

ATTORNEYS FOR PLAINTIFFS:

Peter C. Wetherall, Esq., NV Bar # 4414
WHITE & WETHERALL, LLP
9345 West Sunset Road, Suite 100
Las Vegas, NV 89148
Tel: (702) 838-8500
Fax: (702) 837-5081

Brian S. Franciskato, MO Bar #41634, *Pro Hac Vice*
NASH & FRANCISKATO LAW FIRM
2300 Main Street, Suite 170
Kansas City, MO 64108
Tel: (816) 221-6600
Fax: (816) 221-6612

Altom M. Maglio, FL Bar # 88005, *Pro Hac Vice*
MAGLIO CHRISTOPHER & TOALE LAW FIRM
1751 Mound Street, Second Floor
Sarasota, FL 34236
Tel: (941) 952-5242
Fax: (941) 952-5042

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ANNELIESE RUNDLE, MARTHA
BENDER and KATHERINE GUY,

Plaintiffs,

v.

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

Defendants.

Case No.: 2:11-CV-00634

**MOTION FOR REMAND
and
MEMORANDUM OF LAW**

COME NOW Plaintiffs, by and through their undersigned counsel, and move this Honorable Court, pursuant to 28 U.S.C. §§ 1332(a), 1441(b), and 1447(c), to remand this case back to the Second Judicial District Court of the State of Nevada.

This motion is based on the grounds that the Defendants DePuy Orthopaedics, Inc. (“DePuy”) and Precision Instruments, Inc. (“Precision”) have failed to meet their heavy burden

of establishing jurisdiction based on diversity of citizenship and failed to meet the even heavier burden to establish that the distributor, Precision, has been “fraudulently joined,” as shown in the following Memorandum of Points and Authorities, the exhibits thereto.

The Plaintiffs have viable claims against the Nevada resident sales representative/distributor company, Precision. Similar liability claims have been recognized as proper and colorable by the U.S. District Court of Nevada in the recent Hormone Replacement Therapy (HRT) litigation against Wyeth and in the Vioxx litigation against Merck & Company, Inc. In the instant case, the claims against the sales representative/distributor are even stronger than those in the HRT litigation and Vioxx litigation. Given the presence of viable liability claims against Precision, a Nevada resident company, there is no federal diversity jurisdiction and the case must be remanded.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This lawsuit was filed in the Eighth Judicial District Court of the State of Nevada, and arises out of the failure of a recalled hip replacement implanted in Plaintiffs’ bodies manufactured by DePuy and promoted, distributed, sold, advertised, marketed and serviced by Precision. The principal place of business of Precision is in Clark County, Nevada. Despite the fact that Precision is a citizen of the state of Nevada, on Friday, April 22, 2011, Defendants filed a Notice of Removal removing this case from the Eighth Judicial District Court of the State of Nevada to this federal court. Defendants claim in their Notice of Removal that Precision has been fraudulently joined thus complete diversity jurisdiction exists, and removal to this court is proper.

Defendants are manifestly wrong. Nevada law provides a clear basis of liability against Precision based on the allegations in Plaintiffs' Complaint. Precision, the exclusive distributor of DePuy's products in Nevada, employs and/or utilizes sales representatives who are responsible for marketing DePuy's products, including the DePuy ASR hip. Among other things, the sales representatives educate Plaintiffs' orthopedic surgeons regarding the claimed advantages of the DePuy ASR hip and answer any questions Plaintiffs' orthopedic surgeons have regarding the DePuy ASR hip. Moreover, the sales representatives attend and routinely assist Plaintiffs' orthopedic surgeons during surgery. Plaintiffs' allegations and theories of liability against Precision are based on the specific conduct and activities of Precisions' sales representatives.

No federal judge in Nevada in the recent Fen-Phen removal and remand proceedings, when faced with Plaintiffs who named one or more sales representatives as Defendants (or named a physician or a "pill mill"), ever found such joinder fraudulent. (*See, e.g.*, the various Nevada Federal District Court orders attached hereto as **Exhibits 1-5**).¹ Nor did any federal judge in Nevada find it fraudulent that Plaintiffs named sales representatives/detailers as Defendants in the HRT litigation, where all Plaintiffs were suing all Defendants for negligent misrepresentation and fraud (*See, e.g.*, Orders of Judges Hunt, McKibben, Jones, Mahan and Pro, attached hereto as **Exhibits 6-10**). Most recently, this court has addressed the issues raised by Defendants in the Vioxx litigation and specifically the issue of "fraudulent joinder" of sales

¹ The first Order (**Exhibit 1**) concerns alleged "fraudulent joinder" of a "pill mill," but its analysis is equally applicable to alleged "fraudulent joinder" of a sales representative. **Exhibit 2** at pages 7-8 speaks directly to the sales representative issue. **Exhibit 3** at page 3 and footnote 3, deals with Plaintiffs' "right to structure and implement suit such that diversity does not exist...." **Exhibits 4 and 5** are the Orders of two courts that elected to remand the cases of Plaintiffs who had sued local sales representatives (*Schwartz* case) and a "pill mill" (*Miller* case), but severed and kept federal jurisdiction over the Plaintiffs who had not sued a local Nevada Defendant. (In the instant case, as with the HRT litigation, Plaintiffs have sued a local Nevada Defendant.)

representatives. Following well-settled Nevada law, Judge McKibben ruled that it was not “fraudulent joinder” to name pharmaceutical sales representatives and distributors in the Vioxx litigation. (See, Order of Hon. Howard D. McKibben, attached hereto as **Exhibit 11** in *Allred v. Merck & Company, Inc.*, Cases No. CV-N-05-0332-HDM.)

Despite this solid line of authority, Defendants have chosen to remove this case filed in Nevada, based apparently on their belief that, this time around, the Nevada federal courts will ignore the well-pled allegations of these Nevadans who are recovering or still suffering from their hip injuries and, instead, rule that these Plaintiffs have no claim whatsoever against the company whose sales representatives acted with DePuy to help further a medically documented wave of failed DePuy ASR hip replacements in Nevada and elsewhere.

Finally, although Defendants indicated they will identify these ASR hip cases it has improvidently removed to the various federal courts as “tag-along” cases, in hope of obtaining a conditional transfer order of the cases to the MDL Court (see, FN 1 of Defendants’ Notice of Removal), this Court is no doubt aware that any such conditional transfer order (“CTO”) cannot become effective for several months, if at all.² Therefore, there is no reason to delay decision on this motion to remand. This is especially so in view of the *Manual for Complex Litigation* recommendation that the local transferor federal courts should hear and resolve such motions.³

² Transfer of these removed cases to the MDL Court is not imminent and is not a *fait accompli*. It may occur, if at all, only if these cases have not already been remanded by the time the Judicial Panel on Multi-District Litigation (JPML) gets around to deciding the Nevada Plaintiffs’ upcoming motions to vacate any conditional transfer orders that the JPML may issue. Importantly, the JPML has no choice but to issue a CTO, automatically, when and if Defendants send a letter to the JPML identifying such a case as a potential “tag-along action.” But the identification of a case as a “tag along” and the issuance of a CTO does not impact this Court’s right to decide the pending Motion to Remand.

³ *Manual for Complex Litigation, 4th Ed.*, (2004) Section 20.131 at 220-221.

Moreover, any such delay would be detrimental to the Nevada Plaintiffs in this case, who have the right to have their cases tried and resolved in the forum of their choice. All three Plaintiffs are elderly and in bad health due to the failed DePuy ASR hip. Defendants' ill-conceived removal strategy could delay these cases for several years. That this "strategy" is both ill-conceived and without merit is shown below. Additionally, it denies Plaintiffs right to counsel of their choosing as well as a just and speedy resolution of their case.

