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7 UNITED STATES DISTRICT COURT  
8 SOUTHERN DISTRICT OF CALIFORNIA

9 TRACEY KELLY, *et al.*,  
10 Plaintiff,  
11 v.  
12 AMYLIN PHARMACEUTICALS,  
13 LLC., *et al.*,  
14 Defendants.

) Case No.14cv1086 AJB (MDD)  
) Case No. 14cv1098 AJB (MDD)  
) Case No. 14cv1107 AJB (MDD)  
) ORDER GRANTING PLAINTIFFS'  
) MOTIONS TO REMAND

14 \_\_\_\_\_  
15 LOUIS JOHNSON, *et al.*,  
16 Plaintiff,  
17 v.  
18 MCKESSON CORP., *et al.*,  
19 Defendants.

) *Kelly*, 14cv1086 [Doc. No. 10]  
) *Johnson*, 14cv1098 [Doc. No. 5]  
) *Kries*, 14cv1107 [Doc. No. 7]

18 \_\_\_\_\_  
19 NICOLETTE KREIS, *et al.*,  
20 Plaintiff,  
21 v.  
22 MCKESSON CORP., *et al.*,  
23 Defendants.

24 This matter comes before the Court on Plaintiffs' motions to remand in three  
25 separate but substantially similar cases: (1) *Kelly v. Amylin Pharmaceuticals, LLC* (case  
26 no. 14cv1086); (2) *Johnson v. McKesson Corp.*, (case no. 14cv1098); (3) *Kries v.*  
27 *McKesson Corp.*, (case no. 14cv1107). For purposes of these motions, as the Complaints  
28 allege identical claims against substantially all the same Defendants and the motions and

1 briefs filed in support and opposition raise identical arguments, the Court considers all  
2 three together and issues this Order for all three motions.

3 **I. BACKGROUND**

4 The instant actions involves multiple Plaintiffs bringing personal injury claims  
5 against multiple Defendants including, Amylin Pharmaceuticals (“Amylin”), Eli Lilly  
6 and Company (“Eli Lilly”), Merck, Novo Nordisk Inc. Boehringer Ingelheim  
7 Pharmaceuticals, Inc. (“Boehringer”) (collectively the “Manufacturing Defendants”), and  
8 McKesson Corporation (“McKesson” or the “Distributing Defendant.”) Plaintiffs claim  
9 the ingestion of incretin-based drugs, manufactured by the Manufacturing Defendants  
10 and distributed by McKesson, caused injuries including pancreatic cancer and/or thyroid  
11 cancer. (Compl., Doc. No. 1, Ex. A.)<sup>1</sup> Plaintiffs allege Defendants knew, or should have  
12 known, that the incretin-based drugs were of such a nature that it was not properly  
13 designed, manufactured, tested, inspected, packaged, labeled, distributed, marketed,  
14 examined, sold, supplied, prepared, and/or provided with proper warnings and was not  
15 suitable for the purpose it was intended and was unreasonable likely to injure the  
16 product’s users. (*Id.* at 34.)  
17

18 Plaintiffs initiated these three litigations in the Superior Court of California,  
19 County of San Diego.<sup>2</sup> Each Complaint includes around thirty (30) Plaintiffs with  
20 citizenship from over a dozen states. However, for purposes of these remand motions,  
21 the states of citizenship at issue are California and New Jersey. Each Complaint includes  
22 California and New Jersey Plaintiffs and asserts causes of action against California  
23 Defendant, McKesson and New Jersey Defendant, Merck. Merck removed these actions  
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26 <sup>1</sup> For purposes of this Order, the Court will cite to the briefs filed in *Kelly*,  
14cv1086.

27 <sup>2</sup> Merck requests judicial notice of the Complaint filed in *Briggs, et al. v.*  
28 *McKesson Corp., et al.*, San Diego Superior Court Case No. 37-2104-000164847 (May  
27, 2014). Pursuant to the Federal Rule of Civil Procedure, Merck’s request is  
GRANTED.

