UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: DEPUY ORTHOPAEDICS, INC. PINNACLE HIP IMPLANT PRODUCT LIABILITY LITIGATION	)	MDL No. 2244
	)	Honorable Ed Kinkeade
This Document Relates To:	)	
Alicea v. DePuy Orthopaedics, Inc., et al. No. 3:15-cv-03489-K	)	
Barzel v. DePuy Orthopaedics, Inc., et al. No. 3:16-cv-01245-K	)	
Kirschner v. DePuy Orthopaedics, Inc., et al. No. 3:16-cv-01526-K	)	
Miura v. DePuy Orthopaedics, Inc., et al. No. 3:13-cv-04119-K	)	
Stevens v. DePuy Orthopaedics, Inc., et al. No. 3:14-cv-01776-K	)	
Stevens v. DePuy Orthopaedics, Inc., et al. No. 3:14-cv-02341-K	)	

DEFENDANTS' RESPONSE TO THE MOTION FILED BY JESSICA BRENNAN AND MICHAEL ZOGBY REQUESTING LOGISTICS FOR INQUIRY RELATED TO DR. DAVID SHEIN

Defendants respectfully join the request submitted by Jessica L. Brennan and Michael C. Zogby ("movants") for a protocol that will govern any further inquiry into the statements made by Dr. David Shein in an affidavit concerning his interactions with a DePuy sales representative, Glenn Swajger. (*See* Mot. Requesting Logistics for Inquiry Related to Dr. David Shein ("Movants' Mot."), *Alicea* ECF No. 172.) The movants have requested that the Court permit the U.S. Attorney's Office to complete its investigation before any further inquiry is undertaken in connection with the pending trial, and upon the completion of that investigation, that any further inquiry be made via questioning by this Court, in the same fashion as the examination of Dr. Shein.

Defendants agree. Because the matter has been referred to the U.S. Attorney's Office, it should be permitted to proceed to its conclusion without potential interference from a parallel inquiry connected to this trial. Moreover, to the extent any further inquiry is required subsequent to the conclusion of the criminal investigation – and defendants are confident none will be – any such inquiry should be undertaken by the Court, not by plaintiffs' counsel. The Court used this approach in examining Dr. Shein, and it should not shift gears for defense-affiliated witnesses, especially because plaintiffs' counsel is himself an important witness to pertinent facts.

BACKGROUND

As the Court is aware, on Sunday, October 15, 2017, plaintiffs' counsel submitted an affidavit from Dr. Shein in which Dr. Shein stated that he had discussed the current trial with his DePuy sales representative, Glenn Swajger. (*See* Aff. of David Shein, M.D., *Alicea* ECF No. 146.) In his affidavit, Dr. Shein stated that Mr. Swajger met him before a surgical procedure that required Mr. Swajger's presence on Friday, October 13, 2017, at around 11:00 am, and that Mr.

Swajger "looked terrible and appeared stressed." (*Id.* ¶¶ 1-2.)[1] According to Dr. Shein, he asked Mr. Swajger "what was going on," to which Mr. Swajger responded that he had been contacted by DePuy attorneys the day before and that they were "'on him like crazy,'" "putting 'big time pressure on' on him," and "'peppering him.'" (*Id.* ¶¶ 2, 4.) Dr. Shein stated that Mr. Swajger reported that the "discussion made him anxious"; that "the 'business in Dallas was freaking [him] out'" and Dr. Shein's plan to go there was "driving him crazy"; and that "he was worried there could be ramifications for" Dr. Shein in connection with his trial testimony and that Mr. Swajger "'care[d] about'" Dr. Shein. (*Id.* ¶¶ 2-4.) Finally, Dr. Shein stated that Mr. Swajger added that he "knows as much about metal on metal as [Dr. Shein] do[es], and that [Mr. Swajger] would still want metal on metal because the wear characteristics are better than metal on poly, and he would want [Dr. Shein] to do his surgery." (*Id.* ¶ 5.)

