IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

DEPUY SYNTHES PRODUCTS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 11-652-LPS
	)	
GLOBUS MEDICAL, INC.,	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S ANSWERING BRIEF TO
DEFENDANT'S MOTION FOR RELIEF FROM THE FINAL JUDGMENT

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Dated: April 9, 2015

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GLOSSARY

Below is a list of abbreviations that are used throughout the brief:

Abbreviation	**Meaning**
Br.	Globus' Brief in Support of Its Motion for Relief from the Final Judgment (D.I. 431)
Synthes	Plaintiff DePuy Synthes Products, Inc.
Globus	Defendant Globus Medical, Inc.
Feigenbaum Decl.	Declaration of Aaron J. Feigenbaum, Esq. in Support of Plaintiff's Answering Brief to Defendant's Motion for Relief from the Final Judgment, filed herewith

STATEMENT OF THE NATURE AND STAGE OF THE PROCEEDINGS

The Court held a ten-day jury trial in this matter from June 3 to June 14, 2013, hearing testimony from twenty witnesses. One witness was Richard Gering, an expert Synthes retained. The jury found for Synthes on every issue – infringement, validity and damages. (D.I. 321.) The Court entered a Final Judgment on April 9, 2014. (D.I. 420.) Globus filed a Notice of Appeal on May 9, 2014 (D.I. 423), and its appeal is pending.

SUMMARY OF THE ARGUMENT

1. Globus' motion is fatally flawed because it focuses on the impeachment value of exposing Mr. Gering's true credentials and not on whether those credentials bear on the substantive issues the jury decided overwhelmingly in Synthes' favor. Globus does not and cannot contend that the new information about Mr. Gering's degrees would render Mr. Gering unqualified as an expert witness, and it similarly does not contend that the newly discovered information renders Mr. Gering's opinions or underlying methodology substantively flawed. Globus thus does not address whether, much less dispute that, the Final Judgment is justified based on Mr. Gering's true credentials. Instead, Globus bases its entire motion on the alleged impeachment value of exposing Mr. Gering's lack of a Ph.D., apparently arguing that impeachment on this one of Mr. Gering's many credentials would discredit not only all of Mr. Gering's testimony, but somehow all of the testimony of Synthes' other witnesses. This impeachment-centered argument ignores binding Third Circuit authority that a party seeking to discard a judgment on the basis of newly discovered evidence cannot rely on the mere impeachment value of the evidence. Globus has not produced any substantive evidence that would undermine the Court's damages judgment, and certainly nothing that would undermine the Court's validity or infringement judgments.

2. Globus' "newly discovered evidence" motion under Rule 60(b)(2) therefore fails because Globus has not established that the outcome probably would have been different on any issue in the case if Mr. Gering had testified that he obtained a Master's degree but not a Ph.D. Even if Globus had established the probability of a different outcome, Globus still must show that it could not have discovered Mr. Gering's lack of a Ph.D. through the exercise of reasonable diligence. Globus has not done so. Globus fails to address the multiple ways that it could have located the information concerning Mr. Gering's degrees.

3. Globus' request under Rule 60(b)(3) is equally deficient. Globus does not allege, and indeed cannot allege, that Synthes (the "opposing party" identified in the rule) is responsible for Mr. Gering's false testimony. Moreover, Globus cannot meet its burden to identify any facts relating to the substantive elements of its claims that it could not present to the jury because Mr. Gering said he had a Ph.D. Globus thus has not established that Mr. Gering's testimony prevented Globus from fully and fairly presenting its case at the ten-day trial.

4. The Court should also deny Globus' request for relief under Rule 60(b)(6) because the case law precludes relief under that rule where a movant relies on the same facts that are insufficient to warrant relief under Rules 60(b)(2) and 60(b)(3). Thus, as a matter of law, Globus cannot demonstrate the requisite "extraordinary" circumstances. Nor can Globus demonstrate that Mr. Gering's testimony about his degrees causes any "extreme" or "unexpected" hardship when Globus has not challenged any aspect of Mr. Gering's substantive testimony.

STATEMENT OF THE FACTS

Mr. Gering testified as an expert on damages and, for two of the three patents, on commercial success as a secondary consideration of non-obviousness. (D.I. 350 at 1116:25-1117:4, 1173:6-21 (opining on commercial success for the '616 and '076 patents).) Mr. Gering did not testify about infringement or Globus' *prima facie* case of obviousness. Regarding his

many qualifications, Mr. Gering testified that he: (1) was a Principal at the consulting and public accounting firm EisnerAmper; (2) specialized in valuing intellectual property and calculating damages; (3) had been working in the field of intellectual property valuation for more than 20 years; had a (4) Bachelor of Commerce in Economics, a (5) Master's degree in Economics and a (6) Ph.D. in Economics; (7) was a Certified Licensing Professional; (8) taught economic damages at Villanova Law School; (9) had published book chapters and peer-reviewed journal articles and had given presentations on patent damages; and (10) had testified as an expert on damages and commercial success before. (Id. at 1115:9-1116:24.) Mr. Gering did not testify that he based any of his opinions or methodology on any one of his credentials in particular.

