UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: DEPUY ORTHOPAEDICS, INC. PINNACLE HIP IMPLANT PRODUCT LIABILITY LITIGATION	)	MDL No. 2244
This Document Relates To: All Cases	)	Honorable Ed Kinkeade

DEFENDANTS' MOTION FOR LEAVE TO FILE SURREPLY IN FURTHER OPPOSITION TO PLAINTIFFS' STEERING COMMITTEE'S MEMORANDUM OF LAW REGARDING STAGGERED REMAND

Defendants respectfully move for leave to submit the attached surreply in further response to plaintiffs' briefing, which proposes staggered remand of certain cases currently pending in this MDL proceeding. Given the importance of the issues raised in plaintiffs' reply brief, and because it misapprehends defendants' positions on some of these issues, defendants respectfully submit that the attached surreply would assist the Court in addressing plaintiffs' "staggered remand" request.

As set forth in the attached certificate of conference, plaintiffs' counsel has indicated that plaintiffs oppose this motion.

Dated: August 16, 2017

Respectfully submitted,

s/ John H. Beisner
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CERTIFICATE OF SERVICE

I certify that on August 16, 2017, I filed this document using the Court's Electronic Case Filing ("ECF") system, which will automatically deliver a notice of electronic filing to all parties' counsel of record, who are registered ECF users. Delivery of such notice of electronic filing constitutes service of this document as contemplated by Rule 5 of the Federal Rules of Civil Procedure. *See* LR 5.1.

s/ John H. Beisner

Counsel for Defendants

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DEFENDANTS' SURREPLY IN FURTHER OPPOSITION TO PLAINTIFFS' STEERING COMMITTEE'S MEMORANDUM OF LAW REGARDING STAGGERED REMAND

As defendants' opposition brief highlighted, plaintiffs have submitted an arbitrary and self-serving proposal to the Court that lacks any principled basis in MDL law or practice. In an effort to obscure the arbitrary nature of their request, plaintiffs reply by disparaging defendants and their counsel with unfounded, ad hominem attacks. These attacks are inappropriate and do not merit a response. Accordingly, this surreply focuses solely on addressing the substantive points made in plaintiffs' reply.

In the main, plaintiffs contend that staggered remands are not forbidden and that substantial additional common pre-trial work remains to be done in the MDL proceeding. But the issue here is not whether staggered remands are ever permissible. Rather, the question is whether an MDL court can selectively pick off cases that plaintiffs view as favorable and suggest remand of those cases only, while blocking remand of other, similarly situated cases that have been pending in the MDL proceeding for as long – or longer. It cannot. All of the cases in this proceeding have advanced to the same point and should be remanded *en masse*, as defendants made clear in their opening brief. And any purported need for common discovery does not

support plaintiffs' proposal because such common discovery would presumably be relevant to all cases. If substantial common work remains to be done, then remand is premature, and the parties should focus on completing that work, not cherry-picking certain cases for preferential treatment and consolidated trials, which are doing nothing to facilitate the broader resolution of this litigation or to advance the cases of the remaining MDL plaintiffs.

ARGUMENT

I. ALL CASES PENDING IN THE MDL PROCEEDING SHOULD BE REMANDED.

As set forth in defendants' opposition brief, the Court should reject plaintiffs' proposal for a self-serving limited remand and instead suggest remand of all the cases in this MDL proceeding because coordination of common pretrial issues and discovery is complete. (*See* Defs.' Opp'n at 4.) In response, plaintiffs argue that: (1) "[l]ong-standing precedent confirms that the transferee judge has 'flexibility' to recommend that certain actions be remanded prior to other cases" (Pls.' Reply at 3); and (2) pretrial proceedings have not been completed (*id.* at 7). But neither argument supports plaintiffs' proposal, as detailed below.

First, plaintiffs cite a handful of cases for the proposition that "MDL transferee courts commonly make staggered remand suggestions in line with their greater familiarity with the nuances of the litigation." (*Id.* at 4.) But that is not the issue. Instead, the question is whether a court may suggest remand of ***arbitrarily*** limited groups of cases – i.e., subsets of the California and New York actions – that are no more or less advanced than the broader pool of cases. (*See* Defs.' Opp'n at 6-7.)[1] As elaborated in defendants' opening brief, the authorities on which plaintiffs rely do not support their position; rather, staggered remand was appropriate in those

[1] Even plaintiffs have been forced to concede that there is no basis for excluding Texas from their plan given that "Texas cases have been tried and Texas is the second-most populated state." (Pls.' Reply at 24.) But they still offer no basis for remanding some cases from these states (presumably, their preferred trial candidates) and not others.

proceedings because the progression of the MDL cases was uneven, and pretrial proceedings were deemed complete as to a subset of the cases, making remand appropriate as to ***all*** of the cases in that subset. (*Id.* (distinguishing plaintiffs' authorities on this ground).)

In reply, plaintiffs ignore these problems with the cases on which they originally relied and emphasize a new case as authority for their proposed staggered remand, Pretrial Order No. 91, *In re Boston Scientific Corp. Pelvic Repair System Products Liability Litigation*, MDL No. 2326 (S.D. W. Va. Apr. 11, 2014) (cited in Pls.' Reply at 13).[2] But the *Boston Scientific* ruling is a consolidation order that does not directly address the propriety of staggered remand at all – much less suggest that the kind of arbitrary approach proposed by plaintiffs here is appropriate.

In sum, the general rule is that once pretrial issues and discovery have concluded, the MDL cases must be sent back to the transferor courts for trial. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 34 (1998) (Section 1407 "obligates the Panel to remand any pending case to its originating court when, at the latest, those pretrial proceedings have run their course"). While that general rule has sometimes given way to staggered remands, those examples were the result of the uneven progression of the cases in those MDL proceedings – for example, where pretrial work was complete as to an identifiable subset of the cases in the MDL proceeding. There is simply no authority for countenancing a staggered remand proposal under which cases would be remanded based on the strategic and financial interests of certain plaintiffs' lawyers rather than their litigation status.[3]

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[2] Plaintiffs cited *Boston Scientific* as support for their proposal of intercircuit assignment in their opening brief but did not cite it in the section of their brief arguing that the Court has authority to order staggered remands. (*See* Mot. at 5.) In any event, as explained in the text, it does not support their proposal.

