IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

GLOBUS' REPLY BRIEF IN SUPPORT OF ITS MOTION FOR RELIEF FROM THE FINAL JUDGMENT

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PRELIMINARY STATEMENT

Synthes does not dispute that Mr. Gering lied under oath about his credentials. Although Synthes attempts to trivialize the importance of his concocted Ph.D., it does not dispute that Mr. Gering's credentials were one of three bases for his opinions. Nor does Synthes dispute that Mr. Gering's testimony was fully adopted by the jury and directly led to the award of $16 million. Moreover, Synthes tacitly concedes that Globus' motion is timely. But perhaps most striking is Synthes' admission that it did not investigate Mr. Gering's background—despite its obligation to do so under FED. R. CIV. P. 11(b)(3)—yet its counsel knew how to do so quickly and cheaply. Globus' motion should be granted.

Rule 60(b)(2). Synthes' arguments against relief rest upon a fiction that Mr. Gering's falsified credentials were immaterial to the judgment. But Synthes does not dispute that Mr. Gering's opinions had three stated bases, one of which was his education. Synthes further ignores the importance of expert witness testimony to ascertaining patent damages, as this Court told the jury in its instructions. Synthes' argument that Globus could have discovered Mr. Gering's falsified Ph.D. if Globus knew of the same third party source that Synthes' counsel plainly knew of is irrelevant. Globus took actions to investigate Mr. Gering's credentials that were reasonable under the circumstances. Globus had no reason to know from its investigation that Mr. Gering falsified his credentials and perjured himself for more than a decade.

Rule 60(b)(3). By offloading all blame to Mr. Gering, Synthes overlooks its own representations of Mr. Gering's credentials to this Court, the jury, and Globus. In attempting to exculpate itself, Synthes now **admits** that it made no attempt to investigate its factual representations to the Court and Globus, even though its counsel declares now that it knew how to do so quickly and cheaply. The failure to undertake this investigation is misconduct and is attributable to Synthes. *See* FED. R. CIV. P. 11(b)(3). Contrary to Synthes' argument, this Court

need not weigh the effects of the perjured testimony on the ultimate outcome of the case. Nor does Globus need to show that Mr. Gering would have been precluded from testifying under *Daubert.* Instead, a new trial should be ordered since Globus has shown that it would have tried its case differently had it been aware of Mr. Gering's true credentials and years of perjury.

Rule 60(b)(6). Synthes contends relief is inappropriate under Rules 60(b)(2) and 60(b)(3), but then contends that relief under Rule 60(b)(6) should be denied because relief under Rules 60(b)(2) and 60(b)(3) is available. This double-standard is improper. If relief under Rules 60(b)(2) and 60(b)(3) is unavailable, Mr. Gering's perjury warrants relief under Rule 60(b)(6).

ARGUMENT

I. RELIEF FROM THE JUDGMENT UNDER RULE 60(B)(2) IS PROPER

A. Mr. Gering's Perjury Drives Directly to Issues Relevant to the Consideration of Reasonable Royalty Damages, and, As Such is Not "Merely" Impeaching

1. At the Very Least, the Damages Awarded At Trial Probably Would Have Been Different Had Globus Known of Mr. Gering's Perjury

Globus has shown that the damages award probably would have been different had it known Mr. Gering was a chronic perjurer masquerading as a Ph.D. economist. D.I. 431 at 14-15. Synthes cannot sweep away the fact that Mr. Gering's education was one of three bases for his opinions, that he was addressed as "Dr." Gering, throughout the case and trial, to give his testimony the additional weight of a Ph.D. economist, and that he testified about a "hypothetical negotiation" from an "economic perspective," Ex. 1, Tr. 1125:13, 1131:8-1132:15, 1146:23-25, and invoked "economic principles," *id.* at 1123:24, 1124:8, while defrauding the jury into believing he had the same credentials in economics as Globus' expert. This was a battle of the experts, and Mr. Gering won this battle—resulting in the jury's $16 million award—by lying.

Synthes incorrectly claims that Mr. Gering's perjury merely tends to impeach. Mr. Gering's faked Ph.D. bolstered one of the three bases for his opinions (D.I. 431 at 11-12), and it

is undisputed that his opinions were the basis for the jury's damages award. That Mr. Gering holds a Master's degree, and had two other bases for his opinions, does not change this.

