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9

10 UNITED STATES DISTRICT COURT

11 DISTRICT OF NEVADA

12 ANNELIESE RUNDLE, MARTHA)	Case No. 2:11-cv-00634-PMP-GWF
13 BENDER, and KATHERINE GUY,)	
)	
14 Plaintiffs,)	DEFENDANTS DEPUY
)	ORTHOPAEDICS, INC. AND
15 vs.)	PRECISION INSTRUMENTS,
)	INC.'S OPPOSITION TO
16 DEPUY ORTHOPAEDICS, INC. and)	PLAINTIFFS' MOTION FOR
17 PRECISION INSTRUMENTS, INC.,)	REMAND
)	
18 Defendants.)	

19

20 **I. INTRODUCTION**

21 There is no basis to remand this case. In an attempt to ride on the

22 coattails of their apparent successes many years past, plaintiffs rely on orders from

23 Fen-Phen and HRT litigation that occurred several years ago and ignore this

24 Court's more recent rulings, which do not support remand to state court. This

25 much is clear: plaintiffs have fraudulently joined defendant Precision Instruments,

26 Inc. ("Precision") to destroy diversity and deprive this Court of jurisdiction.

27 Absent the fraudulent joinder of this defendant, complete diversity exists between

28 plaintiffs and the only remaining defendant, DePuy Orthopaedics, Inc. ("DePuy").

1 As set forth below, and in defendants' previous filings with the Court,
2 this case raises jurisdictional issues that overlap with those in other similar cases
3 already transferred to MDL 2197, *In re: DePuy Orthopaedics, Inc., ASR Hip Implant*
4 *Products Liability Litigation*. The best course under these circumstances is for this
5 Court to defer consideration of plaintiffs' motion to remand pending resolution of
6 the transfer to MDL 2197, so that the MDL court can address these questions in an
7 efficient, consistent manner. Alternatively, should the Court decide to consider
8 plaintiffs' motion, it should be denied because plaintiffs have failed to state a claim
9 against Precision under Nevada law.

10 The law on this point in Nevada is clear. In fact, this Court has
11 previously denied remand in medical device product liability cases that, like this
12 one, involve the fraudulent joinder of defendants like Precision. Those decisions
13 have clearly established that, under Nevada law, a defendant cannot be liable
14 under theories of strict products liability or breach of warranty unless it is
15 considered a "seller." And medical device suppliers like Precision are not
16 considered "sellers" under Nevada law when they did not sell, contract to sell, or
17 take title to or ownership in the allegedly defective hip prosthesis, and therefore
18 cannot be liable under these theories. In addition, Precision was uninvolved in the
19 design, manufacture, and development of the allegedly defective hip prosthesis,
20 and plaintiffs do not even allege such involvement, so Precision cannot be subject
21 to liability for such alleged defects under any theory. Given this, the Court should
22 deny plaintiffs' motion to remand, including their request for an award of
23 attorneys' fees.

24 II. PROCEDURAL POSTURE

25 Plaintiffs filed their complaint in state court on March 4, 2011, alleging
26 negligence, strict liability (design defect), strict products liability (failure to warn),
27 breach of implied warranty, breach of express warranty, Deceptive Trade Practice
28 Act violations, deceit by concealment, and negligent misrepresentation based on

1 alleged defects in the ASR™ XL Acetabular Hip Replacement System and ASR™
2 Hip Resurfacing System ("ASR™ Hip Systems"). They sought to avoid federal
3 jurisdiction by joining Precision, alleging that Precision was involved in
4 "promoting, selling, distributing, marketing, and servicing" the hip prosthesis. *See*
5 *Compl.*, ¶ 10.

6 Defendants removed the case to this Court on April 22, 2011 and
7 subsequently notified the Judicial Panel on Multidistrict Litigation ("MDL Panel")
8 that this is a tag-along action to MDL No. 2197, *In re DePuy Orthopaedics, Inc. ASR*
9 *Hip Implant Products Liability Litigation*, the multidistrict litigation ("MDL")
10 proceeding that has been established in the Northern District of Ohio to coordinate
11 all federal products liability actions, like this one, involving the ASR™ Hip
12 Systems. The MDL Panel then included this case on Conditional Transfer Order
13 No. 41 on April 27, 2011. *See Ex. A, CTO-41*. Removal was proper because, but for
14 the fraudulent joinder of Precision, complete diversity exists. Plaintiffs filed their
15 motion for remand on April 26, 2011, and notified the MDL Panel of their
16 opposition to the CTO on May 4, 2011.

17 III. ARGUMENT

18 A. The Court Should Defer Consideration of Plaintiffs' Remand 19 Motion Pending MDL Transfer.

20 As set forth in defendants' pending motion to stay (#6), the Court
21 should stay this case and defer ruling on plaintiffs' motion to remand pending
22 transfer of this case to MDL No. 2197. The MDL Panel has expressly stated that
23 transferor courts should defer ruling on remand motions in cases tagged for MDL
24 transfer to ensure uniform treatment of recurring jurisdictional issues. *See Ex. B,*
25 *Ltr. from MDL Panel to Hon. Ricardo H. Hinojosa (Mar. 21, 2005)* ("[W]ait[ing]
26 until the Panel has decided the transfer issue . . . may be especially appropriate if
27 the [remand] motion raises questions likely to arise in other actions in the
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1 transferee court and, in the interest of uniformity, might best be decided there if
2 the Panel orders centralization").

