

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

LETITIA MALKMUS and GLEN MALKMUS,

Plaintiffs,

versus

DePUY ORTHOPAEDICS, INC. and TRP &
ASSOCIATES, LLC,

Defendants.

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* Civil Action No. _____
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* JUDGE
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* MAGISTRATE JUDGE
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**DEFENDANTS’ MOTION TO STAY PROCEEDINGS PENDING TRANSFER OF
THIS CASE TO MDL NO. 2197 — IN RE: DEPUY ORTHOPAEDICS, INC. ASR HIP
IMPLANT PRODUCTS LIABILITY LITIGATION**

I. INTRODUCTION

Defendants DePuy Orthopaedics, Inc. and TRP & Associates, LLC (“Defendants”) file this motion to stay all proceedings, and to vacate all deadlines in this action pending the transfer of this case to, and docketing in, the Northern District of Ohio to become part of MDL-2197: *In re DePuy Orthopaedics, Inc., ASR Hip Implant Products Liability Litigation*. MDL-2197 is coordinating over 600 federal products liability actions – like this one – involving two hip implant systems DePuy voluntarily recalled – the ASR™ XL Acetabular System and the ASR™ Hip Resurfacing System (“ASR™ Hip Systems”). To date, 93 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. Defendants did not oppose the creation of an MDL, and on December 3, 2010, the U.S. 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 Hon. David A. Katz of the Northern District of Ohio. The Transfer Order is attached hereto as Exhibit A. As required under Rule 6.2(d) of the Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation, Defendants will immediately notify the Panel of this related “tag-along” action and this case will appear on a Conditional Transfer Order #35, which will issue in a matter of days.

B. This Action

On or about January 31, 2011, Plaintiffs filed their Complaint against DePuy Orthopaedics, Inc. (“DePuy”) and Waymar Orthopedic and Spinal Technologies, Inc. (“Waymar”) in the Circuit Court for the County of Kenosha, Wisconsin, bearing Case No. 11CV0288. Plaintiffs voluntarily dismissed Waymar from the case¹ and filed their First Amended Complaint on March 31, 2011, naming DePuy and TRP & Associates, LLC. 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 Amended

¹ The Court entered the dismissal order on April 1, 2011.

Complaint that this case, like the other ASR™ Hip Systems product liability actions, focuses on the allegation that the device failed and whether Defendants knew about the product’s alleged risks, and failed to disclose them to the medical community and consumers. (First Am. Compl., pp. 9-13, Counts One and Two).

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 have repeatedly 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.”).

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 Plaintiffs.

There is no prejudice to Plaintiffs that would result from a stay of the proceedings here because Defendant DePuy has put into place a process through which Plaintiffs can obtain reimbursement for the medical expenses and out-of-pocket costs associated with 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) (“in 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) (“because 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 Plaintiffs, if any, that may arise from a stay.

On the other hand, Defendant 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 soon-to-be-established MDL. This would lead to the very duplication of work that the MDL seeks to avoid. In the absence of a stay, moreover, Defendant 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, this Court should stay all proceedings in this action, including but not limited to, any case management deadlines and any Rule 26 disclosure obligations, and vacate all pending dates and deadlines until the JPML issues a decision as to which District

Court judge will be assigned MDL 2197: *In re DePuy Orthopaedics, Inc., ASR Hip Implant Products Liability Litigation.*

Dated: April 15, 2011

Respectfully submitted,

s/CATHERINE A. FAUGHT

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UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

**IN RE: DePUY ORTHOPAEDICS, INC., ASR HIP IMPLANT
PRODUCTS LIABILITY LITIGATION**

MDL No. 2197

TRANSFER ORDER

Before the Panel^{*}: Five motions are currently pending before the Panel, pursuant to 28 U.S.C. § 1407, seeking centralization of this litigation in the Southern District of Texas or the Northern District of Alabama. Defendants¹ support centralization of all cases involving an ASR XL Acetabular Hip System in the Northern District of Indiana, the Northern District of Ohio, or the District of New Jersey.

