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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:)
DEPUY ORTHOPAEDICS, INC.,)
ASR HIP IMPLANT PRODUCTS,) Judge Katz
) Cleveland, Ohio
)
) MDL Docket No. 1:10MD2197
)
)
)

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TRANSCRIPT OF PROCEEDINGS HAD BEFORE

THE HONORABLE DAVID A. KATZ

JUDGE OF SAID COURT,

ON WEDNESDAY, JULY 25, 2012

- - - - -

Official Court Reporter: Shirle M. Perkins, RDR, CRR
U.S. District Court
801 West Superior, #7-189
Cleveland, OH 44113-1829
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Proceedings recorded by mechanical stenography; transcript
produced by computer-aided transcription.

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1 WEDNESDAY SESSION, JULY 25, 2012, AT 11:37 A.M.

2 THE COURT: This is the open court session in
3 the DePuy ASR MDL Case, 2197.

4 We have concluded a two-hour session of lead counsel
11:37:36 5 with the Court and discussed a multiplicity of things. Some
6 of which are ripe and some of which are merely open for
7 discussion at a later date after the parties have had an
8 opportunity to meet and confer on those issues.

9 I'll now ask that lead counsel give a report on those
11:38:09 10 issues that they feel are appropriate for each side. Ellen?

11 MS. RELKIN: Should we handle it issue by
12 issue; I'll raise an issue and then Defense can speak?

13 THE COURT: I think that's appropriate. If
14 anybody leaves out anything, I'll chime in with questions.

11:38:31 15 MS. RELKIN: Okay.

16 Well, we've -- an order was just entered by your Honor
17 on July 23rd, which deals with the supplements of the
18 protective order regarding data from the United Kingdom's
19 National Joint Registry and something we negotiated at great
11:38:47 20 lengths and resolved it. And what that involves is a lot of
21 the data with regard to the survival rate of the ASR,
22 maintained by a registry run by the United Kingdom, you
23 know, quasi-governmental organization, and we learned
24 through depositions taken in Manchester, a witness, Dr.
11:39:12 25 Borroff, Mr. Borroff, that he was an industry representative

1 from the Registry and, therefore, he had data from the
2 Registry. And we wanted to obtain that, and DePuy felt that
3 because of British privacy laws and restrictions, that they
4 needed to get the Registry involved. And the long and short
11:39:35 5 of it, after much back and forth, and the Registry was
6 involved as well, we worked out this protective order, so
7 that it basically -- that data comes with a protective order
8 of this court, and the only significant difference is
9 instead of a written request from counsel at the end of a
11:39:55 10 litigation to get the data back, we are -- anybody who has
11 the data must provide it, return it when the litigation is
12 over.

13 So it's been entered, and we expect to get the
14 Registry data soon, which will be used by certain experts in
11:40:11 15 further depositions of DePuy witnesses. So, Bob, on that?

16 MR. TUCKER: Your Honor, it's not that DePuy
17 felt that there were privacy laws that had to be adhered to.
18 It was the fact that there are privacy laws in the United
19 Kingdom that had to be addressed, with respect to the
11:40:30 20 release of this data. It's not DePuy's data. It is data of
21 a third-party entity in the United Kingdom.

22 Rather than force the Plaintiffs to seek formal
23 discovery in the United Kingdom to obtain this information,
24 we have -- we have been working with them to work through
11:40:57 25 ensuring the privacy of this data is maintained once it is

1 released by DePuy to the Plaintiffs.

2 It is important that information that is
3 confidential -- not because DePuy deems it as confidential,
4 but because the National Joint Registry deems it as
11:41:21 5 confidential -- is maintained as such, and we have
6 emphasized that point to the Plaintiffs that if we're going
7 to release data from the National Joint Registry, which the
8 National Joint Registry deems to be confidential, that the
9 Plaintiffs must maintain it as confidential. And a
11:41:42 10 protective order -- supplements to the protective order that
11 the Court has signed and put in place is to try to ensure,
12 at the request of the National Joint Registry, that that
13 information be maintained as confidential and not get
14 inappropriately released or used in an inappropriate manner.

11:42:04 15 THE COURT: So was a protective order for the
16 benefit of those using it, so as not to be viewed as
17 violative of the Registry's restrictions?

