BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: BENICAR (AND OTHER OLMESTARTAN DRUGS) PRODUCTS LIABILITY LITIGATION	**MDL No. 2606**

INTERESTED PARTY RESPONSE OF PLAINTIFFS JOSEPH PINCKNEY AND EILEEN PINCKNEY TO THE MOTION FOR TRANSFER OF ACTIONS TO THE NORTHERN DISTRICT OF OHIO

I. INTRODUCTION

Pursuant to 28 U.S.C. § 1407 and Rule 6.2(e) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, Joseph Pinckney and Eileen Pinckney, being the Plaintiffs in *Joseph Pinckney, et al., v. Daiichi Sankyo, Inc. et al.*, Case No. 1:15-cv-00173, pending in the Middle District of North Carolina, Durham Division, respectfully submit this Interested Party Response of Plaintiffs Joseph and Eileen Pinckney to the Motion for Transfer of Actions to the Northern District of Ohio. This Response is made to the Motion by Spangenberg, Shibley & Liber, LLP who has moved for consolidated and coordinated pre-trial procedure under 28 U.S.C. § 1407. The *Pinckney* Plaintiffs agree that consolidation is appropriate and submit that the most appropriate venue is the United States District Court for the Northern District of Ohio before the Honorable Judge Dan Aaron Polster.

II. THE BENICAR (AND OTHER OLMESARTAN DRUGS) PRODUCTS LIABILITY CASES SHOULD BE TRANSFERRED AND COORDINATED PURSUANT TO 28 U.S.C. § 1407

The Pinckneys concur with the arguments already presented in Spangenberg, Shibley & Liber, LLP's Motion and numerous other Plaintiffs who have filed Interested Party Responses. It is clear that all of these cases involve common issues of fact and law regarding claims for

failure to warn, design defect, manufacturing defect, breach of warranty, fraud and misrepresentation in the sales and marketing of Benicar and other olmesartan drugs, which Defendants manufactured, marketed, promoted and placed into the stream of commerce. The Defendants failed to properly advise, warn and otherwise disclose that the olmesartan drugs can and will cause severe gastrointestinal injuries to users, such as that suffered by Joseph Pinckney.

A. CONSOLIDATION IS APPROPRIATE.

As the Panel is well aware, there are three criteria for transfer under 28 U.S.C.A. § 1407(a):

1. The actions must share common issues of fact;
2. Transfer must be for the convenience of parties and witnesses; and
3. Transfer must advance the just and efficient conduct of the actions.

The *Pinckney* Plaintiffs agree that these factors are satisfied in Motion *sub judice*.

B. THE SCOPE OF THE LITIGATION.

Despite Defendants' attempts to characterize this litigation as contained and controlled by a few law firms and informal coordination is occurring, the Benicar litigation is widespread, pervasive and uncoordinated. At this time, the undersigned are aware of thirty-one (31) federal actions, filed by twenty-six (26) different law firms, in eighteen (18) different federal district courts throughout the country, including:

1. Northern District of Ohio
2. Eastern District of Louisiana
3. Northern District of California
4. Southern District of Illinois
5. Southern District of New York

6. Central District of Illinois
7. District of Maine
8. District of Oregon
9. District of Montana
10. Southern District of California
11. Southern District of Iowa
12. Central District of California
13. District of Minnesota
14. Northern District of Alabama
15. Northern District of Mississippi
16. District of Arizona
17. Middle District of Louisiana
18. Middle District of North Carolina

Further, as the record before this Court indicates, many additional cases are pending in State Court of New Jersey relating to Defendants' improper marketing, warning and sale of olmesartan drugs.

The undersigned are counsel of record for only the *Pinckney* case. To suggest that the Pinckneys' counsel are controlled by the dictates of other Plaintiffs' counsel in other jurisdictions, is both untrue and ignores the undersigned's professional obligations to our North Carolina clients. Coordination is clearly necessary, but the Pinckneys are entitled to participle in the coordination, not simply have others' agreements thrust upon them. Simply because Mr. Pinckney sustained unnecessary and predictable injuries from an olmesartan drug in the same way that others were injured in, for example, Montana or Illinois, does not allow the Pinckneys'

attorneys to uniformly acquiesce to the decisions made by the Montana or Illinois counsel, who had no idea that the Pinckneys even existed. Instead, the Pinckneys are entitled to have their rights protected, through a Plaintiff Steering Committee, who owe the Pinckneys fiduciary duties.

