IN THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

CORDIS CORPORATION,

Defendant/Appellant,

vs.

HELEN SMITH,

Plaintiff/Appellee.
_____/

CASE NO. 3D21-468
L.T. NO. 17-23684

ANSWER BRIEF OF APPELLEE HELEN SMITH

On Appeal from a Non-Final Order of the Eleventh Judicial Circuit, In and For Miami-Dade County, Florida

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INTRODUCTION

There is nothing inconvenient (or improper) about suing a company in its own backyard, which is exactly what Plaintiff did here. This is a products liability case brought against a medical device company incorporated in the state of Florida with its principal place of business in Miami-Dade County where a substantial amount of conduct took place related to Plaintiff's claims. The device at issue, Appellant/Defendant Cordis Corporation's ("Cordis") OptEase Inferior Vena Cava ("IVC") Filter, was implanted in Plaintiff/Appellee Helen Smith in Arizona. The device subsequently failed and Plaintiff was treated for her injuries in Nebraska.

Cordis' office here is located at 14201 Northwest 60th Avenue, Miami Lakes, FL 33014. Cordis' Miami Lakes office is the hub for where Cordis operates its worldwide complaint handling, quality affairs, regulatory compliance, post-market surveillance, and sales training activities.

Plaintiff Helen Smith, brought suit against Cordis in the Eleventh Judicial Circuit, Miami-Dade County, Florida, alleging multiple causes of action against Cordis, related to her implantation of a defective OptEase IVC filter. Plaintiff claims that her doctors made numerous attempts to retrieve the OptEase filter, which were unsuccessful. During the procedure, an

inferior venocavagram demonstrated that the IVC filter was projecting outside of her IVC.

Cordis originally sought dismissal of this case on December 29, 2017. The Motion was heard on April 18, 2019, before Judge Pedro P. Echarte, Jr. Judge Echarte orally denied Cordis' motion, but the order was never reduced to a written order. This case was then consolidated with nine others and transferred to Judge David C. Miller. Cordis filed a "renewed" Motion to Dismiss on the grounds of *forum non conveniens* ("FNC"). Cordis sought dismissal of all ten cases on this basis, claiming there is no connection of this case to Florida and that under the standard laid out in *Kinney Sys., Inc. v. Continental Ins. Co.*, 674 So.2d 86 (Fla. 1996), dismissal is appropriate as Florida is not a convenient forum. Judge Miller denied Cordis' motion by order dated October 23, 2020 in nine of the cases. On January 28, 2021, Judge Miller denied Cordis' Motion by written order in this case, incorporating his October 23, 2020 Order and additionally finding that in this case, Cordis' Motion was untimely under Fla. R. Civ. P. 1.061(g).

Judge Miller properly held that Cordis' "renewed" motion was a new, evidentiary motion distinct from its original forum non conveniens motion and therefore, was untimely. Alternatively, Judge Miller correctly exercised his discretion in holding that Cordis failed to overcome the strong presumption

under Florida law in favor of Plaintiff's choice of forum. Judge Miller went through each of the *Kinney* factors and properly found both the private and public interest factors weighed in favor of Florida being the proper forum.

Cordis' arguments on appeal predominantly rest on its claimed inability to compel out-of-state third-party treating physicians to present live testimony at a trial in Florida. Cordis goes so far as to claim without this testimony being presented live, it will not be able to "mount an effective defense." For numerous reasons described herein, Cordis' arguments should be rejected and this Court should not take the bait and give credence to Cordis' alarmist positions. Cordis also heavily relies on its claims that this case has no connection in Florida, despite Plaintiff's allegations and a plethora of evidence showing Cordis conducts a substantial amount of business here related to its IVC filters that undeniably relate to the safety of its IVC filters and Plaintiff's underlying claims. As will be shown throughout this Brief, the Trial Court relied on substantial evidence and allegations in concluding a sufficient general nexus exists between Plaintiff's claims and the Florida forum to support keeping the case here over Cordis' objections. These findings should not be disturbed.

It is plain that Cordis' intent must be to deprive the Plaintiff of her choice of forum and vest that right in the defense, as Cordis clearly does not want

these product liability cases to be tried in Miami-Dade County. The Order Denying Cordis' Motion to Dismiss for *Forum Non Conveniens* should be affirmed in all respects. Cordis has failed to show that the Trial Court abused its discretion in denying Cordis' Motion to Dismiss for Forum Non Conveniens.

STATEMENT OF THE CASE AND FACTS

A. Factual Background

On July 25, 2011, Plaintiff Helen Smith was implanted with a defective OptEase IVC Filter researched, developed, tested, designed, set specifications for, licensed, manufactured, prepared, compounded, assembled, packaged, processed, labeled, marketed, promoted, distributed and sold by Cordis. A:308 at ¶ 110-11.[1] Plaintiff's filter was placed at Kingman Regional Medical Center in Kingman, Arizona. A:308 at ¶ 110. An IVC filter like the OptEase is a medical device implanted in the IVC—the vein that returns blood to the heart from the lower portions of the body. Ostensibly, an IVC filter's purpose is to "catch" and trap blood clots travelling from the

[1] Citations to the Appendix filed with the Initial Brief will be designated as "A" with references to the applicable page numbers in the Initial Brief Appendix. Citations to the Appendix filed with the Answer Brief will be designated as "AA" with references to the applicable page numbers in the Answer Brief Appendix.

lower limbs to prevent them from going to the heart and lungs, where they could cause a pulmonary embolism. A:291 at ¶¶ 42-44.

After implantation, Plaintiff was scheduled to have her OptEase filter removed, at Regional West Medical Center in Scottsbluff, Nebraska. Several attempts were made to retrieve the filter, but it was unable to be removed. During the procedure, an inferior venocavogram revealed the outline of the filter projecting outside of the wall of the inferior vena cava. Plaintiff suffered permanent injuries due to her OptEase filter. A:308-09 at ¶115-16.

Plaintiff claims the IVC Filter was defectively designed, inadequately warned of, inadequately tested, inadequately monitored post-market, and caused a number of serious injuries known or reasonably knowable to Cordis, including, *inter alia*, that they migrate, fracture, tilt, perforate internal organs, and most importantly for the purposes of this case, that Cordis filters can perforate through IVC, preventing them from being able to be retrieved. *See* A:296-306 at ¶¶ 59-99; A:309-13 at ¶ 117-36.

Cordis is a corporation organized and existing under the laws of the State of Florida with its principal place of business located at 14201 Northwest 60th Avenue, Miami Lakes, Miami-Dade County, Florida, 33014.

A:281 at ¶ 12.[2] Cordis conducts substantial business and derives substantial revenue from within the state of Florida, including, but not limited to, its business related activities related to its IVC filters and its sale of IVC filters to Florida residents. *Id*. Further, a substantial amount of Cordis' conduct alleged in Plaintiff's complaint took place in Miami-Dade County, Florida. A:288 at ¶ 33.

More specifically, Cordis' Miami Lakes office is the hub for where Cordis operates its worldwide complaint handling, quality affairs, regulatory compliance, post-market surveillance, and sales training activities. Many of Cordis' corporate witnesses work in, reside in, and will be deposed here in Florida. A:386-484.

B. Procedural Background

Plaintiff brought suit against Cordis in the Eleventh Judicial Circuit, Miami-Dade County, Florida on October 6, 2017, alleging multiple causes of action against Cordis including negligence, strict liability-design defect, strict

[2] *See also,* A:289 at ¶ 34 ("Cordis' website lists its address as 14201 Northwest 60th Avenue, Miami Lakes, FL 33014 (*see* https://www.cordis.com/en_us/contact-us.html (last visited May 2, 2018))"); *Shover v. Cordis Corp.,* 1989 U.S. Dist. LEXIS 18209, at *1 (S.D. Miss. Oct. 25, 1989) ("[Cordis] is a Florida corporation with its principal place of business in Miami, Florida."); *Chan Tse Ming v. Cordis Corp.*, 704 F.Supp. 217, 218, fn 2 (S.D. Fla. 1989) ("Florida is [Cordis'] principal place of business and place of incorporation.").

liability-manufacturing defect, strict liability-failure to warn, breach of implied and express warranties, fraud, negligent misrepresentation and punitive damages.[3]

Plaintiff generally agrees with Cordis' summary of events laid forth in its Initial Brief procedural background section, p. 8-13, although disagrees with Cordis' characterization that it was "deprived" of its ability to obtain a written order from Judge Echarte and appeal it. Initial Brief, p. 11. Judge Miller has also now granted Plaintiff's motion to consolidate for "discovery and all pretrial purposes" in this case and the nine others mentioned above. AA:007-08. The cases are moving forward in litigation at the trial court level.

SUMMARY OF ARGUMENT

The trial court's January 28, 2021 order should be affirmed in all respects. Cordis "renewed" Motion to Dismiss on *forum non conveniens* was filed years after Cordis was served in this case. Moreover, having lost on the original (timely-filed) motion before Judge Echarte, Cordis' "renewed" Motion to Dismiss on *forum non conveniens* was a new and distinct evidentiary motion.

[3] Plaintiff filed her Second Amended Complaint on December 21, 2020, continuing to allege strict liability-design defect, strict liability-failure to warn and negligence. Plaintiff added a claim for gross negligence and removed the claims for strict liability-manufacturing defect, fraud, negligent misrepresentation, and punitive damages. A:279-328.

Judge Miller's alternative grounds for denying Cordis' "renewed" motion laid out in his October 23, 2020 Order, should also be affirmed. Not only did Cordis fail to meet its high burden in overcoming the strong presumption that attaches to Plaintiff's choice-of-forum of Florida, but both the private and public interest factors weigh in favor of retaining the case in Florida. The trial court did not abuse its discretion in denying Cordis' Motion to Dismiss for Forum Non Conveniens.