Expert opinions are critical to the reasonable royalty analysis. After trial, in accordance with *Georgia-Pacific Corp. v. U.S. Plywood Corp*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970), the Court instructed the jury on the importance of expert testimony to its analysis of reasonable royalty damages. *See* Ex. 14, Tr. at 2004:7-10; 2004:24-2005:3; 2007:1. To now say Mr. Gering's qualifications are nothing more than "mere impeachment" and were immaterial to his opinion and the ultimate damages award ignores the jury instructions and the role experts play in determining damages in patent cases. Moreover, if having a Ph.D. was irrelevant to an economic analysis of patent damages, why would Mr. Gering lie to convince the jury he was more qualified than he really is? Having relied on perjured testimony as the basis for a $16 million damages award, Synthes is "in no position now to dispute its effectiveness . . . Truth needs no disguise." *Fraige v. Am.-Nat'l Watermattress Corp*, 996 F.2d 295, 299 (Fed. Cir. 1993).

This case is distinguishable from *Dean v. Brandywine Studios Inc*, where Judge Jordan denied the motion because defendants made a "bare assertion" that "they would have been more successful in challenging a certain witness's credibility had they been in possession of the evidence they claim the plaintiff possessed." C.A. No. 99-679-KAJ, 2003 WL 299362, at *3 (D. Del. Feb. 10, 2003). Globus has shown that Mr. Gering's opinions and testimony were based, in part, on his credentials and that had it known of Mr. Gering's history of perjury and true credentials, the verdict as to damages would probably have been different. *See* D.I. 431 at 14-15.

2. Synthes Presents No Legal Basis For its Contention that Globus Needs to Prove that Mr. Gering Would Have Been Excluded Under Daubert

Synthes sets up a legally-unsound straw man argument by positing that Mr. Gering still may have qualified as an expert even if he only had a Master's degree. D.I. 436 at 4-5. Synthes

has not presented any legal basis to tie *Daubert* to the Rule 60(b)(2) analysis. Surviving a *Daubert* challenge does not immunize perjured testimony from Rule 60 as Synthes posits.

Globus only needs to show that the truth probably would have changed the outcome of the trial. *See, e.g., Bohus v. Beloff*, 950 F.2d 919, 930 (3d Cir. 1991). As discussed in Globus' opening brief and in the preceding section, had Mr. Gering's perjury on an issue directly related to the basis for his opinions been exposed during trial, it probably would have kept the jury from adopting Mr. Gering's proposed $16 million reasonable royalty figure wholesale. Despite Synthes' attempt to compare this case to *Williams*, this case stands worlds apart. D.I. 436 at 5-6. The defendant in *Williams* was charged with possession with intent to distribute heroin. *United States v. Williams*, 77 F. Supp. 2d 109, 112 (D.D.C. 1999). The prosecution called Detective Brown as an expert in "the distribution, packaging, and price of narcotics." *Id.* at 110. Although Detective Brown testified as to his decades of experience investigating drug crimes, he falsely testified that he was a Board certified pharmacist. *Id.* at 111. The court denied Defendant's motion to set aside the judgment. In a sentence overlooked in Synthes' brief, the court tells us why: "[b]eing a Board certified pharmacist is irrelevant to knowing how heroin is distributed on the streets of the District of Columbia, which was the focus of the Detective's testimony."*Id.* at 113. The court even noted that "[t]here may be cases in which Detective Brown's false testimony warrants a new trial." *Id.* at 114. Unlike the *Williams* case, there can be no question that Mr. Gering's educational background was a key aspect on which he based his opinions[1], was directly relevant to the "economic perspective" of his damages analysis, and was considered and weighed by the jury in rendering its verdict. Ex. 1, Tr. 1125:13, 1131:8-1132:15, 1146:23-25.

[1] Synthes notes that Gering's expert report was not in evidence. D.I. 436 at 6-7. Yet, Synthes elicited trial testimony on Mr. Gering's Ph.D., and it is undisputed that, unlike*Williams*, his Ph.D. was directly relevant to his opinions. Further, nothing requires this Court to assume that the trial would have unfolded exactly the same way had Globus known of Mr. Gering's perjury.