In this case, the goals of judicial economy will be better served if the case is quickly remanded to Nevada state court by this Court. This remand motion should be granted because the merits of the causes of action against the Nevada sales representative/distributor Defendant should be decided by a Nevada state court under Nevada state law. Construing all facts in favor of the party seeking remand, and considering Defendants' heavy burden to justify removal, calls for the return of this matter to the Nevada state court.

LEGAL ARGUMENT

I. STANDARDS GOVERNING REMOVAL AND REMAND

The standards governing removal are well established and stringent. Removal is a purely statutory right and removal status must therefore be strictly construed in favor of state court jurisdiction. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09, 61 S.Ct. 868, 872 (1941). In reviewing a motion to remand, this Court must resolve all doubts in favor of remand to state court, and the party opposing remand has the burden of establishing federal jurisdiction by a preponderance of the evidence. *In re Business Men's Assurance Co. of America*, 992 F.2d 181, 183 (8th Cir. 1983).

As explained in *Bellone v. Roxbury Homes, Inc.*, 748 F.Supp. 434, 436 (W.D.Va. 1990), three reasons are traditionally given for the general unwillingness of federal courts to expand on the removal statutes:

First, removal of civil cases to federal court is, quite simply, an infringement on state sovereignty. Consequently, federal courts have concluded that the statutory provisions regulating removal must be strictly applied and that the federal judiciary cannot extend the jurisdiction of its courts beyond the boundaries set by those provisions. Second, state courts are generally courts of general jurisdiction while federal courts are courts of limited jurisdiction. From this fundamental principle, federal courts have reasoned that they should be strictly limited to those cases in which original jurisdiction has been conferred upon them and should not be allowed to denigrate the requirements of the removal statutes to enhance their jurisdiction. Finally and most importantly, a court without jurisdiction in a lawsuit is incapable of rendering a valid judgment. Therefore, in order to avoid reversal for lack of jurisdiction and, hence, to avoid the entry of valueless judgments, federal courts have reasoned that the removal statutes should be applied strictly.

(Citations omitted.)

The foregoing constraints, and the policies which formed them, were aptly summarized by the authors of a definitive treatise on federal jurisdiction, practice and procedure:

The constitutional policy of limited jurisdiction requires that the statutes granting jurisdiction to the federal courts be strictly construed. As Justice Stone stated in *Healy v. Ratta*, “due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.” As the discussion in the succeeding sections makes absolutely clear, this policy of strict construction of the statutes granting federal jurisdiction consistently has been upheld in the diversity context.

14 Wright and Miller, Federal Practice and Procedure, § 3602, p. 376 (West Group 2001.)

When considering the propriety of removal, the Ninth Circuit has stated: “[w]e strictly construe the removal statute *against* removal jurisdiction.” *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). In furtherance of the “strong presumption” against removal jurisdiction, the Ninth Circuit has further emphasized that, “the Defendant always has the burden of establishing that removal is proper.” *Id.* (emphasis added.) A “court may demand that the party alleging

jurisdiction justify his allegations by a preponderance of evidence.” *Id.* at 567 (emphasis added.)

Jurisdiction may not be maintained by “mere averments.” *Id.*

It is axiomatic that a Federal District Court must consider “a number of settled precepts in ruling on a petition to remand a case to state court for lack of diversity jurisdiction.” *Batoff v. State Farm Ins. Co.*, 977 F.2d 848, 850 (3rd Cir.1992). In *Batoff*, the United States Court of Appeals for the Third Circuit discussed these “settled precepts” and stated the following:

When a non-diverse party has been joined as a Defendant, then in the absence of a substantial federal question, the removing Defendant may avoid remand only by demonstrating that the non-diverse party was fraudulently joined. **But the removing party, carries a “heavy burden of persuasion” in making this showing.**

Batoff, 977 F.2d at 850 (emphasis added.)

Applying the foregoing standards reveals that Defendants’ attempted removal to be unsupportable. Indeed, no Federal Court in Nevada has taken issue with these strict standards.⁴

⁴ See, e.g., *Anna Walraven, et al. v. Bayer Corporation, et al.*, Case No. CV-S-03-1627-KJD(LRL) (Order of remand entered by the Hon. Kent J. Dawson, May 6, 2004); *William Stracener, et al. v. Bayer Corporation, et al.*, CV-S-03-1622-JCM(RJL) (Order of remand entered by the Hon. James C. Mahan, April 13, 2004); *Jeff Burres, et al. v. Bayer Corporation, et al.*, CV-N-03-711HDM (RAM), consolidated with *Herbert Klonsky, et al. v. Bayer Corporation, et al.*, CV-S-1618-HDM (RJJ) (Minutes of the Court noting Order of remand, the Hon. Howard D. McKibben, filed on April 21, 2004); *Helen Fisher, et al. v. Bayer Corporation, et al.*, Case No. CV-S-03-1620-RCJ(LRL) (Order of remand entered by the Hon. Robert Clive Jones, April 16, 2004); *Elaine Bautista, et al. v. Bayer Corporation, et al.*, Case No. CV-S-03-1617-RLH (RJJ) (Order of remand entered by the Hon. Roger L. Hunt, March 30, 2004); *Anne Pink, et al. v. Bayer Corporation, et al.*, Case No. CV-S-03-1623-PMP (LRL) (Order of remand entered by the Hon. Philip M. Pro, March 25, 2004); *Carol Marston, et al. v. Bayer Corporation*, Case No. CV-S-02-0852-JCM(RJJ) (Order of remand entered by the Hon. James C. Mahan, November 21, 2002). *Hellman, et al. v. Wyeth, et al.* Case No. CV-S-04-1614-RLH (LRL) (Order of Remand entered by the Hon. Roger L. Hunt, February 10, 2005) (**Exhibit 6**); *Van Brocklin, et al. v. Wyeth, et al.* Case No. CV-N-04-0675-HDM (RAM) (Order of remand entered by the Hon. Howard D. McKibben, February 28, 2005) (**Exhibit 7**); *Mosner, et al. v. Wyeth, et al.* Case No. CV-S-04-1611-RCJ (LRL) (Order of remand entered by the Hon. Robert C. Jones, March 25, 2005) (**Exhibit 8**); *Wernikove, et al. v. Wyeth et al.* Case No. CV-S-04-1615-JCM(PAL) (Order of remand entered by the Hon. James C. Mahan, March 29, 2005)

Defendants have not shown – nor can they show by clear and convincing evidence – that the distributor/sales representative was named in the state court action as “fraudulent” or a sham Defendant solely to defeat diversity jurisdiction, because it was not. Plaintiffs have valid claims against these non-diverse Defendants under Nevada law.

II. DEFENDANTS HAVE FAILED TO SUPPORT THEIR CONTENTION THAT THE NON-DIVERSE DEFENDANT HAS BEEN FRAUDULENTLY JOINED

A. STANDARDS GOVERNING CLAIMS OF “FRAUDULENT JOINDER”

The standards governing claims of “fraudulent joinder” were summarized in *Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459, 461 (2nd Cir. 1998), as follows:

In order to show that naming a non-diverse Defendant is a “fraudulent joinder” effected to defeat diversity, the Defendant must demonstrate, by clear and convincing evidence, either that there has been outright fraud committed in the Plaintiff’s pleadings, or that there is no possibility, based on the pleadings, that a Plaintiff can state a cause of action against the non-diverse Defendant in state court. The Defendant seeking removal bears a heavy burden of proving “fraudulent joinder”, and all factual and legal issues must be resolved in favor of the Plaintiff.

(Footnote omitted; emphasis added.)

