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Hennepin County Civil, MN

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT
Judge Laurie J. Miller

Jamie Anderson and Vanessa Anderson,	Court File No. 27-CV-13-9731
Brian Braden and Julia Braden,	Court File No. 27-CV-13-9920
Alieceno Bryant,	Court File No. 27-CV-13-9863
Jason Graham and Mary Marchell,	Court File No. 27-CV-13-9865
Jeisa J. Jones and Steven G. Jones,	Court File No. 27-CV-13-3715
Wayne Van Camp, Plaintiffs, vs. Medtronic, Inc. and Medtronic Sofamor Danek USA, Inc., Defendants.	Court File No. 27-CV-13-9776 **ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS**

The six above-entitled matters came on for hearing before Laurie J. Miller, undersigned Judge of District Court, on July 22, 2014, pursuant to Defendants' Combined Motion to Dismiss Plaintiffs' First Amended Complaints. Stuart Goldenberg, Esq. and Marlene Goldenberg, Esq. appeared on behalf of Plaintiffs.[1] Jason LaFond, Esq. and Michael Nilan, Esq. appeared on behalf of Defendants. Based upon all of the files, records, and proceedings herein, together with the arguments of counsel,

[1] Plaintiff Jason Graham's spouse is designated in some documents, such as the original complaint filed on May 22, 2013, and Defendants' Combined Motion to Dismiss filed on May 15, 2014, as "Mary Marchell," and in other documents, such as the First Amended Complaint filed on March 11, 2014, as "Mary Graham." Since she was designated as "Mary Marchell" in the original case caption, and no motion has been made to amend the case caption, the Court will use that name.

IT IS HEREBY ORDERED:

1. Defendants' Motions to Dismiss are GRANTED as to the Fourth, Fifth, and, where applicable, the Eleventh Claims for Relief in each of the First Amended Complaints in all six of the above-captioned matters.

2. The remaining Claims for Relief in each of the First Amended Complaints are dismissed with prejudice based on federal preemption, as ordered in the Court's August 7, 2013 Order in *Lawrence v. Medtronic et al.*, Court File No. 27-CV-13-1197, which the parties agreed to treat as the lead case for the federal preemption issues common to all of companioned cases. Therefore, Plaintiffs' First Amended Complaints in all six of the above-captioned matters are dismissed with prejudice in their entirety.

3. The attached Memorandum of Law is incorporated herein.

LET JUDGMENT BE ENTERED ACCORDINGLY

BY THE COURT:

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10/15/2014 05:19:46 pm

Dated: October 15, 2014

Laurie J. Miller
JUDGE OF DISTRICT COURT

MEMORANDUM OF LAW

I. FACTUAL BACKGROUND

These cases all concern the InFUSE™ Bone Graft/LT-CAGE™ Lumbar Tapered Fusion Device ("the Infuse device"), a Class III medical device manufactured and marketed by Defendants. Federal law requires that a new medical device must be approved by the Food and Drug Administration (FDA) before a manufacturer may market and sell that device. On July 2, 2002, the FDA granted its initial premarket approval of the Infuse device, finding that the device was safe and effective for its intended use.

The design and purpose of the Infuse device is discussed in more detail in the Court's Order Granting Defendants' Motion to Dismiss in *Stephen Lawrence v. Medtronic Inc. and Medtronic Sofamor Danek USA, Inc.* (Court File No. 27-CV-13-1197), filed on August 7, 2013. In brief, the Infuse device is used for patients seeking a vertebral fusion, often due to back pain. The device is designed for implantation in the vertebrae, resulting in the fusion of those vertebrae. The device includes three elements: a metallic cage, a recombinant human bone morphogenetic protein, and a scaffold for the bone morphogenetic protein and resulting bone. The FDA's premarket approval of the device was limited to the use of the three elements in concert, with an anterior approach, whether open or laparoscopic.

Plaintiffs allege that Defendants illegally promoted off-label use of the Infuse device, encouraging use of the bone graft components without the approved cage component, and encouraging implantation through non-anterior approaches, such as a posterolateral approach. Plaintiffs allege that Defendants entered into financial agreements with influential consultant doctors to promote off-label uses of the Infuse device through journal articles, presentations, and collegial interactions. As a consequence, Plaintiffs allege that the primary

usage of the Infuse device has become off-label usage. Plaintiffs allege that such off-label usage poses the risk of serious complications to patients, as Plaintiffs claim they each experienced.

