

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

IN RE: DEPUY ORTHOPAEDICS,	§	
INC. PINNACLE HIP IMPLANT	§	MDL Docket No.
PRODUCTS LIABILITY	§	
LITIGATION	§	3:11-MD-2244-K
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This Document Relates to all Cases	§	
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ORDER APPOINTING SPECIAL MASTER

At the initial pretrial conference on August 9, 2011, the Court asked the parties to indicate whether they believed the use of a Special Master in this MDL proceeding was appropriate. Plaintiffs and defendants both supported the use of a Special Master. Having considered the suggestions by the parties about the role and function of a Special Master in this litigation, the Court now appoints James M. Stanton (Mr. Stanton's current resume is attached to this order, and his contact information is as follows: Andrews Kurth, LLP; 1717 Main Street #3700; Dallas, Texas 75201; Phone: (214) 659-4627; Facsimile: (214) 915-1439; E-mail: JamesMStanton@andrewskurth.com.) as Special Master for this litigation.

This appointment is made pursuant to Rule 53 and the inherent authority of the Court. "Beyond the provisions of [Fed. R. Civ. P. 53] for appointing and making

references to Masters, a Federal District Court has ‘the inherent power to supply itself with this instrument for the administration of justice when deemed by it essential.’” *Schwimmer v. United States*, 232 F.2d 855, 865 (8th Cir. 1956) (quoting *In re: Peterson*, 253 U.S. 300, 311 (1920)); see *Ruiz v. Estelle*, 679 F.2d 1115, 1161 n.240 (5th Cir. 1982), cert denied, 460 U.S. 1042 (1983) (same); *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 746 (6th Cir. 1979) (the authority to appoint “expert advisors or consultants” derives from either Rule 53 or the Court’s inherent power). The Court’s inherent power to appoint a Special Master, however, is not without limits. See *Cobell v. Norton*, 334 F.3d 1128, 1142 (D.C. Cir. 2003) (in the absence of consent by the parties, the inherent authority of the court does extend to allow appointment of Special Master to exercise “wide-ranging extrajudicial duties” such as “investigative, quasi-inquisitorial, quasi-prosecutorial role[s]”). As Rule 53 requires, in this Order the Court sets out the duties and terms of the Special Master, the reasons for the appointment, and orders the Special Master to proceed with all reasonable diligence.

I. Background.

On May 24, 2011, the Judicial Panel on Multidistrict Litigation transferred 3 related cases to the undersigned for coordinated or consolidated pretrial proceedings. The Panel concluded that all of the cases: share factual questions as to whether DePuy’s Pinnacle Acetabular Cup System, a device used in hip replacement surgery, was defectively designed and/or manufactured, and whether defendants failed to provide

adequate warnings concerning the device. In re: DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prods. Liab. Litig., (J.P.M.L. May 24, 2011) (MDL No. 2244) [Doc. No. 1].

The Panel also noted a dispute among the plaintiffs and defendants regarding whether the centralized proceedings be limited to solely the metal-on-metal configuration or include all configurations. The Panel deferred that question to this Court:

At this early stage of the litigation, we will not limit the scope of this MDL docket. The transferee judge can further refine the issues and closely scrutinize the arguments of the parties regarding the inclusion of metal-on-metal and other configurations. If he decides to include all configurations, then the transferee judge can employ any number of pretrial techniques--such as establishing separate discovery or motion tracks--to efficiently manage this litigation.

As of January 6th, 2012, 884 cases are currently pending with this transferor court, and plaintiffs' counsel represented to the Court at the initial pretrial conference that there may be hundreds of other plaintiffs. The allegations in this litigation and the submissions of the parties make clear that these cases may, as foreshadowed by the Panel's transfer order, potentially involve separate discovery or motion tracks for different configurations, complicated medical expert testimony, substantial scientific evidence, and other demanding topics.

