IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: DEPUY ORTHOPAEDICS, INC. PINNACLE HIP IMPLANT PRODUCTS LIABILITY LITIGATION	§	MDL Docket No. 3:11-MD-2244-K
This Order Relates To: *ALL CASES*	§	

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO COMPEL JOHNSON & JOHNSON'S COMPLIANCE WITH PLAINTIFFS' NOVEMBER 11, 2015 NOTICE OF ORAL AND VIDEO DEPOSITION OF JOHNSON & JOHNSON PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 30(b)(6)

Before this Court is Plaintiffs' Motion to Compel Johnson & Johnson's Compliance with Plaintiffs' November 11, 2015 Notice of Oral and Video Deposition of Johnson & Johnson Pursuant to Federal Rule of Civil Procedure 30(b)(6) (the "Motion to Compel") [Doc. 591]. Plaintiffs request that the Court order Defendant Johnson & Johnson ("J&J") to produce a witness and the documents requested pursuant to Plaintiffs' November 11, 2015 Notice of Oral and Video Deposition of Johnson & Johnson Pursuant to Federal Rule of Civil Procedure 30(b)(6) (the "Notice"). For the reasons stated herein, the motion is **GRANTED** in part and **DENIED** in part.

I. Factual and Procedural Background

Pursuant to 28 U.S.C.§1407, the United States Judicial Panel on Multidistrict Litigation ordered coordinated or consolidated pretrial proceedings in this Court of all actions involving the Pinnacle Acetabular Cup System hip implants ("Pinnacle Device") manufactured by DePuy, a wholly-owned subsidiary of Johnson & Johnson. The DePuy Pinnacle multidistrict litigation ("MDL") involves DePuy's design, development, manufacture, and distribution of the Pinnacle Device. The Pinnacle Device is used to replace diseased hip joints and was intended to remedy conditions such as osteoarthritis, rheumatoid arthritis, avascular necrosis, or fracture, and to provide patients with pain-free natural motion over a longer period of time than other hip replacement devices. Presently there are over eight thousand cases in this MDL involving Pinnacle Devices made with sockets lined with metal, ceramic, or polyethylene. Pursuant to an Order of this Court, several matters were selected as bellwether matters for a January 6, 2016, trial setting.

The Plaintiffs in the MDL act through a large group of Plaintiffs' lawyers that form the Plaintiffs' Steering Committee ("PSC"). The PSC is headed by the Plaintiffs' Executive Committee, a small group from the PSC appointed by this Court to conduct discovery and other pretrial proceedings and identify common issues in the MDL.

II. The 30(b)(6) Notice

On November 11, 2015, Plaintiffs, by and through the Plaintiffs' Executive Committee, issued a Notice for deposition testimony and documents relating to claims

by the United States Securities and Exchange Commission ("SEC") and Department of Justice ("DOJ") that J&J, through affiliated companies and distributers, made improper payments to public officials and employees in Greece, Poland, Romania, and Iraq. These claims were settled in 2011 through a Deferred Prosecution Agreement ("DPA") in which J&J admitted responsibility for certain violations of the Foreign Corrupt Practices Act of 1977, as amended ("FCPA").

The Notice instructed a J&J corporate designee to appear for an oral deposition on December 11, 2015, and testify on six topics:

1. The matters referred to in the January 14, 2011 [DPA] between Johnson & Johnson and the [DOJ] . . . .

2. The matters referred to in the complaint entitled *U.S. Securities and Exchange Commission v. Johnson & Johnson*, U.S.D.C., Case No. 1:11-cv-00686, dated April 8, 2011 . . . .

3. The payments made by any Johnson & Johnson Affiliated Entity to Greek physicians, hospitals, hospital administrators, and/or Government Officials that was the subject of the January 14, 2011 [DPA] between Johnson & Johnson and the United States Department of Justice. "Johnson & Johnson Affiliated Entity" means (i) Johnson & Johnson, or (ii) any of Johnson & Johnson's direct or indirect, past, present, and/or future parents, subsidiaries, divisions, affiliates, joint venturers, predecessors, successors, assigns, and transferees and, for each person or entity referred to in clauses (i) and (ii), each of their respective past or present agents, distributors, distributor representatives, sales representatives, wholesalers, or other persons or entities involved in the sale, marketing, labeling, promotion, advertising, or distribution of their products. "Government Official" shall mean the government of a country and/or and any employee, agent, or any other Person or entity acting on behalf of that country's government.