The next morning, Mr. Lanier announced in the courtroom that the affidavit revealed some sort of witness-intimidation conspiracy straight out of the "movies." (10/16/17 Trial Tr. 6:22-8:17.) According to Mr. Lanier, there was "no way as a lawyer [he] can put this witness on the stand in light of that type of pressure and in light of . . . that type of . . . intimidation, and in light of that type of subtle psychological manipulation of his testimony, as I perceive it." (*Id.* 8:17-21.) Mr. Lanier further stated that he could not "understand how even Mr. Quattlebaum would be comfortable having a phone conversation with the sales rep of . . . this gentleman right before this gentleman takes the stand" and insinuated that it would be categorically inappropriate for a manufacturer defendant's lawyers to speak with the defendant's own employees in the course of a factual investigation prior to a deposition or trial. (*Id.* 8:24-9:4; *see also id.* 20:2-5

[1] Dr. Shein's affidavit was unsworn, but the Court subsequently had him agree to its contents under oath. (10/16/17 Trial Tr. 13:16-15:10.)

("We find out from Mr. Quattlebaum that they spoke with [the sales representative] before the deposition as well, which is stunning to me . . . .").)

At that point, the Court announced that the U.S. Attorney's Office and the FBI would be involved, and that "[t]his is a serious matter that requires serious . . . treatment and has serious ramifications," further advising defense counsel to retain their own criminal defense lawyers. (*Id.* 11:25-13:3.)

Mr. Quattlebaum subsequently clarified, however, that there was no wrongdoing by DePuy's attorneys because it is, of course, routine, legal and legitimate for a corporate defendant to have its attorneys speak with its employees who might have knowledge pertinent to an issue or a witness involved in ongoing litigation. (*See* 10/16/17 Trial Tr. 22:17-24:4.) Even Mr. Lanier ultimately agreed (in retreat from his initial position) that there is "[a]bsolutely not[hing]" wrong with a defense attorney "talking to the sales rep." (*Id.* 24:24-25:5.) And although Mr. Quattlebaum himself had not spoken with Mr. Swajger prior to the exchange with Dr. Shein that led to his affidavit, it was Mr. Quattlebaum's understanding that whoever had contacted Mr. Swajger had merely attempted to schedule the substantive discussion with him that occurred ***after*** his brief discussion with Dr. Shein (*id.* 5:2-5:19, 6:3-13), an understanding now confirmed by the movants' recitation of the events leading up to the conversation described in Dr. Shein's affidavit (*see* Movants' Mot. at 2-3). Mr. Quattlebaum further explained that Mr. Swajger was under express instructions not to talk to Dr. Shein about these cases. (10/16/17 Trial Tr. 5:20-22.)

In addition, the Court's subsequent examination of Dr. Shein foreclosed any suggestion that the incident will have any effect on his trial testimony. Dr. Shein testified that his conversation with the sales representative, whom he sees twice a week during surgeries, lasted

approximately "[a] minute" or a "minute and a half." (10/16/17 Trial Tr. 169:22-23 and 179:3.) Dr. Shein also made it clear that he "didn't think it was that big a deal"; "thought it was nothing"; and "didn't think that this was something." (*Id.* 177:23, 185:1-5.) Similarly, when asked whether he thought it was unusual for Mr. Swajger to bring up metal-on-metal implants, Dr. Shein noted that "he said it to me before . . . so I really didn't take much, you know, as if this is really weird for him to say that, you know, trying to be as objective of the whole scenario as I can." (*Id.* 182:6-14.)

Dr. Shein also clarified that he had only "mentioned [the conversation] to Mr. Lanier last night" "in passing," in an effort to "be transparent and divulge" what he had witnessed. (*Id.* 177:24-25, 185:1-5.) And while Dr. Shein expressed concern for Mr. Swajger, as his friend (*id.* 185:24-186:7), he was clear that the exchange had no effect on his comfort with testifying. ***To the contrary, when the Court expressly asked him whether it "made [him] uncomfortable about coming," Dr. Shein was emphatic: "No. No. No."*** (*Id.* 185:22-23.) Further, Dr. Shein testified that he had told Mr. Swajger in connection with his upcoming testimony that he should not "worry about it" and that he was "going to speak the truth what I know and my involvement with these hips and the outcomes of these hips and he shouldn't worry about it, there's nothing to be concerned about." (*Id.* 175:6-11.)

