BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: ALLERGAN BIOCELL TEXTURED BREAST IMPLANT LITIGATION	MDL No. ____

MEMORANDUM IN SUPPORT OF PLAINTIFFS A.B., C.D., AND DANA ZETTLEMOYER'S MOTION TO TRANSFER AND CENTRALIZE RELATED ACTIONS FOR CONSOLIDATED OR COORDINATED PRETRIAL PROCEEDINGS

Plaintiffs A.B., C.D., and Dana Zettlemoyer ("Movants")[1] respectfully submit this memorandum of law in support of their Motion to Transfer and Centralize Related Actions for Consolidated or Coordinated Pretrial Proceedings. To date, five related cases concerning Allergan's BIOCELL products have been filed in five districts.

Transfer and centralization of the related actions to a court with the inclination and resources to oversee and promptly advance the litigation will promote "the just and efficient conduct" of the actions—an exigent consideration given that this matter involves thousands of other women with Allergan implants, including hundreds (if not thousands) of women who have already exhibited symptoms commonly associated with breast implant-associated anaplastic large cell lymphoma ("BIA-ALCL").

[1] Plaintiffs A.B. and C.D. are the plaintiffs in the *A.B. v. Allergan, Inc.*, Case No. 8:19-cv-01651-ODW-KESx (C.D. Cal.) action while Plaintiff Dana Zettlemoyer is the plaintiff in the *Zettlemoyer v. Allergan, Inc.*, Case No. 3:19-cv-00866 (M.D. Tenn.) action.

FACTUAL AND PROCEDURAL BACKGROUND

On July 24, 2019, Allergan announced a worldwide recall of its BIOCELL line of textured breast implants and tissue expanders.[2] The Food and Drug Administration requested the recall after receiving 573 reports of BIA-ALCL worldwide in women with textured breast implants, including 33 deaths. Of the 573 known cases of BIA-ALCL, about 84% of them were attributed to Allergan's products, including 12 of the 13 deaths for which the implant manufacturer was known. The FDA reported that the risk of developing BIA-ALCL was six times higher with Allergan's BIOCELL products than textured implants from other manufacturers.

BIA-ALCL can be fatal if not diagnosed and treated early on. Allergan, however, has refused to pay for the costs of removing the recalled implants or any of the medical expenses stemming from the recall and the use of its BIOCELL products, including surgery costs.

At least five civil class action complaints (the "Related Actions") have been filed regarding Allergan's BIOCELL products to date:

- One in the Central District of California (*A.B. v. Allergan, Inc.*, Case No. 8:19-cv-01651-ODW-KESx);
- One in the District of New Jersey (*Jane Doe 1 v. Allergan, Inc.*, Case No. 2:19-cv-16784-SDW-LDW);
- One in the Central District of Illinois (*Tauben v. Allergan, Inc.*, Case No. 2:19-cv-02257-CSB-EIL);

[2] *See* https://www.allergan.com/news/news/thomson-reuters/allergan-voluntarily-recalls-biocell-textured-brea (last visited Oct. 3, 2019).

- One in the Middle District of Tennessee (*Zettlemoyer v. Allergan, Inc.*, Case No. 3:19-cv-00866); and
- One in the Southern District of New York (*Jane Doe 1 v. Allergan, Inc.*, Case No. 7:19-cv-09151-VB)

Each of the Related Actions (*see* Schedule of Related Actions submitted herewith) alleges that Allergan knew of the causal connection between its BIOCELL products and BIA-ALCL but did not warn the FDA, patients, or medical professionals. The plaintiffs all seek damages to cover the cost of removing the textured breast implants, and medical monitoring services to cover expenses associated with determining whether they have (or are at risk of developing BIA-ALCL). The Related Actions are also in a similar procedural posture in that they are all in the very earliest stages of litigation as no dispositive motions have been filed and discovery has yet to commence.