4. The payments made by any Johnson & Johnson Affiliated Entity to Polish physicians, hospitals, hospital administrators, and/or Government Officials

that was the subject of the January 14, 2011 [DPA] between Johnson & Johnson and the United States Department of Justice.

5. The payments made by any Johnson & Johnson Affiliated Entity to Romanian physicians, hospitals, hospital administrators, and/or Government Officials that was the subject of the January 14, 2011 [DPA] between Johnson & Johnson and the United States Department of Justice.

6. The payments made by any Johnson & Johnson Affiliated Entity to any Government Official in Iraq that was the subject of the January 14, 2011 [DPA] between Johnson & Johnson and the United States Department of Justice.

The Notice also sought the production of twenty six categories of documents by "no later than two (2) weeks prior to" the deposition. These categories included requests for all communications with the DOJ or SEC regarding any allegation that any Johnson & Johnson Affiliated Entity, directly or indirectly, violated the FCPA, and all communications with any governmental agencies or entities, including foreign governments, regarding—along with any documents regarding or reflecting—payments to or contracts with Greek, Romanian, Polish, or Iraqi government officials, physicians, hospitals, or hospital administrators from 1998 to the present.

Plaintiffs move to compel compliance with the notice, including the deposition and document production, contending that the discovery sought is relevant to Plaintiffs' fraud and misrepresentation claims, Plaintiffs' request for exemplary damages, and Plaintiffs' request to set aside the general cap on exemplary damages under Texas law. Plaintiffs also argue that while requested discovery need not be admissible to be discoverable, the discovery at issue will generate admissible evidence under Federal Rules of Evidence 404(b) and 406.

Defendants contend that the Notice is untimely, as Plaintiffs were aware of the subject matter of the current discovery for years—and even noticed but failed to pursue a prior similar 30(b)(6) deposition—but failed to seek it until the eve of the second bellwether trial in this MDL. Defendants further contend that the discovery related to foreign public officials and healthcare providers is irrelevant to the current lawsuit and would subject Defendants to substantial undue burden, including significant expense and a hindrance to Defendants' ability to prepare for trial.

III. Legal Issues in the MDL

In addition to Plaintiff's claims regarding the design, development, manufacture, and distribution of the Pinnacle Device, Plaintiffs have alleged that J&J and other entity defendants have made tortious misrepresentations about the Pinnacle Device and that J&J committed commercial bribery, justifying relief from exemplary damage limitations under Texas law. In their Motion, Plaintiffs assert that the discovery sought will reveal Defendants' "routine of making illicit payments to health care providers in order to induce them to use J&J's Pinnacle hip implant, to promote the implant, and to misrepresent the qualities and risks of the implant," which are at issue in the current case.

IV. Legal Standard and Burden of Proof

A trial court has significant discretion in determining the proper scope of discovery. *Crosby v. La. Health Serv. & Indem. Co.*, 647 F.3d 258 (5th Cir. 2011). Generally speaking, pretrial discovery is a "broad regime." *Micro Int'l v. Monolithic*

Power, Sys., 467 F.2d 1355, 1366 (5th Cir. 2006). A party may obtain discovery of any nonprivileged matter "relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). The Federal Rules also allow courts to "limit discovery so as to avoid cumulation, duplication, harassment, expense and burdensomeness." *Baine v. Gen'l Motors Corp.*, 141 F.R.D. 332, 334 (M.D. Ala. 1991); *see* Fed. R. Civ. P. 26(b)(1). The party resisting discovery must show specifically how each request is not relevant or is otherwise objectionable. *See McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990).