Synthes' counsel first learned that Mr. Gering did not have a Ph.D. on December 18, 2014, when Mr. Gering's now-former employer contacted Synthes' counsel. (D.I. 426.) Neither Synthes nor Synthes' counsel knew or had any reason to know prior to this disclosure that Mr. Gering did not have a Ph.D.[1] Synthes informed the Court and Globus the next day, December 19, 2014. (Id.) Globus moved to set aside the Final Judgment based on this development approximately two-and-a-half months later, on March 2, 2015. (D.I. 430.)

ARGUMENT

I. GLOBUS IS NOT ENTITLED TO RELIEF UNDER RULE 60(b)

A. Legal Standard for Motions for Relief from Judgment under Rule 60(b)

Rule 60(b) motions seek "extraordinary relief which should be granted only where extraordinary circumstances are present." Bohus v. Beloff, 950 F.2d 919, 930 (3d Cir. 1991) (quoting Plisco v. Union R.R. Co., 379 F.2d 15, 16 (3d Cir. 1967)). The movant bears a "heavy bur-

[1] Synthes is informed that other law firms representing other Johnson & Johnson business units in unrelated cases in which Mr. Gering was also a witness were informed as early as December 14, 2014. In-house and outside counsel for Synthes in this case, however, were unaware of this information until December 18.

den," which requires "more than a showing of the potential significance of the new evidence." Id.

B. Globus Is Not Entitled to Relief under Rule 60(b)(2)

Globus cannot obtain relief under Rule 60(b)(2) for two independent reasons. First, Globus has not shown that if Mr. Gering had testified to having a Master's degree and not a Ph.D., the trial's outcome probably would have been different on any issue. Second, Globus has not shown that it could not have discovered this fact about Mr. Gering with reasonable diligence.

1. Legal standard for motions under Rule 60(b)(2)

To set aside the Final Judgment under Rule 60(b)(2), Globus must produce "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b)(2). "The evidence must be material to the issues involved, yet not merely cumulative or *impeaching* and must be of such a nature that it would probably change the outcome." Stridiron v. Stridiron, 698 F.2d 204, 207 (3d Cir. 1983) (emphasis added). This "probability" requirement requires more than speculation that the new evidence might have changed the outcome of the trial. See Bohus, 950 F.2d at 930.

2. Globus has not established that the outcome probably would have been different if Mr. Gering had not testified that he had a Ph.D.

Globus' motion fails because Globus has not shown that it probably would have achieved a different outcome had Mr. Gering testified consistent with the newly discovered information – namely, that he possessed a Master's degree but not a Ph.D. Importantly, Globus does not contend that Mr. Gering would not have qualified as an expert on damages and commercial success on the basis of his having a Master's degree and his 20 years of experience in the field. (D.I. 350 at 1115:9-1116:24.) The Third Circuit liberally interprets the "specialized knowledge" requirement of Federal Rule of Evidence 702, requiring no special academic degree to qualify as

an expert. See Betterbox Commc'ns Ltd v. BB Techs., Inc., 300 F.3d 325, 327-28 (3d Cir. 2002); Motivation Innovations LLC v. Ulta Salon Cosmetics & Fragrance Inc., --- F. Supp. 3d ---, 2014 WL 3704224, at *4 (D. Del. July 22, 2014). Although Globus notes that it moved to exclude certain of Mr. Gering's substantive opinions before trial (Br. at 4), Globus does not argue (let alone demonstrate) that it would have successfully excluded Mr. Gering's opinions on the basis of his not having a Ph.D.

Crucially, Globus also does not contend that any of Mr. Gering's calculations were unsound, that any part of his methodology was defective, that he improperly analyzed any information in the record, or that the Court or the jury should have disregarded or discounted any part of his substantive opinions in the case, simply because he had other, unchallenged qualifications but not a Ph.D. Globus thus has not identified any part of Mr. Gering's testimony that could have been substantively undermined by the newly discovered information, nor has it identified how any part of the verdict is unsound. See Bohus, 950 F.2d at 930-31 (rejecting Rule 60(b)(2) motion where newly discovered evidence would not have weakened plaintiff's case).

This case is similar to United States v. Williams, 77 F. Supp. 2d 109, 112-13 (D.D.C. 1999). In that case, the court refused to order a new trial where an expert testified he was a Board-certified pharmacist when in fact he was not. The court concluded that the expert's lack of Board certification did not undermine any of his conclusions in light of his other qualifications:

> Thus, assuming the jury had never heard about Detective Brown's Board certification and ability to receive, maintain, compound and dispense narcotic as well as non-narcotic substances per prescription, it is likely that they would still have

> credited his testimony since it was supported by twenty-five years of practical experience as an MPD detective.[2]

As in Williams, Globus has failed to demonstrate that the jury probably would have reached a different damages verdict or that the damages verdict would be left without substantive evidentiary support because of the newly discovered information.

