UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: ETHICON PHYSIOMESH FLEXIBLE COMPOSITE HERNIA MESH PRODUCTS LIABILITY LITIGATION	MDL DOCKET NO. 2782 ALL CASES CIVIL ACTION NO. 1:17-MD-02782-RWS

DEFENDANTS' MOTION AND BRIEF IN SUPPORT OF A PROTECTIVE ORDER REGARDING CONTACTS WITH TREATING PHYSICIANS

Treating physicians will be critical fact witnesses in these cases, and in some instances their testimony may even be dispositive of claims. Plaintiffs' counsel seek unlimited access to treating physicians, but Defendants understand that Plaintiffs seek to deny defense counsel from having any contact with those same witnesses until they are deposed. Stated more simply, Plaintiffs want no limitations on their end, and they will not agree to any access on the part of Defendants.

Plaintiffs' proposed approach is not only unfair, but it is contrary to the law in many jurisdictions. There is obvious inequity in allowing only *one* side of the litigation unfettered *ex parte* contact with physicians prior to their depositions,

with free reign to show them internal corporate documents they have never seen before, discuss medical literature the physicians did not rely on in their treatment, and present litigation theories—all in the hope that this one-sided view of the evidence will cause the physician to testify in a manner that is favorable to their clients.

To prevent this inequity, the parties' *ex parte* communications with physicians should be expressly limited to the physicians' treatment of the Plaintiffs. This ruling would prohibit parties from speaking about other matters, including, but not limited to, either side's legal theories, medical literature not previously reviewed, or documents produced in the litigation.[1]

In the interest of uniformity and fairness, this ruling should apply equally to all parties. This approach is a reasonable compromise that promotes fairness and provides clear guidance that may be followed by all parties. It is also consistent with the approaches of other MDL courts.

ARGUMENT

I. Treating Physicians Are Uniquely Important Witnesses in Medical Device Product Liability Litigation.

[1] In separate filings, the parties will brief what limitations, if any, may be imposed on the parties in recruiting and retaining potential expert witnesses.

The purpose of any coordinated MDL proceeding is to "'to promote [the] just and efficient conduct' of actions involving common questions of fact." *In re Zyprexa Prods. Liab. Litig.*, 594 F.3d 113, 128 (2d Cir. 2010) (quoting 28 U.S.C. § 1407). Although each party is generally permitted to engage in *ex parte* interviews with any willing non-party witness, interviews of treating physician witnesses present unique issues and the potential for abuse.

Under the "learned intermediary" doctrine, many jurisdictions require the plaintiff to show that "but for the alleged inadequate warning….[the] physician would not have prescribed…." *Porter v. Eli Lilly & Co.*, 291 F. App'x 963, 964 (11th Cir. 2008). As noted by the court presiding over New Jersey's consolidated pelvic mesh proceedings:

> Treating physicians are a unique type of witness. They are fact witnesses who can describe the basic facts such as medical history symptoms, the type of treatment given and the patient's response, but they also give expert testimony even when the treating doctors are not retained as experts. Physicians are frequently allowed to give opinion testimony even when not retained as experts. For example, by stating what their diagnosis is they are stating a fact, but also giving a medical opinion. When asked, they frequently are allowed under the Rules of Evidence to give opinions on causation. . . . In a product liability case involving the use of a drug or a medical device, the questioning about the doctors knowledge and use of the product in question is much more complicated than in most personal injury cases.

In re Pelvic Mesh/Gynecare Litig., No. ATL-L-6341-10, slip op. at 4-5 (N.J. Super. Ct. Dec. 3, 2013) (attached hereto as Ex. A).

Given the central role of the treating physicians' testimony, Plaintiffs' proposal to have exclusive unfettered access to physicians prior to their depositions should be rejected. Instead, Defendants request that the Court ensure a level playing field.

II. Defendants' Proposal is Consistent With What Other Courts Have Adopted.

The primary reason courts have permitted plaintiffs *ex parte* communications with physicians is to preserve the doctor-patient relationship. It is not meant to give plaintiffs a "leg up" in litigation. For this reason, in recent years, numerous courts have limited plaintiffs' *ex parte* discussions with physicians to the care and treatment of the plaintiff—not litigation theories or internal company documents.

For example, in *In re: Mirena IUD Prods. Liab. Litig.*, 13-MC-2434 (CS), 2014 WL 11149641 (S.D.N.Y. June 16, 2014), the district court ruled that interviews of treating physicians by plaintiffs' counsel should be limited to "the particular Plaintiff's medical conditions that are at issue in this litigation, including the physicians' records, course of treatment, product warnings and related matters." *Id.* at *1. The court found that "Plaintiffs' counsel are prohibited from

engaging in ex parte discussions with Plaintiffs' Providers concerning liability issues or theories and Defendants' research documents or related materials."

