

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

CASE NO. 3D23-0834
Lower Tribunal Case No. 2018-041830-CA-01

JOHNSON & JOHNSON and ETHICON, INC.

Appellants/Defendants,

v.

MSP RECOVERY CLAIMS, SERIES LLC, MSPA CLAIMS 1, LLC, and
SERIES PMPI, a designated series of MAO-MSO RECOVERY II, LLC,

Appellees/Plaintiffs.

ON APPEAL FROM A NON-FINAL ORDER OF THE
CIRCUIT COURT FOR THE ELEVENTH JUDICIAL CIRCUIT
IN AND FORM MIAMI-DADE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEES/PLAINTIFFS

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PRELIMINARY STATEMENT¹

This is an appeal from a non-final order denying Appellants' Motion for Judgment on the Pleadings ("Motion"). Specifically, the issues raised by Appellants solely involve the lower court's ruling finding that the allegations in the Second Amended Complaint ("SAC") made out a prima facie showing of the court's jurisdiction over Johnson & Johnson ("J&J") and Ethicon, Inc. ("Ethicon") (collectively, "Appellants"), pursuant to §48.193(1)(a)(1), Fla. Stat. (2016) – the "business activity" provision of Florida's long-arm statute. This ruling was correct and legally sound.

First, Appellants waived their challenge to personal jurisdiction. Appellants moved for dismissal three times attacking the merits of the Appellees' complaint for a pure bill of discovery ("Pure Bill"), the last one of which involved the SAC at issue. **A. App. 130-132** (Order denying motion to dismiss SAC upon finding that Plaintiffs stated a claim for pure bill of discovery). Not once did Appellants move to dismiss on the basis of personal jurisdiction. Not once did Appellants challenge the sufficiency of Appellees' jurisdictional allegations. In fact, Appellants did not raise lack of personal

¹ References to Appellants' Appendix are denoted as App., followed by the page number. References to Appellees' Appendix are denoted as A. App., followed by the page number. References to Appellants' Initial Brief is denoted as Bf, followed by the page number.

jurisdiction until they filed their Answer and Affirmative Defenses to the SAC on November 3, 2020 – almost two years after the initial complaint had been filed. **App. 456-457, 493.** Then, Appellants waited until a little over 4 years after the initial complaint was filed to attempt to excise the lower court of jurisdiction when they filed their Motion. Appellants even went as far as inviting error by arguing to the lower court:

It's not waived, Your Honor. It wasn't argued on the last motion to dismiss which was raised before this Coloplast case was decided... But personal jurisdiction is asserted and set forth in the answer in this case and there's no waiver of argument of the opposition to this motion of the issue... So we believe its preserved and properly before the Court.

App. 1494. The lower court, however, did not fall into this trap.

Based on longstanding precedent in this Circuit, a defendant waives personal jurisdiction when it fails to raise the defense in the “first step” the defendant takes in the case. *Allstate Mortgage Solutions Transfer, Inc. v. Bank of America, N.A.*, 338 So. 3d 985, 987-988 (Fla. 3d DCA 2022) (citing *McKelvey v. McKelvey*, 323 So. 2d 651, 653 (Fla. 3d DCA 1976) (recognizing that a motion to dismiss for failure to state a claim is a motion involving the merits of plaintiff's claim and holding that filing such a motion constitutes a general appearance sufficient to confer in personal jurisdiction over that defendant)). Here, the record is clear that the Appellants did not raise the defense of personal jurisdiction at the “first step,” but instead waited until the

fourth step to raise it as an Affirmative Defense after thrice challenging the merits of Appellee's complaint. As such, Appellants waived their challenge to personal jurisdiction.

Second, even if personal jurisdiction has not been waived or the issue is not properly before this Court, the lower court correctly denied the Motion. Based on the plethora of factual allegations in the SAC regarding, *inter alia*, Appellants' business activities in Florida regarding their Pelvic Mesh Products² and the manner in which the Pure Bill relates to those activities, the lower court correctly held that Appellees made out a prima facie showing of personal jurisdiction pursuant to §48.193(1)(a)(1) – the business activity provision of Florida's long-arm statute. Here, the allegations of the SAC go beyond merely alleging that Appellants "regularly transacts business" in Florida", as Appellants claim. **Bf, 17**. Here, the allegations support the decision reached by the lower court.

More specifically, it is Appellants' business activities *in Florida* regarding the sale of their Pelvic Mesh Products that forms the basis of

² Appellants' pelvic mesh also referred to herein as Pelvic Mesh Products include, but are not limited to, the Prolene Mesh/Prolene Soft Mesh, Gynemesh, Gynemesh PS, TVT, TVT-Obturator (TVT-O), TVT-SECUR (TVT-S), TVT Exact, TVT Abbrevo, Prolift, prolift +M, Prosima and other pelvic mesh products. **App. 4, n 2**.

Appellees' Pure Bill, as set forth in their SAC. That is, Appellees seek information from Appellants, in order to determine, *inter alia*, whether the pelvic mesh products are Appellants'. This is a permissible use of a pure bill of discovery and recently sanctioned by this Court in *RAV Bahamas, Ltd. v. Marlin Three, LLC*, 333 So. 3d 1158, 1161-62 (Fla. 3d DCA 2022).³ This **is not an action for money damages**, much less a case for "reimbursement".

Third, MSP Recovery Claims, Series LLC v. Coloplast Corp., 353 So. 3d 705 (Fla. 3d DCA 2023) is not dispositive. Contrary to Appellants' assertions, *Coloplast* did not dispose of plaintiffs' allegations under the Business Activity provision on the merits. **Bf, 2.** *Coloplast* did not apply the law to an existing set of facts. Additionally, *Coloplast* did not hold that personal jurisdiction pursuant to §48.193(1)(a)(1) failed due to lack of connexity, as Appellants claim. Finally, again, contrary to Appellants' insistence, *Coloplast* did not hold that because the case involved a claim for reimbursement⁴ personal jurisdiction pursuant to §48.193(1)(a)(1) also failed.

³ Although Appellants note the lower court's ruling denying Appellants' Motion on the cause of action, said ruling is not at issue in this appeal.

⁴ Appellees dispute that the cause of action in *Coloplast* was a reimbursement action. *Coloplast* involved the equitable relief of a pure bill of discovery which seeks the discovery of information, only, and not the recovery of economic damages.

Fourth, as Appellants admit that the basis of the lower court's decision was not premised on the lack of Appellants' affidavit, this should be a non-issue. Nevertheless, had the lower court made such a determination, it would not have been erroneous. In light of the legally sufficient allegations regarding Appellants' business activities in Florida regarding their Pelvic Mesh Products and those activities' connexity to the Pure Bill, the burden shifted to Appellants to set forth opposing affidavits / evidence to overcome Appellees' prima facie showing of personal jurisdiction. However, Appellants failed to do so.

Finally, Appellants incorrectly premise their argument in favor of dismissal **with prejudice** on the misconception that this is a reimbursement action under the MSP Act and their re-writing of the *Coloplast* did not hold that jurisdiction pursuant to §48.193(1)(a)(1) is unavailable due to financial injuries. Again, this is a pure bill of discovery aimed to obtain information from Appellants directly related to their business activity in Florida i.e., their Pelvic Mesh Products which were distributed, sold and implanted in individuals in Florida. Moreover, Appellants moved to dismiss, three times, never raising personal jurisdiction as grounds. Appellees served written discovery which included limited jurisdictional discovery. Rather than respond, Appellants filed a Motion to Stay pending determination of their

motion for judgment on the pleadings. Shortley thereafter, this appeal ensued. If this Court opines that the jurisdictional allegations are insufficient, Appellees are entitled to conduct limited jurisdictional discovery and amend, as amendment would not be futile, the privilege has not been abused, and Appellants will not be prejudiced.

At bottom, Appellants' business activities in Florida – i.e., selling and distributing its defective Pelvic mesh Products *in Florida* – were sufficiently pled to demonstrate a prima facie case for personal jurisdiction under Florida Statute 48.193(1)(a)(1) (business activity).

STATEMENT OF THE CASE AND FACTS

A. Nature of the Case

1. The Parties and the Pure Bill

a. Introduction

Appellees obtained assignments from Medicare Advantage organizations, first-tier, downstream, and related Medicare entities (“Assignors”) that provide comprehensive health care coverage for their Medicare beneficiaries (“Enrollees”), throughout the United States, *including Florida*. App. 4, ¶1; 6, ¶7. Appellants marketed, sold, and distributed their Pelvic Mesh Products, including the defective Pelvic Mesh Products, *in Florida*. App. 5, ¶¶4,6; 7-9, ¶¶ 14 – 21.

Assignors paid costs associated with the purchase and implantation of pelvic mesh that were sold *in Florida*. In addition, and separately, Assignors also paid for medical care and treatment received by their Enrollees throughout the United States, *including Florida*, to treat, *inter alia*, injuries resulting from implantation of pelvic meshes that occurred *in Florida*.

Via their Pure Bill, Appellees seek information from Appellants, in order to determine, *inter alia*, whether the pelvic mesh product implanted in their Enrollees are Appellants’.

b. Appellants and Pelvic Mesh

Appellants’ business activities in Florida includes the sale of the Pelvic Mesh Products. It is those sales that form the basis of this Pure Bill. Specifically, J&J engaged in substantial and not isolated activity throughout the *State of Florida*, including the sale of pharmaceutical and health care related products, such as the Pelvic Mesh Products. **App. 5, ¶4.** J&J maintains and carries systematic and continuous contacts *in Florida*, and regularly transacts business *with Florida*. **App. 5, ¶4.** J&J purposefully availed itself of the privilege of conducting activities *in Florida*, thus taking advantage of the protections and benefits of the law. **App. 5, ¶4.** Like J&J,

Ethicon⁵ also engaged in substantial and not isolated activity throughout the ***State of Florida***, including the sale of pharmaceutical and health care related products, such as the Pelvic Mesh Products. **App. 5, ¶6**. Ethicon maintains and carries systematic and continuous contacts ***in Florida***, and regularly transacts business ***with Florida***. **App. 5-6, ¶6**. Ethicon purposefully availed itself of the privilege of conducting activities ***in Florida***, thus taking advantage of the protections and benefits of the law. **App. 5-6, ¶6**.