18 MR. TUCKER: Right. We have attempted to be
19 considerate of the National Joint Registry's concern about
11:42:25 20 privacy of confidential information.

21 THE COURT: Thank you.

22 MS. RELKIN: And just a minor clarification on
23 that.

24 Obviously the Registry itself issues every year a
11:42:38 25 report of the survival rates of different devices, including

1 the ASR. And it's an important issue in this litigation as
2 to the survival rate of the ASR and failure rate and certain
3 advertisements DePuy had put out as to its survival rate
4 based on Registry data. So it's a very important issue in
11:42:58 5 this case, and we're not -- I mean to the extent DePuy is
6 using survival rate and used it in their advertising, it's
7 something we need to respond to and have experts analyze.

8 So I wouldn't want this transcript to suggest that
9 anything regarding the Registry is protected. It is
11:43:17 10 published data they released. The question is interim data
11 that DePuy got by virtue of having an industry member serve
12 on the Registry, we're looking at that interim data because
13 certain advertisements were based on interim data. The
14 actual final data is out there public on the Internet.

11:43:36 15 THE COURT: Okay. Next item.

16 MR. TUCKER: Well, I -- I'm not sure I
17 necessarily agree with that characterization of final versus
18 interim, but I'm not going to debate the issue at this point
19 because it doesn't really get us anywhere.

11:43:52 20 THE COURT: No.

21 Next issue, discovery update.

22 MS. SHARKO: So depositions.

23 The parties have spent an enormous amount of time
24 negotiating the protocol for depositions, the scheduling of
11:44:12 25 the depositions, and the cross-noticing of the depositions.

1 Early in the litigation, your Honor entered an order
2 attempting to help move along straight federal coordination
3 in the deposition process. That order has proved to be
4 enormously successful in getting the parties to work
11:44:32 5 together across state and federal lines. As a result, we
6 have had to date 24 witnesses to have been deposed over 48
7 days. Most witnesses are deposed for two days. Some were
8 deposed for one, a few have been deposed for three. These
9 depositions have resulted in almost 17,000 pages of
11:44:56 10 transcript.

11 A deposition day for us in ASR starts around 9:00 in
12 the morning and ends at 6:00 or 6:30 at night. The parties
13 have agreed that a deposition day constitutes seven hours of
14 testimony, but to get seven hours. Of testimony, which
11:45:14 15 includes lunch and breaks and things like that, that takes
16 us to that length of time.

17 Twelve days of depositions have occurred in the United
18 Kingdom in Manchester. Most of the U.S. depositions have
19 been in Fort Wayne. Some have been in New Jersey, some have
11:45:32 20 been in California. Looking down the road, we have 11
21 witnesses who are scheduled for deposition. There are more
22 to come. Those 11 witnesses will encompass 22 more
23 deposition days between now and early November. A good
24 number of those days will be in Manchester, and most of the
11:45:56 25 rest will be in Fort Wayne. We have discussed with

1 Plaintiffs the idea of getting sooner rather than later
2 their almost final list of people who they would like to
3 depose so we can get those dates set and the depositions
4 underway.

11:46:13 5 These are -- these deposition statistics which I just
6 gave you do not include the depositions of the distributors
7 and reps. Those have been ongoing in state court cases.
8 Now, that we have the bellwether process in the MDL, and
9 soon a bellwether process in California and in New Jersey,
11:46:36 10 the number of those depositions I expect will go up and the
11 case there will increase significantly.

12 That's the deposition report.

13 THE COURT: Thank you. Any supplementation?

14 MR. KENNEDY: Your Honor, on behalf of
11:46:53 15 Plaintiffs, just to add some flesh to the statistics --

16 THE COURT: I can't hear you.

17 MR. KENNEDY: I'm sorry.

18 To add flesh to the discovery statistics relating to
19 the depositions, behind the scenes I think is important for
11:47:09 20 the Court to know that a lot of the success that the
21 Plaintiffs have seen with respect to the deposition process
22 is a result of the cooperation, which the Court has
23 emphasized all along.

