UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. _____

TERESA BIRCH and ROBERT BIRCH,
Her Husband,

Plaintiffs,
v.

GLAXOSMITHKLINE, LLC, etc., et al.

Defendants.
_____/

DEFENDANTS PUBLIX SUPER MARKETS, INC., JOHNSON & JOHNSON, INC., AND JOHNSON & JOHNSON CONSUMER, INC.'S NOTICE OF REMOVAL OF CIVIL ACTION

Defendants Publix Super Markets, Inc. ("Publix"), Johnson & Johnson, Inc. ("J&J"), and Johnson & Johnson Consumer, Inc. ("JJCI"), hereby remove the State Court action entitled *Teresa Birch, et al. v. GlaxoSmithKline LLC, et al.*, which is currently pending in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, Case No. 18-014125-CA27, to the United States District Court for the Southern District of Florida. Removal is warranted under 28 U.S.C. § 1441(b) because this is a diversity action over which the Court has original jurisdiction pursuant to 28 U.S.C. § 1332. In support of this Notice of Removal, Defendants state the following:

I. FACTUAL BACKGROUND

1. On June 13, 2018, Plaintiffs Teresa Birch and Robert Birch filed a product liability action against numerous defendants allegedly involved in the mining and distribution of talc and/or the design, manufacture, or sale of talcum powder products. *See generally* Plaintiffs' Complaint, attached as Exhibit 1. Plaintiff Teresa Birch alleges that she was exposed to asbestos

from Defendants' talc or talcum powder products from 1957 through 2000. *Id.* ¶¶ 7-21. She further alleges that she developed malignant mesothelioma as a result of such exposures. *Id.* ¶ 2. Plaintiff Teresa Birch also alleges that she was exposed to talcum powder products, purchased from Publix, from 1990 to 1995. *Id.* at 29, Exposure Sheet for Publix.

2. Plaintiffs assert claims in negligence (Count I) and strict liability (Count II), as well as a derivative loss of consortium claim (Count III), against all Defendants.

3. Publix was served with a copy of the summons and complaint on June 19, 2018, while J&J and JJCI were served on June 20 and June 22, 2018, respectively. *See* Exhibit 2. This Notice is filed within 30 days. Accordingly, the removal of this action is timely. *See* 28 U.S.C. § 1446(b).

4. The Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1332 in that it is a civil action between diverse parties and the amount in controversy exceeds the sum of $75,000, exclusive of interest and costs.

5. This case is removable to federal court under 28 U.S.C. § 1441(b). The presence of a resident defendant, Publix, is not a bar to removal because Publix is fraudulently joined.

6. Pursuant to 28 U.S.C. § 1446(a), copies of all process, pleadings, orders and other documents served on Publix are attached as Composite Exhibit 3.

II. DIVERSITY OF CITIZENSHIP EXISTS.

7. According to Plaintiffs' Complaint, Plaintiff Teresa Birch is a citizen of the United Kingdom of Great Britain and Northern Ireland. Ex. 1 ¶ 2.

8. Plaintiffs' Complaint is silent as to the citizenship of Plaintiff Robert Birch, stating only that he is Teresa Birch's husband. Ex. 1 ¶ 2. However, Plaintiffs have also filed an asbestos-related action in New York state court in which they allege that Teresa Birch and

Robert Birch are citizens of the United Kingdom of Great Britain and Northern Ireland and currently reside in Kent, England. *See* Plfs.' NY Compl. ¶ 2, attached as Exhibit 4.

9. For purposes of determining diversity, a corporation is deemed a citizen of both the state of its incorporation and the state where it has its principal place of business. 28 U.S.C. § 1332(c)(1). Thus, pursuant to 28 U.S.C. § 1332(c)(1):

a. Defendants Johnson & Johnson Consumer, Inc., and Johnson & Johnson are citizens of New Jersey. Ex. 1 ¶ 3(e) & (f);

b. Defendants Imerys Minerals USA, Inc., and Imerys USA, Inc., are citizens of Delaware and Georgia. Ex. 1 ¶ 3(c) & (d);

c. Defendant Imerys Talc America, Inc., is a citizen of Delaware and California. Ex. 1 ¶ 3(b);

d. Defendant Proctor & Gamble Productions, Inc., is a citizen of Ohio. Ex. 1 ¶ 3(g); and

e. Defendant Whittaker Clark & Daniels, Inc., is a citizen of New Jersey. Ex. 1 ¶ 3 (i).