Appellants' Pelvic Mesh Products have caused complications.⁶ The complaints involving Appellants' pelvic mesh products have been so numerous that in 2011 an MDL was created⁷ to address the multitude of claims regarding Appellants' defective Pelvic Mesh Products, which resulted

⁵ Ethicon is J&J's wholly owned subsidiary. **App. 5, ¶5**. J&J organizes its subsidiary businesses into individual Business Units to coordinate the development, manufacture, testing, marketing promotion, training, distribution and sale of its' pelvic floor repair products. **App. 4, ¶3**. Within the medical devices and diagnostic sector are "Business Units" including the "Ethicon Franchise." **App. 4, ¶3**. The Ethicon Franchise was charged by Johnson & Johnson with the design, development, promotion, marketing, testing, training, distribution, and sale of the pelvic floor repair products at issue in this case. **App. 4, ¶3**. Ethicon is part of the Ethicon Franchise controlled by J&J. **App. 4, ¶3**.

⁶ **App. 7-10, ¶¶15 - 18, 23, 26; 9, 11-12, ¶¶24, 30; 18, ¶ 51; 19, ¶52**.

⁷ *In Re: Ethicon, Inc., Pelvic Repair Sys. Products Liability Litig.*, MDL-No.-2327.

in a mass settlement.⁸ Juries in numerous trials have also established Appellants' liability and the defective nature of their products.

The SAC is replete with allegations regarding Appellants' wrongdoings in regard to their defective Pelvic Mesh Products. See **App. 10-27, ¶¶26 – 90; 21, ¶61; 25, ¶82.; 27, ¶90**. The SAC further alleges that as a result of the implantation of Appellants' Pelvic Mesh Products, Medicare beneficiaries sustained injuries *in Florida*, received medical treatment *in Florida*, and Assignors bore the costs associated with the treatment of said injuries *in Florida*, causing them financial injury. **App. 5, ¶¶4, 6**.

c. Claims Data, Assignors, Enrollees and Pelvic Mesh

Appellees use electronic data interchange (“EDI”) to analyze their Assignors' claims data to identify Enrollees that incurred medical expenses related to the implantation of pelvic mesh, which were paid for by the Assignors. **App. 27-28, ¶¶91 – 97**. Using a proprietary software system (the “MSP System”), MSP Recovery captures, compiles, synthesizes, and funnels large amounts of data from different sources to identify instances where Enrollees incurred medical expenses for the implantation and removal of a mesh device which were subsequently paid by Assignors. **App. 27-28, ¶93**.

⁸ The Ethicon Wagstaff & Carmell Settlement. **App. 3, n 1**.

Here, the Assignors' claims data, which formed the basis of Exhibit Y, *Claims Data*, to the SAC identified 811 instances where Enrollees were implanted with pelvic mesh products that required subsequent revision or mesh removal because of its defective nature. **App. 28, ¶95; 400-435.** The data identifies Enrollees that were implanted with, and subsequently injured by, pelvic mesh products. **App. 29, ¶103.** Specifically, the Assignors' claims data indicates whether pelvic mesh was implanted, removed, revised, or involved complications. **App. 31, ¶113; 401-435.** The Assignors' claims data further demonstrates that the Assignors incurred financial losses when they paid or reimbursed the cost of implantation, removal and/or revision of the defective pelvic mesh products, including the cost of medical items and services provided as a result of the complications from the implantation and removal of defective pelvic mesh products, by **Florida** Assignors. **App. 28, ¶95; 35-54; 56-61; 61-235; 241-268; 290-399; 400-435.** However, one integral component that the MSP System *cannot identify* is which Enrollees were injured by Appellants' Pelvic Mesh Products, as this information is not stored in EDI. **App. 28, ¶97.** The Assignors' claims data does not specify the manufacturer of the implanted pelvic mesh. **App. 31, ¶113.**

d. Appellees' Pure Bill

The claims regarding Appellants' defective Pelvic Mesh Products were the subject of an MDL which culminated in a global settlement and multiple jury verdicts against Appellants. **App. 3, n 1; 1048.**

However, Appellants are not the only pelvic mesh manufacturer that have been the subject of multi-district litigation involving faulty and defective pelvic mesh. Examples include MDL-2324 *In re: Am. Med, Sys., Inc., Pelvic Repair Sys. Prod. Liab. Litig.*; MDL-2304 *In re: Bard Women's Pelvic Repair Prod. Liab. Litig.*; MDL-2326 *In re: Boston Sci. Corp. Pelvic Repair Sys. Prod. Liab. Litig.*; MDL-2187 *In re: C.R. Bard, Inc., Pelvic Repair Sys. Prod. Liab. Litig.*; MDL-2387 *In re: Coloplast Corp. Pelvic Support Sys. Prod. Liab. Litig.*; MDL-2440 *In re: Cook Med., Inc., Pelvic Repair Sys. Prod. Liab. Litig.*; MDL-2004 *In re: Mentor Corp. ObTape Transobturator Sling Prod. Liab. Litig.*; and MDL-2511 *In re: Neomedic Pelvic Repair Sys. Prod. Liab. Litig.*. **App. 1040; 1485; 1528-1529; 1524-1525.**

Given that the Assignors' claims data does not identify the specific pelvic mesh product implanted in the Enrollees, Appellees filed the Pure Bill to determine which of their Enrollees were implanted with Appellants' Pelvic Mesh Product as opposed to that of another manufacturer such as the 8 noted above. Lacking adequate legal remedy, Appellees properly seek to

identify potential defendants and theories of liability through the equitable pure bill of discovery. **App. 29, 32, ¶¶103, 119, 120**. See *RAV Bahamas*, 333 So. 3d at 1161 (Fla. 3d DCA 2022) (“in the absence of an adequate legal remedy, equity has long authorized a pure bill of discovery as an appropriate remedy to obtain information such as the identity of a proper party defendant or the appropriate legal theory for relief.”) quoting *Trak Microwave Corp. v. Culley*, 728 So. 2d 1177, 1178 (Fla. 2d DCA 1998). See also *Vorbeck v. Betancourt*, 107 So. 3d 1142, 1145 (Fla. 3d DCA 2012) (“a bill of discovery may be used “[i]n the absence of an adequate legal remedy ... ‘to identify potential defendants and theories of liability . . .’”)

As illustrated above, the SAC focuses on Appellants’ business activities in Florida and the connexity of those activities to this Pure Bill. Although not at issue in this appeal, Judge Arzola’s decision regarding his denial of Appellants’ Motion regarding the pure bill cause of action is illustrative of the “connexity” of Appellants’ business activities in Florida with the instant Pure Bill, for purposes of personal jurisdiction. That is:

In RAV, the Third DCA held that a pure bill of discovery cannot be used to determine whether sufficient evidence exists to render a cause of action viable and non-frivolous. Id. at 1162. That is not what is being alleged in the instant case. In RAV, the Marlin parties positively identified the Bimini parties as the defendants. ***Here, while Plaintiffs admit that each of the Defendants may ultimately be a defendant, they cannot identify the manufacturer of the pelvic mesh product for any given***

enrollee as a result of the fact that the Defendants are 1 of 8 pelvic mesh manufacturers. The Plaintiffs here are not seeking to substantiate a suspected cause of action like the plaintiff was doing in RAV. Additionally, unlike in RAV where the Marlin parties were specifically avoiding the Bahamian Courts for discovery purposes, here, the Plaintiffs do not have another underlying substantive case where discovery could be sought that they are simply ignoring because of “convenience.”

App. 1474, ¶5 (emphasis added).

2. The MSP Act is Not Relevant

Appellants insist that this Pure Bill is a claim for reimbursement pursuant to the MSP Act. Appellants devote several pages to explaining the MSP Act and the Medicare Advantage Program. Appellants put the cart before the horse. This is a red herring.

First, this is a pure bill of discovery seeking **only** specified **information** from Appellants related to their Pelvic Mesh Products. This **is not an action for money damages**, much less a case for “reimbursement”. See e.g., **App. 32.**⁹ Nowhere in the SAC do Appellees seek money damages. That is,

⁹ See also, **App. 29-30, ¶104** (same); **App. 32, ¶120** (“This complaint only seeks to identify the proper defendant and the appropriate legal relief.”); **App. 30-31, ¶110** (“The requested discovery is material and necessary to maintain Plaintiffs’ claims in the prospective litigation because Plaintiffs need to identify the manufacturer of the Pelvic Mesh Product implanted in the Enrollees. The identity of the Enrollee will dictate the appropriate legal theory of relief”); **App. 30-31, ¶111** (“To identify Enrollees that were implanted with Defendants’ Pelvic Mesh Products, the parties can engage a third-party to conduct a data matching process, comparing Defendants’ data to that of

because they cannot. It is well settled that a pure bill of discovery is not an action for money damages but rather it is an “**equitable remedy under state law which serves to obtain the disclosure of facts within the defendant’s knowledge**”, *inter alia.*” *Carr v. Bombardier Aerospace Corp.*, No. 10-MC-60917, 2010 WL 2220336, at *1 (S.D. Fla. June 3, 2010) (citations omitted); *First Nat. Bank of Miami v. Dade-Broward Co.*, 171 So. 510, 510 (Fla. 1936) (A pure bill of discovery is an equitable remedy that serves to “obtain the disclosure of facts within the defendant’s knowledge, or deeds or writings or other things in his custody, in aid of the prosecution or defense of an action pending or about to be commenced in some other court.”); *Publix Supermarkets, Inc. v. Frazier*, 696 So. 2d 1369, 1370 (Fla. 4th DCA 1997).

