UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

JS-6 / REMAND

Case No.	**CV 20-4120-DMG (JEMx)**	Date	August 5, 2020
Title	***Stephen Plum, et al. v. Medtronic, Inc. et al.***	Page	1 of 8

Present: The Honorable DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

KANE TIEN	NOT REPORTED
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s)	Attorneys Present for Defendant(s)
None Present	None Present

Proceedings: IN CHAMBERS—ORDER RE DEFENDANTS MEDTRONIC MINIMED, INC. AND MEDTRONIC, INC.'S MOTION TO SEVER [7] AND MOTION TO DISMISS [15]

On April 20, 2020, Plaintiffs Stephen Plum, William Oliver, Steven Moyer, Morgan Bailey, Pamela Weisshar, Richard Miller, Jennifer Topel filed a Complaint in Los Angeles County Superior Court against Defendants Medtronic Minimed, Inc. ("Minimed") and Medtronic, Inc ("Medtronic"). Not. of Removal ("NOR"), Ex. 1 (Compl.) [Doc. # 1-1]. The Complaint contains causes of action for strict liability, negligence, breach of express warranty, breach of implied warranty, and unfair and deceptive trade practices. *Id.* at ¶¶ 35–59. On May 5, 2020, Defendants removed the case to this Court. NOR [Doc. # 1].

On May 7, 2020, Defendants filed a Motion to Sever the claims asserted by each individual Plaintiff ("MTS"). [Doc. # 7-1]. On June 26, 2020, Defendants also filed a Motion to Dismiss the case ("MTD"). [Doc. # 15-1]. Both motions have been fully briefed. [Doc. ## 12, 17, 20, 22.][1]

For the reasons set forth below, Defendants' MTS and MTD are **DENIED**, and the case is **REMANDED** to the Los Angeles County Superior Court.

I.
FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs are insulin-dependent Type 1 diabetics. Compl. at ¶ 2. In order to treat their diabetes, Plaintiffs all individually purchased either the 630G or 670G insulin pump manufactured by Defendants, both of which provide automatic insulin delivery to the user. *Id.* at ¶ 20, 24. The pumps are both part of Medtronic's 600 series of insulin pumps but have slightly

[1] Defendants request judicial notice of documents pursuant to their MTD. [Doc. # 16]. Because the Court does not rely on these documents to make its decision, this request is **DENIED**.

different features. *See id.* at ¶¶ 2, 26–27 (comparing the 630G's "threshold suspend feature" which suspends insulin delivery when blood glucose falls below a certain level to the 670G's "auto mode" which could both increase and decrease insulin based on blood glucose levels). As medical devices, both require pre-market approval ("PMA") by the Food and Drug Administration ("FDA"). *See id.* at ¶ 25.

On November 21, 2019, Medtronic issued an "Urgent Field Safety Notification" warning 630G and 670G users that broken or missing retainer rings on the pumps could cause high blood glucose levels (hyperglycemia) or low blood glucose levels (hypoglycemia) by either under- or over-delivering insulin. Users were instructed to examine their retainer rings and to either continue or cease use of the pumps depending on the condition of the rings. *Id.* at ¶ 23. On February 12, 2020, Medtronic issued a recall of the pumps. The FDA reported that it had received more than 26,400 complaints the ring-based defect, including 2,175 reported injuries and one known death. *Id.* at ¶ 24.

Plaintiffs are citizens and residents of six different states: West Virginia, Kansas, Nevada, Ohio, Illinois, and California. *Id.* at ¶¶ 11–17. Minimed is a corporation organized in Delaware with a principal place of business in California, while Medtronic is a corporation both organized and with its principal place of business in Minnesota. NOR at ¶¶ 28–29. Plaintiffs all assert hypoglycemic and/or hyperglycemic episodes caused by the defective rings on either the 630G or 670G pumps, although the details of their specific injuries differ. *See* Compl. at ¶¶ 28–34. For example, Plum, a citizen of West Virginia, suffered approximately 100 severe hypoglycemic episodes with the 670G pump. After the recall notice, he noticed the retainer ring of his pump was "partially displaced." *Id.* at 29. Oliver, a Kansas citizen who used a 630G pump with a "broken" retainer ring, required hospitalization for hyperglycemia. *Id.* at ¶ 29. Weisshar, a citizen of California, used the 670G pump with a "loose and then broken" retainer ring and has experienced both hypoglycemia and hyperglycemia leading to hospitalization. *Id.* at ¶ 32. Plaintiffs bring all five causes of action against Defendants together, *see id.* at ¶¶ 35–59, and request compensatory, special, and punitive damages as well as interest and payment for litigation expenses. *Id.* at 22.[2]

