BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: POWER MORCELLATOR LITIGATION	MDL NO. 2652

BRIEF OF DEFENDANTS KARL STORZ ENDOSCOPY-AMERICA, INC. AND KARL STORZ GMBH & CO. KG's IN OPPOSITION TO PLAINTIFFS' MOTION FOR TRANSFER OF ACTIONS TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS OR THE SOUTHERN DISTRICT OF ILLINOIS, PURSUANT TO 28 U.S.C. § 1407, AND JMPL RULE 7.2, FOR COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS

Respectfully submitted,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP

Robert W. Goodson (D.Md. Bar # 00779)
700 11th Street, NW, Suite 400
Washington, D.C. 20001
robert.goodson@wilsonelser.com
Phone: (202) 626-7660
Fax: (202) 628-3606

Counsel for KARL STORZ GmbH & Co., KG and Co-Counsel for KARL STORZ Endoscopy-America, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

BRIEF OF DEFENDANTS KARL STORZ ENDOSCOPY-AMERICA, INC. AND KARL STORZ GMBH & CO. KG's IN OPPOSITION TO PLAINTIFFS' MOTION FOR TRANSFER OF ACTIONS TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS OR THE SOUTHERN DISTRICT OF ILLINOIS, PURSUANT TO 28 U.S.C. § 1407, AND JMPL RULE 7.2, FOR COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS

Defendants KARL STORZ Endoscopy-America, Inc. ("KSEA") and KARL STORZ GmbH & Co. KG ("KST")[1] submit this Response in Opposition to Plaintiffs' Motion for Transfer of Actions to the United States District Court for the District of Kansas or the Southern District of Illinois, pursuant to 28 U.S.C. § 1407, and JMPL Rule 7.2, for Coordinated or Consolidated Pretrial Proceedings, and respectfully request that the Panel deny the transfer of the actions involving power morcellators for coordinated and consolidated pretrial proceedings. In support of said response, KST and KSEA state the following:

I. PRELIMINARY STATEMENT

Plaintiffs failed to meet their burden of demonstrating that the twenty-two actions pending in the United States District Courts qualify for transfer under 28 U.S.C. § 1407. Plaintiffs concede in their motion that these actions present individualized factual and legal issues. *See* Brief in Support of Motion of Plaintiffs Robin L. Barnett, *et al*. ("Barnett Brief"), dated June 18, 2015, at 7. Such individualized factual and legal issues predominate over common ones, if any, and compels denial of Plaintiffs' motion. Plaintiffs highlight the fact that the alleged injuries vary among the Plaintiffs, some of whom allege that the power morcellator caused the dissemination and upstaging of a variety of cancers, while others allege that the power

[1] By appearing before the Panel and joining in this opposition, KST does not intend to waive any jurisdictional defenses it may have in any pending or future cases.

The other KARL STORZ defendant, KARL STORZ Endovision, Inc., has been dismissed from all cases, except *Barnett*, in which it was recently served. To the extent necessary, KARL STORZ Endovision, Inc. joins in the opposition to Plaintiffs' Motion to Transfer.

morcellator caused the development of parasitic fibroids or other unidentified injuries. *See id.* The alleged surgical procedures performed on these Plaintiffs also vary significantly, from a hysterectomy, where the uterus is removed partially or completely, to a myomectomy, where only fibroids are surgically removed from the uterus. Consequently, discovery regarding medical causation will deviate among Plaintiffs. The same is true for liability issues, as there are over five different manufacturers and/or distributors named among the twenty-two cases, with approximately ten different brands and types of power morcellators between them. Therefore, contrary to Plaintiffs' contention, factual issues pertaining to product testing, warnings, and marketing will inherently turn on defendant- and product-specific facts, and will not likely to overlap among the cases. As such, there is no benefit gained from centralization of an industry-wide litigation that will cause significant delays and instead compromise each party's individual claims and defenses.

