BEFORE THE
UNITED STATES JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

In re: Fluoroquinolone Products Liability Litigation **MDL - 2642**

INTERESTED PARTY RESPONSE IN SUPPORT OF MOTION TO TRANSFER ACTIONS PURSUANT TO 28 U.S.C. § 1407 FOR COORDINATED OR CONSOLIDATED PROCEEDINGS

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, Danny Phillips, the Plaintiff in *Danny Phillips v. Bayer Healthcare Pharmaceuticals, Inc., et al* Case No. 2:15-cv-02570, pending in the Eastern District of Louisiana, respectively submits this Interested Party Response to the Motion to Transfer of Actions for Coordinated Pretrial Proceedings to the Southern District of Illinois.[1] As set forth in more detail below, coordination before the Honorable David R. Herndon of the Southern District of Illinois is the most appropriate venue for these consolidated proceedings.

II. SCOPE OF THE LITIGATION

At this time, the scope of the fluoroquinolone litigation is widespread and uncoordinated. Undersigned counsel is aware of at least fifty nine (59) substantially similar civil actions pending in at thirty three (33) different federal district courts.

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[1] This Response is made to the May 19, 2015 Motion for Transfer of Actions to the Southern District of Illinois Pursuant to 28 U.S.C. § 1407 for Coordinated or Consolidated Pretrial Proceedings filed by Heard Robins Cloud LLP (hereafter "Heard Cloud Robbins' Motion").

The undersigned firm of Andrus Wagstaff, P.C. is counsel of record for the Interested Party case (*Phillips*) and in three (3) additional cases.[2] Andrus Wagstaff also currently represents over one hundred other individuals around the country who allege similar injuries but whose cases have yet to be filed. In addition to all cases filed in Federal Court, many cases are pending in state courts related to improper marketing, warning and sale the fluoroquinolone drugs.

III. TRANSFER AND CONSOLIDATION OF ALL ACTIONS ON AN INDUSTRY WIDE BASIS IS APPROPRIATE UNDER 28 U.S.C. § 1407

Plaintiff *Phillips* joins the arguments presented in Heard Robins Cloud LLP's Motion as well as the Interested Party Responses of Plaintiff *Kathleen M. Smith* in Support of Transfer and Centralization Pursuant to 28 U.S.C. § 1407. 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 Levaquin® ("Levaquin"), Avelox® ("Avelox"), Cipro® ("Cipro") and other fluoroquinolone drugs that Defendants Bayer Healthcare Pharmaceuticals, Inc.; Bayer Corporation; Johnson & Johnson; Janssen Research & Development, LLC, Jannssen Pharmaceuticals, Inc., and Merk & Co, Inc., (collectively, "Defendants") manufactured, marketed, promoted and placed into the stream of commerce. Defendants failed to properly advise, warn, and otherwise disclose the risk, nature, and extent to which fluoroquinolones can and do cause permanent peripheral neuropathy, such as that suffered by the Plaintiff Danny Phillips.

[2] In addition to the *Phillips* case, Andrus Wagstff, P.C. is counsel of record for *Taylor v. Bayer et al*, 1:15-cv-00468; *Smith v. Johnson & Johnson et al*, 4:15-cv-00519-REL; and *Hanson v. Bayer et al*, 1:15-cv-01169

A. INDUSTRY WIDE CENTRALIZATION IS APPROPRIATE

The criteria for transfer Under 28 U.S.C. § 1407(a) requires that (1) actions must share common issues of fact; (2) transfer must be for the convenience of the parties and witnesses; and (3) transfer must advance the just and efficient conduct of the actions. Plaintiff *Phillips* agrees that these factors are satisfied in Heard Cloud Robbins' Motion *sub judice.* Indeed, the record is replete with descriptions of allegations involving common issues of fact. These claims include allegations that the Plaintiffs were injured after taking one or more of the Defendants' defective products (Avelox®, Cipro®, and/or Levaquin®). Virtually every action is premised upon similar factual allegations arising from the same class of drugs and involves the resolution of the same, or similar, questions of fact and law.

