BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE:	:	
	:	**MDL DOCKET NO. _____**
C-QUR MESH LITIGATION	:	

MEMORANDUM IN SUPPORT OF MOTION FOR TRANSFER, COORDINATION AND CONSOLIDATION OF ELEVEN RELATED ACTIONS TO THE DISTRICT OF NEW HAMPSHIRE PURSUANT TO 28 U.S.C. § 1407

Pursuant to 28 U.S.C. § 1407 ("Section 1407") and the Rules of Procedure on Multidistrict Litigation, Plaintiffs in the action styled *Nicole Young v. Atrium Medical Corporation* and others[1] ("Movants" or "Plaintiffs") respectfully submit this Memorandum in Support of Transfer, Coordination and Consolidation of Related Actions to the District of New Hampshire. Specifically, the Movants have requested the Joint Panel on Multidistrict Litigation (the "Panel") to transfer for coordination or consolidation for pretrial purposes the twelve (12) substantially similar cases set forth in the Schedule of Related Actions filed herewith, any tag-along actions, and all other cases that may be subsequently filed that assert related or similar claims. Plaintiffs, like all of the plaintiffs in related actions, bring their actions against Atrium Medical Corporation ("Atrium") relating to its defective C-Qur mesh product. The actions for

[1] The other individuals joining in this motion are the Plaintiffs in the following actions: *Ann Ackley v. Atrium Medical Co., et al.,* Civil Action 1:16-cv-00358 (District of New Hampshire); *Andja Badry v. Atrium Medical Co., et al.,* Civil Action 1:16-cv-00360 (District of New Hampshire); *Felicia Blackwood. v. Atrium Medical Co., et al.,* Civil Action 1:16-cv-00379 (District of New Hampshire); *Jeffery Croucher v. Atrium Medical Co., et al.,* Civil Action 1:16-cv-00371 (District of New Hampshire); *Dan Hicks v. Atrium Medical Co., et al.,* Civil Action 1:16-cv-00357 (District of New Hampshire); *Martha Luna v. Atrium Medical Co., et al.,* Civil Action 1:16-cv-00372 (District of New Hampshire). The *Young* case was the first of the related cases to be filed in the District of New Hampshire. While the other cases that now join in Movant's request for Transfer and Consolidation have filed more factually intensive complaints, all have been filed as related to the *Young* case.

which transfer and consolidation are proposed arise out of the same uniform course of conduct and allege identical "product liability" category claims.

I. SUMMARY OF ARGUMENT

Plaintiffs allege that Atrium negligently designed, manufactured, marketed, labeled, packaged and sold medical devices used for hernia repair, including multiple products in a product line known as C-Qur Mesh. Plaintiffs also allege the C-Qur Mesh's defective design and testing which resulted in a high failure rate and extensive complications for patients who had C-Qur Mesh implanted. Defendant Atrium denies Plaintiffs' allegations.

The District of New Hampshire is the appropriate place for transfer and coordination or consolidation for pretrial purposes. Defendant Atrium was headquartered and carried out the design, manufacture, marketing, and post-market surveillance of C-Qur Mesh in the District of New Hampshire at all times relevant to the underlying litigation. Transfer to the District of New Hampshire is appropriate because of the in-state presence of Atrium and the focus of related activity within the State. These twelve (12) actions plainly share many common questions of fact with the Young action. The transfer will further "the convenience of the parties and witnesses," since each of the plaintiffs will be deposing the same witnesses and obtaining the same corporate documents to prove their respective cases. The transfer of the six (6) like cases[2] presently pending in other districts, as well as those subsequently filed to the District of New Hampshire "will promote the just and efficient conduct of [the] actions" by ensuring centralized oversight of pretrial fact development in what are likely to be identical class actions. *See* 28 U.S.C. § 1407(a).

[2] For ease of reference they are the so-called Zissa, Guzman, Fergerson, Heinz, Dallas, Bryant complaints more specifically identified below.

The District of New Hampshire has the resources, judicial expertise and capability to promptly and efficiently conduct this case. Also, the District of New Hampshire is interested in this litigation and the parties are already cooperatively working to meet the deadlines and discovery schedule set by the New Hampshire District Court in the *Young* case. All actions are in the early stages of litigation and would not be unduly prejudiced by transfer.