10. Plaintiffs allege that GlaxoSmithKline, LLC, is a Delaware corporation with its principal place of business in New Jersey. Ex. 1 ¶ 3.a.. Plaintiffs' allegations notwithstanding, GlaxoSmithKline, LLC, is a Delaware limited liability company, not a corporation, and its sole member is GlaxoSmithKline Holdings (Americas), Inc., a Delaware corporation with its principal place of business in Wilmington, Delaware. For purposes of diversity jurisdiction "a limited liability company is a citizen of any state of which a member of the company is a citizen." *Rolling Greens MHP, L.P. v. Comcast SCH Holdings, L.L.C.*, 374 F.3d 1020, 1022 (11th Cir. 2004). Thus, for diversity purposes, GlaxoSmithKline, LLC is a citizen of Delaware.

See also Mitchell v. Eli Lilly & Co., 159 F. Supp. 3d 967, 971 (E.D. Mo. 2016) (explaining that "GlaxoSmithKline's sole member is incorporated in Delaware and also maintains its principal place of business there").

11. Defendant Publix is a citizen of Florida. Ex. 1 ¶ 3(h). However, as set forth in greater detail below, Publix's joinder does not prevent removal to federal court.

III. PUBLIX IS FRAUDULENTLY JOINED.

12. This case is removable because Publix has been fraudulently joined. The Court must disregard the citizenship of a fraudulently joined resident defendant. *See Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996) (holding that right of removal cannot be defeated by fraudulent joinder of a resident defendant), abrogated on other grounds, *Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir. 2000).

13. A defendant is fraudulently joined where there is no reasonable basis for a claim against it. *See, e.g., Legg v. Wyeth*, 428 F.3d 1317, 1324 (11th Cir. 2005); *Crowe v. Coleman*, 113 F.3d 1536, 1540 (11th Cir. 1997); *see also BP Chems. Ltd. v. Jiangsu Sopo Corp.*, 285 F.3d 677, 685 (8th Cir. 2002); *Badon v. RJR Nabisco, Inc.*, 224 F.3d 382, 393 (5th Cir. 2000).

14. A plaintiff cannot simply assert that "*any mere theoretical possibility* of recovery under local law—no matter how remote or fanciful—suffices to preclude removal." *Badon v. RJR Nabisco Inc.*, 236 F.3d 282, 286 n.4 (5th Cir. 2000) (emphasis in original). Rather, "there must at least be arguably a *reasonable* basis for predicting that state law would allow recovery in order to preclude a finding of fraudulent joinder." *Id.* (emphasis in original); *see also Clay v. Wyeth*, 2004 WL 7330338, *3 (N.D. Fla. Aug. 17, 2004) (explaining that "the possibility that the non-diverse defendants would be held liable in a Florida court must have a reasonable basis in the facts; it must be more than a theoretical abstraction"). The plaintiff "must be able to provide some showing that her claim against the resident defendant has evidentiary support or is likely to

have evidentiary support after a reasonable opportunity for further investigation or discovery." *Sellers v. Foremost Ins. Co.*, 924 F. Supp. 1116, 1119 (M.D. Ala. 1996).

15. Plaintiffs' only Publix-specific allegation is that Teresa Birch purchased asbestos-contaminated talcum powder products, including Johnson's Baby Powder, from "various supermarkets owned and/or operated" by Publix. Ex. 1 ¶¶ 18-19. The exposure sheet for Publix attached to the Complaint lists the products at issue for Publix as "[a]sbestos-contaminated talcum powder products including Johnson's Baby Powder which were marketed, sold and/or distributed" by Publix. Ex. 1 at 29, Exposure Sheet for Publix.

16. As shown by the attached Declaration of Cindy Roberts ("Roberts Decl."), Publix is a retail supermarket chain. *See* Roberts Decl., attached as Exhibit 5 ¶ 4. At all relevant times, Publix did not mine or distribute talc; nor did it manufacture talcum powder products. *Id.*. As such, Publix is a non-manufacturing retailer of talcum powder products.

17. Plaintiff alleges that Publix sold the talcum powder products at issue in this case. Ex. 1 ¶¶ 18-19. Plaintiff Teresa Birch further alleges that, from 1990 to 1995, she was exposed to talcum powder products that she purchased from Publix. *Id.* at 29, Exposure Sheet for Publix.