Globus' attempts to attack the infringement and validity verdicts are even weaker. Mr. Gering did not testify on infringement. Even on validity, he did not opine on the commercial success of the '207 patent. (D.I. 350 at 1173:6-21 (opining on the '616 and '076 patents).) That the jury found the '207 patent valid despite Mr. Gering's silence on the subject shows that his commercial success opinion was not pivotal to the validity determination. As for the '616 and '076 patents, the jury already had sales data and testimony from another witness, Ms. Cannon, showing the success of embodiments of those patents. (D.I. 348 at 632:17-638:20.) Although Globus characterizes commercial success as a "battle of two experts" (Br. at 5), Globus' damages expert did not testify at trial about commercial success. (D.I. 353 at 1762:15-1827:25.)

Because Globus does not contend and cannot show (in light of his other, unchallenged credentials) that Mr. Gering's lack of a Ph.D. could have had any impact on Mr. Gering's substantive methodology or opinions, Globus resorts to its own characterization that Mr. Gering's alleged Ph.D. status was "a central pillar upon which his opinions were based" (Br. at 1). This characterization is pure speculation and not grounded in fact. At trial, Mr. Gering mentioned having a Ph.D. once (D.I. 350 at 1115:20-24), and he never testified that his alleged Ph.D. impacted his methodology or opinions. Globus tries to suggest otherwise by selectively and misleadingly quoting from Mr. Gering's expert reports, which were not admitted into

[2] Although Williams was a criminal case addressing a motion under Fed. R. Crim. P. 33, the standard of review for Fed. R. Crim. P. 33 and Fed. R. Civ. P. 60(b)(2) motions is similar. Williams, 77 F. Supp. 2d at 11 (reciting the applicable standard).

evidence at the trial and therefore could not have affected the trial's outcome. Although Globus uses ellipses to imply that Mr. Gering based his opinions solely on his education (Br. at 2), Mr. Gering actually based the analysis and opinions in his reports "upon the information and documentation identified to date, my education, and my experience in performing similar financial and economic analyses." (D.I. 431.1, Ex. 2 at 2. See also id., Ex. 3 at 1.) The "education" Mr. Gering referred to included his Master's degree, which Globus does not contend was insufficient to support his methodology or opinions. At trial, moreover, Mr. Gering testified to having many more credentials than just his academic degrees. (D.I. 350 at 1115:9-1116:24.)

Globus next resorts to reliance on Synthes' counsel addressing Mr. Gering as "Dr. Gering," as somehow suggesting the criticality of Mr. Gering's statement that he had a Ph.D. (Br. at 1-6.) But Synthes was simply using the title that the witness used for himself, and Globus never cites any portion of Mr. Gering's testimony where he said he had arrived at a particular conclusion because he had a Ph.D.

Globus has not cited any cases that warrant granting its motion. In the cases Globus cites where Rule 60(b)(2) motions were granted, the new information rendered the witnesses' conclusions or the case's outcome substantively unsound. That is not the case here, and Globus has not contended otherwise. For example, in Stridiron, the governing statute would have precluded the court's ultimate ruling had plaintiff disclosed the fact on which the defendant based her motion. See Stridiron, 698 F.2d at 207-08. In contrast, Globus does not point to any authority that would have prevented a ruling for Synthes on infringement, validity or damages.

3. Globus cannot obtain a new trial based on the hypothetical possibility of impeaching Mr. Gering on the stand.

Rather than attempting to show that the jury would probably have reached a different verdict had Mr. Gering told the truth about his education, as required for the relief Globus seeks,

Globus asks the Court to consider a different question: had Globus been armed with knowledge that Mr. Gering did not have a Ph.D., could it have impeached Mr. Gering on the stand, destroyed his credibility and the credibility of every other Synthes witness, and thus prevailed on every single issue in the case? (See, e.g., Br. at 2, 14-15.) This question, the only one Globus ever addresses, is simply not the correct inquiry under Rule 60(b)(2).

As Globus' authority makes clear, the "newly discovered evidence" in support of a Rule 60(b)(2) motion "must be material to the issues involved, yet not merely cumulative *or impeaching*." Stridiron, 698 F.2d at 207 (emphasis added). "[N]ewly-discovered evidence will not support a motion for relief from judgment if it merely tends to impeach the credibility of a witness rather than provide substantive evidence concerning a material issue of fact." Int'l Ctr. for Tech. Assessment v. Leavitt, 468 F. Supp. 2d 200, 206-07 (D.D.C. 2007) (quoting 12 James William Moore et al., Moore's Federal Practice § 60.42[8] (3d ed. 1997)). In this District, Judge Jordan refused to grant a new trial where "the supposedly new evidence goes solely to impeachment and credibility and does not appear to address the substance of the case at all." Dean v. Brandywine Studios Inc., C.A. No. 99-679-KAJ, 2003 WL 299362, at *3 (D. Del. Feb. 10, 2003). Courts in other circuits similarly require more than speculation that the movant could have successfully attacked a witness's credibility to set aside a judgment. In Rembrandt Vision Technologies, L.P. v. Johnson & Johnson Vision Care, Inc., 300 F.R.D. 694, 699 (M.D. Fla. 2014), for example, the court refused to grant a new trial based on an expert's false testimony about his qualifications, finding that the movant's "lost opportunity to impeach [the expert] with evidence of his false testimony does not lead to Rule 60(b)(2) relief."[3]

