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: *Aoki* – 3:13-cv-1071-K *Christopher* – 3:14-cv-1994-K *Greer* – 3:12-cv-1672-K *Klusmann* – 3:11-cv-2800-K *Peterson* – 3:11-cv-1941-K	§	

ORDER GRANTING DEFENDANTS' MOTION TO COMPEL DR. DAVID EGILMAN TO ANSWER QUESTIONS REGARDING WHETHER HE HAS A HIP IMPLANT

Before this Court is the Defendants' Motion to Compel Dr. David Egilman to Answer Questions Regarding Whether He Has a Hip Implant, Docket No. 25 in 3:13-cv-1071 (*Aoki*), Docket No. 19 in 3:14-cv-1994 (*Christopher*), Docket No. 22 in 3:12-cv-1672 (*Greer*), Docket No. 35 in 3:11-cv-2800 (*Klusmann*), and Docket No. 36 in 3:11-cv-1941 (*Peterson*). For the reasons set forth herein, the motion is GRANTED.

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 Defendant DePuy Orthopaedics, Inc. The

DePuy Pinnacle multidistrict litigation ("MDL") involves the 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 dated August 26, 2015, the *Aoki*, *Christopher*, *Greer*, *Klusmann*, and *Peterson*, matters were selected as bellwether matters to be prepared for trial.

II. Motion to Compel

Defendants DePuy Orthopaedics, Inc., DePuy Products, Inc., DePuy International Limited, Johnson & Johnson, and Johnson & Johnson Services, Inc. (collectively, "Defendants") move this Court for an Order compelling Dr. David Egilman, an expert witness for Plaintiffs, to answer certain questions regarding whether he himself has an artificial hip. Specifically, Defendants seek further deposition examination of Dr. Egilman on this topic, as Dr. Egilman declined to answer the same during his expert witness deposition. Defendants contend that inquiry on this topic will reveal a possible basis for Dr. Egilman's expert opinions as well as any bias or prejudice of Dr. Egilman. Plaintiffs argue, however, that the bases

for Dr. Egilman's opinions have been thoroughly set forth in Dr. Egilman's expert reports and that any potential bias is purely speculative and far afield, as Dr. Egilman's opinions are primarily related to Defendants' advertising.

III. Legal Standard

This Court has broad discretion in determining the appropriate scope of discovery. *Crosby v. La. Health Serv. & Indem. Co.*, 647 F.3d 258 (5th Cir. 2011). In general, "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." Fed. R. Civ. P. 26(b)(1). Relevant information "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." *Coughlin v. Lee*, 946 F.2d 1152, 1159 (5th Cir. 1991). The discovery sought need not be admissible at trial "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

Discovery may be limited by the court if it determines that "the discovery sought is unreasonably cumulative or duplicative." Fed. R. Civ. P. 26(b)(2). The court may also restrict discovery if it concludes that "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the

issues." *Id.* Further, the court "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c).

IV. The Testimony Sought Is Relevant

Dr. Egilman was retained by Plaintiffs to serve as an expert witness in these bellwether cases "in the fields of public health, epidemiology, warnings, clinical practice and medicine." Dr. Egilman is expected to testify "regarding corporate duties and responsibilities with respect to the safe testing and sale of products as well as corporate awareness, compliance and communication of public health and safety issues related to their products." In relevant part, Dr. Egilman testified at his deposition that he believed that surgeons do not view marketing materials put out by medical device manufacturers "with a critical eye," but instead accept what they are told by manufacturers, that surgeons choose which medical device to use in a patient based on marketing materials, and that surgeons are not taught how to critically analyze peer-reviewed literature. Counsel for Defendants also inquired as to whether Dr. Egilman himself has an artificial hip implant, which Dr. Egilman refused to answer.

It is generally accepted that bias of a witness is a relevant and probative area of examination which aids the jury when faced with contradictory positions on each side of a case. *See Collins v. Wayne Corp.*, 621 F.2d 777, 784 (5th Cir. 1980). As Plaintiffs note, an expert's financial interest and expected compensation is a commonly

permitted area of inquiry, as a pecuniary interest in the outcome of a case may bias a witness. *See, e.g.*, *id.* Likewise, any other indication that an expert witness has a special relationship with a party is similarly relevant to demonstrate possible bias. *See Butler v. Rigsby*, No. Civ. A. 96-2453, 1998 WL 164857, *3 (E.D. La. Apr. 7, 1998) (citations omitted). While Butler observes primarily those cases where an expert may be biased *in favor of* a party based upon frequency of testimony or history of patient referrals, for example, this Court finds that potential bias *against* a party is comparably probative.

Plaintiffs argue that permitting the requested discovery would require the introduction of "a great deal of other information" regarding Dr. Egilman's medical history and would necessarily chill expert witness testimony in the future. However, the issue before the Court is one of relevance and discoverability; any argument as to the of exclusion of otherwise relevant evidence due to confusion of the issues, a waste of time, or for other reasons may be raised by the parties once the otherwise relevant evidence has been obtained pursuant to this Order. Furthermore, Dr. Eligman's testimony will be subject to the protective orders in place in this matter.

Dr. Eligman is therefore Ordered to respond to deposition questions regarding his own, personal experiences with hip implants. This testimony must be provided within seven (7) days of the date of this Order. Any inquiry as to the scope and application of this ruling which arises during the course of this testimony should be addressed to the Special Master.

SO ORDERED.

Signed January 5th, 2016.

Ed Kinkeade

ED KINKEADE
UNITED STATES DISTRICT JUDGE