While transfer under Section 1407 does not require a complete identity, or even majority, of common factual or legal issues as a prerequisite to transfer, each complaint here alleges C-Qur Mesh designed, manufactured, marketed and sold by Atrium was surgically implanted in each of the Plaintiffs causing substantially identical plaintiffs to suffer physical injury and economic loss. Transfer under Section 1407 will have the salutary effect of placing all actions in this docket before a single judge who can formulate a pretrial program that (1) allows discovery with respect to any non-common issues to proceed concurrently with discovery on common issues, *see In re Joseph Smith Patent Litigation*, 407 F. Supp. 1403, 1404 (J.P.M.L. 1976); and (2) ensures that pretrial proceedings will be conducted in a manner leading to the just and expeditious resolution of all actions to the overall benefit of the parties.

All the underlying civil actions involve common questions of fact. Each of the thirteen pending actions involve allegations of defects in mesh designed, manufactured, marketed and sold by Atrium. All actions will share common factual questions concerning such matters as the design, manufacture, safety, testing, marketing and performance of the mesh. Centralization under Section 1407 is necessary to eliminate duplicative discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary because the thirteen complaints filed by similarly situated victims in seven different states are based on the same fact-intensive proof and will seek the same discovery.

The application of law to the facts is also for all intents and purposes identical. Specifically, all complaints allege that Atrium was negligent in the design, manufacture, marketing, and sale of an unsafe hernia mesh product. All complaints allege that Atrium breached its duty of care by failing to exercise adequate testing and quality control and also that Atrium intentionally, knowingly, carelessly, recklessly, or negligently concealed information regarding the existence of a defect in its mesh products. Finally, all the complaints allege the Defendants negligently, recklessly, or intentionally misrepresented the quality, usefulness, and safety of Atrium Mesh.

The Panel has previously found that product liability actions involving similar claims relating to implantable mesh are proper for centralization under 28 U.S.C. § 1407. *See In Re Kugel Mesh Hernia Patch Litigation, MDL No. 1842 (J.P.M.L. 2007).* Here, all the salutary purposes of multidistrict litigation will be served by granted this Motion.

II. HISTORY OF THE LITIGATION

In addition to the *Young* case, twelve 12 other civil actions have been filed in federal court alleging that their plaintiffs have incurred injuries and damages as a direct and proximate result of defective Atrium C-Qur Mesh patches as follows:

- *Gerra Dawn Zissa v. Atrium Medical Co.,* Civil Action No. 5:15-cv-00295 (District of Western Texas);
- *Dan Hicks v. Atrium Medical Co., et al.,* Civil Action 1:16-cv-00357 (District of New Hampshire);
- *Andja Badry v. Atrium Medical Co., et al.,* Civil Action 1:16-cv-00360 (District of New Hampshire);
- *Jeffery Croucher v. Atrium Medical Co., et al.,* Civil Action 1:16-cv-00371 (District of New Hampshire);
- *Felicia Blackwood. v. Atrium Medical Co., et al.,* Civil Action 1:16-cv-00379 (District of New Hampshire);

- *Martha Luna v. Atrium Medical Co., et al.,* Civil Action 1:16-cv-00372 (District of New Hampshire);
- *Ann Ackley v. Atrium Medical Co., et al.,* Civil Action 1:16-cv-00358 (District of New Hampshire);
- *Doris Dallas v. Atrium Medical Co.,* Civil Action 4:16-cv-00295 (Northern District of Florida);
- *Connie Fergerson. v. Atrium Medical Co., et al.,* Civil Action 2:16-cv-02058 (District of Kansas);
- *Iris Guzman. v. Atrium Medical Co.,* Civil Action 2:16-cv-12179 (Eastern District of Louisiana);
- *Richard Heinz v. Atrium Medical Co., et al.* Civil Action 4:16-cv-1587 (Eastern District of Missouri).
- *Julie Ann Bryant & Philip Bryant v. Atrium Medical Co. et al.,* Civil Action 3:16-cv-00123 (Middle District of Georgia).

Submitted herewith is a Schedule of Actions that lists the twelve related actions that are the subject of this Motion, with each complaint attached thereto. There has been no significant activity in any of the above-mentioned cases which would prevent transfer. Movants seek to have the twelve actions listed above transferred to the District of New Hampshire and consolidated with the *Nicole Young* action pending before United States District Court Judge Landya B. Mccafferty in that jurisdiction. Of note, six of the above listed twelve cases (*Badry*, *Blackwood*, *Croucher*, *Hicks*, *Luna*, and *Ackley*,) cases have already joined Movant Young in this request for transfer, consolidation and coordination.

