

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MARY BANKS and
BETTY COLSTON,

Plaintiff

vs.

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

Defendant

C.A. No. _____

DEFENDANT DEPUY ORTHOPAEDICS, INC.'S NOTICE OF REMOVAL

Pursuant to 28 U.S.C. §§ 1332, 1441, and 1446, Defendant DePuy Orthopaedics, Inc. (“DePuy”) removes this case from the 298th District Court of Dallas County, Texas, to the U.S. District Court for the Northern District of Texas, Dallas Division. In support of this Notice of Removal, DePuy states as follows:

BACKGROUND

1. On March 4, 2011, Plaintiffs Mary Banks and Betty Colston filed their petition (the “Petition”) against DePuy alleging negligence, strict liability, breach of implied warranty, breach of express warranty, violation of the DTPA, and gross negligence/neglect and/or malice allegedly as a result of Plaintiffs’ implantation with artificial hip replacement systems that were designed, manufactured, labeled, distributed, and sold by DePuy. *See* Petition at ¶ 59. The state court action is styled *Mary Banks and Betty Colston v. DePuy Orthopaedics, Inc., Kelly Orthopaedic Sales, LP and KOS Management Company, LLC*, in the 298th Judicial District Court of Dallas County, Texas.

2. On December 3, 2010, the Judicial Panel on Multidistrict Litigation (“JPML”) issued an order pursuant to 28 U.S.C. § 1407 establishing an MDL proceeding before the Honorable David A. Katz in the Northern District of Ohio, *In re: DePuy Orthopaedics, Inc., ASR Hip Implant Products Liability Litigation*, MDL No. 2197, for DePuy ASR Hip Implant-related actions, like this one.

3. As required under the JPML Rules of Procedure, DePuy intends to inform the JPML that this case is a potential tag-along action transferable to MDL-2197. *See* Rules of Procedure of the Judicial Panel on Multidistrict Litig., 199 F.R.D. 425 (JPML 2001).

4. In accordance with Local Rule 81.1 and 28 U.S.C. § 1446(a), attached as appendices hereto are:

- Exhibit A: an index of all documents provided;
- Exhibit B: a copy of the state court docket sheet;
- Exhibit C: a copy of each document filed in the state court action, except discovery material; and
- Exhibit D: a certificate of interested persons.

AMOUNT IN CONTROVERSY REQUIREMENT IS MET

5. The face of Plaintiffs’ Petition makes clear that the amount in controversy is more than \$75,000. Plaintiffs sued DePuy for negligence, strict liability, breach of implied warranty, breach of express warranty, violation of the DTPA, and gross negligence/neglect and/or malice, arising from their implantation with an artificial hip replacement system that was allegedly designed, manufactured, labeled, distributed, and sold by DePuy. *See* Petition at ¶ 59. Plaintiffs assert that the DePuy implants caused them harm and injury. *See id* at ¶ 66. Plaintiffs seek recovery for their actual damages, damages for gross negligence, attorneys fees, costs and

expenses pursuant to § 17.50 of the DTPA, costs of court and fees necessary for preparation of the case, and pre- and post-judgment interest. *Id.* ¶ 132.

6. Plaintiffs also seek exemplary damages. *Id.*

7. Allegations similar to these have been held to establish, on their face, that the amount in controversy exceeds the jurisdictional requirement. *See, e.g., Gebbia v. Wal-Mart Stores*, 233 F.3d 880, 883 (5th Cir. 2000) (finding it facially apparent that amount in controversy was met where plaintiff sought medical expenses, pain and suffering, mental anguish, loss of enjoyment of life, lost wages and earning capacity, permanent disability and disfigurement); *Nadeau v. Mentor Tex., L.P.*, 2005 U.S. Dist. LEXIS 13269 at *6 (N.D. Tex.) (holding the amount in controversy to be satisfied where plaintiff sought pain and suffering and mental anguish); *Boudreaux v. Daimler Chrysler Corp.*, 2001 U.S. Dist. LEXIS 3948 at *8 (E.D. La.) (holding that “alleged damages can easily support the requisite monetary basis for federal jurisdiction” where plaintiff sought compensation for medical expenses, pain and suffering, mental anguish, and lost wages).

DIVERSITY OF CITIZENSHIP EXISTS

8. Removal under 28 U.S.C. § 1441 is appropriate because this case is an action over which this Court would have original jurisdiction pursuant to 28 U.S.C. § 1332. Specifically, the amount in controversy exceeds \$75,000, exclusive of interest and costs, and complete diversity of citizenship exists between Plaintiffs and all properly joined defendants. *See* U.S.C. §§ 1332 & 1441.

