BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

In re Ethicon Physiomesh Flexible Composite Hernia Mesh Products Liability Litigation — MDL-2782

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR TRANSFER TO THE MIDDLE DISTRICT OF FLORIDA, OR IN THE ALTERNATIVE TO THE SOUTHERN DISTRICT OF ILLINOIS, PURSUANT TO 28 U.S.C. § 1407

COME NOW the Plaintiffs in the pending constituent civil actions listed in the attached Schedule of Actions represented by undersigned counsel, and file their Reply Brief in Support of their Motion to Transfer to the Middle District of Florida, or in the alternative, to the Southern District of Illinois, pursuant to 28 U.S.C. § 1407, and show as follows:

ARGUMENT

I. Defendants' contention that "Individualized factual inquiries are expected to predominate" disregards the requisite inquiry for MDL coordination under 28 U.S.C. § 1407.

Defendants urge that MDL coordination is not appropriate because they claim individual cases will involve unique fact questions related to specific causation.[1] Defendants disregard the fact that between 2001 and late 2016, the Panel has transferred eleven (11) different MDLs for surgical mesh implants involving various manufacturers and affiliated defendants, several of which involved multiple products sold for treatment of different medical conditions.[2] In granting

[1] While alleging that there are "many different accepted potential causes," Defendants point only to surgical technique and several medical conditions, which they call "risk factors," that they allege could independently cause these Plaintiffs' injuries (even though not one of these claimed "risk factors" are listed as contraindications in the Physiomesh Instructions for Use). (Dkt. No. 30, p. 6). Blaming a plaintiff's injuries on his or her treating physician, if not on the plaintiff, is a well-worn defense tactic in medical device cases. While these issues are certainly case-specific, Plaintiffs respectfully submit that these issues are defense-created.

[2] MDL No. 1387 (2001); MDL No. 1842 (2007); MDL No. 2004 (2008); MDL No. 2187 (2010); MDLs Nos. 2325, 2326, 2327 (2012); MDL 2387 (2012); MDL 2440 (2013); MDL 2511 (2014); MDL 2753 (2016). MDL 2004 and MDL 2327 involved other surgical mesh devices sold by Johnson & Johnson subsidiaries Mentor Worldwide, LLC and Ethicon, Inc., respectively.

each such MDL, the Panel has consistently found that MDL transfer would promote efficiency, economy and convenience in light of similar claims relating to the same or related products. The overwhelming factual commonality of these constituent cases, each of which asserts similar claims against the same defendants involving the same surgical mesh device, is not overborne by any asserted differences between the individual plaintiffs.

The Panel has recognized that some case-specific fact issues will be present in any group of related medical device product liability actions, but has found "the unique facts presented by individual plaintiffs to be less significant than the fact that these actions share core issues of fact concerning the design, manufacture, testing, and marketing" of the common product or products. *In re Cook Medical, Inc. Pelvic Repair Sys. Prods. Liab. Litig.*, 949 F.Supp.2d 1373, 1375 (J.P.M.L. 2013). In fact, the Panel rejected a similar "individual issue predominance" argument asserted by these same Defendants in another medical device product liability MDL. *In re Power Morcellator Prods. Liab. Litig.*, 140 F.Supp.3d 1351, 1353 (J.P.M.L.2015) ("In opposing centralization, Ethicon argues that unique factual questions regarding plaintiffs will overshadow any common questions of fact. We disagree.").[3]

These cases allege similar design defect and inadequate warning claims against the same related corporate defendants involving a single medical device. The facts necessary to develop and prove liability will necessarily be similar, if not the same, in every constituent case. The same corporate documents to be produced in discovery by Defendants will be utilized by all

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[3] The Panel in *In re Power Morcellators*, *supra* at 1353, further noted that "[t]hese actions involve common factual questions surrounding the design, testing, manufacture, and marketing of Ethicon's power morcellators, including the warnings accompanying those devices and whether they should have included a bag to contain tissue. Most actions also involve common factual questions regarding the risk that women undergoing hysterectomies and myomectomies had occult cancer, and what Ethicon knew about that risk and when. Discovery, including expert discovery, will overlap with respect to these common issues."

