No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

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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CERTIFICATE OF INTERESTED PERSONS

In re: DePuy Orthopaedics, Inc. et al., No. _____

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Marvin Andrews, Margaret Aoki, Jay Christopher, Jacqueline Christopher, Kathleen Davis, Donald Greer, Richard Klusmann, Susan Klusmann, Sandra Llamas, Rosa A. Metzler, Robert Peterson, Karen Peterson, Judith Rodriguez, Linda Standerfer, Michael Weiser, plaintiffs;

2. DePuy Orthopaedics, Inc.; Synthes, Inc.; DePuy Synthes, Inc.; Johnson & Johnson International; Johnson & Johnson, Defendants-Petitioners;

3. Skadden, Arps, Slate, Meagher & Flom LLP (John H. Beisner, Stephen J. Harburg, Jessica D. Miller, Geoffrey M. Wyatt); Locke Lord LLP (Michael V. Powell, Seth M. Roberts); Barrasso Usdin Kupperman Freeman & Sarver, L.L.C. (Richard E. Sarver, Andrea Mahady Price), Counsel for Defendants-Petitioners DePuy Orthopaedics, Inc.; Synthes, Inc.; DePuy Synthes, Inc.; Johnson & Johnson International; and Johnson & Johnson;

4. The Lanier Law Firm, PC (W. Mark Lanier, Richard P. Meadow); Fisher, Boyd, Johnson & Huguenard, LLP (Larry Boyd, Wayne Fisher, Justin

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Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

This petition arises from one of the largest multidistrict litigation ("MDL") proceedings pending in the federal court system. Over the past two years, the MDL court has conducted two multi-month "bellwether" trials, the latest of which resulted in a $502 million verdict in favor of five plaintiffs against petitioners, $360 million of which was for exemplary damages. The MDL court did not enter judgment after either trial. Nonetheless, on June 10, 2016, the court scheduled a third bellwether trial (potentially involving seven plaintiffs) to begin on September 6, 2016 – less than 80 days from now.

Mandamus relief is needed because pressing forward with another trial now – before this Court has had an opportunity to review several critical legal and evidentiary rulings in the last trial that have broad implications for the remaining cases in the MDL proceeding – would corrupt the bellwether process. As this Court has recognized, that process is supposed to serve an important information-generating purpose. *In re Chevron USA, Inc.*, 109 F.3d 1016, 1019 (5th Cir. 1997). Here, however, it stands to generate as many as twelve suspect verdicts against petitioners and thereby create significant pressure to settle this litigation before the parties have had a fair opportunity to evaluate the strengths and weaknesses of the relevant claims and defenses after an appeal to this Court. In light of the importance of this petition and the complexity of the issues involved, petitioners

submit that oral argument is crucially important to resolving the petition. Accordingly, pursuant to Fifth Circuit Rule 28.2.3, petitioners respectfully request that the Court hear oral argument.

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JURISDICTIONAL STATEMENT

Jurisdiction of this Court is invoked under the All Writs Act, which provides in relevant part that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

RELIEF SOUGHT

Petitioners seek a writ from this Court directing the district court to: (1) vacate its Order on Bellwether Trials, dated June 10, 2016, which scheduled a trial for September 6, 2016 (Exhibit A); (2) rule promptly on petitioners' pending post-trial motions in the last bellwether trial; and (3) enter judgment in those cases so that an appeal may follow, *see* Fed. R. Civ. P. 58(b).

ISSUES PRESENTED

This petition arises from a multidistrict litigation ("MDL") proceeding that includes suits in which plaintiffs allege that they were injured by the Pinnacle Ultamet, a metal-on-metal hip implant designed and sold by petitioner DePuy Orthopaedics, Inc. ("DePuy"), one of many subsidiaries of petitioner Johnson & Johnson ("J&J"). The district court presiding over the MDL proceeding opted to employ a bellwether trial process, a common procedure used to inform the parties about the strengths and weaknesses of cases coordinated in MDL proceedings.

Here, however, the MDL court has abused the bellwether process. The

petitioners won the first bellwether trial against a single plaintiff almost two years ago; yet, the MDL court has not entered judgment in that case. Over petitioners' objection, and without calling for briefing from the parties on the issue, the MDL court then consolidated five plaintiffs' cases for trial shortly before the second bellwether trial was set to begin in January 2016. At trial, the MDL court rejected defendants' dispositive motions wholesale, allowing plaintiffs to proceed with novel and far-flung theories, unsupported in law, that will likely recur in most if not all cases in the MDL proceeding – including that parent companies can be held liable for the acts of their subsidiaries on an "aiding and abetting" theory and that a design defect can be proven not by singling out a specific flaw in a specific device but instead by arguing that an entire line of products should not have been sold by any of a range of manufacturers.

The MDL court also allowed (again over petitioners' objections) the injection of all manner of irrelevant and highly inflammatory evidence – including, for example, plaintiffs' counsel's gratuitous assertions that *nonparty* subsidiaries of J&J had made payments to "Saddam's henchmen"; hearsay assertions from a book about supposedly improper scientific articles planted in the literature by "Big Tobacco" and other "industr[ies]"; allegations that the Pinnacle Ultamet poses a risk of cancer, even though no plaintiff alleged such an injury and no science supports it; references to an employee's unproven allegations of racist treatment at

DePuy; and a suggestion that the failure of a metal-on-metal implant in another, nonparty individual led him to commit suicide. Not surprisingly, the jury, awash in this flood of prejudicial evidence, returned a verdict in excess of $500 million – including $360 million in exemplary damages.

Petitioners sought a stay of further trials until this Court has an opportunity to review these issues, but the MDL court effectively denied the motion before it was fully briefed by ordering the parties to prepare seven new cases for trial on September 6 – well before this Court could possibly review any judgment in the prior bellwether trial. Because the MDL court has indicated that it will consolidate the new bellwether cases for a multi-plaintiff trial and because it is likely to issue the same rulings on a slew of issues that petitioners intend to appeal, the order raises the prospect that petitioners could soon be facing twelve adverse verdicts, totaling potentially $1 billion and causing significant reputational harm, all before this Court has ever had a chance to review any judgment in these proceedings.