18. Publix is named as a Defendant in all three counts of the Complaint—Count I (negligence), Count II (strict liability), and Count III (loss of consortium for Teresa Birch's husband, Robert Birch).

19. Under Florida law, a loss of consortium claim is derivative in nature and wholly dependent on the injured party's ability to recover. *E.g.*, *In re Engle Cases*, 767 F.3d 1082, 1087 (11th Cir. 2014); *Faulkner v. Allstate Ins. Co.*, 367 So. 2d 214, 217 (Fla. 1979). Therefore, unless Plaintiffs can properly bring a negligence (Count I) or strict liability (Count II) claim against Publix, Count III fails against Publix as a matter of law.

20. Count II fails against Publix as a matter of law. Pursuant to Florida Statutes section 774.208, Plaintiffs can prevail on an asbestos claim against a non-manufacturing retailer such as Publix *only* if Plaintiffs establish negligence, breach of warranty, or intentional misconduct. Fla. Stat. § 774.208(l)(a).

21. Finally, Count I fails as a matter of law and as a matter of fact. Plaintiff purports to plead a negligence claim, but Count I appears to be directed at manufacturers, as it alleges in its first operative paragraph that "Plaintiff relied upon the skill and knowledge of the Defendant manufacturers who had a duty to advise users of their products of the proper method of handling and using their Asbestos-Contaminated Products." Ex. 1 ¶ 29. In all events, Plaintiffs have not alleged any facts supporting that Publix, a retailer, failed to exercise reasonable care with respect to talcum powder products in this case and cannot do so as a matter of law.

22. Paragraph 29 alleges that all "Defendants knew, or in the exercise of ordinary care should have known, that the use of their asbestos-contaminated talc products was hazardous to the health of individuals such as the Plaintiff." Ex. 1 ¶ 29. Specific allegations of negligent conduct are set forth in Paragraph 30. They include that all Defendants failed to warn (¶ 30.a., 30.b., 30.c., 30.d., 30.e., 30.g., 30.h., 30.k.), failed to ensure that their products were distributed to entities trained in their use (¶ 30.f.), failed to adequately test and/or disseminate the results of their tests (¶ 30.i.), and failed to recall the products or provide alternative means of warning the public (¶ 30.j.).

23. "It is well settled law that a retailer can be liable in negligence in a products liability action only if the retailer can be charged with actual or implied knowledge of the defect." *Ryan v. Atlantic Fertilizer & Chem. Co.*, 515 So. 2d 324, 326 (Fla. 3d DCA 1987).

24. To the extent Plaintiffs allege that Publix had actual knowledge of any supposed asbestos contamination in the talcum powder products at issue, any such contention is meritless. As demonstrated by the Declaration of Cindy Roberts, Publix had no actual knowledge of any supposed asbestos contamination in the talcum powder products at issue. Ex. 5 ¶ 10.

25. More particularly, Publix did not design, manufacture, or test the products at issue in this lawsuit. Ex. 5 ¶ 4. To the contrary, all talcum powder products sold by Publix were designed, tested, and manufactured by others. *Id.* ¶ 5. Publix received all talcum powder products it sold in a finished state, complete with packaging. *Id.* ¶ 8. Publix did not alter any such products. *Id.* ¶ 9.

26. To the extent Plaintiffs allege that Publix had constructive knowledge of any supposed asbestos contamination in the talcum powder products at issue, such a contention is also meritless. Based on the standards of care applicable to retailers like Publix, and as demonstrated by the Declaration of Cindy Roberts, Publix had no constructive knowledge of any supposed asbestos contamination in the talcum powder products at issue. Ex. 5 ¶¶ 13, 15. This is particularly true with respect to latent dangers in products not identified as dangerous products.

27. With respect to retailers, Florida law has long defined certain standards of care, and thus what constitutes reasonable or unreasonable conduct.

28. For instance, it is reasonable, rather than unreasonable, for a retailer not to inspect for *latent* defects. *Foche v. Napa Home & Garden, Inc.*, 2015 WL 1189556, *3 (M.D. Fla. Mar. 16, 2015) ("Florida law is clear that a retailer does not have a duty to inspect for latent defects."); *K-Mart Corp. v. Chairs, Inc.*, 506 So. 2d 7, 9 n.3 (Fla. 5th DCA 1987) ("A retailer does not have a duty to inspect for latent defects.") (citing *Carter v. Hector Supply Co.*, 128 So. 2d 390, 392

(Fla. 1961)). Plaintiffs acknowledge, as they must, that the alleged asbestos contamination in this case would be "invisible to the naked eye." Ex. 1 ¶ 29. Furthermore, as stated above, all talcum powder products that Publix sold were already packaged when they were delivered to Publix. Ex. 5 ¶ 8.