Subsequently, the Special Master ordered counsel for the defendants, for attorneys Jessica L. Brennan and Michael C. Zogby and for Mr. Swajger to certify that a thirty-day document hold had been instituted on communications relating to Mr. Swajger and to Dr. Shein in connection with his testimony. The Court later ordered the defendants, attorneys Jessica L. Brennan and Michael C. Zogby and Mr. Swajger to produce these communications to the Court. Defendants produced their responsive documents to the Court *in camera* on October 30, 2017, in

accordance with the Court's order. Defendants anticipate that a review of these documents will further demonstrate that the allegations are unwarranted.

ARGUMENT

In light of the referral to the U.S. Attorney's Office, and the evidence obtained to date, defendants submit that there is no need for further inquiry in connection with the civil proceedings at this time. Nonetheless, in the event further inquiries are made in the form of examining witnesses such as the movants or others, those inquiries should be made by the Court in a balanced manner – rather than depositions conducted by plaintiffs' counsel – given the nature of the allegations and plaintiffs' counsel's demonstrated intent to turn this issue into an inflammatory and prejudicial sideshow.

First, no further inquiry is required by the Court, particularly while the U.S. Attorney's Office is looking at the matter. Dr. Shein's affidavit reveals only that Mr. Swajger had unelaborated concerns about Dr. Shein's testimony. And Dr. Shein's ***own*** judgment about his interaction with Mr. Swajger was that he "didn't think it was that big a deal"; "thought it was nothing"; and "didn't think that this was something." (10/16/17 Trial Tr. 177:23, 185:1-5.) Mr. Lanier, however, extrapolated that some conspiracy to intimidate witnesses was afoot. (*Id.* 177:23-178:1 ("I in passing just mentioned it to Mr. Lanier last night, in having a chat to Mr. Lanier about today, and then this all blew up.").) This extrapolation was unjustified and unreasonable, and does not suggest that any witness tampering occurred. *Cf., e.g.*, *Walker v. City of Renton*, No. C11-2114 RAJ, 2013 WL 12121084, at *4 (W.D. Wash. July 31, 2013) (concluding that a text message sent by the plaintiff to a witness that he was "calling off the case against the police" so that she did not have to testify did not "provide[] the court with actual evidence of witness tampering" and noting that the court could not simply "speculate as to [the party's] intent" in sending a text message).

In addition, defendants' counsel's calls with Mr. Swajger on October 12 and 13, before his exchange with Dr. Shein later on October 13, were ***scheduling calls only*** (one was a voicemail and the other calls lasted 4 minutes and 28 seconds and 1 minute and 20 seconds); counsel "did not tell Mr. Swajger to do anything or to communicate with Dr. Shein." (Movants' Mot. at 2-3.) Indeed, Dr. Shein testified that he was uncomfortable for his friend, Mr. Swajger, because "[m]aybe he was told not to talk to me, and he did talk to me." (10/16/17 Trial Tr. 186:2-6.) In short, there is ***no*** evidence that defense counsel suggested in any way that Mr. Swajger engage in any alleged witness tampering. For this reason, too, there is no need to conduct any further inquiry in connection with this trial. *Cf., e.g.*, *United States v. Westmoreland*, 312 F.3d 302, 311 (7th Cir. 2002) (concluding that a letter should not have been admitted as evidence of obstruction of justice where there was no proof that the witness against whom it was offered actually authored or was aware of the letter).

