BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

In re Neomedic Women's Pelvic Repair Systems Products Liability Litigation **MDL No.**

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR TRANSFER TO THE SOUTHERN DISTRICT OF WEST VIRGINIA PURSUANT TO 28 U.S.C. § 1407

COME NOW the Plaintiffs in the pending constituent civil actions represented by the undersigned and listed in the attached Schedule of Actions, and file their Motion to Transfer to the Southern District of West Virginia pursuant to 28 U.S.C. § 1407 as follows:

I. BACKGROUND

This product liability litigation involves the women's pelvic organ repair products manufactured and sold by DIMA, S.L., Neomedic International, S.L., Neomedic, Inc. and Specialities Remeex International, S.L. (hereinafter, referred to collectively as "Neomedic"). The products at issue in these cases are: the Needleless sling, the Contasure Needleless sling, and the Remeex System (hereinafter referred to as Neomedic Women's Pelvic Repair Products) which are implantable synthetic surgical meshes sold for use in the female pelvic region to support and reinforce the body's pelvic organs and natural tissues for stress urinary incontinence and/or pelvic organ prolapse. The plaintiffs in the constituent civil actions are women suffering from incontinence and/or pelvic organ prolapse who received implants of these products, and, where applicable, their spouses. All of the plaintiffs herein claim that the Neomedic Women's Pelvic Repair Products implanted in their bodies were defectively designed, manufactured and marketed, and that the defendants failed to provide appropriate warnings and instructions regarding the dangers posed by these devices. The plaintiffs herein suffered serious and permanent physical injuries from the implantation of the Neomedic Women's Pelvic Repair

Products, often requiring additional surgeries, additional medical expenses and unresolved complications.

The common defendants in these cases are DIMA, S.L., Neomedic International, S.L. and Specialities Remeex International, S.L., foreign corporations with principal places of business in Spain; and Neomedic, Inc., a Florida corporation. Upon information and belief, Specialities Remeex International, S.L. and Neomedic, Inc. are subsidiaries of Neomedic International, S.L. The Neomedic Women's Pelvic Repair Products at issue in these actions received FDA clearance for sale in the United States after 510k applications were submitted by Specialities Remeex International, S.L.

In accordance with 28 U.S.C. § 1407, the undersigned are seeking the transfer of all federal cases involving the Neomedic Women's Pelvic Repair Products to the same Court for coordinated and/or consolidated proceedings.

II. THE LOCATION AND STATUS OF THE ACTIONS

To date, 43 women (and, in many instances, their husbands) have filed civil actions arising from the implantation of the Neomedic Women's Pelvic Repair Products. There are 21 actions pending in eight federal districts. The breakdown is: Southern District of West Virginia (14 actions, 13 women)[1]; Eastern District of Tennessee (1 action); Middle District of Tennessee (1 action, 24 women); Middle District of Alabama (1 action); Southern District of Alabama (1 action); Western District of North Carolina (1 action); Western District of Pennsylvania (1 action); and District of Minnesota (1 action).

Several of these actions involve a single plaintiff implanted with multiple women's pelvic repair products manufactured by different defendants, some of which have already been transferred

[1] One of the actions filed in the Southern District of West Virginia, *Gonzalez, et al. v. American Medical Systems, Inc.*, et al., Case Number 2:13-cv-24797, includes Neomedic Defendants but does not allege any specific plaintiff was implanted with a device manufactured or sold by those Defendants.