29. Furthermore, it is reasonable, rather than unreasonable, for a retailer not to test or investigate the dangerous qualities of products the retailer sells. *Craig v. Baker & Holmes Co.*, 85 Fla. 373, 376-77, 96 So. 93, 94-95 (1923). As the Supreme Court of Florida held almost a century ago:

> The seller is under no obligation to test articles manufactured or packed by others for the purpose of discovering latent dangers or defects. He is not under a duty to exercise ordinary care to discover whether it is dangerous or not. He takes it as he finds it on the market.

Craig v. Baker & Holmes Co., 85 Fla. 373, 376-77, 96 So. 93, 94-95 (1923). Indeed, as Florida's high court explained, a retailer purchasing a product from a manufacturer is much like the person who purchases the same product from the retailer—not presumed to know the product's formula or whether it is inherently dangerous. *Id.* ("[A] dealer who buys from the manufacturer occupies the same position practically as the buyer from the dealer and is not presumed to know the formula by which the article is made, or whether it is inherently dangerous or not.").

30. Thus, as a matter of law, Plaintiffs cannot establish constructive knowledge, or unreasonable conduct, by asserting that Publix had an obligation to test or investigate the products at issue by inspecting them for latent defects or conducting research regarding latent defects.

31. Nor can Plaintiffs establish constructive knowledge by asserting that Publix voluntarily undertook to do such things. As the Declaration of Cindy Roberts establishes, under its standard supplier practices, Publix does not investigate the safety of the products it sells in its

retail grocery stores, as it is Publix's practice to rely on its suppliers to label products appropriately, warn consumers of any dangerous aspects, and follow applicable rules regarding a particular product. Ex. 5 ¶ 13. In fact, this supplier practice is the industry standard in the retail grocery industry. Ex. 5 ¶ 15. Publix did not test or investigate the finished talcum powder products at issue in this case . *Id.* ¶¶ 4, 5, 11.

32. Thus, Publix cannot be held negligent under Count I, strictly liable under Count II, or liable for loss of consortium under Count III. No reasonable basis exists upon which to predicate Publix's liability to Plaintiffs under state law.

33. Further, Plaintiffs cannot come forward with a showing that their claims against Publix have evidentiary support or will have such support after a reasonable opportunity for further investigation or discovery.

34. As such, Publix has been fraudulently joined, and its citizenship must be disregarded when determining whether removal is proper under § 1441(b).

IV. THE AMOUNT IN CONTROVERSY EXCEEDS $75,000.

35. It is clear from the face of the Complaint that the amount in controversy exceeds $75,000, exclusive of interests and costs. Where, as here, the jurisdictional amount is not expressly alleged, "removal from state court is proper if it is facially apparent from the complaint that the amount in controversy exceeds the jurisdictional requirement." *Williams v. Best Buy Co., Inc.*, 269 F.3d 1316, 1319 (11th Cir. 2001); *see also Roe v. Michelin N. America, Inc.*, 613 F.3d 1058, 1061 (11th Cir. 2010); *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1211 (11th Cir. 2007) (holding that jurisdiction is proper where "the jurisdictional amount is either stated clearly on the face of the documents before the court, or readily deducible from them"). A court may also consider the removal notice and post-removal evidence concerning the amount in controversy. *See id.* at 1213. District courts need not "suspend reality or shelve common sense

in determining whether the face of a complaint, or other document, establishes the jurisdictional amount." *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 770 (11th Cir. 2010). In conducting this analysis, "courts may use their judicial experience and common sense in determining whether the case stated in a complaint meets federal jurisdictional requirements." *Roe*, 613 F.3d at 1062.

