UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: Guidant Defibrillators Products Liability Litigation	MDL No. 05-1708 (DWF/AJB)
This pleading applies to: Third Party Payor Actions	

THIRD PARTY PAYOR PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THIRD PARTY PAYOR CLAIMS IN THE MASTER COMPLAINT

Defendants' Motion to Dismiss the Third-Party Payer & Medicare Secondary Payer Claims in the Master Complaint and supporting memorandum ("Defs' Brief") rely on a skewed interpretation of relevant case law and a selective reading of the Plaintiffs' Master Complaint for Personal Injury, Economic Loss, Third Party Payor and Medicare Secondary Payor Act Claims, Including Class Actions ("Master Complaint") in an effort to dismiss each claim alleged against them. In reality, the Master Complaint sets forth how third party payors, such as health and welfare funds, self-insured employers and non-profit and for-profit health insurers ("third party payors" or "TPPs"), have shouldered the extraordinary economic burden arising out of the massive recalls resulting from Defendants knowing marketing, distribution and sales of defective implantable cardioverter defibrillators ("ICDs"). Because TPP Plaintiffs have fully alleged each of their nine causes of action against Defendants, the Motion to Dismiss should be denied.

I. INTRODUCTION

Plaintiffs' Master Complaint brings claims against Guidant Corporation, Guidant Sales Corporation, Cardiac Pacemakers, Inc., and Boston Scientific Corporation

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(collectively "Defendants") for their knowing marketing, distribution and sales of life-threatening and defective implantable cardioverter defibrillators ("ICDs"), and for their otherwise wrongful marketing, promotion, advertising and sale of defective heart devices. By reason of Defendants' wrongful conduct, massive, national recalls of heart devices have been underway in the United States and public and private payors of health insurance have had to shoulder most of the staggering costs, estimated to be a total amount in the hundreds of millions of dollars, of device removals and re-implantations. Recalling an implanted heart device is not like recalling a tire or radiator cap. The devices at issue cost thousands of dollars apiece, and medical, surgical, and hospital costs can push the amount to over $100,000 per device; when complications occur require additional hospitalization or treatment, the costs go higher still.

Accordingly, the third party payor cases seek several forms of relief. First, the actions seek class certification pursuant to Fed. R. Civ. P. 23(b)(2) and 23(b)(3) and appointment of Class counsel and Class representatives. Second, the actions seek non-monetary relief, including disclosure (under appropriate protections for privacy) of Defendants' registrant lists in order to aid the implementation of the recalls and to properly allocate their economic burden. Third, the actions seek monetary relief, including payment or reimbursement for the costs of replacement and/or corrective surgeries. Because the recalls involve tens of thousands of devices, these costs will likely exceed many hundreds of millions of dollars. In short, the TPPs have been damaged by having to foot the costs of Defendants' wrongdoing, while Defendants have been unjustly enriched at the TPPs' expense.

II. PROCEDURAL BACKGROUND

In late 2005, health benefit providers filed two actions in the United States District Court for the District of Minnesota: (1) *United Food and Commercial Workers Local 1776 and Participating Employers Health and Welfare Fund v. Guidant, Corp. et al*, CA No. 05-cv-2859 ("UFCW") and (2) *City of Bethlehem, Pennsylvania v. Guidant Corp. et al*, CA No. 05-cv-2883 ("Bethelem"). On January 31, 2006, this court entered an order requiring Plaintiffs to file a master complaint for representative cases and on April 24, 2006, Plaintiffs complied.

Pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2)(3), the Master Complaint seeks relief in part for the following class:

> [A]ll third party payors... in the United States or its territories who (i) have been issuers or sponsors of a contract, policy or plan that provides medical coverage to the natural persons and, (ii) having incurred, pursuant to such contract, policy or plan, full or partial costs for any of the Devices and related medical costs including implementation surgery, replacement surgery, medical monitoring and/or hospital costs.[1]

Master Complaint at ¶ 254. On behalf of TPPs, the Master Complaint alleges nine claims for relief:[2]

Count XVIII	Violation of the Minnesota Deceptive Trade Practice Act
Count XIX	Violation of the Minnesota Prevention of Consumer Fraud Act
Count XX	Violation of the Minnesota False Statements in Advertising

[1] The term "Devices" is defined in the Master Complaint as the enumerated defective devices recalled by Defendants. Excluded from the third party payor class are, of course, Defendants, governmental entities, Plaintiffs' counsel and judges of the court to which the case is assigned.

[2] At this stage of proceedings, Plaintiffs are allowed to assert alternative theories of recovery even if these theories may eventually prove mutually exclusive. *See* Fed R. Civ. P. 8. In addition, any choice of law analysis at this stage of the proceedings would be premature. *See In Re K-Dur Antitrust Litigation*, 338 F.2d 517, 541 (D.N.J. 2004) (noting that a choice of law analysis would be premature at this stage of the proceedings).

	Statute
Count XXI	Unfair and Deceptive Trade Practices Under State Law
Count XXII	Subrogation Liability Determination
Count XXIII	Unjust Enrichment
Count XXIV	Breach of Implied Warranty
Count XXV	Brach of Assumed Contractual Warranty Obligations
Count XXVI	Misrepresentation by Omission

On June 26, 2006, Defendants filed their Motion to Dismiss and accompanying brief. TPP Plaintiffs respectfully submit that the grounds asserted by Defendants lack any merit and urge that the motion be denied.

III. FACTS

As Defendants' motion is based upon Fed. R. Civ. P. 12(b)(6), the allegations of the Master Complaint control, and this Court therefore credits the facts in the Master Complaint as true and makes all reasonable inferences in favor of the pleader. *Coons v. Mineata,* 410 F. 3d 1036, 1039 (8th Cir. 2005). Accordingly, this section references allegations in the Master Complaint and reasonable inferences therefrom.

Defendants research, develop, test, manufacture, market, promote, advertise and sell ICDs and other cardiac devices. Master Complaint at ¶ 33. Primarily through their Cardiac Rhythm Management Division ("CRM Division"), Defendants developed, manufactured, tested, marketed and sold the cardiac devices at issue in this litigation. *Id.* In their public disclosures, Defendants have represented to physicians, patients, Class members and others that their products are essential for saving lives, noting, for example, in one brochure, "Patients often ask how long their devices will last. It's hardly surprising – they know their lives depend on them.... Give your patients the comfort of

knowing they have a Guidant ICD system with the stamina to perform over the long haul..." *Id.* at ¶ 197.

In the Master Complaint, TPPs, all of whom bear the ultimate economic risk of health care payments, bring claims against Defendants for their sale and distribution of defective cardiac devices and for their otherwise wrongful marketing, promotion, advertising and sale of these devices. *Id.* at ¶¶ 376-443. Because of Defendants' wrongful conduct, recalls of approximately 200,000 cardiac devices have been underway in the United States. The overwhelming economic impact of Defendants' conduct and the recalls has fallen, wrongfully, on the shoulders of public and private payors of health insurance.

