

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN RE: DePUY ORTHOPAEDICS, INC.,
ASR HIP IMPLANT PRODUCTS

Case No. 1: 10 md 2197

SEALED ORDER

Drs. Antoni Nargol and David Langton, through counsel, have moved to intervene (Doc. No. 825) in this case pursuant to Federal Rule of Civil Procedure 24(b) in order to modify this Court's April 6, 2011 Stipulated Protective Order of Confidentiality. (Doc. No. 126). The purpose of the intervenors' motion is to share confidential information which they previously obtained in their capacities as retained expert witnesses. As expert witnesses in this case, the proposed intervenors are subject to this Court's Confidentiality Order. (Doc. No. 126, p. 1, ¶ 2). The Defendants have filed a response (Doc. No. 843), and the proposed intervenors have filed a reply. (Doc. No. 846). The intervenors also moved for leave to file an exhibit *in camera* with their motion to intervene. (Doc. No. 825-1, p. 6).

I. Facts

The intervenors seek to modify the Court's Confidentiality Order so they may use the documents and information provided them in this case in a pending False Claims Act action. *United States et al., ex rel. Antoni Nargol and David Langton v. DePuy Orthopaedics, Inc. et al.*, No. 12-cv-10896 (D. Mass.) (Doc. No. 825-1, p. 6). The intervenors also seek to disclose certain documents to the United Kingdom's Medicines and Healthcare Products Regulatory Agency (MHRA). Their request regarding their *in camera* exhibit is an attempt to preserve attorney work-product privilege. (Doc. No. 825-1, p. 6).

The intervenors received access to documents and information produced during discovery in this case following their retention as Plaintiffs' expert witness. As expert witnesses, the intervenors agreed to abide by the Court's Confidentiality Order. The order limits the use of certain documents and information produced in this litigation to "preparation and trial of an action involving an ASR Hip Implant and any appeal herein." (Doc. No. 126, p. 6, ¶ 10).

The intervenors admit that between May 9, 2012, and June 5, 2014, they disclosed certain confidential documents and information, in explicit violation of to this Court's Confidentiality Order, to the United States and the governments of several states in connection with their Massachusetts case. (Doc. No. 825-1, p. 7). The intervenors filed a complaint and an amended complaint in the Massachusetts action which contains allegations corroborated by information derived, in part, from the confidential documents provided in this case. The intervenors state the disclosures were made in connection with the investigation and prosecution of the Massachusetts case. (Doc. No. 825-1, p. 7).

The intervenors seek to modify the Confidentiality Order for two reasons. First, they want to use the documents in the Massachusetts action, including, without limitation, in amended pleadings, discovery, summary judgment, and trial. Second, the intervenors seek modification of the Court's order so that they may advise the MHRA. (Doc. No. 825-1, p. 8).

The intervenors state that in May 2012, Plaintiffs' counsel provided them with documents to assist in their preparation of expert testimony. During their preparation, the intervenors combined their own personal knowledge with the information they received from the provided documents and concluded that DePuy had violated the federal False Claims Act, 31 U.S.C. § 3729 et seq., and parallel state false claims statutes. The intervenors are of the opinion that DePuy

defrauded taxpayers of millions of dollars through illegal sales facilitated by omissions and misrepresentations to government payors concerning the safety and efficacy of the company's medical devices. (Doc. No. 825-1, p. 8).

The intervenors filed their Massachusetts action on May 17, 2012, and amended their complaint on November 13, 2013. The amended complaint alleged that DePuy knowingly sold ASR XL and Pinnacle devices to government payers despite knowledge that these devices failed to satisfy the requisite manufacturing standards of the FDA and the medical device industry. The intervenors asserted that DePuy's manufacturing process routinely generated components with defects and that DePuy sold the defective devices instead of treating them as scrap. The intervenors based their allegations upon their personal knowledge, supporting their analyses and conclusions with information obtained from documents produced in this case. (Doc. No. 825-1, p. 9).

The intervenors subsequently obtained additional documents produced by the parties to the Pinnacle MDL which were subject to that court's confidentiality order. (Doc. No. 825-1, p. 9). The intervenors admit that the documents obtained in this case, along with certain Pinnacle MDL documents, provide substantial factual support to the intervenors' False Claims Act allegations in Massachusetts. (Doc. No. 825-1, p. 10). The intervenors state that they intend to disclose the protected documents, produced in the ASR and Pinnacle MDL litigations, to the United States Department of Justice, various states, the FDA, and the MHRA, along with using the documents to prosecute their False Claim action in Massachusetts. (Doc. No. 825-1, p. 10).

II. Requirements to Obtain Intervention

A court ruling on a motion for permissive intervention under Rule 24(b) must consider two factors: (1) whether the proposed intervenor “has a claim or defense that shares with the main action a common question of law or fact”; and (2) “whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” Fed. R. Civ. P. 24(b)(1)(B); 24(b)(3); *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 760 (6th Cir. 2013). “To intervene permissively, a proposed intervenor must establish that the motion for intervention is timely and alleges at least one common question of law or fact.” *United States v. Michigan*, 424 F.3d 438, 445 (6th Cir. 2005). If these two requirements have been established, the district court must “balance undue delay and prejudice to the original parties, if any, and any other relevant factors to determine whether, in the court’s discretion, intervention should be allowed.” *Id.*

The Sixth Circuit has noted that Rule 24(b) provides no standard for timeliness. *FMC Corp. v. Keizer Equip. Co.*, 433 F.2d 654, 656 (6th Cir. 1970). The court has explained “that: (1) [w]hether intervention be claimed of right or as permissive, it is at once apparent, from the initial words of both Rule 24(a) and Rule 24(b), that the application must be timely; and (2) we review the district court’s conclusion about the timeliness element, under both types of intervention, for abuse of discretion.” *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000) (internal quotation marks and citations omitted). The Sixth Circuit has consistently looked to the circumstances of the case to determine timeliness. *Id.* at 475 (“[t]he absolute measure of time between the filing of the complaint and the motion to intervene is one of the least important circumstances,” citing with approval *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994)

(when measuring timeliness of a motion to intervene, “absolute measures of timeliness should be ignored”). To determine timeliness, the Sixth Circuit reviews five factors:

(1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenors knew or should have known of their interest in the case; (4) the prejudice to the original parties due to the proposed intervenors’ failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and (5) the existence of unusual circumstances militating against or in favor of intervention.

