BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: POWER MORCELLATOR PRODUCTS LIABILITY LITIGATION	)	**MDL Docket No.: 2652**

INTERESTED PARTY RESPONSE OF PLAINTIFFS ANDREA PHILLIPS AND KEVIN PHILLIPS TO THE MOTION FOR TRANSFER OF ACTIONS TO A SINGLE DISTRICT FOR CONSOLIDATED AND COORDINATED PRE-TRIAL PROCEEDINGS PURSUANT TO 28 U.S.C. § 1407

PRELIMINARY STATEMENT

Plaintiffs ANDREA and KEVIN PHILLIPS ("Plaintiffs") submit this Interested Party Response pursuant to Rule 6.2(e) of the Judicial Panel on Multidistrict Litigation Rules of Procedure to the motion filed by Plaintiffs Barnett, Galambos, Johnson, Sanders, Smith, and Whitehead ("Barnett Plaintiffs") for consolidated pre-trial proceedings under 28 U.S.C. § 1407, and to the Interested Party Response of Plaintiff Schroeder ("Schroeder Plaintiff").

Your undersigned's law firm represents Plaintiffs with a case pending in the U.S. District Court for the District of South Carolina, who are seeking recovery against Defendants Ethicon, Inc., Ethicon Endo-surgery, Inc., Johnson & Johnson Services, and Johnson & Johnson (collectively "Ethicon Defendants") for personal injuries caused by their defective Power Morcellators. (Attached hereto as Exhibit A is the schedule of their action).[1]

For the reasons set forth herein, Plaintiffs support the positions of both the Barnett Plaintiffs and the Schroeder Plaintiff – namely, that centralization of all Power Morcellator cases is warranted. Indeed, one single MDL would be the most efficient and most appropriate course of action for the Panel because it would: (1) promote the just and efficient conduct of these

[1] Our office also represents and is investigating claims on behalf of over 10 similarly-situated individuals claiming serious injury from Power Morcellators.

actions; (2) prevent inconsistent pretrial rulings and duplicative discovery; and (3) conserve the resources of the judiciary, the parties and their counsel. *See infra* at pp. 4-14. [2]

To this end, Plaintiffs submit that an appropriate venue for these actions is the U.S. District Court for the District of Kansas before the Honorable Judge Kathryn H. Vratil, as advocated in the Barnett Plaintiffs' motion. An equally suitable alternative would be the U.S. District Court for the Southern District of Illinois before the Honorable Judge David R. Herndon as advocated by the Schroeder Plaintiff.

FACTUAL CLAIMS ABOUT POWER MORCELLATORS

Power Morcellators are electric medical devices used in laparoscopic hysterectomies or myomectomies to assist in the removal of the uterus and/or uterine fibroids.[3] Most Power Morcellators have a rotating blade at their tip designed to chop up the uterus/uterine fibroids into small pieces to facilitate their removal through a small incision site on the abdomen. At least one Power Morcellator - the Gyrus PlasmaSORD Morcellator - is bladeless. Nevertheless, like the others, it is designed to chop up the uterus/uterine fibroids to facilitate their removal.[4]

[2] As an alternative, should the Panel be disinclined to transfer all Power Morcellator actions into one MDL, Plaintiffs would support the creation of separate MDL dockets, distinguished from each other based upon the manufacturers, but transferred to the same federal district court and judge.

[3] Uterine fibroids are noncancerous growths that develop from the muscle tissue of the uterus. At times, the symptoms associated with the uterine fibroids may be so severe that surgery is required to remove either the uterine fibroids (a myomectomy) and/or the uterus with the uterine fibroids (a hysterectomy). Traditionally, hysterectomies and myomectomies were performed openly – meaning that the doctor would cut the patient open and remove the uterus and/or uterine fibroids intact. However, since the introduction of Power Morcellators in the mid-1990s, many conventional hysterectomies and myomectomies have been supplanted by laparoscopic Power Morcellator procedures because of their touted benefits of shorter post-operative recovery time and reduced risk of infection.

[4] Therefore, the common facts that overlap as to all Power Morcellators equally apply to the Gyrus PlasmaSord Morcellator. Thus, *In Re DePuy Orthopaedics, Inc. ASR Hip Implant Prods. Liab. Litig.*, 753 F.Supp.2d 1378, 1379-1380 (J.P.M.L. 2010), has no application here. In that case, the Panel declined to transfer one particular action because it was uncontested that the plaintiff had received a hip device that was not the DePuy ASR. Here, the proposed MDL applies to all Power Morcellators, including the bladeless Power Morcellators.

