

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

(Miami Division)

CASE NO. 1:11-cv-22025-AJ

SHANNON MCCONNELL,

Plaintiff,

v.

MARK DEBIASE, INC. d/b/a
JOINT VENTURE, INC.; DePUY
ORTHOPAEDICS, INC.; DEPUY INC.;
DEPUY INTERNATIONAL, LTD.; DEPUY
IRELAND, LTD.; JOHNSON & JOHNSON
MEDICAL, LTD.; JOHNSON & JOHNSON
INTERNATIONAL; and JOHNSON &
JOHNSON,

Defendants.

**DEFENDANTS' RESPONSE TO PLAINTIFF'S
MOTION FOR REMAND**

INTRODUCTION

Plaintiff Shannon McConnell filed this product liability suit alleging facts substantially similar to the more than 1,200 cases currently pending in MDL No. 2197 in the Northern District of Ohio—namely, that she received a defective DePuy hip implant prosthetic device. But she seeks to evade transfer to the MDL Court (and federal jurisdiction altogether) by joining a non-diverse Florida defendant, Mark Debiase, Inc., which does business as “Joint Venture,” and by filing this motion to remand the case back to state court.

Plaintiff's Motion for Remand should be denied because the only non-diverse defendant, Joint Venture, has been fraudulently joined. There is no reasonable possibility that Joint Venture can be held liable to Plaintiff under Florida law because Plaintiff cannot establish the “essential

requirement” that Joint Venture placed the product at issue into the stream of commerce. *See Williams v. Nat’l Freight, Inc.*, 455 F. Supp. 2d 1335, 1337 (M.D. Fla. 2006) (citing *Johnson v. Supro Corp.*, 498 So.2d 528, 528-29 (Fla. Ct. App. 1986)). Because Joint Venture in fact places nothing in the stream of commerce, it is not the sort of defendant that can be held liable under Florida law for its limited role in the distributive chain.

The jurisdictional issue raised here—whether a non-diverse defendant is fraudulently joined to defeat diversity jurisdiction—overlaps with some 28 other cases already transferred to MDL 2197, *In re: DePuy Orthopaedics, Inc., ASR Hip Implant Products Liability Litigation*, and another 21 working their way through the federal court system on conditional transfer orders. *See* Defendants’ Notice of Removal (ECF no. 1), Defs’ Mot. to Stay (ECF nos. 3 & 4), and Defs’ Resp. to Pl’s Mot. for Reconsideration (ECF no. 11)). Although this Court has indicated that it will address (and Defendants have accordingly briefed) the jurisdictional issue, the best course of action remains for this Court to defer resolving Plaintiff’s Motion for Remand pending transfer to MDL 2197, so that the MDL court can address these issues in an efficient and consistent manner.

FACTUAL BACKGROUND

On December 3, 2010, the Judicial Panel on Multidistrict Litigation (“MDL Panel”) decided that cases involving the ASR™ hip implant devices at issue in Plaintiff’s Complaint “share factual issues as to whether DePuy’s ASR XL Acetabular Hip System, a device used in hip replacement surgery, was defectively designed and/or manufactured, and whether DePuy failed to provide adequate warnings concerning the device” *In re DePuy Orthopaedics, Inc.*, MDL No. 2197, 2010 WL 4940348, at *1 (J.P.M.L. Dec. 3, 2010). It thus found that “[c]entralization under Section 1407 will eliminate duplicative discovery, prevent inconsistent

rulings on discovery and other issues, and conserve the resources of the parties, their counsel and the judiciary.” *Id.*; *see also* 28 U.S.C. § 1407 (providing that cases with common issues of fact may be transferred to the MDL “for the just and efficient conduct of such action.”).

