

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JANINE BARNES
and JULIE FOURNIER,

Plaintiffs,

vs.

Case No.: 8:11-cv-2827-JSM-EAJ

BAYSIDE ORTHOPAEDICS, INC.;
DEPUY ORTHOPAEDICS, INC.;
DEPUY INC.;
DEPUY INTERNATIONAL, LTD.;
JOHNSON & JOHNSON MEDICAL, LTD.;
JOHNSON & JOHNSON INTERNATIONAL;
and JOHNSON & JOHNSON;

Defendants.

**DEFENDANTS' RESPONSE TO PLAINTIFFS'
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 filed this product liability suit alleging facts substantially similar to the more than 3,300 cases currently pending in MDL No. 2197, *In re: DePuy Orthopaedics, Inc., ASR Hip Implant Products Liability Litigation*, in the Northern District of Ohio—namely, that they received defective DePuy hip implant prosthetic devices. But they seek to evade transfer to the MDL Court (and federal jurisdiction altogether) by suing a non-diverse Florida defendant, Bayside Orthopaedics, Inc., (“Bayside”) against whom they have no colorable cause of action under Florida law. Accordingly, Bayside is fraudulently joined and its citizenship should be disregarded for

jurisdictional purposes.

The jurisdictional issue raised here—whether a non-diverse defendant is fraudulently joined under Florida law—is identical to the one raised in *McConnell v. Mark Debiase, Inc.*, recently transferred from the Southern District of Florida to MDL No. 2197. Some 81 other cases from across the country posing the same or similar issues are also now pending before MDL Judge David A. Katz, or have recently been transferred but are not yet docketed.¹

¹ The cases where Plaintiffs filed motions to remand involving the same, or similar, jurisdictional issues, and that have been transferred into MDL 2197, are as follows:

Arizona (1): *LeMarr v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-00445 (D. Ariz.);

Florida (2): *McConnell v. Mark DeBiase Inc., et al.*, Case No. 1:11-cv-22025 (S.D. Fla.);

Georgia (18): *Bailey v. DC Medical LLC, et al.*, Case No. 1:11-cv-01169 (N.D. Ga.); *Beaver v. DC Medical, LLC, et al.*, Case No. 1:11-cv-00869 (N.D. Ga.); *Davis v. DC Medical, LLC, et al.*, Case No. 1:11-cv-00870 (N.D. Ga.); *Davis v. DC Medical LLC, et al.*, Case No. 1:11-cv-00881 (N.D. Ga.); *Finley v. DC Medical LLC, et al.*, Case No. 1:11-cv-01171 (N.D. Ga.); *Gallimore v. DC Medical LLC, et al.*, Case No. 1:11-cv-01173 (N.D. Ga.); *Gray v. DC Medical, LLC, et al.*, Case No. 1:11-cv-00871 (N.D. Ga.); *Jackson v. DC Medical, LLC, et al.*, Case No. 1:11-cv-00873 (N.D. Ga.); *King v. DC Medical LLC, et al.*, Case No. 1:11-cv-00882 (N.D. Ga.); *Lebeda v. DC Medical LLC, et al.*, Case No. 1:11-cv-00875 (N.D. Ga.); *Lewis v. DC Medical LLC, et al.*, Case No. 1:11-cv-01172 (N.D. Ga.); *McClure v. DC Medical, LLC, et al.*, Case No. 1:11-cv-00877 (N.D. Ga.); *McDowell v. DC Medical LLC, et al.*, Case No. 1:11-cv-00939 (N.D. Ga.); *Scott v. DC Medical LLC, et al.*, Case No. 1:11-cv-00878 (N.D. Ga.); *Scullin v. DC Medical LLC, et al.*, Case No. 1:11-cv-00879 (N.D. Ga.); *Welch v. DC Medical LLC, et al.*, Case No. 1:11-cv-00880 (N.D. Ga.); *Williams v. DC Medical LLC, et al.*, Case No. 1:11-cv-00940 (N.D. Ga.); *Wilson v. DC Medical LLC, et al.*, Case No. 1:11-cv-01174 (N.D. Ga.);

Illinois (4): *Aldridge, et al. v. Johnson & Johnson, et al.*, Case No. 2:10-cv-02244 (C.D. Ill.) (misjoinder of plaintiffs); *Hilgers-Luckey v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-02072 (C.D. Ill.); *Hougas v. DePuy Orthopaedics, Inc., et al.*, Case No. 1:11-cv-00476 (N.D. Ill.); *Odegaard, et al. v. DePuy Orthopaedics, Inc., et al.*, Case No. 1:11-cv-04929 (N.D. Ill.) (misjoinder of plaintiffs);

Kentucky (12): *Beavers v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00028 (W.D. Ky.); *Bryson v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00052 (W.D. Ky.); *Carnes v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00046 (W.D. Ky.); *Fox v. DePuy Orthopaedics, Inc., et al.*, Case No. 3:11-cv-00387 (W.D. Ky.); *Honeycutt v. DePuy Orthopaedics, Inc., et al.*, Case No. 7:11-cv-00081 (E.D. Ky.) (amount in controversy); *Humphrey v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00049 (W.D. Ky.); *Johnson v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00045 (W.D. Ky.); *Kimbro v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00051 (W.D. Ky.); *Lacey v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00048 (W.D. Ky.); *McElwayne v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00047 (W.D. Ky.); *Thomas v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00050 (W.D. Ky.); *Vincent v. DePuy Orthopaedics, Inc., et al.*, Case No. 1:11-cv-00102 (W.D. Ky.);

