UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: DEPUY ORTHOPAEDICS, INC. PINNACLE HIP IMPLANT PRODUCT LIABILITY LITIGATION	)	MDL No. 2244
This Document Relates To:	)	Honorable Ed Kinkeade
Andrews v. DePuy Orthopaedics, Inc., et al. No. 3:15-cv-03484-K	)	
Davis v. DePuy Orthopaedics, Inc., et al. No. 3:15-cv-01767-K	)	
Metzler v. DePuy Orthopaedics, Inc., et al. No. 3:12-cv-02066-K	)	
Rodriguez v. DePuy Orthopaedics, Inc., et al. No. 3:13-cv-03938-K	)	
Standerfer v. DePuy Orthopaedics, Inc., et al. No. 3:14-cv-01730-K	)	
Weiser v. DePuy Orthopaedics, Inc., et al. No. 3:13-cv-03631-K	)	

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR JUDGMENT ON THE VERDICT

Defendants do not oppose entry of judgment on the jury's December 1, 2016 verdict. Indeed, under Rule 58, "the court must promptly approve the form of the judgment, which the clerk must promptly enter, when[ ]the jury returns a special verdict or a general verdict with answers to written questions." Fed. R. Civ. P. 58(b)(2)(A) (emphasis added). A motion should not be required; in fact, Rule 58 was amended in 1963 with the express purpose of ending

the requirement that attorneys make submissions to give effect to a judgment. Fed. R. Civ. P. 58, advisory committee's note to 1963 amendment.[1]

Defendants do, however, oppose plaintiffs' request, pursuant to the California offer of judgment rule, California Civil Code § 3291,[2] that "pre-judgment interest be awarded on their actual damage awards at a rate of 10% per annum from the date of their September 9, 2016, settlement offer to the date the judgment is satisfied." (Pls.' Mot. ¶¶ 8, 15, 22, 26, 30, 37.) As a threshold matter, this request is improper because Rule 68 of the Federal Rules of Civil Procedure – and not California Civil Code § 3291 – governs offers of judgment in federal courts. *Medina v. Pile Trucking, Inc.*, 594 F. App'x 358, 360 (9th Cir. 2015) (offers of judgment under California Civil Code § 3291 "are procedural in nature and, therefore, are governed by Federal Rule of Civil Procedure 68 under *Erie Railroad Co. v. Tompkins*"); *see also Home Indem. Co. v. Lane Powell Moss & Miller*, 43 F.3d 1322, 1332 (9th Cir. 1995) (holding that the Alaskan equivalent to § 3291 could not be applied in a diversity action because it is procedural in nature and conflicts with Rule 68); *Manfred v. Superstation, Inc.*, No. CV 06-6208 GPS (JCx), 2010 WL 2464820, at *2 (C.D. Cal. June 14, 2010) (following *Home Indemnity* and holding that § 3291 may not be applied in federal courts); *Day v. Sears Holdings Corp.*, No. CV 11-09068

[1] Defendants continue to maintain that the Court lacks personal jurisdiction over them and that they are entitled to judgment as a matter of law as to all of plaintiffs' claims. They also believe that they are alternatively entitled to a new trial and/or to a remittitur of both compensatory and punitive damages. Thus, while defendants do not oppose entry of a judgment, they do so, of course, without prejudice to their right to raise or renew these and other arguments in their post-judgment motions under Rules 50 and 59 (or any other applicable rule) after any judgment is entered.

[2] Plaintiffs' motion references California Civil Code § 3289, which addresses the applicable rate of interest in breach of contract cases, but they presumably meant to cite to Cal. Civil Code § 3291, which addresses the payment of interest following the rejection of an offer of judgment under Cal. Civil Code §998. *See Teachers' Ret. Bd. v. Genest*, 154 Cal. App. 4th 1012, 1045, 65 Cal. Rptr. 3d 326, 350 (2007) ("Civil Code section 3289 specifies that the applicable interest rate for prejudgment interest in breach of contract cases is 10 percent."). Section 3289 does not apply in tort cases. *See Palomar Grading & Paving, Inc. v. Wells Fargo Bank, N.A.*, 230 Cal. App. 4th 686, 690 (2014) (noting that § 3289 only applies to breach of contract cases).

