UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: DEPUY ORTHOPAEDICS, INC. PINNACLE HIP IMPLANT PRODUCT LIABILITY LITIGATION	)	MDL No. 2244
This Document Relates To:	)	Honorable Ed Kinkeade
Alicea v. DePuy Orthopaedics, Inc., et al. No. 3:15-cv-03489-K	)	
Barzel v. DePuy Orthopaedics, Inc., et al. No. 3:16-cv-01245-K	)	
Kirschner v. DePuy Orthopaedics, Inc., et al. No. 3:16-cv-01526-K	)	
Miura v. DePuy Orthopaedics, Inc., et al. No. 3:13-cv-04119-K	)	
Stevens v. DePuy Orthopaedics, Inc., et al. No. 3:14-cv-01776-K	)	
Stevens v. DePuy Orthopaedics, Inc., et al. No. 3:14-cv-02341-K	)	

DEFENDANT JOHNSON & JOHNSON'S MOTION AND MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

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RULE

Pursuant to Federal Rule of Civil Procedure 50(b), defendant Johnson & Johnson ("J&J") respectfully moves for judgment notwithstanding the verdict on plaintiffs' claims against it.

Plaintiffs prevailed on a host of product liability and fraud-based claims against J&J, based almost entirely on the fact that it is the ultimate parent company of DePuy Orthopaedics, Inc. ("DePuy"). But no reasonable jury could have found J&J liable for any of plaintiffs' claims under New York law. After all, plaintiffs did not present any evidence that J&J either manufactured or distributed the Pinnacle Ultamet, which precluded them from proving a critical element of their product liability claims under New York law. Nor did plaintiffs identify any specific misrepresentation that J&J purportedly made – let alone one on which plaintiffs or their surgeons relied – entitling J&J to judgment notwithstanding the verdict on their negligent undertaking and fraud-based claims.

The jury also decided against J&J on plaintiffs' claims for negligent undertaking and aiding and abetting. But plaintiffs did not assert negligent undertaking or aiding and abetting causes of action in their complaints, and it is too late to assert them now. In any event, plaintiffs did not introduce sufficient evidence to allow a reasonable jury to find in their favor on these claims. Rather, the only evidence they presented was that of an ordinary parent-subsidiary relationship, which does not give rise to liability under a negligent undertaking or aiding and abetting theory under New York law.

For all of these reasons, the Court should grant judgment notwithstanding the verdict in favor of J&J.

ARGUMENT

The standard for a renewed motion for judgment as a matter of law is set forth in defendants' Renewed Motion and Memorandum in Support of Renewed Motion for Judgment as

a Matter of Law on Plaintiffs' Claims Sounding in Failure to Warn, Misrepresentation or Omission, filed separately.

J&J is entitled to judgment notwithstanding the verdict under this standard because plaintiffs failed to present sufficient evidence to impose liability on J&J. Specifically, as detailed below, no reasonable jury could have found J&J liable for: (1) product liability claims (i.e., negligence, strict liability, or negligent undertaking); (2) fraud-based claims (i.e., negligent misrepresentation, fraud, fraudulent concealment and violation of New York's General Business Law § 349); or (3) negligent undertaking or aiding and abetting.[1]

I. J&J IS ENTITLED TO JUDGMENT NOTWITHSTANDING THE VERDICT ON PLAINTIFFS' PRODUCT LIABILITY CLAIMS.

In order to prevail on their product liability claims against J&J, plaintiffs were required under New York law to establish that J&J manufactured or sold the Pinnacle Ultamet.[2] Just last year, New York's highest court made it crystal clear that strict liability claims may only be brought against a defendant ***that manufactured or sold*** the products in question. *Finerty v. Abex Corp.*, 27 N.Y.3d 236, 241-42 (2016) ("[A]bsent any evidence that [the defendant] was in fact a manufacturer or seller of th[e] components [at issue]," the defendant "may not be held liable under a strict products liability theory."). Similarly, under New York law, in order to prevail on any negligence-based theory, a plaintiff must first establish that the defendant owed him or her a duty of care, which, in the product liability context, generally extends only to manufacturers,

[1] Plaintiffs were also awarded punitive damages against J&J, which are derivative of their other claims and therefore fail along with plaintiffs' substantive claims.

[2] Defendants note that the Fifth Circuit's recent ruling in *Aoki* does not control this question. Although that ruling upheld a verdict against J&J under a "nonmanufacturing seller" theory of product liability, the nonmanufacturing-seller theory was a unique creature of Texas statutory law and (not surprisingly) was never invoked here. *See In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig.*, 888 F.3d 753, 782-83 (5th Cir. 2018). In any event, the *Aoki* appellate ruling only addressed whether the statute established a cause of action or an affirmative defense; it expressly did not decide the question whether the evidence was sufficient to support the jury's conclusion that J&J was a "seller" under the statute. *See id.* at 783 n.57. Similarly, that court's assessment of personal jurisdiction acknowledges that J&J is a "nonmanufacturing parent." *Id.* at 779.

sellers, and suppliers. *See Yargeau v. Lasertron*, 128 A.D.3d 1369, 1369-70 (N.Y. App. Div. 2015) (holding that the trial court properly granted summary judgment in favor of defendants on plaintiff's "negligence and strict products liability claims . . . because [the defendants] established that they 'did not design, manufacture or sell the allegedly defective product and thus could not be held liable for either negligence or strict products liability' resulting from the defect") (quoting *Townley v. Emerson Elec. Co.*, 269 A.D.2d 753, 753 (N.Y. App. Div. 2000)).