Recognizing that both Plaintiff Weisshar and Defendant Minimed are California citizens, Defendants now moves to sever the claims of each Plaintiff as fraudulently misjoined and also moves to dismiss all claims under Federal Rule of Civil Procedure 12(b)(6). *See* NOR at ¶¶ 10, 17–26; MTS at 6; MTD at 9.

[2] All page references herein are to page numbers inserted by the CM/ECF system.

II.
LEGAL STANDARD

A federal district court shall have jurisdiction over a civil action where the matter in controversy exceeds the sum or value of $75,000 and there is diversity of citizenship between the parties. 28 U.S.C. § 1332(a). To establish diversity jurisdiction, there must be "complete diversity between the parties—each defendant must be a citizen of a different state from each plaintiff." *Diaz v. Davis (In re Digimarc Corp. Derivative Litig.)*, 549 F.3d 1223, 1234 (9th Cir. 2008) (citing *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806)).

Additionally, federal district courts have jurisdiction over actions presenting a federal question arising under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331. The presence or absence of federal question jurisdiction is governed by the "well-pleaded complaint rule," under which federal court jurisdiction exists when a federal question is presented on the face of the plaintiff's properly pleaded complaint. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) (citing *Gully v. First National Bank*, 299 U.S. 109, 112–13 (1936)). Causes of action "arise under" federal law in accordance with 28 U.S.C. section 1331 if federal law creates the cause of action or the complaint necessarily depends on a substantial question of federal law. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 808 (1988).

A civil action brought in a state court over which a federal district court has original jurisdiction—based on either party diversity or the presence of a federal question—may be removed by the defendants to a district court where the action could have been brought. 28 U.S.C. § 1441(a). But while state courts have jurisdiction to hear all cases and controversies, federal courts have limited jurisdiction. *Hansen v. Grp. Health Coop.*, 902 F.3d 1051, 1056 (9th Cir. 2018). Accordingly, "the party invoking the removal statute bears the burden of establishing federal jurisdiction." *Ethridge v. Harbor House Rest.*, 861 F.2d 1389, 1393 (9th Cir. 1988). For this reason, in the Ninth Circuit, the "removal statute is strictly construed against removal jurisdiction" regardless of the basis for the removal. *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1195 (9th Cir. 1988) (applying this rule in the federal question jurisdiction context); *see Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (applying this rule in the diversity jurisdiction context).

III.
DISCUSSION

Because federal courts have "an independent obligation to assure ourselves of our own jurisdiction" before proceeding to the substance of any claims or motions, the Court first

examines grounds for diversity and federal question subject matter jurisdiction, which implicate arguments the parties make regarding Defendants' MTS. *Rosson v. Fitzgerald (In re Rosson)*, 545 F.3d 764, 769 n.5 (9th Cir. 2008); *see* NOR at ¶¶ 10–49; Opp. to MTS at 14–17 [Doc. # 12]; Reply to MTS at 12–16 [Doc # 17].

A. Diversity Jurisdiction

For a federal court to have diversity jurisdiction over an action, the amount in controversy must exceed $75,000 and the parties must be completely diverse.[3] 28 U.S.C. § 1332(a). Facially, this action appears to violate the complete diversity requirement because Plaintiff Weisshar and Defendant Minimed are citizens of the same state, California. Compl. at ¶ 15; NOR at ¶ 29; *see* 28 U.S.C. § 1332(c)(1) (noting that a corporation is a citizen of the state "where it has its principal place of business"); *Diaz*, 549 F.3d at 1234 (articulating the complete diversity rule). Defendants argue, however, that Weisshar was fraudulently misjoined to this action and that her citizenship should therefore be disregarded for purposes of the diversity jurisdiction analysis. NOR at ¶¶ 17–26.[4] In the alternative, Defendants argue that this Court should exercise its discretion under Federal Rule of Civil Procedure 21 to sever Weisshar from the action, which would also create complete party diversity. *See* Fed. R. Civ. P. 21.