III. BACKGROUND

The actions affected by this motion, as identified in the accompanying Schedule of Actions, present common questions of fact; a common Defendant – Atrium Medical Co.; and all of the actions arise from the C-Qur Mesh manufactured by Atrium in New Hampshire.

C-Qur Mesh was sold by Atrium for surgical implantation in patients in the course of hernia repair. A hernia occurs when the stomach muscles are too weak to contain the intestines. Often a rupture occurs in the muscle wall that allows the intestines to become displaced and protrude, a condition commonly diagnosed as a hernia. Atrium promotes the C-Qur line of surgical mesh products as an appropriate therapy for permanent abdominal wall reinforcement, claiming that the C-Qur Mesh's proprietary Omega-3 barrier coating reduces scar tissue formation between the mesh and the patient's intestines (clinically known as "adhesions") while promoting permanent fixation of the mesh to the abdominal wall. In reality, the C-Qur mesh incites an inflammatory response that promotes bowel adhesion formation, impedes proper abdominal wall fixation, and causes additional severe complications.

Founded in New Hampshire in 1981, Atrium at all times has remained a United States Corporation headquartered in New Hampshire. In 2011, the Getinge Group AB ("Getinge"), a Swedish corporation headquartered at Getinge AB Theres Svenssons gata 7, P.O. Box 8861,SE-402 72, Göteborg, Sweden, acquired Atrium. At the time, Getinge's CEO Johan Malmquist reported that

> [a] key event in the past year was the acquisition of the US company Atrium Medical, which is active in the cardiovascular area and has grown very rapidly in recent years. Growth has averaged 19% in the past three year period, and in late 2011, invoicing amounted to USD 200 m. The key to Atrium's successes lies in the highly innovative product programme (sic) developed by the company, but also in the creation of an effective market organisation (sic).
>
> In terms of products and geography, Atrium provides an exceptional supplement to our existing operations, while also bolstering our presence in the market for the minimally invasive treatment of vascular diseases, which has been a key ambition for us. We expect Atrium to continue to grow rapidly in the coming years. The business will contribute to our earnings per share as early as 2012.

See http://www.getingegroup.com/globalassets/reports/annual-reports/eng/2011_eng.pdf.[3]

In 2011, Atrium had sales of $200 million with the U.S. market accounting for 70% of sales and the remaining 30% sales through proprietary sale offices in the United Kingdom, Germany, France, the Netherlands, India, Australia and New Zealand. *Id.* "Atrium started to utilize (sic) Omega3 fatty acids in the surgical treatment of hernias." *Id.* Atrium advanced that "(T)he inclusion of Omega3 in the mesh utilised (sic) to strengthen the abdominal wall reduces the risk of internal organs attaching to the mesh which facilitates rehabilitation and stimulates the healing process." *Id.*

In 2012, Atrium announced its plan to relocate from Hudson, New Hampshire to a newly purchased site at 40 Continental Boulevard, Merrimack, New Hampshire to accommodate the company's exponential growth over its past few years. The Merrimack facility offered an 115,000 newly renovated square foot two-story structure. That structure was expanded to include an additional 90,000 square foot state-of-the-art medical manufacturing and research and development facility. In an April 26, 2012 press release, Atrium touted that "[t]he new campus will provide the resources and space necessary for Atrium's growing family of talented and dedicated employees as they continue their mission of excellence."
http://www.atriummed.com/News/atriumnews.asp?articleid=66&zoneid=1.

As a result of C-Qur's dangerous and defective design, testing, manufacture, marketing and sale, it has caused patients to suffer serious related health problems. Atrium C- Qur patches

[3] The Getinge Group is a publically listed Swedish company that has 13,111 employees in 37 countries. Getinge holds itself out as "a leading global provider of products and services for operating rooms, intensive-care units, care units, sterilisation centres (sic), elderly care and companies and institutions that are active in the Life Science area." *Id*. Atrium is a business unit of MAQUET Cardiovascular (Maquet). *See* http://www.atriummed.com/News/atriumnews.asp?articleid=66&zoneid=1. Maquet is a subsidiary of the Getinge Group.

have been sold from either of its New Hampshire headquarters at all times relevant to this litigation and, as referenced, were distributed to patients and implanted worldwide.