[3] As part of their effort to disparage defendants and their counsel, plaintiffs accuse defense counsel of making "misstatements" and "misrepresentations" to Special Master Stanton on the July 13, 2017 telephonic status conference. (Pls.' Reply at 5-6.) According to plaintiffs, Mr. Harburg, who served as "national coordinating counsel" for the defendants in the welding fume MDL proceeding, was somehow not being truthful when he told the Special Master that "'I am not aware of any cases where this has come up.'" (*Id.* (quoting 7/13/17 Tr. 6:8-7:11).) But Mr. Harburg was simply noting that he was unaware of cases that had affirmatively addressed defendants'

Second, plaintiffs argue that global remand is improper because "[p]retrial [p]roceedings [a]re [n]owhere [n]ear [c]omplete." (Pls.' Reply at 7.) But the list of supposed discovery needs offered by plaintiffs is made up of: (1) case-specific matters, rather than common MDL discovery; and (2) new discovery initiatives that were clearly concocted solely to justify extending this MDL proceeding. And even if plaintiffs' hyperbolic assertion that "massive amounts of discovery" remain to be completed (Pls.' Reply at 7-13) were true, that would undermine, rather than support, their staggered remand proposal. After all, the discovery issues that plaintiffs list would be just as applicable to the as-yet-unidentified California and New York cases that are the subject of plaintiffs' proposal as they would be to the other California and New York cases, as well as all cases involving other states' laws. If so much more common discovery remains to be completed (which defendants dispute), it makes no sense to push ahead with trials – especially not trials over which this Court would preside – because these trials would only resolve issues in individual cases, at the cost of addressing common pretrial issues, which is the fundamental purpose of an MDL proceeding. In short, if plaintiffs' argument had any merit, it would support retaining ***all*** of the cases in the MDL proceeding, ***not*** remanding groups of California and New York cases for trial.

For this reason, too, plaintiffs' proposal is improper and should be rejected.

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position, and that as a result, defendants were relying on the MDL statute. The *Jowers* case in the welding fume MDL proceeding highlighted by plaintiffs in their reply brief is hardly evidence of a "misrepresentation" by defense counsel. In that case, the MDL judge sought intercircuit transfer of a ***single*** action that had already been worked up for trial as an ***agreed*** bellwether case. Moreover, that course was only taken on the eve of trial, when plaintiffs raised a venue objection that threatened to derail the parties' efforts in preparing the case for trial. *See* Suggestion of Remand, *Jowers v. Airgas-Gulf States, Inc.*, No. 1:07-WF-17010-KMO (N.D. Ohio Nov. 8, 2007) (attached as Ex. 1) (Appendix pp. 1-10). That *sui generis* example is hardly authority for plaintiffs' proposal here, which seeks large-scale remands of California and New York cases, with each remand tranche encompassing no fewer than 20 cases, and with no meaningful bellwether purpose.

II. PLAINTIFFS' SUGGESTED CONDITIONS FOR STAGGERED REMAND ALSO LACK MERIT.

As explained in defendants' opposition brief, even if plaintiffs' request for staggered remand had merit, their requested conditions – specifically, intercircuit assignment and consolidated, multi-plaintiff trials – would still be improper. (*See* Defs.' Opp'n at 8-10.) Plaintiffs' responses lack merit.

First, plaintiffs do not seriously respond to defendants' argument that well-settled Ninth Circuit case law strongly disfavors intercircuit assignment, even in the MDL context. (*See id.* at 8 (citing *In re Motor Fuel Temperature Sales Practices Litig.*, 711 F.3d 1050, 1054 (9th Cir. 2013)).) Plaintiffs instead attempt to downplay the Ninth Circuit's rejection of intercircuit transfer in *In re Motor Fuel* on the ground that "the particular circumstances did not justify a transfer" in that case. (*See* Pls.' Reply at 14.) But Chief Judge Kozinski was "unable to find . . . a justification" for intercircuit assignment absent a "well-documented necessity for judicial help from outside the circuit." *In re Motor Fuel*, 711 F.3d at 1054, 1055. The same rationale applies here. Indeed, plaintiffs do not even attempt to argue that such a "necessity" – much less a "well-documented" one – exists with respect to transferor judges in the Ninth Circuit.

Plaintiffs also attempt to liken the present situation to that in *Jowers*, a case in the welding fume litigation, which plaintiffs assert "employ[ed] a selected remand and intercircuit transfer." (Pls.' Reply at 6.) But in *Jowers*, the propriety of intercircuit transfer was assessed under Fifth Circuit law, not Ninth or Second Circuit law, which would govern any request for intercircuit transfer with respect to California and New York cases, respectively. Moreover, *Jowers* involved a ***bellwether*** trial designed to inform the parties about the strengths and weaknesses of the claims and defenses at a global level. Here, by contrast, and as set forth in defendants' opposition brief, the bellwether process effectively ended when defendants were

forced to defend themselves in consolidated, multi-plaintiff trials, which produced bloated verdicts that failed to meaningfully differentiate among differently situated plaintiffs. (*See* Defs.' Opp'n at 3-4.) Such verdicts were – and continue to be – incapable of facilitating global resolution because they are not ***representative*** or ***informative*** – the touchstone of bellwether trials, as the Fifth Circuit recognized in *In re Chevron USA, Inc.*, 109 F.3d 1016 (5th Cir. 1997). (*See* Defs.' Opp'n at 9-10.)[4]

Plaintiffs accuse defendants of "miscit[ing] and misrepresent[ing] the Fifth Circuit holding in *In re Chevron*," noting that the "Fifth Circuit **upheld the grouping of 30 plaintiffs for trial.**" (Pls.' Reply at 15.) This contention is wrong at multiple levels. Most fundamentally, plaintiffs do not and cannot dispute the core proposition for which defendants cited *Chevron* – that "[a] bellwether trial designed to achieve its value ascertainment function for settlement purposes or to answer troubling causation or liability issues common to the universe of claimants has ***as a core element representativeness***." *In re Chevron*, 109 F.3d at 1019 (emphasis added). Applying this rudimentary principle, the Court of Appeals had no trouble finding that the contemplated multi-plaintiff trial was "***not*** a bellwether trial"; rather, "[i]t [was] simply a trial of fifteen (15) of the 'best' and fifteen (15) of the 'worst' cases contained in the universe of claims involved in th[e] litigation." *Id.* (emphasis added). Defendants submit that the same principle applies here because the consolidation mechanism offers no information with respect to the true merit or value of individual plaintiffs' claims and thus undermines the information-producing purpose of bellwether trials.

