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**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- PMP-GWF

**PLAINTIFFS' REPLY BRIEF IN
SUPPORT OF PLAINTIFFS'
MOTION TO REMAND**

I. The Court Should Not Defer Consideration of Plaintiffs' Remand Motion Pending MDL Transfer Because a Stay is Improper When the Court Lacks Jurisdiction.

In their opposition to remand, Defendants again argue the Court should stay this case and defer ruling on Plaintiffs' Motion to Remand pending transfer of this case to MDL No. 2197. The basis of their argument is the Court should defer ruling because it allegedly encourages consistency and judicial economy to have a single MDL judge in Ohio rule on all motions to

remand. Unfortunately, it is difficult to believe Defendants' argument when, throughout the United States, they pick and choose as to whether or not they are going to remove a case to federal court claiming "fraudulent joinder" of a distributor. Plaintiffs are aware that Defendants have not removed the following litigation in which the distributor was named as a defendant, deciding to allow the cases to proceed in state court:

- (1) *Jackson, et al. v. DePuy Orthopaedics, Inc., et al.*, Circuit Court for Prince George's County, Maryland, Case No. CAL10-32147;
- (2) *Fluharty, et al. v. DePuy Orthopaedics, Inc., et al.*, Circuit Court for Prince George's County, Maryland, Case No. CAL11-05784, (claims were made against a distributor, Chesapeake Surgical, Ltd.); and
- (3) *Kauthen, et ux. v. DePuy Orthopaedics, Inc.*, Circuit Court for Palm Beach, County, Florida, Case No. 50-2011-CA-004158, (claims were made against a distributor, Mark Debaise, Inc.).

What defendants seek is nothing more than an improper and inexcusable delay. If the Court believes plaintiffs have a "possibility" of stating a claim against defendant Precision under Nevada law, then the Motion to Remand should be granted by this Court. To pass the question on to a judge in Ohio risks either a result the Court knows is improper or, at the very least, a lengthy delay in plaintiffs ability to seek redress for the injuries caused by defendants' defective hip implant.

If the case is stayed and transferred to the MDL, there are three possible outcomes. First, Judge Katz in Ohio could issue some blanket ruling denying remand to all cases. This would be an improper exercise of jurisprudence because each state's law is different and the allegations raised by the various plaintiffs throughout the United States undoubtedly are distinct and different. This result would not be proper for these Nevadans because, as plaintiffs have shown, remand is the only appropriate result here under Nevada law.

Second, Judge Katz could review each individual remand motion, apply each state's separate law, and still deny the motion to remand. This clearly is not efficient use of judicial resources. Knowing the facts of the case as this Court does and how Nevada law applies, allowing Judge Katz to rule should offend this Court's sense of justice as well as deny plaintiffs their right to have their claims heard in the appropriate forum. The reality is, this Court is best suited to determine the issue of remand, as it involves issues of Nevada law that this Court routinely applies.

Third, Judge Katz could decide to remand the case. However this decision will not come for months or possibly even years. Then the parties will be back in Nevada state court after a lengthy delay in which the plaintiffs have not been able to pursue their case at all. Defendants will have effectively delayed facing justice for years. Again, this would be a miscarriage of justice when the Court knows that remand is appropriate now.

Finally, while it is true some courts have stayed proceedings pending MDL transfer when there is a pending motion to remand, this Court is not required to do so. *See*, Judicial Panel on Multidistrict Litigation, Rule 2.1(d); *Laurence v. Eli Lilly & Co.*, No. 05-4319-CV-C-NKL, 2005 WL 3533401, at *1 (W.D. Mo. Dec. 22, 2005) (while jurisdictional issues may be decided by the MDL court, there is no mandate that they must be) (citing *In re Ivy*, 901 F2d 7, 9 (2nd Cir. 1990)); *Minn v. Pharmacia Corp.*, No. 05-1394 (PAM/JSM), 2005 WL 2739297, at *2 (D. Minn. Oct. 24, 2005) (denying motion to stay and determining motion to remand although MDL pending).

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II. Remand is Required Because Defendants Have Not Met Their Heavy Burden to Show There is No Possibility Plaintiffs Can Establish Any Cause of Action Against Defendant Precision.

In trying to meet their “heavy burden” to show that plaintiffs cannot possibly state any cause of action against defendant Precision, Defendants’ Response misconstrues some case authority and ignores the case authority most directly on point. Defendants boldly state in their Response that “Nevada law does not recognize a strict liability claim against a medical supplier such as Precision.” Defendants’ Response at 7. To support this position, Defendants rely heavily upon *Thompson v. Medtronic*, 2006 WL 3544937 (D. Nev.) and *Kite v. Zimmer*, 2006 WL 3386765 (D. Nev.). Defendants’ Response at 10. Defendants contend those cases stand for the proposition that a medical device sales representative like Precision cannot be a “seller” under Nevada products liability law. Unfortunately for defendants, they have mischaracterized these decisions by failing to acknowledge critical factual differences that separate those cases from the case before the Court.

What defendants fail to disclose to the Court is that, in both *Thompson* and *Kite*, it was uncontroverted that it was *impossible* for the defendant-distributor who was a party to the action to have been the one who actually supplied the device at issue. In *Thompson*, the only non-diverse defendant was a sales representative for a medical product distributor. However, the defendant sales representative was on disability leave during the time the allegedly defective device was installed. *Thompson* at *1. Therefore, that particular defendant could not have had any role in the distribution or sale of the device so he could not be the “seller”. However, the reason he was not a “seller” was because he was on disability leave and could not possibly have delivered the product at issue—not merely because he was a medical device distributor. Given this important factual distinction, it is clear that defendants have grossly overstated the holding

and meaning of the *Thompson* decision.

