BEFORE THE UNITED STATES
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: **HOWMEDICA OSTEONICS CORP. LFIT V40 TAPER LOCK LITIGATION**[1]	MDL No. 2768

DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF ROBERT O'HARE'S MOTION FOR TRANSFER OF ACTIONS PURSUANT TO 28 U.S.C. § 1407

Pursuant to 28 U.S.C. § 1407 and the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, Defendant Howmedica Osteonics Corp (incorrectly named as "Stryker Orthopaedics d/b/a Howmedica Osteonics Corp" by some of the Plaintiffs) ("HOC")[2] hereby opposes Plaintiff Robert O'Hare's ("Plaintiff") Motion for Transfer of Actions Pursuant to 28 U.S.C. § 1407 ("Plaintiff's Motion") and accompanying Brief in Support ("Pl.'s Br.").[3] [ECF No. 1]

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[1] As set forth infra in Part III.C, Plaintiff O'Hare's proposed MDL title "In re: Stryker Orthopaedics LFIT V40 Femoral Head Product Liability Litigation" is incorrect and misleading. The caption of any MDL should be corrected to "HOC LFIT V40 Taper Lock Litigation."

[2] HOC is the correct defendant for the product at issue here. Stryker Corporation and Stryker Sales Corporation operate as separate corporate entities and are not proper parties to this litigation.

[3] On January 17, 2017, Plaintiffs Daniel Keller, Leroy Denne and Patton Witt filed an interested party response in support of O'Hare's Motion to Transfer, joining in Plaintiff's request for transfer but suggesting the District of Minnesota as a more appropriate venue. [ECF Nos. 4, 5] On February 1, 2017 and February 2, 2017, Plaintiffs James and City Smith and Plaintiffs Debbie and Dennis Brown, respectively, filed interested party responses also choosing the District of Minnesota for any potential MDL venue. [ECF Nos. 25, 30] For the same reasons set forth herein, Plaintiff Keller's, Denne's and Witt's, and the Smith and Brown Plaintiffs separate requests for consolidation should be denied. Counsel for one additional Plaintiff, George W. Forman, also filed a notice of related action with this Court, identifying his case as a potential member action. [ECF No. 13] Similarly, Counsel for three additional Plaintiffs, Peggy Sherman, Alan Kuehl, and Liliane Perez filed a notice of related actions with this Court. [ECF No. 31] Finally, the JPML identified two additional actions as being potentially related. [ECF No. 26]

I. INTRODUCTION

HOC strenuously objects to Plaintiff's request to transfer. Plaintiff cannot meet the heavy burden to demonstrate that transfer of a small number of individual actions involving a myriad of different products, circumstances, and injuries into an MDL is appropriate. First, the request is premature—only a handful of cases are implicated in the current motion and only a fraction of those involve products subject to the August 2016 recall upon which Plaintiff relies. Second, because the LFIT Anatomic V40 Femoral Heads ("LFIT femoral head") are used as part of multiple different total hip replacement systems, individual facts will predominate over common ones. Indeed, a plaintiff-specific evaluation will need to be made *in each individual case* regarding if and how the LFIT femoral head relates to distinct product lines, materials, sizes, recall status, and injuries.

Alternatively, should the Panel even consider transfer, the proper scope of an MDL would be cases alleging a taper lock failure of an LFIT femoral head subject to the August 2016 recall, and that MDL should be located in the District of New Jersey before the Honorable Brian R. Martinotti. The District of New Jersey—where HOC is principally domiciled and where most key documents and witnesses are located—would be far and away the most convenient and accessible forum to promote the just and efficient administration of any potential MDL. Additionally, Judge Martinotti is uniquely qualified and positioned to preside over these cases, as he managed these precise claims as a Superior Court Judge for Bergen County, New Jersey.

II. BACKGROUND

HOC is the worldwide market leader in total hip replacement products, offering a wide range of primary femoral hip components from which surgeons may select the most appropriate combinations. Total hip replacement systems generally consist of four primary components: (1)

the acetabular cup; (2) the acetabular insert, (3) the femoral stem; and (4) the femoral head. The acetabular cup is the component that is placed into the acetabulum (hip socket). The femoral stem fits in the femur (thigh bone). The femoral head mates with the femoral stem, which it connects to through a "taper lock," or a connection that firmly fastens the head to the shaft of the femoral stem. The femoral head articulates with the insert.

The LFIT femoral head is one type of femoral head sold by HOC, which has demonstrated a long history of clinical success since its launch in 2001, and continues to be implanted by surgeons today. This product is available in a variety of sizes and offsets and a surgeon can mate the LFIT femoral head with twenty different femoral stems offered by HOC. This stem/head combination can be mated with any variety of acetabular cups manufactured by HOC.

Like all of HOC's total hip replacement components, the LFIT femoral head is a medical device that is regulated by the U.S. Food and Drug Administration ("FDA") and can only be prescribed for use by licensed healthcare providers. As part of its ongoing post-marketing surveillance, HOC received a higher than expected incidence of complaints describing harm secondary to failure of the femoral head to fully lock onto the stem at the stem-head taper junction, *i.e.*, "taper lock failure," for specific lots of certain catalog numbers of LFIT femoral heads manufactured before March 4, 2011. This can result in the head dissociating from the stem. As a result, on August 29, 2016, HOC sent an urgent medical device notification to its physician customers, alerting them to the issue and recommending that these physicians continue to follow their patients in accordance with their normal protocol. On October 11, 2016, HOC sent an updated recall notification. On November 9, 2016, HOC announced a product correction

with the FDA. Notably, HOC's voluntary recall involved only seven (7) of the more than twenty-six (26) different versions of the LFIT femoral head available.