Stated another way, “fraudulent joinder” is established only if a Plaintiff fails to state a cause of action against a non-diverse Defendant *and* the failure is obvious according to settled rules of law of the state in which the action was brought. *Ritchey v. Upjohn Drug Company*, 139 F.3d 1313, 1318 (9th Cir. 1998) Joinder is only fraudulent where “there is no reasonable basis in fact or colorable ground supporting the claim against the joined Defendant, or no real intention in good faith to prosecute the action against the Defendants or seek a joint judgment.” *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990) [quoting *Abels v. State Farm Fire & Cas. Co.*, 770 F.2d 26, 32 (3d Cir. 1985)]. If the court finds that “there is *even a*

(**Exhibit 9**); *Russing, et al. v. Wyeth, et al.* Case CV-S-04-1597-PMP(RJJ) (Order of remand entered by the Hon. Philip M. Pro, April 5, 2005) (**Exhibit 10**).

possibility that a state court would find that the complaint states a cause of action against any one of the resident Defendants,” then the court must find joinder proper and remand the action. *Batoff*, 977 F.2d at 851 (citations omitted, emphasis added.)

In evaluating a claim of “fraudulent joinder”, the court must: (1) “focus on the complaint at the time the petition for removal was filed”; (2) “assume as true all factual allegations of the complaint”; and (3) “resolve any uncertainties as to the current state of controlling substantive law in favor of the Plaintiff.” *Id.* at 851-52.

In evaluating claims of “fraudulent joinder”, “the court’s inquiry into the validity of a claim against a non-diverse Defendant is less probing than that undertaken in the context of a motion to dismiss.” *Stanley v. Exxon Corp.*, 824 F.Supp. 52, 53-54 (E.D. Pa. 1993). “Regardless of whether such a claim will ultimately fail to state a cause of action, fraudulent joinder exists only if the claims against the non-diverse Defendant are so devoid of merit as to be ‘wholly insubstantial and frivolous’.” *Id.* at 54 (quoting *Batoff*, 977 F.2d at 852). Thus, in order to avoid remand, “a removing Defendant must do more than show that Plaintiff has failed to state a claim against a non-diverse party; the removing Defendant must go so far as to show that the claim meets the ‘insubstantial and frivolous’ standard.” *Id.* In the instant action, the claims against Precision are neither “insubstantial” nor “frivolous.” Therefore, this Court should remand this case back to the Nevada state court.

B. PLAINTIFFS HAVE STATED VALID CLAIMS AGAINST PRECISION ARISING OUT OF THE SPECIFIC CONDUCT OF ITS SALES REPRESENTATIVES

The question before this Court concerning Precision, the sales representative Defendant is: With all factual and legal issues resolved in Plaintiffs’ favor, have Defendants brought forth clear and convincing evidence that, based on the Complaint as framed by Plaintiffs against this

Defendant, is there absolutely no possibility that Plaintiffs could prevail on any of their claims in Nevada state court? The answer to this question is clearly “No”.

As a threshold matter, and as noted by other federal courts (as well as the Nevada U.S. District Courts in the HRT litigation), the “facts alleged” by Plaintiff must be the focus of the inquiry:

If the Plaintiff “has joined a non-diverse party as a Defendant in its state case, he [Defendant] may avoid remand - in the absence of a substantial federal question - only by demonstrating that the non-diverse party was fraudulently joined.” If there is “a ‘colorable’ cause of action - that is, if the state law *might* impose liability on the resident Defendant under the facts alleged - then there is no “fraudulent joinder.” However, in cases where “the sufficiency of the complaint against the non-diverse Defendant is questionable, ‘the better practice is for the federal court not to decide the doubtful question in connection with a motion to remand but simply to remand the case and leave the question for the state courts to decide.’”

In Re: Prempro Products Liability Litigation, Susan Brockert, et al. v. Wyeth, et al., MDL Docket No. 4:03CV1507-WRW, 4:04CV0308 (Order Granting Remand, filed 08/02/2004, attached hereto as **Exhibit 12**).

This judicial philosophy is consistent with the attached orders of the various federal courts in Nevada. Stated differently, Defendants’ claims of “fraudulent joinder” test the sufficiency of Plaintiffs’ allegations. That Defendants believe they will prevail in a summary judgment motion is not the issue. This is a motion for remand, not a motion for summary judgment.

Plaintiffs’ allegations against Precision’s sales representatives are set forth in great detail in Plaintiffs’ Complaint, attached as Exhibit A to Defendants Notice of Removal. Among other things, Plaintiffs allege that Precision, by and through its’ sales representatives, endorsed, marketed, serviced, sold and promoted an unreasonably dangerous product. *See, e.g.*, Complaint, Parties and Jurisdiction (¶¶13-18), Factual Background (¶¶22-41), Ninth Cause of Action (Negligence of Precision), Eleventh Cause of Action (Failure to Warn), Fourteenth Cause of

Action (Violation of the Deceptive Trade Practices Act), Fifteenth Cause of Action (Deceit by Concealment/Fraudulent Misrepresentations), Sixteenth Cause of Action (Negligent Misrepresentation).

The specific details of the involvement and conduct of Precisions' sales representatives pled by Plaintiffs, include, but are not limited to the following:

- In its role as distributor of the product at issue in this matter, Precision utilized sales representatives that were responsible for educating Plaintiffs' orthopedic surgeons regarding claimed advantages of the product, answering any questions Plaintiffs' orthopedic surgeons had regarding the product, assisting Plaintiffs' orthopedic surgeons at surgery regarding the product, and selling the product to Plaintiffs' orthopedic surgeons.
- The directors, managers, and sales representatives of Precision received training and education from DePuy including orthopedic and surgical training, product design rationale for the DePuy ASR Hip, surgical technique tips for demonstrating and implanting the DePuy ASR Hip, training in the use of the tools used to implant the DePuy ASR Hip, training in selecting the hip replacement components to mate with the DePuy ASR Hip cup, and training on how to sell to orthopedic surgeons including training on the advantages of the DePuy ASR Hip rather than its major competitors.
- Defendant Precision provided information to Plaintiffs' orthopedic surgeons including but not limited to: the advantages of the DePuy ASR Hip compared to its competitors, information regarding the design rationale for the DePuy ASR Hip, surgical techniques on how to implant the DePuy ASR Hip and demonstrations on how to implant the DePuy ASR Hip, and the components that could best be mated with the DePuy ASR Hip including providing a variety of scenarios involving the various instrumentation used in implanting a DePuy ASR Hip.
- In their roles as sales representatives for the DePuy ASR Hip in this matter, the sales representatives of Precision were responsible for answering any questions or concerns Plaintiffs' orthopedic surgeons had regarding the DePuy ASR Hip.
- Precision provided information to Plaintiffs' orthopedic surgeons that was intended for the purpose of convincing and inducing Plaintiffs' orthopedic surgeons to use the DePuy ASR Hip instead of one of the competing hip replacements.
- Plaintiffs' orthopedic surgeons, nurses and hospital staff relied on information and assistance from Precision during Plaintiffs' surgical procedure in implanting the DePuy ASR Hip.

See, Plaintiffs' Complaint, ¶¶13-18.

Plaintiffs further allege, among other things, very specific, independent acts of wrongful and negligent conduct of Precision, including but not limited to:

- falsely representing the DePuy ASR hip is designed to reduce wear and provide higher function for all patients;
- falsely representing the DePuy ASR hip is clinically proven to reduce wear;
- falsely representing the DePuy ASR hip is based on a strong clinical history and reduces wear compared to the traditional hip replacement;
- falsely representing the DePuy ASR hip is designed to be installed in younger and more active patients and will last longer than its competitors;
- failing to disclose independent experts from around the world were warning that the design of the DePuy ASR hip was flawed;
- failing to disclose the orthopedic experts were warning that the DePuy ASR hip cup was too thin and prone to deformation;
- failing to disclose the clearance between the DePuy ASR hip cup and head is too small and patients could experience jamming of the component;
- failing to disclose the treatment of the metal used for the DePuy ASR hip cup was prone to increased wear and caused excessive metal debris;
- failing to disclose the DePuy ASR hip cup failed to obtain bony ingrowth and became loose; and
- failing to disclose by 2005 the DePuy ASR hip cup was shown in Australia to have a four-fold higher rate of revision than similar cups of competitors.

