IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: DEPUY ORTHOPAEDICS, INC. PINNACLE HIP IMPLANT PRODUCTS LIABILITY LITIGATION	§ § § §	MDL Docket No. 3:11-MD-2244-K
This Order Relates to:	§	
Alicea – 3:15-cv-03489-K	§	
Barzel – 3:16-cv-01245-K	§	
Buonaiuto – 3:14-cv-02750-K	§	
Heroth – 3:12-cv-04647-K	§	
Kirschner – 3:16-cv-01526-K	§	
Miura – 3:13-cv-04119-K	§	
Riedhammer – 3:11-cv-02460-K	§	
Stevens – 3:14-cv-01776-K	§	
Stevens – 3:14-cv-02341-K	§	

ORDER DENYING DEFENDANTS' MOTION TO VACATE NOVEMBER 8, 2016 ORDER ON BELLWETHER TRIALS FOR LACK OF PERSONAL JURISDICTION AND MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

Before the Court are Defendants' Motion to Vacate November 8, 2016, Order on Bellwether Trials for Lack of Personal Jurisdiction (the "Motion to Vacate") [*Alicea*, 3:15-cv-03489-K, Doc. 8, *Barzel*, 3:16-cv-01245-K, Doc. 8, *Buonaiuto*, 3:14-cv-02750-K, Doc. 8, *Heroth*, 3:12-cv-04647-K, Doc. 6, *Kirschner*, 3:16-cv-01526-K, Doc. 5, *Miura*, 3:13-cv-04119-K, Doc. 10, *Riedhammer*, 3:11-cv-02460-K, Doc. 21, *Stevens*, 3:14-cv-01776-K, Doc. 7, *Stevens*, 3:14-cv-02341-K, Doc. 7] and Defendants' Motion to Dismiss for Lack of Personal Jurisdiction (the "Motion to Dismiss") (collectively, "Defendants' Motions") [*Alicea*, 3:15-cv-03489-K, Doc. 15, *Barzel*, 3:16-cv-01245-K,

Doc. 17, *Buonaiuto*, 3:14-cv-02750-K, Doc. 16, *Heroth*, 3:12-cv-04647-K, Doc. 13, *Kirschner*, 3:16-cv-01526-K, Doc. 12, *Miura*, 3:13-cv-04119-K, Doc. 19, *Riedhammer*, 3:11-cv-02460-K, Doc. 29, *Stevens*, 3:14-cv-01776-K, Doc. 14, *Stevens*, 3:14-cv-02341-K, Doc. 14]. Having considered Defendants' Motions, Plaintiffs' Responses, and Defendants' Replies, Defendants' Motions are **DENIED**.

I. BACKGROUND

Defendants' Motions relate to the cases selected and consolidated for the fourth bellwether trial in this multidistrict litigation ("MDL") involving the Pinnacle Acetabular Cup System hip implant (the "Pinnacle Device"). Since this MDL is now in its sixth year and certain historical facts are implicated by Defendants' Motions, a brief history of the MDL is necessary.

The lawsuits within this MDL relate to the design, development, manufacture, and distribution of the Pinnacle Device in the United States and are asserted against Depuy Orthopaedics, Inc., the manufacturer of the Pinnacle Device, and Depuy Products, Inc., as well as the "J&J Companies:" Johnson & Johnson, Johnson & Johnson Services, Inc., Johnson & Johnson International, and Depuy Synthes, Inc. The Pinnacle Device is used to replace diseased hip joints and was intended to provide pain-free natural motion over a longer period of time that other hip-replacement devices. Plaintiffs claim, however, that the Pinnacle Devices have not so functioned but have instead caused significant health problems in many implantees.

On May 23, 2011, the United States Judicial Panel on Multidistrict Litigation (the "JPML") ordered coordinated or consolidated pretrial proceedings in this Court of all actions involving the Pinnacle Device. *See* Transfer Order [No. 3:11-md-02244-K (Doc. No. 1)]. Pursuant to the JPML's order and 28 U.S.C. § 1407, thousands of cases filed in various federal district courts across the country have been transferred into this MDL. Many other cases, including eight of the ten cases selected for the fourth bellwether trial, were filed into the MDL pursuant to the Court's "direct file order," which the parties consented to and which permitted "any plaintiff whose case would be subject to transfer to MDL 2244 . . . to file his or her case directly in the MDL proceedings in the Northern District of Texas." *See* Mot. Seeking Entry of Proposed Case Mgmt. Order No. 1, Ex. A at ¶¶ 16, 18 [No. 3:11-md-2244-K (Doc. No. 8-1)]; Case Management Order #1 ("CMO #1") ¶ 13 [No. 3:11-md-2244-K (Doc. No. 20)]. The Pinnacle Device MDL—MDL No. 2244—now involves over 9,100 cases.

