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10 UNITED STATES DISTRICT COURT
11 DISTRICT OF NEVADA

12	ANNELIESE RUNDLE, MARTHA)	Case No. 2:11-cv-00634-PMP-GWF
13	BENDER, and KATHERINE GUY,)	
14	Plaintiffs,)	DEFENDANTS DEPUY
15	vs.)	ORTHOPAEDICS, INC. AND
16	DEPUY ORTHOPAEDICS, INC. and)	PRECISION INSTRUMENTS,
17	PRECISION INSTRUMENTS, INC.,)	INC.'S MOTION TO STAY
18	Defendants.)	PENDING TRANSFER TO MDL
)	NO. 2197 – IN RE: DEPUY
)	ORTHOPAEDICS, INC., ASR HIP
)	IMPLANT PRODUCTS LIABILITY
)	LITIGATION

19
20 Defendants DePuy Orthopaedics, Inc. ("DePuy") and Precision
21 Instruments, Inc. (collectively, "Defendants") move the Court to stay all
22 proceedings in this case pending transfer of this case by the Judicial Panel on
23 Multidistrict Litigation (the "MDL Panel") to MDL No. 2197, *In re: DePuy*
24 *Orthopaedics, Inc., ASR Hip Implant Products Liability Litigation.*, the multidistrict
25 litigation ("MDL") proceeding that has been established in the Northern District of
26 Ohio to coordinate all federal products liability actions, like this one, involving the
27 ASR™ XL Acetabular System and the ASR™ Hip Resurfacing System ("ASR™ Hip
28 Systems").

1 A stay will conserve judicial and party resources, avoid inconsistent
2 pre-trial rulings, minimize duplicative pre-trial proceedings and unnecessary
3 discovery, and promote the purposes of multidistrict coordination. Defendants
4 base this motion on 28 U.S.C. § 1407, on the record of proceedings in similar cases,
5 excerpts from which are attached, and the points and authorities that follow.

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17 POINTS AND AUTHORITIES

18 I. INTRODUCTION

19 The Court should stay all proceedings and otherwise operable
20 deadlines in this action pending the transfer of this case to the Northern District of
21 Ohio to become part of MDL No. 2197, *In re: DePuy Orthopaedics, Inc., ASR Hip*
22 *Implant Products Liability Litigation*. MDL-2197 will coordinate all federal products
23 liability actions, like this one, involving the ASR™ Hip Systems. To date, 95
24 federal district courts across the country, with ASR™ Hip System cases pending
25 before them, have granted similar motions to stay all proceedings. The requested
26 stay will serve the interests of judicial economy and fairness to the parties, and
27 will avoid wasting this Court's resources in the interim while this case awaits
28 transfer to MDL-2197.

1 **II. BACKGROUND**

2 **A. Establishment of MDL-2197.**

3 On August 24, 2010, DePuy initiated a voluntary recall of the ASR™
4 Hip Systems. Within days, lawsuits were filed and on August 31, 2010, plaintiff in
5 the lawsuit entitled *Brigham v. DePuy Orthopaedics, Inc., et al.* (N.D. Cal., Case No.
6 3:10-cv-03886-EMC) filed a motion for the creation of an MDL, which Defendants
7 did not oppose. On December 3, 2010, the Judicial Panel on Multidistrict
8 Litigation entered a Transfer Order pursuant to 28 U.S.C. § 1407, assigning MDL
9 No. 2197, *In re: DePuy Orthopaedics, Inc., ASR Hip Implant Products Liability*
10 *Litigation*, to the Honorable David A. Katz of the Northern District of Ohio. More
11 than 520 actions have now been transferred to the MDL court.

12 Defendants intend to seek the transfer of this action to that
13 proceeding, and will shortly provide the Judicial Panel on Multidistrict Litigation
14 ("JPML") with notice of this action pursuant to the "tag-along" procedure
15 contained in the JPML Rules. Defendants expect a conditional transfer order to be
16 issued shortly thereafter.