Plaintiffs. The same corporate witness testimony will likewise be taken and used by all Plaintiffs.[4] Common experts will likely be utilized in these cases, both by Plaintiffs and Defendants. The anticipated voluminous pre-trial motions practice in these cases – including discovery, *Daubert*, evidentiary, and dispositive motions – will largely be the same across all cases. Defendants' defense theories, which are previewed in their Response (blame the doctor and/or the patient), will not differ significantly from case-to-case.[5] In short, to require each individual Plaintiff to conduct the same discovery to obtain the same evidence and to address the same pre-trial motions and issues before different judges in different courts would be the very sort of wasteful redundancy and duplication of effort and unnecessary expense – with potentially inconsistent results – that the MDL process was created to avoid. Defendants' argument that plaintiff-specific issues predominate should be rejected here.

II. Defendants' proposal of the District of New Jersey, which has but one recently-filed case with no direct factual relationship with New Jersey, and where none of the specific Judges proposed by Defendants has a single constituent case, should be rejected.

Much of Defendants' Response is devoted to disparaging the MDL process generally, and questioning the motives underlying Plaintiffs' proposed MDL transferee venue choices. Without engaging in an academic debate, Plaintiffs point out that Defendants argue that this MDL should be transferred to their home District even though the District of New Jersey has but

[4] As in several prior surgical mesh MDLs that the Panel has found appropriate for MDL pre-trial coordination, factual issues relating to Defendants' testing, design and development of the common Physiomesh device and its accompanying Instructions for Use and Defendants' marketing (including market withdrawal) of this product – are common to all constituent cases.

[5] While the facts to be addressed by such defense theories will differ from case-to-case, Plaintiffs will generally need to discover and address what and when Defendants knew about how an individual patient's medical condition may affect his or her reaction to the Physiomesh device, and whether the Physiomesh IFU adequately warned doctors about use of the device in certain patient populations in light of such knowledge. Likewise, anticipating Defendants' "blame the doctor" defense, Plaintiffs will need to discover the adequacy of Defendants' training generally. These are matters that affect all cases generally.

one recently-filed case with no direct factual relation to New Jersey, and even though none of the three District Court Judges proposed in Defendants' Response has a single constituent case. Defendants' "forum-shopping" arguments are, at best, disingenuous.

Transfer of these cases to New Jersey would not be appropriate. The sole constituent action filed in the District Court of New Jersey (*Ramey*) was filed on March 10, 2017 – after this MDL Motion to Transfer was filed. The *Ramey* case involves a Virginia resident implanted by a Virginia physician in a Virginia medical facility – the case has no direct factual relationship with New Jersey. The Hon. Freda L. Wolfson, to whom the *Ramey* case was assigned, currently presides over another large product liability MDL involving Johnson & Johnson's talcum powder products, which was transferred in October 2016.

Defendants' contention that "many of the relevant documents and witnesses are located" in New Jersey is misplaced here. While the Defendants' principal place of business is in New Jersey, the Defendants operate and have facilities and personnel throughout the United States, including the sales representatives who sold the Physiomesh products implanted in these Plaintiffs and interacted with these Plaintiffs' physicians. The design and development of the Physiomesh device occurred largely in Ethicon's German facilities, and was led by Ethicon's German Research & Development personnel. (*See*, Dkt. No. 30, p. 8 (acknowledging that Physiomesh design and development decisions occurred "in New Jersey and Europe.") and p. 10 (noting that "some witnesses may be located in Europe.")). Defendants' documents – wherever they originated – are stored electronically, and will be collected and produced electronically. Corporate and fact witnesses will be deposed where the deponent is located, or where the parties' counsel agree, irrespective of where the requested MDL may be venued.[6] As observed in a well-

[6] These witnesses would be inconvenienced if an MDL were denied, and they were then subject to multiple depositions by different counsel from throughout the country.

known MDL practice manual, "[t]he location of evidence, and particularly witnesses, has probably become less important as the Panel realizes that discovery can effectively be conducted anywhere in the country regardless of the venue of the action…. Because cases are to be tried where filed [in light of *Lexecon*], if trial is needed, location of evidence has less bearing on the forum-selection issue for pretrial matters." David F. Herr, *Multidistrict Litigation Manual*, § 6:5 (2016).

While New Jersey may be considered strategically advantageous by Defendants, it is not convenient for these Plaintiffs, their witnesses, or for counsel involved in these cases. As noted in the Motion to Transfer, and as reflected in the map contained in Defendants' Response, the constituent cases are predominantly in the Southeast, and to a lesser extent, the Midwest.[7] Defendants are represented by attorneys from the Ridgeland, Mississippi offices of the Butler Snow law firm. New Jersey, the location for one recently-filed case which does not involve a New Jersey resident Plaintiff, is not an appropriate venue for this MDL.

