

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

ROSS MACKILLOP,

Plaintiff,

vs.

Case No. 8:09-cv-1939-SDM-TBM

PARLIAMENT COACH CORPORATION,  
BLUE BIRD COMPANY, and  
BLUE BIRD CORPORATION,

Lower Court Case #08-10912 CI

Defendants.

---

**PLAINTIFF'S MOTION TO REMAND AND FOR AN AWARD OF FEES**

Plaintiff hereby moves for an order (a) remanding this action back to the circuit court for Pinellas County, Florida and (b) awarding attorneys' fees and costs pursuant to 28 U.S.C. § 1447(c).

**Introduction**

This case involves claims for breach of warranty and consumer fraud arising out of the sale of a defective RV manufactured by Blue Bird Body Company and its parent, Blue Bird Corporation, and sold at retail to Dr. Ross MacKillop, a semi-retired dentist, by Parliament Coach Corporation ("Parliament") in Clearwater, Florida. Dr. MacKillop's action has been pending in the Pinellas County circuit court for more than a year, since it was first filed in July 2008 (Doc. 1-4, at 12 of 49). All of Dr. MacKillop's claims seek relief under state law. (Doc. 2). Notwithstanding this fact, Blue Bird Body Company and Blue Bird Corporation ("Blue Bird") filed a notice of removal to this court just two

business days before a long-scheduled hearing (Doc. 1-17, at 46) on Dr. MacKillop's motion for partial summary judgment. (Doc. 1-17, 1-67). This was certainly not coincidental. Blue Bird removed this case for entirely strategic reasons and on the basis of the most dubious of grounds. The present motion, which seeks an immediate remand, raises three questions:

(1) Does Dr. MacKillop's claim for damages under Florida's Deceptive and Unfair Trade Practices Act (FDUTPA), as presently alleged in count three of his third amended complaint, raise a substantial question of federal law, as defendants maintain?

(2) If not, is there an alternative basis for removal on grounds of diversity of citizenship?

(3) If not, did Blue Bird's petition for removal lack an objectively reasonable basis for seeking removal, such that Dr. MacKillop should be awarded the attorneys' fees he has incurred in connection with this proceeding?

#### **Factual and Procedural Background**

Dr. MacKillop purchased a Blue Bird RV known as the Wanderlodge 450 LXI for more than \$600,000 from Parliament, taking delivery of this large bus-like coach in October 2007.<sup>1</sup> (Doc. 1-17, at 1-4). He almost immediately encountered mechanical and electrical difficulties with the RV, and spent much of his time in the next two months addressing these issues with Parliament's service department and with Blue Bird itself. (*Id.*,

---

<sup>1</sup> This statement of facts is from the motion for summary judgment since Blue Bird neglected to file Dr. MacKillop's supporting declaration with its removal record.

at 4-6). While he was still attempting to have these difficulties addressed under Blue Bird's warranty, Dr. MacKillop learned that Blue Bird had initiated a safety recall of all 58 of the 450 LXIs it had manufactured, including his, and that his particular unit had been manufactured to be more than 2000 pounds overweight on the front suspension system and that it had been equipped with defective tie rods. (*Id.*, 6-7). This recall led to Blue Bird taking possession of Dr. MacKillop's RV in Texas in March 2008. (*Id.*, at 6-9). The RV remains in Blue Bird's possession today, still overweight even in the wake of the recall, still unrepaired, and still unable to be driven without implementing radical proposals (like relocating the generator into less serviceable areas, closing off a front storage area, and limiting the capacity of the RV's cargo bays) that will still not bring the RV back to its original certified cargo carrying capacity. (*Id.*, at 6-13).

The Blue Bird parties were added to the case in January 2009 (Doc. 1-8) by Dr. MacKillop's second amended complaint (Doc. 1-7), which alleged counts for breach of implied warranty and revocation of acceptance (*Id.*, at 29-36), breach of express warranty (*Id.*, at 36-37), deceptive trade practices under FDUTPA (*Id.*, at 37-39), and violation of Chapter 320, Florida Statutes (*Id.*, 39-41). Notably Blue Bird did not contend that there were any grounds for removal as the result of the addition of the Blue Bird defendants to the action. (Doc. 1-15).