3 In light of this, several courts in this and other circuits have refused to
4 consider remand motions in cases designated for MDL transfer. *See, e.g., In re Ioy*,
5 901 F.2d 7, 9 (2d Cir. 1990) ("Once transferred, the jurisdictional objections can be
6 heard and resolved by a single court and reviewed at the appellate level in due
7 course. Consistency as well as economy is thus served."); *Camera v. Bayer Corp.*,
8 No. C 09-6084 WHA, 2010 WL 902780, at *2 (N.D. Cal. Mar. 9, 2010) (deciding
9 remand motion prior to MDL transfer "would unnecessarily duplicate work and
10 could lead to inconsistent results"); *Nielsen v. Merck & Co.*, No. C07-00076 MJJ, 2007
11 WL 806510, at *2 (N.D. Cal. Mar. 15, 2007) (referencing MDL Panel letter in
12 rejecting plaintiff's argument that "the Court must first preliminarily consider the
13 merits of the remand motion before . . . considering a stay"); *Hardin v. Merck & Co.*,
14 No. C 07-0070 SBA, 2007 WL 1056790, at *2-3 (N.D. Cal. Apr. 5, 2007) (staying
15 action where plaintiff filed motion to remand given that "the precise issue of the
16 alleged fraudulent joinder . . . is a recurring issue"); *Dowler v. Medicine Shoppe*, No.
17 2:07-CV-848, 2007 WL 2907519, at *2 (S.D. Ohio Oct. 3, 2007) (staying action and
18 relying in part on MDL Panel's statement to transferor court, which "suggests that
19 waiting until the Panel has decided the transfer issue may be appropriate in the
20 interest of uniformity").

21 Plaintiffs rely on the Manual for Complex Litigation to support their
22 position that the Court should not delay decision on their remand motion. Mot.
23 for Remand (#5) at p. 4. But plaintiffs omit the more pertinent and compelling
24 language found in the same section, which provides:

25 More often, however, the Panel has held that the
26 pendency of potentially dispositive motions is not an
27 impediment to transfer actions, because such motions can
be addressed to the transferee judge for resolution after
transfer. Furthermore the pendency of motions raising

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1 questions *common to related actions* can itself be an
2 additional justification for transfer.

3 Manual for Complex Litigation, § 20-131 at p. 221 (2004) (citing *Ivy*, 901 F.2d at 9).
4 This language is consistent with the majority view that the best way to ensure that
5 MDL proceedings can achieve their statutory goal of efficient, coordinated
6 proceedings is by staying litigation pending transfer to the MDL court, including
7 the consideration of remand motions. This is particularly true where, as here, the
8 issues raised in plaintiffs' remand motion are similar to those raised in other cases
9 likely to be transferred to the same MDL proceeding. *See, e.g., Ex. C, Butler v.*
10 *DePuy Orthopaedics, Inc.*, Order and Reasons at p. 2 (staying all proceedings
11 pending transfer to MDL Court, and expressly finding that deferring ruling on
12 remand motion to MDL Court would "promote judicial efficiency and help to
13 avoid the possibility of inconsistent decisions."); *Ex. D, Laman v. DePuy*
14 *Orthopaedics, Inc.*, Order and Reasons at p. 3 (granting defendants' motion to stay
15 and deferring ruling on plaintiff's motion to remand to "serve the interests of
16 judicial economy and minimize the risk of inconsistent rulings in related cases.");
17 *Ex. E, Dio v. DePuy Orthopaedics, Inc.*, Decision and Order (granting defendants'
18 motion to stay and, though allowing plaintiff to prepare and file a motion to
19 remand, staying disposition of that motion pending transfer to the MDL court).

20 This is why this Court has frequently refused to rule on remand
21 motions when a case is pending transfer to an MDL, as this one is. *See, e.g., Ex. F,*
22 *Chapman v. Merck & Co.*, No. 2:06-CV-01319-KJD-PAL, Order at p. 3 (D. Nev. Feb.
23 13, 2007) ("The interests of consistency, economy and fairness support addressing
24 the present remand issue as part of [the] MDL"); *Wyman v. Merck & Co.*, No. 2:06-
25 CV-1329-RCJ-GWF, 2007 WL 203954, at *1 (D. Nev. Jan. 24, 2007) ("The Court finds
26 that the remand issues in this case, including fraudulent joinder, would be best
27 decided by the MDL Court."); *Ex. G, Batiz et. al v. Merck & Co.*, No. 2:06-CV-1317-
28 PMP-LRL, Hearing Transcript, at p. 6 (D. Nev. Jan. 11, 2007) ("[I]n the interest of

