

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MARY BANKS AND BETTY COLSTON,

Plaintiffs

vs.

DEPUY ORTHOPAEDICS, INC., KELLY
ORTHOPAEDIC SALES, LP, AND KOS
MANAGEMENT COMPANY, LLC

Defendants

C.A. No. 3:11-cv-00718-L

**DEFENDANT DEPUY ORTHOPAEDICS, INC.’S MOTION TO STAY ALL
PROCEEDINGS PENDING TRANSFER TO MDL NO. 2197 – *IN RE: DEPUY
ORTHOPAEDICS, INC., ASR HIP IMPLANT PRODUCTS LIABILITY LITIGATION***

I. INTRODUCTION

Defendant DePuy Orthopaedics, Inc. (“DePuy”) moves this Court to stay all proceedings and to vacate all deadlines in this action pending the transfer of this case to the Northern District of Ohio to become part of MDL No. 2197, *In re: DePuy Orthopaedics, Inc., ASR Hip Implant Products Liability Litigation*. MDL-2197 will coordinate all federal products liability actions, like this one, involving the ASR™ XL Acetabular System and the ASR™ Hip Resurfacing System (“ASR™ Hip Systems”). To date, 90 federal district courts across the country, with ASR™ Hip System cases pending before them, have granted similar motions to stay all proceedings. The requested stay will serve the interests of judicial economy and fairness to the parties, and will avoid wasting this Court’s resources in the interim while this case awaits transfer to MDL-2197.

II. BACKGROUND

A. Establishment of MDL-2197.

On August 24, 2010, DePuy initiated a voluntary recall of the ASR™ Hip Systems. Within days, lawsuits were filed and on August 31, 2010, plaintiff in the lawsuit entitled *Brigham v. DePuy Orthopaedics, Inc., et al.* (N.D. Cal., Case No. 3:10-cv-03886-EMC) filed a motion for the creation of an MDL, which Defendants did not oppose. On December 3, 2010, the Judicial Panel on Multidistrict Litigation entered a Transfer Order pursuant to 28 U.S.C. § 1407, assigning MDL No. 2197, *In re: DePuy Orthopaedics, Inc., ASR Hip Implant Products Liability Litigation*, to the Honorable David A. Katz of the Northern District of Ohio. More than 500 actions have now been transferred to the MDL court.

DePuy provided the Judicial Panel on Multidistrict Litigation (“JPML”) with notice of this action pursuant to the “tag-along” procedure contained in the JPML Rules and this action was included on conditional transfer order (“CTO”) 34. Plaintiffs subsequently filed notice of opposition to CTO-34 with the JPML. In response, the JPML issued an order requiring that Plaintiffs file a motion to vacate with brief in support by May 2, 2011, and that any responses be filed by May 23, 2011. Ultimately, DePuy expects the JPML to transfer the case to the MDL.

B. This Action.

On or about March 4, 2011, Plaintiffs filed their Petition in Dallas County State District Court and DePuy subsequently removed the case to this Court. There is no dispute that this action involves the same factual inquiries that will be present in the ASR™ Hip Systems product liability actions generally, thereby warranting coordinated pre-trial proceedings in the same district court. Specifically, it is clear from the face of the Petition that this case, like the other ASR™ Hip Systems product liability actions, focuses on the allegation that the device

failed and whether DePuy knew about the product's alleged risks, and failed to disclose them to the medical community and consumers. *See, e.g.*, Petition at ¶¶ 64-67.

III. ARGUMENT

This Court's power to stay is well established. It is "incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). As federal courts repeatedly have concluded, this power includes the power to stay an action pending transfer to an MDL. *See, e.g., Paul v. Aviva Life & Annuity Co.*, No. 09-1038, 2009 U.S. Dist. LEXIS 64420 (N.D. Ill. July 27, 2009); *Doan v. SmithKline Beecham Corp.*, No. 09-0260, 2009 U.S. Dist. LEXIS 49409 (S.D. Ala. June 11, 2009); *Hutchins v. Bayer Corp.*, No. 08-640, 2009 U.S. Dist. LEXIS 4719 (D. Del. Jan. 23, 2009); *Gavitt v. Merck & Co.*, No. 2:08-cv-755, 2008 U.S. Dist. LEXIS 88421, at *4 (M.D. Fla. Oct. 20, 2008) (stay entered "in an effort to preserve judicial and client resources and to promote consistency and economy with regard to jurisdictional objections"); *Lyman v. Asbestos Defendants*, No. 07-4240, 2007 U.S. Dist. LEXIS 78766, at *8-*9 (N.D. Cal. Oct. 10, 2007) ("[B]ecause a stay will likely preserve judicial resources by preventing a duplication of proceedings before this Court and the MDL court, and because the plaintiffs have not persuasively identified any hardship resulting from such a stay, the Court grants the motion to stay.").

