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VAIL CONSULTING, LLC

8
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **COUNTY OF SAN FRANCISCO**

11 LISE MARKHAM,

12
13 Plaintiff,

14 v.

15 DEPUY ORTHOPAEDICS, INC.; JOHNSON
& JOHNSON SERVICES, INC., JOHNSON &
16 JOHNSON, INC., THOMAS P.
SCHMALZRIED, M.D., A PROFESSIONAL
CORPORATION; VAIL CONSULTING LLC,
17 SGF MEDICAL, INC. and DOES 1 through 20,
inclusive,

18
19 Defendants.

CASE NO. CGC-11-507652

**ANSWER BY DEFENDANT VAIL
CONSULTING, LLC TO PLAINTIFFS'
COMPLAINT**

20 Defendant Vail Consulting, LLC ("Vail") hereby answers the unverified Complaint
21 ("Complaint") of Plaintiff Lise Markham ("Plaintiff") as follows:

22 **GENERAL DENIAL**

23 Pursuant to the provisions of section 431.30 of the California Code of Civil Procedure,
24 Vail denies generally and specifically each and every allegation set forth in Plaintiff's
25 Complaint, and the whole thereof, and each and every alleged cause of action therein, and
26 further denies that Plaintiff has sustained damages in the sum alleged, or any sum at all, by
27 reason of any act, breach, or omission on the part of Vail.
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1 As further and separate additional and/or affirmative defenses, Vail alleges:

2 **FIRST AFFIRMATIVE DEFENSE**

3 (Assumption of Risk)

4 1. Plaintiff knowingly and voluntarily assumed any and all risks associated with the
5 use of the product at issue in this case and such assumption of the risks bars in whole or in part
6 the damages Plaintiff seeks to recover herein.

7 **SECOND AFFIRMATIVE DEFENSE**

8 (Comparative Fault)

9 2. At all times mentioned herein Plaintiff was negligent, careless and at fault and
10 conducted herself so as to contribute substantially to her alleged injuries and damages. Said
11 negligence, carelessness, and fault of Plaintiff's bar in whole or in part the damages which
12 Plaintiff seeks to recover herein.

13 **THIRD AFFIRMATIVE DEFENSE**

14 (Intervening, Superseding Cause)

15 3. Plaintiff's alleged injuries attributable to the use of the product at issue in this
16 case, if any, were not legally caused by the product at issue, but instead were legally caused by
17 intervening and superseding causes or circumstances.

18 **FOURTH AFFIRMATIVE DEFENSE**

19 (Unforeseeable Cause)

20 4. Plaintiff's alleged injuries and damages, which Vail now denies, were due to an
21 allergic, idiosyncratic, or idiopathic reaction to the product at issue in this case or by an
22 unforeseeable illness, unavoidable accident, or preexisting condition, without any negligence or
23 culpable conduct by Vail.

24 **FIFTH AFFIRMATIVE DEFENSE**

25 (Failure to Mitigate Damages)

26 5. Plaintiff's alleged damages, if any, are barred in whole or in part by Plaintiff's
27 failure to mitigate such damages.

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1 **SIXTH AFFIRMATIVE DEFENSE**

2 (Statute of Limitations)

3 6. Plaintiff's causes of action are barred by the applicable statutes of limitations,
4 including, but not limited to, California Code of Civil Procedure § 335.1 and § 338(a), and
5 California Uniform Commercial Code § 2725.

6 **SEVENTH AFFIRMATIVE DEFENSE**

7 (No Strict Liability for Medical Device Products)

8 7. The strict liability cause of action of Plaintiff's unverified Complaint is subject to
9 the limitations placed upon the doctrine of strict product liability for a purported design defect,
10 e.g., *Artiglio v. Superior Court* (1994) 22 Cal.App.4th 1388.

