BEFORE THE JUDICAL PANEL ON

MULTIDISTRICT LITIGATION

MDL DOCKET NO.

In Re: INTUITIVE SURGICAL, INC. ROBOTIC SURGERY PRODUCTS LIABILITY LITIGATION:

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR TRANSFER OF ACTIONS PURSUANT TO 28 U.S.C. § 1407

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I. INTRODUCTION

Pursuant to 28 U.S.C. § and Rule 7.2 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, plaintiffs in the action captioned Patricia Mayfield and Drennan Mayfield, Plaintiffs, v. Intuitive Surgical, Inc. respectfully submit this Brief in Support of Plaintiffs' Motion for Transfer of Actions Pursuant to 28 U.S.C. § 1407.

Patricia Mayfield and Drennan Mayfield, Plaintiffs, v. Intuitive Surgical, Inc. and the other related actions listed in the accompanying Schedule of Actions were filed against the defendants based on the defendants' design, maintenance, and use of products and devices that caused the injuries incurred by plaintiffs during routine surgeries. The legal theories and facts asserted in all of those actions are virtually identical and arise from the common conduct of the defendants in designing, manufacturing, selling, and putting into the stream of commerce their defective products.

II.

SUMMARY OF THE CASE

Plaintiffs brought actions against the manufacturers/owners of the the DiVinci Surgical Robotic Device which caused injury to the plaintiffs as a result of product defects resulting in surgical failures or damages. Plaintiffs allege injuries based on the defendant's design, maintenance, and use of products and devices allowed for these failures and injuries.

The defendants in this case include the manufacturer/distributor/owner of the DiVinci Surgical Robot. Between 2000, when the first robotic surgery was performed, and November 3022, almost 1 million people were operated on using robotic systems, including about 350,000 in 2011 alone.

An estimated four in ten hospital websites in the United States publicize the use of robotic surgery, with the lion's share touting its clinical superiority despite a lack of scientific evidence that robotic surgery is any better than conventional operations.[1] The hospitals employing this device have outsourced patient education content to the device manufacturer, allowing industry to make claims that are unsubstantiated by the literature. It is reported that in the last four years, the use of robotics to perform minimally invasive gynecological, heart and prostate surgeries and other types of common procedures has grown 400 percent. While, proponents say robot-assisted operations use smaller incisions, are more precise and result in less pain and shorter hospital stays, a recent study challenge these assertions as unsubstantiated. As a result of these underreported claims, hospitals are buying the expensive new equipment and many use aggressive advertising to lure patients who want to be treated with what they think is the latest and greatest in medical technology. The company claims to run under a Code of

[1] http://www.hopkinsmedicine.org/news/media/releases/hospitals_misleading_patients_about_benefits_of_robotic_surgery_study_suggests

Business Ethics and Conduct but from its practices it does not appear to adhere to this Code. (See Ex. A)

Several cases have been filed regarding this problem and others are likely to be filed requiring consolidation pursuant to § 28 U.S.C. § 1407.

III.

PENDING ACTIONS

There are other related actions filed in the federal courts. There may be other pending federal actions of which Movants are unaware. Movants expect additional cases to soon be filed. Pursuant to Panel Rule 7.5(e) regarding notice of "tag-along" actions, these actions should also be transferable. A listing of these known actions are attached in the Schedule of Actions.

IV.
TRANSFER TO ONE DISTRICT FOR COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS WILL PROMOTE §1407'S GOALS OF INSURING THE JUST AND EFFICIENT CONDUCT OF THE ACTIONS, AND AVOIDING INCONSISTENT OR CONFLICTING SUBSTANTIVE AND PROCEDURAL DETERMINATIONS

Pursuant to 28 U.S.C. § 1407 (a) the above actions should be coordinated and Consolidated. 28 U.S.C. § (a) provides, in relevant part:

> When civil actions involving one or more common questions for fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on the Multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.

The transfer of actions to a single forum under §1407 is appropriate where, as here, it will prevent duplication of discovery and eliminate the possibility of overlapping or inconsistent

pleading determinations by courts of coordinate jurisdictions. *In re Litig. Arising from Termination of Retirement Plan for Employees of Firearm's Fund Ins. Co.*, 422 F. Supp. 287, 290 (J.P.M.L. 1976); In re LTV Corp. Sec. Litig., 470 F.Supp. 859, 862 (J.P.M.L. 1979).