I. The trial court correctly held that the "renewed" Motion to Dismiss was, in reality, a new evidentiary motion different from the Motion to Dismiss heard by Judge Echarte, and hence, was untimely under Fla. R. Civ. P. 1.061(g) since it was brought well beyond the sixty-day deadline. Cordis had the ability to ensure Judge Echarte's ruling was reduced to a written order and thus, appeal it. Instead, only after transfer to Judge Miller did Cordis file a new evidentiary motion and request that the issue be re-heard and re-ruled upon. Having originally lost, Cordis sought an untimely second bite at the apple utilizing a different strategy and evidence it previously withdrew. Judge Miller properly recognized this and ruled against Cordis, accordingly.

II. Regarding Judge Miller's alternate grounds for denying Cordis' motion, the trial court properly applied the *Kinney* factors and *Cortez*'s extension of the strong presumption in favor of Plaintiff's choice-of-forum despite Plaintiff

not being Florida resident. The trial court faithfully applied the *Kinney* factors and addressed all of Cordis' arguments and found them insufficient. Cordis' activities here relate specifically to IVC filters. Many of Cordis' witnesses and documents come from Florida, which Cordis admits to.

III. The trial court correctly held that the private interest factors weigh in favor of Plaintiff's choice-of-forum as Plaintiff showed Cordis' Miami-based activities specifically relate to Plaintiff's claims and will be at issue in this case. Numerous Cordis witnesses and documents confirm this. Cordis failed to show that third-party treating physicians must testify live at trial in order to "mount an effective defense" where their testimony will be accessible and presentable through other means. Furthermore, there is no guarantee those witnesses would be available or required to testify live even if the case is re-filed in Arizona. As non-party treating physicians, their testimony will be of less significance on the key issues in this case compared to expert testimony and Cordis' own witnesses and documents.

IV. The trial court correctly held that the public interest factors also weigh in Plaintiff's favor as Cordis is at home in Florida and as a substantial amount of Cordis' conduct occurred in Florida. Cordis failed to show Arizona would be a more efficient forum and the trial court properly held Florida has a strong interest in holding its own companies responsible for their Florida-based

conduct in Florida courts. Cordis additionally did not present a "true conflict" between the laws of Arizona and Florida sufficient for the trial court to weigh the choice-of-law factor.

V. Plaintiff would be inconvenienced and prejudiced should this case have to be refiled in an Arizona court as only Cordis, but not co-defendant Johnson and Johnson, made the requisite stipulations under Florida Rule of Civil Procedure 1.061.

ARGUMENT

STANDARD OF REVIEW

"The decision to grant or deny a motion to dismiss on the grounds of forum non conveniens rests in the sound discretion of the trial court." *Rabie Cortez v. Palace Holdings*, 66 So. 3d 959, 960 (Fla. Dist. Ct. App. 2011) quoting Fla. R. Civ. P. 1.061(a). "Orders granting or denying dismissal for forum non conveniens are subject to appellate review under an abuse of discretion standard." *Ryder System, Inc. v. Davis,* 997 So.2d 1133 (Fla. 3d DCA 2008). This District has made clear that there is a "limited exception" in which an appellate court can review a trial court's forum non conveniens analysis de novo. "The only exception—a limited one—is when the trial court did not address (and therefore did not exercise any discretion) regarding one or more of the *Kinney* factors. In that situation, this court has

the latitude to address the previously-unaddressed *Kinney* factors for the first time on appeal in the interest of judicial economy and efficiency." *Ryder System, Inc. v. Davis*, 997 So.2d 1133, 1135 (3d DCA Fla. 2008). In this case, the trial court did a thorough analysis of the *Kinney* factors, therefore only an abuse of discretion standard applies.

FORUM NON CONVENIENS STANDARD

"To obtain dismissal for *forum non conveniens*, '[t]he moving party must demonstrate that (1) an adequate alternative forum is available, (2) the public and private factors weigh in favor of dismissal, and (3) the plaintiff can reinstate his suit in the alternative forum without undue inconvenience or prejudice.'" *GDG Acquisitions, LLC v. Government of Belize,* 749 F.3d 1024, 1028 (11th Cir. 2014) (quoting *Leon v. Millon Air, Inc.,* 251 F.3d 1305, 1310–11 (11th Cir. 2001)); *see also Kinney System, Inc. v. Continental Insurance Co.,* 674 So. 2d 86 (Fla. 1996); FLA. R. CIV. P. 1.061(1).

"A motion to dismiss based on forum non conveniens shall be served not later than 60 days after service of process on the moving party." *Id*. This sixty-day deadline is strictly enforced. *Fihe v. Rexall Sundown, Inc*., 966 So.2d 415, 419 (Fla. 4th DCA 2007).

Cordis, as the moving party, bore the burden of persuasion as to each of the FNC factors. *Corinthian Colleges, Inc. v. Philadelphia Indemnity Ins.*

Co., 922 So. 2d 1077, 1079 (Fla. 4th DCA 2006). Although a trial court may consider matters outside the pleadings in ruling on a motion to dismiss based on FNC, it "must draw all reasonable inferences and resolve all factual conflicts in favor of the plaintiff." *Vanderham v. Brookfield Asset Mgmt., Inc.*, 102 F. Supp. 3d 1315, 1318 (S.D. Fla. 2015) (quoting *Wai v. Rainbow Holdings,* 315 F. Supp. 2d 1261, 1268 (S.D. Fla. 2004)). "Unless the balance is ***strongly*** in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (emphasis added); *Telemundo Network Group, LLC v. Azteca Int'l Corp*., 957 So. 2d 705, 710 (Fla. 3d DCA 2006).

In evaluating the private interest factors, courts must consider which forum can better provide: (a) adequate access to documents and relevant sites; (b) adequate access to witnesses; (c) the practicalities and expenses associated with the litigation; and (d) adequate enforcement of judgments. *Kinney,* 674 So. 2d at 86. The public-interest inquiry focuses on "whether the case has a general nexus with the forum sufficient to justify the forum's commitment of judicial time and resources to it." *Kinney,* 674 So. 2d at 92 (citation omitted). Accordingly, the Court should consider factors such as court congestion, local interest in the controversy, and the forum's familiarity with the applicable law. *Id.*

I. The Trial Court Correctly Held that Cordis' "Renewed" Motion to Dismiss was a New Evidentiary Motion that Was Untimely Filed.

Judge Miller found that Cordis' Renewed Motion to Dismiss for Forum Non Conveniens "is a new evidentiary motion which is different from the prior Motion to Dismiss for Forum Non Conveniens heard by the Honorable Judge Echarte" and denied the motion as untimely. A:007. At the hearing, he elaborated that he would not allow a "second bite at the apple." A:151:16-20. Cordis originally filed a FNC motion to dismiss after being served with the original complaint. That motion was timely. That motion was briefed and heard and orally ruled upon. That motion was based upon the pleadings. In fact, the night before the hearing on the original motion, Plaintiff's counsel was served with a declaration of a Cordis employee in support of the motion. At the hearing, counsel objected, citing the fact that Cordis was attempting to relying upon evidence outside of the pleadings, making the motion an evidentiary motion. Counsel for Cordis withdrew the declaration and moved forward on the pleadings. A:379:18-25 to 382:1:18. Judge Echarte orally denied Cordis' motion. A:383:18-25.

This is a classic example of a party not getting what they wanted the first time and attempting to obtain a more favorable outcome by having the issue re-litigated. Only after losing did Cordis file an evidentiary motion that added new argument and evidence. Cordis did not simply "renew" its prior

motion, it filed a new, distinct motion (with a supplemental filing). *Compare* A:1137-45 to A:511-68. Cordis likewise did not request Judge Miller reconsider its first motion and make a final, written order. Judge Miller's holding that Cordis' "renewed" motion was untimely should be upheld.

A. The Filing of Plaintiff's First Amended Complaint Does Not Restart the FNC Motion Deadline Set Forth in Fla. R. Civ. P. 1.061(g).

Cordis first makes the argument that because Plaintiff filed a First Amended Complaint on June 11, 2020, its renewed motion is timely. Cordis' position would, in essence, eviscerate the sixty-day deadline contained in the Rule. Cordis had *already* filed a FNC motion and had *already* been heard on it. The sixty-day deadline would be meaningless if a FNC motion could be re-filed and re-litigated each and every time a plaintiff filed an amended complaint. *See Caraffa v. Carnival Corp.*, 34 So.3d 127, 130 (Fla. 3d DCA 2010) (noting that defendant's FNC motion was filed "over one thousand days" after service of process). This is clearly not what the legislature intended when it explicitly set forth the sixty-day deadline in Rule 1.061(g).

Cordis next argues that because its original FNC motion was timely filed, the second one was as well. But Plaintiff is not arguing the original motion was filed untimely; Plaintiff argued that the second FNC motion was

a new, distinct evidentiary motion and hence, because it was filed *years* after service, it is untimely. This is not a "relation back" issue.

Cordis claims that only once the case was transferred to Judge Miller was it "incumbent on Cordis to seek disposition." Yet Cordis had the ability to ensure Judge Echarte's oral ruling was reduced to a written order in the year following his oral ruling before transfer. Cordis blames Plaintiff's counsel[4], who did agree to prepare the order. But it was Cordis' motion, Cordis' "right to appeal" that it says it was deprived of when Judge Echarte's oral ruling was never put in writing, and Cordis' failure to obtain the ruling that even allowed Cordis to try and seize the opportunity to re-litigate an issue it initially lost. Cordis could have drafted the order itself or it could have raised the issue with Judge Echarte. Had Cordis truly wanted the order in writing, so that it could appeal it, it had options that it chose not to take.

