

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

Case No. \_\_\_\_\_  
State Case No. 12 CA 25901

CONNIE PICCINONNA and CARLO  
PICCINONNA,

Plaintiffs,

vs.

HOWMEDICA OSTEONICS  
CORPORATION, a New Jersey Corporation,  
d/b/a STRYKER ORTHOPAEDICS, and  
ORTHOPEDIC SOLUTIONS, INC. d/b/a  
STRYKER SOUTH FLORIDA AGENCY,

Defendants.

\_\_\_\_\_ /

**DEFENDANT HOWMEDICA OSTEONICS CORP.'S NOTICE OF REMOVAL**

Defendant Howmedica Osteonics Corp., which has at times done business as “Stryker Orthopaedics” (hereinafter “HOC”), hereby removes this action, which is currently pending in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, Case No. 2012 CA 25901, to the United States District Court for the Southern District of Florida, Fort Lauderdale Division. In support of this Notice of Removal, HOC states the following:

**THE REMOVED CASE**

1. The removed case is a civil action filed on September 4, 2012, in the Seventeenth Judicial Circuit, in and for Broward County, Florida, and captioned *Connie Piccinonna and Carlo Piccinonna, Plaintiffs v. Howmedica Osteonics Corp d/b/a Stryker Orthopaedics and Orthopedic Solutions, Inc. d/b/a Stryker South Florida Agency, Defendants*, Case No. 2012 CA 25899.

1  
LAW OFFICES  
SHOOK, HARDY & BACON, LLP

2. This medical device product liability action arises out of an injury allegedly sustained by Plaintiff Connie Piccinonna in connection with the implantation of two Rejuvenate artificial hip implant systems designed and manufactured by HOC. *See* Complaint at ¶¶ 1, 10. Plaintiffs' Complaint seeks to recover damages from HOC and Orthopedic Solutions, Inc. d/b/a Stryker South Florida Agency ("Orthopedic Solutions").

### **PAPERS FROM REMOVED ACTION**

3. Pursuant to 28 U.S.C. § 1446(a), HOC attaches to this Notice of Removal a copy of all pleadings, orders and other papers or exhibits of every kind currently on file in the state court action. *See* Exhibit 1, attached hereto.

### **THE REMOVAL IS TIMELY**

4. Plaintiffs filed this action in the aforementioned state court on September 4, 2012. HOC was served with the Complaint on September 13, 2012. This notice of removal is timely filed. *See, e.g., Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 355 (1999) (removal time frame triggered by receipt of *formal* service; not receipt of complaint.). Accordingly, this Notice of Removal is timely filed under 28 U.S.C. § 1446(b).

### **VENUE IS PROPER**

5. Venue is proper in the Fort Lauderdale Division of this Court because this action is being removed from the Seventeenth Judicial Circuit, in and for Broward County, Florida and the acts complained of in Plaintiffs' Complaint are alleged to have occurred in Broward County, Florida. *See* Complaint at ¶ 5.

**DIVERSITY OF CITIZENSHIP EXISTS  
BETWEEN THE PROPERLY JOINED PARTIES**

6. This is a civil action that falls under the Court's original jurisdiction under 28 U.S.C. § 1332 (diversity of citizenship) and is one that may be removed to this Court based on diversity of citizenship under 28 U.S.C. §§ 1441 and 1446.

7. At all times material hereto, Plaintiffs, Connie Piccinonna and Carlo Piccinonna, were residents and citizens of Broward County, Florida. *See* Complaint at ¶ 4.

8. At all times material hereto, Defendant HOC is and was a New Jersey corporation with its principal place of business in New Jersey. *See* Complaint at ¶ 6.

9. Defendant Orthopedic Solutions is, and was at the time this action was filed, a Florida corporation with its principal place of business in Florida. *See* Complaint at ¶ 5. As set forth in greater detail below, Orthopedic Solutions is fraudulently joined and its presence in this action does not destroy diversity jurisdiction or prevent removal to this court. Its citizenship must, therefore, be disregarded for the purposes of diversity analysis. *See Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996). Further, its consent as a fraudulently joined defendant is not required for purposes of removal. *See Diaz v. Kaplan Univ.*, 567 F. Supp. 2d 1394, 1402 (S.D. Fla. 2008).

10. Because Plaintiffs are citizens of Florida, and HOC, the properly joined Defendant, is not, complete diversity exists under 28 U.S.C. § 1332.

**ORTHOPEDIC SOLUTIONS IS FRAUDULENTLY JOINED**

11. In determining whether diversity jurisdiction exists, the Court must disregard the citizenship of fraudulently joined parties. *See Tapscott*, 77 F.3d at 1360; *Cabalceta v. Standard*

*Fruit Co.*, 883 F.2d 1553, 1561-62 (11th Cir. 1989). Fraudulent joinder is a judicially created doctrine that allows an exception to the requirement of complete diversity. *Triggs v. John Crump Toyota, Inc.*, 154 F.3d, 1284, 1287 (11th Cir. 1998). A defendant is fraudulently joined where there is no “reasonable basis” for a claim against him. *See Crowe v. Coleman*, 113 F.3d 1536, 1542 (11th Cir. 1997).

12. The Eleventh Circuit recognizes three types of fraudulent joinder: (1) where there is no possibility that the plaintiff can prove a cause of action against the resident defendant; (2) when there is outright fraud in the plaintiff’s pleading of jurisdictional facts; and (3) where the claims against the non-diverse defendant have no real connection to the claims against the diverse defendants. *Triggs*, 154 F.3d at 1287. Here, there is no possibility that the Plaintiffs can prove a cause of action against Orthopedic Solutions.

13. Courts have recognized that the “no possibility” standard “cannot be taken literally.” *In re Rezulin Prods. Liab. Litig.*, 133 F.Supp. 2d 272, 280 n.4 (S.D.N.Y. 2001). In fact, numerous circuits have recognized that “the standard more accurately is described as requiring a showing that there is ‘no reasonable basis’ for predicting liability on the claims alleged.” *Id.* (emphasis added); *see Legg v. Wyeth*, 428 F.3d 1317, 1324-25 (11th Cir. 2005) (applying “reasonable basis” test); *Crowe*, 113 F.3d at 1540 (applying “arguably a reasonable basis” test) (internal quotation omitted); *Schwartz v. State Farm Mut. Auto. Ins. Co.*, 174 F.3d 875, 879 (7th Cir. 1999) (noting that it cannot “say that there is no possibility that a state court would someday” recognize plaintiff’s liability theory, but upholding removal because that currently “is not a reasonable possibility”); *see also Woods v. Firestone Tire & Rubber Co.*, 560

F. Supp. 588, 590 (S.D. Fla. 1983) (applying “arguably reasonable basis” test); *Anderson v. Allstate Life Ins. Co.*, No. 00-0958, 2001 WL 228057, \*8 (S.D. Fla. Feb. 1, 2001) (same).

14. When a defendant puts forth evidence of fraudulent joinder, the burden then shifts to the plaintiff to rebut that evidence and show that a reasonable basis for a claim exists against the fraudulently joined defendant. *See Legg*, 428 F.3d at 1323-24. Plaintiffs cannot do so by merely standing on the allegations in the complaint. *See id.* at 1323.

15. Regardless of the theory which liability is predicated upon, it is axiomatic that a plaintiff must establish that it has properly identified a defendant who has actually manufactured, sold, marketed or was in some way involved with the product which caused injury. *See Devore v. Howmedica Osteonics Corp.*, 658 F. Supp. 2d 1372, 1380 (M.D. Fla. 2009); *Rivera v. Baby Trend, Inc.*, 914 So. 2d 1102, 1104-05 (Fla. 4th DCA 2005); *Siemens Energy & Automation, Inc. v. Medina*, 719 So. 2d 312, 315 (Fla. 3d DCA 1998); *Mahl v. Dade Pipe and Plumbing Supply Co.*, 546 So. 2d 740, 741 (Fla. 3d DCA 1989). If a plaintiff cannot prove that the defendant was involved in any way with the product, the defendant has been fraudulently joined. *Devore*, 658 F. Supp. 2d at 1380.

16. In this case, Plaintiffs’ Complaint alleges that the subject medical devices, Rejuvenate hip implant systems, were distributed by Orthopedic Solutions. However, as evidenced by the affidavit of Frank Russo, the President of Orthopedic Solutions, attached hereto as Exhibit 2, Orthopedic Solutions has never participated in any way in the retailing, distributing, marketing and/or supplying of the Rejuvenate hip implant system. *Id.* at ¶ 6. Orthopedic Solutions has not placed the Rejuvenate hip implant system into the stream of commerce or acted as a distributor of that product. *Id.* In particular, Orthopedic Solutions did not participate in any

way in the design, manufacture, marketing, promotion, sale, supply, retailing, and distribution of the Rejuvenate hip implant systems that were purportedly implanted in Plaintiff Connie Piccinonna on September 26, 2011 (left hip implant), and January 4, 2012 (right hip implant), nor did it act as a distributor for those devices or place them into the stream of commerce. *Id.* at ¶ 7. Finally, Orthopedic Solutions has never done business as “Stryker South Florida Agency.” *Id.* at ¶ 5.

17. Accordingly, Orthopedic Solutions should not be a party in this case and has been fraudulently joined. As a result, complete diversity of citizenship exists between the parties to this suit.

**THE AMOUNT IN CONTROVERSY REQUIREMENT IS SATISFIED**

18. Where, as here, the jurisdictional amount is not alleged, it can nevertheless be determined when it is “facially apparent” from the Complaint itself. *Williams v. Best Buy Co.*, 269 F.3d 1316, 1319 (11th Cir. 2001) (holding that district court may consider whether jurisdictional amount is “facially apparent” from the complaint). A court may also consider the removal notice and post-removal evidence concerning the amount in controversy. *See id.*; *see also Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 768 (11th Cir. 2010) (holding that “the evidence the defendant may use to establish the jurisdictional facts is not limited to that which it received from the plaintiff or the court.”) “[A] removing defendant is not required to prove the amount in controversy beyond all doubt or to banish all uncertainty about it.” *Pretka*, 608 F.3d at 754. This is because “[t]he law does not demand perfect knowledge or depend any less on reasonable inferences and deductions than we all do in everyday life.” *Id.*

19. Plaintiffs seek compensatory damages for alleged injuries arising out of alleged defects in the Rejuvenate hip implant systems manufactured by HOC. The face of the Amended Complaint makes clear that Plaintiffs seek damages in excess of \$75,000, for Plaintiffs alleges the following injuries/damages:

- “[P]ast, present and future physical and mental pain and suffering; and past, present and future medical, hospital, rehabilitative and pharmaceutical expenses, and other related damages.” Complaint at ¶ 25.
- Significant discomfort in the area where the device was implanted in Plaintiff Connie Piccinonna’s left hip. *Id.* at ¶ 26.
- Multiple diagnostic workups and blood testing. *Id.* at ¶¶ 27-28.
- “[A] large doughy white pseudo-tumor formation,” “the potential existence of a significant fluid collection around the lateral trochanteric region about the hip prosthesis,” “heavy metal ion contamination,” and “heavy metal toxicity including the presence of large effusion which appeared somewhat grayish, reddish like a liquefied hematoma” in the left hip. *Id.* at ¶¶ 28-29.
- Revision surgery on the left hip implant. *Id.* at ¶¶ 23-25.
- Inpatient rehabilitation. *Id.* at ¶ 26.
- “Soreness and pain” around her right hip implant. *Id.* at ¶ 31.
- “[S]evere physical pain and suffering, emotional distress, mental anguish, loss of the capacity for the enjoyment of life, medical and nursing expenses, surgical expenses, lost wages and loss of earning capacity.” *Id.* at ¶ 65.