Plaintiffs failed to demonstrate how transfer would convenience both Plaintiffs and Defendants, collectively, as opposed to just moving Plaintiffs and their counsel. Certainly, transferring these cases to the District of Kansas or the Southern District of Illinois is not convenient for KST and/or KSEA, which have no cases pending in either jurisdiction, and would be inconvenienced from attending pre-trial proceedings in a jurisdiction where neither their relevant witnesses nor documents are located. Utilizing traditional litigation procedures promotes the just and efficient conduct of these actions, without transferring these actions to another district and disturbing the pre-existing and well-established flow of communication between parties, their counsel, and the court. Moreover, the District of Kansas and the Southern District of Illinois are both overburdened as it is.

Additionally, Plaintiffs claim, without any indicia of proof, that Plaintiffs' firms together have an additional 300 cases under investigation. *See* Motion of Plaintiffs Robin L. Barnett, *et al.*, filed June 18, 2015, at ¶ 1. The mere possibility of future filings, based on purportedly ongoing investigations, does not give reason to centralize the already limited number of cases filed.

In the end, Plaintiffs have not and cannot meet their burden of establishing that the actions share common issues of fact, and that centralization would advance the just and efficient conduct of these actions and be convenient for the parties and witnesses involved. For these reasons, and the reasons discussed below, KSEA and KST respectfully request that the Panel deny Plaintiffs' request for transfer of these cases.

II. FACTUAL AND PROCEDURAL BACKGROUND

KSEA is a wholly-owned subsidiary of KST, a privately-held and family-owned company that manufacturers power morcellators, among other surgical instruments, in Tuttlingen, Germany. KSEA is the exclusive importer and distributor of the power morcellators in the United States; however, KSEA also distributes various other medical devices throughout the United States, exclusive of those manufactured by KST. With its headquarters in El Segundo, California, KSEA has provided a wide-range of instruments to virtually every medical specialty in the United States that benefited from endoscopic and minimally-invasive procedures.

In the mid-1990's, KST began developing gynecological power morcellators. The first of such was cleared by the Food and Drug Administration ("FDA") in 1995. Electromechanical morcellators are used like a scalpel to reduce the volume of large tissue masses into smaller, more manageable fragments that can be removed during minimally-invasive laparoscopic procedures to remove fibroids or uterine tissue. KST has manufactured three brands of power

morcellators, the Steiner, Rotocut G1, and Sawalhe, all of which have obtained 510(k) clearance from the FDA. Separate and apart from KSEA and KST, there are at least four other manufacturers and distributors of power morcellators, with several brands of morcellators between them, each one with its own unique qualities.

Despite these differences, Plaintiffs seek to centralize twenty-two unrelated lawsuits, which were filed against different morcellator defendants. Of these twenty-two lawsuits, KSEA is only a defendant in five actions, and KST, in even fewer. As expected, these five actions maintain varying procedural postures. For example, *Linda S. Bobletz v. KARL STORZ Endoscopy-America, Inc., et al.*, (Northern District of New York) and *Romona Yvette Gourdine, et al. v. KARL STORZ Endoscopy-America, Inc., et al.* (District of South Carolina) were filed over six months ago, have scheduling orders in place, and parties[2] are actively engaging in litigation by serving discovery requests and finalizing Protective Orders and ESI Agreements. *See* Exhibits 14 and 19 to Barnett Brief. In contrast, the court in *Bridget Caradori, et al. v. KARL STORZ Endoscopy-America, Inc., et al.* (District of Maryland) is still overseeing the resolution of jurisdictional issues with respect to KST, and has not issued a scheduling order yet. *See* Exhibit 11 to Barnett Brief. In *Michael Watkins, et al. v. KARL STORZ Endoscopy-America, Inc., et al.* (District of South Carolina), Plaintiffs have yet to serve KST, and KSEA has a meritorious motion to dismiss the plaintiff's complaint.[3] *See* Exhibit 20 to Barnett Brief. And by the time the Panel hears oral arguments on Plaintiffs' underlying motion to transfer, the parties in *Robyn L. Barnett, et al. v. KARL STORZ Endoscopy-America, Inc., et al.* (Western

[2] In the *Gourdine* matter, KST was only recently served, and as of the date of this Brief, responsive pleadings and/or motions have not been filed yet.