MMM (PJWx), 2013 WL 12125738, at *5-7 (C.D. Cal. May 28, 2013) (holding that California Code of Civil Procedure § 998 – the section underlying California Civil Code § 3291 – cannot be applied in federal court because it occupies the same "field of operation" as Federal Rule 68).

In any event, plaintiffs did not comply with the requirements of Cal. Code Civ. P. § 998, and thus would not be entitled to the interest allowed under Cal. Civil Code § 3291 ***even if that provision applied***. Under Cal. Civ. Proc. Code § 998, "[t]he written offer shall include a statement of the offer, containing the terms and conditions of the judgment or award, and a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted." Cal. Civ. Proc. Code § 998(b) (West Supp. 2015). Plaintiffs refer to a September 9, 2016 settlement offer as the basis for their request (Pls.' Mot. ¶¶ 8, 15, 22, 26, 30, 37), but the only "September 9, 2016 offer" defendants are aware of was a letter on that date offering to negotiate a resolution of the entire MDL proceeding. Contrary to the requirements of Cal. Civ. Proc. Code § 998, that letter did not contain "the terms and conditions" for entry of judgment in the six cases at issue here. *See, e.g.*, *Taing v. Johnson Scaffolding Co.*, 9 Cal. App. 4th 579, 583 (1992) ("[A] lump-sum offer to several plaintiffs jointly with no indication of how the offer is to be allocated among them has been held too uncertain to trigger section 998 penalties, because it cannot be determined whether any individual plaintiff's recovery at trial was more favorable than the offer."). Nor did the letter contain a provision that would have allowed defendants to simply sign a statement that an offer to resolve the six cases was being accepted. *Boeken v. Philip Morris USA Inc.*, 217 Cal. App. 4th 992, 1004 (2013) ("Because [the plaintiff's] section 998 offer did not include the required acceptance provision, the offer was invalid."). Rather, the letter was nothing more than an invitation to enter into what the

letter itself recognized would have to be a "time-consuming undertaking" to "work out the details" of a global settlement of all of the thousands of cases in the MDL proceeding.

In short, even if California's offer-of-judgment procedure applied in federal courts, plaintiffs' request would still be improper.

Dated: December 30, 2016

Respectfully submitted,

s/ Steven W. Quattlebaum
Steven W. Quattlebaum
QUATTLEBAUM, GROOMS & TULL PLLC
111 Center Street
Suite 1900
Little Rock, AR 72201
(501) 379-1707

s/John A. Anderson
John A. Anderson
STOEL RIVES LLP
201 S. Main St., Ste. 1100
Salt Lake City, UT 84111
(801) 578-6930

s/Dawn Estes
Dawn Estes
ESTES THORNE & CARR PLLC
3811 Turtle Creek Blvd.
Dallas, TX 75219
(214) 599-4000

s/ Stephen J. Harburg
John H. Beisner
Stephen J. Harburg
Jessica Davidson Miller
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000

s/ Seth M. Roberts
Seth M. Roberts
LOCKE LORD LLP
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201
(214) 740-8453

COUNSEL FOR DEFENDANTS DEPUY ORTHOPAEDICS, INC., DEPUY PRODUCTS, INC., DEPUY SYNTHES, INC., JOHNSON & JOHNSON, JOHNSON & JOHNSON SERVICES, INC., and JOHNSON & JOHNSON, INTERNATIONAL

CERTIFICATE OF SERVICE

I certify that on December 30, 2016, I filed this document using the Court's Electronic Case Filing ("ECF") system, which will automatically deliver a notice of electronic filing to all parties' counsel of record, who are registered ECF users. Delivery of such notice of electronic filing constitutes service of this document as contemplated by Rule 5 of the Federal Rules of Civil Procedure. *See* LR 5.1.

s/ Stephen J. Harburg

Counsel for Defendants