IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: DEPUY ORTHOPAEDICS,	§	
INC. PINNACLE HIP IMPLANT	§	MDL Docket No.
PRODUCTS LIABILITY	§	
LITIGATION	§	3:11-MD-2244-K
	§	
--	§	
This Order Relates To:	§	
Aoki – 3:13-cv-1071-K	§	
Klusmann – 3:11-cv-2800-K	§	
Peterson – 3:11-cv-1941-K	§	
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ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' PARTIAL MOTIONS TO DISMISS THE COMPLAINT AND MOTION TO AMEND SECOND AMENDED ORDER ON BELLWETHER TRIALS

Before the Court are Defendants' Partial Motions to Dismiss the Complaint ("Motions to Dismiss") of three bellwether claimants, Docket No. 20 in *Aoki* (3:13-cv-1071), Docket No. 29 in *Klusmann* (3:11-cv-2800), and Docket No. 31 in *Peterson* (3:11-cv-1941), pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Motions to Dismiss address claims arising out of Defendants' retention of Dr. Heinrich, Plaintiffs' treating physician, as an expert witness. Specifically, Defendants claim that Plaintiffs' amended complaints fail to state a claim for (1) tortious interference with the physician-patient relationship; (2) vicarious liability of defendants for Dr. Heinrich's breach of fiduciary duty; and (3) exemplary damages in excess of the statutory cap based on Defendants' alleged bribery of Dr. Heinrich.

Defendants have also filed a Motion to Amend Second Amended Order on Bellwether Trials ("Motion to Amend"), Docket No. 569 in 3:11-md-2244, contending that the *Peterson, Klusmann,* and *Aoki* trials are not representative of the claims pool because these plaintiffs were treated by Dr. Heinrich. For the reasons set forth herein, Defendants' Motions to Dismiss are granted in part and denied in part. Defendants' Motion to Amend is denied.

I. Factual and Procedural Background

Pursuant to 28 U.S.C. § 1407, the United States Judicial Panel on Multidistrict Litigation ordered coordinated or consolidated pretrial proceedings in this Court of all actions involving the Pinnacle Acetabular Cup System hip implants ("Pinnacle Device") manufactured by Defendant DePuy Orthopaedics, Inc. The DePuy Pinnacle multidistrict litigation ("MDL") involves the design, development, manufacture, and distribution of the Pinnacle Device. The Pinnacle Device is used to replace diseased hip joints and was intended to remedy conditions such as osteoarthritis, rheumatoid arthritis, avascular necrosis, or fracture, and to provide patients with pain-free natural motion over a longer period of time than other hip replacement devices. Presently there are over eight thousand cases in this MDL involving Pinnacle Devices made with sockets lined with metal, ceramic, or polyethylene.

Pursuant to an Order of this Court dated August 26, 2015, the *Aoki*, *Christopher*, *Greer*, *Klusmann*, and *Peterson* matters were selected as bellwether matters

to be prepared for trial. Defendants' Motions to Dismiss address the amended complaints of the *Aoki, Klusmann,* and *Peterson* bellwether matters. These Plaintiffs initially alleged, among other things, that they suffered various injuries as a result of being implanted with a Pinnacle Device sold by Defendants. On August 21, 2015, Plaintiffs Aoki, Klusmann, and Peterson amended their complaints and added causes of action related to Defendants' retention of Dr. Eric Heinrich, Plaintiffs' orthopedic surgeon, as an expert in the bellwether cases. Specifically, Klussmann and Peterson amended their complaints to assert causes of action for (1) tortious interference with the physician-patient relationship by defendants and (2) vicarious liability of Defendants for Dr. Heinrich's breach of fiduciary duty, and Aoki, Klusmann, and Peterson each amended to allege that the statutory cap on exemplary damages should be set aside because Defendants' relationship with Dr. Heinrich constituted "commercial bribery."