[3] See also Morón-Barradas v. Dept. of Educ., 488 F.3d 472, 482 (1st Cir. 2007) (evidence in support of Rule 60(b)(2) motion cannot be "impeaching"); Reese v. Bahash, 574 F. App'x 21, 23 (2d Cir. 2014) (same); U.S. Fid. & Guar. Co. v. Lawrenson, 334 F.2d 464, 466 (4th Cir. 1964)

Globus ignores this authority and bases its motion on implausible, hypothetical impeachment scenarios that find no basis in Rule 60(b). (Br. at 2, 14-15.) In its first scenario, Globus posits that it learns of the newly discovered evidence of Mr. Gering's degrees before trial but Synthes does not, Synthes puts Mr. Gering on the stand and he testifies to having a Ph.D., and Globus then dramatically impeaches Mr. Gering, undermining Synthes' entire case. There is no basis in Rule 60 or the cases construing it for presuming such a lopsided hypothetical.

In the second, equally unlikely scenario, Globus hypothesizes that both parties know before trial that Mr. Gering does not have a Ph.D., but Synthes risks sanctions and criminal penalties by having Mr. Gering testify to possessing a Ph.D. anyway. Nothing in Rule 60 asks the Court to assume that the proffering party would risk sanctions and create an impeachment opportunity for its opponent by knowingly allowing a witness to provide false testimony.

In the third scenario, Globus posits that Synthes learns Mr. Gering does not have a Ph.D. before trial but after it is too late to use a different expert witness. (Br. at 2.) This hypothetical is far removed from the question of whether the newly discovered evidence would change the substantive evidence such that the outcome would probably have been different, and instead relies on hypothetical missed procedural deadlines to hand Globus a win by default. Globus cites no authority, and Synthes is aware of none, directing or even permitting the Court to consider the rigged hypotheticals that Globus relies on. These hypotheticals ignore the real question – whether the new evidence is so probative of the substantive issues in the case (and not mere

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(affirming denial of new trial motion where new evidence was "offered for the purpose of impeaching"); Thermacor Process, L.P. v. BASF Corp., 567 F.3d 736, 744-45 (5th Cir. 2009) ("Moreover, LaCarte's testimony provides nothing more than impeachment evidence, which generally does not support relief from judgment."); Good v. Ohio Edison Co., 149 F.3d 413, 423 (6th Cir. 1998); Sarkes Tarzian, Inc. v. U.S. Trust Co. of Fla. Savings Bank, 168 F. App'x 108, 111 (7th Cir. 2006); In re Levaquin Prods. Liability Litig., 739 F.3d 401, 404 (8th Cir. 2014); FDIC v. Arciero, 741 F.3d 1111, 1117 (10th Cir. 2013); Waddell v. Hendry Cnty. Sheriff's Office, 329 F.3d 1300, 1309 (11th Cir. 2003).

impeachment) that the jury probably would have reached a different outcome if it had the correct information in the first place. With impeachment off the table, as controlling law requires, there is no basis to conclude that a jury, having heard the true information about Mr. Gering's degrees, probably would have come to a different conclusion on any substantive issue in the case.

Even if the Court could consider the possibility of impeachment, Globus has not converted that possibility into the requisite *probability* of a different outcome on all substantive issues: Globus declares that it would have impeached Mr. Gering and then summarily concludes that the jury would have found differently on every issue in the case. But despite the legally-flawed emphasis its Motion places on credibility (Br. at 2, 14-15), Globus never establishes to any degree of probability that its hypothetical impeachment on one academic credential would have caused the jury to disregard all of Mr. Gering's substantive testimony and credit Globus' witnesses instead. This scenario is especially unlikely given the serious flaws in Globus' trial presentation: Globus' only expert on non-infringement, for example, admitted that he never saw key internal Globus documents directly undermining his opinions. (D.I. 352 at 1651:6-1656:9, 1667:18-1672:19.) Globus' unsupported speculation that the outcome would have been different does not satisfy its "heavy burden" in seeking "extraordinary relief." See Bohus, 950 F.2d at 930.

4. Globus has not established that Mr. Gering's degree status "could not have been discovered by Globus with the exercise of reasonable diligence."