1 to this Court asserting diversity jurisdiction exists over the claims of diverse Plaintiffs  
2 and the Court should sever non-diverse Plaintiffs as necessary. (Doc. No. 1.) Addition-  
3 ally, Merck premised the removal on the contention that California-based Defendant,  
4 McKesson was fraudulently joined and should not be considered for purposes of  
5 determining diversity jurisdiction. (*Id.* at 15.)  
6

7 The Court heard oral arguments on these matters on August 7, 2014. As stated  
8 above, the Court disposes of these three motions at once given the substantial similarities  
9 of the claims and arguments presented for and against remand.

## 10 **II. LEGAL STANDARDS**

### 11 **A. Removal**

12 The right to remove a case to federal court is entirely a creature of statute. *See*  
13 *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979). The removal  
14 statute, 28 U.S.C. § 1441, allows defendants to remove an action when a case originally  
15 filed in state court presents a federal question, or is between citizens of different states  
16 and involves an amount in controversy that exceeds \$75,000. *See* 28 U.S.C. §§ 1441(a)  
17 and (b); 28 U.S.C. §§ 1331, 1332(a).

18 “[J]urisdiction in a diversity case is determined at the time of removal,” *Am.*  
19 *Dental Indus., Inc. v. EAX Worldwide, Inc.*, 228 F. Supp. 2d 1155, 1157 (D. Or. 2002),  
20 and only state court actions that could originally have been filed in federal court can be  
21 removed, 28 U.S.C. § 1441(a); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987);  
22 *Ethridge v. Harbor House Rest.*, 861 F.2d 1389, 1393 (9th Cir. 1988); *see also St. Paul*  
23 *Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938) (“The inability of  
24 plaintiff to recover an amount adequate to give the court jurisdiction does not show his  
25 bad faith or oust the jurisdiction . . . Events occurring subsequent to the institution of suit  
26 which reduce the amount recoverable below the statutory limit do not oust jurisdiction”)

27 The Ninth Circuit “strictly construe[s] the removal statute against removal jurisdic-  
28 tion,” and “[f]ederal jurisdiction must be rejected if there is any doubt as to the right of

1 removal in the first instance.” *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992)  
2 (citing *Boggs v. Lewis*, 863 F.2d 662, 663 (9th Cir. 1988). “The ‘strong presumption’  
3 against removal jurisdiction means that the defendant always has the burden of establish-  
4 ing that removal is proper.” *Id.* (citing *Nishimoto v. Federman–Bachrach & Assocs.*, 903  
5 F.2d 709, 712 n.3 (9th Cir. 1990); *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1195  
6 (9th Cir. 1988)).

7 **B. Severance under Federal Rule of Civil Procedure 21**

8 Rule 21 states, in relevant part: “On motion or on its own, the court may at any  
9 time, on just terms, add or drop a party.” Rule 21 provides authority for courts “to allow  
10 a dispensable nondiverse party to be dropped at any time, even after judgment has been  
11 rendered . . . .” *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 573, 124  
12 S.Ct. 1920 (2004).

13 For a party to be dropped pursuant to Rule 21, the court must determine whether  
14 that party is dispensable under Federal Rule of Civil Procedure 19(b). *See e.g., Sams v.*  
15 *Beech Aircraft Corp.*, 625 F.2d 273, 276 n.6 (9th Cir. 1980) (noting the district court  
16 failed to consider whether a party was dispensable under Rule 19(b) so that she could  
17 be dropped pursuant to Rule 21); 7 Wright et al, *Federal Practice and Procedure*, § 1685  
18 (3d ed. 2001) (“Courts frequently employ Rule 21 to preserve diversity jurisdiction over  
19 a case by dropping a nondiverse party if the party's presence in the action is not required  
20 under Rule 19.”).

