

1 **SEDGWICK, DETERT, MORAN & ARNOLD LLP**
RALPH A. CAMPILLO (BAR NO. 70376)
2 Email: ralph.campillo@sdma.com
WENDY A. TUCKER (BAR NO. 121122)
3 Email: wendy.tucker@sdma.com
801 South Figueroa Street, 19th Floor
4 Los Angeles, CA 90017-5556
Telephone: 213.426.6900
5 Facsimile: 213.426.6921

6 **SEDGWICK, DETERT, MORAN & ARNOLD LLP**
KELLY SAVAGE DAY (BAR NO. 235901)
7 Email: kelly.savageday@sdma.com
One Market Plaza
8 Steuart Tower, 8th Floor
San Francisco, CA 94105-1101
9 Telephone: 415.781.7900
Facsimile: 415.781.2635

10 Attorneys for Defendant
11 THOMAS P. SCHMALZRIED, M.D, A PROFESSIONAL
CORPORATION
12

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
14 **COUNTY OF SAN FRANCISCO**

15 LISE MARKHAM,

16 Plaintiff,

17 v.

18 DEPUY ORTHOPAEDICS, INC.; JOHNSON
& JOHNSON SERVICES, INC.; JOHNSON
19 & JOHNSON, INC.; THOMAS P.
SCHMALZRIED, M.D., A PROFESSIONAL
20 CORPORATION; VAIL CONSULTING LLC;
SGF MEDICAL, INC.; and DOES 1 through
21 20, inclusive,

22 Defendants.
23

CASE NO. CGC-11-507652

**ANSWER BY DEFENDANT THOMAS P.
SCHMALZRIED, M.D., A
PROFESSIONAL CORPORATION TO
COMPLAINT**

DEMAND FOR JURY TRIAL

24 Defendant Thomas P. Schmalzried, M.D, a Professional Corporation (hereinafter simply
25 Dr. Schmalzried), hereby answers the complaint of plaintiff Lise Markham as follows:

26 **GENERAL DENIAL**

27 Pursuant to the provisions of section 431.30 of the California Code of Civil Procedure,
28 Dr. Schmalzried denies generally and specifically each and every allegation set forth in

1 plaintiff's complaint, and the whole thereof, and each and every alleged cause of action therein,
2 and further denies that plaintiff has sustained damages in the sum alleged, or any sum at all, by
3 reason of any act, breach, or omission on the part of Dr. Schmalzried.

4 As further and separate additional and/or affirmative defenses, Dr. Schmalzried alleges:

5 **FIRST AFFIRMATIVE DEFENSE**

6 (Assumption of Risk)

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

10 **SECOND AFFIRMATIVE DEFENSE**

11 (Comparative Fault)

12 2. At all times mentioned herein, plaintiff was negligent, careless and at fault and
13 conducted herself so as to contribute substantially to her alleged injuries and damages. Said
14 negligence, carelessness, and fault of plaintiff bar in whole or in part the damages that plaintiff
15 seeks to recover herein.

16 **THIRD AFFIRMATIVE DEFENSE**

17 (Intervening, Superseding Cause)

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

21 **FOURTH AFFIRMATIVE DEFENSE**

22 (Unforeseeable Cause)

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

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FIFTH AFFIRMATIVE DEFENSE

(Failure to Mitigate Damages)

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

SIXTH AFFIRMATIVE DEFENSE

(Statute of Limitations)

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

SEVENTH AFFIRMATIVE DEFENSE

(No Strict Liability for Medical Device Products)

7. The strict liability cause of action is subject to the limitations placed upon the doctrine of strict product liability for a purported design defect set forth in *Artiglio v. Superior Court* (1994) 22 Cal.App.4th 1388.

EIGHTH AFFIRMATIVE DEFENSE

(California Proposition 51)

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

NINTH AFFIRMATIVE DEFENSE

(State-of-the-Art)

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

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1 parties have been improperly joined in this action.

2 **SEVENTEENTH AFFIRMATIVE DEFENSE**

3 (Lack of Standing)

4 17. Plaintiff's claims are barred in whole or in part because plaintiff lacks standing
5 to bring such claims.

6 **EIGHTEENTH AFFIRMATIVE DEFENSE**

7 (Improper Venue)

8 18. Dr Schmalzried hereby raises and preserves his defense of improper venue.

9 **NINETEENTH AFFIRMATIVE DEFENSE**

10 (Inconvenient Forum)

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

13 **TWENTIETH AFFIRMATIVE DEFENSE**

14 (Setoff)

15 20. Dr. Schmalzried is entitled to a set-off for all amounts paid, payable by or
16 available from collateral sources.