Based on data analyzed by the FDA, it is estimated that 1 in 350 women undergoing hysterectomies/myomectomies for the removal of uterine fibroids are found to have an ***unsuspected*** uterine sarcoma. If a woman undergoing a laparoscopic Power Morcellator procedure for uterine fibroids has an ***unsuspected*** uterine sarcoma, her cancerous tissue will be morcellated and will then travel to remote areas of her body where it can become implanted in surrounding tissue or organs and begin to grow. As a result, her ***unsuspected*** early stage cancer can change to a higher stage cancer, thus, significantly worsening the woman's prognosis.[5]

Power Morcellators can also cause the development of parasitic fibroids. This means that the morcellated tissue fragments, even if not cancerous, may remain in the body, migrate and thereafter attach themselves to adjacent organs and grow into "new" fibroids. This could in turn lead to the need for another surgery to remove the "new" fibroids.

In April 2014, the FDA issued a Safety Communication discouraging the use of Power Morcellators during hysterectomies or myomectomies for uterine fibroids noting that power morcellation posed a risk of spreading ***unsuspected*** cancerous tissue beyond the uterus. http://www.fda.gov/MedicalDevices/Safety/AlertsandNotices/ucm393576.htm. Thereafter, in November 2014, following further investigation into the matter, the FDA updated its April 2014 Safety Communication to reflect its stronger position that it was affirmatively "warning against" the use of Power Morcellators in hysterectomies or myomectomies for uterine fibroids. http://www.fda.gov/MedicalDevices/Safety/AlertsandNotices/ucm424443.htm.[6]

[5] In addition, certain types of cells with malignant potential may be converted to frankly malignant cells capable of seeding and metastasizing to other parts of the female body.

[6] The FDA's Safety Communications apply to all Power Morcellators, including the Gyrus Defendants' bladeless morcellator. This is why the warnings on their bladeless morcellator were updated to include the FDA's findings. https://medical.olympusamerica.com/products/handpiece/pks-plasmasord-962000pk. As such, contrary to what the Gryus Defendants have implied, their bladeless morcellator carries with it the same increased risk of causing the upstaging of ***unsuspected*** uterine sarcoma as other bladed morcellators. Indeed, the Gyrus Defendants admit in their response that their bladeless morcellator leaves tissue fragments. *See* the Gyrus Defendants' Response at p. 6.

The Ethicon Defendants control approximately 2/3 of the Power Morcellator market. Following the issuance of the FDA's first Safety Communication in April 2014, the Ethicon Defendants suspended the sales of their Power Morcellators. Shortly thereafter, in July 2014, they withdrew their Power Morcellators from the market. We believe that no other manufacturer has withdrawn their Power Morcellators from the market.

There are approximately 22 actions that have been filed against Power Morcellator manufacturers alleging personal injuries, with the majority of actions having been filed against the Ethicon Defendants. It is anticipated that this number will likely increase. Given the volume of actions filed and the overlapping nature of the facts and issues involved, consolidation and coordination of all Power Morcellator actions into one MDL is undoubtedly warranted.

To this end, the District of Kansas is an appropriate venue for this MDL, particularly because: (1) there it at least one case pending there; (2) at least one manufacturer and potential defendant maintains its principal place of business in Kansas; (3) it is not overburdened; (4) Judge Vratil has the ability and experience to manage this MDL; and (5) the District of Kansas is a geographically central and convenient venue for this litigation. *See infra* at pp. 14-16.

Alternatively, the Southern District of Illinois is an equally viable option given that all of the above factors identified with respect to the District of Kansas (absent No. 1) apply to it. Judge Herndon has the proven ability and experience given that he has successfully managed and resolved two very large mass tort MDLs with exceptional efficiency. *See infra* at pp. 16-20.

ARGUMENT

MULTIDISTRICT CONSOLIDATION IS APPROPRIATE FOR THESE CASES

Under 28 U.S.C. § 1407, the multidistrict litigation Panel *may* consolidate numerous cases if it is demonstrated that: (1) the lawsuits contain common questions of fact, (2)

consolidation would best serve the convenience of the parties and witnesses, and (3) consolidation promotes just and efficient conduct of such actions. See 28 U.S.C. § 1407.

Plaintiffs herein submit that these factors have been demonstrated, and, thus, centralization of pretrial proceedings against all Power Morcellator manufacturers is warranted.

First, each of the related actions against all manufacturers allege the same and/or substantially similar facts: (1) Power Morcellators can cause the upstaging of ***occult*** cancer and/or the development of parasitic fibroids; (2) the plaintiffs suffered grave injuries, primarily cancer, as a result of Power Morcellators; (3) the manufacturers here manufactured, marketed and/or sold the defective Power Morcellators that caused these plaintiffs' injuries; and (4) the risks associated with Power Morcellators were first brought to the attention of the public by the FDA in 2014 when it issued its Safety Communications.