In *Finerty*, the Court of Appeals of New York rejected strict liability claims alleged against Ford Motor Company ("Ford USA"), based on allegations that the plaintiff was injured as a result of his exposure to asbestos-containing brakes included in tractors manufactured by Ford USA's wholly owned subsidiary in the United Kingdom. 27 N.Y.3d at 241-43. The plaintiff argued that "Ford USA was 'actively involved' in the design, specification, production and sale of Ford products throughout the world, including the United Kingdom, such that it could be held liable for the role it 'independently played' in placing the products into the stream of commerce and in failing to warn plaintiff." *Id.* at 240. The trial court and Appellate Division both agreed with the plaintiff, concluding that Ford USA's "'role in facilitating the distribution of the asbestos-containing auto parts' could subject it to strict liability because it was in the best position to exert pressure on Ford UK and to warn end users of the hazards presented by the auto parts." *Id*. at 242 (citation omitted). New York's highest court, however, expressly rejected this approach, holding that it was "error" to conclude that Ford USA could be subject to strict liability based on a theory that, as a parent company, "it was in the 'best position' to 'exert pressure' on [the manufacturer] for improved product safety." *Id.* at 242-43.

As the Court of Appeals explained, "[o]f course, as [the manufacturer's] parent company, Ford USA could 'exert pressure' on [the manufacturer], but ***we have never applied that concept***

to a parent company's presumed authority over a wholly-owned subsidiary." *Id*. (emphasis added). In addition, the Court of Appeals held that "[a]lthough plaintiff submitted evidence tending to show that Ford USA provided guidance to [the manufacturer] in the design of certain tractor components, absent any evidence that Ford USA was in fact a manufacturer or seller of those components, Ford USA may not be held liable under a strict products liability theory." *Id*. at 241-42. The court also held that, "absent any indication that Ford USA was in the distribution chain, it is of no moment that Ford USA exercised control over [the] trademark" used on the products at issue, especially given that Ford USA did not provide "directives as to what warnings, if any, were required to be placed" on products bearing its trademark. *Id*. at 242. As a result, the claims alleged against Ford USA were barred as a matter of New York law.

Similarly, in *Fletcher v. Atex, Inc.*, 68 F.3d 1451 (2d Cir. 1995), the United States Court of Appeals for the Second Circuit rejected tort claims under New York law against a parent company based on injuries allegedly caused by a product manufactured and sold by the parent company's wholly-owned subsidiary. The plaintiffs in that case sought recovery for repetitive stress injuries that they claimed were caused by their use of Atex computer keyboards. *Id.* at 1454. In addition to suing Atex, the manufacturer of the keyboards, the plaintiffs sued Atex's parent corporation, Kodak, on the theory that "Kodak acted in tortious concert with Atex in manufacturing and marketing the allegedly defective keyboards." *Id.* at 1455. In support of this argument, the plaintiffs asserted that "various statements" in Atex's literature and "the use of the Kodak logo on certain documents packaged with Atex products" demonstrated Kodak's "'full collaboration' in the marketing of the keyboards." *Id.* at 1465. The plaintiffs also submitted "various reports and documents on ergonomics and repetitive stress injuries that Kodak created for the use of its own employees as evidence that 'Kodak was fully aware of both the hazards

associated with keyboard use and the means of reducing or eliminating those hazards.'" *Id.* (footnote omitted) (citation omitted). Finally, the plaintiffs pointed to Kodak's evaluation and testing of three Atex keyboards as evidence that "Kodak was a full participant with Atex in the deliberations about whether to warn users . . . , exactly what such warnings should state, and what would be the risks of not issuing such warnings." *Id.* (citation omitted).

The district court held that none of this evidence was sufficient to establish that Kodak "participate[d] in a common plan or design to commit a tortious act" or gave "substantial assistance or encouragement" to Atex, and the Second Circuit affirmed. *Id.* (citations omitted). In its ruling, the Second Circuit explained that the plaintiffs' evidence did not show "that Kodak actually participated in the design or manufacture of the Atex keyboards." *Id.* Moreover, "Kodak's knowledge about repetitive stress injuries generally" could not "be construed as knowledge of the alleged defective design of the Atex keyboard or Atex's alleged failure to warn keyboard users of the hazards of repetitive stress injuries." *Id.* at 1466.

Finerty and *Fletcher* compel entry of judgment notwithstanding the verdict in favor of J&J because plaintiffs did not show that J&J manufactured or distributed the Pinnacle Ultamet. Nor did plaintiffs show that J&J researched, developed, designed, formulated, or tested the Pinnacle Ultamet. Moreover, the evidence plaintiffs produced at trial with respect to J&J showed a regular parent-subsidiary relationship of the type that cannot give rise to product liability claims. For example, plaintiffs introduced evidence that J&J helped DePuy in overseeing public relations developments concerning the ASR hip implant and Pinnacle Ultamet (*see* 9/27/17 Trial Tr. 169:16-20); that J&J provided funding assistance for research and technology (*see* 10/10/17 Trial Tr. 137:19-22); and that certain strategic decisions were reported to J&J (*see* 10/3/17 Trial Tr. 120:25-122:24; 10/18/17 Trial Tr. 64:3-65:23). Such evidence

could not justify liability because a "parent corporation has the right to protect its investment by supervising and actively participating in the subsidiary's management." *In re Sch. Asbestos Litig.*, No. 83-0268, 1993 U.S. Dist. LEXIS 7984, at *37 (E.D. Pa. June 14, 1993); *see also Kardis v. A.C. Nielsen Co.*, No. 96-6008, 1998 U.S. Dist. LEXIS 2963, at *18-19 (D.N.J. Mar. 13, 1998) ("The evidence that plaintiff has produced shows that [the parent] was involved with its wholly-owned subsidiary; such involvement does not abrogate the general rule of limited liability because parent corporations are allowed to participate in . . . subsidiaries' affairs.").

