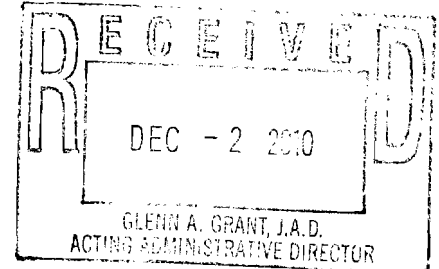


Civil Practice Division

DEC 03 2010

December 1, 2010

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Hon. Glenn A. Grant, J.A.D.  
Acting Administrative Director of the Courts  
Administrative Office of the Courts  
Richard J. Hughes Justice Complex  
25 West Market Street  
P.O. Box 037  
Trenton, New Jersey 08625

Re: **Defendants' Application for Centralized Management of DePuy  
ASR™ Hip Litigation Cases in Middlesex County**

Dear Judge Grant:

We represent the defendants DePuy Orthopaedics, Inc. ("DePuy") and Johnson & Johnson in products liability cases recently filed in New Jersey involving the DePuy ASR™ XL Acetabular System ("ASR™ XL System"), a hip implant that was voluntarily recalled in August 2010. To date, over 139 federal cases have been filed involving the ASR™ XL System, which will soon be consolidated in a federal Multi-District Litigation. An additional 42 state court cases have been filed including three in New Jersey. Given the number of patients implanted with the DePuy ASR™ XL System as well as the number of pending cases nationally, more cases are expected to be filed here. To avoid duplicative discovery and inconsistent rulings, and to conserve judicial resources and promote the interests of justice at the outset of these matters, we submit this application to have the DePuy ASR™ Hip Implant Litigation cases in New Jersey

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consolidated as a mass tort for centralized management before Judge Jessica R. Mayer in Middlesex County.

## I. BACKGROUND

Defendant DePuy Orthopaedics, Inc. (“DePuy”) is the company responsible for the design, manufacture, marketing, and sale of the ASR™ XL System, one of many hip implants made by DePuy within the United States. Most ASR™ XL System hip replacement surgeries have been successful. However, data recently received by DePuy shows that more patients than expected who received the ASR™ XL System underwent a second hip replacement surgery called a revision surgery. New data from the United Kingdom showed that five years after implantation of the ASR™, approximately 12% of patients who had received the ASR™ resurfacing device and 13% of patients who had received the ASR™ total hip replacement needed to have a revision surgery. On August 24, 2010, DePuy issued a voluntary recall of its ASR™ XL System and ASR™ Hip Resurfacing System.

Within days of the recall, lawsuits were filed and on August 31, 2010, the plaintiff in a California federal class action lawsuit<sup>1</sup> involving the ASR™ XL System filed a motion for the creation of an MDL. MDL-2197: In re DePuy Orthopaedics, Inc., ASR Hip Implant Products Liability Litigation will coordinate all federal products liability actions involving the ASR™ Hip Systems. To date, plaintiffs have filed over 139 actions in federal district courts and 42 actions in state courts across the country including

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<sup>1</sup> *Maurice Brigham v. DePuy Orthopaedics, Inc.* U.S.D.C., N.D. Cal., Case No. 3:10-cv-03886-SI.

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Alabama, California, Colorado, Georgia, Florida, Hawaii, Kentucky, Illinois, Louisiana, Massachusetts, Minnesota, Mississippi, Missouri, Ohio, New Jersey, New York, Rhode Island, South Carolina, Tennessee, Texas, and Virginia, all alleging personal injury from the ASR™ XL System. Defendants do not oppose the creation of an MDL; the only issue now before the Panel is venue. The JPML heard oral argument regarding the assignment of MDL-2197 on November 18, 2010, and will soon issue an Order assigning the MDL to a specific United States District Court judge. Likewise, a petition for state wide coordination of pretrial discovery has been filed in California.

DePuy has put into place a process through which patients can obtain reimbursement for the medical expenses and out-of-pocket costs associated with medical treatment that they may need with regard to their ASR™ XL System hip implants. Specifically, DePuy has engaged an independent third-party claims processor, Broadspire Services, Inc., to evaluate claims made by patients who may be affected by the recall and to reimburse them for the expenses they incur in the course of their treatment. It is DePuy's goal that all affected patients will have access to and receive the benefits of the Broadspire program; however, those patients who are represented by counsel cannot be contacted directly by Broadspire.

