IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

SHANNON McCONNELL,

Plaintiff,

v.

MARK DEBIASE, INC., et al.,

Defendants.

Case No.: 1:11-cv-22025-AJ

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR REMAND AND INCORPORATED MEMORANDUM OF LAW

Plaintiff, Shannon McConnell, by and through her undersigned counsel, hereby files this reply to *Defendants' Response to Plaintiff's Motion for Remand* and in support thereof states as follows:

I. Defendants' Pebble Metaphor Misstates Basic Principles of Florida Law

In their *Response*, Defendants misstate basic principles of Florida law and general tort law. On Page 6 of their *Response*, Defendants make the extremely misguided argument:

> Because DePuy is the only entity that places the ASR™ prostheses in the stream of commerce, Joint Venture 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, Joint Venture is like the second child, but pulls nothing out of the stream of commerce. This would be a different case if Joint Venture opened the ASR™ prostheses, modified them, and repackaged them for sale. Then Joint Venture 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 Joint Venture, as a party responsible for placing the product in the stream of commerce, fairly be held liable for alleged harm caused to consumers.

Defendants' above argument turns basic principles of tort law on their head. Of course both the manufacturer and the seller of a product can be liable for injury caused by a defect in the product. Florida law in no way limits liability solely to the manufacturer who *places* a product on the market.

In fact, as stated by the Florida Supreme Court in *Samuel Friedland Family Enterprises v. Amoroso*, "Any entity "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." *Samuel Friedland Family Enterprises v. Amoroso,* 630 So.2d 1067, 1068 (Fla.1994), internal quotations omitted. As stated by Plaintiff on Page 4 of her *Motion for Remand*, "Defendant Joint Venture was clearly part of the distributive chain and derived a profit from the product at issue in this case."

Defendants ignore the chain of distribution concept which serves as the bedrock of Florida product liability law and instead create their own, self-serving rule wherein only a single party can "place" a product into the stream of commerce and only that party may be held liable. Aside from being ludicrous, such notion lacks any basis in Florida law and indeed, ignores numerous cases which hold actors involved in the chain of distribution to be liable. *See e.g*., *Samuel Friedland Family Enterprises v. Amoroso,* 630 So.2d at 1068 ("Florida courts have expanded the doctrine of strict liability to others in the distributive chain including retailers, wholesalers, and distributors.") and cases cited in section II of *Plaintiff's Motion for Remand*.[1]

II. Online Job Descriptions by Joint Venture Sales Representatives Show Falsity of Defendants' Claims

In Footnote 4 on Page 12 of their *Response*, Defendants strongly imply that the sales representatives whose Linkedin profiles were included in Plaintiff's *Motion for Remand* did not work for Joint Venture. Defendants point out that "neither profile even mentions the company

[1] Even the very first case cited by Defendants in their *Response* at page 2, *Williams v. National Freight, Inc.* states quite clearly, "The Florida Supreme Court has recognized that a strict liability theory may apply to manufacturers, as well as to others in the distribution chain, including retailers, wholesalers, distributors, and, most recently, commercial lessors." *Williams v. National Freight, Inc.*, 455 F. Supp. 2d 1335, 1337 (M.D. Fla. 2006). Notably, the *Williams* case in no way states the "essential requirement" of "placing the product in the stream of commerce" for which Defendants cite it as support. Rather, *Williams* explains, "Under Florida law, strict liability actions are 'based on the essential requirement that the responsible party is in the business of and gains profits from distributing or disposing of the 'product' in question through the stream of commerce.'" *Id*. For Defendants to twist the meaning of *Williams* to serve their ends takes quite a feat of semantic acrobatics.

"Joint Venture" or "Mark Debiase, Inc." Sneakily, however, Defendants never actually **deny** that the sales representatives worked for Joint Venture. In fact, at the time of the filing of the *Motion for Remand*, Megan Kontol worked out of Joint Ventures' Jacksonville, Florida office. Similarly, at the time of the filing of the *Motion for Remand*, Ben Neff worked out of Joint Venture's Boyton Beach office. Both sales representatives worked for Joint Venture.[2]

III. Joint Venture Clearly Negotiates Contracts on Behalf of DePuy Orthopaedics, Inc.

In Footnote 5 of Page 12, Defendants appear to deny that Joint Venture negotiates contract prices on behalf of DePuy Orthopaedics, Inc. Defendants state:

> Plaintiff refers in her brief to a letter sent from Mark Debiase to Halifax Medical Center on August 19, 2008, which extends an offer to renew the contract between Halifax and DePuy for two years. This letter does not, as Plaintiff suggests, indicate that Joint Venture negotiated contract prices. Indeed, the letter appears to be nothing more than Mr. Debiase conveying information about prices set by DePuy to Halifax. As such, it is entirely consistent with Mr. Debiase's sworn declaration.