A. The Bellwether Trial Protocol

Bellwether trials allow juries to assess the parties' claims, enable the parties to assess the procedure for trying them, and illustrate how the parties could value the cases, with the hope that this "provide[s] a basis for enhancing prospects of settlement or for resolving common issues or claims." *See In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019 (5th Cir. 1997). On August 9, 2011, during the Court's initial status conference with the parties, the Court first endorsed the possibility of using

bellwether trials in this MDL. Tr. of Status Conference [No. 3:11-md-02244-K (Doc. No. 40)] at 33-34. On August 14, 2012, the Court entered Case Management Order No. 8 ("CMO #8"), which ordered the parties to "submit . . . a stipulated protocol for selection and conducting of bellwether trials in this MDL proceeding" and then "file their recommended selection of 4-6 cases to be included in an initial bellwether trial process." CMO #8 ¶¶ 5, 7 [3:11-md-02244-K (Doc. No. 190)]. In furtherance thereof, the parties worked with the Court and the Special Master to develop a bellwether trial protocol to be used to select and try bellwether cases.

On January 16, 2013, the Special Master submitted his report to the Court, which summarized the parties' working-proposal for selecting a pool of eight bellwether cases and ultimately trying four of them. Special Master's Report Relating to Bellwether Trial Selection Protocol ("Report #1") ¶¶ 2, 4 [3:11-md-02244-K (Doc. No. 247)]. The Report also noted that "Defendants' Lead Counsel have already agreed that they will not raise a venue objection (*i.e.*, a *Lexecon* objection) to any cases in the MDL proceeding being tried in the Northern District of Texas." Report #1 ¶ 1; *see Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) (holding that, as a default rule, 28 U.S.C. § 1407 requires an MDL court to remand a case to the court from which it was transferred after the completion of pretrial proceedings).

B. The Parties Unequivocally Waive Their Venue Objections.

On September 3, 2013, pursuant to the Special Master's direction, Plaintiffs and Defendants filed their proposals for selecting and trying bellwether cases. *See* Pls.' Steering Committee's Prelim. Mem. of Law Regarding Bellwether Trial Procedure and Selection [3:11-md-02244-K (Doc No. 338)]; Defs.' Position Paper Regarding the Bellwether Trial Selection Process [3:11-md-02244-K (Doc No. 339)]. Plaintiffs suggested consolidating multiple cases for each bellwether trial, whereas the Defendants recommended trying one case at a time. *See id.* Defendants objected to Plaintiffs' proposal because, among other reasons, they claimed the Northern District of Texas was not the proper venue to try some of the cases since they were subject to remand under 28 U.S.C. § 1407. *See* Def.'s Resp. to Pls.' Proposal for Bellwether Trial Selection Process at 3-4 (citing *Lexecon Inc. v*, 523 U.S. 26) [3:11-md-02244-K (Doc. No. 341)]. Although the Special Master's Report #1 clearly reflected Defendants' agreement not to raise any venue objections, Defendants claimed they had only "expressed [a] 'willingness to waive'" venue and were not willing to waive venue if the Court consolidated cases for trial. *See id.* at 4. During a status conference with the Court just four days later, however, lead counsel for Defendants withdrew Defendants' incongruous contention and made perfectly clear that Defendants waived all venue objections to trying any of the cases in the MDL in this Court:

> Your honor, I did want to note that with respect to a filing that we made with the [C]ourt on Friday with respect to

> one aspect of the bellwether selection process, I did – did want to note, Your Honor, that our position – we have waived the [*Lexecon*] restriction on these – these cases, consistent with the report that the [S]pecial [M]aster gave to the [C]ourt earlier. And I just wanted to make sure that we were clear on that on – on the record.

Tr. of Status Conference at 5 [3:11-md-02244-K (Doc. No. 344)]. Plaintiffs also clarified at the hearing that they, too, had waived all *Lexecon* challenges to trying any of the cases in this Court. *Id.* at 7.

In September and October 2014, pursuant to the parties' venue waivers, the Court held the first bellwether trial, involving a case transferred from the District of Montana and filed by Montana residents (the "*Paoli*" bellwether). Defendants obtained a take-nothing verdict. *See* Final J. [No. 3:12-cv-04975-K (Doc. 218)].

