

**PARISH GUY CASTILLO, PC**

William H. Parish (State Bar No. 95913)

[parish@parishlegal.com](mailto:parish@parishlegal.com)

1919 Grand Canal Boulevard, Suite A-5

Stockton, California 95207-8114

Telephone: (209) 952-1992

Facsimile: (209) 952-0250

**LAW OFFICES OF FRANCIS O. SCARPULLA**

Francis O. Scarpulla (41059)

Patrick B. Clayton (240191)

456 Montgomery Street, 17<sup>th</sup> Floor

San Francisco, CA 94104

Telephone: (415) 788-7210

Facsimile: (415) 788-0706

[fos@scarpullalaw.com](mailto:fos@scarpullalaw.com)

[pbcl@scarpullalaw.com](mailto:pbcl@scarpullalaw.com)

*Attorneys for Plaintiffs*

[Additional Counsel Appear on Signature Page]

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

IN RE NATIONAL PRESCRIPTION OPIATE  
LITIGATION

1:17-md-02804-dap  
MDL No. 2804  
Judge Dan Aaron Polster

This Document Relates To:

Case No. 1:17-op-45017-DAP

COUNTY OF SAN JOAQUIN, CITY OF  
STOCKTON, and MONTEZUMA FIRE  
PROTECTION DISTRICT,

**PLAINTIFFS' OBJECTIONS TO FILING  
RESPONSES TO THE GOVERNMENT  
PLAINTIFF FACT SHEET; and  
MEMORANDUM IN SUPPORT OF  
OBJECTIONS TO FILING RESPONSES  
TO THE GOVERNMENT PLAINTIFF  
FACT SHEET**

Plaintiffs,

vs.

PURDUE PHARMA L.P., PURDUE PHARMA  
INC., THE PURDUE FREDERICK COMPANY,  
INC. TEVA PHARMACEUTICALS USA, INC.,  
CEPHALON, INC., JOHNSON & JOHNSON;  
JANSSEN PHARMACEUTICALS, INC. ORTHO-  
MCNEIL-JANSSEN PHARMACEUTICALS, INC.  
N/K/A JANSSEN PHARMACEUTICALS, INC.,  
JANSSEN PHARMACEUTICA, INC. N/K/A  
JANSSEN PHARMACEUTICALS, INC., ENDO  
HEALTH SOLUTIONS INC., ENDO  
PHARMACEUTICALS, INC.; McKESSON  
CORPORATION; and DOES 1-100, inclusive,

Defendants.

1                   **OBJECTIONS TO FILING RESPONSES TO THE GOVERNMENT PLAINTIFF**  
2                   **FACT SHEET**

3                   Plaintiffs County of San Joaquin, City of Stockton, and Montezuma Fire District subject to their  
4 motion to remand, objects to filing responses to the government plaintiff fact sheet for the reasons set  
5 forth in the accompanying memorandum in support of objections to filing responses to the government  
6 plaintiff fact sheet.

7                   Plaintiffs respectfully request that the Court sustain Plaintiffs’ objections as set forth in Plaintiffs’  
8 memorandum submitted in support of Plaintiffs’ objections.

9                   **MEMORANDUM IN SUPPORT OF OBJECTIONS TO FILING RESPONSES TO THE**  
10                   **GOVERNMENT PLAINTIFF FACT SHEET**

11                   Plaintiffs County of San Joaquin, City of Stockton, and Montezuma Fire District submit the  
12 following memorandum of points and authorities in support of their objections to filing responses to the  
13 government plaintiff fact sheet:

14                   **STATEMENT OF FACTS**

15                   Plaintiffs are public entities located in the state of California. Plaintiffs filed this action to recover  
16 the multi-million dollar expenses Plaintiffs’ have incurred in treating the opioid epidemic that Defendants  
17 created. Plaintiffs sued manufacturers and distributors in California state court. Among the defendants  
18 named in Plaintiffs’ action is McKesson Corporation (“McKesson”). McKesson is a distributor of  
19 opioids and its principal place of business is located in California.

20                   Defendants, excluding McKesson, removed this case to the District Court for the Eastern District  
21 of California asserting that McKesson had been fraudulently joined in the action and, therefore, the  
22 District Court had authority to act on the basis of diversity jurisdiction. Plaintiffs filed a timely motion  
23 to remand. Plaintiffs’ case was transferred to this Court without a ruling on the motion to remand.  
24 Plaintiffs motion to remand remains pending before this Court. Plaintiffs assert that there is no basis for  
25 the exercise of federal jurisdiction regarding this matter.