B. Florida Courts Strictly Adhere to Rule 1.061(g)'s Sixty-Day Time Limit.

Trial courts lack "any discretion in the interpretation, as opposed to the application, of the Florida Rules of Civil Procedure." *Fihe*, 966 So.2d at 419.

[4] Plaintiff's trial counsel does not deny having agreed to draft the order. Nor does he deny that counsel for Cordis followed up on the draft order. Plaintiff's trial counsel was not aware, however, that Cordis' position was that it was being "deprived of the ability to appeal" because Plaintiff's counsel did not draft the order.

And Florida appellate courts "have strictly enforced [Rule 1.061(g)'s] limitation, repeatedly reversing trial court attempts to grant untimely forum non conveniens motions." *Id*. "It is clear that motions to dismiss filed pursuant to Rule 1.061 '*shall* be served not later than 60 days after service of process on the moving party.'" *S2 Global, Inc. v. Tactical Operational Support Servs., LLC*, 119 So.3d 1280, 1283 (Fla. 4th DCA 2013).

Cordis cites this District's holding in *Verysell-Holding LLC v. Tsukanov*, 866 So.2d 114 (Fla. 3d DCA 2004) for the position that Judge Miller had "inherent discretion" to consider Cordis' second FNC Motion filed outside of the sixty-day deadline. In *Tsukanov*, this District held that only motions to dismiss for forum non conveniens are subject to the sixty-day deadline. On the other hand, if the judge considers the issue *sua sponte*, this District held that the sixty-day deadline is not applicable. *Id*. at 115-16. Regardless, Judge Miller here was *not* acting *sua sponte*—Cordis filed its "renewed" motion to dismiss. "Once a defendant moves, suggests, or even hints that the case should be dismissed for forum non conveniens, the trial court can no longer act *sua sponte*. To do so would eviscerate the rule's sixty-day time limit." *Fihe*, 966 So.2d at 419.[5]

[5] The *Fihe* court disagreed with the ruling of *Tsukanov*. *Fihe*, 966 So.2d at 419. Nevertheless, the *Fihe* court's holding that a judge cannot act *sua sponte* once a party has moved the court is appropriate to apply here.

Cordis also cites *S2 Global* for the position that the sixty-day deadline can be extended. The court in *S2 Global* held "[o]nly upon a showing of excusable neglect could the [FNC] motion have been granted." *Id*. at 1283. Cordis makes no showing (or even argument) that the untimely filing of its "renewed" motion was a result of "excusable neglect". "The factors giving rise to a finding of excusable neglect typically have been administrative mishandling, secretarial errors, and calendaring issues." *Id*. Cordis makes no claim that such an issue occurred here. Rather, as in *S2 Global*, Cordis' "counsel had a good grasp of the issues involving his clients, and made strategic decisions to handle the case a certain way. Reconsideration of tactical decisions and judgment calls does not constitute a basis for finding excusable neglect." *Id*. at 1284.

Cordis was not "unable" to take action to ensure Judge Echarte's oral ruling was reduced to written order. Cordis could have raised it with Judge Echarte or drafted the order itself in the year-long period following Judge Echarte's oral ruling prior to transfer to Judge Miller. It did neither.

C. Judge Miller Correctly Found Cordis' "Renewed" Motion to be a New, Evidentiary Motion Distinct from its Original Forum Non Conveniens Motion.

Cordis made the decision to move forward on its FNC motion relying solely on the pleadings when it withdrew the declaration it served the day

before the original motion was heard. A:382:2-9. Only after learning Judge Echarte orally denied the motion did Cordis change course and seek discovery before filing its second motion. And while Judge Miller did permit limited discovery on the issue, that does not axiomatically mean the second FNC motion was simply a "renewed" motion. Nor did that mean Plaintiff was not permitted to defend the motion on the grounds that it is untimely.

Cordis turned a nine-page motion into one well over 50 pages long because Cordis attached five exhibits to its "renewed" motion. *See* A:511-68. Cordis relied on these new exhibits in its "renewed" motion. Cordis did not ask Judge Miller to rule on its original FNC motion or reconsider it; it asked Judge Miller to rule on a new motion which relied on evidence not included in the original motion.

II. The Trial Court Correctly Exercised its Discretion in giving Strong Deference to Plaintiff's Choice of Forum and Considering Cordis' Substantial Business in Florida related to IVC Filters.

As an alternate ground for denying Cordis' motion, the trial court incorporated its October 23, 2020 Order denying Cordis' Motion to Dismiss for Forum Non Conveniens in the companion case of *Ednesome v. Cordis Corp.* A:007.[6] The *Ednesome* Order found that "[t]his is a case that involves

[6] The *Ednesome* Order is included in Plaintiff's Answer Brief Appendix. AA: 003-06.

the situation in which a Defendant who is a Florida Corporation has been sued in its home forum and has objected that its home forum is inconvenient." AA:003. The trial court further correctly concluded that "[t]here is a strong presumption under Florida law in favor of Plaintiff's Choice of forum of Miami-Dade County, Florida." *Id*.

Both of these findings are correct and consistent with *Kinney* and subsequent Florida law. "[T]he reviewing court always should remember that a strong presumption favors the plaintiff's choice of forum. Thus, the presumption can be defeated only if the relative disadvantages to defendant's private interest are of sufficient weight to overcome the presumption." *Kinney Sys., Inc.*, 674 So.2d at 91. "Indeed, it is axiomatic that the plaintiff has the right to choose the forum." *Cortez v. Palace Resorts, Inc.*, 123 So. 2d 1085, 1094 (Fla. 2013). This strong presumption applies even when the plaintiff is not a Florida resident, as here. *Cortez*, 123 So. 3d at 1096. The Florida Supreme Court instructs reviewing courts to "*always*" remember this strong presumption. *Id.* at 1092 (quoting *Kinney*, 674 So. 2d at 91). A defendant can overcome this strong presumption only when litigating in Florida would cause a "material injustice to the defendant." *Id.* at 1094. It is likewise well-established in Florida that the defendant's home state is an appropriate forum for litigation:

> We observe at the outset, as has one of our sister courts, 'that this case involves the exceptional situation in which the defendant [has] been sued in [his] own home forum and [has] objected that [his] home forum is inconvenient.'….A forum non conveniens argument coming from a party sued where he resides is both 'puzzling' and 'strange.'

Cardoso v. FPB Bank, 879 So.2d 1247, 1250 (Fla. 3d DCA 2004) (internal citations omitted).

Cordis is correct that there is a consolidated action against it involving the same IVC filters currently proceeding in the Superior Court of Alameda County, California. The Eleventh Judicial Circuit for Miami-Dade County, Florida, has ten cases related to Cordis' IVC filters. Cordis' attempt to panic this Court regarding these ten cases is exaggerated and unfounded.

Cordis itself admitted during a hearing in the Alameda JCCP that "If Florida is not an available forum, I don't know what is." *See* Answer Brief Appendix in *Cordis Corp. v. Ednesome*, Case No. 3D20-1676, AA:260 at 12-15. Combined with the rest of its admissions and the plethora of evidence Plaintiff provided to the trial court, it is abundantly clear this case has legitimate connections to Florida, which the trial court properly considered.

A. The Trial Court Gave the Proper Weight to Plaintiff's Choice of Forum in Concluding that Cordis Failed to Defeat Plaintiff's Strong Presumption in Favor of Florida.

Cordis complains that the trial court gave "outsized weight" to these factors and goes so far as to say the trial court gave dispositive weight to

Plaintiff's choice of forum alone. A review of the trial court's order makes it clear that is not the case; the trial court not only properly included these factors in making its decision and accorded appropriate weight to them, but it also went through each argument Cordis presented to it and each of the *Kinney* factors. This is exactly what any trial court in Florida faced with such a FNC motion should do in making its determination.

It is Cordis' burden on all factors under the FNC standard to show it is inconvenient to litigate here and that the public and private interest factors weigh in favor of dismissal sufficient to defeat the strong presumption in favor of Plaintiff's choice of forum. *Kinney Sys., Inc.*, 674 So.2d at 91. "This presumption afforded to the plaintiff's forum choice is a critical part of the analysis in light of the fact that the whole premise behind the forum non conveniens doctrine that the plaintiff's choice of forum, even if inconvenient to the plaintiff, is sufficiently *inconvenient for the defendant*." *Cortez*, 123 So.3d at 1092 (emphasis in original). In other words, the premise of the doctrine is to permit a defendant to show a plaintiff's choice of forum is so inconvenient to the defendant so as to suggest it was made to strategically disadvantage them. That has not been shown here.

The fact Plaintiff chose a Cordis "home" state does not indicate Plaintiff is attempting to strategically disadvantage Cordis. Cordis' attempt to limit

Plaintiff's option to a single state—the state where Plaintiff was implanted with a Cordis IVC filter—is Cordis' strategy to avoid having to litigate in its own home forum of Miami-Dade County. FNC "certainly is not designed to empower defendants to disadvantage Plaintiff by engaging in reverse forum-shopping where, as in a scenario like the one presented in this case, litigating in Florida would not create a substantial burden to the defendant." *Cortez*, 123 So.3d at 1094.

The trial court did not abuse its discretion in applying the strong presumption accorded to Plaintiff's choice of forum despite Plaintiff being a non-Florida resident. The trial court properly followed *Cortez* and *Kinney* and its findings should not be disturbed. *See also, GLF Construction Corp. v. Credinform Int'l, S.A.*, 225 So.3d 377, 382-83 (3d DCA 2017) (trial court did not abuse its discretion in finding that the private interest factors tilt in favor of Florida or, at best, are in equipoise, where evidence and witnesses would be located in Italy and Bolivia, but also in Florida where defendant is incorporated and located and where many emails and letters came from the defendant from Florida).

