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' RESPONSE TO PLAINTIFFS' MOTION TO PRECLUDE DEFENDANTS' *EX PARTE* COMMUNICATIONS WITH PLAINTIFFS' TREATING PHYSICIANS FOR RETAINING EXPERT WITNESSES

Plaintiffs' motion (Doc. 271) proposes an extreme position which is draconian and represents the minority approach among courts that have considered the issue: altogether prohibiting Defendants from retaining any treating physicians as expert witnesses in this litigation. Accepting Plaintiffs' proposal would unduly constrain Defendants' ability to retain qualified experts and would result in a denial of both Defendants' due process right to present their defense, as well as physicians' own First Amendment rights.

Defendants propose a more reasonable approach—one adopted by the majority of courts to have considered this issue in coordinated litigation—which permits Defendants to communicate with treating physicians for purposes of expert retention with the following conditions:

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1. Defendants will not designate a treating physician as a retained expert in a case involving a Plaintiff who is that physician's current or former patient.[1]

2. Defendants will not discuss with a retained expert his or her care and treatment of a specific Plaintiff, except during a deposition or at trial.

3. Plaintiffs' counsel will not refer a Plaintiff for treatment to a physician who has been retained as an expert by the defense for the purpose of creating a conflict to prevent the expert from testifying as a retained expert in that case.

These provisions strike an appropriate balance: protecting the doctor-patient relationship while safeguarding Defendants' and physicians' constitutional rights.

ARGUMENT

I. The Majority of Courts Permit Defendants to Retain Treating Physicians As Expert Witnesses Under Controlled Circumstances.

Contrary to the position advocated by Plaintiffs, the majority of courts addressing this specific issue have landed soundly in favor of precisely what Defendants propose here: contacts conditioned on reasonable restrictions. Indeed, as one MDL court recently noted, "**In the most recent MDL cases discussing this issue, there is a consensus permitting these contacts**." *In re: Benicar (Olmesartan) Prods. Liab. Litig.*, 15-2606 (RBK/JS), 2016 WL 1370998, at *6

[1] This would not prevent either party from designating the physician as a *non-retained* expert, which may be required under the Federal Rules of Civil Procedure if the physician offers opinions at his or her deposition that are set forth in the medical records or formed as part of the treatment and care of the plaintiff.

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(D.N.J. Apr. 6, 2016) (emphasis added; citing cases and permitting *ex parte* contact with treating physicians for purposes of expert retention, with certain restrictions).

Plaintiffs contend that MDL courts have "noted the dangers" in defendants' *ex parte* contacts with physicians for expert retention. (Doc. 271, p. 21). But Plaintiffs fail to point out that even while "noting the dangers," those same courts found that the *ex parte* contacts *should be permitted*. In fact, in the decisions cited by Plaintiffs, the *courts entered orders similar to what Defendants propose here*.

For example, Plaintiffs cite *In re Seroquel Prods. Liab. Litig.*, 2008 WL 821889 (M.D. Fla. Mar. 21, 2008), even though in that decision the district court explicitly *rejected* Plaintiffs' proposed approach. Although the court acknowledged the "potential for misuse" of *ex parte* contacts, the court ultimately agreed that the defendant was entitled to contact treating physicians for the purpose of expert witness retention, so long as certain safeguards were in place. *Id.* at *3. That court imposed restrictions very similar to what Defendants propose here. *Id.*

Likewise, Plaintiffs rely on *Xarelto*, but that decision also favors Defendants' position. In that case, Judge Eldon Fallon rejected the restrictions requested by the plaintiffs because of the "**significance of the at-issue due process interests in accessibility and fairness.**" (Doc. 271, Ex. 3, p. 17) (emphasis added). The court found that "[d]isallowing testimony from the many

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competent, articulate physicians who have prescribed Xarelto would impose a significant burden on the Defendants. The Court, and ultimately the jury, would also be deprived of physician-experts with firsthand clinical experience with the drugs in question." *Id.* Given these concerns, the *Xarelto* court entered an order similar to that in *Seroquel* (and similar to that proposed by Defendants here) permitting *ex parte* contacts with treating physicians for purposes of expert retention, with certain safeguards to protect plaintiffs' confidential information. *Id.* at 18-19.

Several others courts overseeing consolidated litigations have entered orders consistent with Defendants' proposal here.