Plaintiffs essentially ignore all of this and instead focus on the supposed fact that *Chevron* "upheld" consolidation of 30 plaintiffs' claims for trial (Pls.' Reply at 15), but this, too,

[4] For similar reasons, to the extent plaintiffs continue to argue that the staggered remands would be part of a bellwether process, it would make far more sense to try cases under ***other*** states' laws, since MDL judges typically try to minimize similarities among bellwether trials.

is not correct. The Fifth Circuit merely refused to grant mandamus relief with respect to the consolidation question, "***express[ing] no opinion*** on whether . . . this [was] an appropriate case for a stand-alone, common-issue trial." *In re Chevron*, 109 F.3d at 1021 (emphasis added). Although the *Chevron* trial proceeded after mandamus, it did not reach a verdict, precluding any subsequent appellate review of the propriety of the consolidation order. *See* Order of Disqualification at 1-2, *Adams v. Chevron USA Inc.*, No. H-96-1462, ECF No. 518 (S.D. Tex. Aug. 21, 1997) (attached as Ex. 2) (Appendix pp. 11-12). And *Chevron* involved allegations of environmental contamination emanating from a single site, *see generally* Order Establishing Trial Plan and Resolving Related Issues, *Adams v. Chevron USA Inc.*, No. H-96-1462, ECF No. 124 (S.D. Tex. Dec. 19, 1996) (attached as Ex. 3) (Appendix pp. 13-18), not allegations of disparate personal injuries alleged to arise from distinct products implanted by different surgeons, a difference that courts have widely recognized bears on the propriety of consolidation, *see, e.g.*, *Schneck v. IBM*, No. 92-4370 (GEB), 1996 U.S. Dist. LEXIS 10126, at *2, *11 (D.N.J. June 21, 1996) (rejecting request for consolidation in cases involving a "diverse array of so-called [repetitive stress] injuries," finding that prior cases granting consolidation were inapposite "where plaintiffs had the same employer, worksite, occupation, and used the same equipment").

Second, consolidation under Rule 42 is not appropriate, and plaintiffs' argument that any remanded cases should be consolidated for trial fails to show otherwise. Plaintiffs largely rehash their prior arguments regarding consolidation (*see* Pls.' Reply at 14-18), which ignore the experience of this litigation and substantially duplicate their prior submissions on the topic, to which defendants have previously responded (*see* Defs.' Opp'n at 9 n.9).[5] Plaintiffs add the argument that defendants' appellate briefing in *Aoki* "did not even mention the consolidation as

[5] Plaintiffs offer no response to defendants' argument that any request for consolidation is premature inasmuch as no specific cases have even been identified as trial candidates at this point, making it impossible to ascertain the propriety of consolidation. (*See* Defs.' Opp'n at 9.)

error to the Fifth Circuit" (Pls.' Reply at 14), which plaintiffs contend is proof that consolidation "is not error." (*Id.* at 14-15.) This argument rests on a flawed premise: that an appellate brief is an exhaustive list of the errors in the proceeding below. Of course, that is not the case, and because plaintiffs' outlandish litigation conduct produced many additional and even more compelling errors in the *Aoki* trial, there was simply no room left to argue the erroneous consolidation order in that case. Instead, the Fifth Circuit will have the opportunity to address the serious problems with consolidation in the *Andrews* appeal.

Plaintiffs also repeat their mantra that "these cases will ultimately be tried in groups"; "[t]here is no other way to deal with 9,000 cases of predominantly elderly people before they die." (Pls.' Reply at 16-17.) This argument makes no sense for several reasons. First, as defendants have repeatedly argued, the purpose of bellwether trials is not to reduce inventory but to produce information about the value and merit of claims and defenses – information that in turn will (ideally) facilitate global resolution. Consolidation is not needed to further this purpose; indeed, the experiences of other MDL proceedings invoked by plaintiffs demonstrate that consolidated, multi-plaintiff trials are not a prerequisite to a successful bellwether process. For example, ***none*** of the of the six personal injury bellwether trials conducted by Judge Fallon in the federal Vioxx MDL proceeding (cited in Pls.' Reply at 23) involved consolidated, multi-plaintiff trials. And after holding ***one*** two-plaintiff, consolidated trial in the welding fume MDL proceeding (cited in Pls.' Reply at 6, 18), the transferee court in that litigation subsequently eschewed consolidated, multi-plaintiff trials.

In any event, if plaintiffs were really concerned about reducing inventory, they would join defendants' call for a protocol to identify and weed out meritless cases, like the cup-positioning cases that the *Paoli* verdict demonstrated are insubstantial. (*See* Email from S.

Roberts to Special Master Stanton, Nov. 14, 2014 (attached as Ex. 4) (Appendix p. 19).) Indeed, ***plaintiffs' own authority*** endorses the use of such weeding-out protocols. *See In re Aredia & Zometa Prods. Liab. Litig.*, No. 3:06-MD-1760, 2010 WL 5387695, at *2 (M.D. Tenn. Dec. 22, 2010) (cited in Pls.' Reply at 4) (recommending that cases where discovery was complete should be remanded, but stating that remand would be "premature" for other, more recently filed cases that had not yet been subjected to a litigation-wide "weeding out" protocol that the MDL court had employed). And there is a patent need for such weeding out in this litigation, as illustrated by, *inter alia*, the pendency of: (1) cases without evidence of metal reaction; (2) cases where the implant failed within the first few weeks or months of implant before any metal debris could have accumulated; (3) cases involving revisions due to dislocation or clear mechanical failure; and (4) cases where surgeon factors are the cause of revision.[6] Nonetheless, plaintiffs have not indicated any willingness to engage in such a process. Accordingly, plaintiffs' assertions that it is defendants who are engaging in "delay" and "litigation fatigue" tactics (Pls.' Reply at 1) are utterly meritless.[7]

CONCLUSION

For the foregoing reasons, as well as those set forth in defendants' prior briefing, the Court should suggest remand of all of the pending cases for trial in the transferor courts by judges in those jurisdictions.