Kite involved a similar situation. The plaintiff underwent her surgery on April 26, 2004 and had a medical device implanted. The non-diverse defendant distributor filed an affidavit that stated the company had not delivered any medical devices in the city where the surgery occurred after January 1, 2003. *Kite* at *2. Therefore, it was impossible for the defendant to have been the one that sold and delivered the product at issue so it could not be a “seller” for purposes of applying a strict products liability theory.¹

In this case, there is no question that defendant Precision was the party that delivered the products at issue to the operation room. In fact, Precision representatives attended all of the plaintiffs’ surgeries. Consequently, the decisions in *Thompson* and *Kite* lack any persuasive authority here.

While the cases on which Defendants rely lend no assistance here, they do point the Court to a decision that provides a more factually similar scenario and an excellent roadmap for the Court in deciding the remand issue. The Court in *Thompson* cited to another Nevada district court decision, *Moore v. Medtronic*, 2006 WL 1795861, which also involved a remand question in a case with a non-diverse medical product distributor.

In *Moore*, as in the case here, there was no question the non-diverse medical product distributor was the one who actually delivered the device that was implanted into the plaintiff. This was the only significant involvement the distributor had with the defective device. *Id.* at *1. In deciding whether the distributor was fraudulently joined, District Court Judge Kent Dawson lamented that “there is a dearth of case law in Nevada state courts defining what a ‘seller’ is for

¹ The Court in *Kite* also found that the plaintiffs failed to plead sufficient allegations to make the distributor liable for negligence. *Id.* at *4. This deficiency is not present here. Plaintiffs have made numerous specific allegations of Precision’s negligent conduct. *See*, Plaintiffs’ Complaint, ¶¶ 206-207.

purposes of strict products liability.” *Id.* at *2. The Court noted there was no Nevada case law specifically addressing whether a manufacturer’s sales representative could be considered a “seller” under a strict products liability theory. *Id.* But recognizing the burden was upon the defendant to prove the impossibility of maintaining a claim against the sales representative, Judge Dawson ordered that matter remanded to state court because the defendants had not met their “heavy burden.” *Id.* at *3. In so holding, the Court stated:

This Court can not (but more importantly will not) predict how the state courts would define a “seller” for purposes of strict products liability given their silence so far on this issue...when viewing the evidence in the light most favorable to the Plaintiffs, one could find that [the sales representative] was a sufficient link in the chain of distribution.

Id. See also, *Elmore v. Merck & Co., Inc.*, 2007 WL 956893 (D. Nev.) (remanding case to state court where defendants could “point to no settled law of the State of Nevada” that would preclude causes of actions against medical drug sales representatives for failure to warn of defective medical products, therefore, non-diverse defendant were not fraudulently joined).

The analysis in *Moore* applies equally here in contrast to the decisions in *Kite* and *Thompson* where it was impossible for the defendant distributor to actually have distributed the defective product. Defendant Precision was the squarely in the chain of distribution. Therefore, plaintiffs have sufficiently pled causes of action against Precision and defendants have not shown that it is impossible under Nevada law to maintain those claims. Accordingly, this Court should remand the matter to state court.

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III. Defendant Precision May Be Liable For Breach of Warranty and Negligent Product Liability Claims, Therefore, Remand is Required.

Defendants' attempt to negate Precision's potential liability for breach of warranties and negligent product liability claims is solely dependent upon finding Precision is not a seller. Again, defendants rely upon *Thompson* and *Kite* to argue this point. Defendants' Response at 11-13. As shown above, this reliance is misplaced. There is no authority to support the position that medical product sales representatives or distributors cannot be considered sellers. As the Court in *Moore* recognized, it is not impossible that, under Nevada law, a medical product distributor could be a "seller" under a product liability theory. Consequently, Precision could potentially be liable for breach of warranty and negligent product liability claims.

It is important to note that defendant Precision, while denying having a role in the sale of the defective hip implant, does not by affidavit or otherwise, state that it does not provide information to the surgeon about the hip implant device, nor does it deny that it make representations about the product to induce the physician to use it. And the materials plaintiffs attached to their Motion to Remand easily supports the conclusion that Precision is in the business of attempting to promote Depuy's hip implant in order to arrange additional sales. Otherwise, Depuy could simply hire UPS to deliver the product. Based on Plaintiffs' allegations in their Complaint and the additional evidence Plaintiffs provided, it is certainly possible that Precision could be found to be a "seller" under Nevada law.

CONCLUSION

Defendants have failed to meet their "heavy burden" of proving that Plaintiffs could not possibly state a claim against Precision, who marketed, promoted and distributed the defective hip implant. Plaintiffs have viable product liability claims against Precision and Defendants have not, and cannot, show that such claims may not be colorable under Nevada law. Since

Precision is a Nevada resident corporation, this matter never should have been removed from state court and this Court lacks jurisdiction over the matter. Knowing the matter should never have been removed, this Court should immediately grant Plaintiffs' Motion to Remand so Plaintiffs may pursue their action against these Defendants in a timely manner.

Respectfully submitted,

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