- “[S]erious damage to Plaintiff including bodily injury, . . . disability, physical impairment, disfigurement, . . . inconvenience, [and] aggravation of a preexisting condition.” *Id.* at ¶¶ 81, 88, 95.

20. Far less specific allegations have been held to establish, on their face, that the amount in controversy exceeds the jurisdictional requirement. *See, e.g., Gebbia v. Wal-Mart Stores, Inc.*, 233 F.3d 880, 883 (5th Cir. 2000) (slip and fall case in which plaintiff sought damages for: “medical expenses, physical pain and suffering, mental anguish and suffering, loss of enjoyment of life, loss of wages and earning capacity and permanent disability and disfigurement”); *Estevez-Gonzalez v. Kraft, Inc.*, 606 F. Supp. 127, 129 (S.D. Fla. 1985) (unspecified personal injuries; plaintiffs sought damages for “physical and mental pain, physical handicap, impairment of working ability, injuries permanent or continuing in nature, and medical expenses”); *Baker v. Firestone Tire & Rubber Co.*, 537 F. Supp. 244, 247 (S.D. Fla. 1982) (exploding tire caused “permanent and serious injuries . . . pain, disfigurement, disability, loss of wages, loss of earning capacity and loss of the capacity for the enjoyment of life, and great expenses for future medical treatment”); *Lee v. Altamil Corp.*, 457 F. Supp. 979, 981 (M.D. Fla. 1978) (defective machine caused “serious permanent injury, ‘substantial medical expenses,’ ‘great pain and suffering,’ and a substantial loss of income”).

21. Other federal courts, moreover, have concluded that the amount in controversy exceeded \$75,000 *in similar cases*, where the plaintiffs alleged injuries related to allegedly defective hip implants. In *Militer v. Wright Med. Group, Inc.*, No. 11-cv-1153, 2011 WL 4360024, \*3 (E.D. Mich. Sept. 19, 2011), the Court held that the amount in controversy had been satisfied where plaintiff alleged injuries regarding an allegedly defective hip implant that he had



received, including revision surgery, hospitalization, severe lytic lesions in the area of plaintiff's femur where the device had been implanted, premature loosening around the proximal femur, the corrosion of the metal components in defendants' device allegedly resulted in the presence of "extremely elevated levels of toxic metals" in plaintiff's blood, an extended period of disability, medical expenses, lost wages, and "much physical and mental pain and suffering." *Id*; *see also Bloodsworth v. Smith & Nephew*, No. 2:05CV622-D, 2005 WL 3470337, \*2 (M.D. Ala. Dec. 19, 2005) (in hip implant product liability case, plaintiff stipulated that amount in controversy exceed \$75,000); *Askew v. DC Med., LLC*, No. 1:11-CV-1245-WSD, 2011 WL 1811433, \*1 (N.D. Ga. May 12, 2011) (plaintiff did not dispute that the amount in controversy in hip implant product liability action exceeded \$75,000); *Oiler v. Biomet Orthopedics, Inc.*, No. CIV.A. 02-3778, 2003 WL 22174285, \*1 (E.D. La. Sept. 17, 2003) (denying remand in a hip implant product liability case where defendants had successfully argued that "it was facially apparent that the amount in controversy exceeds \$75,000.00 exclusive of interest and costs").

22. Additionally, Plaintiff Carlo Piccononna seeks compensatory damages for the loss of his wife's care, comfort, society and affections. *See* Complaint ¶ 97. Cases similar to Plaintiff's have resulted in verdicts and settlements exceeding \$75,000.00. *See Waller v. Kalbac*, 07FJVR 1-31, 2006 WL 4099790 (Fla. Cir. Ct. Oct. 10, 2006) (awarding \$200,000 on loss of consortium claims where spouse required a total hip replacement prosthesis revision surgery); *Morris v. Kmart Corp.*, JAS Ga Ref No. 56348WL, 2000 WL 33121581 (Ga. State Ct. Aug. 30, 2000) (awarding \$150,000 on loss of consortium claim where injury caused damage to prosthetic hip implant requiring replacement).

23. Thus, the state court action may be removed to this Court by HOC in accordance with the provisions of 28 U.S.C. § 1441(a) because (i) this action is a civil action pending within the jurisdiction of the United States District Court for the Southern District of Florida; (ii) excluding the fraudulently joined defendants, this action is between citizens of different states; (iii) the amount in controversy exceeds \$75,000, exclusive of interest and costs.

**FILING OF REMOVAL PAPERS**

24. Pursuant to 28 U.S.C. § 1446(d), written notice of the removal of this action will be promptly served to Plaintiffs' counsel.

25. Concurrent with the filing of this Notice of Removal, HOC has filed a Notice of Filing the Notice of Removal, including a true and correct copy of the Notice of Removal with the Clerk of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. *See* Exhibit 3, attached hereto.

26. The undersigned counsel is authorized by HOC to file this Notice of Removal, is licensed in the State of Florida and is a member in good standing of the Bar of this Court.

WHEREFORE, Defendant Howmedica Osteonics Corp. hereby removes the above-captioned action from the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, and request that further proceedings be conducted in this Court as provided by law.

Respectfully submitted,

s/ Hildy M. Sastre

Hildy M. Sastre

Florida Bar No. 0026492

E-mail: hsastre@shb.com

Iain L. C. Kennedy  
Florida Bar No. 96668  
E-mail: [ikennedy@shb.com](mailto:ikennedy@shb.com)  
SHOOK, HARDY & BACON L.L.P.  
201 S. Biscayne Blvd., Suite 3200  
Miami, FL 33131  
305-358-5171 (telephone)  
305-358-7470 (facsimile)

*Attorneys for Defendant  
Howmedica Osteonics Corp.*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 2nd day of October, 2012, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system and a true and correct copy was served by CM/ECF, email and U.S. Mail on all counsel of record identified below:

Jesse N. Bernheim  
Florida Bar No. 0525421  
Email: jnbSERVICE@wherejusticeisserved.com  
Kelley, Bernheim & Dolinsky, L.L.C.  
101 NE Third Avenue, Suite 1410  
Fort Lauderdale, Florida 33301  
Telephone: (954) 573-6688  
Facsimile: (954) 573-6690

/s/ Iain L. C. Kennedy

Iain L. C. Kennedy  
Florida Bar No. 96668

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

Case No. \_\_\_\_\_  
State Case No. 12 CA 25901

CONNIE PICCINONNA and CARLO  
PICCINONNA,

Plaintiffs,

vs.

HOWMEDICA OSTEONICS  
CORPORATION, a New Jersey Corporation,  
d/b/a STRYKER ORTHOPAEDICS, and  
ORTHOPEDIC SOLUTIONS, INC. d/b/a  
STRYKER SOUTH FLORIDA AGENCY,

Defendants.

\_\_\_\_\_ /

**DEFENDANT HOWMEDICA OSTEONICS CORP.'S NOTICE OF REMOVAL**

Defendant Howmedica Osteonics Corp., which has at times done business as “Stryker Orthopaedics” (hereinafter “HOC”), hereby removes this action, which is currently pending in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, Case No. 2012 CA 25901, to the United States District Court for the Southern District of Florida, Fort Lauderdale Division. In support of this Notice of Removal, HOC states the following:

**THE REMOVED CASE**

1. The removed case is a civil action filed on September 4, 2012, in the Seventeenth Judicial Circuit, in and for Broward County, Florida, and captioned *Connie Piccinonna and Carlo Piccinonna, Plaintiffs v. Howmedica Osteonics Corp d/b/a Stryker Orthopaedics and Orthopedic Solutions, Inc. d/b/a Stryker South Florida Agency, Defendants*, Case No. 2012 CA 25899.

1  
LAW OFFICES  
SHOOK, HARDY & BACON LLP

2. This medical device product liability action arises out of an injury allegedly sustained by Plaintiff Connie Piccinonna in connection with the implantation of two Rejuvenate artificial hip implant systems designed and manufactured by HOC. *See* Complaint at ¶¶ 1, 10. Plaintiffs' Complaint seeks to recover damages from HOC and Orthopedic Solutions, Inc. d/b/a Stryker South Florida Agency ("Orthopedic Solutions").

### **PAPERS FROM REMOVED ACTION**

3. Pursuant to 28 U.S.C. § 1446(a), HOC attaches to this Notice of Removal a copy of all pleadings, orders and other papers or exhibits of every kind currently on file in the state court action. *See* Exhibit 1, attached hereto.

### **THE REMOVAL IS TIMELY**

4. Plaintiffs filed this action in the aforementioned state court on September 4, 2012. HOC was served with the Complaint on September 13, 2012. This notice of removal is timely filed. *See, e.g., Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 355 (1999) (removal time frame triggered by receipt of *formal* service; not receipt of complaint.). Accordingly, this Notice of Removal is timely filed under 28 U.S.C. § 1446(b).

### **VENUE IS PROPER**

5. Venue is proper in the Fort Lauderdale Division of this Court because this action is being removed from the Seventeenth Judicial Circuit, in and for Broward County, Florida and the acts complained of in Plaintiffs' Complaint are alleged to have occurred in Broward County, Florida. *See* Complaint at ¶ 5.

**DIVERSITY OF CITIZENSHIP EXISTS  
BETWEEN THE PROPERLY JOINED PARTIES**

6. This is a civil action that falls under the Court's original jurisdiction under 28 U.S.C. § 1332 (diversity of citizenship) and is one that may be removed to this Court based on diversity of citizenship under 28 U.S.C. §§ 1441 and 1446.

7. At all times material hereto, Plaintiffs, Connie Piccinonna and Carlo Piccinonna, were residents and citizens of Broward County, Florida. *See* Complaint at ¶ 4.

8. At all times material hereto, Defendant HOC is and was a New Jersey corporation with its principal place of business in New Jersey. *See* Complaint at ¶ 6.

9. Defendant Orthopedic Solutions is, and was at the time this action was filed, a Florida corporation with its principal place of business in Florida. *See* Complaint at ¶ 5. As set forth in greater detail below, Orthopedic Solutions is fraudulently joined and its presence in this action does not destroy diversity jurisdiction or prevent removal to this court. Its citizenship must, therefore, be disregarded for the purposes of diversity analysis. *See Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996). Further, its consent as a fraudulently joined defendant is not required for purposes of removal. *See Diaz v. Kaplan Univ.*, 567 F. Supp. 2d 1394, 1402 (S.D. Fla. 2008).

10. Because Plaintiffs are citizens of Florida, and HOC, the properly joined Defendant, is not, complete diversity exists under 28 U.S.C. § 1332.