Plaintiff Jamie Anderson underwent a spinal fusion surgery on August 24, 2010, in which his treating physician, Dr. Paul Jensen, allegedly used the Infuse device in an off-label procedure, and failed to use the approved LT-Cage. Plaintiff Brian Braden underwent a spinal fusion surgery on July 11, 2008, in which his treating physician, Dr. Edmund Lawrence, allegedly used the Infuse device in an off-label procedure, and failed to use the approved LT-Cage. Plaintiff Alieceno Bryant underwent a spinal fusion surgery on July 31, 2008, in which his treating physician, Dr. Murray Robinson, allegedly used the Infuse device in an off-label procedure, and failed to use the approved LT-Cage. Plaintiff Jason Graham underwent a spinal fusion surgery on March 11, 2005, in which his treating physician, Dr. Walter Eckman, allegedly used the Infuse device in an off-label procedure, and failed to use the approved LT-Cage. Plaintiff Jeisa J. Jones underwent a spinal fusion surgery on March 8, 2011, in which her treating physician, Dr. Hamilton, allegedly used the Infuse device in an off-label procedure, and failed to use the approved LT-Cage. Plaintiff Wayne Van Camp underwent a spinal fusion surgery on February 14, 2011, in which his treating physician, Dr. Terrence Julien, allegedly used the Infuse device in an off-label procedure, and failed to use the approved LT-Cage. Plaintiffs allege that in each of these cases, due to Defendants' alleged unlawful actions, the individual plaintiffs who underwent the off-label procedures suffered injuries and incurred additional surgeries and treatments.

Plaintiffs filed their original Complaints on various dates from February through May of 2013, alleging ten or eleven causes of action: (1) negligence, (2) strict liability, (3) breach of

express and implied warranty, (4) fraud, (5) constructive fraud, (6) violation of the Minnesota False Statements in Advertising Act, (7) violation of the Minnesota Deceptive Trade Practices Act, (8) unjust enrichment, (9) violation of Minnesota's Consumer Protection Statutes, (10) negligence per se, and (11) loss of consortium. (The eleventh cause of action appears only in those cases where a spouse is named as a co-plaintiff.) The parties agreed that these cases, along with all of the other companioned cases alleging similar promotion of off-label use of the Infuse device, would follow along behind the *Lawrence* case which featured briefing and arguments on Defendants' motion to dismiss on federal preemption and other grounds.

In an order filed August 7, 2013, this Court dismissed the original Complaint in *Lawrence*. The majority of Plaintiffs' claims were dismissed with prejudice on the basis of preemption, but the Court found the Fourth, Fifth, and Eleventh Claims for Relief were not preempted. The Court gave Plaintiffs leave to amend those claims in order to meet the heightened standard of pleading fraud with particularity.

Following the timetable established by the Court and counsel for amending all of the complaints in the companioned cases to comply with the August 7, 2013 order in *Lawrence*, Plaintiffs filed their First Amended Complaints (the "Amended Complaints") in the six above-captioned cases on various dates from March 10-14, 2014. In the Amended Complaints, Plaintiffs added a number of factual allegations to try to meet the fraud pleading requirements. However, Plaintiffs failed to identify specific misrepresentations made by Defendants' agents to any of Plaintiffs' treating physicians in order to promote off-label use of the Infuse device. While alleging that available medical literature may have misled physicians in general about the safety and efficacy of the Infuse device, Plaintiffs did

not name specific articles or authors of medical literature read by any of their treating physicians. While Plaintiffs alleged that their treating physicians relied on information learned from Defendants' paid physician consultants in deciding to use the Infuse device in an off-label manner, and that they were taught by unnamed individuals that such off-label use was safe and effective, they did identify any specific alleged misrepresentations made by any specific physician consultant or other representative of Defendants. While Plaintiffs in the *Anderson*, *Jones*, and *Van Camp* cases also alleged that their treating physicians met with unnamed Medtronic sales representatives, they identified no misrepresentations allegedly made by those sales representatives.