B. The Trial Court Appropriately Considered Cordis' Substantial Business in Florida Related to its IVC Filters

Nor did the Trial Court give dispositive weight to Cordis' corporate registration in Florida like Cordis claims. Cordis is not just registered in

Florida, it is incorporated in Florida, it maintains a principal place of business in Miami-Dade County, and it routinely conducts IVC filter-related business in Florida. A:281 at ¶ 12, A:289 at ¶ 34. A "substantial amount" of Cordis' conduct alleged in the complaint took place in Florida. A:288 at ¶ 33. Cordis admits it has witnesses in Miami relevant to this litigation. A:130: 11-14 ("Are there witnesses in Miami Lakes? Absolutely there are witnesses in Miami Lakes."). Cordis now alleges its principal place of business is Dublin, Ohio as of 2015 following its acquisition by Cardinal Health, but that does not erase Cordis' Florida-based activities that were conducted throughout the pertinent timeframe and which continue to be conducted today, in Florida.

Nor is there any basis for Cordis' argument that its connections to Florida demonstrate "only a paper exercise and a filing fee". Initial Brief, p. 30. The trial court may and did consider Cordis' Florida connections as factors to weigh in the balance of conveniences, including its office located here and the operations it undertook (and continues to undertake) here. *Kinney Sys., Inc.*, 674 So.2d at 93; *Cortez*, 123 So.3d at 1096-97. Cordis cites *National Rifle Ass'n v. Linotype Co*., 591 So. 2d 1021 (Fla. 3d DCA 1991), to support its argument that the trial court should have considered the fact that its principal place of business is in Ohio. Initial Brief, p. 17. Cordis ignores that *Kinney* quashed *National Rifle Association* and cases holding a

corporation's residence, determined by its principal place of business, is dispositive. 674 So. 2d at 93. Instead, "it is **immaterial how 'corporate residency' is determined**, because a corporation's various connections with Florida—if any—will only be factors to be weighed in the balance of conveniences." *Id.* (emphasis added). The trial court followed this mandate and weighed all of Cordis' connections with Florida when evaluating FNC.

In *Cortez*, a California resident vacationing in Mexico was sexually assaulted by a masseur at a Mexican resort. *Id*. at 1088. She filed suit in Miami against several Florida corporations who designed and marketed her vacation package, alleging negligence. *Id*. She alleged the marketing scheme that formed the basis of her claims was operated through the defendants' Miami offices. *Id*. at 1089. The trial court dismissed her case on FNC grounds, concluding her allegations were based on events that occurred entirely in Mexico. *Id*. This District upheld the trial court's order and she appealed.

The Florida Supreme Court first adopted the Eleventh Circuit's clarification that the FNC analysis should always include consideration of the third step of the inquiry, the weighing of the public interest factors. *Id*. at 1093. The Court next held that a United States resident is afforded the same strong presumption in their chosen forum of Florida, despite not being a Florida

resident. *Id*. at 1096 ("Accordingly, we now emphasize, in another case involving a non-Florida plaintiff, that except where the plaintiff is from another country, the presumption in favor of the plaintiff's initial choice of forum is always entitled to great deference."). In applying these holdings to the case at hand, the Court held that because the plaintiff was a U.S. resident, her choice of forum was entitled to great deference, which she was not afforded by the lower court. Furthermore, the lower court erred in holding that her case had no connection to Florida where her claims related to Florida corporations alleged to have committed negligent conduct in Florida, despite the event and her injuries occurring in Mexico. *Id*. at 1096-97.

Plaintiff's case is akin to *Cortez*. Plaintiff is a U. S. resident suing a Florida company alleging claims premised, in part, upon conduct that took place here. Just as in *Cortez*, Plaintiff is entitled to great deference for her chosen forum in Miami and her allegations and evidence concerning Cordis' operations and negligent conduct occurring here were appropriate considerations for the trial court when weighing the private interest factors under *Kinney*.

Cordis cites inapposite cases decided before the *Cortez* decision, which extended Florida's strong presumption in favor of the plaintiff's choice of forum to *all* U.S. residents. *Cortez*, 123 So.3d at 1094. *Hilton Intern Co. v.*

Carrillo, 971 So.2d 1001 (3rd DCA Fla. 2008), was not only decided prior to *Cortez*, but none of the Plaintiffs were even living in the U.S. *Id*. at 1006. The event at issue (a terrorist attack at a Hilton hotel) took place overseas in Egypt, meaning "[s]ubstantially all of the evidence is located in Egypt, as are most of the witnesses." *Id*. at 1007. Finally, the *Carrillo* court found that there was no evidence on the record to indicate that the case's only connection to Florida—the parent company's principal place of business—had any operational control over the resort in Egypt or the tragic incident, unlike the facts pled and shown here. *Id*. *Carrillo* had little to no connection to the United States itself, let alone Florida.

Cordis cites three other cases in which a dismissal was granted despite one or more of the defendants having been incorporated, or having a principal place of business, in Florida: *Abeid-Saba v. Carnival Corp*., 184 So. 3d 593 (3rd DCA Fla. 2016); *Fihe v. Rexall Sundown, Inc*., 966 So. 2d 415 (4th DCA Fla. 2007); and *R.J. Reynolds Tobacco Co. v. Carter*, 951 So. 2d 105 (Fla. 3d DCA 2007). None of these cases overcome the precedent established by *Cortez*.

Both *Fihe* and *R.J. Reynolds* were decided in 2007, prior to *Cortez*. Cordis misstates *Fihe*'s holding, as detailed further, but in light of *Cortez*'s explicit extension of the presumption to out-of-state U.S. Plaintiffs, it is clear

that *Fihe* may have been decided differently today. *R.J. Reynolds* specifically holds that out-of-state Plaintiffs are not entitled to the same strong deference as Florida Plaintiffs, but this is clearly no longer the case after *Cortez*. *R.J. Reynolds*, 951 So. 2d, at 109. Finally, *Abeid-Saba*, decided after *Cortez*, expressly differentiates its facts from those in *Cortez*.

In *Abied-Saba*, the case resulted from injures on an Italian flagged cruise ship traveling from one port in Italy to another Italian destination. The vast majority of the 107 Plaintiffs were not U.S. residents and the lawsuit involved five defendants from different nations including one Florida corporation. *Id.* at 598. In conducting its review, the *Abied-Saba* court stated "the presumption in favor of the Plaintiff's initial forum choice in balancing the private interests is at its strongest when the Plaintiff are citizens, residents or corporations of this country." *Id*. at 601 (citing *SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A.*, 383 F. 3d 1097, 1103 (11th Cir. 2007)).

The case at hand is clearly more similar to *Cortez* than *Abeid-Saba*—all parties are U.S. residents and any and all evidence will be found in the U.S. The trial court gave the appropriate deference to Plaintiff's choice of forum, and Cordis' arguments to the contrary lack merit.

III. The Trial Court Correctly Held that the Private Interest Factors Favor Plaintiff's Chosen Forum of Florida.

The trial court held that "[t]he private interest factors weigh against dismissal." AA:003 Specifically, the trial court found that Cordis failed to show an adequate alternative forum would provide better access to documentary evidence and witnesses and that Plaintiff had established many relevant Cordis witnesses are located in Florida. AA:003-04. Also, Cordis failed to identify any live witness testimony that would be necessary which could not be obtained through modern discovery practices like videotaped depositions. *Id*. For these reasons, "Cordis has not met its burden to overcome the presumption in favor of Plaintiff's choice of forum." *Id*. The trial court properly weighed the private interest factors and this Court should affirm.

A. Cordis' Miami-Based Conduct Is at Issue and Is Related to Plaintiff's Claims.

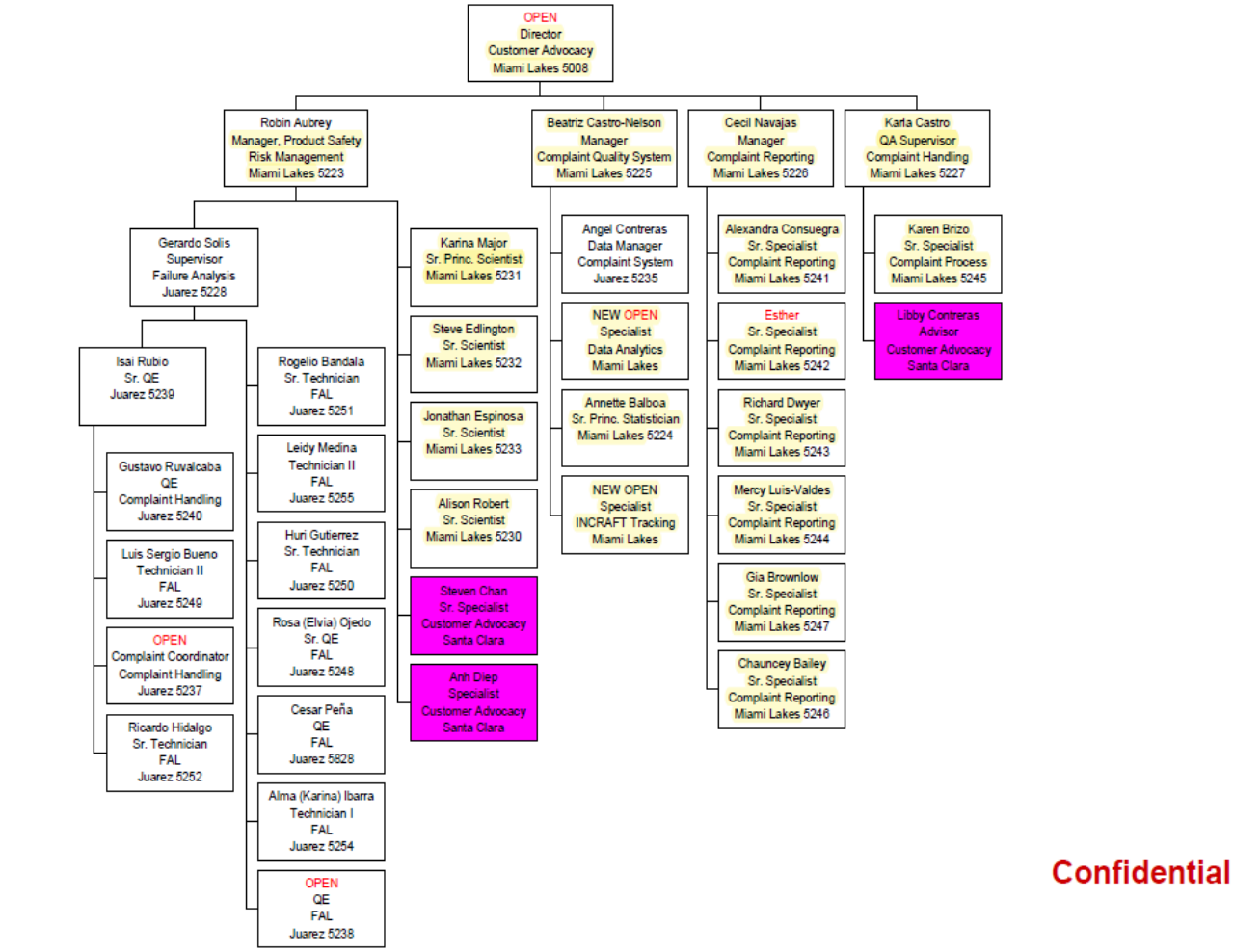
Cordis' Miami-based conduct *is* at issue in this case and is inextricably related to Plaintiff's claims. At dispute is Cordis' knowledge and actions related to the design, development, testing, marketing, adverse event intake and reporting, complaint handling (including manning the call center for complaints), post-market surveillance, complaint trend analysis, complaint audits, product risk analysis and safety review, risk management, and training of certain personnel, including complaint coordinators, analysts, and clinicians of the product. Cordis' knowledge and actions regarding these issues will be made on the basis of documents and corporate witnesses