The decision in *In re: Zimmer NexGen Knee Implant Prods. Liab. Litig.*, 890 F. Supp. 2d 896 (N.D. Ill. 2012), is particularly instructive. There, the court rejected the reasoning of the *Kugel* court (cited by Plaintiffs here and discussed below) as "the only state court decision prohibiting such contact in a consolidated case," and rejected each of the arguments advanced by Plaintiffs here. *Id.* at 911. The court found that the plaintiffs' proposal to ban such communications would "would exclude some of the most qualified experts" because "the chance that a prospective expert witness is treating or has treated a Plaintiff in this case increases with the level of the physician's experience." *Id.* at 910. The court found no valid

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basis for plaintiffs' claims that these contacts were improper, entering an order permitting *ex parte* contacts with physicians for expert retention purposes, with some restrictions. *Id.* at 911-12.

Similar orders adopting positions aligned with Defendants' request here were also entered in *In re Testosterone Replacement Therapy Prods. Liab. Litig.*, 167 F. Supp. 3d 936 (N.D. Ill. Mar. 7, 2016); *In re: Prempro Prods. Liab. Litig.*, No. 1:11-cv-05468, Doc. 511 (E.D. Ark. June 4, 2012), Ex. A; *In re Pelvic Mesh/Gynecare Litig.*, 426 N.J.Super. 167, 195, 43 A.3d 1211, 1227 (N.J. Super. Ct. App. Div. 2012); and *In re Minnesota Penile Prosthesis Litig.*, No. PI 97-1183 (Minn. 4th Jud. Dist. May 8, 1998), Exs. B, C. Consistent with the majority view, each of these courts rejected restrictions of the sort advocated by Plaintiffs here.

II. Plaintiffs' Approach Is a Disfavored, Minority Position.

Despite the body of case law supporting Defendants' position, Plaintiffs' Motion boldly claims that "[*e*]*x parte* communications between defense counsel and Plaintiffs' treating physicians are generally prohibited in MDL proceedings." (Doc. 271, p. 15). As discussed above, the weight of authority is contrary to Plaintiffs' position. What is more, the *only* decisions cited by Plaintiffs in support of their position are two minority decisions from the state and federal Rhode Island courts handling the *Kugel* litigation.

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The *Kugel* decisions offer no support to Plaintiffs' position. Not only have federal courts rejected their reasoning, but the *Kugel* cases were materially different factually. In the *Kugel* MDL, the MDL had already been pending for more than a year, Plaintiff Fact Sheets had been collected, and even after being ordered to identify any surgeons who were both treating physicians and experts, defendants could point to only one. Defendants here do not agree that they should be required to identify whom they are considering for experts or for what reasons, which is confidential attorney work-product as described in the *Zimmer* decision, but these facts are sufficient to distinguish the *Kugel* MDL decision from this case, which has only existed as an MDL for a few months. And in the *Kugel* state court litigation cited by Plaintiffs, the Court had already forbidden *ex parte* contact with treating physicians, but defendants nevertheless proceeded to contact potential experts who were treating physicians—without leave of court.

III. Plaintiffs' Proposed Approach Is Fundamentally Unfair, Unworkable, and Effectively Deprives Defendants of the Ability to Defend These Cases.

Not only is Plaintiffs' request unsupported by law; it is fundamentally unfair. If Plaintiffs' proposal were adopted, Plaintiffs would enjoy an essentially unlimited pool of potential experts, while Defendants' pool of potential experts would be substantially and arbitrarily reduced. The practical effect of Plaintiffs'

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proposal would be that the very physicians who regularly used Physiomesh are the ones most likely to fall under the prohibitions advocated by Plaintiffs.

Here, the MDL has only been in existence for a few months: As of November 7, 2017, the Court's website lists 204 cases pending in this MDL. Though the Court has approved a Short Form Complaint which requires the Plaintiff to identify the implanting surgeon, not all Plaintiffs have yet filed that pleading. *See* PPO-2. And because discovery obligations such as the Plaintiff Fact Sheet have not yet been proposed or approved by the Court, other treating physicians, such as explanting physicians or specialists who may have treated a Plaintiff for an alleged complication, have not been identified. These physicians would also be included in Plaintiffs' proposed prohibition.