The Master Complaint alleges that at all times relevant to this class action, Defendants knew or should have known that the devices were not safe for the patients who received them because of various defects, including short-circuiting, battery depletion caused by the failure of a magnetic switch, latching, battery depletion caused by excessive moisture, presence of foreign material, and unknown modes of failure.[3] *Id.* at ¶¶ 93, 117, 135, 139-40, 147, 163-64. These defects rendered the devices unreliable, unreasonably dangerous and unfit for their intended uses. Defendants placed hundreds of thousands of patients unnecessarily at risk of serious injury and/or death and caused TPP Plaintiffs and members of the Class to incur substantially greater costs than they should and otherwise would have paid for medical treatment. These costs will continue to

[3] The Master Complaint's allegations encompass approximately fifty families of cardiac devices and over 100 device models, involving several failure modes or defects. Although the specifics of the problems differ, the defects were known by Defendants and revealed to the public within roughly the same time period.

mount and Class members will continue to pay for the consequences of Defendants' actions for years to come.

Because of the nature of the defects, it would not have been possible for any TPP Plaintiff or Class member to discover the existence of any of the problems in the cardiac devices until at least May 2005, when the first press reports of some of the defects were published, or June 17, 2005, when the FDA officially notified the public that Defendants were voluntarily recalling certain of the defective cardiac devices. Master Complaint at ¶¶ 181-84. Defendants' failure to properly disclose and their active concealment of known defects from TPP Plaintiffs and Class members constitute fraudulent concealment.

Although Defendants were aware of some of these issues as early as February 2002, in the case of the Ventak Prizm 2 DR 1861, they did not advise the FDA, patients or physicians of the problems. *Id.* at ¶ 93. Instead, Defendants modified the manufacturing specifications and process in April and November 2002 with approval from or contemporaneous disclosure to the FDA. *Id.* at ¶¶ 95-96. Even after April 2002, however, Defendants continued to sell the remaining defective ICDs in their inventory stock without disclosing the potentially fatal defect to patients, physicians, TPP Plaintiffs or Class members. *Id.* at ¶ 97. Patients continued to receive the defective devices for months, and possibly years, after Defendants discovered the problems. Defendants made no public disclosure of the Ventak defect until May 23, 2005, mere hours before the *New York Times* published an article on the death of a young man implanted with a Ventak device. *Id.* at ¶ 104. Nearly one month later, on June 17, 2005, Defendants informed physicians of the short-circuiting failure and issued a nationwide recall of the devices.

Master Complaint at ¶ 106. Defendants engaged in similar behaviour with several other cardiac devices, discovering defects but waiting months, and sometimes years, to inform the public of the problems, all the while endangering the health of patients. *Id.* at ¶¶ 116-69.

At all times relevant to this action, Defendants misrepresented the safety of their recalled cardiac devices and negligently manufactured, marketed, advertised, promoted, and sold them as safe devices to be used for the prophylactic treatment of patients who have had spontaneous and/or inducible life-threatening ventricular arrhythmias and patients who are at high risk for developing such arrhythmias. *Id.* at ¶¶ 187-92, 195-97. Moreover, Defendants knew, and/or had reason to know, that the devices were not safe for the patients in whom they were implanted. *Id.* at ¶ 189. As a result of their defective design and manufacture, the recalled devices can cause serious physical trauma and/or death. Defendants knew, and/or had reason to know, of this tendency and the resulting risk of injury and death yet failed to disclose the information. *Id.* at ¶¶ 189-91. Further, Defendants knew, and/or had reason to know, that their deceptive behavior and failure to disclose the malfunctions of the recalled devices would cause TPP Plaintiffs and the Class to bear unnecessary expenses for the defective devices, replacement costs, and other medical expenses associated with such, allowing Defendants to be unjustly enriched at the expense of TPP Plaintiffs and the Class. Master Complaint at ¶¶ 419-25.

Defendants widely and successfully marketed the recalled devices in the United States and the State of Minnesota. *Id.* at ¶ 397. This included aggressive marketing and promotional campaigns extolling the qualities and virtues of the recalled devices as

reliable and mechanically sound for mitigating the risk of heart failure. As part of the recalls, Defendants made offers of free replacement devices to patients implanted with the recalled devices. Notwithstanding their offer to replace the device, Defendants made no offer to reimburse the cost of the original defective device or to absorb the associated medical costs resulting from the replacement. *Id.* at ¶¶ 246-48. Defendants offered merely to provide a replacement device and provide a small amount of money for *unreimbursed medical expenses to patients, not to TPP Plaintiffs or Class members. Id.*

As a direct and proximate cause of Defendants' conduct, TPP Plaintiffs' participants have suffered injuries and/or received related medical treatment and care. *Id.* at ¶¶ 9, 27-28. Accordingly, TPP plaintiffs have incurred and will likely incur full or partial costs for the recalled devices and related medical expenses including, but not limited to, the original defective device, implantation surgery, replacement surgery, medical monitoring and/or other related healthcare costs. Master Complaint at ¶ 29.

IV. ARGUMENT

Defendants have presented numerous arguments in support of their Motion to Dismiss, all of them unpersuasive and each addressed below. First, TPP Plaintiffs demonstrate that there is a justiciable case or controversy and they have standing to bring these claims. Second, TPP Plaintiffs show that, while it is premature to enter into a choice of law analysis, even if the Court chooses to do so, Minnesota law may be properly applied to the claims. Third, TPP Plaintiffs show that Count XXII of the Master Complaint states a claim for Subrogation Liability Determination. Fourth, TPP Plaintiffs have sufficiently alleged a claim for Breach of the Implied Warranty of Merchantability

and Express Warranty. Fifth, the Master Complaint shows that TPP Plaintiffs are entitled to – and have sufficiently alleged a claim for – unjust enrichment. Lastly, TPP Plaintiffs show that the Master Complaint states an actionable claim for Misrepresentation by Omission.

A. The Master Complaint Pleads a Justiciable Case or Controversy

Defendants argue that the Master Complaint fails to plead a justiciable case or controversy because the claimed injuries are "indirect" and therefore not legally cognizable. Defs' Brief at 5-9. This argument lacks any merit. The Master Complaint alleges that TPP Plaintiffs and Class members suffered direct damage because of Defendants' wrongful conduct, and that they incurred economic injuries by paying wholly unnecessary costs and medical expenses directly attributable and allocable to that conduct. The class-wide relief sought is injunctive, declaratory and monetary. These allegations are sufficient to plead standing and injury under federal procedural and state substantive law.