controlled by Cordis as a Florida corporation alleged to have a principal place of business in Miami-Dade County, Florida.[7] Evidence relating to Cordis' culpable conduct, such as those set out above relating to its defective IVC filters, are located in or accessible from Cordis' place of business in Florida. As such, Florida is demonstrably not an inconvenient forum. *See Cardoso v. FPB Bank*, 879 So.2d 1247, 1250 (Fla. 3d DCA 2004) (observing the "exceptional", "puzzling" and "strange" situation in which a defendant sued in its own forum has made a FNC argument). At a minimum, the fact that Cordis is located in Florida is an indication that it would not be unduly burdensome for Cordis to defend a suit here. Importantly, Cordis charged its Florida employees with monitoring the safety and effectiveness of its products, issues which undeniably relate to Plaintiff's claims.

Cordis has not changed the design of its IVC filters, TrapEase and OptEase, since they were cleared for sale in 2000 and 2002, respectively. Once cleared for sale, medical device companies like Cordis are required to monitor their products through post-market surveillance. As the Court can see from the Global Customer Advocacy and Product Safety Support Surveillance Personnel Chart set forth below, many highly relevant

[7]*See* A:281 at ¶ 12, A:288 at ¶ 32-3; A:130 (admitting there are witnesses in Miami Lakes).

witnesses related to Cordis' IVC filter post-market surveillance are located in Miami Lakes.



A:366; *See, also,* A:386-88.

As explained by Robin Aubrey, Cordis' Manager of Product Safety and Risk Management, in a PowerPoint presentation that Plaintiff attached as an exhibit to their opposition, the product safety team is responsible for the

product throughout the product lifecycle, which includes responsibility for adverse event reporting, complaint handling, safety surveillance, and risk management. A:400. These responsibilities specifically relate to and include IVC filters. A:423-443 (specifically, A:438-40).

Additionally, as explained by Cecil Navajas, a Complaint Handling Manager based in Miami Lakes, the Complaint Handling Team is responsible for investigating complaints, submitting Medical Device Reports ("MDRs") in the US and worldwide, reporting to the FDA, writing complaint conclusions, manning the 1-800 call center for complaints, literature reviews, ownership of the corrective and preventive action ("CAPA") process and training new coordinators, analysts and clinicians. A:396-98. Further, as evidenced by the PowerPoint presentation of Karla Castro, the Complaint Handling Team holds the following responsibilities:

- Additional Responsibilities Post Closure
    - Responsible for Complaint Process WW (worldwide)
    - Responsible for Process compliance WW
    - Liaison with RA (regulatory affairs) WW to ensure compliance with changing regulations
    - Responsible for QA (quality affairs) with Affiliates and EM
    - Responsible for Complaint Process in Audits
    - Responsible for complaint vs. non-conformance process
    - Responsible for Timeliness Metrics

A:399.

Moreover, Miami Lakes is not only the hub for Cordis' Worldwide Complaint Handling, Quality Affairs, and Regulatory Compliance divisions, among many others, but Miami Lakes has also served as the hub for Cordis' National Sales Training "Mastery Course," and has done so as recently as 2017. A:444-54. The Mastery Course occurred over the course of thirteen (13) days from March 13-29, 2017, with the ninth day of training dedicated to IVC filters (including simulation labs). A:450. In fact, the 2017 Mastery Course evidently was not the first sales training to have occurred in Miami Lakes. A:453.

In support of its argument that no relevant witnesses or evidence will be found in Florida, Cordis leaned heavily on a declaration by its Manager of Product Safety and Risk Management, Robin Aubrey. However, Mr. Aubrey himself works at Cordis' Miami-Dade location. A:455-56. Mr. Aubrey's declaration was signed and executed here. A:457-61. Furthermore, Mr. Aubrey testified that "all" of the clinicians who review IVC filter complaints received by Cordis are located in Miami. A:430-37. Plaintiff anticipates several other Cordis witnesses will also be found in the Miami/Fort Lauderdale area, such as Jackie Maestri and Andrew Aquart. A:462-68;

A:469-72.[8] Karla Castro, Cardinal Health's Complaint Handling Manager, has already testified that her office is in Miami Lakes. A:480; A:483-84.[9] In contrast, Cordis did not name a single witness who will be found in Ohio, or anywhere else for that matter.

These Miami witnesses and documents will be necessary for discovery in these Cordis IVC filter cases. Several of these witnesses have already been deposed, in Miami, in other Cordis litigation pending in other Courts.[10] The parties have also already agreed that discovery Cordis produced in the Alameda litigation can be used here. AA:022: 12-25.

In the end, when evaluating the private interest factors, there is a strong presumption against disturbing the plaintiff's choice of forum. *Cortez*, 123 So.3d at 1095; *Kinney,* 674 So.2d at 90. The convenience of the proposed forum must *strongly* favor the alternative forum for transfer to be

[8] Plaintiff believes both Maestri and Aquart worked in Cordis' Quality Affairs ("QA") division in the Miami area.

[9] Cardinal Health acquired Cordis in 2015, which is when Ms. Castro transferred over from Cordis to Cardinal Health. However, her knowledge relates to her time in Cordis' risk management and quality assurance departments prior to the acquisition.

[10] *See* A:423-43 (excerpt of deposition transcript of Robin Aubrey, taken March 9, 2018, in the case of *Jerry Dunson, et al. v. Cordis Corporation, et al.*, Case No. RG16812476, Superior Court for the State of California, County of Alameda, which is the lead case for the Cordis JCCP in Alameda County, California); A: 473-82 (excerpt of deposition transcript of Karla Castro, taken October 9, 2018, also in the *Dunson, et al.* case). *See also*, A:130 (admitting there are witnesses in Miami Lakes).

warranted. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947); *Telemundo,* 957 So. 2d at 710. The trial court properly held that Cordis failed to show that Arizona is a more convenient forum—let alone a *significantly* more convenient one than Florida.

B. The Trial Court Gave Due Consideration to Cordis' Suggested Forum of Arizona Where Plaintiff Had Her Filter Placed.

Much of the basis of Cordis' argument hinges on its claim that "critical third-party evidence and witnesses" are outside of Florida. In actuality, these "critical third party-witnesses" are simply the treating physicians of Plaintiff, i.e., the implanter and the doctors who treated her for her filter-related injuries. They are located in Arizona and Nebraska.

Yet in most product liability cases like this one, the bulk of the witnesses (and the majority of testimony at trial) comes from the manufacturer's own corporate witnesses and through expert testimony. Treating physician testimony is usually not dispositive with respect to key elements like causation or a defect in the product.

Moreover, in its FNC Motion to the trial court, Cordis never identified the names or the number of these alleged "critical third-party witnesses" outside of Florida, never identified the significance of their anticipated testimony (beyond conclusory statements) or whether these anticipated

witnesses would be willing to voluntarily appear at a Florida proceeding. These omissions were properly noted by the trial court in coming to its decision that Cordis failed to meet its high burden on FNC. AA:004.[11] In holding that Cordis failed to meet its burden, the trial court properly considered Cordis' suggested forum of Arizona and found Cordis' arguments lacking.

Cordis cites *Fihe v. Rexall Sundown, Inc.*[12] in support of its argument that Plaintiff's treating doctors being located outside of Florida tips the scale in Cordis' favor under the private interest factors. *Fihe* was decided prior to *Cortez* and thus, before the Florida Supreme Court held that, for purposes of FNC, any U.S. resident's choice of forum is entitled to a strong presumption. Hence, *Fihe* spent scant attention to this presumption and did not give it proper weight. Regardless, Cordis' misstates *Fihe*'s holding. In

[11] *See also*, *R.C. Storage One, Inc. v. Strand Realty, Inc.,* 714 So.2d 634 (Fla. 4th DCA, 1998) ("[F]or a court to consider the convenience of the witnesses, the court must know who the witnesses are and the significance of their testimony.").