Plaintiff *Phillip's* case exemplifies the necessity of an industry wide MDL as well as the flaws inherent to Defendants' argument that such an MDL will not serve the convenience of the parties or the interest of justice. As are many of the complaints filed in this litigation, Plaintiff *Phillip*'s case involves allegations that the combined use of multiple fluoroquinolones resulted in his injury. *See also, e.g., Hobbs v. Bayer Healthcare Pharmaceuticals, Inc., et al.,* Case No. 1:15-cv-04933 (N.D. Ill.) (Levaquin®/Avelox® combination); *Hanson v. Bayer Healthcare Pharmaceuticals, Inc., et al.,* Case No. 1:15-cv-01169 (Levaquin®/Cipro®). As a result, Defendants will have to address problems and complications inherent to multi-defendant, multi-product cases regardless of whether the litigation proceeds as an MDL. Therefore, consolidating the litigation on an industry-wide basis is the most efficient means of conducting fluoroquinolone cases.

Indeed, the Panel has previously centralized litigation on an industry-wide basis under similar circumstances in which Plaintiffs alleged injuries attributable to more than one Defendant's product. *See, e.g., In re: Androgel Prods. Liab. Litig.*, 24 F. Supp. 3d 1378 (J.P.M.L. 2014) (noting that "[a]ll actions involve plaintiffs who used *one or more* testosterone replacement therapies and contend that their use and the drugs caused their injuries...") (emphasis added, internal parenthesis omitted); *In re: Incretin Mimetics Prods. Liab. Litig.*, 968 F. Supp. 2d 1345 (J.P.M.L. 2013) (centralizing actions against competing defendants who manufactured four similar diabetes drugs that allegedly caused pancreatic cancer). Similar to the *Androgel* and *Incretin* cases, this case involves nearly identical allegations about each of the three fluoroquinolone drugs – namely, that fluoroquinolones cause permanent peripheral neuropathy and that Defendants failed to conduct adequate testing and provide adequate warnings of the risk patients faced in developing permanent peripheral neuropathy. More importantly, Plaintiffs such as Plaintiff *Phillips*, and potentially many other plaintiffs, consumed multiple drugs manufactured by Defendants, any one of which could be individually or jointly responsible for the onset of Plaintiffs' injuries.

Discovery in the *Phillips* case, and all cases attributable to multiple products, will involve many of the same documents and witnesses that, absent centralization, will invariably result in repetitive discovery, inefficiencies, and increased costs. See *In re: Incretin Mimetics Prods. Liab. Litig.*, 968 F. Supp. 2d 1345 (J.P.M.L. 2013). Indeed, Defendants' contention that an industry wide MDL will require erecting "complicated confidentiality barriers" only bolsters the need for centralization. *See* Dkt. 25, Brief of Johnson & Johnson Defendants in Opposition to Plaintiffs' Motion to Transfer ("Def

Brief") at 9 quoting *In re Watson Fentanyl Patch Prods. Liab. Litig.*, 883 F. Supp. 2d 1350, 1351 (J.P.M.L. 2012). Defendants in the *Phillips* case, and all cases involving multiple products, are *already* facing a situation requiring confidentiality barriers against business competitors. To the extent that these protective orders are complicated or time-consuming, centralization will promote uniform rulings and decrease expenses for all parties. Should centralization be denied, both parties will be forced to negotiate and conduct discovery on a case-by-case basis across numerous districts, increasing the probability of inconsistent rulings and forcing Plaintiffs and Defendants to litigate substantially similar cases under disparate discovery requirements. *See In re: Incretin Mimetics Prods. Liab. Litig.*, 968 F. Supp. 2d 1345 (J.P.M.L. 2013) ("Centralization will eliminate duplicative discovery; prevent inconsistent pretrial rulings (particularly on such matters as *Daubert* rulings); and conserve the resources of the parties, their counsel, and the judiciary.") Therefore, consolidation of the fluoroquinolone cases will benefit all parties by maintaining uniform discovery throughout this litigation and providing more efficient and just outcomes for all parties involved.

