EXHIBIT 1

NOT FOR PUBLICATION

FILED

DEC 29 2021

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CURTIS ULLESEIT; LISA WEHLMANN, Plaintiffs-Appellees, v. BAYER HEALTHCARE PHARMACEUTICALS INC.; et al., Defendants-Appellants, and BAYER PHARMA AG, FKA Bayer Schering Pharma AG; et al., Defendants.	No. 19-15778 D.C. No. 3:17-cv-07026-JD MEMORANDUM*

BETH WINKLER, Plaintiff-Appellee, v. BAYER HEALTHCARE PHARMACEUTICALS INC.; et al., Defendants-Appellants,	No. 19-15782 D.C. No. 3:18-cv-03077-JD

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

and

MCKESSON CORPORATION;
MCKESSON MEDICAL-SURGICAL INC.,

Defendants.

On Remand From the United States Supreme Court

Argued and Submitted December 8, 2021
San Francisco, California

Before: WATFORD, FRIEDLAND, and MILLER, Circuit Judges.
Dissent by Judge MILLER

Bayer HealthCare Pharmaceuticals Inc., Bayer Corporation, and Bayer Healthcare LLC (collectively, Bayer) appeal from the district court's order remanding five cases to California state court. We previously affirmed the district court's holding that Bayer did not meet the requirements for federal officer removal. *Ulleseit v. Bayer HealthCare Pharms. Inc.*, 826 F. App'x 627, 629 (9th Cir. 2020). Following then-controlling circuit precedent, we declined to review Bayer's other asserted ground for removal. *Id.* at 628. The Supreme Court subsequently overturned our prior precedent, holding in a different case that a court of appeals has jurisdiction to review any asserted basis for federal jurisdiction when a defendant properly appeals under 28 U.S.C. § 1447(d) from a remand order. *BP p.l.c. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021). The Court granted Bayer's petition for certiorari, vacated our judgment, and

remanded for further proceedings. *Bayer HealthCare Pharms. Inc. v. Ulleseit*, 142 S. Ct. 57 (2021). We now address Bayer's remaining ground for removal—namely, that diversity jurisdiction exists because the only non-diverse defendants (the distributors of the drug at issue) were fraudulently joined.

1. The district court correctly held that Bayer has not carried its "heavy burden" of showing that plaintiffs' state law claims against the distributor defendants are obviously foreclosed by federal preemption principles. *GranCare, LLC v. Thrower ex rel. Mills*, 889 F.3d 543, 548 (9th Cir. 2018). Our decision in *Hunter v. Philip Morris USA*, 582 F.3d 1039 (9th Cir. 2009), does not categorically bar a defendant from relying on preemption to establish that claims against a non-diverse defendant are wholly insubstantial.[1] But fraudulent joinder can be found only when a summary review of the complaint reveals that the plaintiff has no possibility of prevailing on any claim against the non-diverse defendant. *Id.* at 1046; *GranCare*, 889 F.3d at 548–49.

[1] *Hunter* stands for the proposition that, in the "unique situation" when the preemption analysis is identical as to both the non-diverse and diverse defendants, a court may not decide that the non-diverse defendants were fraudulently joined on the basis of preemption, because such a determination would "effectively decide[] the entire case." *Id.* at 1044–45 (quotation marks omitted). In this case, the preemption analysis differs as to the diverse and non-diverse defendants, so *Hunter* does not preclude the possibility that, if the claims against the distributors were obviously preempted, the distributors would have been fraudulently joined.

Bayer contends that this standard is met, citing *PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011), as principal support for its preemption argument. That case involved failure-to-warn claims against the manufacturers of generic drugs, not drug distributors. Although there are strong arguments for extending the reasoning of *Mensing* to claims against drug distributors, doing so would require additional analytical work.