The same is true of plaintiffs' evidence that J&J was involved with DePuy's marketing and public relations efforts. (*See, e.g.*, 10/2/17 Trial Tr. 34:2-36:8 (evidence that J&J owned a website featuring doctors using DePuy hip devices); *id.* 229:16-230:12 (evidence that J&J attorneys approved the 99.9% PIN study); *id.* 230:19-232:2 (evidence that J&J, in sponsoring the 2008 Olympic Games, provided funding for DePuy's promotional campaign involving Duke University basketball coach Mike Krzyzewski); 10/3/17 Trial Tr. 120:25-122:24 (email showing that Mr. Alex Gorsky, prior to becoming J&J's chief executive officer, reviewed DePuy promotional materials); 10/3/17 Trial Tr. 49:20-50:7, 53:5-55:9 (video of introductory remarks by J&J's chief executive officer Bill Weldon at the outset of a 2006 panel discussion about bearing surface technology that was broadcast to a number of locations around the country via satellite).) Indeed, courts have specifically rejected the notion that involvement in marketing efforts creates liability for a parent corporation, explaining that "there is apparently no state which extends liability for injuries caused by defective products to those who merely devised the marketing or advertising scheme under which the product is promoted." *Harmon v. Nat'l Auto. Parts Ass'n*, 720 F. Supp. 79, 81 (N.D. Miss. 1989).

Similarly, while plaintiffs presented evidence of the reputational support that J&J provides its subsidiaries (*see, e.g.*, 10/2/17 Trial Tr. 228:22-229:8 (evidence that advertising "was required to use the Johnson & Johnson company on the logo"); 10/4/17 Trial Tr. 154:10-13), that too was insufficient to hold the parent company directly liable as a seller, *Fletcher*, 68 F.3d at 1465 ("the use of the Kodak logo on certain documents packaged with Atex products" was insufficient to hold Kodak liable); *Am. Eagle Ins. Co. v. United Techs. Corp.*, 48 F.3d 142, 147 (5th Cir. 1995) (applying Texas law; where parent company "did not design, manufacture, warrant, sell or otherwise place in the stream of commerce" the allegedly defective product, district court properly dismissed claims against it even where parent allowed use of its logo on the product).[3]

In sum, none of the evidence plaintiffs introduced at trial was sufficient to create liability against J&J under negligence or strict liability theories under New York law.[4] Rather, as other courts have held, pointing to such regular interaction between a parent and its subsidiary is "no more than a strained attempt at linking the two entities and do[es] not substantiate any colorable

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[3] Plaintiffs' counsel also repeatedly referenced "DePuy/Johnson & Johnson." (*See, e.g.*, 9/20/17 Trial Tr. 15:22-23 ("Now, all six of these [plaintiffs] bought a DePuy/Johnson & Johnson Pinnacle metal-on-metal hip."); 9/25/17 Trial Tr. 32:1-6 ("[Q.] I know you work for the DePuy/Johnson & Johnson company, right? A. Yes."); 11/2/17 Trial Tr. 25:23-24 ("Q. Were you told that DePuy/Johnson & Johnson knew that it had not involved issues related to metal debris and ions?").) Counsel's unsupported conflation of the two companies was argument, not evidence, and thus could not create a factual issue. *See, e.g.*, *United States v. Rojas Alvarez*, 451 F.3d 320, 336 (5th Cir. 2006) (stating that "argument is not evidence" and finding that no rational jury could infer that plaintiff was aware of certain facts where the government did not introduce any evidence, but "only argued" that plaintiff must have been aware of them).

[4] Plaintiffs' apparent manufacturer theory of liability similarly fails. As previously discussed, liability cannot be imposed under the apparent manufacturer doctrine because *Finerty*'s logic forecloses that argument. If a parent company could be independently liable merely for placing its name on its subsidiary's product, the *Finerty* court's holding that Ford USA was not liable even though its trademark was used on the allegedly defective brakes would have no force. *See* 27 N.Y.3d at 242 ("[A]bsent any indication that Ford USA was in the distribution chain, it is of no moment that Ford USA exercised control over its trademark."). The Second Circuit in *Fletcher* also recognized that New York does not apply the apparent manufacturer doctrine outside the context of sellers and retailers. 68 F.3d at 1463, 1466 (apparent manufacturer doctrine did not apply because "plaintiffs have not produced any evidence that Kodak developed, designed, sold or distributed the allegedly defective keyboards"; "[U]nder New York law, ***a parent cannot be liable as an apparent manufacturer where it was not the seller or the distributor of the product***.") (emphasis added).

claim against" the parent. *See, e.g.*, *Lopienski v. Centocor, Inc.*, No. 07-4519 (FLW), 2008 WL 2565065, at *4 (D.N.J. June 25, 2008) (where plaintiff alleged that J&J "create[d] standards, policies, and procedures" for its subsidiary, "funnel[ed] employees" to the subsidiary, and "provide[d] documentation preservation practices for [the subsidiary's] legal department," those alleged "nexuses between J&J" and the subsidiary were still "insufficient to establish that J&J is either a 'seller' or 'manufacturer'" of the subsidiary's product); *Hayes v. SmithKline Beecham Corp.*, No. 07-CV-0682-CVE-SAJ, 2008 WL 5003567, at *3 (N.D. Okla. Nov. 20, 2008) (where parent "monitor[ed] the safety" of a subsidiary's pharmaceutical product worldwide, "but d[id] not produce or sell it," claims against the parent "would be subject to dismissal," even if the parent "profit[ed] from [the product's] manufacture and sale").

For all of these reasons, J&J is entitled to judgment notwithstanding the verdict on plaintiffs' product liability claims against it.[5]

II. J&J IS ENTITLED TO JUDGMENT NOTWITHSTANDING THE VERDICT ON PLAINTIFFS' FRAUD-BASED CLAIMS.

The jury also found for plaintiffs against J&J on four fraud-based claims against J&J: negligent misrepresentation, fraud, fraudulent concealment and violation of New York's General Business Law § 349. J&J is entitled to judgment notwithstanding the verdict on these claims because plaintiffs did not present any evidence of any misrepresentations made by J&J, let alone misrepresentations by J&J that were relied on by plaintiffs' surgeons.