It is clear that MDL presents many difficult issues and will require an inordinate

amount of attention and oversight from the Court. Other MDL courts, facing similar challenges, have easily concluded that appointment of a Special Master was appropriate to help the Court with various pretrial, trial, and post-trial tasks. See, e.g., *In re: Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liab. Litig.*, 1999 WL 782560 at *2 (E.D. Pa. Sept. 27, 1999) (MDL No. 1203) (noting that the court had earlier appointed a Special Master to oversee discovery matters and “facilitate the timely remand of individual civil actions to their respective transferor courts;” the court later broadened the Special Master’s duties to include oversight and administration of the settlement trust funds); *In re: Bridgestone/Firestone Inc., ATX, ATX II, and Wilderness Tires Products Liab. Litig.*, Order at 3-5, docket No. 14 (MDL No. 1373) (S.D. Ind. Nov. 1, 2000) (appointing a Special Master to assist the court with all phases of the litigation, from “formulating a governance structure of [the] MDL” in its earliest stage to assisting with “attorneys fees” issues and “settlement negotiations” during the latter stages of the litigation); *In re: Baycol Products Liab. Litig.*, 2004 WL 32156072 (D. Minn. Mar. 25, 2002) (MDL No. 1431) (appointing a Special Master early in the case and assigning him all available “rights, powers, and duties provided in Rule 53”; the court has since appointed two additional masters to assist the first Special Master); *In re: Propulsid Products Liab. Litig.*, 2004 WL 1541922 (E.D. La. June 25, 2004) (MDL No. 1355) (appointing a Special Master and setting out a variety of duties); *In re: Welding Fumes Prods. Liab. Litig.*, 2004 WL 3711622 (N.D. Ohio Nov. 10, 2004)

(same).

Indeed, the appointment of a Special Master in MDL cases such as this is common. The 2003 amendments to Rule 53 specifically recognize the pretrial, trial, and post-trial functions of masters in contemporary litigation. Thus, the Court agrees with the parties that appointment of a Special Master to assist the Court in effectively and expeditiously resolving the parties' disputes is appropriate.

II. Rule 53(b)(2).

Rule 53 requires an order of appointment to include certain contents. See Fed. R. Civ. P. 53(b)(2). This Order sets forth the matters required.

A. Master's Duties.

Rule 53(a)(1)(A) states that the Court may appoint a master to "perform duties consented to by the parties." The Court has reviewed recent legal authority addressing the duties of a Special Master that are permitted under the Federal Rules of Civil Procedure and Article III of the Constitution. See, e.g., Fed. R. Civ. P. 53, advisory committee's notes (discussing the range of duties and authority of the Special Master). Consistent with this legal authority, the currently-anticipated needs of the Court, and the parties' broad consent, the Court states that the Special Master in these proceedings shall have the authority to:

1. assist with preparation for attorney conferences (including formulating agendas), court scheduling, and negotiating changes to the case management order;

2. establish discovery and other schedules, review and attempt to resolve informally any discovery conflicts (including issues such as privilege, confidentiality, and access to medical and other records), and supervise discovery;

3. oversee management of docketing, including the identification and processing of matters requiring court rulings;

4. compile data and assist with, or make recommendations with regard to, interpretation of scientific and technical evidence;

5. assist with legal analysis of the parties' motions or other submissions, whether made before, during, or after trials, and recommend findings of fact and conclusions of law;

6. assist with responses to media inquires;

7. help to coordinate federal, state and international litigation;

8. direct, supervise, monitor, and report upon implementation and compliance with the Court's Orders, and make recommendations on remedial action if required;

9. interpret any agreements reached by the parties;

10. propose structures and strategies for settlement negotiations on the merits, and on any subsidiary issues, and evaluate parties' class and individual claims, as may become necessary;

11. propose structures and strategies for attorneys' fee issues and fee settlement negotiations, review fee applications, and evaluate parties' individual claims for fees, as

may become necessary;

12. administer, allocate, and distribute funds and other relief, as may become necessary;

13. adjudicate eligibility and entitlement to funds and other relief, as may become necessary;

14. monitor compliance with structural injunctions, as may become necessary;

15. make formal or informal recommendations and reports to the parties, and make recommendations and reports to the Court, regarding any matter pertinent to these proceedings; and

16. communicate with parties and attorneys as needs may arise in order to permit the full and efficient performance of these duties.