Globus' motion under Rule 60(b)(2) also fails for the independent reason that Globus could have discovered the truth about Mr. Gering's degrees "with reasonable diligence" in time to move for relief under Rule 59. See Fed. R. Civ. P. 60(b)(2). Globus' focus on the fact that Synthes and other parties did not investigate Mr. Gering's background does not address the relevant question: whether Globus could not have discovered the new evidence with the exercise of

reasonable diligence, had it decided to investigate. By shifting the focus onto what other parties did or did not discover, Globus improperly avoids inquiry into what Globus itself could have done to discover the new facts.

"This inquiry 'looks not to what the litigant actually discovered, but to what he or she *could* have discovered.'" Int'l Ctr., 468 F. Supp. 2d at 207 (quoting Moore's Federal Practice § 60.42[5]). If the party moving for a new trial could have taken further actions to discover the information on which it bases its motion, and it inexcusably did not, it cannot obtain relief under Rule 60(b)(2). In Floorgraphics Inc. v. News America Marketing In-Store Services, Inc., 434 F. App'x 109, 112-13 (3d Cir. 2011), for example, the party seeking a new trial claimed that its adversary wrongfully withheld information during discovery that, had it been produced, would have changed the outcome of the trial. The Third Circuit affirmed the denial of the new trial motion because the movant "did not take any action to compel compliance" with its document demand, such as by moving to compel. Id. at 113. Other courts have similarly rejected Rule 60(b)(2) motions when movants did not demonstrate that they pursued all available discovery remedies, however difficult those remedies may have appeared. See Betterbox, 300 F.3d at 332; LG Elecs. U.S.A., Inc. v. Whirlpool Corp., 798 F. Supp. 2d 541, 568 (D. Del. 2011); Miller v. Baker Implement Co., 439 F.3d 407, 414 (8th Cir. 2006) ("Miller does not explain why he failed to avail himself to available discovery remedies before the district court issued its order . . . .").

Here, Globus had multiple avenues at its disposal that it did not pursue. First, Globus could have subpoenaed Mr. Gering for a copy of his transcript – the document that Globus claims "unmistakably proves" Mr. Gering's lack of a Ph.D. (Br. at 17.) It never did so, and it does not identify any barriers that prevented it from serving such a subpoena.

Second, Globus could have requested verification of Mr. Gering's degrees through an organization such as the National Student Clearinghouse ("NSC"), which offers a publicly available service that verifies students' degrees. This is similar to what the defendant did in the Stridiron case on which Globus relies: rather than rely on the plaintiff's statements in discovery about his prior marriage, the defendant sought confirmation of that marriage through the New York State Bureau of Vital Statistics. See Stridiron, 698 F.2d at 206.[4] After Globus filed its motion, Synthes requested verification of Mr. Gering's degrees through the NSC. Within days, it received confirmation that Mr. Gering had a Master's degree but not a Ph.D. (Feigenbaum Decl. ¶¶ 2-5.) Globus' failure to pursue this avenue of investigation should itself preclude relief under Rule 60(b)(2): "Publicly available information cannot constitute newly discovered evidence." Int'l Ctr., 468 F. Supp. 2d at 207. See also Miller, 439 F.3d at 414-15.

Third, Globus could have pursued its discovery request to Synthes seeking production of Mr. Gering's transcript. Globus issued a document demand that it now claims required production of Mr. Gering's transcript. (Br. at 3-4, 13-14.) Yet Synthes did not possess the transcript and objected to producing documents not within its possession, custody or control (an objection that Globus does not contend was improper). (Id.) Knowing that a transcript existed (as it does for every student), Globus could have subpoenaed the transcript from Mr. Gering. It did not do so.

Globus' inaction demonstrates that Globus did not consider the question of Mr. Gering's degrees as important to the case as Globus now claims it was. The law is clear that Rule 60(b)(2) does not permit losing parties to escape the consequences of their strategic decisions.

[4] Because confirmation did not come quickly enough, the defendant in Stridiron had to move for relief under Rule 60(b)(2), and the court excused her delay. Id. Globus did not even try to obtain confirmation.

C. Globus Is Not Entitled to Relief under Rule 60(b)(3)

Globus cannot obtain relief under Rule 60(b)(3) for two independent reasons. First, Globus has not established a fraud, misrepresentation or misconduct by an opposing party. Second, Globus has not shown that it was prevented from fully and fairly presenting its case.

1. Legal standard for motions under Rule 60(b)(3)

To set aside the Final Judgment under Rule 60(b)(3), Globus must produce evidence of "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or other misconduct by an opposing party." Fed. R. Civ. P. 60(b)(3). The Third Circuit requires movants to establish "clear and convincing" evidence "that the adverse party engaged in fraud or other misconduct, and that this conduct prevented the moving party from fully and fairly presenting his case." LG Elecs., 798 F. Supp. 2d at 568 (quoting Stridiron, 698 F.2d at 207).

