

strict liability claim against TRP, Plaintiffs introduce a stack of pages of general, out-of-context “factual” information to support their remand arguments. (See Exhibits 4-7 to Plaintiffs’ Memorandum of Law in Support of Motion to Remand, Doc. No. 6.) This same, irrelevant information – almost verbatim – was recently presented in two briefs filed by plaintiffs in support of remand motions in Georgia and Texas ASR™ hip implant cases, where the same jurisdictional issue (fraudulent joinder of an alleged distributor or field representative of an ASR™ device) is pending. *Crawley v. DC Medical, LLC*, Case No. 4:11-cv-00067-BAE-GRS (S.D. Ga.); *Banks v. DePuy Orthopaedics, Inc.*, Case No. 3:11-cv-00718-L (N.D. Tex.). Similar to this case, Plaintiffs in both *Crawley* and *Banks* are challenging transfer of their cases to MDL No. 2197, *In re: DePuy Orthopaedics, Inc., ASR Hip Implant Products Liability Litigation*.

Defendants respectfully submit that this is yet another reason why the jurisdictional issues and evidence in these ASR™ device cases should be evaluated by a single judge – Judge Katz, who is presiding over MDL 2197. In fact, to date, ten cases from across the country 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 Forty-three other cases with the same, or similar, jurisdictional issues are working their way through the federal court

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).

system on conditional transfer orders.² At the heart of Plaintiffs' Motion to Remand here – and in the 40 plus cases above – is whether Plaintiffs have stated viable claims against entities other than DePuy that have some alleged involvement in the sale and distribution of the DePuy ASR™ Hip Implant devices. The MDL Panel authorized the creation of MDL 2197, in part, so similar jurisdictional issues affecting cases nationwide could be decided in a consistent and economically efficient manner by one federal judge. Accordingly, the Court should defer consideration of Plaintiffs' Motion to Remand pending transfer of this case to MDL 2197. Alternatively, should the Court decide to consider Plaintiffs' Motion, it should be denied because Plaintiffs have failed to state a claim against TRP under Wisconsin law.

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. 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.); *Kimbrow 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.); *Banks v. DePuy Orthopaedics, Inc., et al.*, Case No. 3:11-cv-00718-L (N.D. Tex.); *Wilson v. DC Medical LLC, et al.*, Case No. 1:11-cv-01174-JEC (N.D. Ga.); *Gallimore v. DC Medical LLC, et al.*, Case No. 1:11-cv-01173-ODE (N.D. Ga.); *Bailey v. DC Medical LLC, et al.*, Case No. 1:11-cv-01169-RWS (N.D. Ga.); *Brannon v. DC Medical LLC, et al.*, Case No. 1:11-cv-01170-TCB (N.D. Ga.); *Finley v. DC Medical LLC, et al.*, Case No. 1:11-cv-01171-SCJ (N.D. Ga.); *Lewis v. DC Medical LLC, et al.*, Case No. 1:11-cv-01172-MHS (N.D. Ga.); *Askew v. DC Medical LLC, et al.*, Case No. 1:11-cv-01245-WSD (N.D. Ga.); and *Zaborsky v. DePuy Orthopaedics, Inc., et al.*, Case No. 3:11-cv-00251-JAG (E.D. Va.).

II. BACKGROUND

A. Removal And MDL Notification.

Defendants timely removed this case to this Court on April 15, 2011 on the grounds that Plaintiffs fraudulently and improperly joined TRP. (Notice of Removal, Doc. No. 1, ¶¶ 13-38.) In the Notice, Defendants established that complete diversity of citizenship existed between Plaintiffs and DePuy – the only properly joined defendant – and that the amount in controversy requirement is met. (*Id.*, ¶¶ 10-12 & 39-45.) Plaintiffs do not challenge that the amount in controversy exceeds the minimum jurisdictional amount, nor do they contend that diversity is lacking between DePuy and them. The sole jurisdictional issue before the Court is whether TRP, the non-diverse defendant, has been fraudulently joined.

Given its similarity to the hundreds of cases already transferred to MDL 2197, this case has been conditionally transferred to MDL 2197, and Defendants have filed a Motion to Stay the proceedings in this Court pending final transfer to the MDL. (Defendants' Motion to Stay, Doc. No. 3.) Plaintiffs are contesting transfer and a stay of the proceedings in this Court. (*See generally* Plaintiffs' Opposition to Motion to Stay, Doc. No. 7.) The Motion to Stay is now fully briefed and pending before this Court. (*See generally* Defendants' Reply in Support of Motion to Stay, Doc. No. 13.) If Defendants' Motion is granted, Plaintiffs' Motion to Remand will also be stayed, and will be resolved by the MDL judge along with the similar jurisdictional motions filed in other cases consolidated in, or en route to, the MDL.

