

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MARY BANKS AND BETTY COLSTON,

Plaintiffs

vs.

DEPUY ORTHOPAEDICS, INC., KELLY
ORTHOPAEDIC SALES, LP, AND KOS
MANAGEMENT COMPANY, LLC

Defendants

C.A. No. 3:11-cv-00718-L

**DEFENDANT DEPUY ORTHOPAEDICS, INC.'S
RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO REMAND**

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Defendant, DePuy Orthopaedics, Inc. (“DePuy”), submits this Response in Opposition to Plaintiffs’ Motion to Remand as follows.

INTRODUCTION

This is a products liability case involving DePuy’s ASR™ hip implant that was later recalled. Both Plaintiffs received an ASR™ hip implant. They filed this lawsuit against DePuy, claiming that their hip replacements were defective and allegedly caused them injuries. The ASR™ hip implant is currently the subject of federal MDL proceedings in the Northern District of Ohio, *In re: DePuy Orthopaedics, Inc., ASR™ Hip Implant Product Liability Litig.*, MDL No. 2197. In an effort to keep the case in state court and out of that federal MDL, Plaintiffs have joined two non-diverse defendants, Kelly Orthopaedic Sales, LP (“Kelly”) and Kelly’s general partner, KOS Management Company, LLC (“KOS”).

Implicitly acknowledging that their Original Petition fails to allege facts sufficient to support their claims against Kelly and KOS, Plaintiffs introduce dozens of pages of internet print-outs and other similar, out-of-context information to support their remand arguments. This

same, irrelevant information—almost verbatim—was recently presented in a Reply Brief in support of a remand motion in a Georgia ASR™ hip implant case, where the same jurisdictional issue is pending. *Crawley v. DC Medical, LLC*, Case No. 4:11-cv-00067-BAE-GRS.

DePuy respectfully submits that this is yet another reason why a single MDL judge should decide these ASR™ hip implant cases. In fact, to date, ten cases with pending motions to remand concerning the same or similar jurisdictional issues have already been transferred to, and docketed in, MDL 2197 before Judge Katz.¹ Moreover, thirty-five other cases with the same or similar jurisdictional issues are working their way through the federal court system on conditional transfer orders.² At the heart of Plaintiff's Motion to Remand here—and

¹ *In re DePuy Orthopaedics, Inc., ASR Hip Implant Prods. Liab. Litig.*, MDL No. 2197, Doc. No. 479 (Apr. 18, 2011) (denying eight separate motions to vacate conditional transfer orders, and ordering all eight cases be transferred to the MDL). Seven of the eight cases involve fraudulent joinder issues similar to the one presently before this Court. They include *Milner v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:10-cv-01085-WC (M.D. Ala.); *Slay v. DePuy Orthopaedics, Inc.*, Case No. 2:10-cv-01086-MEF (M.D. Ala.); *Harper v. DePuy Orthopaedics, Inc.*, Case No. 2:10-cv-01087-WKW-CSC (M.D. Ala.); *Patterson v. DePuy Orthopaedics, Inc.*, Case No. 2:10-cv-01088-WKW-SRW (M.D. Ala.); *Taylor v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-00027-MHT-CSC (M.D. Ala.); *Butler v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:10-cv-04637-KDE-DEK (E.D. La.); *Laman v. DePuy Orthopaedics, Inc.*, Case No. 2:10-cv-04658-LMA-ALC (E.D. La.). The three cases previously docketed in the MDL include *Hougas v. DePuy Orthopaedics, Inc.*, Case No. 1:11-dp-20175-DAK (N.D. Ohio); *Beavers v. DePuy Orthopaedics, Inc.*, Case No. 1:11-dp-20175-DAK (N.D. Ohio); *Hilgers-Luckey v. DePuy Orthopaedics, Inc.*, Case No. 1:11-dp-20387-DAK (N.D. Ohio).

² *Garris v. DePuy Orthopaedics, Inc.*, Case No. 4:11-cv-00042 (E.D. Va.); *Proper v. DePuy Orthopaedics, Inc.*, Case No. 4:11-cv-00217 (W.D. Mo.); *Dio v. DePuy Orthopaedics, Inc., et al.*, Case No. 1:11-cv-00042 (W.D.N.Y.); *Yousey v. DePuy Orthopaedics, Inc., et al.*, Case No. 1:11-cv-00043 (W.D.N.Y.); *LeMarr v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-00445-ROS (D. Ariz.); *Beaver v. DC Medical, LLC, et al.*, Case No. 1:11-cv-00869-SCJ (N.D. Ga.); *Davis v. DC Medical, LLC, et al.*, Case No. 1:11-cv-00870-AT (N.D. Ga.); *Gray v. DC Medical, LLC, et al.*, Case No. 1:11-cv-00871-SCJ (N.D. Ga.); *Hershberger v. DC Medical, LLC, et al.*, Case No. 1:11-cv-00944-WSD (N.D. Ga.); *Hinton v. DC Medical, LLC, et al.*, Case No. 1:11-cv-00935-WSD (N.D. Ga.); *Jackson v. DC Medical, LLC, et al.*, Case No. 1:11-cv-00873-ODE (N.D. Ga.); *McClure v. DC Medical, LLC, et al.*, Case No. 1:11-cv-00877-JEC (N.D. Ga.); *McDowell v. DC Medical LLC, et al.*, Case No. 1:11-cv-00939-HTW (N.D. Ga.); *Meaders v. DC Medical LLC, et al.*, Case No. 1:-11-cv-00938-ODE (N.D. Ga.); *Sedlar v. DC Medical LLC, et al.*, Case No. 1:11-cv-00936-TCB (N.D. Ga.); *Starling v. DC Medical LLC, et al.*, Case No. 1:11-cv-00883-HTW (N.D. Ga.); *Williams v. DC Medical LLC, et al.*, Case No.

