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 DENYING DEFENDANTS' MOTION TO STAY ADDITIONAL TRIALS

Before the Court is Defendants DePuy Orthopaedics, Inc.'s and Johnson and Johnson's Motion to Stay Additional Trials Pending Resolution of Appeal of Second Bellwether Trial Cases. The Court considered the Motion (Doc. No. 657) and the Plaintiffs' Executive Committee's Response and Memorandum in Opposition (Doc. No. 661). Defendants did not file a reply, which was due on June 28, 2016. After reviewing the briefing submitted by the parties, the Court DENIES the Motion.

I. Summary

As numerous MDL courts have held, "it is in the normal process for MDL courts to continue to try bellwether cases while the losing parties from the first bellwether trials appeal." *In re E. I. du Pont de Nemours & Co.*, MDL No. 2433, 2016 U.S. Dist. LEXIS 43337, at *1199 (S.D. Ohio Mar. 29, 2016) (Sargus, J.). Defendants, in a bargained-for exchange, agreed on the bellwether process and exercised a clear *Lexecon* waiver to have bellwether cases tried in the Northern District

of Texas (Doc Nos. 247, 490). Only after losing the second bellwether trial did Defendants object to the process. There are more than 8,000 pending cases in this MDL; the Court cannot grant a stay every time Plaintiffs win a trial.

The third bellwether trial will include Plaintiffs from California, rather than Texas or Montana like the previous bellwether trials, and will therefore present different legal and evidentiary rulings. For those evidentiary rulings that Defendants claim may be implicated in future trials, the Court repeatedly warned Defendants that if they present evidence of their good character, product safety, success of their products abroad, and positive scientific literature, then Plaintiffs will be allowed to refute those claims by introducing contrary evidence. It will be Defendants' choice whether to open those doors in the next trial.

II. 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 more than 8,000 cases in this MDL involving Pinnacle Devices made with sockets lined with metal, ceramic, or polyethylene.

Defendants and Plaintiffs, represented here by the Plaintiffs' Executive Committee, agreed to a bellwether trial process, in which the Court would try representative cases in the Northern District of Texas to allow juries to assess the claims, assess the procedure for trying them, and illustrate how the parties could value the cases.

A. First and Second Bellwether Trials.

In September and October 2014, the Court held the first bellwether trial, involving a Montana Plaintiff and her husband (the "*Paoli* " case, No. 3:12-cv-04975-K). The jury returned a verdict for Defendants on all causes of action in *Paoli* on October 23, 2014. Defendants did not move the Court to stay any further bellwether trials at that time. The Court held a second bellwether trial in January through March 2016, consolidating five cases brought by Texas Plaintiffs in which common issues of law and fact predominated (*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). The jury returned a verdict for the Plaintiffs on March 17, 2016. The Court entered Final Judgment on the claims of all Plaintiffs in the second bellwether trial on July 5, 2016.

B. Third Bellwether Trial.

On May 16, 2016, the Court conducted an in-person status conference with the parties to discuss setting the next bellwether trial. Then, on May 19, 2016, the Court, through the Special Master, asked the parties to suggest cases for a potential September 2016 bellwether trial likely applying California law. The instant Motion to Stay was filed five days later. On June 10, 2016, after considering the submissions of the parties and conducting its own review of potential bellwether selections, the Court selected seven California cases to be prepared for jury trial beginning September 6, 2016 (Doc. No. 660). All other cases in the MDL remain stayed pursuant to the Agreed Order Staying Cases Pending Bellwether Trials (Doc. No. 348).

III. Analysis

Defendants move the Court to stay all further bellwether trials in this MDL proceeding until the Court rules on Defendants' numerous post-trial motions in the second bellwether trial and the Fifth Circuit Court of Appeals resolves any appeal that follows from a potential judgment in those cases. Mot. at 1 (emphasis added). The Court has entered Final Judgment for Plaintiffs in the second bellwether trial. Defendants still contend that staying all further trials would prevent potential retrials of any bellwether trials conducted before the Fifth Circuit provides "guidance" on this Court's evidentiary and legal rulings. *See id.* at 2.