21 Rule 21 provides the court this flexibility because the alternative of dismiss-  
22 ing the action for lack of subject matter jurisdiction would result in the  
23 plaintiff simply refileing the action without the non-diverse party, which  
24 would waste the time and resources of all involved. Accordingly, Rule 21  
25 allows practicality to prevail over logic so that the court may dismiss a  
26 dispensable, non-diverse party in order to perfect retroactively the district  
27 court's original jurisdiction.  
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1 *Eggs 'N Things Intl.*, 2011 WL 676226, \*4 (D. Haw. Feb. 17, 2011)

2 Dismissal of a dispensable nondiverse party should be exercised sparingly after  
3 careful consideration of whether such a dismissal will prejudice any of the parties in the  
4 litigation. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 837-38, 109 S. Ct.  
5 2218 (1989).

### 6 **III. DISCUSSION**

#### 7 **A. Fraudulent Joinder**

##### 8 1. Applicable State Laws and Plaintiffs' Possibility of Recovery

9 “It is a commonplace that fraudulently joinder defendants will not defeat removal  
10 on diversity grounds.” *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir.  
11 1998). Generally, courts determine the existence of federal jurisdiction solely by an  
12 examination of the plaintiff’s case, without recourse to the defendant’s pleadings. *Self v.*  
13 *General Motors Corp.*, 588 F.2d 655, 657 (9th Cir. 1978). However, where fraudulent  
14 joinder is an issue, courts will “go somewhat further.” *Ritchey*, 139 F.3d at 1318.

15 Fraudulent joinder is a term of art. If the plaintiff fails to state a cause of action  
16 against a resident defendant, and the failure is obvious according to the settled rules of  
17 the state, the joinder of the resident is fraudulent. *McCabe v. General Foods Corp.*, 811  
18 F.2d 1336, 1339 (9th Cir. 1987). Courts may resolve fraudulent joinder claims by  
19 “piercing the pleadings” and considering summary judgment-type evidence. *Morris v.*  
20 *Princess Cruises*, 236 F.3d 1061, 1068 (9th Cir. 2001) (citing *Cavallini v. State Farm*  
21 *Mutual Auto Ins. Co.*, 44 F.3d 256, 263 (5th Cir. 1995)). To establish there is no  
22 fraudulent joinder, a plaintiff need only have one potentially valid claim against a non-  
23 diverse defendant. *Knutson v. Allis-Chalmers Corp.*, 358 F. Supp. 2d 983, 993-94 (D.  
24 Nev. 2005); *see also Sessions v. Chrysler Corp.*, 517 F.2d 759, 761 (9th Cir. 1975)  
25 (“Inasmuch as appellant’s case against the individual defendants was sufficient to  
26 withstand a motion under Fed. R. Civ. P. 12(b)(6), the joinder of claims against them was  
27  
28

1 not fraudulent as to warrant dismissal on that score.”). It is removing defendant’s burden  
2 to establish a failure to state a claim. *Id.*

3         The standard for proving fraudulent joinder is more exacting than that for dismiss-  
4 ing a claim for failure to state a claim. It must be shown that the plaintiff has no  
5 possibility of bringing a cause of action against a resident defendant, and therefore has  
6 no reasonable grounds to believe he has such an action. It is only with this showing that  
7 the court can conclude the resident defendant has been joined to evade federal jurisdic-  
8 tion. *See IDS Prop. Cas. Ins. Co. v. Gambrell*, 913 F. Supp. 2d 748, 752 (D. Ariz. 2012)  
9 (citing *Alibi v. Street Smith Publications*, 140 F. 2d 310, 312 (9th Cir. 1944); *see also*  
10 *Gottlieb v. Westin Hotel Co.*, 990 F. 3d 323, 327 (7th Cir. 1993) (finding fraudulent  
11 joinder appropriate only if there is no possibility that a claim can be stated).  
12

## 13         2.     Choice of Law

14         Merck contends that the only claims that are potentially viable against McKesson,  
15 for purposes of the fraudulent joinder inquiry, are the strict liability claims. (Doc. No. 17  
16 at 9.) Plaintiff does not dispute this. However, the Parties disagree as to the applicable  
17 state law. Plaintiffs argue that California’s strict liability law applies and Merck has  
18 failed to overcome this presumption. (Doc. No. 10 at 7-8.)

