

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA**

JANINE BARNES, et al.,

Plaintiffs,

v.

BAYSIDE ORTHOPAEDICS, INC., et al.,

Defendants.

Case No.: 8:11-cv-02827-JSM-EAJ

**EMERGENCY MOTION FOR REMAND FOR LACK OF JURISDICTION,  
MOTION TO SEAL PURSUANT TO COURT ORDER, REQUEST FOR ORAL  
ARGUMENT, AND INCORPORATED MEMORANDUM OF LAW**

Plaintiffs, Janine Barnes and Julie Fournier, by and through their undersigned counsel, pursuant to 28 U.S.C. § 1447 and 28 U.S.C. § 1332, move this Court for an emergency remand of this case to the Sixth Judicial Circuit Court in and for Pinellas County, Florida; for an award of attorneys' fees incurred as a result of the improper removal of this suit pursuant to 28 U.S.C. §1447(c); and, if necessary, for leave to file documents under seal and for oral argument on this matter.

**I. INTRODUCTION**

In May of 2011, Plaintiffs filed suit in Pinellas County against Defendant Bayside Orthopaedics, Inc. ("Bayside"). Pinellas County was the principal place of business of Bayside. Plaintiffs sued Bayside for selling a defective hip replacement that was implanted into the bodies of both Plaintiffs and which subsequently failed in both Plaintiffs. On June 13, 2011, Bayside filed an answer to Plaintiffs' complaint. The parties undertook discovery; exchanging significant discovery, with Plaintiffs taking the depositions of both owners of Bayside Orthopaedics, Inc. On October 12, 2011, the Honorable John A. Schaefer, heard argument on a motion to compel filed by Plaintiffs and entered ruling on the motion. On December 5, 2011, Judge Schaefer

granted Plaintiffs' motion to amend the complaint to add Defendants DePuy Orthopaedics, Inc., DePuy, Inc., DePuy International, Ltd., Johnson & Johnson Medical, Ltd., Johnson & Johnson International, and Johnson & Johnson. On December 22, 2011, the removing Defendants removed this action to this Court. In their notice of removal, the removing Defendants claimed that Plaintiffs fraudulently joined Defendant Bayside Orthopaedics, Inc. "because there is no possibility that a Florida court would find that Plaintiffs' Complaint states a claim against Bayside as the only resident defendant." ¶18 of Defendants' *Notice of Removal*.

The removing Defendants make this argument despite the fact that this case was litigated for months against Defendant Bayside Orthopaedics, Inc. in state court. During that time, Defendant Bayside Orthopaedics, Inc. (represented by the same counsel as the additional defendants) answered the complaint, provided extensive discovery, and made no effort to dismiss Plaintiffs' case against it. Defendant Bayside Orthopaedics, Inc. made no such effort because it would clearly have failed. Despite the removing Defendants' arguments, Defendant Bayside Orthopaedics, Inc. is unmistakably liable for the Plaintiffs' damages under Florida law. Most obviously, Florida applies the doctrine of strict liability to the entire chain of manufacturers, wholesalers, joint ventures, lessors and retailers; of which Defendant Bayside Orthopaedics, Inc. was undeniably a part. As a result, Defendant Bayside Orthopaedics, Inc. was not fraudulently joined and this matter must be immediately remanded back to the Pinellas County Circuit Court of the Sixth Judicial Circuit.

## **II. EMERGENCY NATURE OF THE MOTION**

Plaintiffs request, pursuant to L.R. 3.01(e), that this Court rule on this motion to remand due to lack of subject matter jurisdiction on an emergent basis, as failure of this Court to expeditiously rule will, as a practical matter, deny the relief requested by Plaintiffs. This will

result in grave prejudice to Plaintiffs. As the removing Defendants note in their notice of removal, the hip replacement at issue in this matter is subject to a Multidistrict Litigation (“MDL”). Unless this Court remands this case in a rapid manner, the case will automatically be transferred from this Court to the MDL. The Court overseeing the MDL has a vast number of pressing issues before it and has been encouraged by the removing defendants not to decide other remand motions.<sup>1</sup> Remand motions in cases from across the country filed in cases removed to this MDL sit un-adjudicated.<sup>2</sup> If forced into the MDL, Plaintiffs will be in limbo, unable to prosecute their cause, potentially for years.

### **III. REQUEST FOR ORAL ARGUMENT**

Plaintiffs request, pursuant to L.R. 3.01(j), that their counsel be afforded the opportunity to address the Court on this issue at the Court’s earliest opportunity. This is an issue of grave concern to these Plaintiffs as the outcome of this Court’s ruling will determine whether they are allowed to pursue compensation for the severe damages they incurred as the result of the defective and subsequently recalled hip replacement, or instead are prevented from doing so. Undersigned counsel believes that oral argument on this matter could reasonably be conducted in half an hour.