It is axiomatic that claims based on a misrepresentation theory require proof of a misrepresentation and reliance thereon. Causes of action for both intentional misrepresentation

[5] Prior to trial, the Court rejected J&J's motion for summary judgment on the ground that "the summary judgment evidence raise[d] a genuine issue of material fact related to J&J's role in the production and marketing of the Pinnacle device" from which "[a] jury could reasonably infer that J&J was responsible for placing the product in the marketplace." (Order Den. Defs.' Mots. for Summ. J. ("MSJ Order") at 15-16, *Alicea* ECF No. 88.) In light of the evidence presented at trial to the contrary, defendants respectfully urge the Court to revisit that conclusion.

and negligent misrepresentation require a plaintiff to prove, *inter alia*, that the defendant made a false representation and that the plaintiff relied on it. *See, e.g.*, *Vasquez v. Soto*, 61 A.D.3d 968, 969 (N.Y. App. Div. 2009) ("[A]n element of a cause of action sounding in fraud or negligent misrepresentation is reasonable or justifiable reliance on the misrepresentation."); *MS P'ship v. Wal-Mart Stores, Inc.*, 2 A.D.3d 1482, 1484 (N.Y. App. Div. 2003) ("Essential to a fraud cause of action is the existence of a material misrepresentation made with the intention of inducing the plaintiff's reliance thereon" and "reasonable reliance on the alleged misrepresentation."); *Tompkins v. R.J. Reynolds Tobacco Co.*, 92 F. Supp. 2d 70, 82 (N.D.N.Y. 2000) ("To prove intentional misrepresentation and fraud, [p]laintiffs must show: (1) representation of material fact; (2) falsity; (3) scienter; (4) reasonable reliance; and (5) damages."). Additionally, to establish fraud "based on an omission or concealment of material fact, the plaintiff must also demonstrate that the [defendant] had a duty to disclose material information and failed to do so." *Barrett v. Freifeld*, 77 A.D.3d 600, 601 (N.Y. App. Div. 2010). Claims of fraudulent business acts and practices under New York General Business Law § 349 likewise require a plaintiff to prove that he or she was exposed to and injured by a misrepresentation or omission made by the defendant. *Solomon v. Bell Atl. Corp.*, 9 A.D.3d 49, 52 (N.Y. App. Div. 2004) ("[T]o prevail in a cause of action under General Business Law §§ 349 and 350, the plaintiff must prove that the defendant made misrepresentations or omissions that were likely to mislead a reasonable consumer in the plaintiff's circumstances, that the plaintiff was deceived by those misrepresentations or omissions and that as a result the plaintiff suffered injury."); *Miller v. Wells Fargo Bank, N.A.*, 994 F. Supp. 2d 542, 557-58 (S.D.N.Y. 2014) (dismissing claim under GBL § 349 because the plaintiff failed to show how "'the defendant's material deceptive act caused the injury'") (citation omitted).

Here, plaintiffs have not presented evidence of any specific statements that J&J made to their surgeons (or to them) regarding the safety or efficacy of the Pinnacle Ultamet; nor have they identified any concealment by J&J of information it had a legal duty to disclose.[6] In addition, plaintiffs have not produced any evidence that their surgeons (or plaintiffs themselves) relied on any such statements in selecting the Pinnacle Ultamet.

While this Court previously denied summary judgment on these claims, that holding was based on plaintiffs' evidence that J&J "sponsored" a broadcast during which "thought leaders" made claims about fluid film lubrication and that J&J had "authority [over] or sponsored" DePuy advertising that contained potentially misleading statements such as the 99.9% five-year survival rate. (*See* MSJ Order at 16.) But at trial, plaintiffs only introduced the supposed fact that J&J sponsored a broadcast; they did ***not*** actually play the broadcast, inviting the jury to speculate on its contents. In any event, ***none of these examples involved statements by J&J***. In addition, plaintiffs failed to prove that J&J "had authority" over DePuy's "advertising materials and literature." (*Id*.) The evidence shows, at most, that J&J provided feedback and support regarding DePuy promotional materials and strategies – not authority or control. (*See* 10/3/17 Trial Tr. 120:25-122:24 (email showing that Mr. Gorsky, prior to becoming J&J's chief executive officer, reviewed DePuy promotional materials).) And as discussed above, such attenuated involvement does not give rise to liability against a parent company. *See, e.g.*, *Harmon*, 720 F. Supp. at 81 (liability does not extend "to those who merely devised the

[6] The jury found for J&J as to plaintiffs' theories that intentional misrepresentations were made to them personally, but found for plaintiffs on the theory that such intentional and negligent misrepresentations were made to their surgeons and also found for plaintiffs on the theory that J&J concealed information from both plaintiffs and their surgeons. None of the verdicts for plaintiffs are supported by sufficient evidence.

marketing or advertising scheme under which the product is promoted").[7] Furthermore, although plaintiffs "point[ed] to testimony that their implanting physicians . . . received J&J's representations and that the physicians' decisions to use the Pinnacle Device were based in part [] on these alleged misrepresentations" (*see* MSJ Order at 17), plaintiffs have failed to point to testimony in which any one of their surgeons stated that he ***relied on a statement by J&J specifically***. In fact, the record is replete with evidence that plaintiffs' surgeons did not even rely on DePuy's marketing statements in selecting the Pinnacle Ultamet, let alone any misrepresentation by J&J. (*See, e.g.*, 10/31/17 Trial Tr. 42:6-10 (Dr. Terhaar usually does not "even look at the advertising," but rather "go[es] to the literature."); 11/1/17 Trial Tr. 115:24-116:3 ("Q. Okay. If you're looking at a JBJS journal and there is a one-page ad in there by DePuy . . . [,] is that the kind of evidence that you look to for your decisions for your patients? A. No."); 10/16/17 Trial Tr. 111:22-25 ("Q. Okay. Is this [patient brochure] anything you would rely upon as a surgeon as scientific evidence? A. No. This brochure, from my perspective, is more for patient education.").)