The issue presented is whether the MDL court has clearly abused its discretion in its handling of the bellwether trial process in this litigation.

FACTS NECESSARY TO UNDERSTAND THE ISSUE PRESENTED

A. The MDL Proceeding

The proceeding below was instituted by the Judicial Panel on Multidistrict Litigation in 2011 to "promote the just and efficient conduct of the litigation" of

cases involving allegations that the "Pinnacle Acetabular Cup System, a device used in hip replacement surgery, was defectively designed" and that "defendants failed to provide adequate warnings concerning the device." *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prods. Liab. Litig.*, 787 F. Supp. 2d 1358, 1360 (J.P.M.L. 2011). According to the Panel, "[c]entralization under [28 U.S.C. § 1407] w[ould] eliminate duplicative discovery, prevent inconsistent pretrial rulings on discovery and other issues, and conserve the resources of the parties, their counsel and the judiciary." *Id.* As will be demonstrated below, none of these purposes has been served by the MDL court's conduct of the bellwether trial process.

The MDL proceeding began as three cases, *see id.* at 1359, but has now grown to more than 8,500. In consultation with the MDL court, petitioners and the Plaintiffs' Executive Committee ("PEC") agreed to establish a bellwether trial protocol. (*See* Special Master's Report Relating To Bellwether Trial Selection Protocol ("1st Bellwether Order"), MDL Dkt. No. 247 (N.D. Tex. Jan. 16, 2013).) As recognized by the *Manual for Complex Litigation (Fourth)* (2004), the purpose of bellwether trials is to "produce a sufficient number of representative verdicts and settlements to enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis, and what range of values the cases may have if resolution is attempted

on a group basis." *Id.* § 22.315. Consistent with this purpose, the initial order on bellwether trials provided for a selection of bellwether candidates from a pool of eight cases, four of which were to be selected by the PEC and four by defendants. (1st Bellwether Order at 2.)

The first bellwether trial – *Paoli v. DePuy Orthopaedics, Inc.* – spanned almost two months in the fall of 2014. The case was selected by the PEC and involved a Montana plaintiff and her husband, who sought to recover against DePuy and J&J on failure-to-warn, design-defect, and other theories. The jury found for the defendants on each of plaintiffs' causes of action. (*See* 29 Trial Tr. 7:11, *Paoli v. DePuy Orthopaedics, Inc.*, No. 3:12-cv-04975-K [hereinafter "*Paoli* Dkt."] (N.D. Tex. Oct. 23, 2014) (attached as Ex. B).)

To this day, the MDL court has not entered final judgment on the verdict. After nearly a year of waiting, petitioners moved the MDL court to enter judgment. (Mot. for Entry of J. on Jury Verdict at 1, *Paoli* Dkt. No. 215 (N.D. Tex. filed Oct. 5, 2015).) The PEC opposed the motion, arguing that no final judgments should be entered until "conclusion of the bellwether process." (Pls.' Resp. to Defs.' Mot. for Entry Of J. on Jury Verdict at 1, *Paoli* Dkt. No. 216 (N.D. Tex. filed Oct. 23, 2015).) The MDL court has not ruled on petitioners' motion, and no formal final judgment has been entered in the *Paoli* case.

B. The Second Bellwether Trial

After the first bellwether trial, the MDL court jettisoned the remaining candidates in the previously selected pool of potential bellwether trial cases *sua sponte* and sought new candidates for a second trial.

In February 2015, the MDL court directed the parties to prepare ten cases for trial – eight of which had been selected by plaintiffs' counsel.[1] (Order on Bellwether Trials at 1, MDL Dkt. No. 491 (N.D. Tex. Feb. 18, 2015).)[2] Then, with less than a month remaining before the start of trial, the MDL court advised the parties through an email from the special master that five of those cases (four of which had been selected by the PEC) would be tried jointly, apparently pursuant to a district court's authority to consolidate cases for trial under Rule 42 of the Federal Rules of Civil Procedure. (*See* Defs.' Mem. of Law in Supp. of Mot. for Order Den. Consolidated Trial of Bellwether Cases at 1, Dkt. No. 79-1, *Aoki v. DePuy Orthopaedics, Inc.*, No. 3:13-cv-01071-K [hereinafter "*Aoki* Dkt."] (N.D. Tex. filed Dec. 30, 2015).)[3]

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[1] The order did not state that the cases were to be consolidated for trial. Rather, MDL courts routinely order the parties to work up multiple candidates for trial to ensure that the best trial candidates are identified and that trial will proceed even if some of the candidates are determined to be unsuited for trial during discovery. Indeed, that is precisely what happened in the first trial in this MDL proceeding; multiple candidates were identified, but only one plaintiff's claims were tried.

[2] Record citations to "MDL Dkt." are to the main MDL docket in the district court – No. 3:11-md-2244-K (N.D. Tex.).

[3] The second bellwether trial encompassed the claims of five plaintiffs pending on separate *(cont'd)*

Petitioners moved for an order that the cases not be consolidated.[4] (*See generally id.*) Petitioners argued that the MDL court's *sua sponte* decision to consolidate was made without benefit of briefing, and that any fair consideration of the disparate facts of the five cases would make clear that consolidation was improper. (*See generally id.*) Petitioners also highlighted the prejudicial and confusing nature of consolidated personal injury trials, which have the tendency to unfairly bolster the impression to juries that a product is defective merely because more than one plaintiff is alleging injury. (*Id.* at 14-17.)[5] The PEC opposed the motion, and the MDL court denied it. (*See generally* Order Consolidating Bellwether Cases for Trial, *Aoki* Dkt. No. 95 (N.D. Tex. filed Jan. 8, 2016).)[6]

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dockets in the MDL court. After consolidation, the parties generally filed substantively identical papers on all five dockets. For the sake of simplicity, this petition generally cites to the docket in the *Aoki* case because it comes first alphabetically.