in the other 45 cases—is whether Plaintiffs have stated viable claims against the field representatives for the DePuy ASR™ Hip Implant devices. The MDL Panel authorized the creation of MDL 2197, in part, so that one federal judge could decide similar jurisdictional issues consistently and efficiently. Accordingly, the Court should defer consideration of Plaintiffs’ Motion to Remand pending transfer of this case to MDL 2197.

Should the Court decide to reach the merits of Plaintiffs’ motion to remand, DePuy provides the following response, with a focus on Plaintiffs’ claims against Kelly because Plaintiffs merely assert derivative liability against KOS. In short, Kelly’s joinder is improper. Kelly is not a manufacturer of the ASR™ Hip. In fact, Kelly’s role is so attenuated that it should not be considered a seller at all. But Plaintiffs’ arguments to the contrary merely result in the application of the Texas immunity statute for non-manufacturing sellers. TEX. CIV. PRAC. & REM. CODE § 82.003. Plaintiffs, of course, point to the exceptions to the statute. But those exceptions do not apply. In particular, Plaintiffs primarily allege a negligent *failure to warn*

1:11-cv-00940-JOF (N.D. Ga.); *Crawley v. DC Medical LLC, et al.*, Case No. 4:11-cv-00067-BAE-GRS (S.D. Ga.); *Davis v. DC Medical LLC, et al.*, Case No. 1:11-cv-00881-RLV (S.D. Ga.); *King v. DC Medical LLC, et al.*, Case No. 1:11-cv-00882-ODE (S.D. Ga.); *Lebeda v. DC Medical LLC, et al.*, Case No. 1:11-cv-00875-HTW (S.D. Ga.); *Scott v. DC Medical LLC, et al.*, Case No. 1:11-cv-00878-TWT (S.D. Ga.); *Scullin v. DC Medical LLC, et al.*, Case No. 1:11-cv-00879-AT (S.D. Ga.); *Welch v. DC Medical LLC, et al.*, Case No. 1:11-cv-00880-SCJ (S.D. Ga.); *Bryson v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00052-TBR (W.D. Ky.); *Carnes v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00046-TBR (W.D. Ky.); *Humphrey v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00049-TBR (W.D. Ky.); *Johnson v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00045-TBR (W.D. Ky.); *Kimbro v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00051-TBR (W.D. Ky.); *Lacey v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00048-TBR (W.D. Ky.); *McElwayne v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00047-TBR (W.D. Ky.); *Thomas v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00050-TBR (W.D. Ky.); *Day v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-00501 (D. Nev.); *Rundle v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-00634-PMP (D. Nev.); *Malkmus v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-00365 (E.D. Wis.).

claim against Kelly. In contrast, the Texas immunity statute requires “an express factual representation” to avoid immunity.

There is one claim in which Plaintiffs assert an express (negligent) misrepresentation. However, that claim is based on cursory allegations of just one alleged misstatement—with no indication of who made that representation, to whom, when, or where. Thus, those allegations do not state a claim under the pleading standards construed by the Supreme Court in *Twombly* and *Iqbal*. Moreover, DePuy submitted a declaration that contradicts that allegation, and Plaintiffs fail to grapple with those facts.

In addition, Plaintiffs’ claims against Kelly also fail as a matter of Texas law. In particular, Plaintiffs fail to allege any negligent conduct against Kelly to serve as the basis for the negligent misrepresentation claim. Texas law also precludes Plaintiffs’ claims for negligent undertaking and violations of the Deceptive Trade Practices Act (“DTPA”). In summary, Plaintiffs have improperly joined Kelly and KOS. As a result, this Court has subject matter jurisdiction, and should deny Plaintiffs’ Motion to Remand.

STANDARD OF REVIEW

A case in which federal jurisdiction is based on diversity may be “remov[ed] only if none of the parties in interest *properly joined* and served as defendants is a citizen of the State in which [the] action is brought.” 28 U.S.C. § 1441(b). Thus, to remove a case based on diversity jurisdiction, the removing party must demonstrate that an in-state defendant has been improperly joined. *See Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004) (en banc). The removing party must show either “(1) actual fraud in the pleading of jurisdictional

facts, or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court.” *Crockett v. RJ Reynolds Tobacco Co.*, 436 F.3d 529, 532 (5th Cir. 2006).