2. Globus has not established that Synthes committed any fraud, misrepresentation or misconduct.

Globus cannot show fraud as required by Rule 60(b)(3) because Mr. Gering's testimony about his degrees was not "by an opposing party" but instead by a witness whose true educational background Synthes did not know – and had no reason to know – prior to trial. As the text of the rule ("by an opposing party") and the case law make clear, the misconduct of a witness does not establish a Rule 60(b)(3) violation absent evidence that the party who put the witness on the stand was responsible for the misconduct. See Rembrandt, 300 F.R.D. at 699-700 (denying Rule 60(b)(3) motion where movant did not establish that the opposing party was "complicit" in the expert witness's false testimony about his qualifications); Richardson v. Nat'l R.R. Passenger Corp., 150 F.R.D. 1, 8-9 (D.D.C. 1993) ("Critical to setting aside a final judgment under Rule 60(b)(3) is that the alleged fraud be attributable to the opposing party."), aff'd, 49 F.3d 760 (D.C. Cir. 1995); Metlyn Realty Corp. v. Esmark, Inc., 763 F.2d 826, 832 (7th

Cir. 1985); Rodriguez v. Mitchell, 252 F.3d 191, 201 (2d Cir. 2001) ("A fraud committed by a witness in the habeas proceeding is not a 'fraud . . . , misrepresentation, or other misconduct *of an adverse party*.'").

In Richardson, the court denied Rule 60(b)(3) relief against the plaintiff despite plaintiff's use of an expert who falsified at least five of his credentials. The court explained that the defendant did not adduce evidence "sufficient to establish with any degree of reliability that [plaintiff] was intentionally trying to mislead his examiners or was involved in a concerted effort with the [witness] to misstate the extent of his injuries." 150 F.R.D. at 8. Unable "to suggest that [plaintiff] or his counsel knew or should have known that [the witness] misstated his credentials," there was no misconduct "by an opposing party." Id. at 9. Similarly, in Metlyn, 763 F.2d at 832-33, the court explained that judgments should not be set aside for witness deception unless the sponsoring party or its counsel "procured or knew" of the deception:

> The district court concluded that neither Esmark nor Esmark's counsel knew of [the witness's] misstatements. The objectors do not now challenge this conclusion. They say only that in the exercise of due diligence counsel should have investigated [the witness's] background further and found out. This smacks of the proposition that every party "vouches" for its witnesses, a view long departed and little missed in federal practice. . . . Expert witnesses such as Levy are free agents. Parties and counsel have an obligation not to deceive the court about the witness and to correct statements they know to be false, but they are not responsible for the details of the witness's testimony.

Counsel are "not required . . . to vouch for the evidence submitted in a cause" and must only "not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false." Annotated Mod. R. Prof. Cond. 3.3 cmt. [2].[5]

Globus' authorities suggesting otherwise are either distinguishable or have been criticized in more recent decisions. For example, in Harre v. A.H. Robins Co., 750 F.2d 1501, 1503, 1505 (11th Cir. 1985), vacated in part on reconsideration, 866 F.2d 1303 (11th Cir. 1989), the court

[5] The Model Rules apply in proceedings before this Court. See D. Del. LR 83.6(d).

held that a party's counsel must have known its witness was lying because it represented that witness in another proceeding where the witness testified differently. Globus does not contend that Synthes had any prior knowledge, or reason to know, of Mr. Gering's true degree status. Globus also relies on the Eastern District of Louisiana's opinion in In re Vioxx Products, 489 F. Supp. 2d 587 (E.D. La. 2007), where the court apparently did not require culpability on counsel's part, but that case's analysis "contradicts the majority of the case law on the topic, as well as the plain language of the Rule." Rembrandt, 300 F.R.D. at 700.

Because Globus does not and cannot contend that Synthes knew Mr. Gering lacked a Ph.D., Globus can only point to repeated references by Synthes' counsel to the witness as "Dr." Gering as the evidence of Synthes' misconduct or misrepresentation. (Br. at 1, 15.) But that fails as a matter of law because Globus has no evidence that Synthes knew that title was inaccurate: to establish "misrepresentation" or "misconduct," Globus must show some culpability on Synthes' part. "Misrepresentation" under Rule 60(b)(3) "occurs when an attorney misleads the court, either intentionally or with callous disregard for the truth, and such misrepresentation disrupts the court's ability to render a decision." Moser v. Bascelli, 879 F. Supp. 489, 493 (E.D. Pa. 1995). And in the Anderson case Globus cites for the proposition that misrepresentation and misconduct require no culpability, there was actual evidence suggesting that the charged party intentionally withheld the truth. See Anderson v. Cryovac, Inc., 862 F.2d 910, 927-30 (1st Cir. 1988). Globus does not contend, because it cannot, that Synthes did anything intentionally wrong or acted with "callous disregard for the truth" in referring to Mr. Gering as "Dr. Gering."

Globus provides no authority that the simple act of employing a witness's chosen salutation, without knowing that salutation to be inaccurate, qualifies as a fraud, misrepresentation or misconduct. Moreover, Globus fails to recognize that the Court instructed the jury not to treat

Synthes' counsel's questions and statements (which would include its references to "Dr." Gering) as evidence. (D.I. 346 at 248:1-4, 254:2-4, 254:21-23 (Court instructing jury that "[s]tatements, arguments and questions by lawyers are not evidence," and that "opening statements" and "closing arguments" are not evidence).)

