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 This Order Relates to: *Alicea* – 3:15-cv-03489-K *Barzel* – 3:16-cv-01245-K *Kirschner* – 3:16-cv-01526-K *Miura* – 3:13-cv-04119-K *Stevens* – 3:14-cv-01776-K *Stevens* – 3:14-cv-02341-K	MDL Docket No. 3:11-MD-2244-K

ORDER CONSOLIDATING BELLWETHER CASES FOR TRIAL

Pursuant to Federal Rule of Civil Procedure 42, the above-referenced actions are consolidated for trial on all issues.

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"), which Defendant DePuy Orthopaedics, Inc. ("DePuy") manufactured.

The lawsuits in this MDL relate to the design, development, manufacture, and distribution of the Pinnacle Device in the United States. Plaintiffs assert claims against Depuy, as well as Depuy Products, Inc., Depuy Synthes, Inc., Johnson & Johnson,

Johnson & Johnson Services, Inc., and Johnson & Johnson International (collectively, the "Defendants"). The Pinnacle Device is used to replace diseased hip joints and was intended to provide pain-free natural motion over a longer period of time than other hip-replacement devices. Plaintiffs claim that the Pinnacle Devices have not so functioned but have instead caused significant health problems in many implantees. The Pinnacle Device MDL—MDL No. 2244—now involves over 9,100 cases.

Over the pendency of this MDL, the Court has held three prior bellwether trials. In September and October 2014, the Court held the first bellwether trial, involving a Montana plaintiff and her husband [No. 3:12-cv-04975-K] (the "*Paoli*" bellwether). The Court held a second bellwether trial in January through March 2016, consolidating five cases brought by Texas plaintiffs [*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] (collectively, the "*Aoki*" bellwether). On September 20, 2016, the Court consolidated for trial six California cases (collectively, the "*Andrews*" bellwether) subject to this Order. The trial was held from October 3, 2016, to November 30, 2016.

This order relates to the cases selected and consolidated for the fourth bellwether trial in this multidistrict litigation ("MDL") involving the Pinnacle Device. On November 8, 2016, the Court selected Nine New York cases [*Alicea* – 3:15-cv-03489-K; *Barzel* – 3:16-cv-01245-K; *Buonaiuto* – 3:14-cv-02750-K; *Cousin* – 3:13-md-02244-K; *Heroth* – 3:12-cv-04647-K; *Kirschner* – 3:16-cv-01526-K; *Miura* – 3:13-cv-04119-K; *Stevens* – 3:14-cv-01776-K; *Stevens* – 3:14-cv-02341-K] and one New Jersey case

[*Riedhammer* – 3:11-cv-02460-K] to be prepared for the fourth bellwether trial. Order on Bellwether Trials [3:11-md-2244-K (Doc. 713)]. Plaintiff Cousin's case was later voluntarily dismissed. Stipulation of Dismissal with Prejudice [3:13-md-02244-K (Doc. 28)]. Riedhammer's case was withdrawn. Notice of Withdrawal [3:11-cv-2460-K (Doc. 41)]. Heroth's claims were dismissed on summary judgment, and Buonaiuto's case was removed from the bellwether trial. Accordingly, six cases remain for the fourth bellwether trial.

On February 3, 2017, all Plaintiffs filed Amended Complaints asserting the same nine causes of action against Defendants: negligence, strict liability, fraud, negligent misrepresentation, fraudulent business acts and practices, breach of express and implied warranty. *See, e.g.*, Am. Compl. and Jury Trial Demand ("Am. Compl.") [*Alicea*, 3:15-cv-03489-K (Doc. 14)]. Some Plaintiffs also assert a tenth claim for loss of consortium.

Legal Standard

Rule 42 of the Federal Rules of Civil Procedure permits the consolidation for trial any actions before the court which involve a common question of law or fact. Fed. R. Civ. P. 42(a)(1). This court has broad discretion in determining whether to consolidate cases. *See, e.g., Mills v. Beech Aircraft Corp.*, 886 F.2d 758, 762 (5th Cir. 1989); *see also In re Air Crash Disaster at Fla. Everglades on Dec. 29, 1972*, 549 F.2d 1006, 1013 (5th Cir. 1997) ("The trial court's managerial power is especially strong and flexible in matters of consolidation."). Consolidation is proper when it will avoid

unnecessary costs or delay, *see, e.g.*, *Mills*, at 761-62, without prejudicing the rights of the parties, *see, e.g.*, *St. Bernard Gen. Hospital, Inc. v. Hosp. Service Ass'n of New Orleans, Inc.,* 712 F.2d 978, 989 (5th Cir.1983). Consolidation does not merge the suits into a single action but rather is "a procedural device used to promote judicial efficiency and economy" while "the actions maintain their separate identities." *See Frazier v. Garrison I.S.D.*, 980 F.2d 1514, 1532 (5th Cir. 1993).

Under the facts and circumstances of the Bellwether Cases, the Court finds that the common issues of law and fact predominate and favor consolidation, and the rights of the parties are not prejudiced by an order of consolidation. As noted by the Judicial Panel on Multidistrict Litigation when consolidating the Pinnacle Device matters for pretrial matters, the actions in this MDL share factual questions as to whether the Pinnacle Device was defectively designed and/or manufactured, and whether defendants failed to provide adequate warnings concerning the device. These common issues will continue to predominate at the trial of this matter. Specifically, the circumstances of the Bellwether Cases suggest that the Pinnacle Device at issue for each Bellwether Plaintiff underwent similar testing, manufacturing, and marketing, that each of the Bellwether Plaintiffs and their physicians were provided with similar warnings regarding the Pinnacle Device, that each of the Bellwether Plaintiffs experienced similar implantation procedures, and that each of the Bellwether Plaintiffs experienced similar complications. These prevailing common issues support consolidation of these matters for trial. *See, e.g.*, *In re Mentor Corp. Obtape Transobturator*

Sling Prods. Liab. Litig., No. 4:08-MD-2004, 2010 WL 797273 (M.D. Ga. Mar. 3, 2010) (finding consolidation appropriate with the significant common issues of the manufacturer's knowledge of risks and proper curative treatment versus what was disclosed to physicians, along with other common evidence including expert testimony on "research, development, design, testing, manufacturing, quality control, and product evaluation-as well as general evidence on anatomy, biostatistics, bioengineering, the Food and Drug Administration's 510(k) process, and [Defendant's] corporate knowledge.").

The Court acknowledges that the individual damages alleged will require separate evidence, including evidence relating to Plaintiffs' individual treating physicians. However, any differences between the Plaintiffs can be easily explained to a jury, and any potential risks of prejudice or confusion may be avoided through the organized presentation of evidence and cautionary jury instructions. A single jury will be empaneled to hear the consolidated trial of the Bellwether Cases, but the jury will be instructed to consider liability as to each Bellwether Plaintiff and his or her damages, if any, separately.

Accordingly, the *Alicea* (3:15-cv-03489-K), *Barzel* (3:16-cv-01245-K), *Kirschner* (3:16-cv-01526-K), *Miura* (3:13-cv-04119-K), *Stevens* (3:14-cv-01776-K), and *Stevens* (3:14-cv-02341-K) matters are consolidated for trial pursuant to Rule 42 of the Federal Rules of Civil Procedure.

SO ORDERED.

Signed September 18th, 2017.

Ed Kinkeade

ED KINKEADE
UNITED STATES DISTRICT JUDGE