As discovery progressed, Dr. MacKillop's counsel took the deposition of Parliament's president, Steve Mitchell, (Doc. 1-18, at 2). Mr. Mitchell admitted that Blue

Bird's warranty on the MacKillop RV had been promoted by both Parliament and Blue Bird as an "exclusive" and "new" three year and five year *full* warranty, without disclosing that the warranty was in fact but a limited warranty, and one that purported to limit the availability of both consequential damages and implied warranties. (Doc. 1-18, at 2). At this point, Dr. MacKillop sought leave to amend the existing count 3, a FDUTPA claim, and to add a new count 5, for consumer fraud under FDUTPA (Doc. 1-18), the effect of the amendment being to add Blue Bird as a party to the new count 3 and to a new count 5. (*Id.*) The court granted the amendment, and Dr. MacKillop's third amended complaint became the operative pleading. (Doc. 2). This complaint, much like the prior complaints, asserts the following claims:

Count 1: Breach of implied warranty and revocation of acceptance under Florida's Uniform Commercial Code. (Doc. 2, at 2-8).

Count 2: Breach of express warranty, under the Uniform Commercial Code. (Doc. 2, at 8-10).

Count 3: Deceptive trade practices under FDUTPA. (Doc. 2, at 10-16).

Count 4: Violation of Chapter 320, Fla. Statutes. (Doc. 2, at 17-18).

Count 5: Consumer fraud under FDUTPA. (Doc. 2, at 18-25).

Blue Bird's removal petition was filed before any responsive pleading to the third amended complaint, on September 23, 2009 (Doc. 1), just prior to the hearing scheduled for September 29, 2009 (Doc. 1-17, at 46) on Dr. MacKillop's motion for partial summary

judgment on the express warranty claims. (Doc. 1-17).

In its notice of removal Blue Bird contends that the full warranty allegations of count 3 of Dr. MacKillop's third amended complaint "has as an essential element a substantial, disputed question of federal law." (Doc. 2, at 2). Alternatively, Blue Bird asserts that diversity of citizenship "would provide an independent basis" for subject matter jurisdiction. (Doc. 1, at 2-3).

### **Legal Argument**

Blue Bird "bears the burden of proving" that federal jurisdiction over this purely state-claim, garden-variety warranty suit exists, and that it existed at the time of removal. *Adventure Outdoors, Inc. v. Bloomberg*, 552 F.3d 1290, 1294 (11th Cir. 2008). If the court has any doubts about the "propriety of federal jurisdiction," moreover, those doubts "should be resolved in favor of remand to the state court." *Id.* If federal jurisdiction does exist in this case, the basis for it must be present on the face of the complaint, *Kemp v. International Business Machines Corp.*, 109 F.3d 708, 712 (11th Cir. 1997), for the plaintiff is always the master of his own claim. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). This requires that we consider the allegations of Dr. MacKillop's third amended complaint, principally to determine if the plaintiff's right to relief "necessarily depends on resolution of a substantial question of federal law." *Empire HealthChoice Assurance, Inc v. McVeigh*, 547 U.S. 677, 690 (2006).

**I. The Complaint Presents No Substantial Question of Federal Law**

Every claim alleged in Dr. MacKillop's complaint arises under state, not federal, law, and only a "special and small category" of such state law complaints could possibly raise the substantial question of federal law necessary to justify removal on federal question grounds. *Empire HealthChoice*, at 547 U.S. 699. As the courts in this circuit have emphasized, state law complaints are particularly unsuitable for removal where the disputed federal issue is "between private parties" and "will not be dispositive of all of plaintiffs' claims, which are 'fact-bound and situation-specific.'" *Certified Enterprises, LLC v. Dauphin Creek Apartments, LLC*, 2009 U.S. Dist. LEXIS 80306 at \*15 (S.D. Fla. June 24, 2009), quoting from *Empire HealthChoice*, at 547 U.S. 700-01. See also *Adventure Outdoors*, at 552 F.3d at 1299 (similarly viewing a fact-specific dispute between private parties that merely raised a contested federal issue as insufficient to support federal question removal); *Dunlap v. G&L Holding Group, Inc.*, 381 F.3d 1285, 1290 (11th Cir. 2004) (noting that the mere presence of a federal issue in a state cause of action will not ordinarily suffice for removal). This is such a case.