Louisiana (31): *Arnold v DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-02242 (E.D. La.); *Bouzigard, et al. v DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-02274 (E.D. La.); *Brignac v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-01346 (E.D. La.); *Brown, et al. v Mark Starring and Associates, Inc., et al.*, Case No. 2:11-cv-02308 (E.D. La.); *Butler v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:10-cv-04637 (E.D. La.);

Moreover, 14 other cases with pending jurisdictional issues are percolating through the system on Conditional Transfer Orders (“CTOs”).² Judge Katz has already resolved five of

Casimere v. Mark Starring and Associates, Inc., et al., Case No. 2:11-cv-02333 (E.D. La.); *Clark, et al. v DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-02271 (E.D. La.); *Colvin v DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-02222 (E.D. La.); *Dauzat, et al. v DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-02223 (E.D. La.); *Davis v Mark Starring, et al.*, Case No. 2:11-cv-02115 (E.D. La.); *Dellande, et al. v DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-02244 (E.D. La.); *Duplantier v Mark Starring and Associates, Inc., et al.*, Case No. 2:11-cv-02148 (E.D. La.); *Grant v DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-02231 (E.D. La.); *Harrison v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-01285 (E.D. La.); *Hill, et al. v DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-02265 (E.D. La.); *Hutto v DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-02217 (E.D. La.); *Laman v. DePuy Orthopaedics, Inc.*, Case No. 2:10-cv-04658 (E.D. La.); *Legier v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-01642 (E.D. La.); *Mayho v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-02427 (E.D. La.); *McAllister v DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-02315 (E.D. La.); *Navero, et al. v DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-02252 (E.D. La.); *Paretti v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-02285 (E.D. La.); *Plaisance v. Mark Starring, et al.*, Case No. 2:11-cv-02048 (E.D. La.); *Reichert v Mark Starring and Associates, Inc., et al.*, Case No. 2:11-cv-02171 (E.D. La.); *Rizk, et al. v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-02272 (E.D. La.); *Roussell, et al. v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-02229 (E.D. La.); *Scholle v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-01347 (E.D. La.); *Simpson v. Westside Orthopaedic Clinic, et al.*, Case No. 2:11-cv-02078 (E.D. La.); *Stevenson, et al. v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-02228 (E.D. La.); *Verdin v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-02245 (E.D. La.); *Verheugen, et al. v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-02241 (E.D. La.);

Nevada (1): *Day v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-00501 (D. Nev.);

New York (5): *Backert v. DePuy Orthopaedics, Inc.*, Case No. 1:11-cv-00797 (W.D.N.Y.); *Borrino v. DePuy Orthopaedics, Inc.*, Case No. 1:11-cv-00798 (W.D.N.Y.); *Dio v. DePuy Orthopaedics, Inc., et al.*, Case No. 1:11-cv-00042 (W.D.N.Y.); *Thompson v. DePuy Orthopaedics, Inc., et al.*, Case No. 1:11-cv-00799 (W.D.N.Y.); *Yousey v. DePuy Orthopaedics, Inc., et al.*, Case No. 1:11-cv-00043 (W.D.N.Y.);

South Carolina (1): *Beavers v. DePuy Orthopaedics, Inc., et al.*, Case No. 3:11-cv-02056 (D.S.C.);

Tennessee (1): *Robison v. DePuy Orthopaedics, Inc., et al.*, Case No. 3:11-cv-00900 (M.D. Tenn.);

Texas (2): *Banks v. DePuy Orthopaedics, Inc., et al.*, Case No. 3:11-cv-00718 (N.D. Tex.); *Fisher v. Texas Joint Products, Inc., et al.*, Case No. 4:11-cv-03370 (S.D. Tex.);

Virginia (3): *Asher v. DePuy Orthopaedics, et al.*, Case No. 2:11-cv-00549 (E.D. Va.); *Garris v. DePuy Orthopaedics, Inc.*, Case No. 4:11-cv-00042 (E.D. Va.); *Zaborsky v. DePuy Orthopaedics, Inc., et al.*, Case No. 3:11-cv-00251 (E.D. Va.).

² *Anderson v. Simpson and Associates, Inc., et al.*, Case No. 0:11-cv-03554 (D. Minn.); *Miller v. DePuy Orthopaedics, Inc., et al.*, Case No. 1:11-cv-00887 (W.D.N.Y.); *Stuhlmiller, et al. v. DePuy Orthopaedics, et al.*, Case No. 1:11-cv-00958 (W.D.N.Y.); *Barnes, et al. v. Bayside Orthopaedic, Inc., et al.*, Case No. 8:11-cv-02827 (M.D. Fla.); *Dickerson v. DePuy Orthopaedics, Inc. et al.*, Case No. 3:11-cv-00853 (E.D. Va.); *Walker v. DePuy Orthopaedics, Inc., et al.*, Case No. 3:11-cv-00716 (S.D. Miss.); *Rupard v. DePuy Orthopaedics, Inc.*, Case No. 4:11-cv-03856 (S.D. Tex.); *Walsh v. DePuy Orthopaedics, Inc., et al.*, Case No. 3:11-cv-03297 (N.D. Tex.); *Butler v. Mark Starring & Associates, Inc., et al.*, Case No. 2:11-cv-02402 (E.D. La.); *Dixon v. Mark Starring & Associates, Inc., et al.*, Case No. 2:11-cv-02372 (E.D. La.); *Williams, et al. v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-02855 (E.D. La.); *Dickson v. DePuy Orthopaedics, Inc., et al.*, Case No. 3:11-cv-00661 (M.D. La.); *Joseph v. DePuy Orthopaedics, Inc., et al.*, Case No. 3:11-cv-00659 (M.D. La.); and *Brimley v. SC Phippen Medical, et al.*, Case No. 2:11-cv-01142 (D. Utah).