1 uniformity and ultimately a correct decision, that weighs in favor of the
 2 consolidated treatment that can be had with regard to each state jurisdiction or
 3 federal district that finds itself before a judge designated by the MDL Panel.");
 4 *Mangani v. Merck & Co.*, No. 2:06-CV-00914-KJD-PAL, 2006 WL 2707459, at *2 (D.
 5 Nev. Sept. 19, 2006) ("The hundreds of Vioxx cases pending before [the] MDL . . .
 6 present similar factual and legal issues regarding both the effects of Vioxx and
 7 remand issues such as fraudulent joinder. Because [the] MDL . . . is gaining ample
 8 experience examining the relevant facts for fraudulent joinder analysis, the
 9 interests of consistency, economy and fairness support their addressing the
 10 present remand issue."); *Kimbrough v. Wyeth*, No. CV-S-04-0819-RLH (PAL), Order,
 11 at p. 5 (D. Nev. Nov. 9, 2004) (attached to Mot. for Remand (#5) as Exhibit 3) ("The
 12 Court needs no prompting to recognize that an MDL Court judge assigned to
 13 thousands of Fen-Phen cases would have a vastly more informed perspective on
 14 the resolution of these questions of fact than that of this Court"). Plaintiffs' request
 15 that the Court first decide their motion for remand runs counter to the federal,
 16 statutory scheme that has been put into place to handle these exact types of issues
 17 on a consistent and efficient basis.¹

18 **B. Removal Was Proper Because Precision Was Fraudulently Joined.**

19 If the Court does consider plaintiffs' motion prior to transfer, the
 20 motion should be denied because complete diversity exists between plaintiffs and
 21 DePuy, the only properly joined defendant. There is no doubt that plaintiffs
 22 fraudulently joined Precision in an effort to destroy this Court's diversity
 23 jurisdiction.

24 _____
 25 ¹ The Court should not credit plaintiffs' suggestion that the defendants'
 26 "strategy" is to delay resolution of this case or somehow bully them into federal
 27 court by notifying the JPML of the existence of this case. Mot. for Remand (#5) at
 28 p. 5. As cases are filed throughout the country, or upon their removal to federal
 court, the MDL Panel requires that any party or counsel in actions previously
 transferred to an MDL "promptly notify" the MDL Panel's clerk of any
 "tag-along" actions in which that party is also named or in which that counsel
 appears. JPML R. P. 7.1(a).

1 **1. Standard of Review**

2 It is well-settled law that "fraudulently joined defendants will not
3 defeat removal on diversity grounds." *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313,
4 1318 (9th Cir. 1998); *McCabe v. Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987);
5 *see also Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001). A
6 defendant is fraudulently joined if "the plaintiff fails to state a cause of action
7 against a resident defendant, and the failure is obvious according to the settled
8 rules of the state." *Morris*, 236 F.3d at 1067 (quoting *McCabe*, 811 F.2d at 1339).² A
9 plaintiff fails to state a cause of action against a resident defendant when "the
10 relevant claim is patently spurious, or when there is no reasonable basis for
11 imposing liability on the resident defendant." *TPS Utilicom Servs., Inc. v. AT&T*
12 *Corp.*, 223 F. Supp. 2d 1089, 1102 (C.D. Cal. 2002).

13 **2. No Strict Liability Claim Exists Against Precision Under**
14 **Nevada Law.**

15 Nevada law does not recognize a strict liability claim against a
16 medical supplier such as Precision. To be strictly liable under Nevada law, a
17 defendant must be a seller "engaged in the business of selling . . . a [dangerously
18 defective] product." *Calloway v. City of Reno*, 116 Nev. 250, 268, 993 P.2d 1259, 1270
19 (2000) (quoting Restatement (Second) of Torts § 402A), *overruled on other grounds by*
20 *Olson v. Richard*, 120 Nev. 240, 89 P.3d 31(2004); *see also Allison v. Merck & Co.*, 110
21 Nev. 762, 766 n.1, 878 P.2d 948, 951 n.1 (1994) (defendant's status as "seller of
22 products" is a prerequisite to strict product liability and breach of warranty).
23 Nevada defines "seller" as "a person who sells or contracts to sell goods." NRS
24 104.2103.

25 _____
26 ² Plaintiffs repeatedly refer to a standard that the claims must be "wholly
27 insubstantial and frivolous," but the Ninth Circuit has never adopted such a
28 standard. Rather, as noted above, the controlling test for fraudulent joinder
requires the court to determine whether the plaintiff failed to state a claim against
the resident defendants under the settled law of the state. *See McCabe*, 811 F.2d at
1339 (1987).

1 Precision is not a "seller" as contemplated by Nevada law, and
 2 therefore cannot be liable under a theory of strict product liability. It did not sell,
 3 contract to sell, or take title to any ASR™ Hip System, including the ones
 4 implanted in plaintiffs. See Ex. H, Declaration of Ron Emes, ("Emes Decl."), ¶¶ 4,
 5 9. Furthermore, Precision did not participate in the design or manufacture of the
 6 ASR™ Hip Systems, and did not participate in the development or publishing of
 7 any package inserts or marketing materials accompanying the ASR™ Hip
 8 Systems. *Id.* at ¶¶ 5-6.