### **IV. MOTION FOR LEAVE TO FILE DOCUMENTS UNDER SEAL**

In addition to the deposition transcript excerpts and responses to requests for admission listed below, Plaintiffs are in possession of numerous documents reflecting the extensive role

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<sup>1</sup> In the case of *McConnell v. Mark DeBiase, Inc., et al.*, case number 1:11-dp-22200-DAK, currently pending before the MDL court, in countering the plaintiff’s attempts to have the MDL court rule on the motion for remand, defendants wrote: “The delays associated with deciding motions for remand early could well frustrate the purpose of MDLs, which is to promote just and efficient conduct of actions involving common questions of fact.” *Internal and external citations omitted. Docket entry number 21, page number 4.*

<sup>2</sup> The DePuy ASR MDL has had dozens of cases with remand motions pending for extended periods of time without ruling by the MDL court.

played by Defendant Bayside Orthopaedics, Inc. in the promotion, sale, distribution, and servicing of the defective hip replacements at issue in this matter. Unfortunately, these documents are subject to a protective order entered by Judge Schaefer and pursuant to that order, must be filed under seal. The order states:

14. If, in connection with any motion or other proceeding except trial, any party intends to offer into evidence any documents designated a "PROTECTED DOCUMENT" by either Plaintiffs or Defendant, such evidence shall be submitted in camera and in accordance with the applicable local court rules, and unless otherwise ordered by the Court, shall be sealed with any proceedings involving disclosure of the evidence held in camera.

In the event that it would assist the Court in its determination of this matter, Plaintiffs request the opportunity to file the documents under seal pursuant to L.R. 1.09.

#### **V. BAYSIDE IS STRICTLY LIABLE UNDER FLORIDA LAW FOR SELLING DEFECTIVE PRODUCTS**

Removing Defendants claim that Bayside is not liable because it never took title to the product at issue. However, such argument is ineffective and irrelevant under Florida law. In Florida the doctrine of strict liability applies to the entire chain of product manufacturers, wholesalers, joint ventures, lessors and retailers. *Samuel Friedland Family Enterprises v. Amoroso*, 630 So.2d 1067 (Fla.1994) (lessor); *Mobley v. South Florida Beverage Corp.*, 500 So.2d 292 (Fla. 3d DCA 1986) (retailers), *review denied*, 509 So.2d 1117 (Fla.1987); *Visnoski v. J.C. Penney Co.*, 477 So.2d 29 (Fla. 2d DCA 1985) (joint ventures); *Perry v. Luby Chevrolet, Inc.*, 446 So.2d 1150 (Fla. 3d DCA 1984) (retailers); *Adobe Bldg. Centers, Inc. v. Reynolds*, 403 So.2d 1033 (Fla. 4th DCA) (retailers and wholesalers), *review dismissed*, 411 So.2d 380 (Fla.1981).

The Florida Supreme Court decision in the case of *Samuel Friedland Family Enterprises v. Amoroso*, 630 So.2d 1067 (Fla.1994), is insightful in the instant case. A hotel leased a small

portion of its premises to a boat stand operator and marketed the boats to its guests, but had no ownership interest in the boats or boat business. *Id.* A hotel guest sustained injuries on an allegedly defective boat she rented from the stand and brought a products liability action against the boat stand operator and the hotel. In analyzing the case, the Florida Supreme Court stated:

The underlying basis for the doctrine of strict liability is that those entities within a product's distributive chain "who profit from the sale or distribution of [the product] to the public, rather than an innocent person injured by it, should bear the financial burden of even an undetectable product defect." *North Miami General Hosp., Inc. v. Goldberg*, 520 So.2d 650, 651 (Fla. 3d DCA 1988). Those entities are in a better position to ensure the safety of the products they market, to insure against defects in those products, and to spread the cost of any injuries resulting from a defect.

*Id.* at 1068. The Court then applied the doctrine of strict products liability to both the boat stand operator and to the hotel. *Id.* at 1071. Thus in Florida, any entity involved in distributing a product which profits from the distribution is liable for injuries caused by the product's defect. A distributor that profits by earning a commission on the sale of the product is therefore clearly liable under Florida law even if they do not take title to the product.

Defendant Bayside Orthopaedics, Inc. was clearly part of the distributive chain and derived a profit from the product at issue in this case. The *Declaration of Matthew Brower*, one of the owners of Bayside filed as Exhibit D to the notice of removal does not show otherwise. Instead it contains a laundry list of "red herrings" that do not assist in regard to the issue at hand. In contrast, Mr. Brower's deposition, taken on November 16, 2011, clearly shows that Bayside derived profit from the sale of the products at issue in this case. In regard to the sale of DePuy Orthopaedics, Inc. products generally, Mr. Brower testified in response to the following question:

Q. Okay. Just to put it in a nutshell, since this agreement was signed back in August of 2006 and the present, during that entire time has Bayside Orthopaedics received a commission on sales of DePuy products?