19         At issue here is the fact that a majority of states at issue in these actions do not  
20 recognize strict liability as to wholesale distributors where a distributor is neither aware,  
21 or negligently unaware, of the alleged defect. (Doc. No. 17 at 5.) However, under  
22 California’s strict liability regime, distributors are not excluded. These types of laws are  
23 designed to protect injured citizens and consumers in California. *Kasel v. Remington*  
24 *Arms Co.*, 101 Cal. Rptr. 314, 329 (Ct. App. 1972).

25         The Parties agree that the Court resolves this choice of law dispute by examining  
26 California’s “governmental interest analysis.” This analysis involves a three step  
27 inquiry. *Frontier Oil Corp. V. RLI Ins. Co.*, 154 Cal. App. 4th 1436, 1454-55 (internal  
28 citations omitted.) First, the court determines whether the applicable rules of law of the

1 potentially concerned jurisdictions are the same or different. Second, if the applicable  
2 rules of law are materially different, the court must then examine the interests of each  
3 jurisdiction in having its own law applied to the particular dispute. Finally, in the last  
4 step, otherwise known as the “comparative impairment analysis,” the court determines  
5 which jurisdiction has a greater interest in the application of its own law to the issue, or,  
6 conversely, which jurisdiction’s interest would be more significantly impaired if its laws  
7 were not applied. *Id.* (internal citations omitted).  
8

9 Under California law, the burden is on the proponent of the foreign law to show  
10 that the foreign jurisdiction’s interest in having its law apply is greater than California’s  
11 interest in the application of its laws. Plaintiffs argue Merck has failed to conduct -  
12 much less prove - a choice of law analysis. (Doc. No. 9 at 8.) The Court agrees that  
13 Merck’s choice of law analysis is a somewhat sparse, however this is not fatal. The  
14 parties do not dispute the first two steps of the choice of law analysis. Instead, the  
15 disagreement arises on the “comparative impairment analysis.” Merck contends that  
16 California “has a minimal, if any, countervailing interest in having its laws applied to the  
17 claims of these out-of-state plaintiffs who are not California citizens.” (Doc. No. 17 at  
18 7.) The Court is inclined to agree.

19 “In our federal system, states may permissibly differ on the extent to which they  
20 will tolerate a degree of lessened protection for consumers to create a more favorable  
21 business climate for the companies that the state seeks to attract to do business in the  
22 state.” *Mazza v. American Honda Motor Co., Inc.*, 666 F.3d 581, 592 (9th Cir. 2012).  
23 Indeed, the California Supreme Court notes that each state has an interest in setting the  
24 appropriate level of liability for companies conducting business within its territory.  
25 *McCann v. Foster Wheeler LLC*, 48 Cal. 4th 68, 91 (Cal. 2010). Further, California  
26 recognizes that “with respect to regulating or affecting conduct within its borders, the  
27 place of the wrong has the predominant interest.” *Hernandez v. Burger*, 102 Cal. App. 3d  
28 795, 802 (1980). The “place of the wrong” is the state where the last event necessary to

1 make the actor liable occurred. *McCann*, 48 Cal. 4th at 94 n.12. Moreover, California’s  
2 interest in applying its law to residents of foreign states is attenuated. *See Edgar v.*  
3 *MITE Corp.*, 457 U.S. 624, 644, 102 S. Ct. 2629 (1982).

4 Accordingly, based on all of these considerations, the Court finds that California’s  
5 interest in applying its laws to conduct that occurred outside its borders and to residents  
6 of foreign states is significantly outweighed by the interest of each of the individual  
7 foreign jurisdictions at issue in this case. As such, it is inappropriate for this Court to  
8 apply California law to each Plaintiff.