9 In short, Precision was a mere service provider to plaintiffs. Nevada
 10 follows the Restatement (Second) of Torts § 402A, which provides that service
 11 providers are not subject to strict product liability. *Allison*, 110 Nev. at 766 n.1, 878
 12 P.2d at 951 n.1 (affirming summary judgment in favor of Clark County Health
 13 District because administering allegedly defective vaccines did not make the
 14 health district a "seller of products") (citing Restatement (Second) of Torts § 402A;
 15 NRS 104.2313-2315); see also *Forest v. E.I. DuPont de Nemours, & Co.*, 791 F. Supp.
 16 1460, 1464 (D. Nev. 1992) (Nevada Supreme Court looks to Restatement to resolve
 17 product liability issues). This Court has applied the Restatement view and held
 18 that such parties were fraudulently joined as defendants. *E.g. Thompson v.*
 19 *Medtronic, Inc.*, 2:06-CV-00675-RCJ (PAL), 2006 WL 3544937, at *4 (D. Nev. Dec. 8,
 20 2006) (sales representative not a seller and therefore fraudulently joined); *Kite v.*
 21 *Zimmer*, 2:06-CV-0745-RCJ (RJJ), 2006 WL 3386765, at *4 (D. Nev. Nov. 22, 2006)
 22 (medical device distributor not a seller and therefore fraudulently joined);³ see also
 23 Ex. I, *Johnson v. Zimmer Spine, Inc.*, No. 2:08-CV-00672-KJD-LRL, Order, at p. 6 (D.
 24 Nev. Aug. 8, 2008) (hospital fraudulently joined because it was a service provider
 25 and not a seller of products); Restatement (Third) of Torts § 20, cmt. g ("sales

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 27
 28 ³ These cases prove negative plaintiffs' bald assertion that "every federal
 court in Nevada that has ruled on the issue of drug representatives' liability has
 found Plaintiffs' causes of action to be viable (or colorable) under Nevada law."
 Mot. for Remand (#5) at p. 18.

1 personnel, sales representatives, and other sales facilitators are not subject to strict
2 liability").

3 There is also no legal basis for strict liability claims against Precision
4 because it did not owe plaintiffs a duty to warn. Under Nevada law, the duty to
5 warn is borne by the seller or distributor of a product. See Restatement (Second) of
6 Torts § 402A, cmt. j (cited approvingly and relied upon in *Allison*, 110 Nev. at 774
7 n.12, 878 P.2d at 956 n.12); accord *Kite*, 2006 WL 3386765, at *3 (clarifying that "[t]he
8 *Allison* court refers to a manufacturer that also distributes its product, as was the
9 situation with the defendant in that case"). Given this well-settled law, there is no
10 independent duty for a supplier to warn, and thus no possible strict liability claim
11 against such a defendant. See, e.g., *In re Diet Drugs Litig.*, 2004 WL 1118714, at *4
12 (E.D. Pa. May 18, 2004) (a duty to warn does not extend to sales representatives).

13 Plaintiffs argue that a "solid line of authority" in Nevada allows
14 Precision to be sued under these theories, citing a handful of Fen-Phen and HRT
15 cases from several years ago. See Mot. for Remand (#5) at p. 4 and documents
16 attached thereto as Exhibits 1-10. But plaintiffs ignore this Court's more recent
17 rulings that do not support its position. For instance, in *Thompson v. Medtronic,*
18 *Inc.*, 2006 WL 3544937, the plaintiff sued a sales representative, bringing claims
19 very similar to those brought by plaintiffs here, based on injuries suffered from an
20 allegedly defective diabetes infusion set. This Court held that the sales
21 representative was not a "seller of products" under Nevada law because he did not
22 sell or contract to sell the products, and did not take part in the design,
23 manufacture, marketing, promotion or sale of the product. *Id.* at *3. He thus could
24 not be liable under a strict liability theory claim and was fraudulently joined. *Id.* at
25 *3-4. The Court further noted that even distributors must meet the statutory
26 definition for "seller" in order for liability to attach when they distribute products,
27 and that "sales representatives cannot be liable simply because they are sales
28 representatives." *Id.* at *2-3.

1 Plaintiffs here are trying to argue just that: that sales representatives
 2 should be held liable simply because they are sales representatives. With a
 3 superficial comparison between the distributor in this case and the distributors in
 4 the Fen-Phen and HRT cases, plaintiffs suggest that Precision must be held liable
 5 simply because other distributors have been held liable before. But *not one* case
 6 cited by plaintiffs deals with the question of whether a medical supplier,
 7 distributor, or sales representative can be considered a "seller" under Nevada law.⁴
 8 *Thompson* tells us that they cannot.

9 Plaintiffs fault defendants for their reliance on *Kite v. Zimmer*, 2006
 10 WL 3386765, but this case is significant because it is recent, and its facts are most
 11 similar to those in this case. In *Kite*, the plaintiffs alleged injury from a defective
 12 hip implant, and sued the local supplier of the implant, but this Court held that
 13 they could not maintain a valid cause of action against the supplier because it did
 14 not qualify as a "seller" under Nevada law. *Id.* at *3. Like Precision in this case, the
 15 supplier in *Kite* did not sell or contract to sell the hip implant, and served only as a
 16 conduit to provide physicians and hospitals with medical devices. *See id.*; Ex. H,
 17 Emes Decl., ¶¶ 4, 7, 9.

18 Plaintiffs argue that this case is distinguishable from *Kite* because they
 19 have "specifically pled" facts regarding Precision's training and responsibilities,
 20 where the plaintiffs in *Kite* failed to plead any such facts. Mot. for Remand (#5) at
 21 p. 20-21. But the facts that plaintiffs have alleged in their complaint still do not
 22 provide any evidence that Precision is a "seller" under Nevada law. Plaintiffs
 23 allege that:

24
 25 ⁴ In fact, in some of the Fen-Phen cases that plaintiffs rely upon, the
 26 defendants did not even raise the argument that there was no colorable claim
 27 against the sales representatives. Rather, the defendants argued that these claims
 28 were time-barred. *See, e.g.*, Exhibits 1, 2, and 3 attached to Mot. for Remand (#5).
 One order does not even address the remand motion at all because the Court
 granted the defendants' motion to stay pending transfer to the MDL. *See* Exhibit
 3 attached to Motion for Remand (#5) at p. 2.