III. Transfer to the Eastern District of Kentucky would be improper; that District has only one recently-filed case pending in an inconvenient and relatively inaccessible court, and the presiding District Judge in that case has been nominated to the Court of Appeals.

The Eastern District of Kentucky is not an appropriate venue. Only one recently-filed constituent action (*Carillo*) is pending in that District, and the Judge assigned in that case (the Hon. Amul R. Thapar) has been nominated to the Sixth Circuit. The *Carillo* case is also filed in

[7] While Defendants presumably have the demographic information that would shed light on where Physiomesh products were sold, it is reasonable to assume that the concentration of cases in the Southeastern U.S. is reflective of Defendants' sales in that region, which in turn are likely correlated to the demographics of the region (population, age, lifestyle, average BMI).

the Pikeville Division, which is not an accessible or convenient location for this MDL.[8]

IV. The Northern District of Georgia, where the first-filed case is pending, is convenient and accessible, and it appears both parties agree that the Hon. Richard Story would be well-suited to handle any MDL that may be granted with respect to these cases.

As Defendants point out in their Response, and unbeknownst to the undersigned at the time the Motion to Transfer was filed, the Northern District of Georgia has the first-filed Physiomesh case in the country (*Lucas*). However, all three cases filed in the Northern District of Georgia are pending in the Rome Division, which Defendants acknowledge is not convenient or readily accessible. (Dkt. No. 30, p. 13 n. 4). The Rome Division District Judge assigned to these three cases, the Hon. Harold L. Murphy, is Senior status. Thus, it appears the parties are in agreement that the Rome Division would not be an appropriate venue for any MDL.

Although no constituent case is pending there, the Defendants contend that the Atlanta Division of the Northern District of Georgia would be an appropriate transferee venue. If the Panel were inclined to consider the Atlanta Division, which Plaintiffs acknowledge would be convenient and accessible, Plaintiffs respectfully submit that the cases should not be assigned to the Hon. Timothy Batten, as Defendants propose.[9] For seven years, Judge Batten has presided over a complex antitrust MDL (MDL 2089), which involves a certified class of as many as 25 million Delta and Airtran passengers. While Defendants contend this MDL "appears to be concluding," presumably based on a recent summary judgment order entered there, that order

[8] The closest major airport, Yeager Airport in Charleston, West Virginia, has limited daily direct flights and is 114 miles from Pikeville, Kentucky.

[9] Defendants have multiple facilities and employees in the State of Georgia, including but not limited to their polypropylene processing facilities. The polypropylene material used in Ethicon's sutures and surgical mesh devices (including Physiomesh) is processed in Ethicon's Cornelia, Georgia facility, which is located in the Northern District of Georgia.

was just appealed to the Eleventh Circuit.[10] Even if MDL 2089 were concluded, however, Plaintiffs submit that it would be more appropriate for any MDL in these matters to be handled by one of the several other judges in the Northern District of Georgia who have not previously been assigned an MDL. While MDL experience has been a persuasive factor in selecting an MDL court, providing more qualified and capable jurists the opportunity to gain valuable MDL experience is likewise beneficial. *See, e.g.*, Transfer Order entered in *In re Atrium Medical Corp. C-Qur Mesh Prods. Liab. Litig.*, MDL 2753 (J.P.M.L.2016) ("[W]e are selecting a jurist with the willingness and ability to handle this litigation, but who has not yet had the opportunity to preside over an MDL.").

There are several Judges in the Northern District of Georgia who are well-qualified and capable of handling an MDL in these matters, who could effectively and efficiently handle any MDL. Defendants note in their Response that the Hon. Richard W. Story of the Northern District of Georgia "is also a very experienced jurist." (Dkt. No. 30, p. 13, n. 5). Plaintiffs agree that Judge Story is well-qualified to receive this MDL. Appointed to the Northern District of Georgia bench in 1998, Judge Story has extensive experience presiding over complex actions, including product liability actions, but he has not yet handled an MDL.[11] Plaintiffs also submit that any of the other Northern District of Georgia Judges not currently handling an MDL, and

[10] The appeal has not been briefed, and it could be several months before this complicated appeal is concluded. In light of the appeal in this complex, seven-year anti-trust class action, it would be presumptuous to assume that this MDL is approaching conclusion. It would likewise be unreasonable to assume that any District Court judge would be able to effectively preside over a 25 million-member class action, while simultaneously handling this national product liability MDL.