**ORTHOPEDIC SOLUTIONS IS FRAUDULENTLY JOINED**

11. In determining whether diversity jurisdiction exists, the Court must disregard the citizenship of fraudulently joined parties. *See Tapscott*, 77 F.3d at 1360; *Cabalceta v. Standard*

*Fruit Co.*, 883 F.2d 1553, 1561-62 (11th Cir. 1989). Fraudulent joinder is a judicially created doctrine that allows an exception to the requirement of complete diversity. *Triggs v. John Crump Toyota, Inc.*, 154 F.3d, 1284, 1287 (11th Cir. 1998). A defendant is fraudulently joined where there is no “reasonable basis” for a claim against him. *See Crowe v. Coleman*, 113 F.3d 1536, 1542 (11th Cir. 1997).

12. The Eleventh Circuit recognizes three types of fraudulent joinder: (1) where there is no possibility that the plaintiff can prove a cause of action against the resident defendant; (2) when there is outright fraud in the plaintiff’s pleading of jurisdictional facts; and (3) where the claims against the non-diverse defendant have no real connection to the claims against the diverse defendants. *Triggs*, 154 F.3d at 1287. Here, there is no possibility that the Plaintiffs can prove a cause of action against Orthopedic Solutions.

13. Courts have recognized that the “no possibility” standard “cannot be taken literally.” *In re Rezulin Prods. Liab. Litig.*, 133 F.Supp. 2d 272, 280 n.4 (S.D.N.Y. 2001). In fact, numerous circuits have recognized that “the standard more accurately is described as requiring a showing that there is ‘no reasonable basis’ for predicting liability on the claims alleged.” *Id.* (emphasis added); *see Legg v. Wyeth*, 428 F.3d 1317, 1324-25 (11th Cir. 2005) (applying “reasonable basis” test); *Crowe*, 113 F.3d at 1540 (applying “arguably a reasonable basis” test) (internal quotation omitted); *Schwartz v. State Farm Mut. Auto. Ins. Co.*, 174 F.3d 875, 879 (7th Cir. 1999) (noting that it cannot “say that there is no possibility that a state court would someday” recognize plaintiff’s liability theory, but upholding removal because that currently “is not a reasonable possibility”); *see also Woods v. Firestone Tire & Rubber Co.*, 560



F. Supp. 588, 590 (S.D. Fla. 1983) (applying “arguably reasonable basis” test); *Anderson v. Allstate Life Ins. Co.*, No. 00-0958, 2001 WL 228057, \*8 (S.D. Fla. Feb. 1, 2001) (same).

14. When a defendant puts forth evidence of fraudulent joinder, the burden then shifts to the plaintiff to rebut that evidence and show that a reasonable basis for a claim exists against the fraudulently joined defendant. *See Legg*, 428 F.3d at 1323-24. Plaintiffs cannot do so by merely standing on the allegations in the complaint. *See id.* at 1323.

15. Regardless of the theory which liability is predicated upon, it is axiomatic that a plaintiff must establish that it has properly identified a defendant who has actually manufactured, sold, marketed or was in some way involved with the product which caused injury. *See Devore v. Howmedica Osteonics Corp.*, 658 F. Supp. 2d 1372, 1380 (M.D. Fla. 2009); *Rivera v. Baby Trend, Inc.*, 914 So. 2d 1102, 1104-05 (Fla. 4th DCA 2005); *Siemens Energy & Automation, Inc. v. Medina*, 719 So. 2d 312, 315 (Fla. 3d DCA 1998); *Mahl v. Dade Pipe and Plumbing Supply Co.*, 546 So. 2d 740, 741 (Fla. 3d DCA 1989). If a plaintiff cannot prove that the defendant was involved in any way with the product, the defendant has been fraudulently joined. *Devore*, 658 F. Supp. 2d at 1380.

16. In this case, Plaintiffs’ Complaint alleges that the subject medical devices, Rejuvenate hip implant systems, were distributed by Orthopedic Solutions. However, as evidenced by the affidavit of Frank Russo, the President of Orthopedic Solutions, attached hereto as Exhibit 2, Orthopedic Solutions has never participated in any way in the retailing, distributing, marketing and/or supplying of the Rejuvenate hip implant system. *Id.* at ¶ 6. Orthopedic Solutions has not placed the Rejuvenate hip implant system into the stream of commerce or acted as a distributor of that product. *Id.* In particular, Orthopedic Solutions did not participate in any

way in the design, manufacture, marketing, promotion, sale, supply, retailing, and distribution of the Rejuvenate hip implant systems that were purportedly implanted in Plaintiff Connie Piccinonna on September 26, 2011 (left hip implant), and January 4, 2012 (right hip implant), nor did it act as a distributor for those devices or place them into the stream of commerce. *Id.* at ¶ 7. Finally, Orthopedic Solutions has never done business as “Stryker South Florida Agency.” *Id.* at ¶ 5.

17. Accordingly, Orthopedic Solutions should not be a party in this case and has been fraudulently joined. As a result, complete diversity of citizenship exists between the parties to this suit.

**THE AMOUNT IN CONTROVERSY REQUIREMENT IS SATISFIED**

18. Where, as here, the jurisdictional amount is not alleged, it can nevertheless be determined when it is “facially apparent” from the Complaint itself. *Williams v. Best Buy Co.*, 269 F.3d 1316, 1319 (11th Cir. 2001) (holding that district court may consider whether jurisdictional amount is “facially apparent” from the complaint). A court may also consider the removal notice and post-removal evidence concerning the amount in controversy. *See id.*; *see also Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 768 (11th Cir. 2010) (holding that “the evidence the defendant may use to establish the jurisdictional facts is not limited to that which it received from the plaintiff or the court.”) “[A] removing defendant is not required to prove the amount in controversy beyond all doubt or to banish all uncertainty about it.” *Pretka*, 608 F.3d at 754. This is because “[t]he law does not demand perfect knowledge or depend any less on reasonable inferences and deductions than we all do in everyday life.” *Id.*

19. Plaintiffs seek compensatory damages for alleged injuries arising out of alleged defects in the Rejuvenate hip implant systems manufactured by HOC. The face of the Amended Complaint makes clear that Plaintiffs seek damages in excess of \$75,000, for Plaintiffs alleges the following injuries/damages:

- “[P]ast, present and future physical and mental pain and suffering; and past, present and future medical, hospital, rehabilitative and pharmaceutical expenses, and other related damages.” Complaint at ¶ 25.
- Significant discomfort in the area where the device was implanted in Plaintiff Connie Piccinonna’s left hip. *Id.* at ¶ 26.
- Multiple diagnostic workups and blood testing. *Id.* at ¶¶ 27-28.
- “[A] large doughy white pseudo-tumor formation,” “the potential existence of a significant fluid collection around the lateral trochanteric region about the hip prosthesis,” “heavy metal ion contamination,” and “heavy metal toxicity including the presence of large effusion which appeared somewhat grayish, reddish like a liquefied hematoma” in the left hip. *Id.* at ¶¶ 28-29.
- Revision surgery on the left hip implant. *Id.* at ¶¶ 23-25.
- Inpatient rehabilitation. *Id.* at ¶ 26.
- “Soreness and pain” around her right hip implant. *Id.* at ¶ 31.
- “[S]evere physical pain and suffering, emotional distress, mental anguish, loss of the capacity for the enjoyment of life, medical and nursing expenses, surgical expenses, lost wages and loss of earning capacity.” *Id.* at ¶ 65.

- “[S]erious damage to Plaintiff including bodily injury, . . . disability, physical impairment, disfigurement, . . . inconvenience, [and] aggravation of a preexisting condition.” *Id.* at ¶¶ 81, 88, 95.

20. Far less specific allegations have been held to establish, on their face, that the amount in controversy exceeds the jurisdictional requirement. *See, e.g., Gebbia v. Wal-Mart Stores, Inc.*, 233 F.3d 880, 883 (5th Cir. 2000) (slip and fall case in which plaintiff sought damages for: “medical expenses, physical pain and suffering, mental anguish and suffering, loss of enjoyment of life, loss of wages and earning capacity and permanent disability and disfigurement”); *Estevez-Gonzalez v. Kraft, Inc.*, 606 F. Supp. 127, 129 (S.D. Fla. 1985) (unspecified personal injuries; plaintiffs sought damages for “physical and mental pain, physical handicap, impairment of working ability, injuries permanent or continuing in nature, and medical expenses”); *Baker v. Firestone Tire & Rubber Co.*, 537 F. Supp. 244, 247 (S.D. Fla. 1982) (exploding tire caused “permanent and serious injuries . . . pain, disfigurement, disability, loss of wages, loss of earning capacity and loss of the capacity for the enjoyment of life, and great expenses for future medical treatment”); *Lee v. Altamil Corp.*, 457 F. Supp. 979, 981 (M.D. Fla. 1978) (defective machine caused “serious permanent injury, ‘substantial medical expenses,’ ‘great pain and suffering,’ and a substantial loss of income”).

21. Other federal courts, moreover, have concluded that the amount in controversy exceeded \$75,000 *in similar cases*, where the plaintiffs alleged injuries related to allegedly defective hip implants. In *Militer v. Wright Med. Group, Inc.*, No. 11-cv-1153, 2011 WL 4360024, \*3 (E.D. Mich. Sept. 19, 2011), the Court held that the amount in controversy had been satisfied where plaintiff alleged injuries regarding an allegedly defective hip implant that he had

received, including revision surgery, hospitalization, severe lytic lesions in the area of plaintiff's femur where the device had been implanted, premature loosening around the proximal femur, the corrosion of the metal components in defendants' device allegedly resulted in the presence of "extremely elevated levels of toxic metals" in plaintiff's blood, an extended period of disability, medical expenses, lost wages, and "much physical and mental pain and suffering." *Id*; *see also Bloodsworth v. Smith & Nephew*, No. 2:05CV622-D, 2005 WL 3470337, \*2 (M.D. Ala. Dec. 19, 2005) (in hip implant product liability case, plaintiff stipulated that amount in controversy exceed \$75,000); *Askew v. DC Med., LLC*, No. 1:11-CV-1245-WSD, 2011 WL 1811433, \*1 (N.D. Ga. May 12, 2011) (plaintiff did not dispute that the amount in controversy in hip implant product liability action exceeded \$75,000); *Oiler v. Biomet Orthopedics, Inc.*, No. CIV.A. 02-3778, 2003 WL 22174285, \*1 (E.D. La. Sept. 17, 2003) (denying remand in a hip implant product liability case where defendants had successfully argued that "it was facially apparent that the amount in controversy exceeds \$75,000.00 exclusive of interest and costs").

22. Additionally, Plaintiff Carlo Piccononna seeks compensatory damages for the loss of his wife's care, comfort, society and affections. *See* Complaint ¶ 97. Cases similar to Plaintiff's have resulted in verdicts and settlements exceeding \$75,000.00. *See Waller v. Kalbac*, 07FJVR 1-31, 2006 WL 4099790 (Fla. Cir. Ct. Oct. 10, 2006) (awarding \$200,000 on loss of consortium claims where spouse required a total hip replacement prosthesis revision surgery); *Morris v. Kmart Corp.*, JAS Ga Ref No. 56348WL, 2000 WL 33121581 (Ga. State Ct. Aug. 30, 2000) (awarding \$150,000 on loss of consortium claim where injury caused damage to prosthetic hip implant requiring replacement).