On May 15, 2014, Defendants filed a combined motion to dismiss the amended pleadings each of these six cases, arguing that the Amended Complaints do not meet the heightened fraud pleading standards of Minnesota Rule of Civil Procedure 9.02, and arguing that all of the non-fraud claims, restated in the Amended Complaints, should be dismissed for the same reasons they were dismissed in the original Complaints. Plaintiffs opposed Defendants' motion. While expressing their disagreement with the Court's prior rulings, they did not, in their opposition, ask the Court to reconsider its prior rulings dismissing the fraud and non-fraud claims in the companioned cases.[2]

The Court stands by its prior rulings on all claims that were previously dismissed with prejudice based upon its preemption analysis. Accordingly, this Order addresses only the claims for relief which the Court permitted Plaintiffs to replead – namely, the claims of fraud and constructive fraud. The claims for loss of consortium are derivative of the fraud

[2] On May 15, 2014, Plaintiffs filed a motion for leave to file second amended complaints in the Anderson and Graham cases, as well as several other cases, in order to replead the claims which the Court held to be preempted and dismissed with prejudice in the August 7, 2013 *Lawrence* order. That motion was heard on June 20, 2014, and was denied by an order filed on September 12, 2014.

claims. They can only survive to the extent that the fraud claims do, and cannot stand alone if the fraud claims are dismissed.

II. ANALYSIS

a. Standard

A claim of fraud must be pleaded with particularity. Minn. R. Civ. P. 9.02 ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. . . ."). Pleading with particularity requires that the plaintiff specifically allege the material facts underlying each claim. *Parrish v. Peoples*, 9 N.W.2d 225, 227 (Minn. 1943). In *Martens v. Minnesota Mining & Manufacturing Company*, the Minnesota Supreme Court spelled out the parameters of the heightened specificity standards for pleading a fraud claim:

> It must be pled with specificity that there was a false representation regarding a past or present fact, the fact was material and susceptible of knowledge, the representer knew it was false or asserted it as his or her own knowledge without knowing whether it was true or false, the representer intended to induce the claimant to act or justify the claimant in acting, the claimant was induced to act or justified in acting in reliance on the representation, the claimant suffered damages, and the representation was the proximate cause of the damages.

616 N.W.2d 732, 747 (Minn. 2000) (citing *Vandeputte v. Soderholm*, 216 N.W.2d 144, 146 (Minn. 1974); *see also* Minn. R. Civ. P. 9.02; *Twin Ports Oil Co. v. Whiteside*, 15 N.W.2d 125, 126 (Minn. 1944).

b. August 7, 2013 Ruling in *Lawrence*, and Subsequent Rulings Based Thereon

The Court's August 7, 2013 Order in *Lawrence* dismissed Plaintiffs' claims for fraud and misrepresentation, with leave to amend, due to Plaintiffs' failure to plead such claims with the requisite particularity. Specifically, the Court held:

> Plaintiffs do not . . . identify what representations were made to them or their physicians and allegedly relied on by them in deciding to go ahead with the surgical procedure at issue in this case. It is unclear from the Complaint which specific alleged misrepresentations caused Steven Lawrence and his doctors to choose an off-label use of the Infuse device for Mr. Lawrence's surgery . . . . Plaintiffs' allegations regarding what Mr. Lawrence's physicians knew and what they relied upon in deciding to recommend an off-label use of the Infuse device in his case are conclusory, at best, and are stated upon information and belief, signaling that they are not within Plaintiffs' personal knowledge. (citation omitted)
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> . . . Plaintiffs have alleged that Defendants paid consulting fees to various physicians who published favorable studies about their use of the Infuse device, but Plaintiffs have identified no statement in any of those studies that were allegedly false or misleading and that were relied upon by Plaintiffs or their physicians. . . . In order to give rise to a claim of fraud in such a case, the plaintiff must plead facts to show that his or her physician was affirmatively misled in assessing the potential risk by misrepresentations made by the defendant.