these Motions for Remand.³

As a threshold matter, there is no emergency here. The Judicial Panel on Multidistrict Litigation (“MDL Panel”) has listed this case on CTO 94 (attached as Exhibit A), but transfer does not occur “automatically,” as Plaintiffs represent. (*See* Plaintiffs’ Emergency Motion for Remand, ECF No. 3 at 3). Rather, Plaintiffs may object to transfer (and have done so here) and brief their objections before the MDL Panel. And, contrary to Plaintiffs’ representations, this Court need not act “in a rapid manner” (*see id.* at 3) because the MDL transfer process generally leaves “adequate time” for transferee courts to consider motions for remand, should they choose to do so. (*See* October 7, 2011 Transfer Order, MDL 2197, Doc. No. 285, at 1 n.2, attached as Exhibit B).

The best course is for this Court to defer Plaintiffs’ Motion for Remand pending transfer to MDL 2197, so that the MDL Court can consistently address the issues shared between this case, the *McConnell* case, and the many other MDL cases with overlapping jurisdictional issues.

But should this Court decide to resolve Plaintiffs’ Motion, the Motion should be denied because the only non-diverse defendant, Bayside, has been fraudulently joined. There is no reasonable possibility that Bayside is liable under Florida law because Plaintiffs cannot establish the underpinnings of distributor liability—that Bayside (1) was responsible for placing the product into the “stream of commerce,” *Williams v. Nat’l Freight, Inc.*, 455 F. Supp. 2d 1335, 1337 (M.D. Fla. 2006) (citing *Johnson v. Supro Corp.*, 498 So. 2d 528, 528-

³ *Milner v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:10-cv-01085 (M.D. Ala.); *Slay v. DePuy Orthopaedics, Inc.*, Case No. 2:10-cv-01086 (M.D. Ala.); *Harper v. DePuy Orthopaedics, Inc.*, Case No. 2:10-cv-01087 (M.D. Ala.); *Patterson v. DePuy Orthopaedics, Inc.*, Case No. 2:10-cv-01088 (M.D. Ala.); *Taylor v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-00027 (M.D. Ala.).

29 (Fla. 3d DCA 1986)); and, (2) possessed “some element of ‘control over the allegedly defective product.’” *Devore v. Howmedica Osteonics Corp.*, 658 F. Supp. 2d 1372, 1379 (M.D. Fla. Sept. 2009) (citing *Rivera v. Baby Trend, Inc.*, 914 So. 2d 1102, 1104 (Fla. 4th DCA 2005)).

FACTUAL BACKGROUND

On December 3, 2010, the MDL Panel decided that cases involving the ASR™ hip implant devices at issue in Plaintiffs’ Complaint “share factual issues as to whether DePuy’s ASR XL Acetabular Hip System, a device used in hip replacement surgery, was defectively designed and/or manufactured, and whether DePuy failed to provide adequate warnings concerning the device” *In re DePuy Orthopaedics, Inc.*, MDL No. 2197, 2010 WL 4940348, at *1 (J.P.M.L. Dec. 3, 2010). It thus found that “[c]entralization under Section 1407 will eliminate duplicative discovery, prevent inconsistent rulings on discovery and other issues, and conserve the resources of the parties, their counsel, and the judiciary.” *Id.*; *see also* 28 U.S.C. § 1407 (providing that cases with common issues of fact may be transferred to the MDL “for the just and efficient conduct of such action.”).

Plaintiffs filed their Complaint in state court on May 16, 2011, suing Bayside for negligence, strict liability, breach of implied warranty, and violation of the Florida Deceptive and Unfair Trade Practice Act (“FDUTPA”). But on December 2, 2011, Plaintiffs moved this Court for leave to amend and add the following diverse defendants: DePuy Orthopaedics, Inc., DePuy, Inc., DePuy International, Johnson & Johnson Medical, Ltd., Johnson & Johnson International, and Johnson & Johnson (“Removing Defendants”). (*See* ECF No. 2). The state court judge granted the motion on December 5, 2011, and the Amended Complaint

was deemed filed.

Defendants removed this case on December 22, 2011, on the ground that Plaintiffs fraudulently joined Bayside because there is no reasonable possibility that Bayside could be held liable under Florida law. (*See generally* Notice of Removal, ECF No. 1).⁴ As the Panel rules require, Defendants subsequently notified the MDL Panel that this is a tag-along action to MDL 2197 and the MDL Panel listed this case on CTO 94. On December 28, 2011, Defendants also filed a Motion to Stay all proceedings pending transfer (ECF No. 7), which this Court denied as moot on January 5, 2011. (*See* ECF No. 11). On January 11, 2012, Plaintiffs filed a Notice of Opposition to CTO 94 with the MDL Panel. (*See* Notice of Opposition, attached as Exhibit C).

