BEFORE THE JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

IN RE:	**QUALITEST BIRTH CONTROL LITIGATION**	**MDL Docket No.: 1:14-P-51**

PETITIONERS' AMENDED MEMORANDUM IN SUPPORT OF MOTION FOR TRANSFER AND COORDINATION OR CONSOLIDATION PURSUANT TO 28 U.S.C. § 1407

I. INTRODUCTION

Petitioners Angela Shepherd and Lauren Betancourt [hereinafter referred to as "Petitioners" or "Movants"], whose case is presently pending in the Northern District of Georgia, have moved the Judicial Panel on Multidistrict Litigation [hereinafter "Panel" or "JPML"] for an order, pursuant to 28 U.S.C. §1407, transferring seven (3) virtually identical actions to a single district court and coordinating those actions for pretrial proceedings [hereinafter "Motion for Transfer and Coordination" or "Movants' Motion"]. Further, Petitioners' counsel represent 113 other clients who reside in 27 states. By virtue of United States District Judge, The Honorable Steve C. Jones' October 15, 2012 Order Stipulation and Consent Order as to Statutes of Limitations Tolling and Medical Records Exchange Protocol [Exhibit "6"], the Statute of Limitations has been tolled and

these cases have not, as yet, been filed. These 113 clients have identical claims against these Defendants which would be filed or transferred into an MDL should one be established. When these 113 cases are filed, these cases would be pending in 62 different divisions of the United States District courts. When these 113 cases to be filed are considered with the four (4) cases which are presently pending, there would be 117 total plaintiffs, from 29 different states, who would have cases pending in 66 different federal courts. All of these actions, both those already filed and the 113 cases yet to be filed, allege damages and/or injuries following a consumer's purchase and/or ingestion of the Defendants' dangerous and defective product – Qualitest Birth Control Pills – which was erroneously packaged. Attached as Exhibit "7" are Petitioners' Schedule of Un-filed/Anticipatory Qualitest Actions in which the names of each prospective Plaintiff and the Federal District Court and Division of each prospective venue is listed.

Petitioners are requesting the Panel to transfer all the pending lawsuits to one district court for all pretrial proceedings. Most significantly, these actions put at issue the Defendants' liability for manufacturing, marketing, selling, and distributing the dangerous and defective product – Qualitest Birth Control Pills – which were erroneously packaged. As such, the unique aspect of the actions – *i.e.* in alleging virtually identical claims against the same defendants – warrants the

transfer of these cases to one court to allow the resolution of all threshold matters in the most efficient manner for the courts and the parties. Moreover, these cases fall squarely within the requirements of section 1306. All of these similar actions allege that the Defendants unlawfully manufactured, distributed, marketed and sold birth control pills which were erroneously packaged. It is beyond dispute that all of these actions share common questions of fact, including the same causes of actions and Defendants. Transferring all of these cases to one court for pretrial proceedings will be more convenient for the parties, will not prejudice any parties' interest, and will conserve judicial resources. In addition, the 113 cases which have not, as yet, been filed, would benefit by having one District Court in charge of handling all pretrial matters for the same reasons set out herein.

II. BACKGROUND

A. Facts Common to All Cases

Defendants Qualitest, Endo, Patheon and John Doe Company I - VII defectively and dangerously designed, manufactured, packaged, sold, and distributed Birth Control Pills. More specifically among other things, the Birth Control Pills purchased by the Petitioners were packaged such that select blisters found inside the pill box were rotated 180 degrees within the card, reversing the weekly tablet orientation. As a result of the packaging error, the daily regimen for

the Birth Control Pills left women without adequate contraception and at risk for unwanted pregnancy. Petitioners used the Birth Control Pills as directed by the Defendants, and suffered damages as a result of the packaging defect described above. Petitioners bring this suit to recover damages as a proximate cause of purchasing and/or ingesting the Birth Control Pills for its intended purpose.

B. Allegations Common to All Cases

There are questions of law and fact common to all cases, including, but not limited to:

(a) Whether the Birth Control Pills as delivered to the Petitioners and all Claimants were defectively and dangerously designed, manufactured, packaged, sold, and distributed;

(b) Whether the Birth Control Pills were unreasonably dangerous and defective for its reasonably foreseeable uses;

(c) Whether the Birth Control Pills were fit for the purpose for which they were intended;

(d) Whether the Defendants were negligent in their failure to properly design, manufacture, package, sell, distribute, inspect, and test the Birth Control Pills, and to warn the Petitioners and all Claimants of defects in the Birth Control Pills;

(e) Whether the Defendants made misrepresentations or omissions about the Birth Control Pills that were deceptive and unfair; and

(f) Whether such misrepresentations and omissions were likely to mislead and deceive a consumer acting responsibly.