Defendants' assert that these causes of action do not exist under Texas law, and, even if they did, Plaintiffs have not and cannot plead the requisite elements. Defendants likewise assert that Plaintiffs' commercial bribery claim must meet the pleading standards of Rule 9(b), which Plaintiffs have not done. In the alternative, Defendants assert that all of Plaintiffs' claims related to Dr. Heinrich are barred by the litigation privilege.

In a separate motion, Defendants assert that the *Peterson, Klusmann,* and *Aoki* matters should be removed from the identified list of bellwether cases to be prepared

for trial due to the role of Dr. Heinrich—Defendants' retained expert—as a treating physician of these Plaintiffs.

I. Legal Standard

A court reviewing a motion to dismiss pursuant to Rule 12(b)(6) must construe the complaint in favor of the plaintiff and take all well-pleaded facts as true. *Kane Enterprises v. MacGregor (USA), Inc.*, 322 F.3d 371, 374 (5th Cir. 2010). Plaintiffs must provide the grounds of their entitlement to relief, which "requires more than labels and conclusions." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 564 (2007). "[A] formulaic recitation of the elements of a cause of action will not do." *Id.* "*Twombly* . . . requires that a complaint allege enough facts to state a claim that is plausible on its face." *St. Germain v. Howard,* 556 F.3d 261, 263 n. 2 (5th Cir.2009) (citing *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir.2007)). Rule 12(b)(6) also allows dismissal when "a defendant attacks the complaint because it fails to state a legally cognizable claim." *Ed & F Man Biofuels Ltd. v. MV FASE*, 728 F. Supp. 2d 862, 866 (S.D. Tex. 2010) (quoting *Ramming v. United States,* 281 F.3d 158, 161 (5th Cir.2001), *cert. denied sub nom. Cloud v. United States,* 536 U.S. 960 (2002)).

II. Analysis

A. Plaintiffs Sufficiently Pled Tortious Interference with Physician-Patient Relationship

Defendants assert that Texas law does not recognize a cause of action for "tortious interference with a physician-patient relationship," and, even if it did,

Plaintiffs fail to sufficiently allege the requisite elements of intentionality or causation and loss.

1. *Tortious interference with physician-patient relationship is a cognizable claim.*

Plaintiffs acknowledge that the Texas Supreme Court has not analyzed a claim for tortious interference with a physician-patient relationship brought by a patient. However, the Court does not find any Texas jurisprudence foreclosing this type of action. Instead, Texas Courts have acknowledged that tortious interference with a physician/patient relationship may exist for physicians. *See Moore v. Metro*, 604 S.W.2d 487, 491 (Tex. Civ. App.—Dallas 1980, no writ) (acknowledging a claim brought by a physician for tortious interference with the doctor-patient relationship but finding it indistinguishable from a claim for libel); *see also Hurlbut v. Gulf Atlantic Life Ins. Co.*, 749 S.W.2d 762 (Tex. 1987). Likewise, at least two district courts sitting in diversity recognized the potential viability of a claim for tortious interference with the physician-patient relationship brought by patient plaintiffs. *See Chapman v. Pacificare of Tex., Inc.*, No. Civ.A. H-02-2188, 2005 WL 1155108, at *7 (S.D. Tex. Apr. 18, 2005); *Garcia v. Home Depot U.S.A., Inc.*, No. CA 3:98-CV-3408R, 1999 WL 362787, at *6 (N.D. Tex. June 2, 1999) ("the fact that Defendant has only been able to find tortious interference cases under Texas law in which the party asserting the claim was the doctor does not automatically preclude Garcia, as the patient, from bringing this type of claim"); *see also Van v. Anderson*, 199 F. Supp. 2d

550, 565 (N.D. Tex. 2002) (acknowledging that a cause of action may exist "where doctors have sued third parties for interfering with their patient base").

Seeing no bar to the cause of action, the question then becomes, whether the elements have been properly pled. Other courts addressing this type of action have considered the elements used in tortious interference with contracts and prospective business relationships. *See Garcia,* 1999 WL 362787, at *6. Those elements include:

(1) an enforceable contract;

(2) willful and intentional interference with the contract;

(3) the interference proximately caused damage;

(4) actual damage or loss.