Regarding the second option, a non-diverse party is improperly joined if “there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant.” *Smallwood*, 385 F.3d at 573 (emphasis added). “A ‘mere theoretical possibility of recovery under local law’ will not preclude a finding of improper joinder.” *Id.* at 573 n.9 (citations omitted).

To determine whether a non-diverse party was improperly joined, courts engage in a “Rule 12(b)(6)-type analysis, looking initially at the allegations of the complaint to determine whether the complaint states a claim under state law against the in-state defendant.” *Smallwood*, 385 F.3d at 573-74. However, “the district court may, in its discretion, pierce the pleadings and conduct a summary inquiry” for cases “in which a plaintiff has stated a claim, but has misstated or omitted discrete facts that would determine the propriety of joinder.” *Id.* at 573.

In a Rule 12(b)(6) analysis, all well-pleaded facts are viewed in a light most favorable to the plaintiff. *Sonnier v. State Farm Mut. Auto. Ins. Co.*, 509 F.3d 673, 675 (5th Cir. 2007). Nevertheless, dismissal is proper when the complaint (1) lacks a “cognizable legal theory” or (2) fails to allege “sufficient facts in support of a cognizable legal theory.” *In re Azurix Corp. Secs. Litig.*, 198 F. Supp. 2d 862, 877 (S.D. Tex. 2002) (citations omitted). To survive a Rule 12(b)(6) analysis, the complaint must allege “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do ...” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted).

In particular, the “[f]actual allegations must be enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555. A complaint is insufficient if it does not state “a plausible claim for relief.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* at 1949. Therefore, it is proper for “a court considering a motion to dismiss [to] choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.” *Id.* at 1950.

RESPONSE TO PLAINTIFFS’ FACTUAL ALLEGATIONS

As established below, Plaintiffs have failed to allege facts sufficient to support the claims they assert against Kelly and KOS. They implicitly acknowledge this in their Motion for Remand, in which they state that they are unable to contest the Kelly Declaration without discovery. *See* Motion to Remand at 11 (“Plaintiffs have had absolutely no opportunity for discovery, and thus, a constrained ability to dispute the alleged facts contained in DePuy’s Notice of Removal and supporting affidavit.”). But Plaintiffs are obligated to state a legally cognizable claim at the time that they file suit, without discovery. *See Iqbal*, 129 S.Ct. at 1953-54.

In an attempt to avoid the factual deficiencies in their Original Petition, Plaintiffs attach dozens of pages of publicly available information, much of which they provide without any context. None of this general information even begins to establish what Kelly did *in this case*. For example, Plaintiffs quote (1) portions of the course curriculum authored by the Medical Sales College of Inglewood, Colorado and (2) portions of a DePuy Certification Learning Program Curriculum Guide (Motion to Remand at 7-10), to somehow establish how

Kelly might have conducted itself in this case. This is pure conjecture, as these documents do not shed any light as to what Kelly knew and conveyed about the products, or what it did or did not do or say about them.³

Plaintiffs also rely on unsworn language pulled out of context from a “store locator” drop-down menu on a DePuy website to bolster their legally insufficient pleadings. Motion to Remand at 3-7. Plaintiffs try to draw technical, legal conclusions from this informal language. That is inappropriate. Moreover, that information (1) does not contain statements made under oath, (2) does not contain statements made in the context of the legal issues in this case, and (3) adds allegations that do not appear in Plaintiffs’ pleadings. Thus, it should be disregarded.

All of Plaintiffs’ new “factual” information contains these flaws. They are either general information unrelated to this case or unsworn new allegations (or both). Thus, Plaintiffs are left with the legally insufficient factual assertions in their Original Petition. As established below, this is fatal to their Motion.

ARGUMENT & AUTHORITIES

Even based on Plaintiffs’ theory that Kelly is a non-manufacturing seller, Plaintiffs nevertheless face multiple hurdles in stating realistic claims against it. Most obviously, Texas immunizes non-manufacturing sellers. In addition, Plaintiffs’ claims fail in light of both Texas law and the undisputed facts.

³ Plaintiffs’ citation to affidavit testimony from other litigation, unrelated to the claims here, is actually more descriptive of the reason why sales representatives may be present during a patient surgery—that being to ensure that the specific components of the complete implant a surgeon determines are needed, based on that surgeon’s skill and training, are ultimately available once surgery has begun and the patient’s needs are more clear. *See* Motion to Remand at 10-11.