to a pelvic repair products MDL pending in front of Chief Judge Goodwin in the Southern District of West Virginia accordingly. Specifically, as shown on the Schedule of Actions, Scione-Johnson, et al. v. Coloplast Corp., et al., 2:13-cv-11320 (S.D. of W.V.) involves a plaintiff implanted with an Aris sling sold by Coloplast Corp. and a Contasure Needleless sling by Neomedic; Horridge, et al. v. C.R. Bard, Inc., et al., 2:13-cv-17786 (S.D of W. V.) involves a plaintiff implanted with a Bard mesh sold by Bard and a Needleless sling by Neomedic; Nesse v. American Medical Systems, Inc., et al., 2:13-cv-21078 (S.D. of W.V.) involves a plaintiff with an Intepro LPP Y-Sling sold by AMS and Remeex System by Neomedic; Dailey, et al. v. American Medical Systems, Inc., et al., 2:13-cv-22292 (S.D. of W.V.) involves a plaintiff implanted with a Monarc sold by AMS and Needleless sling by Neomedic; Weirback v. American Medical Systems, Inc., et al., 2:13-cv-02646 (S.D. of W.V.) involves a plaintiff implanted with an Apogee and Monarc sold by AMS and Contasure Needleless by Neomedic; Costa v. Boston Scientific Corp., et al., 2:13-cv-21952 (S.D. of W.V.) involves a plaintiff implanted with a Pinnacle pelvic floor kit sold by Boston Scientific and Remeex System by Neomedic; McDuffie et al. v. American Medical Systems, Inc., et al., 2:13-cv-02780 (S.D. of W.V.) involves a plaintiff implanted with an Elevate sold by AMS and Remeex System by Neomedic; Beasley, et al. v. Cook Biotech, Inc., et al., 2:13-cv-17315 (S.D. of W.V.) involves a plaintiff implanted with a Cook Surgisis BioDesign sold by Cook and Remeex System by Neomedic; Bates v. American Medical Systems, Inc., et al., 2:13-cv-12012 (S.D. of W.V.) involves a plaintiff implanted with a Monarc sling sold by AMS and Needleless sling by Neomedic; Feighner, et al. v. American Medical Systems, Inc., et al., 2:13-cv-23132 (S.D. of W.V.) involves a plaintiff implanted with Sparc sling sold by AMS and Needleless sling by Neomedic; and Raetz v. American Medical Systems, Inc., et al., 2:13-cv-17315 (S.D. of W.V.) involves a plaintiff implanted with a Sparc sling and Perigee mesh sold by AMS and a Contasure

sling by Neomedic. It is anticipated that there will be many more Neomedic and multi-defendant cases filed in the coming months.

III. ARGUMENT

A. These actions are appropriate for centralization and transfer for coordinated and/or consolidated pretrial treatment under 28 U.S.C. § 1407.

These 22 actions currently pending in 8 separate federal district courts all involve similar product design and manufacturing defect and warnings claims against the manufacturer/seller defendant (Neomedic) regarding the women's pelvic repair products that were implanted in these women. The Panel has previously found that product liability actions involving similar claims relating to similar implantable medical devices are proper for centralization under 28 U.S.C. § 1407. See, e.g., In re Protegen Sling and Vesica Systems Prods. Liab. Litig., MDL No. 1387 (J.P.M.L. 2001); In re Mentor Corp. ObTape Transobturator Sling Prods. Liab. Litig., 588 F. Supp. 2d 1374, MDL No. 2004 (J.P.M.L. 2008); In re Avaulta Pelvic Support Systems Prods. Liab. Litig., MDL No. 2187 (J.P.M.L. 2010); In re: American Medical Systems, Inc., Pelvic Repair System Products Liability Litigation, MDL-2325 (J.P.M.L. 2012); In re: Boston Scientific Corporation Pelvic Repair System Products Liability Litigation, MDL-2326 (J.P.M.L. 2012); In re: Ethicon, Inc. Pelvic Repair System Products Liability Litigation, MDL-2327 (J.P.M.L. 2012); In re: Coloplast Corp. Pelvic Repair System Products Liability Litigation, MDL-2387 (J.P.M.L. 2012) and In re: Cook Pelvic Repair System Products Liability Litigation, MDL-2440 (J.P.M.L. 2013).

The Panel's recent decisions to continue to consolidate MDLs involving manufacturers of Women's Pelvic Repair Products before the Honorable Joseph R. Goodwin in the Southern District of West Virginia recognize that actions involving women's pelvic repair products,

regardless of manufacturer, generally will involve some of the same issues. See, e.g., In re: Ethicon, Inc. Pelvic Repair System Products Liability Litigation, MDL-2327 (J.P.M.L. 2012); In re: Coloplast Corp. Pelvic Repair System Products Liability Litigation, MDL-2387 (J.P.M.L. 2012) and In re: Cook Pelvic Repair System Products Liability Litigation, MDL-2440 (J.P.M.L. 2013).