Relevance

Defendants contend that the 30(b)(6) topics and the accompanying document requests are wholly irrelevant to the claims or defenses in this lawsuit. Specifically, Defendants argue that the discovery sought regarding the DPA relates solely to conduct of J&J affiliates and subsidiaries who are not defendants in this matter and concerns only dealings with foreign public officials in Greece, Poland, Romania, and Iraq, with no bearing on or reference to Defendants' conduct in marketing or selling their products in the United States. Additionally, to the extent Plaintiffs' document requests seek, for example, communications with the DOJ and SEC "regarding any allegation that any Johnson & Johnson Affiliated Entity, directly or indirectly, violated the [FCPA]," Defendants contend that such requests are impermissible as they would include all FCPA-related communications concerning any J&J entity regardless of connection to the DPA.

Plaintiffs contend that the discovery sought is relevant to their fraud and negligent misrepresentation claims, as discovery on unlawful payments made in other countries to promote and sell its products will purportedly bear on Defendants' claim to have exercised due care in their representations regarding product risks and benefits and Plaintiffs' contention that Defendants have intentionally induced others to misrepresent their implants' safety and efficacy. Plaintiffs also contend that the discovery sought is relevant to their request for exemplary damages, as the requests are "narrowly drafted to target J&J's knowledge, participation, and intent with respect to the employment of marketing-by-bribery techniques both here and abroad to promote and sell its products," "will reveal J&J's involvement in paying bribes and kickbacks in other countries to promote and sell its products, including [metal-on-metal] hip implants," bearing on Defendants' alleged conduct in this matter and with regards to Plaintiffs' physicians, and are further relevant to Plaintiffs' request to set aside the exemplary damage caps, as the discovery will result in evidence of commercial bribery.

Plaintiffs additionally contend that—although discovery need not be admissible to be discoverable—the discovery sought will be admissible under Federal Rules of Evidence 404(b) and 406, as it reflects prior crimes or bad conduct demonstrating Johnson & Johnson's "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident" and "routine practice." Fed. R. Evid. 404(b), 406. Defendants argue that Rules 404(b) and 406 are not applicable, as the conduct alleged in the current lawsuit is neither sufficiently similar to the conduct

Plaintiffs seek documentation on to implicate Rule 404(b) nor sufficiently habitual to implicate Rule 406.

However, the Court need not decide admissibility at this time. Rather, because the information sought by Plaintiffs "encompasses any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case," it is relevant and discoverable. *See Coughlin v. Lee*, 946 F.2d 1152, 1159 (5th Cir. 1991); Fed. R. Civ. P. 26(b)(1).

Timeliness and Undue Burden

As noted in Defendants' Response, the Court is aware of the Parties' preparations for and attendance at the second bellwether trial in this matter. This, along with the delay in filing their Motion to Compel, forms the basis of Defendants' contention that Plaintiffs' Motion should be denied as untimely. The Plaintiffs' discovery, however, is sought with respect to all of the more than eight thousand cases pending MDL matters, not only the cases in the current bellwether trial. During the previous bellwether trial in this matter, the Parties requested that this Court enter a stay of all MDL matters other than the bellwether cases pending trial. *See* Order, September 30, 2013 [Doc. 348]. No such request was made with regard to the current bellwether trial. Absent a stay, discovery is ongoing.

The Court is mindful of the burden Defendants contend they will undertake to prepare a corporate representative and make the requested document production but does not find the requested information—relevant to multiple claims and damages

asserted by Plaintiffs—to be of such minimal importance that it renders Defendants' efforts an "undue" burden. Fed. R. Civ. P. 26(b)(2)(C)(iii)).

Accordingly, Plaintiff's Motion to Compel is **GRANTED** as set forth herein. Defendant Johnson & Johnson is ordered to produce responsive documents on a rolling basis, with an initial document production no later than seven (7) days from the date of this order. Defendant Johnson & Johnson is further ordered to produce a corporate representative for deposition no later than ten (10) days from the date of this order with the Court-appointed special master in attendance.

SO ORDERED.

Signed January 15, 2016.

Ed Kinkeade

ED KINKEADE
UNITED STATES DISTRICT JUDGE