Jansen v. City of Cincinnati, 904 F.2d 336, 340 (6th Cir. 1990) (discussing the factors of timeliness under Rule 24(a)); *see also Michigan Ass’n for Retarded Citizens v. Smith*, 657 F.2d 102, 105 (6th Cir. 1981) (applying these timeliness factors to both Rules 24(a) and 24(b)).

III. Discussion

The motion to intervene is chronologically timely, having been filed less than a year after the intervenors filed their amended complaint and slightly two years after filing the original complaint in the Massachusetts action. However, the intervenors have failed to satisfy elements two and five of the *Jansen* decision for timeliness.

Jansen requires the Court to evaluate the purpose for which the intervention is sought. *Jansen*, 904 F.2d at 340. The Court finds the purpose for the motion is to allow the experts to personally benefit at the detriment of both parties. Allowing the intervention and modification of the Confidentiality Order rewards the intervenors for using confidential information they obtained in their roles as experts; information which would not have been available to them absent their special employment. The confidential information the intervenors received admittedly helps forms the basis of their Massachusetts action. Permitting the use of the proposed information by the

intervenors allows the intervenors to ignore their obligations under this Court's prior Confidentiality Order, effectively rendering the order null and void.

The Confidentiality Order was carefully crafted by the parties and Court to ensure that the discovery exchanged between the parties was well protected. The order included coverage of experts, such as the intervenors. Modifying the Confidential Order would destroy the carefully crafted agreement between the parties for the intervenors' personal ill-gotten gains. If it were not for their role as experts in this action, the intervenors would not have been privy to the confidential information they admittedly want to use in their Massachusetts action and wish to share with others. A modification of the Confidentiality Order would create distrust between parties regarding the exchange of confidential information. The Defendants would become very hesitant in sharing discovery if Plaintiffs' experts were allowed to subsequently use their positions of trust to their benefit and to the Defendants' detriment. The modification would significantly impair the litigation process and the settlement efforts of all involved.

Allowing the intervention and modification of the Confidentiality Order would also discourage, if not eliminate, the cooperation which now exists among the parties. The elimination of this cooperative atmosphere would inhibit efforts in obtaining any future confidentiality agreements. Therefore, the Court finds that to allow intervention and the modification of the Confidentiality Order would be prejudicial to both parties in this case.

Regarding element five of the *Jansen* analysis, the circumstances of this case mitigate against intervention. The intervenors' request would allow the intervenors to use for their personal gain information they would not have had available but for their retained roles as Plaintiffs' experts. Should the intervenors be allowed to intervene, the Court's Confidentiality Order would

be for naught. The purpose of the order is to allow the parties to freely exchange confidential information without worrying that the parties, their counsel, their employees, and their experts would share the information learned. The intervenors' request defeats this very purpose. If the Court agreed with the intervenors' request, these retained experts would be free to use the knowledge they obtain during this litigation for their own benefit. This result is unacceptable.

In addition, the intervenors must establish a claim or defense that shares a common question of law or fact with the main action. *Vassalle*, 708 F.3d at 760. In evaluating this requirement of Rule 24(b), the Court finds that the intervenors do not possess any such claim. The intervenors have filed a False Claim Act action in Massachusetts, along with seeking permission to share the confidential information with third parties, including state, federal, and foreign government entities.

This is a products liability case which is completely different from the Massachusetts proceeding. The intervenors have no interest in this litigation as they were not individuals who received a hip replacement product from the Defendants. Rather, their only connections with this case are as retained experts for the Plaintiffs. Because the intervenors lack a legal interest in this case, they have failed to satisfy the commonality element of Rule 24(b). *Id.* Accordingly, the motion to intervene and request to modify the Confidentiality Order are denied.

The Court reminds the intervenors of their responsibilities and duties as experts in this case. Under paragraph two of the Court's Confidentiality Order, the intervenors, as experts, are governed by the terms of that order. (Doc. No. 126, p. 1, ¶ 2). Paragraph five of the order states: "No person who examines any item produced pursuant to a discovery request, or information that is protected by this Protective Order, shall disseminate orally, or by any other means, any protected

information other than as permitted by this Order.” (Doc. No. 125, p. 4, ¶ 5). Paragraph eleven emphasizes that any designated protected document under the order “shall not be disclosed to any other person or entity” unless specified by that paragraph. (Doc. No. 125, pp. 6–8, ¶ 11). By becoming experts in this litigation, the intervenors had to first agree in writing to be bound by the Confidentiality Order. (Doc. No. 125, p. 7, ¶ 11(b)). Therefore, pursuant to the Confidentiality Order, the intervenors are *prohibited* from sharing or using the information they received in their capacities as experts in their False Claim Act proceeding. They are also *prohibited* from sharing their information with any third-party, including any government entities, foreign or domestic.

IV. Conclusion

Accordingly, the requests to intervene and to modify the Confidentiality Order are denied. (Doc. No. 825). The motion to file an exhibit *in camera* is granted.

IT IS SO ORDERED.

S/ David A. Katz
DAVID A. KATZ
U. S. DISTRICT JUDGE