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 No. 2244 Honorable Ed Kinkeade
This Document Relates To: *All Cases*	

PEC'S SUPPLEMENTAL MOTION FOR SANCTIONS AND TO COMPEL AND INCORPORATED MEMORANDUM IN SUPPORT THEREOF

On January 14, 2019, the Plaintiffs' Executive Committee (PEC) filed a motion for sanctions related to Defendants' failure to timely produce critically relevant documents (the "Original Motion"). *See* MDL Dkt. No. 966. The PEC hereby supplements its prior motion, seeking an order compelling Defendants to produce additional documents and testimony related to their ethics hotline and ethics complaints. Additionally, the PEC requests that the instant motion be viewed through the prism of Defendants' conduct since the inception of this litigation and that the Court sanction Defendants, not just for their improper conduct related to the ethics hotline/complaint documents, but for the totality of their misconduct during these MDL proceedings.

I. DEFENDANTS SHOULD BE SANCTIONED FOR THEIR CONDUCT RELATED TO THE ETHICS HOTLINE DOCUMENTS AND COMPELLED TO PRODUCE ADDITIONAL DOCUMENTS RELATED TO SAME.

The PEC reasserts the arguments and requests it made in its Original Motion. Since filing its Original Motion, however, some additional information has come to light which the PEC wishes to bring to the Court's attention. On January 16, the Court (as a preliminary matter) ordered Defendants to produce certain documents that were the

subject of the Original Motion in unredacted form. Later that day, Defendants produced six documents to the PEC and Special Master. *See* **Ex. 8** (newly produced documents).

Those documents are a bombshell. As the PEC's Original Motion noted, one of the ethics complaints related to Dr. Pam Plouhar and allegations that she pressured one of her subordinates to author "ghostwritten" scientific studies, in part because her bonus was tied to how many articles she was able to publish. *See* MDL Dkt. 966, Exhibit 3, 4. The PEC explained the importance of this allegation: Dr. Plouhar has testified in all four bellwether trials and has been extensively questioned about the practice of ghostwriting. Here are a few examples of her extensive prior testimony regarding that practice:

From the *Paoli* trial:

> Q. Well, what your company tried to do was convince Dr. Engh to sign a letter written by your company under his signature, a ghost written letter, correct?
>
> A. No.
>
> Q. Now, you are familiar with ghost writing, aren't you?
>
> A. Yes.
>
> Q. And you know it's a reprehensible practice, right?
>
> A. It's -- We don't consider it an ethical practice.

Paoli Tr. Vol. 8 (Sept. 15, 2014) at 197:4-11.[1] Later, she refused to concede that Defendants had used ghost writers. *Paoli* Tr. Vol. 8 (Sept. 15, 2014) at 201:3-13, 201:20-23; *Paoli* Tr. Vol. 9 (Sept. 16, 2014) at 58:23 – 59:1, 59:8 – 60:6, 60:22 – 61:8, 96:7-23. Significantly, Defendants continually denied that they had asked anyone to ghost write articles for them. *See, e.g., Paoli* Tr. Vol. 9 (Sept. 16, 2014) at 234:5-18. The topic was again discussed in re-cross-examination. *See Paoli* Tr. Vol. 10 (Sept. 17, 2014) at 122:16 – 123:7, 125:20 –

[1] In the PEC's Original Motion, the citation to the *Paoli* transcript on page 4 is incorrect. The citation to *Paoli* Tr. Vol. 5, p. 87 should have been to Vol. 8, p. 197.

126:3, 127:9-14, 129:6-9, 129:23-25, 131:8-23. The newly produced Southworth complaint would have aided not only Plouhar's cross-examination but would have allowed the plaintiffs to discovery Southworth's significance and aided the jury's determination of the credibility of both Plouhar and Defendants' defense.

From the *Aoki* trial:

> [Q.]All right. So in addition -- By the way, ghostwriting is a no, no, no, no, no, isn't it?
>
> A. We don't think that it's an ethical practice.
>
> Q. Right. I mean, it's no different than in school you don't let someone else do your homework and put your name on it, right?
>
> A. Yes.

Aoki Dkt. No. 305 (*Aoki* Tr. Vol. 6), at 34:14-20.

From the *Andrews* trial:

> Q. So the marketing man sends out this memo. Ultimately, this does get done in some form, and it gets published. But this publication that y'all put out for everyone was ghostwritten, wasn't it?
>
> A. I disagree with that.
>
> Q. You know what "ghostwritten" means, don't you?
>
> A. I'll let you -- you define that.
>
> Q. Well, as in this gentleman right here, Kirk Kindsfater, the first name on there as the author, that's called the lead author. Correct?
>
> A. That's correct.
>
> Q. He's a hip surgeon that y'all had spent a lot of money on in Fort Collins, Colorado, right?
>
> A. He's an orthopedic surgeon in Fort Collins, correct.
>
> Q. That y'all have paid a lot of money to, right?
>
> A. We've compensated him for his research, yes.

Q. By "compensated," that's paying money to.

A. That's correct.

Q. Yeah. You didn't compensate him -- I'm not saying trips or things like that. Just money. Right? William Barrett, a surgeon in Seattle, y'all paid a lot of money to over the years, haven't you?

A. He's been a designer for us, yes.

Q. And then we get to James Dowd, another surgeon y'all have paid a lot of money?

A. Jim has helped us educate, and he's designed implants, yes.

Q. Is that a yes answer?

A. Yes.

Q. Carleton Southworth, that's the guy within DePuy, not a medical doctor, a master's of science, right?

A. I believe he's a statistician.

Q. That's who really wrote this, isn't it?

A. I disagree with that.

Q. In fact, this had to be mailed in at a time certain.

MR. LANIER: Your Honor, we offer Plaintiff's Exhibit 32.

MR. QUATTLEBAUM: No objection, Your Honor.

THE COURT: Plaintiff's Exhibit 32 is admitted in evidence.

BY MR. LANIER:

Q. By the way, ghostwriting, not a good thing, is it?

A. Ghostwriting for something like this?

Q. Yeah.

A. I would agree with you, it's not.

Andrews Dkt. No. 309 (*Andrews* Tr. Vol. 4) at 84:18 – 86:12.

From the *Alicea* trial:

> Q. Ma'am, this isn't a question of the data in-house. The jury can see names on this poster that supposedly wrote it. One of 'em is William Barrett. Let me put it up here so you can see it. William Barrett. Do you see that?
>
> A. Yes.
>
> Q. You know him. You picked him to be an author, didn't you?
>
> A. Yes.
>
> Q. In other words, y'all had already written up this study, and then they came to you and said, Dr. Plouhar, who do you want us to say wrote it. And you're the one who said Dr. Barrett can be one of the writers. Remember?
>
> A. I identified Dr. Barrett, Dr. Dowd, and Dr. Kindsfater as authors, as potential authors, yes.
>
> Q. Yeah. And then the company paid him money to say he wrote it, didn't they?
>
> A. There was probably some minimal amount that was paid for authorship for the review of the abstract.
>
> Q. Is that a yes answer?
>
> A. Yes.
>
> Q. Is that a yes y'all paid him money?
>
> A. Yes.

Alicea Tr. Vol. 4 (Sept. 25, 2017) at 130:21 – 131:18.

As noted above, some of the most extensive questioning about ghostwriting has centered on the Kindsfater 99.9% "PIN Study" abstract, that was published as part of the 2007 American Academy of Orthopaedic Surgeons annual meeting. As the testimony in the prior trials has shown, the Kindsfater PIN Study paper was actually ghostwritten by

Carleton Southworth, one of Defendants' employees. *See, e.g., Aoki* Dkt. No. 305 (*Aoki* Tr. Vol. 6), at 23:1 – 34:20.

Defendants have forced the PEC to play a game of hide-and-go-seek. For example:

- Defendants redacted Dr. Plouhar's name and Mr. Southworth's name from DEPUY113259867 and its attachments.

- Defendants redacted Dr. Schmalzried's name from the Ethics Hotline Database Export of Complaint JJDPY-09-02-0015 at DEPUY113259863 for an off-label use.

- Despite a request on January 3, 2019, the Ethics Complaint in DEPUY113259917 remains redacted. This is an Ethics Complaint that a patient was left on the operating table for hours while a rep drove two hours away to get a part.

- Defendants still have not provided the PEC with the total number of Ethics Complaints existing, collected and reviewed.

- Even after the revelation of Mr. Southworth's allegations against Dr. Plouhar regarding ghostwriting, Defendants:

    - performed a clearly inadequate search simply for the word "ghost";

    - limited their effort to disclose Dr. Plouhar's bonuses to what was in her Personnel File despite knowing that these files were incomplete;[2]

    - did not produce other Ethics Complaint allegations involving Dr. Plouhar until prompted by the PEC;

    - have not produced complete investigations into the various Ethics Complaints against Dr. Plouhar nor disclosed where these investigations may have been maintained outside of Personnel Files; and

[2] Incredibly, just today, defense counsel informed the PEC that "the files maintained by Human Resources are not always complete and there is no other centralized source for information." Contrary to defense counsel's assertions otherwise, this is the first time the PEC has heard that Defendants do not maintain complete records of financial information regarding their employees, including information related to salary and bonuses.

- have not disclosed whether any investigative reports or documents ever existed in Dr. Plouhar's Personnel File that are not still in her Personnel File today.

This shows a pattern and practice of trying to obscure relevant information. The PEC has been required to guess what documents are missing and where they may be.

In their written response on January 21, 2019 to the PEC's requests for production, Defendants offered the excuse that the ghost-writing ethics complaint was not produced because the words they selected for their computer search of the ethics complaints did not reveal it. But the word "ghost" appears twice in Southworth's March 31, 2013 complaint (DEPUY-R-113259867), so it should have been produced.[3] In any event, a search limited to ghost, ghostwriting, or similar words, would not reveal documents that also relate to this unethical practice, such as "authored paper without input from physician," "paper subsequently published without DePuy author listed," "paper authored by Medical Writer," "hired undisclosed Medical Writer," or "improper attribution on published study." There's no predefined category in the ethics hotline documents system for ghostwriting. Because the complainants were able to use their own words to describe the problem, searching by the term "ghost" alone is inadequate. In their written response on January 21, 2019 to the PEC's requests for production, Defendants' initial search was flawed since it did not even uncover the Southworth complaint that specifically included the very word being searched for.

The newly-produced Southworth complaint also shows that there is a document format available to Defendants that contains additional information on the complaints.