Importantly, beginning in 2013, while serving as Multi-County Litigation Judge in Bergen County, the Honorable Brian R. Martinotti presided over multiple New Jersey state court lawsuits involving claims related to the HOC LFIT femoral head. As part of those cases, Judge Martinotti recognized that the LFIT femoral heads that have experienced taper lock issues can present different failure modes, including subsequent dissociation of the femoral head from the femoral stem. He recognized that each of these failure modes presents separate and distinct issues, and accordingly instituted a case management process whereby cases were triaged based on the failure mode, including a distinct category for femoral head dissociation. *See infra* Part III.B.3.

III. ARGUMENT

A. The Proposed Transfer and Consolidation Does Not Satisfy the Requirements of 28 U.S.C. § 1407.

To successfully consolidate and transfer actions under Section 1407, Plaintiff must demonstrate that transfer and coordination will: (1) "promote the just and efficient conduct of such actions" and serve "the convenience of parties and witnesses"; and (2) involve "one or more common questions of fact [] pending in different districts." *See* 28 U.S.C. § 1407(a). Here, none of the Section 1407 criteria is met.

1. Transfer Is Premature and Will Not Promote the Just and Efficient Conduct of These Proceedings, or Serve the Convenience of the Parties and Witnesses.

As this Panel has explained, "[t]he 'just and efficient conduct' of the actions is the most important of the statutory criteria [under section 1407]. In addition, as the statute and congressional reports emphasize, the existence of a common fact is not enough to justify transfer

of litigation to a single district; there must be a showing that the transfer will produce 'significant economy and efficiency of judicial administration.'" *In re Equity Funding Corp. of Am. Sec. Litig.*, 375 F. Supp. 1378, 1393-94 (J.P.M.L. 1974) (Wisdom, J., dissenting). Indeed, it is widely recognized that the "most important prerequisite to obtaining a transfer under Section 1407 MDL transfer and consolidation is a showing that the just and efficient conduct of the actions will be served thereby." 15 Charles Alan Wright, Arthur Miller & Edward Cooper, Federal Practice and Procedure § 3863 at 489 (4d ed. 2014) (citation omitted); *see also id.* ("Read broadly, as is consistent with the open-ended character statutory language, of course, *this third requirement really subsumes the other two.*") (emphasis added).

The Panel has noted that where, as here, there are only relatively few actions pending, "'it is doubtful the transfer would enhance the convenience of parties and witnesses or promote judicial efficiency.'" *In re Scotch Whiskey*, 299 F. Supp. 543, 544 (J.P.M.L. 1969) (quoting S. Rep. No. 90-454, at 4-5 (1968)); *accord In re Highway Accident in Buffalo County., Neb., on Aug. 22, 2000*, 305 F. Supp. 2d 1359, 1360 (J.P.M.L. 2004). For these reasons, this Panel has repeatedly declined to establish an MDL where the litigation involves only a few *individual* product liability cases. *See, e.g.*, *In re Cymbalta (Duloxetine) Prods. Liab. Litig.*, 65 F. Supp. 3d 1393 (J.P.M.L. 2012) (denying centralization of twenty-five personal injury cases involving withdrawal symptoms from discontinuing use of prescription drug to treat depression and nerve pain); *In re Intuitive Surgical, Inc., Da Vinci Robotic Surgical Sys. Prods. Liab. Litig.*, 883 F. Supp. 2d 1339, 1340 (J.P.M.L. 2012) (denying centralization of five personal injury and wrongful death actions involving alleged defects in a surgical device); *In re Abbott Labs., Inc., Similac Prods. Liab. Litig.*, 763 F. Supp. 2d 1376, 1376-77 (J.P.M.L. 2011) (denying centralization of nine actions alleging injury from recalled baby formula); *In re Blair Corp.*

Chenille Robe Prods. Liab. Litig., 703 F. Supp. 2d 1379, 1380 (J.P.M.L. 2010) (denying centralization of four personal injury and wrongful death actions); *In re Depo-Provera Prods. Liab. Litig*., 499 F. Supp. 2d 1348, 1349 (J.P.M.L. 2007) (denying certification of oral contraceptive medical monitoring class action and two personal injury actions).

Indeed, MDLs comprised of a relatively small numbers of actions typically involve multiple putative *class actions* rather than *individual* personal injury claims. *See, e.g.*, *In re St. Jude Med., Inc., Silzone Heart Valves Prods. Liab. Litig.*, MDL 1396, 2001 WL 36292052, at *1-2 (J.P.M.L. Apr. 18, 2001) (coordinating eight putative class actions) *In re St. Jude Med., Inc., Silzone Heart Valves Prods. Liab. Litig.*, MDL 1396, 2001 WL 36292052, at *1-2 (J.P.M.L. Apr. 18, 2001) (coordinating eight putative class actions); *see also In re Canon U.S.A., Inc., Digital Cameras Prods. Liab. Litig.*, 416 F. Supp. 2d 1369, 1370 (J.P.M.L. 2006) (coordinating two putative class actions and one potential tag-along class action); *In re High Sulfur Content Gasoline Prods. Liab. Litig.*, 344 F. Supp. 2d 755, 756 (J.P.M.L. 2004) (coordinating five putative class actions). Here, Plaintiff suggests consolidation and transfer of a handful of *individual* product liability cases, not putative class actions. In fact, of the handful of individual cases up for transfer, only a small number of those have been confirmed to involve a recalled LFIT femoral head. Accordingly, these cases should be allowed to proceed in their home jurisdictions, to be efficiently decided based on the merits of each individual complaint with appropriate coordination by counsel as to any limited overlapping discovery.