This approach in limiting the scope of *ex parte* interviews "to the particular plaintiff's medical condition at issue in the current litigation" was even conceded as "appropriate" by the plaintiffs in *In re NuvaRing Prods. Liab. Litig.*, 4:08-MD-1964 RWS, 2009 WL 775442, at *2 (E.D. Mo. Mar. 20, 2009). *See also In re Pelvic Mesh/Gynecare Litig.*, No. ATL-L-6341-10, slip op. at 4-5 (attached hereto as Ex. A) (limiting discussions to patient treatment and the doctor's understanding of and about the products used on the patient at the time used and prognosis/ diagnosis/causation); *In re Ortho Evra Products Liab. Litig.*, 1:06-40000, 2010 WL 320064, at *2 (N.D. Ohio Jan. 20, 2010) ("Plaintiffs' counsel may meet ex parte to discuss the physicians' records, course of treatment and related matters, but not as to liability issues or theories, product warnings, Defendant research documents or related materials"); *In re Chantix (Varenicline) Products Liab. Litig.*, 2:09-CV-2039-IPJ, 2011 WL 9995561, at *4 (N.D. Ala. June 30, 2011) ("limited to the individual care of the individual plaintiffs, such as the plaintiffs' treatment, medical records and conversations with their health care providers. Plaintiffs' counsel shall not discuss defendant's internal documents with plaintiffs' health care providers outside of a deposition or other on the record setting"); *In re: Actos*

Product Liability Cases, 2015 WL 1387938, at *2 (Cal. Super. Ct. Mar. 20, 2015) (limiting *ex parte* contacts "to a discussion of the physicians' records, course of treatment and related issues such as diagnosis and prognosis; and . . . barring Plaintiffs' counsel from discussing liability issues or theories, product warnings, Defendants' research documents, medical literature, or related materials with, or showing or providing any such documents to, treating physicians before the physicians' depositions").

Other courts have taken an even more restrictive approach than that proposed by Defendants. For instance, in *Gaus v. Novartis Pharm. Corp.*, No. MID-L-7014-07-MT, slip op. (N.J. Super. Ct. Oct. 29, 2009) (attached hereto as Ex. B), the Court precluded any of the parties from participating in *ex parte* interviews. *See also Kilgore v. Synthes USA LLC*, No. 1:12-cv-00161-JRH-BKE, 2013 WL 12180604, at *1 (S.D. Ga. Aug. 15, 2013) (ordering that neither party may conduct *ex parte* interviews of treating physicians without first providing the opposing party advance notice and an opportunity to be present); *In re Propecia (Finasteride) Prod. Liab. Litig.*, No. 12-MD-2331, slip op. at (E.D.N.Y. July 22, 2015) (attached hereto as Ex. C) (holding that, absent expert report, Plaintiffs were limited to obtaining testimony "concerning the physicians' treatment records and

whatever information and knowledge they had about Propecia, including its risks and benefits, at the time they were prescribing it to the plaintiffs").[2]

Consistent with these authorities, the Court should prohibit Plaintiffs from discussing anything beyond the physician's care and treatment of that particular Plaintiff in *ex parte* meetings.

III. Defendants' Proposed Limitations Would Apply Equally to Defendants in the Numerous Jurisdictions Where They Are Entitled to *Ex Parte* with Physicians.

Under the law of many (if not most) jurisdictions, Defendants are permitted to have *ex parte* contact with physicians. *See, e.g., Zaden v. Elkus*, 881 So.2d 993, 1012-13 (Ala. 2003); *Samms v. District Ct.*, 908 P.2d 520, 526 (Colo. 1995); *Baker v. Wellstar Health Systems, Inc.*, 288 Ga. 336 (2010); *Roberts v. Estep*, 845 S.W.2d 544, 547 (Ky. 1993); *Domako v. Rowe*, 475 N.W.2d 30, 36 (Mich. 1991); *Stempler v. Speidell*, 495 A.2d 857, 864-65 (N.J. 1985); *Arons v. Jutkowitz*, 880 N.E.2d 831, 837 (N.Y. 2007); Tex. Civ. Prac. & Rem. C. § 74.052. These states either do not

[2] Defendants acknowledge that there is a split of authority and that other courts have allowed plaintiffs to have unfettered access to treating physicians provided that the plaintiffs notify the defendants of what was shown to the physicians. *See, e.g, In re: Xarelto (Rivaroxaban) Prods. Liab. Litig.*, 2016 WL 915288, at *4-6 (E.D. La. Mar. 9, 2016).

recognize any physician-patient privilege or hold that a plaintiff waives such privilege by placing his or her medical condition at issue in a lawsuit.[3]

In those jurisdictions, Defendants too would be restricted to discussing the physician's care and treatment of the Plaintiff in *ex parte* meetings, not litigation theories or internal company documents. This represents a reasonable compromise on the part of Defendants in order to ensure uniformity and fairness in this MDL.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant its motion for a protective order as set forth herein.

Respectfully submitted,

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[3] Defendants note that even when states impose certain limitations on Defendants' *ex parte* contacts, those limitations would not necessarily prohibit *all* of Defendants' *ex parte* contacts, but rather only those violating applicable state privilege law or HIPAA.

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FONT CERTIFICATION

Pursuant to Local Rule 7.1D, I hereby certify that the foregoing document was prepared using Times New Roman 14 point type as provided in Local Rule 5.1.

s/ William M. Gage
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CERTIFICATE OF SERVICE

I certify that on this day, I electronically filed this document with the clerk of the court using the CM/ECF system, which will send notification of this filing to CM/ECF participants registered to receive service in this MDL.

/s/ William M. Gage
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