See, Plaintiffs Complaint, ¶¶206 and 207.⁵

Based on these allegations, Precision can be found independently liable under Nevada law for, at the very least, the following causes of action:

Ninth Cause of Action – Negligence, including negligent marketing and negligent failure to warn.

Eleventh Cause of Action – Failure to Warn

⁵ Of course, the entire Complaint must be read as a whole in order to appreciate the nature of the conduct in which Precision and its sales representatives participated. If any or both of these Defendants wish to challenge whether this is pled with sufficient particularity under NRCP Rule 9(b), they may do so in State Court. As noted by Judge Wilson, a question such as this is a “question for the state courts to decide.” *In re Prempro Products Liability Litigation, Brockert, et al. vs. Wyeth, supra*, citing *Iowa Public Service Co. vs. Medicine Bow Coal Co.*, 556 F.2d 400 (8th Cir. 1977) (**Exhibit 12**). The Nevada federal courts would concur. (See, generally, remand orders of Judges Pro, Hunt, Mahan, McKibben and Jones, *supra*, all of which are attached hereto.)

Fourteenth Cause of Action – Deceptive Trade Practices under Nevada law.

Fifteenth Cause of Action – Deceit by Concealment and Fraudulent Misrepresentation in marketing to Plaintiffs’ physicians and concealing the true facts about DePuy ASR with the intent to defraud.

Sixteenth Cause of Action – Negligent Misrepresentation, with the intent to induce reliance, etc.

In analyzing the issue of “fraudulent joinder”, Nevada district courts have routinely upheld the validity of identical causes of action against pharmaceutical sales representatives (a/k/a Detailer Defendants). The *Hellman v. Wyeth*, CV-S-04-1614-RLH (LRL) decision by Judge Hunt is a leading Nevada District Court case on detailer liability. Judge Hunt reasoned as follows:

The case of *Davis v. Prentiss Properties Ltd., Inc.* offered an extensive analysis of “fraudulent joinder” in the Ninth Circuit and how other Circuits have addressed the issue. 66 F. Supp. 2d 1112 (C.D. Cal. 1999). As the *Davis* court held and the Fifth Circuit noted, the burden on Defendant to show that Plaintiff failed to state a cause of action against a resident non-diverse Defendant is a “heavy one.” *Id.* (See *Green v. Amerada Hess Corp.*, 707 F.2d 201, 205 (5th Cir. 1983)). “The removing party must prove that there is absolutely no possibility that the Plaintiff will be able to establish a cause of action against the in-state Defendant in state court, or that there has been outright fraud in the Plaintiff’s pleadings of jurisdictional facts.” *Davis* 66 F.Supp. 2d at 1113 (citing, *Green*, 707 F.2d 201, 205). In another Fifth Circuit case, the court required a compulsory showing “beyond doubt that the Plaintiff can prove no set of facts in support of his claim. *Keating v. Shell Chem. Co.*, 610 F.2d 328, 333 (5th Cir. 1980). The *Davis* court also cited a Fourth Circuit decision requiring that the removing party show “[t]hat there is *no possibility* that the Plaintiff would be able to establish a cause of action against the in-state Defendant in state court . . .” *Davis*, 66 F.Supp. 2d 1112, 1114 (citing, *Marshall v. Mansville Sales Corp.*, 6 F.3d 229, 232 (4th Cir. 1993)(emphasis in original)(quoting *B. Inc., v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. 1981)). The *Davis* court also cited an Eleventh Circuit decision which stated that “[i]f there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident Defendants, the federal court must find that joinder was proper and remand the case to state court.” *Id.* *Crowe v. Coleman*, 113 F.3d 1536, 1538 (11th Cir. 1997)(quoting *Coker v. Amoco Oil Co.*, 709 F.2d 1433, 1440-41 (11th Cir, 1983)). The *Davis* court’s discussion of various other circuits’ decisions, as well as our own Ninth Circuit cases, ably illustrates that high burden incumbent upon Defendants to show that Plaintiffs have no possible causes of action against Detailer Defendants if Defendants are to

successfully establish “fraudulent joinder”. It is the Court’s opinion that Defendants have failed to meet this high burden and the case should be remanded to Nevada state court.

....

The Court finds that Plaintiffs have pled facts sufficient to establish a “colorable” claim against Detailer Defendants under Nevada law. Plaintiffs may have a cause of action against Detailer Defendants for negligent misrepresentation, conspiracy, or breach of implied or express warranties.

(**Exhibit 6**, pp. 3-4). Just like the *Hellman* case, Plaintiffs herein have also pled causes of action against the Precision for negligent misrepresentations and breach of implied or express warranties of its sales representatives. Just as Judge Hunt did in *Hellman*, this Court should hold that the Defendants have failed to meet the high burden of establishing “fraudulent joinder”.

There are other similar decisions from the Nevada District Courts. Judge Jones granted a remand motion on detailer liability on March 25, 2005, in *Mosner v. Wyeth*, CV-S-04-1611-RCJ (LRL) (**Exhibit 8**, p.2). Judge Jones reasoned as follows (and entered the same order in two companion HRT cases):

Having fully considered this matter, this Court elects to be consistent with the Hunt Remand Orders and defers to them as the Court’s Order in this matter. This Court finds that Plaintiffs have pled facts sufficient to establish a “colorable” claim against the Detailer Defendants under Nevada law. The determination of the worthiness of the causes of action plead against the Detailer Defendants can be made at the State court level. If Defendants find after remand and review by the Nevada State District Court that Plaintiffs cannot state a cause of action against the Detailer Defendants, the Defendants may then renew their petition for removal. Consequently, the Court orders that Plaintiffs’ Motion to Remand be granted.

Judge McKibben granted a remand motion on February 28, 2005 in *Van Brocklin v. Wyeth*, CV-N-04-0675-HDM (RDM), reasoning as follows (**Exhibit 7**, p. 4) :

Wyeth argues that the local pharmaceutical representatives are fraudulently joined, as the Plaintiff’s cannot maintain any claim against the local Defendants. Here, Plaintiffs have asserted claims for negligence, strict liability, breach of implied and express warranties, deceit by concealment, and negligent misrepresentation against the local pharmaceutical representatives. “The only question [the court has] to determine is whether the complaints evidence a real

intention to secure a [judgment], and colorable ground for it was shown as the record stood when the causes were removed from the state court.” *Id.* On the basis of the complaint before it, the court concludes that Plaintiffs have plead facts sufficient to establish “colorable” claims against Defendants. Furthermore, there is no evidence in the record to persuade the court that these Defendants were joined in this action solely to defeat federal diversity jurisdiction.