11 **EIGHTH AFFIRMATIVE DEFENSE**

12 (California Proposition 51)

13 8. If Plaintiff was damaged, either as alleged in the Complaint or at all, such
14 damages were directly and proximately caused by the comparative fault of parties other than
15 Vail, whether or not parties to this action, and Plaintiff's recovery, if any, should be reduced in
16 proportion to the amount of the comparative fault of said parties. Therefore, the liability of
17 Vail, if any, for Plaintiff's non-economic loss must be apportioned in accordance with the
18 provisions of California Civil Code § 1431.2.

19 **NINTH AFFIRMATIVE DEFENSE**

20 (State-of-the-Art)

21 9. At the time of sale or delivery, the product conformed to state-of-the-art for such
22 product at that time.

23 **TENTH AFFIRMATIVE DEFENSE**

24 (Learned Intermediary)

25 10. Plaintiff's causes of action are barred by the learned intermediary doctrine.

26 **ELEVENTH AFFIRMATIVE DEFENSE**

27 (Abnormal or Improper Use)

28 11. The product supplied to Plaintiff was fit for its normal use and was without

1 defect, and all of Plaintiff's damages and injuries, if any, were caused by the alteration and/or
2 abnormal or improper use of the product in question.

3 **TWELFTH AFFIRMATIVE DEFENSE**

4 (Waiver)

5 12. Plaintiff, by her own acts or conduct, has waived and/or released all claims, if
6 any there be, against Vail.

7 **THIRTEENTH AFFIRMATIVE DEFENSE**

8 (Informed Consent, Release, and Waiver)

9 13. Plaintiff's claims are barred by the doctrines of informed consent, release, and
10 waiver.

11 **FOURTEENTH AFFIRMATIVE DEFENSE**

12 (Repose, Laches, and Estoppel)

13 14. Plaintiff's claims are barred by the statute of repose and/or by the equitable
14 doctrines of laches and estoppel.

15 **FIFTEENTH AFFIRMATIVE DEFENSE**

16 (Nonjoinder)

17 15. Plaintiff has failed to join all indispensable parties; as a result of such failure to
18 join, complete relief cannot be accorded to those already parties to the action and will result in
19 prejudice to Vail, in any possible future litigation.

20 **SIXTEENTH AFFIRMATIVE DEFENSE**

21 (Misjoinder)

22 16. Plaintiff's claims are barred, in whole or in part, because some or all of the
23 parties have been improperly joined in this action.

24 **SEVENTEENTH AFFIRMATIVE DEFENSE**

25 (Lack of Standing)

26 17. Plaintiff's claims are barred in whole or in part because Plaintiff lacks standing
27 to bring such claims.

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1 **EIGHTEENTH AFFIRMATIVE DEFENSE**

2 (Improper Venue)

3 18. Vail hereby raises, asserts, and preserves its defense of improper venue.

4 **NINETEENTH AFFIRMATIVE DEFENSE**

5 (Inconvenient Forum)

6 19. Plaintiff's claims are barred in whole or part because they have been filed in an
7 inconvenient forum or *forum non conveniens*.

8 **TWENTIETH AFFIRMATIVE DEFENSE**

9 (Setoff)

10 20. Vail is entitled to a set-off for all amounts paid, payable by or available from
11 collateral sources.

12 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

13 (Not "Basis of Bargain")

14 21. In the event that Plaintiff's alleged reliance was placed upon Vail's
15 nonconformance to an express or implied representation, this action is barred since there was no
16 reliance by Plaintiff upon representations, if any, of Vail in deciding to use the product at issue.

17 **TWENTY-SECOND AFFIRMATIVE DEFENSE**

18 (No Fraud on the FDA)

19 22. To the extent Plaintiff's claims are based on alleged misrepresentations or
20 omissions made to the FDA, such claims are barred pursuant to *Buckman v. Plaintiff's Legal*
21 *Comm.*, (2001) 531 U.S. 341.

22 **TWENTY-THIRD AFFIRMATIVE DEFENSE**

23 (Unavoidably Unsafe)

24 23. If the subject product is unsafe in any way, they are unavoidably unsafe.
25 Plaintiff's action is therefore barred by Comment K of §402A of the Restatement (Second) of
26 Torts and/or other applicable law.