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- Precision's sales representatives educated physicians regarding products, answered physicians' questions regarding products, and were present at surgeries to assist the physicians regarding the products;
- Precision employees received training and education on DePuy products; and
- Precision provided information to orthopedic surgeons regarding the advantages of their products, the design of their products, and surgical techniques and demonstrations on how to implant their products.

Compl., ¶¶ 13-15. Even if these allegations were accepted as true, they do not turn Precision into a "seller" that is subject to strict liability. Precision must meet the statutory definition under Nevada law, and the cases cited above hold that it does not.

Precision is simply not a "seller of products" liable under Nevada product liability law. It did not design or manufacture the ASR™ Hip System, did not exercise control over the content of any warnings or instructions that accompanied the ASR™ Hip System, and never took title to or owned the ASR™ Hip System. Ex. H, Emes Decl., ¶¶ 5-6, 9. Accordingly, its joinder as a defendant is fraudulent, and plaintiffs' motion for remand should be denied.

3. No Breach of Warranty Claim Exists Against Precision Under Nevada Law.

In addition, there is no possible breach of warranty claim against Precision. Under Nevada law, express and implied warranties are only provided by "sellers" of products. NRS 104.2313-2315 (providing for express and implied warranties only by sellers). Thus only "sellers" can be liable under a warranty theory. See *Allison*, 110 Nev. at 767 n.1, 878 P.2d at 952 n.1 (defendant who is not a seller of products could not be held liable under a warranty theory). Because Precision is not a "seller" within that statutory definition, as explained above, it is well-settled that there is no basis for an express or implied warranty

1 claims against it, as this Court has previously concluded. *See Thompson*, 2006 WL
2 3544937, at *4 (a claim for breach of warranty against a medical device sales
3 representative fails because sales representative is not a "seller" under Nevada
4 law); *Kite*, 2006 WL 3386765, at *4 (same).

5 **4. No Negligent Product Liability Claim Exists Against**
6 **Precision Under Nevada Law.**

7 Precision cannot be liable for negligent product liability because it
8 was uninvolved in the design, manufacture, and development of the product, and
9 it did not open, test, or alter the products it delivered. A claim for negligence
10 under Nevada law must be based on an existing duty of care. *Jordan v. State ex rel.*
11 *Dept. of Motor Vehicles & Public Safety*, 121 Nev. 44, 74, 110 P.3d 30, 51 (2005). The
12 supplier of an allegedly defective product who neither knows nor has reason to
13 know that a product is, or is likely to be, dangerous, is not liable in a negligence
14 action. Restatement (Second) Torts § 402; *see also Forest*, 791 F. Supp. at 1464 (the
15 Nevada Supreme Court looks to the Restatement to resolve product liability
16 issues). This Court has held that a distributor acting as a mere conduit of the
17 product has no affirmative duty to inspect or test for product defects, and cannot
18 be liable for negligence. *Kite*, 2006 WL 3386765, at *4 (holding that medical device
19 distributor could not be liable for negligence because it did not "manufacture,
20 open, test, or alter any of the products it delivered" and was "merely a conduit
21 between [the manufacturer] and the hospital and could not reasonably have
22 known if the Device was defective"); *see also Sutton v. Major Prods. Co.*, 372 S.E. 2d
23 897, 899 (N.C. Ct. App. 1988) (holding that a distributor can only be liable for
24 injuries caused by *known* dangers and because the product was delivered in its
25 original sealed container, the distributor had no knowledge of any potential defect
26 and therefore could not be held liable in negligence).

27 Plaintiffs make no allegations that Precision was at all involved in the
28 design, manufacture, or development of the ASR™ Hip Systems. The

1 uncontroverted evidence has shown that Precision was in fact not involved. Ex. H,
2 Emes Decl., ¶ 5. Furthermore, Precision delivered the products in sealed
3 containers and did not inspect or examine the implants themselves. *Id.* at ¶ 8. The
4 facts here are once again almost identical to the facts in the *Kite* case, where the
5 distributor was not held liable for negligence. *See* 2006 WL 3386765, at *4. The
6 result here should therefore be the same: Precision had no knowledge of any
7 alleged defects and owed plaintiffs no duty. It cannot be liable for negligence
8 under Nevada law.

9 **5. No Negligent Misrepresentation Claim Exists Against**
10 **Precision Under Nevada Law.**

11 There is also no possible claim under Nevada law against Precision
12 for negligent misrepresentation. It is a well-settled matter of law in Nevada that
13 this tort is limited only to those who suffer *pecuniary loss* in the context of a *business*
14 *transaction*. *See Bill Stremmel Motors, Inc. v. First Nat. Bank of Nev.*, 94 Nev. 131, 134,
15 575 P.2d 938, 940 (1978) (adopting the test for negligent misrepresentation from the
16 Restatement (Second) of Torts § 552, which limits liability for negligent
17 misrepresentation to situations where the plaintiff has suffered a "pecuniary loss"
18 in "business transactions").