These Neomedic Women's Pelvic Repair product cases involve similar claims and defenses to those in the other Women's Pelvic Repair product cases. The factual and legal issues involved in these pelvic repair product cases are inextricably intertwined no matter what manufacturer or model of the product is involved. Many of the serious injuries to women associated with these products are not unique to any particular product, but rather are common throughout the industry. These injuries include multiple repair surgeries, intractable pain syndrome, shrinkage of tissue, hyperfibrotic reaction to the mesh, painful intercourse, degradation of the mesh leading to chronic inflammation, erosion of the mesh through tissue, infection, and alteration of the physical characteristics of the vagina and pelvic area – and occasionally physical injury to the spouse.

The undersigned respectfully submit that MDL treatment of all of these similar products is appropriate and that transfer of all of these women's pelvic repair product cases to a single court before one Judge would be the only way to eliminate inconsistency and redundancy and allow for coordination in accordance with 28 U.S.C. § 1407.

B. The Southern District of West Virginia is uniquely situated to serve as the proper forum for coordinated and/or consolidated pretrial proceedings of these actions.

Transfer of these Neomedic Women's Pelvic Repair Product cases to a single Court before a single judge for purposes of pre-trial discovery and coordination is the only effective means to

efficiently manage this litigation. From a practical standpoint, the Southern District of West Virginia is uniquely situated as the appropriate forum to handle these cases because that Court is already handling the majority of related litigation that could be coordinated with the product actions involving other manufacturers' products.

The MDLs (Bard MDL 2187, American Medical Systems MDS 2325, Boston Scientific MDL 2326, Ethicon/Johnson & Johnson MDL 2327, Coloplast MDL 2387, Cook MDL 2440) now pending before Chief Judge Joseph R. Goodwin involve similar products intended for similar uses in the same area of the female anatomy as the products at issue herein. This is because the Panel has continued to consolidate transvaginal mesh and sling product cases in the Southern District of West Virginia, since first sending the Bard MDL to that court. See, e.g., In re: Ethicon, Inc. Pelvic Repair System Products Liability Litigation, MDL-2327 (J.P.M.L. 2012); In re: Coloplast Corp. Pelvic Repair System Products Liability Litigation, MDL-2387 (J.P.M.L. 2012) and In re: Cook Pelvic Repair System Products Liability Litigation, MDL-2440 (J.P.M.L. 2013). Specifically, the Panel found in regard to the Ethicon, AMS and Boston Scientific MDLs, that the Southern District of West Virginia was the most appropriate transferee forum for each of those MDLs as Chief Judge Joseph R. Goodwin of that district was currently presiding over MDL No. 2187, which involved claims of defects in similar pelvic surgical mesh products, and thus he was uniquely situated to preside over the similar claims in those additional three MDLs. The Panel stated that the pelvic surgical mesh products at issue in MDL Nos. 2325, 2326, and 2327 are used to treat similar conditions as those at issue in MDL No. 2187, and they have allegedly resulted in similar injuries. In re: Ethicon, Inc. Pelvic Repair System Products Liability Litigation, MDL-2327 (J.P.M.L. 2012).

In MDL 2387, the Coloplast MDL, the Panel found that centralization was consistent with its recent decision creating separate pelvic repair product MDLs involving defendants American Medical Systems, Inc., Boston Scientific Corp., and Ethicon, Inc. In re: Coloplast Corp. Pelvic Repair System Products Liability Litigation, MDL-2387 (J.P.M.L. 2012). In deciding to consolidate the Coloplast cases and to do so also in the Southern District of West Virginia, the Panel pointed out that nine of the 24 federal actions in which Coloplast was named as of the date of the hearing to consolidate were already in one or the other of the four pelvic repair product MDLs pending in that district before the Honorable Joseph R. Goodwin since they, as many of the cases subject to the current motion to consolidate, involved a Coloplast product and one or more products at issue in those MDLs. Id. The Panel found that centralization in the Southern District of West Virginia prevented issues of splitting the Coloplast-only cases and multi-product cases between two separate courts. Id.