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1 **TWENTIETH-FOURTH AFFIRMATIVE DEFENSE**

2 (Punitive Damages)

3 24. Vail alleges that Plaintiff's claim for punitive or exemplary damages is
4 unconstitutional in that recovery of punitive or exemplary damages in this case would violate
5 Vail's constitutional rights to due process and equal protection under the Fourteenth
6 Amendment to the Constitution of the United States and similar protections afforded by the
7 California Constitution, and any other state whose law is deemed to apply in this case, whether
8 enacted by that state's legislature or founded upon a decision or decisions of the courts.

9 **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

10 (Punitive Damages)

11 25. Vail alleges that Plaintiff's claim for punitive or exemplary damages is
12 unconstitutional in that the standards for granting and asserting punitive or exemplary damages
13 do not prohibit other plaintiffs from seeking and recovering such damages against Vail for the
14 same allegations of defect in the same product, and as such constitute multiple punishments for
15 the same alleged conduct resulting in deprivation of Vail's property without due process of law
16 and will result in unjustified windfalls for Plaintiff and Plaintiff's counsel, in violation of the
17 Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and similar
18 protections afforded by the California Constitution, and by any other state whose law is deemed
19 to apply in this case.

20 **TWENTY-SIXTH AFFIRMATIVE DEFENSE**

21 (Punitive Damages)

22 26. Plaintiff's claim for punitive damages against Vail cannot be maintained because
23 an award of punitive damages under current California law, or under the law of any other state
24 whose law is deemed to apply in this case, would be void for vagueness, both facially and as
25 applied. Among other deficiencies, there is an absence of adequate notice of what conduct is
26 subject to punishment; an absence of adequate notice of what punishment may be imposed; an
27 absence of a predetermined limit, such as a maximum multiple of compensatory damages or a
28 maximum amount, on the amount of punitive damages that a jury may impose; a risk that

1 punitive damages will be imposed retrospectively based on conduct that was not deemed
2 punishable at the time the conduct occurred; and it would permit and encourage arbitrary and
3 discriminatory enforcement, all in violation of the due process clause of the Eighth and
4 Fourteenth Amendments to the United States Constitution, the due process provisions of the
5 California Constitution, the common law and public policies of the state of California, and
6 similar protections afforded by any other state whose law is deemed to apply in this case.

7 **TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

8 (Punitive Damages)

9 27. To the extent that the law of California, or any other state whose law is deemed
10 to apply in this case permits punishment to be measured by the net worth or financial status of
11 Vail and imposes greater punishment on defendants with larger net worth, such an award would
12 be unconstitutional because it permits arbitrary, capricious, and fundamentally unfair
13 punishments, allows bias and prejudice to infect verdicts imposing punishment, allows
14 punishment to be imposed based on lawful profits and conduct of Vail in other states, and
15 allows dissimilar treatment of similarly situated defendants, in violation of the due process and
16 equal protection provisions of the Fourteenth Amendment to the United States Constitution, the
17 Commerce Clause of the United States Constitution, the state laws and Constitutional
18 provisions of California, and similar protections afforded by any other state whose law is
19 deemed to apply in this case.

20 **TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

21 (Other Defenses)

22 28. Vail is entitled to, and claims the benefit of, all defenses and presumptions set
23 forth in or arising from any rule of law or statute in this state and any other state whose law is
24 deemed to apply in this case. Vail reserves the right to assert any additional defenses which
25 may be disclosed during the course of additional investigation and discovery.

26 **PRAYER**

27 WHEREFORE, Vail prays that:

28 1. Plaintiff take nothing by reason of her Complaint;

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- 2. The Complaint against Vail be dismissed in its entirety;
- 3. Vail recovers its costs; and
- 4. This Court award such other relief as this Court may deem just and proper.

DEMAND FOR JURY TRIAL

Vail hereby demands a trial by jury.

DATED: February 25, 2011

SEDGWICK, DETERT, MORAN & ARNOLD LLP

By: 
Michael F. Healy
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VAIL CONSULTING, LLC

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