Likewise, there is commonality as to the manufacturers' defense of these actions in that they all commonly deny that their Power Morcellators can cause the injuries alleged, and they vehemently disagree with the FDA's findings in this regard. *See e.g.* The Ethicon Defendants' Response at pp. 7-8 [Dkt. 36]. Thus, this fact also supports the need for consolidation here.

By way of illustration, Plaintiffs submit that these related actions will collectively involve common questions against all Defendants, inter alia, in the following topic areas:

- Whether Power Morcellators in general pose an increased risk of upstaging of ***unsuspected*** cancer and/or development of parasitic fibroids;
- Whether the data supporting the FDA's Safety Communications and/or the FDA's analysis of said data is valid;
- Whether there is available scientific data to support a causal link between Power Morcellation and the upstaging of ***unsuspected*** cancer and/or development of parasitic fibroids;

- What an appropriate method is to test and/or analyze the scientific data available to determine whether or not the use of Power Morcellators can cause the upstaging of ***unsuspected*** cancer and/or development of parasitic fibroids;

- What identical warnings should all manufacturers have included on their labels to advise women and/or their treating healthcare physicians of the safety risks associated with the use of Power Morcellators during hysterectomies and/or myomectomies for uterine fibroids;

- What is the generally accepted standard for post-marketing testing and/or surveillance of Power Morcellators; and

- What are the FDA standards with respect to the manufacturing, marketing and/or sale of Power Morcellators.

Accordingly, because common questions of fact overlap and are intertwined as to all manufacturers, centralization of these actions into one MDL is clearly warranted.

Second, consolidation before one MDL court would prevent inconsistent judicial rulings, would eliminate duplicative discovery, would be more convenient to the parties, witnesses and their counsel, and would conserve the resources of the judiciary, the parties and their counsel. Because these actions are based upon substantially similar allegations, the parties will likely address similar issues in discovery, and in some cases identical issues, especially those involving the FDA's Safety Communications and the available scientific data upon which they relied. *See In re Incretin Mimetics Prods. Liab. Litig.*, 968 F.Supp.2d 1345 (J.P.M.L. 2013)(granting consolidation where discovery would involve many of the same or substantially similar documents and witnesses); *see also In Re Walgreens Herbal Supplements Mktg. and Sales Practices Litig.*, 2015 U.S. Dist. LEXIS 75045 (J.P.M.L. 2015)(noting that consolidation into a single MDL was appropriate to resolve the defendants' common challenges to the validity of the New York attorney generals' investigation and underlying testing data, and to address the common discovery regarding said investigation and data). Centralization into one MDL would

eliminate duplicative discovery regarding these issues, and would conserve the resources of the parties, witnesses and their counsel.

Additionally, disputes regarding similar and/or identical discovery issues may arise that should be resolved by one court (as opposed to various federal courts across the country as advocated by Defendants). In this regard, the parties will likely engage in substantially similar, if not identical, motion practice, and it is simple common sense to allow one MDL judge to rule on the motion. Consolidating these actions into one MDL would eliminate the risk of inconsistent, disparate and/or repetitive rulings and would prevent the parties from expending unnecessary resources and duplicating their efforts in each district court. *In Re Janus Mut. Funds Inv. Litig*. 310 F.Supp.2d 1359, 1361 (J.P.M.L. 2004).

Further, the science regarding whether Power Morcellation can cause the upstaging of ***unsuspected*** cancer and/or the development of parasitic fibroids is common to all manufacturers, and, thus, expert witness opinion on causation and *Daubert* hearings will likely overlap as to all manufacturers. It is simply more efficient to allow one Court to become familiar with the underlying science and to issue consistent rulings in this regard. *In Re Androgel Prods. Liab. Litig.*, 24 F.Supp.3d 1378, 1379 (J.P.M.L. 2014).

Lastly, the need for centralization is evidenced by the fact that there are already approximately 22 related Power Morcellator cases on file in numerous district courts around the country that will ultimately result in separate scheduling orders should an MDL not be created. Additionally, it is estimated that there will likely be hundreds of Power Morcellator cases filed throughout the country. Thus, for the sake of economy and efficiency, centralization and coordination of all actions is clearly warranted.

The Defendants have argued strongly against consolidation, and their arguments can be essentially boiled down to three: (1) an MDL would be inefficient given the existence of multiple manufacturers and products; (2) individual issues exist that do not support consolidation; and (3) there will be no convenience to the Defendants, primarily given the current volume of cases filed to date – approximately 22. As discussed herein, Defendants arguments are unpersuasive.