All hip implants on the market result in some frequency of complications that may lead to revision surgery - complications that will likely be alleged in the ASR™ Hip Implant Litigation cases filed and soon-to-be-filed in New Jersey. In addition to issues of specific causation, the central substantive issues involved in these ASR™ Hip Implant Litigation will be the design of the ASR™ system, the cause of the need for revision

surgery, and the warnings which accompanied the device. Given the background rate of complications with all hip implant systems, it is inevitable that lawsuits will be filed on behalf of patients with surgery complications attributable to other factors unrelated to the hip implant used to relieve their pain. Accordingly, coordination for pretrial management is appropriate given the number of expected lawsuits in New Jersey.

The first DePuy ASR™ Hip Implant Litigation cases to be filed in New Jersey Superior Court, Richard Haupt and Karen Haupt v. Johnson & Johnson, et al., Docket No. MID-L-8135-10, Wanda Hamilton v. DePuy Orthopaedics, Inc., et al., Docket No. MID-L-8054-10, and Ruby Allen and David Allen v. Johnson & Johnson, et al., Docket No. MID-L-8315-10, have all been filed in Middlesex County. Hamilton is before Judge Heidi Willis Currier, Haupt is assigned to Judge Nicholas J. Stroumtsos, Jr. and Allen is assigned to Judge Phillip Lewis Paley. Ms. Hamilton and Mr. and Mrs. Allen are Virginia residents and the Haupts are from New Jersey.

## II. LEGAL ARGUMENT

### 1. **The New Jersey DePuy ASR™ Hip Implant Litigation Cases Meet the Standards Set Forth in the Guidelines for Designation as a Mass Tort**

For the reasons set forth below, the current and soon-to-be-filed New Jersey cases meet the factors set forth in the Mass Tort Guidelines and Criteria for Designation, Directive 7-09 (August 18, 2009) such that mass tort designation is warranted here.

First, the DePuy ASR™ Hip Implant Litigation cases involve a large number of plaintiffs as over 30,000 patients have been implanted with DePuy ASR™ hip implants in the United States. There are currently 181 federal and state plaintiffs across the

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country, including New Jersey. More are expected to be filed in New Jersey as it is the corporate headquarters for the Johnson & Johnson defendants.

Second, the New Jersey plaintiffs have, like their federal counterparts, filed “cookie cutter complaints” with the same allegations and theories, all involving the same product - For this reason, core issue discovery will be present in all the cases. These and later-filed cases would benefit from centralized management here in New Jersey and in coordination with the MDL and the state court proceedings in California so that production of core discovery regarding the product at issue may be coordinated and streamlined.

Third, there is and will continue to be a geographical disbursement of the parties in the current and later filed cases. Plaintiffs in the three filed cases are from Virginia and New Jersey, respectively. Defendant DePuy Orthopaedics, Inc. is headquartered in Warsaw, Indiana. Defendant Johnson & Johnson, headquartered in New Brunswick, New Jersey, is a holding company and neither designed, manufactured, nor sold the ASR™ XL System. Despite the fact that Johnson & Johnson is not a proper party to this litigation, it has been named as a defendant in one form or another in nearly all the pending ASR™ Hip Implant Litigation cases here and across the county. There is no doubt that more cases will be filed in New Jersey by out-of-state plaintiffs such that the geographical disbursement of parties will continue.

Fourth, given the fact that there will be coordinated federal and California state proceedings, centralized management here in New Jersey will further the efficient handling of these matters.

Fifth, the DePuy ASR™ Hip Implant Litigation cases are handled by both local and national counsel who are involved in the federal and California proceedings as well as the New Jersey cases.

Sixth, there is no risk that centralization will unreasonably delay the progress of these actions or prejudice any parties. As described above, Defendants have put into place a process through which plaintiffs can obtain reimbursement for the medical expenses and out-of-pocket costs associated with medical treatment that they may need. As such, there is no basis for claiming that Plaintiffs will be prejudiced by consolidation of these cases for centralized management.

Finally, centralized management of the New Jersey DePuy ASR™ Hip Implant Litigation cases is not only fair and convenient to the parties, witnesses and counsel but it will facilitate a more efficient core discovery process and expedite the resolution of these cases. If the New Jersey DePuy ASR™ Hip Implant Litigation cases are not managed in a coordinated fashion at the outset, the risk of unequal procedural footing, inconsistent discovery rulings and other pre-trial issues runs high. Given the vast number of cases that are likely to be filed in New Jersey as this litigation moves forward, now is the best time to consolidate for management. Substantial discovery against Defendants will be pursued through written requests, corporate representative depositions, third party witness depositions, thousands of company documents, and witness testimony. It is also expected that a number of expert witnesses across multiple disciplines will be retained to address the various novel scientific and medical issues presented in these ASR™ Hip Implant Litigation cases. There is no need for the witnesses to have their depositions

taken over and over on the same issues, and for Defendants to respond multiple times to the same written discovery in the various lawsuits. Coordination of the New Jersey ASR™ Hip Implant Litigation cases will prevent duplication of discovery.