The exact same reasoning applies herein. This Court previously granted a remand motion on April 5, 2005 in *Russing v. Wyeth CV-S-04-1597-PMP(RJJ)* and extensively discussed why detailers may be found liable under Nevada law:

The Detailer Defendants, as agents of Wyeth, cannot escape liability by virtue of their agent status. Nevada recognizes that as an agent of a corporation, working to “ensure that physicians are aware of the pharmaceutical company’s products so that the physicians can consider whether to prescribe drugs to particular patients,” the Detailer Defendants may be personally liable for any fraudulent misrepresentation they make. See Nev-Tex Oil, 782 P.2d at 1311. Defendants argue that “Plaintiffs’ artful pleading does not convert their claims against Wyeth into viable causes of actions against Wyeth Detailers merely by virtue of the Detailers performing the duties they were hired to perform by Wyeth.” (Wyeth Defs.’ Opp’n to Pls.’ Mot. to Remand at 13.) However, under Nevada law, it is irrelevant as to whether the Wyeth Detailers were performing jobs that they were hired to do, or that they gained any personal benefit. Even if the alleged misconduct occurred on behalf of Wyeth, and the Detailers received no material benefit other than salary, the Detailers still may be subjected to liability for Plaintiffs’ claims based on fraud or misrepresentation. See 3 Fletcher Cyclopedia of Private Corp. § 1143.

Additionally, the Detailer Defendants’ agent status does not shield them from liability for the negligence they may have committed individually. See Semenza, 901 P.2d at 689. In Nevada, to establish negligence, Plaintiffs must show that “(1) the Defendant had a duty to exercise due care towards the Plaintiff; (2) the Defendant breached the duty; (3) the breach was the actual cause of the Plaintiff’s injury; and (5) the Plaintiff suffered damage.” Perez v. Las Vegas Med. Ctr., 805 P.2d 589, 590-91 (Nev. 1991). Nevada courts have not addressed the issue of whether pharmaceutical sales representatives owe a duty of care to the physicians and patients with whom they deal. Nevada does, however, recognize that an agent may be individually liable for his negligence, regardless of whether or not he or she was acting for the sole benefit of the principal. Defendants acknowledge that Nevada has no settled rules regarding the negligence liability for pharmaceutical sales representatives. Because it is not obvious that Nevada would not recognize a duty running from pharmaceutical sales representatives to patients like Plaintiff Vesta Woodhouse, Defendants have not met their burden of demonstrating the

joinder of the Detailer Defendants was fraudulent. Remand is therefore appropriate.

(**Exhibit 10**, pp. 6-7). This decision is squarely on point.

In response to Defendants' contentions that Plaintiffs have no legal basis for the strict liability claims against Precision, Plaintiffs point out that Nevada law does not limit strict liability for a defective product to the sellers of products. Rather, liability extends to all those in the chain of distribution. *See, e.g., Oak Grove Inv. v. Bell & Gossett Co.*, 99 Nev. 616, 624, 668 P.2d 1075, 1080 (1983), *disapproved on other grounds, Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000). Clearly, the sales representatives who convinced Nevada doctors to implant this product are in that chain.

Defendants also argue that Precision did not have a duty to warn. This proposition fails where the Precision sales representative is involved in communications with Plaintiffs' orthopedic surgeons about the product, trying to promote the product versus the competitor product. "If the manufacturer negligently over-promotes its products, or downplays their dangerous effects, it will not be relieved of liability for the foreseeable misuse of the drug and resulting injuries," [e]ven if adequate warnings were given to the physician. (*Evraets v. Intermedics Intraocular, Inc.*, *supra* at 793); citing, *Brown v. Superior Court* (1988) 44 Cal.3d 1049, 1062, 1066, 245 Cal.Rptr. 412; *Stevens v. Parke-Davis & Co.* (1973) 9 Cal.3d 51, 65, 69, 107 Cal.Rptr. 45)). The same holds true for the sales force that convinced the prescribing physicians of the safety of this unsafe hip implant.

Even if there had been adequate warnings, the over-promotion by Precision and its sales representatives would have negated them. In *Love v. Wolf*, 226 Cal.App. 2d 378, 398-400, 402, 38 Cal.Rptr. 183 (1964), the court held that the manufacturer's promotion of the drug had

“watered down” the effect of its warnings, causing wider use of the drugs than proper medical practice justified:

[I]f the over-promotion can reasonably be said to have induced the doctor to disregard the warnings previously given, the warning given is thereby withdrawn or canceled and if, furthermore, the jury could have found that the doctor here actually prescribed the drug to cure an infection for which the company’s advertising or its detail men had actually recommended its use, then the pharmaceutical company’s negligence remains as an inducing cause coinciding with the negligence of the doctor to produce the result.

[W]e must accept the evidence leading to justifiable inferences that Parke-Davis, believing otherwise, had watered down its regulations-required warnings and had caused its detail men to promote a wider use of the drug by physicians than proper medical practice justified.

In the same manner, Plaintiffs allege the sales representatives of Precision negligently over-promoted the DePuy ASR hip and the Nevada law on warnings is equally demanding.⁶ In the present case, Precision and the detailers promoted DePuy ASR by: (1) wrongfully representing that DePuy ASR was safe and effective when they knew of the severe risk of injuries; (2) failing to warn of the risk of loosening and metal debris; and (3) deliberately concealing or downplaying the reported failure rates and problems with the DePuy ASR hip when communicating with doctors – as Plaintiffs claim Precision directed its sales representatives to do. All of these facts are adequately pled in the Complaint under applicable pleading notice rules.

⁶ The three minimum requirements for an “adequate” warning were set forth by our Supreme Court in the case of *Lewis v. Sea Ray Boats, Inc.*, 119 Nev. 100, 65 P.3d 245, 247, 2003 A.M.C. 815, Prod. Liab. Rep. (CCH)(2003) which held that, to be sufficient, warnings must be:

We therefore embrace the rule of law stated in the Pavlidis instruction offered by appellants below, and hold that Nevada trial courts should advise juries that warnings in the context of products liability claims must be (1) designed to reasonably catch the consumer’s attention, (2) that the language be comprehensible and give a fair indication of the specific risks attendant to use of the product, and (3) that warnings be of sufficient intensity justified by the magnitude of the risk.

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. There should be no different ruling for medical device sales representatives.

III. DEFENDANTS' NOTICE OF REMOVAL IS IN EFFECT A DISGUISED MOTION FOR SUMMARY JUDGMENT RELYING ON A DISINGENUOUS AFFIDAVIT OF RON EMES TO CLAIM PRECISION IS NOT LIABLE

Apparently believing that this Court is deciding a motion for summary judgment, rather than testing the sufficiency of Plaintiffs' Complaint in a motion for remand, Defendants attempt to paint a benign picture of its sales representatives' marketing practices, a picture at complete variance with the allegations against Precision that Plaintiffs have pled, as officers of the Court, in the utmost good faith. Defendants want this Court to believe that Precision's only involvement is a "conduit" for transporting the DePuy ASR hip to the hospital. This is simply ridiculous. If this were true, DePuy could accomplish transporting the device by simply hiring a delivery service. As discussed below, Precision is much more involved than being a delivery service.

A. DISINGENUOUS AFFIDAVIT OF RON EMES

In an affidavit filed together with the notice of removal, Precision's principal, Ron Emes, makes multiple disingenuous claims. All are efforts to minimize the role played by Precision in the sale of the recalled DePuy ASR hip prosthesis at issue in this case. In paragraph 7 of his affidavit, he claims:

Precision Instruments, Inc.'s role in the distribution of the ASR™ hip prosthesis to a hospital facility or surgeon is limited to delivering to the facility the specific prosthesis ordered in sealed packages. Precision Instruments, Inc. and its representatives fill the hospital's order or the surgeon's order either by retrieving the prosthesis from inventory maintained at the hospital or at Precision Instruments, Inc. facility, or by ordering the prosthesis from DePuy and delivering the sealed package to the hospital upon receipt.