First, regarding the existence of multiple manufacturers and products, Defendants' argument should hold little weight because the Panel has repeatedly found centralization to be appropriate where there are multiple Defendants and similar, though not identical, products at issue so long as there are common factual questions such as causation, science, testing and regulatory issues. *In Re Androgel Prods. Liab. Litig.*, 24 F.Supp.3d 1378 (consolidating actions against six competing manufacturers because the actions shared factual questions regarding causation, science and regulatory issues); *In Re Walgreens Herbal Supplements Mktg. and Sales Practices Litig.* 2015 U.S. Dist. LEXIS 75045 (J.P.M.L. 2015)(consolidating class actions against four competing defendants because the actions shared common facts regarding the New York government's investigation and testing of their products); *In Re Gadolinium*, 536 F.Supp.2d 1380 (J.P.M.L. 2008)(consolidating actions against five defendants because they involved common facts relating to causation despite the existence of differing product designs).[7]

As to the manageability and efficiency of an MDL with multiple manufacturers and products, the MDL Court has the power to "employ any number of pretrial techniques – such as establishing separate discovery and/or motion tracks for each [product at issue] and/or separate

[7] *See also In re: Silicone Gel Breast Implant Litig.*, 793 F. Supp. 1098 (J.P.M.L. 1992)(holding that common questions exist as long as the different manufacturers all designed similar defective products); *In re Chinese Manufactured Drywall Prods. Liab. Litig.*, 626 F.Supp.2d 1346 (J.P.M.L. 2009)(holding that "[c]entralization under Section 1407 will eliminate duplicative discovery, including any discovery on international parties; prevent inconsistent pretrial rulings .... and conserve the resources of the parties, their counsel and the judiciary); *In Re Orthopedic Bone Screw Prods. Liab. Litig.*, MDL No. 1014 (finding common questions of law and fact even where different defendant manufacturers were named).

tracks for the different types of actions involved – to efficiently manage the litigation." *In Re Janus Mut. Funds Inv. Litig.*, 310 F.Supp.2d at 1361; *In Re Androgel Prods. Liab. Litig.*, 24 F.Supp.3d at 1379-1380. Here, the MDL Court could employ such techniques and also create a system to ensure that any confidential information the manufacturers may be concerned about is protected. In short, an MDL court is more than capable of addressing the concerns identified by Defendants through case management.

By way of example and as noted above, the Panel recently centralized related testosterone therapy personal injury actions into one MDL, despite the existence of six different defendants with many different products, because the actions shared factual questions regarding causation, science and regulatory issues. *In Re Androgel Prods. Liab. Litig.*, 24 F.Supp.3d 1378. In citing to past precedent, the Panel noted that despite the existence of multiple and, in some cases, competing defendants, centralization would "reduce potentially costly expert discovery, facilitate the establishment of a uniform pretrial approach to these cases, reduce the potential for inconsistent rulings on such matters as *Daubert* rulings, and conserve the resources of the parties, their counsel and the judiciary." *Id.* at 1379.

Indeed, a main reason why the *In Re Androgel Prods. Liab. Litig.* (MDL No. 2545) has been so successful to date is because of the Court's ability to establish a uniform pretrial approach as to all manufacturers. Judge Matthew F. Kennelly of the Northern District of Illinois, who was assigned the litigation by the Panel, has managed the litigation extremely efficiently, despite the existence of various products and six very different defendants (who are competitors in both the testosterone replacement therapy business and pharmaceutical business), because he has ensured that all issues were addressed at the same time with the same counsel, and he, to the extent necessary, has employed separate discovery and/or motion tracks for each

product/defendant at issue.[8] In sum, he did exactly what the Panel said he would do – he accommodated the issues involving the different products and defendants in such a manner so as to guarantee the just and efficient resolution of the cases before him. *Id.*[9]

Defendants primarily rely upon this Panel's decision in *In Re Shoulder Pain Pump – Chondrolysis Prods. Liab. Litig.*, 571 F.Supp.2d 1357 (J.P.M.L. 2008) and *In re Ambulatory Pain Pump-Chondrolysis Prods. Liab. Litig.*, 709 F.Supp.2d 1375 (J.P.M.L. 2010)(collectively "*Pain Pump* actions") to discourage the Panel from consolidating these Power Morcellator actions. But the *Pain Pump* actions are clearly distinguishable from the actions at issue here.

In the *Pain Pump* actions, the Panel had denied consolidation not simply because different pain pump manufacturers and products existed, but because: (1) the pain pumps came in different sizes and designs, with differing volume, duration and flow capacities; (2) an indeterminate number of pain pumps existed; (3) anesthetic drugs used in conjunction with the pain pumps varied in terms of the type of drug used and the pharmaceutical company that manufactured the drug; (4) in some actions the anesthetic drug manufacturers were sued; and (5) some plaintiffs were exposed to multiple pain pumps.[10] *Id.*

[8] There are six different manufacturers involved in this MDL. Confidentiality of documents and trial schedules were addressed at one time with all Defendants. Document production and defendant discovery were addressed at one time with all Defendants. Deposition protocols were addressed at one time with all Defendants. It is these efficiencies that one single MDL will offer.