From the original complaints in the cases at bar, as in *Lawrence*, it was not apparent whether Plaintiffs had spoken to their treating physicians to determine what the physicians relied upon in selecting the off-label procedure used in Plaintiffs' surgeries and whether the treating physicians believed they had been misled in making that selection. In allowing Plaintiffs to amend their complaints, the Court expected that Plaintiffs would have such conversations in order to supply the particulars that were missing from the original pleadings. Given the critical position of the treating physicians as the only ones with personal knowledge of the information that informed their treatment decisions, allegations based upon their knowledge would be necessary before any fraud claims could proceed.

After Plaintiffs in *Lawrence* and the companioned cases began filing their amended complaints, the Court heard and decided motions to dismiss the amended pleadings filed in ten cases: *Lawrence, Younkin, Beaudry, Seeberg, Davenport, Mead, Starovasnik, Marse, Angeles, and Manuel*. The Court denied dismissal in *Lawrence, Younkin, Beaudry, and Seeberg,* and

granted dismissal in the remaining six cases, after analyzing the facts alleged in each of those cases. In all of the cases, save one (*Starovasnik*), the allegations in the amended pleadings demonstrated that Plaintiffs' counsel had conferred with the treating physicians and based their amended fraud claims upon information from those treating physicians. In *Lawrence, Younkin, Beaudry, and Seeberg*, the Court found the new allegations met the requirements of Rule 9.02. In *Davenport, Mead, Marse, Angeles, and Manuel*, the Court found that the added allegations based upon the consultations with the treating physicians remained too indefinite to meet the particularity required by Rule 9.02. In *Starovasnik*, Plaintiffs alleged that the treating physician, Dr. Riew, was a paid representative of Defendants for purposes of promoting the off-label use of the Infuse device, and was part of the alleged scheme of misrepresentations which Mr. Starovasnik claimed caused his damages. The amended complaint alleged, in a contradictory fashion, that Dr. Riew was both a victim of Defendants' alleged fraud and a perpetrator of it. Whether viewed from either standpoint, the Court found the allegations of fraud in the *Starovasnik* case to lack the particularity required by Rule 9.02.

c. Source of Plaintiffs' Allegations

In the six above-captioned cases, the Amended Complaints reflect the results of efforts by Plaintiffs' counsel to communicate with the treating physicians. The information provided by the treating physicians, in turn, forms the basis for the new factual allegations in the Amended Complaints. Those allegations indicate that the treating physicians told Plaintiffs' counsel that they believe they were indeed misled by Defendants. That contact satisfies the Court that the Amended Complaints are based upon the personal knowledge of the individuals who were the direct recipient of the alleged misrepresentations. The primary

challenge raised by Defendants is whether Plaintiffs' amended allegations in these six cases satisfy the particularity requirements of Rule 9.02, as analyzed by the Court in its rulings on the motions to dismiss in *Lawrence, Younkin, Beaudry, Seeberg*, *Davenport, Mead, Starovasnik, Marse, Angeles, and Manuel*. Defendants argue that these cases are unlike *Lawrence, Younkin, Beaudry,* and *Seeberg*, where the allegations of fraud were found sufficient. Instead, Defendants argue the repleaded complaints in these six cases are indistinguishable from those in *Davenport, Mead, Starovasnik, Marse, Angeles, and Manuel*, all of which were found not to comply with Rule 9.02. The amended allegations in the pending cases fall primarily in three general categories, including medical literature read by the treating physicians, conferences attended by the treating physicians, and statements made by Medtronic sales representatives. The Court will address each category in turn.

d. Medical Literature

In all six of the pending cases, Plaintiffs allege that their treating physicians relied upon medical literature to learn about off-label procedures involving the Infuse device. In each case, they make the same allegation, as follows: "Dr. [individual treating physician] relied on the available medical literature on Infuse®, which specifically portrayed the off-label use of Infuse® in [specific off-label procedure] as a safe and effective use of the product." *See Anderson* First Amended Complaint at ¶ 330(i), *Braden* First Amended Complaint at ¶ 330(i), *Bryant* First Amended Complaint at ¶ 329(i), *Graham* First Amended Complaint at ¶ 330(i), *Jones* First Amended Complaint at ¶ 330(a), and *Van Camp* First Amended Complaint at ¶ 329(i). None of these allegations specifies which articles the individual treating physicians allegedly read or relied upon in making their treating decisions. None of these allegations specifies any authors, journals, or date ranges for the

articles allegedly read. None of these allegations specifies which statements in the articles read by the treating physicians are claimed to be misstatements. In one case, *Bryant*, Plaintiffs add the following sentence regarding the medical literature allegation: "Examples of these articles are discussed *supra* ¶ 179." This sentence fails to specify which of the "example" articles the treating physician allegedly read and relied upon, and which statements in such articles were claimed to be misstatements.