The litmus test of transferability and coordination under § 1407 is the presence of common questions of fact. *In re Fed. Election Campaign Act Litig.*, 511 F.Supp. 821, 823 (J.P.M.L. 1979). Common questions are presumed "where two or more complaints assert comparable assert comparable allegations against identical defendants based on similar transactions and events." *In re Air West, Inc., Securities Litig.,* 384 F.Supp. 609, 611 (J.P.M.L. 1974); *See also In re Cuisinart Food Processor Antitrust litig.,* 506 F.Supp. 651, 654-655 (J.P.M.L 1981). The transfer of actions to a single forum under §1407 is appropriate where, as here, it will prevent duplication of discovery and eliminate the possibility of overlapping or inconsistent pleading determinations by courts of coordinate jurisdictions. *In re Silicone Breast Implants Product Liability Litig.* 793 F.Supp. 1098, 1100 (J.P.M.L. 1992). (The Multidistrict panel found that common questions exist as long as the difference manufacturers all designed similar defective products). *See, also In re Humana Inc. Managed Care Litig.,* 2000 WL 1952080, * 3(J.P.M.L. August 4, 1994) (common questions of law and fact existed even when defendants included different health care insurers.); *In re Orthopedic Bone Screw Products Liability Litig.,* (MDL 1014) (J.P.M.L. August 4, 1992); and *In Re Phenylpropanolamine (PPA) Products Liability Litigation,* at p.2 (MDL 1407) (J.P.M.L. 2001).

A.
THE PANEL SHOULD TRANSFER THESE CASES TO THE SOUTHERN DISTRICT OF MISSISSIPPI OR ALTERNATIVELY, THE NORTHERN DISTRICT OF CALIFORNIA

1.
THE SOUTHERN DISTRICT OF MISSISSIPPI IS WELL-SUITED TO HANDLE THIS LITIGATION

The Southern District of Mississippi, Eastern Division is well-suited for an MDL of this type. Currently, neither District in Mississippi has a MDL case assigned by this panel. The district has its docket well under control and would not be overly burdened by an MDL assignment. The experience and ability of Judge Carlton Wayne Reeves are other factors which militate in favor of transferring these actions to the United States District Court for the Southern District of Mississippi. The availability of an experienced and capable judge weights in favor of transferring a case to that district. *See e.g., In re Hawaiian Hotel Room Rate Antitrust Litig.,* 438 F.Supp. 935, 936 (J.P.M.L. 1977); *In re Sugar Indus. Antitrust Litig.,* 437 F.Supp. 1204, 1208 (J.P.M.L. 1977); *In re Ampicillin Antitrust Litig.,* 315 F.Supp. 317, 319 (J.P.M.L. 1970). The experience and knowledge of a particular judge is one of the factors that may be considered in determining the appropriate transferee forum. *See e.g., In re "Factor VIII or IX Concentrate Blood Prod. Liab. Litig.,* 853 F.Supp. 454, 455 (J.P.M.L. 1993); *In re Silicone Gel Breast Implants Prods. Liab. Litig.,* 793 F.Supp. at 1101; *In re Data General Corp. Antitrust Litig.,* 470 F.Supp. 855, 859 (J.P.M.L. 1979).

Judge Carlton Wayne Reeves is eminently qualified to preside over this litigation. Moreover, the Southern District of Mississippi is able to handle its docket efficiently.

2.
ALTERNATIVELY, THE NORTHERN DISTRICT OF CALIFORNIA IS CONVENIENT FOR ALL PARTIES

The United States District Court for the Northern District of California is a particularly convenient forum for litigation after consolidation of these actions given that it is the home of the defendants corporate headquarters and operations. In *In re Worldcom, Inc. Securities & "ERISA" Litig.,* 226 F.Supp. 2d 1352 (J.P.M.L. 2002), this panel consolidated several actions and transferred the consolidated action to the nearby Southern District of New York, noting, in particular, that "a litigation of this scope will benefit from centralization in a major metropolitan center that is well served by major airlines, provides ample hotel and office accommodations, and offers a well-developed support system for legal services." *Id.* At 1355; *See also, In re Jamster Mktg. Litig.,* 427 F.Supp. 2d 1366, 1368 (J.P.M.L. 2006) (choosing as a transfer forum an "accessible metropolitan location"). These considerations of convenience apply with full force to the United States District Court for the Northern District of California's San Francisco courthouse. The courthouse is conveniently located to San Francisco International Airport. San Francisco is easily accessible by plane. Accordingly, convenience weighs in favor of transferring and consolidating these actions in the United States District Court for the Northern District of California.

V.

CONCLUSION

For the foregoing reasons and in light of the similar allegations regarding the defendants' conduct, and the likelihood of overlapping discovery and the potential for conflicting pretrial rulings, Movants respectfully request that this Panel order that the related actions be centralized and transferred to the United States District Court for the Southern District of Mississippi before

Judge Carlton Wayne Reeves or alternatively, the Northern District of California pursuant to 28 U.S.C. §1407, and that all related individual or class actions be transferred thereto as "tag along actions."

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Respectfully submitted,

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