Plaintiff filed her Complaint in state court on April 29, 2011, alleging negligence, strict liability, and breach of implied warranty against all Defendants (the DePuy and Johnson & Johnson entities, and Joint Venture), and alleging violation of the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”) against Joint Venture only, all based on alleged defects in the ASR™ hip devices. She sought to avoid federal jurisdiction and consolidation in MDL 2197 by joining Joint Venture as a defendant in this case. Plaintiff alleges that Joint Venture sold, marketed, distributed, and advised her implanting surgeon regarding the suitability of the ASR™ hip device. (*See* Complaint, ECF no. 1, Exhibit A, at ¶¶ 29-33). While the Complaint contains several allegations regarding Joint Venture’s participation in a DePuy marketing campaign and training for its sales representatives (Compl. at ¶¶ 32-37), it contains only two vague allegations that (1) Joint Venture “sold the DePuy ASR Hip . . . by placing the product for sale in the stream of commerce and delivering the products to purchasers,” and (2) that Joint Venture “sold the DePuy ASR Hip . . . in this matter by placing the products for sale in the stream of commerce and delivering the products for implantation into the body of Plaintiff.” (*Id.* at ¶¶ 30-31).

Defendants removed this case on June 6, 2011, on the ground that Plaintiff fraudulently joined Joint Venture because there is no reasonable possibility that Joint Venture could be liable to Plaintiff under Florida law based on these scant and inaccurate allegations. (*See generally* Notice of Removal, ECF no. 1).¹ As the Panel rules require, Defendants subsequently notified

¹ Plaintiff’s Motion for Remand notes that a copy of the May 26, 2011 answer was not attached to the Notice of Removal. This was a procedural oversight and was remedied by Defendants filing an Amended Notice of Removal on June 16, 2011. (*See* ECF no. 8).

the MDL Panel that this is a tag-along action to MDL 2197. The MDL Panel then listed this case on Conditional Transfer Order (“CTO”) No. 51 on June 9, 2011. On June 10, 2011, Defendants also filed a Motion to Stay all proceedings in this Court pending transfer to the MDL, along with a Memorandum in Support. (ECF nos. 3 & 4). This Court stayed the case on June 16, 2011 “[b]ecause it appears likely that this matter will be transferred to the MDL in the Northern District of Ohio” (ECF no. 9), but vacated that stay on July 1, 2011, after Plaintiff filed a Motion for Reconsideration (ECF no. 10), “[b]ecause M[s]. McConnell’s [remand] motion contests this court’s jurisdiction over the case.” (ECF no. 12). At that time, this Court ordered Defendants to respond to Plaintiff’s remand motion by July 15, 2011.

ARGUMENT

A. Plaintiff’s Motion for Remand Should be Denied Because Joint Venture was Fraudulently Joined, and Thus There is Complete Diversity Among All Proper Parties.

This Court has jurisdiction because there is no possibility that Florida law would impose liability on Joint Venture under the circumstances present in this case. Joinder of a resident defendant is fraudulent and removal is proper “when there is no possibility that the plaintiff can prove a cause of action against the resident (non-diverse) defendant.” *Triggs v. John Crumpa Toyota, Inc.*, 154 F.3d 1284, 1287 (11th Cir. 1998); *see also Crowe v. Coleman*, 113 F.3d 1536, 1538 (11th Cir. 1997). In deciding the fraudulent joinder issue, a court may consider summary judgment evidence, such as affidavits, in addition to the pleadings. *Fowler v. Wyeth*, No. 3:04-CV-83/MCR, 2004 WL 3704897, at *3 (N.D. Fla. May 14, 2004); *Parent v. Wyeth*, No. 2:03-cv-626-FTM-29SPC, 2003 WL 25568554, at *2 (M.D. Fla. Dec. 19, 2003).² Once a removing party

² Defendants attached such summary judgment evidence—the declaration of Mark Debiase—to their Notice of Removal. (See ECF no. 1, Exhibit C). The evidence attached to Plaintiff’s

makes a showing of fraudulent joinder, that party “is entitled to have its case heard in federal court, unless the non-removing party . . . comes forward with significant, probative evidence demonstrating the existence of a genuine issue of material fact with respect to the claim of fraudulent joinder.” *Campana v. Am. Home Prods. Corp.*, No. 1:99cv250 MMP, 2000 WL 35547714, at *3 (N.D. Fla. Mar. 7, 2000).

1. Plaintiff cannot establish liability against Joint Venture because Joint Venture does not place anything in the stream of commerce.