In similar pure bills medical device manufacturers, including one of the appellants here, have made the same arguments, i.e., that a pure bill is a claim for reimbursement under the MSP Act. Those arguments were rejected. See *MSP Recovery Claims, Series LLC v. Eli Lilly & Co.*, No. 18-cv-24617-CMA, ECF No. 27 at 1-2 (S.D. Fla. Nov. 26, 2018) (“Yet, Plaintiffs’ Complaint does not allege a claim under the MSP Act. Rather, the Complaint

Plaintiffs.”); **App. 20, ¶101** (“Plaintiffs request identifying data from Defendants merely to confirm that the Enrollees identified by Defendants as Registered users are indeed the Enrollees named in Plaintiffs’ Exhibit Y.”)

clearly illustrates that at the time of removal, Plaintiffs' action was purely for a bill of discovery.") **A. App. 001-003**; *MSP Recovery Claims, Series LLC v. Coloplast Corp.*, No. 18-cv-24582, ECF No. 24 at 2 (S.D. Fla. Nov. 26, 2018) **A. App. 004-006**; *MSP Recovery Claims, Series LLC v. Jazz Pharm., Inc.*, No. 18-cv-24622-CMA, ECF No. 25 at 2 (S.D. Fla. Nov. 26, 2018) **A. App. 007-009**; *MSP Recovery Claims, Series LLC v. Boston Sci. Corp.*, No. 18-cv-24546-UU, ECF No. 31 at 3 (S.D. Fla. Jan. 9, 2019) **A. App. 010-013**; *MSP Recovery Claims, Series LLC v. Am. Med. Sys., LLC*, No. 18-cv-24497-PCH, ECF No. 25 at 3 (S.D. Fla. Nov. 26, 2018) **A. App. 014-017**; *MSP Recovery Claims, Series LLC v. C.R. Bard, Inc.*, No. 18-cv-24511-RNS, ECF No. 65 at 2-3 (S.D. Fla. May 16, 2019) **A. App. 018-020**; *MSP Recovery Claims, Series LLC v. Johnson & Johnson*, No. 18-cv-24695, ECF No. 26 (S.D. Fla. March 18, 2019) **A. App. 021-024**; *MSP Recovery Claims, Series LLC v. Alere, Inc.*, No. 18-cv-24703-UU, ECF No. 30 at 3 (S.D. Fla. Jan. 15, 2019) **A. App. 025-029**; *MSP Recovery Claims, Series LLC v. Wright Med. Grp., Inc.*, No. 19-cv-22544-KMW, ECF No.14 at 3 (S.D. Fla. July 22, 2019) ("This Court agrees with the reasoning and holding in the numerous cases in this District that have found that subject-matter jurisdiction is lacking because the amount-in-controversy requirement is not satisfied where Plaintiffs' sole claim is for a bill of discovery.") **A. App. 030-033**; *MSP*

Recovery Claims, Series LLC, v. Cook Inc., No. 18-cv-24309-KMW, ECF No. 36 at 1 (Feb. 28, 2019) (same) **A. App. 034-037**.

Moreover, the ***action for money damages*** comes in, if and when the Pure Bill is amended to state a substantive cause of action. “Florida courts treat bills of discovery ***as the first step in a civil action***. *Spector v. Suzuki Motor of Am., Inc.*, No. 17-cv-650, 2018 WL 345925, at *2 (M.D. Fla. Jan. 9, 2018) (emphasis added). See also *MSP Recovery Claims, Series LLC v. C.R. Bard, Inc.*, No. 18-cv-24511, 2019 WL 2254927, at *5 (S.D. Fla. Feb. 5, 2019); *MSP Recovery Claims, Series LLC v. Phila. Indem. Ins. Co.*, No. 19-cv-20665, 2019 WL 13256834 (S.D. Fla. July 29, 2019); *Empire Fin. Grp., Inc. v. Fin. Indus. Regul. Auth., Inc.*, No. 08-cv-80534, 2009 WL 10644856, at *5 (S.D. Fla. Jan. 15, 2009); *Butzberger v. Novartis Pharm. Corp.*, No. 06-cv-80700, 2006 WL 8443453, at *2 (S.D. Fla. Nov. 27, 2006). That is, after receipt of the discovery, Florida law permits amendment of a pure bill of discovery to state a “cause of action” at law. *Surface v. Town of Bay Harbor Islands*, 625 So. 2d 109 (Fla. 3d DCA 1993) (per curiam); *Payne v. Beverly*, 958 So. 2d 1112, 1114 (Fla. 5th DCA 2007); *Phila. Indem. Ins.*, 2019 WL 1325683; *Spector*, 2018 WL 345925, at *2; *Empire Fin.*, 2009 WL 10644856, at *5; *Butzberger*, 2006 WL 8443453, at *2; *APA-The Engineered Wood*

Ass'n v. Glens Falls Ins. Co., Inc., No. 22737-1, 94 Wash.App. 556 (Wash.App. Div. 2 Mar. 12, 1999) (applying Florida law).

Second, if and when the equitable Pure Bill is converted to a substantive cause of action at law, a claim for reimbursement pursuant to the MSP Act **is not** the only avenue of recovery available to Appellees. Depending on what the discovery in this Pure Bill reveals, Appellees can amend to state a substantive cause of action for products liability, subrogation, and state-based consumer protection claims or other violations, *inter alia*. See *MSP Recovery Claims, Series LLC v. C.R. Bard, Inc.*, No. 18-cv-24511-RNS, ECF No. 45 at 14 (S.D. Fla. May 16, 2019) *report and recommendation adopted*, No. 18-cv-24511-RNS, ECF No. 65 (S.D. Fla. May 16, 2019) (“...it would be entirely speculative to conclude that the only relief available to Plaintiffs is a claim under the MSP Act. Plaintiffs could, for example, use the discovery sought to file a products liability claim or seek relief under a state consumer protection statute.”) **A. App.038-055; 018-020; Alere, Inc.**, No. 18-cv-24703-UU, ECF No. 30 at 3 **A. App. 025-029**; *Boston Sci. Corp.*, No. 18-cv-24546-UU, ECF No. 31 at 3 **A. App. 010-013**.

3. Relevant Procedural History

On March 1, 2019, Appellants moved to dismiss the complaint for lack of standing and for failure to state of claim **A. App. 056-075**. Appellants did

not raise or otherwise challenge the lower court's jurisdiction or the sufficiency of the allegations regarding same. *Id.* On June 21, 2019, Appellants filed a second motion to dismiss Appellees' amended complaint again arguing lack of standing and for failure to state a claim for relief **A. App. 076-096**. Appellants did not raise or otherwise challenge the lower court's jurisdiction or the sufficiency of the allegations regarding same. *Id.* On March 4, 2020, Appellants filed a third motion to dismiss not related to the SAC. **A. App. 097-113**. Again, Appellants did not raise or otherwise challenge the lower court's jurisdiction or the sufficiency of the allegations regarding same. *Id.* After the motion was denied, on November 3, 2020 Appellants filed their Answer and Affirmative Defenses to the SAC and for the very first time raised the defense of personal jurisdiction as an affirmative defense. **App. 436-469; 472-507**. It was not until February 3, 2023, more than four years after the filing of the initial complaint, that Appellants affirmatively sought to enforce their defense of personal jurisdiction by way of a motion for judgment on the pleadings. Appellants filed their Motion seeking judgment on, *inter alia*, the lower court's personal jurisdiction pursuant to §48.193(1)(a)(1), (1)(a)(2) and (1)(a)(6). **App. 508 – 1032**.

Appellants disingenuously argue that *Coloplast* held that a claim for reimbursement cannot form the basis of jurisdiction pursuant to the Business

Activity provision of the long-arm statute. **App. 509.** (“That is because even if defendants [] conducted business in Florida, a Medicare reimbursement action does not arise out of those activities.” Appellants also argued that this Court held in *Coloplast* that “while defendants are alleged to do business (selling medical devices) in Florida, plaintiffs’ claims do not arise out of that business” i.e., lack of connexity. **App. 521.** However, *Coloplast* did not render such a ruling.

Appellants reiterated those arguments on April 23, 2023, when the lower court held a hearing on the Motion. **App. 1501.** (“And so what Coloplast says is those kinds of allegations aren’t sufficient because the claims here don’t arise of those allegations.”) The lower court correctly rejected Appellants’ arguments, given that this Court did not render such a ruling in *Coloplast*. **App. 1503.** (referring to *Coloplast* the lower court noted, “But then they got to the business venture provision, subsection 1, and there they didn’t really get into a connectivity analysis.”) And having to concede, Appellants stated, “[w]ell, Your Honor’s quite right that the reasoning is not likely in the Coloplast opinion on business activities.” **App. 1504.** Accordingly, Appellants were not entitled to the requested judgment on the pleadings.

SUMMARY OF THE ARGUMENT

1. The lower court correctly denied the Appellants' Motion. Appellants waived personal jurisdiction. Moreover, the lower court's finding that Appellees made out a prima facie showing of personal jurisdiction pursuant to §48.193(1)(a)(1) – the business activity provision of Florida's long-arm statute – is legally sound. *Coloplast* is not dispositive. Contrary to Appellants' assertions: 1) *Coloplast* did not dispose of personal jurisdiction pursuant to §48.193(1)(a)(1) on the merits. *Coloplast* did not apply the law to an existing set of facts; 2) *Coloplast* did not hold that personal jurisdiction pursuant to §48.193(1)(a)(1) failed due to lack of connexity; and 3) *Coloplast* did not hold that because the case involved a claim for reimbursement personal jurisdiction pursuant to §48.193(1)(a)(1) also failed. Therefore, Appellants were not entitled to judgment in their favor, as a matter of law.

2. The lower court did not base its decision on the lack of opposing affidavit. Therefore, this is a non-issue. However, had the lower court made such a determination it would not have been erroneous, in light of the legally sufficient allegations regarding Appellants' business activities in Florida regarding their Pelvic Mesh Products and those activities' connexity to the Pure Bill.