B. Plaintiffs' Allegations Against TRP.

Plaintiffs assert claims for strict liability, negligence, and negligent misrepresentation against TRP. (*See generally* First Am. Compl.) Yet, Plaintiffs' Motion to Remand addresses almost exclusively the strict liability claim only. Plaintiffs do not allege that TRP designed or

manufactured the ASR™ device. Plaintiffs contend that TRP is liable in strict liability because it distributed and sold the ASR™ device in Wisconsin. (Plaintiffs' Memorandum in Support of Motion to Remand, at 4-9.) Plaintiffs further contend that TRP "aggressively marketed" the ASR™ device, and was responsible for educating Plaintiffs' implanting surgeon, answering questions about the device, and convincing the surgeon to purchase the device to implant into Ms. Malkmus. (First Am. Compl., ¶¶ 18 & 34.)

C. TRP's Actual Role In The Sale And Distribution Of The ASR™ Device.

Defendants' Notice of Removal and their Answers (Doc. Nos. 9 & 11), and the sworn declaration of Todd Peterson (Exhibit B to Defendants' Notice of Removal), the sole member of TRP, establish that TRP's role with respect to the sale and distribution of the ASR™ device was much more limited in scope than the picture painted by Plaintiffs. DePuy is the responsible U.S. entity for the design, manufacture, distribution, marketing, and sale of the ASR™ artificial hip replacement system. (Answer of DePuy Orthopaedics, Inc., ¶ 5.) It is also the U.S. entity responsible for labeling, packaging, and sealing the prosthetic hip systems in packages, as well as for the language included in the package inserts. (*See generally* Peterson Declaration, ¶¶ 5 & 7.) DePuy alone sets the prices it charges for the hip systems, sells them directly to hospitals, and directly invoices the hospitals for those sales. (*Id.*, ¶ 9.)

In its effort to distribute these hip systems to hospitals and implanting surgeons nationwide, DePuy works with companies throughout the United States, such as TRP, to facilitate the delivery of its products to the end-users. TRP provides this service in Wisconsin and Michigan for DePuy. (Peterson Declaration, ¶ 1.) In providing this service, TRP fills orders placed by hospitals and delivers the specific device ordered in its original sealed and unopened packaging to the hospital. (*Id.*, ¶¶ 6-7.) TRP does not inspect the devices it delivers, nor does it

have any opportunity to conduct such an inspection. (*Id.*, ¶ 7.) At no time does TRP ever own, or take title to, the devices it delivers. (*Id.*, ¶ 8.) It does not purchase devices from DePuy, nor does it receive any payments from hospitals. (*Id.*) It has no role whatsoever in the design, development, testing, or manufacturing of any of DePuy’s medical devices, including the ASR™ device, or the development of any packaging, labeling, or language included in package inserts. (*Id.*, ¶¶ 4-5.) TRP does not offer or make any warranties to physicians or the public, including patients such as Letitia Malkmus, regarding the devices. (*Id.*, ¶ 9.) In fact, TRP has had no direct dealings or communications with Ms. Malkmus. (*Id.*, ¶ 11.)

III. ARGUMENT

A. The Court Should Defer Consideration Of Plaintiffs’ Motion To Remand Pending MDL Transfer.

In the context of their Motion to Stay, Defendants have fully briefed why all proceedings in this case – including Plaintiffs’ Motion to Remand – should be stayed pending transfer to MDL 2197. Accordingly, this Court should refrain from ruling on Plaintiffs’ Motion pending resolution of the transfer of this case. Deferral of the Motion will allow the MDL court to resolve overlapping jurisdictional issues, thus “promot[ing] judicial economy and also ensur[ing] that the cases in this litigation are treated in a uniform manner.” (Defendants’ Reply in Support of Motion to Stay, at 7.).