Plaintiffs argue that Defendants have not met their burden to demonstrate why a stay should be granted. Specifically, Plaintiffs contend that 1) thousands of Plaintiffs in this MDL will be prejudiced by undue delay should the Court stay proceedings pending an appeal of uncertain length, 2) Defendants have not established any hardship or inequity they would suffer in moving forward with a bellwether trial that outweighs the prejudice to Plaintiffs, and 3) the requested stay would be of immoderate or indefinite duration. Resp. at 8-12. Plaintiffs further respond that most of the appellate "guidance" sought by Defendants would concern case-specific evidentiary and legal rulings that would have little bearing on upcoming bellwether trials. *Id.* at 16. The Court finds that Defendants have failed to meet their burden and a stay is inadvisable.

A. This Court's Denial of a Stay is Consistent with Other MDL Courts' Rulings.

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes in its docket with economy of time and effort for itself, for counsel and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). "How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Id.* at 254-55 (citations omitted). Where "there is even a fair possibility that the stay . . . will work damage to someone else," the party seeking a stay "must make out a clear case of hardship or inequity in being required to go forward." *Id.* at 255; *In re Beebe*, 56 F.3d 1384, 1995 WL 337666, at *4 (5th Cir. May 15, 1995). "A stay can be justified

only if, based on a balancing of the parties' interests, there is a clear inequity to the suppliant who is required to defend while another action remains unresolved and if the order granting a stay can be framed to contain reasonable limits on its duration." *GATX Aircraft Corp. v. M/V Courtney Leigh*, 768 F.2d 711, 716 (5th Cir. 1985).

In the MDL context, as both Plaintiffs and Defendants acknowledge in their briefing, other MDL courts have denied motions to stay subsequent bellwether trials pending an appeal of an initial bellwether verdict. Just this year, in *In re E. I. du Pont de Nemours & Co.*, MDL No. 2433, 2016 U.S. Dist. LEXIS 43337 (S.D. Ohio Mar. 29, 2016) (Sargus, J.), the MDL court denied a similar motion seeking to stay bellwether trials until the court of appeals could rule upon contested issues of law and evidence. In denying that motion, the court found that "it is the normal process for MDL courts to continue to try bellwether cases while the losing parties from the first bellwether trials appeal." *Id.* at *1199 (planning for 40 bellwether cases to be tried in 2017 despite pending appeal).

Likewise, the MDL court in *In re C. R. Bard, Inc., Pelvic Repair Sys. Prods. Liab. Litig.*, MDL No. 2187, 2013 U.S. Dist. LEXIS 119177, 2013 WL 4508339, at *1 (S.D. W. Va. Aug. 22, 2013) (Goodwin, J.), denied a similar motion to stay (or for certification for interlocutory appeal). The court found that the Defendant "will not be irreparably injured by waiting until the last two bellwether trials conclude; however, considering the size and expense of this MDL, the plaintiffs might be injured by delaying these last two bellwether trials. Finally, the numerosity of cases

within the Bard MDL mandate celerity in the resolution of the bellwethers pending before me." 2013 WL 4508339, at *1.

Defendants note that—outside the MDL context—courts in this district have sometimes stayed cases where an already pending appeal would likely resolve certain issues expected to have significant effects on future trials. *E.g.*, *Greco v. Nat'l Football League*, 116 F. Supp. 3d 744 (N.D. Tex. 2015) (Lynn, J.). In *Greco*, an individual mass action concerning temporary seating problems at the Super Bowl, the court found that a decision on the pending appeal of a related case making the same allegations "will likely streamline issues for dispositive motions and bellwether trials in this case" and that the "risk of duplicative litigation" was "too great . . . to ignore." *Id.* at 761. However, this case neither addressed the same issues typically implicated in an MDL nor the reality of the instant proceeding, which must manage more than 8,000 cases and apply various state laws.

Defendants are asking for a stay that is inconsistent with the agreed-upon bellwether trial plan and is unjustified based on a balancing of interests. This MDL has already been pending for five years. The representative Plaintiffs in the consolidated bellwether trial this year averaged 68 years old. The Court believes that a stay would unduly prejudice Plaintiffs and delay resolution of this matter to the detriment of all parties. Exercising its judgment, weighing the competing interests, and maintaining an even balance, the Court finds that the bellwether trials should proceed as originally agreed. *See Landis*, 299 U.S. at 254-55.