3. Lastly, dismissal with prejudice is not warranted. Given that *Coloplast* does not preclude personal jurisdiction pursuant to §48.193(1)(a)(1), as a matter of law, under the circumstances of this case, amendment would not be futile, the privilege has not been abused, and Appellants will not be prejudiced.

STANDARD OF REVIEW

The determination of whether a defendant has waived personal jurisdiction is a pure question of law subject to de novo review. *Allstate Mortg. Sol. Transfer, Inc.*, 338 So. 3d at 987. Appellees acknowledge that a district court of appeal reviews a trial court's ruling on a motion for judgment on the pleadings de novo. *IMC Grp., LLC v. Outar Inv. Co., LLC*, 336 So. 3d 1217, 1219 (Fla. 3d DCA 2022). Moreover, "[a] motion for judgment on the pleadings may be granted only if the ***moving party is clearly entitled to a judgment as a matter of law.***" *Glenn v. Roberts*, 95 So. 3d 271, 272 (Fla. 3d DCA 2012) (emphasis added) (citations omitted). "The law is also clear that the purpose of a motion for a judgment on the pleadings is to test the legal sufficiency of a cause of action and to permit a trial judge to examine the allegations of the pleadings and determine whether there are any issues of fact to be resolved." *Alanco v. Bystrom*, 544 So. 2d 217, 218 (Fla. 3d DCA 1989) (citation omitted). The existence of disputed issues renders judgment

on the pleadings inappropriate. See *Perez Escalona v. City of Miami Beach*, 227 So. 3d 722, 724 (Fla. 3d DCA 2017) (in reversing judgment on the pleadings in favor of defendant, the Third DCA noted “[i]ndeed, our de novo review of the pleadings identifies this very issue as a disputed one that cannot be determined on the pleadings alone.”) “In considering such a motion, all material allegations of the opposing party’s pleading are taken as true, and all of the movant’s allegations which have been denied are taken as false. Since the answer requires no responsive pleading, all allegations contained therein are deemed denied.” *Jaramillo v. Dubow*, 588 So. 2d 677, 677 (Fla. 3d DCA 1991) (citations omitted). “Judgment on the pleadings lies only if on the facts so admitted the moving party is entitled to judgment.” *Am. Hous. Sys. Corp. v. Cnty. Club of Miami Corp.*, 342 So. 2d 1026, 1028 (Fla. 3d DCA 1977) (citation omitted). “The trial court cannot grant a motion for judgment on the pleadings where factual questions remain unresolved.” *Yentes v. Papadopoulos*, 352 So. 3d 472, 474 (Fla. 2d DCA 2022) (citations omitted). Given that the lower court’s ruling **did not** disregard clearly established law from this Court, the ruling must be upheld.

ARGUMENT

As is well known, the Florida Supreme Court opinion in *Venetian Salami* governs personal jurisdiction analysis in Florida. *Venetian Salami Co. v. J.S. Parthenais*, 554 So. 2d 499 (Fla. 2010). The *Venetian Salami* “two prong” process is now well established. See, e.g., *Execu-Tech Bus. Sys., Inc. v. New Oji Paper Co., Ltd.*, 752 So. 2d 582, 584 (Fla. 2000) (describing the “statutory prong” and the “constitutional prong” of jurisdictional analysis). The “statutory” prong is established by alleging either general or specific jurisdiction under Florida’s long-arm statute. *Highland Stucco & Lime Prods., Inc. v. Onorato*, 259 So. 3d 944, 948 (Fla. 3d DCA 2018).

The statutory prong of personal jurisdiction analysis requires courts to determine if plaintiff alleged sufficient jurisdictional facts to fall within the long-arm statute. *Hilltopper Holding Corp. v. Estate of Cutchin ex rel. Engle*, 955 So. 2d 598 (Fla. 2d DCA 2007). A plaintiff can meet its initial burden under the statutory prong “by alleging specific facts that demonstrate that the defendant’s actions fit within one or more subsections of section 48.193.” *Id.* A complaint need not specifically reference or track the long-arm statute, so long as sufficient facts are alleged to support personal jurisdiction. *Stewart v. Julana Dev. Corp.*, 678 So. 2d 1385, 1387-88 (Fla. 3d DCA 1996). “If the plaintiff has pled a prima facie case for jurisdiction, a simple motion to

dismiss for lack of personal jurisdiction must fail, as a motion to dismiss, without more, challenges only the facial sufficiency of a jurisdictional pleading.” *Walt Disney Co. v. Nelson*, 677 So. 2d 400, 402 (Fla. 5th DCA 1996) (citing *Venetian Salami*, 554 So. 2d at 502).

Defendants seeking to challenge jurisdictional allegations bear the burden to proffer evidence refuting the essential jurisdictional facts alleged in the plaintiff’s complaint. *Id.* (citing *Venetian Salami*, 554 So. 2d at 502); see also *Cnty. of Cumberland, New Jersey v. Kwap*, 220 So. 3d 1207, 1209 (Fla. 4th DCA 2017) (“When a complaint includes sufficient jurisdictional allegations, the burden shifts to the defendant to rebut those allegations through an affidavit or other evidence.”). Where jurisdictional allegations remain un rebutted, plaintiffs’ allegations are entitled to a presumption of truth. See *State v. Altman*, 106 So. 2d 401, 406 n.1 (Fla. 1958) (finding that prima facie evidence is sufficient in law to raise a presumption of fact or establish the facts in question, unless rebutted. Where prima facie evidence remains un rebutted, it “remains sufficient for that purpose.”). Accordingly, a defendant that declines to file affidavits in opposition to the jurisdictional allegations cannot dispute the facts alleged in the complaint. *Labbee v. Harrington*, 913 So. 2d 679, 681 (Fla. 3d DCA 2005) (citing *Electro Eng’g Prods. Co. v. Lewis*, 352 So. 2d 862, 864 (Fla. 1977); *Elmex Corp. v. Atl.*

Fed. Sav. & Loan Ass'n, 325 So. 2d 58, 61–62 (Fla. 4th DCA 1976) (noting that a defendant's unsubstantiated challenge as to the sufficiency of allegations in a complaint relating to long-arm jurisdiction must be treated as an admission that all facts are properly pled)).

At issue here is §48.193(1)(a)(1) the business activity provision of Florida's long-arm statute. Given the facts alleged in the SAC, the lower court correctly ruled that Appellees made a prima facie showing of jurisdiction pursuant to said provision. That decision must be upheld. Moreover, the lower court did not rely on Appellants' lack of opposing affidavit in arriving at its decision. Even if it did, said decision is grounded in Florida law, in light of the well pled allegations of the SAC. That said, Appellants' pleas for dismissal with prejudice is an overreach given that any perceived deficiency in the allegations can be cured on amendment by simply tracking the language of §48.193(1)(a)(1). *Belz*, 721 So. 2d at 789; *Hilltopper*, 955 So. 2d at 601.

I. Appellants Waived Personal Jurisdiction

“Florida law is well settled that a defendant wishing to challenge personal jurisdiction must do so in the first step the defendant takes in the case, or this defense will be deemed waived, and the court will be deemed to have acquired jurisdiction over the defendant.” *Allstate Mortg. Sol.*

Transfer, Inc., 338 So. 3d at 987 (citing *Consolidated Aluminum Corp. v. Weinroth*, 422 So. 2d 330, 331 (Fla. 5th DCA 1982)); *Golden State Indus., Inc. v. Cueto*, 883 So. 2d 817, 820 (Fla. 3d DCA 2004) (“Because personal jurisdiction is intended to protect a defendant’s liberty interests, the defense is a personal right and may be obviated by consent or otherwise waived.”); see also *First Wisconsin Nat’l Bank of Milwaukee v. Donian*, 343 So. 2d 943, 945 (Fla. 2d DCA 1977) (“[T]hose who participate in litigation by moving the court to grant requests materially beneficial to them, have submitted themselves to the court’s jurisdiction.”); *Inter Am. Coal, S.A. v. SHE DDF2-FL2, LLC*, 255 So. 3d 432, 433 (Fla. 3d DCA 2018) (“[A] defendant may waive a timely objection to personal jurisdiction by seeking affirmative relief . . . inconsistent with an initial defense of a lack of personal jurisdiction.” (quoting *Alvarado v. Cisneros*, 919 So. 2d 585, 587 (Fla. 3d DCA 2006))).

Here, the record is unequivocal. Appellees highlighted this to the lower court in both in their opposition to the Motion and at oral argument. **App. 1034;1510**. Appellants filed three separate motions to dismiss directly attacking the merits of Appellees’ Pure Bill and alleged lack of standing to bring these claims. Not once during these motions or at oral argument before the lower court did Appellants raise a challenge to personal jurisdiction.

Appellants made zero effort to make a special or limited appearance or otherwise seek to preserve this defense until they filed their Affirmative Defenses more than two years after the filing of the initial complaint in this matter. *See Cumberland Software, Inc. v. Great Am. Mortg. Corp.*, 507 So. 2d 794, 795 (Fla. 4th DCA 1987) (“The first step a party takes in a case, whether it be the filing of a preliminary motion or a responsive pleading, must raise the issue of personal jurisdiction or that issue is waived.”); *Golden State Indus., Inc. v. Cueto*, 883 So. 2d 817 (Fla. 3d DCA 2004) (holding that defendant, a foreign corporation, waived personal jurisdiction because it first moved to set aside a default but did not move to dismiss for lack of jurisdiction until months after it was repeatedly unsuccessful in obtaining the requested relief).

In *Chestnut v. Nationstar Mortgage LLC*, 255 So. 3d 397, 399 (Fla. 3d DCA 2018), the Third DCA held that where a defendant first filed a pre-answer motion to dismiss solely contesting the plaintiff’s standing and did not raise lack of jurisdiction until a subsequently filed answer to the complaint, submitted himself to the trial court’s jurisdiction and thus waived this defense. *See also McKelvey*, 323 So. 2d at 653 (holding that defendant subjected himself to the trial court’s personal jurisdiction when he filed a motion for

protective, which was in effect a motion to dismiss for failure to state a claim, and thus waived the defense of personal jurisdiction).

