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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Myfanwy Patricia Ioli,
Plaintiff,
vs.
Zimmer Holdings, Inc., et al.,
Defendants.

No. CV-14-00245-PHX-PGR
(Mar.Cty.Sup.Ct. CV2014-002271)

ORDER OF REMAND

Pending before the Court is Plaintiff's Motion for Remand (Doc. 10), wherein plaintiff Ioli seeks to have this medical device product liability action remanded to the Maricopa County Superior Court for lack of subject matter jurisdiction, and Defendant Arizona Spine and Joint Hospital LLC's Motion to Dismiss (Doc. 11), wherein it seeks to have this action dismissed as to it pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim. Having reviewed the parties' memoranda, and being aware that this action has not yet been transferred by Multi-District Litigation Panel to the Zimmer MDL action, the Court finds that it lacks subject matter jurisdiction over this action and that this action must be remanded.¹

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While defendants Zimmer Holdings, Inc. and Zimmer, Inc. have requested oral argument on the motion to remand, the Court concludes that oral

1 The plaintiff alleges in her complaint that she underwent two total hip
2 replacement surgeries at defendant Arizona Spine and Joint Hospital, LLC
3 (“Hospital”) wherein she had an artificial hip replacement device, a Durom Cup,
4 implanted in both of her hips. She alleges that she subsequently had to have the
5 Durom Cups removed due to medical problems they caused her. She claims that
6 the Durom Cup is a defective and unreasonably dangerous product under the
7 governing Arizona products liability law. She seeks to hold defendants Zimmer
8 Holdings, Inc. and Zimmer, Inc. (collectively “Zimmer”) strictly liable as the designer,
9 manufacturer, seller and distributor of the Durom Cup. She also seeks to hold the
10 Hospital strictly liable as a seller of the Durom Cup on the basis that she purchased
11 the Durom Cups from the hospital as part of her surgeries, making the Hospital the
12 final step in the chain of commerce that delivered the product to her.

13 Zimmer removed this action solely on the basis of diversity of citizenship
14 jurisdiction pursuant to 28 U.S.C. § 1332(a) and § 1441 notwithstanding that it is
15 undisputed that the Hospital, which did not join in the removal and has not
16 consented to the removal, is a non-diverse defendant because it, like the plaintiff, is
17 a citizen of Arizona. Zimmer argues in both its notice of removal and in its
18 opposition to the plaintiff’s remand motion that the Hospital’s non-diverse citizenship
19 must be disregarded for diversity purposes because the plaintiff fraudulently joined
20 the Hospital as a defendant inasmuch as the plaintiff cannot state a products liability
21 claim against it under Arizona law.

22 While it is settled law that a fraudulently joined non-diverse defendant will not
23 defeat removal on diversity grounds, Ritchey v. Upjohn Drug Co., 139 F.3d 1313,
24 1318 (9th Cir.1998), there is both a strong presumption against removal jurisdiction

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26 argument would not significantly aid the decisional process.

1 and a general presumption against fraudulent joinder, Hunter v. Philip Morris USA,
2 582 F.3d 1039, 1046 (9th Cir.2009). Zimmer, as the removing party, bears the heavy
3 burden of establishing that the plaintiff's complaint fails to state a products liability
4 claim against the Hospital and that the "failure is obvious according to the settled
5 rules of the state." *Id.* at 1043. In making this determination, the Court must resolve
6 all doubts against removal and any uncertainties as to the current state of the
7 controlling Arizona product liability law in favor of the plaintiff. Bertrand v. Aventis
8 Pasteur Laboratories, Inc., 226 F.2d 1206, 1212 (D.Ariz. 2002). This standard is
9 more favorable to the plaintiff than the standard for ruling on a motion to dismiss
10 under Rule 12(b)(6).² Hartley v. CSX Transportation, Inc., 187 F.3d 422, 424 (4th
11 Cir.1999).