ARGUMENT

A. Plaintiffs' Motion Does Not Warrant "Emergency" Review.

There is no reason to resolve Plaintiffs' Motion on an emergency basis. Plaintiffs argue that absent resolution of the Motion in "a rapid manner" their case will be "automatically transferred" to and sit "in limbo" in MDL 2197, "potentially for years," (*see* ECF No. 3 at 2-3), but their argument is nothing more than an indirect (and inaccurate) attack on the propriety of the MDL process. Whether "grave prejudice" will result if transfer occurs is a concern best left to the MDL Panel, which is empowered by federal statute to determine

⁴ Plaintiffs emphasize that "this case was litigated for months" against Bayside before it was removed. But Defendants removed this case as soon as it became evident that diversity jurisdiction existed—when Plaintiffs amended their Complaint to name the diverse defendants. That Bayside chose not to file a Motion to Dismiss, for whatever reason, has no bearing on whether Plaintiffs have pleaded a colorable cause of action against Bayside.

if transfer is appropriate.⁵

Plaintiffs have recourse if they believe that the MDL court will not efficiently or fairly resolve their Motion, which overlaps with many jurisdictional challenges already pending in MDL 2197. Specifically, they have filed a notice of opposition to CTO 94 and will present their arguments against transfer to the MDL Panel. Plaintiffs should not be permitted, however, to oppose transfer and attack the efficiency and fairness of the MDL process indirectly, through a request to expedite the consideration of their remand motion here.

Further, Plaintiffs fail to disclose to this Court that Judge Katz has already resolved several of the remand motions pending in cases transferred to MDL 2197 involving similar jurisdictional issues. *See Milner v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:10-cv-01085 (M.D. Ala.); *Slay v. DePuy Orthopaedics, Inc.*, Case NO. 2:10-cv-01086 (M.D. Ala.); *Harper v. DePuy Orthopaedics, Inc.*, Case No. 2:10-cv-01087 (M.D. Ala); *Patterson v. DePuy Orthopaedics, Inc.*, Case No. 2:10-cv-01088 (M.D. Ala.); *Taylor v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-00027 (M.D. Ala.). Accordingly, there is no reason to believe that Plaintiffs' Motion will sit "in limbo" after the case is transferred to MDL 2197. (*See* ECF No. 3 at 3).

B. This Court Should Defer Consideration of Plaintiffs' Motion Pending MDL Transfer.

The best course is to defer resolving Plaintiffs' Motion pending transfer to MDL 2197. Deferral of the remand motion will allow the MDL to resolve overlapping

⁵ In any event, Defendants disagree that Plaintiffs would be prejudiced by transfer to MDL 2197, or that transfer would be inappropriate. (*See* Defendants' Motion to Stay, ECF No. 7).

jurisdictional issues, which in turn promotes judicial efficiency and avoids the possibility of inconsistent decisions. Defendants briefed many of the reasons to defer in their denied-as-moot Motion to Stay (ECF No. 7) and incorporate those same arguments here.

In fact, the MDL Panel *encourages* transferor courts to defer ruling on pending remand motions in cases tagged for MDL transfer to ensure uniform treatment of recurring jurisdictional issues. *See, e.g.*, Ltr. From the MDL Panel to Hon. Ricardo H. Hinojosa (Mar. 21, 2005) (“[W]ait[ing] until the Panel has decided the transfer issue . . . may be especially appropriate if the [remand] motion raises questions likely to arise in other actions in the transferee court and, in the interest of uniformity, might best be decided there is the Panel orders centralization.”) (attached as Exhibit D). In light of the MDL Panel’s position, numerous courts have refused to consider motions to remand in cases designated for transfer. *See, e.g.*, *Dowler v. Med Shoppe*, No. 2:07 cv 848, 2007 WL 2907519, at *1 (S.D. Ohio Oct. 3, 2007) (staying action because the MDL Panel “suggests that waiting until the Panel has decided the transfer issue may be appropriate in the interest of uniformity.”); *Nielsen v. Merck & Co.*, No. C07-00076 MJJ, 2007 WL 806510, at *2 (N.D. Cal. Mar. 15, 2007) (referencing letter from MDL Panel in rejecting plaintiff’s argument that “the court must first preliminarily consider the merits of the remand motion before even considering a stay.”).

Indeed, this Court has itself deferred resolving motions for remand where transfer to an MDL Court is pending and it is “clear that Plaintiff’s motion to remand raises issues likely to arise in other actions.” *See, e.g.*, *Perez v. Wyeth*, No. 8:03-cv-02311-JSM, at 1-2 (M.D. Fla. Mar. 3, 2004) (Moody, J.) (attached as Exhibit E); *Garver v. Wyeth*, No. 8:03-cv-02645-JSM, at 1 (M.D. Fla. Mar. 3, 2004) (Moody, J.) (attached as Exhibit F); *Daniels v. Wyeth*,

No. 8:03-cv-02309-JSM, at 1 (M.D. Fla. Mar. 3, 2004) (Moody, J.) (attached as Exhibit G). In each of these cases, this Court faced the same issue as here under the same circumstances. Each time, even when plaintiffs sought “expedited” review of their remand motions, the overlapping jurisdictional issues pending in the MDL made those motions an issue “best dealt with by the MDL Panel.” *Perez* at 2; *Garver* at 1; *Daniels* at 1.