A. Yes.

*Pages 45-46 of the Deposition Testimony of Matthew Brower.* The co-owner of Bayside, Ronald Todd Cook, testified similarly at his deposition taken on September 1, 2011:

Q. Okay. I believe we spoke earlier and I believe you testified that Bayside Orthopaedics received a commission based on the percentage of the selling price of products in its territory.

MR. GERECKE: Object to form.

THE WITNESS: Yes.

BY MR. MAGLIO:

Q. Likewise, the actual particular sales reps are also paid a percentage of the selling price of the products that they're responsible for selling; is that correct?

A. Correct.

Q. Okay. Any amounts of these percentages are determined, for example, the percentage that Bayside receives is determined by its contract with DePuy Orthopedics; is that correct?

A. Yes.

*Pages 48-49 of the Deposition Testimony of Ronald Todd Cook.* Likewise, in response to specific requests for admission on this topic, Bayside admitted that it sold the products at issue in this matter and received a commission on that sale. In regard to the sale of the device implanted in the body of Ms. Barnes, Bayside admitted the following:

REQUEST NO.1: From 1/1/2009 to 1/31/2011, Bayside Orthopaedics, Inc. was responsible for making sales calls on George Markovich, M.D. and representing DePuy Orthopaedics, Inc.

RESPONSE NO.1: Bayside Orthopaedics admits that, from January 1, 2009 through January 31, 2011, as set forth in its contract with DePuy Orthopaedics, Inc. ("DePuy"), Bayside Orthopaedics contracted to provide, among other functions, sales-related functions with respect to DePuy products in certain Florida counties to medical providers, including George Markovich, M.D. Except as expressly stated herein, Bayside Orthopaedics denies this Request.

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REQUEST NO. 3: From 1/1/2009 to 11/31/2011, Bayside Orthopaedics, Inc. received a commission for sales of products of DePuy Orthopaedics, Inc. for implantation into the patients of George Markovich, M.D.

RESPONSE NO.3: Bayside Orthopaedics admits this Request.

REQUEST NO. 4: Bayside Orthopaedics, Inc. received a commission for the sale of the DePuy ASR Acetabular Cup implanted in Janine Barnes on July 6, 2009.

RESPONSE NO.4: Bayside Orthopaedics admits this Request.

*Second Supplemental Response of Bayside Orthopaedics, Inc. to Plaintiff's First Request for*

*Admission*, dated September 26, 2011. Bayside admitted the same information in regard to Ms.

Fournier, stating:

REQUEST NO. 1: From 1/1/2008 to 1/31/2011, Bayside Orthopaedics, Inc. was responsible for making sales calls on Fletcher A. Reynolds, III, M.D. and representing DePuy Orthopaedics, Inc.

RESPONSE NO.1: Bayside Orthopaedics admits that, from January 1, 2008 through

January 31, 2011, as set forth in its contract with DePuy Orthopaedics, Inc. ("DePuy"), Bayside Orthopaedics contracted to provide, among other functions, sales-related functions with respect to DePuy products in certain Florida counties to medical providers, including Fletcher A. Reynolds, III, M.D. Except as expressly stated herein, Bayside Orthopaedics denies this Request.

...

REQUEST NO.3: From 1/1/2008 to 1/31/2011, Bayside Orthopaedics, Inc. received a commission for sales of products of DePuy Orthopaedics, Inc. for implantation into the patients of Fletcher A. Reynolds, III, M.D.

RESPONSE NO. 3: Bayside Orthopaedics admits this Request.

REQUEST NO. 4: Bayside Orthopaedics, Inc. received a commission for the sale of the DePuy ASR 300 Acetabular Cup implanted in Julie Fournier December 9, 2008.

RESPONSE NO. 4: Bayside Orthopaedics admits this Request.

*Second Supplemental Response of Bayside Orthopaedics, Inc. to Plaintiff's First Request*

*for Admission*, dated September 26, 2011. Under the Florida Supreme Court's analysis

delineated in *Samuel Friedland*, there is no question that Bayside was part of the distributive chain of the product at issue in this matter.

The same principles applied in *Samuel Friedland* have been applied in other jurisdictions for purposes of strict products liability. For instance, in *Bittler v. White and Co., Inc.*, 560 N.E.2d 979 (Ill. App. Ct. 1990), an authorized sales representative was found to be subject to strict liability. The sales representative argued that it was outside the chain of distribution and merely acted as a liaison between the manufacturer/seller and the purchaser. The court disagreed because the sales representative was bound by contract to promote the manufacturer's products and through that relationship derived a commission from the transaction. *Id.* at 982. The court found that this "participatory connection" with the defective product was sufficient to make it subject to strict liability. *Id.* The court explained its reasoning as follows:

The public policy rationale which justifies imposing strict liability on manufacturers as well as sellers, wholesalers, joint ventures, and even lessors, is based on the fact that these entities, as part of the chain of distribution, are involved in and reap a profit from placement of the allegedly defective product into the stream of commerce. *Even parties who are not within the actual chain of distribution, but who play an integral role in the marketing enterprise of an allegedly defective product and participate in the profits derived from placing the product into the stream of commerce, are held liable under the doctrine of strict liability.... Consequently it appears that the imposition of strict liability hinges on whether the party in question has any participatory connection, for personal profit or other benefit, with the injury-causing product and with the enterprise that created consumer demand for and reliance upon the product.*

*Id.* at 981, *emphasis added and internal citations removed.* Bayside similarly marketed DePuy Orthopaedics, Inc.'s products in its territory and participated in the profits derived from placing the product at issue into the stream of commerce. As a result, under Florida law, Bayside is strictly liable for selling the defective hip replacements implanted in Plaintiffs.