The Court finds the allegations regarding medical literature in each of these cases to be analogous to those found insufficient in *Davenport*, *Manuel*, *Mead*, and *Starovasnik*. Generic allegations that the treating physicians read unspecified articles by unidentified authors with unknown alleged misstatements in them do not provide the specificity required by Rule 9.02.

e. Conferences

In five of the cases, Plaintiffs allege that the treating physicians attended conferences, in terms largely similar to the following: "Dr. [individual treating physician] attended meetings and conferences with paid consultant physicians who were paid by Medtronic to actively promote off-label uses of Infuse® . . . . During these conferences, Dr. [individual treating physician] was told . . . that a variety of off-label uses . . . were both safe and effective." *Anderson* First Amended Complaint at ¶ 330(ii); *see also Braden* First Amended Complaint at ¶ 330(ii), *Graham* First Amended Complaint at ¶ 330(ii), *Jones* First Amended Complaint at ¶ 330(b), *Van Camp* First Amended Complaint at ¶ 329(ii). Plaintiffs do not specify when or where such meetings or conferences took place, or who spoke at them. In one case, *Anderson*, Plaintiffs add that the unidentified individuals who spoke about off-label uses "were present on behalf of MEDTRONIC, because they were standing behind a booth

with MEDTRONCI's [sic] logo." *Anderson* First Amended Complaint at ¶ 330(iii). In another case, *Jones*, Plaintiffs add that the treating physician relied on an unidentified spine surgeon from Emory University at an unspecified time for information about how to use the Infuse device off-label, and that one of Medtronic's Key Opinion Leaders, Dr. Scott Boden, worked at Emory and trained physicians there on how to use the Infuse device off-label. *Jones* First Amended Complaint at ¶ 330(d). Plaintiffs do not allege that their treating physician talked to Dr. Boden or that the unidentified surgeon at Emory communicated information from Dr. Boden to their treating physician.

The Court finds the allegations regarding medical conferences and meetings in each of these cases to be analogous to those found insufficient in *Davenport* and *Marse*. Generic allegations that the treating physicians attended unspecified events on unknown dates with unknown speakers do not provide the specificity required by Rule 9.02, even where it is alleged the unknown speakers stood behind a Medtronic booth, or that the unknown speakers were associated at an unknown point in time with the same institution as one of Medtronic's Key Opinion Leaders.

f. Statements by Medtronic Sales Representatives

In three of the cases, Plaintiffs allege that the treating physicians met with Medtronic sales representatives and discussed off-label procedures, as follows: "Dr. Jensen met with a MEDTRONIC sales representative, who told Dr. Jensen that many other physicians were using Infuse® off-label suuessfully [sic] in the same manner that Dr. Jensen implanted Infuse® in JAMIE ANDERSON." *Anderson* First Amended Complaint at ¶ 330(iv). *See also* *Jones* First Amended Complaint at ¶ 330(c) ("Dr. Hamilton met with a MEDTRONIC sales representative, who shared information about Infuse with him."); *Van Camp* First Amended

Complaint at ¶ 329(iii) ("Dr. Julien met with a MEDTRONIC sales representative, who told Dr. Julien that many other physicians were using Infuse® off-label in the same manner that Dr. Julien implanted Infuse® in Mr. Van Camp."). Plaintiffs do not identify the sales representatives in question, or state when or where the alleged communications occurred. More significantly, Plaintiffs do not allege that the information communicated by the sales representatives was false.