Finally, and most recently, in MDL 2440, the Panel consolidated and centralized women's pelvic mesh and sling actions involving Cook Medical products in the West Virginia Southern District. The Panel held, "though these actions present some individual issues of fact, this is usually true of products liability cases and medical device cases, in particular." In re: Cook Pelvic Repair System Products Liability Litigation, MDL-2440 (J.P.M.L. 2013) (citing In re: Zimmer Duron Hip Cup Prods. Liab.). The Panel also again pointed out, in choosing to centralize MDL Nos. 2325 (AMS), 2326 (Boston Scientific), and 2327 (Ethicon) in the Southern District of West Virginia where it had centralized MDL No. 2187 (C.R. Bard, Inc.), that a number of the actions were brought by plaintiffs who were implanted with multiple products made by multiple manufacturers. In re: Ethicon, Inc. Pelvic Repair System Products Liability Litigation, MDL-2327 (J.P.M.L. 2012). The Panel stated that centralization of those three MDLs

in one court would allow for coordination of any overlapping issues of fact in such multi-product, multi-defendant actions. Id.

If these pelvic repair product cases are not in MDL proceedings before a single court, it would force the attorneys representing both the plaintiffs and the defendants in these cases to litigate the same issues in several different federal courts, leading to disparate and conflicting rulings. Additionally, the drain on resources resulting from litigating these cases in different courts would diminish the attorneys' abilities to fully and efficiently represent any individual client – plaintiff or defendant. It is not difficult to envision, for example, a scenario where the same plaintiffs' and defense lawyers would be required to argue the same *Daubert* motions regarding the same experts in different federal courts; which could result in potentially conflicting rulings regarding the same experts. The inefficiency and potential duplication of effort inherent in splitting these pelvic repair product cases between multiple federal district courts would only be exacerbated in the many cases that involve a single plaintiff implanted with multiple products sold by multiple manufacturers.

The very reason for the creation of an MDL is to avoid the potential for inconsistent rulings, the unnecessary waste of time, effort and resources resulting from the duplication of effort in *multiple cases* that involve a common issue of fact. To have the Neomedic MDL assigned to a different court than the one overseeing the other pending mesh MDLs would result in inconsistency, redundancy, and wastefulness. Having a single Judge would continue to avoid the nearly inevitable conflict in scheduling orders and competing deadlines between two different courts presiding over cases involving the same products – or even different aspects of a single plaintiff's case. Issues of confidentiality/trade secrets should be ruled on by one Judge familiar with the different manufacturers' products and respective positions in accordance with a single,

predictable standard.[2] The same discovery taken in one plaintiff's case should not have to be rehashed in another court, with the same plaintiff, same medical witnesses, and the same experts potentially having to be deposed multiple times. Most of the same pre-trial motions – dispositive motions, *Daubert* motions, motions in limine – will apply equally to all defendants, and they should be ruled on by a single Judge.[3] The only way to avoid these potential pitfalls would be to have the Neomedic MDL before a single Court along with the other mesh MDLs.

The overarching goal of 28 U.S.C. § 1407 for selecting a transferee forum is to find a court that will advance "the convenience of the parties and will promote the just and efficient conduct" of the transferred cases. Based on the commonality of the defendants in these cases, the commonality of counsel involved on behalf of the plaintiffs and defendants, as well as the similarity between the products and claims at issue in all of these cases, the transfer of these cases to the Southern District of West Virginia for handling by Chief Judge Joseph R. Goodwin, who is already presiding over multiple Women's Pelvic Repair Products MDLs and who is dealing with the same type products and issues, will be convenient to all parties, their counsel and their witnesses and will provide a just and efficient forum for these cases.