ARGUMENT

I. CENTRALIZATION OF THE RELATED ACTIONS IS WARRANTED UNDER 28 U.S.C. § 1407

Under 28 U.S.C. § 1407, "[w]hen civil actions involving one or more common questions of fact are pending in different districts," this Panel may transfer such actions "to any district for coordinated or consolidated pretrial proceedings," if transfer would serve "the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a). Because these requirements are met here, the Panel should transfer the Related Actions to a single district for coordinated or consolidated pretrial proceedings.

A. The Related Actions Involve Common Questions of Fact

For purposes of § 1407, common questions of fact exist where multiple actions assert

similar "core factual allegations" and "can be expected to focus on a significant number of common events, defendants, and/or witnesses." *In re Unumprovident Corp. Sec., Derivative & "ERISA" Litig.*, 280 F. Supp. 2d 1377, 1379 (J.P.M.L. 2003).

The Panel routinely finds that cases concerning medical devices involve common questions of fact. *See, e.g., In re Silicone Gel Breast Implants Prod. Liab. Litig.*, 793 F. Supp. 1098, 1100 (J.P.M.L. 1992) ("The actions present complex common questions of fact, as nearly all responding parties have acknowledged, on the issue of liability for allegedly defective silicone gel breast implants."); *In re Johnson & Johnson Talcum Powder Prod. Mktg., Sales Practices & Prod. Liab. Litig.*, 220 F. Supp. 3d 1356, 1357 (J.P.M.L. 2016) ("All the actions involve factual questions relating to the risk of cancer[.]"); *In re Cook Med., Inc., Pelvic Repair Sys. Prod. Liab. Litig.*, 949 F. Supp. 2d 1373, 1374 (J.P.M.L. 2013) ("The subject actions share factual issues arising from allegations that defects in surgical products manufactured by Cook to treat pelvic organ prolapse and stress urinary incontinence cause injuries to women who are implanted with the products."); *In re Power Morcellator Prod. Liab. Litig.*, 140 F. Supp. 3d 1351, 1353 (J.P.M.L. 2015) ("These actions all involve common factual questions arising from allegations that (1) defects in the design of Ethicon's power morcellators made laparoscopic hysterectomy or myomectomy procedures more likely to result in the dissemination and upstaging of occult cancer or other conditions, and (2) Ethicon failed to warn patients adequately of these risks . . . ."); *In re: Wright Med. Tech., Inc., Conserve Hip Implant Prod. Liab. Litig.*, 844 F. Supp. 2d 1371, 1372 (J.P.M.L. 2012) ("The actions share factual questions concerning design, manufacture, marketing and performance of Wright's Conserve line of hip implant products.").

There is no reason to diverge from the Panel's past medical device precedent here. The

Related Actions all concern whether Allergan's BIOCELL products significantly increase the risk of developing BIA-ALCL. *See In re: Roundup Prod. Liab. Litig.*, 214 F. Supp. 3d 1346, 1347 (J.P.M.L. 2016) ("[A]ll the actions entail an overarching query—whether glyphosate causes non-Hodgkin's lymphoma in persons exposed to it while using Roundup."). They also all involve common questions surrounding Allergan's knowledge and the design, testing, manufacture, and marketing of its BIOCELL products, "including the warnings accompanying those devices. . . ." *In re Power Morcellator Prod. Liab. Litig.*, 140 F. Supp. 3d at 1353 ("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.").

Centralization is therefore appropriate under § 1407.

B. Centralization Would Serve the Convenience of Parties and Witnesses and Promote the Just and Efficient Conduct of The Related Actions

Because the Related Actions' factual allegations and legal claims largely overlap, transfer would serve "the convenience of parties and witnesses and . . . promote the just and efficient conduct" of the Related Actions. 28 U.S.C. § 1407(a).