24 I think that the areas and times where there has been
11:47:24 25 difficulty or early on and both parties were feeling each

1 other out with respect to expectations of protocol and
2 decorum, those have, from our point of view, have passed. I
3 think it's important to know and understand from the Court's
4 standpoint and of the lawyers' that the depositions from the
11:47:41 5 Plaintiffs' side have been taken by teams of what we believe
6 to be very talented attorneys. California has sent us their
7 most talented trial lawyers. Illinois has done the same, as
8 has New Jersey, and the MDL designation of attorneys to take
9 those depositions.

11:47:58 10 I think also important with respect to the success of
11 the Plaintiffs in the discovery process is the fact that the
12 same teams and groups of attorneys are taking particularly
13 the engineering depositions, which has allowed us to build
14 our knowledge based on things that have been done
11:48:16 15 previously. It's allowed us to interact and share
16 information because it's essentially the same teams.

17 A prime example would be the deposition of an
18 engineer, Magnus Flett, a DePuy employee, who was involved
19 early on in the development of the product, the postmarking
11:48:32 20 surveillance of the product. That deposition involved 15
21 lawyers over a one-month period preparing for two
22 questioners. It was the fourth time this team had worked
23 together in the preparation of such a deposition, and I can
24 tell you that the fourth time was more effective and more
11:48:47 25 efficient than times one, two, and three. So we are very

1 happy about the progress we've made in that regard.

2 From a substantive standpoint, the Plaintiffs have
3 learned through the presentation of these witnesses and the
4 questioning, I think we've gained an understanding as to
11:49:07 5 what the nature of the defects are in this product, which we
6 believe led to the recall. Two categories; one being the
7 aseptic loosening category failure, the other being metal
8 wear related failures. I think we have a pretty good
9 understanding of the design aspects and the marketing
11:49:24 10 aspects and the constructional aspects that have contributed
11 to these two different modes of failure.

12 I think we gained a good understanding, your Honor, of
13 the DePuy market process and what we believe are final
14 analysis testing, simulator testing, clinical trial testing
11:49:42 15 that could and should have been done to prevent this
16 product, from our standpoint, from getting to the market.
17 We have followed up with questioning of engineers in the
18 surveillance process, have the marketing. We believe we,
19 from a Plaintiff's, again, perspective, have gained
11:49:56 20 information with respect to the information that was coming
21 in to DePuy from registries, from their own complaint
22 system, from further testing that they had done from, of
23 course, individual positions that should have led, again
24 from our perspective, to an earlier recall of this product.

11:50:14 25 Ben's going to talk a little bit about marketing, but

1 the same lawyers are involved in the marketing depositions,
2 which has really allowed us to compare what was being
3 represented about the product in relation to what was known
4 internally.

11:50:29 5 We are not done. Though great progress has been made,
6 there are additional depositions scheduled. We learned
7 about new deponents and witnesses that we believe we will
8 need to take. We talked briefly about the propounding of
9 requests for admissions to try and make some of these facts
11:50:46 10 stand still. There's discussions about -- a little
11 disagreement, but we will work it out -- with respect to the
12 detail data that is -- that is available in the Australia
13 Registry, which will play a relatively important role in
14 this litigation. And, you know, given the importance of a
11:51:04 15 cup size and acclimation and anteversion of mode of failure,
16 we think we're going to need to look at this data in detail
17 with the cooperation of the Defendants.

18 So I guess from our standpoint, your Honor, we believe
19 that we have taken the Court's charge seriously, and that we
11:51:22 20 are creating a very efficient, effective trial product for
21 lawyers around the country to be able to utilize. We will
22 be ready for the first bellwether trials. Thank you.

23 MR. GORDON: Your Honor, Ben Gordon. Brief
24 follow-up to what Ms. Starko said and follow-up of my
11:51:40 25 colleague, Mr. Kennedy.

1 I've been involved in a number of the marketing
2 employees' depositions, ones in Fort Wayne, Indiana, and while I
3 agree that there has been a very positive working
4 relationship, we tried very hard, all of us, to do that, and
5 we are not going to get into the details of some of the
6 issues we have had, in spite of this coordination and this
7 cooperation, this has been a very cooperative agreement
8 fostered by the Court, but we haven't reached a deposition
9 protocol, nor do we think one is necessary, and we do not
10 want to bother the Court any more than we have to with the
11 process issues, but there have been some bumps in the road,
12 issues with depositions. I think DePuy would agree with
13 that. They probably blame some of them on me. You would
14 agree with the details. I blame some of them on them.

