BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: POWER MORCELLATOR LITIGATION	**MDL NO. 2652**

OPPOSITION OF DEFENDANTS RICHARD WOLF GmbH AND RICHARD WOLF MEDICAL INSTRUMENTS CORP. TO THE MOTION FOR COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS

Richard Wolf GmbH and Richard Wolf Medical Instruments Corp. (the "Richard Wolf Defendants"), defendants in just one of the twenty-two power morcellator products liability cases subject to the pending motion for coordinated or consolidated pretrial proceedings (*Salem-Robinson v. Richard Wolf GmbH*, N.D. Cal., No. 5:14-cv-02209-EJD), submit this opposition to the motion.

The power morcellator product liability cases are a classic set of cases, such as those denied consolidation by this panel on numerous occasions in the past (*see* cases cited *infra*), in which individualized issues concerning both the plaintiffs (a different one in every case) and the many different defendants will predominate. The very few factual issues that the cases have in common will not involve significant discovery, and there is therefore no need for coordinated or consolidated pretrial proceedings. There will be no efficiency or convenience for any of the parties or witnesses from such proceedings, rather, just the opposite.

It is telling that much of the detail provided in support of the motion is for matters of public record that will not be in dispute and as to which little or no discovery is needed. As for the vast majority of the factual issues in the twenty-two cases mentioned, no detail is provided as to the alleged additional common issues of fact, and none could be, since there is none, which means that there is zero risk of any inconsistent pretrial rulings and zero efficiency or convenience to result from coordinated or consolidated proceedings. *See In re Intuitive Surgical,*

Inc., 833 F. Supp. 2d 1339, 1339 (J.P.M.L. 2012)(denying a motion to centralize: "the parties seeking centralization made only vague generalizations about the specific nature of any common questions of fact, where discovery and pretrial proceedings will overlap, and how many case are expected to be filed"). The plaintiffs seeking centralization have fallen far short of their burden under 28 U.S.C. § 1407.

The motion concerns only twenty-two cases, none of which is a class action. There is no plaintiff in common to even two of the cases, and there is not even one defendant common to all the cases. The motion hints that there may be as many as hundreds more cases, but these cases concern aggressive, often fatal cancers (Motion at 6 ¶ 20), and the idea that there is a boatload of cases out there not yet filed, when the failure to file could deny a plaintiff her day in court while still alive, is relying on improbabilities. This Panel has consistently refused to take into account such speculation about additional cases not actually the subject of a motion. *See, e.g., In re Intuitive Surgical, Inc.*, 833 F. Supp. 2d 1339, 1340 (J.P.M.L. 2012).

These are all product liability cases, governed by the forum state law, and the causes of action among the various cases are not uniform (Motion at 3 ¶ 3).

These twenty-two cases involve at least a half dozen physically different morcellators (perhaps more since some manufacturers have offered more than one model), sold under six different directly competing brand names: Ethicon; Karl Storz; Olympus; Lina; Richard Wolf; and Blue Endo, from six different manufacturers. The technology involved is not uniform. While five of the six have general similarities since they use a blade, they are certainly not identical (most are reusable, but Ethicon's were single-use disposables), and the sixth (Olympus) is entirely different because it is bladeless.

The corporate structure that has brought each of these morcellators to market in the U.S. differs markedly. At least four of the six morcellators (Karl Storz; Olympus; Lina; and Richard Wolf) are manufactured outside the United States, overseas in four different European countries (Germany, the U.K., Denmark and Switzerland, respectively), and marketed by company groups that are based in three different foreign countries (Germany, Japan, Denmark and Germany, respectively), dramatically differing facts that bring with them with all the attendant differences in discovery issues that could result. At least one of the morcellators (Richard Wolf's) is manufactured by a non-party vendor from outside the company group whose name it bears. The morcellators may or may not pass through the hands of the foreign parent or a foreign owned U.S. subsidiary on their way to U.S. customers. They may be marketed by employees of a U.S. subsidiary or by independent sales representatives. Some of the sixteen defendants (Motion at 4-5 ¶ 12) are manufacturers, some are distributors. None of the six brand names presents the same issues concerning which defendant parties should be before the court or where ultimate liability may rest, and these are all issues governed by the forum state law for each case.

There will be issues as to what knowledge each of the companies had at various points in time concerning the risks and what warnings their product literature had, and why (Motion at 3 ¶ 6 and at 10 ¶ 35). Again, none of these issues will be common across all the suits, and could differ markedly between companies. The same is certainly true for the design, testing, manufacturing and FDA approval history of each model of machine. One of the manufacturers, Johnson & Johnson, has withdrawn its device from the market (Motion at 8 ¶ 27), but none of the others has, presenting opposite situations potentially subject to discovery.

Given all these individualized issues on the defense side of fewer than two dozen cases, it is no wonder that this Panel is "typically hesitant to centralize litigation against multiple,

competing defendants which marketed, manufactured and sold similar products." *In re Yellow Brass Plumbing Component Prods. Liab. Litig.*, 844 F. Supp. 2d 1377, 1378 (J.P.M.L. 2012). This presents a situation this Panel has rejected for centralization before:

> The liability of each defendant is each action is predominantly an individual question. The variables will include the defendants' knowledge at a particular time of the health risks involved in exposure to asbestos, the adequacy of any product testing by the defendant manufacturers, the sufficiency of any warnings or directions for use of products, and the issue of assumption of risk by the plaintiffs. Other variables will include the materials used, the method of manufacture, and the period of production.