The Court finds the allegations regarding discussions with sales representatives in these three cases to be analogous to those found insufficient in *Angeles*, *Davenport*, *Manuel*, *Marse*, and *Mead.* Generic allegations that the treating physicians spoke with unspecified sales representatives on unknown dates at unknown places, with no allegation that misstatements were made, do not provide the specificity required by Rule 9.02.

g. Other Allegations

In the *Jones* case, Plaintiffs allege that the treating physician, Dr. Hamilton, "reported Mrs. Jones' adverse event directly to Medtronic and it was reported to him that no similar event had ever been observed concerning Infuse®. Dr. Hamilton did not find this statement to be credible." *See Jones* First Amended Complaint at ¶ 290. Plaintiffs do not identify when, how or to whom Dr. Hamilton communicated this information, or who responded to Dr. Hamilton on behalf of Medtronic. Regardless of who was involved, these communications could not serve as the basis for Plaintiffs' fraud claim. Dr. Hamilton could not have known about or reported Mrs. Jones' adverse event until after the procedure took place. Therefore, he could not have relied upon any information communicated by Defendants in response to his report of Mrs. Jones' adverse event when he made his treatment decision prior to performing the off-label procedure upon Mrs. Jones.

Aside from their allegations based upon communications with the individual treating physicians, Plaintiffs have attempted to fill in the missing links in the Amended Complaints in several different ways. First, Plaintiffs rely on allegations that Defendants so flooded the market with misinformation, all treating physicians necessarily must have been affected by it, even without knowing what led to the particular treatment recommendation in each of these six cases. Plaintiffs argue that physicians, generally, learned about the Infuse device through medical literature, medical conferences and seminars, consultations with sales representatives, and consultations with peers. Because Defendants allegedly infiltrated all of those sources of information, Plaintiffs argue that they should not be required to specify which sources their treating physicians relied upon. *See, e.g.,* Plaintiffs' Mem. at 4 ("Medtronic committed fraud by controlling nearly all available information about Infuse®, making it exceptionally difficult for Plaintiffs' surgeons to gain access to truthful information concerning the safety and efficacy of the product."). Defendants respond that this argument presents an impermissible "fraud on the market" theory, notwithstanding Plaintiffs' disavowal of reliance on such a theory.

The Court finds Plaintiffs' allegations of generalized misinformation in the marketplace to be insufficient to satisfy Rule 9.02. Without allegations that Plaintiffs' individual treating physicians received Defendants' alleged misrepresentations and relied upon them in formulating Plaintiffs' treatment recommendations, the generalized allegations are little more than allegations of "fraud on the market," which Plaintiffs themselves recognize cannot carry the day in this type of case. Plaintiffs assert that they have alleged individualized fraud claims, but admit they have not pleaded any facts to identify which alleged misrepresentations reached and influenced their particular treating

physicians. Without such particularity, the Court finds they have failed to meet the pleading requirements for their individualized claims of fraud. Plaintiffs acknowledge that if their individualized fraud claims are permitted to proceed, "at trial, they will be required to show which representations made by Medtronic directly influenced their surgeons." Plaintiffs' Mem. at 21, n.18. They ask for the opportunity to conduct discovery to flesh out their claims, suggesting that their pleadings are not required to be as specific as their proof at trial. While the Court does not expect Plaintiffs to summarize in their pleadings all evidence that might be presented at trial, it does expect them to comply with Rule 9.02. It is not proper to use discovery to search out the missing factual basis for a fraud claim.

Next, Plaintiffs argue that courts in other jurisdictions have found similar complaints to satisfy the pleading requirements of those jurisdictions. *See*, *e.g.*, *Alton v. Medtronic, Inc.*, 2013 WL 4786381 (D. Ore., Sept. 6, 2013); *Ramirez v. Medtronic Inc.*, 961 F.Supp.2d 977, 2013 WL 4446913 (D. Ariz., Aug. 21, 2013) (clarified on denial of reconsideration, Oct. 24, 2013). Defendants reply that many other courts have found fraud claims in Infuse device cases to be inadequately pleaded. The Court is aware that many other jurisdictions have pending products liability cases involving the Infuse device, and have issued a whole host of rulings on a variety of issues. Some of those rulings reach conclusions similar to those reached by this Court; some of those rulings diverge from those made by this Court. This Court has not undertaken the exercise of reconciling its decisions with those in all of the Infuse device lawsuits pending in other states. Such an exercise, even if possible, would not be helpful. This Court is bound to apply Minnesota law, and has done its best to do so in its rulings thus far. In the Court's view, Plaintiffs' market-based allegations do not meet the particularity requirements of Minnesota's Rule 9.02.