IV. ARGUMENT

A. Transfer and Consolidation of the Twelve (12) Cases for Coordinated Pretrial Proceedings Is Appropriate under 28 U.S.C. § 1407

The purpose of the multidistrict litigation process is to "eliminate the potential for contemporaneous pretrial rulings by coordinating district and appellate courts in multidistrict related civil actions." *In re Multidistrict Private Civ. Treble Damages Litig.*, 298 F. Supp. 484, 491-92 (J.P.M.L. 1968). Consolidation is especially important in multidistrict litigations where "the potential for conflicting, disorderly, chaotic" action is greatest. *Id.* at 493. Transfer of related actions to a single district for pretrial proceedings avoids conflicting pretrial discovery and ensures uniform and expeditious treatment in the pretrial procedures. *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1230 (9th Cir. 2006). The Panel "considers that eliminating duplicate discovery in similar cases, avoiding conflicting judicial rulings, and conserving valuable judicial resources are sound reasons for centralizing pretrial proceedings." Hon. John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 Tul. L. Rev. 2225, 2236 (2008).

In relevant part, 28 U.S.C. § 1407(a) specifies that the Panel may transfer and consolidate two or more civil cases for coordinated pretrial proceedings upon a determination that (i) the cases "involv[e] one or more common questions of fact," (ii) transfer will further "the convenience of the parties and witnesses," and (iii) transfer will promote the just and efficient conduct of the actions." Cases interpreting this section have held that a motion for transfer, coordination and consolidation pursuant to § 1407 is appropriate when the cases are all federal civil actions, pending in different federal districts; one or more common questions of disputed

fact exist among the cases; and transfer of the cases will promote efficiencies and will conserve the resources of the parties, counsel and the judiciary. *Rosenfeld v. Hartford Fire Ins. Co.,* Nos. 88-Civ-2153 & 88-Civ-2252, 1988 U.S. Dist. LEXIS 4068 at *2-3 (S.D.N.Y. May 12, 1988); *see also, U.S. ex rel. Pogue v. Diabetes Treatment Centers of America, Inc.*, 238 F. Supp.2d 270 (D.D.C. 2002). The thirteen federal civil actions under consideration meet these criteria and should be transferred and consolidated in the District of New Hampshire for pretrial proceedings. Transfer is also necessary to eliminate duplicative discovery and prevent inconsistent rulings on pretrial motions.

The complaints all name Atrium Medical Corporation as a Defendant, factually rely on similar alleged uniform conduct and practices, and advance similar claims for relief. The complaints are supported by nearly identical detailed factual allegations tending to establish C-Qur Mesh was designed, produced, tested, packaged, sold, and shipped in an unsafe manner by the Defendants. Similarly alleged facts in each complaint describe how C-Qur Mesh was designed and produced in such a way that sterilization of C-Qur Mesh increases the likelihood of the mesh breaking down in the body, or causing adverse and allergic reactions.

1. The Related Actions Involve One or More Common Questions of Fact

The first requirement of Section 1407—that the cases "involv[e] one or more common questions of fact"—is plainly met here. The cases before this Panel contain numerous common questions fact, including, but not limited to, the following:

1. Whether there are design or manufacturing defects in the Atrium C-Qur Mesh;
2. Whether Atrium failed to (i) follow the good manufacturing practices provided by the United States Food and Drug Administration ("FDA"), (ii) properly

investigate complications from C-Qur Mesh implantation, and (iii) adequately document reports of the defect;

3. Whether Atrium failed to exercise adequate quality control;

4. Whether Atrium's conduct in the design, manufacturing, marketing or monitoring of the C-Qur Mesh fell below the duty of care owed by them to Plaintiffs and Plaintiffs' participants;

5. Whether Defendants intentionally, knowingly, carelessly, recklessly, or negligently concealed information regarding the existence of a defect in the C-Qur Mesh from the FDA, physicians and Plaintiffs;

6. Whether C-Qur Mesh products share a common or inherent design defect that causes complications, or other adverse reactions when implanted creating a risk of injury or death;