9  
10 However, even if the Court finds that some states would preclude those plaintiffs  
11 from bringing the specific claims as alleged against McKesson, this does not resolve the  
12 issue for those California Plaintiffs and Plaintiffs from the other states which the parties  
13 do not discuss. This is insufficient to show that no Plaintiffs in these cases have no  
14 possibility of relief from McKesson. Accordingly, Merck has not satisfied the “heavy  
15 burden” of demonstrating that McKesson cannot be liable on any theory presented by  
16 any of the Plaintiffs, and therefore has not established that McKesson was fraudulently  
17 joined.

18 Additionally, Merck contends that the Complaint failed to specifically allege that  
19 McKesson was the distributor of the actual units of drugs ingested by these individual  
20 Plaintiffs. (Doc. No. 17 at 9) This argument applies to the *Kelly* Complaint. However, a  
21 review of the *Kelly* Complaint shows that this allegation was made, albeit vaguely and  
22 hidden among other allegations. (*Kelly* Compl. at ¶ 1) “Plaintiffs . . . bring this action for  
23 personal injuries Plaintiffs suffered as a proximate result of being prescribed and  
24 ingesting the defective and unreasonably dangerous prescription Drugs . . . marketed,  
25 sold, and distributed by Defendant McKesson.” (*Id.*)

#### 26 4. Jurisdictional Discovery

27 Alternately, Merck requests additional time to conduct targeted discovery on  
28 whether McKesson was the distributor of the drugs actually ingested by the Decedents.

1 Given the findings of this Court, that Plaintiffs may be able to recover from McKesson in  
2 state court, there are insufficient grounds to allow discovery to be conducted in the  
3 absence of subject matter jurisdiction. Should McKesson later be dismissed from this  
4 action during the state court proceedings, Defendants will have the ability to remove this  
5 action within the statutory period. *See* 28 U.S.C. § 1446(c). That discovery would best  
6 be done in the state court. Accordingly, Merck’s request to allow discovery prior to  
7 remanding this action is DENIED.  
8

9 **B. Rule 21 Severance of McKesson**

10 For this case to remain before this Court pursuant to 28 U.S.C. § 1332(a), there  
11 must be complete diversity of citizenship between the parties opposed in interest. *Kuntz*  
12 *v. Lamar Corp.*, 385 F.3d 1177, 1181 (9th Cir. 2004). As the Court finds that Merck has  
13 failed to show fraudulent joinder as to McKesson, it must now decide how to proceed.

14 Merck argues that no matter how the Court resolves the issue of fraudulent  
15 joinder, the Court has the discretion to sever McKesson under Rule 21 as this Court has  
16 broad authority to exclude an unnecessary party from an action. (Doc. No. 17 at 17.)  
17 Plaintiffs dispute this and instead contend Rule 21 severance occurs “almost exclusively  
18 after a finding of fraudulent joinder.” However, Plaintiffs have not cited to any author-  
19 ity, and this Court has found none, that stands for the proposition that this Court is  
20 precluded from severing a party simply because the party has been deemed not fraudu-  
21 lently joined.<sup>3</sup> Accordingly, under the broad discretion afforded to the courts to drop  
22 parties pursuant to Rule 21, this Court may drop McKesson to preserve its jurisdiction if  
23 McKesson is found to be a dispensable party. *Sams v. Beech Aircraft Corp.*, 625 F.2d  
24 273, 277 (9th Cir. 1980) (“Rule 21 grants a federal district . . . court the discretionary  
25 power to perfects its diversity jurisdiction by dropping a nondiverse party provided the  
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27 <sup>3</sup> *See Elmore v. Merck & Co., Inc.* 2007 WL 956893, \*5 (D. Nev. March 29, 2007)  
28 (“Although this court finds that the joinder of all parties in this case was done properly,  
this court is also aware that it has the authority under . . . Rule 21, to add or drop parties  
to a suit ‘at any stage of the action an on such terms as are just.’”).

1 nondiverse party is indispensable to the action under Rule 19.”). Indeed, the Parties do  
2 not dispute this Court’s discretionary power under Rule 21.