Given the general similarities between these Neomedic Women's Pelvic Repair Product cases and those already before Chief Judge Joseph R. Goodwin in the other Women's Pelvic Repair Product MDLs (MDL 2187, 2325, 2326, 2327, 2387, 2440), Chief

[2] The splitting of cases between courts due to conflicting confidentiality orders issued by the two judges could prevent a plaintiff from using discovery obtained from one defendant in one court against another defendant in the other court on such issues as the "state-of-the-art" or feasibility of safer alternative design even though the manufacturer is held to the standard of an expert, and "must keep abreast of scientific knowledge, discoveries, and advances and is presumed to know what is imparted thereby..." Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1089 (5th Cir. 1973). These issues should be dealt with by a single judge.

[3] The Panel has most recently noted in its decision to send the Cook MDL (MDL 2440) to the Southern District of West Virginia that "there will be overlapping discovery and pretrial proceedings as to the claims against Cook, which are fairly typical of the claims involved in the West Virginia pelvic mesh MDLs." See Transfer Order, In re: Cook Medical, Inc., Pelvic Repair System Products Liability Litigation, Case MDL No. 2440, 6/11/13.

Judge Goodwin has had an opportunity to become familiar with many of the factual and legal issues involved in this litigation and with these products in general. Based on such experience, Chief Judge Goodwin is uniquely suited to preside over MDLs involving these similar transvaginal mesh product cases. "[T]he availability of an experienced and capable judge familiar with the litigation is one of the more important factors in selecting a transferee forum...." In re Ampicillin Antitrust Litigation, 315 F. Supp. 317, 319 (J.P.M.L. 1970); See also, David H. Herr, *Multidistrict Litigation Manual* § 6.14 (2008) ("The availability of a judge experienced with the litigation may overcome otherwise significant factors in selecting a transferee district."); In re American Investors Life Ins. Co. Annuity Marketing and Sales Practices Litigation, 398 F. Supp. 2d 1361 (J.P.M.L. 2005) (appropriate forum where five constituent actions already proceeding, and judge who "has already developed familiarity with the issues present in this docket as a result of presiding over motion practice and other pretrial proceedings in the actions pending before her for the past year."). A transferee judge can gain valuable familiarity with the factual and legal issues from involvement in other litigation even if that litigation involved different facts, legal theories, and different parties. See, e.g., In re Amoxicillin Patent and Antitrust Litig., 449 F. Supp. 601, 604 (J.P.M.L. 1978) (based on supervision of litigation involving another similar product, transferee judge had the opportunity "to become familiar with chemical and historical matters relating to the semisynthetic penicillin industry and that therefore assignment of the present litigation to him will promote the expeditious processing of this litigation."); In re Dollar General Corp. Fair Labor Standards Act Litig., 346 F.Supp.2d 1368, 1370 (J.P.M.L. 2004) (transferee court gained familiarity with the issues involved through his handling of an FLSA action involving a different defendant); In re Flat Glass

Antritrust Litig. (No. II), 559 F.Supp.2d 1407 (J.P.M.L. 2008) (transferee judge was generally familiar with antitrust allegations based on her involvement in a prior action involving a different time period and method of price-fixing).

Judge Goodwin also has the *exclusive* ability to coordinate the Neomedic MDL in these cases with the cases involving the similar women's pelvic repair products now pending in the other six (6) MDLs. The Panel has considered favorably the transferee court's ability to coordinate with related federal court proceedings. See, e.g., In re Laughlin Products, Inc., Patent Litig., 313 F.Supp.2d 1380, 1382 (J.P.M.L. 2004) (factual and legal allegations in the actions proposed for transfer were similar to those in actions previously centralized before transferee court, and transferee judge was thus familiar with the issues and able to determine whether any distinction between the actions was warranted); In re Polychloroprene Rubber (CR) Antitrust Litig., 360 F.Supp.2d 1348 (J.P.M.L. 2005) (concluding that transfer was appropriate to a district where a related MDL was already pending involving some of the same parties, albeit a different product). The transfer of these Neomedic Women's Pelvic Repair Product cases to the Southern District of West Virginia would facilitate the coordination of these cases with the related cases involving the similar products now pending in the other six mesh MDLs.

Transfer of the related cases at issue in this motion involving Neomedic's women's pelvic repair products for coordination with similar litigation involving related products sold by other companies would likewise be in the interest of convenience for all parties, and would achieve the justice and efficiency that are the hallmarks of Section 1407. If these actions are transferred to a single judge then this Panel and that judge have the inherent

authority to determine the appropriate scope and operation of the coordinated proceedings, which could best be determined if these matters are in the hands of one judge.