It is beyond dispute that Section 1407 transfer is not appropriate when alternatives to centralization exist. "If conventional case handling practices in the districts in which the actions are filed would be adequate for management of the litigation, it may be said that an alternative to transfer exists." *Multidistrict Litigation Manual*, § 5.33 (2015). The Panel regularly denies

transfer where counsel can informally coordinate discovery and pretrial proceedings in lieu of an MDL. *See, e.g.*, *In re: Crest Sensitivity Treatment & Protection Toothpaste Mktg. and Sales Practices Litig.*, 867 F. Supp. 2d 1348 (J.P.M.L. 2012). When alternatives to transfer exist, Section 1407 transfer will not "serve the convenience of the parties and witnesses or promote the just and efficient conduct of the actions." *See Multidistrict Litigation Manual*, § 5.33 (citing 28 U.S.C. § 1407(a)). Indeed, the Panel has stressed that "centralization under section 1407 should be the **last solution** after considered review of all other options. These options include: Section 1404 transfer; dismissal or stay under the first-to-file doctrine; agreement by plaintiffs to voluntarily dismiss their actions in favor of one district; and cooperation and coordination among the parties and the various transferor courts." *In re: Gerber Probiotic Prods. Mktg. & Sales Practices Litig.*, 899 F. Supp. 2d 1378, 1379-1380 (J.P.M.L. 2012) (emphasis added).

Here, in their rush to file, Plaintiff's counsel have not considered any of these options, nor have they made any attempt to informally coordinate these cases despite this Panel's admonition that informal coordination is "preferable to formal centralization." *In re Adderall XR (Amphetamine/Dextroamphetamine) Mktg., Sales Practices & Antitrust Litig.*, 968 F. Supp. 2d 1343, 1345 (J.P.M.L. 2013); *see also In re Northeast Contaminated Beef Prods. Liab. Litig.*, MDL No. 2346, 856 F. Supp. 2d 1354, 1355 (J.P.M.L. 2012) ("[I]nformal cooperation among the involved attorneys and courts is both practicable and preferable."); *In re Intuitive Surgical*, 883 F. Supp. 2d at 1340 ("We consider voluntary coordination among the parties and the involved courts of these relatively few actions to be a preferable alternative to centralization at this time."); *accord In re Abbott Labs., Inc., Similac Prods. Liab. Litig.*, 763 F. Supp. 2d 1376, 1377 (J.P.M.L. 2011).

The Panel has also identified methods parties can employ to coordinate in lieu of an MDL: "Notices of deposition can be filed in all related actions; the parties can stipulate that any discovery relevant to more than one action can be used in all those actions; or the involved courts may direct the parties to coordinate their pretrial activities." *In re Adderall*, 968 F. Supp. 2d at 1345 (citation and internal quotation marks omitted). To the extent there is overlapping discovery between the cases, informal coordination is certainly possible as HOC is ready and willing to cooperate to minimize any duplicative efforts related to the few common questions of fact presented here. *See In re Chilean Nitrate Products Liab. Litig.,* 787 F. Supp. 2d 1347, 1347-48 (J.P.M.L. 2011) (transfer denied because defendant offered to coordinate discovery and depositions in the few cases presented for consolidation); *In re Children's Pers. Care Prods. Liab. Litig*., 655 F. Supp. 2d 1365, 1366 (J.P.M.L. 2009) (discussing a variety of informal coordination mechanisms).

Plaintiff attempts to create the appearance of a need for centralization here by asserting that he "anticipates additional filings." (Pl's Br. at 9). Given Plaintiff's overbroad definition of actions discussed *infra* in Part III.C., it is no surprise that Plaintiff anticipates additional filings. In fact, the need for additional filings to justify the creation of an MDL may explain Plaintiff's overly broad proposed definition. But speculation about whether and how the litigation might expand does not support consolidation. *See In re Intuitive Surgical*, 883 F. Supp. 2d at 1340 (denying motion to transfer, noting 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"). Even if additional cases alleging "exposure to the LFIT V40 Anatomic femoral head…, injury due to the failure of the product…, [and] negligent and/or egregious conduct by

the defendant" (Pl.'s Br. at 4) were filed, the common issues in these cases would be overwhelmed by the individualized issues.