[4] Petitioners are the corporations named as defendants in the cases identified in the latest bellwether trial order, which gave rise to this petition. There are other defendants named in other cases pending in the MDL proceeding.

[5] The prejudice and confusion inherent in consolidation – especially at large numbers like those at issue here – has been established by empirical research. One study found, for example, that consolidations of four or more plaintiffs made it harder for jurors to understand the evidence; more likely that the jury would find the defendant liable; and more likely that the jury would set higher per-plaintiff compensatory-damages awards. *See generally* Irwin A. Horowitz & Kenneth S. Bordens, *The Consolidation of Plaintiffs: The Effects of Number of Plaintiffs on Jurors' Liability Decisions, Damage Awards, and Cognitive Processing of Evidence*, 85 J. Applied Psy. 909 (2000).

[6] The MDL court also refused petitioners' request for a pretrial conference to address consolidation and other issues. Indeed, the MDL court did not hold a single conference on the record between the conclusion of the first bellwether trial in October 2014 and the start of the second trial in January 2016. This is in stark contrast to most MDL proceedings, which have monthly status conferences. *See, e.g.*, http://www.laed.uscourts.gov/vioxx/ (noting monthly

(cont'd)

At trial, the MDL court entered numerous orders on legal and evidentiary issues that favored plaintiffs and are likely to recur in most – if not all – cases pending in the MDL proceeding. For example, the plaintiffs argued, as their central theory of liability, that *all* metal-on-metal hip implants (regardless of manufacturer) are inherently defective – a theory that is not viable under state law and is preempted under federal law. Plaintiffs also argued that J&J as a parent company should be held liable on the theory that it "aided and abetted" its subsidiary, even though it was a subsidiary, DePuy, that sold and promoted the Pinnacle Ultamet. And plaintiffs argued that they could meet their burden to prove that an alleged failure to warn caused a plaintiff's injury based solely on the fact that the defendant broadly marketed the product – without showing that a particular representation or omission affected the plaintiff's surgeon's decision to use a particular implant. Petitioners argued that all of these theories were flawed as a matter of law in motions raised at various stages during the trial; but all of these motions, and several others, were denied. (*See generally* Order Den. Defs.'

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status conferences in Vioxx MDL proceeding); *see also Manual for Complex Litigation (Fourth)* § 22.62 (2004) ("Many judges monitor the activities of the parties and counsel through regularly scheduled status conferences and hearings on pretrial motions and discovery."); *MDL Standards & Best Practices* at 4, Duke Law School Center for Judicial Studies (2014), https://law.duke.edu/sites/default/files/centers/judicialstudies/MDL_Standards_and_Best_Practices_2014-REVISED.pdf ("*Best Practice* 1B(i): The transferee judge should schedule regular status conferences. In most proceedings, case management is aided greatly by regular status conferences. Monthly conferences are desirable, although less frequent conferences may be necessary as the proceeding matures.") (footnote omitted).

Mots. to Dismiss & for Summ. J., *Aoki* Dkt. No. 90 (N.D. Tex. filed Jan. 5, 2016).)

The MDL court also repeatedly overruled petitioners' objections to the efforts of plaintiffs' lead trial attorney, Mr. Lanier, to inject highly inflammatory evidence into the trial – most of which had no plausible connection to plaintiffs' claims that their hip implants had failed and injured them. This included: references to "bribes" supposedly paid to Saddam Hussein's "henchmen" by a nonparty J&J subsidiary in the pharmaceutical business; repeated references to a risk of cancer that has been refuted by science and was not related to any plaintiffs' allegations; references to a book that accused "industry" of corrupting scientific literature; references to alleged racism by DePuy employees; references to over 45,000 lawsuits facing another nonparty J&J subsidiary over pelvic mesh products; references to other products and claims against DePuy; and references to a physician's speculation that one of his patients committed suicide because of problems with his metal-on-metal hip implant.[7]

[7] As trial was coming to a close, and after plaintiffs had presented their case with no time restrictions of any sort, the MDL court ruled *sua sponte* that petitioners would have only six more trial days. Petitioners attempted to preserve their objection to the court's mid-trial decision to impose a unilateral time limitation, but the MDL court shut down their effort. Contrary to petitioners' counsel's understanding, the court announced that it believed it had reached an off-the-record deal under which petitioners waived any appeal of the time limitation. When petitioners protested, the MDL court threatened to tell the jury that petitioners' counsel lied to the court unless petitioners abandoned the objection. (*See generally* 3/9/16 Trial Tr. 214:3-223:17 (attached as Ex. C).) Under these circumstances, petitioners felt trapped, acquiesced and agreed to rest their case without formal objection. (*Id.* 223:20-224:2.)

C. Post-Trial Proceedings

On March 17, following a trial lasting nine weeks, the jury found for the plaintiffs and rendered a $502 million verdict, encompassing $142 million in compensatory damages and $360 million in exemplary damages.[8] On March 31, defendants renewed their motions for judgment as a matter of law with respect to all claims at issue, which remain pending before the MDL court.

Although it has not ruled on defendants' post-trial motions, the MDL court, again through the special master, directed the parties to submit a list of cases that the MDL court should consider as bellwether selections for an upcoming September 2016 trial. (*See* Email from Special Master James M. Stanton to Mark Lanier, Richard Arsenault, Stephen J. Harburg and Seth Roberts, May 19, 2016 (attached as Ex. D).) It also invited the parties to discuss the possibility of global settlement in an off-the-record conference.