23. Thus, the state court action may be removed to this Court by HOC in accordance with the provisions of 28 U.S.C. § 1441(a) because (i) this action is a civil action pending within the jurisdiction of the United States District Court for the Southern District of Florida; (ii) excluding the fraudulently joined defendants, this action is between citizens of different states; (iii) the amount in controversy exceeds \$75,000, exclusive of interest and costs.

**FILING OF REMOVAL PAPERS**

24. Pursuant to 28 U.S.C. § 1446(d), written notice of the removal of this action will be promptly served to Plaintiffs' counsel.

25. Concurrent with the filing of this Notice of Removal, HOC has filed a Notice of Filing the Notice of Removal, including a true and correct copy of the Notice of Removal with the Clerk of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. *See* Exhibit 3, attached hereto.

26. The undersigned counsel is authorized by HOC to file this Notice of Removal, is licensed in the State of Florida and is a member in good standing of the Bar of this Court.

WHEREFORE, Defendant Howmedica Osteonics Corp. hereby removes the above-captioned action from the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, and request that further proceedings be conducted in this Court as provided by law.

Respectfully submitted,

s/ Hildy M. Sastre

Hildy M. Sastre

Florida Bar No. 0026492

E-mail: hsastre@shb.com

Iain L. C. Kennedy  
Florida Bar No. 96668  
E-mail: [ikennedy@shb.com](mailto:ikennedy@shb.com)  
SHOOK, HARDY & BACON L.L.P.  
201 S. Biscayne Blvd., Suite 3200  
Miami, FL 33131  
305-358-5171 (telephone)  
305-358-7470 (facsimile)

*Attorneys for Defendant  
Howmedica Osteonics Corp.*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 2nd day of October, 2012, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system and a true and correct copy was served by CM/ECF, email and U.S. Mail on all counsel of record identified below:

Jesse N. Bernheim  
Florida Bar No. 0525421  
Email: jnbsservice@wherejusticeisserved.com  
Kelley, Bernheim & Dolinsky, L.L.C.  
101 NE Third Avenue, Suite 1410  
Fort Lauderdale, Florida 33301  
Telephone: (954) 573-6688  
Facsimile: (954) 573-6690

/s/ Iain L. C. Kennedy

Iain L. C. Kennedy  
Florida Bar No. 96668



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

Case No. \_\_\_\_\_  
State Case No. 12 CA 25901

CONNIE PICCINONNA and CARLO  
PICCINONNA,

Plaintiffs,

vs.

HOWMEDICA OSTEONICS  
CORPORATION, a New Jersey Corporation,  
d/b/a STRYKER ORTHOPAEDICS, and  
ORTHOPEDIC SOLUTIONS, INC. d/b/a  
STRYKER SOUTH FLORIDA AGENCY,

Defendants.

\_\_\_\_\_/

**DEFENDANT HOWMEDICA OSTEONICS CORP.'S NOTICE OF REMOVAL**

Defendant Howmedica Osteonics Corp., which has at times done business as “Stryker Orthopaedics” (hereinafter “HOC”), hereby removes this action, which is currently pending in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, Case No. 2012 CA 25901, to the United States District Court for the Southern District of Florida, Fort Lauderdale Division. In support of this Notice of Removal, HOC states the following:

**THE REMOVED CASE**

1. The removed case is a civil action filed on September 4, 2012, in the Seventeenth Judicial Circuit, in and for Broward County, Florida, and captioned *Connie Piccinonna and Carlo Piccinonna, Plaintiffs v. Howmedica Osteonics Corp d/b/a Stryker Orthopaedics and Orthopedic Solutions, Inc. d/b/a Stryker South Florida Agency, Defendants*, Case No. 2012 CA 25899.

1  
LAW OFFICES  
SHOOK, HARDY & BACON LLP

2. This medical device product liability action arises out of an injury allegedly sustained by Plaintiff Connie Piccinonna in connection with the implantation of two Rejuvenate artificial hip implant systems designed and manufactured by HOC. *See* Complaint at ¶¶ 1, 10. Plaintiffs' Complaint seeks to recover damages from HOC and Orthopedic Solutions, Inc. d/b/a Stryker South Florida Agency ("Orthopedic Solutions").

### **PAPERS FROM REMOVED ACTION**

3. Pursuant to 28 U.S.C. § 1446(a), HOC attaches to this Notice of Removal a copy of all pleadings, orders and other papers or exhibits of every kind currently on file in the state court action. *See* Exhibit 1, attached hereto.

### **THE REMOVAL IS TIMELY**

4. Plaintiffs filed this action in the aforementioned state court on September 4, 2012. HOC was served with the Complaint on September 13, 2012. This notice of removal is timely filed. *See, e.g., Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 355 (1999) (removal time frame triggered by receipt of *formal* service; not receipt of complaint.). Accordingly, this Notice of Removal is timely filed under 28 U.S.C. § 1446(b).

### **VENUE IS PROPER**

5. Venue is proper in the Fort Lauderdale Division of this Court because this action is being removed from the Seventeenth Judicial Circuit, in and for Broward County, Florida and the acts complained of in Plaintiffs' Complaint are alleged to have occurred in Broward County, Florida. *See* Complaint at ¶ 5.

**DIVERSITY OF CITIZENSHIP EXISTS  
BETWEEN THE PROPERLY JOINED PARTIES**

6. This is a civil action that falls under the Court's original jurisdiction under 28 U.S.C. § 1332 (diversity of citizenship) and is one that may be removed to this Court based on diversity of citizenship under 28 U.S.C. §§ 1441 and 1446.

7. At all times material hereto, Plaintiffs, Connie Piccinonna and Carlo Piccinonna, were residents and citizens of Broward County, Florida. *See* Complaint at ¶ 4.

8. At all times material hereto, Defendant HOC is and was a New Jersey corporation with its principal place of business in New Jersey. *See* Complaint at ¶ 6.

9. Defendant Orthopedic Solutions is, and was at the time this action was filed, a Florida corporation with its principal place of business in Florida. *See* Complaint at ¶ 5. As set forth in greater detail below, Orthopedic Solutions is fraudulently joined and its presence in this action does not destroy diversity jurisdiction or prevent removal to this court. Its citizenship must, therefore, be disregarded for the purposes of diversity analysis. *See Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996). Further, its consent as a fraudulently joined defendant is not required for purposes of removal. *See Diaz v. Kaplan Univ.*, 567 F. Supp. 2d 1394, 1402 (S.D. Fla. 2008).

10. Because Plaintiffs are citizens of Florida, and HOC, the properly joined Defendant, is not, complete diversity exists under 28 U.S.C. § 1332.

**ORTHOPEDIC SOLUTIONS IS FRAUDULENTLY JOINED**

11. In determining whether diversity jurisdiction exists, the Court must disregard the citizenship of fraudulently joined parties. *See Tapscott*, 77 F.3d at 1360; *Cabalceta v. Standard*

*Fruit Co.*, 883 F.2d 1553, 1561-62 (11th Cir. 1989). Fraudulent joinder is a judicially created doctrine that allows an exception to the requirement of complete diversity. *Triggs v. John Crump Toyota, Inc.*, 154 F.3d, 1284, 1287 (11th Cir. 1998). A defendant is fraudulently joined where there is no “reasonable basis” for a claim against him. *See Crowe v. Coleman*, 113 F.3d 1536, 1542 (11th Cir. 1997).

12. The Eleventh Circuit recognizes three types of fraudulent joinder: (1) where there is no possibility that the plaintiff can prove a cause of action against the resident defendant; (2) when there is outright fraud in the plaintiff’s pleading of jurisdictional facts; and (3) where the claims against the non-diverse defendant have no real connection to the claims against the diverse defendants. *Triggs*, 154 F.3d at 1287. Here, there is no possibility that the Plaintiffs can prove a cause of action against Orthopedic Solutions.

13. Courts have recognized that the “no possibility” standard “cannot be taken literally.” *In re Rezulin Prods. Liab. Litig.*, 133 F.Supp. 2d 272, 280 n.4 (S.D.N.Y. 2001). In fact, numerous circuits have recognized that “the standard more accurately is described as requiring a showing that there is ‘no reasonable basis’ for predicting liability on the claims alleged.” *Id.* (emphasis added); *see Legg v. Wyeth*, 428 F.3d 1317, 1324-25 (11th Cir. 2005) (applying “reasonable basis” test); *Crowe*, 113 F.3d at 1540 (applying “arguably a reasonable basis” test) (internal quotation omitted); *Schwartz v. State Farm Mut. Auto. Ins. Co.*, 174 F.3d 875, 879 (7th Cir. 1999) (noting that it cannot “say that there is no possibility that a state court would someday” recognize plaintiff’s liability theory, but upholding removal because that currently “is not a reasonable possibility”); *see also Woods v. Firestone Tire & Rubber Co.*, 560

F. Supp. 588, 590 (S.D. Fla. 1983) (applying “arguably reasonable basis” test); *Anderson v. Allstate Life Ins. Co.*, No. 00-0958, 2001 WL 228057, \*8 (S.D. Fla. Feb. 1, 2001) (same).

14. When a defendant puts forth evidence of fraudulent joinder, the burden then shifts to the plaintiff to rebut that evidence and show that a reasonable basis for a claim exists against the fraudulently joined defendant. *See Legg*, 428 F.3d at 1323-24. Plaintiffs cannot do so by merely standing on the allegations in the complaint. *See id.* at 1323.

15. Regardless of the theory which liability is predicated upon, it is axiomatic that a plaintiff must establish that it has properly identified a defendant who has actually manufactured, sold, marketed or was in some way involved with the product which caused injury. *See Devore v. Howmedica Osteonics Corp.*, 658 F. Supp. 2d 1372, 1380 (M.D. Fla. 2009); *Rivera v. Baby Trend, Inc.*, 914 So. 2d 1102, 1104-05 (Fla. 4th DCA 2005); *Siemens Energy & Automation, Inc. v. Medina*, 719 So. 2d 312, 315 (Fla. 3d DCA 1998); *Mahl v. Dade Pipe and Plumbing Supply Co.*, 546 So. 2d 740, 741 (Fla. 3d DCA 1989). If a plaintiff cannot prove that the defendant was involved in any way with the product, the defendant has been fraudulently joined. *Devore*, 658 F. Supp. 2d at 1380.

16. In this case, Plaintiffs’ Complaint alleges that the subject medical devices, Rejuvenate hip implant systems, were distributed by Orthopedic Solutions. However, as evidenced by the affidavit of Frank Russo, the President of Orthopedic Solutions, attached hereto as Exhibit 2, Orthopedic Solutions has never participated in any way in the retailing, distributing, marketing and/or supplying of the Rejuvenate hip implant system. *Id.* at ¶ 6. Orthopedic Solutions has not placed the Rejuvenate hip implant system into the stream of commerce or acted as a distributor of that product. *Id.* In particular, Orthopedic Solutions did not participate in any

way in the design, manufacture, marketing, promotion, sale, supply, retailing, and distribution of the Rejuvenate hip implant systems that were purportedly implanted in Plaintiff Connie Piccinonna on September 26, 2011 (left hip implant), and January 4, 2012 (right hip implant), nor did it act as a distributor for those devices or place them into the stream of commerce. *Id.* at ¶ 7. Finally, Orthopedic Solutions has never done business as “Stryker South Florida Agency.” *Id.* at ¶ 5.

