No. 17-10812

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In re: DEPUY ORTHOPAEDICS, INC.; DEPUY PRODUCTS, INC.; DEPUY SYNTHES, INC.; JOHNSON & JOHNSON; JOHNSON & JOHNSON SERVICES, INC.; JOHNSON & JOHNSON INTERNATIONAL

REPLY IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS

On Petition for Writ of Mandamus to the United States District Court
for the Northern District of Texas, MDL No. 2244
Honorable Ed Kinkeade, District Judge

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TABLE OF AUTHORITIES

CASES

OTHER AUTHORITY

Defendants' petition presents a classic case for mandamus relief: novel rulings on important issues of personal jurisdiction and waiver, which have implications for more than 9,300 currently pending cases and untold additional numbers of cases in current and future multidistrict litigation proceedings ("MDLs") in this Circuit, and which were clearly erroneously decided.

Plaintiffs' response only strengthens the case for review. It first underscores the need for authoritative guidance on the issues presented. With respect to personal jurisdiction, plaintiffs contend that the only other two Fifth Circuit district court cases to address the issue of which state's contacts apply in the case of a direct-file order in an MDL proceeding (both of which support petitioners) reached the wrong result. (Resp. at 21-22.) And with respect to waiver, they complain that only a "single out-of-circuit MDL case" has addressed the standard by which waiver is to be measured in the context of MDL bellwether trials. (*Id.* at 15.) Both arguments highlight the "novelty" of the issue presented in this Circuit – a ground expressly acknowledged by respected treatise writers as a strong basis for mandamus. 16 Charles Alan Wright et al., *Federal Practice and Procedure* § 3934.1 (3d ed. 2017 Supp.).

Plaintiffs also do not dispute the broad importance of the issue, instead arguing that mandamus relief is unnecessary because the question of personal jurisdiction will be presented in another appeal. (Resp. at 26.) But this argument

only serves to illustrate the cross-cutting nature of the issue and further strengthen the case for mandamus. Indeed, as this Court expressly recognized in *In re Lloyd's Register North America, Inc.*, 780 F.3d 283 (5th Cir. 2015) *cert. denied*, 134 S. Ct. 64 (2015) (mem.) – which plaintiffs cite multiple times in elucidating the standards governing mandamus (Resp. at 9, 10, 11-12, 27) – the fact that there was "already an appeal pending from another case on this issue" demonstrated that issuance of the writ would "have significance 'beyond the immediate case,'" making mandamus appropriate under the circumstances. *In re Lloyd's*, 780 F.3d at 294 (citation omitted).[1] All the more so here, where the issues will affect not merely one other appeal (which could be entirely obviated if relief is granted here) but also the continued conduct of trials in this MDL proceeding and rules governing such trials in all current and future MDL proceedings in this Circuit. *See* 16 Charles Alan Wright et al., *Federal Practice and Procedure* § 3934.1 (3d ed. 2017 Supp.) (explaining that mandamus is appropriate where a "novel ruling may easily become a repeated error" with broad significance for other cases).

[1] Plaintiffs also argue that issues of personal jurisdiction are not properly addressed by mandamus absent other compelling factors (Resp. at 23-26), but other compelling factors are present here given the broad significance of the issues presented, the fact that the MDL court has made the same error in both the last trial and in this one, and the especially significant costs of trying these cases.

Rather than seriously attack these factors favoring mandamus relief, plaintiffs instead attempt to obscure the clear error in the MDL court's personal jurisdiction and waiver determinations. This attempt is unavailing.

With respect to personal jurisdiction, the proper course was to analyze the parties' contacts with Texas, where they filed suit – and not New York, where they reside. Plaintiffs attempt to advance the trial court's previously stated position that the existence of a direct-file order enables it to pretend that it is a New York court when determining its personal jurisdiction over these cases for *all purposes* – including *trial*. But Fifth Circuit precedent is clear that federal courts cannot simply enter orders that alter the rules of personal jurisdiction, and other district courts that have addressed MDL direct-file orders have rightly looked to contacts with the MDL forum in determining personal jurisdiction over such cases for trial. (Pet. at 17-21.)

As to waiver, the MDL court treated defendants' *Lexecon* waivers for particular trials as though they were global and permanent, even though both the context and express limitations on those waivers made clear that they were limited. This conclusion, too, was clearly erroneous, especially in light of the requirement that such waivers must be clear, deliberate and knowing, and all the more so in the MDL context, where trials are the exception, not the default. (Pet. at 21-26.)