1. Fraudulent Misjoinder

Fraudulent misjoinder occurs when "plaintiffs . . . each have a claim but are improperly joined in the same lawsuit." *In re Roundup Prods. Liab. Litig.*, 396 F. Supp. 3d 893, 896 (N.D. Cal. 2019) (distinguishing fraudulent *mis*joinder from fraudulent joinder, the latter of which occurs when "a non-diverse defendant is named in the lawsuit to defeat diversity jurisdiction, even though there is no claim against that non-diverse defendant."). As an initial matter, the

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[3] Neither party contests that the amount in controversy requirement is met in this case. *See* NOR at ¶¶ 32–36.

[4] Typically, removal by a California defendant such as Minimed of a case brought in California would be automatically improper without the need for further jurisdictional analysis. *See* 28 U.S.C. § 1441(b)(2) (noting that actions removable on the basis of diversity jurisdiction "may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."). Defendants note, however, that Minimed had not yet been served at the time of removal. NOR at ¶ 30 (noting that Minimed had yet to be served on May 5, 2020, when the NOR was filed); MTS at 1 (listing the date of service as May 7, 2020). Where a defendant has not been served, its participation in a removal action provides no ground for remand. *See* NOR at ¶ 30; *Dechow v. Gilead Scis., Inc.*, 358 F. Supp. 3d 1051, 1054–55 (C.D. Cal. 2019) (interpreting 28 U.S.C. section 1441(b)(2) according to its "plain text" in finding only properly joined *and served* defendants subject to its constraints). Accordingly, Minimed's consent to removal poses no jurisdictional issue for this Court.

Ninth Circuit has not explicitly recognized the doctrine of fraudulent misjoinder. *See Osborn v. Metro. Life Ins. Co.*, 341 F. Supp. 2d 1123, 1128 (E.D. Cal. 2004) (noting that the Ninth Circuit had not addressed fraudulent misjoinder, although other circuits had); *Mohansingh v. Crop Prod. Servs., Inc.*, No. CV 17-00439-DAD (EPGx), 2017 WL 4778579, at *3-4 (E.D. Cal. Oct. 23, 2017) (collecting cases of in-circuit district courts declining to apply the doctrine). In one unpublished case, the Ninth Circuit "assume[d], without deciding, that this circuit would accept the doctrines of fraudulent and egregious joinder as applied to plaintiffs" and found that the defendants failed to meet their burden of proving fraudulent joinder and that no diversity jurisdiction existed. *See Cal. Dump Truck Owners Ass'n v. Cummings Engine Co.*, 24 F. App'x 727, 729 (9th Cir. 2001). More recently, however, a district court within this circuit has adopted the fraudulent misjoinder doctrine as set forth by the Eleventh Circuit. *In re Roundup*, 396 F. Supp. 3d at 897–98 (citing *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996), *abrogated on other grounds by Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1072–73 (11th Cir. 2000)).

The Court need not resort to other federal courts' interpretation of the fraudulent misjoinder rule, however, because the California rules on joinder of plaintiffs apply here. Although Defendants argue that Rule 20 should apply, rather than California law, because the action was properly removed, *see* MTS at 9 n.4, the weight of decisions in this circuit favor remanding to the state court to decide issues of misjoinder, rather than assuming the propriety of removal despite non-diverse citizenship of parties. *See, e.g.*, *Osborne*, 341 F. Supp. 2d at 1127 (holding that the "better rule" is to "resolve the claimed misjoinder in state court, and then, if that court severed the case and diversity then existed, it could seek removal of the cause to federal court"); *see also Mohansingh*, 2017 WL 4778579, at *5 (collecting cases recommending remand for the state court to decide issues of misjoinder). In California, plaintiffs may be joined when they assert a right to relief "[1] in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and [2] if any question of law or fact common to all these persons will arise in the action." Cal. Civ. Proc. Code § 378(a)(1). This standard mirrors the language of Federal Rule of Civil Procedure 20 but is recognized as "broader than the federal rule" in permitting joinder. *Osborn*, 341 F. Supp. 2d at 1128; *see* Fed. R. Civ. P. 20(a)(1).