2. Individual Questions of Fact Predominate Over Common Questions of Fact.

The Panel consistently has denied consolidation where case-specific facts are "likely to predominate" in a particular litigation, *In re Mirena IUS Levonorgestrel-Related Prods. Liab. Litig.*, 38 F. Supp. 3d 1380, 1381 (J.P.M.L. 2014), or where there are "differences in the health risks alleged," *In re Oxyelite Pro & Jack3d Prods. Liab. Litig.*, 11 F. Supp. 3d 1340, 1341 (J.P.M.L. 2014). *See also In re Prescription Drug Co-Pay Subsidy Antitrust Litig.*, 883 F. Supp. 2d 1334, 1335 (J.P.M.L. 2012) (denying consolidation because "[i]ndividualized discovery and legal issues [were] likely to be numerous and substantial"). Here, individual questions of fact strongly predominate over any common questions of fact.

Notably, the LFIT V40 femoral head is not a standalone product. It **must** be used with an entire hip replacement system containing different parts, and it can be mated with any one of twenty different femoral stems, as well as any number of different acetabular cups. Even Plaintiff acknowledges that the "LFIT V40 femoral head was designed and intended to be mated on a variety of femoral hip stems," and "the design and geometry of each hip stem may contribute in different degrees" to the alleged taper lock failure at issue in some of the Plaintiffs' cases. (Pl.'s Br. at 2.) Indeed, the LFIT femoral head is offered in several different sizes with varying degrees of offset. Each of these femoral heads can be mated with several different hip stems that likewise have varying stem sizes, stem lengths, neck lengths, neck angles, and offsets, and are manufactured from varying materials. For example, *only* considering LFIT femoral heads mated with a particular femoral stem, the Accolade® TMZF® stem, there are approximately

408 different combinations that could be utilized.[4] When taking into account the numerous other potential femoral stems that can be or have been mated with LFIT femoral heads (*e.g.* Accolade II®, Rejuvenate®, ABG II®, Meridian®, Citation®, Secur-Fit®, Restoration®), there are *thousands* of potential combinations. This is particularly significant given Plaintiff's concession that "the design and geometry of each hip stem may contribute in different degrees" to the injuries alleged.[5] (Pl.'s Br. at 2.)

These differences in combinations are not merely academic: Plaintiff confusingly argues that "cases involving the failure of this device will involve common issues of inquiry as to the mechanism of failure when mated . . . with different materials" (Pl.'s Br. at 2), but these "different materials," in addition to other differences in design and geometry, are precisely the individual issues that would make this MDL unworkable. Indeed, each alleged combination would require unique, individualized expert analysis as to the alleged failure mode.

No benefit from efficiency will follow with so many individual issues predominating and so few individual cases currently identified for transfer. In those few cases, at least five different LFIT V40 heads were used.[6] And of the few cases, only an even smaller number involved use of

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[4] Multiplying the twelve possible LFIT V40 heads by thirty-four possible Accolade® TMZF® stems create these 408 possible combinations.

[5] HOC notes that there are significant differences between the Rejuvenate/ABG II cases pending in MDL No. 13-2441 and the LFIT femoral head taper lock cases at issue here. Rejuvenate and ABG II are femoral stems and the cases involve a modular neck/stem junction that does not even exist in the LFIT femoral head cases. While the LFIT cases in New Jersey state court managed by Judge Martinotti dealt directly with femoral head taper lock failures, the Rejuvenate/ABG II cases, by contrast, have nothing to do with such a claim. Therefore, any comparison of the LFIT femoral heads at issue here to Rejuvenate/ABG II cases is inapposite.

[6] Upon information and belief, Plaintiff O'Hare was implanted with a 36mm +10 head; Plaintiff Belisle was implanted with a 40mm +8 head; Plaintiff Driscoll was implanted with a 40mm +0 head; Plaintiff Layne was implanted with a 36mm +5 head; and Plaintiff Smith was implanted with a 40mm +0 head. HOC does not know the sizes or offsets of the heads implanted into the remaining plaintiffs.

an LFIT V40 head that was part of the recall.[7] At least three different femoral stems, made from two different types of metal, were used in the cases referenced and relied upon by Plaintiff O'Hare in his Motion.[8] In fact, HOC is aware of one case that could potentially be transferred under Plaintiff's proposed scope that involved use of a femoral head actually made of *ceramic* material rather than cobalt chromium.[9] Thus, Plaintiff's conclusory statement that these cases "will involve common issues of inquiry as to the mechanism of failure when mated with these different materials" (Pl.'s Br. at 2) is not only unsupported, it is incorrect. *See In re Shoulder Pain Pump Chrondrolysis Prods. Liab. Litig.*, 571 F. Supp. 2d 1367, 1368 (J.P.M.L. 2008) (denying transfer when it appears "individualized issues (including ones of liability and causation)" will overwhelm "efficiencies that might be gained by centralization").

Critically, Plaintiff also acknowledges: "**not each plaintiff suffered the exact same symptoms requiring revision surgery[,] as some suffered from metallosis due to corrosion, some suffered constant dislocation of the head from the stem, some others suffered both, while some suffered other symptoms[**.]" (Pl.'s Br. at 6). Indeed, of the cases cited by Plaintiff O'Hare and the Meshbesher & Spence Plaintiffs, at least six different types of injuries are

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[7] *Keller v. Howmedica Osteonics Corp.*, No. 2:16-cv-734 (W.D. Pa. Jun. 2, 2016); *Belisle v. Howmedica Osteonics Corp.*, No. 0:16-cv-03897 (D. Minn. Aug. 25, 2016); *D'Orlando v. Howmedica Osteonics Corp.*, No. 1:16-cv-12253 (D. Mass. Nov. 8, 2016); *Layne v. Howmedica Osteonics Corp.*, No. 1:16-cv-03350 (S.D. Ind. Dec. 13, 2016).