[6] Plaintiffs' dismissal of the *Cousin* case after discovery revealed that Ms. Cousin's alleged problems could not have been caused by metal debris and their own expert's disclaimer of causation in the *Heroth* case (as elaborated in defendants' pending motion for summary judgment) make clear that exposing plaintiffs' claims to sunlight would likely result in the dismissal of a significant number of cases in this proceeding.

[7] Finally, plaintiffs also devote more than six pages of their reply brief to mischaracterizing the procedural history of the MDL proceeding by, for example, misperceiving the narrow scope of defendants' *Lexecon* waivers in the first two MDL trials. (*See* Pls.' Reply at 19-25.) Defendants incorporate their prior briefing on this issue, which is now before the Fifth Circuit by way of defendants' petition for a writ of mandamus.

Dated: August 16, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

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s/ John H. Beisner

Counsel for Defendants

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APPENDIX TO DEFENDANTS' SURREPLY IN FURTHER OPPOSITION TO PLAINTIFFS' STEERING COMMITTEE'S MEMORANDUM OF LAW REGARDING STAGGERED REMAND

1. Suggestion of Remand, *Jowers v. Airgas-Gulf States, Inc.*, No. 1:07-WF-17010-KMO (N.D. Ohio Nov. 8, 2007)

2. Order of Disqualification, *Adams v. Chevron USA Inc.*, No. H-96-1462, ECF No. 518 (S.D. Tex. Aug. 21, 1997)

3. Order Establishing Trial Plan and Resolving Related Issues, *Adams v. Chevron USA Inc.*, No. H-96-1462, ECF No. 124 (S.D. Tex. Dec. 19, 1996)

4. Email from S. Roberts to Special Master Stanton, Nov. 14, 2014

EXHIBIT 1

07WF17010a-ord(Suggestion-of-Remand).wpd

BEFORE THE JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

In re: Welding Fumes
Products Liability Litigation **MDL No. 1535**

SUGGESTION OF REMAND

***Jowers v. Airgas-Gulf States, Inc.*, case no. 1:07-WF-17010-KMO (N.D. Ohio)**
(originally case no. 1:06-CV-01187 (S.D. Miss.); transferred pursuant to CTO-47)

REQUEST FOR EXPEDITED HEARING

On January 11, 2007, the Judicial Panel on Multidistrict Litigation ("JPML") docketed Conditional Transfer Order 47 ("CTO-47"), thereby transferring the above-entitled action ("*Jowers*") to the undersigned for coordinated or consolidated pretrial proceedings.[1] For the reasons stated below, and pursuant to Rule 7.6(c)(ii) of the Rules of Procedure of the JPML, the undersigned transferee judge now suggests that *Jowers* be **remanded** to the transferor court, the United States District Court for the Southern District of Mississippi.

In addition, due to certain time constraints explained below, the undersigned respectfully requests an expedited ruling from the JPML.

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[1] On January 29, 2007, the JPML lifted the automatic stay on CTO-47, and the Order was filed in the District Court for the Northern District of Ohio on February 5, 2007.

BACKGROUND

Global discovery in this MDL has been largely completed, and the undersigned (also, "the Court") has conducted two bellwether trials.[2] On May 1, 2007, lead counsel for MDL plaintiffs requested that the Court designate *Jowers* as the next bellwether case and, further, that the case be remanded to the Mississippi transferor court for trial.[3] Plaintiffs' lead counsel also suggested that the undersigned seek temporary appointment to the District Court for the Southern District of Mississippi, for the purpose of presiding over the trial of *Jowers*, after remand.[4]

The defendants objected to plaintiffs' designation of *Jowers* as a bellwether trial, both because defendants believed that all additional MDL bellwether trials should be randomly selected, and because defendants believed that all bellwether trials should be conducted in the Northern District of Ohio.[5] Defendants suggested, accordingly, that the Court either designate a case other than *Jowers* using random selection, or require Jowers to waive any objection to venue in the transferee court and agree to trial in Cleveland, Ohio. The defendants did indicate, however, that *if* the Court chose to designate *Jowers* as a bellwether case, and *if* the JPML remanded *Jowers* to the Southern District of Mississippi for trial, then defendants joined plaintiffs' request that the undersigned preside over that trial, via temporary appointment to the Southern District of Mississippi.

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[2] In addition, the undersigned has presided over four other bellwether cases that were set for trial but ultimately were not tried.

[3] *See* exhibit A (email dated May 1, 2007 from Don Barrett, Plaintiffs' Lead Counsel, to David R. Cohen, Court-Appointed Special Master in the *Welding Fume* MDL).

[4] *Id.*

[5] *See* exhibit B (letter dated May 15, 2007 from John Beisner, Defendants' Lead Counsel, to the undersigned).

After considering the parties' positions, the Court granted in large part plaintiffs' request to designate *Jowers*. Specifically, on May 18, 2007, the Court informed the parties by telephone that it had decided to schedule three (not just one) additional bellwether trials: (1) a trial to begin on November 5, 2007, in Cleveland, Ohio, of a case to be selected by plaintiffs from a group of 100 cases previously designated randomly by the Court for early case-specific discovery; (2) trial of the *Jowers* case, to begin on January 28, 2008, in the Southern District of Mississippi (assuming remand by the JPML); and (3) a trial to be scheduled, beginning in the spring or summer of 2008, of a case that the Court would randomly select after the *Jowers* case is completed. The Court then gave the plaintiffs 10 days to identify a case for the November, 2007 trial slot; on May 29, 2007, plaintiffs chose a case known as *Tamraz*.[6]

On June 6, 2007, the Court entered an Order ("*Bellwether Order*") confirming the choices of *Tamraz* and *Jowers* as bellwether trials, and documenting their trial dates.[7] As explained in the *Bellwether Order*, the Court concluded that *Jowers* was among those cases that best served the purposes contemplated by the Court's "bellwether" designation, and that trial of the *Jowers* case – even in a remote District – would serve well to advance the resolution of the MDL as a whole. The Court then ordered the parties in both *Tamraz* and *Jowers* to complete all case-specific discovery and to otherwise make the cases trial-ready as of the dates designated.[8]

In addition, over the next several months, the undersigned pursued and obtained temporary

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[6] *Tamraz v. Lincoln Elec. Co.*, case no. 04-CV-18948 (N.D. Ohio).