In response to this request, petitioners filed a motion to stay additional trials pending resolution of an appeal in the second bellwether trial cases, arguing that it makes no sense to go forward with another trial given the inevitably recurring issues that petitioners intend to present to this Court. (*See* Defs.' Mem. of Law in

[8] The verdict far exceeded the Texas cap on punitive damages, which the PEC has now challenged as unconstitutional. (*See* Pls.' Resp. to Defs.' Mot. to Apply the Mandatory Cap on Exemplary Damages, *Aoki* Dkt. No. 272 (N.D. Tex. filed Apr. 21, 2016); Defs.' Reply Mem. in Supp. of Mot. to Apply the Mandatory Cap on Exemplary Damages, *Aoki* Dkt. No. 284 (N.D. Tex. filed May 5, 2016).)

Supp. of Mot. to Stay Additional Trials Pending Resolution of Appeal of Second Bellwether Trial Cases, MDL Dkt. No. 657-1 (N.D. Tex. filed May 24, 2016) (attached as Ex. E).) Petitioners also advised the MDL court through the special master that petitioners did "not see a way to resolve the litigation in its current posture[.]" (Email from Seth Roberts to Hon. James M. Stanton, June 7, 2016 (attached as Ex. F).)

Just three days after petitioners advised the MDL court that they were not in a position to discuss settlement (and before plaintiffs' response to the motion for stay brief was due), the MDL court issued an order instructing the parties to prepare seven cases (all selected by plaintiffs' counsel) governed by California law for a September 2016 trial. (*See* Order on Bellwether Trials, MDL Dkt. No. 660 (N.D. Tex. filed June 10, 2016).) The PEC had suggested California law because, unlike Texas law, California law does not impose a statutory cap on punitive damages. (*See* Email from Seth Roberts to Mark Lanier and Richard J. Arsenault, May 24, 2016 (attached as Ex. G).)[9]

On June 14, the PEC filed an opposition to the motion for stay, principally arguing that a stay would cause "undue delay" in the litigation of the cases of "thousands of plaintiffs in this MDL." (PEC's Resp. & Mem. in Opp'n to Defs.'

[9] The MDL court's order offered no explanation, analysis or justification for the candidates it selected.

Mot. to Stay Add'l Trials Pending Resolution of Appeal of Second Bellwether Trial Cases ("Stay Opp'n") at 8, MDL Dkt. No. 661 (N.D. Tex. filed June 14, 2016) (attached as Ex. H).) The PEC also argued that there is no need to await appellate review of the second bellwether trial because an appeal "is unlikely to impact the upcoming proposed bellwether trial," based largely on the PEC's contention that petitioners either "opened the door" to all of the prejudicial evidence they presented or because petitioners "waived" objections to the evidence.[10] (*Id.* at 10, 17.)

REASONS WHY THE WRIT SHOULD ISSUE

Mandamus is an "extraordinary remedy" that is granted "'not as a matter of

[10] None of this is correct. To the extent the PEC is concerned about a supposed delay in trying the cases of "thousands of plaintiffs," such an argument clearly lacks merit. As discussed further below, the purpose of bellwether proceedings is not to try "thousands of plaintiffs'" cases, but to try test cases in an effort to inform the parties about the broader claims pool. Moreover, although the MDL court accepted plaintiffs' argument that petitioners "opened the door" to much of the prejudicial evidence mentioned here merely by claiming that DePuy was a "good company" (*e.g.*, 1/12/16 Trial Tr. 105:13-107:11 (attached as Ex. I) ("You can't tell the good story this is your life hip implants without this being told. . . . [W]hen you open that door, that door is open for good.")), that proffered justification is incorrect. "Evidence allowed through the open door 'must rebut something that had been elicited,'" *Valadez v. Watkins Motor Lines, Inc.*, 758 F.3d 975, 982 (8th Cir. 2014) (citation omitted), and none of the evidence here was proper rebuttal, *see also, e.g.*, *Tanberg v. Sholtis*, 401 F.3d 1151, 1166 (10th Cir. 2005) ("whether or not rebuttal evidence is admissible depends on whether the initial proof might affect the case and 'whether the rebuttal evidence fairly meets the initial proof.'") (citation omitted). For example, the defendants never took a position on DePuy or J&J's track record on matters of racism or foreign corrupt practices. And in any event, the concept of "door opening" relates only to relevance; it does not remedy the significant hearsay problems that made much of the evidence at issue inadmissible. Nor did petitioners waive *any* of their objections – far less did they waive *all* of them. Indeed, the MDL court expressly acknowledged near the end of the trial, when petitioners reiterated their objections to many of the evidentiary issues noted in this petition, that "y'all had objected to almost all of those things timely during the trial." (3/10/16 Trial Tr. 71:25-72:1 (attached as Ex. J).)

right, but in the exercise of a sound judicial discretion.'" *S. Pac. Transp. Co. v. San Antonio*, 748 F.2d 266, 270 (5th Cir. 1984) (citation omitted); *accord In re Ramu Corp.*, 903 F.2d 312, 318 (5th Cir. 1990). Notwithstanding the fact that the remedy is "reserved for extraordinary cases," 748 F.2d at 270, this Court has recognized that "the standard governing the availability of mandamus is not 'never,' but 'hardly ever,'" *In re Am. Airlines, Inc.*, 972 F.2d 605, 608 (5th Cir. 1992) (citation omitted); *accord Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004) (while the conditions for obtaining the "drastic and extraordinary" remedy of mandamus may be "demanding, [they] are not insuperable") (citation omitted). Indeed, "[w]hen [a] writ of mandamus is sought from an appellate court to confine a trial court to a lawful exercise of its prescribed authority, the court should issue the writ almost as a matter of course." *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987) (quoting *United States v. Denson*, 603 F.2d 1143, 1145 (5th Cir. 1979)).

Parties seeking mandamus must satisfy a two-pronged test. First, petitioners "carry the burden of showing that their right to issuance of the writ is clear and indisputable." *Am. Airlines*, 972 F.2d at 608 (internal quotation marks and citations omitted). Second, petitioners must show that the district court's error is "not *effectively* reviewable on appeal." *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1021 (5th Cir. 1997) (Jones, J., specially concurring); *see also Hebert v. Exxon*

Corp., 953 F.2d 936, 938 (5th Cir. 1992) ("'[P]etitioners must show that they lack adequate alternative means to obtain the relief they seek[.]'").