Blue Bird asserts that it was nevertheless justified in removing the present case on the strength of *Ayres v. GMC.*, 234 F.3d 514, 517-20 (11th Cir. 2000), which, it contends, justifies removal whenever even a single claim of a state law complaint "has as an essential element a substantial, disputed question of federal law." (Doc. 1, at 2). But this is not what *Ayres* holds, as the court noted in *Adventure Outdoors*, at 552 F.3d at 1303. More

importantly, this is an argument that the Supreme Court has repeatedly rejected, most recently in *Empire HealthChoice*, at 547 U.S. 700-701. In *Empire HealthChoice*, the Court was careful to note, in distinguishing its holding from that of *Grable & Sons Metal Products, Inc v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), that removal in state cases which raise federal issues between nondiverse parties is seldom justified – particularly where permitting removal would disturb a “congressionally approved balance of federal and state judicial responsibilities.” *Grable*, at 545 U.S. 314. As the Supreme Court remarked in *Empire HealthChoice*: “In sum, *Grable* emphasized that it takes more than a federal element ‘to open the ‘arising under’ door’ . . . This case cannot be squeezed into the slim category *Grable* exemplifies.” *Id.*, at 547 U.S. 701. But if most cases involving a federal element to a state claim do not qualify for removal, how can Dr. MacKillop’s latest complaint, which merely refers to federal law as a standard of conduct for a consumer claim, be made to fit into the “slim category” of cases eligible for removal on federal question grounds? This is the central issue which Blue Bird has attempted to bypass.

Count 3 of Dr. MacKillop’s complaint alleges that Blue Bird and Parliament committed a number of violations of FDUTPA in connection with the warranty that Blue Bird was offering on the 450 LXI RV which Dr. MacKillop purchased. These violations include false representations about the nature of Blue Bird’s warranty. What this claim clearly does not do, however, is to state a cause of action under the Magnuson-Moss

Warranty Act (“MMWA”), 15 U.S.C. §§ 2301 *et seq.* At most, count 3 frames a claim of deceptive trade practices under FDUTPA against the backdrop of the MMWA and in light of the MMWA’s warranty standards. Blue Bird essentially acknowledges this point, for it sums up Dr. MacKillop’s complaint this way: “Plaintiff alleges that . . . Defendants represented that they were providing a ‘full warranty’ as that term is defined by the Magnuson-Moss Warranty Act. . . . when the warranty provided did not meet the requirements for a ‘full warranty’. . . . *Therefore*, Plaintiff’s Third Amended Complaint asserts a theory of recovery that has as an essential element a substantial, disputed question of federal law.” (Doc. 1, a 2) (emphasis added). This is an admission of just how flimsy Blue Bird’s argument is: Blue Bird isolates a single reliance in count 3 of Dr. MacKillop’s latests complaint upon the definition of an industry warranty term, defined by the MMWA, and attempts to magically transmute this ordinary FDUTPA dispute into a *substantial* federal question, ignoring in the process not only the rest of the allegations of the complaint but also controlling Supreme Court and Eleventh Circuit precedent contrary to this mode of analysis. This argument is without merit.

Consider, first, FDUPTA’s relationship to the MMWA. The FDUPTA statute was expressly intended to “make state consumer protection and enforcement consistent with established policies of federal law relating to consumer protection.” Fla. Stat. § 501.202(3). These policies doubtless include those of the MMWA, such as the Federal Trade Commission’s Magnuson-Moss Warranty Rules codified at 16 CFR §§ 700.3, 702.3 and

700.6, among others. Such regulations are expressly entitled to “great weight” in determining whether a warrantor has engaged in an unfair or deceptive trade practice in violation of Florida law. Fla. Stat. § 501.204(2). Section 700.3, of these FTC rules, broadly defines the term “written warranty” to include any “written affirmation of fact or a written promise that the product is defect free, or by a written undertaking of remedial action.” Section 702.3 sets forth pre-sale requirements for the disclosure of written warranties to consumers. And section 700.6 draws a clear distinction between a “limited warranty” and a “full warranty,” as does the MMWA itself. A warrantor who violates these regulations may be found liable under FDUTPA whether or not the consumer has alleged an independent claim under the MMWA. Fla. Stat. § 501.204(2). Indeed, this is true even if no cause of action would be available under the MMWA itself.