Butnaru v. Ford Motor Co., 84 S.W.3d 198, 207 (Tex. 2002); *Holloway v. Skinner*, 898 S.W.2d 793, 794-95 (Tex. 1995). The Court addresses each element in turn.

2. *Plaintiffs pled the existence of a contract between Plaintiffs and Dr. Heinrich for medical services.*

Defendants claim that Plaintiffs fail to allege a contract that Defendants could have caused Dr. Heinrich to breach. As a case relied on by Defendants explains, the "relation of physician and patient is contractual and wholly voluntary, created by agreement, express or implied." *Childs v. Weis*, 440 S.W.2d 104, 106-07 (Tex. App.—Dallas 1969, no writ). The requisite elements of a contract include "promise, reliance, and an agreement." *Zorilla v. Aypco Constr. II., LLC*, -- S.W.3d. --, 2015 WL 3641299, at *10 (Tex. 2015).

Plaintiffs' complaints state that they engaged Dr. Heinrich to serve as their treating physician, Dr. Heinrich agreed to provide care as an orthopedic surgeon for hip surgeries, and that in consideration of this, Plaintiffs agreed to pay Dr. Heinrich for his services. *See* Klusmann Am. Compl. ¶ 134; Peterson Am. Compl. ¶ 132. Plaintiffs further alleged that as a term or condition of the agreement, they expected Dr. Heinrich to maintain confidentiality of their medical records and not use them for his own monetary gain at their expense. *Id.* Even if this contract were oral, Texas courts recognize a claim for tortious interference with both an oral contract and a contract terminable at will. *See Sterner v. Marathon*, 767 S.W.2d 686, 689 (Tex. 1989); *Wohlstein v. Aliezer*, 321 S.W. 3d 765, 771 (Tex. App.—Houston [14th Dist.] 2010, no pet.); *Mobile Am. Housing Corp. v. Schroder*, No. 01-93-01062-CV, 1995 WL 489172, at *5, *7 (Tex. App.—Houston [1st Dist.] Aug. 17, 1995, no pet.).

3. *Plaintiffs pled willful and intentional interference with the contract.*

Plaintiffs must also allege that Defendants willfully and intentionally interfered with the contract. Courts have interpreted this as requiring a showing of malice. *Davis v. W. Cmty. Hosp.*, 755 F.2d 455, 466 (5th Cir. 1985). In other words, Plaintiffs must plead that Defendants specifically intended to disrupt their physician-patient relationships. Plaintiffs have pled that "Defendants secretly solicited Dr. Heinrich's services as a consulting expert in this MDL despite knowing that Dr. Heinrich's prior and ongoing treatment of patients, including Plaintiff [], was directly related to this litigation." Klusmann Am. Compl. ¶ 135; Peterson Am. Compl. ¶ 133.

Plaintiffs further pled that "Defendants knew that engaging Dr. Heinrich to perform consulting expert services would interfere with his physician-patient relationship" and nevertheless "intentionally eliminated Dr. Heinrich's ability to serve [Plaintiffs'] best interests" by "compel[ing] Dr. Heinrich to conduct his treatment . . . and documentation regarding [Plaintiffs'] treatment in such a way as to not implicate the Pinnacle hip implant as a cause of [Plaintiffs'] symptoms, ailments, and need for revision surgery." *Id.* Plaintiffs accordingly allege willful conduct directed at interfering with their specific contracts.

4. *Plaintiffs have pled actual loss.*

Plaintiffs must sufficiently plead that the intentional interference with the contract caused actual damage or loss. Plaintiffs pled damages for 1) mental anguish, 2) decreased value of treatment, and 3) costs incurred by Plaintiffs to locate new treating physicians. Klusmann Am. Compl. ¶ 137-41; Peterson Am. Compl. ¶ 137-39.