3 To sever McKesson, the Court must first determine whether it is a dispensable  
4 party under Rule 19(b). A party is indispensable when, in equity and good conscience,  
5 the action should not be allowed to proceed without the presence of the party.  
6 *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1160,  
7 1155 (9th Cir. 2002). Whether a party is indispensable involves a practical, fact-specific  
8 inquiry designed to avoid the harsh results of rigid application. *Id.* at 1154.

9 To determine whether a party is indispensable under Rule 19(b), the court must  
10 consider: (1) to what extent a judgment rendered in the person's absence might be  
11 prejudicial to the person or those already parties; (2) the extent to which, by protective  
12 provisions in the judgment, by the shaping of relief, or other measures, the prejudice can  
13 be lessened or avoided; (3) whether a judgment rendered in the person's absence will be  
14 adequate; and (4) whether the plaintiff will have an adequate remedy if the action is  
15 dismissed for nonjoinder. Fed.R.Civ.P. 19(b).

16 The Complaints asserts thirteen (13) causes of action against Defendants, and  
17 seeks to hold Defendants jointly and severally liable for failing to warn on the alleged  
18 risk associated with ingesting incretin-based drugs.<sup>4</sup> (*See e.g., Kelly Compl.* at ¶ 73.)  
19 “[A] tortfeasor with the usual joint-several-liability is merely a permissible party to an  
20 action against another with like liability . . . . Joinder of these tortfeasors continues to be  
21 regulated by Rule 20.” Fed. R. Civ. P. 19(a) Advisory Comm. Notes (internal quotation  
22 marks and citation omitted.) “It has long been the rule that it is not necessary for all joint  
23 tortfeasors to be named as defendants in a single lawsuit.” *Temple v. Synthes Corp.*, 498  
24 U.S. 5, 7, 111 S. Ct. 315 (1990); *Union Paving Co. v. Downer Corp.*, 276 F.2d 468, 471  
25 (9th Cir. 1960) (“And it is well established that a joint tort-feasor is not an indispensable  
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28 <sup>4</sup> “As a direct and proximate result of the aforesaid conduct of Defendants and  
each of them as set forth hereinafter . . . .” (*See Complaint* ¶¶ 168-170.)

1 party.”); accord *Pujol v. Shearson/Am. Express, Inc.*, 877 F.2d 132 (1st Cir.1989)  
2 (“unlike a person vicariously liable in tort, a person potentially liable as a joint tortfeasor  
3 is not a necessary or indispensable party, but merely a permissive party subject to joinder  
4 under Rule 20.” (citations omitted)); *Behrens v. Donnelly*, 236 F.R.D. 509, 515 (D. Haw.  
5 2006) (“Joint tortfeasors, however, are not necessary and indispensable parties.”)

6  
7 Plaintiffs fail to make a showing of prejudice and inadequacy to them if McKesson  
8 is dismissed. Indeed, as Merck contends, “[t]here is no question that plaintiffs can obtain  
9 ‘complete relief’ by seeking money damages against one or more of the pharmaceutical  
10 manufacturers they have chosen to sue.” (Doc. No. 17 at 20.) If the remaining Defen-  
11 dants suffer an adverse judgment, they may file third-party complaints against McKesson  
12 to recover an appropriate share of damages awarded to Plaintiffs.<sup>5</sup> Finally, any prejudice  
13 to McKesson if they are dismissed from these actions is not fatal. McKesson would not  
14 suffer from the preclusive effects of collateral estoppel that may result from this action.  
15 For collateral estoppel purposes, McKesson and the remaining defendants would not be  
16 in privity with each other given California’s definition of privity as “refer[ing] to a  
17 mutual or successive relationship to the same rights or property, or to such an identifica-  
18 tion in interest of one person with another as to represent the same legal rights.”  
19 *Clemmer v. Hartford Ins. Co.*, 22 Cal. 3d 865, 875 (Cal. 1978). The inquiry is whether  
20 the relationship between the party to be estopped and the party in a prior litigation is  
21 “sufficiently close” so as to justify application of collateral estoppel. *Id.*; see also *In re*  
22 *Gottheiner*, 703 F.2d 1136, 1140 (9th Cir.1983) (“Privity exists when there is ‘substan-  
23 tial identity’ between the parties, that is, when there is a sufficient commonality of  
24 interest.”). For the foregoing reasons, the Court concludes McKesson is not an indis-  
25 dispensable party to this action. Notwithstanding this finding, the Court is not exercising its  
26 discretion to sever McKesson as requested. As discussed below, remand will result in  
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<sup>5</sup> Although Merck concedes that McKesson has a speculative and tangential (if any) role in this matter. (Doc. No. 17 at 20.)