Every theory of products liability under Florida law requires a plaintiff to prove that the defendant was “in the business of and gain[ed] profits from the distribution and sale of the product through the stream of commerce.” *Tipton v. Bergrohr GMBH-Siegen*, 965 F.2d 994, 997 n.7 (11th Cir. 1992) (citing *Lane v. Int’l Paper Co.*, 545 So.2d 484, 486 (Fla. Ct. App. 1989)); *Williams.*, 455 F. Supp. 2d at 1337; *Johnson v. Supro Corp.*, 498 So.2d at 528-29. Accordingly, whether a plaintiff’s theory is based in strict liability, negligence, or warranty, there is no possibility of success if a defendant can establish that it does not place any product (and thus, does not profit from placing) a product *in the stream of commerce*.

The stream-of-commerce requirement ensures that Florida law imposes liability on the parties who can most fairly be held responsible for consumer injuries—those who designed, manufactured, or otherwise exercised a significant degree of control over the product. *See Devore v. Howmedica Osteonics Corp.*, 658 F. Supp. 2d 1372, 1379 (M.D. Fla. 2009) (one factor relevant to the issue of defendant’s control is “whether the person or entity . . . is in a position to control the risk of harm a product might cause once put into the stream of commerce.”); *West v. Caterpillar Tractor Co.*, 336 So.2d 80, 86 (Fla. 1976) (“The manufacturer, by placing on the

remand motion, however, may not be considered for purposes of determining the fraudulent joinder issue for the reasons described in Section B, *infra*.

market a potentially dangerous product for use and consumption . . . thereby undertakes a certain and special responsibility toward the consuming public who may be injured by it.”).

Joint Venture places nothing in the stream of commerce. As the declaration signed by Mark Debiase explains, DePuy, not Joint Venture, is “the U.S. entity responsible for the design, manufacture, and sale of the ASR™ Hip prostheses.” (See Declaration of Mark Debiase, ECF no. 1, Exhibit C at ¶1). Joint Venture does not enter into any contracts to sell, accept payment for, take title to, or even open and examine the ASR™ prostheses. (*Id.* at ¶¶ 6-7). It conveys a consumer’s order directly from inventory to the ordering hospital or surgeon in “sealed, sterile packages that were labeled, packaged, and sealed by DePuy.” (*Id.* at ¶¶ 5-6). In short, it is DePuy that places the ASR™ prostheses in the stream of commerce, not Joint Venture. Plaintiff, for her part, has presented nothing more than unsupported allegations to contradict this Declaration. See *Legg v. Wyeth*, 428 F.3d 1317, 1323 (11th Cir. 2005) (“When the Defendants’ affidavits are undisputed by the Plaintiffs, the court cannot then resolve the facts in the Plaintiffs’ favor based solely on the unsupported allegations in the Plaintiffs’ complaint.”); *Woodard v. Wal-Mart Stores East, L.P.*, No. 5:09-CV-428(CAR), 2010 WL 942286, at *2 (M.D. Ga. Mar. 12, 2010) (same; and: “WalMart satisfie[d] its burden for showing fraudulent joinder.”) (internal citation omitted).

Because DePuy is the only entity that places the ASR™ prostheses in the stream of commerce, Joint Venture cannot be held liable for doing so. A succinct metaphor explains why. If a child tosses a stone into a stream, a second child cannot come along and toss that *same* stone into the stream for a second time—at least, not without first reaching into the water and pulling the stone back out. Here, Joint Venture is like the second child, but pulls nothing out of the stream of commerce. This would be a different case if Joint Venture opened the ASR™

prostheses, modified them, and repackaged them for sale. Then Joint Venture would be like the second child that comes along, plucks the stone from the water, and tosses it back into the stream. Only then could Joint Venture, as a party responsible for placing the product in the stream of commerce, fairly be held liable for alleged harm caused to consumers.

The Supreme Court of Florida's decision in *Samuel Friedland Family Enterprises v. Amoroso*, 630 So.2d 1067 (Fla. 1994) is not to the contrary. While Plaintiff suggests that Joint Venture was in the same position as the Diplomat Hotel—the Florida defendant that leased its beach to a boat-stand operator and marketed the boats to its guests—the comparison falls flat. The Diplomat may not have had an “ownership interest” in the boats, but it intentionally established a rental business in which it appeared to hotel guests that they rented boats from the Diplomat, and that the Diplomat itself delivered the boats to consumers. *See id.* at 1071. (“The record reflects that, when the Amorosos, and presumably the other hotel guests, rented a boat, they reasonably believed that they were renting it from the Diplomat.”). In short, the Diplomat implied that it quite literally put the boats “in the water” for its guests use. Joint Venture, in contrast, cannot be characterized as placing anything in the stream of commerce.