Based on the foregoing, Appellants waived personal jurisdiction.

II. The Lower Court Correctly Ruled That Appellees Pled a Prima Facie Case for Personal Jurisdiction Under Section 48.193(1)(a)(1) (Business Activity) of Florida’s Long-Arm Statute

Appellants did not argue below nor here that minimum contacts i.e., the Due Process prong of the inquiry is lacking. Therefore, the only question before this Court is whether the SAC made a prima facie showing of personal jurisdiction pursuant to §48.193(1)(a)(1) and the connexity of the Pure Bill with those business activities. *See Citicorp Ins. Brokers (Marine), Ltd. v. Charman*, 635 So. 2d 79, 80 (Fla. 1st DCA 1994).

Florida’s long-arm statute provides for personal jurisdiction over foreign defendants for any cause of action arising from “[o]perating, conducting, engaging in, or carrying on a business or business venture in this state . . .” §48.193(1)(a)(1), Fla. Stat. Florida courts consider the “collective activities” of a defendant to determine if they demonstrate “a general course of business activity in the State for pecuniary benefit.”

DeVaney v. Rumsch, 228 So. 2d 904 (Fla. 1969).¹⁰ The purpose of Florida long-arm’s statute is “to regard nonresidents who have availed themselves of the privilege of ‘dealing in goods, services, or property, whether in a professional or nonprofessional capacity, within the State in anticipation of economic gain,’ as operating a business or business venture.”” *Kapila v. RJPT, LTD.*, 357 So. 3d 241, 246 (Fla. 2d DCA 2023) (quoting *Stonepeak Partners, LP v. Tall Tower Cap., LLC*, 231 So. 2d 548, 557 (Fla. 2d DCA 2017)) (quoting *Labbee v. Harrington*, 913 So. 2d 679, 683 (Fla. 3d DCA 2005)). Whether a nonresident is “doing business” or “engaged in a business venture” in Florida turns on the unique facts of each case and a mechanical test cannot be applied. *Kapila*, 357 So. 3d 246. “[A] “business venture” “may be established by showing a lesser involvement than would be required to prove” a “business.”” *Id.* at 246-247 (citations omitted). “Consequently, “[o]ne may engage in a ‘business venture’ without operating, conducting, engaging in or carrying on a ‘business.’” *Id.* (citations omitted).

As to the “connexity” requirement, “the term ‘arising from’ is broad; it does not mean ‘proximately caused by,’ but only requires a “direct affiliation,

¹⁰ A foreign defendant engaging the services of wholesalers or distributors can be doing business in Florida if the foreign defendant was engaged in a course of conduct in Florida for the purpose of realizing a pecuniary benefit through those wholesalers or distributors. *Dinsmore v. Martin Blumenthal Assocs., Inc.*, 314 So. 2d 561, 564 (Fla. 1975).

nexus, or substantial connection” to exist between the basis for the cause of action and the business activity.” *Kapila*, 357 So. 3d at 249 (citing *Citicorp*, 635 So. 2d 79 and quoting *Damoth v. Reinitz*, 485 So. 2d 881, 883 (Fla. 2d DCA 1986)); see also *Am. Fin. Trading Corp. v. Bauer*, 828 So. 2d 1071, 1075 (Fla. 4th DCA 2002) (plaintiffs’ cause of action for defendant’s breach of the settlement agreement arose from defendant’s underlying business activities in Florida) (citations omitted); *Core Indus., Inc. v. Agostinelli*, 591 So. 2d 207, 208 (Fla. 4th DCA 1991) (“amended complaint can be construed as putting the defendants [] on notice that [plaintiff] is alleging that [defendant’s] activities in Florida are substantial and not isolated so as to satisfy the connexity requirements with regards to pleading §48.193(1)(a)”; *Canron Corp. v. Holt*, 444 So. 2d 529, 530 (Fla. 1st DCA 1984) (“The evidence demonstrates that among **[defendant’s] business activities in the State of Florida was the sale and delivery of the trac-gopher involved in the instant case.** There was, therefore, sufficient “connexity” between [defendant’s] business activities in Florida and the cause of action.”) (emphasis added, citations omitted).

Specifically, at all times relevant to the Pure Bill, Appellants designed, tested, manufactured, marketed, sold, and distributed the Pelvic Mesh Products throughout the United States, **including Florida**; Appellants

regularly transacts business *in Florida*; purposefully availed themselves of the privilege of conducting activities *in Florida*; took advantage of the protection and benefits of *Florida* law; maintained systematic and continuous contacts *in Florida*; engaged in substantial and not isolated activity *throughout Florida*, including sales of pharmaceutical and health care related products, such as the Pelvic Mesh Products. **App. 5-6, ¶¶4, 6.** Enrollees were implanted with pelvic mesh *in Florida*; sustained injuries *in Florida*; received medical treatment *in Florida*; and the Assignors bore the costs associated with the implantation of and/or for medical care and treatment of said injured *in Florida* **App. 5-6, ¶¶4, 6.** Said Assignors are *Florida* entities. **App. 35-54; 56-61; 61-235; 241-267; 290-399; 401-435.** *Florida* Assignors suffered financial damages throughout the United States, *including Florida*, in the form of medical payments for services rendered for the implantation, removal of the pelvic mesh products and to treat their Enrollees' injuries in Florida, caused by the pelvic mesh products to throughout the United States, *including Florida*. **App. 28-29, 31, ¶¶ 95, 103, 113; 35-54; 56-61; 61-235; 241-267; 290-399; 401-435.**¹¹ Moreover,

¹¹ Additionally, Appellees dedicate countless paragraphs in addressing the defective nature of the Pelvic Mesh Products and the grave injury caused by them. **App. 9-27.** Plaintiffs also allege that said injuries arose out of Appellants' acts or omissions. **App. 9-27.**

Appellees allege that the claims data attached to the SAC, identified 811 instances where Enrollees were implanted with pelvic mesh products that required subsequent revisions or mesh removal as a result of its defective nature. **App. 28, ¶95; 401-435.** The data identifies Enrollees that were implanted with, and subsequently injured by, pelvic mesh products. **App. 29, ¶103.** Specifically, the Assignors' claims data indicates whether pelvic mesh was implanted, removed, revised or involved complications. **App. 31, ¶113.** The Assignors' claims data further demonstrates that the Assignors incurred financial losses when they paid or reimbursed the initial cost of implantation, removal and/or revision of the defective pelvic mesh, including the cost of medical items and services provided as a result of the complications from the implantation and removal of defective pelvic mesh, by **Florida** Assignors. **App. 28, ¶96; 35-54; 56-61; 61-235; 241-267; 290-399; 401-435.** In support of these allegations, Appellees attached pelvic mesh products related claims data to the SAC. **App. 400-435.** However, one integral component that the MSP System *cannot identify* is which Enrollees were injured by Appellants' Pelvic Mesh Products, as this information is not stored in EDI. **App. 28, ¶97.** The Assignors' claims data does not specify the manufacturer of the implanted pelvic mesh. **App. 31, ¶113.** As such, the Pure Bill seeks information to determine which of their Enrollees were implanted with

Appellants' Pelvic Mesh Product as opposed to that of another manufacturer.

App. 20, ¶101; 29-30, ¶104; 30-31, ¶110, 111; 32, ¶120, wherefore clause.

Here, the facts alleged by Appellees, which are conclusively established for purposes of the underlying Motion, establish a prima facie showing of personal jurisdiction under §48.193(1)(a)(1). Indisputably, Appellants “engaged in a general course of business activity for pecuniary gain.” *Am. Fin. Trading Corp.*, 828 So. 2d at 1074 (“[Defendants] engaged the services of [plaintiffs] for the purpose of buying and selling commodities for pecuniary benefit. His business activity was substantial and not isolated. He engaged in over 120 transactions involving more than \$465,000.”); *Gray v. ACT Holdings, Inc.*, 05-21987-CIV, 2006 WL 8433399 at *3 (S.D. Fla. June 1, 2006) (personal jurisdiction existed over a foreign defendant where the plaintiff was not paid for approximately 100 telephone conversations and for raising a total of \$323,000 from Florida investors over a two-month period, and the cause of action arose from a foreign defendants’ alleged conduct.)

The Pure Bill’s “connexity” to Appellants’ business activity in Florida regarding the distribution and sale of their Pelvic Mesh Product is established. The SAC focuses on Appellants’ business activities in Florida regarding their Pelvic Mesh Products and the connexity of those activities to this Pure Bill. *Cannon Corp. v. Holt*, 444 So. 2d 529, 530 (Fla. 1st DCA 1984)

(“The evidence demonstrates that among **[defendant’s] business activities in the State of Florida was the sale and delivery of the trac-gopher involved in the instant case**. There was, therefore, sufficient “connexity” between [defendant’s] business activities in Florida and the cause of action.”) (emphasis added, citations omitted).

The above illustrates that Appellees’ allegations regarding Appellants’ business activities in Florida regarding their Pelvic Mesh Products and how this Pure Bill arises from those activities,¹² is well beyond Appellants’ contention that “plaintiffs’ only allegation to support jurisdiction under subsection (a)(1) is that defendants “regularly transact[] business with Florida””. **Bf, 19**. The Pure Bill at issue here, seeking **only** the discovery of information, **and not an action for money damages** whether couched in terms of “reimbursement” or otherwise, is directly related to Appellants’ business activities regarding the sale of their Pelvic Mesh Products in Florida. Stated differently, if Appellants did not sell their Pelvic Mesh Products in Florida, the underlying Pure Bill would be non-existent.

The United States Supreme Court’s opinion in *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 592 U.S. ----, 141 S.Ct. 1017, 209 L.Ed.2d 225

¹² Appellants’ business activities in Florida relating to their Pelvic Mesh Products and those activities connexity to the instant Pure Bill, are taken as true and remain undisputed.