1 these cases joining the Judicial Council Coordinated Proceeding (JCCP), *In re Byetta*  
2 *Cases*, JCCP No. 4573, in Los Angeles, where coordination with this Court’s MDL is  
3 underway. Severance of McKesson, however, would cast the McKesson cases adrift,  
4 untethered to the coordinated proceedings and result in another tier of proceedings  
5 regarding the incretin memetic’s produced and or distributed by defendants.

6 **C. Severance of the New Jersey Plaintiffs**

7  
8 Finally, for the Court to retain diversity jurisdiction, Merck advocates the severing  
9 of the non-diverse New Jersey Plaintiffs. (Doc. No. 1 at 20-23; Doc. Nol 17 at 21-23.)  
10 Merck contends Rule 21 severance is warranted where the only commonality between  
11 the individual Plaintiffs is the claim that a number of incretin-based therapies caused  
12 them to develop cancer (thyroid or pancreatic). Plaintiffs argue that severance of these  
13 two individual Plaintiffs’ claims is inappropriate where each of their claim arises from  
14 the “same series of transactions and present common questions of fact.” (Doc. No. 10 at  
15 14.) Moreover, Plaintiffs claim that if the non-diverse New Jersey Plaintiffs were to be  
16 severed, Defendants would be required to litigate the same case in numerous other  
17 jurisdictions, resulting in a waste of judicial resources, and potentially inconsistent  
18 rulings.

19 First, Merck argues that Plaintiffs do not satisfy the standards of Rule 20 joinder,  
20 thus they were improperly joined (Doc. No. 1 at 21-22, n.4.) Essentially, Merck argues  
21 that Plaintiffs were “fraudulently misjoined.” Fraudulent misjoinder, as articulated by  
22 the Eleventh Circuit, is distinct from the traditional joinder doctrine. *See Tapscott v. MS*  
23 *Dealer Service Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996), *abrogated in part on other*  
24 *grounds by Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir. 2000). Fraudulent, or  
25 procedural, misjoinder looks at the factual commonality among the plaintiff’s claims  
26 against different defendants and determines if they are sufficient to satisfy the standards  
27 provided by Rule 20. *See id.* at 1360. Though *Tapscott* involved the misjoinder of  
28 defendants, other courts have applied this theory to the misjoinder of plaintiffs. *See, e.g.,*

1 Koch v. PLM Int'l, No. Civ. A. 97-0177-BH-C, 1997 WL 907917, at \*2 (S.D.Ala. Sept.  
2 27, 1997); *Lyons v. Am. Tobacco Co., Inc.*, No Civ. A. 96-0881-BH-S, 1997 WL 809677  
3 at \*4 (S.D.Ala. Sept. 30, 1997).