[12] Cordis also cites *R.J. Reynolds Tobacco Co. v. Carter*, 951 So. 2d 105 (Fla. 3d DCA 2007), but *R.J. Reynolds* specifically holds that out-of-state Plaintiff are not entitled to the same strong deference as Florida Plaintiff, which is no longer the case after *Cortez*. *R.J. Reynolds*, 951 So. 2d, at 109. *Carter* further held the majority of witnesses and evidence was located in Tennessee. The co-defendant (a Florida company) had "highly questionably and solely derivative" liability with "minimal" evidence that would come from Florida. *Id*.

Fihe, a Michigan plaintiff filed a wrongful death suit against a dietary supplement manufacturer in Florida state court. *Fihe*, 966 So.2d at 417. The defendant was a Florida corporation and many of its activities related to the development, manufacture and marketing of the dietary supplement occurred in Florida. Numerous witnesses were also identified as residing in Florida. *Id*. at 417-18. The defendant filed a FNC motion to dismiss and the trial court granted it, first concluding that the private interest factors weighed in favor of transferring the case to Michigan "where unnamed fact witnesses and medical records were located." *Id*. at 418. Alternatively, the trial court held that even if the private interests were near equipoise between the parties, the public interest factors favored transfer. *Id*. at 418-19.

On appeal, the Fourth District Court of Appeal, relying on analogous cases outside of Florida, actually held that "at worst, the instant case was one where the private factors were at equipoise." *Id*. at 420. Hence, it proceeded to review the trial court's weighing of the public interest factors under an abuse of discretion standard. *Id*. at 421. Then, relying on several cases involving non-U.S. residents and parties, the Fourth District affirmed, concluding

> In sum, based on *Piper*, a reasonable person could conclude that the fact that Plaintiff reside in Michigan and foreign law will apply significantly outweighs the fact that this is the defendant's home forum, where the culpable conduct allegedly occurred. Thus, the

> public interest factor arguably supports dismissal. Accordingly, we defer to the trial court's conclusion and affirm dismissal of the Jamieson case.

Id. at 423. An accurate reading of *Fihe* makes it clear that it affirmed the trial court's holding based on the trial court's weighing of the *public* interest factors, under an abuse of discretion standard. It specifically found that when it came to the *private* interest factors, it was convinced that the factors were at equipoise. *Id*. at 420-21. As previously noted, this case is more akin to *Cortez*, which supports retention of the case in Florida.

C. Cordis' Argument that it Cannot Mount an Effective Defense in Florida is Wildly Exaggerated.

Cordis next complains that without the ability to compel live testimony at trial from treating doctors that it cannot "mount an effective defense". This is clearly hyperbole. Even on appeal, Cordis does not address the deficiencies found by the trial court in holding that Cordis "has not identified any live witness testimony which is necessary and could not otherwise be obtained through videotaped deposition, letters rogatory, or other similar procedure." AA:004. Furthermore, "Cordis has not shown there is any impediment to using [videotaped depositions or videoconference testimony] to bring an out-of-state witness' testimony into a Florida courtroom." *Id*.

i. There is no Guarantee Treating Doctors Would be Available to Testify Live if this Case is Re-Filed in Arizona.

Both Arizona and Nebraska (where Plaintiff's treating doctors are located) allow for videotaped deposition testimony to be played at trial in lieu of live testimony. *See* 16 A.R.S. R. Civ. P. 32(a)(3); Neb. Ct. R. Disc. §6-332.[13] There is no guarantee these witnesses will testify live even if the cases are refiled in Arizona and Cordis has not made any showing these witnesses are even located within the alternative court's subpoena power. Use of videotaped deposition testimony of treating doctors at trial is routine in personal injury and products liability cases like this one.

ii. Cordis Will Be Able to Obtain the Testimony it Desires from Third Party Treating Doctors

In the modern era of technology, the use of videotaped depositions or videoconference testimony is common at trial. The trial court correctly held that Cordis "has not identified any live witness testimony which is necessary and could not otherwise be obtained through videotaped deposition, letters rogatory, or other similar procedure." AA:004. *See, Ward v. Kerzner Int'l Hotels Ltd.*, 2005 WL 2456191, *4 (S.D. Fla. 2005) (defendants failed to carry their burden of establishing that two third-party treating doctors in the Bahamas must give live testimony or that the necessary evidence could not be procured through videotaped depositions, letters rogatory, or some other

[13] As does Florida. Fla. R. Civ. P. 1.330(a)(3)(F).

similar procedure); *Chan Tse Ming v. Cordis Corp*., 704 F.Supp. 217, 219 (S.D. Fla. 1989) (in denying Cordis' FNC motion, noting that medical records of a Hong Kong resident and evidence surrounding the implantation of Cordis' product in Hong Kong could be presented at trial in documentary and deposition form).[14]

Unlike in *Carrillo*, which Cordis heavily relies upon, Cordis here will be able to compel testimony and documents from these alleged "critical third party witnesses". *Carrillo* involved witnesses and documents located in Egypt. And the defendant's experts opined that the defendant would not be able to compel Egyptian witness testimony or documents, which Plaintiff's experts did not rebut. *Carrillo*, 971 So.2d at 1007. Yet Cordis fails to mention or address that to the extent there are relevant witnesses located in Arizona, both Arizona and Florida have enacted the Uniform Interstate Depositions and Discovery Act. *See* Ariz. R. Civ. P. 45.1; Fl. Stat. § 92.251. The UIDDA provides a simple procedure for compelling the depositions of individuals and

[14] *See also*, *Tuite v. Kerzner Int'l Bah., Ltd.*, 2013 U.S. Dist. LEXIS 190860, at *27 (S.D. Fla. 2013) (same); *Van Hoy v. Sandals Resorts Int'l, Ltd.*, 2013 WL 1192316, *10 (S.D. Fla. 2013) (same); *Picketts v. International Playtex, Inc.,* 576 A.2d 518, 529 (Conn. 1990) (noting that "the advent of the videotaped deposition greatly transformed the meaning of 'compulsory process' in the *forum non conveniens* calculus. Videotaped depositions frequently make corporeal transportation of foreign witnesses unnecessary.").

the production of documents located in Arizona when the litigation is located out-of-state. *See* Ariz. R. Civ. P. 45.1(b)(1). As such, not only is *Carrillo* distinguishable, but Cordis' argument that it cannot obtain "necessary" testimony from third party witnesses lacks merit.

iii. Treating Doctor Testimony Will Likely Not Be of Great Significance For Key Liability Issues At Trial

Cordis' argument in essence is that: There may be a small amount of unnamed third-party treating doctor witnesses who are unwilling to testify live, although we do not actually know that with certainty (nor have we asked), and without the pressure of these third party treating doctor witnesses having to testify live, we will not be able to mount an effective defense. Which borders on ridiculous. Particularly if understood in the correct context: treating physician testimony will most likely be a minimal part of the trial testimony as a whole, as it is in many other similarly-situated products liability actions. Cordis unabashedly implies these unnamed non-party treating physician fact witnesses will not be truthful if they are not testifying live at trial and if their testimony is instead recorded via a videotaped deposition. Which is even more ridiculous.

Cordis' argument that keeping the case in Florida "would prejudicially force Cordis to present its defense to the jury almost entirely by video," is disingenuous at best. Nor is its citation to an outdated 1975 law review

article, when use of this type of technology was still experimental, persuasive. This is a products liability case. The key issues in most product liability cases involve whether the product is defective, whether the product caused the plaintiff's alleged injuries, and whether the manufacturer was negligent. These issues are typically presented by expert testimony, not treating physician testimony. In most similarly situated product liability cases, the bulk of the "key" trial evidence comes in through corporate documents, corporate witnesses, and experts. In *Fihe*, a defective product case, the Court summarized this nicely in finding that the private interest factors were "at worse" at equipoise:

> The liability evidence in this case appears to be mostly in Florida, where the product was researched, designed, manufactured and marketed. While strict liability (i.e., defectiveness) can probably be established through experts alone, the Plaintiff have also put forward negligence, fraud, and unfair trade practices theories, which will require close examination of Rexall's top executives, most of whom reside in South Florida. Causation will be a matter of expert proof, though the Plaintiff's medical records will also be relevant. Damages evidence will be in the foreign forums.

Fihe, 966 So.2d at 420.[15]

[15] *See also*, *Ford Motor Co. v. James*, 33 So.3d 91, 93 (4th DCA Fla. 2010) (in affirming the denial of a motion to transfer venue for forum non conveniens, holding that "the material allegations of the complaint involve a potential manufacturing defect in the tire, a design defect in the van, and negligent maintenance of the van. Thus, the determination of liability in the present case will turn primarily on expert testimony. The testimony of the public servants who responded to the scene of the accident or the lay people

Similarly, here, while third party treating doctor testimony will be relevant to establishing what happened to the Plaintiff and in assessing damages, expert testimony will be the most crucial evidence at trial. Cordis does not (and cannot) point to any Florida precedent establishing dismissal based on FNC is appropriate if a defendant merely shows that they will not be able to compel every single witness it wants to present live at trial—without regard to the volume or significance of their testimony in comparison to the other evidence anticipated to be presented. Cordis has not provided any sufficient basis to show why this anticipated testimony, which it *will* be able to obtain, is necessary to hear live, particularly where Cordis argues this case should be in Arizona yet the bulk of Plaintiff's treating physicians are in Nebraska. The trial court did not abuse its discretion in concluding Cordis failed to meet its burden to establish that the private interest factors weigh in favor of dismissal.