ARGUMENT

I. PLAINTIFFS' PERSONAL JURISDICTION ARGUMENTS ARE CLEARLY WITHOUT MERIT.

As explained in the petition, an MDL court may exercise personal jurisdiction to the same extent as a transferor court *for pretrial* purposes because that is the necessary implication of 28 U.S.C. § 1407, as other decisions have recognized, but not as to trial. (Pet. at 18.) Plaintiffs contend that this authority extends past pretrial proceedings to trial itself as evidenced by the fact that "MDL courts can, and regularly do, try bellwether cases *with the consent of the parties*." (Resp. at 19 (emphasis added).) But plaintiffs' argument confuses the waiver and personal jurisdiction issues. Section 1407 expressly limits the authority granted to MDL courts to pretrial matters; that is the unambiguous holding of *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). Thus, an MDL court possesses none of the transferor court's power over a case for trial.[2] It is the parties' *consent* to trial that enables an MDL court to try a case over which it would not otherwise have personal jurisdiction or venue.

[2] As such, plaintiffs' related contention that petitioners "do not even attempt to explain why an MDL court should apply a different personal-jurisdiction analysis for cases tried as bellwethers than it would for the pretrial proceedings of those same cases" is clearly wrong. (Resp. at 20.) The distinction is dictated by § 1407, which necessarily authorizes personal jurisdiction for pretrial matters but leaves ordinary personal jurisdiction principles in play for any subsequent proceedings.

For similar reasons, plaintiffs' contention that the Court should recognize some special power in MDL direct-file orders to alter the normal operation of personal jurisdiction principles (Resp. at 17-19) is also plainly incorrect. Most fundamentally, courts clearly lack the power to effect such alterations by order, as this Court squarely held in *Point Landing, Inc. v. Omni Capital International, Ltd.*, 795 F.2d 415, 423, 427 (5th Cir. 1986) (en banc) (per curiam) ("[T]he federal courts possess no warrant to create jurisdictional law of their own.") (cited with additional history in Pet. at 18), *aff'd*, *Omni Capital International, Inc. v. Rudolf Wolff & Co. Ltd.*, 484 U.S. 97 (1987). Plaintiffs essentially ignore this precedent.[3]

Instead, plaintiffs contend that construing the direct-file order to permit the MDL court to pretend that it is a New York court when evaluating personal jurisdiction over New York plaintiffs' direct-filed claims will result in treating "direct-filed cases and transferred cases . . . equally" because an MDL court can exercise the same personal jurisdiction over cases transferred under § 1407 as the transferor court. (Resp. at 19.) But this argument improperly elides the distinction between pretrial and trial proceedings. As just explained, an MDL court exercises personal jurisdiction over cases transferred under § 1407 to the same extent as the

[3] Plaintiffs relegate their discussion of this case to a footnote addressing their repeated, erroneous contention that petitioners agreed to an open-ended "bellwether process in this MDL." (Resp. at 20 & n.25.) Again, this argument confuses the question of the power to exercise personal jurisdiction with the issue of waiving objections to that power.

transferor court *as to pretrial matters only*. The direct-file order in this case was intended to treat direct-file cases "equally," expressly contemplating transfer after "completion of all pretrial proceedings." (Pet. at 20 (citation omitted).) Thus, plaintiffs' position would introduce inequality between transferred and direct-filed cases because, under their erroneous construction of the direct-file order, the MDL court would have the option of retaining direct-file cases for trial even absent consent, while it would be required to remand cases transferred under § 1407 after pretrial work is done.

II. PLAINTIFFS' WAIVER ARGUMENTS ARE ALSO CLEARLY WRONG.

Plaintiffs do not seriously dispute the Seventh Circuit's articulation of the standard governing a finding of waiver of personal jurisdiction and venue in the MDL context in *Armstrong v. LaSalle Bank National Association*, 552 F.3d 613, 615 (7th Cir. 2009): there must be a clear and unambiguous showing of a deliberate relinquishment of a known right. (Pet. at 21; *see also* Resp. at 15-16.) Nor do they contest the fact that an even "stronger showing" of waiver is required than in other contexts given the presumption that MDL courts address pretrial matters only. (Pet. at 22 (citation omitted).)[4] And there is no suggestion anywhere

[4] *Armstrong*'s reasoning is consonant with this Circuit's precedents on waiver in similar contexts, as explained in the petition. (*See* Pet. at 22-23.) Plaintiffs dismiss this Court's precedents without discussion as "inapposite" (Resp. at 15 n.18), but they do not even attempt to argue that some other standard is dictated by this Court's precedents.

in their brief that the MDL court actually applied this standard in resolving waiver. (*See generally* Resp.)