3. Globus has not established that Mr. Gering's testimony prevented Globus from fully and fairly presenting its infringement, validity and damages cases.

Globus is also not entitled to relief under Rule 60(b)(3) because Mr. Gering's testimony about his degrees did not prevent Globus from fully and fairly presenting its case. Globus has not identified any fact that it could not present to the jury because of Mr. Gering's testimony, or any part of the verdict that cannot be sustained in light of Mr. Gering's not having a Ph.D. See Kiburz v. Sec'y, U.S. Dept. of the Navy, 446 F. App'x 434, 435-37 (3d Cir. 2011) (defendant's failure to produce document did not prevent plaintiff from fully and fairly presenting his case where document would not have undermined the court's substantive rulings). Accordingly, this is not a case like Stridiron, where if the plaintiff had told the truth – that he was already married at the time he married the defendant – the court's judgment of divorce (as opposed to annulment) would have been unsustainable. See Stridiron, 698 F.2d at 207.

In Globus' cases, the false testimony either was crucial to the witness's qualification as an expert or went to the core of the witness's substantive opinions such that without it the witness would not have been able to render those opinions. In Harre and Vioxx, for example, the expert's falsification of his credentials permitted him to testify as an expert – which is not an issue here, as Globus does not dispute that Mr. Gering would have qualified as an expert without a Ph.D. See Harre, 750 F.2d at 1502; Vioxx, 489 F. Supp. 2d at 594 (expert's false testimony "call[ed] into question the Court's acceptance of him as an expert witness"). In Harre, Cardiac Pacemakers and Viskase, the true facts withheld by the witnesses would have undermined their

opinions. See Harre, 750 F.2d at 1503 (expert "testified falsely on the ultimate issue in the case"); Cardiac Pacemakers, Inc. v. St. Jude Med., Inc., No. IP 96-1718-C-H/K, 2002 WL 1801525, at *54-55 (S.D. Ind. July 5, 2002), aff'd in part, rev'd in part, 381 F.3d 1371 (Fed. Cir. 2004)[6]; Viskase Corp. v. Am. Nat'l Can Co., 261 F.3d 1316, 1323-24 (Fed. Cir. 2001) (expert testified falsely "at least 15 times" about his participation in infringement-related laboratory tests). In contrast, Globus identifies no part of Mr. Gering's methodology, calculations or opinions that turned on his having a Master's degree and other qualifications but not a Ph.D.

Courts have rejected the notion that false testimony from a witness automatically prevents the opposing party from fully and fairly presenting its case. In Richardson, for example, the witness in question "greatly inflat[ed] his credentials at trial," lying about no less than five separate qualifications, but the court still rejected the notion that "Defendant was prevented from fully and fairly presenting its case in any respect." Richardson, 150 F.R.D. at 9-10. See also Dean, 2003 WL 299362, at *3; Rembrandt, 300 F.R.D. at 700-01.[7] It is not enough for Globus to point to Mr. Gering's false testimony to discard a Final Judgment under Rule 60(b)(3); Globus must demonstrate that the false testimony prevented it from presenting facts required to make its case. Globus has not even attempted to identify a single such fact.

D. Globus Is Not Entitled to Relief under Rule 60(b)(6)

Globus cannot obtain relief under Rule 60(b)(6) because it bases its request on the same facts that are insufficient to warrant relief under Rules 60(b)(2) and 60(b)(3), thus failing to

[6] Cardiac Pacemakers, which was not decided under Rule 60(b)(3), was also a case where there was evidence that the parties' lawyers knew of the witness's misconduct. Id. at *56-59.

[7] Although the court in Rembrandt noted that the witness who testified falsely "was not required for [the non-movant] to win the case," id. at 701, Mr. Gering's status as Synthes' only damages expert is irrelevant. Globus has not shown that Mr. Gering would not have qualified as an expert had he testified truthfully, nor has it shown that Mr. Gering's lack of a Ph.D. had any substantive impact on any part of Mr. Gering's testimony.

demonstrate the "extraordinary" circumstances required by the rule. Globus similarly shows no "extreme and unexpected hardship" from the verdict.

1. Legal standard for motions under Rule 60(b)(6)

A party seeking relief under Rule 60(b)(6) "must demonstrate the existence of 'extraordinary circumstances' that justify reopening the judgment." Budget Blinds, Inc. v. White, 536 F.3d 244, 255 (3d Cir. 2008). "[A] showing of extraordinary circumstances," in turn, "involves a showing that without relief from the judgment, 'an 'extreme' and 'unexpected' hardship will result.'" Id. (citing Mayberry v. Maroney, 558 F.2d 1159, 1163 (3d Cir. 1977)).