However, the very wording of the letter clearly shows that Mark Debiase is negotiating the pricing of orthopedic implants. The first paragraph of Mr. Debiase's letter reads "On September 30, 2008 the term of your current orthopedic implant pricing agreement is due to expire. I have reviewed these terms and would like to offer another two year contract with a three (3) percent annual increase." *Motion for Remand* Exhibit G. This certainly does not appear to be Mr. Debiase simply "conveying information about prices set by DePuy to Halifax."

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[2] Defendants also claim in the same footnote that the Court should disregard the profiles of the Joint Venture sales representatives as they were not authenticated pursuant to the Federal Rules of Evidence. However, Defendants cite no caselaw supporting such a requirement. The reason that Defendants fail to cite caselaw supporting their contention is that there is no support in the caselaw for such a requirement.

Additional correspondence provided by Halifax Health pursuant to a public records request by counsel for Plaintiff shows further orthopedic implant price negotiations by Joint Venture. A copy of the response to the public records request from Halifax consisting of a cover letter and an exchange of emails between Shane Stalcup, listed as Sales Manager for Joint Venture, and Halifax is attached hereto as Exhibit "A". In a September 29, 2010 e-mail to Halifax, Joint Venture Sales Manager Shane Stalcup writes: "The Total Joint Pricing that we have discussed will commence on 10/1/10 fixed for a period of two years. This will include the [redacted] discount on revisions." He goes on to write "Regarding the discrepant invoices, we have written credits in excess of 25K over the last several years, we feel that we have done our part to help your facility in this regard." These are hardly the words of an actor simply "conveying information about prices set by DePuy to Halifax."

Likewise, a January 26, 2010 e-mail from Mr. Stalcup to Halifax again clearly shows Joint Venture negotiating pricing of orthopedic joint replacements with Halifax. Mr. Stalcup writes:

> I reviewed your comments on the old discrepant p.o. list. Attached is the most recent one updated through the 19th of January. I understand your position on the Altrx, although if we had used the older technology Marathon liner we would have had an approved upcharge (value to you because we waved the common upcharge practice of the Marathon liner). Your comment on the stem outside of the knee cap is simple to explain. We could have charged component pricing because the cap is for 4 components (Femur, Insert, Tray, Patella). The use of a stem by Dr. Gillespy on the case in question, automatically broke the case out of caps. We chose the high road and decided to try and save Halifax money and bill for the cap plus the stem separately, which is significantly less than it would have been had we billed component pricing.

The relevant portions of this and the prior e-mail have been highlighted in Exhibit "A" to assist in locating the quoted text. Once again Mr. Stalcup was doing far more than simply "conveying information about prices set by DePuy to Halifax."

IV. Plaintiff Certainly Gets the Opportunity to Counter the Disingenuous Affidavit of Mark Debiase

Defendants' Response contains the novel argument that Plaintiff is barred from filing materials countering the Notice of Removal and the attached affidavit of Mark Debiase. On Page 13 of their Response, Defendants state:

> Moreover, this Court may not consider the new "evidence" contained in Plaintiff's remand motion for the purposes of determining whether Joint Venture has been fraudulently joined. In assessing jurisdiction, the "district court has before it only the limited universe of evidence available when the motion to remand is filed-i.e., the notice of removal and accompanying documents." *Lowery v. Alabama Power Co.,* 483 F.3d 1184, 1213 (l1th Cir. 2007).

Defendants misuse the language of the *Lowery* case in supporting their novel argument. In *Lowery*, the Eleventh Circuit was presented with a case removed from Alabama state court under the Class Action Fairness Act and remanded back to state court. The court in *Lowery* was concerned with the amount in controversy rather than the issue *instanter*, fraudulent joinder. *Id*. After deciding a host of issues relating to the Class Action Fairness Act, the Court stated: "We turn now to two related questions: (1) on what evidence may a *removing defendant* rely in asserting jurisdiction?; and (2) if that evidence is found wanting, may discovery be invoked to supplement that evidence." *Id* at 1211 (emphasis supplied). It is in this context that the Eleventh Circuit states the language quoted by Defendants.[3] *Id* at 1214. The standard espoused by the Eleventh Circuit is not what evidence to which a plaintiff seeking remand is limited, but rather what evidence is required of a defendant seeking removal and seeking to establish a sufficient amount in controversy for federal jurisdiction. Thus, *Lowery* may be distinguished both by the party to which it applies (defendants rather than plaintiffs) and the jurisdictional issues raised

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[3] Actually, the full sentence cited by Defendants gives greater insight to its meaning, "*In assessing whether removal was proper in such a case*, the district court has before it only the limited universe of evidence available when the motion to remand is filed." *Id*. at 12-13-14.