IV. The Trial Court Properly Held that the Public Interest Factors Weigh in Plaintiff's Favor.

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who witnessed the accident is less important."); *Corrigan v. Superior Court*, 2002 WL 339549, *5 (Cal. Ct. App. 2002) (unpublished) (concluding that under the private interest factor of ease of access to proof that "[v]irtually all product liability cases focus on the product and the manner in which it was used, not the place where it happened to be when the plaintiff was injured" and that the case "will be a battle of experts and it is expert testimony, not the testimony of eyewitnesses, that will establish or disprove [defendant's] liability.").

The trial court correctly held that the public interest factors also weighed against dismissal under the FNC standard, particularly in light of Florida's strong interest in encouraging domestic companies to exercise reasonable care in their activities in producing products to the public at large.

A. Cordis' Failed to Meet its Burden to Show Trials Here would be Unduly Burdensome to the Community.

The trial court found that Cordis failed to provide *any* evidence to permit it to conclude Arizona courts would be more effective or efficient than Florida courts. AA:004. It did not say Cordis must *prove* that to be the case. Indeed, Cordis itself admitted it did not compare the efficiency or effectiveness of the two forums at issue. A:339. As it is Cordis' burden on all of the *Kinney* factors, the trial court's finding that Cordis failed to provide any evidence to support the first public interest factor was entirely appropriate. *See Corinthian Colleges, Inc.,* 922 So. 2d at 1079. Cordis' argument on the public interest factors focused almost entirely on its claim that this case has little "nexus" to Florida, which rests on Cordis' representations that none of its Florida activities are relevant to the issues in this case. As shown below, and as held by the trial court, these representations are false.

B. Cordis Continues to Ignore Plaintiff's Allegations and Evidence Showing Cordis' Activities in Miami Are Related to Plaintiff's Claims.

Contrary to Cordis' repeated suggestions, Plaintiff provided a plethora of evidence supporting this case's "nexus" to Florida, in addition to Plaintiff's allegations as pled. Cordis' own internal documents and Florida-based employees who have been deposed in other cases confirm this. *See* Section III, A, above. There is plenty of support in the record for the trial court's finding that "[t]his case has a general nexus with Florida sufficient to justify commitment of its judicial time and resources," given that "Cordis is a Florida corporation which conducts substantial business and maintains an office in Florida related to its vena cava filters." AA:005.

Cordis' Miami-based activity includes IVC-filter complaint handling and analysis, adverse events, sales representative training, regulatory compliance, and post-market surveillance of its IVC filters. This activity touches on Cordis' knowledge, the existence of a defect, what Cordis did do or did not do with that information, causation and the broader question of Cordis' negligence—all key liability issues in *this case*. Cordis' Florida-based witnesses will be deposed for the purposes of discovering and exploring these key liability issues and others. Cordis' Florida-based documents will be used to discover and explore these key liability issues. Plaintiff's allegation that a substantial amount of Cordis' conduct underlying the claims took place in Florida is well-founded. A:288 at ¶ 33.

By way of example, Plaintiff has directly alleged that Cordis' post-marketing surveillance and adverse event handling is at issue in this case and should have alerted Cordis to the problems and defects in its IVC filters. A:299 at ¶¶ 72-99.[16] Plaintiff has directly alleged Cordis' activities in this regard (or failure to address the issues they learned through these activities) constituted negligence on the part of Cordis. *Id*. These activities were conducted from Cordis' Florida office. Likewise, Cordis' employees in Miami Lakes have evidence critical to Cordis' continuing duty to monitor the safety and effectiveness of its IVC filters and warn of known risks. Evidence that Cordis knew of adverse events concerning its IVC filters, but failed to change the design or warnings, is directly relevant to Plaintiff's negligence, gross negligence, and products liability claims.

Cordis does not dispute that these activities took place in and continue to take place in Florida. It merely insists they are irrelevant and only design, manufacturing and shipping activities, which it alleges did not take place in Florida, are relevant to liability. Cordis' attempts to downplay and pigeonhole Plaintiff's claims to just that of defective design, defective manufacture[17], and

[16] Most of the same allegations were included in Plaintiff's original complaint. *See* A:1170-74 at ¶¶ 76-91.

[17] In her Second Amended Complaint, Plaintiff is no longer asserting a manufacturing defect claim. *See* A:279-328.

shipping[18] should be rejected. It is undeniable that Cordis' Florida-based operations relate in meaningful ways to safety, design, and warnings issues in this case.[19] Full discovery will reveal to what extent, but on the basis of Plaintiff's allegations and the evidence put forth on the record thus far, there is more than sufficient evidence to support the existence of a "nexus" to Florida of Plaintiff's claims under the public interest factors of the forum non conveniens analysis.

This evidence also supports the trial court's finding with respect to the second public interest factor that "Florida has an important public interest in the resolution of claims against a domestic corporation, such as Cordis. Florida has an important public interest in encouraging domestic corporations, such as Cordis, to exercise reasonable care in designing and manufacturing medical products, such as vena cava filters, and in properly

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[18] As to shipping, beyond claiming Cordis sells and distributes its IVC filter products, Plaintiff does not claim any sort of negligence on the basis of "shipping" activities.

[19] *See Eghnayem v. Boston Scientific Corp.*, 873 F.3d 1304, 1316-17 (11th Cir. 2017); *Jackson v. H.L. Bouton Co.*, 630 So. 2d 1173, 1176 (Fla. 1st DCA 1994) (admitting evidence of substantially similar injuries to show the danger from the design and the defendant's knowledge of the risks); *Worsham v. A.H. Robins Co.*, 734 F.2d 676 (11th Cir. 1984) (same).*See, also, e.g. Raab v. Smith & Nephew, Inc.*, 150 F.Supp.3d 671, 694-95 (S.D. W.V. 2015) (plaintiff's allegations that the defendant failed to conduct adequate post-marketing surveillance and take corrective action and comply with adverse event reporting and investigative requirements plausibly stated state law negligence and products liability claims).

warning consumers about those products." AA:004-05. *See Fihe*, 966 So.2d at 422 (listing cases that held a defendant's home forum has a strong interest in providing a forum for redress of injuries caused by its own citizens, including manufacturers alleged to have committed culpable conduct in their own home state).

This Court should give deference to the trial court's holding and affirm. The trial court properly held there is a "general nexus" of this case to Florida sufficient that the public interest factors weigh in keeping the case here.

C. The Trial Court Correctly Held Cordis Failed to Show a "True Conflict" Exists Between the Laws of Florida and Arizona.

The trial court held that Cordis failed to make any showing of a "true conflict" between Arizona and Florida law sufficient to justify a choice of law analysis with respect to the third public interest factor set forth in *Kinney*. AA:005. While Florida follows the "most significant relationship" test under the Restatement (Second) of Conflict of Laws §145 (1971)[20], the determination that a "true conflict" exists is a threshold issue a court must first make before applying the "most significant relationship" factors. *Tune v. Philip Morris Inc.,* 766 So. 2d 350, 352 (2d DCA Fla. 2000). A "true conflict" exists where "two or more states have a legitimate interest in a particular set

[20] *See Bishop v. Fla. Specialty Paint Co.*, 389 So.2d 999, 1001 (Fla. 1980).

of facts in litigation and the laws of those states differ or would produce a different result." *Pycsa Panama, S.A. v. Tensar Earth Technologies, Inc.*, 625 F.Supp.2d 1198, 1219 (S.D. Fla. 2008).

As a threshold issue, Cordis cannot show that Arizona law "will predominate" without even identifying a "true conflict" of law. Cordis' arguments with respect to choice-of-law and its claim that Arizona law will predominate here should be rejected for the additional following reasons.

i. De Novo Review is Not Applicable and Cordis Cannot Raise New Arguments on Appeal.

The trial court's finding that Cordis has failed to identify a "true conflict" between Arizona and Florida law is not subject to *de novo* review by this Court, it is subject to the abuse of discretion standard. This District has made clear that there is a "limited exception" in which an appellate court can review a trial court's FNC analysis de novo. "The only exception—a limited one—is when the trial court did not address (and therefore did not exercise any discretion) regarding one or more of the *Kinney* factors. In that situation, this court has the latitude to address the previously-unaddressed *Kinney* factors for the first time on appeal in the interest of judicial economy and efficiency." *Ryder System, Inc. v. Davis*, 997 So.2d 1133, 1135 (3d DCA Fla. 2008).

Thus, Cordis is incorrect that this Court can apply de novo review on the basis that the existence of a "true conflict" presents a "purely legal

question which this Court can review de novo." Initial brief, p. 58. The trial court properly addressed each *Kinney* factor, including this one, and therefore, the appropriate standard of review is for abuse of discretion. Any additional arguments and bases raised by Cordis for the first time in its appellate briefing (i.e., its arguments premised on the alleged differing definitions of gross negligence under Arizona and Florida law, and its argument that Arizona permits use of both the consumer expectations test and risk-utility test for design defect, whereas Florida does not[21]) have not been preserved. *Sanchez v. Miami-Dade County*, 286 So.3d 191, 195 (Fla. 2019) (per curium) ("A litigant seeking to overturn a lower court's judgment may not rely on one line of argument in the trial court and then pursue a different line of argument in the appellate courts.").

ii. Even if this Court Agrees that Cordis Identified a "True Conflict" Between Arizona Law and Florida Law, it is, in fact, a "False Conflict".

[21] This new argument is a reversal of what Cordis argued to the trial court. In a footnote in Cordis' reply brief, Cordis claimed at the trial court level that Florida allows use of both the consumer expectations and risk-utility test for design defect claims, whereas Arizona requires use of the risk-utility test and proof of a reasonable alternative design. A:341. Cordis now flips the argument, claiming Florida requires use of the risk-utility test, whereas Arizona allows both the risk-utility test and the consumer expectations test to be utilized. Because Cordis argued differently to the trial court, Plaintiff addresses that argument, as it is the only one which has been preserved.