Another factor favoring the transfer of these cases to the Southern District of West Virginia for consolidation or coordination is that the Plaintiffs in many of the constituent cases identified in the attached Schedule of Actions support such transfer. While not controlling, the Panel has taken into consideration the parties' preferences when selecting a transferee court. See, e.g., In re Sierra Wireless, Inc., Securities Litigation, 387 F. Supp.2d 1363 (J.P.M.L. 2005) (support of responding parties weighed in favor of transferee district); In re Rubber Chemicals Antitrust Litigation, 305 F. Supp. 2d 1366, 1367 (J.P.M.L. 2004) (district that was choice of all responding parties was proper transferee forum); In re PrimeVision Health Inc. Contract Litigation, 206 F. Supp. 2d 1369, 1307 (J.P.M.L. 2002) (choosing district in which all responding parties favored consolidation). Such broad-based support among the diverse Plaintiffs in this motion further supports the conclusion that the Southern District of West Virginia is the proper transferee district.

The Southern District of West Virginia provides a convenient and appropriate location to receive the transfer of these cases for consolidated and/or coordinated handling, in accordance with Chief Judge Joseph R. Goodwin's handling of the Bard, Ethicon, Boston Scientific Corp., American Medical Systems, Coloplast and Cook Women's Pelvic Repair Product MDLs currently pending in his Court, which involve similar claims relating to similar products. Transfer of these Neomedic Women's Pelvic Repair Products to the Southern District of West Virginia would allow a single Judge familiar with the factual and legal issues presented to coordinate this related litigation in one forum.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs move for transfer pursuant to 28 U.S.C. § 1407 to the Hon. Joseph R. Goodwin, Chief Judge of the Southern District of West Virginia, and respectfully request that this motion be granted.

This 8th day of November, 2013.

By: /s/ Derek H. Potts
Derek H. Potts, MO Bar No. 44882
Timothy L. Sifers, MO Bar No. 49836
Hans Van Zanten, MO Bar No.
Patricia L. Campbell, MO Bar No. 60917
dpotts@potts-law.com
tsifers@potts-law.com
hvanzanten@potts-law.com
pcampbell@potts-law.com

The Potts Law Firm, LLP
908 Broadway, 3rd Floor
Kansas City, MO 64105
(816) 931-2230
(816) 931-7030 (fax)

Counsel for Plaintiffs in the following actions:

Ruffin v. DIMA, S.L., et al., S.D. of Alabama, Case No. 1:12-cv-00586-N;
Dickerson v. DIMA, S.L., et al., W.D. of North Carolina, Case No. 5:12-cv-00192-RLV-DSC;
Carpenter and Carpenter v. DIMA, S.L., et al., W.D. of Pennsylvania, Case No. 1:13-cv-00077-MBC;
Horridge and Horridge v. C.R. Bard, Inc., et al., S.D. of West Virginia, Case No. 2:13-cv-17786;
Nesse v. American Medical Systems, Inc., et al., S.D. of West Virginia, Case No. 2:13-cv-21078;
Scione-Johnson and Johnson v. Coloplast Corp., et al., S.D. of West Virginia, Case No. 2:2013-cv-11320;
Dailey and Dailey v. American Medical Systems, Inc., et al., S.D. of West Virginia, Case No. 2:13-cv-22292; and *Ogelsby and Ogelsby v. DIMA, S.L., et al.*, M.D. of Alabama, Case No. 1:13-CV-484-WC.

By: /s/ Mark Burton____

Mark Burton, CA Bar No. 178400
Young S. Lee, CA Bar No. 184506
mburton@audetlaw.com
ylee@audetlaw.com

Audet & Partners LLP
221 Main Street, Suite 1460
San Francisco, CA 94105
(866) 213-1283
(866) 425-6237 (facsimile)

Counsel for Plaintiff in the following action:

Thomas v. Neomedic, Inc., 0:13-cv-01057-JNE-TNL, D. of Minnesota