19 This Court has applied Nevada's negligent misrepresentation test to
20 deny relief to a plaintiff in a products liability action similar to this one. *See Forest*,
21 791 F. Supp. 1460. In that case, the plaintiff had received a joint implant and later
22 brought an action against a manufacturer of one of the implant's materials. *Id.* at
23 1461. This Court granted summary judgment in favor of the defendant on the
24 negligent misrepresentation claim, concluding that "[i]t is clear . . . that [this] tort is
25 only available to those *suffering pecuniary injury in the context of a business*
26 *transaction*. As such, the facts of the instant case do not support even the allegation
27 of negligent misrepresentation nor could plaintiffs recover damages for personal
28 injury [under this theory]." *Id.* at 1470 (emphasis added). This Court reached the

1 exact same conclusion in the *Kite* case, discussed above. *Kite*, 2006 WL 3386765, at
 2 *4 ("a claim for negligent misrepresentation is only available if the plaintiff suffers
 3 pecuniary losses in the context of a business transaction"). The same result obtains
 4 here. Plaintiffs cannot possibly recover from Precision under this theory, making
 5 this claim patently spurious.

6 **6. Plaintiffs State No Claim Against Precision for Deceit by**
 7 **Concealment or Deceptive Trade Practices.**

8 Plaintiffs' fraud-based claims against Precision are also spurious and
 9 cannot be credited to defeat diversity jurisdiction. Both fraudulent
 10 misrepresentation and deceptive trade practices claims are fraud claims within the
 11 meaning of Nev. R. Civ. P. 9(b) and Fed. R. Civ. P. 9(b), and must thus be pleaded
 12 with particularity to properly state a claim. *See Golden Nugget, Inc. v. Ham*, 98 Nev.
 13 311, 314-15, 646 P.2d 1221, 1224 (1982) ("fraudulent concealment must be alleged
 14 with particularity"); *Graziose v. Am. Home Prods. Corp.*, 202 F.R.D. 638, 642 (D. Nev.
 15 2001) (Rule 9(b)'s specificity requirement applies to all allegations of intentional
 16 misrepresentation, fraudulent concealment and civil conspiracy); *Hearn v. R.J.*
 17 *Reynolds Tobacco Co.*, 279 F. Supp. 2d 1096, 1113 (D. Ariz. 2003) ("The Ninth Circuit
 18 requires that fraudulent concealment claims be plead [sic] with particularity.");
 19 NRS 41.600 (creating cause of action for fraud based on deceptive trade practices).

20 Particularity requires that plaintiffs *specify* the alleged fraudulent
 21 representations, the maker of those representations, when and where those
 22 representations were made and the manner in which those representations are
 23 false. *In re GlenFed, Inc. Secur. Litig.*, 42 F.3d 1541, 1547 n.7 (9th Cir. 1994)
 24 (requiring that allegations of fraud state "time, place, persons, statements made
 25 [and] explanation of why or how such statements are false or misleading"); *Vess v.*
 26 *Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (particularity means that
 27 fraud allegations must include the "who, what, when, where and how" the fraud
 28 occurred.); *Arroyo v. Wheat*, 591 F. Supp. 136, 139 (D. Nev. 1984) ("[s]tatements of

1 the time, place and nature of the alleged fraudulent activities must be included in
2 the complaint. . . . [P]laintiffs should have to detail the misrepresentations of
3 which they complain, explain in what way they were false, and designate the facts
4 that support an inference of fraud by each defendant." (citation omitted).

5 Plaintiffs' conclusory allegations do not provide any of the details
6 necessary to properly state these claims against any defendants, including
7 Precision. Plaintiffs do not allege *any* detail as to the who, what, when, where, and
8 how surrounding the alleged fraudulent activities. Instead, they make only
9 conclusory allegations of fraud. *E.g.*, Compl. at ¶¶ 194 (alleging that Precision
10 made false representations and failed to disclose material facts without stating the
11 relevant time, place, and person who allegedly made these representations); 198-
12 99 (alleging that Precision "willfully deceived" plaintiffs without giving particulars
13 as to who allegedly deceived, and when or where such alleged deception took
14 place); and 201 (alleging that Precision "intentionally concealed and suppressed"
15 facts concerning the ASR™ Hip Systems "with the intent to defraud" plaintiffs, but
16 pleading no specifics as to the who allegedly made the statements, what was
17 alleged to be said, or when and where such statements were allegedly made).
18 Plaintiffs' failure to plead fraud with the particularity required by Rule 9(b) means
19 they have stated no reasonable fraud-based cause of action against these
20 defendants. *Vess*, 317 F.3d at 1107 (recognizing the dismissal for failure to plead
21 fraud in accordance with Rule 9(b) is appropriate); *Bly-Magee v. Cal.*, 236 F.3d 1014,
22 1019 (9th Cir. 2001) (dismissing complaint for failure to satisfy Rule 9(b)).

23 Given these fatal defects in the fraud claims alleged against Precision,
24 the Court should follow the lead of other federal courts and refuse to credit these
25 claims to defeat diversity jurisdiction and reject plaintiffs' blatant attempt to
26 destroy otherwise proper diversity jurisdiction. *Burns v. Wyeth, Inc.*, 352 F. Supp.
27 2d 773, 777 (E.D. Ky. 2004) (finding fraudulent joinder with respect to

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1 pharmaceutical representative where "Plaintiffs do not plead with any
2 particularity or specificity when or where the alleged misrepresentations occurred,
3 or for that matter, what was allegedly misrepresented"); *Wakeland v. Brown &*
4 *Williamson Tobacco Corp.*, 996 F. Supp. 1213, 1221 (S.D. Ala. 1998) (failure to allege
5 particular facts supporting claims against in-state defendants violated Rule 9(b)
6 and supported finding of fraudulent joinder).

