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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

CASE NO. 1: 10 md 2197

IN RE: DePUY ORTHOPAEDICS, INC,
ASR HIP IMPLANT PRODUCTS,

January 10, 2013

HEARING
BEFORE THE HONORABLE DAVID KATZ
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS: ELLEN RELKIN, ESQUIRE
STEVEN SKIKOS, ESQUIRE
ERIC KENNEDY, ESQUIRE
MICHELLE KRANZ, ESQUIRE
BEN GORDON, ESQUIRE
ASA DANES, ESQUIRE
DANIEL ROBINSON, ESQUIRE

FOR THE DEFENDANTS: SUSAN SHARKO, ESQUIRE
ROBERT TUCKER, ESQUIRE
KRISTEN MAYER, ESQUIRE
JOHN LEWIS, ESQUIRE
JAMES O'CALLAHAN, ESQUIRE

REPORTED BY: TAMMY NESTOR, RPR
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1 THE COURT: Thank you. Please be seated, ladies and
2 gentlemen.

3 Ladies and gentlemen, thank you. As you know, this is
4 an open court meeting of the Depuy MDL 2197 as previously
5 determined. We have an agenda. Because of certain plain
6 constrictions, we are going to move along very rapidly. And we
7 will start with a report on the status of discovery and state
8 court reports.

9 MS. SHARKO: Thank you, Your Honor. As of this time,
10 we have produced approximately 60 million pages of documents.
11 We have had approximately 90 days of company witness
12 depositions and third party depositions not including reps and
13 distributors.

14 In terms of the state court cases, the Jackson case in
15 Maryland was voluntarily dismissed yesterday. There was no
16 settlement paid. Rather, the claims against the distributors
17 will be dismissed with prejudice. The claims against Depuy
18 will be refiled in the MDL.

19 The same thing will occur with regard to Mr. Maglio's
20 other state court cases except for those in New Jersey and
21 Illinois which will stay where they are. The next case up for
22 trial is in California at the end of this month, followed by
23 Illinois at the end of February, and then the state court
24 trials go on from there. That's the discovery and state court
25 report.

1 THE COURT: Anything additional from the plaintiffs?

2 MS. RELKIN: That's essentially accurate. New Jersey
3 has all the trials set for September, November, and discovery
4 is proceeding with those as well. So we expect those should go
5 forward.

6 THE COURT: Thank you. We recently issued two orders
7 on each, one order designating two cases as Bellwether trial
8 cases.

9 Of those that were submitted by plaintiffs and
10 defendants and subsequently within the past several days, we
11 issued trial orders on each of those cases.

12 The first case Faye Dorney-Madgitz is to be tried
13 beginning with jury selection on May 13, 2013 followed
14 immediately by opening statements, presentation of witnesses.

15 The next case determined as to the starting date in
16 July when the first case is concluded is Ann McCracken. That
17 is scheduled for, as I said, July 2013.

18 Anything else with regard to the issue of the
19 designated cases for Bellwether trials in May and July?

20 MS. RELKIN: No, Your Honor. But I did want to
21 introduce you to the lawyers who are handling the cases. I
22 believe you already know Ester Berezofsky who is on our PSC
23 who is lead counsel in the Dorney-Madgitz case.

24 And I would like to introduce, I don't think you have
25 met, Steve Schwartz and Hadley Matarazzo from the Faraci Lange

1 firm in New York. And they are counsel in the McCracken case.
2 I'm co-counsel with them. They are all fine lawyers who I have
3 known for many, many years.

4 THE COURT: Don't get too many many years. You're not
5 that old.

6 MS. RELKIN: Well, Ester and I, our daughters are the
7 same age and we were pregnant together at the same time and
8 they are all applying to colleges now, so it gives a little
9 perspective.

10 THE COURT: I would like to see the three of you after
11 court just for a few minutes. I won't hold you long.

12 Anything from defense counsel on that issue?

13 MR. TUCKER: No, Your Honor, just that the plaintiffs
14 have asked that we meet and confer on some of the dates in the
15 Court's trial order, and we will do so.

16 THE COURT: Yeah, thanks. I have indicated that if
17 there are dates which are inappropriate in light of
18 developments as a result of discovery thus far, that they
19 should meet and confer and submit to the Court agreed revisions
20 to the trial order.

21 My career law clerk who runs my chambers directly and
22 indirectly has just informed me that we only issued the
23 Dorney-Madgitz trial order and not the McCracken.

24 The next one, mandatory disclosure form and order.
25 Steven, was that yours?

1 MR. TUCKER: Your Honor, the parties have spent a lot
2 of time and actually counsel in the MDL have spent a lot of
3 time putting together responses to the PFSs. And the lead
4 counsel have tried to work with those PFSs to determine the
5 nature of the injuries that are being claimed in the course of
6 the litigation.