## **VI. NEGLIGENCE OF BAYSIDE**

The removing Defendants imply that Bayside merely serves to deliver the product to the operating room. However, Bayside's sale representatives are trained and expected to do far more. It is important to understand the role of Bayside's sales representatives in the sale of the

products at issue in this matter to assess whether a Florida court would find that Plaintiffs' Complaint states a claim against Bayside for negligence. The Medical Sales College of Englewood, Colorado, trains sales representatives for hip replacement manufacturers generally and DePuy Orthopaedics, Inc. and its distributors in particular. In its *2010-2011 Course Catalog*, the Medical Sales College describes the typical role of a sales representative in a joint replacement surgery:

The highly technical side of the job often comes in the servicing after the sale, usually around the aspects of a case. Whether it is templating x-rays with a surgeon to determine the proper implants, or guiding a surgical team during surgery in the proper use of instrumentation and implant, the role of a sales rep in being the voice-of-the-manufacturer is critical. In many instances, a rep will have seen more of a particular surgery, and certainly have seen it in more different situations, than anybody on the surgical team, including the surgeon.

Page 11 of the *2010-2011 Course Catalog* of the Medical Sales College of Englewood, Colorado is attached hereto as Exhibit "A".

Similarly, the written testimony of Peter D. Coffaro, DePuy Orthopaedics, Inc.'s Territory General Manager for Central and Northern California filed by DePuy Orthopaedics, Inc. on October 12, 2007, in the case of *Mahoney v. DePuy Orthopaedics, Inc.* before the United States District Court for the Eastern District of California, states:

DePuy's sales representatives are DePuy's primary point of contact with the physicians and hospitals that use DePuy's products. DePuy's sales representatives play a vital role in DePuy's business. They educate customers about product features, assist customers in understanding the proper use of the products, and often observe surgeries first hand to ensure that the products are being used appropriately.

Paragraph 7 of the declaration of Peter D. Coffaro, Territory General Manager for Central and Northern California for DePuy Orthopaedics, Inc., attached hereto as Exhibit "B".

By contract with its distributors, DePuy Orthopaedics, Inc. requires that sales representatives receive training on how to provide the above information to orthopedic surgeons

and what information to provide. See the Declaration of Pamela Davis filed on March 24, 2011, in the case of *Garris v. DePuy Orthopaedics, Inc. and Commonwealth Surgical Solutions*, in the United States District Court for the Eastern District of Virginia, ¶ 4, attached hereto as Exhibit “C”. Newly hired sales representatives are required to undergo a six day course on DePuy Orthopaedics, Inc. joint replacement products at DePuy Orthopaedics, Inc. headquarters in Warsaw, Indiana. Pursuant to the *DePuy Certification Learning Program Curriculum Guide*:

At the end of the primary reconstructive program, the participant should be able to:

- Identify anatomical landmarks as they relate to total joint replacement
- Describe the movements of the body
- Discuss the key rationale points of each core product offering
- *Compare and contrast the DePuy reconstructive product line to that of our major competitors*
- *Demonstrate how to implant each core product*

*Emphasis added.* Page 11 of the *DePuy Certification Learning Program Curriculum Guide*.

The *DePuy Certification Learning Program Curriculum Guide* attached hereto as Exhibit “D”.

The *Curriculum Guide* goes on to state:

Primary School is designed to address the needs of new associates to DePuy. The program highlights a variety of topics including product design rationale, surgical technique tips for implanting products, and an overview of competitive product offerings.

...

Bioskills workshops are conducted for all major product lines. Bioskills or Sawbones workshops enable the student to work through a variety of scenarios involving our instrumentation packages. Instructors assist students to learn the basic steps and procedures for implanting our reconstructive products. ***Skills learned during these workshops are intended to give the participants the necessary skills to enable them to verbally assist their surgeons, nursing staff and other hospital-based customers during surgical procedures.***

*Emphasis added. Id.* at pages 11 to 12. Sales representatives are then trained in providing more advanced assistance to orthopedic surgeons. The “learning objectives” of the “Advanced Reconstructive Sales Associate Learning Centers – Length of course 1-2 days” in the *DePuy Certification Learning Program Curriculum Guide* include:

- Discuss details relating to pre-op planning of simple and complex surgical cases
- Identify competitive advantages within the DePuy product portfolio
- Demonstrate how to template, plan and consult on product options for primary and revision scenarios
- Explain concepts relative to soft tissue balancing, biomechanics of the hip and knee

...  
The advanced program is intended to enhance skills of the sales associate in the area of surgical techniques, pre-op planning, and basic decision-making regarding primary and revision surgical procedures.