However, in the medical records of all three Plaintiffs, there is clear evidence to the contrary. Attached as **Exhibit 13** is a page from the operative records of the surgery to implant the subsequently recalled DePuy ASR hip prosthesis in Martha Bender. **Exhibit 13** evidences that Kevin Nowicki, one of Precisions's sales representatives, scrubbed-in and was present during the surgery. Next to his name on the record is "DePuy Sales Rep". Likewise, attached as **Exhibit 14** is a page of the operative report from Mrs. Bender's surgery removing and replacing the recalled DePuy ASR hip prosthesis with a non-defective hip prosthesis. Ron Emes was actually present during this surgery. Next to his name in the record is "DePuy". It is disingenuous for Mr. Emes to declare all Precision really did was to deliver the "sealed package" to the operating room. If this was true, why would sales representatives need to be present at Mrs. Bender's revision surgery?

Attached as **Exhibit 15** are pages from the medical records of Anneliese Rundle, indicating that Kevin Nowicki, attended and scrubbed in on the original surgery implanting the recalled ASR into Ms. Rundle's body and also attended and scrubbed in on the surgery removing the defective components from her body. Similarly, Steven Milversted, a sales representative for Precision, attended and ascrubbed in on the surgery implanting the DePuy ASR in Ms. Guy, identifying him as a "DePuy Co. Sales rep." (*See, Exhibit 16*, Medical record of Katherine Guy). Then, Kevin Nowicki, attended Ms. Guy's revision surgery in which the defective DePuy ASR prosthesis was removed from her body. (*See, Exhibit 17*, medical record of Katherine Guy).

Defendants further contend Precision played no role in the development of publishing the DePuy ASR Hip prosthesis package inserts or marketing materials accompanying the prosthesis. *See*, paragraph 7 of Ron Emes' Declaration. Furthermore, in paragraphs 7 and 9 of his affidavit,

Mr. Emes states that Precision did not take title or ownership interest in the prosthesis, never paid money to DePuy and never received money from a hospital for the prosthesis. Defendants argue that Precision cannot be held liable under strict liability or negligence theories because it never took title of the alleged defective prosthesis. *See*, Defendants' Notice of Removal, ¶¶21 and 26.

Relying exclusively on *Kite vs. Zimmer US, Inc.*, 2006 WL 3386765 (D. Nev. 2006) (and crafting a declaration of Ron Emes identical to the language set forth in *Kite*), Defendants argue that Plaintiffs cannot establish a cause of action against Precision under Nevada law because Precision is merely a company that is a "conduit" for the delivery of the product. *See*, Defendants' Notice of Removal, paragraph 9. In *Kite*, claims were made against Zimmer US, Inc. ("Zimmer") and Zimmer Frye Associates ("Zimmer Frye") for, among other things, strict product liability, negligence, negligent misrepresentation and breach of warranty arising out of the failure of a hip implant. Zimmer Frye, a Nevada resident corporation was a distributor of Zimmer products. The court, in *Kite*, in ruling on Plaintiff's motion to remand concluded that Plaintiff's counsel failed to present sufficient evidence that Zimmer Frye was a seller under Nevada law or that Zimmer Frye's specific negligent conduct caused damage to Plaintiffs, concluding Zimmer Frye was merely a conduit between Zimmer and the hospital, and could not reasonably have known the device was defective. *See, Kite* at 3-4.

Just because the counsel in *Kite* failed to plead and produce sufficient evidence against the Zimmer distributor in *Kite* does not preclude Plaintiffs' causes of action in this case. In this case, Plaintiffs' counsel has specifically pled negligent conduct of the distributor that caused Plaintiffs' damages. In fact, Plaintiffs' counsel involved in this litigation, Brian S. Franciskato and Altom M. Maglio, have routinely sued Zimmer's distributors and have been successful in

remand proceedings based on the liability of non-diverse Zimmer distributors. *See*, attached **Exhibits 18-24**, Orders from various United States District Courts, finding no “fraudulent joinder” of Zimmer distributors and remanding cases against Zimmer and its distributors back to state court.⁷

It is well-known (and is discussed in greater detail below) that sales representatives are present during the surgery to assist the surgeon and answer any questions the surgeon may have. They are not merely a delivery service like UPS and Federal Express. Unlike *Kite*, the present case involves an exclusive distributor of the DePuy ASR hip prosthesis whose sole business is the selling, marketing, distribution and servicing of DePuy products to the medical community in Nevada. Unlike *Kite*, Plaintiffs have pled Precision was responsible for educating Plaintiffs’ orthopedic surgeons, provided surgical training and techniques to Plaintiffs’ orthopedic surgeons, explaining the advantages of the DePuy ASR hip compared to competitors and convincing Plaintiffs’ orthopedic surgeons to use the DePuy ASR hip instead of one of the competing products. *See*, Plaintiffs’ Complaint ¶¶13-18.

⁷ *See*, **Exhibit 18**, *LeAir v. Zimmer, et al.*, Case No. 03-c-690-S (Order of remand entered by Hon. John C. Shabaz, June 17, 2004; remanding the case against a Zimmer distributor because of its active involvement of advertising and selling Zimmer products); *see*, **Exhibit 19**, *Cooper v. Zimmer Holding, Inc.*, Case No. 03-2628-JWL (D. Kan. June 9, 2004) (Order of remand entered by Hon. John W. Lungstrum, June 9, 2004, ordering remand on claims against Zimmer distributor for strict product liability, negligence and violation of the Kansas Consumer Protection Act); *see*, **Exhibit 20**, *Hinds v. Zimmer, Inc.*, Case No. 1:09-cv-0442 (Order of remand entered by Hon. Dennis L. Beck, May 29, 2009, remanding claims against a Zimmer distributor back to the state of California); *see*, **Exhibit 21**, *Bullock v. Zimmer, Inc., et al.*, Case No. cv10-334-THS-SRD (Order of remand entered by Hon. Susan R. Bolten, June 8, 2010, remanding case against Zimmer distributor back to the state of Arizona); *see*, **Exhibit 22**, *Bryant v. Zimmer, Inc., et al.*, Case No. 6:06-cv-844-ORL-31DAB (Order of remand entered by Hon. Gregory A. Presnell, remanding claims against a Zimmer distributor back to the state of Florida); *see*, **Exhibit 23**, *Moses v. Zimmer Holdings, Inc., et al.*, 2007 WL 3036096 (S.D. Tex. 2007) (Order of remand entered by Hon. Sim Lake, remanding claims against a Zimmer distributor back to the state of Texas); and *see*, **Exhibit 24**, *Milla v. Zimmer, Inc., et al.*, Case No. 09-6432DSF (Order of remand entered by Hon. Dale S. Fischer, November 4, 2009, ordering remand on claims against Zimmer distributor back to the state of California).

Plaintiffs' counsel, through investigation and research, was able to identify a former Precision sales representative who promoted DePuy's products and was able to learn the nature of the conduct the sales representatives are likely to have engaged in. Brian Goodson was a former sales representative of Precision from September 2003 to January 2007 and is currently a sales representative for DePuy Spine. Mr. Goodson holds himself out on the Internet as having significant orthopedic sales experience and states while working for Precision he was responsible for the following:

“Performed daily sales calls to orthopedic surgeons and related health care professionals offering orthopedic products and discussing clinical outcomes for total joint replacement and joint revision surgery. Assisted operating room supervisors with national contract pricing. Worked with product managers introducing new products to surgeons. Consulted with surgeons prior to surgery, reviewed implant choices and templated x-rays for proper patient fit and alignment. Planned, scheduled, delivered, set up implants for surgery. Assisted surgical team intraoperative representing product line. Reviewed post operative x-rays. Processed surgical instruments and resent implant bank for future surgery. Managed implant and instrument inventory. Obtained purchase orders and communicated information to DePuy office staff for payment.”