B. Plaintiffs’ Motion To Remand Should Be Denied Because TRP Has Been Fraudulently Joined, Making Removal Proper.

1. Fraudulent joinder standard of review.

In analyzing the fraudulent joinder of a non-diverse defendant, a court should disregard that defendant’s citizenship where “there exists no reasonable possibility that a state court would rule against the [non-diverse] defendant.” *Schwartz v. State Farm Mut. Auto. Ins. Co.*, 174 F.3d

875, 878 (7th Cir. 1999) (internal quotations and citation omitted). In making this determination, a court is entitled to pierce the pleadings and consider summary judgment-type evidence, like a declaration or affidavit submitted by the moving party. *See, e.g., Faucett v. Ingersoll-Rand Mining & Mach Co.*, 960 F.2d 653 (7th Cir. 1992) (finding uncontroverted affidavit sufficient to show fraudulent joinder and thus supported court's assertion of jurisdiction over the case).

2. TRP cannot be held liable in strict liability because it is not a “seller” of the ASR™ device under Wisconsin law.

(a) TRP's activities with the ASR™ device are “insufficiently active” to rise to the level of a seller.

There is no reasonable possibility that TRP can be held liable in strict liability where its activities with respect to the sale and distribution of the ASR™ device were not sufficiently active to meet the definition of “seller” under Wisconsin law. Because Plaintiffs do not contend that TRP designed or manufactured the ASR™ device, TRP can only be held liable in strict liability if it is a seller that “engaged in the business of selling” the device in Wisconsin. *Dippel v. Sciano*, 37 Wis.2d 443, 155 N.W.2d 55, 63 (1967); *see In Nelson by Hibbard v. Nelson Hardware, Inc.*, 160 Wis.2d 689, 467 N.W.2d 518, 523 (1991); *see also* Restatement (Second) of Torts § 402A. Wisconsin has adopted the doctrine of strict liability as initially set forth in § 402A of the Restatement (Second) of Torts. *See Dippel*, 155 N.W.2d at 63. Under this rule, liability can be maintained against those entities that place or maintain a defective product in the stream of commerce, including the product's manufacturer, distributor, and seller. *Geboy v. TRL Inc.*, 159 F.3d 993, 997 (7th Cir. 1998) (citing *St. Clare Hosp. of Monroe, WI v. Schmidt, Garden, Erickson, Inc.*, 148 Wis.2d 750, 437 N.W.2d 228, 231 (1989)). These entities can generally be held liable because the traditional purpose of strict liability is to impose liability on those “in the best position to control the risk of harm a product might cause.” *Geboy*, 159 F.3d at

997 (citing *Westphal v. E.I. duPont de Nemours & Co.*, 192 Wis.2d 347, 531 N.W.2d 386, 390 (1995)). The Seventh Circuit has been clear, however, that if a party did not place or maintain the allegedly defective product in the stream of commerce, and did not create or assume the risk of harm, it cannot be held liable in strict liability. *Id.*

Plaintiffs argue that Wisconsin law imposes liability on any party involved in the chain of distribution, now matter how tangential or insignificant the party's involvement. (Plaintiffs' Memorandum in Support of Motion to Remand, at 4.) This is an incorrect interpretation of Wisconsin case law. Wisconsin law is clear that an entity must qualify as a "seller" who is engaged in the business of selling the product at issue, as contemplated by § 402A of the Restatement (Second) of Torts. *Nelson*, 467 N.W.2d at 523; *Dippel*, 155 N.W.2d at 63; *Geboy*, 159 F.3d at 998. To rise to the level of a seller, an entity's involvement with the product must be "more than passive;" it must be "sufficiently active" with respect to the sale, distribution, and marketing of the product. *Sedbrook v. Zimmerman Design Group, Ltd.*, 190 Wis.2d 14, 526 N.W.2d 758, 764 & n.6 (Wis. Ct. App. 1994). In *Geboy*, the Seventh Circuit concluded that the "routine activities" of the defendant's business must be considered to determine whether that defendant meets the definition of seller under § 402A of the Restatement (Second) of Torts. 159 F.3d at 998.