17 **B. This Action.**

18 On or about March 4, 2011, Plaintiffs filed their Complaint against
19 Defendants in the Eighth Judicial District Court of Clark County, Nevada, bearing
20 Case No. A-11-636272-C. Defendants removed to this Court on April 25, 2011.
21 There is no dispute that this action involves the same factual inquiries that will be
22 present in the ASR™ Hip Systems product liability actions generally, thereby
23 warranting coordinated pre-trial proceedings in the same district court.
24 Specifically, it is clear from the face of the Complaint that this case, like the other
25 ASR™ Hip Systems product liability actions, focuses on the allegation that the
26 device failed and whether Defendants knew about the product's alleged risks, and
27 failed to disclose them to the medical community and consumers. (Compl., pp. 5-
28 12.)

1 **III. ARGUMENT**

2 **A. The Court Has the Power to Stay These Proceedings.**

3 This Court's power to stay is well established. It is "incidental to the
4 power inherent in every court to control the disposition of the causes on its docket
5 with economy of time and effort for itself, for counsel, and for litigants." *Landis v.*
6 *N. Am. Co.*, 299 U.S. 248, 254 (1936). As federal courts repeatedly have concluded,
7 this power includes the power to stay an action pending transfer to an MDL. *See,*
8 *e.g., Avant v. Merck & Co., Inc.*, No. 2:06-CV-1313, 2007 WL 203953 (D. Nev. Jan. 24,
9 2007); *Paul v. Aviva Life & Annuity Co.*, No. 09-1038, 2009 WL 2244766 (N.D. Ill. July
10 27, 2009); *Hutchins v. Bayer Corp.*, No. 08-640, 2009 WL 192468 (D. Del. Jan. 23,
11 2009); *Gavitt v. Merck & Co.*, No. 2:08-cv-755, 2008 WL 4642782, at *2 (M.D. Fla. Oct.
12 20, 2008) (stay entered "in an effort to preserve judicial and client resources and to
13 promote consistency and economy with regard to jurisdictional objections");
14 *Lyman v. Asbestos Defendants*, No. 07-4240, 2007 WL 2972926, at *3 (N.D. Cal. Oct.
15 10, 2007) ("[B]ecause a stay will likely preserve judicial resources by preventing a
16 duplication of proceedings before this Court and the MDL court, and because the
17 plaintiffs have not persuasively identified any hardship resulting from such a stay,
18 the Court grants the motion to stay.").

19 Indeed, to date, 95 stays have been granted by federal courts with
20 ASR™ Hip System cases pending before them.¹ Federal courts throughout the
21 country in other similar product liability actions have also determined that a stay
22 of proceedings pending the JPML's decision as to transfer is appropriate.

23 This Court has previously stayed similar product liability actions
24 pending MDL transfer in the interest of efficiency and judicial economy, even in
25 cases that, like this one, involve the fraudulent joinder of non-diverse defendants

26
27
28 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 could rule on the stay, and forty-five motions are pending and have not been ruled upon.

1 and a possibility of a motion to remand. *See, e.g., Batiz v. Merck & Co., Inc.*, 2:06-
2 CV- 1317-PMP (LRL), hearing transcript at 6 (D. Nev. Jan. 11, 2007) (staying Vioxx
3 cases pending transfer to MDL, despite pending remand motion, in interests of
4 "conserving judicial resources, comity, [and] uniformity") (attached as Exhibit A);
5 *Mangani v. Merck & Co., Inc.*, CV-S-06-0914-KJD-PAL, 2006 WL 2707459, at *1 (D.
6 Nev. Sept. 19, 2006) (staying Vioxx case and denying remand pending transfer to
7 MDL because the presence of hundreds of similar cases currently before the MDL
8 "present similar factual and legal issues regarding both the effects of Vioxx and
9 remand issues such as fraudulent joinder").

10 **B. A Stay Will Advance the Purposes of the MDL.**

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

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

20 By contrast, allowing this action to proceed in this Court without a
21 stay risks that this and the other ASR™ Hip System actions will be on inconsistent
22 procedural footing when transferred to the MDL. In some cases, answers or
23 responsive pleadings will have been filed, while in others not. In some cases,
24 discovery will have commenced, while in others not. And in some cases, the
25 parties will have filed motions, while in others not. In this Court's most recent
26 treatment of these issues, it relied on just this rationale in staying a collection of
27 product liability cases involving a prescription pharmaceutical, ruling that:

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1 [The] MDL system exist[s] for . . . some very sound
 2 reasons, not to deprive plaintiffs or individuals of a
 3 forum or even a local forum, but to endeavor to provide
 4 uniformity, comprehensive resolution. And the
 5 interest[s] of uniformity or comprehensiveness are not
 6 antithetical to the interest of plaintiffs. Indeed, the
 7 interest of plaintiffs as well as defendants can be equally
 8 served, I'm satisfied, in that context. The consolidation
 9 can be very helpful at bringing about a fair resolution of
 10 issues and in some cases entire pieces of litigation.