2. Florida law will not hold a party strictly liable where the party's only involvement in the “stream of commerce” was to deliver a prescription product in a sealed, unopened container, from manufacturer to consumer.

Florida law does not impose strict liability as a knee-jerk reaction to the allegation that a defendant is a “distributor.” Rather, Florida courts examine the relationship between the manufacturer, the product, and those in the distribution chain to determine which parties can fairly be held liable. *See, e.g., Devore*, 658 F. Supp. 2d at 1378 (“[T]he Florida Supreme Court held that ‘[i]n order to hold a manufacturer liable on the theory of strict liability in tort, the user must establish the manufacturer's relationship to the product in question.’”) (citing *West*, 336

So.2d at 87) (emphasis in original). And in evaluating that relationship, courts look at a constellation of factors focused on whether the defendant “possessed some element of ‘control over the allegedly defective product.’” *Id.* at 1379; *see also Rivera v. Baby Trend, Inc.*, 914 So.2d 1102, 1104 (Fla. Ct. App. 2005). In addition to physical possession, those factors include:

[W]hether the person or entity placed the product in the stream of commerce, is in a position to ‘control the risk of harm a product might cause once put into the stream of commerce,’ or either created or assumed the risk of harm for the defective product.

Rivera, 914 So.2d at 1104. Courts may also ask whether the defendant was the “actual seller of the product” or “accepted payment for the product.” *Id.* at 1104-05; *see also Martin v. Medtronic, Inc.*, No. 5:11-cv-144/RS-CJK, 2011 WL 2473318, at *1 (N.D. Fla. June 22, 2011) (finding the fact that the non-diverse defendant “took the decedent’s order and payment” significant in determining whether the defendant was part of the “distributive chain.”); *Amoroso*, 630 So.2d at 1071 (“The sailboats were paid for by [the Diplomat] charging them to the room and leaving the room key as security for the rental.”).

Collectively, the above factors indicate that Florida law would not impose strict liability on Joint Venture for its very limited role in the chain of distribution. Plaintiff nevertheless suggests—based on a 21-year-old Illinois Court of Appeals decision—that a “participatory connection” between Joint Venture and the allegedly defective ASR™ is a sufficient basis for strict liability. *See Bittler v. White and Co., Inc.*, 560 N.E.2d 979 (Ill. Ct. App. 1990). The *Bittler* decision, however, is not Florida law. Florida requires a more detailed examination of the relationship between defendant and product.

In fact, Florida courts have confirmed that strict liability does *not* apply to situations where, as here, a defendant delivers a prescription product from manufacturer to consumer in a sealed, unaltered state. This exclusion applies even where the defendants unquestionably

profited from the underlying transactions. For example, in *McLeod v. W.S. Merrell Co.*, 174 So.2d 736 (Fla. 1965), the Florida Supreme Court refused to impose liability for breach of implied warranty on “retail druggist[s] who properly fill[] a prescription of a medical doctor with an unadulterated drug.” *Id.* at 737. The “concept of strict liability without fault,” the Court reasoned, “should not be applied to the prescription druggists in the instant situation,” where the prescription was filled strictly in accordance with a doctor’s orders. *Id.* at 739. Moreover, the fact that the manufacturer had prepared the product and put it in a sealed package that the defendant never opened or analyzed—that is, that the product was essentially untouched by the defendant—was a driving factor behind the court’s decision not to impose strict liability. *See id.* at 737.