C. Neither Party Raises Venue Objections in the Second Bellwether Trial.

Following the *Paoli* bellwether trial, the parties and the Court worked to select the next set of bellwether cases for trial. On February 17, 2015, the Special Master filed another report, which again noted that "Defendants have agreed they will not raise a venue objection (*i.e.*, a *Lexecon* objection) to any cases in the MDL being tried in the Northern District of Texas." Special Master's Report Relating to Bellwether Trial Selection ("Report #2") at 1 [3:11-md-02244-K (Doc. No. 490)]. The Court ultimately selected five cases to be consolidated and tried as the second bellwether trial [*Aoki* – 3:13-cv-1071-K; *Christopher* – 3:14-cv-1994-K; *Greer* – 3:12-cv-1672-K; *Klusmann* – 3:11-cv-2800-K; *Peterson* – 3:11-cv-1941-K] (collectively, the "*Aoki*" bellwether). *See* Order on Bellwether Trials [3:11-md-02244-K (Doc. No. 491)]; Am.

Order on Bellwether Trials [3:11-md-02244-K (Doc. No. 536)]; Second Am. Order on Bellwether Trials [3:11-md-02244-K (Doc. No. 551)]; Order Consolidating Bellwether Cases for Trial [3:11-md-02244-K (Doc. No. 606)]. All five of these cases, involving Plaintiffs who resided in the Southern, Eastern, and Western Districts of Texas, were direct-filed into this MDL pursuant to CMO #1.

Although Defendants again filed numerous objections to consolidating cases for trial in this Court, Defendants did not assert any objection relating to venue. *See, e.g.*, Defs.' Reply Br. in Support of Mot. for Pretrial Hearing [*Aoki*, 3:13-cv-01071-K (Doc. No. 67)]; Defs.' Mot. for Order Denying Consolidated Trial of Bellwether Cases [*Aoki*, 3:13-cv-01071-K (Doc. No. 79)]. After denying Defendants' objections, the Court presided over the *Aoki* bellwether from January through March 2016. Plaintiffs obtained a $502 million verdict, which the Court reduced to approximately $150 million. Both parties are currently appealing the final judgments entered in the *Aoki* bellwether.

D. After Losing the Second Bellwether Trial, Defendants Attempt to Retroactively Limit Their Waiver of Their Venue Objections.

After the *Aoki* bellwether, Defendants moved the Court to stay additional bellwether trials until the Fifth Circuit resolved the parties' appeals relating to the *Aoki* bellwether. *See* Defs.' Mot. to Stay Additional Trials Pending Resolution of Appeal of Second Bellwether Trial Cases [3:11-md-02244-K (Doc. No. 657)]. In a footnote, Defendants claimed for the first time that they "never agreed to a blanket *Lexecon* waiver and do not waive their venue objections with respect to forthcoming

[bellwether] trials." *Id.* at 2 n.1. The Court rejected Defendants' new contention, noting that Defendants waived their potential venue objections to trying any cases in the MDL in this Court. *See* Order Denying Defs.' Mot. to Stay Additional Trials at 8-9 [3:11-md-02244-K (Doc. No. 665)]. The Court explained that Defendants prior statements and actions, including, particularly, proceeding with the *Aoki* bellwether trial, were inconsistent with their newly-asserted limitation of their venue waiver. *Id.*

On June 10, 2016, the Court selected five directly-filed cases involving California plaintiffs for the third bellwether trial [*Andrews* – 3:15-cv-03484-K; *Davis* – 3:15-cv-01767-K; *Metzler* – 3:12-cv-02066-K; *Rodriguez* – 3:13-cv-3938-K; *Standerfer* – 3:14-cv-01730-K; *Weiser* – 3:13-cv-03631-K] (collectively, the "*Andrews*" bellwether). Defendants moved to dismiss these cases based on a lack of personal jurisdiction and again asserted in a footnote that they had not globally waived their venue objections. *See, e.g.*, Defs.' Mot. to Dismiss for Lack of Personal Jurisdiction at 1-2 n.1 [*Andrews*, 3:15-cv-03484 (Doc. No. 20)]. For the first time, though, Defendants also asserted that their prior waiver was strictly a *Lexecon* waiver, *i.e.*, it only waived objections based on the mandatory remand provision in 28 U.S.C. § 1407 for cases transferred into the MDL but did not waive venue objections relating to cases that were directly filed into the MDL pursuant to CMO #1. *Id.* The Court denied Defendants' motion, holding that directly-filed cases are treated the same as cases transferred under § 1407 and finding that because Defendants would be subject to personal jurisdiction in California courts in those cases, they were subject to personal jurisdiction in this

Court as well. *See* Order Denying Defs.' Mot. to Dismiss for Lack of Personal Jurisdiction [*Andrews*, 3:15-cv-03484-K (Doc. 81)]. The Court conducted the *Andrews* bellwether trial from September through October 2016, and Plaintiffs obtained a $1.04 billion verdict, which the Court reduced pursuant to *State Farm Mutual Auto Insurance Co. v. Campbell*, 538 U.S. 408 (2003) before entering Final Judgment.