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[3] Southworth wrote: "The details of my complaint are contained in the uploaded files. Pam Plouhar wanted me to **ghost** write articles so that she could get a bigger bonus. I refused and left J&J as a result. . . . Although I had been through the clearance process and passed I was told yesterday that I was on a 'no hire list.' This was retaliation for my refusal to help Pam Plouhar get bigger bonuses by engaging in unethical/illegal **ghost** writing, and for the embarrassment I caused her by electing to exit J&J instead of submitting to her unethical initiative toward me." (emphasis added).

The format for the newly-produced Southworth complaint is entitled Ethics Hotline Database Export. That format allows a reader to determine every person who reviewed the case and when, questions and the (apparent) verbatim answers by the complainant. Defendants have not produced all the hotline complaints in that format.

Since producing the six bombshell documents discussed above on January 16, Defendants have produced some additional documents related to their ethics hotline. However, their production is still inadequate and incomplete. For example, there were monthly reports in 2008 (DEPUY017288173) and 2009 (DEPU017564693). Defendants did not produce the monthly reports for September, October, November, and December 2008 nor January 2009.[4] Defendants produced an Excel spread sheet entitled DePuy Orthopaedics HCC Investigations Tracker for 2008 and 2009 (DEPUY-R-001985203) but not for other years.[5] Defendants produced another Excel spread sheet dated October 6, 2011 (heavily redacted), but no reports in that format for other dates (DEPUY072052503). They produced a report entitled DePuy Orthopaedic Investigations Opened and/or Closed during 2009-2010 CIA Reporting Period, but no similar reports for other years (DEPUY072052608). Accordingly, the PEC requests that Defendants be compelled to produce **all** relevant documents and information related to the requested documents. More specifically, and given the fact that opening statements are set to begin on January 25, 2019, the PEC requests that Defendants be compelled to produce, within 24 hours:

- **All** documents related to Defendants' ethics hotline, and all other procedures established to receive any complaints of unethical or inappropriate behavior, whether from an employee or third party,[6]

[4] It is not clear when these reports began or ended. The March 16, 2009 email attaching the February 2009 report states the monthly reports were prepared pursuant to the DPA and a November 14, 2007 letter from Debra Wong Yang to Tony Cutshall. Defendants have not produced that letter.

[5] The document is not dated so it is unclear whether it covers the entirety of those years.

[6] To avoid any misunderstanding, the PEC requests all complaints and investigations in any form, including any summaries, analysis, or tables of complaints By EthicsPoint Call Center,

including any investigations of such complaints, in searchable format,[7] so that the PEC can conduct the search for relevant documents. Defendants' searches have proven to be inadequate.

GCS Call Center, and Open Door. According to an Ernst & Young review of DePuy's complaint system,

> "DePuy utilized the Global Compliance Systems case management system until February, 2011 and EthicsPoint case management system starting February, 2011 to track all investigations received from a variety of sources. . . . These cases are summarized in an investigations log that tracks, among other metrics, the disclosure date, case identifiers, summary of allegations, status, date closed, type, corrective actin, and whether the allegations were substantiated. DePuy provided a copy of this log to us for our review that pertained to investigations open, opened and/or closed " between 2010 and 2011."

The E&Y report goes on,

> "Investigation activity is tracked on the the HCC dashboard monitoring tool and every month HCC reports investigation activity to the Compliance Committee -typically in summary fashion. As noted in the Year 3 Report, incident reporting is triaged into groups. "Group 1" reports are the most significant possible violations and "Group 2" reports are less significant possible violations. The Reporting Investigations and Corrective Action policy was revised during the previous Review Period, as described in our Year 3 report.
>
> DePuy Orthopaedics has its own hotline number that was implemented during the DPA and will remain in place through the term of the CIA. This is in addition to making available the general Johnson & Johnson hotline number."

DEPUY072053196, 072053229. That report also makes it clear that there were other complaint systems before 2010, including a DePuy Health Care Compliance Internet Website. *See* DEPUY072053231. For example, the E&Y report states:

> "DePuy has implemented and executed procedures requiring the Compliance Officer to review the ADB, the internal review and approval process, and other arrangements procedures. The HCC Committee continues to utilize a dashboard to track activity on a monthly basis. This dashboard includes metrics on reports of suspected noncompliance, policy development pipeline, training and awareness summaries, pending audits and audit results, major HCC project developments, and other business and compliance information. HCC also utilizes logs to track open and closed compliance investigations. HCC, under the direction of the Chief Compliance Officer, completes a quarterly database review, obtaining information from multiple sources, including the *Access* database, *DePuyCONNECT* (including GMS), and the Royalties database."

[7] Defendants have not produced any investigation of Southworth's complaint that ghostwriting occurred; it has produced only an investigation of Southworth's retaliation complaint, not his underlying complaint that he had been asked to ghost write articles. The

- A **complete** copy of Dr. Plouhar's personnel file. From what Defendants have produced thus far, the following items are not accounted for: (1) complete compensation history; (2) criteria for determining her bonuses; (3) complete performance reviews for all years of her employment; (4) exit interview with related notes; and (5) any reference to the six known ethics complaint allegations in which Dr. Plouhar was mentioned.

As issue-related sanctions, the PEC requests (i) that Dr. Plouhar be compelled, after service by an appropriate subpoena, to testify at the *Aoki* retrial via satellite, (ii) that the PEC be permitted to depose, or call live via satellite during the *Aoki* retrial, any of the persons identified in the late-produced documents, and (iii) any other form of issue-related sanctions justified under the circumstances as additional facts develop. With respect to punitive sanctions, the PEC reserves the right to seek an award of appropriate punitive sanctions once the facts surrounding Defendants' conduct are more fully known.

II. DEFENDANTS AND THEIR COUNSEL SHOULD BE SANCTIONED FOR THEIR CONTINUED MISCONDUCT DURING THIS MDL.

The recent incident with the Plouhar ethics complaint merely highlights what has been a long-standing problem. Throughout the course of this MDL, Defendants' conduct has repeatedly followed a pattern of obfuscation and obstruction. The Court has witnessed Defendants' strategy first-hand in the bellwether trials, and will undoubtedly remember many of the other incidents that have occurred over the years. Although not an exhaustive list, § II.B below describes various examples of Defendants' most egregious conduct during the pendency of this MDL. Eight years of misconduct is quite enough. Given the egregiousness of Defendants' conduct, the PEC would be well within its rights to request severe sanctions, including, but not limited to, attorneys' fees, costs, and fines. The PEC simply requests that the Court, after giving Defendants and their counsel an

PEC requests that Defendants be compelled to admit that no investigation was performed of the ghost writing complaint or to produce the investigation.

opportunity to be heard, sanction Defendants and their counsel in whatever manner the Court deems appropriate.[8]

A. Legal Standards

This Court is specifically authorized to sanction parties or counsel for their litigation misconduct under various federal rules[9] and statutes, including, but not limited to: (i) FED. R. CIV. P. 11(c) (authorizing sanctions for filing false, frivolous, or unsupported pleadings or papers);[10] (ii) FED. R. CIV. P. 16(f) (authorizing sanctions for failing to obey scheduling or other pretrial orders);[11] (iii) FED. R. CIV. P. 26(g) (authorizing sanctions for

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[8] As is clear from their continued misconduct, Defendants and their counsel have not been sufficiently deterred by this Court's prior verbal warnings and reprimands.

[9] Notably, courts "generally may act *sua sponte* in imposing sanctions under the [Federal] Rules [of Civil Procedure]." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 n.8 (1991).

[10] A sanction under Rule 11 "must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation." FED. R. CIV. P. 11(c)(4). *See also* Fed. R. Civ. P. 11, Advisory Comm. Notes, 1993 Amendment. Subdivisions (b) and (c) ("The court has available a variety of possible sanctions to impose for violations, such as striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; referring the matter to disciplinary authorities (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head), etc.").

[11] "Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses--including attorney's fees--incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust." FED. R. CIV. P. 16(f)(2). "Among the sanctions authorized by [Rule 16(f)] are: preclusion order, striking a pleading, staying the proceeding, default judgment, contempt, and charging a party, his attorney, or both with the expenses, including attorney's fees, caused by noncompliance. The contempt sanction, however, is only available for a violation of a court order. The references in Rule 16(f) are not exhaustive." FED. R. CIV. P. 16, Advisory Comm. Notes, 1983 Amendment. Subdivision (f); Sanctions.

false or frivolous discovery disclosures, requests, responses, objections, and motions);[12] (iv) FED. R. CIV. P. 37(b)-(c) (authorizing sanctions for failure to obey a discovery order or failure to disclose or supplement discovery);[13] (v) 28 U.S.C. § 1927 (authorizing sanctions against an attorney who "multiplies the proceedings in any case unreasonably and vexatiously . . ");[14] and (iv) 18 U.S.C. § 401 (authorizing courts to punish, as contempt of court, the misbehavior of court officers).[15] Additionally, the Local Rules for the Northern District of Texas authorize the Court to discipline attorneys for certain improper behavior. N.D. TEX. LOCAL RULE 83.8(b).[16]

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[12] Sanctions under Rule 26(g) "may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation." FED. R. CIV. P. 26(g)(3).

[13] Sanctions for failure to obey a discovery order include: "(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims; (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; (iii) striking pleadings in whole or in part; (iv) staying further proceedings until the order is obeyed; (v) dismissing the action or proceeding in whole or in part; (vi) rendering a default judgment against the disobedient party; or (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination." FED. R. CIV. P. 37(b)(2)(A). Sanctions for failure to disclose or supplement an earlier discovery response include: (i) prohibiting the party from using information or witnesses it failed to disclose "to supply evidence on a motion, at a hearing, or at a trial[;]" (ii) ordering the "payment of the reasonable expenses, including attorney's fees, caused by the failure;" (iii) informing "the jury of the party's failure;" and/or (iv) imposing "other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi)." FED. R. CIV. P. 37(c)(1).

[14] Under § 1927, the court can require such attorneys "to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927.

[15] Under § 401, courts can punish officers of the court "by fine or imprisonment, or both[.]" 18 U.S.C. § 401.

