

1 MORRIS PETERSON
Robert McCoy, No. 9121
2 Email: rrm@morrislawgroup.com
Joni A. Jamison, No. 11614
3 Email: jaj@morrislawgroup.com
900 Bank of America Plaza
4 300 South Fourth Street
Las Vegas, Nevada 89101
5 Telephone: (702) 474-9400
6 Facsimile: (702) 474-9422

7 Attorneys for Defendants
DePuy Orthopaedics, Inc.
8 and Precision Instruments, Inc.

9

10

UNITED STATES DISTRICT COURT

11

DISTRICT OF NEVADA

12

ANNELEISE RUNDLE, MARTHA
13 BENDER, and KATHERINE GUY,

) Case No.

14

Plaintiffs,

)

) **NOTICE OF REMOVAL**

15

vs.

)

) **JURY TRIAL DEMANDED**

16

DEPUY ORTHOPAEDICS, INC. and
17 PRECISION INSTRUMENTS, INC.,

)

18

Defendants.

)

)

)

)

19

20

PLEASE TAKE NOTICE that defendants DePuy Orthopaedics, Inc.

21

("DePuy") and Precision Instruments, Inc. ("Precision Instruments") remove this

22

action from the Eighth Judicial District Court for Clark County, Nevada to the

23

United States District Court for the District of Nevada. Federal jurisdiction exists

24

over this proceeding pursuant to 28 U.S.C. §§ 1332, 1441, and 1446 because there is

25

complete diversity among all of the properly named parties and because the

26

amount in controversy exceeds \$75,000. In support of removal, defendants state:

27

28

1 I. INTRODUCTION & BACKGROUND

2 1. This is a products liability action premised on allegations that
3 plaintiffs Anneliese Rundle, Martha Bender, and Katherine Guy experienced pain
4 and injury from prosthetic hip implants allegedly manufactured by DePuy. Ex. A,
5 Compl., ¶ 78. Since DePuy voluntarily recalled the ASR™ XL Acetabular Hip
6 System and the ASR™ Hip Resurfacing System ("ASR™ Hip Systems") on August
7 24, 2010, hundreds of lawsuits have been filed against DePuy in federal and state
8 courts across the country. On December 3, 2010, the Judicial Panel on Multidistrict
9 Litigation ("MDL Panel") designated a multidistrict litigation ("MDL") court, the
10 Northern District of Ohio (Judge David A. Katz), in which to coordinate any such
11 federal proceedings. *In re DePuy Orthopaedics, Inc., ASR Hip Implant Prods. Liab.*
12 *Litig.*, 2010 WL 4940348 (J.P.M.L. Dec. 3, 2010). Since the designation of the MDL
13 court, over 600 cases that, like this one, involve allegations of injury from DePuy
14 ASR™ Hip Systems have been transferred to the MDL proceeding.¹

15 2. Plaintiffs, allegedly Nevada residents, commenced this action
16 against DePuy on March 4, 2011, by filing a Complaint in the Eighth Judicial
17 District Court, Clark County, Nevada, case number A-11-636272-C. In their
18 Complaint, a copy of which is attached as Exhibit A, plaintiffs assert claims for
19 negligence, strict liability, breach of warranty, violation of the Nevada Deceptive
20 Trade Practices Act, deceit by concealment, and negligent misrepresentation. All
21 claims are pleaded against DePuy and Precision Instruments, a Nevada
22 corporation that facilitates orders of DePuy products.

23
24
25
26
27 ¹ As required under the MDL Panel rules, DePuy will identify this
28 removed case as a "tag-along" action, and the MDL Panel will then issue a
Conditional Transfer Order transferring this case to the Northern District of Ohio
within a matter of days.

1 **II. REMOVAL IS PROPER IN THIS CASE**

2 **A. There Is Complete Diversity Among All Proper Parties.**

3 3. Plaintiffs are, and were at the time this lawsuit was filed,
4 citizens of Nevada. Ex. A, Compl., ¶¶ 1-3.