Time is of the essence in these cases. BIA-ALCL is a disease that can be fatal if not treated early and several Movants have already exhibited symptoms commonly associated with BIA-ALCL. The recalled BIOCELL products have been on sale in the United States for more than a decade. There are thousands of women who similarly face significantly greater risks of developing BIA-ALCL. While Allergan has instituted a recall, it has not agreed to pay for the removal of BIOCELL implants and associated medical expenses, including costly surgical fees, or to cover the expenses associated with ongoing medical monitoring. An expeditious resolution

is therefore critical, and streamlining discovery, motion practice, and class certification will ensure that these cases do not face unnecessary delays. Moreover, given the likelihood that additional cases will be filed, centralization under section 1407 now would be the most efficient means of proceeding. *See, e.g., In re: Edward H. Okun I.R.S. |1031 Tax Deferred Exch. Litig.*, 609 F. Supp. 2d 1380, 1381 (J.P.M.L. 2009) ("[D]enial of either of Wachovia's transfer motions could engender delay, as the Panel may be asked to revisit the question of Section 1407 centralization. Centralizing these actions now under Section 1407 should streamline resolution of this litigation to the overall benefit of the parties and the judiciary."); *In re: AndroGel Prod. Liab. Litig.*, 24 F. Supp. 3d 1378, 1379 (J.P.M.L. 2014) (rejecting alternatives to centralization because they "would delay the resolution of the common core issues in this litigation").

Centralization would also serve the convenience of the parties and witnesses. To show that Allergan knew of the risks of BIA-ALCL associated with its BIOCELL products, the plaintiffs in the Related Actions will pursue substantially similar testimony, documents, and other evidence from Allergan and third parties. Therefore, transfer and consolidation of the Related Actions will have "the salutary effect of placing all actions in this docket before a single judge who can formulate a pretrial program that 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." *In re Cook Med., Inc., Pelvic Repair Sys. Prod. Liab. Litig.*, 949 F. Supp. 2d at 1375.

Moreover, because the Related Actions have many common questions of fact and law, they will also have many overlapping pretrial issues, including the type and scope of discovery and the adequacy of the claims and allegations. And because each Related Action is a class action, centralization would eliminate the possibility of inconsistent rulings on class certification.

See, e.g., In re: Zimmer Durom Hip Cup Prod. Liab. Litig., 717 F. Supp. 2d 1376, 1377 (J.P.M.L. 2010) ("Centralization under Section 1407 will eliminate duplicative discovery, prevent inconsistent pretrial rulings on discovery and other issues, and conserve the resources of the parties, their counsel and the judiciary."); *In re: Actos Prod. Liab. Litig.*, 840 F. Supp. 2d 1356 (J.P.M.L. 2011) (similar); *In re: AndroGel Prod. Liab. Litig.*, 24 F. Supp. 3d at 1379 (similar).

For these reasons, this Panel has frequently centralized actions involving medical devices, and it should do so here, in the interests of justice and efficiency. *See, e.g., In re Stryker Rejuvenate, ABG II Hip Implant Prod. Liab. Litig.*, 949 F. Supp. 2d 1378, 1380 (J.P.M.L. 2013); *In re: Cook Med., Inc., IVC Filters Mktg., Sales Practices & Prod. Liab. Litig.*, 53 F. Supp. 3d 1379, 1381 (J.P.M.L. 2014); *In re: Biomet M2a Magnum Hip Implant Prod. Liab. Litig.*, 896 F. Supp. 2d 1339, 1340 (J.P.M.L. 2012); *In re Smith & Nephew BHR & R3 Hip Implant Prod. Liab. Litig.*, 249 F. Supp. 3d 1348, 1351 (J.P.M.L. 2017); *In re: Zimmer Nexgen Knee Implant Prod. Liab. Litig.*, 802 F. Supp. 2d 1374, 1377 (J.P.M.L. 2011).

II. MOVANTS SEEK CENTRALIZATION IN A COURT THAT IS POSITIONED TO PROMPTLY ADVANCE THIS LITIGATION

In determining the appropriate transferee district, the Panel considers a variety of factors, including: (1) whether the district "offers a forum that is both convenient and accessible for the parties and witnesses"; (2) the location of "relevant witnesses and evidence"; (3) the positions of the parties; and (4) the experience of the transferee judge and district in navigating "the nuances of complex and multidistrict litigation." *In re: Aggrenox Antitrust Litig.*, 11 F. Supp. 3d 1342, 1343 (J.P.M.L. 2014). This Panel has also recognized the importance of transferring actions to a "court that has the resources available to manage this litigation"—a particularly acute

consideration here given the exigency of these matters. *In re ClassicStar Mare Lease Litig.*, 528 F. Supp. 2d 1345, 1347 (J.P.M.L. 2007).