11 . . .

12 And I think really, in the interest of uniformity, and
 13 ultimately a correct decision, that weighs in favor of the
 14 consolidated treatment that can be had with regard to
 15 each state jurisdiction or federal district that finds itself
 16 before a judge designated by the MDL panel.

17 Ex. A, *Batiz v. Merck & Co., Inc.*, 2:06-CV- 1317-PMP (LRL) (D. Nev. Jan. 11, 2007) at
 18 4, 6.

19 The exact same rationale should be applied here. To achieve the
 20 benefits of pretrial coordination, it makes sense to allow these ASR™ Hip System
 21 cases to proceed together with respect to responsive pleadings, discovery, and
 22 motion practice. Duplication of case management tasks by multiple courts not
 23 only is an uneconomical use of judicial resources, but also could lead to
 24 inconsistent rulings by different courts considering identical issues. *See Nguyen v.*
 25 *BP Exploration & Production Inc.*, 2010 WL 3169316, at *2 (S.D. Tex. Aug. 9, 2010)
 26 (Atlas, J.) ("Defendants face a significant risk of inconsistent pretrial rulings by
 27 different courts if there is no stay in effect until the Panel issues its decision.").
 28 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).

C. 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

1 costs associated with the recall, and the reasonably related medical treatment that
2 he may need. Further, staying this action will benefit Plaintiffs by sparing them
3 the costs of pre-trial motion practice and discovery that may later be repeated in
4 the transferee court. Regardless, any prejudice associated with a short stay is
5 slight and outweighed by preserving judicial economy. *See Maiben v. CSX Transp.,*
6 *Inc.*, No. 09-0125-WS-B, 2009 WL 1211186, at *1 (S.D. Ala. May 1, 2009) ("[I]n
7 determining whether a stay is appropriate, the court must assess and balance the
8 nature and substantiality of the injustices claimed on either side."); *Fuller v.*
9 *Amerigas Propane, Inc.*, Nos. C-09-2493/C-09-2616, 2009 WL 2390358, at *1 (N.D.
10 Cal. Aug. 3, 2009) ("[B]ecause the MDL Panel was expected to hear the matter
11 within a few months, any delay caused by a stay would be of very short duration
12 and unlikely to cause the degradation of memories or the loss of material
13 evidence."); *Smith v. Merck & Co.*, No. 06-cv-0931-DRH, 2006 WL 3842190, at *1
14 (S.D. Ill. Dec. 29, 2006). The benefits to the Court and the parties clearly outweigh
15 any minor inconvenience to Plaintiffs, if any, that may arise from a stay.

16 On the other hand, Defendants could suffer a hardship in the
17 absence of a stay. They would be forced to respond to separate discovery
18 requests, both in this action and in the established MDL. This would lead to the
19 very duplication of work that the MDL seeks to avoid. In the absence of a stay,
20 moreover, Defendants could face conflicting decisions on similar pretrial issues,
21 from this Court and from the eventual MDL court, if not the same, which would
22 further undermine the purpose of the MDL.

23 **IV. CONCLUSION**

24 For the foregoing reasons, Defendants respectfully request that this
25 Court grant their motion to stay all proceedings, including, but not limited to, any
26 case management deadlines and any Rule 26 disclosure obligations, and vacate all
27

28

1 pending dates and deadlines until this case is transferred to and docketed in MDL
2 2197: *In re DePuy Orthopaedics, Inc., ASR Hip Implant Products Liability Litigation.*

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b) and Section IV of District of Nevada Electronic Filing Procedures, I certify that I am an employee of MORRIS PETERSON, and that the following documents were served via electronic service:
DEFENDANTS DEPUY ORTHOPAEDICS, INC. AND PRECISION INSTRUMENTS, INC.'S MOTION TO STAY PENDING TRANSFER TO MDL NO. 2197 – IN RE: DEPUY ORTHOPAEDICS, INC., ASR HIP IMPLANT PRODUCTS LIABILITY LITIGATION

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DATED this 27th day of April, 2011.

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