

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No.: _____

State Court Case No.: 2019-023444-CA-01

JENNIFER TINKLER,

Plaintiff,

v.

MENTOR WORLDWIDE, LLC,

Defendant.

NOTICE OF REMOVAL

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. §§ 1332, 1441, and 1446, Defendant Mentor Worldwide LLC (“Mentor”) hereby timely removes this action from the Circuit Court of the 11th Judicial Circuit, in and for Miami-Dade County, Florida to this Court.¹ The United States District Court for the Southern District of Florida has original subject-matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(a) because there is complete diversity among all parties and the amount in controversy exceeds \$75,000.00, exclusive of interest and costs. As grounds for removal, Mentor states as follows:

I. STATE COURT ACTION

1. On or about August 7, 2019, Jennifer Tinkler (“Plaintiff”) filed an action styled *Tinkler v. Mentor Worldwide, LLC*, Case No. 2019-023444-CA-01, in the Circuit Court of Miami-Dade County, Florida (the “State Court Action”). A true and correct copy of the

¹ By removing this action to this Court, Mentor does not waive any defenses, objections, or motions available under state or federal law. Further, Mentor expressly reserves the right to move for dismissal of some or all of Plaintiff’s claims and/or seek dismissal on grounds of lack of personal jurisdiction, insufficient or improper service of process, improper venue, or forum non conveniens.

Complaint is attached hereto within Exhibit 1. The Complaint names Mentor as the only defendant.

2. Plaintiff alleges claims for negligence and strict liability. Plaintiff alleges that Mentor manufactured Smooth Round Saline-Filled Mammary Prosthetic Breast Implants (“Mentor Implants”) that caused Plaintiff’s various injuries. (Compl. ¶¶ 10–11, 34, 41.)

II. REMOVAL IS PROPER BECAUSE THIS COURT HAS ORIGINAL SUBJECT MATTER JURISDICTION PURSUANT TO 28 U.S.C. § 1332(A).

3. Pursuant to 28 U.S.C. §§ 1332, 1441 and 1446, and this Court’s diversity jurisdiction, removal of the State Court Action to this Court is appropriate.

4. Mentor has not yet been served with Plaintiff’s Complaint. This Notice of Removal is timely pursuant to 28 U.S.C. § 1446(b), which allows a defendant to remove a case no later than thirty days of receipt of the initial pleading setting forth the claim for relief upon which such action or proceeding is based.

A. Complete Diversity is Satisfied.

5. Complete diversity exists between Plaintiff and Mentor, thus satisfying the diversity requirement of 28 U.S.C. § 1332(a)(1).

6. Plaintiff alleges that she is a resident of Miami-Dade County, Florida. (*See* Compl. ¶ 4.) Plaintiff’s Florida residency gives rise to a presumption that she is also a Florida citizen. *See King v. Cessna Aircraft Co.*, 505 F.3d 1160, 1171-72 (11th Cir. 2007). Additionally, publicly available records establish that Plaintiff maintains a physical address in Florida, owns property in Florida, holds multiple Florida professional licenses as well as a Florida driver’s license and motor vehicle registration, and is a registered Florida voter. Accordingly, based on her Complaint and publicly available records, Plaintiff is, and was at the time of filing this action, a citizen of Florida for purposes of diversity jurisdiction. *See Pretka v.*

Kolter City Plaza II, Inc., 608 F.3d 744, 757-60 (11th Cir. 2010) (a defendant removing no later than 30 days of service may provide information outside the complaint as the basis for removal).

7. Mentor is a limited liability company organized and existing under the laws of the State of Delaware. Mentor's sole member is Ethicon, Inc., a New Jersey corporation with its principal place of business in New Jersey. The citizenship of a limited liability company is determined by the citizenship of each of its members. See *Rolling Greens MHP, L.P. v. Comcast SCH Holdings L.L.C.*, 374 F.3d 1020, 1022 (11th Cir. 2004). Therefore, Mentor is, and was at the time Plaintiff commenced this action, a citizen of New Jersey.