26 ///

27 ///

**GOVERNING LAW**

The foundational legal principles upon which this motion is based were succinctly described by the Court in an order dated August 23, 2018 (MDL 2804, Doc. 899):

Moreover, the United States Supreme Court has consistently held that the federal courts are “courts of limited jurisdiction. They possess only that power authorized by Constitution and statute.” *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 552 (2005) (quoting *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U. S. 375, 377 (1994)). Courts are obliged to strictly construe removal jurisdiction against removal and all doubts should be resolved in favor of remand. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941); *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 493 (6th Cir. 1999). The party seeking removal bears the burden of demonstrating that removal is proper. *Coyne*, 183 F.3d at 495.

While the *State of Montana* order from which this quotation was borrowed involved an issue of federal question jurisdiction, the parameters within which federal courts may assume subject matter jurisdiction over a proceeding are accurately described by this order.

This Honorable Court previously faced the identical legal question in the Gadolinium MDL, as explained in *Geffen v. General Elec. Co.*, 575 F. Supp. 2d 865 (N.D. Ohio 2008). In that proceeding, as in the case at bar, a mass tort lawsuit was removed to federal court by one of several defendants on the basis of diversity of citizenship. There, as here, the plaintiff had joined citizens of the Plaintiffs state of residence. The removing defendant relied upon a novel “misjoinder” argument that would have the court ignore the presence of the citizen defendants by using severance to create diversity. Your Honor declined to adopt this reasoning, stating:

Instead, the better course of action is for the state court to rule on the propriety of joinder under the state’s joinder law in the first instance. The state court is also then in a position to potentially address a motion to sever the parties and claims for further proceedings. *See Osborn*, 341 F.Supp.2d at 1127 (“I thus conclude that the better rule would require [the removing defendant] 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.”). Here, the California state court is in the best position to determine if the Geffens appropriately joined the Medical Defendants under California's liberal joinder laws, and, if not, whether the proper remedy is to sever \*872 the parties and claims into two different cases.

*Id.* at 871-72 (footnotes omitted). The same outcome is appropriate in the case under consideration. Thus, as urged in their motion to remand, Plaintiffs continue to proclaim that their lawsuit should be remanded to California state court for further action. In the interim, respectfully, this Honorable Court is without

1 jurisdiction or authority to order Plaintiffs to complete and file the fact sheet or to otherwise participate  
2 in MDL 2804.

3 **LACK OF JURISDICTION AND, THEREFORE, DUE PROCESS**

4 Plaintiffs have been thwarted from prosecuting its claims because it was involuntarily and  
5 wrongfully removed to federal court without the removing parties presenting even a scintilla of proof of  
6 diversity jurisdiction. The diversity statute - 28 U.S.C. § 1332 - requires “complete diversity,” meaning  
7 that “all persons on one side of the controversy be citizens of different states than all persons on the other  
8 side.” *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 89 (2005). “A case falls within the federal district court’s  
9 ‘original’ diversity ‘jurisdiction’ only if diversity of citizenship among the parties is complete, i.e., only  
10 if there is no plaintiff and no defendant who are citizens of the same state.” *Wis. Dep’t of Corrections v.*  
11 *Schacht*, 524 U.S. 381, 388 (1998).

12 The removing defendants failed to produce evidence to satisfy the above requirements in the case  
13 at bar. McKesson headquarters is located in California. The Judicial Panel on Multi-District Litigation  
14 has determined that the opioid litigation will “implicate common fact questions as to the allegedly  
15 improper marketing and widespread diversion of prescription opiates into states, counties and cities  
16 across the nation” and that actions involve common factual questions about, inter alia, the manufacturing  
17 and distributor defendants’ knowledge of and conduct regarding the alleged diversion of these  
18 prescription opiates....” (MDL 2804, Doc. 328). Hence, the joinder of manufacturers and distributors is  
19 appropriate.