I. As an Innocent Seller, Kelly Is Immune From Liability for the Plaintiffs' Product Liability Claims.

If, as Plaintiffs allege, Kelly is a seller of the ASR™ Hip, then the immunity provisions of Chapter 82 of the Texas Civil Practices and Remedies Code govern this dispute. TEX. CIV. PRAC. & REM. CODE § 82.003(a); *see also Garcia v. Nissan Motor Co., Ltd.*, 2006 WL 869944, *6 (S.D. Tex. Mar. 30, 2006) (“This Court has previously concluded that any theories of recovery plead against a non-manufacturing seller must fall within one of the seven exceptions to § 82.003, regardless of whether such allegations otherwise state a viable claim under Texas law.”) (citations omitted).

Plaintiffs' attempt to invoke three of those exceptions by arguing that Kelly either:

- (1) “exercised substantial control over the content of a warning or instruction that accompanied the product”;
- (2) “made express factual representations” regarding the product that Plaintiffs relied on to purchase the product; or
- (3) “knew of a defect” at the time it sold the product.

TEX. CIV. PRAC. & REM. CODE § 82.003(a)(4)-(6). None of these arguments provide a “reasonable basis” for predicting that Kelly might be liable. *Smallwood*, 385 F.3d at 573.

A. This Court Must Consider Whether Plaintiffs Have Alleged Sufficient Facts to Establish an Exception to Section 82.003(a).

As an initial matter, Plaintiffs assert that the Court should not consider the immunity statute because, allegedly, it is an affirmative defense. *See* Motion to Remand at 17-20. However, “Section 82.003 clearly places the burden of proof upon a plaintiff to establish one of the exceptions to non-liability; it is not an affirmative defense.” *Gonzalez v. Estes, Inc.*,

2010 WL 610778, *5 (W.D. Tex. Feb. 19, 2010) (emphasis added). This is clear from the plain language of the statute:

A seller that did not manufacture a product is not liable for harm caused to the claimant by that product unless the claimant proves
....

TEX. CIV. PRAC. & REM. CODE § 82.003(a) (emphasis added).

Moreover, even if Section 82.003(a) were an affirmative defense, it is proper to consider affirmative defenses in a motion to dismiss when the basis for the defense “appears on the face of the pleadings.” *Kansa Reinsurance Co., Ltd. v. Congressional Mortg. Corp. of Texas*, 20 F.3d 1362, 1366 (5th Cir. 1994) (citations omitted). In that situation—when a plaintiff essentially pleads himself out of court—the plaintiff must plead sufficient facts to show that his claims remain plausible. *See Ackerson v. Bean Dredging LLC*, 589 F3d 196, 208-09 (5th Cir. 2009) (applying *Twombly* to reject plaintiffs’ efforts to “plead around” an affirmative defense that appeared on the face of the complaint).

Here, Plaintiffs allege that Kelly is not the manufacturer but instead that it merely “sold products manufactured by DEPUY” Original Petition at 3, ¶ 10. On their face, these allegations trigger application of the immunity statute. *See* TEX. CIV. PRAC. & REM. CODE § 82.003(a). Thus, Plaintiffs must plead a plausible basis to avoid immunity under Section 82.003. *See Kansa*, 20 F.3d at 1366; *Ackerson*, 589 F3d at 208-09.

B. Section 82.003(a)(4): Kelly Did Not Exercise Substantial Control Over the Content of the Warnings and Instructions that Accompanied the Product.

Plaintiffs first argue that their Petition sufficiently alleged that Kelly “exercised substantial control over the content of the warning and instruction that accompanied the product.” TEX. CIV. PRAC. & REM. CODE § 82.003(a)(4) (emphasis added).

This argument is disingenuous. The manufacturer of a prescription medical device—not independent companies like Kelly—prepare the warnings that accompany the product. *See Reeves v. AcroMed Corp.*, 44 F.3d 300, 305 (5th Cir. 1995) (“FDA regulations require device manufacturers to submit the proposed labeling and warnings for their devices to the FDA as part of the approval process under the MDAs.”) (emphasis added & citations omitted).

Furthermore, the Kelly Declaration makes it clear that DePuy is exclusively responsible for the labeling:

7. All DePuy ASR™ prosthesis components obtained from DePuy through Kelly Orthopaedic are received in double-sealed sterile packages that were labeled, packaged, and sealed by DePuy.... In handling these packages, neither Kelly Orthopaedic nor its representatives break the seal, or alter in any manner the contents of the package or any labeling or markings on the packaging prior to delivery to hospitals.

8. Also contained inside the sealed cardboard box ... are the package inserts for the orthopedic implant products. This information is provided by DePuy.

13. Neither Kelly Orthopaedic nor its representatives have ever been involved in any way in developing, drafting, compiling or generating any packaging labeling, and/or language used in the

package inserts for DePuy orthopedic implants, including the ASR™ hip prosthesis at issue in this case.

Kelly Declaration at 2-3 ¶¶ 7-8 & 13. Plaintiffs did not submit any contrary information.