[3] The plaintiff in *Watkins* filed an opposition to KSEA's motion to dismiss, as well as an Amended Complaint. As of the date of this Brief, the time for KSEA to respond has not yet expired.

District of Wisconsin), will have taken the deposition of Plaintiff Robyn Barnett. *See* Exhibit 24 to Barnett Brief.

In addition to their unique procedural postures, the five cases against KSEA, and even fewer against KST, also involve disparate factual and legal issues. For example, in *Bobletz*, the plaintiff was allegedly diagnosed with leiomyosarcoma in early September 2011, and claims that the cancer was upstaged by the laparoscopic supracervical hysterectomy with uterine morcellation she underwent in late August 2011. *See* Exhibit 14 to Barnett Brief. In contrast, the plaintiffs in *Watkins* claim that Enid Watkins was diagnosed with a cancer called adenosarcoma with sarcomatous overgrowth in May 2011, after undergoing a supra-cervical hysterectomy and bilateral salpingo-oophorectomy procedure with uterine and fibroid morcellation six days prior. *See* Exhibit 20 to Barnett Brief. The plaintiffs claim the procedure worsened the long-term prognosis of the cancer, which led to Ms. Watkins' death nearly a year later. *See id*. Equally unrelated is the *Barnett* matter, in which the plaintiff underwent a supracervical hysterectomy, and pathology results from the surgery revealed that the plaintiff had leiomyosarcoma. *See* Exhibit 24 to Barnett Brief. It is purported the cancer reoccurred two years later, appearing in the plaintiff's pelvic area and on her liver. *See id*. Plaintiff claims that the cancer was disseminated and upstaged during the initial a hysterectomy with the use of a morcellator. *See id*. Notwithstanding these significant factual differences and their individual causation issues, Plaintiffs seek to transfer these and other disparate cases to the District of Kansas or the Southern District of Illinois, for coordinated and consolidated pretrial proceedings. Plaintiffs' motion for transfer is based on the false notion that there are common issues of fact among these cases, and must be denied.

III. ARGUMENT

Plaintiffs failed to meet their burden of demonstrating that transfer of twenty-two unrelated actions would be appropriate under 28 U.S.C.A. § 1407(a). *See In re: Raymond Lee Org., Inc. Sec. Litig.*, 446 F. Supp. 1266, 1268 (J.P.M.L. 1978). Plaintiffs cannot demonstrate, with any specificity, that (1) the actions share common issues of fact; (2) transfer would be for the convenience of parties and witnesses; and (3) transfer would advance the just and efficient conduct of the actions. *See* 28 U.S.C.A. § 1407(a). Instead, Plaintiffs convey "vague generalizations about the specific nature of any common questions of fact, where discovery and pretrial proceedings will overlap,... how many cases are expected to be filed," why the District of Kansas or the Southern District of Illinois are convenient locations for parties and witnesses, and why centralization should trump the preferred alternatives, such as voluntary coordination. *In re: Intuitive Surgical, Inc., Da Vinci Robotic Surgical System Prod. Liab. Litig.*, 883 F. Supp.2d 1339, 1340 (J.P.M.L. 2012). These baseless arguments have not persuaded the Panel in the past, and should not do so here. *See id*.