B. Communications with the Parties and the Court.

Rule 53(b)(2)(B) directs the Court to set forth “the circumstances – if any – in which the master may communicate ex parte with the court or a party.” The Special Master may communicate ex parte with the Court at the Special Master’s discretion, without providing notice to the parties, in order to assist the Court with legal analysis of the parties’ submissions. The Special Master may also communicate ex parte with the Court, without providing notice to the parties, regarding logistics, the nature of his activities, management of the litigation, and other appropriate procedural matters. The Court may later limit the Special Master’s ex parte communications with the Court with

respect to certain functions, if the role of the Special Master changes. If, for example, the Court later finds it desirable to use the Special Master as a mediator regarding the merits of a particular dispute, which mediation would require disclosure of information by the parties to the Special Master that the parties would prefer to keep from a final adjudicator, the Court may redefine the scope of allowed ex parte communications with the Court regarding that dispute. See, e.g., *In re: Propulsid Products Liab. Litig.*, 2002 WL 32156066 (E.D. La. Aug. 28, 2002) (after the Special Master was given additional mediation duties, the scope of his ex parte communications with the parties and the Court, as well as his record-keeping obligations, changed); Rule 53(b)(4) (noting that an order of appointment may be amended). On the other hand, such imposition of different limits on ex parte communications does not necessarily require amendment of this Order.

The Special Master may communicate ex parte with any party or his attorney, as the Special Master deems appropriate, for the purposes of ensuring the efficient administration and management of this MDL, including the making of informal suggestions to the parties to facilitate compliance with Orders of the Court; such ex parte communications may, for example, address discovery or other procedural issues. Such ex parte communications shall not, however, address the merits of any substantive issue, except that, if the parties seek assistance from the Special Master in resolving a dispute regarding a substantive issue, the Special Master may engage in ex parte communications

with a party or his attorney regarding the merits of the particular dispute, for the purpose of mediating or negotiating a resolution of that dispute, only with the prior permission of those opposing counsel who are pertinent to the particular dispute. To the extent it may be considered a “substantive issue,” the Special Master may engage in ex parte communications with a party or counsel, without first obtaining the prior permission of opposing counsel, to resolve privilege or similar questions and in connection with in camera inspections.

C. Master’s Record.

Rule 53(b)(2)(c) states that the Court must define “the nature of the materials to be preserved and filed as a record of the master’s activities.” The Special Master shall maintain normal billing records of his time spent on this matter, with reasonably detailed descriptions of his activities and matters worked upon. See also section II.E of this Order, below. If the Court asks the Special Master to submit a formal report or recommendation regarding any matter, the Special Master shall submit such report or recommendation in writing, for electronic filing on the case docket. The Special Master need not preserve for the record any documents created by the Special Master that are docketed in this or any other court, nor any documents received by the Special Master from counsel or parties in this case. The Court may later amend the requirements for the Special Master’s record if the role of the Special Master changes. See, e.g., *In re: Propulsid Products Liab. Litig.*, 2004 WL 1541922 (E.D.La. June 25, 2004) (setting out

additional record-keeping requirements after the Special Master was charged with new duties of administering a settlement program).

D. Review of the Special Master's Orders.

Rule 53(b)(2)(D) directs the Court to state “the time limits, method of filing the record, other procedures, and standards for reviewing the master’s orders, findings, and recommendations.” The Special Master shall either: (1) reduce any formal order, finding, report, or recommendation to writing and file it electronically on the case docket via Electronic Case Filing (“ECF”); or (2) issue any formal order, finding, report, or recommendation on the record before a court reporter. Pursuant to Rule 53(g)(2), any party may file an objection to an order, finding, report, or recommendation by the Special Master within 14 calendar days of the date it was electronically filed; failure to meet this deadline results in permanent waiver of any objection to the Special Master’s orders, findings, reports, or recommendations. Rule 53(g)(2) provides that parties may file objections “no later than 20 days from the time the master’s order, report, or recommendations are served, unless the court sets a different time.” The Court chooses to set a period of 14 calendar days (NOT business days) in order to expedite final resolution of matters formally reported upon by the Special Master. Motions for extensions of time to file objections will not normally be granted unless good cause is shown. The Special Master may, however, provide in his order, finding, report, or recommendation that the period for filing objections to that particular document is some