1. Minnesota law provides standing and right to recovery

Although the first three third party payor counts of the Master Complaint state claims under three Minnesota statutes, Defendants argue one Minnesota Supreme Court decision, *State v. Philip Morris, Inc.*, 551 N.W.2d 490 (Minn. 1996), holding that private health benefit providers have standing to make claims nearly identical to those involved in this case, is without relevance and ignore another, *Group Health Plan, Inc. v. Philip Morris, Inc.*, 621 N.W.2d 2 (Minn. 2001). Both these Minnesota high court decisions are on-point and controlling. In *State v. Philip Morris, Inc.*, a private health care

organization brought suit against tobacco companies under Minnesota's Unlawful Trade Practices Act (Minn. Stat. §§ 325D.09 –.16), Deceptive Trade Practices Act (Minn. Stat. §§ 325D.43 –.48) and False Statement in Advertisement Act (Minn. Stat. §§ 325F.67), seeking damages "resulting from the fact that it has paid and will pay substantially higher amounts to its contracted health care providers due to the increased cost of health care services for treatment of smoking-related illnesses..." 551 N.W.2d at 492. The Supreme Court of Minnesota held "that the broad grants of standing within the statutes themselves" reach a private health care organization and thereby permit it to pursue "relief for these claims." *Id.* at 495.[4] Similarly, in *Group Health Plan, Inc.*, the Supreme Court of Minnesota again ruled that private health benefit providers have a legally cognizable injury and standing to sue under Minnesota statutes for the economic burdens placed on them by unlawfully increased medical expenditures. 621 N.W.2d at 11. The *Group Health Plan* court expressly rejected the argument that a plaintiff must be a purchaser of a product in order to have standing under the statutes to recover, stating: "Neither the private remedies statute nor the substantive statutes contains any language restricting those who may sue to purchasers or consumers." *Id.* at 8. TPP Plaintiffs assert these same statutory claims in this action and accordingly have standing to pursue them.

2. Pennsylvania law provides standing and right to recovery

Defendants argue that TPP Plaintiffs lack standing to bring claims under Pennsylvania law because the "named plaintiffs did not purchase any Guidant device

[4] The *State v. Philip Morris* Court also held that a private health care organization has standing to bring equitable claims, including unjust enrichment. *State v. Philip Morris*, 551 N.W.2d at 497-98.

primarily for personal use" and because the Pennsylvania consumer protection act "does not apply to prescription medical devices." Defs' Brief at 11. Both arguments ignore the law. As the Commonwealth Court of Pennsylvania recently reiterated, the appropriate inquiry for determining standing under the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL") concerns the purpose of the product at issue. *Commonwealth v. TAP Pharm. Prods., Inc.*, 885 A.2d 1127, 1142 (Pa. Commw. Ct. 2005). Referring to *Valley Forge Towers South Condominium v. Ron-Ike Foam Insulators, Inc.*, 574 A.2d 641 (Pa. Super. Ct. 1990), *aff'd* 605 A.2d 798 (Pa. 1992), the court noted that "the [Superior] Court rejected the defendant's focus on the type of product involved. The Court reflected that the UTPCPL restricts suits not on the basis of the type of product, but rather the purpose of the purchase." *Id.* Accordingly, the *TAP Pharmaceuticals* court found the state had standing to pursue its UTPCPL claim as the purchaser of pharmaceutical drugs. *Id.* at 1142-43 (stating "[h]ere, as in that case, the drugs are ultimately used for a personal, family or household purpose.... Based upon the foregoing... that the purchases the programs made were for personal, family, or household use under *Valley Forge Towers*, we overrule Defendants' preliminary objection" to the Commonwealth's standing.). *TAP Pharmaceuticals* and the Pennsylvania state courts control the question of standing under the UTPCPL and have made clearance for claims brought by entities such as City of Bethlehem, a named TPP Plaintiff and governmental agency like the Commonwealth in *TAP Pharmaceuticals*, who purchased goods for the "personal, family, or household use" of their insureds and beneficiaries.

Defendants' reliance on *Balderston v. Medtronic Safamor Danek, Inc.*, 285 F.3d 238 (3d Cir. 2002) is similarly misplaced. There, unlike the instant case, the plaintiff physician acknowledged that he did not purchase the medical device at issue. *Balderston*, 285 F.3d at 241. Further, Pennsylvania courts hold that entities, such as TPP Plaintiffs, that have a duty to act on behalf of their constituents may bring these claims. *Valley Forge Towers*, 574 A.2d at 642-43. *See also Kane & Son Profit Sharing Trust v. Marine Midland Bank*, 1996 U.S. Dist. LEXIS 8023, *8-11 (E.D. Pa. 1996). Even the *Balderston* court recognized this distinction, remarking "[i]n both [cases] the court concluded that the plaintiffs had standing under the [CPL] because they purchased the goods and services at issue primarily for the personal, family or household purposes of the consumers for whom they were the legal representatives." *Id.* at 241-42 (quoting the lower court's ruling in *Balderston v. Medtronic Sofamor Danek, Inc.*, 152 F. Supp. 2d 772, 778-79 (E.D. Pa. 2001).[5] TPP Plaintiffs and the Class did not buy heart devices (or the medical services involved in implanting and explanting them) for resale to others; rather, pursuant to their contractual obligations to their beneficiaries, they paid for the goods and services their beneficiaries received for personal medical use. Given their duties on behalf of their insureds and beneficiaries, TPP Plaintiffs meet the UTPCPL's standing requirements and accordingly have a right to recovery here.

3. Numerous other courts recognize the rights of TPPs to recover

In addition to the two Minnesota decisions (and the relevant Pennsylvania cases)

[5] The *Balderston* court elected not to follow the *Valley Forge Towers* and *Kane* path because the physician plaintiff "did not act as the legal representative of his patients and [was] not pursuing this litigation on his patients' behalf." *Balderston*, 285 F.3d at 242. That is a far cry from the case at hand.

discussed above, numerous other courts likewise recognize the standing of health benefit providers to seek damages from medical device and pharmaceutical companies for medical costs or pharmaceutical purchases arising from a defendant's wrongful conduct. In fact, in *Desiano v. Warner-Lambert Co.*, 326 F.3d 339 (2d Cir. 2003), the Second Circuit thoroughly reviewed, analyzed, and ultimately rejected a virtually identical argument to the one Defendants raise here. In *Desiano*, the Court of Appeals held that health benefit providers, who paid for drugs they would not have covered but for the defendants' misrepresentations, were the purchasers of the product and indeed suffered a direct injury. *Desiano*, 326 F.3d at 350.[6] The court recognized that health benefit providers have themselves incurred an economic injury that is "in no way 'derivative'" of the claims of their insureds/beneficiaries:

> Consider, for example, a hypothetical in which a defendant drug company markets a "new," much more expensive drug claiming it is a great advancement (safer, more effective, etc. than metformin – the standard diabetes drug) when in fact the company is simply replicating the metformin formula and putting a new label on it. In other words, the only difference between metformin and the "new" drug is the new name and the higher prescription price (paid almost entirely by the insurance company). In that case, the "new" drug would be *exactly* as safe and effective as metformin, and thus there could be no injury to any of the insurance company's insured. Nevertheless, the insurance companies would be able to claim – precisely as they do here – that the defendants engaged in a scheme to defraud it, and that the company suffered direct economic losses as a result.

Id. at 349-50.

[6] The Second Circuit also held that, on a motion to dismiss, the district court is obligated to accept as true a TPP plaintiff's allegation that it was in fact the purchaser of the product. *Desiano*, 326 F.3d at 350-51.