Dr. Shein has also unequivocally testified that the 90-second (or less) exchange with Mr. Swajger would have ***no*** effect on his testimony. (*See* 10/16/17 Trial Tr. 185:22-23 ("It made you uncomfortable about coming [to testify]? [A.] No. No. No."); *see also id.* 175:6-11 (recalling that he had told Mr. Swajger not to "worry about it" and that he was "going to speak the truth what I know and my involvement with these hips and the outcomes of these hips and he shouldn't worry about it, there's nothing to be concerned about").) Courts have made clear that allegations of witness tampering are not relevant where they had no effect on the target witness. *See, e.g.*, *Kay v. Sunbeam Prods., Inc.*, No. 2:09cv-4065-NKL, 2009 WL 1664624, at *2 (W.D. Mo. June 15, 2009) (striking allegations of witness tampering in product liability case because the plaintiff "d[id] not demonstrate how such a [witness tampering] conclusion would have any bearing on the case at hand"); *Shannon v. Koehler*, No. C 08-4059-MWB, 2011 WL 10483366,

at *6-7 (N.D. Iowa Oct. 19, 2011) (concluding that "the probative value of [the witness]'s testimony regarding [plaintiff]'s 'tampering' [was] ambiguous at best," because "[the witness] himself stated that he did not take [plaintiff] seriously"). There is simply no reason to divert the parties' or the Court's time – in the middle of a long and complicated trial – to pursue further inquiry into the details of alleged witness tampering where the undisputed evidence from the witness himself is that the events would have no effect on his testimony. After all, any wrongdoing that might have occurred (and none did) can be addressed through the criminal investigation requested by the Court.

Moreover, Assistant United States Attorney Marcus Busch has already interviewed Dr. Shein regarding the statements made in the affidavit he submitted to the Court. In addition, Ms. Brennan has contacted Mr. Busch and has voluntarily offered to provide him with an interview related to these matters. In fact, Ms. Brennan has asked that such an interview take place as soon as possible so that it can be determined that criminal proceedings are entirely unwarranted. (Movants' Mot. at 3.) The Court should not move forward in examining these same allegations in connection with the ongoing civil trial of plaintiffs' personal injury claims until the threat of criminal action, however remote, has been formally resolved. *See In re Grand Jury Subpoena*, 866 F.3d 231, 234 (5th Cir. 2017) ("We have previously recognized that due to the significant public interest in law enforcement, criminal prosecutions often take priority over civil actions."); *see also Gemini Ins. Co. v. Usplabs, LLC*, No. 3:15-CV-3293-K, 2016 WL 6497431, at *1 (N.D. Tex. Mar. 23, 2016) (Kinkeade, J.) (staying civil case pending resolution of criminal case). Such an approach would ensure that the integrity of the criminal investigation is maintained and the rights of potential targets are not unfairly compromised.

Second, to the extent any further inquiry into the discussion between Dr. Shein and Mr. Swajger proceeds in connection with this trial (or thereafter), defendants respectfully submit that the issue at hand – whether someone has interfered with the workings of the justice system – is entirely divorced from the merits of plaintiffs' cases and thus a poor candidate for the tools of adversarial litigation like depositions. Moreover, Mr. Lanier, and potentially other members of his team, are themselves key witnesses with respect to any discussion that took place with Dr. Shein leading up to the drafting and filing of his affidavit, and any balanced inquiry would need to examine that interaction as well.[2] Accordingly, the Court should conduct the inquiry itself, by examining witnesses in the same fashion employed to examine Dr. Shein.[3] In addition, as part of its examination, the Court should also ask appropriate follow-up questions that are submitted by either side's counsel.

Deviating from the Court's initial approach of questioning the witnesses – and permitting plaintiffs' counsel to conduct depositions instead – would only compound the one-sided nature of the inquiry conducted to date. This is especially so because some of the potential witnesses are lawyers in these cases, requiring very careful questioning with respect to matters that may impinge on the attorney-client privilege. And the prospect for abuse is substantial in light of Mr. Lanier's already-expressed and overblown views of the facts.

Finally, if the Court determines that further inquiry is required, it should question plaintiffs' witnesses as well, including relevant plaintiffs' counsel who first brought this issue to the attention of the Court. Such questioning should address plaintiffs' counsel's interactions

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[2] Importantly, in light of the ongoing criminal investigation, one potential government witness in a criminal investigation, i.e., Mr. Lanier, should not be deposing other potential government witnesses in the same investigation, i.e., Ms. Brennan, Mr. Zogby or Mr. Swajger.