15 (Laughter.)

16 MR. GORDON: Without getting --

17 THE COURT: They seem to be tougher than you
18 bone --

19 MS. SHARKO: Susan has a strong right hook.
20 She does.

21 THE COURT: You're wearing a band-aid and none
22 of them are.

23 (Laughter.)

24 MR. GORDON: That said, this case -- the
25 harder the case is marketing, the Plaintiffs believe, and

1 that there should have been some things done differently in
2 the marketing of these products -- ASR, in particular --
3 based on the defects the engineering side experts have
4 figured out. And there's a real argument about whether they
11:52:48 5 knew these things and when they should have pulled this
6 thing from the market, to put it simply. It was a
7 rationalization process, they called it, that we believe in
8 and of itself gave them information to suggest that they
9 could have and should have pulled the device from the market
11:53:01 10 long before they rationalized, long before they actually
11 did, that there were business reasons they did that, and
12 that was marketing over science, basically.

13 What's in these depositions, as a result, these
14 witnesses have been very, very, very well conditioned for
11:53:15 15 these depositions and have been very, very difficult to get
16 them to answer the questions responsibly, but we've gotten
17 through it so far. We believe we can continue to work it
18 out and cooperatively.

19 You know, we did have to bother you with one
11:53:29 20 deposition. We're hoping that won't happen again, and we
21 can work through it. But, I didn't want the record to be
22 left as it was suggesting that there -- it's been just
23 everybody's, you know, totally agree on everything. There
24 have been some problems, and we believe that we want to
11:53:41 25 reserve the right to come back and take further discovery of

1 some of these witnesses because of this.

2 THE COURT: Thank you.

3 MR. TUCKER: If I can just respond.

4 THE COURT: Mr. Tucker.

11:53:50 5 MR. TUCKER: If I can just admire and
6 paraphrase Paul Harvey, at trial, we'll hear the rest of the
7 story. So I don't necessarily agree with Mr. Kennedy's
8 recitation. I certainly don't agree with Mr. Gordon's
9 comments about what's happened at the depositions. But, as
11:54:08 10 I said, we'll hear the rest of the story.

11 THE COURT: But, you'll agree with me, will
12 you not, both of you, that this has been an unusual MDL, an
13 unusual case with a significant amount of cooperation,
14 discussion on both issues of process, and long?

11:54:40 15 MR. GORDON: Yes, your Honor, I agree with
16 that.

17 THE COURT: And I believe, at least in my
18 practice, very close to unprecedented. There have been 44
19 million pages produced by the Defendants. I'm advised by
11:54:59 20 their mathematician, Mr. Tucker, that that's the equivalent
21 of stacked side-by-side of seven -- no, ten stacks of paper
22 the size, each the size of the height of the Empire State
23 Building. Now, that is an opportunity for lawyers to
24 improve their reading ability, as is the interrelationships
11:55:37 25 created through depositions and the struggles that you've

1 had to go through on both sides is to their ability to seek
2 solutions by discussing the matters openly. Okay.

3 Report on the state court cases. Susan.

4 MS. SHARKO: State court litigation is moving
11:56:01 5 along, journeying from west to east in California. We're in
6 the process of negotiating a bellwether process for the
7 California cases. There are some motions pending for
8 preference cases, which is a uniquely California thing in the
9 California rules. There are a couple of other motions
11:56:24 10 pending before Judge Cramer.

11 In Illinois, we have a trial date in February of next
12 year. Plaintiffs have made their expert disclosures. We
13 will make our expert disclosures in the fall. We're
14 actively engaged now in the process of deposing Plaintiffs'
11:56:42 15 experts. The parties met and conferred to agree upon a
16 order on expert discovery in Illinois that brings Illinois
17 closer to the federal rules in terms of what will be
18 disclosed and what won't be disclosed so that we can have,
19 hopefully, a seamless process across the jurisdictions. In
11:57:05 20 other words, if you're not allowed to get a draft report in
21 the federal court, you shouldn't be allowed to get it in
22 Illinois and whatever states.