In holding that claims against generic drug manufacturers were preempted, the Court in *Mensing* relied in part on a federal regulation stating that only brand-name drug manufacturers are permitted to alter their drugs' approved labeling. *See id.* at 614 (citing 21 C.F.R. § 314.70(c)(6)(iii)). But that regulation did not give rise to the federal law duty that the Court concluded generic drug manufacturers would be forced to violate if they attempted to comply with state law. In concluding that the generic drug manufacturers *would* necessarily violate federal law, the Court pointed to regulations requiring them to keep their labels "the same" as the labels of the corresponding brand-name drug. *See id.* at 613–14 (citing 21 C.F.R. § 314.94(a)(8)(iv)). Bayer has not identified any equivalent regulation governing drug distributors, and it is likely that an analysis of federal law prohibitions on "misbranding" would be necessary to establish that plaintiffs' state law failure-to-warn claims are subject to impossibility preemption. *See* 21 U.S.C. §§ 331(a), 352. The need for that additional layer of analysis exceeds what is

permissible in this procedural posture. *See Hunter*, 582 F.3d at 1044 ("[T]he inability to make the requisite decision in a summary manner itself points to an inability of the removing party to carry its burden.") (quotation marks omitted).

2. The district court correctly rejected Bayer's second argument for finding fraudulent joinder. Our case law provides just two ways to establish fraudulent joinder: (1) actual fraud in the pleading of jurisdictional facts, or (2) the inability of the plaintiff to establish a cause of action against the non-diverse party. *GranCare*, 889 F.3d at 548; *Hunter*, 582 F.3d at 1044. Bayer asks us to consider a third possibility. It contends that objective evidence shows that plaintiffs do not intend to pursue a judgment against the distributor defendants. Bayer has not identified any case in this circuit permitting a finding of fraudulent joinder on that basis, and the limited authority we do have suggests that Bayer's asserted third basis for finding fraudulent joinder is not valid. *See Smith v. S. Pac. Co.*, 187 F.2d 397, 400 (9th Cir. 1951) (noting that, if the complaint's allegations establish a potentially meritorious claim, the plaintiff's "motive in joining the individual defendant is not fraudulent even if the sole reason for joinder is to prevent removal").

AFFIRMED.

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U.S. COURT OF APPEALS

Ulleseit v. Bayer Corp., No. 19-15778+

MILLER, Circuit Judge, dissenting:

Bayer is entitled to remove this case to federal court because complete diversity exists among all parties who have been properly joined. Although Bayer's co-defendant, McKesson, is not diverse from the plaintiffs, "courts may disregard the citizenship of a non-diverse defendant who has been fraudulently joined," and McKesson was fraudulently joined because it "'cannot be liable on any theory.'" *GranCare, LLC v. Thrower ex rel. Mills*, 889 F.3d 543, 548 (9th Cir. 2018) (quoting *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998)).

Plaintiffs allege that they were injured by using a drug that was manufactured by Bayer and distributed by McKesson. They claim, in particular, that Bayer and McKesson failed to warn them of the drug's dangers. But any warning that either Bayer or McKesson might have provided would have been part of what federal law considers to be the drug's "labeling." 21 C.F.R. § 202.1(*l*)(2) (defining "labeling" to include any "printed, audio, or visual matter descriptive of a drug . . . supplied by the manufacturer, packer, or distributor of the drug"). FDA regulations make clear that only the drug's manufacturer—the "applicant" for FDA approval—may change the labeling. *See id.* § 314.70 (permitting post-approval changes to a drug's labeling only by the drug's "applicant"); *id.* § 314.3 (defining "applicant"); *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 614–15 (2011). McKesson is

not the drug's applicant—Bayer is. Because federal law prohibits distributors like McKesson from changing the drug's labeling, a state tort law that imposes a duty on McKesson to modify the labeling is preempted. *See PLIVA*, 564 U.S. at 618 (holding that failure-to-warn claims against generic drug manufacturers are preempted because generic drug manufacturers, unlike brand-name manufacturers, cannot alter a drug's labeling). It follows that McKesson "cannot be liable" to plaintiffs. *GranCare*, 889 F.3d at 548 (quoting *Ritchey*, 139 F.3d at 1318).

