

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

|                                   |   |                |
|-----------------------------------|---|----------------|
| IN RE: DEPUY ORTHOPAEDICS,        | § |                |
| INC. PINNACLE HIP IMPLANT         | § | MDL Docket No. |
| PRODUCTS LIABILITY                | § |                |
| LITIGATION                        | § | 3:11-MD-2244-K |
| -----                             | § |                |
| This Order Relates To:            | § |                |
| <i>Aoki</i> – 3:13-cv-1071        | § |                |
| <i>Christopher</i> – 3:14-cv-1994 | § |                |
| <i>Greer</i> – 3:12-cv-1672       | § |                |
| <i>Klusmann</i> – 3:11-cv-2800    | § |                |
| <i>Peterson</i> – 3:11-cv-1941    | § |                |
| -----                             | § |                |

**ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS’  
MOTION TO COMPEL DEFENDANTS’ RESPONSES TO PLAINTIFFS’  
INTERROGATORIES AND REQUEST FOR PRODUCTION OF  
DOCUMENTS**

Before this Court is the Plaintiffs’ Motion to Compel Defendants’ Responses to Plaintiffs’ Interrogatories and Request for Production of Documents (for Bellwether Plaintiffs, Propounded May 19, 2015), Docket No. 535. For the reasons set forth 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 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. 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 (“PEC”), a small group from the PSC appointed by this Court to conduct discovery and other pretrial proceedings and identify common issues in the MDL.

On February 18, 2015, this Court entered an Order on Bellwether Trials, selecting the *Aoki* (3:13-cv-1071), *Borel* (3:14-cv-0441), *Brown* (3:12-cv-2780), *Christopher* (3:14-cv-1994), *Greer* (3:12-cv-1672), *Klusmann* (3:11-cv-2800), *O’Neill* (3:12-cv-3027), *Peterson* (3:11-cv-1941), and *Ryan* (3:13-cv-2195), and *Thibodeau* (3:13-cv-1027) matters to be prepared for trial. On May 19, 2015, the discovery requests made the subject of the instant motion were served, specific to these bellwether matters. The Court has since entered amended orders specifying that only the *Aoki*, *Christopher*, *Greer*, *Klusmann*, and *Peterson* matters be prepared for the

upcoming trial, removing *Borel, Brown, O'Neill, Ryan, Thibodeau*. The current scheduling orders set the commencement of the bellwether trials for January 6, 2016.

## II. Motion to Compel

The Plaintiffs, through the PEC, have moved this Court for entry of an order compelling Defendants DePuy Orthopaedics, Inc., DePuy Products, Inc., DePuy International Limited, Johnson & Johnson, and Johnson & Johnson Services, Inc. (collectively, “Defendants”) to provide further answers in response to Plaintiffs’ Interrogatories Nos. 1, 2, 3, 4, 5, 8, 10, 12, 13, and 14, and Plaintiffs’ Request for Production of Documents Nos. 1, 2, 3, 4, 5, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20. Plaintiffs identify these interrogatories and requests for production as belonging to three categories: (1) objections and responses to requests pertaining to the nature of Defendants’ defenses, (2) responses to requests relating to the nature of Defendants’ relationship with Dr. Heinrich as it pertains to this lawsuit, and (3) objections and responses to other requests for production relating to photographs and recordings of Plaintiffs and their surgical procedures. In response, Defendants contend that Plaintiffs’ requests regarding specific defenses are premature, that Defendants have adequately provided information regarding Defendants’ relationship with Dr. Heinrich, in that, as of the time their discovery responses were made, Defendants had not yet determined whether they would retain Dr. Heinrich to serve as an expert in one or more specific bellwether cases, and that Defendants have produced all non-privileged plaintiff-specific sales representative information and

photographs. Having considered all of the briefing of the parties, the Plaintiffs' Motion is granted in part and denied in part, as set forth below.

### **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).

### **IV. Requests Pertaining to the Nature of Defendants’ Defenses**

#### **A. Defendants’ Contentions**

Plaintiffs’ Interrogatories Nos. 1, 2, 3, 4, 5, 12, 13, and 14 seek information relating to the nature of Defendants’ defenses, specifically, whether Defendants contend a number of specific defenses apply to any bellwether Plaintiff, and Plaintiffs’ Request for Production Nos. 1, 2, 3, 4, 5, 13, 14, 15, 16, 17, 18, and 19 request corresponding documents or materials to be relied upon as proof supporting any of these specific defenses. In their Response, Defendants urge the position that these requests are premature, as fact and expert discovery remained such that

“defendants cannot yet determine whether they will contend that any of the case-specific defenses identified in plaintiffs’ requests apply to the nine bellwether plaintiffs.” However, the scheduling orders in place for the *Aoki*, *Christopher*, *Greer*, *Klusmann*, and *Peterson* matters required the designation of the bellwether Plaintiffs’ experts to be made by August 14, 2015, with depositions to take place by October 2, 2015. Similarly, the Defendants’ expert designations were required to be made by September 4, 2015, with depositions to take place by October 30, 2015. All discovery was to be completed by December 4, 2015.

Accordingly, with respect to the *Aoki*, *Christopher*, *Greer*, *Klusmann*, and *Peterson* matters only, Plaintiffs’ Motion regarding Interrogatories Nos. 1, 2, 3, 4, 5, 12, 13, and 14 and Requests for Production Nos. 1, 2, 3, 4, 5, 13, 14, 15, 16, 17, 18, and 19 is GRANTED. Defendants must provide complete discovery responses to the same within seven (7) days of entry of this Order.