17. Accordingly, Orthopedic Solutions should not be a party in this case and has been fraudulently joined. As a result, complete diversity of citizenship exists between the parties to this suit.

**THE AMOUNT IN CONTROVERSY REQUIREMENT IS SATISFIED**

18. Where, as here, the jurisdictional amount is not alleged, it can nevertheless be determined when it is “facially apparent” from the Complaint itself. *Williams v. Best Buy Co.*, 269 F.3d 1316, 1319 (11th Cir. 2001) (holding that district court may consider whether jurisdictional amount is “facially apparent” from the complaint). A court may also consider the removal notice and post-removal evidence concerning the amount in controversy. *See id.*; *see also Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 768 (11th Cir. 2010) (holding that “the evidence the defendant may use to establish the jurisdictional facts is not limited to that which it received from the plaintiff or the court.”) “[A] removing defendant is not required to prove the amount in controversy beyond all doubt or to banish all uncertainty about it.” *Pretka*, 608 F.3d at 754. This is because “[t]he law does not demand perfect knowledge or depend any less on reasonable inferences and deductions than we all do in everyday life.” *Id.*

19. Plaintiffs seek compensatory damages for alleged injuries arising out of alleged defects in the Rejuvenate hip implant systems manufactured by HOC. The face of the Amended Complaint makes clear that Plaintiffs seek damages in excess of \$75,000, for Plaintiffs alleges the following injuries/damages:

- “[P]ast, present and future physical and mental pain and suffering; and past, present and future medical, hospital, rehabilitative and pharmaceutical expenses, and other related damages.” Complaint at ¶ 25.
- Significant discomfort in the area where the device was implanted in Plaintiff Connie Piccinonna’s left hip. *Id.* at ¶ 26.
- Multiple diagnostic workups and blood testing. *Id.* at ¶¶ 27-28.
- “[A] large doughy white pseudo-tumor formation,” “the potential existence of a significant fluid collection around the lateral trochanteric region about the hip prosthesis,” “heavy metal ion contamination,” and “heavy metal toxicity including the presence of large effusion which appeared somewhat grayish, reddish like a liquefied hematoma” in the left hip. *Id.* at ¶¶ 28-29.
- Revision surgery on the left hip implant. *Id.* at ¶¶ 23-25.
- Inpatient rehabilitation. *Id.* at ¶ 26.
- “Soreness and pain” around her right hip implant. *Id.* at ¶ 31.
- “[S]evere physical pain and suffering, emotional distress, mental anguish, loss of the capacity for the enjoyment of life, medical and nursing expenses, surgical expenses, lost wages and loss of earning capacity.” *Id.* at ¶ 65.

- “[S]erious damage to Plaintiff including bodily injury, . . . disability, physical impairment, disfigurement, . . . inconvenience, [and] aggravation of a preexisting condition.” *Id.* at ¶¶ 81, 88, 95.

20. Far less specific allegations have been held to establish, on their face, that the amount in controversy exceeds the jurisdictional requirement. *See, e.g., Gebbia v. Wal-Mart Stores, Inc.*, 233 F.3d 880, 883 (5th Cir. 2000) (slip and fall case in which plaintiff sought damages for: “medical expenses, physical pain and suffering, mental anguish and suffering, loss of enjoyment of life, loss of wages and earning capacity and permanent disability and disfigurement”); *Estevez-Gonzalez v. Kraft, Inc.*, 606 F. Supp. 127, 129 (S.D. Fla. 1985) (unspecified personal injuries; plaintiffs sought damages for “physical and mental pain, physical handicap, impairment of working ability, injuries permanent or continuing in nature, and medical expenses”); *Baker v. Firestone Tire & Rubber Co.*, 537 F. Supp. 244, 247 (S.D. Fla. 1982) (exploding tire caused “permanent and serious injuries . . . pain, disfigurement, disability, loss of wages, loss of earning capacity and loss of the capacity for the enjoyment of life, and great expenses for future medical treatment”); *Lee v. Altamil Corp.*, 457 F. Supp. 979, 981 (M.D. Fla. 1978) (defective machine caused “serious permanent injury, ‘substantial medical expenses,’ ‘great pain and suffering,’ and a substantial loss of income”).

21. Other federal courts, moreover, have concluded that the amount in controversy exceeded \$75,000 *in similar cases*, where the plaintiffs alleged injuries related to allegedly defective hip implants. In *Militer v. Wright Med. Group, Inc.*, No. 11-cv-1153, 2011 WL 4360024, \*3 (E.D. Mich. Sept. 19, 2011), the Court held that the amount in controversy had been satisfied where plaintiff alleged injuries regarding an allegedly defective hip implant that he had



received, including revision surgery, hospitalization, severe lytic lesions in the area of plaintiff's femur where the device had been implanted, premature loosening around the proximal femur, the corrosion of the metal components in defendants' device allegedly resulted in the presence of "extremely elevated levels of toxic metals" in plaintiff's blood, an extended period of disability, medical expenses, lost wages, and "much physical and mental pain and suffering." *Id*; *see also Bloodsworth v. Smith & Nephew*, No. 2:05CV622-D, 2005 WL 3470337, \*2 (M.D. Ala. Dec. 19, 2005) (in hip implant product liability case, plaintiff stipulated that amount in controversy exceed \$75,000); *Askew v. DC Med., LLC*, No. 1:11-CV-1245-WSD, 2011 WL 1811433, \*1 (N.D. Ga. May 12, 2011) (plaintiff did not dispute that the amount in controversy in hip implant product liability action exceeded \$75,000); *Oiler v. Biomet Orthopedics, Inc.*, No. CIV.A. 02-3778, 2003 WL 22174285, \*1 (E.D. La. Sept. 17, 2003) (denying remand in a hip implant product liability case where defendants had successfully argued that "it was facially apparent that the amount in controversy exceeds \$75,000.00 exclusive of interest and costs").

22. Additionally, Plaintiff Carlo Piccononna seeks compensatory damages for the loss of his wife's care, comfort, society and affections. *See* Complaint ¶ 97. Cases similar to Plaintiff's have resulted in verdicts and settlements exceeding \$75,000.00. *See Waller v. Kalbac*, 07FJVR 1-31, 2006 WL 4099790 (Fla. Cir. Ct. Oct. 10, 2006) (awarding \$200,000 on loss of consortium claims where spouse required a total hip replacement prosthesis revision surgery); *Morris v. Kmart Corp.*, JAS Ga Ref No. 56348WL, 2000 WL 33121581 (Ga. State Ct. Aug. 30, 2000) (awarding \$150,000 on loss of consortium claim where injury caused damage to prosthetic hip implant requiring replacement).

23. Thus, the state court action may be removed to this Court by HOC in accordance with the provisions of 28 U.S.C. § 1441(a) because (i) this action is a civil action pending within the jurisdiction of the United States District Court for the Southern District of Florida; (ii) excluding the fraudulently joined defendants, this action is between citizens of different states; (iii) the amount in controversy exceeds \$75,000, exclusive of interest and costs.

**FILING OF REMOVAL PAPERS**

24. Pursuant to 28 U.S.C. § 1446(d), written notice of the removal of this action will be promptly served to Plaintiffs' counsel.

25. Concurrent with the filing of this Notice of Removal, HOC has filed a Notice of Filing the Notice of Removal, including a true and correct copy of the Notice of Removal with the Clerk of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. *See* Exhibit 3, attached hereto.

26. The undersigned counsel is authorized by HOC to file this Notice of Removal, is licensed in the State of Florida and is a member in good standing of the Bar of this Court.

WHEREFORE, Defendant Howmedica Osteonics Corp. hereby removes the above-captioned action from the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, and request that further proceedings be conducted in this Court as provided by law.

Respectfully submitted,

s/ Hildy M. Sastre

Hildy M. Sastre

Florida Bar No. 0026492

E-mail: hsastre@shb.com

Iain L. C. Kennedy  
Florida Bar No. 96668  
E-mail: [ikennedy@shb.com](mailto:ikennedy@shb.com)  
SHOOK, HARDY & BACON L.L.P.  
201 S. Biscayne Blvd., Suite 3200  
Miami, FL 33131  
305-358-5171 (telephone)  
305-358-7470 (facsimile)

*Attorneys for Defendant  
Howmedica Osteonics Corp.*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 2nd day of October, 2012, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system and a true and correct copy was served by CM/ECF, email and U.S. Mail on all counsel of record identified below:

Jesse N. Bernheim  
Florida Bar No. 0525421  
Email: jnbsservice@wherejusticeisserved.com  
Kelley, Bernheim & Dolinsky, L.L.C.  
101 NE Third Avenue, Suite 1410  
Fort Lauderdale, Florida 33301  
Telephone: (954) 573-6688  
Facsimile: (954) 573-6690

/s/ Iain L. C. Kennedy

Iain L. C. Kennedy  
Florida Bar No. 96668

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

Case No. \_\_\_\_\_  
State Case No. 12 CA 25901

CONNIE PICCINONNA and CARLO  
PICCINONNA,

Plaintiffs,

vs.

HOWMEDICA OSTEONICS  
CORPORATION, a New Jersey Corporation,  
d/b/a STRYKER ORTHOPAEDICS, and  
ORTHOPEDIC SOLUTIONS, INC. d/b/a  
STRYKER SOUTH FLORIDA AGENCY,

Defendants.

\_\_\_\_\_/

**DEFENDANT HOWMEDICA OSTEONICS CORP.'S NOTICE OF REMOVAL**

Defendant Howmedica Osteonics Corp., which has at times done business as “Stryker Orthopaedics” (hereinafter “HOC”), hereby removes this action, which is currently pending in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, Case No. 2012 CA 25901, to the United States District Court for the Southern District of Florida, Fort Lauderdale Division. In support of this Notice of Removal, HOC states the following:

**THE REMOVED CASE**

1. The removed case is a civil action filed on September 4, 2012, in the Seventeenth Judicial Circuit, in and for Broward County, Florida, and captioned *Connie Piccinonna and Carlo Piccinonna, Plaintiffs v. Howmedica Osteonics Corp d/b/a Stryker Orthopaedics and Orthopedic Solutions, Inc. d/b/a Stryker South Florida Agency, Defendants*, Case No. 2012 CA 25899.

1  
LAW OFFICES  
SHOOK, HARDY & BACON LLP

2. This medical device product liability action arises out of an injury allegedly sustained by Plaintiff Connie Piccinonna in connection with the implantation of two Rejuvenate artificial hip implant systems designed and manufactured by HOC. *See* Complaint at ¶¶ 1, 10. Plaintiffs' Complaint seeks to recover damages from HOC and Orthopedic Solutions, Inc. d/b/a Stryker South Florida Agency ("Orthopedic Solutions").

### **PAPERS FROM REMOVED ACTION**

3. Pursuant to 28 U.S.C. § 1446(a), HOC attaches to this Notice of Removal a copy of all pleadings, orders and other papers or exhibits of every kind currently on file in the state court action. *See* Exhibit 1, attached hereto.