23 So that was a good -- a good first step in
24 coordination. It was an issue counsel couldn't agree upon
11:57:22 25 in terms of the length of a couple of the expert

1 depositions. We've briefed and argued that before Judge
2 Dooling, and she issued a ruling. She issued a ruling on
3 that last week.

4 Continuing east, we have our first trial in Maryland
11:57:38 5 in Prince George's County in January. That's a
6 three-plaintiff case. A motion for severance will be filed.
7 And then we have expert disclosures for the Plaintiffs are
8 coming up in early August. Ours will be in the fall. We'll
9 start the deposition process there.

11:57:55 10 In New Jersey we have our next case management
11 conference tomorrow. The main item on the agenda will be
12 the bellwether schedule and process for New Jersey, and we
13 expect the first New Jersey trial will come in between the
14 two MDL trials. There's active litigation ongoing in a
11:58:15 15 number of other jurisdictions in the country.

16 And I think that's it for the states. We have a long
17 list of state court trial dates that follow from January,
18 2013.

19 THE COURT: Thank you.

11:58:33 20 MR. ROBINSON: You want me to go?

21 Yes, yes, your Honor, I'm going to speak briefly about
22 the native production or the supplement. I'm Mark Robinson,
23 your Honor. And I think the -- I want to echo what the
24 Court just said about what I seen in discovery in this case.
11:58:55 25 It is really, due to the great cooperation between the

1 Defense leads and the Plaintiffs' Executive Committee and
2 Steering Committee in this case. And I don't think I've
3 been in an MDL coordination where things have gone as
4 smoothly as they've gone in this case. So I wanted to say
11:59:19 5 that. And that's just my observation.

6 And an example of that is the order supplementing the
7 previous Case Management Order Number 6 regarding native
8 metadata. And as this Court knows, the Federal Rules of
9 Civil Procedure and the Sedona Conference Principles express
11:59:43 10 a preference for production of electronically stored
11 information in native format, with metadata.

12 Now, we have some orders in this case where we haven't
13 needed to do that, but the Defense has worked with
14 Plaintiffs. For certain types of documents in this case,
12:00:07 15 that we do need to have a production and native, and I'm
16 just going to give the -- sort of salient points of the
17 supplement to the order. Number 1, all native files will be
18 produced, plus TIF images as well. And then we understand
19 that some TIF would -- plus low files are really -- they
12:00:35 20 can't be properly produced without giving you an Excel
21 spread sheet and the like, and I think Defense has agreed to
22 this production.

23 And frankly, they made under this order, they may mark
24 the natives, if I understand it, protected if they want to,
12:00:54 25 so protect those documents.

1 In terms of redactions, if Plaintiffs challenge their
2 redactions, they've -- they, pursuant to the protective
3 order, they will redact the privilege, privacy, and highly
4 confidential information. And then there is a method for
12:01:15 5 Plaintiffs to object. But, I really think that this is
6 another order that's been worked out with cooperation
7 between Plaintiffs and Defense, and I think it's going to
8 help move the case along. And these kind of spread sheet
9 documents may be things that we -- I'm sure the Defense
12:01:38 10 doesn't want any change in a spread sheet, and we don't --
11 we do not either. So I think that this order will help
12 protect against that.

13 That's really what I have to say. Thank you, your
14 Honor.

12:01:51 15 MR. TUCKER: I really don't have much to
16 supplement to that, except to emphasize that last point that
17 when -- when you're producing a native document, you're
18 actually producing a live document with information in there
19 that can be changed should somebody choose to change it, and
12:02:12 20 then print it and it would appear as though it was an
21 original document. Native documents also will look
22 different, depending upon the computer settings that the
23 native document shows up on, and will print differently,
24 depending upon the printed document -- the printing settings
12:02:30 25 on a printer.

1 So a native document is exquisitely difficult to deal
2 with in litigation. That's why we had the initial ESI
3 protocol that the Court signed. These documents are
4 initially produced in TIF images, marked as protected, Bates
12:02:50 5 numbered, and all of that, which is a static image. And
6 because there are certain native files that the -- that the
7 Plaintiffs have requested in their native format, we have
8 produced them in their native format. But, to use them at
9 deposition, there has to be a process or a protocol in place
12:03:10 10 for the use of a native deposition or a native document in
11 deposition. And that's what this order achieves in terms of
12 how you use it and how you can extract information from it,
13 how you can create summaries to use in the examination of a
14 witness.