If the manufacturer, as Blue Bird did in this case, has issued only a “limited” warranty, as opposed to a “full” warranty, as those terms are defined in the MMWA, the manufacturer may not necessarily be liable under the substantive damage provisions of the MMWA, for “a ‘limited warranty’ is not subject to § 2304 or the Magnuson-Moss Act’s substantive remedies.” *McKissic v. Country Coach, Inc.*, 2008 U.S. Dist. LEXIS 104147 at \* 17 (M.D. Fla. July 16, 2008). Yet the manufacturer, or its dealer, or both, may still be liable for deceiving the consumer into believing that the warranty was in fact “full” when it was not, or for violating the pre-sale disclosure rules of the FTC, or for similar acts of consumer deception. This type of deception is common ground for FDUTPA claims, and

the state court, rather than the federal court, is the proper forum for addressing such questions, as every reported decision to visit this issue appears to have decided. *Frischkorn v. Lake County Chrysler, Inc.*, 2006 U.S. Dist. LEXIS 74541 at \* 6 (N.D. Ohio Oct. 13, 2006) (consumer claim relying upon a Magnuson-Moss consumer regulation as a standard of conduct for deception does not create a substantial federal question); *Hinton v. Landmark Dodge, Inc.*, 2006 U.S. Dist. LEXIS 10453 at \* 4-5 (W.D. Mo. Feb.23, 2006) (same); *Greene v. GMC*, 261 F. Supp. 2d 414, 418 (W.D. N.C. 2003) (same). Dr. MacKillop's FDUTPA claim in count 3 is clearly of this character and cannot be meaningfully distinguished from these cases.

The first substantive contention made in count 3 is that Parliament used Blue Bird's literature to promote the 450 LXI to consumers, including "Coach Specifications" (Exhibit D to Third Amended Complaint, Doc. 2) touting Blue Bird's "exclusive new 5-year/3-year warranty." (Doc. 2, ¶¶ 31-35). Note that this literature describes the "exclusive" warranty only as a "warranty," not a "limited warranty." Next, count 3 alleges that Parliament's own president represented to Dr. MacKillop that the 450 LXI came with a full warranty (*Id.*, ¶ 39). These allegations, the complaint continues, were either made because Parliament believed them to be true, based on Blue Bird's own representations to it, or because they were made with intent to deceive (*Id.*, ¶¶ 40-41). In any event, Dr. MacKillop reasonably believed that he would receive a "full" warranty on the 450 LXI, based on what he was told (*Id.*, ¶¶ 43-45), as the term "full warranty" is defined by the MMWA (*Id.*, ¶¶ 46-48). In

truth, the Blue Bird warranty turned out to be only a “limited warranty” (*Id.*, ¶¶ 48-55) and one that at least purported to prevent the buyer from electing a refund even if all efforts to repair defects failed. (*Id.*, ¶54b). Because the real Blue Bird warranty was not a “full” warranty, the complaint continues, the defendants “engaged in an unfair and deceptive practice by leading Plaintiff MacKillop to believe that it was a full warranty.” (*Id.*, ¶ 55). Moreover, in misrepresenting the warranty coverage, the defendants also violated a separate consumer statute, Fla. Stat. § 501.976 (*Id.*, ¶ 58).

Next, count 3 asserts that Blue Bird and Parliament had not conspicuously disclosed in writing at or before the consummation of the sale the actual “limited” warranty that Dr. MacKillop would receive should he buy the 450 LXI, a violation of Fla. Stat. § 501.976(8) (*Id.*, ¶¶ 57-58) – a provision having no necessary connection to the MMWA.