To give meaning to its independent status under Rule 60(b), "[r]ule 60(b)(6) generally requires the movant to make 'a more compelling showing of inequity or hardship' than would normally be required to reopen a case under any of the first five subsections of Rule 60(b)." Hooten v. Greggo & Ferrara Co., C.A. No. 10-776-RGA, 2013 WL 5272366, at *1 (D. Del. Sept. 18, 2013) (quoting Project Mgmt. Inst., Inc. v. Ireland, 144 F. App'x 935, 937 n.1 (3d Cir. 2005)). For this reason, courts have held that a party cannot obtain relief under Rule 60(b)(6) if it bases its motion on grounds specified under any other subsection of Rule 60(b) – such as Rule 60(b)(2) or 60(b)(3). See Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 863 n.11 (1988) ("clause (6) and clauses (1) through (5) are mutually exclusive"); Project Mgmt. Inst., 144 F. App'x at 937 n.1 ("Because, as explained below, the District Court properly found that Ireland was not entitled to relief under Rule 60(b)(3), his reliance on Rule 60(b)(6) is unavailing."); Davidson v. Dixon, 386 F. Supp. 482, 493 (D. Del. 1974), aff'd, 529 F.2d 511 (3d Cir. 1975); Advanced Multilevel Concepts, Inc. v. Bukstel, C.A. No. 11-3718, 2014 WL 6907973, at *3 n.5 (E.D. Pa. Dec. 9, 2014). See also Moore's Federal Practice § 60.48[2] ("If the reasons offered for relief from judgment could be considered under one of the more specific clauses of Rule 60(b)(1)-(5), those reasons will not justify relief under Rule 60(b)(6).").

2. Globus cannot request relief under Rule 60(b)(6) because it bases that request on the same conduct underlying its Rule 60(b)(2) and (b)(3) requests.

Because Globus does not identify any unique facts in support of its request for relief under Rule 60(b)(6) (Br. at 19) – anything beyond what it already alleges in support of its request for relief under Rules 60(b)(2) and (b)(3) – relief is not available under Rule 60(b)(6). To grant relief under Rule 60(b)(6) in this case would eviscerate the distinction between that subsection and the other subsections of the rule, which the Supreme Court has described as "mutually exclusive." Liljeberg, 486 U.S. at 863 n.11.

3. Globus has not established the requisite extraordinary circumstances nor the requisite extreme and unexpected hardship.

Even if Globus had identified some unique circumstance in support of its request under Rule 60(b)(6), Globus still could not obtain relief because it fails to show the "extreme" and "unexpected" hardship required by the rule. In the single Third Circuit case Globus cited where a court even granted relief under Rule 60(b)(6), the movants' attorney's failure to respond to summary judgment motions caused summary judgment to be entered against them, "preclud[ing] an adjudication on the merits" at trial. See Boughner v. Sec'y of Health, Educ. & Welfare, 572 F.2d 976, 979 (3d Cir. 1978). Globus received a full trial on the merits, and it nowhere has shown how Mr. Gering's false testimony caused it "extreme" and "unexpected" hardship. Globus' identification of a hypothetical line of cross-examination on Mr. Gering's credentials does not support relief under Rule 60(b)(6): "Almost every losing litigant can point to some corroborating witness he might have called or to some line of relevant questioning his attorney failed to exhaust on cross-examination." Davidson, 386 F. Supp. at 493 (denying relief). Ultimately, Globus contends that Mr. Gering's testimony about his degrees renders the judgment inequitable (Br. at 19), but labeling the judgment inequitable – when in fact the direct evidence

overwhelmingly supported the jury's verdict regardless of Mr. Gering's testimony about his degrees – does not support relief under Rule 60(b)(6). See Moolenaar v. Gov't of Virgin Islands, 822 F.2d 1342, 1348 (3d Cir. 1987).

II. THE COURT CANNOT GRANT GLOBUS' MOTION NOW, BUT IT CAN AND SHOULD DENY IT, OR AT LEAST DEFER IT UNTIL THE APPEAL CONCLUDES

Globus confirmed the Court's lack of jurisdiction to grant this motion when it requested relief under Rule 62.1 (Br. at 3 (¶ 4)), which applies to parties who move for relief "that the [district] court lacks authority to grant because of an appeal that has been docketed and is pending." Fed. R. Civ. P. 62.1(a); Venen v. Sweet, 758 F.2d 117, 122-23 (3d Cir. 1985) (filing of timely notice of appeal divested district court of jurisdiction to grant Rule 60(b) motion). The Court may deny Globus' motion now on the merits (as it should) or it may "defer considering the motion." Fed. R. Civ. P. 62.1(a)(1)-(2). Should the Court opt not to deny Globus' Motion now, it should defer ruling until the Federal Circuit rules on Globus' appeal of four of this Court's claim constructions and three of this Court's infringement rulings. Globus has asked the Federal Circuit to resolve the appeal before acting on any request for an indicative ruling under Rule 62.1(a)(3).

CONCLUSION

Synthes respectfully requests that the Court deny Globus' motion.

Respectfully submitted,

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Dated: April 9, 2015