E. Defendants' Motions Again Assert that the Court Lacks Personal Jurisdiction Over Defendants in Bellwether Cases.

Following the conclusion of the *Andrews* bellwether, the Court selected ten cases involving New York plaintiffs to be prepared for the fourth bellwether trial. Order on Bellwether Trials [3:11-md-2244-K (Doc. 713)]. Eight of these cases [*Alicea* – 3:15-cv-03489-K; *Barzel* – 3:16-cv-01245-K; *Buonaiuto* – 3:14-cv-02750-K; *Heroth* – 3:12-cv-04647; *Kirschner* – 3:16-cv-01526-K; *Miura* – 3:13-cv-04119-K; *Riedhammer*-3:11-cv-02460-K; *Stevens* – 3:14-cv-01776-K; *Stevens* – 3:14-cv-02341-K] were directly filed in this Court pursuant to CMO #1. The other two cases [(*Riedhammer*-3:11-cv-02460-K; and *Cousin*-3:13-cv-00244-K)] were filed in the District of New Jersey and Western District of New York respectively and transferred to this Court pursuant to 28 U.S.C. § 1407. Subsequent to Defendants' Motions, Ms. Cousin dismissed her case.

As in the *Andrews* bellwether, Defendants have again moved to dismiss the bellwether cases for lack of personal jurisdiction, but this time, they have done so in two separate motions. As they had for the *Andrews* bellwether cases, Defendants filed a standard Motion to Dismiss for Lack of Personal Jurisdiction. Defendants also filed

their Motion to Vacate, arguing specifically that the Court does not have personal jurisdiction over Defendants in these cases for trial purposes, even if the Court had personal jurisdiction over them for purposes of pretrial proceedings.

The two motions generally assert the same grounds for dismissal. Specifically, Defendants' Motions contend that (1) Texas, and not New York (the state in which the *Alicea* Plaintiffs reside and Defendants' actions underlying Plaintiffs' suits occurred), is the relevant state for conducting the personal jurisdiction analysis; (2) the Court does not have general jurisdiction over any Defendant in Texas; (3) the Court does not have specific jurisdiction over any Defendant because none of the actions or events underlying Plaintiffs' claims occurred in Texas. Defendants further contend the Court lacks personal jurisdiction over the J&J Companies because these Defendants are only holding or parent companies that were not involved in the development or distribution of the Pinnacle Device, and therefore, any federal court would lack specific jurisdiction over them for purposes of these cases. Finally, Defendants assert that because they have not waived their venue objections to trying these cases in the Northern District of Texas, they have not waived personal jurisdiction. Because Defendants' Motions generally assert the same grounds for dismissal, the Court addresses them simultaneously.

II. LEGAL STANDARD

The Court addresses both of Defendants' Motions as it would a standard Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction. Plaintiffs bear the

burden of establishing a prima facie case of personal jurisdiction. *Quick Techs., Inc. v. Sage Grp. PLC*, 313 F.3d 338, 343 (5th Cir. 2002). "[T]he court must accept as true all uncontroverted allegations in the complaint and must resolve any factual disputes in favor of the plaintiff." *ITL Int'l, Inc. v. Constenla, S.A.*, 669 F.3d 493, 496 (5th Cir. 2012).

Whether a court has personal jurisdiction over a nonresident defendant depends on whether exercise of jurisdiction is consistent with due process and whether the relevant state's long-arm statute extends to the defendant. *Johnston v. Multidata Sys. Int'l Corp.*, 523 F.3d 602, 609 (5th Cir. 2008). The Due Process Clause permits the exercise of personal jurisdiction over a non-resident when (1) the defendant has established minimum contacts with the forum state, and (2) the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. *Kelly v. Syria Shell Petrol. Dev., B.V.*, 213 F.3d 841, 854 (5th Cir. 2000). "There are two types of 'minimum contacts': those that give rise to specific personal jurisdiction and those that give rise to general personal jurisdiction." *Johnston*, 523 F.3d at 609 (citation omitted). A court may exercise general jurisdiction when the defendant's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State." *Daimler AG v. Bauman*, 134 S.Ct. 746, 754 (2014) (citation omitted). A court may exercise specific jurisdiction when the litigation results from injuries that arise out of or relate to the defendant's activities in the forum state. *Id.* The defendant's contact with the forum state must

show that it "reasonably anticipates being haled into court" there. *Luv N' care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 470 (5th Cir. 2006).