TRP's involvement in the sale and distribution of the ASR™ device as evidenced by the declaration of Todd Peterson – not the unsupported allegations of Plaintiffs – is insufficiently active to raise TRP to the level of seller, and thus Plaintiffs' strict liability claim fails. TRP is a service provider who acts as an intermediary between DePuy (the U.S. entity responsible for the design, manufacture, and sale of the product) and hospitals and implanting surgeons to facilitate orders and the delivery of the ASR™ device. (*See generally* Peterson Declaration.) TRP never

owns or takes title to the medical devices it delivers. (*Id.*, ¶ 8.) It does not buy the medical devices from DePuy to then re-sell to medical providers. (*Id.*) DePuy independently sets the prices and sells its medical devices directly to health care providers. (*Id.*, ¶ 9.) TRP has no role in the design, development, testing, manufacturing, and quality control, or the development of any packaging, labeling, or package insert language related to the ASR™ device. (*Id.*, ¶¶ 4-5.) TRP does not even have the opportunity to conduct inspections for defects because it delivers the devices in the sealed, sterile packages that have been labeled, packaged, and sealed by DePuy. (*Id.*, ¶ 7.) It is clear from this evidence of record that TRP plays little substantive role in the actual sale or distribution of the ASR™ device in Wisconsin. As a result, TRP is not a seller of the ASR™ device, and thus cannot be held liable in strict liability.

(b) Plaintiffs' Motion and exhibits in support fail to raise issues controverting the sworn statement of Todd Peterson as to TRP's true and accurate role with respect to the ASR™ device.

Plaintiffs' reliance on factually distinguishable case law and pages of out-of-context, irrelevant information purportedly submitted to establish TRP as a seller of the ASR™ device does not create any reasonable possibility that Plaintiffs can state a claim against TRP. The case law upon which Plaintiffs heavily rely, *Sedbrook v. Zimmerman Design Group, Ltd.*, 190 Wis.2d 14, 526 N.W.2d 758 (Wis. Ct. App. 1994) and *LeAir v. Zimmer, Inc.*, Case No. 03-C-690-S (W.D. Wis. June 18, 2004) (*see* Exhibit 1 to Plaintiffs' Memorandum in Support of Motion to Remand), does not require – or even merit – the conclusion that TRP is a seller of the ASR™ device.³ It is important to emphasize that both cases were decided on their facts; nowhere does either opinion make the blanket statement that all field representatives or service providers

³ Plaintiffs rely so heavily on *LeAir* that much of pages 11-13 of their Memorandum of Law in Support of Motion to Remand are copied almost verbatim from Judge Shabaz's Memorandum and Order in *LeAir*.

involved in the sale and distribution of products, regardless of the factual circumstances, can be held liable in strict liability. Further, neither *Sedbrook* nor *LeAir* involved the ASR™ device or the DePuy distribution network at issue in this case. Further, these cases were from completely different time periods: each involved products distributed well before 2009 – the year of Ms. Malkmus’s original ASR™ implantation procedure. These cases stand on their individual factual circumstances, and should be disregarded for purposes of analyzing TRP’s involvement with the ASR™ device.

Plaintiffs attempt to refute the sworn statements made by Mr. Peterson in his declaration by characterizing his statements as “disingenuous,” and by resorting to documents purportedly designed to paint the picture that field representatives in hip replacement surgeries generally, and DePuy representatives in particular, play such a critical role in the sale and distribution of the products that an entity such as TRP rises to the level of a seller. (Plaintiffs’ Memorandum in Support of Motion to Remand, Exhibits 2-7, and at 13-17.) In support of this argument, Plaintiffs rely on surgical records that identify a DePuy representative present at each of Ms. Malkmus’s two hip replacement surgeries. (*See* Exhibits 2 and 3 to Plaintiffs’ Memorandum in Support of Motion to Remand.) Problematically for Plaintiffs, these records do nothing to advance their assertion that TRP sold the ASR™ device in question for the simple reason that they provide no information other than that the field representatives were present at the time of the surgeries. They certainly do not refute the statements made by Mr. Peterson.

Rather than offer substantive evidence of TRP’s actual role in the sale and distribution of the ASR™ device, Plaintiffs rely on generic, out-of-context information that does not even mention or address TRP: (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, to somehow establish how TRP and its field representatives might have conducted themselves with respect to the particular implantation of Ms. Malkmus's ASR™ device. (Exhibits 4 & 7 to Plaintiffs' Memorandum in Support of Motion to Remand.) This is pure conjecture, as this information sheds no particular light on the actual activities of TRP, nor does it refute any of the statements made by Mr. Peterson as to TRP's role in the sale and distribution of the ASR™ device in Wisconsin.⁴ As a result, there is no reasonable possibility that Plaintiffs can establish a strict liability claim against TRP.

3. Plaintiffs make no effort to show that they will be able to establish claims for negligence and negligent misrepresentation against TRP.