[7] *See* exhibit C (*Bellwether Order*, MDL master docket no. 2043).

[8] As of the date of this Suggestion, having undertaken efforts at making *Jowers* trial-ready, the defendants no longer object to the choice of *Jowers* for trial; but, as noted below, they do continue to object to trial of *Jowers* in Mississippi.

assignment to the Southern District of Mississippi, for the purpose of presiding over the trial of *Jowers* after remand. Specifically, pursuant to 28 U.S.C. §292, the undersigned obtained formal approvals for temporary assignment to the Southern District of Mississippi from: (1) Chief Justice John G. Roberts, Jr.; (2) Fifth Circuit Court of Appeals Chief Judge Edith Jones; (3) Sixth Circuit Court of Appeals Chief Judge Danny Boggs; and (4) the Chairman of the Judicial Conference Committee on Inter-Circuit Assignments.[9]

In sum, as of today, the great bulk of pretrial proceedings in *Jowers* has been completed; and, by virtue of the above-described temporary judicial assignment, the undersigned will ensure that any remaining pretrial proceedings are completed before the anticipated trial date of January 28, 2008, should the JPML order remand to the transferor court.

For these reasons, the just and efficient handling of this matter will best be served by the remand of this action to the United States District Court for the Southern District of Mississippi, from which it was originally transferred.

VENUE ISSUES

The only fact that potentially complicates the JPML's decision regarding this Suggestion of Remand arises from an amended pleading filed by plaintiffs. Plaintiffs filed this amended pleading after the Court informed the parties of its intention to: (1) seek remand of *Jowers* to the transferor court, and (2) procure designation to preside over that action, following remand by the JPML.

Specifically, on June 5, 2007, plaintiff Jowers filed a second amended complaint, which

[9] *See* exhibit D (Designation and Assignment of an Active United States Judge for Service in Another Circuit, dated October 23, 2007).

dropped 14 of the defendants listed in the prior complaint. In addition, the second amended complaint alleged that venue was proper in the Northern District of Ohio, rather than Mississippi. In a third amended complaint, which added a defendant, Jowers repeated this Ohio venue allegation. Previous to the filing of these amended complaints, Jowers had consistently maintained in correspondence and other documents filed with the MDL court that venue was and is proper only in Mississippi, and that he did not intend to waive Mississippi venue.

On October 1, 2007, the Court informed the parties that the undersigned had received informal notification that all necessary approvals for temporary assignment to the Southern District of Mississippi, to preside over the *Jowers* trial, were forthcoming.[10] On October 3, 2007, some of the defendants filed a motion to withhold suggestion of remand,[11] relying on Jowers' apparent waiver of venue in his second and third amended complaints. This document was the first time any party pointed out to the Court that Jowers had changed his venue allegations. In their motion, the moving defendants asked the Court to order that *Jowers* be tried by the undersigned in the Northern

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[10] *See* exhibit E (email dated October 2, 2007, from *Welding Fume* Special Master to various counsel in MDL and in *Jowers*, confirming conversation of October 1, 2007).

[11] *See* exhibit F (*Jowers* docket no. 84). Notably, the motion to withhold suggestion of remand was filed by only 6 of the 18 defendants listed in Jowers' third amended complaint (referred to hereinafter as "moving defendants"). Of the other 12 defendants, 9 *denied* Jowers' new allegation of Ohio venue, 2 more denied the allegation for want of knowledge, and 1 did not answer. Thus, according to their pleadings, less than half of all defendants named in Jowers' third amended complaint believe that trial of the case should occur in the Northern District of Ohio.

On November 7, 2007, several hours after this point was noted by Jowers' counsel during the final hearing on this matter, counsel for the moving defendants notified the Court that he had contacted the other defendants and obtained their agreement to waive any objections to trying *Jowers* in Cleveland. Counsel for moving defendants did not contend that this late change in the other defendants' position, as compared with the written allegations in their pleadings, was anything other than a decision to change their *substantive* view of this venue issue – that is, there is no claim that the initial objections to venue in the other defendants' answers to Jowers' third amended complaint had been made in error.

District of Ohio, instead of the Southern District of Mississippi. As moving defendants pointed out, there is authority for the proposition that, despite the rule established in *Lexecon*,[12] a party to an MDL may be deemed to have waived any objection to trial in the transferee court if, by words and/or actions, the party indicates a clear intention to consent to trial in that district. *See, e.g., In re: Carbon Dioxide Industry Antitrust Litig.*, 229 F.3d 1321, 1326 (11th Cir. 2000) ("*Carbon Dioxide*") (affirming transferee court's refusal to suggest remand of an MDL case, because plaintiffs had stipulated to venue in the transferee court and did not attempt to retreat from that stipulation until the day of trial; plaintiffs' emergency motion to remand, filed with the JPML on the eve of trial in the transferee court, was later denied as moot); *In re: African-American Slave Descendants Litig.*, 471 F.3d 754, 755 (7th Cir. 2006) ("*Slave Descendants*") (concluding that plaintiffs' filing of a consolidated amended complaint, which did not object to venue in the MDL transferee court, authorized the transferee court to rule on the merits of the lawsuit, "notwithstanding" *Lexecon*; citing *Carbon Dioxide*).