To be sure, fraudulent joinder is a demanding standard, one that we have described as "similar to the 'wholly insubstantial and frivolous' standard for dismissing claims under Rule 12(b)(1) for lack of federal question jurisdiction." *GranCare*, 889 F.3d at 549 (quoting *Bell v. Hood*, 327 U.S. 678, 682–83 (1946)). If plaintiffs had articulated any colorable theory of McKesson's liability, that would have been enough to defeat Bayer's claim of fraudulent joinder. But confronted with an argument that their claims against McKesson are preempted, plaintiffs have responded with . . . nothing. They have not suggested that their claims against McKesson rest on anything other than McKesson's failure to change the drug's labeling. They have not argued that federal law would have allowed McKesson to change the drug's labeling. And when asked at oral argument what McKesson could have done to avoid liability without violating federal law, plaintiffs' only answer was that it should simply have stopped distributing the

drug—a theory that is squarely foreclosed by Supreme Court precedent. *Mutual Pharm. Co. v. Bartlett,* 570 U.S. 472, 488–90 (2013).

Whatever analytical work may be necessary to conclude that plaintiffs' claims are preempted, it is not work that anyone should find unduly taxing. Because plaintiffs can offer no explanation of how their claims against McKesson might avoid preemption, I would reverse the district court's remand order and allow this case to proceed in federal court.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- A response, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or response must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 10. Bill of Costs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form10instructions.pdf

9th Cir. Case Number(s)

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The Clerk is requested to award costs to *(party name(s))*:

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EXHIBIT 2

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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U.S. COURT OF APPEALS

CURTIS ULLESEIT; LISA WEHLMANN, Plaintiffs-Appellees, v. BAYER HEALTHCARE PHARMACEUTICALS INC.; et al., Defendants-Appellants, and BAYER PHARMA AG, FKA Bayer Schering Pharma AG; et al., Defendants.	No. 19-15778 D.C. No. 3:17-cv-07026-JD Northern District of California, San Francisco ORDER

BETH WINKLER, Plaintiff-Appellee, v. BAYER HEALTHCARE PHARMACEUTICALS INC.; et al., Defendants-Appellants, and MCKESSON CORPORATION; MCKESSON MEDICAL-SURGICAL INC.,	No. 19-15782 D.C. No. 3:18-cv-03077-JD

Defendants.

Before: WATFORD, FRIEDLAND, and MILLER, Circuit Judges.

Judge Watford and Judge Friedland vote to deny the petition for panel rehearing; Judge Miller votes to grant the petition for panel rehearing. The panel unanimously votes to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and rehearing en banc, filed February 2, 2022, is DENIED.

EXHIBIT 3

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KATHLEEN GEISSE, et al., Plaintiffs, v. BAYER HEALTHCARE PHARMACEUTICALS INC., et al., Defendants.	Case No. 17-cv-07026-JD **ORDER RE MOTIONS TO REMAND** Re: Dkt. Nos. 38 (17-7026); 24 (18-811); 19 (18-3077); 15 (18-4568); 23 (18-6015)
PATRICIA YOUNG, Plaintiff, v. BAYER HEALTHCARE PHARMACEUTICALS INC., et al., Defendants.	Case No. 18-cv-00811-JD
BETH WINKLER, Plaintiff, v. BAYER HEALTHCARE PHARMACEUTICALS INC., et al., Defendants.	Case No.18-cv-03077-JD
JANE DOE, Plaintiff, v. BAYER HEALTHCARE PHARMACEUTICALS INC., et al., Defendants.	Case No. 18-cv-04568-JD

LINDA MANSOLILLO, Plaintiff, v. BAYER HEALTHCARE PHARMACEUTICALS INC., et al., Defendants.	Case No. 18-cv-06015-JD