Next, Plaintiffs argue that their pleading burden should be relaxed, because the alleged recipients of the misrepresentations in their cases are non-parties – namely, their treating physicians. They cite two Eighth Circuit cases, *Great Plains Trust Co. v. Union Pac. R.R. Co.*, 492 F.3d 986 (8th Cir. 2011), and *Murr Plumbing, Inc. v. Sherer Bros. Fin. Servs. Co.*, 48 F.3d 1066 (8th Cir. 1995), which they claim establish that a showing of due diligence alone is enough to satisfy the particularity standard, even if no particulars have been discovered or pleaded. Defendants retort that the Court has already relaxed Rule 9.02, by allowing Plaintiffs to proceed based upon what they have been told by their treating physicians, which is, in Defendants' view, hearsay, and not within the personal knowledge of the pleaders. Defendants ask the Court not to relax the rule any further. The Court does not believe it has relaxed any pleading requirements. In its rulings thus far, the Court has attempted to apply Rule 9.02 even-handedly toward both sides.

In the Court's view, neither *Great Plains* nor *Murr* supports Plaintiffs' position. In both cases, the fraud claims were found to have been pleaded inadequately. In *Great Plains*, the fraud claim was dismissed as time-barred, because it lacked particularity, and "[e]ach act allegedly constituting fraud was discoverable with due diligence during the ordinary course of Great Plains's business." 492 F.3d at 994. In *Murr*, dismissal of the fraud claim was likewise affirmed, based upon the lack of the requisite particularity in the complaint. The holdings in *Great Plains* and *Murr* that the particulars of the fraud could have been discovered with the exercise of due diligence cannot logically be extended to mean that the exercise of due diligence is a substitute for discovering the particulars. Due diligence is necessary to timely discovery fraud, but due diligence which does not lead to the discovery of fraud cannot, in and of itself, serve as a basis for a fraud pleading.

Plaintiffs next argue that they have alleged the "ultimate facts" of Defendants' claimed fraud. They assert that no more is required under Rule 9.02. The "ultimate facts" to which Plaintiffs refer are their allegations that Defendants generally marketed the Infuse device through misrepresentations about its safety and efficacy in off-label procedures. As discussed above, these allegations, if true, would constitute "fraud on the market." Plaintiffs do not include any specific allegations that Plaintiffs' treating physicians received or relied upon particular misrepresentations made by Defendants in making their individual treatment recommendations to Plaintiffs. Thus, even if the Court were to accept that pleading of "ultimate facts" can satisfy Rule 9.02, Plaintiffs have failed to connect their market-based fraud allegations to their individualized fraud claims.

Finally, Plaintiffs argue that they have satisfied Rule 9.02 through their allegations that each of their treating physicians recalled receiving misrepresentations from Defendants, even though they couldn't recall when or where they received them, who said them, or what the specific misrepresentations were. This, too, fails to solve Plaintiffs' pleading problem. Generic claims that misinformation was allegedly conveyed to the treating physicians cannot support a fraud claim against Defendants, without the particularity required by Rule 9.02.

All of these arguments lead back to the missing link identified in the Court's August 7, 2013 order in *Lawrence*. Given the role of the treating physicians as the intermediary between any alleged misrepresentations by Defendants and any claimed detrimental reliance by Plaintiffs, without some particularity as to the communications between Defendants and each of the treating physicians in these cases, the amended pleadings remain deficient under Rule 9.02.

III. CONCLUSION

Based on the foregoing facts and legal analysis, Defendants' motion to dismiss is granted as to the Fourth, Fifth, and (where applicable) Eleventh Claims for Relief in the First Amended Complaints in each of the six above-captioned matters. The Fourth and Fifth claims, for fraud and constructive fraud, respectively, rest on factual allegations that fall short of the particularity requirements of Rule 9.02. The Eleventh claims for loss of consortium cannot stand alone, when all other claims are dismissed.

L.J.M.