Moreover, as set forth in defendants' renewed motion for judgment as a matter of law with respect to plaintiffs' claims sounding in failure to warn, plaintiffs have the burden of proving causation or reliance to support a fraud-based claim – i.e., that a particular representation

[7] The cases cited by the Court are inapposite and do not provide authority for holding a parent company liable for misrepresentations on the packaging or advertising of a product ***made by its subsidiary***. *See Wechsler v. Hoffman-La Roche, Inc.*, 99 N.Y.S.2d 588, 590 (Sup. Ct. 1950) (denying motion to dismiss where there were sufficient allegations to hold a "***manufacturer or supplier***" liable for fraud) (emphasis added); *Standish-Parkin v. Lorillard Tobacco Co.*, 786 N.Y.S.2d 13, 14-15 (App. Div. 2004) (denying motion for summary judgment because a material issue of fact existed as to whether a smoker relied upon a cigarette manufacturer's alleged fraudulent misrepresentations); *City of N.Y. v. Lead Indus. Ass'n*, 190 A.D.2d 173 (N.Y. App. Div. 1993) (affirming denial of motion to dismiss fraud claims against "manufacturers of lead-based paint");*Young v. Robertshaw Controls Co.*, 481 N.Y.S.2d 891, 893 (App. Div. 1984) (affirming ruling allowing plaintiff to amend complaint to assert fraud allegations against manufacturer of control valve); *Danna v. Malco Realty, Inc.*, 857 N.Y.S.2d 688, 689 (App. Div. 2008) (denying motion to dismiss case involving use of a fiduciary relationship to induce an individual to purchase real estate).

affected their implanting surgeons' prescribing decisions. (*See* Defs.' Renewed Mot. & Mem. of Law in Supp. of Renewed Mot. for J. as a Matter of Law on Pls.' Claims Sounding in Failure to Warn & Fraud (filed separately).) Here, even if plaintiffs had presented evidence that J&J made a misrepresentation that could support a fraud claim, there is no evidence that any surgeon relied on a ***J&J-authored*** representation. For this reason, too, J&J is entitled to judgment notwithstanding the verdict on plaintiffs' fraud-based claims against it.

III. J&J IS ENTITLED TO JUDGMENT NOTWITHSTANDING THE VERDICT ON PLAINTIFFS' UNPLED CLAIMS AGAINST IT FOR NEGLIGENT UNDERTAKING AND AIDING AND ABETTING.

Plaintiffs finally prevailed on theories of negligent undertaking and aiding and abetting against J&J. J&J is entitled to judgment notwithstanding the verdict on these claims too.[8]

A. These Causes Of Action Were Not Pled In Plaintiffs' Complaints.

As a threshold matter, plaintiffs' claims for negligent undertaking and aiding and abetting should not have been presented to the jury because plaintiffs failed to properly plead these causes of action in their complaints. Under the Federal Rules of Civil Procedure, a plaintiff's complaint is required to set forth a short and plain statement of all of the plaintiff's claims and show that the plaintiff is entitled to relief. Fed. R. Civ. P. 8(a)(2). Where a plaintiff fails to properly plead a claim, courts have recognized that the claim should not be submitted to the jury, particularly where doing so would unfairly prejudice or surprise the opposing party. *Seatrax, Inc. v. Sonbeck Int'l, Inc.*, 200 F.3d 358, 368 (5th Cir. 2000); *New Trend Foods, LLC v. Kato Sushi Rest.*, No. M-06-330, 2008 WL 901568, at *4 (S.D. Tex. Mar. 31, 2008).

[8] In addition to the J&J-specific reasons set forth in this brief, these claims also fail as a matter of law because they rest on the premise that plaintiffs established that DePuy failed to warn and that it defectively designed and manufactured the Pinnacle Ultamet. Because DePuy should not have been held liable for these claims, as set forth in the contemporaneously filed renewed motions for judgment as a matter of law on these claims, neither can J&J.

The Court ordered plaintiffs in these cases to amend their complaints by February 3, 2017. (*E.g.*, Scheduling Order, *Alicea* ECF No. 6.) Among the ten claims for relief in their amended complaints, plaintiffs failed to assert causes of action for negligent undertaking or aiding and abetting. Nor did they do so in their Second Amended Complaints, filed on July 17, 2017. At most, with respect to negligent undertaking, plaintiffs made a single-sentence allegation in the general factual section of their complaints that did not support any asserted claim in particular. (*See, e.g.*, *Alicea* Am. Compl. ¶ 14 (alleging that J&J "undertook to perform certain services for Defendants that it knew or should have known were necessary for the protection of patients implanted with Defendants' Pinnacle MoM Devices; Johnson & Johnson failed to exercise reasonable care in performing those services; patients such as Plaintiff Ramon Alicea relied on Johnson & Johnson's performance and reputation; and Johnson & Johnson's performance of those services increased the risk of harm to patients, including Plaintiff Ramon Alicea.").) Similarly, with respect to aiding and abetting, plaintiffs asserted a single, generic allegation, unconnected with any particular conduct or claim, that all six defendants "acted in concert with one another, pursuant to a common design, provided substantial assistance and/or encouragement to the tortious conduct of the others, and participated in their tortious conduct." (*Id*. ¶ 9.) These terse and generic allegations did not adequately disclose plaintiffs' intent to pursue theories of negligent undertaking or aiding and abetting to commit tortious conduct, and permitting plaintiffs to proceed on these theories will only encourage improper hide-the-ball tactics that the rules of pleading are designed to prevent. Accordingly, the Court should not have instructed the jury on plaintiffs' claims for aiding and abetting or submitted those claims to the jury, and the verdicts should be set aside for that reason alone. *See New Trend Foods*, 2008 WL 901568, at *4 (where plaintiff only asserted a claim for unfair competition in his complaint,

district court was not required to instruct the jury on the separate, specific cause of action for unfair competition by misappropriation).