Plaintiffs originally filed these related product liability cases in California Superior Court after exposure to Magnevist, a medical contrast agent used to enhance MRI images. Defendant Bayer Healthcare Pharmaceuticals Inc. ("Bayer") manufactures Magnevist and removed the cases to this Court on alleged diversity and "federal officer" grounds. Dkt. No. 1. Plaintiffs seek a remand to state court. Dkt. Nos. 38 (17-7026); 24 (18-811); 19 (18-3077); 15 (18-4568); 23 (18-6015). The parties stipulated to submit the remand question for all of the related cases on the arguments in *Doe v. Bayer HealthCare Pharmaceuticals Inc*., Case No. 18-cv-4568-JD. *See* Dkt. Nos. 59-61 in 17-7026.[1] The Court concludes that these cases were removed improvidently and without jurisdiction, and remands them to the California Superior Court pursuant to 28 U.S.C. Section 1447(c).

BACKGROUND

As alleged in the complaints, Magnevist is formulated with gadolinium, a toxic heavy metal that is not normally present in the human body. Magnevist is marketed as a contrast agent that is injected intravenously to enhance and improve the quality of MRI images. Plaintiffs allege that they developed gadolinium deposition disease ("GDD") from being injected with Magnevist. GDD is said to cause tremors and mental confusion, damage to kidneys, muscles and bone, and other serious health problems. It typically occurs in individuals who had normal kidney functions before injection, in contrast with another gadolinium-linked disease called Nephrogenic Systemic Fibrosis, which occurs mainly in patients who had pre-existing renal failure. The complaints

[1] All record citations are to *Doe*, Case No. 18-4568, unless stated otherwise. Plaintiff Doe filed under a pseudonym, although a request to proceed pseudonymously has not been filed or approved by the Court.

allege claims for strict product liability and negligence for defendants' failure to warn patients and healthcare professionals about the risks of GDD and other complications caused by Magnevist. *See generally* Dkt. No. 1-1.

Bayer and its affiliates manufactured, marketed and sold Magnevist throughout the United States and in California. Defendant McKesson Corporation ("McKesson") and its affiliates distributed Magnevist in California. Plaintiffs are California residents, and allege that they were injected with Magnevist made by Bayer and distributed by McKesson to them in California.

Plaintiffs sued in California Superior Court under California products liability law. They alleged, with no opposition here, that McKesson and another defendant distributor, Merry X-Ray Chemical Corp., are incorporated or have a principal place of business in California. Bayer is an out-of-state entity, and removed the cases to federal court on diversity grounds. Bayer contends that complete diversity is present because McKesson was fraudulently joined and should be disregarded for removal purposes.[2] Bayer also says that removal was proper under 28 U.S.C. Section 1442(a), which permits removal of cases involving the United States and its agencies and officers, and those acting under the control of federal officials.

DISCUSSION

As in all federal cases, the foundational principle here is that the jurisdiction of the federal courts is limited to what is authorized by the Constitution and statute. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Accordingly, removal is appropriate only when a case presents a federal question or involves diversity of citizenship and meets the statutory amount in controversy. 28 U.S.C. §§ 1331, 1332. There is a strong presumption against removal, and the removal statute is strictly construed against finding federal jurisdiction. *Gaus v. Miles*, 980 F.2d. 564, 566 (9th Cir. 1992). Any doubts about the propriety of removal should be resolved in favor of a remand to state court. *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir. 2003). Principles of federalism, comity, and respect for the state courts also counsel strongly

[2] This order uses McKesson as a proxy for Merry X-Ray in light of the parties' stipulation that the briefing in *Doe*, which refers only to McKesson, will resolve all the remand disputes. The two distributors are similarly situated factually.

in favor of scrupulously confining removal jurisdiction to the precise limits that Congress has defined. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 109 (1941). The defendant always bears the burden of demonstrating that removal was proper. *Gaus*, 980 F.2d at 566.

