

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

In re: STRYKER REJUVENATE AND  
ABG II HIP IMPLANT PRODUCTS  
LIABILITY LITIGATION

MDL No. 13-2441 (DWF/FLN)

This Document Relates to

Mary E. Boario and Anthony Boario,

Plaintiffs,

v. Civil No. 13-3420 (DWF/FLN)

Howmedica Osteonics Corp. d/b/a Stryker  
Orthopaedics; Stryker Corp.; Stryker Sales  
Corporation; Styker Ireland Limited; New  
York Society for the Relief of the Ruptured  
and Crippled, Maintaining the Hospital for  
Special Surgery d/b/a Hospital for Special  
Surgery; and Belaire Condominium, Inc.,

Defendants.

**ORDER ON MOTION TO DISMISS  
AND MOTION FOR LEAVE TO FILE  
SECOND AMENDED COMPLAINT**

Plaintiffs Mary E. Boario (“Boario”) and her husband Anthony Boario (collectively, “Plaintiffs”) filed this lawsuit in connection with Boario’s allegedly defective artificial hip. After Boario experienced pain in the area of her artificial hip, Boario’s surgeon recommended revision surgery. Thereafter, on December 11, 2013, Plaintiffs filed their Complaint against Defendant Howmedica Osteonics Corp. d/b/a Stryker Orthopaedics (“Howmedica”), the entity that developed the allegedly defective artificial hip. (Civ. No. 13-3420, Doc. No. 1.)

On January 28, 2014, Boario, an Alaska resident, underwent the recommended revision surgery at the Hospital for Special Surgery in New York. After the procedure, Boario remained in New York to recover. On approximately March 11, 2014, while staying at the Belaire Guest Facilities, Boario’s walker became entangled with a misaligned bed frame, causing Boario to fall and sustain physical injury.

On June 18, 2015, Plaintiffs moved for leave to amend the Complaint to add allegations related to Boario’s fall. (Civ. No. 13-3420, Doc. No. 33.) Among other things, Plaintiffs sought to add Belaire Condominium, Inc. (“Belaire”)—the alleged owner or operator of the Belaire Guest Facilities—as a defendant in the case. (*Id.*; *see also* Civ. No. 13-3420, Doc. No. 41.) Defendant Howmedica filed a notice of non-response to Plaintiffs’ motion. (Civ. No. 13-3420, Doc. No. 39.) On October 29, 2015, the Court granted Plaintiff’s motion. (Civ. No. 13-3420, Doc. No. 40.)

Presently, two motions are before the Court: Plaintiffs’ Motion to Dismiss (Civ. No. 13-3420, Doc. No. 48) and Plaintiff’s Motion for Leave to File Second Amended Complaint (Civ. No. 13-3420, Doc. No. 59). As explained below, the Court grants both motions.

## **I. Motion to Dismiss**

On July 5, 2016, Plaintiffs moved under Federal Rule of Civil Procedure 41(a)(2) for voluntary dismissal of their claims against Belaire. Rule 41(a)(2) provides that a court may dismiss an action at the plaintiff’s request “on terms that the court considers proper.” Fed. R. Civ. P. 41(a)(2). Unless the court “states otherwise, a dismissal under [Rule 41(a)(2)] is without prejudice.” *Id.* In deciding a motion under Rule 41(a)(2), “the

district court should consider . . . whether the party has presented a proper explanation for its desire to dismiss; whether a dismissal would result in a waste of judicial time and effort; and whether a dismissal will prejudice the defendants.” *Mullen v. Heinkel Filtering Sys., Inc.*, 770 F.3d 724, 728 (8th Cir. 2014) (internal quotation marks and citation omitted). Neither the “expense and effort of drafting and responding to discovery prior to dismissal” nor the possibility of defending another action constitutes legal prejudice. *Id.*

Plaintiffs argue that the Court should dismiss their claims against Belaire *without prejudice*. According to Plaintiffs, documents and testimony produced in discovery “appear to indicate” that Belaire does not own or operate the Belaire Guest Facilities. As such, Plaintiffs presently lack a good-faith basis for alleging that Belaire is responsible for Boario’s fall and resulting injury. Still, in Plaintiffs’ view, the Court should dismiss the claims without prejudice because further discovery may reveal that Belaire bears some other responsibility for Boario’s injury—as an employer, for example—even if Belaire does not own or operate the property where Boario fell.