C. Claims Presently Pending and Claims to be Filed

There are presently 4 cases pending in 4 District Courts in 4 states making identical claims against one or more of these Defendants. In addition, Petitioners' counsel represent 113 clients residing in 27 states whose claims would be consolidated into this proposed MDL. These 113 separate actions would be filed in 63 different District Courts. Should Petitioners' Motion be granted, the total number of civil actions which would be consolidated into the MDL would be 117 and these Plaintiffs would be from 29 states and 66 Federal District Courts.

Petitioners' claims are typical of the claims belonging to absent members of the Class, because Defendants uniformly designed, manufactured, packaged, sold, and distributed the Birth Control Pills to the Petitioners and the Class members and uniformly made misrepresentations regarding their risks and effectiveness.

III. ARGUMENT

This Panel is authorized under 28 U.S.C. §1407 to consolidate and transfer "civil actions involving one or more common questions of fact" to a single district

court for coordination or consolidated pretrial proceedings upon the Panel's "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". 28 U.S.C. §1407(a). The purpose of this transfer procedure is to conserve judicial resources and to avoid the delays that are bound to result if all aspect of pretrial proceedings were conducted separately. *See* Moore's Federal Practice – Civil, Chapter 112 Multidistrict Litigation § 112.02.

All of the cases that the parties seek to transfer and coordinate in one district court fall squarely within the requirements of 28 U.S.C. §1407(a). In fact, given that they involve virtually identical causes of actions against virtually identical Defendants, important considerations warrant transferring all these cases to one district court for coordination/consolidation and pretrial proceeding.

A. The Qualitest Actions Satisfy All of the Requirements of Section 1407(a)

All of the cases subject to Petitioners' Motion for Transfer satisfy the requirements of section 1407(a). *i.e.*, they "involve[] one or more common questions of fact" and transfer for consolidated or coordinated pretrial proceedings "will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. §1407(a).

1. All of the Actions Share One or More Common Questions of Fact

It is without doubt that all of these actions share "one or more common questions of fact". *See* 28 U.S.C. §1407(a). All of these actions put at issue the Defendants' liability for manufacturing, selling, and distributing the dangerous and defective product – Birth Control Pills – which were erroneously packaged. The factual allegations in each of these complaints are virtually identical. As a result, they are highly likely to involve duplicative discovery, including shared witnesses and document. On these bases alone, the MDL panel has repeatedly recognized that creation of a centralized forum is highly appropriate. *See In re Mersorp, Inc, Real Estate Settlement Procedures*, No. 1810, 473 F. Supp. 2d 1397, 2007 WL 128792, at *1 (J.P.M.L. Jan. 10, 2007) (holding that centralization under Section 1407 was warranted since all actions involved common questions of fact and centralization would promote just and efficient conduct of the litigation, and was necessary in order to eliminate duplicative discovery); *In re Darvocet, Darvon and Propoxyphene Prods. Liab. Litig.*, 939 F.Supp.2d 1376, 2013 WL 1635469, at *4 (J.P.M.L. Apr. 17, 2013); *In re NSA Telecomms. Records Litig.*, 444 F. Supp. 2d 1332, 1334 (J.P.M.:. 2006); *In re Seroquel Prods. Liab. Litig.*, 447 F. Supp. 2d 1376, 1378 (J.P.M.L. 2006); *In re Cobra Tax Shelters Litig.*, 408 F. Supp. 2d 1348, 1349 (J.P.M.L. 2005); *In re Capital One Bank Credit Card Terms Litig.*, 201 F.

Supp 2d 1377, 1378 (J.P.M.L. 2002) ("[T]hese actions share sufficient complex common questions of fact… ."). In addition, these actions generally bring the same claims – namely products liability and the common law. There cannot be any dispute that all of these actions share "one or more common questions of law".

2. Transfer of These Cases Promotes Just and Efficient Conduct of These Actions and Serves the Convenience of the Parties and Witnesses