B. The Amount-in-Controversy Requirement is Satisfied.

8. Removal is proper under section 1446(c)(2)(B) if the Court finds by a preponderance of the evidence that the amount in controversy exceeds \$75,000, exclusive of interest and costs.²

9. Under section 1446(a), a defendant seeking to remove an action must include in its notice of removal "a short and plain statement of the grounds for removal." The Supreme Court has explained that "by borrowing the familiar 'short and plain statement' standard" from Rule 8(a) of the Federal Rules of Civil Procedure, Congress "intended to 'simplify the pleading requirements for removal' and to clarify that courts should 'apply the same liberal rules [to removal allegations] that are applied to other matters of pleading.'" *Dart Cherokee Basin*

² The preponderance of the evidence standard was announced in the Federal Courts Jurisdiction and Venue Clarification Act of 2011 (the "Act"), Pub. L. No. 112-63, 125 Stat. 758. According to the House Report accompanying the bill, "circuits have adopted differing standards governing the burden of showing that the amount in controversy is satisfied. The 'sum claimed' and 'legal certainty' standards that govern the amount in controversy requirement when a plaintiff originally files in federal court have not translated well to removal, where the plaintiff often may not have been permitted to assert in state court a sum claimed or, if asserted, may not be bound by it." H.R. Rep. No. 112-10, at 15 (2011). Accordingly, "the defendants do not need to prove to a legal certainty that the amount in controversy requirement has been met. Rather, defendants may simply allege or assert that the jurisdictional threshold has been met." *Id.* at 16.

Operating Co. v. Owens, 135 S. Ct. 547, 553 (2014) (quoting H.R. Rep. No. 100-889, p. 71 (1988)) (internal quotation marks omitted). To satisfy the “short and plain statement” requirement, the removal notice must allege the amount in controversy “plausibly” but “need not contain evidentiary submissions” to support the allegation. *Id.* at 551 (quoting *Ellenburg v. Spartan Motors Chassis Inc.*, 519 F.3d 192, 200 (4th Cir. 2008), for the proposition that “a removing party’s notice of removal need not ‘meet a higher pleading standard than the one imposed on a plaintiff in drafting an initial complaint.’”).³

10. “If a plaintiff makes an unspecified demand for damages in state court, a removing defendant must prove by a preponderance of the evidence that the amount in controversy more likely than not exceeds the ... jurisdictional requirement.” *Roe v. Michelin North America, Inc.*, 613 F.3d 1058, 1061 (11th Cir. 2010) (citations and internal quotation marks omitted). A removing defendant “is not required to prove the amount in controversy beyond all doubt or to banish all uncertainty about it.” *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 754 (11th Cir. 2010). The defendant may satisfy its burden by showing that it is “[f]acially apparent from the pleading itself that the amount in controversy exceeds the jurisdictional minimum,” or that there is “additional evidence demonstrating that removal is proper.” *Roe*, 613 F.3d at 1061 (citations omitted). The defendant is not required to come

³ If a court questions a defendant’s amount-in-controversy allegation, the court *must* give the parties an opportunity to present evidence relating to the allegation and only then decide whether the preponderance of that evidence shows that the amount in controversy is met. *See Dart Cherokee*, 135 S. Ct. at 554 (“Evidence establishing the amount *is required* . . . when . . . the court questions[] the defendant’s allegation.”) (emphasis added). In other words, a court may not *sua sponte* remand a removed case based on a deficient amount-in-controversy allegation before giving the defendant an opportunity to cure the alleged deficiency. *See, e.g., Ellenburg*, 519 F.3d at 194, 197–98; *Corporate Mgmt. Advisors, Inc. v. Artjen Complexus, Inc.*, 561 F.3d 1294, 1295–96, 1298 (11th Cir. 2009); *accord Harmon v. OKI Systems*, 115 F.3d 477, 479 (7th Cir. 1997) (failure to allege amount in controversy constitutes a “procedural defect” that does not undermine jurisdiction).

forward with evidence beyond the text of the complaint. Instead, “courts may use their judicial experience and common sense in determining whether the case stated in a complaint meets federal jurisdictional requirements.” *Id.* at 1062. Courts are free to rely on “reasonable deductions, reasonable inferences, or other reasonable extrapolations from the pleadings,” and “need not suspend reality or shelve common sense” in performing this analysis. *Id.* at 1061–62 (citations and internal quotation marks omitted).