B. Synthes Fails to Rebut The Three Hypotheticals About How Trial Would Have Unfolded Had Mr. Gering's True Credentials Been Known

As shown in its opening brief, had Globus known that Mr. Gering lied under oath for years, there are at least three possibilities as to how trial on Synthes' damages claim would have unfolded: (1) Mr. Gering would have to admit that he has repeatedly lied under oath to inflate his credentials, thus admitting to a crime; (2) Mr. Gering would have invoked his right against self-incrimination; or (3) Synthes would not have put him on the stand. D.I. 431 at 2. While Synthes tries to contort these hypotheticals into something they are not[2], D.I. 436 at 9, Synthes fails to offer any alternative theory of how events would have unfolded at trial. Nor does Globus' motion require the Court to conclude that "the jury would have found differently on every issue in the case," as Synthes falsely surmises. D.I. 436 at 10. Instead, it is enough to conclude that the jury probably would have reached a different conclusion regarding damages to warrant a new trial. Globus has made the requisite showing. D.I. 431 at 8-9, 14-15.

C. Globus' Efforts to Discover the New Evidence Were Reasonable; Synthes' Proposed Legal Standard is Impossible and Incorrect

Synthes argues that Globus cannot rely on Synthes' lack of diligence in investigating its own expert's qualifications, nor can Globus rely on the fact that Mr. Gering's perjury had gone undetected by many sophisticated parties and their lawyers for many years, through many trials and depositions. D.I. 436 at 10-11. Synthes proffers an impossible legal standard requiring that a movant show that it could not have "taken further actions to discover the information" and that it "pursued all available discovery remedies, however difficult those remedies may have

[2] Contrary to Synthes' suggestion, Globus' hypotheticals do not require Synthes' counsel to "risk sanctions and criminal penalties." D.I. 436 at 9. Rather, Mr. Gering could have testified truthfully that he merely held a Master's degree, leaving him open to having to either admit that he committed perjury in numerous other trials or to invoke his right against self-incrimination. If the true facts had been known, they would impugn the veracity of the opinions he proffered, which, according to his expert report, were based on his Ph.D.

appeared." *Id.* at 11. This is not the law.

The distinguishing characteristic in each of the cases relied on by Synthes is that the movants were at least on notice to inquire regarding further discovery, but they did not take the discovery. In *Floorgraphics*, the movant requested discovery, knew its opponent objected to its production, and did not move to compel.[3] *See Floorgraphics Inc. v. News Am. Mktg. In-Store Servs., Inc.*, 434 Fed. App'x 109, 113 (3d Cir. 2011). In *Betterbox*, the movant knew that the PTO was cancelling the trademark, but it failed to seek discovery or ask for a continuance of the trial pending the cancellation. *Betterbox Commc'ns Ltd. v. BB Techs., Inc*, 300 F.3d 325, 331-32 (3d Cir. 2002). In *LG Electronics*, the movant sought a new trial because it learned that one of several named inventors was not with the company at the time of the alleged conception of the invention. *LG Elecs. U.S.A., Inc. v. Whirlpool Corp*, 798 F. Supp. 2d 541, 568-69 (D. Del. 2011). The Court concluded that the movant had "access to the priority document for the [involved] patent, which did not list" the absent inventor but the movant did not ask questions of the other, named inventors about the contribution of the unlisted inventor. *Id.* In the *Miller* case, the movant served document requests, received objections, and failed to move to compel responses until the day the court entered summary judgment six months later. *Miller v. Baker Implement Co.*, 439 F.3d 407, 414 (8th Cir. 2006). These cases are not applicable here.

Synthes identifies three ways Globus could have allegedly learned of Mr. Gering's perjury. *First*, Synthes says that Globus should have subpoenaed Mr. Gering. D.I. 436 at 11. That argument is not only unreasonable, but it ignores that Mr. Gering's transcript did not issue until December 5, 2014—many months after trial. *See* Ex. 11. Since a subpoena can only request information in a party's possession, custody or control, Synthes has not shown that a

[3] Unlike here, where Synthes says it did not possess the transcripts, the movant in *Floorgraphics* alleged that its opponent produced the documents in a separate litigation. 434 Fed. App'x at 110.