4         The Ninth Circuit has not adopted the fraudulent misjoinder doctrine, and district  
5 courts in this Circuit are split on whether the doctrine applies. *See, e.g., Osborn v.*  
6 *Metropolitan Life Ins. Co.*, 341 F. Supp. 2d 1123, 1127 (E.D. Cal.2004) (declining to  
7 apply fraudulent misjoinder doctrine); *N.C. ex rel. Jones v. Pfizer, Inc.*, 2012 WL  
8 1029518 at \*3 (N.D. Cal. March 26, 2012) (holding that even if it were to adopt *Tapscot-*  
9 *t*, the doctrine would not apply to the case before it involving claims against drug  
10 manufacturers/sellers and healthcare providers); *HVAC Sales, Inc. v. Zurich Am. Ins.*  
11 *Grp.*, No. 04–03615 RMW, 2005 WL 2216950 at \*6 (N.D.Cal. July 25, 2005) (same).  
12 *But see, e.g., Sutton v. Davol, Inc.*, 251 F.R.D. 500, 505 (E.D.Cal. May 28, 2008)  
13 (finding healthcare provider defendants fraudulently misjoined with the manufacturing  
14 defendants in a case arising out of implantation of a medical device); *Greene v. Wyeth*,  
15 344 F. Supp. 2d 674, 684–85 (D.Nev.2004) (agreeing with Fifth and Eleventh Circuits  
16 “that the [fraudulent misjoinder] rule is a logical extension of the established precedent  
17 that a plaintiff may not fraudulently join a defendant in order to defeat diversity jurisdic-  
18 tion in federal court”).

19         Even if the Court were to adopt this doctrine and find Plaintiffs fraudulently  
20 misjoined, the Court would be unable to grant the relief Merck seeks. If the Court were  
21 to find, as Merck advocates, that the “mere fact that two plaintiffs allege that they  
22 suffered the same injury as a result of the same drug is not enough to satisfy Rule 20,”  
23 (Doc. No. 1 at 22) the Court would necessarily have to sever all Plaintiffs, not just the  
24 non-diverse New Jersey Plaintiffs. Under this doctrine, the Court cannot selectively  
25 carve out diversity destroying Plaintiffs while keeping all others before it.

26         Second, Merck argues that the Court’s ability to sever claims under Rule 21 does  
27 not require a showing of misjoinder. (Doc. No. 17 at 22, n.4.) Though Rule 21 grants  
28

1 the Court the discretion to sever non-diverse parties, the Court again declines to exercise  
2 this discretion given the facts of the instant case. Ninth Circuit case law makes it clear  
3 that there is a “strong presumption” against removal jurisdiction, and courts should  
4 “strictly construe the removal statute against removal jurisdiction.” *Gause v. Miles, Inc.*,  
5 980 F.2d 564, 566 (9th Cir. 1992). Though the Court recognizes that this action, which  
6 includes claims of multiple plaintiffs, from multiple states, would be remanded to  
7 California state court, a forum where a majority of Plaintiffs have no connection, this is  
8 not enough for this Court to order severance. Moreover, a primary reason Merck wishes  
9 to keep this action before the Court is so that it may join the MDL for coordination and  
10 avoid inconsistent rulings from multiple courts.  
11

12 At the August 7, 2014 hearing on these motions, the Court extensively discussed  
13 the practical and policy implications of severing with both Parties. Both sides raised  
14 several worthy arguments in support of their respective positions. However, given that  
15 these cases would join the current actions pending in California state court as part of the  
16 JCCP action and the fact that this Court has been in coordination with the Los Angeles  
17 state court, the risk of inconsistent rulings is unpersuasive at this point. Moreover, as  
18 Plaintiffs concede, if Merck seeks to sever in state court and is successful, nothing  
19 precludes Merck from removing those actions that may properly appear before this  
20 Court.

21 The Court acknowledges the unique posture of these cases, as the first multi-  
22 Plaintiff, multi-state, actions being filed in a California state court. However, after  
23 consideration of the Plaintiffs’ reasons as expressed during oral arguments, the Court can  
24 conceive the rationale of Plaintiffs wished to file in the state forum. It is not the place of  
25 this Court to excessively analyze and micro-manage Plaintiffs’ choice of forum or  
26 method of pleading given the lack of showing fraud at this juncture. Accordingly, the  
27 Court declines to exercise its discretion under Rule 21.  
28

1 **IV. CONCLUSION**

2 For the foregoing reasons, Plaintiffs' motions to remand in each of the three  
3 above-captioned cases are GRANTED.  
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5 DATED: August 8, 2014  
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9 Hon. Anthony J. Battaglia

10 U.S. District Judge  
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