[9] Similarly, in *In re Chinese Manufactured Drywall Products Liability Litigation*, MDL No. 2047, Judge Eldon E. Fallon oversaw and managed one single MDL with over one thousand defendants (manufacturers, suppliers, builders, installers, etc.). He issued case management orders to provide infra-structure applicable to all parties. He set discovery parameters globally, and when appropriate for individual defendants, as needed. He also presided over trials involving individual defendants in a calculated manner to address specific issues intended to advance the overall docket of the MDL. This is yet another example of how one MDL for multiple and competing defendants can be successfully managed, and further demonstrates the convenience, efficiency and superiority of careful case management to further the goals of the parties, the judiciary, and the public at large.

[10] But compare to *In Re Incretin Mimetics Prods. Liab. Litig.*, 968 F.Supp.2d at 1347, in which the Panel noted that the fact that a plaintiff may have been exposed to more than one product manufactured by different defendants actually supported consolidation.

Here, unlike in the *Pain Pump* actions, an indeterminate number of products do not exist,[11] it is not alleged that the Power Morcellators were used in conjunction with any other product to cause the plaintiffs' injuries, and the factual dispute does not involve any different aspects of the designs of Power Morcellators.[12] Rather, the factual dispute concerns: (1) whether Power Morcellators in general are capable of disseminating cancerous and/or fibroid tissue throughout the body; (2) what the manufacturers should have known about the risks of *unsuspected* cancer in women undergoing procedures for uterine fibroids; and (3) whether the manufacturers should have warned about the dangers of dissemination and upstaging of occult cancers given what they should have known about said dangers.

Thus, these actions are more like the actions that were consolidated in *In Re Androgel Prods. Liab. Litig.* and in another multiple defendant MDL – *In Re Gadolinium*, 536 F.Supp.2d 1380. There, the Panel allowed coordination of 24 actions against unrelated manufacturers on the basis that the actions "share[d] questions of fact arising out of the allegations that gadolinium based contrast dyes may cause nephrogenic systemic fibrosis in patients with impaired renal function." *Id.* at 1381-1382. In rejecting the opposing defendants' arguments that the contrast agents involved were chemically and pharmacologically different and that too few actions had been filed, the Panel noted that consolidation "does not require a complete identity or even a majority of common factual or legal issues as a prerequisite to transfer." *Id.* at 1382. Rather, as long as common factual issues exist, consolidation can be granted, and then, upon transfer, it is the responsibility of the MDL judge to create a pretrial program to address the individual issues.

[11] See Karl Storz Defendants' Response [Dkt. 40] at p. 2 acknowledging that the number of Power Morcellators on the market can be determined.

[12] For this reason, these actions are also unlike the actions that were before the Panel in *In Re Watson Fentanyl Patch Prods. Liab. Litig.*, 883 F.Supp.2d 1350 (J.P.M.L. 2012). There, the plaintiffs were alleging that a patch manufactured by one defendant was defectively designed and prone to leakage, and that patches manufactured by two unrelated defendants provided safer alternatives. Here, plaintiffs are alleging that all Power Morcellators are defective because they cause upstaging of occult cancer and/or parasitic fibroids.

Under this same line of reasoning, Defendants' second argument regarding the existence of individual issues must also be given little deference.

Defendants have devoted many pages in their respective response briefs to identifying each and every individual issue that could arise in these actions in an attempt to create the impression that too many individual issues of fact exist to warrant centralization. But the individual issues they have identified are issues that are encountered in almost all products liability, personal injury MDLs (i.e. varying degrees of injury, determining what product was received, was the treating physician warned, was the plaintiff warned of the risk, did the treating physician play a part in the injury, when did the plaintiff discover her injury and its potential cause, etc.). But their existence does not mean that centralization is not warranted. To the contrary, as the Panel has repeatedly stressed, so long as common issues of fact exist (which they do, *supra*), a single transferee court is more than capable of creating a system whereby pretrial proceedings regarding individual issues can proceed concurrently with pretrial proceedings regarding the common issues. *Id.*; *In Re Androgel Prods. Liab. Litig.*, 24 F.Supp.3d at 1379.

Here, the transferee court could easily create and implement pretrial procedures regarding the individual issues identified by Defendants that could proceed concurrently with pretrial proceedings regarding common issues. Indeed, products liability MDL judges routinely employ sophisticated Plaintiff Fact Sheets and many other techniques in applying this dual discovery approach to conserve the resources of parties, their counsel and the judiciary, and there is no reason why such approaches should not apply here.

Lastly, Defendants' third argument – that consolidation would be inconvenient – is without merit because: (1) Defendants have failed to accurately address the standard of

convenience required for consolidation; and (2) Defendants would undoubtedly be convenienced, not inconvenienced, by the consolidation of these actions.