period long than 14 calendar days, if a longer period appears warranted. Absent timely objection, the orders, findings, reports, and recommendations of the Special Master shall be deemed approved, accepted, and ordered by the Court, unless the Court explicitly provides otherwise.

If the Special Master issues an informal ruling or order that is not on the record (such as the resolution of a discovery dispute) either orally, via E-mail, or through other writing, and a party wishes to object to that ruling or order, the party shall ask the Special Master to formalize the ruling or order by filing it on the docket or appearing before a court reporter. Such request shall be made within three days of issuance of the informal order or ruling, else the opportunity to object shall be waived. The procedures and deadlines outlined in this section shall then apply.

As provided in Rule 53(g)(4 & 5), the Court shall decide de novo all objections to conclusions of law made or recommended by the Special Master; and the Court shall set aside a ruling by the Special Master on a procedural matter only for an abuse of discretion. The Court shall retain sole authority to issue final rulings on matters formally submitted for adjudication, unless otherwise agreed by the parties, and subject to waiver of objection to written orders or recommendations as noted above. To the extent the Special Master enters an order, finding, report, or recommendation regarding an issue of fact, the Court shall review such issue de novo, if any party timely objects pursuant to the Rules and within the 14 calendar day time period set forth herein; see

Rule 53(g)(3). Failure to meet this deadline results in permanent waiver of any objection to the Special Master's findings of fact.

E. Compensation.

The Court will address compensation by separate order.

1. Affidavit.

Rule 53(b)(3) notes that the Court may enter an Order of appointment "only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. §455." See also Rule 53(a)(2) (discussing grounds for disqualification). Attached to this Order is the affidavit earlier submitted to the Court by the Special Master.

2. Cooperation.

The Special Master shall have the full cooperation of the parties and their counsel. Pursuant to Rule 53(c), the Special Master may, if appropriate, "impose upon a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty." As an agent and officer of the Court, the Special Master shall enjoy the same protections from being compelled to give testimony and from liability for damages as those enjoyed by other federal judicial adjuncts performing similar functions." See *Atkinson-Baker & Associates, Inc. v. Kolts*, 7 F.3d 1452, 1454-55 (9th Cir. 1993) (applying the doctrine of absolute quasi-judicial immunity to a Special Master). The parties will make readily available to the Special

Master any and all facilities, files, databases, and documents which are necessary to fulfill the Special master's functions under this Order.

SO ORDERED.

Signed January 9th, 2012.

A handwritten signature in black ink that reads "Ed Kinkeade". The signature is written in a cursive style with a horizontal line underneath it.

ED KINKEADE

UNITED STATES DISTRICT JUDGE

Affidavit Of James M. Stanton
Tendered Pursuant to Fed. R. Civ. P. 53

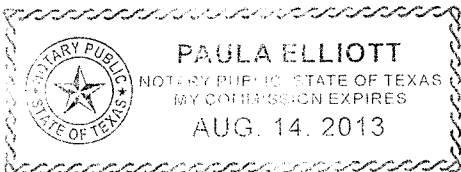
STATE OF TEXAS)
)
COUNTY OF DALLAS)

James M. Stanton, being first duly sworn according to law, states the following:

1. I am an attorney at law, duly licensed to practice law in the State of Texas since November 6, 2002. My Texas State Bar Number is 24037542. I am also admitted to practice (1) in the State of Colorado (Colorado Bar Number 35302) although I took inactive status in 2009 upon entering judicial service and have not changed my status since re-entering private practice; (2) before the United States Fifth Circuit Court of Appeals; and, (3) before several United States District Courts.