The complaint then turns to a number of other violations of FDUTPA, including attempting to enforce a disclaimer of warranty forbidden by Fla. Stat. § 320.839 (Doc. 2, ¶ 59a), and using a boilerplate form that was not conspicuous, in violation of § 501.976(6) and (8), Fla. Stat. (*Id.*, ¶59c). These are also statutes having no connection to the MMWA. Count 3 then concludes with the usual assertions of standing and damages (*Id.*, ¶¶ 60-65).

As this recital shows, nothing in count 3 purports to state a claim under the MMWA itself and many of its allegations have nothing at all to do with the MMWA. A remedy under the MMWA might have been available, at least in theory, to Dr. MacKillop under 15 U.S.C. § 2310(d), assuming that the requisite amount in controversy exists and subject

to the limitations of subsection (f) and further subject to the confining, some would say unduly limiting, warranty interpretations of cases applying the MMWA. That Dr. MacKillop explicitly eschewed the federal forum by not suing under the MMWA is the first of many factors in this case militating against removal. It remains important under the removal case law that the plaintiff has not alleged, and has no interest in alleging, a federal claim. *Ekas v. Burris*, 2007 U.S. LEXIS 84340 at \*9-12 (S.D. Fla. Nov.14, 2007). The closest Dr. MacKillop comes to alleging anything to do with the MMWA is to refer to the provisions *defining* the term “full” warranty. But this is to be expected, for the MMWA, and the FTC’s implementing regulations, did establish the relevant *standard of care* for car dealers and other consumer warrantors who make disclosures about warranties. To say that you offer a “full warranty” is to use a term of disclosure that everyone in the business of selling to consumers ought to understand, in view of the MMWA and its implementing regulations. The same is true for the term “limited warranty.” The MMWA was intended to make the standards of consumer disclosure for such terms uniform, and clear. *See, e.g.*, 15 U.S.C. § 2304 (setting federal minimum standards for warranties on consumer products). In this respect the MMWA merely “provides a floor for acceptable terms in consumer warranties and leaves to the states the ability to impose requirements that provide greater protection to consumers.” A. Overby, *Our New Commercial Law Federalism*, 76 Temp. L. Rev. 297, 319 (Summer, 2003).

This is precisely why the Florida legislature employs the standards of the MMWA

in regulating consumer practices. Section 501.976, Fla. Stat., thus provides, in relevant part:

It is an unfair or deceptive act or practice, actionable under the Florida Deceptive and Unfair Trade Practices Act, for a dealer to:

. . .

(6) Sell a vehicle without fully and conspicuously disclosing in writing at or before the consummation of sale any warranty or guarantee terms, obligations, or conditions that the dealer or manufacturer has given to the buyer. . . If the dealer intends to disclaim or limit any expressed or implied warranty, the disclaimer must be in writing in a conspicuous manner and in lay terms in accordance with chapter 672 and the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act.

(7) Provide an express or implied warranty and fail to honor such warranty unless properly disclaimed pursuant to subsection (6).

(8) Misrepresent warranty coverage, application period, or any warranty transfer cost or conditions to a customer.

These provisions are intended to be understood against the background of disclosure required by the MMWA and the FTC's implementing regulations. But they are certainly not intended to make every warranty dispute under the state law the litigation of a federal question, nor could they do so. The warranty-related allegations of count three of Dr. MacKillop's claim, like these statutory provisions, refer to the MMWA only for the necessary factual background, the standard against which Parliament and every other vehicle dealer must be viewed. A state complaint that refers to a federal act only as the necessary standard of care for evaluating a claim of state consumer fraud, does not, as a matter of law, frame a substantial federal question. This Court should join those courts which have so held.