The Texas Supreme Court has foreclosed mental anguish damages for tortious interference with a contract. *Creditwatch, Inc. v. Jackson*, 157 S.W.3d 814, 818 (Tex. 2005). Plaintiffs acknowledge that mental anguish damages are not normally recoverable based on a breach of contract, but assert that they can be recovered in certain noncommercial subjects. Mental anguish damages are compensable for breach of a duty "arising out of certain special relationships." *City of Tyler v. Likes*, 962 S.W.2d 489, 496 (Tex. 1997). In so holding, the Texas Supreme Court held that

mental anguish could be compensable for breach of a duty arising out of a physician-patient relationship, but explained that this is because "most physician's negligence also causes bodily injury." *Id.* The Court also recognized the ability to recover mental anguish damages in a "very limited number of contracts dealing with intensely emotional noncommercial subjects." *Id.* (citing, for example, mental anguish caused by a funeral home performing an improper burial or delivering news of a family emergency); *see Pat H. Foley & Co. v. Wyatt*, 442 S.W.2d 904, 907 (Tex. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.) (explaining that "the tenderest feelings of the human heart center around the remains of the dead.") While the evidence at trial may reveal that the Plaintiffs did not actually suffer damages of the sort contemplated by this narrow exception, they have sufficiently pled damage arising out of a noncommercial subject that could give rise to mental anguish damages.

The basic measure of actual damages for tortious interference with a contract is the same as the measure of damages for breach of the contract interfered with: to put the plaintiff in the same economic position he would have been in had the contract interfered with been actually performed. *Am. Nat. Petroleum Co. v. Transcon. Gas Pipe Line Corp.*, 798 S.W.2d 274, 278 (Tex. 1990). Plaintiffs claim that they suffered economic damages from decreased value of medical care and having to locate a new physician. Klusmann Am. Compl. ¶ 139-40; Peterson Am. Compl. ¶ 137-38. While the evidence at trial may reveal that these damages are de minimus, Plaintiffs sufficiently plead loss of economic damages in having to invest time and money in

locating and establishing a relationship with a new physician. Likewise, Plaintiffs may be able to prove that Defendants intentional interference caused the value of their medical care to decrease, causing damage to Plaintiffs.

B. Vicarious Liability for Dr. Heinrich's Breach of Fiduciary Duty May Be Based on His Alleged Breach of Confidentiality

The elements of a fiduciary duty claim are: (1) a fiduciary relationship between the plaintiff and defendant; (2) breach of that fiduciary duty; and (3) injury to the plaintiff or benefit to the defendant. *Jones v. Blume*, 196 S.W.3d 440, 447 (Tex. App.—Dallas 2006, pet. denied). Plaintiffs allege that Dr. Heinrich, in acting as an agent for Defendants, breached his fiduciary duty by (1) failing to disclose his role as an expert while consulting with Defendants to defeat Plaintiffs' claims; (2) voluntarily serving as a retained expert witness in litigation directly related to Dr. Heinrich's treatment of Plaintiffs; and (3) breaching his duty of confidentiality and trust by using Plaintiffs' confidential and privileged medical records to aid in his role as expert witness. Klusmann Am. Compl. ¶ 145; Peterson Am. Compl. ¶ 143.

Defendants assert that there is no legally enforceable fiduciary duty between Dr. Heinrich and his patients, and, even if there was, Plaintiffs have not plead a legally cognizable claim, nor can Defendants be vicariously liable for Dr. Heinrich's actions.

1. *Physicians may owe a fiduciary duty to patients.*

The existence of a common law duty is a question of law. *Humble Sand & Gravel, Inc. v.* Gomez, 146 S.W.3d 440, 447 (Tex. 2004). Texas law acknowledges

that in certain circumstances physicians owe a fiduciary duty to their patients. *See Savage v. Psychiatric Inst. of Bedford, Inc.*, 965 S.W.2d 745, 754 (Tex. App.—Fort Worth 1998, pet. denied); *Thames v. Dennison*, 821 S.W.2d 380, 384 (Tex. App. — Austin 1991, pet. denied). The question thus becomes, did Plaintiffs plead a viable legal claim for breach of such a duty.