[16] "A presiding judge, after giving opportunity to show cause to the contrary, may take any appropriate disciplinary action against a member of the bar for: 1. conduct unbecoming a member of the bar; 2. failure to comply with any rule or order of this court; 3. unethical behavior; 4. inability to conduct litigation properly; 5. conviction by any court of a felony or crime involving dishonesty or false statement; or 6. having been publicly or privately disciplined by any court, bar, court agency or committee." *Id.*

Additionally, this Court, sitting *en banc*, "adopted standards of litigation conduct for attorneys appearing in civil actions in the Northern District of Texas." *Lelsz v. Kavanagh*, 137 F.R.D. 646,

Separate and apart from its authority to sanction pursuant to statute or rule, this Court is vested with the inherent power to " 'manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases.' " *Chambers*, 501 U.S. at 43 (citation omitted).[17] *See also Sandifer v. Gusman*, 637 Fed. Appx. 117, 121 (5th Cir. 2015) (same).[18] This includes the power to sanction parties or attorneys who disregard court orders or otherwise abuse the judicial process. *See Chambers*, 501 U.S. at 44-49 (pursuant to their inherent powers, courts have the discretion "to fashion an appropriate sanction for conduct which abuses the judicial process").[19] In most respects, the Court's inherent power to sanction is "broader" than "other means of imposing sanctions" because "whereas each of the other mechanisms reaches only certain individuals or conduct, the inherent power extends to a full range of litigation abuses." *Chambers*, 501 U.S. at 46.

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654 (N.D. Tex. 1991) (citing *Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n*, 121 F.R.D. 284, 285-87 (N.D. Tex. 1988)). "Although the *Dondi* opinion established no new powers for the regulation of attorney conduct by the Court, it did serve notice on all attorneys appearing in the Northern District of Texas that the Court would actively police their behavior." *Id.* The Court cautioned that "[m]alfeasant counsel can expect . . . that their conduct will prompt an appropriate response from the court, including the range of sanctions the Fifth Circuit suggests in the Rule 11 context: 'a warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions, or other measures appropriate to the circumstances.' " *Dondi*, 121 F.R.D. at 288 (citation omitted).

[17] "It has long been understood that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.' For this reason, 'Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates.' " *Id*. (internal citations omitted).

[18] *See also Bayoil, S A. v. Polembros Shipping Ltd.*, 196 F.R.D. 479, 481 (S.D. Tex. 2000) ("This Court has the inherent power, as well as the authority expressly granted to it under the Federal Rules of Civil Procedure, to impose sanctions where warranted."); *Parson v. Wilmer Hutchins Indep. Sch. Dist.*, CIV.A. 3:03-CV-0492B, 2005 WL 396292, at *2 (N.D. Tex. Feb. 17, 2005), *aff'd*, 145 Fed. Appx. 944 (5th Cir. 2005).

[19] *See also Lelsz*, 137 F.R.D. at 653 ("It is clear that a district court is obliged to act against improper conduct occurring in any proceeding before it."); *Parson*, 2005 WL 396292, at *2.

"[T]he inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct." *Id.* at 49. Indeed, the Supreme Court has recognized that a court's reliance on its inherent powers is particularly appropriate when sanctioning an extended course of bad faith conduct throughout the litigation:

> [W]e find no abuse of discretion in resorting to the inherent power in the circumstances of this case. It is true that the District Court could have employed Rule 11 to sanction Chambers for filing "false and frivolous pleadings," and that some of the other conduct might have been reached through other Rules. Much of the bad-faith conduct by Chambers, however, was beyond the reach of the Rules; his entire course of conduct throughout the lawsuit evidenced bad faith and an attempt to perpetrate a fraud on the court, and the conduct sanctionable under the Rules was intertwined within conduct that only the inherent power could address. In circumstances such as these in which all of a litigant's conduct is deemed sanctionable, requiring a court first to apply Rules and statutes containing sanctioning provisions to discrete occurrences before invoking inherent power to address remaining instances of sanctionable conduct would serve only to foster extensive and needless satellite litigation, which is contrary to the aim of the Rules themselves.

Id. at 50–51 (internal citation omitted).

The Court must exercise its inherent powers "with restraint and discretion." *Id.* at 44. The exercise of a district court's inherent power requires a finding of bad faith or willful abuse of the judicial process. *Sandifer*, 637 Fed. Appx. at 121;[20] *Parson*, 2005 WL 396292, at *2; *Salmeron v. Enter. Recovery Sys., Inc.*, 579 F.3d 787, 793 (7th Cir. 2009) ("Sanctions meted out pursuant to the court's inherent power are appropriate where the offender has willfully abused the judicial process or otherwise conducted litigation in bad

[20] As one example, violating the court's previous orders "constitutes bad faith." *Id.* at 122.

faith.").[21] The Court also "must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing any fees[.]" *Chambers*, 501 U.S. at 50. Due process requires that the party or attorney to be sanctioned be given adequate notice and an opportunity to be heard before the Court issues the sanction. *Sandifer*, 637 Fed. Appx. at 121 ("Here, the district court complied with due process because it ordered Wilson to show cause why he should not be sanctioned for disregarding previous orders, allowed Wilson to file a response, and held a hearing before sanctioning Wilson.").

In exercising its inherent power, this Court can impose a variety of sanctions:

> A court may rely on its inherent powers to award monetary sanctions when a party has acted in "bad faith, vexatiously, wantonly, or for oppressive reasons." Courts of justice also have the ability to "fashion an appropriate sanction for conduct which abuses the judicial process." And while sanctions must be fashioned with restraint and discretion, courts of justice can fashion appropriate monetary and nonmonetary sanctions to rectify misbehavior. Examples of sanctions fashioned by courts include: attorneys' fees; barring a criminal defendant who disrupts a trial from the courtroom; ordering a new trial on all issues; and issuing reprimands[.]

Nat'l Org. of Veterans Advocates, Inc. v. Sec'y of Veterans Affairs, 710 F.3d 1328, 1334–35 (Fed. Cir. 2013) (internal citations omitted). *See also Mingo v. Sugar Cane Growers Co-op. of Florida*, 864 F.2d 101, 102 (11th Cir. 1989) ("The sanctions imposed can range from a simple reprimand to an order dismissing the action with or without prejudice.").[22] The

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[21] " '[W]hen bad faith is patent from the record and specific findings are unnecessary to understand the misconduct giving rise to the sanction, the necessary finding of 'bad faith' may be inferred.' " *Sandifer*, 637 Fed. Appx. at 121 (citations omitted).

[22] *See also Yaffa v. Weidner*, 717 Fed. Appx. 878, 885–86 (11th Cir. 2017) ("Because the boundaries of a district court's power to sanction under Rule 16(f) are very similar to the boundaries of a district court's inherent power, a sanction that is permissible under the former is likely permissible under the latter."); *Fink v. Nourse*, 45 Fed. Appx. 670 (9th Cir. 2002) ("The court had authority to issue this reprimand under its inherent authority[.]").

Court's "inherent power to sanction for violations of the judicial process is permissibly exercised not merely to remedy prejudice to a party, but also to reprimand the offender and 'to deter future parties from trampling upon the integrity of the court.' " *Salmeron.*, 579 F.3d at 797 (citation omitted).

The Court must use the least severe sanction necessary to deter the improper behavior. *See Sandifer*, 637 Fed. Appx. at 122–23 (" '[T]he sanctioning court must use the least restrictive sanction necessary to deter the inappropriate behavior.' ") (citation omitted). Among the permissible range of sanctions for litigation misconduct, a public reprimand is considered one of the least severe; indeed, it is a sanction often issued for violations of Rule 11, for which it is not necessary to establish that the sanctioned party acted in bad faith. *See Jenkins v. Methodist Hosps. of Dallas, Inc.*, 478 F.3d 255, 265 (5th Cir. 2007) (noting that "an admonition by the court may be an appropriate sanction, in instances where the attorney's sanctionable conduct was not intentional or malicious, where it constituted a first offense, and where the attorney had already recognized and apologized for his actions"); *Seawright v. Charter Furniture Rental, Inc.*, 39 F. Supp. 2d 795, 808 (N.D. Tex. 1999) ("To the Court's knowledge, Janette Johnson has not been sanctioned for a violation of Rule 11 before. Therefore, the Court concludes and holds that a published reprimand coupled with a strong admonishment and warning to not engage in the future in the conduct chronicled above is the least severe sanction that is likely to deter Ms. Johnson from such conduct in the future.").[23] Indeed, in circumstances

[23] *See also Slater v. Skyhawk Transp., Inc.*, 187 F.R.D. 211, 220 (D.N.J. 1999) ("In this case, I find that an admonition and the publication of this opinion are sufficient sanctions to deter repetition of such conduct. I find that a relatively mild sanction is appropriate in these circumstances, because the seriousness with which Mr. Eisenstat has responded to the Order to Show Cause demonstrates that he will take his obligations under Rule 11(b) more seriously in the future. Further, I find that the publication of this Opinion and *Slater I,* and the imposition of an admonition, will serve as a 'wake-up' call to Mr. Eisenstat, that will sensitize him to his obligations under Rule 11."); *cf. Younes v. 7-Eleven, Inc.*, 312 F.R.D. 692, 713 (D.N.J. 2015) ("After evaluating the totality of the circumstances, the Court finds the appropriate sanction for 7-Eleven's Rule 26(g) violation is an admonition. 7-Eleven and its counsel are

involving prolonged litigation misconduct, courts often impose much more severe sanctions. *See Chambers*, 501 U.S. at 54–55 (district court "acted within its discretion in assessing as a sanction for [the defendant's] bad-faith conduct the entire amount of [the plaintiff's] attorney's fees[,]" $1 million, where the defendant "perpetrated [a fraud] on the court and [displayed] bad faith . . . toward both his adversary and the court throughout the course of the litigation").[24]

admonished that 7-Eleven's January 15, 2014 interrogatory answers violated Rule 26(g) and that similar conduct will be addressed more harshly in the future.").

[24] *See also Buren v. U.S. Postal Serv.*, 883 F.2d 429, 430–31 (5th Cir. 1989) (affirming district court's dismissal of plaintiff's frivolous complaint and awarding the defendant "double costs in addition to damages of $500"; "[I]t is clear to us that this complaint is simply one more example of an ongoing pattern of vexatious, multiplicious, and frivolous litigation that has now extended for more than four years. In our first opinion regarding Buren, cited above, we observed that '[p]laintiff should be thankful that the district court merely dismissed his complaint rather than impos[e] Rule 11 monetary sanctions.' Buren should heed our advice. Enough is enough."); *Parson v. Wilmer Hutchins Indep. Sch. Dist.*, 145 Fed. Appx. 944, at *1 (5th Cir. 2005) (affirming district court's dismissal of plaintiff's suit where it had "warned [the plaintiff] numerous times to refrain from abusive litigation tactics and follow the court's orders and plaintiff persisted in refusing to heed those warnings"); *Bayoil*, 196 F.R.D. at 483 ("Plaintiff has proven by a preponderance of the evidence that Defendants have engaged in a pattern of obfuscatory, misleading, and untruthful conduct which supports striking their defenses of lack of personal jurisdiction and forum non conveniens. "); *Lelsz*, 137 F.R.D. at 648 (Assistant AG's "pattern of misconduct" and use of "litigation tactics that prejudiced the rights of her adversaries and undermined the administration of justice in this Court" warranted her removal "from further participation in this litigation"); *Salmeron*, 579 F.3d at 798 ("[I]n light of Sanchez's continuing pattern of misconduct for which he had been given a 'final warning,' the district court did not abuse its discretion in dismissing Salmeron's suit with prejudice as a sanction for the willful leaks of the document.").