A. Common Issues of Fact Do Not Predominate

In their motion for transfer, Plaintiffs make sweeping statements regarding the supposed common issues of fact among the twenty-two cases. Yet, upon closer examination, Plaintiffs' motion highlights the varying types of surgical procedures at issue here (*hysterectomy vs. myomectomy*); the number of brands and manufacturers of the power morcellators involved (*KARL STORZ's Steiner, Sawahle, and Rotocut G1 and SIII; Ethicon's Gynecare Morcellators, Gynecare Morcellex, and Morcellex Sigma; Richard Wolf's Morce Power Plus; LiNA Medical's LiNA Xcise; Trokamed GmbH's Trokamed Morcellator; and Gyrus' PlasmaSORD*); and the groupings of alleged injuries (*varying types of cancer vs. parasitic fibroids vs. other injuries*). A

cursory review of the pleadings only increases the variances, adding differing types and stages of cancers, individual discovery times, divergent courses of treatment, exceptional cases of reoccurrence, and other factual discrepancies, such as the number, brands, and types of power morcellators used during the surgery.

For example, the plaintiff in *Bobletz* was diagnosed with leiomyoscarcoma, while the plaintiffs' decedent in *Watkins* was diagnosed with a cancer called adenosarcoma with sarcomatous overgrowth. *See* Exhibits 14 and 20 to Barnett Brief; *Contrast with In re: Incretin Mimetics Prods. Liab. Litig.*, 968 F. Supp. 2d 1345 (J.P.M.L. 2013) (granting transfer where the only alleged injury consisted of pancreatic cancer). Also, in *Barnett*, the plaintiff's cancer allegedly reoccurred two years later, first appearing in the plaintiff's pelvic area and later, on her liver. *See* Exhibit 24 to Barnett Brief. In contrast, in *Bobletz*, the plaintiff's cancer allegedly reoccurred locally nearly three years later, and caused her to undergo a different course of treatment than the plaintiff in *Barnett*, for instance. *See* Exhibits 14 to Barnett Brief. Another difference is presented in the *Caradori* matter, where it is alleged that in July 2011, the plaintiffs' decedent was diagnosed with cancer, which they contend was upstaged from the use of a morcellator during a hysterectomy only five months prior, in February 2011. *See* Exhibit 11 to Barnett Brief. Notably, the plaintiffs in *Caradori* also have a separate medical malpractice case against the health care providers, one of which is the pathologist, who allegedly incorrectly interpreted the February 2011 surgical specimen as benign fibroid. Plaintiffs' decedent passed nine months later.

It is well-established that where there are significant individual factual questions on liability and causation, transfer should be denied. *See In re: Shoulder Pain Pump Chondrolysis Prods. Liab. Litig.*, 571 F. Supp. 2d 1367, 1368 (J.P.M.L. 2008) (noting that the cases involved

"multiple individualized issues (including ones of liability and causation)"). Plaintiffs may argue that there is a common issue as to whether the power morcellators are capable of causing the dissemination and upstaging of occult cancer or the development of parasitic fibroids. However, whether something other than the defendant's product caused Plaintiffs' injuries, such as the timing and/or predisposition or metastasis of the plaintiff's specific type of cancer, independent of surgery, will require an individualized, factual inquiry. Accordingly, centralization would not further the just and efficient conduct of this litigation. *See In re: Rite Aid Corp. Wage and Hour Emp't Practices Litig.*, 655 F.Supp. 2d 1376, 1377 (J.P.M.L. 2009) (denying transfer where "[d]iscovery is likely to require an individualized, factual inquiry into the job duties performed by each employee, and the plaintiffs assert violations of various state wage laws, which have differing provisions").

Plaintiffs also fail to satisfy the burden that common factual questions, if any, are sufficiently complex or numerous to warrant centralization. *See In re: Trilegiant Membership Program Marketing And Sales Practices Litig.*, 828 F. Supp. 2d 1362, 1362-1363 (J.P.M.L. 2011) (denying transfer where the moving party failed to convince the Panel that any common factual questions are sufficient complex or numerous to justify transfer); *In re: Skinnygirl Margarita Beverage Marketing And Sales Practices Litigation*, 829 F. Supp. 2d 1380 (J.P.M.L. 2011) (same); *In re: AriZona Beverage Co. Products Mktg. and Sales Practices Litig.*, 609 F. Supp. 2d 1369 (J.P.M.L. 2009) (same). While Plaintiffs commonly assert causes of actions for negligence and strict liability, there are other causes of actions among Plaintiffs that do not overlap, such as wrongful death, fraudulent misrepresentation and omission, breach of implied and express warranties, defective manufacturing, defective design, failure to warn, negligent

misrepresentation, fraudulent concealment, punitive damages, and violations of consumer protection acts under specific state laws.