See, Exhibit 25, printout of Brian Goodson's LinkedIn web page. (emphasis added)

The activity identified by Mr. Goodson, an active sales representative for Precision is the norm within the industry. (*See*, discussion below regarding the role of sales representatives in hip replacement surgery and the role of DePuy sales representatives.) Plaintiffs' claims against the sales representatives are neither insubstantial nor frivolous. At best, Precision's protestations that the sales representatives were mere “conduits” creates a question of fact that can be addressed in a motion for summary judgment or at trial.

Moreover, Mr. Emes, himself, plays a greater role in marketing DePuy products than insinuated in his declaration. He does more than serve as a “conduit” in transporting devices to the operating room. Mr. Emes attends seminars and is routinely providing information to surgeons regarding DePuy's products. He also is involved in presentations regarding surgical

techniques and use of DePuy products. As evidenced in the photograph below, Mr. Emes participated in continuing medical education seminars in Australia, including observing hip surgeries in St. Vincent's Hospital in Sidney, and discussing with physicians issues pertaining to surgical techniques.

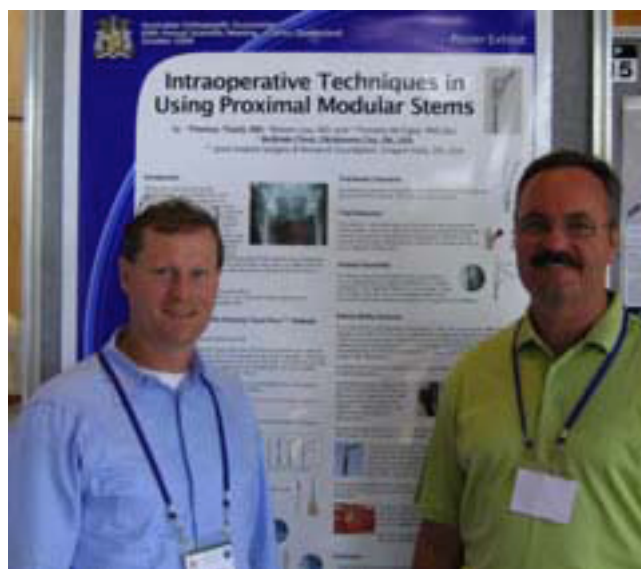


Ron Emes, Timothy McTighe, Tom Tkach & Brad Vaughn

November 28, 2009

JISRF Participates In Two CME Activities In Australia

Continuing a tradition started in the 1970's by Professor Bechtol. Seeing the local sights never gets old for some of our seasoned travelers. This was Brad's third trip to Sydney and approaching twenty for McTighe enjoying fellowship with friends and colleagues Ron and Tom on their first trip down under.



Tkach & Emes in front of Tom's (Tkach) poster on Intra-operative techniques for modular stems

(Taken from <http://www.jisrf.org/activities/112009.htm>)

This Court need only predict that there is a reasonable possibility that a Nevada court would rule against Precision. In light of Plaintiffs' allegations that Precision knowingly made false representations to Plaintiffs' orthopedic surgeons regarding the DePuy ASR hip and failed to disclose known problems with the DePuy ASR hip, it is certainly reasonably possible that a Nevada court would find such allegations support, at a minimum, a theory of negligence, failure to warn and misrepresentation.

In fact, similar allegations regarding distributors of the DePuy ASR hip have been alleged in current litigation through the United States. The United States District Court for the Northern District of Illinois concluded that an Illinois distributor was not "fraudulently joined" for claims of failure to warn. *See, Exhibit 26, Kopitke v. DePuy Orthopaedics, Inc., et al.*, Case No. 11-cv-912 (Order of Remand from Hon. John W. Darrah, remanding case against a DePuy distributor of the defective DePuy ASR hip, where Plaintiff claimed the distributor knew the DePuy ASR hip was defective and harmful to consumers and that the ASR had an unacceptable failure rate and complication rate, and failed to convey such knowledge to Plaintiff's orthopedic surgeon). There have been several other lawsuits against distributors of DePuy's orthopedic products remanded back to state courts throughout the United States in which DePuy alleged the "fraudulent joinder" of its distributor.⁸

⁸ *See, Exhibit 27, Spataro v. DePuy Orthopaedics, Inc.*, 2009 WL 382617 (D.N.M. 2009) (Order of remand entered by Hon. Judith C. Herrera, concluding that DePuy Orthopaedics, Inc. failed to meet their burden of showing that a sales representative was fraudulently joined and remanding the case back to the state of New Mexico on Plaintiff's claim of strict products liability); *see, Exhibit 28, McCarty v. Johnson & Johnson and DePuy, Inc., et al.*, 2010 WL 2629913 (E.D.Cal. 2010) (Order of remand entered by Hon. Oliver W. Wanger, concluding DePuy Orthopaedics, Inc. failed to meet its burden that the sales representative was fraudulently joined, remanding Plaintiff's claims for strict products liability back to the state California; and *see, Exhibit 29, Eckhart v. DePuy Orthopaedics Inc.*, Case No. 2:03-cv-1063 (Order of remand entered by Hon. George C. Smith, remanding the case against a DePuy distributor for liability under Ohio law for strict products liability).

B. ROLE OF SALES REPRESENTATIVE IN HIP REPLACEMENT SURGERY IN GENERAL IS SIGNIFICANT

The fact that Precision's employees scrubbed-in to assist with the surgeries on all three Plaintiffs was not unusual. Defendant DePuy contracted with Precision to promote, sell, distribute, and service DePuy's ASR hip prosthesis in Nevada. Precision in turn employed and contracted with individual sales representatives to accomplish that task. Orthopedic sales representatives typically play a crucial role in hip replacement surgeries. The Medical Sales College of Englewood, Colorado, trains sales representatives for hip replacement manufacturers generally, and DePuy and its distributors in particular. In its *2010-2011 Course Catalog*, the Medical Sales College describes the typical role of a sales representative in a joint replacement surgery:

The highly technical side of the job often comes in the servicing after the sale, usually around the aspects of a case. Whether it is templating x-rays with a surgeon to determine the proper implants, or guiding a surgical team during surgery in the proper use of instrumentation and implant, the role of a sales rep in being the voice-of-the-manufacturer is critical. In many instances, a rep will have seen more of a particular surgery, and certainly have seen it in more different situations, than anybody on the surgical team, including the surgeon.

Page 11 of the *2010-2011 Course Catalog* of the Medical Sales College of Englewood, Colorado, attached hereto as **Exhibit 30**.

C. ROLE OF THE DEPUY SALES REPRESENTATIVES SPECIFICALLY IS SIGNIFICANT

Obviously, Plaintiffs' Complaint cannot be reasonably read to accuse these sales representatives of meeting directly with Plaintiffs themselves. Rather, they met with Plaintiffs' physicians, who in turn prescribed DePuy ASR to the Plaintiffs based in large part on these sales representatives' statements about the overall safety of DePuy ASR. Nor can or should the Complaint be reasonably read to accuse the sales representative Defendants of manufacturing the

DePuy ASR hip. These are “straw” arguments that Defendants invent in order to knock them down, but knocking them down means nothing in the larger context of this case and the true nature of the allegations stated against the sales representatives of Precision regarding this dangerous product.