Defendants' proposed informal coordination, places the Pinckneys and the North Carolina Court's in a precarious situation. Defendants' counsel may, in fact call the Pinckneys' lawyers and propose certain agreements that may have been reached with some and possibly not all Plaintiffs' counsel. Defendants' counsel may cite a court order from another jurisdiction as a basis for the agreement. In turn, Pinckneys' counsel and the North Carolina Court will have inadequate knowledge of the basis for the prior decisions, whether those underlying facts and assumptions are still valid, and whether other agreements were reached or Orders issued on different terms. Formal coordination avoids these concerns.

C. COMMON CLAIMS FOR RELIEF.

The record before the Panel is replete with descriptions of the various claims asserted against the Defendants and facts that serve as the basis thereof. The *Pinckney* Complaint asserts the following Claims for Relief: Negligence-Defective Design; Negligence-Failure to Warn; Negligence *Per Se* for Defendants' Failure to Comply with Federal Standards and Requirements Applicable to the Sale of its Olmesartan Products; Gross Negligence; Breach of Express Warranties, Breach of Implied Warranties; Negligent Misrepresentation; Fraudulent Concealment; Constructive Fraud; Fraud; Unfair and Deceptive Trade Practices; and Civil Conspiracy. These claims are typical of pharmaceutical cases of this type and are included in nearly all of the cases that have filed Interested Party Responses to the Motion *sub judice*.

D. COMMON FACTS.

The facts giving rise to the *Pinckney* Claims for Relief are the same for all other cases before the Panel. The *Pinckney* Complaint's "Introduction" sufficiently illustrates the common issues of fact.

> Plaintiffs, Joseph Pinckney and Eileen Pinckney bring this action for personal injuries suffered by them as a proximate result of Benicar® being prescribed and ingesting the defective and unreasonably dangerous pharmaceutical blood pressure drug containing the drug *olmesartan medoxomil*, which is, and was at all times relevant to this action, manufactured, designed, researched, tested, packaged, labeled, marketed, advertised, distributed, prescribed, and sold by Defendants identified herein. Plaintiffs claim and allege that their damages and injuries are the direct and proximate result of Defendants' negligent, intentional, and wrongful acts, omissions, and conduct regarding Defendants' design, development, formulation, manufacture, testing, packaging, labeling, promotion, advertising, marketing, distribution and sale of products containing the drug *olmesartan medoxomil*.
>
> *Pinckney* Complaint, Case 1:15-cv-00173 M.D.N.C. [D.E. 1]

The same alleged wrongful acts, omissions, testing, product design, alternative designs, marketing and advertisements, warnings and labeling will be at issue in all related cases. Rather than dispute these common facts, Defendants in their opposition, claim that the cases deal with different olmesartan products, and point to the role physicians play in the decision to prescribe the olmesartan products to various human beings, who, of course, are different.

First, Defendants' assertion that the olmesartan drugs are sold under the brands Benicar®, Benicar HCT®, Azor® and Tribenzor® is irrelevant to the issue of consolidation. The offending products at issue are materially the same. The offending drug and design is the same. The gastrointestinal injuries caused by these olmesartan drugs are the same. The Defendants' failures and improper actions for each brand are the same.

Second, Defendants' argument that each plaintiff could have specific causation related facts is also unpersuasive to defeat centralization. This Panel constantly considers the impact of individualized factual issues and under similar circumstances has repeatedly found the same to be no impediment to centralization. In a hip implant case, this Panel noted: "almost all injury litigation involves questions of causation that are case- and plaintiff-specific" and that "[s]uch differences have not been an impediment to centralization in the past" *In re: Wright Medical Technology, Inc., Conserve Hip Implant Products Liability Litigation,* 844 F.Supp.2d 1371, 1372 (J.P.M.L. 2012) (citing the *In re: Zimmer Durom Hip Cup Products Liability Litigation*, 717 F. Supp. 2d 1376, 1378 (U.S.J.P.M.L. 2010) Panel's rejection of defendant's argument that individual questions predominate, and noting "this is usually true of device cases and other products liability cases").

The reason individualized issues are less concerning to a centralization determination, lies, in large part, on the Transferee Court's powers to manage the issues. The Panel addressed the issue in *In re: Darvocet, Darvon and Propoxyphene Products Liability Litigation*, 780 F. Supp. 2d 1379, 1381 (U.S.J.P.M.L. 2011):