subpoena to Gering for something that did not exist until after trial would have been successful. *Second,* Synthes says that "Globus could have pursued its discovery requests to Synthes," but admits that it "did not possess the transcript," D.I. 436 at 12, making further pursuit of discovery from Synthes futile. FED. R. CIV. P. 34(a)(1) (limiting production to documents in a party's possession, custody or control). *Finally,* Synthes says Globus could have used the National Student Clearinghouse to verify Mr. Gering's degrees and contends that such information is "publicly available." D.I. 436 at 12. Yet, Synthes fails to show this service is commonly known or ubiquitous. Further, information that must be ordered and paid for is not "publicly available" in the sense that the publications in *Int'l Center for Tech. Assessment v. Leavitt*, 468 F. Supp. 2d 200, 207 (D.D.C. 2007) were. Moreover, Synthes has not shown that even though its counsel was aware of it, Globus should be charged with knowledge of that service.

Unlike Synthes, who admits its counsel did nothing to investigate Mr. Gering's credentials but knew how to do so quickly and cheaply, Globus was reasonably diligent in investigating Mr. Gering's background. When Mr. Gering was identified as a witness, Globus' counsel: (1) directed searches for Mr. Gering's prior reports and motions concerning Mr. Gering and reviewed the results; (2) searched Google for results relating to Mr. Gering; and (3) asked other attorneys for insights on Mr. Gering. Culpepper Decl. ¶¶ 2-5. None of this investigation unearthed any reason to dig deeper into Mr. Gering's credentials. *Id.* There is no reason to conclude that Globus' investigation was anything but reasonably diligent.

II. RELIEF FROM THE JUDGMENT UNDER RULE 60(B)(3) IS PROPER

A. Even if Synthes Did Not Intend to Misrepresent the Facts, Synthes Has Submitted Evidence Proving its Culpability Under Rule 60(b)(3)

Synthes argues that because it did not know Mr. Gering lacked a Ph.D., and that in any event his testimony would not have been excluded from testifying as an expert, Rule 60(b)(3)

does not allow relief from the judgment. Synthes is wrong.

Under Rule 60(b)(3), neither "misconduct" nor "misrepresentations" require proof of intentional acts. Four circuit courts have squarely considered this issue and are in accord. *See Anderson v. Cryovac, Inc.*, 862 F.2d 910, 923 (1st Cir. 1988); *Bros Inc. v. W.E. Grace Mfg. Co.*, 351 F.2d 208, 210-11 (5th Cir. 1965); *Lonsdorf v. Seefeldt*, 47 F.3d 893, 897 (7th Cir. 1995); *United States v. One (1) Douglas A-26B Aircraft*, 662 F.2d 1372, 1374 n.6 (11th Cir. 1981). Therefore, Globus need not show that Synthes intended to misrepresent the facts or engage in misconduct. Instead, Globus need only show that Synthes reasonably should have known Mr. Gering did not have the credentials he put forth.[4] *Rembrandt Vision Techs., L.P. v. Johnson & Johnson Vision Care, Inc.*, 300 F.R.D. 694, 700 (M.D. Fla. 2014) ("Rembrandt…must demonstrate that JJVC or its attorneys knew or should have known that [the expert's] testimony was false."); *see also Harre v. A.H. Robins Co.*, 750 F.2d 1501, 1503 (11th Cir. 1985).

Despite repeatedly referring to Mr. Gering as "Dr." Gering in pleadings, expert declarations, and proffered trial testimony, Synthes admits that "***Synthes . . . did not investigate Mr. Gering's background***." D.I. 463 at 10 (emphasis added). Yet, Synthes' counsel submitted a declaration showing that he knew how to verify Mr. Gering credentials quickly and cheaply. D.I. 437. According to Synthes, confirming Mr. Gering's true credentials was easy: "[w]ithin days," Synthes says, "it received confirmation that Mr. Gering had a Master's degree but not a Ph.D." D.I. 436 at 12. Synthes has proven that it knew how to verify Mr. Gering's credentials with ease but made a strategic choice not to do so until it would benefit its position.[5]

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[4] The statement in *Moser v. Bascelli*, 879 F. Supp. 489 (E.D. Penn. 1995) regarding "callous disregard for the truth," is based on a citation to a case involving "fraud on the court" under Rule 60(b)(6)—not Rule 60(b)(3). This language from *Moser* thus appears to have dubious origins.

[5] Synthes provided a copy of Mr. Gering's transcript by email on February 6, 2015, though Synthes is silent regarding how or when it acquired that transcript. *See* .