### **THE REMOVAL IS TIMELY**

4. Plaintiffs filed this action in the aforementioned state court on September 4, 2012. HOC was served with the Complaint on September 13, 2012. This notice of removal is timely filed. *See, e.g., Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 355 (1999) (removal time frame triggered by receipt of *formal* service; not receipt of complaint.). Accordingly, this Notice of Removal is timely filed under 28 U.S.C. § 1446(b).

### **VENUE IS PROPER**

5. Venue is proper in the Fort Lauderdale Division of this Court because this action is being removed from the Seventeenth Judicial Circuit, in and for Broward County, Florida and the acts complained of in Plaintiffs' Complaint are alleged to have occurred in Broward County, Florida. *See* Complaint at ¶ 5.

**DIVERSITY OF CITIZENSHIP EXISTS  
BETWEEN THE PROPERLY JOINED PARTIES**

6. This is a civil action that falls under the Court's original jurisdiction under 28 U.S.C. § 1332 (diversity of citizenship) and is one that may be removed to this Court based on diversity of citizenship under 28 U.S.C. §§ 1441 and 1446.

7. At all times material hereto, Plaintiffs, Connie Piccinonna and Carlo Piccinonna, were residents and citizens of Broward County, Florida. *See* Complaint at ¶ 4.

8. At all times material hereto, Defendant HOC is and was a New Jersey corporation with its principal place of business in New Jersey. *See* Complaint at ¶ 6.

9. Defendant Orthopedic Solutions is, and was at the time this action was filed, a Florida corporation with its principal place of business in Florida. *See* Complaint at ¶ 5. As set forth in greater detail below, Orthopedic Solutions is fraudulently joined and its presence in this action does not destroy diversity jurisdiction or prevent removal to this court. Its citizenship must, therefore, be disregarded for the purposes of diversity analysis. *See Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996). Further, its consent as a fraudulently joined defendant is not required for purposes of removal. *See Diaz v. Kaplan Univ.*, 567 F. Supp. 2d 1394, 1402 (S.D. Fla. 2008).

10. Because Plaintiffs are citizens of Florida, and HOC, the properly joined Defendant, is not, complete diversity exists under 28 U.S.C. § 1332.

**ORTHOPEDIC SOLUTIONS IS FRAUDULENTLY JOINED**

11. In determining whether diversity jurisdiction exists, the Court must disregard the citizenship of fraudulently joined parties. *See Tapscott*, 77 F.3d at 1360; *Cabalceta v. Standard*

*Fruit Co.*, 883 F.2d 1553, 1561-62 (11th Cir. 1989). Fraudulent joinder is a judicially created doctrine that allows an exception to the requirement of complete diversity. *Triggs v. John Crump Toyota, Inc.*, 154 F.3d, 1284, 1287 (11th Cir. 1998). A defendant is fraudulently joined where there is no “reasonable basis” for a claim against him. *See Crowe v. Coleman*, 113 F.3d 1536, 1542 (11th Cir. 1997).

12. The Eleventh Circuit recognizes three types of fraudulent joinder: (1) where there is no possibility that the plaintiff can prove a cause of action against the resident defendant; (2) when there is outright fraud in the plaintiff’s pleading of jurisdictional facts; and (3) where the claims against the non-diverse defendant have no real connection to the claims against the diverse defendants. *Triggs*, 154 F.3d at 1287. Here, there is no possibility that the Plaintiffs can prove a cause of action against Orthopedic Solutions.

13. Courts have recognized that the “no possibility” standard “cannot be taken literally.” *In re Rezulin Prods. Liab. Litig.*, 133 F.Supp. 2d 272, 280 n.4 (S.D.N.Y. 2001). In fact, numerous circuits have recognized that “the standard more accurately is described as requiring a showing that there is ‘no reasonable basis’ for predicting liability on the claims alleged.” *Id.* (emphasis added); *see Legg v. Wyeth*, 428 F.3d 1317, 1324-25 (11th Cir. 2005) (applying “reasonable basis” test); *Crowe*, 113 F.3d at 1540 (applying “arguably a reasonable basis” test) (internal quotation omitted); *Schwartz v. State Farm Mut. Auto. Ins. Co.*, 174 F.3d 875, 879 (7th Cir. 1999) (noting that it cannot “say that there is no possibility that a state court would someday” recognize plaintiff’s liability theory, but upholding removal because that currently “is not a reasonable possibility”); *see also Woods v. Firestone Tire & Rubber Co.*, 560



F. Supp. 588, 590 (S.D. Fla. 1983) (applying “arguably reasonable basis” test); *Anderson v. Allstate Life Ins. Co.*, No. 00-0958, 2001 WL 228057, \*8 (S.D. Fla. Feb. 1, 2001) (same).

14. When a defendant puts forth evidence of fraudulent joinder, the burden then shifts to the plaintiff to rebut that evidence and show that a reasonable basis for a claim exists against the fraudulently joined defendant. *See Legg*, 428 F.3d at 1323-24. Plaintiffs cannot do so by merely standing on the allegations in the complaint. *See id.* at 1323.

15. Regardless of the theory which liability is predicated upon, it is axiomatic that a plaintiff must establish that it has properly identified a defendant who has actually manufactured, sold, marketed or was in some way involved with the product which caused injury. *See Devore v. Howmedica Osteonics Corp.*, 658 F. Supp. 2d 1372, 1380 (M.D. Fla. 2009); *Rivera v. Baby Trend, Inc.*, 914 So. 2d 1102, 1104-05 (Fla. 4th DCA 2005); *Siemens Energy & Automation, Inc. v. Medina*, 719 So. 2d 312, 315 (Fla. 3d DCA 1998); *Mahl v. Dade Pipe and Plumbing Supply Co.*, 546 So. 2d 740, 741 (Fla. 3d DCA 1989). If a plaintiff cannot prove that the defendant was involved in any way with the product, the defendant has been fraudulently joined. *Devore*, 658 F. Supp. 2d at 1380.

16. In this case, Plaintiffs’ Complaint alleges that the subject medical devices, Rejuvenate hip implant systems, were distributed by Orthopedic Solutions. However, as evidenced by the affidavit of Frank Russo, the President of Orthopedic Solutions, attached hereto as Exhibit 2, Orthopedic Solutions has never participated in any way in the retailing, distributing, marketing and/or supplying of the Rejuvenate hip implant system. *Id.* at ¶ 6. Orthopedic Solutions has not placed the Rejuvenate hip implant system into the stream of commerce or acted as a distributor of that product. *Id.* In particular, Orthopedic Solutions did not participate in any

way in the design, manufacture, marketing, promotion, sale, supply, retailing, and distribution of the Rejuvenate hip implant systems that were purportedly implanted in Plaintiff Connie Piccinonna on September 26, 2011 (left hip implant), and January 4, 2012 (right hip implant), nor did it act as a distributor for those devices or place them into the stream of commerce. *Id.* at ¶ 7. Finally, Orthopedic Solutions has never done business as “Stryker South Florida Agency.” *Id.* at ¶ 5.

17. Accordingly, Orthopedic Solutions should not be a party in this case and has been fraudulently joined. As a result, complete diversity of citizenship exists between the parties to this suit.

**THE AMOUNT IN CONTROVERSY REQUIREMENT IS SATISFIED**

18. Where, as here, the jurisdictional amount is not alleged, it can nevertheless be determined when it is “facially apparent” from the Complaint itself. *Williams v. Best Buy Co.*, 269 F.3d 1316, 1319 (11th Cir. 2001) (holding that district court may consider whether jurisdictional amount is “facially apparent” from the complaint). A court may also consider the removal notice and post-removal evidence concerning the amount in controversy. *See id.*; *see also Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 768 (11th Cir. 2010) (holding that “the evidence the defendant may use to establish the jurisdictional facts is not limited to that which it received from the plaintiff or the court.”) “[A] removing defendant is not required to prove the amount in controversy beyond all doubt or to banish all uncertainty about it.” *Pretka*, 608 F.3d at 754. This is because “[t]he law does not demand perfect knowledge or depend any less on reasonable inferences and deductions than we all do in everyday life.” *Id.*

19. Plaintiffs seek compensatory damages for alleged injuries arising out of alleged defects in the Rejuvenate hip implant systems manufactured by HOC. The face of the Amended Complaint makes clear that Plaintiffs seek damages in excess of \$75,000, for Plaintiffs alleges the following injuries/damages:

- “[P]ast, present and future physical and mental pain and suffering; and past, present and future medical, hospital, rehabilitative and pharmaceutical expenses, and other related damages.” Complaint at ¶ 25.
- Significant discomfort in the area where the device was implanted in Plaintiff Connie Piccinonna’s left hip. *Id.* at ¶ 26.
- Multiple diagnostic workups and blood testing. *Id.* at ¶¶ 27-28.
- “[A] large doughy white pseudo-tumor formation,” “the potential existence of a significant fluid collection around the lateral trochanteric region about the hip prosthesis,” “heavy metal ion contamination,” and “heavy metal toxicity including the presence of large effusion which appeared somewhat grayish, reddish like a liquefied hematoma” in the left hip. *Id.* at ¶¶ 28-29.
- Revision surgery on the left hip implant. *Id.* at ¶¶ 23-25.
- Inpatient rehabilitation. *Id.* at ¶ 26.
- “Soreness and pain” around her right hip implant. *Id.* at ¶ 31.
- “[S]evere physical pain and suffering, emotional distress, mental anguish, loss of the capacity for the enjoyment of life, medical and nursing expenses, surgical expenses, lost wages and loss of earning capacity.” *Id.* at ¶ 65.

- “[S]erious damage to Plaintiff including bodily injury, . . . disability, physical impairment, disfigurement, . . . inconvenience, [and] aggravation of a preexisting condition.” *Id.* at ¶¶ 81, 88, 95.

20. Far less specific allegations have been held to establish, on their face, that the amount in controversy exceeds the jurisdictional requirement. *See, e.g., Gebbia v. Wal-Mart Stores, Inc.*, 233 F.3d 880, 883 (5th Cir. 2000) (slip and fall case in which plaintiff sought damages for: “medical expenses, physical pain and suffering, mental anguish and suffering, loss of enjoyment of life, loss of wages and earning capacity and permanent disability and disfigurement”); *Estevez-Gonzalez v. Kraft, Inc.*, 606 F. Supp. 127, 129 (S.D. Fla. 1985) (unspecified personal injuries; plaintiffs sought damages for “physical and mental pain, physical handicap, impairment of working ability, injuries permanent or continuing in nature, and medical expenses”); *Baker v. Firestone Tire & Rubber Co.*, 537 F. Supp. 244, 247 (S.D. Fla. 1982) (exploding tire caused “permanent and serious injuries . . . pain, disfigurement, disability, loss of wages, loss of earning capacity and loss of the capacity for the enjoyment of life, and great expenses for future medical treatment”); *Lee v. Altamil Corp.*, 457 F. Supp. 979, 981 (M.D. Fla. 1978) (defective machine caused “serious permanent injury, ‘substantial medical expenses,’ ‘great pain and suffering,’ and a substantial loss of income”).