Moreover, Plaintiffs do not identify “any particular warning over which the Plaintiffs exercised substantial control.” *FLS Miljo, Inc. v. Munters Corp.*, 682 F. Supp. 2d 681, 694-95 (N.D. Tex. 2010) (finding, that, without a specific warning over which the seller exercised control, plaintiff could not overcome the seller’s immunity). Plaintiffs thus cannot state a “plausible claim of relief” to survive a Rule 12(b)(6) analysis on the basis of this exception. *Iqbal*, 129 S.Ct. at 1950.

C. Section 82.003(a)(5): Kelly Did Not Make Any Representations About the ASR™ Hips That Would Allow Plaintiffs to Strip Kelly of Immunity.

Plaintiffs also claim that Kelly is not immune because it “made an express factual representation about an aspect of the product.” TEX. CIV. PRAC. & REM. CODE § 82.003(a)(5). Plaintiffs’ reliance on this exception is surprising, given that their primary claim is really an omission claim—*i.e.*, that Kelly negligently failed to warn. *See* Original Petition at 18-20; Motion to Remand at 15-17.

Under the statute, Plaintiffs’ “failure to warn” claims are irrelevant. Kelly is immune unless it made “an express factual representation.” *See* TEX. CIV. PRAC. & REM. CODE § 82.003(a)(5); *see also Rubin v. Daimler Chrysler Corp.*, 2005 WL 1214605, *9 (S.D. Tex. May 20, 2005) (“Rubin made general ‘failure to warn’ allegations. Because Rubin’s state court petition fails to allege the specific actionable conduct required by section 82.003(a)(5), this section does not provide a basis for remand.”).

Nevertheless, Plaintiffs cite one purported express (negligent) misrepresentation:

105. Defendant KELLY made express factual representations about the DePuy ASR™ Hip, including that it was less prone to the generation of excessive metal debris; the representation was incorrect; the Plaintiffs relied on the representation in obtaining and using the DePuy ASR™ Hip; and if the DePuy ASR™ Hip had been as represented, the Plaintiffs would not have been harmed by the product or would not have suffered the same degree of harm.

See Original Petition at 19 ¶ 105; *see also id.* at 21 ¶ 121A. This allegation is entirely cursory. Plaintiffs do not state (1) who at Kelly made the representation, (2) to whom, (3) when, (4) where, and (5) how Plaintiffs relied on it. *Id.* at 19 ¶ 105. On its face, this allegation is just a “formulaic recitation of the elements.” *Twombly*, 550 U.S. at 555. Further, Plaintiffs allege in this paragraph that Kelly made a nonsensical representation—*i.e.*, that the ASR™ was “less prone” than what? Nor is such a “comparison” actionable in Texas. *See, e.g., GJP, Inc. v. Ghosh*, 251 S.W.3d 854, 889 (Tex. App.—Austin 2008, no pet.) (holding that “‘broad, and vague, commendatory language comparing [one’s] goods favorably with others ...’ amounts to mere sales talk, or puffery ...”) (citations omitted). In short, Plaintiffs fail to assert in this paragraph sufficient facts to show that their claim has any plausibility. *See id.*

In addition, the undisputed facts contradict this allegation:

Kelly Orthopaedic’s role in the distribution of ASR™ hip prostheses ... is solely limited to delivering to hospitals or surgeons the specific prosthesis ordered and providing technical product information to the surgeon that is provided to Kelly Orthopaedic by DePuy.

Kelly Declaration at 1-2 ¶ 4 (emphasis added). Plaintiffs attack other aspects of the Declaration but not this statement. *See Motion to Remand at 2-6.*

Even then, these other attacks on the Declaration are based on conjecture. For example, Plaintiffs interpret four pages of medical records to contradict Mr. Kelly's testimony that "Kelly Orthopaedic representatives do not scrub-in, enter the sterile field, or assist the surgeon with the surgery." *See* Kelly Declaration at 3 ¶ 9. But the medical records do not say that the Kelly representative scrubbed in, entered the sterile field, or assisted with the surgery. Plaintiffs simply assume that merely attending the surgery implies these things. There is no basis for such an assumption, and it is wrong. Thus, the Court should accept the Declaration's averment that Kelly's representations were limited to "providing technical product information to the surgeon." Kelly Declaration at 1-2 ¶ 4.

D. Section 82.003(a)(6): Kelly Did Not Have Actual Knowledge of Any Alleged Defect of the ASR™ Hips.

Last, Plaintiffs allege that Kelly "actually knew of a defect to the product at the time the seller supplied the product." TEX. CIV. PRAC. & REM. CODE § 82.003(a)(6). Plaintiffs do not, however, allege in their Original Petition that Kelly had actual knowledge of any defect in the ASR™ Hip. For example, Plaintiffs emphasize paragraph 33 of the Petition, which merely alleges that Kelly was aware of "problems with the design of the ASR™ Hip, and also aware of excessive failures necessitating revision" *See* Original Petition at 9 ¶ 33.

As a matter of law, knowledge of alleged "problems" is insufficient:

This Court concludes that a nonmanufacturing seller's knowledge of a condition in or of a product without actual knowledge that the condition renders the product defective is insufficient to satisfy the Section 83.002(a)(6) exception....