2. I have thoroughly familiarized myself with the issues involved in the case captioned *In re: DuPuy Orthopaedics, Inc. Pinnacle Hip Implant Products Liability Litigation*. As a result of my knowledge of that case, I can attest and affirm that there are no non-disclosed grounds for disqualification under 28 U.S.C. § 455 that would prevent me from serving as the Special Master in the captioned matter.

FURTHER AFFIANT SAYETH NAUGHT.



[Handwritten Signature]

James M. Stanton

Sworn to before me and subscribed in my presence this 6th day of January, 2012.

[Handwritten Signature]

Notary Public

James M. Stanton

**Counsel**

1717 Main Street
 Suite 3700
 Dallas, TX 75201
 P: 214.659.4627
 F: 214.915.1439
 JamesMStanton@andrewskurth.com

James assists businesses at all stages of litigation in federal and state court. Whether in the courtroom or at the settlement table, his experience as a state district judge and a board certified trial attorney helps his clients resolve their lawsuit so they can get back to focusing on their business.

James joined Andrews Kurth following his service as presiding judge of the 134th Judicial District Court in Dallas County, Texas. During his career as a lawyer and judge, his experience includes handling over 60 jury trials, 40 bench trials, and thousands of hearings. He is board certified in Civil Trial Law by the Texas Board of Legal Specialization.

His scholarly writing in the *Baylor Law Review* and the *Thurgood Marshall Law Review* has been cited by Texas appellate courts, and he speaks frequently on trial advocacy and juror and judicial decision making.

REPRESENTATIVE EXPERIENCE

- Represented a client in a misappropriation of trade secrets lawsuit in Texas state court. The claims arose when the client learned that former employees had secretly taken customer lists and proprietary pricing information to a competitor in violation of an executed confidentiality and non-compete contract. The case was resolved after a temporary restraining order was obtained and expedited discovery was completed.
- Represented a client in commercial fraud and breach of contract lawsuit in federal district court. The claims arose when a Fortune 500 corporation failed to transfer certain assets pursuant to an anti-trust divestiture order recommended by the U.S. Department of Justice and approved by a U.S. District Court. The case was resolved following a bench trial.
- Represented a client in a fraud, breach of fiduciary duty, and professional negligence lawsuit in federal district court. The claims arose after an alleged improper transfer of securities by a brokerage firm in violation of federal law. The case was resolved during trial.
- Represented a client in a guardianship action in Texas state court. The action arose following the legal incapacity of a family member and an attempt to wrongfully sell the assets of a multi-million dollar estate including personal property and real estate. The case was resolved following a bench trial.

PRACTICES

Antitrust Litigation
 Commercial Litigation
 Litigation
 Professional Liability
 Securities Litigation

EDUCATION

JD, Baylor Law School;
Baylor Law Review,
 Senior Executive Editor;
 Recipient, Louis
 Muldrow Jury Argument
 Award and W. Frank
 Newton Law
 Review-Advocacy
 Award
 BA, *magna cum laude*,
 University of Colorado
 at Colorado Springs

ADMISSIONS

Texas
 Colorado
 US Court of Appeals for
 the Fifth Circuit
 US District Courts for
 the Northern, Southern,
 Eastern & Western
 Districts of Texas

James M. Stanton

PUBLICATIONS

- "Risky Business: Four Things a Judge Will Analyze Before Entering a TRO," *Texas Lawyer* (December 26, 2011)
- "Three Things Never to Write in Court Papers," *Texas Lawyer* (November 7, 2011)
- "Questions to Ask to Win the Next Hearing," *Texas Lawyer* (September 19, 2011).
- *Recovering Attorney Fees in Equity Under Texas Law: Why Some Texas Courts of Appeal Have it Wrong*, 29 T. Marshall L. Rev. 243 (2004) (cited by *Naschke v. Gulf Coast Conference*, 187 S.W.3d 653 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) and *Akin Gump Strauss Hauer & Feld, LLP v. Nat'l Dev't & Research Corp.*, 232 S.W.3d 883 (Tex. App.—Dallas 2007), *rev'd*, 299 S.W.3d 106 (Tex. 2009)).
- *Requirements of a Class Certification Order Under Texas Rule of Civil Procedure 42 After Southwestern Refining Co. v. Bernal*, 54 Baylor L. Rev. 287 (2002).