DePuy sales representatives are charged with the role of serving as the principal method by which surgeons receive information about DePuy ASR hip prosthesis. The sales representative is trained to educate the surgeon about DePuy ASR hip prosthesis and how they compare to competitors’ products. DePuy sales representatives also instruct the surgeon on the proper use of DePuy ASR hip prosthesis. In addition to providing information, the DePuy representative is responsible for assisting the orthopedic surgeon in the implantation of the hip replacements. *See, Exhibit 25.*

The written testimony of Peter D. Coffaro, DePuy Orthopaedics, Inc.’s Territory General Manager for Central and Northern California filed by DePuy Orthopaedics, Inc. on October 12, 2007, in the case of *Mahoney v. DePuy Orthopaedics, Inc.* before the United States District Court for the Eastern District of California, states:

DePuy's sales representatives are DePuy's primary point of contact with the physicians and hospitals that use DePuy's products. DePuy's sales representatives play a vital role in DePuy's business. They educate customers about product features, assist customers in understanding the proper use of the products, and often observe surgeries first hand to ensure that the products are being used appropriately.

Paragraph 7 of the declaration of Peter D. Coffaro, Territory General Manager for Central and Northern California for DePuy Orthopaedics, Inc., attached hereto as **Exhibit 31**.

By contract with its distributors, DePuy requires that sales representatives receive training on how to provide the above information to orthopedic surgeons and what information to provide. *See, Declaration of Pamela Davis filed on March 24, 2011, in the case of Garriss v.*

DePuy Orthopaedics, Inc. and Commonwealth Surgical Solutions, in the United States District Court for the Eastern District of Virginia, ¶4, attached hereto as **Exhibit 32**. Newly hired DePuy sales representatives are required to undergo a six-day course on DePuy’s joint replacement products at DePuy headquarters in Warsaw, Indiana. Pursuant to the *DePuy Certification Learning Program Curriculum Guide*:

At the end of the primary reconstructive program, the participant should be able to:

- Identify anatomical landmarks as they relate to total joint replacement
- Describe the movements of the body
- Discuss the key rationale points of each core product offering
- ***Compare and contrast the DePuy reconstructive product line to that of our major competitors***
- ***Demonstrate how to implant each core product***

(emphasis added.) Page 11 of the *DePuy Certification Learning Program Curriculum Guide* attached hereto as **Exhibit 33**. The *Curriculum Guide* goes on to state:

Primary School is designed to address the needs of new associates to DePuy. The program highlights a variety of topics including product design rationale, surgical technique tips for implanting products, and an overview of competitive product offerings.

...

Bioskills workshops are conducted for all major product lines. Bioskills or Sawbones workshops enable the student to work through a variety of scenarios involving our instrumentation packages. Instructors assist students to learn the basic steps and procedures for implanting our reconstructive products. ***Skills learned during these workshops are intended to give the participants the necessary skills to enable them to verbally assist their surgeons, nursing staff and other hospital-based customers during surgical procedures.***

(emphasis added.) *Id.* at pages 11 to 12. DePuy then trains the sales representatives in providing more advanced assistance to orthopedic surgeons. The “learning objectives” of the “Advanced Reconstructive Sales Associate Learning Centers – Length of course 1-2 days” in the *DePuy Certification Learning Program Curriculum Guide* include:

- Discuss details relating to pre-op planning of simple and complex surgical cases
- Identify competitive advantages within the DePuy product portfolio
- Demonstrate how to template, plan and consult on product options for primary and revision scenarios
- Explain concepts relative to soft tissue balancing, biomechanics of the hip and knee

...

The advanced program is intended to enhance skills of the sales associate in the area of surgical techniques, pre-op planning, and basic decision-making regarding primary and revision surgical procedures.

Id. at page 15.

The written testimony of Pamela Davis, an orthopedic sales representative for a DePuy distributor from 2005 through 2010, confirms the training objectives of the DePuy Learning Programs were employed by its orthopedic sales representatives. *See, Exhibit 32.* Ms. Davis testified that sales representatives hold meetings with surgeons to discuss DePuy orthopedic products and their benefits compared to competitor's products. *See, Exhibit 32, ¶¶6, 16 and 17.* Sales representatives also accompany surgeons to cadaver labs to convince them of the advantages of DePuy products. *See, Exhibit 32, ¶7 and 16.* Indeed, the bulk of a sales representative's time, according to Ms. Davis, is spent assisting with implant surgeries:

My daily routine was to travel to the hospital in which I was assigned, cover the surgeries which were posted several weeks or days prior, with hospital scheduling personnel, organize instruments to be used for surgery; bring implants being used to the hospital if they were not there and make sure proper implants were brought into the surgical suite for the nurse to open.

See, Exhibit 32, ¶10. (emphasis supplied.)

In sum, DePuy sales representatives play a pivotal role in promoting, distributing, selling, marketing and servicing DePuy hip replacements.

D. REQUEST FOR ATTORNEYS' FEES

The federal removal statute permits the award of costs and actual expenses incurred in connection with a remand. 28 U.S.C. §1447(c). In its 2005 decision in *Martin v. Franklin Capital Corp.*, the United States Supreme Court discussed Congress' concerns in providing for such fee shifting:

...Congress thought fee shifting appropriate in some cases. The process of removing a case to federal court and then having it remanded back to state court delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources. Assessing costs and fees on remand reduces the attractiveness of removal as a method for delaying litigation and imposing costs on the Plaintiff. The appropriate test for awarding fees under § 1447(c) should recognize the desire to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, while not undermining Congress' basic decision to afford Defendants a right to remove as a general matter, when the statutory criteria are satisfied.

Martin v. Franklin Capital Corp., 546 U.S. 132, 104 (2005). In the instant case, Defendants removed this case from state court to this Court claiming improper joinder with no factual or legal basis. Defendants further removed this case in direct contradiction of well-established Nevada law allowing causes of action against sales representatives. Finally, Defendants removed this case relying on a disingenuous affidavit of Ron Emes, which in no way sets forth the true nature and involvement of Precision's sales representatives in the marketing, advertising, promoting, distributing, selling and service the DePuy ASR hip implants. As a result, Plaintiffs are entitled to award of their attorneys' fees and costs in seeking and obtaining remand.

CONCLUSION

Defendant Precision has not been fraudulently joined. Therefore, there is not “complete diversity” and this Court lacks subject matter jurisdiction. As a result, this case must be remanded to the District Court of Clark County, Nevada. Furthermore, as this action was improperly removed by Defendants, Defendants are responsible for Plaintiffs’ attorneys’ fees incurred in obtaining the remand of this case back to state court.

Respectfully submitted,

WHITE & WEHTERALL, LLP

/ s / Peter C. Wetherall
Peter C. Wetherall State Bar #4414
9345 West Sunset Road, Suite 100
Las Vegas, NV 89148
Phone 702-838-8500
Fax 702-837-5081
Email: pwetherall@whiteandwetherall.com

Altom M. Maglio FL Bar #88005
(*pro hac vice* admission requested)
MAGLIO CHRISTOPHER & TOALE, PA
1751 Mound Street, Second Floor
Sarasota, FL 34236
Phone 941-952-5242
Fax 941-952-5042
E-mail: amm@mctplaw.com

Brian S. Franciskato MO Bar # 41634
(*pro hac vice* admission requested)
NASH & FRANCISKATOLAW FIRM
2300 Main Street, Suite 170
Kansas City MO 64108
Phone 816-221-6600
Fax 816-524-5821
E-mail: bfranciskato@nashfranciskato.com

Signature of this document certifies that a copy was served to the persons named below on the date and in the manner indicated:

| <u>Person Served</u> | <u>Party</u> | <u>Date</u> | <u>Method</u> |
|--|---|----------------------------|---------------|
| Robert R. McCoy rrm@morrislawgroup.com | Defendants DePuy Orthopaedics, Inc. and Precision Instruments, Inc. | Tuesday, April 26, 2011 | Electronic |
| Joni A. Jamison jaj@morrislawgroup.com | | | |
| Morris Peterson 300 South Fourth Street, #900 Las Vegas, NV 89101 (702) 474-9400 FAX: (702) 474-9422 | | | |