

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,

February 13, 2013

HEARING
BEFORE THE HONORABLE DAVID KATZ
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS: ELLEN RELKIN, ESQUIRE
STEVEN SKIKOS, ESQUIRE

FOR THE DEFENDANTS: SUSAN SHARKO, ESQUIRE
JAMES O'CALLAHAN, ESQUIRE

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1 THE COURT: Good afternoon, ladies and gentlemen.
2 Those who speak, please identify yourselves, thus making it
3 easier for the court reporter to make a record. And indicate
4 your name before you speak.

5 We have a relatively short agenda. I want you to know
6 that as of this morning, there were 7,393 cases on the docket
7 in this MDL. Five additional cases have come in thus far today
8 making it very close to 7400. That's cases.

9 There are something short of an additional 2800
10 plaintiffs, so a total of, I'm going to say, roughly 10,500
11 plaintiffs. The difference being that some state courts permit
12 the filing of complaints or petitions, whatever they are called
13 in that state, with multiple plaintiffs named, and that's the
14 difference between the number of plaintiffs and the number of
15 cases.

16 Last month there were a total of 10,112 such
17 plaintiffs. I don't know whether that has grown significantly.
18 I want to have both counsel for defendants and for plaintiffs
19 discuss briefly the status of discovery.

20 Let's start with Ms. Sharko.

21 MS. SHARKO: Thank you, Judge. Discovery continues
22 apace. We have produced 61 million pages of documents. We
23 have had 92 days of depositions of company and third party
24 witnesses. Those 92 days covered 51 witnesses. We have about
25 33,000 pages of deposition transcript.

1 There are additional depositions scheduled for the
2 coming months, but hopefully we are getting very near to the
3 end on that.

4 THE COURT: Those are primarily non case specific
5 witnesses, though 51 witnesses, is that correct?

6 MS. SHARKO: Yes, these are entirely non case
7 specific. The numbers do not include distributors and
8 representatives taken in the state court or the MDL Bellwether
9 cases, plaintiffs, surgeons, and the like.

10 THE COURT: And anything to add to that?

11 MS. RELKIN: That's essentially accurate. Obviously
12 with the --

13 THE COURT: Ellen Relkin.

14 MS. RELKIN: Sorry. Ellen Relkin from the firm of
15 Weitz & Luxenberg.

16 (Thereupon, there was an interruption by the court
17 reporter.)

18 MS. RELKIN: Ellen Relkin from the firm of Weitz &
19 Luxenberg. The Bellwethers is case specific. There may be
20 some witnesses who are corporate but have roles that are
21 germane to the individual case specific that we may be noticing
22 up.

23 As a result of the trial in California, there are
24 certain areas we realize we might want to fill in some gaps.
25 While I agree that the bulk of the depositions are done, we may

1 have some new notices going out and I will be in touch with
2 Ms. Sharko about that. But it's proceeding well.

3 THE COURT: Okay. What about the status of the
4 various state courts, anything to report on that?

5 MS. SHARKO: No, the state courts are running
6 smoothly. We have a trial ongoing in California. In Illinois
7 we have a trial that was to start on February 25. It's been
8 moved back a week to March 4. The judge will use the week of
9 February 25 for motions and a Frye hearing on one of the
10 plaintiff's experts.

11 In New Jersey our next case management conference is
12 February, I want to say 27, and we are working up our
13 Bellwethers there for fall trial dates. And things are pretty
14 quiet otherwise in state court.

15 THE COURT: Anything to add?

16 MS. RELKIN: No, that's accurate. We are -- the New
17 Jersey Bellwethers are working closely with ours and they are
18 proceeding, and I think there might be -- Steve can speak about
19 the California Bellwethers.

20 MR. SKIKOS: We have an agreement in California on
21 Bellwethers. We have a status conference coming up. We are
22 going to have to do some more discussions with Susan about
23 that.

24 (Thereupon, there was an interruption by the court
25 reporter.)