The same reasons to defer apply here. The MDL Panel recently transferred another case, *McConnell v. Mark Debiase, Inc.*, from the Southern District of Florida to MDL 2197, notwithstanding a pending remand motion presenting the very question at issue here—whether a distributor of the DePuy ASR™ is fraudulently joined under Florida law. (See Transfer Order, Exhibit B; *McConnell* Plaintiff’s Motion for Remand, attached as Exhibit H). If this Court defers, the MDL Panel will likely transfer this case too, ensuring that the issue will be resolved uniformly in both cases.⁶

C. Plaintiffs’ Motion for Remand Should be Denied Because Bayside was Fraudulently Joined.

This Court has jurisdiction because there is no possibility that Florida law would impose liability on Bayside under the circumstances of this case. Joinder of a resident defendant is fraudulent and removal is proper “when there is no possibility that the plaintiff can prove a cause of action against the resident (non-diverse) defendant.” *Triggs v. John Crumpa Toyota, Inc.*, 154 F.3d 1284, 1287 (11th Cir. 1998); *see also Crowe v. Coleman*, 113 F.3d 1536, 1538 (11th Cir. 1997). In deciding the fraudulent joinder issue, a court must consider summary judgment evidence, such as affidavits, in addition to the pleadings. *Legg*

⁶ For these same reasons, this Court should decline Plaintiffs’ request for oral argument. Plaintiffs will have the opportunity to present their arguments to the MDL panel. Oral argument is not necessary in this Court.

v. Wyeth, 428 F.3d 1317, 1322-23 (11th Cir. 2005) (“legal error” to fail to consider such evidence); *Fowler v. Wyeth*, No. 3:04-CV-83/MCR, 2004 WL 3704897, at *3 (N.D. Fla. May 14, 2004); *Parent v. Wyeth*, No. 2:03-cv-626-FTM-29SPC, 2003 WL 25568554, at *2 (M.D. Fla. Dec. 19, 2003).⁷

Once a removing party makes a showing of fraudulent joinder, that party “is entitled to have its case heard in federal court, unless the non-removing party . . . comes forward with significant, probative evidence demonstrating the existence of a genuine issue of material fact with respect to the claim of fraudulent joinder.” *Campana v. Am. Home Prods. Corp.*, No. 1:99cv250 MMP, 2000 WL 35547714, at *3 (N.D. Fla. Mar. 7, 2000). The district court will “resolve all questions of fact . . . in favor of the plaintiff,” but “there must be some question of fact before the district court can resolve that fact in the plaintiff’s favor.” *Legg*, 428 F.3d at 1323. In applying this burden-shifting approach, if a plaintiff does not offer evidence disputing the removing party’s evidence, “the court cannot then resolve the facts in the Plaintiffs’ favor based solely on the unsupported allegations in the Plaintiffs’ complaint.” *Id.* That is, in resolving a fraudulent joinder issue, the court must base its decision on the fact record and not on allegations, speculation, or promises of evidence to be filed at a later date.

1. Florida law does not impose strict liability on parties that exercise no control over the product at issue.

Every theory of products liability under Florida law requires a plaintiff to establish that the defendant “possessed some element of ‘control over the allegedly defective product.’” *Devore v. Howmedica Osteonics Corp.*, 658 F. Supp. 2d 1372, 1379 (M.D. Fla.

⁷ Defendants attached such summary judgment evidence—the declaration of Matthew Brower—to their Notice of Removal. (See ECF No. 1, Exhibit D).

2009) (citing *Rivera v. Baby Trend, Inc.*, 914 So. 2d 1102, 1104 (Fla. 4th DCA 2005)). This inquiry in turn asks whether the defendant “placed the product in the stream of commerce” or “is in a position to control the risk of harm a product might cause once put into the stream of commerce.” *Id.* In Bayside’s case, the answer to each question is “no.” The undisputed evidence cited by Defendants in support of removal—the Declaration of Matthew Brower (ECF No. 1, Exhibit D)—confirms that Bayside does not place the DePuy ASR™ in the stream of commerce and is not in a position to control any risk of harm from the DePuy ASR™.

As the Brower Declaration explains, DePuy, not Bayside, is “the U.S. entity responsible for the design, manufacture, and sale of the ASR™ Hip prostheses.” (*Id.* at ¶ 1). Bayside facilitates delivery of, but exercises no control over, the DePuy ASR™. Specifically, Bayside does not negotiate prices for, enter into any contracts to sell, accept payment for, take title to, or even open or examine the ASR™ prostheses. (*Id.* at ¶¶ 6-7). It conveys a consumer’s order directly from inventory to the ordering hospital or surgeon in “sealed, sterile packages that were labeled, packaged, and sealed by DePuy.” (*Id.* at ¶¶ 5-6). In short, it is DePuy, not Bayside that places the ASR™ into the stream of commerce.⁸ Bayside, for its part, is never in a position to control the risk posed by a product it receives and delivers in “sealed, sterile packages,” which it never even opens. (*See id.* at ¶¶ 5-6).

⁸ Because DePuy is the entity that places the ASR™ prostheses in the stream of commerce, Bayside cannot be held liable for doing so. A succinct metaphor explains why. If a child tosses a stone into a stream, a second child cannot come along and toss that same stone into the stream for a second time—at least, not without first reaching into the water and pulling the stone back out. Here, Bayside is like the second child, but pulls nothing out of the stream of commerce. This would be a different case if Bayside opened the ASR™ prostheses, modified them, and repackaged them for sale. Then, Bayside would be like the second child that comes along, plucks the stone from the water, and tosses it back into the stream. Only then could Bayside, as a party responsible for placing the product in the stream of commerce, fairly be held liable for alleged harm caused to consumers.