9. The Petition states that Plaintiff Mary Banks is a resident of the State of Texas. Petition at ¶ 1. Plaintiff Betty Colston is a resident of the State of Oklahoma. Petition at ¶ 2.

10. DePuy is incorporated under the laws of the State of Indiana and has its principal place of business in Indiana. For the purposes of determining diversity, a corporation is deemed to be a citizen of both the state of its incorporation and of the state where it has its principal place of business. 28 U.S.C. § 1332(c)(1). Thus, DePuy is a citizen only of Indiana.

11. Defendants Kelly Orthopaedic Sales, LP (“Kelly”) and KOS Management Company, LLC (“KOS”) are organized and exist pursuant to the laws of the State of Texas and have their principal places of business in the State of Texas.

12. However, the fact that Kelly and KOS are citizens of Texas is irrelevant for removal purposes as both Kelly and KOS were improperly joined. *Burden v. General Dynamics Corp.*, 60 F.3d 213, 217-18 (5th Cir. 1995); *see also Dodson v. Spiliada Mar. Corp.*, 951 F.2d 40, 42-43 (5th Cir. 1992). Because no properly joined defendants are residents of Texas, complete diversity of citizenship exists between Plaintiffs and DePuy.

DEFENDANTS KELLY AND KOS ARE IMPROPERLY JOINED

13. The inclusion of Defendants Kelly and KOS in this action is for the sole purpose of preventing DePuy from exercising its legal right to remove this case to federal court.

14. “[D]iversity cannot be destroyed by a plaintiff fraudulently joining a non-diverse defendant.” *McKee v. Kansas City Southern Ry. Co.*, 358 F.3d 329, 333 (5th Cir. 2004). Removal of this suit under complete diversity of citizenship should not be thwarted by Plaintiffs’ attempt to join Kelly and KOS improperly to destroy diversity. *See id.*

15. In this jurisdiction, a defendant is improperly joined where the plaintiff cannot “establish a cause of action against the non-diverse party in state court.” *See Travis v. Irby*, 326 F.3d 644, 647 (5th Cir. 2003). To assert improper joinder, the defendant must demonstrate that there is “no *reasonable* basis for the district court to predict that the plaintiff might be able to

recover against an in-state defendant.” *Smallwood v. Illinois Cent. R.R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004) (emphasis added). *See also Hornbuckle v. State Farm Lloyds*, 385 F.3d 538, 542 (5th Cir. 2004) (holding that a finding of improper joinder depends on whether there is a reasonable basis for the claim against the in-state defendant.)

16. The potential for legal liability of Kelly and KOS must be more than “merely theoretical.” *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 312 (5th Cir. 1992). As the Fifth Circuit has made clear: “We have never held that a particular Plaintiff might possibly establish liability by the mere hypothetical possibility that such an action could exist.” *Griggs v. State Farm Lloyds*, 181 F.3d 694, 701 (5th Cir. 1999).

17. Plaintiffs sole theory of liability against KOS is that KOS, as the general partner of Kelly, is liable for its debts. *See* Petition at ¶ 128. Thus, KOS’s liability depends wholly on the liability of Kelly.

18. Plaintiffs allege that Kelly was negligent in promoting, distributing, selling and servicing the products at issue in this lawsuit. *See id.* at ¶¶ 9-11. But Kelly’s limited role with regard to these products forecloses the possibility of recovery by Plaintiffs under these theories.

19. Indeed, Kelly’s actual role was simply to deliver the DePuy devices ordered by a hospital or surgeon to the respective hospital or surgeon. *See* Declaration of George Kelly ¶ 4, attached as Exhibit E. Kelly fills orders by either retrieving devices maintained in inventory at the hospital or a Kelly facility, or by ordering the device from DePuy. *See Id.* at ¶ 5.

20. Kelly never purchases, takes title or obtains an ownership interest in the DePuy devices. *See id.* at ¶ 6. Nor does Kelly ever make or receive payments related to the hospital or surgeon’s purchase of a device. *Id.* Furthermore, Kelly is not a party to any contract between DePuy and any hospital concerning the sale of any DePuy products. *Id.* To that end, Kelly does

not fit the definition of a seller under Texas law. *See* TEX. BUS. & COM. CODE § 2.103(a)(4) (adopting the UCC in defining a seller as “a person who sells or contracts to sell goods”).