Given the early phase of this MDL, the current number of identified physicians is likely to represent just a small fraction of what the future number of identified physicians will likely be. As more Short Form Complaints are filed, and as the Court orders additional case-specific discovery such as Plaintiff Fact Sheets, the number of known physicians will correspondingly grow.

In 2017, the rate of filings has steadily increased throughout the year, with an average of at least 31 new cases per month in the last two months alone. Assuming for purposes of argument only that this trend continued into the

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next year, Plaintiffs' prohibition on physician contacts could effectively result in exclusion of as many as 500 implanting physicians as potential retained expert witnesses, plus any additional treating physicians. Given that the Americas Hernia Society lists only 769 hernia surgeons in the United States in its public directory,[2] Plaintiffs' requested relief could foreclose Defendants' ability to contact as many as two thirds of those potential expert witnesses. This is plainly unfair to Defendants.

Moreover, as a practical matter, the pool of potential experts will be a "moving target." Defendants could be well into discussions with a potential expert or could already be working with an expert, and then a case is filed naming that physician as a treating physician. In that situation, Plaintiff's proposal would seem to halt any additional communications with that physician. Plaintiffs' proposal, therefore, is not just unfair; it is unworkable. Judge Fallon found this a "persuasive" consideration in *Xarelto*, where more experts would become disqualified as more claims are filed. 2016 WL 915288, at *8.[3]

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[2] *See* https://americanherniasociety.org/ (last accessed Nov. 7, 2017)

[3] Defendants, in fact, began retaining experts in these cases well before Plaintiffs moved for the formation of an MDL. Defendants explicitly instruct their experts not to divulge any protected patient information, and these experts are also bound by their professional ethical obligations. In addition, Defendants are defending cases involving mesh products besides Physiomesh (the only product in issue in this MDL). Experts contacted in those cases may potentially be treating

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Defendants have a constitutional right to present the jury with all material evidence pertinent to their defense. Due process prevents "denying potential litigants use of established adjudicatory procedures, when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed right[s]'." *Nat'l Union Fire Ins. Co. v. City Sav., F.S.B.*, 28 F.3d 376, 395 (3d Cir. 1994) (citation omitted). "A prohibition on . . . contacting and retaining physicians has the potential to deprive [Defendant] of a fair opportunity to present its defense." *In re Seroquel*, 2008 WL 821889, at *4.

Exclusion of treating physicians from consideration as experts would unfairly deprive Defendants of a fair opportunity to present their defense, especially given the vast number of physicians that are and will be associated with the cases in this MDL.

IV. Plaintiffs' Proposal Impedes Physicians' First Amendment Rights.

Finally, Plaintiffs' proposal also impinges on physicians' individual constitutional rights. The physicians, themselves, have a First Amendment right to hold and express opinions and to testify truthfully about non-privileged matters at

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physicians for Plaintiffs or future Plaintiffs in this MDL. Thus, outside of this MDL, *ex parte* contacts with these physicians may occur, and those discussions are likely to at least touch on Physiomesh in the course of discussing the risks and benefits of available surgical treatments.

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trial.[4] *See Smith v. Hightower*, 693 F.2d 359, 368 (5th Cir. 1982) ("[T]he first amendment protects the right to testify truthfully at trial"); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Board*, 502 U.S. 105, 115 (1991).

As the court noted in *In re Pelvic Mesh/Gynecare Litig.*, "Our system of civil justice does not bar a physician from expressing a position in litigation of one plaintiff that is contrary to the 'litigation interests' of a current or past patient in another case." 426 N.J. Super. 167, 179-80. This additional consideration weighs strongly against Plaintiffs' proposal.

CONCLUSION

For all these reasons, Plaintiffs' motion should be denied, and the Court should enter an appropriate Order permitting Defendants to have *ex parte* contact with treating physicians for the purpose of retaining them as experts, with the conditions outlined above.

[4] Plaintiffs have not yet made any argument that Defendants' proposal violates doctor-patient privilege or HIPAA. Nor could they, because "HIPAA regulates only information pertaining to the health condition or treatment of an individual, or the payment of health care services." *In re Am. Med. Sys., Inc. Pelvic Repair Sys. Prod. Liab. Litig.*, 946 F. Supp. 2d 512, 516 (S.D.W. Va. 2013) ("Given that AMS seeks only to meet with Dr. Moore regarding his consulting services for AMS, HIPAA is entirely irrelevant.").

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Respectfully submitted,

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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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