Unlike many of the Panel's previous decisions, save *Pain Pump,* cited by Defendants declining industry-wide centralization, this case involves Plaintiffs who consumed multiple products.[3] The *Pain Pump* case is factually dissimilar from the present case, due to the number of defendants and the multiple types of claimed injuries in the pain pump litigation versus the singular injury here. As noted by this Panel, *Pain*

[3] *See In re Honey Prod. Mktg. & Sales Practices Litig.*, 883 F. Supp. 2d 1332, 1333 (J.P.M.L. 2012) (no Plaintiff brought suit against multiple Defendants alleging the same or similar causes of action); *In re Watson Fentanyl Patch Prods. Liab. Litig.*, 883 F. Supp. 2d 1350, 1351 (J.P.M.L. 2012) (involved allegations of personal injuries sustained from an overdose of Fentanyl due to defective patch designs where no known Plaintiff was alleged to have overdosed upon multiple patches).

Pump involved an "*indeterminate* number of different pain pumps made by different manufacturers," and "different anesthetics made by different pharmaceutical companies." *In re Ambulatory Pain Pump-Chondrolysis Prods. Liab. Litig.*, 709 F. Supp. 2d 1375, 1377 (J.P.M.L. 2010) (emphasis added). Further, *Pain Pump* involved cases at vastly different procedural stages, and included a number of Plaintiffs arguing against centralization. Conversely, the present petition involves only three manufacturers, three products and one alleged injury type. Moreover, virtually all cases are in their infancy. Due to the relatively straightforward nature of the claims alleged and the similarities of the products involved, it cannot be said that individual issues of causation and liability will predominate or overwhelm the efficiencies gained by centralization. Thus, centralization of the fluoroquinolone cases will avoid duplication of discovery, serve the convenience of parties and the courts, and promote the just and efficient conduct of these actions.

B. INFORMAL COORDINATION IS IMPRACTICAL

Efficient informal coordination is impractical due to the posture of the defendants. Absent formal coordination, an unwieldy and inefficient process is virtually guaranteed for both Plaintiffs and Defendants. *See In re: Cooper Tire & Rubber Co. Tires Prods. Liab. Litig.*, 2001 U.S. Dist. LEXIS 2099, at 3 (J.P.M.L. Feb. 23, 2001) (centralization under Section 1407 granted where "[m]otion practice and relevant discovery will overlap substantially in each action."); *In re: Cuisinart Food Processor Antitrust Litig.*, 506 F. Supp. 651, 655 (J.P.M.L. 1981) (transfer would "effectuate a significant overall savings of cost and a minimum of inconvenience to all concerned with the pretrial activities"). Further, informal coordination runs the risk of ignoring the needs of plaintiffs harmed by

multiple products, as informal coordination amongst the multiple defendants will be substantially more difficult to effect.

IV. THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS IS THE MOST APPROPRIATE TRANSFEREE COURT

Plaintiff agrees with Movants that and those responding parties who agree that the Southern District of Illinois is the most appropriate transferee court. The Southern District of Illinois is a capable forum for this litigation, provides a convenient and central location, and will not be overtaxed with other MDLs. The Honorable David R. Herndon has a demonstrated track record for efficient resolution of MDL cases and is imminently qualified to handle these cases. The transferee Judge's experience is exceedingly important and Judge Herndon has ample experience to oversee this litigation. 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"). For these reasons, the undersigned requests that the litigation be transferred to the Southern District of Illinois before Judge David R. Herndon.

V. CONCLUSION

As set forth above and all the reasons presented in Heard Robins Cloud LLP's brief and reply in support of its Motion for consolidation under 28 U.S.C. § 1407 [Doc. 1-1], the Interested Party respectfully requests that the Panel order coordination or consolidated pretrial proceedings for the fluoroquinolone products liability litigation and

that these cases be presided over by the Honorable David R. Herndon of the Southern District of Illinois.

Dated: July 14, 2015.

Respectfully Submitted

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Certificate of Service

I hereby certify that on July 14, 2015, I electronically filed the foregoing **INTERESTED PARTY RESPONSE IN SUPPORT OF MOTION TO TRANSFER ACTIONS PURSUANT TO 28 U.S.C. § 1407 FOR COORDINATED OR CONSOLIDATED PROCEEDINGS** with the United States Judicial Panel on Multidistrict Litigation using the CM/ECF system, which sent notification of such filing to all counsel of record.

Dated: July 14, 2015

/s/ David J. Wool
David J. Wool