5 4. Defendant DePuy is, and was at the time this lawsuit was
6 filed, a corporation organized under the laws of Indiana with its principal place of
7 business in Indiana, and is thus a citizen of Indiana for purposes of determining
8 diversity. *See* 28 U.S.C. § 1332(c)(1) ("[A] corporation shall be deemed to be a
9 citizen of any State by which it has been incorporated and of the State where it has
10 its principal place of business").

11 5. The Complaint also names Precision Instruments, which
12 is a Nevada corporation, in an attempt to prevent diversity jurisdiction, and thus
13 removal. Precision Instruments was not sued for a legitimate purpose but was
14 joined to thwart DePuy's statutory right to federal jurisdiction. Precision
15 Instrument's joinder is fraudulent and can and should be disregarded in assessing
16 jurisdiction.

17 **B. The Citizenship of Precision Instruments Should Be Disregarded
18 Because It Is Fraudulently Joined.**

19 6. Precision Instruments is fraudulently joined because the
20 Complaint "fails to state a cause of action against [this defendant] and the failure is
21 obvious according to the settled rules of the state." *Ritchey v. Upjohn Drug Co.*, 139
22 F.3d 1313, 1318 (9th Cir. 1998) (citing *McCabe v. Gen. Foods Corp.*, 811 F.2d 1336,
23 1339 (9th Cir. 1987)); *TPS Utilicom Seros., Inc. v. AT&T Corp.*, 223 F. Supp. 2d 1089,
24 1102 (C.D. Cal. 2002) ("There is no cause of action stated when the relevant claim is
25 patently spurious, or when there is no reasonable basis for imposing liability on
26 the resident defendant."). The legal claims asserted against it do not exist under
27 Nevada law. Even if state law did recognize a claim against Precision
28 Instruments, plaintiffs fail to allege a sufficient factual basis for those claims.

1 7. "The defendant seeking removal to the federal court is entitled
2 to present the facts showing the joinder to be fraudulent." *McCabe*, 811 F.2d at
3 1339; *see also Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1068 (9th Cir. 2001)
4 (court may pierce the pleadings and take into consideration evidence from the
5 defendant in the form of affidavits to determine whether the fraudulent joinder
6 doctrine should be allowed to effect removal to federal court).

7 8. The Declaration of Ron Emes, attached as Exhibit D,
8 establishes that there are no colorable state law claims against Precision
9 Instruments:

10 a. Precision Instruments facilitates delivery of DePuy
11 products to hospitals and surgeons. Ex. D, Emes Decl., ¶¶ 1, 7. Precision
12 Instruments delivers the implants in sealed packages and does not inspect or
13 examine the implants contained therein. *Id.* at ¶ 8.

14 b. Precision Instruments did not take title to or an
15 ownership interest in any ASR™ Hip System, and never pays DePuy nor receives
16 money from hospitals for any ASR™ Hip System. *Id.* at ¶ 9. Hospitals order
17 ASR™ Hip Systems from DePuy directly, and DePuy invoices the hospitals
18 directly. *Id.* at ¶ 10.

19 c. Precision Instruments never participated in the design
20 or manufacture of an ASR™ Hip System, and never participated in the
21 development or publishing of the package inserts or marketing materials for the
22 ASR™ Hip Systems. *Id.* at ¶¶ 5-6.

23 d. Precision Instruments has had no direct dealings or
24 communications with the plaintiffs in this matter. *Id.* at ¶ 12.