Other circuit decisions have similar holdings.[7] In *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406 (7th Cir. 1995), *cert. denied*, 516 U.S. 1184 (1996), Judge Posner concluded that a Blue Cross entity had standing to sue a medical clinic by virtue of its payment to the latter of alleged overcharges for medical services. *Marshfield Clinic*, 65 F.3d at 1414.[8] As the court reasoned, Blue Cross had paid for health care services, "in accordance with Blue Cross's contractual obligations to its insureds, and if it paid too much because the Clinic violated the antitrust laws then it ought to be allowed to sue to recover these damages." *Id.* at 1415. In short, federal courts have held with virtual unanimity that health benefit providers have standing to recover for expenditures on consumers of prescription drugs, medical devices and other

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[7] In *Kartell, M.D. v. Blue Shield of Massachusetts, Inc.*, 749 F.2d 922, 926 (1st Cir. 1984), the First Circuit concluded in the antitrust context that TPPs must be treated like purchasers because they act like purchasers; *i.e.*, the TPPs pay the insureds' bills and set the amount for the charges. These two facts were the "relevant antitrust facts" in *Kartell* because it established the TPP was a purchaser and in that capacity could impose certain contractual restrictions on its sellers in return for direct payment without running afoul of antitrust laws. The Seventh Circuit has also found that TPPs are, as a practical and legal matter, purchasers of drugs when the TPPs pay at least a portion of the price of prescriptions filled by their insureds/beneficiaries. *See In re Synthroid Marketing Litig.*, 264 F.3d 712 (7th Cir. 2001). In *Synthroid*, interveners in a class action brought by TPPs and consumers of Synthroid objected to a proposed settlement because the consumers – it was alleged – should have received a larger share of the settlement. *Id.* at 717. The Seventh Circuit rejected this argument, giving great weight to the TPPs' acquiescence to the settlement. The court found this acquiescence telling because patients typically "do not bear the full expenses of the drugs (and often do not purchase them directly)." *Id.* In contrast, "TPPs are sophisticated purchasers of pharmaceuticals." *Id.* The court reasoned that the TPPs, as the primary purchasers of the drugs, would not have acquiesced to an unfavorable settlement. *See also In re Cardizem CD Antitrust Litig.*, 105 F. Supp. 2d. 618, 625 and 651 (E.D. Mich. 2000), *aff'd on other grounds*, 332 F.3d 896 (6th Cir. 2003) (denying motion to dismiss class action brought by indirect purchaser entities because "[p]laintiffs are customers, not competitors, of Defendants, and the injury claimed consists of higher prices paid for drugs as a result of the" alleged wrongful conduct); *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 259 (D. Del. 2002) (where an objector to settlement of a class action brought by consumer and TPP indirect purchasers of a drug claimed that TPPs lack standing to assert claims under the antitrust laws, the court rejected this argument, observing that the "TPPs are arguably in the same position as consumers in that they allegedly paid supracompetitive prices for Coumadin or unnecessarily paid for Coumadin instead of lower-priced generic warfarin sodium.").

[8] The Court elaborated that "[i]t would be cumbersome, to say the least, . . ." to condition the recovery of such TPPs upon the filing of a class action and successful recovery by their insureds/beneficiaries (consumers) of money that they never paid, and subsequent actions by such TPPs for restitution from their insureds/beneficiaries. *Marshfield Clinic*, 65 F.3d at 1414.

health care products and services.[9]

4. Defendants' cases on standing are inapposite

As shown, *supra*, Defendants ignore Minnesota law and many circuit opinions that recognize that health care benefit providers have standing to recover economic costs resulting from a defendant's wrongful conduct. Nonetheless, because Defendants rely heavily upon one inapposite decision, *Rivera v. Wyeth-Ayerst Laboratories,* 283 F. 3d 315 (5th Cir. 2002), TPP Plaintiffs will briefly discuss it.

In *Rivera*, the district court entered a class certification order, and denied discovery to the defendants, even over the objection of plaintiffs' counsel. On appeal, the circuit court recognized that the district court judge's rulings on class certification were far afield and observed: "Rarely on appeal does the appellee concede that the district court's order is so fatally flawed that it cannot stand." *Rivera*, 283 F.3d at 318. But the appellee there did just that – acknowledged that the proceedings below required a reversal. *Id.* The claims of plaintiffs were equally novel – although plaintiffs sought to bring non-physical injury based claims for an alleged defective product, the plaintiffs did

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[9] *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 531 (3d Cir. 2004) (rejecting claim that clients with PBMs have no standing to assert, *inter alia*, GBL § 349 claims for overpriced drugs due to false and misleading statements made by manufacturer; citing *Desiano* with approval: "TPPs are...purchasers."); *In re Synthroid,* 264 F.3d at 717 ("TPPs are sophisticated purchasers of pharmaceuticals."); *Marshfield Clinic,* 65 F.3d at 1415 (Blue Cross paid for heath cares services, "in accordance with Blue Cross's contractual obligations to its insureds/beneficiaries" and is a "buyer of medical services."); *Kartell,* 749 F.2d 926 (health benefit providers must be treated like buyers because they act like buyers); *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.*, 239 F. Supp.2d 180, 194-95 (D.R.I. 2003), *aff'd*, 373 F.3d 57 (1st Cir. 2004) ("Blue Cross also must be viewed as the buyer of the prescription drugs dispensed to its members because it pays the lion's share of their cost"); *In re Cardizem,* 105 F. Supp. 2d at 625, 651 ("Plaintiffs [including health benefit providers] are customers, not competitors, of Defendants, and the injury claimed consists of higher prices paid for drugs as a result of the alleged wrongful conduct"); *Westchester Radiological Assoc. P.C. v. Empire Blue Cross and Blue Shield,* 707 F. Supp. 708, 712 n.6 (S.D.N.Y. 1989), *aff'd,* 884 F.2d 707 (2d Cir. 1989) (rejecting the argument that Blue Cross was not a buyer); *Michigan State Podiatry Ass'n v. Blue Cross and Blue Shield of Mich.*, 671 F. Supp. 1139, 1152 (E.D. Mich. 1987) ("[L]ike other insurers, [Blue Cross] purchases health care services for its subscribers from health care providers); *Sausalito Pharmacy, Inc. v. Blue Shield of Cal.*, 544 F. Supp. 230, 233, 238 (N.D. Cal. 1981), *aff'd,* 677 F.2d 47 (9th Cir. 1982) (Blue Shield is purchaser of prescription drugs and services).

not allege how they had been damaged economically nor that they would have purchased different products had the defendant given better warnings. *Id.* at 319. The plaintiffs had not even alleged that the product was ineffective, and the circuit court found that that the plaintiffs had not shown that additional warnings would have put them in a different economic position. *Id.* at 320-21.

This case stands in stark contrast. Here, as TPP Plaintiffs' allegations make clear, Defendants' wrongdoing resulted in the recall of *every* device at issue in the case (unlike *Rivera*, where all products remained on the market with FDA approved warnings). Thus every one of the devices at issue serves as a basis for actual injury and real world recovery. Here, Defendants' conduct expands beyond the defective heart devices themselves and includes Defendants' widespread campaign of false and deceptive marketing and promotion of the devices, including deception of the physicians that make implantation decisions and selections. And, of course, here (in contrast again to *Rivera*), if Defendants had not engaged in the wrongful conduct alleged in the Master Complaint, no member of the Class would have suffered the economic consequences of having to remedy Defendants' conduct. Thus, unlike the truly novel effort that sought to raise claims under Texas law in *Rivera*, this case falls squarely within the parameters of the numerous cases cited earlier.