21. Other federal courts, moreover, have concluded that the amount in controversy exceeded \$75,000 *in similar cases*, where the plaintiffs alleged injuries related to allegedly defective hip implants. In *Militer v. Wright Med. Group, Inc.*, No. 11-cv-1153, 2011 WL 4360024, \*3 (E.D. Mich. Sept. 19, 2011), the Court held that the amount in controversy had been satisfied where plaintiff alleged injuries regarding an allegedly defective hip implant that he had

received, including revision surgery, hospitalization, severe lytic lesions in the area of plaintiff's femur where the device had been implanted, premature loosening around the proximal femur, the corrosion of the metal components in defendants' device allegedly resulted in the presence of "extremely elevated levels of toxic metals" in plaintiff's blood, an extended period of disability, medical expenses, lost wages, and "much physical and mental pain and suffering." *Id*; *see also Bloodsworth v. Smith & Nephew*, No. 2:05CV622-D, 2005 WL 3470337, \*2 (M.D. Ala. Dec. 19, 2005) (in hip implant product liability case, plaintiff stipulated that amount in controversy exceed \$75,000); *Askew v. DC Med., LLC*, No. 1:11-CV-1245-WSD, 2011 WL 1811433, \*1 (N.D. Ga. May 12, 2011) (plaintiff did not dispute that the amount in controversy in hip implant product liability action exceeded \$75,000); *Oiler v. Biomet Orthopedics, Inc.*, No. CIV.A. 02-3778, 2003 WL 22174285, \*1 (E.D. La. Sept. 17, 2003) (denying remand in a hip implant product liability case where defendants had successfully argued that "it was facially apparent that the amount in controversy exceeds \$75,000.00 exclusive of interest and costs").

22. Additionally, Plaintiff Carlo Piccononna seeks compensatory damages for the loss of his wife's care, comfort, society and affections. *See* Complaint ¶ 97. Cases similar to Plaintiff's have resulted in verdicts and settlements exceeding \$75,000.00. *See Waller v. Kalbac*, 07FJVR 1-31, 2006 WL 4099790 (Fla. Cir. Ct. Oct. 10, 2006) (awarding \$200,000 on loss of consortium claims where spouse required a total hip replacement prosthesis revision surgery); *Morris v. Kmart Corp.*, JAS Ga Ref No. 56348WL, 2000 WL 33121581 (Ga. State Ct. Aug. 30, 2000) (awarding \$150,000 on loss of consortium claim where injury caused damage to prosthetic hip implant requiring replacement).

23. Thus, the state court action may be removed to this Court by HOC in accordance with the provisions of 28 U.S.C. § 1441(a) because (i) this action is a civil action pending within the jurisdiction of the United States District Court for the Southern District of Florida; (ii) excluding the fraudulently joined defendants, this action is between citizens of different states; (iii) the amount in controversy exceeds \$75,000, exclusive of interest and costs.

**FILING OF REMOVAL PAPERS**

24. Pursuant to 28 U.S.C. § 1446(d), written notice of the removal of this action will be promptly served to Plaintiffs' counsel.

25. Concurrent with the filing of this Notice of Removal, HOC has filed a Notice of Filing the Notice of Removal, including a true and correct copy of the Notice of Removal with the Clerk of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. *See* Exhibit 3, attached hereto.

26. The undersigned counsel is authorized by HOC to file this Notice of Removal, is licensed in the State of Florida and is a member in good standing of the Bar of this Court.

WHEREFORE, Defendant Howmedica Osteonics Corp. hereby removes the above-captioned action from the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, and request that further proceedings be conducted in this Court as provided by law.

Respectfully submitted,

s/ Hildy M. Sastre

Hildy M. Sastre

Florida Bar No. 0026492

E-mail: hsastre@shb.com

Iain L. C. Kennedy  
Florida Bar No. 96668  
E-mail: [ikennedy@shb.com](mailto:ikennedy@shb.com)  
SHOOK, HARDY & BACON L.L.P.  
201 S. Biscayne Blvd., Suite 3200  
Miami, FL 33131  
305-358-5171 (telephone)  
305-358-7470 (facsimile)

*Attorneys for Defendant  
Howmedica Osteonics Corp.*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 2nd day of October, 2012, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system and a true and correct copy was served by CM/ECF, email and U.S. Mail on all counsel of record identified below:

Jesse N. Bernheim  
Florida Bar No. 0525421  
Email: jnbSERVICE@wherejusticeisserved.com  
Kelley, Bernheim & Dolinsky, L.L.C.  
101 NE Third Avenue, Suite 1410  
Fort Lauderdale, Florida 33301  
Telephone: (954) 573-6688  
Facsimile: (954) 573-6690

/s/ Iain L. C. Kennedy

Iain L. C. Kennedy  
Florida Bar No. 96668



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

Case No. \_\_\_\_\_  
State Case No. 12 CA 25901

CONNIE PICCINONNA and CARLO  
PICCINONNA,

Plaintiffs,

vs.

HOWMEDICA OSTEONICS  
CORPORATION, a New Jersey Corporation,  
d/b/a STRYKER ORTHOPAEDICS, and  
ORTHOPEDIC SOLUTIONS, INC. d/b/a  
STRYKER SOUTH FLORIDA AGENCY,

Defendants.

\_\_\_\_\_/

**DEFENDANT HOWMEDICA OSTEONICS CORP.'S NOTICE OF REMOVAL**

Defendant Howmedica Osteonics Corp., which has at times done business as “Stryker Orthopaedics” (hereinafter “HOC”), hereby removes this action, which is currently pending in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, Case No. 2012 CA 25901, to the United States District Court for the Southern District of Florida, Fort Lauderdale Division. In support of this Notice of Removal, HOC states the following:

**THE REMOVED CASE**

1. The removed case is a civil action filed on September 4, 2012, in the Seventeenth Judicial Circuit, in and for Broward County, Florida, and captioned *Connie Piccinonna and Carlo Piccinonna, Plaintiffs v. Howmedica Osteonics Corp d/b/a Stryker Orthopaedics and Orthopedic Solutions, Inc. d/b/a Stryker South Florida Agency, Defendants*, Case No. 2012 CA 25899.

1  
LAW OFFICES  
SHOOK, HARDY & BACON LLP

2. This medical device product liability action arises out of an injury allegedly sustained by Plaintiff Connie Piccinonna in connection with the implantation of two Rejuvenate artificial hip implant systems designed and manufactured by HOC. *See* Complaint at ¶¶ 1, 10. Plaintiffs' Complaint seeks to recover damages from HOC and Orthopedic Solutions, Inc. d/b/a Stryker South Florida Agency ("Orthopedic Solutions").

### **PAPERS FROM REMOVED ACTION**

3. Pursuant to 28 U.S.C. § 1446(a), HOC attaches to this Notice of Removal a copy of all pleadings, orders and other papers or exhibits of every kind currently on file in the state court action. *See* Exhibit 1, attached hereto.

### **THE REMOVAL IS TIMELY**

4. Plaintiffs filed this action in the aforementioned state court on September 4, 2012. HOC was served with the Complaint on September 13, 2012. This notice of removal is timely filed. *See, e.g., Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 355 (1999) (removal time frame triggered by receipt of *formal* service; not receipt of complaint.). Accordingly, this Notice of Removal is timely filed under 28 U.S.C. § 1446(b).

### **VENUE IS PROPER**

5. Venue is proper in the Fort Lauderdale Division of this Court because this action is being removed from the Seventeenth Judicial Circuit, in and for Broward County, Florida and the acts complained of in Plaintiffs' Complaint are alleged to have occurred in Broward County, Florida. *See* Complaint at ¶ 5.

**DIVERSITY OF CITIZENSHIP EXISTS  
BETWEEN THE PROPERLY JOINED PARTIES**

6. This is a civil action that falls under the Court's original jurisdiction under 28 U.S.C. § 1332 (diversity of citizenship) and is one that may be removed to this Court based on diversity of citizenship under 28 U.S.C. §§ 1441 and 1446.

7. At all times material hereto, Plaintiffs, Connie Piccinonna and Carlo Piccinonna, were residents and citizens of Broward County, Florida. *See* Complaint at ¶ 4.

8. At all times material hereto, Defendant HOC is and was a New Jersey corporation with its principal place of business in New Jersey. *See* Complaint at ¶ 6.

9. Defendant Orthopedic Solutions is, and was at the time this action was filed, a Florida corporation with its principal place of business in Florida. *See* Complaint at ¶ 5. As set forth in greater detail below, Orthopedic Solutions is fraudulently joined and its presence in this action does not destroy diversity jurisdiction or prevent removal to this court. Its citizenship must, therefore, be disregarded for the purposes of diversity analysis. *See Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996). Further, its consent as a fraudulently joined defendant is not required for purposes of removal. *See Diaz v. Kaplan Univ.*, 567 F. Supp. 2d 1394, 1402 (S.D. Fla. 2008).

10. Because Plaintiffs are citizens of Florida, and HOC, the properly joined Defendant, is not, complete diversity exists under 28 U.S.C. § 1332.

**ORTHOPEDIC SOLUTIONS IS FRAUDULENTLY JOINED**

11. In determining whether diversity jurisdiction exists, the Court must disregard the citizenship of fraudulently joined parties. *See Tapscott*, 77 F.3d at 1360; *Cabalceta v. Standard*

*Fruit Co.*, 883 F.2d 1553, 1561-62 (11th Cir. 1989). Fraudulent joinder is a judicially created doctrine that allows an exception to the requirement of complete diversity. *Triggs v. John Crump Toyota, Inc.*, 154 F.3d, 1284, 1287 (11th Cir. 1998). A defendant is fraudulently joined where there is no “reasonable basis” for a claim against him. *See Crowe v. Coleman*, 113 F.3d 1536, 1542 (11th Cir. 1997).

12. The Eleventh Circuit recognizes three types of fraudulent joinder: (1) where there is no possibility that the plaintiff can prove a cause of action against the resident defendant; (2) when there is outright fraud in the plaintiff’s pleading of jurisdictional facts; and (3) where the claims against the non-diverse defendant have no real connection to the claims against the diverse defendants. *Triggs*, 154 F.3d at 1287. Here, there is no possibility that the Plaintiffs can prove a cause of action against Orthopedic Solutions.

13. Courts have recognized that the “no possibility” standard “cannot be taken literally.” *In re Rezulin Prods. Liab. Litig.*, 133 F.Supp. 2d 272, 280 n.4 (S.D.N.Y. 2001). In fact, numerous circuits have recognized that “the standard more accurately is described as requiring a showing that there is ‘no reasonable basis’ for predicting liability on the claims alleged.” *Id.* (emphasis added); *see Legg v. Wyeth*, 428 F.3d 1317, 1324-25 (11th Cir. 2005) (applying “reasonable basis” test); *Crowe*, 113 F.3d at 1540 (applying “arguably a reasonable basis” test) (internal quotation omitted); *Schwartz v. State Farm Mut. Auto. Ins. Co.*, 174 F.3d 875, 879 (7th Cir. 1999) (noting that it cannot “say that there is no possibility that a state court would someday” recognize plaintiff’s liability theory, but upholding removal because that currently “is not a reasonable possibility”); *see also Woods v. Firestone Tire & Rubber Co.*, 560

F. Supp. 588, 590 (S.D. Fla. 1983) (applying “arguably reasonable basis” test); *Anderson v. Allstate Life Ins. Co.*, No. 00-0958, 2001 WL 228057, \*8 (S.D. Fla. Feb. 1, 2001) (same).