B. Illustrative Sanctionable Conduct by Defendants and their Counsel During this MDL.[25]

1) Defendants' obstructionist conduct during MDL depositions.

Defendants' obstructionist tactics began in earnest when the PEC started taking depositions of Defendants' current and former employees back in 2013. There are numerous examples of improper conduct, including, but not limited to the following:

a) Improper instructions to witnesses not to answer questions: Depositions of Paul Sade and Kim Blevins Earle.

During the deposition of Paul Sade on February 7, 2013, one of Defendants' many lawyers (Mr. Rob Simpson) repeatedly and flagrantly violated FED. R. CIV. P. 30 through the use of improper "speaking" objections and instructing the witness not to answer questions even though no issue of privilege was involved. **Ex. 1** (Sade Dep.). Another of Defendants' lawyers defending that deposition (Mr. Bruce Hurley) stated that Defendants would not allow the PEC to question any witnesses about a document unless the witness authored or received the document, a position that was clearly inappropriate.[26] The PEC prepared a draft Motion for Sanctions and forwarded it to Defendants' lead counsel (Mr. Harburg) via email on February 12, 2013, with a copy to Special Master Stanton. A copy of that draft motion is attached as **Ex. 2**.[27]

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[25] In addition to the misconduct described herein, the PEC incorporates, as if fully set forth herein, the misconduct of Defendants described in the PEC's recent briefing regarding this Court's holdback order. *See* MDL Dkt. Nos. 913, 917, 956, 963.

[26] Perhaps most egregiously, in that deposition Mr. Sade insisted that he be given the opportunity to review a lengthy document before he would answer any questions about it. After Mr. Sade took approximately 45 minutes to review an eight-page document, Mr. Simpson instructed Mr. Sade not to answer any questions about it. **Ex. 1** (Sade Dep.) at pp. 56-74. Mr. Simpson maintained his position even after being told that the document in question was part of Mr. Sade's custodial file. *Id*. at p. 175.

[27] As the PEC noted in the motion, another of Defendants' lawyers improperly instructed Kim Blevins Earle not to answer certain questions during her deposition as well. *See* **Ex. 2** (2/13 Draft Motion) at p. 4 fn 1.

After reviewing what had transpired at the Sade and Earle depositions, the Court admonished Defendants and issued an Order Regarding Depositions on March 4, 2013, which set forth instructions for the parties to follow in future depositions, including limiting what can be stated when making an objection and reiterating that witnesses may not be instructed not to answer a question unless permitted by Rule 30. *See* MDL Dkt. No. 270. In addition, the Court precluded Mr. Simpson and Mr. Hurley from participating in the case for a time.

b) Deliberate evasiveness during depositions: Deposition of Paul Kurring.

Paul Kurring was deposed on May 21, 2013 in Manchester, England. He was an employee of Defendants at that time. Mr. Kurring was deliberately and repeatedly evasive in answering questions. **Ex. 3** (Kurring Dep.). Mr. Lanier asked Defendants' counsel, Mr. Steve Quattlebaum and Mr. Gene Williams, to intervene so that the deposition could be properly conducted, but they stated that they did not believe the witness was acting improperly. *Id* at pp. 123-27.

After the deposition was concluded, Defendants approached Special Master Stanton complaining about how the deposition was taken. **Ex. 4** (6/19/13 Email from S. Harburg to J. Stanton).[28] The parties provided Special Master Stanton and the Court with the deposition transcript and the video recording of the deposition. The Court ultimately ordered that Mr. Kurring be re-presented by Defendants for deposition (in Dallas), and observed that the questioning by Mr. Lanier was appropriate and did not need to be addressed.[29]

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[28] The relevant portion of the email thread regarding this issue is reproduced in **Ex. 4**.

[29] The Court's ruling on this dispute was conveyed to the parties via a telephone call with Special Master Stanton. The PEC thought that phone call was memorialized in a subsequent email from the Special Master, but have been unable to locate that email.

c) *Early deponents met with lawyers for hours but claimed not to have reviewed a single document while preparing for their depositions.*

Kim Earle was deposed on February 6, 2013. Ms. Earle testified she met with lawyers for approximately two and a half days (eighteen hours total over three days), yet did not review a single document. **Ex. 5** (Earle Dep.) at pp. 183-85. Paul Sade was deposed on February 7, 2013. Mr. Sade testified he met with lawyers for the three days prior to his deposition, for a total of approximately 13 or 14 hours, as well as a meeting the week prior to his deposition (maybe two) – yet he also claimed not to have reviewed a single document in that preparation. **Ex. 1** (Sade Dep.) at pp. 6-11. Andrea Hicks was deposed on February 13, 2013. Ms. Hicks testified she met with lawyers for a total of approximately 16 hours over "five-ish" days, but did not review a single document. **Ex. 6** (Hicks Dep.) at pp. 9-10.

These depositions were taken in early 2013, and would have covered events going back for more than a decade. These were not low-level employees with no knowledge of the Pinnacle device; Mr. Sade was the Project Manager – Hip Development and was involved in marketing the aSphere hip. **Ex. 1** (Sade Dep.) at pp. 15, 42. Ms. Earle and Ms. Hicks were in the clinical research department. The only explanation for why these witnesses would not have reviewed any documents – even documents from their own files – is so that they could deny recollection or knowledge of matters, and obstruct the PEC's efforts to conduct discovery. The nefarious nature of this strategy is accentuated by Defendants' early position that witnesses could not be questioned about documents that they neither authored or received. The Special Master and the Court had to intervene in order to get the deposition process on track.

d) *Defendants' gamesmanship in deposition scheduling*.

In addition to the items described above, Defendants also attempted to hinder the PEC's efforts to conduct discovery in this MDL through deliberately inconvenient scheduling. When the PEC was trying to schedule the depositions of Dr. Andy Engh and

Dr. Thomas Schmalzried in August of 2013, the Defendants unilaterally noticed the deposition of Dr. Engh in Washington, D.C. for September 13, 2013 – the day after Dr. Schmalzried was to be deposed in Los Angeles. Moreover, the Defendants attempted to limit the time the PEC would be permitted to question Dr. Engh to five hours, rather than the full seven hours provided by Rule 30. Defendants' conduct is fully described in the PEC's Brief in Support of Motion to Compel the Deposition of Charles Anderson Engh, Jr., M.D. and to Strike Defendants' Notice of Deposition, MDL Dkt. No. 337.

The Schmalzried deposition went forward as scheduled, and the Engh deposition was rescheduled and completed in April of 2014.

e) Defendants' arbitrary attempt to impose a discovery cut off in the MDL.

After the conclusion of the *Paoli* trial, the PEC identified three new witnesses who needed to be deposed and sought to re-depose seven witnesses based on a showing of good cause. Defendants filed a Motion for Protective Order, requesting that the PEC be precluded from taking *any* depositions. *See* MDL Dkt. No. 484. The PEC responded and explained why each of the requested depositions was warranted. *See* MDL Dkt. No. 486.

For the three new witnesses – Dr. Kirk Kindsfater, Carleton Southworth, and Randy Kilburn – the PEC explained that they did not have sufficient time to complete those depositions before the *Paoli* trial, and the trial shed new light on the importance of their testimony. As the Court knows, Carleton Southworth "ghost wrote" the PIN Study abstract that was published under the name of Dr. Kindsfater. And it was only after the *Paoli* trial that the PEC was able to uncover the fraudulent conduct by Defendants, Dr. Kindsfater, and others that was involved in the PIN Study, as the evidence in the *Aoki, Andrews*, and *Alicea* trials has shown.

For the seven witnesses[30] the PEC sought to re-depose, the PEC demonstrated that good cause existed to allow those witnesses to be deposed a second time. Defendants represented to the Court that Drs. Barrett and Griffin would be testifying live at the *Paoli* trial, but then attempted to use their earlier deposition testimony. Defendants offered a statistical analysis regarding survivorship for metal/metal hips in evidence in the *Paoli* trial that had been prepared after Voorhorst (Defendants' director of biostatistics) had been deposed. Drs. Wasielewski and Fehring were designated as non-retained experts by Defendants after they were deposed. New depositions of Isaac and Cutshall were warranted based on new information that was not available at the time of their original depositions. The Court denied Defendants' motion for a protective order and granted leave for the PEC to proceed with the depositions. See MDL Dkt. No. 497.

2) Improper conduct during Paoli trial.

Prior to the first bellwether trial (*Paoli*), Defendants argued that evidence regarding other MoM hips should be excluded as irrelevant. *See Paoli* Dkt. Nos. 97-98. The Court granted their motion *in limine* on this issue and precluded the plaintiffs from offering evidence regarding other MoM hips. *Paoli* Dkt. No. 105 at p. 8; *see also Paoli* Tr. Vol. 5 (Sept. 9, 2014) at 104:5 – 105:4. The Court repeatedly cautioned Defendants against opening the door to such evidence. *Paoli* Tr. Vol. 5 (Sept. 9, 2014) at 104:14 – 105:4 ("[W]ell, the part about the whole MDL and with regard to ASR, if the defense goes into saying everything was successful, we were successful, that's where you're going to get into trouble with me on changing my ruling. I want to make sure you understand. That's where you're getting very close, if you go there were no problems with metal-on-metal, that was never a problem, that would open it up. . . . [Y]our defense so far is you put the – the doctor put it in at the wrong angle. But if the defense is going to be there's never

[30] Dr. William Barrett, Dr. William Griffin, Paul Voorhorst, Dr. Ray Wasielewski, Dr. Thomas Fehring, Graham Isaac, and Tony Cutshall.

any problem with metal-on-metal, metal-on-metal has always been great, there's never been any problems, you may go over the line with me."); *Paoli* Tr. Vol. 6 (Sept. 10, 2014) at 10:18 – 11:2 ("I don't think you can leave an impression that metal-on-metal other than this case has been without problems. It's had lots of problems. I mean, I've read all these depositions. . . . It's my job to – and I'll do my best to try to make sure that – that we walk this sort of – that we're careful about how this proceeds."); *Paoli* Tr. Vol. 16 (Sept. 29, 2014) at 78:13-19 ("My concern really boils down to how far the defense has gone in defending this case and saying that metal-on-metal is great, there's no problems, and the witness has continued to say that and accumulation of that, and it's gone – I think the defense has gone beyond defending this one case and defending metal-on-metal."), 131:22 – 132:7 ("I think it boils down to whether the defendants have opened this up or not. And I think you have. I think from the opening – I warned you about it, and I think you've continued to push it, push it, push it. And you want to try these cases one by one, but you want to defend it. You want to defend the whole thing. . . . And you just can't have it both ways.").