*Id.* at page 15.

The written testimony of Pamela Davis, an orthopedic sales representative for a DePuy Orthopaedics, Inc. distributor from 2005 through 2010 confirms that the training objectives of the DePuy Learning Programs were employed by its orthopedic sales representatives. *See* the Declaration of Pamela Davis filed on March 24, 2011, in the case of *Garris v. DePuy Orthopaedics, Inc. and Commonwealth Surgical Solutions*, in the United States District Court for the Eastern District of Virginia, attached hereto as Exhibit “C”. Ms. Davis testifies that sales representatives hold meetings with surgeons to discuss DePuy Orthopaedics, Inc. orthopedic products and their benefits compared to competitor’s products. *See* Exhibit “C”, ¶ 6, 16 and 17. Sales representatives also accompany surgeons to cadaver labs to convince them of the advantages of DePuy Orthopaedics, Inc. products. *See* Exhibit “C” at ¶ 7 and 16. Indeed, the bulk of a sales representative’s time, according to Ms. Davis, is spent assisting with implant surgeries:

My daily routine was to travel to the hospital in which I was assigned, cover the surgeries which were posted several weeks or days prior, with hospital scheduling personnel, *organize instruments to be used for surgery; bring implants being used to the hospital* if they were not there and *make sure proper implants were brought into the surgical suite* for the nurse to open.

*See* Exhibit “C”, ¶ 10. (Emphasis supplied.)

In sum, distributors such as Defendant Bayside Orthopaedics, Inc. play a pivotal role in promoting, distributing, selling, and servicing DePuy Orthopaedics, Inc.'s hip replacements.<sup>3</sup> Through the sales representatives that Bayside employees, Bayside is the primary conduit by which surgeons learn about products, such as the product at issue in this case. As alleged in the complaint, Bayside sales representatives "negligently and carelessly promoted, marketed, sold, distributed, and serviced the ASR hip replacement components implanted in Plaintiffs." Plaintiffs have pled all elements of negligence against Bayside and there is certainly far more than a "possibility that a Florida court would find that Plaintiffs' Complaint states a claim against Bayside as the only resident defendant" regarding its negligence. Plaintiffs have numerous documents designated as "confidential" by Bayside which they can provide to the Court under seal if necessary to show the extensive role played by Bayside sales representatives in particular.

## **VII. FDUTPA CLAIM AGAINST DEFENDANT BAYSIDE**

The removing Defendants claim in paragraphs 33-34 of their notice of removal that the learned intermediary doctrine bars Plaintiffs' Florida Deceptive and Unfair Trade Practices Act Claim. Removing Defendants state that Plaintiffs' claims "are all ultimately based upon [Bayside's] alleged failure to warn of the risks of the device, and so the learned intermediary doctrine bars the FDUTPA claim." *Internal quotations omitted.* In support of this proposition, removing Defendants cite the case of *Beale v. Biomet, Inc.*, 492 F. Supp. 2d 1360 (S.D. Florida

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<sup>3</sup> In paragraph 19 of the notice of removal, the removing Defendants cite to three decisions holding that the naming of in-state pharmaceutical field representatives as defendants constituted fraudulent joinder. All of these cases were brought in states other than Florida which have adopted position on distributor product liability than the doctrine set forth by the Florida Supreme Court in *Friedland*. It is unclear as to how these cases could be relevant to the instant case as they involve entirely different factual scenarios applying entirely different state law.

2007). However, in so doing, they misconstrue *Beale*. The Court in *Beale* does not reach the holding claimed by the removing Defendants. Instead, the Court in *Beale* stated:

Pursuant to the doctrine, a manufacturer has a duty to give a physician adequate warning of the risks associated with a prescription drug. *Buckner v. Allergan Pharmaceuticals, Inc.*, 400 So.2d 820, 822 (Fla. 5th DCA 1981). However, “failure of the manufacturer to provide the physician with an adequate warning of the risks associated with a prescription product is not the proximate cause of a patient's injury if the prescribing physician had independent knowledge of the risk that the adequate warning should have communicated.” *Christopher v. Cutter Labs.*, 53 F.3d 1184, 1192 (11th Cir.1995). “Thus, the causal link between a patient's injury and the alleged failure to warn is broken when the prescribing physician had ‘substantially the same’ knowledge as an adequate warning from the manufacturer should have communicated to him.” FN8 *Id.*

*Beale v. Biomet, Inc.*, 492 F. Supp. 2d 1360, 1365 (S.D. Florida 2007). In the instant case, Plaintiffs have alleged and the evidence will show that Defendant Bayside Orthopaedics, Inc. had information unavailable to the Plaintiffs’ orthopedic surgeons showing that the product at issue was defective, but failed to provide that information to Plaintiffs or their surgeons.