B. The Evidence Was Insufficient To Hold J&J Liable For Negligent Undertaking.

Even if plaintiffs had properly pled negligent undertaking claims, J&J would still be entitled to judgment notwithstanding the verdict because the evidence was insufficient to hold J&J liable under this theory of relief.

As a threshold matter, the Fifth Circuit's recent ruling in the *Aoki* appeal – which upheld a negligent undertaking verdict against J&J under Texas law – does not control here because it was expressly made against the backdrop of state legal precedents that offered "little guidance" on the issue. *In re DePuy*, 888 F.3d at 783. Here, by contrast, New York law is clear that plaintiffs were required to establish that J&J manufactured or sold the Pinnacle Ultamet in order to prevail on this cause of action. Indeed, at least one New York court has refused to apply negligent undertaking liability in a product liability case where the defendant did not manufacture or sell the product at issue. *See In re N.Y. State Silicone Breast Implant Litig.*, 632 N.Y.S.2d 953, 955 (Sup. Ct. 1995) (rejecting negligent undertaking claim where the defendant had not designed, manufactured, sold, tested, or opined about the safety of breast implants comprised of silicone), *aff'd*, 642 N.Y.S.2d 681 (App. Div. 1996); *accord, e.g.*, *Artiglio v. Corning Inc.*, 957 P.2d 1313, 1319 (Cal. 1998) (parent company of medical device subsidiary was not liable on theory of negligent undertaking for allegedly defective breast implants due to its, *inter alia*, provision of silicone toxicology research to subsidiary); *Tetteh v. Alcatel-Lucent USA, Inc.*, No. N14C-08-023 ASB, 2016 WL 4581286, at *4 (Del. Super. Ct. Aug. 31, 2016) (parent corporation not liable for workplace injury at subsidiary company under negligent undertaking theory even though it provided safety-related recommendations and guidance to the

subsidiary), *reconsideration and reargument denied sub nom. In re Asbestos Litig.*, No. N14C-08-023 ASB, 2016 WL 6248464 (Del. Super. Ct. Oct. 25, 2016).[9] As explained above, the evidence plaintiffs produced at trial with respect to J&J showed a regular parent-subsidiary relationship of the type that cannot give rise to product liability claims. Accordingly, plaintiffs' negligent undertaking claims fail as a matter of New York law and the jury's contrary verdict must be set aside.

In any event, even if negligent undertaking could ever apply in the parent-subsidiary context, the evidence here would not support holding J&J liable. Under New York law, there are only "three situations" "in which a party who enters into a contract to render services may be said to have assumed a duty of care – and thus be potentially liable in tort – to third persons": (1) "where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launches a force or instrument of harm'"; (2) "where the plaintiff detrimentally relies on the continued performance of the contracting party's duties"; and (3) "where the contracting party has entirely displaced the other party's duty" to the plaintiff.[10] *See Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136, 140 (2002) (citations omitted).[11]

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[9] Absent any indication that New York courts would apply negligent undertaking liability to a parent company that exercises ordinary controls over its subsidiary but did not manufacture or sell the product at issue, this Court should not expand New York law on that state's behalf. *See In re DePuy*, 888 F.3d at 781 (holding that a court should not "exceed[] its circumscribed institutional role and 'expand [state law] beyond its presently existing boundary'") (citation omitted). After all, "'a federal court sitting in diversity [should] not . . . adopt innovative theories that may distort established state law.'" *Avedisian v. Quinnipiac Univ.*, 387 F. App'x 59, 60 (2d Cir. 2010) (citation omitted); *accord Barfield v. Madison Cty., Miss.*, 212 F.3d 269, 272 (5th Cir. 2000) ("[The Fifth Circuit] will not expand state law beyond its presently existing boundaries.") (citation omitted); *Dean v. Dean*, 837 F.2d 1267, 1267 (5th Cir. 1988) ("[F]ederal courts in diversity cases do not adopt innovative theories of recovery or defense but simply apply state law as it exists."); *Burris Chem., Inc. v. USX Corp.*, 10 F.3d 243, 247 (4th Cir. 1993) (proper role of "federal courts sitting in diversity" is to "rule upon state law as it exists" – not to "surmise or suggest its expansion").

[10] For this reason, too, these cases depart from *Aoki*. After all, the inquiry under Texas law was whether J&J had "controlling, primary authority for maintaining safety at [its subsidiary's] facilities.'" *In re DePuy*, 888 F.3d at 783 (citation omitted). As elaborated in the text, the standard under New York law is different.

[11] *Espinal* refers to the potential duty in tort for "a party who enters a contract," but it is clear that a similar analysis applies even where, as here, no effort was made at trial to prove that J&J and DePuy had entered into any *(cont'd)*

Plaintiffs have not established that these cases involve any of the three situations in which liability for negligent undertaking can arise. First, plaintiffs did not offer any evidence that the supposed "services" J&J provided to DePuy "launche[d] a force or instrument of harm" that would not have otherwise existed. New York courts have explained that a defendant can only be said to have "launch[ed] a force or instrument of harm" where there is proof that the defendant "create[d] an unreasonable risk of harm to others, or increase[d] that risk" by virtue of its conduct. *Church ex rel. Smith v. Callanan Indus., Inc.*, 99 N.Y.2d 104, 112 (2002) (citing *H. R. Moch Co.*, 247 N.Y. at 168). Such a showing cannot be made absent proof that the defendant affirmatively "created or increased the risk of" the plaintiff's injury "beyond the risk" that would have existed absent the defendant's "contractual undertaking." *Id*. (refusing to impose liability based on the defendant's alleged failure to install additional guiderails on a roadway because the defendant "did nothing more than neglect to make the highway . . . safer – as opposed to less safe – than it was before the repaving and safety improvement project began"). Plaintiffs here failed to present any evidence that J&J took actions that affirmatively made the Pinnacle Ultamet "less safe" than it would have been absent J&J's alleged conduct. *Id*. Instead, plaintiffs simply argued that J&J failed to make the product safer, which is not enough to establish a claim for negligent undertaking under New York law.

