaintiff's counsel in California.[29] Second, none of the causes of action asserted in this case – strict liability,

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[26] *Id.*

[27] *Id.*

[28] *See* Pratt Aff., Exhibit A, Notice of Removal at ¶¶ 11-12.

[29] In addition to *Brown*, Plaintiff's counsel has filed the *Kocol* and *Kostrach* cases, both of which name EVT as a defendant, in California state courts. *Kocol v. Guidant Corporation et al.*, No. C-06-06537 JF (originally filed in Santa Clara County Superior Court on September 8, 2006; transferred to the MDL on April 19, 2007); *Kostrach v. Guidant Corp. et al.*, No. CV-06-6391 AHS (C.D. Cal.) (originally filed in Los Angeles Superior Court on July 6, 2006; transferred to the MDL on November 27, 2006). Plaintiff's counsel has chosen not to file motions to remand in these cases before this Court. The remaining cases naming EVT as a defendant are *Hendon v. Guidant Corp. et al.*, No. 4-06-CV-0000 (E.D. Ark., filed June 8, 2006) (originally filed in federal court), and *Johnson vs. Guidant Corp. et al.* No. 06-CA-574-SC (Sarasota County, Florida, filed Jan. 19, 2006).

negligence, breach of express and implies warranty, deceptive trade practices, fraud, fraudulent concealment, negligent misrepresentation, violations of Restatement of Torts §§ 402B, 388, and violations of the Consumer Legal Remedies Act – apply to EVT. Each cause of action is based on allegations that the Guidant ICD implanted in Plaintiff was defective.[30] EVT, however, has never developed, manufactured, marketed or distributed ICDs.[31]

Instead, Plaintiff tries to connect EVT's involvement to a 2003 Corporate Integrity Agreement ("CIA") regarding different medical devices.[32] Neither the CIA nor EVT, however, has anything to do with the device involved in this lawsuit. EVT's involvement in the CIA concerns the ANCURE® ENDOGRAFT® System, a system for the treatment of abdominal aortic aneurysms.[33] Plaintiff has not alleged that he received an ANCURE® ENDOGRAFT® device or was in any way injured by an ANCURE® ENDOGRAFT® device.[34]

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[30] *See, e.g.*, Plaintiff's Complaint at ¶ 11-12, 18.

[31] Pratt Aff., Exhibit E, Kruse Decl. at ¶ 2.

[32] Plaintiff's Motion to Remand at 6-9. On June 12, 2003, EVT entered into a Settlement Agreement with the United States and the CIA was incorporated into that Settlement Agreement. *See* CIA at 1, attached as Exhibit C to Plaintiff's Motion to Remand.

[33] *See id.*

[34] This is not the first time that Plaintiff's counsel has attempted to connect EVT's involvement with the CIA to this litigation. In August 2005, Plaintiff's counsel attempted to relate two cases originally filed in the Northern District of California and now pending in the MDL – *Ettinger v. Guidant Corp. et al.*, Case No. 3:05-cv-03279 and *Allen v. Guidant Corp. et al.*, Case No. 3:05-cv-3042 – to a criminal case in which EVT (prior to its acquisition by Guidant) was a party, *USA v. Endovascular Technologies, Inc.*, Case No. CR-03-0179. The *Enodvascular* case had been closed since 2003 and Guidant was never a party to the case. Regardless, Plaintiffs filed administrative motions pursuant to local rule to

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

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

II. Plaintiff's Motion to Remand Should be Denied Because Defendants' Notice of Removal is Procedurally Proper.

In addition to improperly joining EVT and Dr. Housman to this action, Plaintiff's Motion to Remand should be denied for several other reasons. First, Plaintiff argues that this Court lacks jurisdiction because the removal to federal court was untimely. Plaintiff claims that service on Dr. Housman triggered the 30-day time period for removal and that the case was not removed until 39 days

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persuade the court to relate *Ettinger* and *Allen* to *Endovascular*. On September 13, 2005, Judge Susan Illston denied Plaintiffs' motions, ruling that neither *Ettinger* nor *Allen* were related to *Endovascular*.

later.[35] Plaintiff is wrong because service of process on an improperly-joined party does not trigger the deadline for removal.[36] Under 28 U.S.C. § 1446(b), the notice of removal of a civil action shall be filed within 30 days after the receipt by a properly-joined defendant of a copy of the initial pleading setting forth the claim for relief upon which such action of proceeding is based. To trigger the 30-day removal period, receipt of the summons and complaint must be by proper service. *See Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 354 (1999). Neither Guidant nor EVT were served with a summons and complaint in this case.