*Plaintiffs’ First Amended Complaint* ¶¶33-35, 86, and 88. Plaintiffs have thus pled a valid cause of action against Defendant Bayside Orthopaedics, Inc. for breach of the Florida Deceptive and Unfair Trade Practices Act Claim.<sup>4</sup>

### VIII. HEAVY BURDEN RESTS ON REMOVING PARTIES

It is axiomatic that federal courts are courts of limited jurisdiction and are “empowered to hear only those cases within the judicial power of the United States as defined by Article III of the Constitution.” *University of South Alabama v. American Tobacco Co.*, 168 F.3d 405, 409 (11th Cir.1999). Title 28 U.S.C. § 1447(c) provides in the relevant part “the case *shall* be remanded [if] it appears that the district court lacks subject matter jurisdiction.” (emphasis

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<sup>4</sup> Plaintiffs only focus on the validity of their strict liability, negligence, and FDUPTA counts for the sake of brevity. Plaintiffs only need one of those counts to possibly state a cause of action against Bayside to make the removal of this action improper.

supplied). The removal statute must be strictly construed against removal. *See Crowe v. Coleman*, 113 F.3d 1536, 1538 (11th Cir. 1998); *Samuel-Bassett Motors v. KIA Motors America, Inc.*, 357 F.3d 392, 396 (3d Cir. 2004) (citing *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990)); *Bromwell v. Mich. Mut. Ins. Co.*, 115 F.3d 208, 212 (3d Cir. 1997)(citing *Int'l Primate Prot. League v. Admin'rs of Tulane Educ. Fund*, 500 U.S. 72, 87 (1991)); *Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 217 (3d Cir. 1999).

There is a persuasive policy argument behind the directive to resolve questionable jurisdictional matters in favor of the remanding party. This Court spoke to this very point in *Seminole County v. Pinter Enterprises, Inc.* stating that:

Any close questions regarding the propriety of removal are resolved in favor of remanding the case to the state court. A presumption in favor of remand is necessary because if a federal court addresses the merits of a pending motion in a removed case where the subject matter jurisdiction does not exist, the federal court deprives the state court from its Constitutional right to resolve controversies in its own courts.

*Seminole County v. Pinter Enterprises, Inc.*, 184 F. Supp. 2d 1203, 1207 (M.D. Fla. 2000).

Where a removing defendant asserts federal subject matter jurisdiction pursuant to 28 U.S.C. § 1332, the defendant must show that every plaintiff is diverse from every defendant. *Triggs v. John Crum Toyota, Inc.*, 154 F.3d 1284, 1287 (11th Cir. 1998). If there is any doubt as to whether a plaintiff has stated a claim against the non-diverse defendant, the joinder is not fraudulent. *Parks v. New York Times Co.*, 308 F.2d 474 (5th Cir. 1962), *cert. denied*, 376 U.S. 949 (1964). All questions of fact, controlling law and jurisdiction should be resolved in favor of remand to state court and against removal. *Shamrock Oil & Gas v. Sheets*, 313 U.S. 100, 108-109 (1941); *American Tobacco Co.*, 168 F.3d at 411.

“[I]t is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.” *Kokkonen v. Guardian Life*

*Ins. Co. of Am.*, 511 U.S. 375 (1994); see also *Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368, 1373 (11th Cir. 1998); *Samuel-Bassett Motors*, 357 F.3d at 396. “The burden of the removing party is a ‘heavy one.’” *Crowe*, 113 F.3d at 1538; see also *Boyer*, 913 F.2d at 111. A claim of fraudulent joinder must be supported by clear and convincing evidence, and proven with certainty by the party seeking to establish federal jurisdiction. *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921); *Parks v. New York Times Co.*, 308 F.2d 474, 478 (5th Cir. 1962). “If there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that the joinder was proper and remand the case to the state court.” *Coker v. Amoco Oil Co.*, 709 F.2d 1433, 1440-41 (11th Cir. 1983); see also *Laughlin v. Prudential Ins. Co.*, 882 F.2d 187, 190 (5th Cir. 1989) and *Abels v. State Farm Ins. & Cas. Co.*, 770 F.2d 26, 32 (3d Cir. 1985).

Plaintiff only needs to have a possibility of stating a valid cause of action in order for the joinder to be legitimate. *Triggs*, 154 F.3d 1284, 1287-1288; *Crowe*, 113 F.3d at 1541 (states Plaintiff need not be able to survive a motion for summary judgment for the court to find that a reasonable basis exists for predicting that state law might impose liability on the non-diverse defendant).