Yet despite the Court's many warnings, as soon as Defendants began their case in chief, one of their first witnesses (Dr. Patricia Campbell) proceeded to extoll the virtues of MoM hips and their history of clinical success. *See, e.g., Paoli* Tr. Vol. 18 (Oct. 1, 2014) at 75:1 – 83:12, 103:15-19. In light of Dr. Campbell's testimony, the Court, in an off-the-record discussion, determined that the door had been opened to evidence of other MoM hip implants. When defense counsel later objected to the admission of this evidence, the Court made it clear for the record and the jury as to why the admission of such evidence was relevant and permissible: "Overruled. Opened up by your questions particularly, Mr. Sarver, and the way the defense has prepared this case. I want the jury to understand that." *Id*. at 179:24 – 180:3. *See also Paoli* Tr. Vol. 26 (Oct. 16, 2014) at 8:17 – 9:14 ("I think that you did open this up, not just through Dr. Campbell but through Dr. Nelson and all of your other witnesses."); *Aoki* Dkt. No. 302 (*Aoki* Tr. Vol. 3) at 106:3-5 ("And so you can't

tell the good without telling the bad. That's what we did in the last trial. And so when you open that door, that door is open for good."), 107:3-9 ("The last time we tried this case – and I don't mind putting in the record – the defendants asked me to keep a lot of things out, and then you guys after all the witnesses were dismissed and gone you brought 'em in, and all those things you wanted me to keep out with regard to Europe and what was going on over there. And so I'm not going to play that game this time, and I'm not going to let you."); *Aoki* Dkt. No. 303 (*Aoki* Tr. Vol. 4) at 64:9-12 ("First of all, you're the ones that have brought up Europe. You're going to keep bringing it up just like you did in the last trial. You can't tell good things and not expect the bad things to come in."); *Aoki* Dkt. No. 314 (*Aoki* Tr. Vol. 15) at 110:12-19 ("[T]his is the way y'all are trying this case. Y'all are trying this case – this is your life DePuy, this is your life J&J, and this is your life metal-on-metal. I know I'm going to hear that, because I heard the witnesses before in the last trial, and that is all of the good things metal-on-metal has done and all of the good things."); *Alicea* Tr. Vol. 4 (Sept. 25, 2017) at 71:15-18 ("Let me say this: If that occurs . . . and I think that did occur in a prior trial, the first trial. And it was a mess to try to clean it up, I agree. That's why I don't release any witnesses[.]").

It was for this reason that, in future trials, the Court has declined to release any witnesses until the trial was over. *See, e.g., Andrews* Dkt. No. 310 (*Andrews* Tr. Vol. 5) at 196:15-24 ("With regard to Mr. Ekdahl, I'm going to say outside the presence of the jury, Mr. Ekdahl, I'm not going to release you or any other witnesses during this trial. Not picking on you. It's just I'm not going to let either side – everybody has got to be back on 24/48 hour notice. If you can't do that, you're going to have to stay the whole trial. I've done that in other trials. Usually that was back when I was on the state bench, but we had some difficulty in the first trial getting you and others back, and so I don't want to go through that at this time."); *Andrews* Dkt. No. 326 (*Andrews* Tr. Vol. 21) at 237:17-21; *Alicea* Tr. Vol. 4 (Sept. 25, 2017) at 71:15-18.

3) Rule 30(b)(6) deposition of J&J corporate representative on FCPA DPA.

On January 15, 2016, the Court ordered J&J to produce a corporate representative for an oral and video deposition regarding the 2011 Deferred Prosecution Agreement wherein Defendants admitted to violation of the Foreign Corrupt Practices Act in connection with the sale of implants and other medical devices in Europe and Iraq.[31] Despite the Fifth Circuit's teaching that a Rule 30(b)(6) deponent must fully prepare its designated witness to answer questions completely and that the deponent should use documents, employees, former employees and other sources to ensure that the designee is completely prepared,[32] J&J designated an outside attorney (Christina Egan), hired only a few weeks before, who had no prior history of working with J&J or DePuy.[33] This witness did not speak to any non-lawyer J&J employee regarding the subject matter of her testimony and based that testimony solely on documents which J&J had hand-picked for her to review.[34] J&J chose this witness, whose knowledge it could artificially circumscribe, rather than an employee or executive with relevant knowledge.[35] The Court admonished defense counsel for its improper conduct:

> Okay. So a hundred plus thousand [employees of J&J worldwide]. And out of all those people we pick somebody out of Chicago that's never set foot on J&J property anywhere, never spoken to a J&J

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[31] *See* 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), dated January 15, 2016, MDL Dkt. No. 614.

[32] *See Brazos River Auth. v. GE Ionics Inc.*, 469 F.3d 416, 432-34 (5th Cir. 2006).

[33] *Aoki* Dkt. No. 314 (*Aoki* Tr. Vol. 15) at 45:16-46:1.

[34] *Aoki* Dkt. No. 314 (*Aoki* Tr. Vol. 15) at 45:4-15, 46:14-16, 51:16-52:5, 53:4-24.

[35] *Aoki* Dkt. No. 314 (*Aoki* Tr. Vol. 15) at 8:17-15:4, 56:16-60:17. Indeed, one of J&J's in-house counsel with contemporaneous knowledge regarding the DPA was in the courtroom, but that attorney was not designated, nor was he interviewed by J&J's designee. *Id*. at 70:7-71:14,76:16-80:2.

> employee anywhere in the world, never done anything but maybe use a Band-Aid?
>
> ***
>
> Well, that doesn't comply. Bottom line, you didn't comply. Period. I'm just going to think about how hard I'm going to sanction you. That's really all that's left.

Aoki Dkt. No. 314 (*Aoki* Tr. Vol. 15) at 16:6-17. *See also id.* at 20:11-18 ("What I need to know is every time J&J doesn't want to do something they're going to pull something like this? . . . . I don't ask y'all. I don't ask them. I don't care what y'all want. I listen to you, I make a decision, I make a ruling. This has been floating around for two months. And then you do this. I just can't believe it."), 26:9-17 ("I already ordered you. It doesn't seem to make any difference what I order you to do. You're not going to do it. . . . That's what you're telling me. Hush. I ordered you to do it here and you didn't do it. What makes you think they're going to do anything different? Why is it going to be different?"), 32:3-8 ("I don't think you subverted it. I think you said, no, not going to do it, I don't want to do it. . . . You know, if you're going to do that, you need to just go get a mandamus or do something that's proper, not – not just thumb your nose at me."), 35:8-9 ("Don't roll your eyes again, Mr. Harburg. That's not a good thing, doesn't help."). Yet despite the egregious nature of Defendants' and defense counsel's conduct, the Court chose not to sanction Defendants any further at that time. *Aoki* Dkt. No. 314 (*Aoki* Tr. Vol. 15) at 34:17 – 35:3, 35:21 – 36:3.

4) Defendants and their counsel tried to renege on an agreement they made with the Court regarding time limits during the Aoki trial.

Near the end of the *Aoki* trial, despite being allotted approximately the same number of trial days as the plaintiffs,[36] Defendants filed a motion seeking additional trial

[36] In fact, Defendants ultimately ended up having one day more than the plaintiffs to present their case. Excluding opening and closing arguments, the plaintiffs presented their case for 16.5 days (*Aoki* Dkt. Nos. 302-318), which included the time defense counsel took to put on direct examinations of Andrew Ekdahl and Pam Plouhar. *Aoki* Dkt. No. 302 (*Aoki* Tr. Vol. 3)

time, so that they could call **seventeen** additional witnesses.[37] The plaintiffs opposed Defendants' request, noting that, aside from the two sides being granted approximately the same amount of time, the plaintiffs' presentation took as long as it did only because (i) Defendants opened the door to numerous issues that the plaintiffs then had to address, (ii) Defendants' witnesses were continuously nonresponsive and obstructive, and (iii) Defendants wasted their own trial time by presenting cumulative and repetitive testimony.[38] In an effort to resolve this issue, the parties, in consultation with the Court and the Special Master, reached an agreement (initially off the record), whereby (i) Defendants agreed to rest their case by 5:00 p.m., March 9, 2016, (ii) the plaintiffs waived their right to present rebuttal evidence, (iii) Defendants were no longer required to bring a J&J corporate compliance witness, **despite their prior agreement to do so**; and (iv) Defendants agreed to withdraw and waive any complaint on appeal relating to their motion for more time and several other filings.[39] However, on the afternoon of March 9, after presenting the testimony of their final witness, Defendants attempted to renege on

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at 146:21 – 238:25; *Aoki* Dkt. No. 305 (*Aoki* Tr. Vol. 6) at 53:2 – 147:7, 149:25 – 209:23. Defendants presented their case for 17.5 days. *Aoki* Dkt. Nos. 318-335.

[37] *See* Defendants' Memorandum in Support of Motion for More Time to Present Their Defense, dated February 28, 2016, *Aoki* Dkt. No. 193-1. Of course, the Court had informed the parties early on that it expected the trial to last as few as eight weeks and that it was unlikely it would last as long as twelve weeks. *Aoki* Dkt. No. 300 (*Aoki* Tr. Vol. 1) at 16:4-5, 35:15-16, 193:25 – 194:2.

[38] *See* Plaintiffs' Opposition to Defendants' Motion for More Time to Present Their Defense, dated March 1, 2016, *Aoki* Dkt. No. 201.