Responding plaintiffs in various potential tag-along actions also propose centralization in the following districts: the Central and the Northern Districts of California, the Middle District of Florida, the Central and Northern Districts of Illinois, the Western District of Kentucky, the Eastern and Western Districts of Louisiana, the District of Massachusetts, the Eastern District of Michigan, the Eastern District of New York, the District of South Carolina, and the Middle District of Tennessee.

The only plaintiff to oppose centralization does so only with respect to her action pending in the District of Maryland (*Bloom*), purportedly because she did not receive an ASR XL Acetabular Hip System. Additionally, *amicus curiae* law firm Fleming & Associates (Fleming) requests centralization of the litigation only if the Panel imposes time limits on the centralized proceedings of twelve to eighteen months; without time limits, Fleming opposes centralization.

This litigation currently consists of eight actions pending as follows: an action each in the Northern and Middle Districts of Alabama, the Northern District of California, the Eastern District

^{*} Judge John G. Heyburn II did not participate in the decision of this matter due to ownership of shares in one of the defendants. Judge Kathryn H. Vratil also did not participate in the decision of this matter.

¹ DePuy Orthopaedics, Inc. (DePuy); and Johnson & Johnson Services, Inc., and Johnson & Johnson.



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of Kentucky, the Northern District of Illinois, the District of Maryland, the Northern District of Mississippi, and the District of Utah, as listed on Schedule A.²

On the basis of the papers filed and the hearing session held, we find that seven of these eight actions involve common questions of fact, and that centralization under Section 1407 in the Northern District of Ohio will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. The actions share factual issues as to whether DePuy's ASR XL Acetabular Hip System, a device used in hip replacement surgery, was defectively designed and/or manufactured, and whether DePuy failed to provide adequate warnings concerning the device, which DePuy recalled along with another ASR device,³ the ASR Hip Resurfacing System,⁴ in August 2010. Centralization under Section 1407 will eliminate duplicative discovery, prevent inconsistent pretrial rulings on discovery and other issues, and conserve the resources of the parties, their counsel and the judiciary.

There is some doubt as to whether two actions – the Northern District of Illinois *Fitzgerald* and the District of Utah *Williams* actions – involve DePuy ASR hip implant components. The complaints in the two actions are ambiguous, and briefing by the parties did not resolve the ambiguity. Moreover, the parties also disagree – responding plaintiffs broadly asserted that all actions on the motions for centralization involve recalled DePuy hip implant components, while DePuy asserted otherwise as it pertains to these two actions. We are unwilling, based on the opaque record before us, to conclude that these two actions warrant exclusion from the centralized proceedings. We encourage the transferee judge to scrutinize whether plaintiffs in these actions received an ASR hip implant component. If the transferee judge discovers that a recalled DePuy ASR hip implant component is in fact not at issue in any transferred action, then we encourage him to consider promptly suggesting to the Panel Section 1407 remand of such actions to the transferor court. *See* Rule 10.1, R.P.J.P.M.L.; *In re ClassicStar Mare Lease Litig.*, 528 F.Supp.2d 1345, 1347 (J.P.M.L. 2007).

Plaintiff in the District of Maryland *Bloom* action opposes centralization of her action on the grounds that she did not receive a recalled DePuy hip implant. DePuy agrees. Accordingly, given the agreement of the parties regarding this essential fact, we decline to centralize this unrelated action.

² An additional action pending in the Middle District of Florida (*Margenau*) was included on the initial motion for centralization but was later dismissed. Further, the Panel has been notified of 105 additional related actions. Those actions and any other related actions are potential tag-along actions. *See* Rules 1.1(h), 7.1 and 7.2, R.P.J.P.M.L.

³ “ASR” is an acronym for “articular surface replacement.”

⁴ The parties disagree as to whether claims relating to the ASR Hip Resurfacing System should be included in the centralized proceedings. We need not decide this issue now because no party has asserted that the ASR Hip Resurfacing System is involved in any of the eight actions currently before the Panel.