[8] Upon information and belief, Plaintiff O'Hare was implanted with an Accolade TMZF Stem #3.5; Plaintiff Belisle was implanted with an Accolade II 127 degree #6; and Plaintiff Howard was implanted with an Accolade TMZF 127 degree #3.5. HOC does not know the sizes, angles, or offsets of the stems implanted into the remaining plaintiffs.

[9] Plaintiff Erin Howard (referenced in the Meshbesher & Spence Motion) was implanted with a Biolox Delta ceramic head and not a cobalt chrome head like the LFIT femoral head.

alleged.[10] Furthermore, any of these six asserted injuries are known, warned-of risks that could be caused by any number of factors unassociated with the recall, or even unrelated to any issues or malfunctions with the products themselves. In addition, not all recalled products will actually exhibit the taper lock issue. *See, e.g.*, *Hughes v. Stryker Sales Corp.*, et al., Civ. No. 08-0655-WS-N, 2010 WL 1961051, at * (S.D. Ala. May 13, 2010) (recognizing recall notice related to Stryker hip implant was insufficient to demonstrate causation because hip devices can fail for "innumerable possible reasons" that are "wholly divorced from, and independent of any defect that the device may have had").

As Plaintiff's own admissions highlight, the extraordinarily fact-intensive differences between the actual devices, the combination of devices and components, the failure mechanisms, and disparate injuries alleged in these cases are simply too great for transfer and consolidation to be appropriate. *See In re: Blair Corp. Chenille Robe Prods. Liab. Litig*., 703 F. Supp. 2d 1379, 1380 (J.P.M.L. 2010) (denying transfer where "the litigation will focus to a large extent on individual issues of fact concerning the circumstances of each consumer's injuries"); *In re Reglan/Metoclopramide Prods. Liab. Litig.*, 622 F. Supp. 2d 1380, 1381 (J.P.M.L. 2009) (denying motion to transfer with respect to 11 actions in 10 federal districts notwithstanding "share[d] factual issues as to whether the drug metoclopramide causes neurological injuries"). Because common questions of fact will not predominate over the individual questions present in each action, the Panel should deny Plaintiff's Motion. *See In re: G.D. Searle & Co.*, 483 F. Supp. at 1345 (denying transfer and consolidation of cases involving a *single* medical device); *In re: Luminex Int'l, Inc*., 434 F. Supp. at 669-70 (finding transfer and consolidation inappropriate

[10] Plaintiffs' various claims include allegations of metal toxicity, tissue necrosis, trunnion failure, head/stem dissociation, dislocation, and adverse local tissue reaction, among others. Each of these alleged injuries could be caused by something other than a product defect.

where significant individual factual questions existed concerning the condition of the ocular lens used by each plaintiff); *In re: Asbestos and Asbestos Insulation Material Prods. Liab. Litig.*, 431 F. Supp. 906, 910 (J.P.M.L. 1977) (finding common need for medical literature insufficient to outweigh individual causation issues).

Simply put, the factual disputes in these cases are not sufficiently common to warrant centralization. *See, e.g.*, *In re Mirena*, 38 F. Supp. 3d at 1381 (denying consolidation of nine cases "[a]lthough the actions share factual questions" in part because "individualized causation issues [were] likely to predominate"); *In re Qualitest Birth Control Prods. Liab. Litig.*, 38 F. Supp. 3d 1388, 1389 (J.P.M.L. 2014) (denying consolidation in spite of common "factual questions arising out of the design, manufacturing, and packaging of the Qualitest birth control products").

B. If an MDL were Appropriate, It Should be Assigned to The Honorable Brian R. Martinotti in the District of New Jersey, Who has Unmatched Experience With These Claims.

The Panel considers several key factors in selecting an appropriate MDL forum, including: (i) the location of parties, witnesses, and documents; (ii) the accessibility of the transferee district for parties and witnesses; and (iii) the respective case loads and experience of the proposed transferee district courts. *See, e.g.*, *In re Serzone Prods. Liab. Litig.*, 217 F. Supp. 2d 1372, 1374 (J.P.M.L. 2002); *see also In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 469 F. Supp. 2d 1348, 1350 (J.P.M.L. 2006); *In re: Wellnx Mktg. & Sales Practices Litig.*, 505 F. Supp. 2d 1380, 1381 (J.P.M.L. 2007). While transfer is manifestly inappropriate here, even if an MDL were to be considered, all of the relevant factors point decidedly to the District of New Jersey as the most effective venue, as well as to the Honorable Brian R. Martinotti as the choice for presiding judge. New Jersey is the location of HOC's corporate headquarters and where many of these products are manufactured, and thus the home of many key documents and

witnesses. Just as importantly, Judge Martinotti in the District of New Jersey has unique and unmatched experience with matters involving LFIT femoral heads precisely like those at issue here, because he presided over lawsuits *involving these same femoral heads* while he served as a Superior Court Judge in Bergen County, New Jersey.