2. *There is no legal duty to avoid or disclose expert engagements that gives rise to breach of fiduciary duty.*

Plaintiffs cite two cases to support the existence of a physician's duty to disclose. However, both deal with a physician's duty to disclose his own negligence, not the duty to disclose potentially conflicting expert engagements. *See Evans v. Conlee*, 741 S.W.2d 504, 505 (Tex. App.—Corpus Christi 1987, no pet.) (physician-patient relationship imposed a duty to disclose existence of negligent act to patient); *Savage*, 965 S.W.2d at 754 ("the physician-patient relationship gives rise to a fiduciary relationship, and thus the duty to make certain disclosures" when discussing the duty to disclose defendant's negligence).

In the absence of any authority, the Court is reticent to apply a legal duty to disclose directly to one's patients all professional engagements that physicians have with pharmaceutical companies. Likewise, there is no legal duty to avoid all engagements with pharmaceutical companies. Physicians are often compensated by pharmaceutical companies for assisting in research, giving presentations, or acting as an expert witness for a party to a litigation. Plaintiffs have not offered any legal authority to support that the receipt of compensation from pharmaceutical

companies to act as expert witnesses against their own clients, standing alone, constitutes a breach of fiduciary duty giving rise to legal remedy.

3. *Plaintiffs may recover for breach of confidentiality and alteration of medical records.*

While the Court does not find a breach of fiduciary duty based on failure to disclose has been sufficiently pled, Plaintiffs also pled that Dr. Heinrich breached a duty of confidentiality and altered medical records. Klusmann Am. Compl. ¶ 145; Peterson Am. Compl. ¶ 143. Plaintiffs claim that Dr. Heinrich used Plaintiffs' medical information without obtaining their consent to both defeat Plaintiffs' claims and to aid Defendants in ongoing litigation. Texas courts recognize a cause of action for a physician's breach of confidentiality. *Sloan v. Farmer*, 217 S.W.3d 763, 767 (Tex. App.—Dallas 2007, pet. denied); *TTHR, L.P. v. Coffman*, 338 S.W.3d 103, 108 (Tex. App.—Fort Worth 2011, no pet.). A claim may also exist for breach of fiduciary duty in altering Plaintiffs' medical records to further Defendants' cause in a litigation. *See id.* Thus, Plaintiffs' claim for breach of a fiduciary duty based on Dr. Heinrich's alleged breach of confidentiality and alteration of medical records survives, assuming Plaintiffs have sufficiently pled vicarious liability, as discussed below.

4. *Defendants may be liable for allegedly directing Dr. Heinrich's tortious actions.*

Texas jurisprudence does not acknowledge an agency relationship simply because a party is retained as an expert in a litigation. *See Horizon Offshore Contractors, Inc. v. Aon Risk Servs. of Tex., Inc.*, 283 S.W.3d 53, 70 (Tex. App.—Houston [14th

Dist.] 2009, pet. denied). However, Plaintiffs do not merely plead that Dr. Heinrich is serving as a testifying expert in this litigation. Plaintiffs also allege that in order to perform his duties as an expert, Defendants required Dr. Heinrich to employ the unauthorized use of Plaintiffs' medical information and histories. Klusmann Am. Compl. ¶ 145-46; Peterson Am. Compl. ¶ 143-44. Assuming, as we must, that this is true, Dr. Heinrich would be unable to perform his role for Defendants without breaching his duty of confidentiality. "[A]n employer may become liable for the independent contractor's tortious acts only if the employer controls the details or methods of the independent contractor's work to such an extent that the contractor cannot perform the work as it chooses." *Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788, 791 (Tex. 2006) (citing *Coastal Marine Serv. of Tex., Inc. v. Lawrence*, 988 S.W.2d 223, 226 (Tex. 1999)). According to the complaints, Defendants directed Dr. Heinrich to use Plaintiffs' confidential medical records to defeat Plaintiffs' claims. Klusmann Am. Compl. ¶ 135; Peterson Am. Compl. ¶ 133. Plaintiffs sufficiently pled that Defendants were controlling Dr. Heinrich's alleged breach of confidentiality such that Defendants may be held vicariously liable for his actions.