Furthermore, there is also a very practical rationale for the strict construction of removal. The Eleventh Circuit enunciated that rationale in *Crowe v. Coleman*, 113 F. 3d 1536, 1538 (11th Cir. 1997), stating:

The strict construction of removal statutes also prevents exposing the plaintiff to the possibility that he will win a final judgment in federal court, only to have it determined that the court lacked jurisdiction on removal, a result that is costly not just for the plaintiff, but for all the parties and for society when the case must be relitigated.

*Id.*

In the case of *Bryant v. Zimmer, Inc.*, Case No. 6:06-cv-844-Orl-31DAB, United States District Judge Gregory A. Presnell of this Court dealt with the issue of whether an in-state distributor for a competing hip replacement manufacturer had been fraudulently joined. The only claim alleged against the distributor by plaintiffs was a claim for spoliation. In his August 14, 2006, Order remanding the case back to state court, Judge Presnell wrote:

[W]hen the district court must assess an allegedly fraudulent joinder, “the question is whether there is arguably a reasonable basis for predicting that the state law might impose liability on the facts involved. If that possibility exists, a good faith assertion of such an expectancy in a state court is not a sham, is not colorable and is not fraudulent in fact or in law.” Crowe v. Coleman, 113 F.3d 1536, 1540 (11th Cir. 1997) quoting Bobby Jones Garden Apartments v. Suleski, 391 F.2d 172, 176-77 (5th Cir.1968).

The August 14, 2006, Order of Judge Presnell is attached hereto as Exhibit “E”.

In a case even more analogous to the instant case, United States District Judge William J. Zloch of the Southern District of Florida sua sponte remanded the case of *Hughes v. Howmedica Osteonics Corporation*, Case No. 07-61721-CIV-ZLOCH to state court. A copy of Judge Zloch’s *Final Order of Remand* is attached hereto as Exhibit “F”. The plaintiff had brought suit in Broward County against orthopedic joint replacement manufacturer Howmedica and a company plaintiff alleged was its in-state distributor. *Id.* Howmedica removed the case to the Southern District claiming that the alleged distributor had been fraudulently joined. *Id.* In support of their notice of removal, Howmedica included the affidavit of the President and CEO of the alleged distributor stating that his company had never been a distributor for Howmedica. *Id.* at page 2. Judge Zloch analyzed the limited information available to him in the record, stating:

Howmedica is seeking a ruling from the Court on the merits of Plaintiff’s claim against Orthopedic. Specifically, Howmedica seeks a finding that Orthopedic is not liable to Plaintiff because it did not distribute the product alleged to have injured her. This is based on the allegations to that effect in Frank Russo’s

Affidavit. DE 1, Ex. A. The Court cannot make such a finding in Orthopedic's favor by one self-serving Affidavit.

*Id.* at page 3. Judge Zloch then went on:

Indeed, Howmedica's argument in the Notice Of Removal "requires searching investigation of matters outside the complaint and shifts the district court from the task of determining whether . . . [P]laintiff[] "possibly" allege[s] a claim for relief against [Defendants] to the task of determining whether . . . [P]laintiff[] will prevail and whether . . . [D]efendants enjoy a complete defense. But the district court's job is not to resolve the dispute or even to adjudicate the merits of claims and defenses; the district court's job is merely to ascertain whether . . . [P]laintiff[] "possibly" allege[s] a legally cognizable claim." *Jones v. Honeywell Int'l, Inc.*, 385 F. Supp. 2d 1268, 1271-72 (M.D. Fla. 2005).

*Id.* The Court then sua sponte remanded the case to the Seventeenth Judicial Circuit, Broward County. *Id.* at page 4.

#### **IX. FEDERAL DISTRICT COURTS HAVE REMANDED DEPUY ASR CASES WHERE DEPUY ALLEGED IN-STATE DISTRIBUTOR FRAUDULENTLY JOINED**

In a number of cases, Federal District Courts have remanded back to state court cases alleging that DePuy ASR hip replacements were defective that named the in-state distributor as a defendant. In *Malkmus v. DePuy Orthopaedics, Inc.*, Case No. 11-C-365, the United States District Court for the Eastern District of Wisconsin ruled that contrary to the claims of DePuy Orthopaedics, Inc., the distributor had not been fraudulently joined. A copy of the June 13, 2011 decision of the United States District Court for the Eastern District of Wisconsin is attached hereto as Exhibit "G".

In *Malkmus*, like the instant case, the defendants claimed that the distributor was not involved in the sale of the ASR hip and thus plaintiff's claims must fail. *Id.* at page 4. However, the Court did not buy defendants' arguments, holding "[t]he record presented to this court demonstrates that TRP was at least as involved in the distribution of the allegedly defective product..." *Id.* at page 5. The Court then granted Plaintiff's motion to remand. *Id.*