Because all these cases are factually similar, and advance similar causes of actions, pretrial proceedings in all these actions will virtually be the same. Transfer and coordination to one district court will preclude inconsistent rulings relating to pretrial proceedings by different district courts on similar issues. For this reason alone, transfer and coordination of these actions will promote the just and efficient conduct of these actions. *See, e.g., In re NSA Telecomms. Records Litig.*, 444 F. Supp. 2d at 1334 (Centralization for pretrial proceedings was warranted to "prevent inconsistent pretrial rulings" and "conserve the resources of the parties, their counsel and the judiciary."); *In re Seroquel Prods Liab. Litig.*, 447 F. Supp. 2d at 1378 (Centralizing over 120 related actions pending in multiple federal districts); *In re Bank of America Inv. Services, Inc.*, No. 1803, 2006 U.S. Dist. LEXIS 94113, at *4 (J.P.M.L. Dec. 19, 2006) ("Transfer under Section 1407 will have the salutary effect of assigning the present actions and any future tag-

along action to a single judge who can formulate a pretrial program . . . that ensures that pretrial proceedings will be conducted in a streamlined manner leading to the just and expeditious resolution of all actions to the overall benefit of the parties and the courts."); *In re Prempro Products Liability Lit.*, 254 F.Supp.2d 1366, 1367 (J.P.M.L. 2003) ("Centralization under section 1407 is necessary in order to eliminate duplicative discovery, prevent inconsistent pretrial rulings . . ., and conserve the resources of the parties, their counsel and the judiciary"); *In re Cobra Tax Shelters Litig.*, 408 F. Supp. 2d at 1349 ("Transfer under Section 1407 will offer the benefit of placing all actions in this docket before a single judge who can structure pretrial proceedings to accommodate all parties' legitimate discovery needs."); *In re Mirena IUD Products Liab. Litig.*, 938 F.Supp.2d 1355, 2013 WL 1497304 (Centralizing pretrial proceedings in eight actions pending in eight districts). Most fundamentally, transfer of these actions to a single district will permit the formulation of a rational, sequenced pretrial program that will streamline discovery, minimize witness inconvenience and overall discovery expense and permit parties, through cooperation and pooling of resources, to benefit from the "economies of scale" that MDL pre-trial proceedings uniquely facilitate.

The resolution of the Defendants' purported affirmative defenses by a single district court, moreover, further supports the judicial economy of these actions. Pretrial motions, such as motions to dismiss or for summary judgment, are the types of pretrial proceedings that are appropriate for the transferee court to consider. *See, e.g., U.S. v. Baxter Inter., Inc.*, 345 F.3d 866 (11th Cir. 2003), *cert. denied*, 542 U.S. 946 (2004) (court affirmed in part and reversed in part district court's granting of Defendants' motion to dismiss in multidistrict litigation actions).

For example, in the Petitioners' case in the Northern District of Georgia, Defendants Patheon Pharmaceuticals, Inc. and Patheon Pharmaceuticals Services, Inc. have filed a Motion to Dismiss or, in the Alternative, for Summary Judgment which is presently pending. Consolidation of these actions in one district court will facilitate the prompt resolution of the Defendants' intended assertions and preclude any potential inconsistent rulings in similar cases.

The statutory requirement that transfer and coordination of these cases serve the convenience of the parties and witnesses is also met here. Litigating these cases in multiple courts across the country will cause substantial inconvenience to representatives of the Defendants, who would be required to appear and sit for a deposition in each action. Given the significant day-to-day responsibilities of the

Defendants' representatives, the need for them to personally participate in discovery for over 100 separate lawsuits will impose a substantial and unwarranted distraction for an extended period of time. (As indicated previously, there are presently 4 actions making the same allegations against Defendants presently pending and there are another 113 claims to be filed against Defendants).

It would serve the convenience of all parties, moreover, to have such similar matters resolved in one forum. As noted, these cases assert the same factual allegations, bring similar causes of action, and seek similar relief. Resolving the pretrial proceedings in one court would facilitate resolution of all claims in a timely manner without the risk of inconsistent rulings.

B. The Northern District of Georgia, Atlanta Division is an Appropriate Forum

In this instance there is no geographic center of pending cases, but because discovery has been conducted and is presently scheduled to begin anew in the Northern District of Georgia, because many of the Defendants are based in the Southern United States, because the Petitioners' attorneys reside in and practice within the Northern District of Georgia and represent a total of 115 women from 27 states residing in 63 different federal court districts who make up 96% of the claimants known to Petitioners' counsel at this time, and because there is no other

district which would be more appropriate, the Northern District of Georgia would be a logical and convenient forum.