28 U.S.C. § 1407 allows for consolidation if it would be convenient to the parties and their witnesses. Yet in their briefs, the Defendants have only focused on whether consolidation would be convenient for them, and they have failed to address the convenience factor as it applies to the parties and their witnesses as well as their counsel. In so doing, they have failed to accurately address this standard of 28 U.S.C. § 1407.

On pages 6-7 above, Plaintiffs have addressed in detail how consolidation would be more convenient to the parties, witnesses and their counsel, and would conserve their resources as well as those of the judiciary. In short: (1) similar/identical discovery issues will be addressed by one court thus preventing duplicative discovery; (2) similar/identical motions will be addressed by one court thus preventing inconsistent, disparate and/or repetitive rulings as well as conserving judicial resources; and (3) the parties, the witnesses and their counsel will only have to travel to one court as opposed to many courts throughout the country to address issues that will arise regarding common discovery, causation, and experts, including *Daubert* hearings, thus saving all involved significant travel expenses.[13]

Defendants argue that informal coordination would be more convenient than an MDL, and while they cite to various cases in which this Panel has supported informal coordination, they have failed to specifically identify exactly why informal coordination would be a better solution in this case. While it may be appealing for them, it should not be for the plaintiffs or the

[13] Further, if the Panel was to choose either the District of Kansas or the Southern District of Illinois as an appropriate venue, the parties, their counsel and their witnesses would be more convenienced because they would be able to travel to a geographically central forum. In this regard, the Karl Storz Defendants' argument that Kansas and Illinois would not be convenient because their witnesses are located in foreign countries should be given no weight. Foreign defendant manufacturers are commonplace in products liability MDLs, and agreements are always entered into whereby defense counsel agrees to produce and plaintiffs' counsel agrees to take the deposition of witnesses at a mutually agreeably place, usually overseas.

Court because it would very quickly become an unwieldy endeavor that would stymie judicial efficiencies and prove to be more costly for the parties. As mentioned above, this litigation is, for the most part, in its early stages and is growing. As such, additional plaintiffs' counsel (and potentially defense counsel) will be introduced into this litigation, and there is no guarantee that the informal coordination that defendants so advocate will work.

In short, there is nothing to suggest that informal coordination would be superior to MDL coordination, but plenty to support that MDL coordination would be superior to informal coordination. MDL centralization of related actions was instituted precisely for the purpose of avoiding issues that even informal coordination could result in, such as different scheduling tracts, inconsistent and repetitive rulings and duplicative discovery. Efficiency must be promoted as well as financial savings and the only way to accomplish this in this case is by ordering coordination of all Power Morcellator actions into one MDL.

THE MOST APPROPRIATE VENUES FOR THIS LITIGATION ARE EITHER THE DISTRICT OF KANSAS, OR, ALTERNATIVELY, THE SOUTHERN DISTRICT OF ILLINOIS

Assuming centralization is appropriate – which we submit that it is – the question presented then becomes one of determining the proper venue for these cases. To this end, Plaintiffs submit that the most appropriate venue for this litigation is either the U.S. District Court for the District of Kansas or the U.S. District Court for the Southern District of Illinois.

A. The United States District Court for the District of Kansas is a Proper Transferee Court and Venue

Plaintiffs herein respectfully support the District of Kansas as an appropriate venue for these cases for the multitude of reasons discussed below.

i) The District of Kansas's Caseload and Limited Number of MDLs Favors It as An Appropriate Forum

According to judicial statistics, each District of Kansas judge had approximately 488 civil filings for the 12-month period ending on March 31, 2015. The average length of time from filing to disposition was an extremely efficient 9.0 months. Thus, the District of Kansas's caseload supports that the District of Kansas will not be overwhelmed by this MDL.

As to MDL status, there are only four MDL's currently pending before the District of Kansas, with two of them assigned to Judge Vratil – *In Re Motor Fuel Temperature Sales Practices Litigation* (MDL-1840) and *In Re Monsanto Company Genetically-Engineered Wheat Litigation* (MDL-2473). The former MDL is currently in settlement stages according to the Court's website, http://www.ksd.uscourts.gov/motor-fuel-temperature-sales-practices-litigation/, and the latter has only one action pending according to Judicial Panel statistics as of August 17, 2015. http://www.jpml.uscourts.gov/pending-mdls-0. Thus, neither the District of Kansas nor Judge Vratil is overly burdened at this time.

Should the Panel be inclined to send this litigation to the District of Kansas, your undersigned submits that Judge Vratil has the "ability and temperament to manage a large and growing litigation in an efficient and expeditious manner." *See e.g. In re Diet Drugs (Phentermine, Fenfluramine, Dexfenflurmine) Prods. Liab. Litig.*, 990 F.Supp. 834, 835. (J.P.M.L. 1998).