[39] *See also* Agreed Order, dated March 10, 2016, MDL Dkt. No. 635 (signed by Defendants, the plaintiffs, and the Court).

their agreement with the Court.[40] The Court addressed the matter with defense counsel outside of the presence of the jury:

> THE COURT: You're not going to abide by the agreement? Just yes or no. Yes or no?
>
> MR. POWELL: Not by the agreement the court described.
>
> THE COURT: You made an agreement, and you're not going to abide by it; is that correct?
>
> MR. POWELL: Not by the agreement the court described.
>
> THE COURT: You're not going to abide by any agreement.
>
> MR. POWELL: Yes, we would, Your Honor. We think we've –
>
> THE COURT: One you want to rewrite.
>
> MR. POWELL: We think we abide by the agreement that we made.
>
> THE COURT: Okay. Then I'm going to put you on the witness stand, and each of you, and you're going to have to testify about it. Okay? Are y'all prepared to do that?
>
> MR. POWELL: We're prepared to do that?
>
> THE COURT: And I'm going to hold each of you individually responsible, because I think you're lying to me. Okay? Do you want to start?
>
> ***
>
> THE COURT: No. You can make offers of proof on Emerson.
>
> MR. POWELL: But on – on the other witnesses?
>
> THE COURT: You're done. That was the deal. You knew that was the deal. You waived all that. I don't mean you've waived all your other objections during the trial. But all these other things, you agreed these were your witnesses, the rest of these witnesses. Otherwise, bring that fellow from Belgium.

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[40] *Aoki* Dkt. No. 335 (*Aoki* Tr. Vol. 36) at 213:22 – 224:3.

> ***
>
> THE COURT: I want you to abide by the agreement. I just – I've read it – I've stated it twice.
>
> ***
>
> THE COURT: I just want you to know – No. No. No. That's the agreement. Yes or no?
>
> MR. POWELL: We accept the Court's version of the agreement.
>
> THE COURT: No. No. No. You're still not there yet. That's the agreement, yes or no. It's not a compulsive agreement. That's the agreement. Y'all gave up certain things. They gave up certain things, and in return for that, I left you off on sanctions for bring that man here on what I had already ordered you to do. That was the deal. Either you acknowledge that's the deal or you don't. I'm okay with that if you don't.
>
> MR. POWELL: Well, you know, under the compulsion.
>
> THE COURT: No. No. No. No. You either acknowledge that was your deal. There wasn't any compulsion. That was your deal.
>
> MR. POWELL: Did we not have a discussion though about bills of exception and offers of proof?
>
> THE COURT: Absolutely no. If we had, I would acknowledge it. No, that was not. Not about allowing you to do that. Absolutely not.

Aoki Dkt. No. 335 (*Aoki* Tr. Vol. 36) at 214:15 – 215:15, 218:16-24, 219:5-6, 222:16 – 223:11. Ultimately, after much discussion with the Court, Defendants agreed to abide by the original agreement.[41] Of course, this did not prevent Defendants from later misrepresenting the situation to the Fifth Circuit:

> As trial was coming to a close, and after plaintiffs had presented their case with no time restrictions of any sort, the MDL court ruled *sua sponte* that [Defendants] would have only six more trial days.

[41] *Aoki* Dkt. No. 335 (*Aoki* Tr. Vol. 36) at 223:12-14; Agreed Order, dated March 10, 2016, MDL Dkt. No. 635.

> [Defendants] attempted to preserve their objection to the court's mid-trial decision to impose a unilateral time limitation, but the MDL court shut down their effort. Contrary to [Defendants'] counsel's understanding, the court announced that it believed it had reached an off-the-record deal under which [Defendants] waived any appeal of the time limitation. When [Defendants] protested, the MDL court threatened to tell the jury that [Defendants'] counsel lied to the court unless [Defendants] abandoned the objection. Under these circumstances, [Defendants] felt trapped, acquiesced and agreed to rest their case without formal objection.

Petition for a Writ of Mandamus, *In re: DePuy Orthopaedics, Inc.; DePuy Products, Inc.' DePuy International, Ltd.; Johnson & Johnson; Johnson & Johnson Services, Inc.*, in the United States Court of Appeals for the Fifth Circuit, Case No. 16-10845, Doc. 00513562143, filed June 23, 2016, 2016, at p. 9 n.7.

5) Defendants and their counsel regularly attempt to sandbag the Court and the plaintiffs with last-minute filings/requests during trial.

During trial, Defendants and their counsel often file or present motions/briefs at the last possible moment, in an effort to prevent the plaintiffs from having time to respond before Defendants raise the issue with the Court. In one particularly egregious example, defense counsel presented the Court with a bench brief regarding certain evidentiary issues first thing on a Monday morning. *Andrews* Dkt. No. 317 (*Andrews* Tr. Vol. 12) at 5:20-25. The plaintiffs received the brief at the same time as the Court. *Id.* at 10:5-10 ("First of all, the bench brief that they gave you, we don't have a reply to. This was not an 11th hour bench brief; it was a 9:00 a.m. bench brief, and we had no knowledge it was coming, and so we're not in a position, having been sandbagged, to provide any type of response to the court in terms of the law."). The Court reprimanded defense counsel for not filing the brief sooner:

> THE COURT: Why didn't you file this over the weekend?
>
> MR. ANDERSON: Excuse me, Your Honor?

THE COURT: Why wait? This is the second time in a row when you had an opportunity that did something in the middle of the night. This is your second time, Mr. Anderson. You told me the first time was your fault. Is the second time your fault, too?

MR. ANDERSON: I take full responsibility for the filing.

THE COURT: Do you want them to do this to you?

MR. ANDERSON: No, your Honor, it was not prepared to be filed.

THE COURT: How many lawyers do you have working on this?

***

THE COURT: More than ten?

MR. ANDERSON: On the entirety of the team, I suspect there are more than ten. I know there are more than ten.

THE COURT: Okay. So you know more than 10. More than 20?

MR. ANDERSON: Perhaps somewhere in that vicinity, Your Honor. I can't say.

THE COURT: And not any of them could do this and get this filed over the weekend so that I could have a response? Are you doing this so that I'm only operating on your law and what you can find?

MR. ANDERSON: No, Your Honor. We – we understand – we understand what the court's position is, and we wanted to give the court the benefit of the law. If we had filed it last night, it would have been late in the evening after we determined which of the exhibits we would use with Dr. Plouhar. And I don't think that would have benefited you.

THE COURT: You could have done that earlier. I said what I said Thursday.

MR. ANDERSON: I understand.

THE COURT: So you don't have any excuse. You just didn't get it done because you're busy doing other stuff?

MR. ANDERSON: Your Honor, I'm in the [sic] here to offer excuses. Even if I had an excuse, Your Honor, I wouldn't offer it.

***

THE COURT: I asked Mr. Quattlebaum that the other day, and he assured me that we weren't going to have any more of these kinds of issues, but we are. And both of 'em are yours. I don't know how – other than just holding you to, you know . . . Somebody signed the certificate of service? Who signed that?

***

THE COURT: But you didn't do it in advance –

MR. ANDERSON: No, Your Honor. We filed it – we did not file it in advance.

THE COURT: -- to give the other side a chance to respond. You want them to do it for you, but you're not willing to do it for them. That's what the records show, correct?

MR. ANDERSON: The record will show that we did not provide this in advance to Mr. Lanier.

THE COURT: Is that correct or wrong? Am I wrong? If I'm wrong, just tell me I'm wrong.

MR. ANDERSON: I think I agree with the court and the record is clear we handed the brief to the court this morning, and I handed it to Mr. Lanier at the same time.

THE COURT: Has it even been filed – ECF doesn't even have it.

MR. ANDERSON: I can't say, Your Honor.

THE COURT: Well, you just told me you didn't put fingers to it, but it's your brief. Did you file it?

MR. ANDERSON: I did not personally file it.

THE COURT: Did somebody in your 20-plus-person team file this document at any time?

MR. ANDERSON: It was my understanding that it had been filed, would be filed, Your Honor. I cannot answer that question.

THE COURT: So the answer is I don't know?

MR. ANDERSON: The answer is I don't know.

THE COURT: Well, if it's not filed I can't even consider it. I mean, it's just a piece of paper. I can consider your arguments. I'm willing to do that, but I will tell you this, that without an adequate foundation, having a hearing on all these questions, I really can't – can't rule on it. I guess – let me check on the certificate of service here just a sec. I certify I filed this document using the court's electronic case filing system. Has it been or not? Mr. Roberts says it has. But we don't have it.

MR. ANDERSON: Well, Your Honor, I trust Mr. Roberts implicitly.

THE COURT: Was it filed yet or not?

MR. ROBERTS: Not yet, Your Honor. No, it has not been filed yet.

THE COURT: So that isn't true. So what you said in the certificate of service is a lie, correct?

MR. ROBERTS: I don't think it's a lie, Your Honor.

THE COURT: What is it?

MR. ROBERTS: I'm sorry?

THE COURT: What is it? If it's not a lie, what is it?

MR. ROBERTS: Well, it hasn't been filed yet, Your Honor.

THE COURT: So you swore it was? Correct?

MR. ROBERTS: Yes, your Honor.

THE COURT: So that's not true. Can you agree it's not true?

MR. ROBERTS: I agree, Your Honor.

THE COURT: So we're just going to do what we want and say what we want and not be true in what we file in here. Is that correct, Mr. Roberts?

MR. ROBERTS: No, sir.

THE COURT: Is that the way I trained you?

MR. ROBERTS: No, sir.

Andrews Dkt. No. 317 (*Andrews* Tr. Vol. 12) at 13:12 – 21:9; *see also id.* at 26:8-25. Significantly, at no time during this lengthy morning discussion with the Court did defense counsel inform the Court that they would be filing a **459-page appendix** with their brief; the Court did not learn of this until hours later:

> THE COURT: Is there an appendix to this brief?
>
> MR. QUATTLEBAUM: Is there an appendix? There was a long filing I think that went either with that or with a motion that went with it.
>
> THE COURT: Nobody gave that to me. Nobody mentioned any appendix this morning. Nobody gave an appendix, I was watching, to the plaintiffs. I'm going to have a hearing on this. This is outrageous. Then you cite in here the Mello versus DePuy Orthopaedics case, which was in the Aoki case. That has nothing to do with what Dr. Plouhar is doing in this case. That's not designating in this case. You cite it over and over again in this brief. We're going to have a hearing on it.
>
> MR. QUATTLEBAUM: Yes, sir.
>
> THE COURT: I mean this – it's outrageous. Did you ever mention that this morning, there was an appendix, Mr. Roberts?
>
> MR. ROBERTS: Did not, Your Honor.
>
> THE COURT: Did you provide it to me?
>
> MR. ROBERTS: No, sir.
>
> THE COURT: Did you provide it to me, Mr. Anderson?
>
> MR. ANDERSON: I did not, Your Honor. And –
>
> THE COURT: Did any of your team provide it to me?
>
> MR. QUATTLEBAUM: No, sir.
>
> MR. ANDERSON: Not to my knowledge, Your Honor.
>
> ***

> THE COURT: What in the world does Dr. Plouhar's filing some designation two years ago in a case have to do with what she's being designated in this case?
>
> Y'all complain over and over again about what the plaintiffs do, then you want to smuggle in – smuggle in for the record so you can make me look bad at the Fifth Circuit for the kind of things y'all are pulling. I want the Fifth Circuit to read and know what's going on in this case. I want them to know. I absolutely want them to know. Not one mention of this. You hand me a brief this morning, don't mention a 459-page appendix and expect me to rule on it. Unbelievable. It's unbelievable.
>
> There's only one reason that would happen, and that is y'all are playing games with this court. It's absolutely outrageous. Over the top. We're going to have a hearing on it. Not now, but . . .