Three other decisions cited by Defendants require little comment. *Burton v. Central Interstate Low Level Radioactive Waste Compact Comm'n*, 23 F.3d 208 (8th Cir. 1994) affirmed the dismissal of a suit brought by electors of a public power entity, finding they did allege how they were harmed by taxes imposed on the public power

entity. *Burton*, 23 F.3d at 210. In *Young America Corp. v. Affiliated Computer Services*, 424 F.3d 840 (8th Cir. 2005), the plaintiff simply presented no allegations of injury beyond an "alleged threat of enforcement" of an audit, although the Court did observe that a "complaint need not make a large number of allegations relating to the injury suffered: 'general factual allegations of injury resulting from the defendant's conduct may suffice' to establish standing." *Young*, 424 F.3d at 843-44. In *Allegheny General Hospital v. Philip Morris, Inc.*, 228 F.3d 429 (3d Cir. 2000) the question was whether the plaintiffs had standing to bring claims under the statutory requirements of federal antitrust and RICO laws. *Allegheny*, 228 F.3d at 435. There, the court simply followed the inapposite line of cases from the tobacco area for claims derivative of smokers' claims for addictiveness or failure to warn of the hazards of smoking. *Id.* at 435-48.

B. Though Choice of Law Analysis Is Premature at This Juncture, Minnesota – Not Pennsylvania – Law Applies

Defendants have moved to dismiss TPP Plaintiffs' consumer fraud and warranty causes of action, arguing that Pennsylvania law both governs the case and precludes such claims. Defendants' assertions are unsupported, erroneous and premature. Although TPP Plaintiffs believe a choice of law analysis is not yet ripe in this litigation, such an examination shows Minnesota law governs the case. Accordingly, Defendants' Motion to Dismiss, based on the application of Pennsylvania law, should be denied.

1. Choice of law need not be conducted at this stage of the proceeding

Defendants attempt to accelerate the choice of law determination by baiting TPP Plaintiffs and the Court by arguing Pennsylvania law applies to the TPP cases. Defs'

Brief at 9-13. This Court need not conduct a choice of law analysis at this point since TPP Plaintiffs satisfy the pleading requirements of the Federal Rules of Civil Procedure with respect to all of their claims, as set forth in detail below.

The choice of law analysis in a class action is properly undertaken in the context of the class certification predominance analysis under Fed. R. Civ. P. 23(b)(3). *See, e.g., Spence v. Glock, Inc.*, 227 F.3d 308, 311 (5th Cir. 2000) (a threshold question in reviewing a class certification decision is "whether the district court conducted a proper choice of law analysis"); *Castano v. American Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996) (noting "a district court must consider how variations in state law affect predominance and superiority" when contemplating certifying a class and citing *Walsh v. Ford Motor Co.*, 807 F.2d 1000 (D.C. Cir. 1986) (Ginsburg, J.)); *see also Silzone Heart Valve Prods. Liab. Litig. v. St. Jude Med., Inc.* (*In re St. Jude Med., Inc.*), 425 F.3d 1116, 1119-20 (8th Cir. 2005) (district court failed to conduct a sufficient conflicts-of-law analysis for class certification decision); *In re Prempro Prods. Liab. Litig.*, 230 F.R.D. 555, 561 (E.D. Ark. 2005) ("choice-of-law issue [must] be addressed at the class certification stage"); *In re Pharm. Indus. Average Wholesale Price Litig.*, 230 F.R.D. 61, 82 (D. Mass. 2005) ("[t]o analyze the predominance challenge, this court must first determine what law applies."); *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 276-78 (D. Mass. 2004) (deciding choice of law in context of predominance analysis); *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 207-08 (D. Minn. 2003) (same) (citing *Castano*, 84 F.3d at741); *In re Propulsid Prods. Liab. Litig.*, 208 F.R.D. 133, 140-44 (E.D. La. 2002) (same); *In re Warfarin*, 212 F.R.D. at 251-52 (same, in response to objection to

settlement class). However, there is as yet no purchase claims class certification motion pending. It makes intuitive sense to defer analysis and decision on the choice of law issue to the class certification juncture.

2. Defendants failed to meet their burden in arguing Pennsylvania law applies

Defendants suggest Pennsylvania law must apply to TPP Plaintiffs' claims because TPP Plaintiffs are Pennsylvania residents. Even if a choice of law determination should be conducted at this stage in the proceeding, however, Defendants ignore the Master Complaint context of TPP Plaintiffs' claims, and likewise ignore the TPP class action allegations. Defendants know full well that in these contexts, the named plaintiffs' citizenship is not the end – or even the beginning – of the choice of law analysis. *Phillips Petroleum Co. v. Shutts, infra.* Moreover, Defendants' three cases cited in support of their attempt to assert Pennsylvania law fail to provide the necessary foundation for it. The district court in *In re Minn. Breast Implant Litigation*, 36 F. Supp. 2d 863 (D. Minn. 1998) actually applied Minnesota law to the fraud claims brought before it. *In re Minn. Breast Implant Litig.*, 36 F. Supp. 2d at 872 ("It is undisputed that 3M's actions regarding that transfer occurred in Minnesota; thus, Minnesota law shall apply to Plaintiffs' fraud claims."). The court in *Foster v. St. Jude Medical, Inc.*, 229 F.R.D. 599 (D. Minn. 2005) elected not to certify a nationwide class and did not perform a thorough choice of law analysis. *Foster*, 229 F.R.D. at 599, 605. Further, the court's single sentence on choice of law did not apply to fraud or consumer protection claims. *Id.* at 605. Finally, the decision in *In re St. Jude Med. Inc.*, 2003 LEXIS 5188 (D. Minn. 2003), is inapposite,

since the Eighth Circuit later instructed the court to conduct a more detailed choice of law analysis. *See In re St. Jude Med., Inc.*, 425 F.3d at 1120-21. Defendants have not sustained their burden to show that Pennsylvania consumer fraud law applies, based on the authority cited.

In addressing TPP Plaintiffs' implied and express warranty claims, Defendants similarly improperly assume the application of Pennsylvania law, but provide no grounds for the assumption. Defendants cite only Pennsylvania warranty cases that relate to personal injury implied warranty claims, cases which do not apply to TPP Plaintiffs' economic loss claims. Again, Defendants have failed to meet their burden to show that Pennsylvania law applies.