The Supreme Court of Florida's decision in *Samuel Friedland Family Enterprises v. Amoroso*, 630 So. 2d 1067 (Fla. 1994) is consistent with finding fraudulent joinder here. While Plaintiffs suggest that Bayside was in the same position as the Diplomat Hotel—the Florida defendant that leased its beach to a boat-stand operator and marketed the boats to its guests—the comparison falls flat. The Diplomat may not have had an “ownership interest” in the boats, but it intentionally established a rental business in which it appeared to hotel guests that they rented boats from the Diplomat, and that the Diplomat itself delivered the boats to consumers. *See id.* at 1071 (“The record reflects that, when the Amorosos, and presumably the other hotel guests, rented a boat, they reasonably believed that they were renting it from the Diplomat.”). In short, the Diplomat implied that it quite literally put the boats “in the water” for its guests’ use. Bayside, in contrast, cannot be characterized as placing anything in the stream of commerce.

In fact, it was the *Amoroso* court that articulated that the “underlying basis for the doctrine of strict liability” was a policy of holding responsible those entities who “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. Plaintiffs, to the extent they read *Amoroso* to focus on money, profits, or the receipt of a sales commission, ignore that the court required a connection to the product before imposing liability. *See id.*; *see also Devore*, 658 F. Supp. 2d at 1378 (“[T]he Florida Supreme Court held that ‘[i]n order to hold a manufacturer liable on the theory of strict liability in tort, the user must establish the manufacturer’s relationship *to the product in question.*’”) (emphasis

added).⁹ Bayside, the Brower Declaration makes clear, exercises no such control over the DePuy ASR™. Because Bayside was not in a position to ensure the ASR™’s safety or to “control the risk of harm [the] product might cause once put into the stream of commerce,” *see Devore*, 658 F. Supp. 2d at 1379, there is no possibility that it could be liable under Florida law.

Echoing the reasoning in *Amoroso*, Florida courts have confirmed that strict liability does not apply where, as here, a control-less defendant delivers a prescription product from manufacturer to consumer in a sealed, unaltered state. For example, in *McLeod v. W.S. Merrell Co.*, 174 So. 2d 736 (Fla. 1965), the Florida Supreme Court refused to impose liability for breach of implied warranty on “retail druggist[s] who properly fill[] a prescription of a medical doctor with an unadulterated drug.” *Id.* at 737. The “concept of strict liability without fault,” the Court reasoned, “should not be applied to the prescription druggists in the instant situation,” where the prescription was filled strictly in accordance with a doctor’s orders. *Id.* at 739. There too, the pharmacist had no control over the product, which was prepared by the manufacturer and put in a sealed package that the defendant never opened or analyzed, and so Florida law would not hold the pharmacist liable. *See id.* at 737; *see also Fontanez v. Parental Therapy Associates, Inc.*, 974 So. 2d 1101, 1105 (Fla. 5th DCA 2007) (“The *McLeod* court found that the imposition of strict liability on a pharmacist simply dispensing a prescription drug would improperly convert retail pharmacists into insurers of

⁹ Plaintiffs nevertheless suggest—based on a 21-year-old Illinois Court of Appeals decision—that a “participatory connection” between Bayside and the allegedly defective ASR™ is a sufficient basis for strict liability. *See Bittler v. White and Co., Inc.*, 560 N.E.2d 979 (Ill. Ct. App. 1990). The *Bittler* decision, however, is not Florida law. Florida requires a more direct relationship between defendant and product in which the defendant exercises affirmative control over the product.

the safety of the manufactured drug.”).¹⁰

2. Plaintiffs have failed to cite record evidence contradicting the Brower Declaration or establishing that Bayside exercised control over the DePuy ASR™.

Because Plaintiffs have offered no evidence to dispute the Brower Declaration, this Court cannot resolve the issue of whether Bayside exercised control over the DePuy ASR™ in Plaintiffs’ favor based solely on unsupported allegations and promises to file evidence sometime in the future. *See Legg*, 428 F.3d at 1323 (“When the Defendants’ affidavits are undisputed by the Plaintiffs, the court cannot then resolve the facts in the Plaintiffs’ favor based solely on the unsupported allegations in the Plaintiffs’ complaint.”). Here, Plaintiffs fail to even acknowledge the Eleventh Circuit’s decision in *Legg*, much less dispute the Brower Declaration with record evidence. Accordingly, denial of Plaintiffs’ remand motion is appropriate because Plaintiffs have not presented any evidence “demonstrating the existence of a genuine issue of material fact with respect to the claim of fraudulent joinder.” *Campana*, 2000 WL 35547714 at *3.

Rather than contradict the Brower Declaration, Plaintiffs characterize the Declaration as full of “red herrings” and instead assert that Bayside was “clearly” a “part of the distributive chain.” (ECF No. 3 at 5). They cite to Mr. Brower’s deposition testimony (*id.* at 5-8), but that deposition has not been filed and is not record evidence. They allege that

¹⁰ The Northern District of Florida recently remanded a case in which the defendants removed based in part on the *Fontanez* holding. *Martin v. Medtronic, Inc.*, No. 5:11-cv-144/RS-CJK, 2011 WL 2473318, at *1 (N.D. Fla. June 22, 2011). In distinguishing *Fontanez*, the trial court—without citing any authority—drew an artificial distinction between prescription drug cases and “the traditional medical device line of strict liability cases.” *Id.* Florida law does not support any such distinction. Rather, the determinative factor is not an artificial distinction between drug and medical device, but whether the alleged distributor exercises control over the product at issue.