In the MDL context, 28 U.S.C. § 1407 "authoriz[es] the federal courts to exercise nationwide personal jurisdiction" in order to conduct pretrial proceedings. *See Howard v. Sulzer Orthopedics, Inc.*, 382 F. App'x 436, 442 (6th Cir. 2010) (citation omitted). Thus, when a case is transferred pursuant to § 1407, the MDL court "has jurisdiction over nonresident defendants to the same extent that [the transferor] court would have such jurisdiction." *In re Norplant Contraceptive Prods. Liability Litig.*, 915 F. Supp. 845, 852 (E.D. Tex. 1996) (citation omitted); *see also In re Agent Orange Prod. Liability Litig. MDL No. 381*, 818 F.2d 145, 163 (2d Cir. 1987) (quoting *In re FMX Corp. Patent Litig.*, 422 F. Supp. 1163, 1165 (J.P.M.D.L. 1976)) ("Transfers under Section 1407 are simply not encumbered by considerations of in personam jurisdiction and venue."). Similarly, where a case was filed in an MDL court pursuant to a direct-file order, the MDL court has jurisdiction over nonresident defendants to the same extent that a court in the state in which the plaintiff was implanted with the Pinnacle Device would have jurisdiction. *See generally*, *In re Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and Pods. Liability Litig.*, No. 3:09-md-02100-DRH-PMF, 2011 WL 1375011, at *5-6 (S.D. Ill. Apr. 12, 2011).

Finally, the "requirement of personal jurisdiction is a waivable right," and "there are a variety of legal arrangements by which a litigant may give express or implied consent to the personal jurisdiction of the court." *PaineWebber Inc. v. Chase*

Manhattan Private Bank (Switzerland), 260 F.3d 453, 461 (5th Cir. 2001) (citation omitted); *see also* Fed. R. Civ. P. 12(h)(1).

III. ANALYSIS

This Order only pertains to the eight *Alicea* bellwether cases that were directly-filed pursuant to CMO #1. Since Defendants have generally moved to dismiss these cases for lack of personal jurisdiction and more specifically to dismiss the Court's order that they be tried in this Court, the Court separately analyzes its personal jurisdiction over Defendants for pretrial proceedings and for purposes of trial.

This Order does not address the two transferred cases selected for the fourth bellwether because one of them—*Cousins*—has been dismissed, and the other—*Riedhammer*—presents unique issues by virtue of it having been originally filed in New Jersey, which were not adequately briefed by the parties. Plaintiffs assert that because the *Riedhammer* case was filed in the District of New Jersey, "the personal jurisdiction analysis . . . would be different than such analysis for the nine other cases," and therefore it should not be tried with the remaining cases. Pls.' Resp. at 5-6. Since neither party addressed whether New Jersey courts would have personal jurisdiction over Defendants in the *Riedhammer* case, the Court instructs them to submit additional briefing on that issue as well as any other choice-of-law issues that may arise because the case was filed in New Jersey.

A. The Court Has Personal Jurisdiction Over Defendants For Pretrial Proceedings.

As a general rule, direct-file cases in an MDL are treated "as if they were transferred from a judicial district sitting in the state where the case originated," which is the state in which plaintiffs used the medical product at issue. *See, e.g.*, *In re Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and Pods. Liability Litig.*, 2011 WL 1375011 at *5-6. Although Defendants argue that this rule should not apply in the personal jurisdiction context, the Court finds their arguments unavailing. Defendants first argue that the general rule should not apply to personal jurisdiction because it would otherwise encourage forum shopping. *See, e.g.*, Defs. Mot. to Dismiss at 5-8. This argument is nonsensical. Regardless of whether a case is directly-filed into an MDL court or is transferred there, the case ends up in the same forum—the MDL court—and is subject to the same laws.

Alternatively, Defendants assert that just as the Texas MDL court in *In re Heartland* analyzed its personal jurisdiction over a defendant in a directly-filed case based on the defendant's contacts with Texas, so too this Court should analyze whether it has personal jurisdiction over Defendants based on their contacts with Texas. *See, e.g.*, Defs.' Mot. to Dismiss at 5-6 (citing *In re Heartland Payment Sys., Inc. Customer Data § Breach Litig.*, No. H-10-171, 2011 WL 1232352 (S.D. Tex. Mar. 31, 2011)). But, unlike in *In re Heartland*, where the defendant had not consented to, and the Court had not issued, a direct-file order, 2011 WL 1232352, at *4-5, Defendants in this case consented to the Court's direct-file order. *In re Heartland* is therefore inapposite. *See id.* at *4 (explaining that unlike in that case, defendants in

other cases "facilitated direct filing through a stipulation waiving personal jurisdiction for the pretrial proceedings under § 1407"). Therefore, consistent with its previous orders, the Court applies the general rule that direct-filed cases are treated as if they were transferred under § 1407 to its analysis. Since Plaintiffs were implanted with the Pinnacle Device in New York, the Court finds New York, and not Texas, is the relevant state for personal jurisdiction purposes.