20 “The burden of proving all jurisdictional facts is on the party asserting jurisdiction.” *McNutt v.*  
21 *Gen. Motors Acceptance Corp. of Ind., Inc.*, 298 U.S. 178, 189 (1936)). The removing party bears the  
22 burden of establishing federal jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377  
23 (1994). “It is to be presumed that a cause lies outside [of federal courts’] limited jurisdiction, and the  
24 burden of establishing the contrary rests upon the party asserting jurisdiction.” *Id.*

25 Federal Rule 12(h)(3) states that, “[i]f the court determines at any time that it lacks subject-matter  
26 jurisdiction, the court must dismiss the action.” *Fed. R. Civ. P.* 12(h)(3). Thus, a court “generally may  
27 not rule on the merits of a case without first determining that it has jurisdiction over the category of claim  
28

1 in the suit.” *Sinochem Int’l Co. Ltd. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 430-31 (2007). All  
2 courts have an “independent obligation to determine whether subject-matter jurisdiction exists, even in  
3 the absence of a challenge from any party.” *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006).

4 A federal court has continuing authority to determine whether it has jurisdiction to hear a  
5 particular case. *United States v. Ruiz*, 536 U.S. 622, 628 (2002); *United States v. Mine Workers of Am.*,  
6 330 U.S. 258, 291 (1947). The objection that a federal court lacks subject-matter jurisdiction may be  
7 raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the  
8 entry of judgment.” “*Arbaugh*, 546 U.S. at 506; *see also Kontrick v. Ryan*, 540 U.S. 443, 455 (2004)  
9 (“Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the  
10 subject matter, the court shall dismiss the action.”); *Peninsula Asset Mgmt. (Cayman) Ltd. v. Hankook*  
11 *Tire Co.*, 509 F.3d 271, 272 (6th Cir. 2007).

12 At the time the removal petition was filed by the defendants, these defendants knew that at least  
13 one of the defendants, McKesson, was a citizen of California and that there is no legitimate basis for  
14 federal jurisdiction. Nevertheless, defendants asserted that McKesson was fraudulently joined in the  
15 action. The “fraudulently misjoinder” claim is belied by the hundreds of cases, many now pending in  
16 this Court, that name McKesson as a defendant. This court's ruling in the Gadolinium litigation  
17 concluded:

18 Conducting fraudulent misjoinder analysis in this case necessarily requires the Court  
19 to wade into a thorny thicket of unsettled law; disagreements exist as to numerous  
20 questions about the doctrine, and “the last thing the federal courts need is more  
21 procedural complexity.” *Osborn*, 341 F.Supp.2d at 1127. Whether to apply the  
22 doctrine in the first place, whether the doctrine requires egregious misjoinder or  
23 some other level of bad faith before it can be invoked, whether to apply state or  
24 federal joinder law, and whether a federal court should be deciding issues of state  
25 joinder law in the first instance are among the unresolved inquiries the Court declines  
26 to decide here.

23 *Geffen v. General Elec. Co.*, 575 F. Supp. 2d at 871. Nonetheless, the removing parties presented no  
24 evidence of misjoinder under the California Code of Civil Procedure, no evidence of egregious conduct  
25 by the Plaintiffs, and no evidence the joinder was calculated solely to defeat jurisdiction.

26 ///

27 ///

**CONCLUSION**

For all of the foregoing reasons, Plaintiffs request that their objection be sustained.

**DATED:** September 14, 2018

**PARISH GUY CASTILLO, PC**

By           /s/William H. Parish            
**WILLIAM H. PARISH**  
Attorneys for Plaintiffs

**DATED:** September 14, 2018

**LAW OFFICES OF FRANCIS O. SCARPULLA**

By           /s/Francis O. Scarpulla            
**FRANCIS O. SCARPULLA**  
**PATRICK B. CLAYTON**  
Attorneys for Plaintiffs

1 **Additional Counsel:**

2 **J. Mark Myles**

3 [jmyles@sjgov.org](mailto:jmyles@sjgov.org)

4 County Counsel

5 San Joaquin County

6 44 North San Joaquin Street

7 Sixth Floor, Suite 679

8 Stockton, CA 95202

9 Telephone: (209) 468-2980

10 Facsimile: (209) 468-0315

11 *Counsel for San Joaquin County*

12 **John M. Luebberke**

13 [John.luebberke@stocktonca.gov](mailto:John.luebberke@stocktonca.gov)

14 City Attorney

15 City of Stockton

16 425 North El Dorado Street, Second Floor

17 Stockton, CA 95202

18 Telephone: (209) 937-8333

19 Facsimile: (209) 937-8898

20 *Counsel for City of Stockton*