7 **7. Plaintiffs' Deceit by Concealment and Deceptive Trade**
8 **Practice Claims Against Precision Also Fail Substantively.**

9 In addition to failing because the plaintiffs did not plead fraud with
10 the particularity required by both state and federal law, plaintiffs' deceit by
11 concealment and deceptive trade practices claims fail substantively and cannot
12 defeat removal.

13 Under Nevada law, a fraudulent misrepresentation claim, like a
14 negligent misrepresentation claim, is limited to those who allegedly suffer
15 *pecuniary loss*, not personal injuries. See Restatement (Second) of Torts § 533 (1977)
16 ("The maker of a fraudulent misrepresentation is subject to liability for *pecuniary*
17 *loss* to another who acts in justifiable reliance upon it") (emphasis added). The
18 Nevada Supreme Court has recognized and adopted this portion of the
19 Restatement. *Epperson v. Roloff*, 102 Nev. 206, 212, 719 P.2d 799, 803 (1986) (citing §
20 533 with approval). It is accordingly clear that plaintiffs have no claim against the
21 named professional representatives under this theory.

22 The deceptive trade practices claim against the professional
23 representatives also fails because these defendants owe no duty to the plaintiffs, as
24 outlined above. For an omission to constitute actionable fraud, "a plaintiff must
25 first demonstrate that the defendant had a duty to disclose the fact at issue." *Dow*
26 *Chemical Co. v. Mahlum*, 114 Nev. 1468, 1486, 970 P.2d 98, 110 (1998), *overruled in*
27 *part on other grounds by* 117 Nev. 265, 21 P.3d 11 (2001); *accord Nev. Power Co. v.*
28 *Monsanto*, 891 F. Supp. 1406, 1415 (D. Nev. 1995) (required element of claim for

1 fraudulent concealment is that "[t]he defendant must have been under a duty to
2 disclose the fact to the plaintiff"). As Precision has no such duty, for the reasons
3 explained above, plaintiffs have no possible deceptive trade practice claim against
4 it.

5 In short, none of the claims asserted against Precision are available
6 under Nevada law. Other jurisdictions that have considered similar claims against
7 suppliers of the ASR™ Hip Systems have determined that such defendants were
8 fraudulently joined and have denied motions to remand on those grounds. *See,*
9 *e.g., Ex. J, Askew v. DC Medical, LLC, Opinion and Order, at p. 18 (finding*
10 *fraudulent joinder denying remand where plaintiff had brought claims of*
11 *negligence, negligent misrepresentation, breach of warranty, and fraud against*
12 *medical supplier); Ex. K, Bedgood v. DC Medical, LLC, Opinion and Order, at p. 29*
13 *(same); Ex. L, Crawley v. DC Medical, LLC, Order, at p. 9 (finding fraudulent joinder*
14 *of medical suppliers and denying remand where plaintiff had brought claims for*
15 *negligence, failure to warn, fraud and misrepresentation, and breach of warranty).*
16 Here, Precision was fraudulently joined solely to defeat diversity jurisdiction, and
17 its citizenship should be disregarded in analyzing subject matter jurisdiction. This
18 Court should follow the others and deny remand of this case to state court.

19 **C. The Court Should Not Consider Any Allegations Not Pleaded in**
20 **Plaintiffs' Complaint.**

21 In an attempt to paint a picture of Precision as a "seller" of the ASR™
22 Hip Systems under Nevada law and to supplement the weak allegations contained
23 in their complaint, plaintiffs have filled their motion to remand with voluminous
24 exhibits that provide general, out-of-context information meant to highlight
25 Precision's employees' training and responsibilities. *See Exhibits 25 and 30-33*
26 *attached to Mot. for Remand (#5). These exhibits include a former Precision*
27 *employee's LinkedIn web page, a course catalog from a medical sales college,*
28 *affidavits from other cases, and pages from DePuy's training guide, and all are*

1 meant to discredit the sworn testimony of Ron Emes, Precision's principal,
2 contained in the declaration that defendants filed with their Notice of Removal.
3 See Ex. H, Emes Decl.