25
26
27
28

1 **1. There is No Legal Basis for the Claims Asserted Against**
2 **Precision Instruments.**

3 9. A claim for negligence under Nevada law must be based on,
4 among other things, an existing duty of care and a breach of that duty. *Jordan v.*
5 *State ex rel. Dept. of Motor Vehicles & Public Safety*, 121 Nev. 44, 74, 110 P.3d 30, 51
6 (2005). The supplier of an allegedly defective product who neither knows nor has
7 reason to know that a product is, or is likely to be, dangerous, is not liable in a
8 negligence action. Restatement (Second) Torts § 402; *see also Forest v. E.I. DuPont*
9 *de Nemours & Co.*, 791 F. Supp, 1460, 1464 (D. Nev. 1992) (the Nevada Supreme
10 Court looks to the Restatement to resolve product liability issues); *Kite v. Zimmer*,
11 2:06-CV-745-RCJ-RJJ, 2006 WL 3386765, at *4 (adopting Restatement view and
12 holding that supplier could not be liable for negligence). A distributor acting as a
13 mere conduit of the product has no affirmative duty to inspect or test for product
14 defects, and cannot be liable for negligence. *Kite*, 2006 WL 3386765, at *4 (holding
15 that medical device distributor could not be liable for negligence because it did not
16 "manufacture, open, test, or alter any of the products it delivered" and was
17 "merely a conduit between [the manufacturer] and the hospital and could not
18 reasonably have known if the Device was defective"); *Sutton v. Major Prods. Co.*,
19 372 S.E. 2d 897, 899 (N.C. Ct. App. 1988) (holding that a distributor can only be
20 liable for injuries caused by *known* dangers and because the product was delivered
21 in its original sealed container, the distributor had no knowledge of any potential
22 defect and therefore could not be held liable in negligence). Precision Instruments
23 delivered the ASR™ Hip Systems in sealed containers and did not inspect or
24 examine the implants themselves. Ex. D, Emes Decl., ¶ 8. It therefore had no
25 knowledge of any alleged defects and owed plaintiffs no duty.

26 10. Under Nevada law, only "sellers" can be strictly liable in tort.
27 *See Calloway v. City of Reno*, 116 Nev. 250, 268, 993 P.2d 1259, 1270 (2000) (to be
28 strictly liable, a defendant must be a seller "engaged in the business of selling . . . a

1 [dangerously defective] product") (quoting Restatement (Second) of Torts § 402A),
2 *overruled on other grounds by Olson v. Richard*, 120 Nev. 240, 89 P.3d 31(2004); *Allison*
3 *v. Merck & Co., Inc.*, 110 Nev. 762, 766 n.1, 878 P.2d 948, 951 n.1 (1994) (holding
4 county health district could not be strictly liable as a matter of law for distributing
5 allegedly defective health product because it was not a "seller of products") (citing
6 Restatement (Second) of Torts, § 402A). Precision Instruments was not a "seller" of
7 the ASR™ Hip System, and therefore cannot be held strictly liable for any alleged
8 defects under Nevada law. *See Ex. D, Emes Decl.*, ¶¶ 9-10.

9 11. The breach of warranty claim against Precision Instruments
10 also fails. As with strict liability, only "sellers" can be liable for breach of warranty
11 claims in Nevada. *See NRS §§ 104.2313-2315; Allison*, 110 Nev. at 766 n.1, 878 P.2d
12 at 951 n.1 (a party who is not a "seller of products" cannot be liable under a
13 warranty theory). "Sellers" are defined as those who sell or contract to sell goods.
14 NRS 104.2103. Since Precision Instruments is not a "seller" within that statutory
15 definition, it is well-settled that there is no basis for any warranty claims against it.
16 *See Ex. D, Emes Decl.*, ¶¶ 9-10 (never sold, contracted to sell, or took title to
17 goods).

18 12. There is also no reasonable basis for plaintiffs' claims for
19 deceptive trade practices. These claims are premised on fraud. NRS 41.600
20 (creating cause of action for fraud based on deceptive trade practices). Plaintiffs
21 have not pleaded fraud with the requisite particularity because they have not set
22 forth required detail as to the maker of any allegedly fraudulent statements, when
23 and where those representations were made, and the manner in which those
24 representations were false. *In re GlenFed., Inc. Securs. Litig.*, 42 F.3d 1541, 1547 n.7
25 (9th Cir. 1994) (requiring that allegations of fraud state "time, place, person,
26 statements made [and] exploitation of why or how such statements are false or
27 misleading"); *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989)
28 (allegations that are vague or conclusory are insufficient to satisfy the particularity