In *Green* for example, a consumer plaintiff's claim against a car dealer and a manufacturer was held non-removable because the plaintiff's allegations of the breach of the MMWA's warranty standards were only aimed at showing "further evidence that they committed unfair and deceptive trade practices." *Green*, at 261 F. Supp. 2d 418. As the court noted, "federal question jurisdiction does *not* arise when a state court plaintiff alleges that a federal statute provides a standard of care or conduct, or otherwise refers to federal authority as evidence that a defendant violated state law." *Id.*

Similarly in *Hinton*, 2006 U.S. Dist. LEXIS 10453, at \* 4 the claim against the car dealer, made in state court, was that the dealer had failed to provide the complaining consumer with the information reciting the nature of the available warranties on the vehicle required by the MMWA and the FTC's implementing regulations. The court concluded that the "mere reference to a federal statute in Plaintiff's complaint as a 'standard of care or conduct' is not a sufficient basis to exercise federal jurisdiction over the claims." *Id.* As the court further observed:

Plaintiff's complaint is firmly rooted in state law in that it alleges common law fraud, violations of the Missouri Merchandising Practices Act, and breach of express and implied warranties. Put another way, Plaintiff's state law claims do not raise a federal issue, actually disputed and substantial, which may be entertained by this Court without disturbing the congressionally approved balance of federal and state judicial responsibility. *Hinton*, at \* 4.

To the same effect is *Frischkorn*, 2006 U.S. LEXIS 74541, at \* 5, another case in which the MMWA and implementing regulations formed the background for a state law

consumer complaint under the Ohio Consumer Sales Practices Act. Again the court concluded that a complaint's "fleeting reference" to the MMWA to support the necessary standard of care by an automobile dealer "does not create a federal question." *Id.*

What all of these cases recognize is that viewing these purely state law consumer disputes, in which the MMWA serves as background context, as raising a substantial federal claim, would not only federalize much of consumer law, but would improvidently ignore "congressional judgment about the sound division of labor between state and federal courts." *Grable*, at 545 US 313-14. Congress clearly did not intend, in enacting MMWA, to so federalize warranty disputes. This is the only conclusion one can draw from Congress's decision to limit claimants to the state courts even on claims *expressly* asserting causes of action under MMWA, except where a jurisdictional or other threshold is met. *See, e.g., Smith v. Vanguard Dealer Services, LLC*, 2009 U.S. Dist. LEXIS 598333 at \* 7 (D. N.J. July 14, 2009) (noting that the statutory restrictions on the size of class actions under MMWA was intended to "avoid trivial or minor actions brought as class actions in the federal district courts.") The MMWA has a " 'far more limited mission' than to become the 'dominant regulator of consumer product warranties.' " *Richardson v. Palm Harbor Homes, Inc.*, 254 F.3d 1321, 1325 (11th Cir. 2001), quoting from *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1013 (D.C. Cir. 1986). What Blue Bird is advocating is just the opposite view – one that would inevitably "open the doors of the federal courts in this circuit," *Adventure Outdoors*, at 552 F.3d 1302, to every consumer claim alleging that a car dealer

failed to abide by MMWA's standards for warranty disclosure. If Dr. MacKillop's reliance on MMWA for the "full" warranty distinction is enough to make this case one in which there is a *substantial* federal question to be decided, why is not every warranty dispute involving the deception of consumers over the terms of an offered "full" warranty necessarily likewise a federal question?

It is no answer to this question to say that it was resolved by the eleventh circuit in *Ayres*, on which Blue Bird exclusively relies. *Ayres* presented the question of whether a violation of the disclosure duty under the Safety Act could constitute an act of wire or mail fraud under Georgia's RICO law. *Ayres*, 234 F.3d at 516. The court concluded that this question qualified as one that raised a substantial question of federal law, even though it expressly declined to hold that "every state RICO cause of action which depends upon proving, as necessary predicate acts, a violation of the federal mail and wire fraud statutes establishes federal question jurisdiction." *Id.*, at 519. As that court later noted in *Adventure Outdoors*, *Ayres* was not only decided before the Supreme Court's narrowing holdings in *Grable* and *Empire HealthChoice*, it also presented unique questions over the interaction of two federal "bodies of law." *Id.*, at 1302. This case, in contrast, presents no such "need to construe independent bodies of federal law." *Id.* Dr. MacKillop merely relies upon the clear and unremarkable definition of what a "full" warranty is, something every vehicle dealer must know, in order to make out part, but not all, of a consumer deception claim. This is about as far from the weighty federal issues in *Ayres* as one could imagine.