21. Additionally, Kelly does not fit the definition of “seller” under Chapter 82 of the Civil Practices and Remedies Code. Chapter 82 defines a seller as “a person who is engaged in the business of distributing or otherwise placing ... in the stream of commerce for use or consumption a product.” *See* Tex. Civ. Prac. & Rem. Code § 82.001(3). Kelly does not place devices in the stream of commerce — DePuy does when it sells its products to hospitals. Once in the stream of commerce, Kelly simply delivers the devices to the ordering party.

22. But even if Chapter 82 and its definition of seller were to be applied here, Kelly would still be protected from liability under §82.003 because it did not manufacture the products at issue. *See* Tex. Civ. Prac. & Rem. Code § 82.003(a). Moreover, none of the exceptions to 82.003 are applicable in this case because Kelly did not design, alter, modify, install, exercise substantial control over any warning or instruction, or in any other way meet the requirements for liability as set forth under the rule. *See id.*

23. The DePuy ASR products obtained from DePuy through Kelly are received in double sealed sterile packaging. *See id.* ¶ 7. Neither Kelly nor any of its representatives break the seal or alter in any manner the content or labeling of any package prior to delivery to the hospital or surgeon. *Id.* The DePuy devices are delivered in their sealed packaging by a Kelly representative to a nurse. *See id.* at ¶ 9. The Kelly representatives do not enter the sterile field or assist the surgeon in any way. *Id.*

24. Furthermore, any marketing or promotional materials used by Kelly or its representatives were generated and provided by DePuy. *See id.* at ¶ 10. Neither Kelly nor its representatives ever generated, assisted in generating, or modified any such materials. *Id.* Kelly

simply delivers to the surgeons technical information about the products that is provided by DePuy. *See id.* at ¶ 4. For example, the package inserts for the ASR prosthetic devices are provided by DePuy and are contained in the sealed containers that Kelly delivers to the hospitals and surgeons. *See id.* at ¶ 8. And neither Kelly nor its representatives ever generated, assisted in generating, or modified any packaging labels or their language. *See id.* at ¶ 13. Kelly representatives simply delivered information provided by DePuy and responded to inquiries from surgeons using information provided by DePuy. *See id.* at ¶ 15.

25. Additionally, neither Kelly nor any of its representatives has ever been involved in the design, manufacturing, development, or testing of the DePuy devices at issue. *See id.* at ¶ 11. Nor were they involved in any way in the regulatory or approval process related to the devices. *See Id.* at ¶ 12.

26. Because Kelly and its representatives in no way altered any package inserts or marketing materials provided by DePuy, and only detailed DePuy products based on those materials, Kelly did not exercise substantial control over the content of any materials or undertake any responsibility for the content of those materials. *See Id.* at ¶ 17.

PROPRIETY OF REMOVAL

27. For the foregoing reasons, this Court has jurisdiction over this matter based on diversity of citizenship pursuant to 28 U.S.C. § 1332(a)(1).

28. This Notice is timely as it was filed within 30 days of receipt of the initial pleadings and within one year of the commencement of this action as required by 28 U.S.C. § 1446(b).

29. Pursuant to 28 U.S.C. § 124(b), the U.S. District Court for the Northern District of Texas, Dallas Division, is the federal judicial district encompassing the District Court of Dallas

County, Texas, where this suit was originally filed. Venue is therefore proper in this district under 28 U.S.C. § 1441(a).

30. DePuy is not a citizen of the State of Texas, where the state court action was brought. See 28 U.S.C. § 1441(b). Kelly and KOS were both improperly joined and thus their citizenship is irrelevant for removal purposes. See *Burden v. General Dynamics Corp.*, 60 F.3d at 217-18; see also *Dodson v. Spiliada Mar. Corp.*, 951 F.2d at 42-43.

31. Accordingly, the present action may be removed from the District Court of Dallas County, Texas, and brought before the U.S. District Court for the Northern District of Texas, Dallas Division, pursuant to 28 U.S.C. §§ 1332(a)(1), and 1441(a)-(b).

32. A copy of this Notice of Removal is being served on Plaintiff and filed with the Clerk of the District Court of Dallas County, Texas, as provided by 28 U.S.C. § 1446(d).

WHEREFORE, notice is hereby given that this action is removed from the District Court of Dallas County, Texas, to the U.S. District Court for the Northern District of Texas, Dallas Division.

Respectfully submitted,

By: /s/ Gene M. Williams

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of April, 2011, I electronically filed DEFENDANT DEPUY ORTHOPAEDICS, INC.'S NOTICE OF REMOVAL with the Clerk of the Court using the CM/ECF System which will send notification of such filing to counsel. Defendant's counsel is also serving undersigned counsel with a copy of the filed document in accordance with the Federal Rules of Civil Procedure.

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