As a preliminary matter, Plaintiffs should not be afforded unfettered access to discovery on a wide range of issues, without any regard or limitation to the causes of action Plaintiffs have actually pled. More importantly though, each of these causes of action will unveil varying discovery from defendant to defendant, company to company, as they all have differing regulatory, design, testing, warning, and marketing histories. It comes as no surprise then that the Panel is "typically hesitant [of] centraliz[ing] litigation on an industry-wide basis." *In re: AndroGel Prods. Liab. Litig.*, 24 F. Supp. 3d 1378, 1379 (J.P.M.L. 2014); *see also In re: Yellow Brass Plumbing Component Prods. Liab. Litig.*, 844 F. Supp. 2d 1377 (J.P.M.L. 2012) (stating Panel is "typically hesitant to centralize litigation against multiple, competing defendants which marketed, manufactured and sold similar products"); *In re: Ambulatory Pain Pump-Chondrolysis Prod. Liab. Litig.*, 709 F. Supp. 2d 1375 (J.P.M.L. 2010).

As a consequence, Plaintiffs mainly rely upon transfer orders where only one product or manufacturer was involved, and therefore, common factual issues were found to predominate. For example:

- *In re: Yamaha Motor Corp., Rhino ATV Prods. Liab. Litig.*, 597 F. Supp. 2d 1377, 1378 (J.P.M.L. 2009), the Panel ordered the transfer of cases that contained allegations of injuries arising from the use of a Yamaha Rhino all-terrain vehicle, which is designed, manufactured, marketed, and distributed by Yamaha alone. The Panel found centralization to be appropriate because the product and alleged defect were the same in each case. *See id.*, at 1378.

- *In re: Zimmer Durom Hip Cup Prods. Liab. Litig.*, 717 F. Supp. 2d 1376 (J.P.M.L. 2010), the Paneled ordered the transfer of 45 actions, because they all shared factual issues as to one product, the Zimmer's Durom Acetabular Component (or Durom Cup), manufactured by one company, Zimmer, Inc.
- *In re: Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig.*, 655 F. Supp. 2d 1343 (J.P.M.L. 2009), the Panel ordered the transfer of 32 actions because all of the actions shared factual questions relating to at least one of the oral contraceptives, which were manufactured by Bayer.
- *In re: Chantix (Varenicline) Prods. Liab. Litig.*, 655 F. Supp. 2d 1346 (J.P.M.L. 2009), the Panel ordered the transfer of 37 actions because they shared factual issues regarding only one common defendant, Pfizer's design, testing, manufacture, and marketing of the drug, Chantix.

These special circumstances are not present in the cases at bar, which involve multiple types, brands, and manufacturers of power morcellators, with varying designs, warnings, and marketing strategies. Indeed, this industry-wide litigation is comparable to the *Ambulatory Pain Pump-Chondrolysis Prod. Liab. Litig.*, where the Panel denied centralization on two separate occasions. *See In re: Shoulder Pain Pump-Chondrolysis Prod. Liab. Litig.*, 571 F. Supp. 2d 1367, 1368 (J.P.M.L. 2008); *In re: Ambulatory Pain Pump-Chondrolysis Prod. Liab. Litig.*, 709 F. Supp. 2d 1375 (J.P.M.L. 2010). The plaintiffs in these cases first sought centralization of thirteen lawsuits involving an indeterminate number of different pain pumps made by different manufacturers, as well as different anesthetic drugs made by different pharmaceutical companies. *See In re: Shoulder Pain*, 571 F. Supp. 2d at 1368. In its analysis, the Panel noted that not all of the actions involved the same defendants, and many defendants are sued in only a

minority of the actions. *See id.* As a result, the Panel denied centralization, finding that "proponents of centralization have not convinced us that the efficiencies that might be gained by centralization would not be overwhelmed by the multiple individualized issues (including ones of liability and causation)." *Id.*