C. Plaintiffs Sufficiently Pled Commercial Bribery.

Texas law imposes a statutory limit on exemplary damages. Tex. Civ. Prac. & Rem. Code Ann. § 41.008(b). However, this statutory limit does not apply when a plaintiff's request for exemplary damages is based on felonious conduct, including commercial bribery. *Id.* at § 41.008(c). Plaintiffs allege that Defendants' alleged

tortious interference with physician-patient relationship amounts to commercial bribery, thus negating the application of the statutory limit on exemplary damages. Klusmann Am. Compl. ¶ 156-60; Peterson Am. Compl. ¶ 154-58. Defendants assert that Plaintiffs' claims are based on fraud and fail because they cannot meet the heightened pleading standards required to plead fraud in Federal Rule of Civil Procedure 9(b). The Court holds that Plaintiffs sufficiently pled the elements of commercial bribery regardless of whether Rule 9(b) applies.

The Rule 9(b) standard applies when the predicate acts of a claim sound in fraud. *See Cypress/Spanish*, 814 F. Supp. 2d at 711 (citing *Bonton v. Archer Chrysler Plymouth*, 889 F. Supp. 995 (S.D. Tex. 1995)); *cf. In re DJK Residential, LLC*, 416 B.R. 100, 104-5 (Bankr. S.D.N.Y. 2009). When subjected to Rule 9(b), a complaint must set out "the essentials of the first paragraph of a newspaper story, namely the who, what, when, where, and how." *Melder v. Morris*, 27 F.3d 1097, 1100 n.5 (5th Cir. 1994). The "focal point" of the courts inquiry should be on whether the pleading satisfies the Rule's purpose. *Cypress/Spanish*, 814 F. Supp. 2d at 712 (citing *Mitchell Energy Corp. v. Martin*, 616 F. Supp. 924, 927 (S.D. Tex. 1985)). "Rule 9(b) does not 'reflect a subscription to fact pleading' and requires only 'simple, concise, and direct' allegations of the 'circumstances constituting fraud,' which after *Twombly* must make relief plausible, not merely conceivable, when taken as true." *United States v. Kanneganti*, 565 F.3d 180, 186 (5th Cir. 2009) (quoting *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 178 (5th Cir. 1997)).

There are five elements to the crime of commercial bribery: 1) intentionally or knowingly; 2) offering, conferring, or agreeing to confer a benefit; 3) to a fiduciary; 4) without the consent of the fiduciary's beneficiary; and 5) acceptance of that benefit would be a violation of Subsection (b). Tex. Penal Code Ann. § 32.43(c). An allegation of an offense under 32.43(c) does not require proof of any agreement; the offense is complete upon making the offer. *Adegbenro v. State*, 36 S.W.3d 658, 660 (Tex. App.—Houston [1st Dist.] 2001). The crime of commercial bribery also falls under Subsection D of Chapter 32, entitled "Other Deceptive Practices." Tex. Penal Code Ann. § 32.43(b).

Meeting the elements of a claim for commercial bribery thus necessitates that Plaintiffs plead fraud. Plaintiffs pled that Defendants offered to pay Plaintiffs' treating physician, a fiduciary, for undisclosed consulting services in relation to this lawsuit, during the pendency of the litigation, and intentionally compromised the physician's ability to maintain the trust of the plaintiffs and continue treating them ethically, forcing Plaintiffs to engage a new physician. Klusmann Am. Compl. ¶ 140; Peterson Am. Compl. ¶ 138. Plaintiffs have sufficiently pled the elements for commercial bribery, and have, in turn, met the pleading requirements of Rule 9(b).