Nor do the second and third circumstances identified in *Espinal* apply in these cases. Plaintiffs did not present any evidence that J&J took responsibility for any duty owed by DePuy

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(cont'd from previous page)
formal contract with respect to the Pinnacle device. Indeed, in Justice Cardozo's seminal decision on negligent undertakings in *H. R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160 (1928) (Cardozo, C.J.), on which *Espinal* relies, *see* 98 N.Y.2d at 139, the Court of Appeals made clear that a similar analysis would be entailed "irrespective of a contract," though *H. R. Moch Co.*, too, involved a contractual relationship, *see* 247 N.Y. at 164-67. If anything, the absence of a contractual duty should make the law even more circumspect about imposing a duty of care on a third party because, in the absence of a carefully defined scope of obligations provided by a contract, any connection between the third party's conduct and a possible plaintiff would be even more attenuated.

to plaintiffs, or that plaintiffs or their surgeons thought that J&J had undertaken such responsibility. Thus, plaintiffs certainly could not have proven that J&J acted in a manner that "'induced detrimental reliance'" by plaintiffs upon J&J's continued performance or that J&J displaced DePuy with respect to any duty owed to plaintiffs by DePuy. *Espinal*, 98 N.Y.2d at 140 (quoting *Eaves Brooks Costume Co. v. Y.B.H. Realty Corp.*, 76 N.Y.2d 220, 226 (1990)).

For these reasons too, J&J is entitled to judgment notwithstanding the verdict with respect to negligent undertaking.

C. The Evidence Was Insufficient To Hold J&J Liable For Aiding And Abetting.

The evidence was also insufficient to support a jury verdict against J&J on a theory of aiding and abetting. Under New York law, liability may be imposed for aiding and abetting the commission of an intentional tort if the party gave "'substantial assistance or encouragement' to the primary wrongdoer." *Pittman by Pittman v. Grayson*, 149 F.3d 111, 123 (2d Cir. 1998) (citation omitted). But "theories of collective liability only apply to intentional torts." *Portnoy v. Am. Tobacco Co.*, No. 96/16323, 1997 WL 638800, at *7 (N.Y. Sup. Ct. Sept. 26, 1997). Thus, ***actual knowledge and intent*** are required to impose aiding and abetting liability. *See Nat'l Westminster Bank USA v. Wzeksel*, 511 N.Y.S.2d 626, 629 (App. Div. 1987) (dismissing aiding and abetting claim where there were no "allegation[s] of fact . . . that defendant . . . ***knew of or intended*** to aid . . . in the commission of a fraud") (emphasis added); *Pittman by Pittman*, 149 F.3d at 123 ("In order to be liable for acting in concert with the primary tortfeasor . . . , the defendant must ***know*** the wrongful nature of the primary actor's conduct.") (emphasis added).

Moreover, courts have made clear that plaintiffs must make a ***heightened showing*** of "assistance or encouragement" in the context of a parent-subsidiary relationship so as not to undermine well-settled principles of corporate law. *See In re TMJ Implants Prods. Liab. Litig.*,

880 F. Supp. 1311, 1319-20 (D. Minn. 1995) (although parent companies "naturally wish to be supportive of their wholly owned subsidiary," "[t]his does not mean that such support should be cast as aiding and abetting the torts of . . . the subsidiary" "[u]nless the support amounts to substantial assistance"), *aff'd*, 113 F.3d 1484 (8th Cir. 1997); *Pizza Mgmt., Inc. v. Pizza Hut, Inc.*, 737 F. Supp. 1154, 1166 (D. Kan. 1990) (rejecting the notion of a civil conspiracy between a parent and subsidiary; "[b]y the very nature of their relationship, the parent corporation and its wholly owned subsidiary have shared goals, particularly economic ones"); *In re Welding Fume Prods. Liab. Litig.*, No. 1:03-CV-17000, MDL No. 1535, 2010 U.S. Dist. LEXIS 57859, at *40-41 (N.D. Ohio June 11, 2010) ("To be liable as an aider and abettor," the parent "must knowingly give 'substantial assistance' that proximately results in the harm"; "[m]ere knowledge that a tort is being committed and the failure to prevent it" does not suffice). Simply showing that the parent "lent aid or encouragement to the wrongdoer" is not enough because a parent-subsidiary relationship "by its very nature involves 'aid or encouragement.'" *King v. Eastman Kodak Co.*, 631 N.Y.S.2d 832, 833-34 (App. Div. 1995) (citations omitted). Indeed, if a reduced evidentiary burden were the rule, "the stricter burdens governing the alter ego doctrine and the policy value reflected in those burdens would be readily circumvented." *Pizza Mgmt.*, 737 F. Supp. at 1166.

In *In re TMJ Implants Products Liability Litigation*, for example, the Eighth Circuit rejected a claim for aiding and abetting against a parent company similar to plaintiffs' claims here. 113 F.3d 1484, 1495 (8th Cir. 1997). There, the plaintiffs filed suit seeking recovery for injuries sustained when the silicone in their temporomandibular joint ("TMJ") implants deteriorated. *Id*. at 1487. In addition to suing Dow Corning, the manufacturer of the implants, the plaintiffs also sued its parent company, Dow Chemical, on a theory of aiding and abetting.

Id. In support, the plaintiffs argued that the parent was "liable because of its alleged involvement in the research, testing, and development of silicone used in the TMJ implants." *Id*. Applying "generally applicable statements of the law,"[12] which mirror the requirements for liability for aiding and abetting under New York law, the Eighth Circuit held that the district court properly granted summary judgment in the parent company's favor. *Id*. at 1489, 1495.