1 MR. SKIKOS: Steve Skikos.

2 THE COURT: S-K-I-K-O-S.

3 With regard to the Bellwether cases which have been
4 designated for trial in the MDL, the first case which is set
5 for May 13 for jury selection, the parties will be over the
6 next month or so working out a questionnaire to be submitted to
7 jurors. That questionnaire will, when agreed upon, be
8 submitted to the Court on or before April 1.

9 If there are areas as to which the parties cannot
10 agree, they will submit that as well and the Court will make a
11 determination of whether to include or exclude or restate those
12 items within the questionnaire that's being provided to the
13 Court.

14 Those questionnaires will be provided to the jury on
15 either the Wednesday or Thursday preceding the trial date, thus
16 to provide an opportunity for counsel for both plaintiff and
17 defendant to have copies for review prior to voir dire or the
18 jury selection process.

19 Other issues that may be raised would be appropriate
20 now. First from plaintiff.

21 MR. SKIKOS: Well, I know Mr. O'Callahan is here on
22 the Mintz case and would like to be heard.

23 THE COURT: Mr. O'Callahan.

24 MR. O'CALLAHAN: Thank you, Your Honor. James
25 O'Callahan, O-'-C-A-L-L-A-H-A-N.

1 THE COURT: Would you flip the microphone. Good.

2 MR. O'CALLAHAN: Your Honor, I'm sorry to be troubling
3 you again about the Mintz case. I know you are aware of Mr.
4 Mintz's situation.

5 Since the last hearing, I did file a motion to set the
6 case for trial. There was an opposition to that motion filed.
7 I ran into Ms. Sharko at the opening statements of the Kransky
8 case in California and I inquired if she had any thoughts on
9 the matter. And she expressed concern that she hadn't received
10 medical records, the medical records relating to Mr. Mintz.
11 But we had actually sent them a couple of days before. And I
12 haven't heard that she hasn't received them. I haven't heard
13 anything in point of fact.

14 And my hope was that the Court would give us a hearing
15 on the motion to set dates for trial because that may spur some
16 activity which to this point hasn't occurred.

17 So I would, once again, ask that the Court at least
18 set a hearing on the motion. I would also before that hearing
19 be able to update the Court with an additional report from his
20 treating doctors. So that would be my request of the Court at
21 this time.

22 THE COURT: May I ask a question, sir?

23 MR. O'CALLAHAN: Yes, sir.

24 THE COURT: Generally, not always, the Court
25 determines these motions and rules without a hearing. Do not

1 the documents which have been filed, first by you on behalf of
2 Mr. Mintz and then by defendants, sufficiently outline the
3 issues, his health, which the Court will take as a given unless
4 there is reason presented. And I have not read the documents
5 since Monday was the last day for filing a reply -- and to the
6 best of my knowledge as of, there was no reply filed.

7 MR. O'CALLAHAN: That's correct, Your Honor.

8 THE COURT: Okay. It would seem to me that I could
9 rule on the motion on the papers. If on the other hand you
10 believe that it is important to have an oral hearing on the
11 motion, that's fine, we can arrange it. What's your thought?

12 MR. O'CALLAHAN: Well, my thought, Your Honor, is that
13 I would love to know what you were thinking before I said we
14 will just submit it on the papers, of course. I had thought
15 that the Court might want an update from the plaintiff as to
16 his situation. That was the only reason I didn't file --

17 THE COURT: Ben, I think someone's trying to get in.

18 I'm sorry. Go ahead. Sorry for the interruption.

19 MR. O'CALLAHAN: And that was the primary
20 consideration. I understand that the request that we are
21 making is really without precedence. There's -- it's
22 difficult, unless the Court exercises its discretion, to grant
23 this motion.

24 Whatever, if there's anything that the Court thinks or
25 believes would help in reaching the right decision, I would be

1 delighted to supply that. And in the event that the Court then
2 thinks it would be worth while to have a hearing, a formal
3 hearing with oral argument, I would be delighted to do that.

4 THE COURT: If I decide to do that, we can do it by
5 video conferencing you from your -- you are in Los Angeles and
6 defense from either New Jersey or Cleveland, wherever it's to
7 emanate from, and that won't be a problem.