1 requirement of Fed. R. Civ. P. 9(b)); *see also Burns v. Wyeth, Inc.*, 352 F. Supp. 2d
2 773, 777 (E.D. Ky. 2004) (finding fraudulent joinder with respect to pharmaceutical
3 representative where "Plaintiffs do not plead with any particularity or specificity
4 when or where the alleged misrepresentations occurred, or for that matter, what
5 was allegedly misrepresented"). Plaintiffs' claim for deceptive trade practices
6 against Precision Instruments must therefore fail.

7 13. For the same reason, there is no reasonable legal basis for
8 plaintiffs' deceit by concealment (also known as fraudulent misrepresentation)
9 claim. Such a claim is also premised on an alleged intent to defraud plaintiffs. *See*
10 *Midwest Supply, Inc. v. Waters*, 89 Nev. 210, 212, 510 P.2d 876, 878(1993) (statements
11 which are alleged to be aimed at deceiving the public are subject to standard for
12 fraud). Again, fraud has not been pleaded with the requisite particularity. *See Fed*
13 *R. Civ. P. 9(b); Nev. R. Civ. P. 9(b); Golden Nugget, Inc. v. Ham*, 98 Nev. 311, 314-15,
14 646 P.2d 1221, 1224 (1982) (holding that "fraudulent concealment must be alleged
15 with particularity"); *Hearn v. R.J. Reynolds Tobacco Co.*, 279 F. Supp. 2d 1096, 1113
16 (D. Ariz. 2003) ("The Ninth Circuit requires that fraudulent concealment claims be
17 pled with particularity"). Plaintiffs have not pleaded fraud with the requisite
18 particularity because they have not set forth details regarding the maker of the
19 allegedly false statements, the time and place thereof, or how those statements
20 were false or misleading. *GlenFed*, 42 F.2d at 1547 n.7.

21 14. Finally, there is no legal basis for plaintiffs' negligent
22 misrepresentation claims. Under Nevada law, negligent misrepresentation is only
23 available to plaintiffs who have suffered pecuniary loss in the context of a business
24 transaction. *See Bill Stremmel Motors, Inc. v. First Nat'l Bank of Nev.*, 94 Nev. 131,
25 134, 575 P.2d 938, 940 (1978) (adopting test for negligent misrepresentation from
26 the Restatement (Second) of Torts § 552); *Forest*, 791 F. Supp. at 1461 (granting
27 summary judgment in defendant's favor on a negligent misrepresentation claim

28

1 against manufacturer of medical device implant). Precision Instruments therefore
2 cannot be held liable for negligent misrepresentation under Nevada law.

3 **2. Precision Instruments Is Also Fraudulently Joined Because**
4 **Plaintiffs Have Not Alleged Any Factual Basis for the**
5 **Claims Against It.**

6 15. Even if the causes of action pleaded against Precision
7 Instruments were available under Nevada law—and they are not for the reasons
8 explained above—a finding that this defendant is fraudulently joined is also
9 warranted because the Complaint alleges absolutely no factual basis for the claims
10 against the non-diverse defendant. *See, e.g., TPS*, 233 F. Supp. 2d at 1094 (denying
11 remand because of insufficient factual allegations directed at the non-diverse
12 defendant); *Brown v. Allstate Ins.*, 17 F. Supp. 2d 1135, 1137 (S.D. Cal. 1998) (finding
13 in-state defendants fraudulently joined where "no material allegations against
14 [them] are made"). Plaintiffs cannot defeat removal by relying on the same generic
15 claims made against DePuy, without specifying why the non-diverse defendants
16 are properly joined as defendants and should assume liability. *Banger ex rel.*
17 *Freeman v. Magnolia Nursing Home, L.P.*, 234 F. Supp. 2d 633, 638 (S.D. Miss. 2002)
18 (conclusory and generic allegation of wrongdoing on part of all defendants is "not
19 sufficient to show that [non-diverse] defendant was not fraudulently joined");
20 *Lyons v. Am. Tobacco Co.*, 1997 WL 809677, at *5 (S.D. Ala. Sept. 30, 1997) (there is
21 "no better admission of fraudulent joinder" than plaintiffs' failure to make any
22 specific factual allegations against these non-diverse defendants").