Having studied carefully the moving defendants' position and the cases they cite in both their motion to withhold suggestion of remand and in their reply brief,[13] however, the Court finds clearly distinguishable the circumstances at issue here from those at issue in either *Slave Descendants* or *Carbon Dioxide*. In *Slave Descendants*, all parties apparently agreed that the written waiver of venue in the consolidated amended complaint was intentional, and no waiving-plaintiff ever requested remand. In *Carbon Dioxide*, the waiver of venue was repeatedly reaffirmed in various

[12] *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

[13] *See* exhibit G (*Jowers* docket no. 130) (moving defendants' reply in support of motion to withhold suggestion of remand, and response to Jowers' motion to amend complaint nunc pro tunc).

filings and oral arguments, documented through a stipulation memorialized by court order, and remained unquestioned until the first day of trial. Here, in contrast, until filing his second amended complaint on June 5, 2007, plaintiff Jowers had always asserted clearly and unequivocally his right and intention to seek remand to the transferor district when appropriate. Indeed, it was Jowers' insistence on trial in the Southern District of Mississippi, as reflected in exhibit A, that prompted moving defendants' initial objections to the selection of *Jowers* as a bellwether case, and it is what prompted the undersigned to go through the arduous process of obtaining designation to act as trial judge in that remote District. And, at least until last evening, the defendants in *Jowers* were not even close to unanimous in their position that venue is appropriate in the Northern District of Ohio.[14]

As reflected in plaintiffs' November 2, 2007 motion to amend complaint nunc pro tunc,[15]

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[14] *See* footnote 11, above.

[15] *See* exhibit H (*Jowers* docket no. 123).

See also exhibit I (*Jowers* docket no. 111) (Jowers' opposition to moving defendants' motion to withhold suggestion of remand). In exhibit I, Jowers advocated that, if the Court concluded it could not suggest remand pursuant to 28 U.S.C. §1407, it should transfer the case to the Southern District of Mississippi pursuant to 28 U.S.C. §1404. The Court concluded, however, that a §1404 transfer is not allowed. *See Lexecon*, 523 U.S 41 n.4 ("Because we find that the statutory language of §1407 precludes a transferee court from granting any §1404(a) motion, we have no need to address the question whether §1404(a) permits self-transfer given that the statute explicitly provides for transfer only 'to any other district.'"); *In re: Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 2005 WL 1528946 at *1 (W.D. Wash. June 24, 2005) ("The court concludes that given the language of 28 U.S.C. §1407(a) and the Supreme Court's *Lexecon* opinion, it does not have the authority to rule on any motion to transfer a case under 28 U.S.C. §1404(a)."); *In re: Bridgestone/Firestone, Inc.*, 190 F.Supp.2d 1125, 1146 n.31 (S.D. Ind. 2002) ("transfer to a possibly more appropriate federal court under 28 U.S.C. §1404 appears to be beyond our power at this point") (citing *Lexecon*).

If the Court were to consider whether a §1404(a) transfer is appropriate, the Court would conclude that, after weighing all relevant factors, the sum of those factors clearly preponderates in favor of transfer. The moving defendants note correctly that the fact that *Jowers* is part of a larger MDL proceeding in the Northern District of Ohio weighs against transfer, and does lessen the strength of some of the factors upon which parties traditionally rely under §1404(a); but, ultimately, the Court does not find that the "MDL overlay" to this inquiry would change the Court's final calculus.

moreover, where plaintiffs seek to reinstate the venue allegations from the original *Jowers* complaint, plaintiffs assert that the references to venue in the Northern District of Ohio that appear in the second and third amended complaints resulted from scrivener's error; and, after a hearing on the issue, the undersigned found plaintiffs' assertion to be well-taken.[16] Specifically, this Court found that Jowers did not intend to, and did not in fact, waive Mississippi venue by including the

[16] Jowers' counsel avers, in an affidavit, that: (1) the Ohio venue allegations contained in the second and third amended complaints were "cut and pasted" from another Mississippi plaintiff's amended complaint, using word processing software; (2) Jowers did not authorize and counsel did not intend to change the venue allegation in *Jowers* from Mississippi to Ohio; and (3) the scrivener's error arises because Plaintiffs' lead counsel in this MDL represents many hundreds of plaintiffs. The Court finds these averments credible and that they provide an appropriate basis upon which to allow plaintiffs to cure their error. Other courts have reached the same conclusion in highly similar circumstances. *See Schillinger v. Union Pacific Railroad Co.*, 425 F.3d 330, 333 (7th Cir. 2005) (affirming the district court's remand of the case to state court, where federal subject matter jurisdiction depended on whether a particular defendant ("UPC") was added properly in an amended complaint, ruling: "plaintiffs' counsel filed an affidavit in which he explained that his staff used the original complaint as a word processing template in drafting the amended complaint and failed to notice that this resulted in the incorporation of the old caption and introductory allegations into the amended complaint. The district court acted within its discretion in finding that UPC's inclusion [as a defendant] in the amended complaint was a clerical error, that plaintiffs had no intention of bringing UPC back into the litigation, and that UPC was in fact not a new party to the suit.").

Ohio venue allegation in his second and third amended complaints.[17]

Having found no intentional waiver of venue, the undersigned believes this case falls squarely within the rule of *Lexecon*, which mandates remand for trial upon completion of all pretrial matters within the jurisdiction of the transferee court.[18]

REQUEST FOR EXPEDITED RULING

Since June 6, 2007 – the date of the Court's *Bellwether Order* designating *Jowers* for trial – the parties, their counsel, the undersigned, and the Judges and staff of the Southern District of

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[17] In so ruling, the Court found factually distinguishable the case cited by moving defendants, *Orb Factory, Ltd. v. Design Science Toys, Ltd.*, 6 F. Supp.2d 203 (S.D.N.Y. 1998). In *Orb Factory*, the plaintiff alleged a certain venue in its complaint, and defendant DST did not object via Rule 12 motion or in its answer. "[O]ver one full year" later, DST then claimed, *for the first time*, that its failure to object to venue was a mistake; and the basis for the alleged mistake was DST's own counsel's false assumption regarding postal addresses – not scrivener's error. *Id.* at 207. In this case, in contrast: (1) Jowers' *initial pleading* asserted venue was proper in Mississippi, and he reiterated his continuing desire to adhere to that venue assertion as recently as May 18, 2007; (2) the period between Jowers' subsequent allegation of Ohio venue and his request to amend his complaint to correct this allegation was only five months; (3) the Court found credible Jowers' counsel's affidavit that the Ohio venue allegation was scrivener's error, and not the product of any dilatory motive; (4) the period between Jowers' actual discovery of the scrivener's error and the request to amend was only one month; and, most important, (5) given that the Court's grant of Jowers' motion to amend complaint nunc pro tunc merely returned circumstances to their status as of June 6, 2007 (the date of the Court's *Bellwether Order*), moving defendants could point to no undue prejudice.