11. Plaintiff claims that, as a result of the Mentor Implants, Plaintiff suffers from “Breast Implant Illness,” symptoms of which include “fatigue, chest pain, hair loss, headaches, chills, photosensitivity, chronic pain, rash, body odor, anxiety, brain fog, sleep disturbance, depression, neurological issues, autoimmune issues and hormonal issues.” (Compl. ¶¶ 13-15.) Plaintiff alleges that “Breast Implant Illness can also affect mothers and their babies” and that Plaintiff “became pregnant and had a baby while she had the Breast Implants in her and before she was diagnosed with Breast Implant Illness.” (*Id.* ¶¶ 16.) Plaintiff alleges both economic and non-economic damages associated with “bodily injury and resulting pain and suffering, disability, disfigurement, mental anguish, loss of capacity for the enjoyment of life, expense of hospitalization and medical treatment, loss of earnings, loss of ability to earn money, and aggravation of previously existing conditions.” (*Id.* ¶¶ 34, 41.) Plaintiff further alleges that these injuries are permanent and continuing, and Plaintiff will suffer the same losses in the future. (*Id.*)

12. Federal courts within Florida recognize that “damages in excess of \$75,000” are “facially apparent” in product-liability cases such as this one that involve prescription medical products and continuing medical care. *See, e.g., Devore v. Howmedica Osteonics Corp.*, 658 F. Supp. 2d 1372 (M.D. Fla. 2009) (finding the amount in controversy clearly met in case where

plaintiff alleged injuries resulting from defective hip prosthesis); *Wilssens v. Medtronic, Inc.*, No. 09-60792-CIV, 2009 WL 9151079, at *9 (S.D. Fla. July 23, 2009) (plaintiff alleged further hospitalization after implantation of medical device); *see also Bolin v. SmithKline Beecham Corp.*, No. 08-60523-CIV, 2008 WL 3286973, at *3 (S.D. Fla. Aug. 7, 2008) (plaintiff alleged respiratory damages from prescription-medicine use).

13. Moreover, reported verdicts and settlements in cases with damage allegations similar to this case have exceeded \$75,000. *See, e.g., Brazell v. Chadwick*, 2010-EV-011176-Y, 2014 WL 2567535 (Ga. Super., Fulton Cty., Jan. 24, 2014) (verdict of \$125,000 for plaintiff who suffered disfigurement, tissue loss, and breast asymmetry and required implant removal after bilateral breast augmentation surgery); *Siravo v. Manstein*, Case No. 2008-24237, 2013 WL 5716741 (Pa.Com.Pl. July 19, 2013) (verdict of \$175,000 for plaintiff who suffered breast disfigurement, scarring, embarrassment, and emotional distress after bilateral breast reduction surgery); *Waite v. Lincenberg*, Case No. 2010CV187413, 2011 WL 8002905 (Ga. Super., Fulton Cty., Sept. 22, 2011) (verdict of \$170,000 for plaintiff who suffered disfigurement, pain, and emotional distress after bilateral breast reduction surgery); *Schwartz v. Terrasse*, Case No. 07 L 828, 2011 WL 4389420 (Ill. Cir. Ct., Lake Cty., June 21, 2011) (verdict of \$425,000 for plaintiff who suffered disfigurement after bilateral breast reduction surgery); *Severance v. Landsman*, Case No. 4575/2006, 2011 WL 7461741 (N.Y. Sup., Suffolk Cty., May 17, 2011) (verdict of \$1,250,000, including \$500,000 for past pain and suffering and loss of enjoyment of life, for plaintiff who suffered breast disfigurement, scarring, embarrassment, self-consciousness and underwent several surgeries after an initial breast asymmetry surgery); *Ellsworth v. Elwood*, Case No. 06-L-115 (Peoria Cty., Ill. Apr. 7, 2009) (verdict of \$330,000 for plaintiff who suffered breast disfigurement after a bilateral breast reduction surgery); *Swanson v. Pummill*, Case No.