1. Key Evidence and Witnesses Are Located in the District of New Jersey.

First, to the extent there is a "center of gravity" for these cases, it rests decidedly in New Jersey. *See, e.g.*, *In re Nickelodeon Consumer Privacy Litig.*, 949 F. Supp. 2d 1377, 1377–78 (J.P.M.L. 2013) (concluding that the District of New Jersey was "a convenient and accessible forum," in part because it was "relatively close to potential witnesses and evidence located in New Jersey and New York City"). The LFIT femoral head is used as a component in total hip replacement systems implanted throughout the country. There is no reason to believe, and Plaintiff offers none, that the various injuries alleged would occur in one region more often than any other. Accordingly, there is no geographic focal point for potential plaintiffs and their witnesses (*e.g.*, implanting physicians, following physicians, family members, etc.). New Jersey is, however, a focal point for witnesses, documents and accessibility.

The District of New Jersey is a particularly convenient forum because HOC is domiciled in Mahwah, New Jersey, the home of its corporate headquarters and operations. Consequently, the vast majority of corporate witnesses and documents are located in New Jersey, and it is where many of the products at issue are manufactured. Thus, discovery that would be relevant to the limited common questions of fact will be centered there. For these very reasons, the Panel has repeatedly—and sensibly—transferred to the district where the defendant's corporate headquarters is located, even when there is no case pending in the transferee district (which is *not* the case here, as there are cases already pending in the District of New Jersey). *See, e.g.*, *In*

re Pfizer Inc. Sec., Derivative & ERISA Litig., 374 F. Supp. 2d 1348, 1350 (J.P.M.L. 2005) (centralizing 29 actions in the Southern District of New York where "Pfizer has its headquarters and many individual defendants reside, and therefore relevant witnesses and documents will likely be found there"). In contrast, Plaintiff's proffered venue of the District of Massachusetts (Pl.'s Br. at 11-15) has no common connection to the litigation other than the fact that three plaintiffs have chosen to file complaints there.

2. The District of New Jersey is Readily Accessible to Key Parties, Witnesses, and Counsel.

The District of New Jersey is also geographically accessible and convenient for all parties and witnesses. Eight airports—Trenton-Mercer Airport, Philadelphia International, Newark Liberty International, John F. Kennedy International, LaGuardia, Teterboro Airport, Westchester County Airport and Stuart Airport—service the courthouses of the District of New Jersey and provide daily service to and from most metropolitan areas. The various airports provide multiple accessible options for travel to and from the court location, as well as HOC's corporate headquarters for witness depositions. The Panel has recently recognized that the District of New Jersey is a convenient location, as well as an accessible and appropriate MDL forum. *See In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Prac. & Prods. Litig.*, MDL No. 2738, 2016 WL 5845997, at *2 (J.P.M.L. 2016) (noting that the District of New Jersey "is a convenient and accessible forum for [] nationwide litigation" where the defendant-manufacturer was "headquartered in New Jersey [and] relevant evidence and witnesses" were located).

3. Judge Martinotti's Unique Experience Will Promote the Just and Efficient Conduct of These Actions.

In addition to the District of New Jersey being the most appropriate venue should an MDL even be considered, Judge Martinotti is distinctly and uniquely positioned to best manage these matters. As the New Jersey Superior Court mass tort judge in Bergen County, Judge

Martinotti presided over LFIT taper lock cases for over three years.[11] In fact, in January 2016, Judge Martinotti ordered case questionnaires to be completed by the parties to help define different and unique modes of injury specific to the LFIT taper lock cases. Thus, Judge Martinotti is well familiar with the fact that the LFIT femoral heads that have experienced taper lock issues can present different failure modes, such as dissociation of the femoral head, and that these failure modes present separate and distinct issues. Accordingly, Judge Martinotti's advanced perspective on this specific taper lock issue is unparalleled and makes him exceptionally qualified to handle these cases. Moreover, Judge Martinotti currently presides over three New Jersey District Court LFIT femoral head cases, at least one of which involves a recalled LFIT femoral head.[12]

During his tenure as a New Jersey Superior Court Judge from 2002 to 2016, Judge Martinotti was one of four judges assigned to handle cases consolidated by the New Jersey Multicounty Litigation Center ("MCL"), and simultaneously managed multiple complex MCLs. Judge Martinotti also has experience overseeing federal coordinated products liability proceedings, currently presides over the In re: Invokana (Canagliflozin) Products Liability Litigation, MDL No. 2750 (D.N.J.), and MDL which has only 100 pending cases. Importantly, Judge Martinotti has also indicated his willingness to accept this coordinated proceeding in the event the Panel deems coordination necessary. Judge Martinotti's singular experience with the very products at issue here, coupled with New Jersey being the only common center of gravity in

[11] Judge Martinotti properly treated these matters as separate and distinct from Rejuvenate/ABG II cases.