7. Whether Atrium negligently, recklessly, or intentionally misrepresented the quality and usefulness of the C-Qur Mesh;

8. Whether Atrium is liable for selling a dangerously defective product; and

9. Whether Plaintiffs have been injured by virtue of the Defendants' deceptive business practices and conduct.

The factual issues to be determined in each of the actions are nearly identical. *See, e.g., In re "Factor VIII or IX Concentrate Blood Prods." Prod. Liab. Litig.,* 853 F. Supp. 454, 455 (J.P.M.L. 1993) (common questions of fact existed regarding defendants' conduct); *In re Cuisinart Food Processor Antitrust Litig.,* 506 F. Supp. 651, 655 (J.P.M.I. 1981) (noting that transferred actions "share[d] numerous questions of fact concerning the existence vel non of the alleged conspiracy and its scope, participants, means of operation and effects."). Given the

virtually identical allegations and issues presented, transfer and consolidation are highly appropriate and should be granted. *See, e.g., In re Alert Income Partners Sec. Litig.,* 788 F. Supp. 1230, 1231 (J.P.M.L. 1992); *In re Oil Spill by" Amoco Cadiz" Off Coast of France on March 16, 1978,* 471 F. Supp. 473, 478 (J.P.M.L. 1979) (where common questions predominate, first factor favoring consolidation is met even where some differing legal theories are present); *In re Litigation Arising From Termination of Retirement Plan for Employees of Firemen's Fund Ins. Co.,* 422 F. Supp. 287, 290 (J.P.M.L. 1976).

In all of the related cases, Plaintiffs' proof will involve the same evidence concerning defendants' allegedly misconduct that resulted in design, production, marketing, and sale of defective hernia mesh and led to Plaintiffs' injuries. Thus, the first prong of Section 1407 weighs in favor of consolidation.

2. Consolidation Will Further the Convenience of Parties and Witnesses

The second prong of Section 1407 is also satisfied because consolidation of the cases will serve "the convenience of parties and witnesses." The Plaintiffs in each of the pending actions will rely upon the same corporate policies, studies and analysis to prove the nature and extent of Atriums' and the other Defendants' wrongdoing. Plaintiffs will also depose the same core set of corporate employees and officers who are believed to have knowledge of Defendants' design, manufacture, marketing, and sales practices. All of the actions will share factual questions including the design, manufacture, safety, testing, marketing and performance of the Atrium mesh that is at the center of this litigation. Given the common factual questions raised by the parties in each of the pending actions, and the concomitant reliance of each action on substantially the same set of documents, extensive discovery will be duplicated absent consolidation of the actions. In particular, discovery requests and depositions of the executives

and employees involved in the unlawful practices may be taken multiple times on the same subjects absent consolidation. Transfer will enable a single court to establish a pretrial plan that will minimize the inconvenience to the witnesses. Moreover, many of the same pretrial disputes are likely to arise in each case, such as issues concerning the nature and scope of discovery, motions to dismiss, and determinations regarding class certification. Consolidation will solve this problem by enabling a single judge to formulate a pretrial program that will minimize witness inconvenience and overall expense for all parties involved.

Consolidation will benefit the plaintiffs, the defendants and the judicial system. *See, e.g., Cuisinart Food Processor,* 506 F. Supp. at 651 (transfer would "effectuate a significant overall savings of cost and a minimum of inconvenience to all concerned with the pretrial activities."). Accordingly, it should be granted.

3. Consolidation Will Promote Just and Efficient Conduct of These Actions

Consolidation is also strongly favored in accordance with the third factor considered by the Panel pursuant to Section 1407 – whether consolidation will "promote the just and efficient conduct of [the] actions." First, where, as here, meaningful discovery has not yet begun in any of the related actions, consolidation will prevent duplicative discovery and conflicting pretrial rulings and will also result in a "substantial savings of judicial time and resources." *See In re Japanese Elec. Prods. Antitrust Litig.,* 388 F. Supp. 565, 567 (J.P.M.L. 1975); *see also In re European Rail Pass Antitrust Litig.,* No. MDL 1386, 2001 WL 587855, at *1 (J.P.M.L. Feb. 7, 2001) (ordering cases transferred to a single district in order "to avoid duplicative discovery"); *In re Fine Paper Antitrust Litig*., 453 F. Supp. 118, 121 (J.P.M.L. 1978) ("Section 1407 transfer . . . is necessary in order to prevent duplicative discovery and eliminate any possibility of conflicting class and other pretrial rulings."). Without consolidation, there is a high likelihood that

duplicative discovery demands and redundant depositions will occur. The District of New Hampshire has put in place a discovery schedule that was designed with the intent it could be easily modified if transfer is granted.