... While it is undisputed that Local Defendant knew the vehicle lacked side-curtain airbags and electronic stability control, Plaintiff has failed to show that Local Defendant knew that lack of these

features rendered the vehicle defective.... It is one thing to show that the defendant might have designed a safer product; quite another to show that the product he did design was unreasonably dangerous.

See Garcia, 2006 WL 869944, at *3 (emphasis added & citations omitted). The distinction that *Garcia* draws is critical. Knowledge of problems or complaints is simply not equivalent to knowledge that a device is “unreasonably dangerous.” *Cf. Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 665 (Tex. 1999) (“For strict liability, ‘defect’ means ‘a condition of the product that renders it unreasonably dangerous.’”).

For their authority, Plaintiffs point to *Moses v. Zimmer Holdings, Inc.*, 2007 WL 3036096 (S.D. Tex. Jun. 29, 2007), in which the Court found sufficient a complaint alleging that the seller received reports of problems with a hip implant and had a chance to analyze failed parts. However, in *Moses*, the seller analyzed x-rays of a failed product and also gave input on the redesign of the product. *Id.* at *6. Further, the seller was aware of the “fracture of the metal stem portion of” the artificial hip system at issue. *Id.* The combination of these facts was decisive. *See id.* (“If, as [plaintiff] states, [seller] analyzed the earlier failed implant and had input into the special implant, there is evidence that [seller] knew that the initial ... artificial hip replacement product was defective.”).

Here, Plaintiffs have not alleged that Kelly had an opportunity to analyze a failed ASR™ Hip, or that it gave any input into the design of the ASR™ Hip. Mr. Kelly, in his Declaration, agreed, stating that “[n]either Kelly Orthopaedic nor its representatives have ever been involved in any way in the design, manufacture, development, or testing of DePuy orthopedic implants, including the ASR™ hip prosthesis at issue in this case.” Kelly Declaration

at 3 ¶ 11. In summary, Plaintiffs are without sufficient facts to allege that Kelly had actual knowledge that the product was unreasonably dangerous, and thus Plaintiff does not state a “plausible claim for relief” that avoids Kelly’s statutory immunity. *Iqbal*, 129 S.Ct. at 1950.

II. In Any Event, Plaintiff Does Not State Valid Claims Against Kelly Under Texas Law.

Even if some aspect of Plaintiffs’ claims somehow states a valid exception to immunity under Section 82.003, Plaintiffs must still state a valid cause of action against Kelly under Texas law.

To show a valid Texas claim, Plaintiffs primarily point to their negligent failure to warn claim. *See* Motion to Remand at 15-17 (quoting paragraphs 101-03 & 106-10 from the Original Petition). But “failure to warn” claims, in particular, do not survive Section 82.003, based on the plain language of the statute. *See Rubin*, 2005 WL 1214605, at *9. Thus, Plaintiffs must look elsewhere to find a valid claim. DePuy will show that any remaining claims that potentially survive Section 82.003 do not state a valid cause of action under Texas law.

A. Plaintiffs Did Not State a Valid Claim for Negligent Misrepresentation Against Kelly.

Plaintiffs’ negligent misrepresentation claim in paragraph 105 of their Original Petition does not state a valid claim. Plaintiffs allege in that paragraph that Kelly negligently represented that the ASR™ Hip “was less prone to the generation of excessive metal debris”

See Original Petition at 19 ¶ 105. The elements of a claim for negligent misrepresentation are:

- (1) the representation is made by a defendant in the course of his business, or in a transaction in which he has a pecuniary interest;
- (2) the defendant supplies “false information” for the guidance of others in their business;
- (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the

information; and (4) the plaintiff suffers pecuniary loss by justifiably relying on the representation.

Federal Land Bank Ass'n of Tyler v. Sloane, 825 S.W.2d 439, 442 (Tex. 1991) (emphasis added).

In light of the Kelly Declaration, the allegations in paragraph 105 do not meet element #3. Specifically, Kelly “detailed” the product solely on the basis of information it obtained from DePuy. Kelly Affidavit at 3 ¶ 14. Indeed, this is how Plaintiffs pled the case against Kelly. *See, e.g.*, Original Petition at 5 ¶¶ 20-22. Yet there is nothing in the Original Petition that suggests that relying on the manufacturer’s labeling and advertising violates “reasonable care or competence.” Indeed, DePuy’s warnings and advertisements were FDA-approved, which are presumptively adequate in Texas. *Cf. TEX. CIV. PRAC. & REM. CODE* § 82.007 (providing a presumption of no liability for pharmaceutical warnings approved by the FDA). Ultimately, Plaintiffs are attempting to impose a duty on independent companies like Kelly to second-guess the safety information put out by manufacturers and approved by the FDA. There is no such duty in Texas.