> In opposing centralization, defendants argue that the actions involve multiple individualized fact issues of causation and product identification which will require discovery unique to each case. We appreciate this argument, but our experience causes us respectfully to disagree as to its significance. Though the actions certainly present some individual issues, this is true of products liability cases, generally. *In re Zimmer Durom Hip Cup Prods. Liab. Litig.*, 717 F.Supp.2d 1376, 1378 (J.P.M.L.2010). Section 1407, however, does not require a complete identity or even a majority of common factual issues as a prerequisite to centralization. *In re Denture Cream Prods. Liab. Litig.*, 624 F.Supp.2d 1379 (J.P.M.L.2009); *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 173 F.Supp.2d 1377 (J.P.M.L.2001). Transferee judges can accommodate common and individual discovery tracks, gaining the benefits of centralization without delaying or compromising consideration of claims on their individual merits. *In re: Yamaha Motor Corp. Rhino ATV Prods. Liab. Litig.*, 597 F.Supp.2d 1377 (J.P.M.L.2009). We believe that this dual approach is viable here as it has been in other products liability dockets. *See, e.g., In re: Yasmin and Yaz (Drospirenone)*

> *Mktg., Sales Practices and Prods. Liab. Litig.*, 655 F.Supp.2d 1343 (J.P.M.L.2009); *In re: Chantix (Varenicline) Prods. Liab. Litig.*, 655 F.Supp.2d 1346 (J.P.M.L.2009); *In re Vioxx Prods. Liab. Litig.*, 360 F.Supp.2d 1352 (J.P.M.L.2005). Our experience from the *PPA* litigation is that a single judge can resolve collective issues expeditiously and, then, suggest Section 1407 remand of actions to transferor courts for more individual discovery and trial, if necessary.
>
> *In re: Darvocet, Darvon & Propoxyphene Products Liab. Litig.*, 780 F. Supp. 2d at 1381.

In short, the Benicar Defendants have simply highlighted an obvious component to most product liability cases and all drug litigation. This complexity is not a consolidation issue and is more adequately addressed in the Panel's Transferee forum selection.

E. <u>COMMON DISCOVERY, MOTION PRACTICE AND PRE-TRIAL ACTIVITIES</u>.

An objective analysis of the claims and facts set forth in the Benicar Complaints, clearly indicate that each Benicar case will have overlapping discovery, Motion practice and pre-trial proceedings. As is typical in these cases, each Plaintiff will inquire into the facts and circumstances surrounding Defendants' design, development, formulation, manufacture, testing, packaging, labeling, promotion, advertising, marketing, distribution and sale of products containing the drug *olmesartan medoxomil* and the various approval processes related to the same. Defendants' defenses and discovery, will be similarly consistent, and can be anticipated. Basically, the Defendants will assert that their *olmesartan* products are effective and safe, the warning and disclosures were adequate, they received necessary approvals, the facts and science supports their contentions and the Plaintiffs' gastrointestinal injuries, while unfortunate and regretful, are not their fault.

The discovery process needs to be coordinated. The undersigned lawyers will be propounding written discovery to the Defendants that may or may not have been issued by some

Plaintiffs in the cases listed above. At this time, the undersigned, being disconnected from those cases, are unable to discern what the Defendants have or will produce. The witnesses that Plaintiffs' counsel will seek to depose in the *Pinckney* case may be the same as those being deposed by other Plaintiffs. As is described in the Interested Party Response of Plaintiffs *Verduzco* and *Ewald* in Support of Transfer and Centralization Pursuant To 28 U.S.C. § 1407, [D.E. 18], many of these witnesses are located in Japan. If anything can be learned from *In re: Chinese Manufactured Drywall Products Liability Litigation* (E.D. La. MDL 2047), judicial oversight of oversees manufacturer depositions is essential. Further, Motion practice will abound. The Middle District of North Carolina will be required to rule on the same Motion practice that will occur in dozens of other Courts around the country. Not only will the Middle District of North Carolina resources be unnecessarily burdened by ruling on issues decided or to be decided by other Judges, the threat of inconsistent rulings on these Motions is distinct.

The Defendants' document production in earlier filed cases provides a simple example of numerous reasons underlying the coordination the *Pinckney* Plaintiffs support and request. As is stated above, evidence for this case is located in Japan. The expense associated with issuing and accommodating dozens of requests for documentation located in a distant country is exorbitant and unnecessary. Further, in the Interested Party Response of Plaintiffs, Brenda Baugh, et al., to the Motion for Transfer of Actions to the Northern District of Ohio [D.E. 25], counsel alerts the Court to the status of document production in the New Jersey proceedings as well as apparent discovery disputes. Depending on the reason documents were withheld, the *Pinckney* counsel will seek these unproduced documents through Motions filed in the Middle District of North Carolina. It should be apparent that Plaintiffs, whose cases are pending in other Districts, will do the same. Once again, the Middle District of North Carolina will be required to rule on discovery

Motions and possibly conduct *in camera* review, which may have already occurred or will occur in a different jurisdiction.