(2021) is squarely on point. In that case, Ford Motor Company argued the same exact position as Appellants do now. Almost as if addressing the Appellants' arguments, the Court rejected Ford's position outright:

But Ford's causation-only approach finds no support in this Court's requirement of a "connection" between a plaintiff's suit and a defendant's activities. That rule indeed serves to narrow the class of claims over which a state court may exercise specific jurisdiction. But not quite so far as Ford wants. None of our precedents has suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do. As just noted, **our most common formulation of the rule demands that the suit "arise out of or relate to the defendant's contacts with the forum."** The first half of that standard asks about causation; but the back half, after the "or," contemplates that some relationships will support jurisdiction without a causal showing. That does not mean anything goes. In the sphere of specific jurisdiction, the phrase "relate to" incorporates real limits, as it must to adequately protect defendants foreign to a forum. But again, we have never framed the specific jurisdiction inquiry as always requiring proof of causation—i.e., proof that the plaintiff's claim came about because of the defendant's in-state conduct.

* * *

And indeed, this Court has stated that specific jurisdiction attaches in cases identical to the ones here—when a company like Ford serves a market for a product in the forum State and the product malfunctions there.

(Citations omitted, emphasis added).

The cause of action here is a pure bill of discovery which arises from the financial injury caused to Assignors as a result of Appellants' defective

Pelvic Mesh Products being distributed in Florida. Appellees have alleged that they have suffered injury as a result of the defective pelvic meshes. However, the full extent of this disaster cannot be determined from records other than those in the exclusive possession of the Appellants. This does not mean that there is no connection between the claim for a bill of discovery and the Appellants' manufacture and distribution into Florida of its defective meshes. It is manifest that the SAC's Pure Bill is based on the Appellants' conduct that has impacted Florida – namely the distribution and sale of defective pelvic meshes in Florida.

The SAC's allegations, as illustrated above, support the lower court's denial of Appellants' request for judgment on the pleadings. Accordingly, the lower court's decision must be affirmed.

*i. **The Pure Bill Only Seeks Information from Appellants.
The Pure Bill is Not an Action for Money Damages***

First, this is a pure bill of discovery **only** seeking specified **information** from Appellants related to their Pelvic Mesh Products. This **is not an action for money damages**, much less a case for “reimbursement”. See e.g., **App. 32** (“**WHEREFORE**, Plaintiffs respectfully request this Court to: 1. direct Defendants to identify which of their Assignors' Enrollees listed in Exhibit Y were implanted with Defendants' Pelvic Mesh Products; or 2. to the extent that Defendants, for any reason, are unable to identify which Enrollees listed

in Exhibit Y were implanted with Defendants' Pelvic Mesh Products, direct Defendants to provide a list of all parties").¹³ Nowhere in the SAC do Appellees seek money damages. That is, because they cannot. It is well settled that a pure bill of discovery is not an action for money damages but rather it "... is an ***equitable remedy under state law which serves to obtain the disclosure of facts within the defendant's knowledge....***" *Carr*, 2010 WL 2220336, at *1 (citation omitted, emphasis added); *First Nat. Bank of Miami*, 171 So. at 510; *Publix Supermarkets, Inc.*, 696 So. 2d at 1370. A pure bill of discovery lies "to obtain disclosure of facts within *the defendant's* knowledge" or "*in [its] custody.*" *First Nat'l Bank*, 171 So. at 511. The purpose of a pure bill is "to identify potential defendants and theories of liability and to obtain information necessary for meeting a condition precedent to filing suit." *Vorbeck*, 107 So. 3d at 1145; *RAV Bahamas*, 333

¹³ See also, **App. 29-30, ¶104** (same); **App. 32, ¶120** ("This complaint only seeks to identify the proper defendant and the appropriate legal relief."); **App. 30-31, ¶110** ("The requested discovery is material and necessary to maintain Plaintiffs' claims in the prospective litigation because Plaintiffs need to identify the manufacturer of the Pelvic Mesh Product implanted in the Enrollees. The identity of the Enrollee will dictate the appropriate legal theory of relief"); **App. 30-31, ¶111** ("To identify Enrollees that were implanted with Defendants' Pelvic Mesh Products, the parties can engage a third-party to conduct a data matching process, comparing Defendants' data to that of Plaintiffs."); **App. 20, ¶101** ("Plaintiffs request identifying data from Defendants merely to confirm that the Enrollees identified by Defendants as Registered users are indeed the Enrollees named in Plaintiffs' Exhibit Y.")

So. 3d at 1161-62 (Fla. 3d DCA 2022) (citing *Trak Microwave Corp. v. Culley*, 728 So. 2d 1177, 1178 (Fla. 2d DCA 1998) and *Mendez v. Cochran*, 700 So. 2d, 46-47 (Fla. 4th DCA 1997)); *Payne*, 958 So. 2d at 1114.

For this same reason, federal courts have remanded similar pure bills of discovery involving the Appellees. See *Wright Med. Grp., Inc.*, No. 19-cv-22544-KMW, ECF No. 14 at 3 (“This Court agrees with the reasoning and holding in the numerous cases in this District that have found that subject-matter jurisdiction is lacking because the amount-in-controversy requirement is not satisfied where Plaintiffs’ sole claim is for a bill of discovery.”) **A. App. 030-033**; *Cook Inc.*, No. 18-cv-24309-KMW, ECF No. 36 at 3 (“This Court agrees with the reasoning and holding in the numerous cases in this District that have found that subject-matter jurisdiction is lacking because the amount-in-controversy requirement is not satisfied where Plaintiffs’ sole claim is for a bill of discovery.”) **A. App. 034-037**; *Eli Lilly & Co.*, No. 18-cv-24617-CMA, ECF No. 27 at 2 (granting remand based on, *inter alia*, lack of amount of controversy, “Plaintiffs only seek a pure bill of discovery, following which cognizable claims may or may not be pressed.”) **A. App. 001-003**; *Jazz Pharm., Inc.*, No. 18-cv-24622-CMA, ECF No. 25, at 2 (same) **A. App.007-009**; *Alere, Inc.*, No. 18-cv-24703-UU, ECF No. 30, at 3 (noting that “this is not an action for reimbursement claims, it is an action for a Pure Bill

of Discovery. Plaintiffs do not seek damages; they merely request that Defendants provide them with information ...”) **A. App. 025-029.**

Moreover, in similar pure bills medical device manufacturers, including one of the appellants here, have made the same arguments, i.e., that a pure bill is a claim for reimbursement under the MSP Act, in opposition to motions for remand. Those arguments were rejected. That is, the Appellees’ pure bills of discovery did not involve a claim under the MSP Act, which would warrant a federal court to exercise subject matter jurisdiction. As stated by Judge Altonaga:

Defendant asks the Court to “look to the claims alleged under the MSP Act” as a basis for federal question jurisdiction under 28 U.S.C. section 1331. Yet, Plaintiffs’ Complaint does not allege a claim under the MSP Act. Rather, the Complaint clearly illustrates that at the time of removal, Plaintiffs’ action was purely for a bill of discovery. Defendant’s admission that “the pure bill of discovery is being used as the first step in a civil action” is telling. That a pure bill of discovery may later be amended to actually state causes of action over which the Court has jurisdiction, such as a claim under the MSP Act, does not cure the absence of subject matter jurisdiction at the time of removal.

Eli Lilly & Co., No. 18-cv-24617-CMA, ECF No. 27 at 1-2 (cleaned up)

A. App. 001-003. See also *MSP Recovery Claims, Series LLC v. Coloplast Corp.*, No. 18-cv-24582, ECF No. 24 at 2 (S.D. Fla. Nov. 26, 2018) (same)

A. App. 004-006; *Jazz Pharm., Inc.*, No. 18-cv-24622-CMA, ECF No. 25 at 2 (same) **A. App. 007-009;** *Boston Sci. Corp.*, No. 18-cv-24546-UU, ECF

No. 31 at 3 (“as to federal question jurisdiction, the complaint does not allege a claim under the Medicare Single Payer Act or any other federal statute. And the Court cannot conclude that a federal claim is the only claim that Plaintiffs could eventually bring. To conclude otherwise requires the Court to speculate and draw inferences *against* remand, which is not permissible.”)(citation omitted) **A. App. 010-013**; *Am. Med. Sys., LLC*, No. 18-cv-24497-PCH, ECF No. 25 at 3 (remanding based, *inter alia*, on a lack of federal question where “Complaint does not allege a claim under the MSP Act or any other federal statute) **A. App. 014-017**; *MSP Recovery Claims, Series LLC v. C.R. Bard, Inc.*, No. 18-cv-24511-RNS, ECF No. 65 at 2-3 (S.D. Fla. May 16, 2019) (“The Defendant’s argument rests on the assumption that the state court must interpret the MSP Act’s private cause of action in order to grant discovery. Plaintiffs, however, have not yet asserted a federal cause of action. The state court will need to determine if the Plaintiffs are entitled to discovery based on the elements for a pure bill of discovery under state law, not their entitlement to recovery under the MSP Act. Therefore, Plaintiffs’ rights under the MSP Act are not yet raised or actually disputed under *Grable*.”) (cleaned up) **A. App. 018-020**; *Johnson & Johnson*, No. 18-cv-24695, ECF No. 26 **A. App. 021-024**; *Alere, Inc.*, No. 18-cv-24703-UU, ECF No. 30 at 3 (“the complaint does not allege a claim

under the Medicare Single Payer Act (the “MSP Act”) or any other federal statute. The Complaint seeks a pure bill of discovery, which is a state law procedural device.”) **A. App. 025-029.**

In a similar pure bill, J&J unsuccessfully argued in favor of removal based on the same argument presented here, i.e., that the pure bill involves a claim for reimbursement under the MSP Act. *MSP Recovery Claims, Series LLC v. Johnson & Johnson*, No. 18-cv-24695-KMW, ECF No. 22 at 4 (defendant arguing that “[t]he Court has subject-matter jurisdiction over plaintiffs’ bill of discovery action because a fundamental basis for plaintiffs’ bill of discovery is a claim under the federal MSP Act.”) **A. App. 021-024.** In rejecting J&J’s pleas Judge Williams noted:

“A pure bill of discovery is an equitable remedy under state law which serves to ‘obtain the disclosure of facts within the defendant’s knowledge, or deeds or writings or other things in his custody, in aid of the prosecution or defense of an action pending or about to be commenced in some other court.’” *Carr v. Bombardier Aerospace Corp.*, No. 10-MC-60917, 2010 WL 2220336, at *1 (S.D. Fla. June 3, 2010). Contrary to Defendants’ arguments, Plaintiffs’ pure bill of discovery does not raise a substantial federal question of law since the mere presence of a federal issue is not enough. Numerous courts in this district have rejected the exact same arguments Defendants advance here ...