Synthes made numerous filings with the Court holding Mr. Gering out as "Dr. Gering," a Ph.D. economist. *See* D.I. 186 at *passim*; D.I. 187 at B0150-B0250 (expert report), B0253-263 (C.V. of "Richard J. Gering, Ph.D."); B0495-B0516 (supplemental expert report), B0534-B0560 (rebuttal expert report); D.I. 190 at vi-vii, 33; D.I. 192 at B2510-2514; D.I. 255 at 6, 7, 13; D.I. 361 at 7, 8, 10, and 11; D.I. 362 at 2-3, 5-6, 8-9; D.I. 363 at 4; D.I. 366 (declaration representing Mr. Gering had "a Ph.D . . . in Economics from the University of Maryland"). Synthes further relied on "Dr." Gering in its pursuit of a temporary restraining order and preliminary injunction, attaching a declaration representing that Mr. Gering had "a Ph.D. . . . in Economics from the University of Maryland." *See* D.I. 334 at 5, 8; D.I. 359 at 7; D.I. 336. In all, Synthes' counsel signed no fewer than ten pleadings informing the Court that its expert had a Ph.D. degree.

By signing that raft of pleadings, Synthes' counsel certified that "to the best of [Synthes' counsel's] knowledge, information, and belief, ***formed after an inquiry reasonable under the circumstances***, . . . the factual contentions have evidentiary support." FED. R. CIV. P. 11(b)(3). Yet, Synthes now admits it made no inquiry at all. D.I. 436 at 10, 12; D.I. 437. No inquiry cannot be a reasonable inquiry. Synthes' counsel's failure to perform ***any*** investigation into Mr. Gering's qualifications, despite certifying pleadings and submitting declarations including those qualifications, is attributable to Synthes. *See Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-34 (1962). And, it constitutes misconduct or misrepresentation under Rule 60(b)(3).

B. Since Mr. Gering Testified on the Ultimate Issue of Damages, It is Improper to Weigh the Effect of the Perjured Testimony on the Overall Trial and It is Enough for Globus to Show It Would have Presented Its Case Differently

Synthes misstates the law in telling this Court that "Globus must demonstrate that the false testimony prevented [Globus] from presenting facts required to make its case." D.I. 436 at 17. First, Synthes, not Globus, bore the burden to prove damages. *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1324 (Fed. Cir. 2009). Thus, Synthes' argument that Globus must

prove that it was prevented from "presenting facts required to make its case" is wrong. Second, Synthes does not dispute that the jury fully adopted Mr. Gering's opinions. When perjured testimony is relevant and material to the issues to be decided, "the court should not attempt to weigh the effect of the perjured testimony on the trier of fact and should instead order a new trial." *Viskase Corp. v. Am. Nat'l Can Co*, 979 F. Supp. 697, 700 (N.D. Ill. 1997) (citing *Fraige*, 996 F.2d at 299). "A determination of whether the alleged misrepresentation altered the result of the case is unnecessary because Rule 60(b)(3) protects the fairness of the proceedings, not necessarily the correctness of the verdict." *Lonsdorf*, 47 F.3d at 897. Here, Mr. Gering's credentials were one of the bases for his opinions, and the jury adopted his view of damages. We need not weigh what would have happened had the jury known of Mr. Gering's true credentials. It is enough that Globus would have approached trial differently had it known the truth.

III. IF RELIEF IS NOT GRANTED UNDER RULE 60(B)(2) OR 60 (B)(3), RELIEF FROM THE JUDGMENT UNDER RULE 60 (B)(6) IS PROPER

Synthes contends that relief under Rule 60(b)(6) should be denied because the relief sought can be considered under Rules 60(b)(2) and 60(b)(3). D.I. 436 at 17-18. Synthes also argues that relief from the judgment is not available under Rules 60(b)(2) and 60(b)(3). Synthes cannot have it both ways. If the Court finds relief under Rules 60(b)(2) and 60(b)(3) to be unavailable, relief under Rule 60(b)(6) is warranted in view of the extraordinary circumstances present here - Mr. Gering's years of perjury constitute extraordinary circumstances and should not be tolerated. Thus, this case presents circumstances that work an extreme hardship on Globus.

CONCLUSION

Therefore, Globus' motion for relief from the judgment should be granted.

Respectfully submitted,

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