07-87620 (Genesee Cty., Mich. April 3, 2009) (verdict of \$364,000 for plaintiff who suffered breast disfigurement, pain, suffering, and mental anguish affecting her activities of daily living after surgery to remove breast implants); *Angela L. v. Saks*, Case No. YC056541, 2008 WL 6298055 (Los Angeles Cty., Cal. 2008) (settlement of \$400,000 for plaintiff who suffered breast disfigurement after breast augmentation surgery); *Call v. Keiter*, Case No. 030903501, 2009 Jury Verdicts LEXIS 237703 (Weber Cty., Utah 2008) (verdict of \$108,522 for plaintiff who, following a breast implant procedure, developed an infection requiring removal and replacement of the implant resulting in deformity); *Dicicco v. Cattani*, No. 11366/03, 2007 NY Jury Verdicts Review LEXIS 746 (N.Y. 2007) (verdict of \$737,000, including \$400,000 for plaintiff who suffered breast disfiguring scarring and underwent multiple surgeries after an initial breast augmentation surgery); *Davis v. Rai*, Case No. 05-8226-G (Dallas Cty., Tex. 2007) (verdict of \$165,000, including \$100,000 for future pain and mental anguish, for plaintiff who suffered breast disfigurement and underwent multiple surgeries following an initial breast augmentation surgery); *Karachum v. Wasserstrum*, Case No. BER-L-3731-02, 2004 Jury Verdicts LEXIS 40368 (Bergen Cty., N.J. 2004) (verdict of \$1,500,000 for plaintiff who suffered from permanent breast disfigurement after reduction surgery); *Raviv v. Tiller*, Case No. 00-11955 (Miami-Dade Cty., Fla. 2003) (verdict of \$155,000 for plaintiff who experienced pain, breast disfigurement, and humiliation after initial breast augmentation); *Kelley v. Stromberg*, Case No. 00CC-001066 (St. Louis Cty., Mo. Apr. 17, 2002) (verdict of \$300,000 returned for plaintiff who suffered breast disfigurement after reconstruction); *Allbritton v. Zachariah*, Case No. 768844 (Santa Clara Cty., Cal. July 28, 2000) (verdict of \$186,200 increased by court to \$226, 072 to include interest and costs in breast disfigurement and multiple surgeries case); *Grimes v. Baxter Healthcare Corp.*, Case No. 93-8828-E (Dallas Cty., Tex. 1995) (verdict of \$400,000 for plaintiff who

suffered injuries due to rupture of breast implant, including pain, mental anguish, disfigurement, impairment, and medical expenses). Although Mentor intends to vigorously defend the allegations in the complaint, courts often look to jury verdicts in comparable cases to determine the amount in controversy. Copies of these verdict reports are attached hereto as Exhibit 2.

14. Therefore, in light of the injuries alleged in the Complaint and the extensive and varied damages sought by Plaintiff, it is “facially apparent” that the amount in controversy in this case exceeds \$75,000, exclusive of interest and costs, *see Pretka*, 608 F.3d at 754-55, and Mentor has sufficiently alleged the basis for diversity jurisdiction at the notice-of-removal stage. *See Dart*, 135 S. Ct. at 553; *Corp. Mgmt. Advisors, Inc. v. Artjen Complexus, Inc.*, 561 F.3d 1294, 1295 (11th Cir. 2009) (holding that the trial court cannot *sua sponte* remand a case as long as the removing party pleads the general basis for diversity jurisdiction).

15. This Court, accordingly, has original jurisdiction over this action pursuant to 28 U.S.C. § 1332, because the State Court Action presents a case where the amount in controversy exceeds the sum or value of \$75,000 and is between citizens of different states.

III. THE PROCEDURAL REQUIREMENTS FOR REMOVAL ARE MET.

16. As required by 28 U.S.C. § 1446(a), attached as Exhibit 1 are copies of all process, pleadings, and orders filed in the removed case.

17. Under 28 U.S.C. § 1441(a), venue for this action is proper in this Court, which is the district embracing the place where the state action is pending.

18. Consistent with 28 U.S.C. § 1446(d), Mentor is also filing a Notice of Filing Notice of Removal with the clerk of the Circuit Court of Miami-Dade County, Florida, and is promptly serving written notice of this removal on Plaintiff’s counsel this date.

19. Accordingly, Defendant Mentor Worldwide LLC removes this action and gives notice to Plaintiff and to the Circuit Court of Miami-Dade County, Florida, that the State Court Action shall proceed no further pursuant to 28 U.S.C. § 1446(d).

Dated: August 12, 2019

Respectfully submitted,

/s/ David J. Walz

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by U.S. Mail on August 12, 2019, upon the following counsel of record:

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