This petition meets both prongs. Petitioners have a "clear and indisputable" right to mandamus because the MDL court has abused its discretion by conducting the proceedings in a manner that distorts the bellwether process, limits petitioners' opportunity for appeal, and creates strong but significantly premature settlement pressures. Mandamus is the proper remedy because appeal will never be possible unless the district court resolves petitioners' post-trial motions and enters judgment.[11] For these reasons, detailed below, the petition should be granted.[12]

I. PETITIONERS' RIGHT TO ISSUANCE OF A WRIT OF MANDAMUS IS CLEAR AND INDISPUTABLE.

Mandamus relief is appropriate because petitioners' right to the issuance of the writ on the merits is "clear and indisputable," for three separate reasons. *Am. Airlines*, 972 F.2d at 608. First, the bellwether process has been sapped of its putative benefits. Bellwether cases are supposed to be representative cases that aid

[11] Petitioners acknowledge that it is possible the MDL court will rule on their post-trial motions. But the MDL court's refusal to enter judgment in the first bellwether case, which has now been final for almost two years, suggests that it will not rule on post-trial motions in the second trial in time for any meaningful review by this Court. In light of the tight timeframe adopted by the MDL court for the next bellwether trial, petitioners do not have the luxury of waiting to see if the court will act.

[12] "[E]ven if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 311 (5th Cir. 2008) (quoting *Cheney*, 542 U.S. at 380-81). As demonstrated throughout this petition, the circumstances underlying the district court's orders are such that issuance of a writ is not only appropriate, but indeed essential.

the parties in efficiently resolving large-scale litigation. Instead, the MDL court has destroyed the representative character of the cases by making legal and evidentiary rulings that would not be followed by other courts. Second, by failing to enter final orders in the bellwether trials that have been litigated to verdict, the MDL court has deprived petitioners of a viable means of exercising their right to appeal to this Court. Third, the combined effect of this course of proceeding is to create significant settlement pressure before sufficient information about the claims pool can be obtained.

As further detailed below, each of these grounds, standing alone, warrants mandamus relief.

A. This Court Should Intervene Now To Prevent Further Wasted Resources In A Fatally Flawed Bellwether Trial Process.

The Court should first grant the writ because the MDL court has abused the "bellwether" process. The course chosen by the MDL court can neither yield representative verdicts nor aid the parties in achieving a fair or efficient resolution of the mass litigation. As such, the MDL court's bellwether process is so flawed that it constitutes a clear abuse of discretion.

This Court has recognized that the "heart of the bellwether case approach to handling complex litigation is the court's decision, reached after numerous pretrial conferences with the parties, to select particular plaintiffs' cases whose trials will furnish data that may facilitate settlement of the remaining cases." *In re FEMA*

Trailer Formaldehyde Prods. Liab. Litig., 628 F.3d 157, 161 (5th Cir. 2010). More specifically, "[i]f a representative group of claimants are tried to verdict, the results of such trials can be beneficial for litigants who desire to settle such claims by providing information on the value of the cases as reflected by the jury verdicts." *Chevron*, 109 F.3d at 1019; *see also Briggs v. Merck Sharp & Dohme*, 796 F.3d 1038, 1051 (9th Cir. 2015) ("A bellwether trial is a test case that is typically used to facilitate settlement in similar cases by demonstrating the likely value of a claim or by aiding in predicting the outcome of tricky questions of causation or liability."). It follows that "[w]ithout a sufficient level of confidence in the sample results, no inferences may be drawn from such results that would form the basis for applying such results to cases or claims that have not been actually tried." *Chevron*, 109 F.3d at 1020.

Recognizing the critical importance of bellwether trials to resolution of mass litigation, appellate courts have been solicitous of concerns presented by way of mandamus that a district court's rulings applicable to the bellwether process will deprive defendants of the right to present a meaningful defense. In *Chevron*, for instance, this Court granted mandamus relief to the defendant Chevron, which was challenging the district court's method for selecting bellwether cases. 109 F.3d at 1017-18. The district court had ordered the selection of a bellwether group of thirty plaintiffs (out of the 3,000 who had filed suit), with the idea that the

resolution of common issues in the bellwether trials could be applied to the remaining claims or used to facilitate settlement. *Id.* at 1017. The district court rejected Chevron's argument that the method for selecting the bellwether plaintiffs was not representative, and Chevron responded by seeking mandamus. *Id.* at 1018.

This Court granted Chevron mandamus relief, emphasizing that fairness concerns about the bellwether process must be resolved at the outset. The Court began by noting that "[t]here is no pretense that the thirty . . . cases selected are representative of the 3,000 member group of plaintiffs" and, consequently, "the results that would be obtained from a trial of these thirty . . . cases lack the requisite level of representativeness so that the results could permit a court to draw sufficiently reliable inferences about the whole that could, in turn, form the basis for a judgment affecting cases other than the selected thirty." *Id.* at 1019-20. The Court then explained that "the procedure subjects Chevron to potential liability to 3,000 plaintiffs by a procedure that is completely lacking in the minimal level of reliability necessary for the imposition of such liability." *Id.* at 1020. It thus concluded that mandamus was warranted to bar the district court from using "results obtained from the trial of the thirty . . . selected cases for any purpose affecting issues or claims of, or defenses to, the remaining untried cases." *Id.* at 1020-21.