[11] By way of example only: *Purdiman v. Organan Pharmaceuticals USA, Inc.*, 2008 WL 686996 (N.D.Ga.2008) (J. Story; pharmaceutical product liability); *Denton v. DaimlerChrysler Corp.*, 645 F.Supp.2d 1215 (N.D.Ga.2009) (J. Story; automotive product liability); *Roberts v. Tractor Supply Co.*, 2015 WL 1862 (N.D.Ga. 2015) (J. Story; deer stand product liability); *Travelers Prop. Cas. Co. of Amer. v. Anda, Inc.*, 658 Fed.App'x 955 (11th Cir.2016) (J. Story, by designation) (pharmaceutical product liability insurance coverage dispute).

who have yet to have an opportunity to preside over an MDL,[12] would also be well-suited to handle this MDL.

V. Defendants' opposition to the Middle District of Florida is self-contradictory; the Middle District of Florida has by far the most filed cases, is undeniably accessible, and the Hon. Paul G. Byron is well-qualified and is currently handling multiple constituent actions, and the Hon. James D. Whittemore is likewise qualified and has prior MDL experience.

In opposing the Middle District of Florida, Defendants urge that Plaintiffs are trying to manipulate the system in their favor, and that the Middle District of Florida judges proposed by Plaintiffs lack sufficient experience with these cases to support transfer of these cases to them.[13]

First, any suggestion that these Plaintiffs have somehow conspired or colluded to bringing cases in a favorable jurisdiction is meritless. It is simply a fact that more cases are filed in the Middle District of Florida at present than anywhere in the country. That is not by design or intention – that is where the Plaintiffs in those cases reside and where they received medical treatment. Again, Defendants have this information, but it is reasonable to assume that the number of cases is a product of sales, which in turn is reflective of the population and demographics of the state. The Middle District of Florida, and more specifically the judges

[12] In addition to Judge Story, the following Northern District of Georgia judges have not yet had opportunity to preside over an MDL: Hon. Mark H. Cohen; Hon. Steve C. Jones; Hon. Leigh Martin May; Hon. Eleanor L. Ross; and Hon. Amy Totenberg. While Judge Cohen is certainly qualified, his former law firm, Troutman Sanders, is counsel for Defendants in the Northern District of Georgia constituent cases, and thus Plaintiffs respectfully submit that it would not be appropriate for Judge Cohen to receive this MDL. None of these judges are burdened with significant numbers of cases pending more than three years (Story – 5; Totenberg – 0; Jones – 0; May – 1; Ross – 2), or motions pending more than six months (Story – 1; Totenberg – 0; Jones – 0; May – 0; Ross – 0) (*See* http://www.uscourts.gov/sites/default/data_tables/cjrna.na.0331.2016.pdf).

[13] Defendants also point to the fact that Judge Byron has not previously handled an MDL. As discussed above, it is counterintuitive to urge elimination from consideration of any judge who, regardless of how well-qualified, has not yet had an MDL. There is no way for judges to gain MDL experience if they never receive an MDL solely because they lack MDL experience in the first instance. Not only would the judge selected to handle this MDL benefit from such experience, but the Federal judiciary generally would benefit from having another qualified and capable judge experienced with handling an MDL.

presiding over the constituent actions filed there, are not predisposed to one side of this litigation or the other – and Defendants certainly do not suggest otherwise. The argument that merely because Plaintiffs propose transfer to a given Court, there must be some ulterior motive is little more than lawyer paranoia. There is nothing contrived or unfair about Plaintiffs' proposal; Plaintiffs simply want these cases coordinated before a District Court that is convenient and accessible to the parties, their witnesses and their counsel, and that will achieve the goals of efficiency and economy embodied in 28 U.S.C. § 1407.

Second, the suggestion that none of the Middle District of Florida judges handling constituent actions have the requisite case-specific experience to warrant MDL transfer is self-contradictory. While Defendants oppose the Middle District of Florida, which has 8 of the 37 filed cases (21.6%), they propose transfer to courts with only one filed case each (District of New Jersey and District of Kentucky). Likewise, Defendants allege a lack of substantive familiarity with these cases on the part of the Middle District of Florida judges handling constituent actions, while simultaneously urging this Court to transfer these cases to five judges in three different District Courts who between them do not have a single filed case. Defendants' circular argument is self-defeating. While Defendants are openly suspicious of Plaintiffs' motives, it appears instead that Defendants are urging a particular court merely to gain some perceived litigation advantage.