As an initial matter, the court held that the requirement for actual knowledge was not satisfied, despite the plaintiffs' proffer of evidence of "transfers of various employees between Dow Chemical and Dow Corning" and "the sale of silicone products by Dow Chemical." *Id*. at 1495-96. As the court explained, "there [was] no indication that any information regarding the dangers of TMJ implants or any silicone implants was ever disseminated to Dow Chemical." *Id*. at 1496. Nor was there proof to support the "substantial assistance" requirement. "The record show[ed] that Dow Corning designed, manufactured, and sold the TMJ implants on its own" and "was not 'heavily dependent' on Dow Chemical in this endeavor." *Id*. (citation omitted). Moreover, the evidence the plaintiffs proffered of Dow Chemical's involvement – e.g., testing of silicone, use of Dow Chemical facilities, attendance at meetings in which the idea for a tooth implant was raised, and two articles on the toxicity of silicone – did not prove the "significant assistance" necessary, "especially when compared to the extensive efforts necessary to bring the idea for a TMJ implant to fruition." *Id*. Finally, the court observed that "[a]s Dow Corning's parent, Dow Chemical obviously wants to be supportive; however, this generic desire to support,

[12] The district court and the Eighth Circuit recognized that the plaintiffs' claims would be governed by different states' laws because their cases were transferred from all over the country for MDL coordination. *See In re TMJ Implants Prods. Liab. Litig.*, 113 F.3d at 1488-89, 1495. However, the parties did not inform either the district court or the Eighth Circuit of any differences in the applicable state laws, and therefore the parties and the courts applied "generally applicable statements of the law." *Id.*

without more, is not sufficient to form the basis for aiding and abetting liability." *Id.* (likening relationship to "normal spousal support activities").

The *TMJ Implants* court's reasoning compels entry of judgment in favor of J&J. Plaintiffs failed to proffer sufficient evidence to prove that J&J knew that DePuy's conduct purportedly constituted a breach of duty. In addition, plaintiffs' evidence fell far short of proving the requisite "substantial assistance or encouragement." To the contrary, plaintiffs only proffered evidence of a standard parent-subsidiary relationship. For example, plaintiffs' evidence showed, at most, that J&J provided feedback regarding DePuy's marketing strategies (*see* 10/3/17 Trial Tr. 120:25-122:24 (email showing Alex Gorsky, prior to becoming J&J's chief executive officer, reviewed DePuy promotional materials)); provided funding for television advertising airtime during the 2008 Olympic Games to DePuy for its "Coach K" promotional campaign (which did not mention the Pinnacle Ultamet or any other metal-on-metal hip implant) (*see* 10/2/17 Trial Tr. 230:19-232:2); provided funding for research (*see* 10/10/17 Trial Tr. 137:19-22); and helped DePuy in overseeing public relations developments (*see* 9/27/17 Trial Tr. 169:16-20 (assistance in managing DePuy's recall of the ASR hip)).

This evidence fell far short of proving that DePuy was "heavily dependent" on J&J or that J&J provided the "significant assistance" required for liability, "especially when compared to the extensive efforts necessary to bring the idea for [the Pinnacle Ultamet] implant to fruition." *In re TMJ Implants Prods. Liab. Litig.*, 113 F.3d at 1496. To the contrary, as set forth above, these were normal activities that a parent corporation has the right to undertake in order to "protect its investment by supervising and actively participating in the subsidiary's management." *In re Sch. Asbestos Litig.*, 1993 U.S. Dist. LEXIS 7984, at *37; *see also Fletcher*, 68 F.3d at 1465 (noting the plaintiff's arguments that Kodak created documents and reports on

ergonomics for its employees and that it evaluated the ergonomics of the Atex keyboards); *iSocial Media Inc. v. Bwin.Party Digital Entm't PLC*, No. 12-81278-CIV-HURLEY, 2013 U.S. Dist. LEXIS 146701, at *21 (S.D. Fla. Oct. 10, 2013) ("enjoying a 'unified or global strategy' and goals" or the parental "enforcement of goals and directives over the subsidiary" are "'normal' parent/subsidiary controls" and "not the same as 'operational control'") (citations omitted); *Kardis*, 1998 U.S. Dist. LEXIS 2963, at *16-19 ("The evidence that plaintiff has produced shows that [the parent] was involved with its wholly-owned subsidiary; such involvement does not abrogate the general rule of limited liability because parent corporations are allowed to participate in . . . subsidiaries' affairs.").[13]

For these reasons too, the Court should grant J&J judgment notwithstanding the verdict on plaintiffs' claims for aiding and abetting.

CONCLUSION

For the foregoing reasons, the Court should enter judgment notwithstanding the verdict in favor of Johnson & Johnson on all of plaintiffs' claims against it.

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[13] Plaintiffs also tried to confuse the jury by suggesting that J&J provided feedback regarding DePuy's marketing strategies through emails involving Marlene Tandy. (*See, e.g.*, 10/2/17 Trial Tr. 222:7-224:6, 229:16-230:7; 10/3/17 Trial Tr. 23:23-25:23, 29:2-31:24, 33:12-34:1, 38:21-24; 10/4/17 Trial Tr. 112:20-113:15.) However, as defense counsel repeatedly explained in an effort to correct the erroneous record, Ms. Tandy is an employee of J&J Services, not J&J, and plaintiffs proffered no evidence capable of imputing any supposed liability from the former to the latter. In any event, even if Ms. Tandy had worked for J&J, the mere provision of such feedback would likewise fall into the same category of "normal" support insufficient to establish liability. *See In re TMJ Implants Prods. Liab. Litig.*, 113 F.3d at 1496.

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CERTIFICATE OF SERVICE

I certify that on September 26, 2018, I filed this document using the Court's Electronic Case Filing ("ECF") system, which will automatically deliver a notice of electronic filing to all parties' counsel of record, who are registered ECF users. Delivery of such notice of electronic filing constitutes service of this document as contemplated by Rule 5 of the Federal Rules of Civil Procedure. *See* LR 5.1.

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