Mandamus is likewise necessary here to restore the proper purpose of the

bellwether process. The MDL court has entered a broad range of legal and evidentiary rulings that substantially diverge from governing legal principles and, in doing so, has deprived the bellwether cases of the "requisite level of representativeness" to either produce settlements or streamline future trials. Thus, ordering the parties to proceed to the next trial threatens the same type of harm addressed in *Chevron* by using questionable rulings from one set of cases to subject petitioners to potential liability on dubious grounds in the next set of cases. As one legal commentator has explained, a single error in the MDL setting "can have immediate and sweeping impact on thousands of cases in one fell swoop," making the availability of appeal crucially important to "enable[] the parties to make informed choices" about how to proceed and potentially resolve the litigation. Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 Fordham L. Rev. 1643, 1643, 1694 (2011). By contrast, withholding the opportunity for appeal "render[s] both settlement and trial untenable options." *Id.* at 1663.

Citing similar concerns, other courts have recognized the virtues of pausing bellwether trials until an appeal has been decided where – as here – the issues on appeal "will very likely bear" on subsequent bellwether trials. *E.g.*, *Greco v. Nat'l Football League*, 116 F. Supp. 3d 744, 761 (N.D. Tex. 2015). In *Greco*, the court stayed trial of future cases pending resolution of an appeal to this Court from the

judgment entered in the first bellwether trial, recognizing that the "interests of the parties, and appropriate conservation of judicial resources, weigh in favor of granting a stay." *Id.* Referencing the likelihood that the decision on appeal would govern issues involved in future cases, the court concluded that continuing forward with trying other cases would risk retrial of those cases if this Court reversed any of the significant rulings entered in the first case. *Id.* Because "[t]he risk of duplicative litigation [was] too great for th[e] [c]ourt to ignore," it granted the motion for a stay pending the final outcome of the appeal. *Id.*

The same is true here. As set forth above the MDL court entered a host of erroneous and prejudicial rulings in the last trial – from its decision to consolidate five disparate cases for trial without meaningful analysis, to its resolution of a range of legal issues in dispositive motions, to its evidentiary rulings allowing plaintiffs to inject inflammatory issues into trial.

This includes permitting plaintiffs' counsel to:

- Ask a 30(b)(6) witness whether "bribes" were made by *nonparty subsidiaries* of J&J to "the henchmen of Saddam Hussein" and public officials in Iraq, Poland, and Romania. (*See, e.g.*, 1/29/16 Trial Tr. 68:25-69:5, 77:8-13, 99:15-18 (attached as Ex. K).)[13]

[13] The MDL court required petitioners' 30(b)(6) witness to testify at trial after it concluded that petitioners failed to adequately prepare the witness for a deposition that the MDL court *(cont'd)*

- Introduce speculative evidence that plaintiffs face a risk of cancer as a result of having once had metal-on-metal hip implants,[14] which led one plaintiff to testify later in the trial that after hearing the testimony, she was now worried about dying of cancer. (1/26/16 Trial Tr. 86:20-25 (attached as Ex. M); 1/27/16 Trial Tr. 234:10-14 (attached as Ex. N).)
- Read into the record portions of a book maligning "industry" to the jury as though it were evidence, including pages of hearsay statements about supposedly improper scientific articles planted in the literature by "Big Tobacco" and other industries, and then insinuate that petitioners' attorneys had similarly "maneuvered" science "to influence juries in litigation." (2/25/16 Trial Tr. 124:1-18, 126:10, 126:12, 127:3-9, 127:18-128:9, 132:10-133:5.)
- Introduce into the record emails from an African-American individual who was formerly employed by DePuy, containing, *inter alia*, unproven allegations of "nepotism, favoritism, and racism" on the part of other

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(cont'd from previous page)
ordered to take place mid-trial – even though the witness was able to speak to every single question asked within the scope of the Rule 30(b)(6) notice. (*See* Def. Johnson & Johnson's Mem. in Supp. of Mot. for Recons., MDL Dkt. No. 626-1 (N.D. Tex. filed Feb. 6, 2016).)

[14] Even plaintiffs' counsel acknowledged that the alleged risk of cancer was merely "a concern" or "a question" (2/25/16 Trial Tr. 263:20-21 (attached as Ex. L); *id.* 264:17-18), and the extensive epidemiological research that has looked at the question has refuted any link (*see* Defs.' Mem. of Law In Supp. of Renewed Mot. for Mistrial Re: Improper References to Cancer at 9 n.4, *Aoki* Dkt. No. 196-1 (N.D. Tex. filed Feb. 29, 2016)).

DePuy employees. (1/13/16 Trial Tr. 95:7-100:23 (attached as Ex. O).)

- Refer to "thousands" of other Pinnacle lawsuits and tell the jury that the Pinnacle Ultamet has been a "tragic failure[]," as evidenced by the fact that "[t]here have been thousands of cases" filed against defendants, in addition to the five at issue in the second bellwether trial. (1/11/16 Trial Tr. 31:15-17 (attached as Ex. P).) These references were also a centerpiece of plaintiffs' counsel's closing argument, during which counsel told the jury that "[t]housands of people suffered." (3/10/16 Trial Tr. 54:12; *id.* 54:14-15 ("[T]housands of them, are – they're walking time bombs.").)
- Introduce evidence about 45,000 lawsuits that have been filed by women against a different J&J subsidiary with regard to transvaginal mesh products, presumably to prejudice the predominantly female jury against J&J. (1/15/16 Trial Tr. 221:16-24 (attached as Ex. Q).)
- Show the jury an email by a plaintiffs' expert who did not testify in which he speculated that a patient in whom he implanted a metal-on-metal hip implant "just committed suicide because he was so depressed and thought he would never resolve the issue. Shot himself." (1/19/16 Trial Tr. 78:9-13 (attached as Ex. R).)

All of these issues are likely to recur in the next trial unless this Court

reviews them first. Thus, while bellwether trials in multidistrict litigation sometimes proceed before appeals in prior cases are completed, the unusual nature and number of broadly applicable rulings in the second bellwether trial render it irresponsible and wasteful to force the parties to try another case before an appeal from the last trial is resolved.