Andrews Dkt. No. 317 (*Andrews* Tr. Vol. 12) at 101:8 – 103:13.

Additionally, sometimes Defendants would fail to file a motion altogether and instead try to raise the issue with the Court through a late-night e-mail:

> MR. QUATTLEBAUM: The only other thing going on, Your Honor, is that Ms. Plouhar is available to be here.
>
> THE COURT: I don't have a motion in front of me about that.
>
> MR. QUATTLEBAUM: Okay.
>
> THE COURT: You have 50 lawyers working with y'all –
>
> MR. QUATTLEBAUM: Yes, sir.
>
> THE COURT: -- and you can't file a motion? And you send an email? Not good enough.
>
> MR. QUATTLEBAUM: Okay. I understand.
>
> THE COURT: All right. Tell me about it, I'll listen to it.
>
> MR. QUATTLEBAUM: Okay.
>
> THE COURT: Out of respect for you – obviously there's no respect for the court. My understanding there was an email sent last night at 11 – actually eleventh hour, the eleventh hour.

MR. QUATTLEBAUM: I agree.

THE COURT: No motion was filed.

MR. QUATTLEBAUM: No.

THE COURT: Is that appropriate?

MR. QUATTLEBAUM: No.

THE COURT: Tell me what rule in the federal rules. Y'all are wanting to make sure and you have complained about what rules I followed and not followed. Tell me about that rule and how you followed it and what rule there is.

MR. QUATTLEBAUM: There is not a rule that says we can –

THE COURT: So you want me to accommodate you, correct?

MR. QUATTLEBAUM: Yes, Your Honor.

THE COURT: With an email in the middle of the night?

MR. QUATTLEBAUM: Yes, Your Honor.

THE COURT: Over something that's not an emergency.

MR. QUATTLEBAUM: Yes, Your Honor.

THE COURT: Not the sort of thing you would do for me, but the sort of thing you want me to do for you, correct?

MR. QUATTLEBAUM: I would hope that I would accommodate the court any way I possibly could.

THE COURT: Well, but you haven't. I mean, go ahead. Tell me about it.

***

THE COURT: If you're going to wait until the eleventh hour, tell me how it took until then. Obviously y'all don't agree with me about 4345 [sic]. Aside from that. That has nothing to do with it. So I'm going to hear from y'all at 11:00 o'clock. Every night I need to get up, which I did in the middle of the night last night at 3:00 o'clock to deal with this. So that's the way we're going to do this trial?

> MR. QUATTLEBAUM: I hope not. I hope this doesn't happen.
>
> THE COURT: No. I want to hear yes or no. I'm going to do that again when I feel like – I'm not going to file motions. I'm just going to file it in the middle of the night when I knew it earlier in the day.
>
> MR. QUATTLEBAUM: No, Your Honor. We won't do that again.

Andrews Dkt. No. 312 (*Andrews* Tr. Vol. 7) at 5:2 – 6:18, 9:8-23; *see also id.* at 4:17-20 ("I don't have any pending motions in front of me from y'all. So I guess we're ready to start. . . . I don't act on emails."), 11:15-19 ("THE COURT: Do you understand my frustration? MR. QUATTLEBAUM: I totally understand, judge. It was – I can tell you it was not pleasant for us either. But I – but it was much more unpleasant for you than it was for us."), 14:15-20 ("This appears to be gamesmanship. . . . Sending an email, an email not even from the lead lawyer. As you and I have had this conversation, there is nothing above your pay grade."), 18:12 – 19:17 ("But I'm going to tell you something, I don't want any more gamesmanship. Whether it is or isn't, I haven't determined that yet. . . . Either way, it's not fair -- . . . . – to the plaintiffs. It's just not fair. . . . I mean, we know what the rules are. Don't expect me to respond to any more emails in the middle of the night.").

Moreover, Defendants' trial counsel would sometimes disclaim knowledge of assertions made in Defendants' briefs, arguing that they were written by other defense counsel. It reached a point where this Court ordered both sides to have their trial counsel physically sign every brief filed:

> Okay. I just want to tell y'all this. No more lawyers for either side file any motions that aren't the trial lawyers. If you're a thousand miles away, you're now a trial lawyer. If you file something, I'm going to make you come argue it. I don't care if it's Mr. Beisner, Mr. Harburg, any of the other plaintiffs lawyers that aren't here. You're now a trial lawyer if you file something in this. So warn everybody. Okay? Do you kind of understand what I'm saying. I only want to be dealing with trial lawyers, not those that are behind doors somewhere that I'm not going to see and deal with. Okay?

Andrews Dkt. No. 307 (*Andrews* Tr. Vol. 2) at 7:5-16. *See also Andrews* Dkt. No. 317 (*Andrews* Tr. Vol. 12) at 25:8 – 26:7.

6) Defendants and their counsel regularly exhibit blatant disregard and disrespect to and about this Court.

Defendants have a history of blatantly disregarding this Court's orders. For example, after the *Aoki* trial, the Court asked the parties to suggest cases involving California plaintiffs for the third bellwether trial. *See* Response to Petition for Writ of Mandamus, *In re: DePuy Orthopaedics, Inc.; DePuy Products, Inc.' DePuy International, Ltd.; Johnson & Johnson; Johnson & Johnson Services, Inc.*, in the United States Court of Appeals for the Fifth Circuit, Case No. 16-10845, Doc. 00513587087, filed July 11, 2016, at pp. 10-11. The plaintiffs complied by proposing seven California cases. *Id.* at p. 11. Defendants ignored the Court's explicit request and proposed two cases involving **Texas** plaintiffs. *Id*. Then in their later briefing to the Fifth Circuit, Defendants complained that the Court selected only those cases proposed by the plaintiffs, without explaining that they never offered their own California cases to the Court.[42]

Defense counsel has also disregarded the Court's order for trial counsel to physically sign every brief filed with the Court (*supra* at § II.B.5):

> Okay. I'm going to make two or three more things clear. I told everybody in this case that trial lawyers have to sign all documents. Ms. Estes, you didn't sign this one. You didn't sign it, Mr. Anderson. All of them did on what they filed. They filed it. Y'all will have to sign it. Mr. Beisner signed it, which he's now a trial lawyer. He needs to be prepared to come here and be a trial lawyer.
>
> Anytime any lawyers sign anything in this, they're trial lawyers. You tell them, I'm going to expect Mr. Beisner to come here and be prepared to be a trial lawyer. Does everybody – he signs any more

[42] Petition for a Writ of Mandamus, *In re: DePuy Orthopaedics, Inc.; DePuy Products, Inc.' DePuy International, Ltd.; Johnson & Johnson; Johnson & Johnson Services, Inc.*, in the United States Court of Appeals for the Fifth Circuit, Case No. 16-10845, Doc. 00513562143, filed June 23, 2016, 2016, at p. 11 & fn.9.

> documents, it's what I said. I mean it. You understand that, Mr. Quattlebaum?
>
> ***
>
> Well, anybody that's trial counsel is going to sign everything. I told you that. I don't know how many times I need to tell you that. Y'all just do what you want to do, don't follow the rules.

Andrews Dkt. No. 317 (*Andrews* Tr. Vol. 12) at 25:8 – 26:7. *See also id.* at 102:11-22 ("THE COURT: Did Ms. Estes and Mr. Anderson sign this brief whenever it finally did get filed? MR. ANDERSON: I did not sign it, Your Honor. I reviewed it. THE COURT: Did you sign it? MS. ESTES: I did not, Your Honor. I did not understand your earlier order to mean we all three needed to -- THE COURT: You didn't understand that this morning? MS. ESTES: No. No. This morning I did, Your Honor. But before I did not. We will definitely comply with that. Absolutely.").

Defendants and their counsel have also repeatedly disparaged this Court in their briefing to the Fifth Circuit:

- "[T]he MDL court has abused the bellwether process."[43]
- "[T]he MDL court has destroyed the representative character of the cases by making legal and evidentiary rulings that would not be followed by other courts." *Id.* at p. 15.
- "[T]he MDL court has misused the bellwether process in a manner that has produced a coercive pressure to settle through a range of unconventional and inappropriate procedures[.]" *Id*. at p. 28.

[43] *See* Petition for a Writ of Mandamus, *In re: DePuy Orthopaedics, Inc.; DePuy Products, Inc.' DePuy International, Ltd.; Johnson & Johnson; Johnson & Johnson Services, Inc.*, in the United States Court of Appeals for the Fifth Circuit, Case No. 16-10845, Doc. 00513562143, filed June 23, 2016, 2016, at pp. 1, 15, 26.

- "The proceedings below careened off the rails in a number of critical respects[.]"[44]

- "In short, the MDL court has decided that it is no longer constrained by the MDL statute or personal jurisdiction principles and can order trials of as many cases as it chooses instead of remanding these cases to courts of proper jurisdiction, as required by the MDL statute and basic jurisdictional principles."[45]

- "[I]t is plaintiffs and the MDL court that have improperly isolated statements from the context in which they were made in an attempt to support their waiver contentions."[46]

- "Critically, this limited scope of the initial waiver was lost on no one – least of all the MDL Court[.]" *Id*. at p. 12.

7) Defendants' witnesses have been continuously nonresponsive during trial.

During each trial, Defendants' witnesses have been both nonresponsive and obstructive, requiring that plaintiffs' counsel spend exponentially more time questioning them. For example, during the *Aoki* trial, the Court sustained 459 nonresponsive objections with respect to Defendants' witnesses (compared to only 10 nonresponsive objections sustained with respect to the plaintiffs' witnesses). *Aoki* Dkt. Nos. 301-335. Similarly, during the *Andrews* trial, the Court sustained 209 nonresponsive objections with respect to Defendants' witnesses and instructed those witnesses to answer 104 times.

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44 *See* Opening Brief for Appellants, *Christopher, et al. v. DePuy Orthopaedics, Inc. and Johnson & Johnson*, in the United States Court of Appeals for the Fifth Circuit, Case No. 16-11051, Doc. 00513855568, filed January 30, 2017, at p. 2.