The *McLeod* decision created a line of precedent that has confirmed that strict liability does *not* apply every time a defendant is alleged to be a “distributor.” Accordingly, in *Fontanez v. Parental Therapy Associates, Inc.*, 974 So.2d 1101 (Fla. 5th DCA 2007), the Florida District Court of Appeal drew a bold line between “retail” druggists, who sell drugs “in the original unbroken containers that they . . . received from the manufacturer,” and “compounding” druggists, who tailor a product “to the needs of an individual patient.” *Id.* at 1104-05.³ Both kinds of pharmacists could be fairly called “distributors,” but the *Fontanez* court reasoned that:

When a pharmacist merely resells a drug that he or she has received from a manufacturer, the pharmacist is playing no role in the preparation of the product, but is simply dispensing the drug. The *McLeod* court found that the imposition of strict liability on a pharmacist simply dispensing a prescription drug would

³ The Northern District of Florida recently remanded a case in which the defendants removed based in part on the *Fontanez* holding. *Martin v. Medtronic, Inc.*, No. 5:11-cv-144/RS-CJK, 2011 WL 2473318, at *1 (N.D. Fla. June 22, 2011). In distinguishing *Fontanez*, the trial court—without citing any authority—drew an artificial distinction between prescription drug cases and “the traditional medical device line of strict liability cases.” *Id.* Florida law does not support any such distinction. Defendants, consequently, respectfully urge this Court to apply Florida law as articulated by the Florida courts, not the Northern District.

improperly convert retail pharmacists into insurers of the safety of the manufactured drug.

Id. at 1105. The same paragraph could apply verbatim to Joint Venture, which dispenses an unopened, unaltered prescription product to consumers. Simply, Florida law does not impose strict liability on a defendant whose role in the distributive chain is so disconnected from the manufacturing or design process.

3. Plaintiff's negligence claim also fails because Joint Venture does not place any product in the stream of commerce.

Plaintiff's negligence claim against Joint Venture carries no possibility of success for the same reasons described above. Because Joint Venture places nothing in the stream of commerce, Plaintiff cannot as a matter of law establish the essential prerequisite for her product liability claims, whether founded in negligence or some other theory. *See Tipton*, 965 F.2d at 997 n.7; *Johnson*, 498 So.2d at 528-29.

4. Plaintiff's warranty claims must fail because Joint Venture did not sell ASR implants to, or enter into any sales contracts with, Plaintiff, her surgeon, or the hospital.

Plaintiff's warranty theory likewise fails because Plaintiff cannot establish that Joint Venture placed anything in the stream of commerce. But moreover, Plaintiff has no possibility of succeeding on her warranty theory for the separate reason that she cannot establish privity as a matter of law. *See Rees v. Engineered Controls Int'l, Inc.*, No. 6:06-cv-1558-ORL-19JGG, 2006 WL 3162834, at *2 (M.D. Fla. Nov. 2, 2006). In her Motion, Plaintiff responds by alleging generally that the evidence shows Joint Venture "did sell the removing Defendant products and as a result, privity is present." (ECF no. 10 at 17). But the undisputed facts, as established in Mark Debiase's Declaration, confirm that Joint Venture did not enter into any contractual relationship (express or implied) with Plaintiff, her surgeon, or the hospital in which her surgery occurred, nor receive any monies from any of these parties for the ASR™ implant. (*See*

Declaration at ¶ 7). All those transactions were between the Plaintiff and DePuy, not Joint Venture.

5. Plaintiff's FDUTPA claim is barred by Florida's "Learned Intermediary" rule.

There is no possibility that Plaintiff's claim for relief under the Florida Deceptive and Unfair Trade Practices Act may succeed because, under Florida law, a plaintiff may not press a FDUTPA claim where the claim is nothing more than a substitute for a failure-to-warn cause of action. *See Beale v. Biomet, Inc.*, 492 F. Supp. 2d 1360, 1370-71 (S.D. Fla. 2007). This rule is designed to protect the integrity of the "learned intermediary" doctrine, which offers a defense against failure-to-warn claims by barring a plaintiff from establishing proximate cause where the manufacturer of a prescription drug or medical device provides an adequate warning to the prescriber. *See id.* at 1371.

For her part, Plaintiff maintains that Defendants misread the *Beale* case, directing this Court's attention to a paragraph in which the court explained that, under the doctrine, "the causal link between a patient's injury and the alleged failure to warn is broken when the prescribing physician had 'substantially the same' knowledge as an adequate warning from the manufacturer would have communicated to him." (ECF no. 10 at 17) (citing *Beale*, 492 F. Supp. 2d at 1365. That reading is far too cramped and would deprive the Court's decision of meaning. Giving *Beale* its full meaning, the court not only described the learned intermediary doctrine, but for the first time addressed how, under Florida law, the doctrine interacted with FDUTPA claims "relating to a prescription medical product." *Beale*, 492 F. Supp. 2d at 1372. And in so doing, the court determined that the doctrine "would be rendered meaningless" if plaintiffs were allowed to couch failure-to-warn claims as "affirmative misrepresentations or misrepresentations by concealment" actionable under the FDUTPA:

While Plaintiffs have provided various names for their claims against Biomet, the claims are all ultimately based upon Biomet's alleged failure to warn of the risks of the device. Because Florida has adopted the learned intermediary doctrine, I conclude that it would follow the reasoning above and hold that the doctrine bars the Plaintiffs' claims in this case.