[12] *Kuehl v. Howmedica Osteonics, et al.*, No. 3:17-cv-00416 (D.N.J. Jan. 23, 2017); *Sherman v. Howmedica Osteonics, et al.*, No. 3:17-cv-00417 (D.N.J. Jan. 20, 2017); *Perez v. Howmedica Osteonics, et al.,* No. 3:17-cv-00465 (D.N.J. Jan. 23, 2017). The *Sherman* case is not associated with the August 2016 recall. Of the other two cases, current information available to HOC shows that only the *Kuehl* case can be confirmed to include an LFIT femoral head subject to the recall.

these cases, easily compels the District of New Jersey as the best venue for any potential MDL.[13]

C. The Panel Should Modify the Title and Correctly Narrow the Scope of any Potential MDL.

As set forth above, multi-district consolidation is inappropriate at this juncture, but if the Panel were to opt for transfer and consolidation, the scope of such MDL should be clarified to include only cases alleging a taper lock failure of an LFIT femoral head subject to the August 2016 recall. Consequently, the title of any MDL should be changed to *In re: HOC LFIT V40 Taper Lock Litigation* to accurately reflect that scope and avoid improper filings. *See* Panel Rule 3.2(a)(i) (requiring counsel to use "an appropriate description" if the Panel has not designated a title); *see also In re Androgel Prods. Liab. Litig.*, 24 F. Supp. 3d 1378, 1380 (J.P.M.L. 2014) (centralizing certain cases and changing the MDL caption).[14]

Plaintiff proposes that this Panel consolidate and transfer any case that "(1) allege[s] exposure to the LFIT V40 Anatomic femoral head; (2) asserts injury due to failure of the product; and (3) alleges . . . negligent and/or egregious conduct by the defendants." Pl.'s Br. at 4. This proposed definition is deceptively overbroad, invites forum shopping, and will lead to a barrage of frivolous claims. It is simply unworkable, which is why it is critical that the scope of any consolidation be properly narrowed and accurately reflected in the title. Indeed, Plaintiff

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[13] Should the Panel decide to transfer, the Southern District of New York is an appropriate alternative forum because of its proximity to HOC's Mahwah, New Jersey headquarters and key evidence and witnesses. It is an accessible forum to all parties given that it is served by several major international airports (Newark Liberty International, John F. Kennedy International, and LaGuardia). *See In re Mirena IUD Prod. Liab. Litig.*, 938 F. Supp. 2d 1355, 1358 (J.P.M.L. 2013) (transferring the Mirena perforation MDL to the Southern District of New York in part because it was near Bayer's corporate headquarters and the district would be "easily accessible for th[e] nationwide litigation"). HOC is aware of one action in the Southern District of New York which could potentially qualify for consolidation here. *Gidora v. Howmedica Osteonics Corp.*, No. 7:16-cv-05774 (S.D.N.Y. Jul. 20, 2016) (Karas. J.) (Assigned to White Plains Division).

[14] In a pending request by plaintiffs to consolidate LFIT femoral head cases in New Jersey state court, the plaintiffs have requested this very same and more accurate caption title.

concedes that the common factual question underlying these cases (and differentiating these cases from other ongoing litigation) is not only whether the plaintiff was implanted with the LFIT femoral head, but rather whether there is an allegation of "failure of th[e] taper lock" between that LFIT femoral head and the femoral stem with which it was mated associated with HOC's August 2016 voluntary recall. Pl.'s Br. at 2-3; *see also O'Hare* at ¶¶ 23, 31, 37 [ECF No. 1, Ex. 9]; *Belisle* at ¶ 95 [ECF No. 1, Ex. 7]; *Smith* at ¶¶ 35, 69 [ECF No. 1, Ex. 8]; *Driscoll*, ¶¶ 34, 46 [ECF No. 1, Ex. 10]; *D'Orlando,* ¶¶ 34, 46 [ECF No. 1, Ex. 6]; and *Layne*, ¶ 40 [ECF No. 1, Ex. 5].[15]

Similarly, Plaintiff's proposed title would invite confusion because it names the incorrect party. The manufacturer of the products at issue is HOC. *See, e.g.,* Answer of Stryker Corporation, *O'Hare v. Howmedica Osteonics Corp.,* No. 1:16-cv-11510, ECF No. 6 at ¶ 6 (D. Mass. July 21, 2016) (admitting that "Howmedica Osteonics Corp[] designs, manufactures, labels, packages, markets, and sells certain implant components" including the Accolade® hip stem and the LFIT femoral head at issue). Although HOC licenses the Stryker brand name for use on certain prosthetic hip devices and pays Stryker a licensing fee, it operates as Howmedica Osteonics Corp and does not do business as Stryker Orthopaedics. *See Whitney v. TJX Companies, Inc.*, No. CIV.A. 14-40066-LTS, 2014 WL 5092289, *1, fn. 1 (D. Mass. Oct. 7, 2014) (noting that, "[a]s a rule, when a plaintiff misnames a corporate party, or names a related organization rather than the proper one, courts allow the plaintiff to amend the complaint to name the proper party unless it would result in prejudice to that party"); *Roberts v. Michaels,* 219 F.3d 775, 777–78 (8th Cir. 2000). In light of the apparent confusion regarding the proper party,

[15] Plaintiff's Complaint in *Layne* does not specifically mention a taper lock failure. However, it alleges that the Accolade® system was negligently designed to increase the risk of corrosion at the stem-head junction. *Id.* at ¶ 40.

HOC has requested that plaintiffs who name Stryker Corporation and other Stryker entities as a defendant dismiss those claims. *Compare, e.g.,* Plaintiff's Complaint, *Smith v. Howmedica Osteonics*, No. 0:16-cv-3897, ECF No. 1 (D. Minn. Nov. 14, 2016) *with* Plaintiff's Amended Complaint, *Smith v. Howmedica Osteonics*, No. 0:16-cv-3897, ECF No. 17 (D. Minn. Jan 13, 2017) (repleading to dismiss Stryker Corp., Stryker Sales Corporation and Stryker Ireland Limited as parties).