17 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

18 (Not "Basis of Bargain")

19 21. In the event that plaintiff's alleged reliance was placed upon Dr. Schmalzried's
20 nonconformance to an express or implied representation, this action is barred since there was no
21 reliance by plaintiff upon representations, if any, of Dr. Schmalzried in deciding to use the
22 product at issue.

23 **TWENTY-SECOND AFFIRMATIVE DEFENSE**

24 (No Fraud on the FDA)

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

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1 of any other state whose law is deemed to apply in this case, would be void for vagueness, both
2 facially and as applied. Among other deficiencies, there is an absence of adequate notice of what
3 conduct is subject to punishment; an absence of adequate notice of what punishment may be
4 imposed; an absence of a predetermined limit, such as a maximum multiple of compensatory
5 damages or a maximum amount, on the amount of punitive damages that a jury may impose; a
6 risk that punitive damages will be imposed retrospectively based on conduct that was not deemed
7 punishable at the time the conduct occurred; and it would permit and encourage arbitrary and
8 discriminatory enforcement, all in violation of the due process clause of the Eighth and
9 Fourteenth Amendments to the United States Constitution, the due process provisions of the
10 California Constitution, the common law and public policies of the state of California, and
11 similar protections afforded by any other state whose law is deemed to apply in this case.

12 **TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

13 (Punitive Damages)

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

25 **TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

26 (Other Defenses)

27 28. Dr. Schmalzried is entitled to, and claims the benefit of, all defenses and
28 presumptions set forth in or arising from any rule of law or statute in this state and any other

1 state whose law is deemed to apply in this case. Dr. Schmalzried reserves the right to assert any
2 additional defenses that may be disclosed during the course of additional investigation and
3 discovery.

4 **PRAYER**

5 WHEREFORE, Dr. Schmalzried prays that:

- 6 1. Plaintiff take nothing by reason of her complaint;
7 2. The Complaint against Dr. Schmalzried be dismissed in its entirety;
8 3. Dr. Schmalzried recovers his costs and attorney's fees; and
9 4. This Court awards such other relief as this Court may deem just and proper.

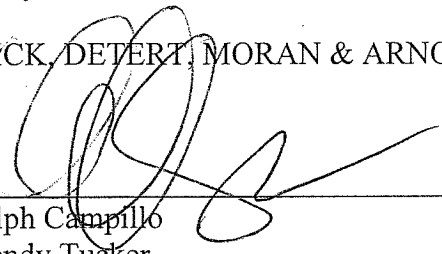
10 **DEMAND FOR JURY TRIAL**

11 Dr. Schmalzried hereby demands a trial by jury.

12 DATED: February 24, 2011

13 SEDGWICK, DETERT, MORAN & ARNOLD LLP

14 By: _____

15 
16 Ralph Campillo
17 Wendy Tucker
18 Kelly Savage Day
19 Attorneys for Defendants
20 THOMAS P. SCHMALZRIED, M.D.,
21 A Professional Corporation

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Sedgwick, Detert, Moran & Arnold LLP, One Market Plaza, Steuart Tower, 8th Floor, San Francisco, California 94105. On February 24, 2011, I served the within document(s):

**ANSWER BY DEFENDANTS THOMAS P. SCHMALZRIED, M.D., A
PROFESSIONAL CORPORATION TO COMPLAINT**

DEMAND FOR JURY TRIAL

- MAIL - by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below.

Kenneth M. Seeger
Brian J. Devine
Seeger • Salvas LLP
455 Market Street, Suite 1530
San Francisco, CA 94105

Attorneys For Plaintiff
LISÉ MARKHAM

Michael F. Healy, Esq.
Dennis Raglin, Esq.
Sedgwick, Detert, Moran & Arnold LLP
One Market Plaza
Steuart Tower, 8th Floor
San Francisco, CA 94105-1101

Attorneys For Defendants
VAIL CONSULTING, LLC

Michael C. Zellers
Mollie F. Benedict
Sarah C. Trankiem
Tucker Ellis & West LLP
515 South Flower Street
Forty-Second Floor
Los Angeles, CA 90071-2223

Attorneys For Defendants
**JOHNSON & JOHNSON SERVICES, INC.,
JOHNSON & JOHNSON, INC., AND DEPUY
ORTHOPAEDICS, INC.**

Thomas W. Pulliam, Jr.
Michelle A. Childers
Nathan D. Cardozo
Drinker Biddle & Reath LLP
50 Fremont Street, 20th Floor
San Francisco, CA 94105-2235

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

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Executed on February 24, 2011, at San Francisco, California.



Marlene Adelman