[3] To the extent Mr. Swajger's examination is scheduled to take place in New Jersey, the Court could conduct the examination remotely, or it could authorize the Special Master to conduct the questioning.

with Dr. Shein surrounding the affidavit; his willingness to come voluntarily to testify in Dallas; the consistency/inconsistency of any statements made by Dr. Shein in the meeting with plaintiffs' counsel on October 15 compared to prior statements made to plaintiffs' counsel; and plaintiffs' counsel's decision, communicated to defense counsel on October 22, not to call Dr. Shein as a live witness.[4]

For all of these reasons, if the Court believes that further inquiry is required, it should conduct that inquiry itself, at the appropriate time, in the balanced manner discussed above, in court and outside the presence of the jury.

CONCLUSION

For the foregoing reasons, the Court should adopt the protocol set forth above regarding any further inquiry into the allegations in Dr. Shein's affidavit. Specifically, the Court should: (1) allow the U.S. Attorney's Office to complete its investigation before any further inquiry is undertaken in connection with the pending trial; (2) require plaintiffs to produce relevant documents to the Court and a privilege log to defendants; and (3) undertake any further inquiry through questioning by the Court itself, including questioning of relevant plaintiffs' witnesses, in the same fashion as the examination of Dr. Shein, and with the Court asking appropriate questions that are submitted by either side's counsel.

[4] Defendants further note that they have requested that the Court order plaintiffs' counsel to preserve "any communications in any format, including but not limited to emails, texts and phone messages, between any attorney or representative for the plaintiffs in the *Alicea* cases and Dr. Shein, from the date that plaintiffs' counsel first contacted Dr. Shein about appearing live to testify at trial in the *Alicea* cases through the end of the day on October 16," in order to preserve potentially exculpatory evidence. (*See* Email from R. Roper to Special Master Stanton, Oct. 20, 2017 (attached as Ex. 1) (Appendix p. 1).) To defendants' knowledge, no such order has been entered. Nor has the Court ordered plaintiffs to produce for in camera review documents and a privilege log related to their interactions with Dr. Shein in connection with his testimony and his affidavit, despite making such a request of defendants. Defendants again request that a preservation order be issued and further request that plaintiffs be ordered to produce relevant documents to the Court and prepare a privilege log like the one prepared by defendants.

Dated: October 30, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 30, 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/ Stephen J. Harburg

Counsel for Defendants

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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APPENDIX TO DEFENDANTS' RESPONSE TO THE MOTION FILED BY JESSICA BRENNAN AND MICHAEL ZOGBY REQUESTING LOGISTICS FOR INQUIRY RELATED TO DR. DAVID SHEIN

1. Email from R. Roper to Special Master Stanton, Oct. 20, 2017

EXHIBIT 1

From: Roper, Richard [mailto:Richard.Roper@tklaw.com]
Sent: Friday, October 20, 2017 12:07 PM
To: James M. Stanton
Cc: Bill Mateja; wml@lanierlawfirm.com; Jayne Conroy; Richard J. Arsenault; Harburg, Stephen J (WAS); Jason Hoggan; mrfeinsteinesq@aol.com; Hunter, Renee
Subject: [Ext] RE: Availability of Jessica Brennan

Judge Stanton:

We are working on our certification and further response.

We would like to follow up on our call earlier this week. As we noted on the call, we want to formally request that the Court order plaintiffs' counsel take all reasonable steps to preserve any communications in any format, including but not limited to emails, texts and phone messages, between any attorney or representative for the plaintiffs in the *Alicea* cases and Dr. Shein, from the date that plaintiffs' counsel first contacted Dr. Shein about appearing live to testify at trial in the Alicea cases through the end of the day on October 16. I would also respectfully request that plaintiffs' counsel preserve any other relevant notes or documents, including but not limited drafts of the affidavit signed by Dr. Shein. This is consistent with the Court's instruction to our clients, and will ensure the preservation of potentially important exculpatory evidence.

Respectfully,

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This message is confidential and may be attorney-client privileged. If received in error, please do not read. Instead reply to me that you have received it in error and then delete the message. Thank you.