As a starting position, Bayer contends that removal was appropriate on the basis of diversity under Section 1332. Diversity removal requires complete diversity, which means that each plaintiff must have a different citizenship from each defendant. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996). Since the complaints show on their face that plaintiffs and McKesson are non-diverse, Bayer can remove under Section 1332 only if it establishes that McKesson was fraudulently joined. *Grancare, LLC, v. Thrower by and Through Mills*, 889 F.3d 543, 548 (9th Cir. 2018). If so, the presence of the non-diverse party can be disregarded and not counted against diversity. *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001).

"There are two ways to establish fraudulent joinder: '(1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court.'" *Grancare*, 889 F.3d at 548 (quoting *Hunter v. Philip Morris, USA*, 582 F.3d 1039, 1044 (9th Cir. 2009)). Consequently, short of proving that the plaintiff committed actual fraud in pleading jurisdictional facts, a defendant urging fraudulent joinder must show that the non-diverse party who was "'joined in the action cannot be liable on any theory.'" *Id*. (quoting *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998)). Our circuit has emphasized that this inquiry is not the same as the Rule 12(b)(6) review for failure to state a plausible claim. *Id*. at 549. It has a lower bar and requires only that "there is a '*possibility* that a state court would find that the complaint states a cause of action against any of the [non-diverse] defendants.'" *Id*. (quoting *Hunter*, 582 F.3d at 1046) (emphasis added in *Grancare*). This means that the joinder of a non-diverse party will not necessarily be deemed fraudulent even if the claim could be dismissed. *Id*. In effect, the "possibility" standard is akin to the "wholly insubstantial and frivolous standard for dismissing claims under Rule 12(b)(1)." *Id*. at 549-50 (quotation omitted). If there is any possibility above the trivial or frivolous that the plaintiff can state a claim against the non-diverse defendant, "the federal court must find that the joinder was proper and remand the case to state court." *Hunter*, 582 F.3d at 1046 (quotation omitted).

There is a "'general presumption against [finding] fraudulent joinder,'" which adds to the usual presumption against removal in all cases under Section 1332 and imposes a particularly heavy burden on the defendant to prove. *Grancare*, 889 F.3d at 548 (quoting *Hunter*, 582 F.3d at 1046). The defendant has some leeway to present facts outside the complaint, but the complaint is usually the best guide in determining whether joinder was fraudulent, and in any event the defendant must prove fraudulent joinder by clear and convincing evidence. *Id*. at 549; *Hamilton Materials, Inc. v. Dow Chem. Corp.*, 494 F.3d 1203, 1206 (9th Cir. 2007).

Bayer has not established fraudulent joinder under either of the dispositive tests. It appears to make a single, rather tentative stab at plaintiff Doe under the first test by suggesting that she actually resides in New York and not California. Dkt. No. 18 at 3-4. In response, Doe represented that she does, in fact, reside in California, and indicated that Bayer appeared to be relying on outdated Internet information. Dkt. No. 19 at 4. Bayer has not proffered clear and convincing evidence of actual jurisdictional fraud on Doe's part, or that she is not a citizen of California. To the extent there are any doubts about removal under this prong, they are of course construed in favor of a remand.

With respect to the second test, Bayer does not meaningfully dispute that plaintiffs' claims against McKesson have at least a non-frivolous possibility of stating a cause of action in California state court. Plaintiffs allege that McKesson has its main office in San Francisco, California, and distributed and sold Magnevist generally throughout California, and specifically to plaintiffs. *See, e.g.*, Dkt. No. 1-1 ¶¶ 11-18, 36. Plaintiffs further allege that McKesson's failure to warn about the risks associated with Magnevist was the legal cause of their injuries. *See, e.g.*, *id.* ¶¶ 39-46, 73. California law does not, by any means, rule out plaintiffs' strict liability and negligence claims against McKesson as a participant in the chain of distribution of the allegedly defective Magnevist product. *See, e.g., Bostick v. Flex Equip. Co.*, 147 Cal. App. 4th 80, 88 (2007). The vast majority of other district courts that have considered this question have reached the same conclusion. *See Dodich v. Pfizer Inc.*, 18-cv-02764-WHA, 2018 WL 3584484, at *1 (July 26, 2018 N.D. Cal. 2018) (collecting cases); *Hatherley v. Pfizer, Inc.*, 2:13-00719 WBS, 2013 WL 3354458, at *2 (July 3, 2013 E.D. Cal.) (same). The sound reasoning of these many

courts in finding that a products liability claim in similar circumstances is, at a minimum, a possibility in California state court makes short work of Bayer's suggestion to the contrary.