Bayside received a commission from DePuy, but ignore the reality that a commission has nothing to do with “control” over a product. (*See id.* at 5-8). And while Plaintiffs claim to be “in possession of numerous documents reflecting the extensive role played by Defendant Bayside Orthopaedics, Inc. in the promotion, sale, distribution, and servicing of the defective hip replacements at issue in this matter,” none of that evidence is in the record. (*See id.* at 3-4). Their evidence is just the sort of “unsupported allegations” that the *Legg* court cautioned cannot be used to dispute affidavits filed in support of removal. *See Legg*, 428 F.3d at 1323.

3. Plaintiffs’ negligence claims also fail because Bayside does not exercise any control over the DePuy ASR™.

Plaintiffs’ negligence claims against Bayside carry no possibility of success for the same reasons as Plaintiffs’ strict-liability claims. That is, Bayside has no ability to “control the risk of harm [the] product might cause once put into the stream of commerce.” *Devore*, 658 F. Supp. 2d at 1379. And again, Plaintiff offers no record evidence to dispute the Brower Declaration, which makes clear Bayside’s lack of responsibility for the ASR™—Bayside has “no role in the design or manufacture of the DePuy ASR™ hip prosthesis,” no role in developing or publishing marketing materials, and never so much as unseals, much less takes title to the ASR™ prostheses. (Declaration at ¶¶ 3, 4, 6 & 7).

Rather than contradict the Brower Declaration, Plaintiffs cite to evidence not only absent from the record, but also unrelated to this case. For example, Plaintiffs argue that Bayside is a “seller” based on voluminous references and exhibits regarding sales representatives in other cases, their training, and their responsibilities. (*See* ECF No. 3 at 9-11 and Exhibits A-D). But the issue is not what sales representatives in general may or may

not do, nor how pivotal their role is. The issue is what *Bayside* did with respect to these two plaintiffs and their surgeons. *See Devore*, 658 F. Supp. 2d at 1379 (analyzing control relative to the plaintiff's specific product). Non-record evidence, conclusory allegations, and promises to file documents in the future do not contradict the case-specific Brower Declaration. Applying the Eleventh Circuit's decision in *Legg*, these "unsupported allegations" do not dispute the Brower Declaration, and this Court must resolve the fraudulent joinder issue on that undisputed evidence alone.

4. Plaintiffs' warranty claims must fail because Bayside did not enter into any sales contracts with Plaintiffs, their surgeons, or their hospitals.

Plaintiffs have no possibility of succeeding on their warranty theories because they cannot establish privity as a matter of law. *See Montgomery v. Davol, Inc.*, No. 3:07cv176/RV/EMT, 2007 WL 2155644, at *2-*3 (N.D. Fla. July 24, 2007); *Barrow v. Bristol-Myers Squibb Co.*, No. 96-689-CIV-ORL-19B, 1998 WL 812318, at *46 (M.D. Fla. Oct. 29, 1998). Tellingly, Plaintiffs do not make any argument with respect to their warranty claims in their Motion for Remand. They do not because they cannot—Plaintiffs made no allegations with respect to privity in their Complaint. And moreover, the undisputed facts, as established in the Brower Declaration, confirm that Bayside did not enter into any contractual relationship (express or implied) with Plaintiffs, their surgeons, or the hospitals in which their surgeries occurred, nor receive any monies from any of these parties for the ASR™ implants. (*See* Declaration at ¶ 7).

5. Plaintiffs have no reasonable possibility of success on their FDUTPA claims.

There is no possibility that Plaintiffs' claims for relief under the FDUTPA may

succeed because, under Florida law, a plaintiff may not press such an FDUTPA claim as a substitute for a failure-to-warn cause of action. *See Beale v. Biomet, Inc.*, 492 F. Supp. 2d 1360, 1370-73 (S.D. Fla. 2007) (holding that the learned-intermediary doctrine applies to FDUTPA claims). Failure to warn, however, is precisely what Plaintiffs allege. (*See* ECF No. 3 at 13 (“Plaintiffs have alleged . . . that Defendant Bayside . . . failed to provide that information to Plaintiffs or their surgeons.”)). In this circumstance, the duty to warn is the *manufacturer’s* duty to warn, not Bayside’s. *See Beale*, 492 F. Supp. 2d at 1365-66 (“Pursuant to the doctrine, a manufacturer has a duty to give a physician adequate warning of the risks . . .”). Simply, the learned-intermediary doctrine, which *Beale* sought to protect, “would be rendered meaningless” if Plaintiffs were allowed to couch failure-to-warn claims as “an affirmative misrepresentation or a misrepresentation by concealment” actionable under the FDUTPA. *Id.* at 1373.

And again, Plaintiffs have failed to carry their burden under *Legg* of opposing Defendants’ record evidence with respect to fraudulent joinder. Plaintiffs ignore that burden and instead state that they “have alleged and the evidence will show that Defendant Bayside . . . had information that the product at issue was defective, but failed to provide that information to Plaintiffs or their surgeons.” (ECF No. 3 at 13). But unsupported allegations are not enough at this stage, especially in the face of the Brower Declaration confirming that Bayside had no role in labeling and marketing statements. (*See* Declaration at ¶ 4). Plaintiffs must establish facts on the record that demonstrate “the existence of a genuine issue of material fact with respect to the claim of fraudulent joinder.” *Campana*, 2000 WL 35547714, at *3. Plaintiffs cannot do so.