3. Choice of law analysis, once undertaken, will show Minnesota law applies

When a proper choice of law analysis is conducted, the Court will find that Minnesota law applies to this case. As a threshold matter, "[f]ederal courts sitting in diversity apply the forum state's conflict of laws rules." *Nesladek v. Ford Motor Co.*, 46 F.3d 734, 736 (8th Cir.1995) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)). The Master Complaint was filed in the District of Minnesota. Under Minnesota law, "the first consideration is whether the choice of one state's law over another's creates an actual conflict." *Jepson v. Gen. Cas. Co.*, 513 N.W.2d 467, 469 (Minn. 1994). Next, a court must inquire whether application of a particular state's law would be constitutional: whether the state has sufficient contacts to the underlying litigation that application of its law would be "neither arbitrary nor fundamentally

unfair." *Id.* at 469-70 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)). Assuming sufficient contacts with the forum state, the court continues the choice of law analysis and considers five "choice influencing" factors (known as the "Leflar" factors) to determine which state's law to apply: (1) predictability of result, (2) maintenance of interstate order, (3) simplification of the judicial task, (4) advancement of the forum's governmental interests and (5) the better rule of law. *Jepson,* 513 N.W.2d at 470 (citing *Milkovich v. Saari,* 203 N.W.2d 408, 412 (Minn.1973)); *see also Hughes v. Wal-Mart Stores, Inc.*, 250 F.3d 618, 620 (8th Cir. 2001) (addressing all five factors in a tort action). In this case, this analysis must be conducted for both the consumer fraud claims and the warranty claims.

a. Pennsylvania and Minnesota consumer protection laws evidence an outcome-determinative conflict

Minnesota and Pennsylvania may have an outcome-determinative conflict of substantive law in the area of consumer protection law. As enumerated in the Master Complaint, TPP Plaintiffs allege that Defendants' conduct violated both Minnesota and Pennsylvania consumer protection laws. Master Complaint at, *e.g.*, ¶ 404(x), (mm). Minnesota requires neither reliance nor scienter. *Group Health Plan, Inc.,* 621 N.W.2d at 12-13. Unlike Minnesota law, Pennsylvania's Consumer Protection Statute, UTPCPL, historically has required the element of individual reliance. *Yocca v. Pittburgh Steelers Sports, Inc.*, 854 A.2d 425, 438-39 (Pa. 2004); *Toy v. Metropolitan Life Ins. Co.*, 863 A.2d 1, 10 (Pa. Super. Ct. 2004), *appeal granted and pending*, 882 A.2d 462 (2005). *But see Zwiercan v. General Motors Corp.*, 2003 Phila. Ct. Com. Pl. LEXIS 85, *5 (plaintiffs

are "entitled to a class wide presumption of reliance where it can be proven that the defect may cause serious bodily harm or death." Thus, the reliance element may, in some cases, be demonstrable by classwide proof, and MDL No. 1708 may indeed be such a case.). Pennsylvania law has also historically required the element of scienter. *Hart v. Arnold,* 884 A.2d 316, 339 n.7 (Pa. Super. Ct. 2005); *Debbs v. Chrysler Corp.*, 810 A.2d 137, 155 (Pa. Super. Ct. 2002). Although the issue of justifiable reliance is now before the Pennsylvania Supreme Court for reexamination, *see Toy v. Metropolitan Life Insurance Co.*, 882 A.2d 462 (Pa. 2005) (granting allowance of appeal on, *inter alia*, justifiable reliance requirement), for purposes of this argument, we will assume that reliance and scienter are required under Pennsylvania consumer fraud law, thereby creating a substantive, outcome-determinative conflict with Minnesota law.

Pennsylvania and Minnesota warranty law may also conflict in their interpretation of U.C.C. § 2-318 (1998). The U.C.C. provides three alternative versions of § 2-318, which have been variously adopted by the states. U.C.C. § 2-318 (1998). Pennsylvania's law uses language similar to that of Alternative A of U.C.C. § 2-318, applying breach of warranty claims to actually injured natural persons. 13 Pa. Con. Stat. § 2318 (2006). Yet even with its adoption of Alternative A, Pennsylvania law does not require privity for a breach of warranty claim. *Kassab v. Central Soya*, 246 A.2d 848, 852 (Pa. 1968), *overruled on other grounds*, *AM/PM Franchise Assoc. v. Atlantic Richfield Co.*, 584 A.2d 915 (Pa. 1990); *see also Mannsz v. Macwhyte Co.*, 155 F.2d 445, 449-50 (3d Cir. 1946). The lack of privity requirement holds true for economic loss claims brought in warranty as well. In *Spagnol Enterprises, Inc. v. Digital Equipment Corporation,* 568 A.2d 948,

952 (Pa. Super. Ct. 1989), the court wrote, "[I]t is clear from this Court's reading of the *Kassab* opinion that it was intended to apply to all breach of warranty cases brought under the warranty provisions of the Uniform Commercial Code for all types of damages, whether they be personal injuries, damage to property or economic loss." Similarly, in *Moscatiello v. Pittsburgh Contractors Equipment Co.,* 595 A.2d 1198, 1201-02 (Pa. Super. 1991), the court did not even contemplate privity of contract as a potential bar to a claim when the court held that a remote purchaser of a paving machine had a breach of warranty action against the manufacturer. *Moscatiello*, 595 A.2d at 1202 (noting "the right of a consumer to recover economic losses from a manufacturer of a defective product in a breach of warranty action is well-established in Pennsylvania").

Minnesota's law, based on Alternative C of U.C.C. § 2-318, is more expansive, extending breach of warranty claims to "any person...affected by the goods....", regardless of privity or lack thereof. Minn. Stat. § 336.2-318 (2006). The term "person" includes corporations and other business organizations. Minn. Stat. § 336.1-210(27) (2005); *Minnesota Min. and Mfg. Co. v. Nishika Ltd.*, 565 N.W.2d 16, 19 (Minn. 1997).

The differences in the Pennsylvania and Minnesota consumer fraud statutes evidence an actual conflict between the states' laws. Even though this may not be the case with regard to the states' warranty laws, the next step in the choice of law analysis should be undertaken.

b. Defendants and each claim maintain significant contacts with Minnesota

Defendants assert that none of the third party payers has any connection with any state other than Pennsylvania. Defendants make this assertion by analyzing only the contacts maintained by TPP Plaintiffs with Minnesota: but this is not the law. The Supreme Court has explained that the "significant contact" must exist for each ***claim*** in a class action case. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821 (1985) (noting a state "must have a 'significant contact or significant aggregation of contacts' to the claims asserted" by the plaintiffs and citing *Allstate*, 449 U.S. at 312-13). Every claim in the present case bears more than a "significant contact" with the state of Minnesota by virtue of the claims-related activities and corporate and physical domicile of Defendants, particularly the wholly-owned, Minnesota based corporation Cardiac Pacemakers, Inc. ("CPI"). These contacts include:

- CPI is incorporated, headquartered, and has its principal place of business in Minnesota.[10] Master Complaint at ¶ 35. *See, e.g., CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 93 (1987) (upholding application of Indiana state law to a resident corporation); *Ferris, Baker Watts, Inc. v. Deutsche Bank Securities*, 2004 U.S. Dist. LEXIS 22588, *19-20 (D. Minn. 2004) (finding New Jersey law may be applied to claims of nonresident plaintiffs where some of the defendants and their corporations were domiciled in New Jersey); *Simon v. Philip Morris Inc.*, 124 F. Supp. 2d 46, 72 (E.D.N.Y. 2000) (applying New York law to nationwide plaintiffs in part because defendants were domiciled and had their principle places of business in New York).

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10 Accordingly, Defendants cannot claim that application of Minnesota statutes to their conduct of business as a Minnesota corporation based in Minnesota could ever be arbitrary or unfair. *See, e.g., Allstate*, 449 U.S. at 317-18 (noting that even a defendant's mere business presence in a state is sufficient to bar claims of unfair surprise at the application of that state's law); *In re ORFA Securities Litig.*, 654 F. Supp. 1449, 1464 (D.N.J. 1987) ("Defendants chose to use New Jersey as their principle place of business and cannot claim surprise at being held to the state's legal standards.").