Further, because of the numerous judicial resources that are readily available to any judge in the District of Kansas, and the exceptional Clerk's office, we submit that the District of Kansas would serve as an excellent transferee court.

ii) The District of Kansas Is a Convenient and Highly Accessible Venue for All Parties and Witnesses

Kansas City, Kansas is without a doubt geographically central and, thus, an easily accessible venue for this litigation. Sitting in the center of the United States, it can be easily accessed by the parties and their counsel. The Kansas City International Airport is within a 30-minute car ride from the District of Kansas Courthouse, and the city itself offers many hotel options for the parties, their counsel and their witnesses. Therefore, in the interest of time, convenience, and economy, Plaintiffs submit that the District of Kansas is undeniably one of the most appropriate forums in which these actions should be coordinated and centralized.

iii.) At Least One Action is Pending and One Potential Defendant is Located in Kansas

As of today, your undersigned submits that there is no one venue that has more connections to this litigation than any other. Thus, the Panel should consider a variety of factors, including the location of pending cases and the location of the defendants. *See e.g. In re Cintas Corp. Overtime Pay Arbitration Litig.*, 444 F.Supp.2d 1353, 1355 (J.P.M.L. 2006).

Here, at least one action is pending in Kansas,[14] and at least one Power Morcellator manufacturer, Blue Endo, is headquartered in Kansas. Thus, these two factors further favor the District of Kansas as a suitable venue for this litigation.

To summarize, the District of Kanas is the most appropriate venue for this MDL, because: (1) there it at least one case pending there; (2) at least one manufacturer and potential defendant, Blue Endo, maintains its principal place of business there; (3) it is not overburdened; (4) Judge Vratil has the ability and experience to manage this MDL; and (5) the District of Kansas is a geographically central and convenient venue for this litigation.

[14] Shafer, et al. v. Ethicon, Inc., et al.; 2:14-CV-02633 (D.Kan.).

B. The United States District Court for the Southern District of Illinois is an Equally Suited Venue for These Cases

Should the Panel be inclined to send this litigation to a District other than the District of Kansas as requested by the Barnett Plaintiffs, Plaintiffs herein support the Southern District of Illinois before the Honorable David R. Herndon as requested by the Schroeder Plaintiff.

i) The Southern District of Illinois and Judge Herndon are Ready for Another MDL

The Southern District of Illinois and Judge Herndon are currently handling only two MDL's – the Yasmin/ Yaz litigation (MDL-2100) and the Pradaxa litigation (MDL-2385), and, contrary to what some of the Defendants have argued, we respectfully submit that Judge Herndon is likely no longer overburdened by these litigations.

As co-lead counsel in both MDL-2100 and MDL-2385 before Judge Herndon, your undersigned can attest to the fact that litigation in both MDLs has essentially concluded. Specifically, your undersigned can attest to the fact that the parties have resolved approximately 19,500 Yasmin/Yaz cases, and the Court has issued Scheduling Orders regarding the deminimus number of unresolved cases.[15]

While Defendants here have cited to judicial statistics that make it appear as if Judge Herndon is still presiding over thousands of Yasmin/Yaz cases, the fact is that a majority (almost all) of these cases have been resolved and are either in the settlement stages or have simply not yet been cleared and/or dismissed by the Clerk's office.[16]

[15] Further, on April 15, 2015, because the Yasmin/Yaz MDL was in its final stages, Judge Herndon issued Case Management Order 73 in which he revoked direct filing into the Southern District of Illinois, and notified all counsel that the Judicial Panel, at his request, had suspended the transferring of all future tag-along actions to the MDL. http://www.ilsd.uscourts.gov/documents/mdl2100/CMO73.pdf

[16] The Ethicon Defendants admit that their cited statistics date back to May 15, 2015. But since that time, a global settlement has been announced in the Yasmin/Yaz litigation that would resolve approximately 1,200 cases and CMOs 78 and 79 have been put in place to address any cases that are still unresolved under this global settlement. Thus, these cases may remain before Judge Herndon until they are formally resolved, yet their settlement and

As to the Pradaxa litigation, this litigation involved approximately 4,000 claimants, and a global settlement was announced in May 2014. This litigation is now over for all of the approximately 4,000 claimants, and is not being actively litigated in any regard. It therefore requires only minimal involvement from Judge Herndon as it draws to a close. Thus, the Southern District of Illinois and Judge Herndon should have the time to devote to a new MDL.

ii) The Southern District of Illinois has the Proven Ability to Efficiently Manage an MDL

The aforementioned Yasmin/Yaz and Pradaxa MDLs were successfully resolved in large part due to the ability of the Court, and Judge Herndon more specifically, to efficiently manage these two large and complex litigations.