Perhaps more importantly, there is nothing in paragraph 105 that explains how Kelly acted negligently at all in “in obtaining or communicating” the particular information mentioned in that paragraph. *Sloane*, 825 S.W.2d at 442. Thus, paragraph 105 does not state a valid claim for negligent misrepresentation under Texas law.

Without pleading a violation of the duty of care “in obtaining or communicating” information, Plaintiffs cannot “establish a cause of action against the non-diverse party in state court,” and thus they fail to survive an improper joinder analysis. *Travis v. Irby*, 326 F.3d 644, 647 (5th Cir. 2003).

B. Delivery of the ASR™ Hip Prosthesis Does Not Constitute a Negligent Undertaking as a Matter of Law.

Plaintiffs' also assert a negligent undertaking claim against Kelly. Plaintiffs have not attempted to explain how their negligent undertaking claim avoids immunity under Section 82.003. Nevertheless, this claim fails as a matter of Texas law.

“[T]o establish a claim for a negligent undertaking, a plaintiff must show (1) the defendant undertook to perform services that it knew or should have known were necessary for the plaintiff's protection, (2) the defendant failed to exercise reasonable care in performing those services, and either (3) the plaintiff relied upon the defendant's performance, or (4) the defendant's performance increased the plaintiff's risk of harm.” *Pugh v. General Terrazzo Supplies, Inc.*, 243 S.W.3d 84, 94 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

Kelly's role in furnishing the ASR™ Hip prosthesis cannot meet these elements. First, the ASR™ Hip prosthesis is not a “service”; it is a good. *Compare* TEX. BUS. & COMM. CODE § 17.45(2) (“‘Services’ means work, labor, or service purchased or leased for use, including services furnished in connection with the sale or repair of goods.”) *with id.* § 17.45(1) (“‘Goods’ means tangible chattels or real property purchased or leased for use.”). The incidental labor used either (1) to deliver the ASR™ Hip or (2) to provide technical information about the ASR™ Hip to Plaintiffs' surgeons does not render the ASR™ Hip a “service.” *See Ramirez v. H.E. Butt Grocery Co.*, 909 S.W.2d 62, 69 (Tex. App.—Waco 1995, writ denied) (holding that use of a store was incidental to the purchase of goods and therefore did not constitute a “service”).

Second, even if the incidental work of delivering the ASR™ Hip or providing technical information about it constituted a service (which it did not), that would not constitute a

service to Plaintiffs because Kelly delivered the product and information to the surgeons. *See Pugh*, 243 S.W.3d at 95 (“The records indicates that the Pughs contracted with Westbrook, Westbrook contracted with RBS, and RBS purchased the EIFS materials from General Terrazzo. The Pughs have not cited any authority for stretching a negligent undertaking claim so far as to apply to General Terrazzo under these facts.”). Indeed, Plaintiffs acknowledge this. *See* Original Petition at 20, ¶ 113 (“Defendant KELLY undertook the service of advising Plaintiffs’ orthopedic surgeons”).

Finally, Kelly’s actions were not necessary for Plaintiffs’ protection. In short, like all prescription devices, the ASR™ Hip replacement came with FDA-approved warnings or instructions *from the manufacturer*. *See Reeves*, 44 F.3d at 305. Kelly’s actions do not replace those warnings—which are presumed adequate under Texas law. *See* TEX. CIV. PRAC. & REM. CODE § 82.007. In light of all of the above, Plaintiffs’ alleged facts are insufficient as a matter of law to state a claim for negligent undertaking.

C. Plaintiffs’ DTPA Claims Are Precluded by Kelly’s Immunity.

Finally, Plaintiffs’ DTPA claims do not avoid immunity or state a valid claim. First, the DTPA does not apply to Plaintiffs’ claims against Kelly. The DTPA only applies to “consumers,” *i.e.*, to parties who “seek[] or acquire[] by purchase or lease, any goods or services” TEX. BUS. & COMM. CODE § 17.45(3). Here, Plaintiffs did not seek or acquire the ASR™ Hip from Kelly. Specifically, Kelly never took title to the ASR™ Hip nor obtained any ownership interest in it. Kelly Declaration at 2-4 ¶¶ 6 & 15. “Rather, DePuy sells its products directly to hospitals. Kelly Orthopaedic does not make payments to DePuy for such devices, nor does it receive payments from the hospitals for DePuy products.” *Id.* at 2 ¶ 6 (emphasis added).

Even if the DTPA applied to Kelly, the immunity provisions of Section 82.003 would prohibit those claims. *See* TEX. CIV. PRAC. & REM. CODE § 82.003(a). Thus, Kelly would be immune from DTPA allegations unless an exception applies. *See Garcia*, 2006 WL 869944, at *6. Plaintiff alleges three bases for the DTPA claims. *See* Original Petition at 21-22 ¶¶ 121A, B & C. In each case, the allegations either fail to state a claim or they fail to avoid immunity.