Indeed, to date, **98 stays** have been granted by federal courts with ASR™ Hip System cases pending before them.¹ Federal courts throughout the country in other similar product

¹ Additionally, only four courts have denied Motions to Stay, two dismissed the stay motions as moot, twenty-two cases were transferred to the MDL before the Court ruled on the stay, and sixty-four motions are pending and have not been ruled upon.

liability actions have also determined that a stay of proceedings pending the JPML's decision as to transfer is appropriate.

A. A Stay Will Advance the Purposes of the MDL.

Staying this action pending transfer to the MDL will advance the purpose of the MDL, which "is to further judicial economy and to eliminate the potential for conflicting pretrial rulings." *Good v. Prudential Ins. Co. of Am.*, 5 F. Supp. 2d 804, 809 (N.D. Cal. 1998); *see also* 28 U.S.C. § 1407; *In re Meridia Prods. Liab. Litig.*, 217 F. Supp. 2d 1377, 1378 (J.P.M.L. 2002).

A short stay will ensure that this action proceeds in an orderly, coordinated fashion under the direction of the MDL court. A stay will facilitate the MDL court's efficient, uniform resolution of pretrial issues common to all of these federal ASR™ Hip System actions.

By contrast, allowing this action to proceed in this Court without a stay risks that this and the other ASR™ Hip System actions will be on inconsistent procedural footing when transferred to the MDL. In some cases, answers or responsive pleadings will have been filed, while in others not. In some cases, discovery will have commenced, while in others not. And in some cases, the parties will have filed motions, while in others not.

To achieve the benefits of pretrial coordination, it makes sense to allow these ASR™ Hip System cases to proceed together with respect to responsive pleadings, discovery, and motion practice. Duplication of case management tasks by multiple courts not only is an uneconomical use of judicial resources, but also could lead to inconsistent rulings by different courts considering identical issues. *See Nguyen v. BP Exploration & Production Inc.*, 2010 WL 3169316, at *2 (S.D. Tex. Aug. 9, 2010) (Atlas, J.) ("Defendants face a significant risk of inconsistent pretrial rulings by different courts if there is no stay in effect until the Panel issues its decision."). Indeed, this Court should not have to expend its time and energy "familiarizing

itself with the intricacies of a case that [may] be heard by another judge.” *Rivers v. Walt Disney Co.*, 980 F. Supp. 1358, 1360 (C.D. Cal. 1997).

B. A Stay Will Not Prejudice the Parties.

There is no prejudice to Plaintiffs that would result from a stay of the proceedings here because Defendants have put into place a process through which Plaintiffs can obtain reimbursement for the medical expenses and out-of-pocket costs associated with the recall, and the reasonably related medical treatment that she may need. Further, staying this action will benefit Plaintiffs by sparing them the costs of pre-trial motion practice and discovery that may later be repeated in the transferee court. Regardless, any prejudice associated with a short stay is slight and outweighed by preserving judicial economy. *See Maiben v. CSX Transp., Inc.*, No. 09-0125-WS-B, 2009 U.S. Dist. LEXIS 37875, at *2 (S.D. Ala. May 1, 2009) (“[I]n determining whether a stay is appropriate, the court must assess and balance the nature and substantiality of the injustices claimed on either side.”); *Fuller v. Amerigas Propane, Inc.*, Nos. C-09-2493/C-09-2616, 2009 WL 2390358, at *1 (N.D. Cal. Aug. 3, 2009) (“[B]ecause the MDL Panel was expected to hear the matter within a few months, any delay caused by a stay would be of very short duration and unlikely to cause the degradation of memories or the loss of material evidence.”); *Smith v. Merck & Co.*, No. 06-cv-0931-DRH, 2006 U.S. Dist. LEXIS 94189, at *3 (S.D. Ill. Dec. 29, 2006). The benefits to the Court and the parties clearly outweigh any minor inconvenience to Plaintiff, if any, that may arise from a stay.

On the other hand, DePuy could suffer a hardship in the absence of a stay. It would be forced to respond to separate discovery requests, both in this action and in the established MDL. This would lead to the very duplication of work that the MDL seeks to avoid. In the absence of a stay, moreover, DePuy could face conflicting decisions on similar pretrial issues, from this Court

and from the eventual MDL court, if not the same, which would further undermine the purpose of the MDL.

IV. CONCLUSION

For the foregoing reasons, DePuy respectfully request that this Court grant its motion to stay all proceedings, including, but not limited to, any case management deadlines and any Rule 26 disclosure obligations, and vacate all pending dates and deadlines until this case is transferred to and docketed in MDL 2197: *In re DePuy Orthopaedics, Inc., ASR Hip Implant Products Liability Litigation*.

Respectfully submitted,

By: /s/ Kathleen A. Frazier

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