23 16. Because Precision Instruments is fraudulently joined, its non-
24 diverse citizenship does not defeat diversity jurisdiction. *See Morris*, 236 F.3d at
25 1068 (denying motion to remand because in-state travel agent was fraudulently
26 joined); *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353 (11th Cir. 1996) (denying
27 motion to remand in part because non-diverse parties were fraudulently joined),
28

1 abrogated on other grounds by *Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir.
2 2000).

3 **C. The Amount in Controversy Exceeds \$75,000.**

4 17. A preponderance of evidence supports that the amount in
5 controversy exceeds \$75,000. See *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398,
6 403-404 (9th Cir. 1996); accord *Guglielmino v. McKee Foods Corp.*, 2007 WL 2916193
7 (9th Cir. Oct. 9, 2007). This is evidenced by the nature and amount of damages
8 plaintiffs seek in their Complaint and by the damages recovered in cases factually
9 and/or legally similar to the one pleaded by plaintiffs, as set forth below.²

10 a. *Punitive Damages*: Plaintiffs seek punitive damages. Ex.
11 A, Compl., ¶¶ 215-222. The amount of punitive damages sought by plaintiffs must
12 be considered in assessing the amount in controversy in this case. *Bell v. Preferred*
13 *Life Assurance Soc'y*, 320 U.S. 238, 240 (1943) ("Where both actual and punitive
14 damages are recoverable under a complaint each must be considered to the extent
15 claimed in determining jurisdictional amount."); *Richmond v. Allstate Ins. Co.*, 897 F.
16 Supp. 447, 450 (S.D. Cal 1995) ("Punitive damages are also included in calculating
17 the amount in controversy if they are recoverable as a matter of law."). Punitive
18 damages against a manufacturer, distributor, or seller of goods are not limited by
19 statute in Nevada. See NRS 42.005(2)(a). This Court has held that the amount in
20 controversy was satisfied where a plaintiff sought punitive damages in an
21 unspecified amount. *Coleman v. Assurant, Inc.*, 463 F. Supp. 2d 1164 (D. Nev. 2006)
22 ("In considering whether the punitive damages sought will make the amount in
23 controversy meet the jurisdictional requirement, the Supreme Court has held that
24 it must appear 'to a legal certainty from the complaint that [the plaintiff] could not

25
26
27 ² DePuy and Precision Instruments make these arguments for the
28 purposes of removal only and without waiving any rights to contest liability or
claimed damages.

1 recover . . . sufficient punitive damages to make up the requisite [jurisdictional
2 amount].").

3 b. *Compensatory and Special Damages:* Plaintiffs seek
4 compensation for general and special damages as well. Ex. A, Compl., p. 34.
5 Although plaintiffs pleaded this cause of action in the minimalist manner
6 mandated by Nev. R. Civ. P. 8(a)³, they allege that the injuries they claim were
7 caused by DePuy's product are sufficiently serious so as to give rise to the causes
8 of action alleged in the Complaint. The amount of compensatory and special
9 damages alone (aside from the remainder of damages sought by plaintiffs) is,
10 therefore, more likely than not in excess of \$75,000. See *Guglielmino*, 2007 WL
11 2916193, slip op. at n.5.