Johnson & Johnson, No. 18-cv-24695-KMW, ECF No. 26 at 2-3 **A. App.**

022-023.

Moreover, the **action for money damages** comes in, if and when the Pure Bill is amended to state a substantive cause of action. “Florida courts treat bills of discovery **as the first step in a civil action**. *Spector*, 2018 WL 345925, at *2 (emphasis added); *C.R. Bard, Inc.*, 2019 WL 2254927, at *5 ; *Phila. Indem. Ins. Co.*, 2019 WL 13256834 ; *Empire Fin. Grp., Inc.*, 2009 WL 10644856, at *5; *Butzberger*, 2006 WL 8443453, at *2. That is, after receipt of the discovery Florida law permits amendment of a pure bill of discovery to state a cause of action at law. *Surface*, 625 So. 2d 109 (per curiam) (“trial court abused its discretion in denying the motion to amend.”); *Payne*, 958 So. 2d at 1114 (“A pure bill of discovery may also be amended to state a cause of action at law.”) (citations omitted). See also *C.R. Bard, Inc.*, 2019 WL 2254927 at *5; *Phila. Indem. Ins. Co.*, 2019 WL 1325683; *Spector*, 2018 WL 345925, at *2; *Empire Fin.* 2009 WL 10644856, at *5; *Butzberger*, 2006 WL 8443453, at *2; *APA-The Engineered Wood Ass’n*, 94 Wash.App. 556 (applying Florida law).

Second, if and when the equitable Pure Bill is converted to a substantive cause of action at law, a claim for reimbursement pursuant to the MSP Act **is not** the only avenue of recovery available to Appellees. After discovery in this Pure Bill is completed and depending on what it reveals, Appellees can amend to state a substantive cause of action for products

liability, subrogation, and state-based consumer protection claims or violation, *inter alia*. See *C.R. Bard, Inc.*, No. 18-cv-24511-RNS, ECF No. 45 at 14 (“[t]he facts of this case are noticeably distinguishable because it would be entirely speculative to conclude that the only relief available to Plaintiffs is a claim under the MSP Act. Plaintiffs could, for example, use the discovery sought to file a products liability claim or seek relief under a state consumer protection statute. This means that – while a pure bill of discovery may be later amended to state a federal claim – the complaint as it stands now does not cure the absence of subject matter jurisdiction at this time.”) **A. App. 038-055**; *Alere, Inc.*, No. 18-cv-24703-UU, ECF No. 30, at 3 (“The Court also cannot conclude that a federal claim is the only claim that Plaintiffs could eventually bring.”) **A. App. 025-029**; *Boston Sci. Corp.*, No. 18-cv-24546-UU, ECF No. 31 at 3 (“... the complaint does not allege a claim under the Medicare Single Payer Act or any other federal statute. And the Court cannot conclude that a federal claim is the only claim that Plaintiffs could eventually bring.”) **A. App. 010-013**.

ii. Coloplast is Not Dispositive of Whether Appellants Engaged in a Business or Business Venture in Florida Supporting Personal Jurisdiction Under Section 48.193(1)(a)(1) of Florida’s Long-Arm Statute

Contrary to Appellants’ assertions, *Coloplast* is not dispositive. *First*, this Court **did not** dispose of this issue on the merits. *Coloplast* did not apply the law to an existing set of facts.

Second, this Court **did not hold** that because the case involved a claim for reimbursement¹⁴ personal jurisdiction pursuant to §48.193(1)(a)(1) failed. Nevertheless, Appellants insist that this Court held §48.193(1)(a)(1) inapplicable due to the type of financial injury giving rise to plaintiffs’ claims. This is disingenuous and contrary to this Court’s ruling. The lower Court correctly rejected Appellants’ argument. This Court’s ruling regarding the economic injuries sought by the plaintiffs, was limited to §§48.193(1)(a)(6) and (1)(a)(2),¹⁵ causing an injury to person or property and committing a tortious act, provisions of Florida’s long-arm statute. Specifically, this Court held “. . . we find that MSP seeks economic damages that do not fall within

¹⁴ Appellees dispute that the cause of action in *Coloplast* was a reimbursement action. *Coloplast* involved the equitable relief of a pure bill of discovery which seeks the discovery of information, only, and not the recovery of economic damages.

¹⁵ Appellees do not concede that the claims at issue in *Coloplast* involved a claim for reimbursement.

section 48.193(1)(a)(6). The analysis for the torts provision of the long-arm statute is essential the same.” *Coloplast Corp.*, 353 So. 3d at 707 (internal citations omitted). This Court **did not apply** the same rational in its decision regarding §48.193(1)(a)(1), the business activity provision. If it wished to do so, it would have done so clearly and unequivocally as it did with §48.193(1)(a)(6) and §48.193(1)(a)(2) as noted above. This Court’s ruling regarding §48.193(1)(a)(1), stated: “[a]s to the business venture provision of the long-arm statute, MSP failed to provide facts to demonstrate personal jurisdiction on this ground in its second amended complaint. MSP also fails to mention this provision, much less provide evidence to support it, in its opposition to Coloplast’s motion to dismiss.” *Id.* at 708. (citation omitted).

Finally, this Court **did not hold** that personal jurisdiction pursuant to §48.193(1)(a)(1) failed due to lack of connexity, contrary to Appellants’ argument. **Bf, 20** (“... decision in *Coloplast* was that the MSP plaintiffs’ “claims lacked a substantive connection to Florida sufficient to trigger jurisdiction under subsection (a)(1).”). Again, Appellants attempt to re-write this Court’s opinion. Clearly, this Court’s ruling regarding the lack of substantive connection between the basis of the cause of action and the activity in the state was limited to the analysis of §§48.193(1)(a)(6) and (1)(a)(2), causing an injury to person or property and committing a tortious

act, respectively. Again, if this Court wished for this ruling to apply to §48.193(1)(a)(1), the business activity provision, it would have done so. However, as illustrated above, it did not. As such, the lower Court correctly found that the “Third DCA in Coloplast did not address the alleged lack of a substantive connection when it discussed the claim for personal jurisdiction under 48.193(a)(1).” **App. 1476, ¶11.**

iii. Appellants’ Reliance on Great American, Northland and Arbella are Also Misplaced

First, unlike the instant matter, *Great American, Northland and Arbella* **did not** involve a pure bill of discovery. *Great American, Northland and Arbella* involved substantive causes of action seeking reimbursement from primary plans i.e., insurance carriers, pursuant to the MSP Act, for conditional payments made by assignors. *MSP Recovery Claims, Series 44 LLC v. Great Am. Ins. Co.*, No. 1:20-CV-24094-CMA, ECF No. 60 at 9-10 (S.D. Fla. 2020) (“This is a class action lawsuit under the MSP Law, arising from Defendants’ systematic and Uniform failure to reimburse conditional payments made by Plaintiff’s assignors and the Class Members on behalf of Enrollees for accident-related medical expenses.”); *MSP Recovery Claims, Series LLC v. Northland Ins. Co.*, No. 20-CV-24176-KMW, ECF No. 95, at 14 (S.D. Fla. 2020) (same), *MSP Recovery Claims, Series LLC v. Arbella*

Mut. Ins. Co., No. 1:20-CV-24062-UU, ECF No. 8, at 10 (S.D. Fla. 2020) (same).

Moreover, in *Great American*, the crux of the District Court's decision was plaintiffs' failure to tie in the insurer's failure to reimburse to the defendants' activities in Florida. *MSP Recovery Claims, Series 44 LLC v. Great Am. Co.*, 2021 WL 8343191, at *4 (S.D. Fla. 2021) ("Moreover, a failure to reimburse plainly does not amount to "carrying on" business or issuing an insurance policy in Florida ..."). Additionally, in *Northland*, unlike the instant matter, the District Court noted that the exemplar claims do not demonstrate that the foreign defendants conduct business within this state as none of the exemplar claims alleged that any of the foreign defendants' actions took place in Florida. *MSP Recovery Claims, Series LLC v. Northland Ins. Co.*, No. 20-CV-24176-KMW, 2022 WL 2341158, at *4 (S.D. Fla. June 16, 2022), *report and recommendation adopted*, No. 20-CV-24176-WILLIAMS/MCALILEY, 2022 WL 3042265 (S.D. Fla. Aug. 1, 2022) ("Specifically, the exemplar claims include no facts that indicate that any of the Connecticut Defendants conducted business in Florida or insured persons or property in Florida.") (citations omitted). Lastly, in *Arbella*, unlike the instant matter, defendants submitted an affidavit in opposition attesting to:

(1)Arbella Insurance Group is a trade name, not a legal entity, and it is not registered to do business in any jurisdiction; (2) Arbella Insurance Group is not licensed to issue insurance policies in any jurisdiction and has never issued insurance policies of its own; (3) Arbella Mutual Insurance Company is domiciled and headquartered in Massachusetts; (4) Arbella Mutual Insurance Company is not licensed to issue, and does not issue, any insurance policy in the state of Florida; (5) Arbella Mutual Insurance Company does not maintain offices in Florida; (6) Arbella Mutual Insurance Company does not directly advertise to Florida insureds; and (7) Arbella Mutual Insurance does not have any Florida employees.