As discussed above, the LFIT femoral head is a common hip prosthesis component that can be used across numerous femoral stems manufactured by HOC. Where potential product liability MDLs involve multiple products or subsets of products, this panel has used titles that refer to the factors that distinguish involved products from those that are unaffected, such as *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, No. 2672; *In re Frito-Lay North America, Inc., "All Natural" Litigation*, No. 2413; and *In re Kind LLC "All Natural" Litigation*, No. 2645. *See* Pending MDLs By Docket Type as of January 17, 2017, available at http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_ Type-January-17-2017.pdf (last visited January 25, 2017). A similar naming convention noting "Taper Lock" is appropriate and necessary here.

IV. CONCLUSION

HOC respectfully asks the Panel to deny Plaintiff Robert O'Hare's Motion for Transfer of Actions Pursuant to 28 U.S.C. § 1407, as MDL designation is inappropriate for the reasons previously set forth. In the alternative, HOC asks this Court to transfer these actions to the District of New Jersey and to the Honorable Brian R. Martinotti, or to the Southern District of New York, for coordinated and consolidated proceedings.

Dated: February 3, 2017 Respectfully Submitted,

By: /s/ Gene M. Williams

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BEFORE THE
UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

IN RE: STRYKER ORTHOPAEDIC
LFIT V40 FEMORAL HEAD PRODUCTS
LIABILITY LITIGATION

MDL NO. 2768

SCHEDULE OF ACTIONS

	Plaintiffs	Defendants	District	Civil Action	Judge
1.	Layne, Russell and Gladys	Howmedica Osteonics Corporation d/b/a Stryker Orthopaedics	INS	1:16-cv-03350-WTL-DKL	Denise K. LaRue
2.	D'Orlando, William	Stryker Corp., Howmedica Osteonics Corp.	DMA	1:16-cv-12253-IT	Indira Talwani
3.	Belisle, Donald	Howmedica Osteonics Corporation	DMN	0:16-cv-02881-DWF-FLN	Donovan W. Frank
4.	Smith, James and Cindy F.	Howmedica Osteonics d/b/a Stryker Orthopaedics, Stryker Corp., Stryker Sales Corporation, Stryker Ireland Limited	DMN	0:16-cv-03897-DWF-FLN	Donovan W. Frank
5.	O'Hare, Robert and Janice	Howmedica Osteonics corp. d/b/a Stryker Orthopaedics, Stryker Corp. and Surgi-Care, Inc.	DMA	1:16-cv-11510-IT	Indira Talwani

6.	Driscoll, Joseph	Howmedica Osteonics Corp. d/b/a Stryker Orthopaedics and Stryker Corp.	DMA	1:17-cv-10057-IT	Indira Talwani
7.	Keller, Daniel and Carol	Howmedica Osteonics Corp.	PAW	2:16-cv-00734-MRH	Mark R. Hornak
8.	Denne, LeRoy and Deborah	Howmedica Osteonics Corp.	DMN	0:16-cv-2073-DWF	Donovan W. Frank
9.	Witt, Patton and Annie	Howmedica Osteonics Corp.	DAK	4:17-cv-00001-HRH	H. Russell Holland
10.	Forman, George W. and Virginia G.	Howmedica Osteonics Corporation	KYW	3:17-cv-00036-TBR	Thomas B. Russell
11.	Brown, Dennis and Debbie	Howmedica Osteonics Corporation d/b/a Stryker Orthopaedics, Stryker Corp., Stryker Sales Corporation, and Stryker Ireland Limited	S.D. Texas	4:17-cv-00190	Nancy F. Atlas
12.	Kuehl, Alan	Howmedica Osteonics Corp. d/b/a Stryker Orthopaedics, and Stryker	D. NJ	3:17-cv-00416	Brian R. Martinotti
13.	Perez, Liliane	Howmedica Osteonics Corp. d/b/a Stryker Orthopaedics, and Stryker	D. NJ	3:17-cv-00465	Brian R. Martinotti
14.	Sherman, Peggy	Howmedica Osteonics Corp. d/b/a Stryker Orthopaedics, and Stryker	D. NJ	3:17-cv-00417	Brian R. Martinotti
15.	Halfman, Leanne	Howmedica Osteonics Corp., d/b/a Stryker Orthopaedics	N.D. IL	1:17-cv-00587	Sara L. Ellis

16.	Gidora, Annah Marie	Howmedica Osteonics Corporation, d/b/a Stryker Orthopaedics, Stryker	S.D. NY	7:16-cv-05774	Kenneth Karas
17.	Wollam, Glenn A. and Shoenstein, Bonnie J.	Howmedica Osteonics Corp., d/b/a Stryker Orthopaedics	D. CO	1:16-cv-02105	Marcia Krieger

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Dated: February 3, 2017

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BEFORE THE
UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

IN RE: STRYKER ORTHOPAEDIC LFIT V40 FEMORAL HEAD PRODUCTS LIABILITY LITIGATION

MDL NO. 2768

PROOF OF SERVICE

I CERTIFY that a copy of Defendant's Memorandum of Law in Opposition to Plaintiff Robert O'Hare's Motion for Transfer of Actions Pursuant to 28 U.S.C. § 1407 and Proof of Service were electronically filed through the CM/ECF system, which will send notice of electronic filing to:

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