In *Murphy Brothers*, the defendant removed within 30 days after receiving formal service, but 44 days after receiving a "courtesy copy" of the complaint from the plaintiff. *Id.* Interpreting section 1446(b)'s phrase "service or otherwise," the United States Supreme Court held that a named defendant's time to remove is triggered by formal service of the summons and the complaint, and not "by mere receipt of the complaint unattended by any formal service." *Id.* Here, Guidant, the only properly-joined defendant, was never served with a "courtesy copy" of Plaintiff's complaint, let alone formal service of process. The 30-day period for removal was never triggered and Guidant's removal was therefore timely.

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[35] Plaintiff's Motion to Remand at 3.

[36] 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." 28 U.S.C. § 1441(b) (emphasis added). *See also United Computer Sys., Inc.* 298 F.3d at 762 (9th Cir. 2002) (holding that the usual rule that all defendants in an action in state court join in a petition for removal does not apply to "nominal, unknown, or fraudulently-joined parties"). *See* Pratt Aff., Exhibit A, Notice of Removal.

And although the issue has not yet been addressed by the Ninth Circuit,[37] the clear trend in the Northern District of California is that the 30-day period for removal does not run until after the last-served defendant receives formal service. *See Bonner v. Fuji Photo Film*, 461 F. Supp. 2d 1112, 1117 (N.D. Cal. 2006) (adopting last-served defendant rule, noting that the most plausible reading of the removal statute is that Congress intended to extend the right of removal to *all* defendants, regardless of when they became parties to a case); *Doijode v. Sears, Roebuck, and Co.*, No. C 05-04552, 2006 WL 149007, at *2-3 (N.D. Cal. 2006) (holding that, despite receiving a copy of the complaint, because plaintiff did not effect proper service of the summons and complaint on defendant, 30-day removal period did not begin to run); *Drew v. Equifax Info. Servs.*, No. C 07-00726 SI, 2007 WL 1321728, at *1, n1 (N.D. Cal. May 4, 2007) (following last-served defendant rule); *Goularte v. ABEX Corp.*, No. C 97-1265 FMS, 1997 WL 294397, at *2 (N.D. Cal. May 28, 1997) ("[L]anguage and the legislative history do not support the notion that the decision to remove rests exclusively with the first-served defendant. . . . Creating such a limit would effectively remove the protections of the removal statutes from defendants who have the misfortune to be served late in an action.").[38] *See also Smith*, 191 F. Supp. 2d 1155, 1161 (E.D. Ca.

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[37] *See United Computer Sys., Inc.*, 298 F.3d at 762.

[38] *But see McAnally Enters. Inc. v. McAnally*, 107 F. Supp. 2d 1223, 1227-29 (C.D. Cal. 2000) (equitable factors weighed in favor of applying first-served rule because there was no risk that plaintiff was "manipulating the time of service so as to secure a state forum" by "nam[ing] Defendant in the initial complaint and then merely delay[ing] service on her").

2002) (finding that the failure of one defendant to remove within 30 days should not foreclose the right of a later-served defendant to remove, "given that the latter had no control over the first-defendant's removal decision"). Under this rule, service on Dr. Housman does not prevent Guidant from removing at a later date.

Further, the Notice of Removal is not deficient as Plaintiff suggests[39] because all properly-joined defendants consented to the removal. 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." 28 U.S.C. § 1441(b) (emphasis added). *See also United Computer Sys., Inc.*, 298 F.3d at 762 (holding that the usual rule that all defendants in an action in state court join in a petition for removal does not apply to "nominal, unknown, or fraudulently-joined parties"). As explained in Guidant and EVT's Notice of Removal, Dr. Housman is improperly joined and his consent to removal is not required.[40] Guidant and EVT's Notice of Removal was timely and all properly-joined defendants consented to removal.

III. This Action Satisfies the $75,000 Amount in Controversy.

Lastly, Plaintiff argues that Guidant has failed to meet its burden to show that this case meets the requisite amount in controversy. As the removing party, the defendant must show that it is "more likely than not" that the amount in controversy exceeds $75,000. *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398,

[39] Plaintiff's Motion to Remand at 3.

[40] Pratt Aff., Exhibit A, Notice of Removal at ¶ 13.