14. When a defendant puts forth evidence of fraudulent joinder, the burden then shifts to the plaintiff to rebut that evidence and show that a reasonable basis for a claim exists against the fraudulently joined defendant. *See Legg*, 428 F.3d at 1323-24. Plaintiffs cannot do so by merely standing on the allegations in the complaint. *See id.* at 1323.

15. Regardless of the theory which liability is predicated upon, it is axiomatic that a plaintiff must establish that it has properly identified a defendant who has actually manufactured, sold, marketed or was in some way involved with the product which caused injury. *See Devore v. Howmedica Osteonics Corp.*, 658 F. Supp. 2d 1372, 1380 (M.D. Fla. 2009); *Rivera v. Baby Trend, Inc.*, 914 So. 2d 1102, 1104-05 (Fla. 4th DCA 2005); *Siemens Energy & Automation, Inc. v. Medina*, 719 So. 2d 312, 315 (Fla. 3d DCA 1998); *Mahl v. Dade Pipe and Plumbing Supply Co.*, 546 So. 2d 740, 741 (Fla. 3d DCA 1989). If a plaintiff cannot prove that the defendant was involved in any way with the product, the defendant has been fraudulently joined. *Devore*, 658 F. Supp. 2d at 1380.

16. In this case, Plaintiffs’ Complaint alleges that the subject medical devices, Rejuvenate hip implant systems, were distributed by Orthopedic Solutions. However, as evidenced by the affidavit of Frank Russo, the President of Orthopedic Solutions, attached hereto as Exhibit 2, Orthopedic Solutions has never participated in any way in the retailing, distributing, marketing and/or supplying of the Rejuvenate hip implant system. *Id.* at ¶ 6. Orthopedic Solutions has not placed the Rejuvenate hip implant system into the stream of commerce or acted as a distributor of that product. *Id.* In particular, Orthopedic Solutions did not participate in any

way in the design, manufacture, marketing, promotion, sale, supply, retailing, and distribution of the Rejuvenate hip implant systems that were purportedly implanted in Plaintiff Connie Piccinonna on September 26, 2011 (left hip implant), and January 4, 2012 (right hip implant), nor did it act as a distributor for those devices or place them into the stream of commerce. *Id.* at ¶ 7. Finally, Orthopedic Solutions has never done business as “Stryker South Florida Agency.” *Id.* at ¶ 5.

17. Accordingly, Orthopedic Solutions should not be a party in this case and has been fraudulently joined. As a result, complete diversity of citizenship exists between the parties to this suit.

**THE AMOUNT IN CONTROVERSY REQUIREMENT IS SATISFIED**

18. Where, as here, the jurisdictional amount is not alleged, it can nevertheless be determined when it is “facially apparent” from the Complaint itself. *Williams v. Best Buy Co.*, 269 F.3d 1316, 1319 (11th Cir. 2001) (holding that district court may consider whether jurisdictional amount is “facially apparent” from the complaint). A court may also consider the removal notice and post-removal evidence concerning the amount in controversy. *See id.*; *see also Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 768 (11th Cir. 2010) (holding that “the evidence the defendant may use to establish the jurisdictional facts is not limited to that which it received from the plaintiff or the court.”) “[A] removing defendant is not required to prove the amount in controversy beyond all doubt or to banish all uncertainty about it.” *Pretka*, 608 F.3d at 754. This is because “[t]he law does not demand perfect knowledge or depend any less on reasonable inferences and deductions than we all do in everyday life.” *Id.*

19. Plaintiffs seek compensatory damages for alleged injuries arising out of alleged defects in the Rejuvenate hip implant systems manufactured by HOC. The face of the Amended Complaint makes clear that Plaintiffs seek damages in excess of \$75,000, for Plaintiffs alleges the following injuries/damages:

- “[P]ast, present and future physical and mental pain and suffering; and past, present and future medical, hospital, rehabilitative and pharmaceutical expenses, and other related damages.” Complaint at ¶ 25.
- Significant discomfort in the area where the device was implanted in Plaintiff Connie Piccinonna’s left hip. *Id.* at ¶ 26.
- Multiple diagnostic workups and blood testing. *Id.* at ¶¶ 27-28.
- “[A] large doughy white pseudo-tumor formation,” “the potential existence of a significant fluid collection around the lateral trochanteric region about the hip prosthesis,” “heavy metal ion contamination,” and “heavy metal toxicity including the presence of large effusion which appeared somewhat grayish, reddish like a liquefied hematoma” in the left hip. *Id.* at ¶¶ 28-29.
- Revision surgery on the left hip implant. *Id.* at ¶¶ 23-25.
- Inpatient rehabilitation. *Id.* at ¶ 26.
- “Soreness and pain” around her right hip implant. *Id.* at ¶ 31.
- “[S]evere physical pain and suffering, emotional distress, mental anguish, loss of the capacity for the enjoyment of life, medical and nursing expenses, surgical expenses, lost wages and loss of earning capacity.” *Id.* at ¶ 65.

- “[S]erious damage to Plaintiff including bodily injury, . . . disability, physical impairment, disfigurement, . . . inconvenience, [and] aggravation of a preexisting condition.” *Id.* at ¶¶ 81, 88, 95.

20. Far less specific allegations have been held to establish, on their face, that the amount in controversy exceeds the jurisdictional requirement. *See, e.g., Gebbia v. Wal-Mart Stores, Inc.*, 233 F.3d 880, 883 (5th Cir. 2000) (slip and fall case in which plaintiff sought damages for: “medical expenses, physical pain and suffering, mental anguish and suffering, loss of enjoyment of life, loss of wages and earning capacity and permanent disability and disfigurement”); *Estevez-Gonzalez v. Kraft, Inc.*, 606 F. Supp. 127, 129 (S.D. Fla. 1985) (unspecified personal injuries; plaintiffs sought damages for “physical and mental pain, physical handicap, impairment of working ability, injuries permanent or continuing in nature, and medical expenses”); *Baker v. Firestone Tire & Rubber Co.*, 537 F. Supp. 244, 247 (S.D. Fla. 1982) (exploding tire caused “permanent and serious injuries . . . pain, disfigurement, disability, loss of wages, loss of earning capacity and loss of the capacity for the enjoyment of life, and great expenses for future medical treatment”); *Lee v. Altamil Corp.*, 457 F. Supp. 979, 981 (M.D. Fla. 1978) (defective machine caused “serious permanent injury, ‘substantial medical expenses,’ ‘great pain and suffering,’ and a substantial loss of income”).

21. Other federal courts, moreover, have concluded that the amount in controversy exceeded \$75,000 *in similar cases*, where the plaintiffs alleged injuries related to allegedly defective hip implants. In *Militer v. Wright Med. Group, Inc.*, No. 11-cv-1153, 2011 WL 4360024, \*3 (E.D. Mich. Sept. 19, 2011), the Court held that the amount in controversy had been satisfied where plaintiff alleged injuries regarding an allegedly defective hip implant that he had



received, including revision surgery, hospitalization, severe lytic lesions in the area of plaintiff's femur where the device had been implanted, premature loosening around the proximal femur, the corrosion of the metal components in defendants' device allegedly resulted in the presence of "extremely elevated levels of toxic metals" in plaintiff's blood, an extended period of disability, medical expenses, lost wages, and "much physical and mental pain and suffering." *Id*; *see also Bloodsworth v. Smith & Nephew*, No. 2:05CV622-D, 2005 WL 3470337, \*2 (M.D. Ala. Dec. 19, 2005) (in hip implant product liability case, plaintiff stipulated that amount in controversy exceed \$75,000); *Askew v. DC Med., LLC*, No. 1:11-CV-1245-WSD, 2011 WL 1811433, \*1 (N.D. Ga. May 12, 2011) (plaintiff did not dispute that the amount in controversy in hip implant product liability action exceeded \$75,000); *Oiler v. Biomet Orthopedics, Inc.*, No. CIV.A. 02-3778, 2003 WL 22174285, \*1 (E.D. La. Sept. 17, 2003) (denying remand in a hip implant product liability case where defendants had successfully argued that "it was facially apparent that the amount in controversy exceeds \$75,000.00 exclusive of interest and costs").

22. Additionally, Plaintiff Carlo Piccononna seeks compensatory damages for the loss of his wife's care, comfort, society and affections. *See* Complaint ¶ 97. Cases similar to Plaintiff's have resulted in verdicts and settlements exceeding \$75,000.00. *See Waller v. Kalbac*, 07FJVR 1-31, 2006 WL 4099790 (Fla. Cir. Ct. Oct. 10, 2006) (awarding \$200,000 on loss of consortium claims where spouse required a total hip replacement prosthesis revision surgery); *Morris v. Kmart Corp.*, JAS Ga Ref No. 56348WL, 2000 WL 33121581 (Ga. State Ct. Aug. 30, 2000) (awarding \$150,000 on loss of consortium claim where injury caused damage to prosthetic hip implant requiring replacement).

23. Thus, the state court action may be removed to this Court by HOC in accordance with the provisions of 28 U.S.C. § 1441(a) because (i) this action is a civil action pending within the jurisdiction of the United States District Court for the Southern District of Florida; (ii) excluding the fraudulently joined defendants, this action is between citizens of different states; (iii) the amount in controversy exceeds \$75,000, exclusive of interest and costs.

**FILING OF REMOVAL PAPERS**

24. Pursuant to 28 U.S.C. § 1446(d), written notice of the removal of this action will be promptly served to Plaintiffs' counsel.

25. Concurrent with the filing of this Notice of Removal, HOC has filed a Notice of Filing the Notice of Removal, including a true and correct copy of the Notice of Removal with the Clerk of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. *See* Exhibit 3, attached hereto.

26. The undersigned counsel is authorized by HOC to file this Notice of Removal, is licensed in the State of Florida and is a member in good standing of the Bar of this Court.

WHEREFORE, Defendant Howmedica Osteonics Corp. hereby removes the above-captioned action from the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, and request that further proceedings be conducted in this Court as provided by law.

Respectfully submitted,

s/ Hildy M. Sastre

Hildy M. Sastre

Florida Bar No. 0026492

E-mail: hsastre@shb.com

Iain L. C. Kennedy  
Florida Bar No. 96668  
E-mail: [ikennedy@shb.com](mailto:ikennedy@shb.com)  
SHOOK, HARDY & BACON L.L.P.  
201 S. Biscayne Blvd., Suite 3200  
Miami, FL 33131  
305-358-5171 (telephone)  
305-358-7470 (facsimile)

*Attorneys for Defendant  
Howmedica Osteonics Corp.*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 2nd day of October, 2012, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system and a true and correct copy was served by CM/ECF, email and U.S. Mail on all counsel of record identified below:

Jesse N. Bernheim  
Florida Bar No. 0525421  
Email: jnbserve@wherejusticeisserved.com  
Kelley, Bernheim & Dolinsky, L.L.C.  
101 NE Third Avenue, Suite 1410  
Fort Lauderdale, Florida 33301  
Telephone: (954) 573-6688  
Facsimile: (954) 573-6690

/s/ Iain L. C. Kennedy

Iain L. C. Kennedy  
Florida Bar No. 96668