[18] As noted above, there are some final case-specific pretrial matters in *Jowers* that are yet to be resolved. That fact arises from the way this MDL has been structured by both the Court and the parties. Thus, while matters pertinent to all cases (including complex rulings under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and generally-applicable dispositive motions) were handled prior to commencement of any bellwether trials, *case-specific* dispositive motions and motions in limine are handled just prior to the commencement of the trial of the case to which those motions apply. Because the undersigned will be the one both deciding all case-specific motions in *Jowers* and also presiding over trial of the case, the fact that these additional pretrial matters remain should not delay remand of this action.

Mississippi, have all been working hard to ensure the *Jowers* trial begins on the scheduled date of January 28, 2008 (or as soon thereafter as the JPML may authorize).

So that this trial date may be accommodated, the undersigned requests that the JPML consider this matter on an expedited basis, with an expedited briefing schedule and telephonic hearing, if a hearing is deemed necessary.

CONCLUSION

For all the reasons stated above, the undersigned concludes that the just and efficient handling of *Jowers* will best be served by remand of the action to the United States District Court for the Southern District of Mississippi, from which it was originally transferred.

The undersigned appreciates the JPML's timely consideration of this matter and remains available to provide to the JPML additional information in support of this Suggestion, as needed.

Respectfully submitted,

/s/ Kathleen M. O'Malley
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE
(MDL TRANSFEREE COURT)

DATED: November 8, 2007

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DOROTHY ADAMS, ET AL Plaintiffs	§ § §	
vs.	§	CIVIL ACTION NO. H-96-1462
CHEVRON USA INC., ET AL Defendants.	§ §	

ORDER OF DISQUALIFICATION

Again today, Chevron orally seeks disqualification of the trial judge in this case based on its view that Chevron cannot receive a fair trial. While Chevron continues to insist that the trial judge is biased against Chevron and harbors a deep-seated favoritism for the plaintiffs, Chevron has not persuaded this Court nor the Fifth Circuit Court of Appeals that such prejudice or bias exists.[1]

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[1] *In re Chevron U.S.A., Inc.*, Cause No. 97-20612, dated August 19, 1997:

> "From the comments and actions counsel have underscored in briefs and oral argument we are not persuaded that the judge has displayed a deep-seated favoritism toward the plaintiff, nor has he formed actual opinions based upon an extrajudicial source that disadvantage Chevron."

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However, in the interest of justice, the Court disqualifies itself from proceeding further in this case. 28 U.S.C. § 455. The Court declares a mistrial in this case and the jury is excused.

It is so Ordered.

Signed this 21st day of August, 1997.

KENNETH M. HOYT
United States District Judge

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DOROTHY ADAMS, ET AL Plaintiffs,	§	
vs.	§	CIVIL ACTION NO. H-96-1462
CHEVRON U.S.A., INC., ET AL Defendants.	§	

ORDER: ESTABLISHING TRIAL PLAN AND RESOLVING RELATED ISSUES

I. INTRODUCTION

Pending before the Court are the parties' competing motions to determine or establish a trial plan (#68 and #98) and the plaintiffs' motions for sanctions (#98 and #100). The Court has deliberated on the issues, reviewed the pleadings, considered the arguments of counsel and determines that the motions for sanctions should be denied and a trial plan should issue.

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I. JURISDICTIONAL BASIS FOR CLAIMS

The plaintiffs[1], some 3,000 or more individuals who claim injury to property, person or both, seek monetary and injunctive relief, pursuant to federal and state law. The suit has been brought pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") 42 U.S.C. § 9601 *et. seq.*, the Resource Conservation and Recovery Act ("RCRA") 42 U.S.C. § 6901 *et. seq.*, the Safe Drinking Water Act ("SDWA") 42 U.S.C. § 300f *et. seq.*, the Clean Water Act ("CWA") 33 U.S.C. § 1251 *et. seq.*, the Oil Pollution Act of 1990 ("OPA") 33 U.S.C. § 2701 *et. seq.*, the Fair Housing Act 42 U.S.C. § 3601 *et. seq.*, the Civil Rights Act, 42 U.S.C. § 1983, the supplemental jurisdiction of the Court (28 U.S.C. § 1367), and state common-law and statutory claims of fraud, negligent misrepresentation, conspiracy, fraudulent concealment, real estate fraud and estoppel.

III. FACTUAL BACKGROUND FOR CLAIMS

The plaintiffs contend that the subdivisions referred to as Kennedy Heights were constructed on an old Gulf/Chevron chemical waste pits. According

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[1]The plaintiffs are current or former residents of Kennedy Heights and surrounding subdivisions such as Crestmont Plaza, South Acres Estates, Crestmont Park, King Estates, Paradise Valley, Cloverland and Shamrock Manor. For purposes of this suit, the Court, when referring to Kennedy Heights, is referring to all relevant subdivisions.

to the plaintiff, Gulf purchased acreage known as the Mykawa Tank Farm over 70 years ago for the purpose of storing oil and brine water from the Pierce Junction Field, where Gulf was producing oil.[2] The plaintiffs also contend that when Gulf discontinued operating the tank farm, it failed to take appropriate measures to secure the site, resulting in other waste being deposited there. In the 1960's Gulf's management sold the site for residential development to Log Development, knowing that the tank farm had not been properly closed. Various defendants then filled in the pits without remediating the land. Thus, asserts the plaintiffs, the hazardous substances that were stored have migrated into the environment, including the drinking water supply. As a result, the plaintiff's have sustained damages to their property and/or their person or both.

IV. PROCEDURAL HISTORY

Original causes of action were brought by separate plaintiffs in state and federal court. After the federal suit was filed, the state court cause of action was removed to federal court and consolidated into this case (*John R. Simmons, et al v. Chevron U.S.A. et al* Civil Number 96-1858 consolidated under *Dorothy Adams, et al v. Chevron U.S.A., et al* Civil Number 96-1462).

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[2]Originally it was Gulf Oil in its separate capacities that operated the Pierce Junction Field during the 1920's. Gulf Oil later became known as Chevron, which accounts for the addition of its name.