404 (9th Cir.1996). In cases in which the existence of diversity jurisdiction depends on the amount in controversy, the district court may consider whether it is facially apparent from the complaint that the jurisdictional amount is in controversy. *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th Cir.1997). If the complaint is silent on the amount of damages claimed, the court may consider facts in the removed petition. *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); *Gallo v. Homelite Consumer Prods.*, 371 F. Supp. 2d 943, 948 (N.D. Ill. 2005) (although complaint omitted monetary demand, as required by state law, allegations that plaintiff suffered from burns over 60% of his body causing pain, disfigurement, etc., showed claim exceeded $75,000).

Plaintiff cites to *Gaus v. Miles, Inc.*, 980 F.2d 564, 566-67 (9th Cir. 1992) and *McNutt v. General Motors Acceptance Corporation*, 298 U.S. 178, 189 (1936) to support his argument that Defendants have not proven the requisite amount in controversy. In *Gaus,* however, the defendant did not set forth any underlying facts in the removal petition to support the court's exercise of jurisdiction. *Gaus*, 980 F.2d at 567. Instead, the plaintiff simply alleged that "the matter in current controversy ... exceeds the sum of $50,000." *Id.* Therefore, the court held (relying on *McNutt*) that the defendant had not offered sufficient evidence to support the amount in controversy. *Id.* In contrast, here, the facts alleged in Plaintiff's complaint demonstrates that the amount in controversy exceeds

$75,000.

Plaintiff seeks several items of damages to compensate him for the "serious injuries to his chest."[41] He requests general damages; special damages; restitution and disgorgement of profits; compensatory and other damages; costs, including experts' fees and attorneys' fees and expenses, and the costs of prosecuting this action.[42] Plaintiff also alleges that he "required healthcare and medical services, and incurred direct medical costs for physician care, monitoring, treatment, medications, and supplies."[43] Finally, Plaintiff seeks "exemplary and punitive damages . . . sufficient to punish Defendant or to deter them and others from repeating the injurious conduct alleged herein or similar conduct. . . ."[44] Punitive damages are included in the calculation of the amount in controversy. *See Bell v. Preferred Life Assurance Soc'y*, 320 U.S. 238, 240 (1943); *Green*, 2002 WL 553219, at *2.

These allegations equal a request for relief that not only meets, but exceeds $75,000. Complaints seeking damages such as those alleged by Plaintiff 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

[41] Plaintiff's Complaint at ¶ 130.
[42] *Id.* at 24, Prayer.
[43] *Id.*
[44] *Id.*

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). Furthermore, claims of similar types litigated in California have produced judgments far exceeding the $75,000 jurisdictional threshold at issue here. *See, e.g., Hern v. Intermedics, Inc.* 1997 WL 229916 (N.D. Cal. 1997) (jury awarded $121,883 in general damages and $1,550,000 in punitive damages following a trial in which plaintiff alleged post-traumatic stress disorder and depression from defendant manufacturer's failure provide him and his physician with accurate information concerning nature and extent of problem with his pacemaker following recall); *Steinbuck v. Medtronic Inc.*, 1999 WL 6194566 (S.D. Sup. Ct. 1999) (jury verdict totaling $290,000 in case involving allegations that defendant was negligent and failed to warn about alleged known defect in pacemaker lead). The underlying facts establish that the amount in controversy exceeds the jurisdictional threshold here.

IV. Plaintiff Should Not Be Awarded Costs and Attorneys' Fees.

Plaintiff requests costs and attorneys fees against Guidant and EVT. An award of attorney's fees is inappropriate "where the defendant's attempt to remove the action was fairly supportable and where there has been no showing of bad faith." *Schmitt v. Ins. Co. of N. Am.*, 845 F.2d 1546, 1552 (9th Cir. 1988). As demonstrated above, Guidant not only has an objectively reasonable basis for removal, but in fact has shown that this action should remain in federal court as

other similarly-situated cases have. Accordingly, Plaintiff's request for costs and fees should be denied.

CONCLUSION

This case belongs in the MDL. In an effort to defeat federal diversity jurisdiction and transfer to the MDL court, Plaintiff has improperly joined resident defendant Dr. Housman and has fraudulently joined EVT. Nevertheless, because improper or fraudulent joinder of an in-state defendant does not defeat this Court's jurisdiction under 28 U.S.C. § 1332, Defendants properly removed this case to federal court. Plaintiff's Motion to Remand should be denied.

Dated: June 26, 2007

Respectfully submitted,

SHOOK, HARDY & BACON L.L.P.

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