The PEC's arguments to the contrary in its district court briefing fundamentally misconceive the purpose of bellwether trials. The PEC chiefly contends that bellwethers must go forward to ensure that "thousands of plaintiffs in this MDL" have the opportunity "to litigate their cases without undue delay" (Stay Opp'n at 8) – implying a belief that the MDL proceeding was established to try every pending case in the proceeding.[15] But the purpose of an MDL proceeding is not to try "thousands of plaintiffs'" cases. *See, e.g.*, *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35-40 (1998) (holding that 28 U.S.C. § 1407 only authorizes coordinated or consolidated pretrial proceedings in multidistrict litigation, not trial, and quoting legislative history expressly stating that the law does not provide for "'the trial of cases in the consolidated proceedings'") (citation omitted); *In re Worldcom, Inc. Sec. Litig.*, Nos. 02 Civ.

[15] Plaintiffs' counsel's statements to the media echo this fundamental misunderstanding of the purpose of MDL proceedings. *See* Emily Field, *Judge Won't Stay J&J Hip Implant Trials After $498M Verdict*, Law360, June 13, 2016 (attached as Ex. S) (mistakenly attributing to petitioner DePuy a belief that the MDL court "will need to try all 8,500 cases" and that such a task could only be accomplished by trying ever larger consolidations of individual cases).

3288(DLC), 03 Civ. 1282(DLC), 2003 WL 23024454, at *1 (S.D.N.Y. Dec. 29, 2003) (MDL transfer is not "for all purposes, but only for pre-trial proceedings").[16] Instead, bellwether trials are supposed to be representative proceedings, undertaken with the aim of obviating the need to try every single case in the claims pool.

In addition, the PEC's contention that none of the issues on appeal from the last bellwether trial could possibly affect future trials betrays the same misunderstanding. The *entire point* of bellwether trials is to develop an understanding of issues that have significance for the broader claims pool in order to facilitate broader resolution. If, as the PEC apparently contends, the bellwether process is resulting in verdicts of no broader significance, then that process has failed its fundamental purpose and the MDL proceeding should be disbanded, with all remaining cases remanded to their transferor courts. But the PEC has notably not sought to terminate the proceeding below.

Under the circumstances, the Court should grant mandamus to bar the MDL court from impermissibly "subject[ing] [defendants] to potential liability" to another set of plaintiffs "by a procedure that is completely lacking in the minimal level of reliability necessary for the imposition of such liability." *Chevron*, 109 F.3d at 1020.

[16] In any event, petitioners welcome expedited review of the petition and are prepared to seek expedited review of an appeal from the second bellwether trial.

B. The Court Should Grant Mandamus To Ensure That The Parties Have A Meaningful Opportunity For Appellate Review.

The Court should also grant mandamus because the MDL court's decision to force another bellwether trial on a very tight time schedule – particularly when considered in light of its failure to enter judgment in the first bellwether case – will have the effect of thwarting petitioners' ability to appeal the large number of tenuous rulings in the second bellwether trial.

As the Supreme Court has repeatedly recognized, a district court is not entitled to "defeat[]" appellate jurisdiction through "unauthorized action . . . obstructing the appeal." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943). One clear means of obstructing appeal is refusing to resolve post-trial motions, as other courts have recognized. In *Tough v. Ives*, 268 A.2d 371 (Conn. 1970), for instance, the trial court refused either to enter a judgment or to grant a motion to set aside the verdict after the jury returned a verdict in favor of the defendant. *Id.* at 372. Observing that "there is no right of appeal" "[u]ntil there is a final judgment or the court has granted the motion to set aside the verdict," the Connecticut Supreme Court stressed that a district judge "must not be permitted to hold a case in limbo and thwart appellate review" by refusing to enter a final judgment. *Id.* The court therefore directed the trial judge "to take any action necessary to complete or perfect the record for the proper presentation of an appeal." *Id.*

The only way out of such a bind in the federal system is mandamus. Indeed, absent such a remedy, the ability to exercise appellate jurisdiction would be "thwarted" by the district court's refusal to act. *Roche*, 319 U.S. at 25. For this reason, the U.S. Supreme Court and the federal courts of appeals have held that "mandamus is the appropriate remedy to compel action in the event of failure or refusal of a court to enter judgment when the situation of a case requires." *Steccone v. Morse-Starrett Prods. Co.*, 191 F.2d 197, 199 (9th Cir. 1951); *see also, e.g.*, *Ex Parte United States*, 287 U.S. 241, 250 (1932) (granting mandamus and ordering district judge to issue bench warrant because the court's refusal to issue the warrant "is, in reality and effect, a refusal to permit the case to come to a hearing upon either questions of law or of fact, and falls little short of a refusal to permit the enforcement of the law"); *United States v. Malmin*, 272 F. 785, 791-92 (3d Cir. 1921) (granting mandamus and directing district judge to "return to his jurisdiction and to perform the duties of his office," including, among other things, issuing final orders to safeguard the opportunity of parties to seek appellate review).

The Court should grant mandamus relief here for the same reasons. The MDL court has erroneously held the cases from the second bellwether trial "in limbo and thwart[ed] appellate review" by pushing ahead with a third bellwether trial without deciding the post-trial motions still pending from the completed trial.

See Tough, 268 A.2d at 372. Moreover, the MDL court's refusal to enter judgment in the *Paoli* case portends a strong likelihood that the post-trial motions from the second bellwether trial will remain pending in perpetuity. The Court should grant mandamus to ensure that the MDL court complies with its mandate to afford parties the opportunity to secure appellate review in at least one bellwether case before this Court.

C. The Court Should Grant Mandamus To Prevent Settlement Pressures That Would Result From The MDL Court's Order.

Finally, this Court's intervention is needed to stem the settlement pressures created by the MDL court's misuse of the bellwether process.