In addition to discovery sought against Defendants, coordination will also aid in managing the significant written and deposition discovery propounded on the plaintiffs. Defendants will request discovery regarding plaintiffs' medical condition prior to the use of the product and damages. Written discovery may be negotiated and resolved in a coordinated manner. The medical histories of each plaintiff will be put at issue and, therefore, coordination will be required to efficiently assemble the medical and other records of what is expected to be an increased number of plaintiffs once all cases have been filed. Coordination of all pretrial discovery will minimize the potential for inconsistent rulings on the legal and evidentiary issues involved in these ASR™ Hip Implant Litigation cases, prevent disparate treatment of both plaintiffs and Defendants, and avoid litigation difficulties of managing these actions before several different judges.

Placing all of the New Jersey ASR™ Hip Implant Litigation cases before a single, experience mass tort judge, who can formulate and monitor a pretrial discovery program and coordinate with the MDL proceeding, will advance judicial economy, reduce the overall litigation management burdens, and conserve the resources of the parties, their counsel, and the judiciary. All of these factors militate in favor of mass tort designation and coordination because they serve to promote the ends of justice.

**2. Venue for Centralized Management is Appropriate in Middlesex County.**

Consideration of the relevant factors – fairness, geography and existing case loads – leads to the conclusion that Middlesex County provides the most appropriate vicinage for centralized management of the DePuy ASR™ Hip Implant Litigation cases. See Mass Tort Guidelines and Criteria for Designation, at 2.

The Court's central inquiry as to "the existing civil and mass tort caseload in the vicinage" favors Middlesex County. Judge Mayer in Middlesex County currently presides over consolidations in Gadolinium, HRT, ORTHO EVRA®, Risperdal®/Seroquel/Zyprexa, and Zometa/Aredia, almost all mature litigations at the trial stage and many of which are winding down – indeed the ORTHO EVRA® litigation has only three cases left. Judge Marinotti in Bergen County presides over more than half a dozen predominantly new coordinated torts and mass torts with well over 1,000 plaintiffs collectively. At least one of his largest litigations (Yasmin®) is in its infancy in terms of discovery. Judge Higbee of Atlantic County Superior Court is currently overseeing nine mass tort matters with well over 2,000 plaintiffs collectively. Many of these are new or young litigations, and they are very large.

The three DePuy ASR™ Hip Implant Litigation cases currently filed in New Jersey are in Middlesex County. Judge Mayer has led several complex product liability litigations through to trials, and the majority of the consolidated actions before her court are now in their final stages. She has overseen a large and complicated mass tort, In re ORTHO EVRA® Products Liability Litigation, Case No. 266, which is wrapping to conclusion with only three plaintiffs left. In handling ORTHO EVRA®, Judge Mayer



gained extensive experience coordinating mass tort litigation with one of the proposed judges to be assigned the DePuy ASR™ Hip Implant MDL, Judge David Katz of the U.S. District Court for the Northern District of Ohio. Both plaintiffs' and defense counsel argued in favor of Judge Katz for assignment of the DePuy ASR™ Hip Implant MDL.

Middlesex County also has a readily available staff of resources and provides the prudent venue for centralized management of the DePuy ASR™ Hip Implant Litigation cases as Johnson & Johnson's world headquarters are there, and DePuy is a part of the Johnson & Johnson family of companies and the defendant party at interest in this litigation. In addition, the county is conveniently located in the center of the State of New Jersey, it is a hub of the State's public transportation system, and is serviced by a direct express rail lines to one of the nation's largest airports at Newark Liberty International (for all of the out-of-state plaintiffs) and to New York City and Philadelphia (for all of the out-of-state plaintiffs' lawyers). Middlesex County is a geographically superior location for all interested parties in these matters.

In light of geographic location, ease of accessibility, experience of the Bench, existing case loads, and presently available judicial resources and capacity, Middlesex County is the appropriate venue for centralization here. If there is to be a New Jersey forum for out-of-state plaintiffs who allege product liability claims against a New Jersey corporate defendant, the forum should be where that defendant is located.

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**CONCLUSION**

For the foregoing reasons, defendants submit that the DePuy ASR™ Hip Implant Litigation cases currently and subsequently filed in New Jersey should be consolidated as a mass tort for centralized management before Judge Jessica Mayer in Middlesex County.

Respectfully Submitted,

DRINKER BIDDLE & REATH LLP



Susan M. Sharko

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