7 We believe that it would be beneficial to the parties
8 if we had a one-page supplement to the PFS which provided
9 certain information to be filled out by counsel of record, not
10 to be signed by their clients, but it's just some very basic
11 information that will assist, we believe, counsel and the Court
12 in terms of motion practice going forward in terms of trial and
13 remand issues going forward.

14 And so we are meeting and conferring, in the last
15 stages of a meet and confer on the information to be requested
16 in the operating order to implement it. And we will get it to
17 the Court shortly.

18 MR. SKIKOS: We are going to, for uniformity's sake, I
19 think we are going to work with California and Illinois and New
20 Jersey to have the exact same form implemented in those
21 jurisdictions. And Mr. Tucker is right, it's going to assist
22 us in evaluating the remand issues which I will address later.

23 THE COURT: And it will be extremely helpful to the
24 Court. I have reviewed the current draft of that form and I
25 understand the changes that are now being discussed and no

1 problem with it at all. But I think we will need that as we
2 move forward on remand and related issues.

3 We discussed in our prior meeting with leadership
4 remaining scheduled or anticipated deposition schedulings, and
5 I believe that we have resolved all of the issues surrounding
6 that with one exception which is subject to a further meet and
7 confer between and among counsel.

8 And I anticipate that within the next few days, that
9 too will be resolved or, fortunately or unfortunately, I will
10 hear from the attorneys and we will resolve it within the next
11 week to ten days.

12 Any further comments on that, Ellen or Susan?

13 MS. SHARKO: No, Your Honor.

14 MS. RELKIN: No, Your Honor.

15 THE COURT: Thank you.

16 Next item was the discussion of remand issues.

17 Mr. Skikos.

18 MR. SKIKOS: As you have heard, the defense has
19 produced their 60 million documents and we have taken a lot of
20 depositions including trial related depositions for liability
21 purposes. We have expert reports that are upcoming, as does
22 the defense.

23 Cases are scheduled to go in state court in which we
24 are actively assisting and being a part of, including
25 California, Illinois, and New Jersey. And because of the

1 cooperation between the leadership and the steering committees
2 and the lawyers and the state courts and here in the MDL, we
3 have been able to get through the discovery process and we are
4 moving towards its conclusion.

5 And we will be prepared to have a trial package for
6 everyone which can be used to assist in helping plaintiffs and
7 their patients and their clients get ready for trial.

8 This MDL has thousands of cases as there are thousands
9 of cases around the country. And it is important, given the
10 demographics of the patient population in this case, that we
11 move forward rapidly, which is why Ellen and I and the MDL
12 executive committee and PSC reached out early to the California
13 leadership and the other state court leaders to work together.
14 And as you know, we have done so.

15 And we appreciate Your Honor working cooperatively
16 with the state court judges and moving this litigation
17 promptly. As a result of these cooperative efforts, even
18 though we had 60 million pages of documents to get through and
19 even though we had several dozen depositions to take and even
20 though there are an extreme number of highly qualified experts,
21 we are rapidly preparing -- we are rapidly getting ready for
22 trial.

23 Part of the long-term plan on at least as part of the
24 plaintiffs are concerned is remand motions. And as we
25 discussed, we will be meeting with all plaintiffs' counsel in

1 February, much like we did in December or whenever of last year
2 or November to update the plaintiff's counsel on the remand
3 process. And then we will confer with the defense and with
4 Your Honor to bring remand motions at the appropriate time
5 after we have gone through this.

6 Today, Mr. O'Callahan is here on behalf of one of his
7 clients as, I guess, both an example of and a justification for
8 why we are doing this. So with that, I'll turn it over to
9 Mr. O'Callahan.

10 THE COURT: Thank you.

11 Wherever you feel more comfortable, sir.

12 MR. O'CALLAHAN: James O'Callahan,
13 O-'-C-A-L-L-A-H-A-N.

14 Thank you, Your Honor, for affording me the
15 opportunity to speak. I would also like to thank liaison
16 counsel, both plaintiff and defense, for their cooperation up
17 to this point.

18 And I believe that during your sessions in chambers,
19 you were made aware of the fact that our client, Steven Mintz,
20 has been diagnosed with pancreatic cancer. He's been given
21 three to six months to live.

22 I have provided defense counsel with a copy of a
23 declaration from his treating oncologist Dr. Mina, and I have a
24 copy of that for the Court if the Court is interested.

25 The declaration from Dr. Mina indicates that Mr. Mintz

1 has three to six months to live. It is urgent that his case be
2 set for trial. In the event that he were to pass away before
3 his trial were heard, his claims would evaporate. There are a
4 number of practical issues, I understand, in getting this case
5 set for trial.