Instead, plaintiffs contend that the standard is met because petitioners "(i) requested the Forum for this MDL, (ii) agreed to the bellwether process allowing Judge Kinkeade to try representative cases, and (iii) engaged in extensive pretrial discovery for over six years and participated in three lengthy bellwether trials in the MDL Forum," and "most importantly, petitioners explicitly and repeatedly waived their *Lexecon* venue objections to 'any cases in the MDL' being tried in the Forum." (Resp. at 12-13 (emphasis omitted).) These arguments all fail.

As a threshold matter, the first and third points identified by plaintiffs are simply irrelevant. Selection of an MDL forum and participation in discovery – quintessentially *pretrial* matters – do not constitute any kind of consent *to trial* in the MDL. That is the inescapable implication of *Lexecon*, and similar conduct was squarely rejected as tantamount to waiver in *Armstrong*. *See* 552 F.3d at 618 (explaining that participation in extensive pretrial proceedings and even agreement to "specific trial dates" did not constitute waiver of *Lexecon* objections).[5]

Plaintiffs' other arguments – that petitioners agreed to a bellwether process and waived *Lexecon* venue objections – simply repeat the MDL court's clear error

[5] Participation in some trials likewise does not intimate consent to future, additional trials, especially where, as here, the third of three trials mentioned by plaintiffs was held over petitioners' express objection on *Lexecon* grounds.

of construing limited agreements and consents into global waivers. In reality, the bellwether process has always been iterative rather than global, and both the context of petitioners' waivers and their express reservations illustrate that their consents to trial have always been limited. Indeed, while plaintiffs malign petitioners' explication of the record on these matters as "cherry-picked and misleading" (Resp. at 2), it is plaintiffs and the MDL court that have improperly isolated statements from the context in which they were made in an attempt to support their waiver contentions.

For example, plaintiffs cite CMO 8 for the proposition that the parties broadly "agreed to a bellwether process in which Judge Kinkeade would try representative cases in the MDL Forum." (Resp. at 2-3.) But that is not what CMO 8 says. Instead, it expressly referred to "an initial bellwether process" under which the parties were to recommend "4-6 cases to be included," and it referred only to a trial plan for "the first bellwether case." (*See* CMO 8 ¶¶ 6-17, MDL ECF No. 190.) Notably, subsequent trials in the MDL proceeding did not rely on any of the cases selected as part of this "initial bellwether process"; to the contrary, the MDL court expressly discarded those candidates and asked the parties to identify new cases, of a different sort, after the first case was tried. (Pet. at 5-7.)[6]

[6] For similar reasons, plaintiffs' reference to petitioners' understanding that the initial bellwether process was to comprise "'four initial bellwether trials'" (Resp. at 4 (citation

(cont'd)

Plaintiffs' reference to allegedly "explicit[] and repeated[]" waivers to "any cases in the MDL" likewise ignores context, which makes it unmistakably clear that petitioners were waiving objections in any cases *for the trial slot at issue*, not for any (much less every) future trial that the MDL court or plaintiffs might ever desire to hold. For example, plaintiffs emphasize the Special Master's report on January 16, 2013, that petitioners had agreed not to raise a venue objection (Resp. at 3), but plaintiffs omit the fact (noted in the petition) that the report was expressly issued pursuant to CMO 8, which itself was expressly limited to an "initial bellwether" process that ultimately did not proceed beyond the first trial. (Pet. at 5-7.) Plaintiffs also point to the hearing on September 10, 2013, where petitioners' counsel reiterated petitioners' waiver in "'*these* cases'" – i.e., those that were part of "the bellwether selection process" outlined in CMO 8 – "'*consistent with the report that the special master gave* to the court earlier.'" (Resp. at 4-5 (emphases added) (citation omitted).) As the emphases underscore, however, counsel was referring to the same limited waiver for the "initial bellwether process" then in contemplation by the MDL court and the parties.

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omitted)) adds nothing to the analysis. The four trials referenced were those originally contemplated for the "4-6 cases to be included" under CMO 8 – cases that the MDL court discarded sua sponte. When the MDL court discarded those cases, it did not somehow transfer petitioners' consent to an entirely new process of trying different cases.