B. Defendants Agreed to this Bellwether Process in a Bargained-for Exchange.

Bellwether cases should

> produce a sufficient number of representative verdicts and settlements to enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis, and what range of values the cases may have if resolution is attempted on a group basis.

Manual for Complex Litigation Fourth § 22.315 at 360 (4th ed. 2004). To this end, the parties agreed to a bellwether process to be supported and directed by the Court. The Defendants won the first bellwether trial applying Montana law; the Plaintiffs won the second bellwether trial applying Texas law. The third bellwether will apply California law.

Defendants argue that "the Court and the parties should not plow ahead with more trials absent guidance from the Fifth Circuit. Otherwise, the Court could find itself in the position of having to retry a significant number of cases." Mot. at 2. This is the same argument made to other MDL courts when defendants lose a bellwether trial. Consistent with other courts, although the Court understands Defendants' position, it is untenable to stay additional bellwethers and thereby delay resolution of a MDL every time Plaintiffs prevail in a bellwether trial.

Defendants also contend, for the first time, that they have not waived venue objections pursuant to *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26 (1998), for forthcoming bellwether trials. Mot. at 1 n.1. Of note, Defendants chose the Northern District of Texas as the venue for this MDL (Doc. No. 1,

"Defendants support centralization of all actions involving all configurations of Pinnacle Acetabular Cup System hip implants in the Northern District of Texas."). More importantly, the parties agreed on the Northern District of Texas for all bellwether proceedings, requiring those Plaintiffs represented by the Plaintiffs' Executive Committee to also waive the opportunity to try bellwether cases in a Plaintiff's home district in front of a local jury. Only after losing the second trial did Defendants voice their apparent belief—in a footnote—that they did not exercise a *Lexecon* waiver.

As reflected in the January 16, 2013, Special Master's Report Relating to Bellwether Trial Selection Protocol (Doc. No. 247), "Defendants' Lead Counsel have already agreed that they will not raise a venue objection (i.e., a *Lexecon* objection) to any cases in the MDL proceeding being tried in the Northern District of Texas." Report at 1. Defendants' Position Paper (Doc. No. 339) responding to the Special Master's Report does not refute this waiver, nor did Defendants' subsequent actions. Again in February 2015, the Special Master's Report reflected this agreement, stating, "In order to insure the broadest pool of cases for the bellwether selection process, Defendants have agreed they will not raise a venue objection (i.e., a *Lexecon* objection) to any cases in the MDL being tried in the Northern District of Texas." (Doc. No. 490). Defendants engaged in the bellwether process for a Montana Plaintiff and multiple Texas Plaintiffs without objection.

C. The September 2016 Bellwether Trial Will Address Different Legal and Evidentiary Issues than Prior Bellwether Trials.

Defendants claim that a stay is appropriate because legal issues raised on appeal will bear on remaining trials in this MDL proceeding. Mot. at 5. However, the September 2016 trial will include Plaintiffs from California, rather than Texas or Montana as before. Thus, the legal questions presented will be different than the first two bellwether trials.

Defendants also assert that, absent an appeal, Plaintiffs will continue to use objectionable evidence in future trials. First, as Defendants acknowledge in their Motion, different evidence was admitted in the first two bellwether trials. Mot. at 6 n.2. Further, as Plaintiff's Response explains, the Court warned Defendants on numerous occasions that if they presented certain defenses, Plaintiffs would be permitted to introduce evidence to refute it. Resp. at 1-3. Defendants, not Plaintiffs, opened the door to the evidence Defendants now claim was error to admit. It will be Defendants' choices that govern whether this evidence is admitted in future trials.

IV. Conclusion

For these reasons, the Court DENIES Defendants' Motion to Stay. The parties are hereby directed to coordinate with the Special Master regarding the management of pretrial matters pursuant to the Court's Order on Bellwether Trials (Doc. No. 660).

SO ORDERED.

Dated: July 5th, 2016

Ed Kinkeade

ED KINKEADE
UNITED STATES DISTRICT JUDGE