The Panel is often confronted with the concerns the Pinckneys articulate herein. For example, the *In re: Yamaha Motor Corp. Rhino ATV Products Liability Litigation*, 597 F. Supp. 2d 1377, 1378 (U.S.J.P.M.L. 2009) opinion, reads, in relevant part:

> Some parties here, including some plaintiffs and at least one defendant, have emphasized the need and value of coordinated discovery by suggesting that Yamaha has not been forthcoming with discovery in a number of the individual cases. The Panel has always been appropriately careful not to base its rulings upon our own perception of discovery dynamics within a particular group of cases. Regardless of whether discovery resistance is indeed a problem in this litigation, it appears that discovery disputes have arisen in several actions. Centralization will enable the transferee judge to make consistent rulings on such discovery disputes from a global vantage point.

As this Benicar litigation is at its infancy, the Panel simply cannot ignore the fact that the necessary discovery has yet to occur, discovery disputes have arisen or will arise, the Motion practice over common document production disputes has not yet occurred, and no viable coordination over document production can be reasonably assured. On the other hand, a transferee Court has numerous tools at its disposal to efficiently control discovery at significant savings to all litigants and the various Courts.

Document production alone confirms the request for coordination and consolidation. Other issues, such as depositions, duplicative Motion practice and other obvious common pre-trial activities are far more difficult to coordinate than document production. Thus, even the simplest, most basic litigation process cannot be uniformly and efficient achieved without coordination, much less more difficult activities, issues and Motions.

II. THE NORTHERN DISTRICT OF OHIO IS THE MOST APPROPRIATE TRANSFEREE FORUM.

Pinckney counsel has considered the various requests made by Plaintiffs' counsel for the appropriate transferee district. While it is always tempting to propose one's home state and Judges for a MDL, our duty and responsibility is to avoid self-serving, parochial requests and support a forum that is properly situated for the case at hand. *In re Master Key*, 320 F. Supp. 1404, 1406 (J.P.M.L. 1971). Many excellent Jurists and seemingly appropriate districts have been proposed by the parties. We find, however, that the most compelling arguments are made in support of Spangenberg, Shibley & Liber, LLP's Motion. The undersigned counsel agrees that the federal cases should be consolidated and transferred to the Northern District of Ohio and should be assigned to the Honorable Judge Dan Aaron Polster.

The Northern District of Ohio appears able to handle this litigation. The number of cases present in the district, its resources, docket load, geographic location and large airport have lead the undersigned to conclude that the forum is best suited for this case. We believe that the Pinckney and other Benicar cases will be efficiently and fairly handled in this district.

Judge Dan Aaron Polster is an imminently qualified jurist with the requisite experience in handling pre-trial issues that arise in complex litigation. The various Memorandums supporting Judge Polster contain an incomplete, yet adequately impressive description of this excellent jurist. Judge Polster has experience handling an MDL relating to an allegedly defective drug that involved numerous individual plaintiffs (MDL 1909, Gladolinium Contrast Dyes Products Liability Litigation). The transferee Judge's experience is exceedingly important. See *In re Ocean Fin. Corp. Prescreening Litig.*, 435 F. Supp. 2d 1350, 1351 (J.P.M.L. 2006) (assigning litigation to "an experienced transferee judge [who] has already developed familiarity with the

issues"); *In re Paxil Prods. Liab. Litig.*, 296 F. Supp. 2d 1374, 1375 (J.P.M.L. 2003) (transferring actions "to a seasoned jurist in a district with the capacity to handle this litigation"). Judge Polster is an excellent Judge whose credentials and experiences cannot reasonably be questioned by any Party. For these reasons, the Pinckney Plaintiffs request the litigation be transferred to the North District of Ohio before Judge Dan Aaron Polster.

III. CONCLUSION

For the aforementioned reasons, Joseph Pinckney and Eileen Pinckney respectfully request that the Panel order coordinated or consolidated pretrial proceedings for the Benicar (and other olmesartan drugs) products liability litigation and that these cases be presided over by the Honorable Judge Dan Aaron Polster in the Northern District of Ohio.

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Dated: March 9, 2015.

BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: BENICAR (AND OTHER OLMESTARTAN DRUGS) PRODUCTS LIABILITY LITIGATION	**MDL No. 2606**

PROOF OF SERVICE

In compliance with Rule 4.1(a) of the Rules of Procedure for the United States Judicial Panel on Multidistrict Litigation, I hereby certify that copies of the foregoing **INTERESTED PARTY RESPONSE OF PLAINTIFFS, JOSEPH PINCKNEY AND EILEEN PINCKNEY, TO THE MOTION FOR TRANSFER OF ACTIONS TO THE NORTHERN DISTRICT OF OHIO** and this Proof of Service in the above-captioned matter were served via MDL CM/ECF website on the 9th of March, 2015 on the following recipients:

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