4. Transfer Will Streamline Discovery and Reduce Costs

Consolidation and coordination of these similar actions will prevent the problems identified by the court in *In re Fine Paper Antitrust Litigation* by streamlining discovery and conserving resources. *See In re Universal Serv. Fund Tel. Billing Practices Litig.*, 209 F. Supp.2d 1385, 1386 (J.P.M.L. 2002); *In re Multi-Piece Rim Prods. Liab. Litig.*, 464 F. Supp. 969, 974 (J.P.M.L. 1979); *In re Cross – Fla. Barge Canal Litig.,* 329 F. Supp. 543, 544 (J.P.M.L. 1971) (consolidation of two actions ordered because "consolidation will eliminate the likelihood of repetitive discovery in [certain] areas, serving the convenience of the parties and witnesses and furthering the just and efficient conduct of the litigation"). For example, since the parties will be requesting and relying upon the same core set of corporate documents, medical documentation, and witnesses, coordination will avoid wasteful duplicative discovery. Moreover, to the extent the parties engage in any discovery disputes and motion practice, such issues can be *uniformly* resolved in a single proceeding, rather than multiple, separate hearings that may lead to inconsistent rulings. The corresponding savings in time and expense will benefit both parties and the courts. *See Cuisinart Food Processor,* 506 F. Supp. at 655 (transferring actions would result in "significant overall savings of cost and a minimum of inconvenience to all concerned with the pretrial activities").

As discussed above, the complaints in the pending related actions contain substantially identical factual allegations. Where "an analysis of the complaints reveals a commonality of factual issues," transfer "is necessary in order to prevent duplication of discovery and eliminate

the possibility of conflicting pretrial rulings." *In re A.H. Robbins Co., Inc. "Dalkon Shield" IUD Prods. Liab. Litig.,* 406 F. Supp. 540, 542 (J.P.M.L. 1975). This will benefit the parties and conserve overtaxed judicial resources. *See In Re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig.,* 844 F. Supp. 1553 (J.P.M.L. 1994) (centralization "necessary in order to eliminate duplicative discovery, prevent inconsistent pretrial rulings, . . . and conserve the resources of the parties, their counsel and the judiciary"); *In re Silicone Gel Breasts Implants Prods. Liab. Litig.,* 793 F. Supp. 1098, 1100 (J.P.M.L. 1992) (same); *In re Amino Acid Lysine Antitrust Litig.,* 910 F. Supp. 696, 698 (J.P.M.L. 1995) (consolidation and coordination is appropriate to "conserve the resources of the parties, their counsel and the judiciary").

5. Transfer Will Eliminate the Likelihood of Inconsistent Rulings

Consolidation will assure that the parties to these actions are not subject to inconsistent pretrial rulings regarding these various pivotal issues – always a critical consideration in determining whether cases should be consolidated under Section 1407. *See In re Multi-Piece Rim Prods.,* 464 F. Supp. at 974 (consolidation necessary "to prevent duplication of discovery and eliminate the possibility of conflicting pretrial rulings concerning . . . common factual issues."); *In re First Nat'l Bank, Heavener Okl. (First Mortgage Revenue Bonds) Sec. Litig.,* 451 F. Supp. 995, 997 (J.P.M.L. 1978) (Transfer "necessary, even though only two actions are involved, in order to prevent duplicative pretrial proceedings and eliminate the possibility of inconsistent pretrial rulings."). Important identical issues in the instant litigation that would produce irreconcilable inconsistent rulings include choice of law questions.

6. These Actions Are Sufficiently Complex to Warrant Consolidation and Transfer

The Panel has consistently and repeatedly found medical product liability litigation sufficiently complex to warrant transfer. *See, e.g., In re Kugel Mesh Hernia Patch Prod. Liab.*

Litig., 493 F. Supp. 2d 1371 (J.P.M.L. 2007); *In re Denture Cream Prod. Liab. Litig.,* 624 F. Supp. 2d 1379, 1403 (J.P.M.L. 2009); *In re: Human Tissue Prod. Liab. Litig.*, 435 F. Supp. 2d 1352 (J.P.M.L. 2006); *In re Phenylpropanolamine (PPA) Prod. Liab. Litig.*, 386 F. Supp. 909 (J.P.M.L. 2001).

The Panel has stated that where issues involved are sufficiently complex and where consolidation will prevent the duplication of discovery and pretrial rulings, it will not require large numbers of pending cases as a prerequisite to granting consolidation under Section 1407. *See, e.g., First Nat'l Bank,* 451 F. Supp. at 996; *New Mexico Natural Gas*, 482 F. Supp. at 336; *California Armored Car,* 476 F. Supp. at 454; *Cross-Fla Barge Canal,* 329 F. Supp. at 544; *In re Ryder Truck Lines, Inc., Employment Practices Litig.,* 405 F. Supp. 308 (J.P.M.L. 1975). Indeed, this Panel has consolidated as few as two cases. *See In re Clark Oil & Ref. Corp. Antitrust Litig.,* 364 F. Supp. 458 (J.P.M.L. 1973).