At the time the state case was transferred to federal court, the state trial court had scheduled the case for trial in October of 1996, and the plaintiffs and defendants had submitted "Bellwether" designations of fifteen (15) claimants each. (See December 17, 1996 Hearing Ex. #1).

At the outset, the Court declares this case to be complex. Fair and efficient resolution of this case requires the Court to exercise the discretion necessary to resolve all disputes between the parties. Therefore, the parties are on notice that the Court hereby invokes the stated and implied authority granted to it pursuant to FRCP 1, 11, 16, 26, 37, 51, 52, and the inherent authority granted by the federal Constitution in setting forth the following general rules and principles.

V. GENERAL RULES AND PRINCIPLES GOVERNING THIS CASE:

a. The rules and principles governing the imposition of sanctions are the same;

b. During the pendency of this litigation and until other orders of the Court, each of the parties herein and their respective officers, agents, servants, employees, and attorneys are restrained and enjoined from altering, interlining, destroying, permitting the destruction of, or in any fashion changing any documents in the actual or constructive care custody or control of any such persons. A document is defined as any writing, drawing, etc. in any form.

c. To avoid unnecessary litigation concerning any motion, counsel are directed to meet and confer before filing any motion. In any motion filed, counsel for the moving party shall certify that a good faith effort was made to resolve the dispute.

d. All documents requested for production that are related to a scheduled deposition shall be produced five (5) days prior to the deposition.

e. No vacation letters or other trial settings shall interfere with the development and trial of this case.

f. To achieve the greatest efficiency and expedition in the resolution of all issues, the structure of the trial shall be as follows:

1. Composed of thirty (30) plaintiffs, fifteen (15) chosen by the plaintiffs and fifteen (15) chosen by the defendants. The thirty (30) plaintiffs chosen shall come from the lists submitted by the parties to the state court in April of 1996. However, each side is permitted to substitute or replace not more than five (5) plaintiffs, within its discretion, on or before January 1, 1997.

2. All chosen plaintiffs shall be adults, to the exclusion of minor children, unless the children are part of a household represented by at least one adult.

3. Each individual shall be counted as a single plaintiff, as opposed to a household as a single plaintiff.

4. The trial shall focus on the individual claims of each of the selected plaintiffs and on the issue of the existence or nonexistence of liability on the part of Chevron for the pollutants that, allegedly, give rise to all of the plaintiffs' claims.

   Thus, a unitary trial on the issues of general liability or causation as well as the individual causation and damage issues of the selected plaintiff shall occur.

5. The Court reserves the right to: (a) place a time limit on the length of the trial, limit the testimony of certain witnesses, limit the number of witnesses to be called on a particular issue, amend this Order, and issue additional orders.

6. The motions for sanctions are denied without prejudice.

It is so Ordered.

Signed this 19th day of December, 1996.

KENNETH M. HOYT
United States District Judge

EXHIBIT 4

From: Roberts, Seth
Sent: Friday, November 14, 2014 5:30 PM
To: James M. Stanton (stanton@stantontrialfirm.com)
Cc: Harburg, Stephen J (Stephen.Harburg@skadden.com); Ken.Inskeep@btlaw.com
Subject: New Potential Bellwether Candidates

Dear Judge Stanton,

At our meeting last week, Judge Kinkeade requested that we provide him with some new potential bellwether candidates where the plaintiff had a revision due to a reaction to metal wear debris and where there did not appear to be any issue with the angle at which the cups were implanted. The following are four cases that we believe meet these criteria based on the limited information that we have available, the plaintiffs' fact sheets and the medical records provided by plaintiffs with the fact sheets: Kathy Long, Donna Wray, Francis Shea and Deborah Hunter. We have attached the PFS and medical records we were provided for these four cases. We note that further work up of these cases may reveal issues that make one or more of them less than ideal bellwether candidates, but we will not know this until discovery occurs.

As we noted at the meeting last week, we think that it would still serve the purpose of the bellwether process for the Court to try either the Rowe case or the Garvin case. Both of these cases fall within recognized categories of reasons for revisions - infection and dislocation. Assuming that plaintiffs still intend to pursue these cases and others like them as having value and are not willing to dismiss them, they will need to be addressed as part of the MDL proceeding. Another reason for selecting one of these cases for trial is it could be tried in the January to March timeframe given the extensive work that has already been done on them under the existing scheduling orders. This would give the Court and the parties time to select and work up a new bellwether case from among the candidates currently being proposed without bringing the MDL proceeding to a temporary halt. In addition, to the extent that the Court is intending to start a new bellwether process, it would at least mean that each side would have been able to try one of its selections from the original pool of bellwethers and that the time and money spent over the last year working up these cases would not have been wasted. Another option would be to try the Jones case, one of plaintiffs' original selections, which has also been largely worked up and could be tried in this same timeframe. We are available to discuss the four new cases we have identified and the process for moving forward with bellwether trials at your convenience.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: DEPUY ORTHOPAEDICS, INC. PINNACLE HIP IMPLANT PRODUCT LIABILITY LITIGATION	)	MDL No. 2244
This Document Relates To: All Cases	)	Honorable Ed Kinkeade

CERTIFICATE OF CONFERENCE

Defendants respectfully submit this conference statement pursuant to Local Rule 7.1.

Defense counsel conferred with plaintiffs' counsel by email on August 15, 2017, and plaintiffs responded by email on August 16, 2017 that they were opposed to the foregoing motion.

Dated: August 16, 2017

Respectfully submitted,

s/ John H. Beisner
John H. Beisner
Stephen J. Harburg
Jessica Davidson Miller
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
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COUNSEL FOR DEFENDANTS DEPUY ORTHOPAEDICS, INC., DEPUY PRODUCTS, INC., DEPUY INTERNATIONAL, LTD., JOHNSON & JOHNSON and JOHNSON & JOHNSON SERVICES, INC.

CERTIFICATE OF SERVICE

I certify that on August 16, 2017, I filed this document using the Court's Electronic Case Filing ("ECF") system, which will automatically deliver a notice of electronic filing to all parties' counsel of record, who are registered ECF users. Delivery of such notice of electronic filing constitutes service of this document as contemplated by Rule 5 of the Federal Rules of Civil Procedure. *See* LR 5.1.

s/ John H. Beisner
Counsel for Defendants