- Virtually all of the corporate acts implicated by each claim occurred in Minnesota. Master Complaint at ¶¶ 33, 35, 43, 79. *See Ferris, Baker Watts, Inc.*, 2004 U.S. Dist. LEXIS at *19-20 (finding New Jersey law may be applied to the claims of nonresident plaintiffs in part because "the New Jersey contacts are directly related to the claims at issue here"); *Simon*, 124 F. Supp. 2d at 70 (applying New York law to nationwide plaintiffs in part because defendants' activities in the state "relate[] to the alleged conspiracy that led to plaintiff's damages").

- Defendants' ICDs and Pacemakers were substantially created and manufactured in Minnesota. Master Complaint at ¶33, ¶35. *See, e.g., In re Benedictin Litig.*, 857 F.2d 290, 305 (6th Cir. 1988) (noting that in multidistrict litigation regarding an anti-nausea drug, the court "see[s] the law of the state of manufacture of the product as being more significant" than the domiciles of the plaintiffs); *In re Air Crash Disaster at Mannheim, Germany on 9/11/82*, 769 F.2d 115, 120-21 n.7 (3d Cir. 1982) (affirming application of law of the state of helicopter manufacture, though plaintiffs were domiciled and accident occurred elsewhere, in light of state's interest in governing manufacturing liability within its borders).

- Defendants earn compensation and profits from sales of their ICDs and pacemakers in this District.

- All of the warranty and recall communications emanated from Minnesota.

The weight of such Minnesota contacts comfortably surpasses the threshold of "significance" for constitutional purposes. Several of these categories of contacts have been sufficient by themselves to support constitutionally-compliant contacts in other cases. Accordingly, the aggregation of contacts based on domicile and activities directly implicated by the claims, as well as the design and manufacture of Defendants' heart devices, exceeds any criterion of "significant contact" with each claim.

c. Choice influencing factors weigh in favor of Minnesota law

Assuming a conflict between the consumer fraud and warranty laws of Pennsylvania and Minnesota and finding significant contacts between Defendants and Minnesota, choice of law analysis now turns to the Leflar choice influencing factors. *Jepson*, 513 N.W.2d at 470. All five factors point to application of Minnesota law.

(1) Predictability of results

The first "choice influencing" factor – predictability of results – concerns whether the "choice of law was predictable before the time of the transaction or event giving rise to the cause of action, not to whether that choice was predictable after the transaction or event." *Nesladek*, 46 F.3d at 738. The factor applies "primarily to consensual transactions where the parties desire advance notice of which state law will govern in future disputes." *Nodak Mut. Ins. Co. v. American Family Mut. Ins. Co.*, 604 N.W.2d 91, 94 (Minn. 2000) (quoting *Myers v. Government Employees Ins. Co.*, 225 N.W.2d 238, 242 (Minn. 1974)).

It may be argued that, because the parties here did not plan in advance to litigate matters involving Defendants' heart devices, the "predictability of result" factor is inapplicable. However, the application of the laws of the state in which Defendants are incorporated and conduct business (discussed *supra*) is entirely predictable, as Defendants are able to plan for and shape this factor by selecting the location of such conduct far in advance of any resulting claims. Accordingly, because CPI is a Minnesota corporation, wholly owed by Defendants, and because the heart devices were designed and manufactured in Minnesota, the parties to this litigation could legitimately anticipate that Minnesota law would govern any disputes. *SCM Corp. v. Deltak Corp.*, 702 F. Supp. 1428, 1431 (D. Minn. 1988).

(2) Maintenance of interstate order

Maintenance of interstate order, the second Leflar factor, is

> primarily concerned with whether the application of [one state's] law would manifest disrespect for [another state's] sovereignty... or impede the interstate movement of people and goods. An aspect of this concern is to maintain a coherent legal system in which the courts of different states strive to sustain, rather than subvert, each other's interests in areas where their own interests are less strong.

Nodak, 604 N.W.2d at 95 (quoting *Jepson*, 513 N.W.2d at 471). In tort cases, the maintenance of interstate order factor "is generally satisfied as long as the state whose laws are purportedly in conflict has sufficient contacts with and interest in the facts and issues being litigated." *Nesladek*, 46 F.3d at 739 (quoting *Myers*, 225 N.W.2d at 242).

Application of Minnesota law to Defendants would not manifest disrespect for any other state's sovereignty or 'impede the interstate movement of people and goods.' Indeed, the interests of interstate order will be best served by the application of Minnesota law to the claims of the classes. Because Defendants' domestic operations are headquartered in Minnesota, the state is the locus of the critical operative facts giving rise to the claims asserted in the Master Complaint.[11] Accordingly, Minnesota has significant contacts, discussed *supra*, with a primary interest in the facts and issues being litigated. *See Nesladek*, 46 F.3d at 739 (the maintenance of interstate order factor favored the application of the law of the "state in which almost all of the events that gave rise to this lawsuit occurred").

[11] The Judicial Panel's *Transfer Order* recognizes Minnesota's "nexus to this docket given the location there of key Guidant facilities involved in the development and manufacturing of the relevant devices." J.P.M.L. MDL No. 1708 *Transfer Order* (11/07/2005) at 2.

(3) Simplification of the judicial task

The third factor – simplification of the judicial task – "has not been given much weight" by the Minnesota Supreme Court, *Nodak*, 604 N.W.2d at 95, perhaps because the routine tort case provides no unique management challenges, and the application of one state's law over another's does not present significant difficulty. *See id.* Nevertheless, *this* court is presented with the unusual challenge of managing an MDL, which the Judicial Panel sent here for centralized management – including class certification determination – expressly because "centralization under Section 1407 in the District of Minnesota will serve the convenience of the parties and the witnesses and promote the just and efficient conduct of this litigation ... and conserve the resources of the parties, their counsel and the judiciary." J.P.M.L. MDL No. 1708 *Transfer Order* (11/07/2005). The judicial task of "determining, interpreting, and applying" law, *Nesladek*, 46 F.3d at 739, and managing this proposed nationwide litigation would be greatly simplified by the court's application of Minnesota law on a class-wide basis – as opposed to the application of multiple states' laws.

(4) Advancement of the forum's governmental interests

The fourth, and perhaps most important, factor – governmental interest – concerns the law that "most advances a significant interest of the forum." *Nodak,* 674 N.W.2d at 95 (quoting *Jepson,* 513 N.W.2d at 472). In light of the facts of this matter, Minnesota has the strongest governmental interests in having its law applied.

Minnesota has an interest in ensuring that corporations headquartered, incorporated, or that do substantial portions of their business in Minnesota comply with

the law. *Ferris, Baker Watts*, 2004 U.S. Dist. LEXIS 22588 at *27 (citing *Fluck v. Jacobson Machine Works, Inc.*, 1999 Minn. App. LEXIS 255, *10-11 (Minn. Ct. App. 1999) as "holding that Minnesota contacts and governmental interests outweighed those of Colorado in product liability action where plaintiff was resident of Colorado and injury occurred there, but product was manufactured in Minnesota by a Minnesota corporation."). Minnesota courts have long recognized that Minnesota has a strong interest in both compensating tort victims and promoting responsibility for corporations committing wrongful acts, particularly if the wrongdoer is a Minnesota corporation. *See Jacobson v. Universal Underwriters Ins. Group,* 645 N.W.2d 741, 746 (Minn. Ct. App. 2002) (citing *Jepson*, 513 N.W.2d at 472). This interest in fully compensating tort victims is not limited to Minnesota residents. *Jacobson*, 645 N.W.2d at 746 (citing *Gimmestad v. Gimmestad*, 451 N.W.2d 662, 666 (Minn. Ct. App. 1990)).