Even if this Court agrees that Cordis did identify a "true conflict" between Arizona's and Florida's design defect standard, it is, in reality, a "false conflict" because both states employ similar standards, will require similar evidence, and Cordis has not shown the two laws would produce a different outcome. Arizona design defect claims do not require proof of a reasonable alternative design, contrary to Cordis' claims and citation to a single federal court case from 2015. *See* A:341.

> A false conflict can exist under at least three different circumstances. It can exist when the laws of different states are (1) the same, (2) different but would produce the same outcome under the facts of the case, or (3) when the policies of one state would be furthered by the application of its laws while the policy of the other state would not be advanced by the application of its laws.

Tune v. Philip Morris Inc., 766 So. 2d 350, 352 (Fla. Dist. Ct. App. 2000).

Florida law holds manufacturers strictly liable for placing a product in the stream of commerce if the defective design makes the product unreasonably dangerous. *See*, *e.g.*, *Aubin v. Union Carbide Corp.*,177 So. 3d 489, 502-03 (Fla. 2015); *West v. Caterpillar Tractor Co.,* 336 So. 2d 80, 86-87 (Fla. 1976). A product is unreasonably dangerous in design under the consumer expectations test when the product fails to perform as an ordinary consumer would expect when used in a reasonably foreseeable manner. *Aubin*, 177 So. 3d at 510; *Cavanaugh v. Stryker Corp.*, 45 Fla. L.

Weekly D2278, 2020 WL 5937405 (Fla. 4th DCA Oct. 7, 2020). Alternatively, the plaintiff can prove defect by showing the risks inherent in the design outweigh the benefits. *Aubin*, 177 So. 3d at 510. The defendant can raise the risk-benefit test as an affirmative defense. *Id.*; *Force v. Ford Motor Co.,* 879 So. 2d 103, 106 (Fla. 5th DCA 2004). A product is likewise defective under a strict liability warning claims when "the foreseeable risks of harm from the product could have been reduced or avoided by providing reasonable instructions or warnings, and the failure to provide those instructions or warnings makes the product unreasonably dangerous." Fla. Std. Instr. (Civ.) 403.8. Cordis provides those warnings and instructions to the doctors who prescribe and implant its IVC filters.

In *Aubin v. Union Carbine Corp.*, 177 So.3d 489 (Fla. 2015)*.,* the Florida Supreme Court did not direct any modification to the standard jury instructions, which addressed both the consumer expectation test and the risk utility test. *Aubin*, 177 So. at 512. Instead, the Court held that the jury instructions were sufficient because both tests' factors were addressed correctly and completely in the jury instructions and the jury verdict for the plaintiff was sufficient. Other Florida courts have weighed the two tests and determined "that there may indeed be products that are too complex for a logical application of the consumer-expectation standard. We leave the

definition of those products to be sorted out by trial courts." *Force*, 879 So. 2d at 110; *Cavanaugh*, 2020 WL 5937405 at *5. The trial court in this case has not yet determined which test (or whether both) will apply.

Like Florida, Arizona recognizes both negligent design defect claims and strict liability design defect claims. As to strict liability design defect claims, like Florida, Arizona also allows for use of both the consumer expectations and risk-utility test. *Id*. at 531. Under the "consumer expectation test," the fact-finder determines whether the product "failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonable manner." *Dart v. Wiebe Mfg., Inc.,* 147 Ariz. 242, 245 (1985) (quoting *Barker v. Lull Engineering Co.*, 20 Cal.3d 413, 143 Cal.Rptr. 225 (1978)). If so, the product was in a defective condition and unreasonably dangerous. *Dart*, 147 Ariz. at 245. The "risk/benefit analysis" asks the fact-finder to decide, as discussed under the negligence cause of action, whether "the benefits of [a] challenged design ... outweigh the risk of danger inherent in [the] design." *Id*. (quoting *Barker*, 143 Cal. Rptr. 225, 573 P.2d at 446). If not, the design was defective and unreasonably dangerous. *Dart*, 147 Ariz. at 245. While "the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive" is a factor to be considered in determining whether a defect is "unreasonably dangerous"

(see *Byrns v. Riddell, Inc.*, 113 Ariz. 264, 267 (Ariz. 1976)), it is not a specific element of a design defect claim in Arizona, nor is it included in the Revised Arizona Jury Instructions (Civil), 6th, Product Liability 3 – Defect and Unreasonable Danger Defined (Design Defect).

Secondly, Cordis has failed to prove that a different outcome would result from use of Arizona's strict liability design defect standard versus Florida's (which are substantially similar, in any event). To have a "true conflict", the test applied would have to produce a different outcome. Cordis has made no argument that a different result would occur, let alone provided any basis for explaining why; therefore, a "false conflict" exists. A single three-sentence citation in a last-minute footnote made the first time in its reply brief to the trial court does not justify overturning the trial court's finding that Cordis failed to identify a "true conflict". Particularly where Cordis makes no explanation as to how this alleged difference would affect the outcome in this case.

iii. Florida Law is Applicable to this Case

In any event, Florida law is applicable here because Florida has the most significant relationship to this case. Florida has a significant interest in preventing its corporate residents from distributing dangerous medical devices in other states. *Bishop v. Fla. Specialty Paint Co.*, 389 So. 2d 999,

1001 (Fla. 1980) (explaining the "significant relationships test" factors include the "place of incorporation and place of business of the parties" and "the place where the conduct causing the injury occurred"). Cordis is incorporated in Florida and maintains an office in Miami Lakes. A:281 at ¶ 12. Florida has the most significant relationship because this is where much of Cordis' culpable conduct, such as product safety reviews, post market surveillance, handling complaints and training sales staff, occurred *See, e.g.*, A:366.

For all of these reasons, the trial court correctly exercised its discretion in holding that the public interest factors weigh in favor of retention of this case in Florida and in concluding Cordis failed to show a "true conflict" of law exists.

IV. Plaintiff Would be Inconvenienced and Prejudiced if This Case Had to be Refiled in Arizona.

Even if the private and public interest factors strongly favored an Arizona forum (which they do not), reversal is inappropriate unless it was clear that Plaintiff could reinstate her suit in the alternative forum without undue inconvenience or prejudice. Cordis has offered to stipulate that it will not dispute specific personal jurisdiction in Arizona and will waive any statute of limitations issues. But Cordis did not establish that its co-defendant,

Johnson and Johnson, will make the same stipulations.[22] Because Cordis failed to show that *all* Defendants would be willing to waive their limitations or jurisdictional defenses in the transfer forum, reversal of the trial court's forum non conveniens order is inappropriate.

Florida Rule of Civil Procedure 1.061 governs motions to dismiss for *forum non conveniens*. Rule 1.061(b) and (c) provide, in pertinent part, that:

> **(b) *Stipulations in General.***--The parties to any action for which a satisfactory remedy may be more conveniently sought in a jurisdiction other than Florida may stipulate to conditions upon which a forum-non-conveniens dismissal shall be based, subject to approval by the trial court. The decision to accept or reject the stipulation rests in the sound discretion of the trial court, subject to review for abuse of discretion. ***A forum-non-conveniens dismissal shall not be granted unless all defendants agree*** to the stipulations required by subdivision (c) and any additional stipulations required by the court.
> **(c) *Statutes of Limitation.***--In moving for forum-non-conveniens dismissal, defendants shall be deemed to automatically stipulate that the action will be treated in the new forum as though it had been filed in that forum on the date it was filed in Florida, with service of process accepted as of that date.

FLA. R. CIV. P. 1.061(b)-(c) (emphasis added).

Here, only Cordis filed a Motion to Dismiss for Forum Non Conveniens and Johnson and Johnson have not agreed to the stipulations required by

[22] Plaintiff originally included another co-defendant, Confluent Medical Technologies, Inc., in her Amended Complaint but has since dismissed Confluent from the case. AA:011-12.

FLA. R. CIV. P. 1.061(c).[23] By the letter of the law, a **forum-non-conveniens dismissal shall not be granted unless all defendants agree** to the stipulations required by subdivision (c) and any additional stipulations required by the court. *Id*. Accordingly, as a final matter, the trial court's order should be upheld because only one of the two defendants agreed to the required stipulations.

CONCLUSION

The trial court's January 28, 2021 order, holding Cordis' Motion to Dismiss was untimely and that, alternatively, Cordis failed to meet its burden to show dismissal is appropriate under a forum non conveniens analysis, should be affirmed in all respects. Cordis' "renewed" evidentiary motion was brought years after Cordis was served with process. Judge Miller correctly held this was a new evidentiary motion distinct from Cordis' original motion to dismiss and therefore, it was filed too late. Judge Miller also properly denied Cordis' motion on substantive grounds, finding that not only did Cordis fail to overcome the strong presumption in favor of Plaintiff's choice of forum here in Florida, but both the private and public interest factors weigh

[23] At the hearing, counsel for Johnson and Johnson did say they would stipulate to not raising a statute of limitations defense in the alternate forum, but did not also say they would stipulate to not contesting jurisdiction in the alternate forum. A:047-48. Johnson and Johnson has not expressed in writing that it would stipulate to either requirement.

in favor of keeping the case in Florida. The trial court faithfully applied the *Kinney* factors, while keeping in mind the strong presumption entitled to Plaintiff's choice of forum. For all the reasons set forth herein, the trial court did not abuse its discretion and Cordis' arguments to the contrary lack merit.

DATED this 19th day of March, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 19th of March, 2021, that a true and correct copy of the foregoing has been electronically filed with the Clerk of Court using the Florida Courts E-Filing Portal, which will serve a copy of such filing to:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Arial, 14-point font, in compliance with Rule 9.045(b) of the Florida Rules of Appellate Procedure. I further certify that this brief is in compliance with Rule 9.210(a)(2)(B) with respect to word count. This brief contains 12,966 words, excluding the parts of the brief exempted by Rule 9.045(e).

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