12 18. It is clear that plaintiffs here have placed a sufficient amount
13 in controversy to meet the jurisdictional amount. See e.g. *Coleman*, 463 F. Supp. 2d
14 at 1168. Such alleged damages, in similar cases, have been found to satisfy the
15 federal amount in controversy. See e.g. *Gebbia v. Wal-Mart Stores, Inc.*, 233 F.3d 880,
16 883-84 (5th Cir. 2000) (alleging damages in a slip and fall case for "medical
17 expense, physical pain and suffering, mental anguish and suffering, loss of
18 enjoyment of life, loss of wages and earning capacity, and permanent disability
19 and disfigurement" met the jurisdictional threshold); *Baker v. Firestone Tire &*
20 *Rubber Co.*, 537 F. Supp. 244 (S.D. Fla. 1982) (a complaint which did not state more
21 than the jurisdictional amount in controversy but alleged permanent and serious
22 injuries, loss of wages, loss of earning capacity, loss of capacity for enjoyment of
23 life and great expenses for future medical treatment was removable on its face).

24
25
26
27 ³ Nev. R. Civ. P. 8(a) states, "Where claimant seeks damages of more than
28 \$10,000, the demand shall be for damages 'in excess of \$10,000' without further
specification of amount."

1 **III. DEPUY HAS SATISFIED THE PROCEDURAL REQUIREMENTS FOR**
2 **REMOVAL**

3 19. This notice is timely filed within 30 days of service of the
4 complaint and summons. 28 U.S.C. § 1446(b). The complaint was filed on March
5 4, 2011 and process was served on both defendants on March 23, 2011.

6 20. All properly joined defendants consent to removal. The
7 consent of the fraudulently joined defendant Precision Instruments is not
8 necessary for removal; however, Precision Instruments consents to removal. *See*
9 *United Computer Sys., Inc. v. AT&T Corp.*, 298 F.3d 756, 762 (9th Cir. 2002) (the
10 consent of fraudulently joined defendants is not required for removal).

11 21. Venue properly lies in the unofficial Southern Division of the
12 United States District Court for the District of Nevada pursuant to 28 U.S.C. §
13 1441(a) and 1446(a) because it encompasses the Eighth Judicial District Court,
14 where this action was originally brought.

15 22. Defendants will file a copy of this Notice of Removal with the
16 Clerk of the Eighth Judicial District Court and will serve a copy on plaintiffs'
17 counsel as required by 28 U.S.C. § 1446(d).


18 23. A copy of the Complaint is attached as Exhibit A. A copy of
19 the summons served on DePuy is attached as Exhibit B. A copy of the summons
20 served on Precision Instruments is attached as Exhibit C. No other pleadings were
21 filed in the Eighth Judicial District Court prior to removal.

22 **IV. CONCLUSION**

23 For these reasons, DePuy and Precision Instruments respectfully
24 remove this action, bearing case number A-11-636272-C, to this Court from the
25
26
27
28

1 Eighth Judicial District Court for Clark County, Nevada, pursuant to 28 U.S.C. §
2 1441.

3 MORRIS PETERSON

4
5 By 
6 Robert McCoy, No. 9121
7 Joni A. Jamison, No. 11614
8 900 Bank of America Plaza
9 300 South Fourth Street
10 Las Vegas, Nevada 89101

11 Attorneys for Defendants
12 DePuy Orthopaedics, Inc.
13 and Precision Instruments, Inc.

14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Pursuant to Fed. R. Civ. P. 5(b) and Section IV of District of Nevada

Electronic Filing Procedures, I certify that I am an employee of MORRIS PETERSON, and that the following documents were served via electronic service:

NOTICE OF REMOVAL

TO:

Peter C. Wetherall
WHITE & WETHERALL, LLP
9345 West Sunset Road
Suite 100
Las Vegas, NV 89148
(702) 838-8500
(702) 837-5081 Facsimile

Brian S. Franciskato
NASH & FRANCISKATO LAW FIRM
2300 Main Street
Suite 170
Kansas City, MO 64108
(816) 221-6600
(816) 221-6612 Facsimile

Altom M. Maglio
MAGLIO CHRISTOPHER & TOALE
LAW FIRM
1751 Mound Street
Second Floor
Sarasota, FL 34236
(941) 952-5242
(941) 952-5042 Facsimile

Attorneys for Plaintiffs

DATED this 22nd day of April, 2011.

By: Heather Catek