Two years later, the plaintiffs sought centralization again, this time with over 100 lawsuits in tow. *See In re: Ambulatory Pain,* 709 F. Supp. 2d at 1377. Yet, the Panel denied centralization again, finding that while the number of related actions had certainly grown, the issues that weighed against centralization in that earlier docket still remained. *See id.* For example, the Panel found that "most, if not all, defendants [we]re named in only a minority of actions," and noted the fact that defendant Breg Inc., was a defendant in fewer than fifteen of the actions; Pacific Medical, Inc. was a defendant in only four actions; and the Zimmer defendants were named in only one action. *Id.* As a result, the Panel determined that "individual issues of causation and liability continued to appear to predominate, and remain likely to overwhelm any efficiencies that might-be-gained by, centralization." *Id.*, at 1377.

The same is true here. With an overwhelming number of brands, manufacturers, and distributors involved, and the notable disparities among Plaintiffs, their medical histories, and injuries, "the differences among the actions will reduce any efficiencies to be gained from centralization," and only amplify the hardship and prejudice to defendants. *In re: Trilegiant,* 828 F. Supp. 2d at 1362-3 (denying transfer where due to the differences among the actions, much of the pretrial proceedings will vary across the actions, including discovery targeted to the unique defendants in each action and issues specific to those defendants). Accordingly, the Panel should deny Plaintiffs' motion to transfer these actions for coordinated and consolidated pretrial proceedings. *See id.*

B. Centralization Would Not Equally Convenience the Witnesses or Parties

Plaintiffs also failed to demonstrate how transfer, particularly to the District of Kansas or the Southern District of Illinois, would convenience both Plaintiffs and Defendants, collectively and equally. KSEA is only a defendant in five of the twenty-two actions sought to be transferred, and KST, in even fewer. *See In re: Ambulatory Pain,* 709 F. Supp. 2d 1375 (denying centralization, where "[m]ost, if not all, defendants are named in only a minority of actions; and several defendants are named in but a handful of actions"). If these cases are transferred for coordinated and consolidated pretrial proceedings with seventeen or more other unrelated actions, KSEA and KST would be forced to partake in an industry-wide litigation that would increase litigation expenses and cause delays in litigating its own actions. For example, during the course of consolidated discovery, counsel for KSEA and KST will need to review discovery responses and expert disclosures for each and every defendant (*e.g.*, manufacturer, distributor, or otherwise) in order to identify and distinguish their affirmations, defenses, and concessions. It may also be necessary for counsel to attend each and every defendant's corporate and expert witness depositions in order to anticipate and defend against any future use of another party's testimony and/or evidence against KSEA and KST. These tasks, which would not arise in the normal course of traditional litigation, will cause KSEA and KST to incur significant litigation costs and expenses, even though they are only in a limited number of cases.

With respect to the location of the proposed multi-district litigation, neither KSEA nor KST have any connection with the District of Kansas or the Southern District of Illinois. *Contrast with, In re Anthem, Inc. Customer Data Security Breach Litig.*, 2015 U.S. Dist. LEXIS 76161 (J.P.M.L. June 8, 2015) (centralizing where defendant had significant ties); *In re: RC2 Corp. Toy Lead Paint Prod. Liab. Litig.*, 528 F. Supp. 2d 1374, 1375 (J.P.M.L. 2007); *In re:*