BRIEFINGS, SEMINARS & SPEECHES

- "The Ten Rules Every Juror Wants Every Young Lawyer To Know" presented to the Law Clerks and Summer Interns in the Dallas Division of the United States District Court for the Northern District of Texas in the courtroom of United States District Judge Ed Kinkeade with Trey Cox (Dallas, Texas; June 2011).
- "What Every Juror Wants Every Trial Lawyer to Know and Do in the Courtroom" presented at the Annual Meeting of the Texas Trial Lawyers Association with Lisa Blue Baron and Trey Cox (Austin, Texas; June 2011).
- "The Jury Speaks: Tips from Jurors to Prevail in Your Next Jury Trial" presented to the Dallas Bar Association Trial Skills Section with United States District Judge W. Royal Furgeson, Jr. and Trey Cox (Dallas, Texas; January 2011).
- "Dinner and a Movie: Jurors Tell You How to Be a Better Trial Court Judge" presented at the 2010 College for Newly Appointed and Elected Judges by the Texas Center for the Judiciary with Trey Cox (Austin, Texas; December 2010).
- "Ever Wonder What They Are Thinking: The Jury Speaks Featuring Videotaped Exit Interviews from Jurors" presented to the Garland Walker Inn of Court with United States District Judge Gray H. Miller, United States Bankruptcy Judge Jeff Bohm, and Trey Cox (Houston, Texas; December 2010).
- "What Civil Court Judges Want You to Know" sponsored by the National Business Institute, Inc. with State District Judge Ken Curry, State District Judge Eric V. Moye', State District Judge John Roach, Jr., State District Judge Gena Slaughter, State District Judge Bonnie Sudderth, and State District Judge Melody Wilkinson (Fort Worth, Texas; October 2010).
- "Persuading Your Judge and Maintaining Your Ethics" presented at the Ethics Symposium sponsored by Legal Placement with State District Judge Lorraine Raggio, State District Judge Eric V. Moye', and Randy Johnston (Dallas, Texas; July 2010).
- "Judicial Recusal and Disqualification, and Attorney Disqualification" presented at the Advanced Personal Injury Course sponsored by the State Bar of Texas with State District Judge Melody Wilkinson, Dallas County Court at Law Judge King Fifer, and Former State District Judge Joe Cox (Dallas, Texas; July 2010).
- "Jury Box Gossip: What Juries Say Behind Closed Doors" presented at the Understanding Juries Seminar at the Advanced Civil Trial Course sponsored by the State Bar of Texas with Trey Cox (San Antonio, Texas; July 2010).
- "Tips from the Judges on How to Be a More Persuasive Courtroom Advocate" presented to the Dallas Trial Lawyers Association with State District Judge Emily Tobolowsky and State District Judge Jim Jordan (Dallas, Texas; June 2010).
- "Approach the Bench (the Right Way): Tips from Judges on Winning in Court" presented to the Dallas Bar Association with State District Judge Eric V. Moye', State District Judge Ken Molberg, and State District Judge Craig Smith (Dallas, Texas; May 2009).

AFFILIATIONS

- Judge, 134th District Court of Dallas County
- Justice, Tenth District Court of Appeals (appointed to consider a single case)
- Board Certified in Civil Trial Law and Personal Injury Trial Law

James M. Stanton

- Capital Campaign Chair, First United Methodist Church of Dallas (2011)
- Member, Texas Association of District Judges
- Life Fellow of The Foundation of the American Board of Trial Advocates, Texas Bar Foundation, Dallas Bar Foundation, and Dallas Association of Young Lawyers Foundation