The pending actions clearly present complex factual issues relating to the manufacturing of medical components, and the chemical and biological reactions of those components in the human body. Thus, these similar complex actions, arising from Defendants' same course of conduct, are well-suited for consolidation.

B. This Panel Should Transfer These Actions to the District of New Hampshire

1. The District of New Hampshire is the Most Appropriate Forum for the Parties and Witnesses

The convenience of the parties and witnesses is a critical factor in determining to which district related actions should be transferred. *See* 28 USC § 1407(a) (related actions may be transferred to a district for coordinated proceedings upon a determination that the transfer "will be for the convenience of parties and witness and will promote the just and efficient conduct of such actions"). In deciding whether a particular forum is convenient, the Panel examines factors

such as the locations of the following: (1) the current actions; (2) the parties; (3) the documents; (4) potential witnesses; and (5) the majority of actions that have been brought. *See In re Baldwin-United Corp. Litig.,* 581 F. Supp. 739, 740 (J.P.M.L. 1984). These factors weigh in the facor of the District of New Hampshire.

No other district is as much a geographic focal point for the facts and circumstances surrounding these claims as the District of New Hampshire. The current and potential plaintiffs with claims against the Defendants are spread out across the nation. Movant is aware of twelve related actions currently pending in seven different federal district courts.[4] No other district is currently presiding over more than one of these related actions. Seven of the twelve known plaintiffs have already determined the District of New Hampshire is the most appropriate forum.

Defendant Atrium is headquartered in New Hampshire. The Movants expect that the vast majority of the documents and witnesses needed as evidence in the related actions are alreadyy located in the District of New Hampshire. Transfer of the related actions to the District of New Hampshire would save the parties and witnesses an enormous amount of time and money in travel and other discovery related expenses. The Panel has routinely transferred related cases to courts that are situated in close proximity to a defendant's headquarters because witnesses and documents are liekly to be found there. *See, e.g., In re Service Corp. Int'l Sec. Litig.*, 323 F. Supp. 2d 1377, 1378 (J.P.M.L. 2004). In addition, the FDA previously sought, and was granted, an injunction against one or more of the Defendants enjoining the continued production of C-Qur Mesh out of the District of New Hampshire. The FDA inspection relating to C-Qur Mesh occurred in New Hampshire and the relevant witnesses were located and interviewed by the FDA in New Hampshire.

[4] The Movants are also aware of over 100 related cases filed in New Hampshire's state court system.

As noted above, seven of the thirteen pending actions have been filed in the District of New Hampshire. As such, the District of New Hampshire is where the majority of actions have been brought. Transfer of the related federal actions to the District of New hampshire would allow this controversy to be efficiently and conveniently conducted in close proximity to the parties and evidence.

2. The District of New Hampshire Is the Most Convenient Forum

The District of New Hampshire is a particularly convenient forum for litigation after consolidation of these actions. Interstates 93 and 89 run through Concord, the capital of New Hampshire, making it easily accessible by car. As mentioned above, Movants anticipate that many of the witnesses to this litigation may work or reside on the east coast, and specifically in New Hampshire. The District of New Hampshire courthouse, in Concord, is easily accessible to these witnesses. In New Hampshire, and for that matter – New England - all roads lead to Concord New Hampshire.

Further, for those parties and witnesses residing outside of New Hampshire, the District Court of New Hampshire is conveniently located in Concord. The courthouse is easily accessible because it is immediately located off Route 93, the Northeast's primary highway. Concord boasts several major hotel chains and other affordable boutique hotels, including a Marriott with a conference center. Other hotels are designed for longer stays. http://www.concordnhchamber.com/hotelsmotelslodgingresorts.html. Concord also hosts many affordable and very good restaurants. Located in the Lakes Region, other accommodations and restaurants are within driving distance. The United States District Court for the District of New Hampshire is also located near two major airports offering direct flights on most major airlines to numerous cities across the United States and around the world. The Manchester-Boston Regional

Airport is about a 30-minute drive. https://www.flymanchester.com Certified for Cat III B Instrument Landing operations, the airport has a reputation for never surrendering to bad weather. The airport has closed only once, when the national airspace was shut down for two days following the September 11 terrorist attacks, and all American airports were required to close. Manchester also has many hotels and restaurants. Boston's Logan Airport[5] is less than hour and one half drive away from Concord, New Hampshire. Both Manchester-Boston Regional Airport and Boston Logan are served by most major domestic airlines.