Pfizer Ins. Securities, Derivative & Erisa Litig., 374 F. Supp. 2d 1348, 1350 (J.P.M.L. 2005) (finding a strong nexus to New York). None of Plaintiffs' actions against KSEA and/or KST were filed in Kansas or Illinois. Furthermore, KSEA's headquarters, its witnesses, and documents are not located there. The same is true for KST, which is headquartered in Germany, where its witnesses and documents are also located. Certainly, Kansas and Illinois are not conveniently-located or easily accessible for those witnesses who are coming from Germany, and other international locations. Without any nexus to the State of Kansas or Illinois, centralization of the small number of actions against KSEA and/or KST in either one of these jurisdictions compounds the inefficiency of centralization.

C. Centralization in the District of Kansas or the Southern District of Illinois Would Only Overburden These Districts and Inconvenience the Parties

Centralization in the District of Kansas or the Southern District of Illinois would be inappropriate, due to the pending litigations in these districts. First, the District of Kansas has the highest number of cases within the Tenth Circuit, with 3,450 pending cases among six judges. *See U.S. District Courts – Federal Court Management Statistics – Comparison Within Districts*, available at: http://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2015/03/31-3. In addition, the District of Kansas already has three pending multi-district litigations, two of which are before the Honorable Kathryn H. Vratil, whom the majority of the moving Plaintiffs have requested. These two multi-district litigations include *In re: Motor Fuel Temperature Sales Practices Litig.* and *In re: Monsanto Company Genetically-Engineered Wheat Litig.* *See* MDL Statistics Report - Distribution of Pending MDL Dockets by District (as of June 15, 2015), available at http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-June-15-2015.pdf.

The Southern District of Illinois is even more overloaded, with over 6500 cases distributed among only four judges. *See supra U.S. District Courts – Federal Court Management Statistics – Comparison Within Districts*. This amounts to an overwhelming 1,620 plus cases per judge, presently the highest in the country. *See id.* More importantly though, there are currently two pending multi-district litigations in the Southern District of Illinois, and both are before the Honorable David R. Herndon, whom Plaintiff Timothy Schroeder has requested by name. These two multi-district litigations include: *In re: Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and Prod. Liab. Litig.*, with approximately 2,922 pending cases; and *In re: Pradaxa (Dabigatran Etexilate) Prod. Liab. Litig.*, with approximately 361 pending cases. In sum, Judge Herndon is presiding over 3000 cases, one of the highest among MDL judges. Certainly, Plaintiffs have not demonstrated enough of a reason to centralize their dissimilar cases, involving a multitude of defendants, in order to justify overburdening either the District of Kansas or the Southern District of Illinois with another set of cases.

D. There Are Alternatives Ways of Promoting the Just and Efficient Management of Pre-Trial Proceedings at the Convenience of Witnesses and Parties Without the Need for Centralization

Although Plaintiffs argue that coordinating and streamlining discovery may minimize unnecessary duplication, travel, and other expenses, "centralization under Section 1407 should be a last resolution after considered review of all other options." *In re: Best Buy Co., Cal. Song-Beverly Credit Card Act Litig.*, 804 F. Supp. 2d 1376, 1378 (J.P.M.L. 2011). Where "[c]ounsel… can avail themselves of alternatives to transfer that may minimize whatever possibility there are of duplicative discovery and/or inconsistent pre-trial rulings," motions for transfer have been denied. *In re: Rite Aid Corp.*, 655 F.Supp. 2d at 1377; *see e.g., In re: Eli Lilly and Co. (Cephalexin Monohydrate) Patent Litigation*, 446 F. Supp. 242, 244 (J.P.M.L.1978).

In the matter of *In re: Boehringer Ingelheim Pharm., Inc., Fair Labor Standards Act Litig.*, for example, the Panel denied transfer, finding viable alternatives to formal coordination, such as voluntary cooperation among the few involved counsel and courts, where the plaintiffs in three actions shared counsel, and the defendant was represented by common counsel as well. *See* 763 F. Supp. 2d 1377, 1378-79 (J.P.M.L. 2011). Likewise, in the matter of *In re: Rite Aid Corp. Wage and Hour Emp't Practices Litig*., the plaintiffs in four out of the six actions were represented by the same counsel. *See In re: Rite Aid Corp.*, 655 F. Supp. 2d at 1377. As a result, the Panel believed cooperation among the limited number of counsel and parties was feasible, and therefore, denied transfer. *Id*.