Tens of thousands of women across the country have been affected by the products in question. The Related Actions are geographically dispersed, and the practical reality is that electronic discovery is equally accessible in any forum. Any of the districts in which matters are currently pending (or some other district) may thus be appropriate for centralization. *In re Onglyza (Saxagliptin) & Kombiglyze XR (Saxagliptin & Metformin) Prod. Liab. Litig.*, 289 F. Supp. 3d 1357, 1359 (J.P.M.L. 2018) ("Given that the drugs at issue here were marketed nationwide, and no action or group of actions is significantly advanced, any number of potential transferee districts would be appropriate.").

Movants suggest that the Middle District of Tennessee is well-suited for these cases, as the district does not currently have any pending MDLs or judicial vacancies.[3] *See In re Pressure Sensitive Labelstock Antitrust Litig.*, 290 F. Supp. 2d 1374, 1376 (J.P.M.L. 2003) (where there were several appropriate transferee districts, choosing the district that did not currently have any MDLs and had generally favorable docket conditions). The Middle District's "general docket conditions permit [the Panel] to make the Section 1407 assignment knowing that the court has the resources available to manage this litigation." *In re ClassicStar*, 528 F. Supp. 2d at 1347; *see also In re 3M Combat Arms Earplug Prod. Liab. Litig.*, 366 F. Supp. 3d 1368, 1369 (J.P.M.L. 2019) ("Centralization in this district allows the Panel to assign this nationwide litigation to a

[3] *See* Judicial Panel on Multidistrict Litigation, *MDL Statistics Report—Distribution of Pending MDL Dockets by District* (Sept. 16, 2019), *available at* https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_by_District-September-16-2019.pdf (last visited Sept. 30, 2019).

forum with the necessary judicial resources and expertise to manage this litigation efficiently and in a manner convenient for the parties and witnesses.").

Nashville is also geographically central and accessible. *In re: DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig.*, 787 F. Supp. 2d 1358, 1360 (J.P.M.L. 2011) (choosing district that was "geographically central and accessible" when medical device at issue was sold nationwide); *In re Wireless Tel. 911 Calls Litig.*, 259 F. Supp. 2d 1372, 1374 (J.P.M.L. 2003) (similar). The Honorable William L. Campbell, Jr. is a capable jurist "who has not yet had the opportunity to preside over an MDL." *In re Fisher-Price Rock 'N Play Sleeper Mktg., Sales Practices, & Prod. Liab. Litig.*, No. MDL 2903, 2019 WL 4010712, at *2 (J.P.M.L. 2019); *In re Stryker Orthopaedics LFIT V40 Femoral Head Prod. Liab. Litig.*, 249 F. Supp. 3d 1353, 1356 (J.P.M.L. 2017) (same).

The Central District of California may also be an appropriate transferee forum. Many of the BIOCELL products at issue were originally developed in Santa Barbara County, California (which is within the jurisdiction of the Central District), and Allergan's medical aesthetics division responsible for its breast implant products and the BIOCELL product recall is based in the district. Judge Wright is an experienced judge who has similarly not had the opportunity to preside over an MDL.

Movants' primary objective is to ensure the prompt centralization of these cases before a court that has the time and inclination to address this matter on an expedited basis. The Panel may conclude that transferring these actions to one of the districts in which a case is pending, or some other district altogether, will best ensure a prompt and efficient resolution of this important women's health matter.

CONCLUSION

For the foregoing reasons, Movants respectfully request that the Panel transfer and promptly centralize the Related Actions to the Middle District of Tennessee, or any other district the Panel may deem best equipped to preside over this urgent women's health matter.

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Respectfully submitted,

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