In re Asbestos & Asbestos Insulation Material Prods. Liab. Litig., 431 F. Supp. 906, 910 (1977); *see also In re Watson Fentanyl Patch Prods. Liab. Litig.*, 833 F. Supp. 2d 1350, 1351 (J.P.M.L. 2012)("Each group of cases against each manufacturer will involve unique product- and defendant-specific issues (such as the different product designs, manufacturing processes, regulatory histories, and company documents and witnesses) that will overwhelm the few common issues . . . ."); *see also id.* ("centralization could complicate these matters, as defendants may need to erect complicated confidentiality barriers, since they are business competitors"); *In re Shoulder Pain Pump – Chondrolysis Prods. Liab. Litig.*, 571 F. Supp. 2d 1367, 1368 (J.P.M.L. 2008).

And the differences are just as great on the plaintiffs' side. Each of the plaintiffs will present a unique, extensive complex of vastly varying facts: her medical history and current diagnosis that led to the surgery; whether she had any conditions in addition to fibroids that might have affected the decisions whether to have surgery and what type of surgery to perform; whether she had any contraindications for power morcellation or for any of the other treatment options; what discussions she had with her surgeon about the risks and about the pros and cons of the various treatment options; what her surgeon's training and experience with the device and

knowledge of the risks was; how extensive her surgery was and whether there were any complications during surgery; her post-surgical diagnosis; if cancer, what type of cancer, and what stage it had reached at the time of the surgery; whether the cancer spread in the wake of the surgery; if it spread, to where; what the evidence is as to whether the surgery did or did not cause or contribute to the spread; her prognosis (if still alive); damages; and whether there is a spouse with a loss of consortium claim.

Each case will present a pile of medical evidence, such as doctor's notes, surgical, anesthesia and other hospital records, x-rays or CAT or MRI scans, pathology reports and cancer treatment records, all of which will be entirely unique and individual to each plaintiff and all or almost all of which will be local. In each case, there will be individualized local questions concerning the morcellator used, such as its age, condition, and history of care and maintenance, and whether there is the potential for third-party claims by the manufacturer against a surgeon, hospital, or other party. *See In re Asbestos & Asbestos Insulation Material Prods. Liab. Litig.*, 431 F. Supp. at 910:

> A considerable amount of technical medical evidence such as diagnoses, x-rays and tissue microscopies will be involved in each action. This evidence is of an individual nature. . . . Local issues will predominate in the discovery process. The medical, personnel and product use records of each individual will be found locally.

The only common issues of fact are the state of the medical literature at any relevant point in time, which is easily accessible to anyone with an internet connection or access to a medical library (*see id.)*, and certain events at the FDA (Motion at 6-10 ¶¶ 21-33), which are all public record. Neither of these presents even the slightest discovery difficulty. (To the extent any of the cases involve some of the same expert witnesses, avoiding duplicative discovery can easily and more efficiently be handled by negotiations among counsel or by application to courts

where the cases are currently pending. There is no need to let that possible tail wag the dog that is the much larger set of local, individualized issues for each case.)

Especially for defendants as the Richard Wolf Defendants, which are currently involved in just one case, consolidation would not only present no possible efficiency or convenience, but a significant burden, inefficiency and inconvenience, saddling them and their counsel with dealing with notices and events involving twenty-one other cases with only the slightest bearing on the case in which they are defendants.

This panel has on more than on occasion recognized that product liability situation such as this—and even if there were more numerous cases involved—present overwhelmingly individualized issues and denied MDL treatment. *See In re Mirena IUD Prods. Liab. Litig.*, MDL No. 2434, 2013 U.S. Dist. LEXIS 122827 (J.P.M.L. Aug. 28, 2013); *In re Intuitive Surgical, Inc.,* 833 F. Supp. 2d 1339, 1339 (J.P.M.L. 2012)("These are relatively straightforward personal injury or wrongful death actions, and the litigation may focus to a large extent on individual questions of fact concerning the circumstances of each patient's injuries."); *In re Yellow Brass Plumbing Component Prods. Liab. Litig.*, 844 F. Supp. 2d 1377 (J.P.M.L. 2012); *In re Shoulder Pain Pump – Chondrolysis Prods. Liab. Litig*., 571 F. Supp. 2d 1367 (J.P.M.L. 2008); *In re Eli Lilly & Co. "Oraflex" Prods. Liab. Litig.*, 578 F. Supp. 422 (J.P.M.L. 1984); *In re Rely Tampon Prods. Liab. Litig.*, 533 F. Supp. 1346 (J.P.M.L. 1982); *In re Asbestos & Asbestos Insulation Material Prods. Liab. Litig.*, 431 F. Supp. 906 (J.P.M.L. 1977). The last of these, on which the *Oraflex* and *Rely* cases both rely, is particularly instructive in its extensive examination of the issues typical in these cases and how they have weighed heavily against consolidation.

For all the foregoing reasons, the pending motion should be denied in its entirety.

Dated: July 10, 2015

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BEFORE THE UNITED STATES JUDICIAL PANEL
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IN RE: Power Morcellator Litigation **MDL No. 2652**

CERTIFICATE 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 July 10, 2015, a copy of the foregoing **Opposition of Defendants Richard Wolf GmbH and Richard Wolf Medical Instruments Corp. to the Motion for Coordinated or Consolidated Pretrial Proceedings** was filed electronically via this Panel's ECF filing system. Notice of this filing was served on all parties of record by E-mail.

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