The decided Southeastern "center of gravity" warrants transfer of these cases to the Middle District of Florida in the interests of efficiency and judicial economy, and for the convenience of the parties, their witnesses and their counsel. The Middle District of Florida has by far the largest number of filed cases of any District Court, and Defendants do not dispute the facts set forth in Plaintiffs' motion demonstrating that the Middle District of Florida is readily

accessible and has favorable docket conditions.[14] Judge Byron, who is now presiding over two of the eight Middle District of Florida cases (*Quinn* and *Miller*), would be well-suited to handle this MDL, as would Judge Whittemore, who has a constituent action (*Gilman*) and has previous MDL experience, having successfully handled MDL 1656 (*In re CP Ships Ltd. Secs. Litig.*) and MDL 2173 (*In re Photochromic Lens Antitrust Litig.*).[15] Neither Judge Byron nor Judge Whittemore has any cases pending more than three years, or any motions pending longer than six months. (*See* http://www.uscourts.gov/sites/default/data_tables/cjrna.na.0331.2016.pdf).

VI. The Southern District of Illinois presently has two filed cases, including the second filed case in the country, and Defendants' opposition to Plaintiffs' suggestion of Judge Herndon is misguided.

Defendants oppose the Plaintiffs' proposal of the Hon. David Herndon by complaining Plaintiffs only tout his MDL experience. Judge Herndon's *bona fides* as an innovative MDL jurist are beyond serious debate. Moreover, unlike any of the five judges proposed by these Defendants, Judge Herndon is presently presiding over a pending constituent action (*Worrell*).

The Southern District of Illinois is an appropriate MDL venue. The District is centrally located, and is accessible via the St. Louis Lambert International Airport, which has many daily direct flights. There are two cases filed in the Southern District of Illinois; only the Northern District of Georgia (3) and the Middle District of Florida (8) have more. The earliest filed case in the Southern District of Illinois (*Huff*) was the second filed case in the country.[16]

Although Judge Herndon would be the logical choice for transferee judge in light of his

[14] Defendants acknowledge in their Response that the situs of the majority of filed cases, accessibility of the court, and relative caseloads are among the factors considered in choosing an MDL transferee court. (Dkt. No. 30, p. 8).

[15] As Defendants Response notes, the Hon. Susan Bucklew is Senior Status.

[16] *Huff* is assigned to Senior Judge J. Phil Gilbert.

vast MDL experience and the fact he has a pending constituent action, the Hon. Chief Judge Michael J. Reagan and the Hon. Staci M. Yandle of the Southern District of Illinois would also be appropriate choices to handle any MDL.[17]

CONCLUSION

As demonstrated above, an MDL is warranted in light of the overwhelming factual commonality of these cases. Defendants' challenges to the Middle District of Florida, or alternatively, the Southern District of Illinois, are ill-founded. Refuting Defendants' suggestion of gamesmanship, Plaintiffs would not oppose transfer to the Northern District of Georgia, which Defendants propose. While both parties concede that the Rome Division would not be convenient or accessible, Plaintiffs would support transfer of these cases to the Hon. Richard Story, who Defendants agree is experienced and qualified, or else to one of the other Northern District of Georgia judges who have not yet presided over an MDL.

Dated this 20th day of April, 2017.

Respectfully submitted,

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[17] The Hon. Nancy J. Rosenstengel recused from the *Worrell* case, and it appears she may have a conflict.

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BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

In re Ethicon Physiomesh Flexible Composite Hernia Mesh Products Liability Litigation

MDL No. 2782

PROOF OF SERVICE

In compliance with Rule 4.1(a) of the Rules of Procedure for the United States Judicial Panel on Multidistrict Litigation, I hereby certify that the Reply Brief in Support of Plaintiffs' Motion for Transfer to the Middle District of Florida, or in the alternative, to the Southern District of Illinois, pursuant to 28 U.S.C. § 1407 and this Proof of Service were electronically filed with the Clerk of the JPML by using the CM/ECF and was served on all counsel or parties in manners indicated and addressed as follows:

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