Here, Plaintiffs in two of the five KSEA actions sought to be transferred (*Watkins* and *Gourdine*) are represented by the same firm, Motley Rice. The applicable KARL STORZ defendant in each is represented by the law firm of Young Clement Rivers, LLP. More importantly, both of the cases are before the Honorable Richard M. Gergel in the District Court for South Carolina, eliminating any likelihood of inconsistent pretrial rulings, and the attorneys have agreed to coordinate discovery to avoid any duplication.

Indeed, voluntary cooperation and coordination among the limited number of cases against KSEA and/or KST is a viable and preferable alternative to transfer. Informal coordination can be achieved through common depositions, the filing notices of depositions in every action in which KSEA and/or KST are defendants, as well as parties stipulating that, where appropriate, discovery taken in one action can be used in other actions. *See In re: Crest Sensitivity Treatment & Protection Toothpaste Mktg. and Sales Practices Litig.*, 867 F. Supp. 2d 1348 (J.P.M.L. 2012).

E. The Panel Cannot Be Persuaded By the Mere Possibility of Additional Actions

Upon information and belief, Plaintiffs claim that there are "an additional 300 cases under investigation and additional potential clients are contacting these firms and asking for information about the Power Morcellator litigation with each passing day." This Panel has given little weight to such bare allegations in the past. *See e.g. In re: California Wine Inorganic Arsenic Levels Prods. Liab. Litig.*, 2015 U.S. Dist. LEXIS 76166 (J.P.M.L. 2015) ("although plaintiffs assert that the number of actions is likely to expand, the mere possibility of additional actions does not convince us that centralization is warranted"); *In re: Qualitest Birth Control Prods. Liab. Litig.*, 38 F. Supp. 3d 1388 (J.P.M.L. 2014) ("[a]s we have stated previously, we are disinclined to take into account the mere possibility of future filings in our centralization calculus"); *In re: Intuitive Surgical*, 883 F. Supp.2d at 1340 (denying centralization, reasoning that "[w]hile proponents maintain that this litigation may encompass 'hundreds' of cases or 'over a thousand' cases, we are presented with, at most five actions"). Without any available evidence, other than allegations of so-called investigations and litigation inquiries, Plaintiffs' motion cannot be granted on the mere possibility that other actions may be filed in the future.

IV. CONCLUSION

For the foregoing reasons, Defendants KARL STORZ Endoscopy-America, Inc. and KARL STORZ GmbH & Co. KG respectfully request that the Panel deny Plaintiffs' Motion for Transfer of Actions to the United States District Court for the District of Kansas or the Southern District of Illinois for coordinated and consolidated pre-trial proceedings.

Dated: July 10, 2015

Respectfully submitted,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP

By: */s/ Robert W. Goodson*

Robert W. Goodson (D.Md. Bar # 00779)
700 11th Street, NW, Suite 400
Washington, D.C. 20001
robert.goodson@wilsonelser.com
Phone: (202) 626-7660
Fax: (202) 628-3606

Counsel for KARL STORZ GmbH & Co., KG and KARL STORZ Endoscopy-America, Inc.

BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: POWER MORCELLATOR LITIGATION	MDL NO. 2652

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 on this 10th day of July, 2015, the foregoing Brief in Opposition to Plaintiffs' Motion to Transfer was filed using the Judicial Panel for the Multidistrict Litigation's CM/ECF system, which will send notification of such filing all counsel of record in the involved actions.

/s/ Robert W. Goodson
Robert W. Goodson (D.Md. Bar # 00779)