Id. at 1373 (citing *In re Norplant Contraceptive Prods. Liab. Litig.*, 955 F. Supp. 700 (E.D. Tex. 1997)). Here too, the doctrine prevents Plaintiff from succeeding on a FDUTPA claim that is in fact a failure-to-warn claim couched as a complaint about misrepresentations.

B. This Court Should Not Consider Any Allegations Not Pleaded In Plaintiff's Complaint.

In an attempt to depict Joint Venture as a seller of the ASR™ Hip Systems (and thus, presumably, a party that places the ASR™ in the stream of commerce), Plaintiff has filled her remand motion with voluminous references and exhibits that provide general, out-of-context information meant to highlight Joint Venture's employees' training and responsibilities. (ECF no. 5 at 7-15, and Exhibits C-G). These exhibits include the LinkedIn web pages of persons alleged to be former Joint Venture employees⁴, a course catalog from a medical sales college, affidavits from other cases, pages from DePuy's training guide, and a letter sent by Mark Debiase to Halifax Medical Center,⁵ and all are meant to discredit the sworn testimony of Mark Debiase, Joint Venture's principal, contained in the declaration that Defendants filed with their Notice of Removal. (See ECF no. 1, Exhibit C). This is all pure conjecture, as this information

⁴ Plaintiff has not authenticated either purported screen capture under Fed. R. Evid. 901, and so this Court should disregard the images for purposes of deciding Plaintiff's motion. In any event, neither screen capture supports Plaintiff's assertion that these are Joint Venture employees. Neither profile even mentions the company "Joint Venture" or "Mark Debiase, Inc."

⁵ Plaintiff refers in her brief to a letter sent from Mark Debiase to Halifax Medical Center on August 19, 2008, which extends an offer to renew the contract between Halifax and DePuy for two years. This letter does not, as Plaintiff suggests, indicate that Joint Venture negotiated contract prices. Indeed, the letter appears to be nothing more than Mr. Debiase conveying information about prices set by DePuy to Halifax. As such, it is entirely consistent with Mr. Debiase's sworn declaration.

sheds no particular light on the actual activities of Joint Venture, nor does it refute any of the statements made by Mr. Debiase as to Joint Venture's role in the sale and distribution of the ASR™ devices in Florida. As a result, these attachments and new allegations do not create a reasonable possibility that Plaintiff can establish a strict liability claim against Joint Venture.

Moreover, this Court may not consider the new "evidence" contained in Plaintiff's remand motion for the purposes of determining whether Joint Venture has been fraudulently joined. In assessing jurisdiction, the "district court has before it only the limited universe of evidence available when the motion to remand is filed—i.e., the notice of removal and accompanying documents." *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1213 (11th Cir. 2007). Accordingly here, this Court is limited to considering the allegations contained in the Complaint and the Defendants' Notice of Removal.

C. This Court Should Follow the Majority Approach of Federal District Courts And Defer Ruling on Plaintiff's Remand Motion.

Although this Court may resolve Plaintiff's Motion for Remand, it retains discretion (despite vacating the Stay Order) to defer ruling on Plaintiff's Motion. Defendants have already fully briefed the reasons why this Court should defer ruling on the remand motion until the MDL Panel issues its transfer decision and incorporate those same arguments here. (*See* Defendants' Motion to Stay (ECF nos. 3 & 4); Defs' Resp. to Pl's Mot. for Reconsideration (ECF no. 11)).