36. "Certain injuries are by their nature so substantial as to make it readily apparent that the amount in controversy requirement is satisfied." *See Sanderson v. Daimler Chrysler Motor Corp.*, 2007 WL 2988222, *1 (S.D. Ala. Oct. 9, 2007). Here, Plaintiffs allege that Plaintiff Teresa Birch was diagnosed with terminal malignant mesothelioma as a result of Plaintiffs' exposure to asbestos and asbestiform fibers. Ex. 1 ¶¶ 2, 24. Plaintiffs further allege that Mrs. Birch has suffered great and lasting physical pain and mental anguish, had to spend various sums of money to treat her disease and injuries, and lost enjoyment of life and earnings capacity. *Id.* ¶¶ 45-47. Given the nature of these allegations, this Court can easily conclude that the amount in controversy in this matter exceeds $75,000 exclusive of costs and interests.

37. Indeed, federal courts routinely reach such a conclusion with regard to personal injury cases that do not involve a terminal diagnosis such as here. *See, e.g.*, *Andrews v. E.I. Du Pont De Nemours & Co.*, 447 F.3d 510, 515 (7th Cir. 2006) (finding the jurisdictional amount requirement met where plaintiff alleged permanent injuries, pain and suffering, and medical expenses); *Gebbia v. Wal-Mart Stores*, 233 F.3d 880, 883 (5th Cir. 2000) (holding that alleged damages in a slip-and-fall case 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" met the jurisdictional amount); *Sanderson v. Daimler Chrysler Motor Corp.*, 2007 WL 2988222, *1 (S.D. Ala. Oct. 9, 2007); *Carleton v. CMC Indus.,*

Inc., 49 F. Supp. 2d 961, 962 (S.D. Tex. 1999) (stating it is "undeniably facially apparent" the jurisdictional amount is met where plaintiff alleged he contracted leukemia from defendant's chemicals).

38. Similarly, multiple courts have recognized that the amount in controversy in cases involving mesothelioma or similar illnesses exceeds $75,000. *See Miller v. Am, Art Clay Co. Inc.*, 28 F. Supp. 3d 825, 828 (W.D. Wis. 2014) (acknowledging amount in controversy met where clay purchaser died from mesothelioma); *Bourke v. Exxon Mobil Corp.*, 2016 WL 836872, *3 (E.D. La. Mar. 4, 2016) ("The parties agree, and the Court finds, the amount-in-controversy requirement is satisfied. Plaintiff alleges he contracted 'malignant mesothelioma,' which is an 'incurable terminal cancer', as a result of his exposure to asbestos. It is facially apparent that the amount-in-controversy exceeds $75,000.") (internal citations omitted); *In re Silica Prod. Liab. Litig.*, 398 F. Supp. 2d 563, 646 (S.D. Tex. 2005) (concluding that "it is facially apparent that each of the claims exceed the jurisdictional amount of $75,000" in cases involving claims of personal injuries from inhalation of silica).

39. Although Publix denies any liability, it is evident that the amount in controversy in this matter exceeds $75,000, exclusive of interests and costs.

V. REMOVAL IS OTHERWISE PROPER.

40. Plaintiff commenced this action on June 13, 2018. Publix was first served with Plaintiffs' Complaint on June 19, 2018. J&J and JJCI were first served on June 20 and June 22, 2018, respectively. Therefore, this removal is timely pursuant to 28 U.S.C. § 1446(b).

41. Venue exists in the Southern District of Florida because the Circuit Court of Broward County, Florida, is within the Southern District.

42. All Defendants have been served as of the time of this removal.

43. All Defendants have consented in writing to removal. *See* 28 U.S.C. § 1446(b)(2)(A). Copies of other Defendants' written consents are attached hereto as Composite Exhibit 6.

44. Written notice of the filing of the Notice of Removal will be promptly served on all counsel of record and a copy will be promptly filed with the Clerk of the Circuit Court for Broward County, Florida, pursuant to 28 U.S.C. § 1446(d). A copy of the Notice of Filing of Notice of Removal to Federal Court is attached as Exhibit 7.

WHEREFORE, Publix Super Markets, Inc., Johnson & Johnson, Inc., and Johnson & Johnson Consumer, Inc., respectfully remove this case from the Circuit Court for the Seventeenth Judicial Circuit in and for Broward County, Florida, to the United States District Court for the Southern District of Florida and request that further proceedings be conducted in this Court as provided by law.

CARLTON FIELDS JORDEN BURT, P.A.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 19, 2018, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day by e-mail on all counsel of record identified on the below Service List.

/s/ *Matthew J. Conigliaro*
Matthew J. Conigliaro

SERVICE LIST

Teresa Birch and Robert Birch v. GlaxoSmithKline, LLC, et al.
Case No. _____
United States District Court, Southern District of Florida

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