MSP Recovery Claims, Series LLC v. Arbella Mut. Ins. Co., 2021 WL

8343190, at *3 (S.D. Fla. 2021). The District Court then concluded, “[g]iven these facts, the Court finds that Defendants have sufficiently controverted Plaintiff’s allegation that Defendants “engaged in business within the state of Florida,” and the burden thus sifts back to the plaintiff to produce evidence supporting jurisdiction under §48.193(1)(a)(1).” *Id.*

Based on the facts and causes of action which are factually and substantively distinguishable from the instant action, it is inconceivable how Appellants argue that *Great American, Northland* and *Arbella* implicitly recognized that this Pure Bill does not arise out of Appellants’ business activity in Florida to wit, their sale of their Pelvic Mesh Products in Florida. In sum, the analysis here is limited to the cause of action currently pled and not one that might be pled in the future. For the purposes of this analysis, one cannot look ahead as to whether personal jurisdiction exists for a potential

cause of action that may or may not be asserted in the future, if the complaint is amended to assert a substantive cause of action. As it stands now, the allegations of the SAC clearly demonstrate that Appellants' business activities in Florida regarding their Pelvic Mesh Products is directly related to this Pure Bill.

III. The Lower Court Did Not Base Its Ruling on Appellants' Failure to Provide Opposing Affidavits, Nevertheless, Said Reliance Would Not Have Been Erroneous

As Appellants admit that the basis of the lower court's decision was not premised on the lack of Appellants' affidavit, this is a non-issue and not ripe for appeal. Nevertheless, had the lower court made such a determination, it would not have been erroneous. As delineated herein, Appellees allege sufficient unrefuted facts for a Florida court to exercise personal jurisdiction pursuant to §48.193(1)(a)(1) over Appellants. Appellees met their burden under *Venetian Salami* and its progeny. In light of the legally sufficient allegations regarding Appellants' business activities in Florida and those activities' connexity to the Pure Bill, the burden shifted to Appellants to set forth opposing affidavits and/or proffer evidence to overcome Appellees' prima facie showing of personal jurisdiction. See *Crownover v. Masda Corp.*, 983 So. 2d 709, 713 (Fla. 2d DCA 2008). However, Appellants failed to do so. In declining to do so, Appellants waived their right to challenge Appellees'

allegations. See, e.g., *Labbee v. Harrington*, 913 So. 2d 679, 681 (Fla. 3d DCA 2005).

Crownover, *Fishman* and *Wynn* are distinguishable. *Crownover* involved an action to collect against defendant, Ms. Crownover, pursuant to a defaulted guaranty agreement to pay plaintiff the obligations of Crown Heating & Colling, Inc. (“CHC”). The credit application and guaranty agreement attached to the complaint reflected that plaintiff had a New Jersey address, CHC was incorporated in New Jersey and had an address in New Jersey. The credit application reflected defendant’s address in New Jersey. The pertinent invoices also attached to the complaint indicate that the goods sold to CHC were delivered to CHC in New Jersey and the invoices directed CHC to remit payment to plaintiff at a P.O. Box in New Jersey. The alias summons was served on defendant’s husband by a New Jersey deputy sheriff at a New Jersey address. Based on the foregoing, the 2d DCA noted that the “complaint and its attachments did not demonstrate that CHC, Ms. Crownover, or the subject of the parties’ dispute had any connection to Florida.” *Crownover v. Masda Corp.*, 983 So. 2d 709, 711 (Fla. 2d DCA 2008). Unlike here, in *Crownover* there was absolutely **no** reference to Florida, nothing alleged or attached to the complaint implicated Florida, whatsoever and none of the defendants’ activities involved Florida, *inter alia*.

See *Id.*, at 713 (“Here, [plaintiff’s] complaint **did not contain any allegations** to demonstrate a basis for the circuit court’s exercise of personal jurisdiction over [defendant].”) (emphasis added). Therefore, the 2d DCA concluded that because the plaintiff “**completely failed** to establish a basis for the exercise of personal jurisdiction over [defendant], the circuit court erred ...” *Id.* (emphasis added).

Fishman involved a dissolution of marriage wherein the wife claimed an interest in three out of state corporations, which were named as defendants in an amended petition. The corporations did not have any involvement with Florida. The only claim by petitioner was that some of the corporations’ assets represent marital property of a Florida marriage; that marital funds and labor was used for the corporations and that the corporations increased in value during the marriage. The corporations’ motion to dismiss based on lack of personal jurisdiction was denied. Corporations appealed. Based on these scant and attenuated allegations noted above, the 4th DCA held that those claims were insufficient to bring a foreign corporation within the jurisdictional reach of a Florida court. *Fishman, Inc. v. Fishman*, 657 So. 2d 44, 46 (Fla. 4th DCA 1995). Contrast the foregoing, with the Appellants’, giants in the pharmaceutical industry, direct

involvement with Florida in the sale and distribution of their Pelvic Mesh Products.

Wynn involved a dispute to the proceeds of a life insurance policy. The insurer filed an interpleader action in Florida against two claimants. The only allegation involving Florida was that all parties were Florida residents. The claimant at issue in the appeal, was a resident of Tennessee, was served in Tennessee and had no ties to Florida. The claimant submitted an affidavit. Not surprisingly, the First DCA concluded that the insurer failed to plead any facts establishing the basis of long-arm jurisdiction over the claimant. *Wynn v. Aetna Life Ins. Co.*, 400 So. 2d 144, 146 (Fla. 1st DCA 1981).

Here, unlike *Crownover*, *Fishman* and *Wynn*, the SAC is replete with allegations regarding Appellants' business activities in Florida and their connection with the instant Pure Bill. If Appellants wished to dispute the well-pled allegations, they should have submitted opposing affidavits or the like. Most likely they did not because they cannot. Appellants admitted in their Answer to the SAC that Ethicon manufactured, marketed and sold the Pelvic Mesh Products and that it sells its products in the State of Florida. **App. 438-440; 474-477.**

IV. Dismissal with Prejudice is Not Warranted

Again, Appellants incorrectly premise their argument in favor of dismissal with prejudice on the misconception that “The jurisdictional flaws stem not from inartful pleading but from the fact that their assignors’ injuries are simply not the type for which out-of-state actions can be haled into Florida court.” **Bf, 26**. One assumes that Appellants’ argument here refers to their claim that this is a reimbursement action under the MSP Act and Appellants’ misconstruction of this Court’s *Coloplast* opinion. As stated herein, this is not an action for money damages much less one for reimbursement. And *Coloplast* did not hold that personal jurisdiction pursuant to §48.193(1)(a)(1) is impermissible due to the purported financial injury sought. Although Appellants attempt to couch their §48.193(1)(a)(1) challenge as a legal challenge, this argument is not based in good faith given that their basis stems from the *Coloplast* decision and *Coloplast* did not hold what Appellants claim it did, in this regard. Based on the *Coloplast* decision, the extent of Appellants’ challenge to personal jurisdiction based on the business activity provision can only be based on a factual challenge.

Again, this is a Pure Bill of discovery aimed to obtain information from Appellants directly related to their business activity in Florida i.e., their Pelvic Mesh Products which were distributed, sold and implanted in individuals in

Florida. Moreover, Appellants moved to dismiss, three times, never raising personal jurisdiction as grounds. In the event this Court perceives the SAC's allegations are insufficient, a point Appellees do not concede, Appellees are entitled to conduct limited jurisdictional discovery to further establish personal jurisdiction over Appellants in Florida. See *Gleneagle Ship Mgmt. Co. v. Leondakos*, 602 So. 2d 1282, 1284 (Fla. 1992) (“[adopting] the federal courts’ policy allowing discovery on questions of jurisdiction ...”). Appellees filed two separate requests for admissions, including requests relating to personal jurisdiction. **A. App. 114-120.** Appellants failed to timely answer and instead filed a Motion to Stay Discovery Pending Resolution of Forthcoming Motion for Judgment on the Pleadings. **A. App. 121-129.** Additionally, Appellees should be afforded the opportunity to amend to either track the statutory language of §48.193(1)(a)(1) or add additional supporting facts. See *Hilltopper*, 955 So. 2d at 601 (plaintiff may satisfy their initial burden of pleading a basis of jurisdiction by “tracking the language of section 48.193 without pleading supporting facts or by alleging specific facts that demonstrate that the defendant’s actions fit within one or more subsections ...”); *Belz Investco Ltd. P’ship v. Groupo Immobiliario Cababie, S.A.*, 721 So. 2d 787, 789 (Fla. 3d DCA 1998) (same). Either way amendment would not be futile, the privilege to amend has not been abused, and the Appellants

will not be prejudiced. See *If Six Were Nine, LLC v. Lincoln Road III, LLC*, 242 So. 3d 1187, 1188 (Fla. 3d DCA 2018) (citing *Vorbeck*, 107 So. 3d at 1147) (“Where a party may be able to allege additional facts to support its cause of action or to support another cause of action based on a different legal theory, dismissal with prejudice is an abuse of discretion.”); *Penn Cork & Closures, Inc. v. Piggyback Shippers Ass’n of Fla., Inc.*, 281 So. 2d 46, 47 (Fla. 3d DCA 1973) (“The test of finding that point wherein the moving party has abused his privilege to amend is not a mere counting up of the number of chances that he has already been given. The test must go more to the substance of the error and the possible prejudice that might result to the non-moving party.”). See also *Wackenhut Prot. Servs, Inc. v. Key Biscayne Commodore Club Condo. I, Inc.*, 350 So. 2d 1150, 1151 (Fla. 3d DCA 1977) (denial of leave to amend requires the demonstration of “substantial” prejudice to the defendant).

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that the Order under review should be **affirmed**.

Respectfully Submitted,

By: /s/ Aida M. Landa

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 17, 2023, a true and correct copy of the foregoing was filed and sent via electronic mail, to the parties identified in the Service List below.

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I HEREBY CERTIFY that the foregoing brief is in Arial 14 point font and complies with the font requirements of Florida Rule of Appellate Procedure 9.045 and word count requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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