8 I would like the opportunity, now that we have the
9 final documents, the motion and memorandum and the response, I
10 will read them in the coming week and I will advise counsel
11 whether we need additional information.

12 You should feel free to supply, if you believe it is
13 necessary and/or appropriate, additional medical information on
14 Mr. Mintz's current status. Make sure that the defense has a
15 copy of it whenever you supply it to me.

16 MR. O'CALLAHAN: I will do that, Your Honor.

17 THE COURT: But I will give it my attention,
18 relatively short period of time.

19 MR. O'CALLAHAN: We got the message.

20 THE COURT: Okay.

21 MR. O'CALLAHAN: Thank you, Your Honor.

22 THE COURT: No, thank you. Thank you for your
23 courtesy too.

24 One more thing.

25 MR. O'CALLAHAN: Yes, Your Honor.

1 THE COURT: When we last spoke at the last conference
2 which I think was January 13, I think, somewhere in that area,
3 I had suggested that it would be appropriate for you to take a
4 look at -- I think it's CMO-7 --

5 THE CLERK: Correct.

6 THE COURT: -- our case management order 7 on
7 preservation of evidence, that no matter what happens to your
8 motion, you and your client would be well served in looking at
9 that motion following it -- in that order, I'm sorry, that
10 order, and getting preservation of certain key things,
11 plaintiff, operating surgeon, et cetera.

12 So take a look at it, that may be important, and
13 discuss with Ms. Sharko how you want to proceed with respect to
14 that preservation of evidence. That's going to be important
15 whether I grant or deny your motion because it will take some
16 time if I grant it for it to work its way to a trial in
17 California anyway.

18 MR. O'CALLAHAN: Understood, Your Honor.

19 THE COURT: Thank you.

20 MR. O'CALLAHAN: Thank you, Your Honor. And I would
21 like to thank all counsel for their courtesy.

22 THE COURT: No, thank you, sir.

23 Do you wish to add anything at this juncture?

24 MS. SHARKO: No, Your Honor. When we were last here
25 on January 10, we had no medical records. I had asked

1 Mr. O'Callahan for them. I saw him in court on January 30 and
2 I reminded him we did not have the medical records. Thereafter
3 he sent them to us. We have had them for about ten days and we
4 will look at them and get back to him on what additional
5 records we need. And of course we need authorization so we can
6 get our own records.

7 THE COURT: Okay. Thank you. Anything further from
8 you, sir?

9 MR. SKIKOS: Yes. I will get up for this.

10 So one of the reasons our agendas are so light is
11 because we are all working with the trials. So there's a lot
12 of trials coming up and we are all spending a lot of time on
13 that.

14 We have had discussion at our last hearing regarding
15 the plaintiffs bringing motions to remand. What I mean by that
16 is motions to remand within the federal system. So cases that
17 are appropriately filed in federal court in which this Court
18 has jurisdiction, to have a number of those cases remanded to
19 another federal court for trial.

20 And the rationale behind that is that we are already
21 at 10,000 plaintiffs and we have a population demographic that
22 needs to move forward, as evidenced by Mr. O'Callahan's motion.

23 So Ms. Relkin and I have met again yesterday with
24 the -- invited the plaintiff's bar. There were some 200
25 lawyers who came. We have told them that we would follow up on

1 our promise that we were going to be bringing these motions.

2 We have not yet had any meaningful meet and confer
3 with the defense about this other than our proclamation that we
4 are doing this. But that process is now under way. And there
5 are a number of firms who are fully committed in almost every
6 venue to cooperate with the MDL and our cooperating
7 jurisdictions of California, New Jersey, and Illinois to move
8 cases towards trial.

9 This is separate from the remand motions that are
10 pending before Your Honor based upon lack of subject matter
11 jurisdiction, diversity motions. And those motions we will
12 work with the defense and with the Court on addressing.

13 So I say that because it's very important that perhaps
14 in the next status conference or two we start moving on that
15 process. Thank you.