If this Court were to defer ruling on Plaintiff's Motion for Remand, its decision would be in line with numerous other courts within the Eleventh Circuit that have likewise refused to resolve remand motions in cases designated for MDL transfer. *See, e.g., Kline v. Earl Stewart Holdings, LLC*, No. 10-80912-CIV, 2010 WL 3432824, at *2 (S.D. Fla. Aug. 30, 2010) (granting defendant's motion to stay pending action by MDL Panel); *Miller v. Merck & Co.*, No. 2:08-cv-757, 2008 WL 4642779, at *1 (M.D. Fla. Oct. 20, 2008) ("[T]he Court concludes that the motion

to stay should be granted and that the issues raised in the motion to remand should be deferred to the district court presiding over MDL-1657.”); *Republic of Venez. ex rel. Garrido v. Philip Morris Cos.*, No. 99-0586-CIV, 1999 WL 33911677, at *1 (S.D. Fla. Apr. 28, 1999) (staying consideration of motion to remand pending transfer by MDL Panel); *Farrow v. Bayer Corp.*, No. 03:04-CV-161-F, slip op. at 1 (M.D. Ala. April 19, 2004) (withholding ruling on remand motion and staying case pending MDL Panel’s decision on MDL transfer) (attached as Exhibit A).

D. Plaintiff’s Request for Fees Should Be Denied Because Defendants’ Removal Is “Objectively Reasonable.”

If Plaintiff’s Motion is granted, her request for related fees and costs should be denied because Defendants have “an objectively reasonable basis for seeking removal.” *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). In *Martin*, the Supreme Court of the United States held that “[a]bsent unusual circumstances, courts may award attorney’s fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal.” *Id.* Here, Defendants’ removal was objectively reasonable because it was based on a legitimate interpretation of existing Florida case law and because complete diversity exists between Plaintiff and DePuy. *See McKin v. Home Depot U.S.A.*, No. 09-81427-Civ, 2010 WL 2612613, at *2 (S.D. Fla. June 22, 2010) (“Although the District Court rejected this [fraudulent joinder] argument, such does not render Defendants’ position objectively unreasonable.”); *see also Diebel v. S.B. Trucking Co.*, 262 F. Supp. 2d 1319, 1333-34 (M.D. Fla. 2003) (“[T]his Court is reluctant to order [fees] because the record reflects that the Defendants’ efforts to remove to federal court were reasonable in that they were not without some basis in law, and there was no binding Eleventh Circuit authority to the contrary.”).

CONCLUSION

Florida law is clear that a defendant in a product liability suit will not be held liable if its business did not involve, or it did not profit from, placing a product into the “stream of commerce.” Joint Venture, which did not open or examine, much less take title in Plaintiff’s ASR™ hip implant, placed nothing in the stream of commerce. For this reason, among the others described above, there is no possibility that Joint Venture can be liable to Plaintiff under Florida law. If this Court chooses to resolve Plaintiff’s Motion, counter to the expressed intent of the MDL Panel and the practice of Federal District Courts across the country, then this Court should deny Plaintiff’s Motion for Remand.

Dated: July 14, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by Notice of Electronic filing generated by CM/ECF or in some other authorized manner on July 14th, 2011, on all counsel of record on the Service List below:

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9676713.1

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

| | |
|---------------------------|----------------------------------|
| BRENDA FARROW, |) |
| |) |
| PLAINTIFF, |) |
| |) |
| v. |) CIVIL ACTION NO. 3:04-CV-161-F |
| |) |
| BAYER AG, <i>et al.</i> , |) |
| |) |
| DEFENDANTS. |) |

ORDER

This cause is before the Court Defendant's Motion to Stay Proceedings Pending Transfer to Multidistrict Proceeding (Doc. # 5) filed on March 10, 2004. The Court has considered the arguments in support of and in opposition to this motion. It is hereby ORDERED as follows:

(1) Defendant's Motion to Stay Proceedings Pending Transfer to Multidistrict Proceeding (Doc. # 5) is GRANTED and this case is STAYED pending a final decision from the Panel on Multidistrict Litigation on transfer of this case to the multi-district litigation proceeding.

(2) A ruling on the Motion for Remand (Doc. # 7) filed by Plaintiff on March 12, 2004 is WITHHELD pending a final decision from the Panel on Multidistrict Litigation on transfer of this case to the multi-district litigation proceeding.

DONE this 19th day of April, 2004.

/s/ Mark E. Fuller
UNITED STATES DISTRICT JUDGE