Belaire opposes Plaintiffs’ motion and argues that the Court should dismiss Plaintiffs’ claims against Belaire *with prejudice*. In particular, Belaire asserts that Plaintiffs’ claims against it are baseless because Belaire has established (and Plaintiff concedes) that Belaire does not own or operate the Belaire Guest Facilities. Further, according to Belaire, Plaintiffs failed to properly investigate the correct defendants at the outset, and this failure has forced Belaire to spend time and resources defending Plaintiffs’ meritless claims against it.

While the Court is sympathetic to Belaire's position, it finds that dismissal without prejudice is appropriate. Plaintiffs and Belaire agree that Belaire should be dismissed from the lawsuit at this time, as Plaintiffs no longer allege that Belaire owns or operates the Belaire Guest Facilities. Further, because the case is in the early stages of litigation, voluntary dismissal of Plaintiffs' claims against Belaire will not result in a waste of judicial time and effort. Finally, while Plaintiffs' claims have forced Belaire to hire counsel and expend resources, the Court cannot conclude that voluntary dismissal will prejudice Belaire or other Defendants. In these circumstances, the Court grants Plaintiffs' motion to dismiss without prejudice Plaintiffs' claims against Belaire. At the same time, in light of the suggestion that Plaintiffs sued Belaire without a sufficient basis to do so, the Court reserves the right to impose sanctions, including attorney fees and costs, if appropriate, at a later date.

## **II. Motion for Leave to File Second Amended Complaint**

On July 27, 2016, Plaintiffs moved for leave to file a second amended complaint to add a new defendant. Under Federal Rule of Civil Procedure 15(a)(2), a party may amend its pleading with the court's leave, which "[t]he court should freely give . . . when justice so requires." Fed. R. Civ. P. 15(a)(2). Despite Rule 15(a)(2)'s policy of liberal allowance of amendment, "[a] motion to amend should be denied if the plaintiff is guilty of undue delay, bad faith, dilatory motive, or if permission to amend would unduly prejudice the opposing party." *Kozlov v. Assoc. Wholesale Grocers, Inc.*, 818 F.3d 380, 395 (8th Cir. 2016) (internal quotation marks and citation omitted).

Plaintiffs claim that discovery has revealed that HSS Properties Corporation (“HSS Properties”) may be the owners or operators of the Belaire Guest Facilities. As such, Plaintiffs seek to add HSS Properties as a defendant. No Defendant has filed a response in opposition to this motion, the Court sees no evidence of bad faith, and the risk of undue prejudice appears to be minimal. Accordingly, the Court gives Plaintiffs leave to file a second amended complaint.

### **ORDER**

Based on the files, records, and proceedings herein, and for the reasons stated above, **IT IS HEREBY ORDERED** that:

1. Plaintiffs’ Motion to Dismiss (Civ. No. 13-3420, Doc. No. [48]) is **GRANTED**. Plaintiffs’ claims against Defendant Belaire Condominium, Inc. are **DISMISSED WITHOUT PREJUDICE**.
2. Plaintiffs’ Motion for Leave to File Second Amended Complaint (Civ. No. 13-3420, Doc. No. [59]) is **GRANTED**. The Court gives Plaintiffs leave to file a second amended complaint naming HSS Properties Corporation as a defendant.

Dated: January 6, 2017

s/Donovan W. Frank  
DONOVAN W. FRANK  
United States District Judge