6 One thought that I had is that this case could be
7 joined with the Dorney Madgitz case and those cases could be
8 tried together.

9 I think that there are, of course, a number of issues
10 that are shared. I can promise Ms. Beresofsky we would stay
11 out of her way when she needed to do what she needed to do.
12 And obviously we would cooperate with defense counsel to
13 whatever extent was necessary to get the information needed to
14 them.

15 I do believe that it's incumbent on me as a lawyer to
16 get this case set for trial. I need the Court's help in doing
17 that and I'm very candid in saying that you are the person that
18 my client and I have to look to to make sure that this case is
19 heard before he passes away.

20 THE COURT: Thank you, Mr. O'Callahan. I am aware of
21 the case.

22 This is extremely difficult for all of us. I can't
23 say we all anticipated this exact scenario, but we did
24 anticipate the need in many cases to preserve testimony. And
25 for that reason, we prepared and filed what we have called

1 CMO7, which is, not only deposition guideline, but deposition
2 guideline for plaintiffs who are in extremes such as your
3 client. You need to review that.

4 You also need to file a motion in our process on
5 behalf of Mr. Mintz to remand. That has to be on the docket
6 before I could ever consider it.

7 You should understand a few things which, believe me,
8 are difficult to articulate for me. First among those is the
9 difficulty in advancing a case for trial after having set forth
10 the Bellwether process and the selection.

11 I cannot put a case in front of those. What you and
12 counsel for plaintiffs and defendants work out along the lines
13 which you indicated a few moments ago, that's something else.
14 That's by agreement. We will do it.

15 If it is not, we will approach it expeditiously upon
16 the filing of your motion.

17 MR. O'CALLAHAN: To that end, Your Honor, when would I
18 be able to come in ex parte to have that motion set?

19 THE COURT: You wouldn't have to do it ex parte. File
20 the motion. There is a process for opposition and we will set
21 it immediately upon that opposition being filed.

22 MR. O'CALLAHAN: Your Honor, the other element that
23 concerns me is that our last experience in having a case
24 remanded from an MDL to the Central District of California, and
25 I point out that this case was actually filed by a preceding

1 law firm and it was filed, in fact, in the Northern District of
2 Ohio.

3 And I am not quite sure how that would impact the
4 motion to remand in terms of the requirements of Ohio procedure
5 in terms of the federal courts there.

6 But beyond that, the fact is that it will take us
7 many, many months to get this case in front of a judge for
8 trial in the Central District of California, if that is where
9 it is sent.

10 Our last experience, it was a matter of, I believe,
11 nine months from the time that the transfer order was issued
12 until the Court set a trial date. And I'm very concerned that
13 unless Your Honor undertakes to get this case heard in the
14 limited time frame that we have, that Mr. Mintz's claim will
15 essentially be --

16 THE COURT: Diminished.

17 MR. O'CALLAHAN: -- diminished in a very substantial
18 way.

19 THE COURT: You should understand that I have limited
20 ability on where it should be remanded and it may do you more
21 harm than good to have it remanded. And that is where you need
22 to discuss the matter with counsel for defense and counsel for
23 the plaintiffs.

24 MR. O'CALLAHAN: I take it the Court has, to the
25 extent there's an open mind about setting the case in front of

1 Your Honor, that is a very narrow, narrow opening.

2 THE COURT: The answer is yes and no. If the parties
3 agreed to combine the cases, while it would be unusual, not
4 that unusual in this context, if the parties agreed, then we
5 would proceed accordingly in July.

6 If the parties do not agree, I cannot impose upon
7 Ms. McCracken's counsel to do that. We will talk afterwards.

8 MR. O'CALLAHAN: Very good, Your Honor. I thank you
9 for the opportunity. I'm sorry to interrupt the other
10 proceedings.

11 THE COURT: No, no interruption.

12 MR. O'CALLAHAN: Thank you.

13 THE COURT: Thank you.

14 I believe that is all that is on the agenda in front
15 of me. Questions from those in attendance?

16 If not, I appreciate your being here. I will stay
17 around for a while as I always do. I wish everybody safe
18 travels and a happy new year.

19 I know several of you have to catch a 3:00 plane, so
20 get out of here.

21 MS. SHARKO: Thank you, Judge.

22 THE COURT: That concludes this hearing, the formal
23 part of this hearing.

24 (Thereupon, the hearing concluded at 1:28 p.m.)

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C E R T I F I C A T E

I hereby certify that the foregoing is an accurate transcription of the proceedings in the above-entitled matter.

1/13/13

s/ Tammy Nestor
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