Bayer's mention of potential preemption, Dkt. No. 18 at 7, does not discount this conclusion in any way. Bayer does little more than flag preemption as a concept, and does not provide a meaningful discussion about how it might be germane to the removal question under governing law. It has an even bigger problem in that preemption goes to the merits of the plaintiff's case and entails a degree of analysis that does not render a state law claim obviously barred or frivolous for fraudulent joinder purposes. *See Hunter*, 582 F.3d at 1045. Bayer does not identify a California case saying preemption would be obvious here, and the lone Supreme Court case it cites involved generic drug manufacturers and has not been extended in binding precedent to distributors like McKesson. *See PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011). At best, Bayer merely says that preemption might be found, which necessarily admits that it might not be found, and so does not foreclose the possibility that plaintiffs have a viable claim in state court.

Bayer devotes considerably more effort to attacking plaintiffs' supposed motivation for joining McKesson as a defendant. *See, e.g.*, Dkt. No. 18 at 8-10. Bayer points to other cases where it says McKesson was named as a defendant and subsequently dismissed or not seriously pursued for settlement or judgment. In Bayer's view, this indicates that plaintiffs sued it here solely with the intent of defeating removal, and so its presence should be ignored.

The argument is not well taken. A plaintiff's motives for joining a defendant play no role in the fraudulent joinder tests established by *Grancare* and *Hunter*, and Bayer has not shown otherwise. Its focus on motive is all the more doubtful because the Supreme Court has long held that a plaintiff has "an absolute right" to sue any and all joint tortfeasors it chooses, regardless of motive, and a charge of fraudulent joinder in that context "would be bad on its face." *Illinois Cent. R.R. Co. of Ill. v. Sheegog*, 215 U.S. 308, 316 (1909); *see also Chicago, Rock Island & Pacific Railway Co. v. Schwyhart*, 227 U.S. 184, 193-94 (1913) (motive of plaintiff irrelevant for removal purposes); *Albi v. Street & Smith Publications, Inc.*, 140 F.2d 310, 312 (9th Cir. 1944) (same). Even if an inquiry into a plaintiff's subjective intent were appropriate, which is not the case, Bayer has not proffered clear and convincing evidence of bad intent, whatever that might be.

Plaintiffs have adduced facts indicating McKesson was actively litigated against in some of the other cases, and that some of the dismissals mentioned by Bayer happened because discovery showed that McKesson had not distributed the Magnevist used by the plaintiffs in those cases. *See* Dkt. No. 15-2 ¶¶ 3, 5; Dkt. No. 19 at 5.

That resolves Bayer's arguments for removal on the basis of fraudulent joinder and diversity. Bayer's next argument is under 28 U.S.C. Section 1442(a), which permits the removal of a state-court action against an officer, or a person acting under an officer, of the United States for an act under color of office. Bayer contends that plaintiffs' failure-to-warn claims arise out of conduct Bayer took under the direction of the FDA, and so removal under Section 1442(a) was proper. Dkt. No. 18 at 12-14.