Dr. MacKillop's warranty allegations, moreover, easily fit the category of cases that were deemed unworthy of removal in *Empire HealthChoice*. First, count 3 does not raise a significant "pure issue of law" that can be "settled once and for all." *Empire HealthChoice*, at 547 U.S. 700. It merely relies upon an already settled *definition* of a term – full warranty – that needs no further clarification. *Adventure Outdoors*, at 552 F.3d 1299. There is simply no controversy over the construction or effect of this definition that could justify removal. *Grable*, 545 U.S. at 313. Second, Dr. MacKillop's allegations regarding the full warranty and limited warranty distinction are entirely "fact-bound and situation specific." *Id.*, at 701. Count 3 relates not to what Congress intended in enacting the MMWA, but what Parliament and Blue Bird represented to Dr. MacKillop and under what circumstances. Count 3 thus presents commonplace questions of fact that are appropriate for a state court jury to resolve. A complaint that presents only a "fact-specific application of rules that come from both federal and state law rather than a context-free inquiry into the meaning of a federal law," does not present a federal issue that must be resolved in federal court. *Adventure Outdoors*, at 552 F.3d 1299 (internal quotations omitted). *See also Empire HealthChoice*, at 547 U.S. 700; *Grable*, at 545 U.S. at 315. Finally, Dr. MacKillop's count 3 presents some theories having *no* necessary connection to federal law at all, such as the failure of Parliament to fully and conspicuously disclose in writing at or before consummation of the sale the actual limited warranty, as required by Fla. Stat. § 501.976(6). Where is the "federal issue, actually disputed and substantial,"

*Grable*, at 545 U.S. 314, in this independent basis for liability? Where the liability of the defendant exists “independently of federal law,” *Adventure Outdoors*, at 552 F.3d 1297, as in this case, removal on federal question grounds cannot be justified. *E.g.*, *Ekas*, at 2007 U.S. Dist. LEXIS \*20 (because “delving into federal law is unnecessary based on the allegations of this Complaint, this case is certainly not ‘one of those exceptional cases’ for which the Court should confer federal jurisdiction.”).

The problem Blue Bird has created by its removal notice is thus clear: there are no substantial federal issues in Dr. MacKillop’s complaint. To say nevertheless that Dr. MacKillop’s latest complaint fits into the “slim category” of state law cases that “open the ‘arising under’ door” to the federal courts, *Empire HealthChoice*, at 547 U.S. 701, as Blue Bird apparently does, is to say something absurd.

## **II. There is No Basis for Claiming Diversity Jurisdiction In this Case**

Aware of the weakness of its federal question contention, Blue Bird also asserts that “diversity of citizenship would provide an independent basis for this Court’s subject matter jurisdiction in this case.” (Doc. 1, at 3). This contention is indefensible. As Blue Bird admits, Parliament is a Florida corporation, maintaining its principal place of business in Clearwater, Florida. (*Id.*). And 28 U.S.C. § 1441(b) prohibits removal of an action premised on diversity grounds where any “of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.” Parliament is just such a “properly joined and served” defendant, and its presence in this case prevents the

complete diversity long required for removal. *Pullman Co. v. Jenkins*, 305 U.S. 534, 540-41 (1939); *Florence v. Crescent Resources, LLC*, 484 F.3d 1293, 1297 (11th Cir. 2007) (“a court must remand the matter back to state court if any of the properly joined parties in interest are citizens of the state in which the suit was filed.”). Nor have any grounds for an exception to this requirement, such as fraudulent joinder, been pleaded in the notice of removal. As a matter of law, diversity removal does not exist in this case, and Blue Bird must have known this when it filed its notice of removal.