(amount in controversy rather than fraudulent joinder) which issues vary greatly in terms of proof.

The language cited by the Defendants in *Lowery* when examined in context in no way supports the proposition claimed by Defendants. Of course, a plaintiff challenging removal gets the opportunity to refute (in the instant case, destroy) a disingenuous affidavit filed in support of a notice of removal. The alternative would permit removing defendants to run roughshod over the jurisdiction of state courts. For this reason, this Court and other federal courts considering similar motions for remand consistently rely upon the information submitted by plaintiffs in support of remand. *See e.g.*, *Wade v. Bausch & Lomb, Inc., et al.,* Order Granting Motion to Remand, Denying Motion for Attorneys' Fees and Denying Motion to Stay, at 3, Case No. 06-80546-CIV-MIDDLEBROOKS/JOHNSON (S.D. Fla. Aug. 16, 2006) (Relying on portion of defendants website, submitted in plaintiffs' reply, in granting remand), attached as Exhibit "B"; *Malkmus v. DePuy Orthopaedics Inc, et al.*, Order Granting Plaintiffs' Motion to Remand, at 4, Case No. 11-C-365 (E.D. Wis. June 13, 2011) (Relying on "the additional information contained in the parties' submissions regarding the plaintiffs' motion for remand" in granting remand), attached as Exhibit "C"; *Rundle, et al. v. DePuy Orthopaedics, Inc., et al.*, Findings and Recommendation Re: Plaintiffs' Motion to Remand - #5, at 4, 18, Case No. 2:11-cv-00634-PMP-GWF (D. Nev. July 6, 2011) (Recommended order granting remand citing to Internet postings and quoted testimony by DePuy representatives in other actions submitted by plaintiffs in support of motion to remand and finding such material provided support for plaintiffs' allegations), attached as Exhibit "D".

V. Defendants' Attached Order Staying Case Pending Transfer to MDL is Inapposite

In support of their *Response*, Defendants attached a one page 2004 order from the United States District Court for the Middle District of Alabama. The order involves different defendants and, if it is a product liability case, a very different product than the one in question judging by the one listed defendant, Bayer AG. The basis of the removal to federal court is not stated in the order. Instead, it is a bare bones one page order that is clearly irrelevant to the instant case.

In contrast, attached as Exhibit "D" hereto is the July 6, 2011, recommended order from Magistrate George Foley, Jr. of the United States District Court for the District of Nevada. The case involves similar claims of injury from the same model hip replacement as in the instant case. Like the instant case, the plaintiffs sued the in-state distributor and also DePuy Orthopaedics, Inc. Like the instant case, DePuy Orthopaedics, Inc. removed the case to federal court claiming that the distributor had been fraudulently joined and asked the court to stay the case so that it would be transferred to the DePuy ASR Multi-District Litigation. The plaintiffs moved for the case to be remanded back to state court and opposed the stay. In analyzing similar issues to the instant case but applying Nevada law, Magistrate Foley wrote an extensive 19 page *Findings and Recommendations*, denying the motion to stay the case and remanding it back to state court.

VI. Defendants' Spurious Arguments Show they Lacked Objectively Reasonable Basis to Remove Case

Defendants' arguments in the instant case supporting their *Notice of Removal* lack any merit. The reason for this lack of merit is that the removal itself lacked an objectively reasonable basis. It is simply not possible to provide reasonable arguments in support of Defendants' removal of the instant action.

In an unpublished May 31, 2011, decision in *Taylor Newman Cabinetry, Inc. v. Classic Soft Trim, Inc.*, the Eleventh Circuit upheld an award of attorneys' fees against defendants for improper removal of a case to federal court by claiming fraudulent joinder. *Taylor Newman Cabinetry, Inc. v. Classic Soft Trim, Inc.*, 2011 WL 2150183 (11th Cir. 2011), attached hereto as Exhibit "E". The United States District Court for the Middle District of Florida had held that there was no objectively reasonable basis for the removal and, without any further proceedings, awarded attorneys' fees of $2,500. The Eleventh Circuit upheld the award of attorneys' fees. The approach employed by the District Court in *Taylor Newman* would be well suited to the instant case and prevent the necessity for further proceedings on the issue.

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 July 15, 2011, on all counsel of record.

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