A New York court could exercise personal jurisdiction over Defendants in these cases if the New York long-arm statute extends to Defendants and if the exercise of jurisdiction comports with due process. *See Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 163-64 (2d Cir. 2010); *Johnston*, 523 F.3d at 609. Because Defendants do not argue that it would offend traditional notions of fair play and substantial justice if the Court were to exercise personal jurisdiction, the Court limits its due process inquiry to whether Defendants have sufficient minimum contacts with New York to establish personal jurisdiction.

1. The New York long-arm statute extends to Defendants.

Under New York's long-arm statute, a New York court may exercise personal jurisdiction over a non-resident defendant,

> who in person or through an agent: 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or 2. commits a tortious act within the state . . . ; or 3. commits a tortious act without the state causing injury to a person or property within the state . . . if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used in or

> consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce . . . .

N.Y. C.P.L.R. § 302(a). Additionally, under New York law, the activities of a representative of a non-domiciliary in New York may be attributed to the non-domiciliary for purposes of establishing personal jurisdiction. *Id.*; *Crouch v. Atlas Van Lines, Inc.*, 834 F. Supp. 596, 601 (N.D.N.Y. 1993) (citing *Alan Lupton Assocs., Inc. v. Ne. Plastics, Inc.*, 482 N.Y.S.2d 647, 651 (N.Y. App. Div. 1984)); *Murphy v. Cirrus Design Corp.*, No. 2011-1824, 969 N.Y.S.2D 804 (Table), 2013 WL 765318, at *2 (N.Y. Sup. Ct. 2013).

Plaintiffs allege that the long-arm statute extends to Defendants because, among other things, Depuy Orthopaedics, Inc. and Depuy Products, Inc. manufactured, marketed, and sold a defective product to Plaintiffs' New York physicians, who implanted them in New York, and that Plaintiffs suffered injuries resulting from the Pinnacle Device in New York. Pls.' Resp. and Memorandum in Opposition to Defs. Mot. To Vacate ("Pls.' Resp.") [*Alicea*, 3:15-cv-03489-K (Doc. No. 9)]. Plaintiffs further contend that these Defendants marketed the Pinnacle Device at meetings in New York, contracted with sales representatives in New York, held meetings with surgeons and patients in New York, contracted with surgeon consultants in New York, and tracked patient outcomes in New York. *Id.* at 10-12. Thus, a New York Court could exercise personal jurisdiction over these Defendants

under N.Y. C.P.L.R. § 302(a)(2), as they allegedly committed tortious acts within New York.

Regarding the J&J Companies, the Court previously held:

> the evidence shows that the [J&J Companies] (1) hosted a nationwide satellite telecast to physicians all over the country . . . to tout the advantage of the Pinnacle Device, including representations of the benefits of metal-on-metal hip replacements and fluid film lubrication that are in issue in this case; (2) gave direction regarding advertising content and appearance for the Pinnacle Device; (3) managed the recall of another implant device and redirecting customers to the Pinnacle line; (4) made a website available to DePuy for doctors and patients and anyone else seeking information to view advertisements about the Pinnacle Device; and (5) placed their name on all Pinnacle Device advertising, literature, products, and packaging that contained representations that are in issue in this case and that were distributed across the country . . . for health care providers and doctors to see.

Order Denying Defs.' Mot. to Dismiss for Lack of Personal Jurisdiction at 9-10 [(*Andrews* – 3:15-cv-3484, Doc. No. 81)]. The Court finds that these allegedly tortious acts occurred in New York and that N.Y. C.P.L.R. § 302(a)(2) would confer personal jurisdiction over these Defendants to New York courts. But even if these acts are not considered as having been performed in New York, the J&J Companies would anyway be subject to personal jurisdiction in New York under N.Y. C.P.L.R. § 302(a)(3). These acts caused injuries to Plaintiffs in New York, and the J&J Companies (i) should reasonably expect these acts to have consequences in New York and derive substantial revenue from interstate commerce, and (ii) derive substantial revenue from goods used or consumed in New York. *See, e.g.*, *In re DES Cases*, 789 F.

Supp. 552, 570 (E.D.N.Y. 1992). Thus, all Defendants are subject to personal jurisdiction under New York's long-arm statute.