12 The gist of Zimmer's position is that this Court has diversity jurisdiction over
13 this action because the Hospital, as a provider of medical services, cannot as a
14 matter of Arizona law be reasonably considered to be a "seller" of the allegedly
15 defective Durom Cups implanted into the plaintiff.³ The plaintiff argues that a

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17 Notwithstanding that it did not file a response to the motion to remand,
18 the Hospital argues in effect in its reply to its motion to dismiss that the Court should
19 resolve its motion prior to resolving the remand motion. The Court cannot do so.
20 A decision granting a Rule 12(b)(6) motion is one on the merits of the action, which
21 the Court cannot reach without first determining that it has subject matter jurisdiction
22 over this action. Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 101
23 (1998) (Supreme Court, in rejecting the doctrine of hypothetical jurisdiction that
24 some courts had adopted to resolve contested questions of law when their
25 jurisdiction was in doubt, held that Article III generally requires a federal court to
26 satisfy itself of its jurisdiction over the subject matter before it considers the merits
of a case.)

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Under Arizona law a "products liability action" can be brought "against
a ... seller of a product for damages for bodily injury ... caused by or resulting from
the manufacture, construction, design, formula, installation, preparation, assembly,

1 remand is required because Arizona law is not so settled as to this issue as to make
2 it obvious that she cannot state a products liability claim against the Hospital. The
3 Court agrees with the plaintiff.

4 As both defendants clearly concede, no Arizona court has directly addressed
5 the issue of whether a hospital can be held strictly liable for alleged defects in
6 medical devices that are used in medical procedures. The defendants argue instead
7 that existing Arizona products liability-related case law strongly suggests that
8 Arizona courts would adopt the approach adopted by the large majority of other
9 jurisdictions that hold that hospitals are not sellers of medical implant devices for
10 product liability purposes. While the defendants may be correct as to the ultimate
11 lack of merits of the plaintiff's claim, the Court's duty at this time is not to determine
12 the merits of the plaintiff's claim but only to determine if there is any non-fanciful
13 possibility that the plaintiff's claim against the Hospital could survive a motion to
14 dismiss under settled Arizona law existing at the time of removal. See Pacheco de
15 Perez v. AT&T Co., 139 F.3d 1368, 1380-81 (11th Cir. 1998) ("In a fraudulent joinder
16 inquiry, federal courts are not to weigh the merits of plaintiff's claim beyond
17 determining whether it is an arguable one under state law.") (Internal quotation
18 marks omitted). Speculating as to whether Arizona courts may or may not adopt the
19 majority position in the future regarding the Hospital's alleged liability is not part of
20 that determination. See Macey v. Allstate Property and Casualty Ins. Co., 220

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22 testing, packaging, labeling, sale, use or consumption of any product, the failure to
23 warn or protect against a danger or hazard in the use or misuse of the product or the
24 failure to provide proper instructions for the use or consumption of any product."
25 A.R.S. § 12-681(5). A "seller" for purposes of a products liability action is "a person
26 or entity, including a wholesaler, distributor, retailer or lessor, that is engaged in the
business of leasing any product or selling any product for resale, use or
consumption." A.R.S. § 12-681(9).

1 F.Supp.2d 1116, 1118 (N.D.Cal.2002) (“When there are real ambiguities among the
2 relevant state law authorities, federal courts that are considering motions to remand
3 should avoid purporting to decide how state courts would construe those
4 authorities.”)

5 The Court concludes that Zimmer has not met its heavy burden of
6 demonstrating that Arizona law clearly immunizes hospitals from strict liability under
7 the circumstances present here. Although the types of parties who may be strictly
8 liable under Arizona law are certainly limited, the possibility that the Hospital meets
9 the definition of a seller under A.R.S. § 12-681(9) is not clearly foreclosed by the
10 case law cited by the defendants. Rather than adopting a precise definitional usage
11 of the term “seller” for purposes of product liability actions, Arizona courts define the
12 term in accordance with the justification for imposing strict liability, which is “risk/cost
13 spreading to those parties in the distribution chain that are best able to both bear the
14 cost and protect the consumer from defective products.” Antone v. Greater Arizona
15 Auto Auction, Inc., 155 P.3d 1074, 1076 (Ariz.App.2007). For this reason, the
16 Arizona courts have expanded the definition of a seller to include a variety of
17 enterprises that do not fit a common notion of seller. *Id.* While strict liability will not
18 be imposed on an entity that bears no causal connection to the production or
19 distribution of a defective product, *id.*, such a participatory connection is present here
20 to the extent that the plaintiff alleges in her complaint that the Hospital was involved
21 with the distribution of the allegedly defective Durom Cups because she purchased
22 them from the Hospital. Whether the Hospital’s involvement with the Durom Cups
23 turns out to be a sufficiently significant participation in the stream of commerce for
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1 strict liability purposes remains to be decided.⁴