To be specific, MDL-2100 – the Yasmin/Yaz litigation – was one of the largest mass tort MDL's in history, proven simply by the number of cases and voluminous discovery statistics.[17] The extremely brief time-frame for accomplishing the progress is by far one of the most astounding aspects of that fast-paced litigation: virtually the entire discovery process was accomplished in just under 27 months from the Panel's Transfer Order dated October 1, 2009, to the announcement of the resolution process with the issuance of CMO 53, dated December 31, 2011. Just over two years passed from Judge Herndon's first Yasmin/Yaz status conference on November 19, 2009 to CMO 53.

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pending dismissals are imminent. Accordingly, truly only a very small number of cases remain before Judge Herndon in the Yasmin/Yaz litigation.

[17] By way of enumeration, the defense produced over 90 million pages of documents, and more than 50 Bayer corporate witness and 40 expert witness depositions took place in five different countries, in a little over a year and a half. Notwithstanding the above, case-specific plaintiff discovery also occurred and included over 100 depositions of plaintiffs and related witnesses in fewer than 120 days. Thereafter, a process of plaintiff-only depositions began in approximately 100 cases. In total, well over 200 depositions were taken in just over one year. Further, all pre-trial work, including Daubert motions and rulings, briefing on 95 motions in limine (and rulings on the majority of them), deposition designations, exhibits lists, and more, were all concluded in the approximately two months before the January 9, 2012 trial date. In sum, less than two weeks before jury selection in the parties reached the mass settlement initiative at the behest of Judge Herndon, and as memorialized in Case Management Order 53 (issued on December 31, 2011).

Regarding the Pradaxa litigation, in addition to the production of over 70 million pages of documents, 48 defense corporate witness depositions took place both in the U.S. and abroad, all within less than two years. In addition to, and simultaneously with, general liability discovery, case-specific plaintiff discovery also took place, which included 84 depositions of plaintiffs and their spouses, their treating/prescribing doctors, and sales representatives. Like with the Yasmin/Yaz litigation, this entire discovery process ran on an expedited schedule: not even two years passed between the Panel's Transfer Order on August 8, 2012 creating the Pradaxa MDL and the announcement of the parties agreeing to the Pradaxa global settlement on May 28, 2014 which included over 99% of all the cases.

Accordingly, there should be no doubt that the Southern District of Illinois and Judge Herndon have the proven ability to efficiently manage an MDL.

iii) At Least One Potential Defendant is Located in Illinois

As mentioned above, the Panel can consider the location of a Defendant in determining whether a proposed forum would be appropriate. Here, at least one of the manufacturers, Richard Wolf Medical Instruments Corp, has its principal place of business in Vernon Hills, Illinois. As such, should the Court consider the location of a manufacturer as a factor, your undersigned submits that this factor would favor the Southern District of Illinois.[18]

iv) The Southern District of Illinois is Convenient for All Parties and Witnesses

The Southern District of Illinois is a readily accessible and convenient travel locale. Pertaining to travel to and from the Southern District of Illinois, both the Yasmin/Yaz and

[18] Admittedly, Richard Wolf Medical Instruments Corp's principal place of business is located in the Northern District of Illinois. Yet in the past, the Panel has granted consolidation and transferred actions to a district court within the state that a defendant's corporate headquarters is located, even though the headquarters was not located in that particular district. *See In Re Bayer Combination Aspirin Sales Practices Litigation*, 609 F.Supp.2d 1379, (J.P.M.L. 2009) (transferring to the Eastern District of New York even though the defendant's principal place of business was in the Southern District of New York).

Pradaxa litigations involved consistent and active participation by attorneys from across the country (e.g., Chicago, Pittsburgh, Philadelphia, Denver, Florida, New Jersey, New York, Washington D.C., California, etc.), thus underscoring the accessibility of the Southern District of Illinois. The courthouse itself is in close proximity to Lambert–St. Louis International Airport (which is only 15.4 miles away and, per Google maps, approximately 23 minutes from the courthouse) and is thus a very convenient location for witnesses and parties to convene. Furthermore, there are a multitude of local hotels ranging from a Four Seasons, Westin, Hyatt, Sheraton, two Hiltons, multiple Drury Inns, and many more available options, all centrally located in downtown St. Louis, which is just over the river and only minutes from the District Courthouse for the Southern District of Illinois. Therefore, in the interest of time, convenience, and economy, Plaintiffs submit that the Southern District of Illinois is undeniably one of the most appropriate forums in which these actions should be coordinated and centralized.

CONCLUSION

For the foregoing reasons, Plaintiffs herein respectfully request that the Panel: (1) grant the Barnett Plaintiffs' motion for centralization via a multidistrict litigation to the U.S. District Court for the District of Kansas; (2) alternatively, grant centralization in the U.S. District Court for the Southern District of Illinois as advocated for by the Schroeder Plaintiff; and/or (3) grant such other and further relief as it may deem just and appropriate under the circumstances.

Dated: New York, New York
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