Even if this Court applied the fraudulent misjoinder standard articulated by the Eleventh Circuit and applied in *In re Roundup*, the misjoinder must be "'so egregious' that it is akin to fraud" to be deemed fraudulent. *In re Roundup*, 396 F. Supp. 3d at 897 (citing *Tapcott*, 77 F.3d at 1360). Defendants have not met their burden to show such egregious or nearly fraudulent misjoinder where Plaintiffs bought nearly identical types of insulin pumps from the same manufacturer and suffered the same type of injury as a result of the same alleged defect. These commonalities support the conclusion that Plaintiffs' claims "ar[ose] out of the same . . . series

of transactions or occurrences"—namely, a manufacturing defect—thus satisfying the first prong of joinder analysis under Federal Rule of Civil Procedure 20.[5] In addition, because there need only be "*some* questions of fact and law common to all of the plaintiffs" to satisfy the second prong of the joinder analysis, this prong is also satisfied by Plaintiff's allegations. *In re Roundup*, 396 F. Supp. 3d at 897 (emphasis added); *see* Compl. at ¶¶ 28–34; MTS at 13. Thus, Plaintiffs' claims cannot be severed on this basis even if the Ninth Circuit adopted the theory of fraudulent misjoinder. The California citizenship of both Weisshar and Minimed precludes this Court from exercising jurisdiction based on party diversity. *See Diaz*, 549 F.3d at 1234.

2. Rule 21 Severance

Defendants also argue that, even if Plaintiffs' claims were properly joined, the Court should exercise its discretion under Rule 21 to sever claims to create party diversity. MTS at 15–19; *see* Fed R. Civ. P. 21. Defendants argue that severing Plaintiffs' claims would avoid undue prejudice towards Defendants, promote judicial economy, and help facilitate settlement. MTS at 15–19. While district courts "'may at any time, on just terms, add or drop a party,'" Rule 21 discretion to dismiss a party "is not a requirement that it do so." *Mendoza v. Nordstrom*, 865 F.3d 1261, 1266 (9th Cir. 2017) (quoting Fed. R. Civ. P. 21).

Pertinent here, the Court "can't exercise jurisdiction it doesn't have for the purpose of creating federal jurisdiction." *In re Roundup*, 396 F. Supp. 3d at 898; *see also Hampton v. Insys Therapeutics, Inc.*, 319 F. Supp. 3d 1204, 1213–14 (D. Nev. 2018) ("Federal courts have frowned on using the Rule 21 severance vehicle to conjure removal jurisdiction that would

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[5] Defendants cite to *Flauta v. Johnson & Johnson*, CV 12-9095 PSG (AGRx), 2013 WL 12138986 (C.D. Cal. Jan. 10, 2013), and *Adams v. I-Flow Corp.*, No. CV 09-09550-R-(SSx), 2010 WL 1339948 (C.D. Cal. Mar. 30, 2010), which found joinder of plaintiffs improper under Rule 20. These cases are factually distinguishable. *Flauta* involved "over 940 named Plaintiffs from 43 states" who asserted "different kinds" of tendon injuries related to ingestion of a drug manufactured by the defendant. *Flauta*, 2013 WL 12138986, at *3. In *Adams*, 141 plaintiffs from 37 states and Canada underwent shoulder treatments to treat various shoulder ailments and sued 22 different manufacturers and distributors of different pain pumps and anesthetics based on "injury as a result of the unidentified pain pumps' administration of the unidentified anesthetics" used after the surgeries. *Adams*, 2010 WL 1339948, at *1. Plaintiffs here have not only taken the same drug, insulin, but were administered that drug by essentially the same pump. *Compare* Ex. 1 [Doc. # 1-1] at 27 (the FDA notice listing the 630G and 670G pumps together as the "Minimed 600 Series Insulin Pumps"), *with Adams*, 2010 WL 1339948, at *1 (noting that the plaintiffs had been administered drugs via "unidentified pain pumps"). Moreover, in contrast to both *Flauta* and *Adams*, Plaintiffs have asserted not just similar but the same fundamental injury: uncontrolled blood glucose levels. Compl. at ¶¶ 28–34. Plaintiffs also include more shared facts by alleging that their injuries were caused by a specific, defective part on the relevant insulin pumps, the retaining ring. Finally, the much smaller number of Plaintiffs in this case, compared to those cited by Defendants, makes joining Plaintiffs' claims economical rather than impractical. *See Coughlin*, 130 F.3d at 1351.

otherwise be absent.”). This is particularly true where, as here, Rule 21 is used as an “alternative argument [that] appears to be an improper end-run around courts’ rejection of the fraudulent misjoinder doctrine.” *Hampton*, 319 F. Supp. 3d at 1214. Without jurisdiction at the time of removal, this Court will not sever Plaintiffs. This Court thus leaves the merits of Defendants’ arguments concerning prejudice, judicial economy, and settlement facilitation to the sound discretion of the state court on remand.