This argument, too, is not well taken. As the plain language of Section 1442(a) indicates, it is intended to protect federal officers from interference with their official duties through state-court litigation. *Arizona v. Manypenny*, 451 U.S. 232, 241-42 (1981). The statute "responds to three general concerns: (1) 'State-court proceedings may reflect 'local prejudice' against unpopular federal laws or federal officials'; (2) 'States hostile to the Federal Government may impede' federal law; and (3) 'States may deprive federal officials of a federal forum in which to assert federal immunity defenses.'" *Fidelitad, Inc. v. Insitu, Inc.*, 904 F.3d 1095, 1099 (9th Cir. 2018) (quoting *Watson v. Philip Morris Cos.*, 551 U.S. 142, 150 (2007)). Section 1442 is liberally construed to address these issues, but is not limitless in scope. *Id*. (citing *Watson*, 551 U.S. at 147).

To remove under the section, Bayer must show "that (a) it is a 'person' within the meaning of the statute; (b) there is a causal nexus between its actions, taken pursuant to a federal officer's directions, and plaintiff's claims; and (c) it can assert a 'colorable federal defense.'" *Goncalves By & Through Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1244 (9th Cir. 2017) (citation omitted).

Bayer has not shown that any of this might justify removal here. Bayer, a global public pharmaceuticals company, is decidedly not an agency or officer of the United States. The linchpin of its removal theory under Section 1442(a) is that it was acting pursuant to the directions of a

federal officer in undertaking the actions that are the subject of this lawsuit. Dkt. No. 18 at 12-14. For a private entity to be "acting under" a federal officer, the private entity must be involved in "an effort to assist, or to help carry out, the duties or tasks of the federal superior." *Watson*, 551 U.S. at 152) (emphasis omitted). "The paradigm is a private person acting under the direction of a federal law enforcement officer." *Fidelitad*, 904 F.3d at 1099; *see also Watson*, 551 U.S. at 151 ("That relationship typically involves 'subjection, guidance, or control.'") (quotation omitted).

No federal officer directed Bayer not to warn patients or healthcare professionals about the potential risks of Magnevist and link to GDD. Bayer says its disclosures were made in accordance with FDA laws and regulations, Dkt. No. 18 at 13-14, but "'simply complying with the law' does not bring a private actor within the scope of the federal officer removal statute." *Fidelitad*, 904 F.3d at 1100 (quoting *Watson*, 551 U.S. at 152 (emphasis omitted)). Bayer's heavy reliance on *Leite v. Crane Co.*, 749 F.3d 1117 (9th Cir. 2014), does not lead to a different result. In *Leite*, a military contractor was permitted to remove a state-court case alleging a failure to warn about asbestos hazards in naval equipment because senior officers in the United States Navy filed declarations stating that the Navy exercised complete control over the form and content of all warnings made by contractors, and that contractors could not include warnings unless specifically required and approved by the Navy. *Id*. at 1123. Bayer has not proffered any similar evidence here for its alleged failure to warn about Magnevist. The fact that Bayer and other pharmaceutical companies might be highly regulated also does not, it itself, constitute a basis for removal under Section 1442(a). *Watson*, 551 U.S. at 153; *Fidelitad*, 904 F.3d at 1100. To hold otherwise on any of these points, or to read Section 1442(a) as broadly as Bayer urges, would allow removal to federal court in circumstances far beyond anything Congress intended. *See Lu Junhong v. Boeing Co.*, 792 F.3d 805, 808-09 (7th Cir. 2015).

So too for the fact that Bayer participated in certain FDA advisory committees. Its participation was entirely free and voluntary, *see, e.g.*, Dkt. No. 1 ¶¶ 56-63, and hardly to product of direction or compulsion by the FDA.

This is enough to end the Section 1442(a) analysis, but for the sake of completion, Bayer also has not shown a colorable federal defense of any import to removal. It claims to have

"numerous" such defenses but does nothing more than name-drop them with no discussion of whether and how they might apply here. *See* Dkt. No. 18 at 14-15.

CONCLUSION

The cases were removed improvidently and without jurisdiction. They are remanded to the California Superior Court for the City and County of San Francisco pursuant to 28 U.S.C. Section 1447(c).

IT IS SO ORDERED.

Dated: March 18, 2019

JAMES DONATO
United States District Judge

United States District Court
Northern District of California