Although each state has an interest in compensating tort victims injured within its borders, the governmental interest factor favors the choice of Minnesota law given Minnesota's interests in regulating the behavior of corporate conduct in Minnesota. Such a result would be consistent with relevant Minnesota authority. *See, e.g., In re Lutheran Bhd. Variable Ins. Prod. Co. Sales Practices Litig.*, 201 F.R.D. 456, 461 n.1 (D. Minn. 2001) (certifying a nationwide class under Minnesota's consumer fraud act where a defendant was headquartered and incorporated in Minnesota and much of the relevant conduct occurred in or emanated from Minnesota); *Peterson v. BASF Corporation*, 618 N.W.2d 821, 825-826 (Minn. Ct. App. 2000) (affirming certification of a class asserting claims under New Jersey law, the state of defendant's headquarters and

conduct); *Heller v. Schwan's Sales Enterprises, Inc.*, 548 N.W.2d 287, 289-291 (Minn. Ct. App. 1996) (affirming the trial court's settlement of multi-state product liability litigation, including class-wide application of the law of Minnesota, where the relevant conduct occurred and the defendant was based).

In the particular context of the consumer fraud claims in this litigation, Pennsylvania does not have a strong interest in imposing reliance or scienter requirements on TPP Plaintiffs. The Pennsylvania Supreme Court has explained the purpose behind the enactment of the UTPCPL:

> The Legislature sought by the Consumer Protection Law [UTPCPL] to benefit the public at large by eradicating, among other things, 'unfair or deceptive' business practices.... [P]revention of deception and the exploitation of the unfair advantage has always been an object of remedial legislation.
>
> Although the Consumer Protection Law did articulate the evils desired to be remedied, the statute's underlying foundation is fraud prevention. This Court emphatically stated in *Verona v. Schleneley Farms Co.*, 167 A.2d 317, 320 (1933), "[a]s a statute for the prevention of fraud, it must be liberally construed to effect the purpose...."

Commonwealth v. Monumental Prop., Inc., 329 A.2d 812, 815-16 (Pa. 1974). Further, Pennsylvania, as any state, has no interest in depriving its citizens of the benefits of Minnesota's consumer protections against a Minnesota corporation. *See, e.g., Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1007 (9th Cir. 2001) (dismissing as "pure fancy" the suggestion "that Hawaii would wish to restrict its residents from recovery that others could obtain" under California law); *Mahne v. Ford Motor Co.*, 900 F.2d 83, 88 (6th Cir. 1990) (observing that Florida had no interest in having its statute of repose apply to a

Florida accident involving a Florida plaintiff because such an application "would not benefit the interest it was designed to protect. Instead of protecting a Florida manufacturer as intended, the statute of repose would protect an out-of-state manufacturer at the expense of a Florida resident."); *Magnant v. Guidant, Inc.*, 818 F. Supp. 204, 207 (W.D. Mich. 1993) (Michigan's interest in protecting its own citizens did not weigh in favor of Michigan law where Minnesota law provided more protection); *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 587 F. Supp. 180, 191 (D.D.C. 1984) (noting "foreign jurisdictions have no interest in applying their law to damages issues if it would result in less protection to their nationals in a suit against a United States corporation."). Accordingly, application of Minnesota's more expansive consumer protection statutes that do not require individualized proof of TPP Plaintiffs' justifiable reliance or Defendants' scienter would not frustrate Pennsylvania's governmental interests in requiring the same.

However, Minnesota's governmental interests would be frustrated if Pennsylvania law were applied. Minnesota requires neither proof of reliance nor scienter in a situation involving a resident company charged with committing misconduct arising and occurring predominantly in Minnesota. As the Minnesota Supreme Court recently noted,

> In passing consumer fraud statutes, the legislature clearly intended to make it easier to sue for consumer fraud than it had been to sue for fraud at common law. The legislature's intent is evidenced by the elimination of elements of common law fraud, such as proof of damages or reliance on misrepresentations.

Group Health Plan, 621 N.W.2d at 12. To now require proof of reliance or scienter would frustrate Minnesota's governmental interests in expanding the availability of redress for actions committed by resident companies. Under these circumstances, Minnesota's governmental interests in applying its consumer protection law are paramount to Pennsylvania's.

Similarly, Minnesota's governmental interests in its warranty law would be frustrated by application of Pennsylvania warranty law to this case. As noted, Pennsylvania law, likely designed to provide some protection to Pennsylvania corporations, allows breach of warranty claims only for actually injured natural persons. But Pennsylvania has no interest in providing protection to foreign corporations such as Defendants here. Nor does it have any interest in depriving its residents of the benefits of Minnesota's breach of warranty protections against a Minnesota corporation, as discussed in the consumer fraud section above.

Minnesota, however, has a strong interest in regulating the activities that emanate from within its borders by a corporation domiciled therein and in protecting all persons, as defined by the Minnesota legislature, harmed by those activities. Minn. Stat. § 336.2-318 "embodies a policy of extending the express or implied warranties of a seller to 'any person who may reasonably be expected to use, consume, or be affected by the goods and who is injured by breach of the warranty.'" *SCM Corp.*, 702 F. Supp. at 1432. This extension benefits TPP Plaintiffs, Pennsylvania residents and purchasers of Defendants' goods, and allows them to take advantage of protection they might not otherwise have by granting recourse from a breach of warranty by a Minnesota corporation. Application of

Pennsylvania's §2-318 in this case would be contrary to Minnesota's interest as a justice administering state.

(5) Better rule of law

The better rule of law factor is only to "be applied only when the choice-of-law question remains unresolved after the other factors are considered" and accordingly has not been used as a determinative factor for quite some time. *Medtronic, Inc. v. Advanced Bionics, Corp.*, 630 N.W.2d 438, 455-56 (Minn. Ct. App. 2001) (citing *Nodak*, 604 N.W.2d at 96). However, if it were applied, Minnesota law would prevail. As the Minnesota Court of Appeals has noted,

> consumer protection statutes are remedial in nature and are to be liberally construed to favor of protection of consumers.... Consumer protection laws were not intended to codify the common law; rather they were intended to broaden the cause of action to counteract the disproportionate bargaining power present in consumer transactions.

Minnesota v. Alpine Air Prod., Inc., 490 N.W.2d 888, 892 (Minn. Ct. App. 1992). Applying Pennsylvania's laws more restrictive laws frustrate and undermine the remedial nature of consumer protection law. Accordingly, Minnesota offers the better rule of law in the instant case.

Based on the foregoing analysis and the fact that Defendants have purposefully availed themselves of the laws of Minnesota, the Court should apply Minnesota law to Defendants' motion to dismiss and deny the motion.