45 *See* Petition for a Writ of Mandamus, *In re: DePuy Orthopaedics, Inc.; DePuy Products, Inc.' DePuy International, Ltd.; Johnson & Johnson; Johnson & Johnson Services, Inc.*, in the United States Court of Appeals for the Fifth Circuit, Case No. 17-10812, Doc. 00514088377, filed July 25, 2017, 2017, at p. 2.

46 *See* Reply in Support of Petition for a Writ of Mandamus, *In re: DePuy Orthopaedics, Inc.; DePuy Products, Inc.' DePuy International, Ltd.; Johnson & Johnson; Johnson & Johnson Services, Inc.*, in the United States Court of Appeals for the Fifth Circuit, Case No. 17-10812, Doc. 00514118136, filed August 16, 2017, at p. 8.

Andrews Dkt. Nos. 309-310, 313-318, 325-327, 330-336.[47] At one point during the *Andrews* trial, Defendants filed an objection regarding the plaintiffs being permitted to exceed the time limits imposed by the Court. *See Andrews* Dkt. No. 238. The Court rejected Defendants' objection on the record, noting the obstructive tactics used by their witnesses during the trial:

> And y'all filed something on the time last night – I'm not looking in detail. But it's complaining that I'm awful again and terrible judge and not being fair with y'all and – one more time, and that can't let anybody go over 70 hours. And here's what I want to know:
>
> Do you want me to give you an order detailing all the things that I think you've done that – you know, this is a guideline. Do you want me to give you a detail of all the things where your witnesses refused to answer questions, where the Clower problem – all those things. I'm going to give you an order on all the things you've done that deserve all – it's not going to be great. I'm happy to do that if that's what you'd like for me to do.
>
> ***
>
> Yeah, well, the record needs to be clear about why I'm doing what I'm doing and all the things y'all have done to obfuscate, not answer, your witnesses haven't answered, all those things on and on and on.
>
> The plaintiffs' witnesses almost to the man and the woman have answered their questions without saying, uh, please repeat that question, please, I don't know what that meant when they clearly did know, and the witnesses are refusing to answer until they're forced, forced, forced. That all goes against your – you know, adds more time to them. I'm making those decisions, and I have to. I'm not asking you to agree with those, but I'll give you an order that details every bit of that because I'm keeping record of it.
>
> ***

[47] For comparison purposes, the Court sustained only three of Defendants' nonresponsive objections with respect to the plaintiffs' witnesses, and instructed one witness of plaintiffs to answer once. *Andrews* Dkt. Nos. 311-312.

> I want to make sure the record is clear too. . . . If you're going to file those kind of hot inappropriate kinds of documents I'm going to respond in kind, because I – that's not true. That's not what happened. And y'all can say all those things that you want to say, but the reality of it is you're the ones that are causing delay, and I want the record to be clear about that. And we'll see how the next witnesses do.
>
> But over and over and over again, oh, I'm not clear about that, oh, I don't – and if they're not clear, that's fine, but then when they answer they obviously did know. They have to be asked four and five and six questions to get to the point instead of just saying, yes, that's right, no, that's wrong, I don't know.
>
> It's – it's delay after delay after delay after delay. And those are – those are all going against you in time. And you're going to get your 70 hours. So you're going to be okay. And that's what I told you yesterday.

Andrews Dkt. No. 333 (*Andrews* Tr. Vol. 27) at 6:7 – 8:25. *See also Paoli* Tr. Vol. 8 (Sept. 15, 2014) at 146:8 – 147:3; *Andrews* Dkt. No. 333 (*Andrews* Tr. Vol. 27) at 59:3-21 ("Mr. Quattlebaum, outside the presence of the jury I want to give you an example. I was keeping notes during that last bit of hours long, and about 15 minutes of that I'm adding to your time, taking away from your time, and adding to their time, because of instruct the witness, didn't answer the question, didn't answer the question, didn't answer the question. That's your fault. You take a minute to decide whether you're going to object every time, that's against your time. I'm sorry, that's the way y'all chose to do that. . . . I mean, every time I have to instruct the witness, that goes against whichever side that is, and that's just the way this is going to work.").

8) Defendants have tried to renege on their Lexecon waiver.

Perhaps the most egregious example of Defendants' efforts to disrupt the orderly progress of this MDL was when they threatened to revoke their clear *Lexecon* waiver. This issue has been briefed extensively in this Court and in the Fifth Circuit in response to Defendants' personal-jurisdiction objections in the *Andrews* and *Alicea* bellwether trials.

See, e.g., Plaintiffs' Response and Memorandum of Law in Opposition to Defendants' Motion and Memorandum of Law in Support of Motion for Judgment Notwithstanding the Verdict Due to Lack of Personal Jurisdiction, filed October 31, 2018, *Alicea* Dkt. No. 259.

The Court may recall that the parties were directed to confer with Special Master Stanton regarding numerous MDL management matters, which included discussion of a bellwether protocol and whether the parties would agree to waive their *Lexecon* rights. *See* Case Management Order No. 8, MDL Dkt. No. 190. Special Master Stanton filed a Report Relating to Bellwether Trial Selection Protocol on January 16, 2013 (MDL Dkt. No. 247), in which Plaintiffs' Lead Counsel were instructed to advise the Defendants and the Court which of the plaintiffs with cases then pending in the MDL would waive their *Lexecon* venue rights by April 1, 2013. Special Master Stanton specifically noted, "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." *Id*. Defendants (and the PEC) reviewed and approved the Special Master's report before it was filed, and did not file any objection to the report after it was filed.

Despite this explicit representation, which was made without any reservations or limits, Defendants attempted to renege on their *Lexecon* waiver. Defendants' first attempt to renege occurred shortly after the agreement was made. Defendants argued that they previously had only "expressed [a] 'willingness to waive" *Lexecon* and were not willing waive *Lexecon* if the Court consolidated multiple cases for trial. MDL Dkt. No. 341 at pp. 3-4. Four days later, after a heated discussion with the Court in chambers, defense counsel withdrew this objection, stating on the record:

> You Honor, I did want to note that with respect to a filing that we made with the court on Friday with respect to one aspect of the bellwether selection process . . . that our position – we have waived the lexicon [sic] restriction on these – these cases, consistent with the

> report that the special master gave to the court earlier. And I just wanted to make sure that we were clear on that on – on the record. We have some concerns about whether the factual text in which that waiver was given may have changed with the proposal now for multiplaintiff trials, so we may come back to Your Honor for some relief on that waiver, depending on how all this unfolds, but did just want to confirm to the court that . . . . that is the defendant's position.

MDL Dkt. No. 344 at p. 5.

Defendants' next attempt to renege on their *Lexecon* waiver occurred over three years later, shortly before the *Andrews* trial. In a footnote in their motion to stay additional trials, Defendants for the first time took the position that, "[a]lthough [they] previously waived *Lexecon* for purposes of selecting prior bellwether cases, they have never agreed to a blanket *Lexecon* waiver and do not waive their venue objections with respect to forthcoming trials." MDL Dkt. No. 657-1 at p. 2 n.1. The Court rejected Defendants' argument, noting:

> 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.

MDL Dkt. No. 665 at pp. 1-2; *see also id*. at pp. 8-9. However, despite the original *Lexecon* waiver described in the Special Master's Report, and the renewed waiver in open court on September 10, 2013, Defendants have continued to misrepresent their promises to this Court in mandamus briefing to the Fifth Circuit and in the *Andrews/Metzler* appeal to the Fifth Circuit.

9) Defendants failed to produce documents relevant to their recent settlement with 46 Attorneys General regarding their MoM hips.

Just this very week, the PEC learned through the media that Defendants have reached a $120 million settlement with 46 Attorneys General across the United States over Defendants' misleading information regarding their MoM hip implants. *See*

https://ag.ny.gov/press-release/attorney-general-james-and-45-attorneys-general-nationwide-reach-120-million, dated January 22, 2019. The Attorneys General "allege that DePuy engaged in unfair and deceptive practices in its promotion of the ASR XL and Pinnacle Ultamet hip implant devices by making misleading claims as to the longevity, also known as survivorship, of metal-on-metal hip implants." *Id*. "As part of the Consent Judgment, DePuy has agreed to reform how it markets and promotes its hip implants." *Id*.

To date, Defendants have failed to provide the PEC with any documents related to this settlement or investigation, including, but not limited to, the consent judgments, documents produced in connection with the investigation, and a list of individuals interviewed as part of the investigation. Yet these documents are responsive to requests for production the PEC served on Defendants in late 2012. *See* **Ex. 7** (excerpts of Defendants' RFP responses). For example, the PEC previously requested "ALL DOCUMENTS that RELATE TO any criminal proceedings and/or other proceedings involving reprimand, penalty or fine imposed that RELATE TO the PINNACLE HIP SYSTEM in which Defendant or anyone acting on Defendant's behalf has been involved." *Id*. at RFP #181. Defendants are under a continuing duty to supplement their discovery responses in a timely matter. FED. R. CIV. P. 26(e)(1). Not only have Defendants failed to produce these responsive documents, they failed to inform the PEC of the existence of this investigation and settlement. Immediately upon learning of this settlement, the PEC emailed defense counsel regarding Defendants' failure to provide the relevant documents.

As of the filing of this supplemental motion, the requested documents have not yet been produced. The PEC has filed a motion to compel production of all consent judgments entered into between Defendants and the State Attorneys General; a list of the individuals interviewed in connection with the State Attorneys General investigations;

and all documents produced in connection with the State Attorneys General investigations.

III. CONCLUSION AND PRAYER

The PEC recognizes that any relief to address Defendants' misconduct is entrusted entirely to the discretion of the Court. Any sanction should be tailored carefully to address and redress the relevant misconduct. Based on Defendants' misconduct discussed above and in the PEC's Original Motion, the PEC requests that

(i) Defendants be sanctioned and compelled to produce additional documents as discussed in § 1; and

(ii) Defendants and their counsel be sanctioned for their continued misconduct in these MDL proceedings in whatever manner the Court deems appropriate.

The PEC reserves the right, however, to request further sanctions upon the production of the information requested herein.

January 23, 2019.

[SIGNATURE BLOCK ON FOLLOWING PAGE]

January 23, 2019

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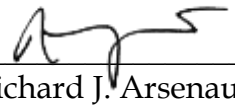
CERTIFICATE OF SERVICE

I certify that the foregoing instrument was filed via the Court's CM/ECF system on January 23, 2019, and was also served on Defendants by electronic mail.



Richard J. Arsenault