4 Plaintiffs' additional allegations and the arguments thereon cannot be
5 credited to defeat jurisdiction: the question of whether Precision was fraudulently
6 joined must be determined *only* from the allegations of the complaint, *not* the new
7 allegations in plaintiffs' motion. *Batoff v. State Farm Ins. Co.*, 977 F.2d 848, 851 (3d
8 Cir. 1992) ("In evaluating the alleged fraud, the district court must *"focus on the*
9 *plaintiff's complaint* at the time the petition for removal was filed.") (emphasis
10 added); see also *Pullman Co. v. Jenkins*, 305 U.S. 534, 538 (1939) (the right to remove
11 is "determined according to the plaintiffs' pleading at the time of the petitioner for
12 removal"); *Sparta Surgical Corp. v. Nat'l Assoc. of Sec. Dealers, Inc.*, 159 F.3d 1209,
13 1213 (9th Cir. 1998) (removal jurisdiction "must be analyzed on the basis of
14 pleadings filed at the time of removal without reference to subsequent
15 amendments"). This Court has held the same on numerous occasions. See, e.g.,
16 *Kite*, 2006 WL 3386765, at *1 ("The legitimacy of removal must be decided on
17 evidence available at the time of removal and not on possible future evidence that may
18 be obtained through further discovery.") (emphasis added); *Van Brocklin v. Wyeth*,
19 No. CV-N-04-0675-HDM (RAM), Order, at p. 4 (D. Nev. Mar. 2, 2005) (attached to
20 Mot. for Remand (#5) as Exhibit 7) ("The only question the court has to determine
21 is whether *the complaint* evidence[s] a real intention to secure a judgment, and
22 colorable ground for it was shown as the record stood when the causes were
23 removed from the state court.") (citing *Smith v. S. Pac. Co.*, 187 F.2d 397, 401 (9th
24 Cir. 1951)) (emphasis added).

25 Defendants, however, may present evidence to show that the joinder
26 of Precision was fraudulent. Plaintiffs find fault with the fact that defendants
27 attached the Emes declaration to their Notice of Removal, repeatedly emphasizing
28 that the Court is not deciding a motion for summary judgment. Mot. for Remand

1 (#5) at pp. 10, 18. But it is well-settled Ninth Circuit law that where defendants
2 assert that there has been a fraudulent joinder, they are entitled to present facts
3 showing that the joinder was fraudulent. *McCabe*, 811 F.2d at 1339. This
4 proposition has also been cited with approval by this Court several times. *See, e.g.,*
5 *Thompson*, 2006 WL 3544937, at *2 ("Where fraudulent joinder is at issue, the
6 defendant seeking removal to federal court is entitled to present the facts showing
7 the joinder to be fraudulent.") (internal quotations omitted); *Kite*, 2006 WL 3386765,
8 at *2 (same); *Greene v. Wyeth*, No. CV-N-04-0312-LRH (VPC), Order, at p. 7 (D.
9 Nev. Nov. 2, 2004) (attached to Mot. for Remand (#5) as Exhibit 2) ("Ordinarily, the
10 court relies on only the face of the complaint to determine if diversity is present.
11 However, an exception presents itself where the defendants . . . assert that there
12 has been a fraudulent joinder In such cases, the defendant seeking removal is
13 entitled to present the facts and submit evidence which shows that the joinder is
14 fraudulent.") (internal citations and quotations omitted).

15 Thus, in considering fraudulent joinder claims, the Court may "pierce
16 the pleadings" and "consider[] summary judgment-type evidence such as
17 affidavits" from the defendants. *See Morris*, 236 F.3d at 1068 (citing *Cavallini v.*
18 *State Farm Mut. Auto. Ins. Co.*, 44 F.3d 256, 263 (5th Cir. 1995)); *see also Thompson*,
19 2006 WL 3544937, at *2; *Kite*, 2006 WL 3386765, at *2. "[A] defendant must have the
20 opportunity to show that the individuals joined in the action cannot be liable on
21 any theory." *Ritchey*, 139 F.3d at 1318. Defendants have shown that here.

22 Even if the Court considers the additional evidence plaintiffs include
23 with their motion, the result is the same. It seems that plaintiffs are trying to
24 create a "question of fact" that would remand this case to state court, even though
25 that is not the standard. *See Ex. F, Chapman*, No. 2:06-CV-01319-KJD-PAL, Order,
26 at p. 3 ("When considering 'a defendant's assertion that joinder of another
27 defendant was a sham to defeat removal, the District Court must determine the
28 facts from the evidence . . . and not decide automatically in favor of remand

1 simply because some facts may be said to be in dispute."') (quoting *In re Diet*
2 *Drugs v. Am. Home Prods.*, 220 F. Supp. 2d 414, 420 (E.D. Pa. 2002)). But upon a
3 close reading, none of the allegations in plaintiffs' motion actually contradicts the
4 statements in the Emes declaration. They are unconnected to the facts here, and
5 do nothing to establish what Precision actually did or did not do *in this case*.
6 Furthermore, none of the allegations in plaintiffs' motion establishes that Precision
7 is a "seller" under Nevada law that can be liable for strict liability or breach of
8 warranty, or that it was in any way involved in the design, manufacture, or
9 development of the ASR™ Hip System. Plaintiffs thus have no valid claims
10 against Precision under Nevada law, and fraudulently joined it as a defendant to
11 defeat diversity jurisdiction. Defendants' removal of this action was proper, and
12 the Court should deny plaintiffs' motion to remand.

13 **IV. CONCLUSION**

14 Because there is no reasonable basis under Nevada law for holding
15 Precision liable under any legal theory, they were fraudulently joined. But for
16 their fraudulent joinder, all parties are completely diverse, and this Court has
17 jurisdiction. The Court should therefore deny plaintiffs' motion for remand and
18 request for award of attorneys' fees.

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CERTIFICATE OF SERVICE

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: **DEFENDANTS DEPUY ORTHOPAEDICS, INC. AND PRECISION INSTRUMENTS, INC.'S OPPOSITION TO PLAINTIFFS' MOTION FOR REMAND**

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DATED this 13th day of May, 2011.

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