In *Rundle, et al. v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-CV-00634-PMP-GWF, also decided this year, the Hon. Philip M. Pro remanded back to Nevada state court a case involving the DePuy ASR, concluding that Plaintiffs alleged sufficient facts upon which the distributor could be held strictly liable for product design defects causing injury to Plaintiffs. The defendants in *Rundle* raised arguments identical to those raised in the instant case, including that the in-state distributor did not take title to the product, had no role in the manufacture of the product, no role in the regulatory approval of the product, and had no role in the development of the marketing materials for the product. *Id.* at page 3. After extensive briefing and oral argument, the Magistrate Judge held that despite the unsettled nature of Nevada's law (unlike Florida law) on what constitutes a product "seller" for the purposes of strict liability, "the state court could find that a medical device sales representative such as Precision [the in-state distributor] is strictly liable for product." *Id.* at pages 17-18. A copy of the July 6, 2011 decision of the *Findings and Recommendation* of the Magistrate Judge and the July 21, 2011 order of the United States District Court for the District of Nevada affirming the *Findings and Recommendation* are collectively attached hereto as Exhibit "H".

The United States District Court for the Northern District of Illinois in the case of *Kopitke v. DePuy Orthopaedics, Inc.*, Case No. 11-cv-912, faced a more complicated issue, but ruled in favor of remand. A copy of the March 8, 2011 decision of the United States District Court for the Northern District of Illinois is attached hereto as Exhibit "I". In *Kopitke*, the plaintiff filed suit in state court alleging that she suffered permanent injuries as the result of a defective ASR hip replacement manufactured by DePuy Orthopaedics, Inc. and distributed by an in-state company. *Id.* at page 1. DePuy Orthopaedics, Inc. removed the case from state court to Federal District Court claiming that the in-state distributor had been fraudulently joined. *Id.* In

the *Kopitke* case DePuy Orthopaedics, Inc. claimed that the distributor was an “innocent seller” under Illinois law, thus plaintiff did not have a valid claim against the distributor, and as a result the distributor had been fraudulently joined. *Id.* at page 4. However, the Federal District Court found to the contrary, holding that “[a]s alleged in Kopitke's complaint, Premier is not an innocent distributor.” *Id.* at page 5. The Court then remanded the case back to state court.

#### **X. PLAINTIFFS ARE ENTITLED TO THEIR ATTORNEYS’ FEES**

The federal removal statute permits the award of costs and actual expenses incurred in connection with a remand. 28 U.S.C. §1447(c). In its 2005 decision in *Martin v. Franklin Capital Corp*, the United States Supreme Court discussed Congress’ concerns in providing for such fee shifting:

...Congress thought fee shifting appropriate in some cases. The process of removing a case to federal court and then having it remanded back to state court delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources. Assessing costs and fees on remand reduces the attractiveness of removal as a method for delaying litigation and imposing costs on the plaintiff. The appropriate test for awarding fees under § 1447(c) should recognize the desire to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, while not undermining Congress' basic decision to afford defendants a right to remove as a general matter, when the statutory criteria are satisfied.

*Martin v. Franklin Capital Corp.*, 546 U.S. 132, 104 (2005). In the instant case, the removing Defendants removed this case from state court to this Court claiming improper joinder with a clear lack of factual or legal basis. The parties have already engaged in extensive discovery and litigation in state court and ample evidence has been adduced to establish a basis of a claim against the in-state defendant, Bayside. In all of these months of litigation, the in-state defendant, Bayside, never argued for dismissal for failure to state a claim in state court. Thus, the *Notice of Removal* filed by the removing Defendants is a sham pleading. Removing Defendants removed this case to this Court in a classic gamesmanship ploy, knowing the

resulting delay to Plaintiffs, additional costs to Plaintiffs, and with the very real possibility of the case ending up in a judicial morass preventing the Plaintiffs from moving forward in the litigation. As a result, Plaintiffs are entitled to award of their attorneys' fees and costs in seeking and obtaining remand.

## **XI. CONCLUSION**

Removing Defendants have in no way met their burden of showing that Defendant Bayside Orthopaedics, Inc., was fraudulently joined. As Defendant Bayside Orthopaedics, Inc. was not fraudulently joined, there is not complete diversity and the Federal Court lacks subject matter jurisdiction. As this Court lacks subject matter jurisdiction, this case must be remanded back to the Sixth Judicial Circuit Court in and for Pinellas County, Florida. Furthermore, as this action was improperly removed by Defendants, Defendants are responsible for Plaintiffs' attorneys' fees incurred in obtaining the remand of this case back to state court

## **XII. CERTIFICATE OF GOOD FAITH**

Pursuant to Local Rule 3.01(g), undersigned counsel hereby certifies that his office spoke with counsel for the Defendants and counsel for the Defendants stated he was unable to consent nor object to the remand of this matter nor to the filing of "confidential" documents under seal. Undersigned counsel followed up with an e-mail to the other counsel of record for Defendants yesterday, but as of yet has received no reply. Given the emergent nature of this matter and the fact that Defendants are unlikely to have changed their position since removing this matter three business days ago, Plaintiffs have filed this motion in good faith.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served by Notice of Electronic filing generated by CM/ECF on December 28, 2011, on all counsel of record.

/ s / Altom M. Maglio

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