After the Plaintiffs propounded the discovery at issue, the Court amended the bellwether selections to remove the *Borel*, *Brown*, *O’Neill*, and *Ryan* matters. Plaintiffs’ Motion regarding Interrogatories Nos. 1, 2, 3, 4, 5, 12, 13, and 14 and Requests for Production Nos. 1, 2, 3, 4, 5, 13, 14, 15, 16, 17, 18, and 19 specific to the *Borel*, *Brown*, *O’Neill*, and *Ryan* matters is DENIED without prejudice to re-urging the same at a later time.

## **B. Defendants' Exhibits**

In this same category of requests, Plaintiffs also seek to compel responses to Plaintiffs' Interrogatory No. 10 and Requests for Production 9 and 10, which request the identity and production of any exhibits Defendants intend to use at trial or any pretrial proceedings in this matter. Following Plaintiffs' Interrogatories and Requests for Production, propounded on May 19, 2015, and Defendants' objections and responses to the same, made on June 22, 2015, the Court entered certain July 13, 2015, scheduling orders governing the bellwether selections in this matter. These scheduling orders set forth, in relevant part, that "[t]he Special Master is ordered to coordinate with the parties regarding filing and management of pretrial matters including, but not limited to . . . trial exhibits . . . ." Pursuant to the scheduling order, the process for identification and exchange of exhibits should be coordinated with the Special Master. Accordingly, Plaintiffs' Motion as to Plaintiffs' Interrogatory No. 10 and Requests for Production 9 and 10 are DENIED as moot. If additional concerns of the parties remain following conference with the Special Master, they should be addressed with the Court at the pretrial conference.

## **V. Requests Relating to the Nature of Defendants' Relationship with Dr.**

### **Heinrich**

Plaintiffs' Interrogatory No. 8 and Plaintiffs' Request for Production Nos. 7 and 12 seek information relating to the business relationship, financial relationship, and communications between Defendants and Dr. Eric Heinrich, who previously

served as a testifying expert in a related matter and who Defendants have designated as an expert in these bellwether matters. When Defendants initially objected to these discovery responses, they represented that they had not determined whether to retain Dr. Heinrich as a consulting or testifying expert in any bellwether matter, and that no invoices have been produced because they do not yet have the invoices in their possession, but that the same would be supplemented upon receipt. Because Dr. Heinrich has been designated and given his deposition related to the bellwether matters, the Court assumes that these documents have been produced. However, to the extent any further responsive documents exist, Plaintiffs' Motion as to Plaintiffs' Interrogatory No. 8 and Plaintiffs' Request for Production Nos. 7 and 12 is GRANTED. Defendants must provide complete discovery responses to the same within three (3) days of entry of this Order.

**VI. Requests Relating to Photographs and Recordings of Plaintiffs**

Finally, Plaintiffs' Request for Production No. 11 seeks the production of "any and all photographs, videos, records, documents, materials or otherwise prepared by or on behalf of any marketing or sales representatives who attended any surgical procedure of any Plaintiff," and Plaintiffs' Request for Production No. 20 seeks the production of "any audio and/or visual recordings of Plaintiff."

Defendants respond that they have produced and specifically identified all documents responsive to Request for Production No. 11; as such, Plaintiffs' Motion with respect to Plaintiffs' Request for Production No. 11 is DENIED.

Defendants further respond that they do not possess any “surveillance” photographs or videos of Plaintiffs responsive to Request for Production No. 20, and that any other, non-surveillance, photographs which they may possess should be protected by the work product privilege, as production of only those photographs which Defendants’ counsel found to have special significance enough to save from public sources will necessarily invade counsel’s mental processes.

Defendants’ formal response to Plaintiffs’ Request for Production, however, did not address any distinction between “surveillance” and non-surveillance photography or video. Accordingly, Plaintiffs’ Motion with respect to Plaintiffs’ Request for Production No. 20 is GRANTED in part; Defendants are ordered to amend their response to either produce any non-privileged surveillance photography or video or reflect the absence of the same with three (3) days of the date of this Order.

Defendants will not be ordered to produce copies of photographs selected by counsel from publicly available sources in response to Plaintiffs’ Request for Production No. 20; however, the Court notes that this does not exempt Defendants from compliance with any procedures established in this matter for the identification and exchange of exhibits to be used at trial.

## VII. Conclusion

With respect to the *Aoki*, *Christopher*, *Greer*, *Klusmann*, and *Peterson* matters only, Defendants are ORDERED to provide full and complete responses to Plaintiffs’



Interrogatories Nos. 1, 2, 3, 4, 5, 8, 12, 13, and 14 and Plaintiffs' Requests for Production Nos. 1, 2, 3, 4, 5, 7, 12, 13, 14, 15, 16, 17, 18, and 19 within three (3) days of entry of this Order.

Defendants are further ORDERED to amend their response to Plaintiffs' Request for Production No. 20 to either produce any non-privileged surveillance photography or video or reflect the absence of the same with three (3) days of the date of this Order.

All other relief sought in Plaintiffs' Motion to Compel Defendants' Responses to Plaintiffs' Interrogatories and Request for Production of Documents (for Bellwether Plaintiffs, Propounded May 19, 2015), Docket No. 535, not expressly granted herein is DENIED.

**SO ORDERED.**

Signed January 6<sup>th</sup>, 2016.

  
ED KINKEADE  
UNITED STATES DISTRICT JUDGE