Critically, this limited scope of the initial waiver was lost on no one – least of all the MDL court, as reflected by the Special Master's request for a new waiver from petitioners prior to the second trial. (*See* Pet. at 7-8.) As noted in the petition, that request would have been "a superfluous exercise if the initial waiver had truly been global" (*id.* at 23 (emphasis omitted)) – a fact plaintiffs ignore. Rather, they argue that petitioners' response to the second request somehow established global waiver – even though the response *expressly* stated that waiver was being given "'*[i]n order to allow the Court to select the next round of bellwether cases.*'" (Resp. at 5 (emphasis added) (citation omitted).)

Although plaintiffs quote this limiting language, *they do not even attempt to explain* what it could signify other than an express limitation on the scope of waiver. Instead, plaintiffs contend that petitioners somehow had a duty to object to the subsequently issued report by the Special Master, which omitted this limiting language. (Resp. at 5.) But it is simple to understand why petitioners did not object: *their* waiver contained the limitation; and the context made it clear to petitioners that waivers were to be sought before each trial. In that context, they did not understand the Special Master's recitation to be effectuating some sort of global waiver they had never agreed to, but instead understood it as an implicit acknowledgment that future objections were preserved without having to repeatedly reiterate them. Imposing a duty to object in these circumstances would

essentially penalize petitioners for not foreseeing that plaintiffs and the MDL court would attempt to exploit the Special Master's report to construe a global waiver from a statement by petitioners that contained an express limitation. This rule is precisely the opposite of the clear and unambiguous showing of a deliberate relinquishment of a known right that is required under basic waiver principles.[7]

Finally, plaintiffs variously deride petitioners' position on waiver as "evolving" and indicative of "buyer's remorse," and they otherwise attempt to delegitimize petitioners' express objections to waiver in the third and fourth MDL trials as opportunistic. (Resp. at 1, 7.) These attacks only underscore the fact that petitioners did expressly object to waiver in the third and fourth trials, which is at odds with any notion of global waiver. And the suggestion of an evolving or opportunistic stance on waiver is fundamentally misplaced. From the beginning, petitioners' position has been that true bellwether trials should involve individual plaintiffs, not consolidated trials, to avoid confusing juries and to generate reliable

[7] For similar reasons, plaintiffs' reliance on *In re Zimmer Duron Hip Cup Products Liability Litigation*, MDL No. 2158, 2015 WL 5164772 (D.N.J. Sept. 1, 2015) (cited in Resp. at 14-15) is misplaced. That case involved not merely the failure to correct an errant report by a special master but waiver language that *the parties themselves* had mutually suggested. *Id.* at *1 (indicating that the special master had "signed" a jointly proposed order); *see also Parties'* Joint [Proposed] Case Management Order Regarding MDL Trials, ECF No. 538, *In re Zimmer Durom Hip Cup Prods. Liab. Litig.*, MDL No. 2158 (D.N.J. Oct. 3, 2014). A party's obligation to correct its *own* mistake is one thing, but an obligation to correct a special master's potential misconstruction of its waiver is quite another. Especially in this context, where petitioners made expressly clear to the Special Master that their waiver was only for "the next round of bellwether cases," their "silence" in the face of the Special Master's subsequent report cannot be fairly construed as a global waiver.

information regarding how juries perceive the strength of various claims and defenses. That consistent position was expressed *from the outset* – before *any* case was tried (*see* Pet. at 6) – and reiterated after petitioners won the first trial in the form of an opposition to consolidation in the second trial. When it became clear that the MDL court intended to continue trying consolidated cases, petitioners decided to stop consenting to trials.[8] That was their right under § 1407, *Lexecon*, and basic personal jurisdiction principles, and this Court should grant mandamus to vindicate that clear right.

CONCLUSION

For the foregoing reasons and those set forth in the petition, petitioners respectfully request that this Court issue a writ of mandamus prohibiting the Honorable Ed Kinkeade, Judge of the United States District Court for the Northern District of Texas, from trying plaintiffs' cases because he lacks personal jurisdiction over defendants for trial. Petitioners further request a ruling on the petition in advance of September 5, 2017, the date on which trial is scheduled to commence.

[8] Plaintiffs' attack on petitioners' observation that the waiver found by the MDL court is affecting cases that were not even filed at the time the waiver was supposedly made (*see* Resp. at 7) is also misplaced. Petitioners are not making a new argument about the intended scope of their waiver, but are simply highlighting the astounding implications of the MDL court's finding of global waiver.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 21(d)(1) because this brief contains 3,076 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman font.

Date: August 16, 2017

s/John H. Beisner
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CERTIFICATE OF SERVICE

I certify that the foregoing was filed with the Court electronically on August 16, 2017, and an electronic copy was served on the individuals below via electronic mail on the same date.

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