2 The bottom line here is that Zimmer has, at best, established that the plaintiff's
3 strict liability claim against the Hospital is likely doubtful under existing Arizona law.
4 But given the rule that all ambiguities and uncertainties in state law must be resolved
5 in favor of the plaintiff in resolving a motion to remand, the Ninth Circuit has made
6 it clear that "[i]n borderline situations, where it is doubtful whether the complaint
7 states a cause of action against the resident [and non-diverse] defendant, the doubt
8 is ordinarily resolved in favor of the retention of the cause in the state court." Albi v.
9 Street & Smith Publications, Inc., 140 F.2d 310, 312 (9th Cir.1944). Because the
10 Court cannot conclude with the requisite certainty that the plaintiff cannot state a
11 products liability claim against the Hospital, the Court concludes that the Hospital is
12 not a fraudulently joined defendant and that its presence in this action defeats the
13 Court's diversity of citizenship jurisdiction. See Snyder v. Davol, Inc., 2008 WL

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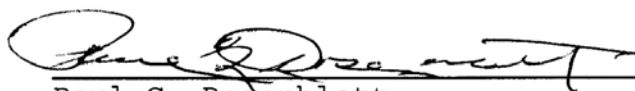
16 The defendants also argue that even if existing Arizona law does not
17 dictate the dismissal the plaintiff's claims against the Hospital, that claim should be
18 dismissed based on Restatement (Third) of Torts: Products Liability, § 20, cmt. d.
19 which states that "in a strong majority of jurisdictions, hospitals are held not to be
20 sellers of products they supply in connection with the provision of medical care,
21 regardless of the circumstances." The defendants have not cited to any Arizona
22 case that has specifically adopted this Restatement comment and the Court cannot
23 say with the requisite certainty that the Arizona courts will do so. While Arizona
24 courts generally follow the Restatement in the absence of controlling Arizona when
25 they deem it good legal authority, they "do not follow the Restatement blindly ... and
26 will come to a contrary conclusion if Arizona law suggests otherwise." Powers v.
Taser International, Inc., 174 P.3d 777, 782 (Ariz.App.2007). When it comes to strict
liability actions, Arizona courts have not always followed the Restatement. For
example, the Arizona courts have rejected the Restatement's limited definition of
"seller" for strict liability purposes in favor of a broader definition. Grubb v. Do It Best
Corp., 279 P.3d 626, 628 fn.2 (Ariz.App.2012) ("Because Arizona has defined 'seller'
more broadly by statute and common law, ... we will not follow this portion of the
Restatement [(Third) of Torts: Products Liability § 20(a)].")

1 113902, at *7 (D.Or. Jan. 7, 2008) (In a removed diversity-based products liability
2 claim involving an allegedly defective hernia patch, the removing defendants argued
3 that the non-diverse, resident defendant medical facility where the hernia repair was
4 performed was a fraudulently joined defendant because it was not a “seller” of the
5 patch for purposes of Oregon strict products liability law. The Court held that the
6 plaintiffs’ motion to remand for lack of diversity jurisdiction had to be granted
7 notwithstanding that the clear weight of authority from other jurisdictions supported
8 the defendants’ position because there were uncertainties in the controlling state law
9 inasmuch as there had not been any “definitive ruling from any Oregon appellate
10 court as to the viability of a strict products liability claim against a hospital for an
11 allegedly defective device implanted during the course of a procedure at the hospital
12 facilities.”) Therefore,

13 IT IS ORDERED that no ruling is made as to Defendant Arizona Spine and
14 Joint Hospital, LLC’s Motion to Dismiss (Doc. 11) and the Court leaves that motion
15 to be resolved by the Maricopa County Superior Court.

16 IT IS FURTHER ORDERED that Plaintiff’s Motion for Remand (Doc. 10) is
17 granted and that this action is remanded to the Maricopa County Superior Court for
18 lack of subject matter jurisdiction pursuant to 28 U.S.C. § 1447(c).

19 DATED this 22nd day of April, 2014.

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22 Paul G. Rosenblatt
23 United States District Judge
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