D. The Litigation Privilege Does Not Apply.

Texas law recognizes a privilege for any communication, oral or written, uttered or published in the due course of a judicial proceeding. *Ed & F Man Biofuels Ltd. v. MV FASE*, 728 F. Supp. 2d 862, 868 (S.D. Tex. 2010). As the case relied on

by Defendants, *Ed & F Man Biofuels Ltd.*, explains, the litigation privilege "is based on a public policy that 'the administration of justice requires full disclosure from witnesses, unhampered by fear of retaliatory suits for defamation.'" *Id.* at 869 (quoting *Perdue, Brackett, Flores, Utt & Burns v. Linebarger, Goggan, Blair, Sampson & Meeks, LLP*, 291 S.W.3d 448, 451 (Tex. App.—Forth Worth 2009, no pet.)). However, Defendants do not invoke the privilege to allow Dr. Heinrich the ability to fully disclose his opinions related to this litigation, but, rather, as a shield to avoid liability for allegedly tortious interference.

Ed & F explains that for tortious interference claims, the litigation privilege "seeks to avoid liability based upon a claimed interest that is being impaired or destroyed by the plaintiff's contract. Such defenses, which constitute a confession and avoidance, are affirmative in nature." *Ed & F Man Biofuels Ltd.*, 728 F. Supp. 2d at 869 (quoting *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989)). In this context, "the privilege of legal justification or excuse in the interference of contractual relations is an affirmative defense upon which the defendant has the burden of proof," not a privilege that bars Plaintiffs' claims. *Id.* The question is not whether Dr. Heinrich's communications are privileged, but whether Defendants' interference with Dr. Heinrich's and Plaintiffs' contractual relations is legally justified. Defendants may assert this as an affirmative defense.

III. Plaintiffs' Claims Do Not Necessitate an Amended Order on Bellwether Trials

In a related motion, Defendants contend that the addition of the above-mentioned causes of action reveal that the *Aoki, Klusmann,* and *Peterson* cases are not representative of the claims pool and that instead, the trial of these matters and their claims challenging Defendants' retention of Dr. Heinrich, would "result in a sideshow" about Defendants' expert, not a trial about the Pinnacle Device. Dr. Heinrich's relationship with DePuy is longstanding; beginning in 2005, DePuy contracted with Dr. Heinrich to provide services such as training and educational programs related to numerous DePuy hip and knee products. In or around August 2013, Defendants retained Dr. Heinrich as an expert in this MDL.

In addition to these roles, Dr. Heinrich was also the implanting and revising surgeon for Plaintiff Klusmann with respect to his Pinnacle Device, the implanting surgeon with respect to Plaintiff Aoki's Pinnacle Device, and the revising surgeon for Plaintiff Peterson's Pinnacle Device. Defendants contend that the *Aoki, Klusmann,* and *Peterson* matters are no longer representative, as they involve the unique claims addressed in this Order, and the examination of Dr. Heinrich will take on a different character than an ordinary treating physician's examination. However, as Plaintiffs note, Dr. Heinrich's role is not unique; Dr. Heinrich served as a treating physician for numerous other MDL plaintiffs, and several other MDL plaintiffs have been treated by other orthopedic surgeons designated as experts by Defendants.

Defendants have simultaneously elected to retain treating physicians as experts in this matter while they contend that trials involving such treating physicians would be confusing and unrepresentative. No two matters will be identical, however, and Defendants have not identified any unique "outlier" situations meriting an amendment to the current Bellwether Order.

V. Conclusion

For the foregoing reasons, the Court DISMISSES WITH PREJUDICE Plaintiffs' claims for breach of fiduciary duty based on Dr. Heinrich's alleged failure to disclose his status as a retained expert. As to all other positions, the Court DENIES Defendants' Motions to Dismiss. Defendants may amend their live pleadings to assert legal justification for excuse in the interference of contractual relations, should they wish to do so, within seven (7) days of the date of this Order.

The Court further DENIES Defendants' Motion to Amend Second Amended Order on Bellwether Trials.

SO ORDERED.

Signed January 5th, 2016.

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UNITED STATES DISTRICT JUDGE