D. This Court Should Follow the Majority Approach of Federal District Courts and Defer Ruling on Plaintiffs' Motion.

If this Court defers ruling on Plaintiffs' Motion for Remand, its decision will be consistent with numerous other courts within the Eleventh Circuit that have likewise refused to resolve remand motions in cases designated for MDL transfer, as well as with this Court's prior decisions. *See, e.g., Kline v. Earl Stewart Holdings, LLC*, No. 10-80912-CIV, 2010 WL 3432824, at *2 (S.D. Fla. Aug. 30, 2010) (granting defendant's motion to stay, pending action by MDL Panel); *Miller v. Merck & Co.*, No. 2:08-cv-757, 2008 WL 4642779, at *1 (M.D. Fla. Oct. 20, 2008) ("[T]he Court concludes that the motion to stay should be granted and that the issues raised in the motion to remand should be deferred to the district court presiding over MDL-1657"); *Gavitt v. Merck & Co.*, No. 2:08-cv-755, 2008 WL 4642782, at *1-*2 (M.D. Fla. Oct. 20, 2008) (same); *Republic of Venez. v. Philip Morris Cos.*, No. 99-0586-CIV, 1999 WL 33911677, at *1 (S.D. Fla. Apr. 28, 1999) (staying consideration of motion to remand pending transfer by MDL Panel); *Perez v. Wyeth*, No. 8:03-cv-02311-JSM, at 1-2 (M.D. Fla. Mar. 3, 2004) (Moody, J.) (Exhibit E); *Garver v. Wyeth*, No. 8:03-cv-02645-JSM, at 1 (M.D. Fla. Mar. 3, 2004) (Moody, J.) (Exhibit F).

Indeed, this is the very approach applied by the Southern District of Florida in the *McConnell* case where, despite a remand motion that remained pending for more than two months, the court elected not to rule on this very fraudulent joinder issue before the MDL Panel transferred the plaintiff's case to MDL 2197. Likewise, as stated above, it is the very approach taken by *this Court* and others within this District under these same circumstances.

Plaintiffs, for their part, cite two kinds of inapplicable authority: (1) cases suggesting

that courts should remand where fraudulent joinder requires a detailed investigation of the evidence; and (2) cases applying law outside of and inapplicable to the State of Florida.

First, Plaintiffs rely heavily on a Southern District of Florida decision remanding the case of *Hughes v. Howmedica*, No. 07-61721-CIV-ZLOCH (S.D. Fla. Dec. 18, 2007), to state court. (See ECF No. 3, Exhibit F). But unlike *Hughes*, which required a “searching investigation of matters outside the complaint” to ascertain removability, this Court can determine the fraudulent joinder issue on nothing more than the Amended Complaint and the summary judgment-type evidence appropriately attached to the Notice of Removal.

Moreover, in *Hughes*, the District Court did not apply the binding Eleventh Circuit test set forth in *Legg*. Indeed, the case that *Hughes* relied upon, *Jones v. Honeywell Int’l, Inc.*, 385 F. Supp. 2d 1268 (M.D. Fla. 2005), was decided *before Legg*. Thus, *Hughes* is inapposite.

Second, Plaintiffs rely on three remand decisions from Illinois (*Kopitke v. DePuy Orthopaedics, Inc.*), Nevada (*Rundle v. DePuy Orthopaedics, Inc.*), and Wisconsin (*Malkmus v. DePuy Orthopaedics, Inc.*), which represent the minority approach and, moreover, lack any bearing on Florida law. None of those cases addressed whether an in-state distributor had been fraudulently joined under Florida law. Indeed, Plaintiffs admit that the law in Nevada, unlike Florida, was unsettled, and that the issue in Illinois was “more complicated.” (See ECF No. 3 at 17-18). None of these cases, then, offer any reason to remand this case under Florida law.

E. Plaintiffs’ Request for Fees Should be Denied Because Defendants’ Removal Is “Objectively Reasonable.”

If Plaintiffs’ Motion is granted, their request for related fees and costs should be denied because Defendants have “an objectively reasonable basis for seeking removal.”

Martin v. Franklin Capital Corp., 546 U.S. 132, 141 (2005). In *Martin*, the Supreme Court of the United States held that “[a]bsent unusual circumstances, courts may award attorney’s fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal.” *Id.* Here, Defendants’ removal was objectively reasonable because it was based on a legitimate interpretation of existing Florida case law, mirrored the recent removal of the *McConnell* case, and because complete diversity exists between Plaintiffs and DePuy. See *McKin v. Home Depot U.S.A.*, No. 09-81427-Civ., 2010 WL 2612613, at *2 (S.D. Fla. June 22, 2010) (“Although the District Court rejected this [fraudulent joinder] argument, such does not render Defendants’ position objectively unreasonable.”); see also *Diebel v. S.B. Trucking Co.*, 262 F. Supp. 2d 1319, 1333-34 (M.D. Fla. 2003) (“[T]his Court is reluctant to order [fees] because the record reflects that the Defendants’ efforts to remove to federal court were reasonable in that they were not without some basis in law, and there was no binding Eleventh Circuit authority to the contrary.”).

CONCLUSION

Florida law is clear that a defendant in a product liability suit will not be held liable if it did not possess “control” over the allegedly defective product. Bayside, which did not open or examine, much less take title to or place into the stream of commerce Plaintiffs’ ASR™ hip implants, exercised no such control. For this reason, among the others described above, there is no possibility that Bayside can be liable to Plaintiffs under Florida law. If this Court chooses to resolve Plaintiffs’ Motion, counter to the expressed intent of the MDL Panel and the practice of federal courts across the country, then this Court should deny Plaintiffs’ Motion for Remand.

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CERTIFICATE OF SERVICE

I CERTIFY that on the 11th day of January, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to Altom M. Maglio at amm@mctplaw.com.

/s/ Edward W. Gerecke

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