16 MS. SHARKO: We all gather together in an MDL for
17 certain specific reasons. One of which is coordinated
18 discovery. One of which is to ensure that five, ten, a hundred
19 federal judges around the country do not have to review the
20 same papers and make the same rulings on the same issues over
21 and over. We come here for consistency and efficiency and
22 fairness.

23 And I think there's a lot to be done before we reach
24 the point of remands. We need to wrap up the case specific
25 discovery. I would like to believe it's further along than

1 Ms. Relkin does, I guess, on the depositions, but we are
2 getting there. We need to finish that.

3 We need to have the Court rule on in limine motions,
4 dispositive motions, Daubert motions, other motions that will
5 come as we get closer to the Bellwether cases. And we need to
6 try Bellwether cases in the MDL setting to reap the benefits of
7 the MDL statute which is what brought us here.

8 I don't think that remand is or should be in the near
9 future. It will come eventually. And when we get to the point
10 of remand, there's a lot of things that we need to do to make
11 the cases remand ready to be in a package to be sent back to
12 federal courts so that we don't have the inefficiency and
13 inconsistencies that bring us here.

14 THE COURT: Let me react to both of you. Assuming
15 that motions are made for reasons other than jurisdiction, et
16 cetera, or the one that Mr. O'Callahan spoke to earlier this
17 afternoon, then, I will have to take a good look at that. I
18 will listen to both sides. I hope I will treat it with the
19 consistency and fairness of which Ms. Sharko just spoke.

20 One of the things that is important to recognize, and
21 this impacts both plaintiffs and the defendants, is the
22 difficulty that remand creates for a judge who may have in
23 state court in particular they win their way back one case and
24 has to address the multiplicity of difficult issues that this
25 and other cases like it create for the parties and the judge.

1 That is why, and I think Mr. Skikos spoke to it, that
2 we look to this as the last thing we MDL judges do, not in the
3 middle of it, but at the end when everything is ready for
4 trial, which means motions related to things such as would be
5 addressed at a Frye hearing or a Daubert hearing have been
6 decided, things of that nature.

7 I am jealous of the role we are asked to play for the
8 benefit of the transferor judge and judges who have a paucity
9 of these cases but the same issues that we face as judges with
10 7400 cases. Big difference.

11 So I will take it under advisement at the appropriate
12 time and listen and at the appropriate time rule on the
13 motions.

14 Anyone else defense side?

15 MS. SHARKO: No, Your Honor. Thank you.

16 MR. SKIKOS: No.

17 MS. RELKIN: No, Your Honor.

18 THE COURT: Anyone in the -- any of the attorneys in
19 the audience wish to ask any question?

20 I don't apologize for the brevity of the hearing. I
21 only -- I don't apologize even that there's not much more to
22 report on because you all know how much work is being done by
23 both plaintiffs' steering committee and the defense attorneys
24 behind the scenes, so to speak, which moves these cases along
25 toward trials, resolutions of motions, things of that nature.

1 I thank you for your continued attention in these
2 matters. And one thing we didn't do.

3 (Thereupon, a sidebar discussion was held off the
4 record.)

5 THE COURT: Then the next meeting between the Court
6 and the executive committee and defense counsel will be
7 9:00 a.m. on Wednesday, April 3, 2013 to be followed by in
8 court at 11:30 a.m. on that same date. If when you return to
9 your respective offices there's a problem that you didn't
10 anticipate, please let us know and we will get a telephone
11 conference together and pick a different date, either that week
12 or the next. Okay?

13 MS. SHARKO: Okay.

14 THE COURT: Okay. That's fine.

15 There being nothing further to come before the Court
16 in this matter at this juncture, this meeting is adjourned.
17 And I thank you for your presence here throughout the day.

18 MR. SKIKOS: Thank you.

19 MS. SHARKO: Thank you.

20 MS. RELKIN: Thank you.

21 (Thereupon, the hearing concluded at 2:12 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.

2/15/13

s/ Tammy Nestor
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