12:03:27 15 So it's a very valuable order. It's a bit contentious
16 at times, but through a meet-and-confer process with the
17 Court's guidance, hearing us out, we've worked that through.

18 THE COURT: Yeah, I'd call it less guidance
19 and more hearing you out and then affirming a position for
12:03:52 20 you. Another example of lawyers teaching the Court about
21 items that don't generally come before courts, a particular
22 court, and reaching a result, which is supportable. And I
23 commend you for these processes that you've capitalized
24 upon.

12:04:27 25 Next item, and there may be others which you folks

1 have, is the bellwether selection schedule and proposed CMO
2 14.

3 MS. SHARKO: The bellwether order.

4 The parties spent an ungodly amount of time
12:04:46 5 negotiating, quarreling, and fighting over this order. I
6 suspect it's hard to think of an issue that wasn't debated
7 in the entry of this order, and the order I think makes both
8 of us unhappy. So it's probably a good order.

9 There were discussions about -- and this is not an
12:05:05 10 exhaustive list -- whether the candidates should be limited
11 to Northern District of Ohio people, or District of Ohio
12 people, or revisions as of a certain date, unilateral,
13 bilateral, the list goes on and on.

14 Here is what we finally came to and which will be in
12:05:25 15 the order which will be entered today. And another --

16 THE COURT: Let me interrupt. We have a
17 little technical problem we encountered before 9:30 in the
18 morning.

19 MS. SHARKO: Thank you.

12:05:37 20 THE COURT: Is that -- is that all right for
21 the purpose we discussed?

22 MS. SHARKO: Yes.

23 THE COURT: Thank you.

24 MS. SHARKO: Thank you.

12:05:42 25 Another hotly debated issue was whether the Plaintiffs

1 could pick the candidates or whether we could, whose case
2 would go first, whether there would be strikes. We felt
3 very strongly there should be strikes. Plaintiffs felt very
4 strongly there should not be strikes. What we came to was
12:06:01 5 this: Each side will select four cases as bellwether
6 candidates. We will exchange the names on or before August
7 8th. These cases may only be selected from MDL cases where
8 there's revision surgery, and a PFS, a signed authorization
9 and medical records required by the PFS, PFS served as of
12:06:31 10 April 30th.

11 THE COURT: The Plaintiffs?

12 MS. SHARKO: Right.

13 No bilaterals will be eligible for the first
14 bellwether trials.

12:06:40 15 The parties then have until November 1st to conduct
16 limited discovery in this pool of eight cases. The limited
17 discovery will be the deposition of the Plaintiff, the
18 implanting surgeon, the explanting surgeon, and one fact
19 witness per side as necessary to determine whether the case
12:07:04 20 is suitable as a bellwether candidate.

21 By December 1st, the parties will prepare and file
22 submissions to the Court with arguments as to which is the
23 best bellwether case and why. And we have specifically
24 agreed in our order to explain the case facts and
12:07:24 25 characteristics supporting the designation of the case as a

1 bellwether. We will try to agree on the bellwether
2 candidates, and if we can't, your Honor will select a
3 bellwether case and a backup case for the May trial date,
4 and a bellwether case and a backup case for the July trial
12:07:46 5 date. The May trial will begin on May 6th, the July trial
6 on May 8th. Those are the dates that your Honor established
7 this morning -- I'm sorry, July 8th. One is designated as a
8 bellwether trial case. The Plaintiffs may not dismiss the
9 case except with prejudice. And then we have a skeletal set
12:08:09 10 of deadlines. Obviously deadlines for various trial things
11 will come in another order, but basically for the May case,
12 the parties will complete all remaining discovery, including
13 expert discovery, by April 15th. Plaintiff will identify
14 her experts or his experts and provide Rule 26 reports on or
12:08:32 15 before February 1st. Proposed dates for the depositions of
16 all experts will be provided with the expert reports.
17 Defendants will identify all experts and provide the Rule 26
18 reports on or before March 15th. Proposed dates for
19 depositions of all experts will be provided with the expert
12:08:51 20 reports. And then we have a similar set of deadlines for
21 the July bellwether trials. And we've agreed that a
22 subsequent order will be entered governing final pretrial
23 order deadlines, identification of witnesses, exchange of
24 exhibits, deposition designations, and the like.