The MDL Panel has previously indicated that the geographic locus of duplicative litigation is the preferred forum for centralization of duplicative multi-district litigation. *See In re Merscorp, Inc.*, 473 F. Supp. 2d. 1379, 2007 WL 128792, at *1 (holding that the Eastern District of Texas was the appropriate transferee forum in this docket since "one of the eleven actions is already pending in that district…"); *In re Comer, Money Ctr., Inc. Equip. Lease Litig.*, 229 F. Supp. 1379, 1380 (J.P.M.L. 2002) (centralizing litigation in the district "where almost half of the constituent actions are already pending."); *In re Lupron Mktg & Sales Practices Litig.*, 180 F. Supp. 2d at 1378 (holding that the District of Massachusetts was the most appropriate transferee district for this litigations since "three of the four actions now before the Panel are already pending there."). Where claims have been made throughout the nation and there was no a geographical center of the litigation to consider, considerations have included selecting a forum where cases were already pending and which is conveniently located and readily accessible for most of the litigants. (See *In re Cooper Tire & Rubber Co. Tires Prods. Liab. Litig.*, Not Reported in F.Supp.2d, 2001 WL

253115, at *1 (J.P.M.L. 2001); and *In re StarLink Corn Prods. Liab. Litig.*, 152 F.Supp.2d 1378, 1380 (J.P.M.L. 2001).

Even though there is no geographical center of pending actions, there are many factors supporting the Northern District of Georgia as the appropriate transferee court for the Qualitest litigation which include:

(1) The center of this litigation from the perspective of the parties and their counsel is Georgia. While there is no geographic center of this litigation as it relates to pending actions, there is a litigation center as most of the Defendants reside in the southern United States and many of the attorneys are in metro-Atlanta. Movants' counsel in Georgia represent 115 of the 118 known claimants. (There could be others that Petitioners have not located, but these would be known to Defendants). The Vintage Defendant resides in Alabama and has counsel in California, New York and Atlanta; the Endo Defendants reside in Delaware and have counsel in California, New York and Atlanta; and the Patheon Defendants reside in North Carolina and have counsel in Atlanta. As the great majority of Claimants are represented by Movants' counsel who are located in metro-Atlanta and most of the Defendants are located in states contiguous to

Georgia, it is clear that the litigation/attorney center of this litigation points toward the Northern District of Georgia as being the appropriate forum for these cases to be consolidated. *See In re: Biomet M2a Magnum Hip Implant Prods. Liab. Litig*., 896 F.Supp.2d 1339, 1340 (J.P.M.L. 2012) (Biomet litigation transferred to the Northern District of Indiana, in part, as the "Biomet hip implants at issue are marketed and sold throughout the nation. Biomet itself is based in nearby Warsaw, Indiana. With many of the relevant documents and witnesses likely found there, the district should be convenient for Biomet.")

(2) Of the pending cases, there is only one, that involving the Movants here, that has more than one plaintiff. Since the majority of the cases in suit at this point are filed in the Northern District of Georgia and discovery has begun, transfer of all the Qualitest Actions to that court can conserve judicial resources and minimize any inconvenience to the parties and the court. *See in re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. 415, 422 (J.P.M.L. 1991) (transfer of actions to the district with the greatest number of pending actions is the most likely to effectuate "an

overall savings of cost and a reduction of inconvenience to all concerned.")

(3) All defendants have appeared in the Northern District of Georgia cases.

(4) The Judges in the Northern District of Georgia have particular experience with complex multi-party products liability litigation, such as present here. *See In re: Wright Med. Tech., Inc., Conserve Hip Implant Prod. Liab.*, 844 F.Supp.2d 1371, 1373 (J.P.ML. 2012). In particular, Judge Jones, who was assigned the Petitioners' case, is familiar with the litigation from having dealt with several matters previously, including the Stipulation and Consent Order as to Statutes of Limitations and Tolling and Medical Records Exchange Protocol [attached as Exhibit "6" hereto]. Notably, Judge Jones' October 15, 2012 Order set up a Medical Records Protocol which required each of the 115 clients of Petitioners' counsel to provide authorizations for Defendants to obtain medical records, insurance records, employment records, academic records, workers' compensation records, Social Security records, and tax returns. Petitioners 115 clients have complied with this Order and provided these

multiple authorizations to Defendants. Judge Jones has also considered and entered the following Orders:

(a) Order of April 12, 2012 to resolve the dispute between the parties as to the timing and coordination of discovery;

(b) Orders of May 18, 2012 and January 4, 2012 regarding substitution of parties; and

(c) Protective Order of July 2, 2012.

Also, pending before Judge Jones presently are Defendant Patheon's Motion to Dismiss and Plaintiffs' Motion to Stay Pending Decision by Judicial Panel on Multi-District Litigation. Because of his familiarity with the issues in this matter, Petitioners suggest that Judge Steve Jones is the appropriate judge to be assigned these cases should the request for coordination be granted.

IV. CONCLUSION

Accordingly, Petitioners respectfully request that this Panel grant Petitioners' Motion for Transfer and Coordination of all actions to one district court for pretrial proceedings.

RESPECTFULLY SUBMITTED THIS the 30th Day of April, 2014.

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