2. Defendants' contacts with New York are sufficient to establish jurisdiction over Defendants under the Due Process Clause.

The same acts that support jurisdiction under the New York long-arm statute also suffice to bring the exercise of jurisdiction within the limits of due process. Plaintiffs have alleged Depuy Orthopaedics, Inc. and Depuy Products, Inc. marketed and sold their Pinnacle Devices in New York and that they were implanted with those same Pinnacle Devices in New York. These contacts with New York are enough to support the exercise of jurisdiction over them under the Due Process Clause. *See Luv N' Care*, 438 F.3d at 470; *Chloe*, 616 F.3d at 164. Further, as the Court has previously found, the J&J Companies' acts identified above are also sufficient to support the exercise of jurisdiction over them. Distribution of false information to consumers within a state sufficiently subjects a defendant to the jurisdiction of courts of that state. *Guidry v. U.S. Tobacco Co., Inc.*, 188 F.3d 619, 628 (5th Cir. 1999). Plaintiffs offer various examples of such actions taken by the J&J Companies in New York. *See* Pls.' Resp. at 17-18. Based on the J&J Companies' activities directed toward and tortious conduct committed in New York, and in accordance with this Court's previous rulings, the Court finds that a New York court would have specific personal jurisdiction over the J&J Companies in these cases. Because the Court treats these cases as if they were transferred from New York under

§ 1407, the Court thus finds that it, too, has jurisdiction over Defendants for pretrial purposes.

B. The Court Has Personal Jurisdiction Over Defendants for Purposes of Trial.

Defendants contend that even if the Court has personal jurisdiction over them in transferred and direct-filed cases, the Court's jurisdiction only extends to pretrial proceedings and not to trial. *See* Defs. Mot. to Vacate at 6. Because Defendants affirmatively waived any venue objections to trying these cases in this Court, however, they have also effectively waived any objections based on personal jurisdiction to this Court trying them. Because personal jurisdiction can be waived and Defendants have waived it, the Court need not employ the traditional personal jurisdiction analysis. Thus, even if Texas were the relevant state to analyze this Court's personal jurisdiction over Defendants for trial purposes absent waiver, and even if Defendants would not have been subject to jurisdiction in Texas, Defendants' personal jurisdiction waiver permits the Court to exercise jurisdiction over them for purposes of trial.

1. *Defendants globally waived any and all venue objections to any cases in the MDL being tried in this Court.*

As explained in detail above, Defendants clearly and unequivocally represented to this Court on multiple occasions that they waived any objections based on venue

to trying any of the cases in the MDL in the Northern District of Texas. While Defendants have variably contended that their waiver did not apply if the Court consolidated cases for trial [Def.'s Resp. to Pls.' Proposal for Bellwether Trial Selection Process], that it only applied to challenges based on *Lexecon* and therefore did not apply to cases directly filed under CMO #1 [Defs,' Mot. To Dismiss for Lack of Personal Jurisdiction at 1-2 n.1], and that the waiver inexplicably only extended to the selection of cases for the first and second bellwether trials [Defs.' Reply in Support of Mot. to Vacate at 7-8], these newly claimed limitations are not credibly asserted. Critically, Defendants did not limit their waiver to the first two bellwether trials or in any manner when they asserted it. Furthermore, Defendants did not raise any venue objections relating to the *Aoki* bellwether trial, which consolidated five directly-filed cases for trial. Defendants failure to object makes clear that they waived all objections based on venue, regardless of whether cases were transferred under § 1407 or directly-filed pursuant to CMO #1. Accordingly, the Court finds that Defendants globally waived any and all objections based on venue to trying any of the cases in the MDL in this Court as part of any bellwether trial.

2. *Defendants cannot revoke their waiver without a good cause.*

Defendants also argue that even if they globally waived their venue objections, they now revoke that waiver. Defs.' Mot. to Dismiss at 2. Defendants did not cite to any case law or other support for the proposition that they can revoke their waiver. Other courts to confront this issue, however, have held that a party must have good

cause to revoke such a waiver. *See, e.g.*, *In re Zimmer Durom Hip Cup Prods. Liability Litig.*, No. 09-4414, MDL No. 2158, 2015 WL 5164772, at *2-4 (D.N.J. Sept. 1, 2015); *In re Fosamax Prods. Liability Litig.*, No. 06-MD-1789(JFK), 2011 WL 1584584, at *1-2 (S.D.N.Y. Apr. 27, 2011). In order to establish good cause to retract a venue waiver, a party must show "fraud, collusion, mistake or duress, or [that] the agreement is unconscionable or contrary to public policy." *In re Zimmer*, 2015 WL 5164772, at *3-4 (citations omitted). Here, Defendants have not argued or shown that their waiver resulted from fraud, collusion, mistake, or duress, or that they otherwise have good cause to revoke it.