B. Federal Question Jurisdiction

Defendants argue that, in the event this Court finds there is no diversity jurisdiction, the Court nonetheless has jurisdiction over the action due to a question of federal law. NOR at ¶¶ 37–49; *see* 28 U.S.C. § 1331. Defendants acknowledge that because Plaintiffs pled only state law claims, federal law does not create any of Plaintiffs’ causes of action. NOR at ¶ 46; *see Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 6 (2003) (noting the “well pleaded complaint” rule under which courts look to the causes of action to determine whether there is a federal question). Defendants allege, however, that Plaintiffs’ claims fall into the “slim category” of claims where, despite federal law not creating any of the causes of action, the complaint necessarily depends on a substantial, disputed question of federal law and therefore arises under federal law for jurisdictional purposes. *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 701 (2006); *see Christianson*, 486 U.S. at 808.

Specifically, Defendants point out that both of the relevant pumps were approved under the FDA premarket approval (“PMA”) process, which implicates federal law. NOR at ¶ 38. It is well-established that for state law claims not to be preempted by federal law on PMA-covered medical devices, plaintiffs must plead that their state law claims “parallel, rather than add to, federal requirements.” *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 330 (2008) (internal quotation omitted); *see* NOR at ¶¶ 47–49; 21 U.S.C. § 360k(a)(1) (providing that federal law preempts state requirements that are not “different from, or in addition to, any requirement applicable . . . to the device.”). Defendants do not contest that Plaintiffs’ Complaint pleads such parallel claims. NOR at ¶ 48. Although Defendants rely on out-of-circuit cases to additionally argue that “an allegation of parallel claims . . . creates federal question jurisdiction sufficient to support removal of a case to federal court,” NOR at ¶ 47, Defendants essentially concede in their Reply to their MTS that Ninth Circuit precedent precludes their federal question jurisdiction argument. *See* Reply to MTS at 13 (“Medtronic recognizes that there are decisions from within the Ninth Circuit, including from this Court, that have reached a different result on [the] issue [of federal question jurisdiction]. For the purposes of the present motion, though, it is clear that the Court has diversity jurisdiction . . . .”).

Defendants are correct—in the Ninth Circuit, it is "settled law" that Plaintiffs' anticipation of a preemption defense does not create federal question jurisdiction "even if both parties concede that the federal defense is the only question truly at issue." *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1106 (9th Cir. 2000). Under applicable precedent, parallel claims do not "necessarily raise" federal issues, and the failure to raise these issues precludes federal question jurisdiction. *Gunn v. Minton*, 568 U.S. 251, 258 (2013) (noting that federal jurisdiction over a state law claim only lies where the federal issue is, among other requirements, necessarily raised by the complaint). Moreover, this Court has previously considered this jurisdictional issue concerning claims relating to another medical device manufactured by these very Defendants. In that case, the Court explicitly noted that even where "the preemption question will undoubtedly arise as a defense," the complaint itself—which sought to "establish that the state law requirements parallel[ed] requirements for devices set by the FDA"—did "not necessarily depend on a resolution of a federal issue." *David v. Medtronic, Inc.*, No. CV 13-04441 DMG (CWx), 2013 WL 12132038, at *3–4 (C.D. Cal. Aug. 6, 2013). In the absence of new guidance from the Ninth Circuit, this Court finds parallel claim allegations insufficient to create federal question jurisdiction.

IV.
CONCLUSION

In light of the foregoing, the Court concludes that it lacks subject matter jurisdiction over this matter and hereby **REMANDS** the case to the Los Angeles County Superior Court. Defendants' motions to sever claims and dismiss the action are **DENIED without prejudice as moot**.

IT IS SO ORDERED.