12:09:13 25 We have deferred the issue of the issues related to

1 expert depositions and discovery and believe we've worked
2 those out and will present a subsequent order or will bring
3 them to your Honor for ruling. And that's the bellwether
4 process.

12:09:31 5 THE COURT: Thank you.

6 MS. RELKIN: Susan did a very good job of
7 describing the whole process and what led up to it, and I
8 think the best thing about this order is that we were able
9 to resolve kind of the most contentious issue, which I've
10 litigated many cases with Susan Sharko over the years and
11 she's always insisted on strikes, and I got her off the
12 strike.

13 No. The way it works, it really will incentivize both
14 sides to truly find representative cases because there's no
15 strikes. But, if we can't amongst ourselves agree upon
16 which of the eight is the first trial and the second goes to
17 your Honor and --

18 THE COURT: You don't want that.

19 MS. RELKIN: Never know what that Judge is
12:10:17 20 going to do.

21 THE COURT: No Judge will have as much
22 intimate knowledge necessary to make that decision as will
23 the folks sitting at these tables.

24 MS. RELKIN: Right. So this will really
12:10:31 25 motivate both sides. I mean -- you know, Defendants

1 sometimes in litigations try to find the worse Plaintiffs,
2 someone who's a criminal record, or got injured in an
3 accident, they had a revision following an auto accident as
4 opposed to failure of the hip. They would never pick that
5 up because -- certainly your Honor wouldn't pick that just
6 like, you know, we have some extremely tragic cases that --
7 thankfully a rarity of a plaintiff who had a stroke
8 secondary to the revision and is paralyzed. We wouldn't
9 pick that because your Honor wouldn't pick that. So this
10 will get us to the mid level of what is a representative
11 case.

12 So we hammered that a lot, and I think this hopefully
13 will be a successful methodology.

14 THE COURT: Thank you.

15 As I said, this order will be entered early tomorrow,
16 and I think this should get things on the appropriate track
17 in discovery and of those cases that are ultimately selected
18 and many other issues that will involve the leadership as
19 well as the committee members during deposition.

20 Other issues that you wish to articulate upon at this
21 juncture?

22 MR. TUCKER: I don't believe so, your Honor.

23 MS. RELKIN: I don't think so, your Honor.

24 THE COURT: All right. Thank you very, very
25 much. Go ahead.

1 MR. TUCKER: Your Honor, I was just going to
2 suggest -- and this may have happened because I came into
3 the courtroom late -- but, the Court has generally had
4 everybody sign in that's in the courtroom at the outset
5 of --

12:12:35

6 THE COURT: Should have done that.

7 MR. TUCKER: And so I --

8 THE COURT: Here, free of charge.

9 MR. TUCKER: -- have people enter their

12:12:42

10 appearance before they leave the courtroom. That would be
11 helpful.

12 THE COURT: Here's what they should sign.

13 MR. TUCKER: Do you want for discuss the next
14 date or you want to hold that and have people circulate
15 proposals?

12:13:28

16 THE COURT: That's fine. Whichever you
17 prefer. But, we should relatively quickly pick the next
18 date for both meeting of leadership and open court session.

19 MR. TUCKER: Why don't I suggest that we all
20 get together with our calendars and then propose some dates
21 to --

12:13:50

22 THE COURT: That's fine. Thank you. All
23 right. Thank you.

24 Unless there's anything further from those in
25 attendance -- I know it was a dangerous question -- that

12:14:02

1 concludes this open court session of the DePuy MDL matter.

2 Thank you all.

3 (Proceedings adjourned at 12:14 p.m.)

4 C E R T I F I C A T E

5 I certify that the foregoing is a correct

6 transcript from the record of proceedings in the

7 above-entitled matter.

8

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10

11

s/Shirle Perkins

12

Shirle M. Perkins, RDR, CRR

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