3. The District of New Hampshire Has the Resources and Judicial Expertise to Properly Conduct this Case

The District of New Hampshire has the capacity and capability to manage a multi-district litigation case. As of August 15, 2016, there is only one MDL case pending in the District of New Hampshire. The District of New Hampshire has seasoned jurists and magistrates who can direct this litigation on a steady and expeditious course. Presently, the *Young* case is assigned to Judge Landya B. Mccafferty and Magistrate Judge Andrea K. Johnstone. The parties are cooperatively working to comply with those orders issued in the Young action.

Another important factor for determining the most appropriate forum for multidistrict litigation is the speed and efficiency with which the available districts manage their respective caseloads. *See In re Laughlin Prods., Inc. Patent Litig.,* 240 F. Supp. 2d at 1359 (transfer based in part on fact that district "enjoys general caseload conditions permitting the Panel to effect the Section 1407 assignment to a court with the present resources to devote the time to pretrial matters that this docket is likely to require."); *Preferential Drug*, 429 F. Supp. at 1029 (transferring cases based in part upon transferee court's low median time between filing and disposition in civil actions); *Corn Derivatives*, 486 F. Supp. at 932 (faster docket cited as a

[5] Logan Airport served as a destination for over 33 million passengers in 2015 and is New England's busiest transportation center.

consideration for choice of transfer forum). The District of New Hampshire has under 600 cases filed per year and can easily accommodate the workload. *See*, http://www.nhd.uscourts.gov/sites/default/files/pdf/Civil%20Case%20Types%202014%20to%20Present.pdf; *See also*, http://www.nhd.uscourts.gov/sites/default/files/pdf/Civil%20Case%20Types%202014%20to%20Present.pdf.

The balance of convenience and efficiency favor consolidation and transfer to the District of New Hampshire because it offers a centralized location that is easily accessible and a judge that is well-suited to supervise this Multi District litigation. The median time from filing to disposition of a civil case in the District of New Hampshire, was 8.4 months in 2015, making it the third fastest within the First Circuit.

V. CONCLUSION

For the foregoing reasons, Movants respectfully request that the Panel order that the abovementioned related actions as well as any cases that may subsequently be filed asserting related or similar claims be transferred to the District of New Hampshire and consolidated for pretrial proceedings. Consolidation of these actions will further "the convenience of parties and witnesses and [would] promote the just and efficient conduct of [the] actions." 28 U.S.C. § 1407(a). Plaintiffs allege Defendant Atrium negligently designed, manufactured, marketed, labeled, packaged and/or sold medical devices used for hernia repair, including C-Qur Mesh. All of the above factors combine to make the District of New Hampshire an appropriate, capable, and efficient forum for these related actions to be transferred to for coordinated pretrial proceedings. Moreover, Defendant Atrium was headquartered and carried out the design, development, manufacture, licensing, marketing, distribution and/or sale of C-Qur Mesh in the

District of New Hampshire. The discovery and pretrial proceedings of the related federal actions should be conducted there also.

Transfer is needed because these related actions involve common issues of fact, it will convenience the parties, witnesses and counsel, and it will provide for the efficient and consistent conduct of this litigation. Transfer to the District of New Hampshire is appropriate because of the in-state presence of Atrium, the locus of related activity in the State, and the resources and capability of the court to promptly and efficiently conduct this litigation. The District is convenient to all the parties. No other district court has as much of a factual and circumstantial nexus to this litigation as the District of New Hampshire. No other district court has as substantial of a relationship to Atrium or the product in issue. No other district court presides over more than one related action.

This litigation and these actions squarely fit the statutory prerequisites for transfer and consolidation. Consolidating and transferring these actions to the United States District Court for the District of New Hampshire would also best serve judicial efficiency. They are necessary to avoid duplication and wasted efforts. In the absence of transfer, the very problems Section 1407 is intended to avoid will arise - duplicative fact and expert discovery and motion practice resulting in a needless waste of judicial resources in multiple federal district courts as well as inconsistent rulings. Finally, Judge Landya B. Mccafferty is an able jurist who is interested and capable in this litigation.

Respectfully submitted,

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