It is well understood that the MDL process "'creates incentives for judges to treat settlement as the ultimate goal.'" Pollis, 79 Fordham L. Rev. at 1669 (citation omitted). But while "judges should encourage and aid early settlement," "they should not attempt to coerce that settlement." *In re NLO, Inc.*, 5 F.3d 154, 157 (6th Cir. 1993) (citing *Strandell v. Jackson Cty.*, 838 F.2d 884, 887 (7th Cir. 1987)). To be sure, "[d]istrict courts [may] struggle to deal effectively with caseloads expanding at a precipitous rate" in mass tort litigation. *Id.*; *see also Chevron*, 109 F.3d at 1021 ("We are sympathetic to the efforts of the district court to control its docket and to move this case along."). Nonetheless, courts of appeals have made clear that district courts cannot cross the line between facilitating settlement and coercing it, and that requiring "'particular lawyers or litigants to

participate in additional and unconventional settlement procedures'" crosses that line. *NLO*, 5 F.3d at 158 (quoting Jennifer O'Hearne, Comment, *Compelled Participation in Innovative Pretrial Proceedings*, 84 Nw. U.L. Rev. 290, 320 (1989)); *see also Chevron*, 109 F.3d at 1022 (Jones, J., specially concurring) (recognizing that a flawed bellwether process could have the potential effect of "forc[ing] defendants to settle even when they might have meritorious defenses").

In *NLO*, for example, the U.S. Court of Appeals for the Sixth Circuit granted a petition for mandamus where the district court sought to compel the parties to engage in a "summary jury trial [to] be held as a settlement tool." *Id.* at 155. As the court explained, "[a] summary jury trial is a non-binding mini-trial designed to give the attorneys and their clients an indication of what they may expect at a full-blown trial on the merits." *Id.* at 156. The Sixth Circuit concluded that the district court clearly abused its discretion in ordering such a procedure. Although it acknowledged that "[d]istrict courts unquestionably have substantial inherent power to manage their dockets," the court cautioned that a district court's power "must be exercised in a manner that is in harmony" with the Federal Rules. *Id.* at 157. In addition, while the court recognized the importance of facilitating settlement to manage docket pressures, it also made clear that a district court "should not attempt to coerce . . . settlement" through the use of unconventional case-management techniques. *Id.* The court further expressed its concern that a

"jury trial, even one of summary nature, . . . requires" a significant investment of resources, and "[c]ompelling an unwilling litigant to undergo this process improperly interposes the tribunal into the normal adversarial course of litigation. It is error." *Id.* at 158.

The same is true here – the MDL court has misused the bellwether process in a manner that has produced a coercive pressure to settle through a range of unconventional and inappropriate procedures, including: the consolidation of cases for trial; evidentiary rulings that invite plaintiffs to present the jury with irrelevant, inflammatory and highly prejudicial evidence; and the failure to open any realistic avenue to appeal. As in *NLO*, petitioners have never consented to the process employed by the district court. Indeed, they have resisted them at every turn, through motions to deny consolidation, to exclude evidence, and to stay further trials until this Court has had an opportunity to review the manner in which the MDL court has handled bellwether cases in this litigation. The Court should intervene to ensure that it has that opportunity and to restore the utility of the bellwether process as a mechanism to provide the parties with valuable information regarding the strengths and weaknesses of their claims and defenses.

II. THE DISTRICT COURT'S ERRORS ARE IRREMEDIABLE ABSENT IMMEDIATE APPELLATE REVIEW.

There can be little question that petitioners satisfy the second prong of this Court's inquiry on a mandamus petition – i.e., irremediable harm. As Judge Jones

has explained, the touchstone of this inquiry is whether there is a "realistic opportunity for [defendants] to appeal." *Chevron*, 109 F.3d at 1022 (Jones, J., specially concurring); *accord Volkswagen*, 545 F.3d at 318 (this prong asks whether "the petitioner . . . ha[s] no other adequate means to attain relief" through a normal appeal).

Such an opportunity would only present itself in these cases in the far-from-certain event that the MDL court ultimately enters judgment in the second bellwether trial cases. Given the MDL court's unwillingness to enter judgments in bellwether trials to date, any appeal through the normal appellate process may never happen – a possibility that itself is a recognized basis for mandamus review, as previously discussed. *See, e.g.*, *McClellan v. Carland*, 217 U.S. 268, 281 (1910).

In any event, it is clear that any end-of-case appeal could never occur before DePuy and J&J will have borne tremendous costs and burdens associated with additional bellwether trials. Petitioners should not have to spend the millions of dollars associated with the working up and trying *seven* cases on an expedited basis, subject to the same erroneous and prejudicial rulings that tainted the last trial, before this Court has an opportunity for review of those rulings. Indeed, charging ahead with the next trial poses a significant risk that the investment in a third trial will be entirely wasted should petitioners prevail on appeal on grounds

that necessitate reversal of the third bellwether trial as well. At that point, the "harm" "will already have been done," especially if the MDL court's prejudicial rulings culminate in another gigantic verdict that is shielded from appellate review, causing defendants tremendous financial and reputational injury – "and the prejudice suffered cannot be put back in the bottle." *Volkswagen*, 545 F.3d at 318-19 (issuing writ with respect to erroneous transfer order because an appeal of a transfer order after final judgment "will provide no remedy"); *cf., e.g., NLO*, 5 F.3d at 159 (granting mandamus in part because the "expense of compulsory participation in a summary jury trial, even of short duration, is unnecessary and irremediable").

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court issue a writ of mandamus directing the Honorable Ed Kinkeade, Judge of the United States District Court for the Northern District of Texas, to: (1) vacate its Order on Bellwether Trials, dated June 10, 2016, which scheduled a trial for September 6, 2016 (Exhibit A); (2) rule promptly on petitioners' pending post-trial motions in the last bellwether trial; and (3) enter judgment in those cases so that an appeal may follow, *see* Fed. R. Civ. P. 58(b).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the Petition for a Writ of Mandamus was filed with the Court electronically on June 22, 2016, and an electronic copy of the brief were served on the individuals below via electronic mail on the same date.

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