In their Notice of Removal, Defendants extensively established how there is no reasonable possibility that Plaintiffs can prove their negligence and negligent misrepresentation claims against TRP. (Notice of Removal, ¶¶ 33-38.) In particular, Plaintiffs cannot establish their negligence claim because TRP had no involvement in the design or manufacture of the ASR™ device, in preparing any warnings or instructions related to the device, or in deciding which warnings would ultimately be included in the package insert. (Peterson Declaration, ¶¶ 4-5.) TRP also had no opportunity to inspect the devices it delivered to hospitals and surgeons, and had no reason to know that there was any dangerous condition (alleged or otherwise) that existed when it merely delivered the device to Ms. Malkmus's surgeon. (*See generally* Peterson Declaration.) Under these circumstances, TRP cannot be liable in negligence under Wisconsin

⁴ Plaintiffs' citation to affidavit testimony from other litigation, unrelated to the claims here, is actually more descriptive of the reason why field representatives may be present during a patient's surgery – that being to ensure that the specific components of the complete implant a surgeon determines are needed, based on the surgeon's skill and training, ultimately are available once surgery has begun and the patient's needs are more clear. (*See* Exhibits 5-6 to Plaintiffs' Memorandum in Support of Motion to Remand.)

law.⁵

As for their negligent misrepresentation claim, Plaintiffs have no reasonable possibility of proving such a claim because they have not sufficiently shown or alleged that TRP made any reckless or intentional misrepresentations with regard to the ASR™ device, or that any representations it may have made were based on its personal knowledge of the product, or that it made any misrepresentations to Plaintiffs upon which they ultimately relied. At most, Plaintiffs' allegations show that TRP merely passed on information about the ASR™ device given to it by DePuy, the U.S. entity responsible for the creation of all product-related information. Plaintiffs have come forth with no evidence refuting Mr. Peterson's sworn statement that TRP had no ability to inspect the device implanted in Ms. Malkmus, nor was it aware of any dangerous condition (alleged or otherwise) in the device.

Other than including a basic summary of the allegations contained in the Amended Complaint, Plaintiffs make no attempt in their Motion to refute Defendants' Notice of Removal. Because Plaintiffs have not controverted the Notice of Removal and the evidence submitted in its support, there is no reasonable probability to predict that negligence and negligent misrepresentation claims can be established against TRP. Accordingly, TRP has been fraudulently joined and Plaintiffs' Motion to Remand should be denied.

C. Plaintiffs' Request For Attorney's Fees Should Be Denied Because Defendants' Removal Is "Objectively Reasonable."

If Plaintiffs' Motion is granted, their request for related attorney's fees and costs should

⁵ See, e.g., *Smalley v. Procter & Gamble Co.*, 2006 WL 5908354 (W.D. Wis. July 17, 2006) (finding the appropriate defendant for a negligent failure to warn claim to be the manufacturer where the named individual was not involved in the decision to warn, was not responsible for testing or developing the product, did not know of any dangers associated with the product, and was not responsible for curing any problems or stopping the product distribution); *Geboy*, 159 F.3d at 1000-01 (finding several entities in the chain of distribution not negligent after considering whether they had assembled, inspected, or used the product; supplied a guaranty or warranty with the product; or had any notice of any dangerous condition with the product).

be denied because Defendants had “an objectively reasonable basis’ for seeking removal.” *Wolf v. Kennelly*, 574 F.3d 406, 411 (7th Cir. 2009) (quoting *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005)). In *Martin*, the United States Supreme Court held that “[a]bsent unusual circumstances,” attorney’s fees and costs may be awarded under 28 U.S.C. §1447(c) only where the removal was not objectively reasonable. 546 U.S. at 141. Here, Defendants’ removal was objectively reasonable because it was based on a legitimate and plausible interpretation of existing case law, and complete diversity exists between Plaintiffs and DePuy. Plaintiffs’ request for attorney’s fees and costs should therefore be denied.

IV. CONCLUSION

Plaintiffs’ Motion to Remand raises jurisdictional issues almost identical to issues arising in numerous cases currently pending in MDL 2197. The goals of consistency and judicial efficiency will be best served by this Court deferring its ruling on Plaintiffs’ Motion pending transfer of this case to MDL 2197. Yet, if this Court decides to resolve Plaintiffs’ Motion on the merits, it should be denied because there is no reasonable possibility that Plaintiffs can prove any of their claims against TRP. Plaintiffs’ request for attorney’s fees should also be denied.

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Respectfully submitted,

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