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We reject Fleming's request to limit the length of pretrial proceedings. We have long held that the Panel "has neither the power nor the inclination to dictate in any way the manner in which transferee judges supervise actions pending before them." *See In re: Fair Food Sec. Litig.*, 465 F.Supp. 1301, 1305 n.3 (J.P.M.L 1979) (citing *In re: Westinghouse Elect. Corp. Uranium Contract Litig.*, 436 F.Supp. 990, 996 (J.P.M.L.1977); *In re: Plumbing Fixture Cases*, 298 F.Supp. 484, 489 (J.P.M.L.1968)). Such a request is more properly addressed to the transferee judge. *Id.* Fleming offered nothing in its brief or at oral argument to persuade us to revisit this sound approach.

We conclude that the Northern District of Ohio is an appropriate transferee district for pretrial proceedings in this litigation. Several potential tag-along actions are already pending in this geographically accessible district, which enjoys the support of defendants and several plaintiffs. Additionally, Judge David A. Katz is an experienced transferee judge with the time and experience necessary to steer this litigation on a prudent course.

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. § 1407, the actions listed on Schedule A are transferred to the Northern District of Ohio and, with the consent of that court, assigned to the Honorable David A. Katz for coordinated or consolidated pretrial proceedings.

IT IS FURTHER ORDERED that centralization of the action listed on Schedule B is denied.

PANEL ON MULTIDISTRICT LITIGATION



David R. Hansen
Acting Chairman

W. Royal Furgeson, Jr.
Barbara S. Jones

Frank C. Damrell, Jr.
Paul J. Barbadoro

**IN RE: DePUY ORTHOPAEDICS, INC., ASR HIP IMPLANT
PRODUCTS LIABILITY LITIGATION**

MDL No. 2197

SCHEDULE A

Middle District of Alabama

Grace Jackson v. Depuy Orthopaedics, Inc. et al., C.A. No. 2:10-00931

Northern District of Alabama

Cresha Moore v. Depuy Orthopaedics, Inc. et al., C.A. No. 4:10-02945

Northern District of California

Maurice Brigham v. DePuy Orthopaedics, Inc., et al., C.A. No. 3:10-3886

Eastern District of Kentucky

Joseph A. Jones v. Depuy Orthopaedics, Inc., C.A. No. 5:10-00374

Northern District of Illinois

Patrick Joseph Fitzgerald v. DePuy Orthopaedics, Inc., et al., C.A. No. 1:10-4822

Northern District of Mississippi

Pamela Lackey v. Depuy Orthopaedics, Inc. et al., C.A. No. 1:10-00258

District of Utah

Hilda Frances Williams, et al. v. DePuy Orthopaedics, et al., C.A. No. 2:10-691

**IN RE: DePUY ORTHOPAEDICS, INC., ASR HIP IMPLANT
PRODUCTS LIABILITY LITIGATION**

MDL No. 2197

SCHEDULE B

District of Maryland

Sandra Bloom v. DePuy Orthopaedics, Inc., C.A. No. 1:10-2170

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

LETITIA MALKMUS and GLEN MALKMUS,

Plaintiffs,

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DePUY ORTHOPAEDICS, INC. and TRP &
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* JUDGE
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**ORDER GRANTING DEFENDANTS' MOTION TO STAY PROCEEDINGS PENDING
TRANSFER OF THIS CASE TO MDL NO. 2197 – IN RE: DEPUY ORTHOPAEDICS,
INC., ASR HIP IMPLANT PRODUCTS LIABILITY LITIGATION**

This Court has considered Defendants' Motion to Stay Proceedings Pending Transfer of this case to, and docketing in, the Northern District of Ohio, MDL No. 2197 – *In re: DePuy Orthopaedics, Inc., ASR Hip Implant Products Liability Litigation* and is of the opinion that the same should be granted.

It is, therefore, ORDERED that all proceedings and all deadlines in the above-captioned case are STAYED pending transfer of this matter to, and docketing in, MDL-2197 in the Northern District of Ohio.

SIGNED this ____ day of _____, 2011.

United States District Judge Presiding