### **III. There Was No Objectively Reasonable Basis for Removal**

Under 28 U.S.C. § 1447(c) this Court may, in its discretion, award attorneys’ fees to the plaintiff where a defendant has removed a pending state court action without having an objectively reasonable basis for removal. *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 136 (2005). This is surely such a case. We have already seen that the diversity grounds advanced by Blue Bird are, as a matter of law, objectively unsupportable. Any student of civil procedure hoping for a passing mark would instantly appreciate that there were no diversity grounds for removal of Dr. MacKillop’s complaint. What, then, about the contention that removal is justified on federal question grounds? Here again the answer is obvious: no reported cases support removal and all of the reported cases involving FDUPTA-like consumer claims rejected removal. In addition, all of the Supreme Court and Eleventh Circuit cases make it clear that removal of state law claims that incidentally involve federal issues are seldom removable unless they present discrete questions of

federal law that are substantial and important – questions that a “federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.” *Adventure Outdoors*, 552 F.3d at 1295, quoting from *Grable* at 545 U.S. 314. No objective reviewer of count 3 of Dr. MacKillop’s complaint could find buried within its allegations such a substantial federal question, let alone one that involved a “nearly pure issue of law,” *Empire HealthChoice*, at 547 US 700, a “crucial factor” to removal. *Adventure Outdoors*, at 552 F.3d 1299.

Nor could Blue Bird’s purported reliance on *Ayres* supply the necessary objectively reasonable basis for removal. As noted already, *Ayres* is factually far different from this case, and it involved far more weighty and “pure” questions of federal law. Dr. MacKillop’s complaint presents state claims that, at most, depend on the background of federal law for the standards of disclosure to which Parliament and Blue Bird are subject. No one reading *Ayres* alone, to say nothing of the more recent authority in the Supreme Court and in the Eleventh Circuit that Blue Bird elected not to cite, would discern an objectively reasonable basis for removal.

The availability of sanctions under section 1447(c) for improvident removal was the result of “ ‘balancing the desire to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, while not undermining Congress’ basic decision to afford defendants a right to remove as a general matter when the statutory criteria are satisfied.’ ” *Bauknight v. Monroe County*, 446 F.3d 1327, 1329 (11th Cir. 2006),

quoting from *Martin*, at 546 U.S. 140. Congress' objective would be ill-served, however, if every unjustified removal, no matter how calculated to oppress and vex an opponent, were allowed to escape the sanctions Congress provided. And what is apparent on this record is that Dr. MacKillop's claims arise entirely under state law and present no substantial questions of federal law. Blue Bird doubtless knew this. Blue Bird filed its removal notice not to litigate a genuine issue of federal law, still less to litigate a genuinely diverse claim, but to delay the hearing of Dr. MacKillop's summary judgment motion. This sort of asymmetric economic warfare by well-heeled parties against a single consumer hoping for a just and speedy resolution of a legitimate claim is precisely what Congress intended to deter by an award under Section 1447(c). An award of attorneys' fees is appropriate in this case.

#### **Conclusion**

The Court should order a remand on as expedited a basis as possible. An award of attorneys' fees should be entered against the Blue Bird defendants.

#### **Local Rule Certification**

The undersigned certifies, pursuant to Middle District Rule 3.01, that he has conferred with Blue Bird's counsel in an effort to resolve this disputed issue by agreement but was unsuccessful in doing so.

DATED this 29th day of September, 2009.

**s/ Stephen D. Milbrath**

Stephen D. Milbrath

Florida Bar No. 239194

[smilbrath@addmg.com](mailto:smilbrath@addmg.com)

**Allen, Dyer, Doppelt, Milbrath  
& Gilchrist, P.A.**

255 South Orange Avenue, Suite 1401

Post Office Box 3791

Orlando, FL 32802-3791

Telephone: 407-841-2330

Facsimile: 407-841-2343

Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on September 29, 2009, I presented the foregoing to the Clerk of the Court for uploading to the Case Management/Electronic Case Files ("CM/ECF") System, which will send a Notice of Electronic Filing to:

Christopher S. Branton, Esq.

[cbranton@hwlaw.com](mailto:cbranton@hwlaw.com)

Rocco Cafaro, Esq.

[rcafaro@hwlaw.com](mailto:rcafaro@hwlaw.com)

Hill Ward Henderson

3700 Bank of America Plaza

101 East Kennedy Boulevard

Tampa, FL 33602

**s/ Stephen D. Milbrath**

Stephen D. Milbrath