To the extent Defendants would argue that they mistakenly consented to waiving venue objections for all bellwether trials and not just the first two, the Court rejects that argument. The court in *Zimmer* confronted a similar claim. There, Plaintiffs' counsel represented they were willing to waive venue objections for two cases in off-the-record phone calls and emails. *Id.* at *1. The magistrate judge assigned to the case subsequently submitted a report that stated that "Plaintiffs . . . waive their . . . rights under *Lexecon* . . . ." *Id.* A few months later, the court held a status conference, at which, for the first time, Plaintiffs stated on the record that their waiver only applied to two cases. *Id.* at *2. Then, after those two cases had been resolved, Plaintiffs filed a motion to clarify that the waiver only applied to those two cases. *Id.* The Court rejected Plaintiffs' motion because they failed to "take any steps to clarify or correct" the magistrate's report until the status conference some months

later and further failed to file a motion addressing the issue until a few months after the conference. *Id.* at *4. The court found that the Plaintiffs' "carelessness" did not "constitute good cause to rescind the waiver." *Id.* The same is true here. Defendants did not attempt to limit their waiver to the first and second bellwether trials until after they lost the second bellwether trial, which was long after the Special Master first reported they had globally waived venue objections and Defendants' lead counsel unequivocally reaffirmed the same to the Court on the record. Defendants do not have good cause to revoke their venue waiver, particularly since the Court and the parties have relied on Defendants' waiver as part of selecting and preparing bellwether cases for trial.

3. *Defendants' waiver of objections based on venue also waived objections based on personal jurisdiction.*

"A waiver of objection to venue would be meaningless . . . if it did not also contemplate a concomitant waiver of objection to personal jurisdiction." *Inso Corp. v. Dekotec Handelsges, mbH*, 999 F. Supp. 165, 167 (D. Mass. 1998) (citation omitted). The Fifth Circuit has held that when a party consents to venue, it also consents to being subject to personal jurisdiction in that venue. *See, e.g.*, *Kevlin Svcs., Inc. v. Lexington State Bank*, 46 F.3d 13, 15 (5th Cir. 1995) (reversing the district court's dismissal for lack of personal jurisdiction because the contract at issue provided for "venue in Dallas County, Texas, [and] thereby grant[ed] the district court jurisdiction" over the defendant). Since Defendants have affirmatively waived any objection based on venue to trying any of the cases in the MDL in this Court as

bellwether cases, Defendants have also waived any objections to this Court trying any cases in the MDL based on personal jurisdiction. Defendants' argument that this holding is inconsistent with Fifth Circuit precedent is unavailing.

Defendants, citing *Burstein v. State Bar of Cal.*, 693 F.2d 511 (5th Cir. 1982), argue that they do not have to separately object to venue in order to object to personal jurisdiction. Defendants claim that even if they waived the right to raise a venue objection, they did not forfeit their objections based on personal jurisdiction. *Burstein* is inapposite. In *Burstein*, the court held that a party did not waive objections to personal jurisdiction by passively waiving any venue objections by failing to also assert them in their same Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction. *Busrstein*, 693 F.2d at 513 n.2. Here, however, Defendants have not simply passively failed to assert venue objections while simultaneously objecting to personal jurisdiction. Rather, Defendants affirmatively consented to venue in this Court by affirmatively waiving any objections based on venue. Such a waiver is no different than a contractual forum selection clause in which a party consents to venue in a particular court, *i.e.*, waives its right to challenge whether that venue is proper. Just as the Fifth Circuit has held that a forum selection clause prevents a party from challenging whether the selected forum has jurisdiction, *Kevlin Svcs., Inc.*, 46 F.3d at 15, so too, Defendants' waiver of their venue objections to trying any of the MDL cases in this Court also waived their personal jurisdiction challenges to trying these

cases in this Court. The Court has personal jurisdiction over all of the Defendants in the *Alicea* bellwether cases for trial purposes.

IV. CONCLUSION

For these reasons, the Court finds that it has personal jurisdiction over Defendants for pretrial proceeding and for purposes of trial. Defendants' Motion to Vacate November 8, 2016, Order on Bellwether Trials for Lack of Personal Jurisdiction and Defendants' Motion to Dismiss for Lack of Personal Jurisdiction are **DENIED**.

SO ORDERED.

Signed June 28th, 2017.

Ed Kinkeade

ED KINKEADE
UNITED STATES DISTRICT JUDGE