The first basis for Plaintiffs' DTPA claim is essentially the same as the express (negligent) misrepresentation claim in paragraph 105. *See id.* at ¶121A (alleging that the ASR™ Hip was not as Kelly represented it to be because the ASR™ Hip “was prone to the creation of excessive metal debris and failure to achieve boney ingrowth.”). This claim fails for the same reasons as the negligent misrepresentation claim. The Petition provides no detail about the alleged misrepresentation—it does not state (1) who at Kelly made the representation, (2) to whom, (3) when, (4) where, and (5) how Plaintiffs relied on it. *See id.* Moreover, the Kelly Declaration refutes this allegation by showing that Kelly's representatives only provided “technical information” to the surgeons. *See* Kelly Declaration at 1-2 ¶ 4.

The other two bases for the Plaintiffs' DTPA claims simply fail to state a claim that avoids immunity under Section 82.003(a)(5). Specifically, Plaintiffs' allege a “failure to warn” claim in paragraph 121B and an “unconscionable” course of conduct claim in paragraph 121C. The Texas immunity statute, however, requires “an express factual representation” to avoid immunity. *See* TEX. CIV. PRAC. & REM. CODE § 82.003(a)(5). Thus, these DTPA claims do not avoid immunity.

In summary, Plaintiffs have failed to sufficiently allege any exception to § 82.003(a) in their DTPA claim or to otherwise state a valid DTPA claim. Thus, again, they

have “not establish[ed] a cause of action against the non-diverse party in state court” to survive an improper joinder analysis. *Travis*, 326 F.3d at 647.

III. Kelly is Not a “Seller” As Defined Under Section 82 of the Texas Civil Practices and Remedies Code.

Notwithstanding the above analysis, Kelly is not a “seller” as defined under either Section 82 or the Texas Business and Commercial Code. *See* TEX. CIV. PRAC. & REM. CODE § 82.001(3); TEX. BUS. & COM. CODE § 2.103(a)(4) (defining a seller as “a person who sells or contracts to sell goods”). Thus, it is not responsible for the alleged defects in the product at all.

Chapter 82 defines a seller as “a person who is engaged in the business of distributing or otherwise placing ... in the stream of commerce for use or consumption a product.” TEX. CIV. PRAC. & REM. CODE § 82.001(3). Kelly’s actual role was simply to deliver the DePuy devices ordered by a hospital or surgeon to the respective hospital or surgeon. *See* Kelly Declaration at 1-2 ¶ 4. Kelly fills orders “by either retrieving the prosthesis from inventory maintained at the hospital, a Kelly Orthopaedic facility, or by ordering the prosthesis from DePuy.” *Id.* at 2 ¶ 5. While performing these delivery services, Kelly never purchases, takes title to or obtains an ownership interest in any DePuy device. *Id.* ¶ 6. Kelly is also not a party to any contract between any hospital and DePuy for the sale of any DePuy product. *Id.* As such, Kelly is not a seller under the Texas Commercial Code. *See* TEX. BUS. & COM. CODE § 2.103(a)(4).

Moreover, Kelly cannot be considered a “seller” under Chapter 82 of the Texas Civil Practice and Remedies Code because it does not place DePuy devices in the stream of commerce—DePuy does that when it sells its products to hospitals. Once in the stream of commerce, Kelly simply is the conduit by which the ordering party receives the device.

IV. Plaintiffs Are Not Entitled to Attorney's Fees.

Finally, Plaintiffs have asked for attorneys fees because of DePuy's removal. Attorney's fees, however, "should not be awarded when the removing party has an objectively reasonable basis for removal." *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 136 (2005). Here, DePuy has "an objectively reasonable basis for removal," namely that Kelly was improperly joined. *Id.* Improper joinder is a proper reason for removal. *See McKee v. Kansas City Southern Ry. Co.*, 358 F.3d 329, 333 (5th Cir. 2004). Moreover, Plaintiffs themselves admit that "Section 82.003 ... generally exempts nonmanufacturing sellers from product liability." Motion to Remand at 20 (emphasis in original). By itself, this admission demonstrates good faith as Plaintiffs cannot simultaneously plead one of the narrow exceptions to Section 82.003 and state a valid claim under Texas law at the same time.

This dispute is clearly between Plaintiffs and the manufacturer of the ASR™ Hip prosthesis, DePuy. Those parties are completely diverse and thus the removal was thus entirely proper.

CONCLUSION

In light of the foregoing reasons, Plaintiffs have not demonstrated a "reasonable basis" for predicting that they might recover against Kelly in state court. Therefore, Plaintiffs have improperly joined both Kelly and its general partner, KOS, and this Court should deny Plaintiffs' Motion to Remand and deny Plaintiffs' request for attorney's fees and costs.

Respectfully submitted,

By: /s/ Gene M. Williams

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 29th day of April, 2011, I electronically filed DEFENDANT DEPUY ORTHOPAEDICS, INC.'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO REMAND with the Clerk of the Court using the CM/ECF System which will send notification of such filing to counsel. Defendant's counsel is also serving undersigned counsel with a copy of the filed document in accordance with the Federal Rules of Civil Procedure.

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