BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

In Re: Covidien Hernia Mesh Products Liability Litigation	:	**MDL No. _____**

RESPONSE OF PLAINTIFFS TO DEFENDANTS' MOTION FOR TRANSFER OF ACTIONS PURSUANT TO 28 U.S.C. § 1407, AND JPML RULE 7.2, FOR COORDINATED PRETRIAL PROCEEDINGS

Pursuant to 28 U.S.C. § 1407 and Rule 7.2 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, Plaintiffs Gary Northrup and Shari Jorden, by and through their counsel McCune Wright Arevalo, LLP, respectfully respond to Defendants'[1] Motion for Transfer of Related Covidien Hernia Mesh Products Liability Actions for coordinated pretrial proceedings. For the reasons discussed below, Plaintiffs do not oppose the formation of an MDL, however, the Panel should consider the number of proposed cases to transfer as well as the procedural standing of the cases, some of which have been pending for 1-4 years. Additionally, if Defendants' motion is granted, the actions should be transferred and centralized to the District of Massachusetts where Covidien is located and where a separate state court consolidation is already pending. Covidien has no ties to the Southern District of New York and, more importantly, New York has been the epicenter in the United States for the COVID-19 pandemic. Coordination in the Southern District of New York would unnecessarily put the court and the parties at risk.

[1] The Covidien Defendants are Covidien LP, Covidien Holding Inc., Covidien, Inc., Covidien plc, Tyco Healthcare Group, Tyco International, Sofradim Productions SAS, Medtronic, Inc., and Medtronic USA, Inc. (collectively, "Covidien").

INTRODUCTION

Plaintiff Gary Northrup filed his case on February 16, 2019. The case was filed in the Central District of California and was assigned to the Honorable Fernando Olguin. Plaintiff Northrup was implanted with Defendants' Parietex Optimized Composite Mesh. Defendants filed a Motion to Dismiss on May 23, 2019. The motion was granted with leave to amend. After meeting and conferring, Plaintiff filed a Fourth Amended Complaint which Defendants answered on August 9, 2019. On November 21, 2019, Defendants informed Plaintiff that, when his complaint was filed, there was not complete diversity between all parties (unbeknownst to Defendants when they answered the complaint one Defendant had been a California entity for a period of time). As a result, the parties agreed to a stipulated dismissal of the action and a short tolling period. On December 4, 2019, Plaintiff Northrup re-filed his complaint in the Central District of California and that case was assigned to the Honorable Dean Pregerson. Defendants filed an answer to the complaint and discovery commenced.

Plaintiff Northrup propounded discovery in both actions and received responses. The parties were in the process of meeting and conferring regarding Defendants' discovery responses when Defendants filed the instant Motion to Transfer. Additionally, the deposition of Plaintiff's surgeon was set to proceed on July 8, 2020. Defendants propounded discovery to Plaintiff Northrup and his responses were due the day that the Motion to Transfer was filed. A motion to stay was filed and granted pending a decision on Covidien's Motion to Transfer.

Plaintiff Shari Jorden filed her case on September 11, 2019 in the Northern District of California. The case was assigned to the Honorable William Alsup. Plaintiff Jorden's case also involves the Parietex Optimized Composite Mesh. Defendants filed a motion to dismiss which was argued on November 21, 2019, and subsequently denied. Defendants filed an answer to the

complaint and the parties agreed to an early mediation which took place on February 20, 2020. The case did not resolve at mediation. Discovery was served by both parties and Defendants responded to discovery and produced documents. The parties were in the process of meeting and conferring regarding the discovery responses, document production, and deposition dates for corporate witness depositions when Defendants filed the instant Motion to Transfer.

According to Covidien's Motion to Transfer, at the time of its filing, Covidien was aware of 12 pending federal lawsuits from a total of 15 plaintiffs who are alleging injuries from Covidien hernia mesh products. *Petition* at 2. Covidien also states that an additional 141 cases are filed in state courts across the Country, with the majority being part of a Massachusetts State Court Consolidation.

Covidien states that there have been several other hernia mesh litigations consolidated by this Panel in the last ten years, and that the 12 pending federal cases should be consolidated for the same reasons as other hernia mesh litigations. However, the other outstanding MDLs have thousands of cases pending in each MDL and have been pending for years. Importantly, the 12 pending federal cases involve five Covidien mesh products and not just the Parietex Optimized Composite Mesh that was implanted in Plaintiffs Northrup and Jorden. Formation of an MDL at this point would involve 5 different meshes for just 12 cases. Covidien states that an MDL could involve up to 20 of its hernia mesh products.

Given that the Massachusetts State Court consolidated action involves hundreds of cases, it is hard to believe that, since 2016, more federal cases have not been filed against Covidien for its mesh products. That tends to lend itself toward the reasonable belief that most filings are occurring in state court and an MDL will not result in an influx of federally filed cases, meaning an MDL would only involve a handful of cases.

THE DISTRICT OF MASSACHUSETTS IS THE PROPER VENUE FOR CONSOLIDATION

If this Panel does create an MDL, it should not be centralized in the Southern District of New York ("SDNY"). Indeed, while Covidien acknowledges the obvious risk of COVID-19 infections inherent to New York City, Covidien also points to several positive aspects of consolidating in the SDNY such as the District's experience with handling MDLs, and its proximity to airports as well as Covidien witnesses. However, the District of Massachusetts is much more convenient to the parties in terms of travel, issuing subpoenas, and deposing witnesses. The SDNY is over 200 miles from Boston and the Boston area has all the same amenities that are available in SDNY.

The District of Massachusetts is also closer to the Massachusetts State Court consolidation, which is where more than a hundred cases have been pending since at least 2017. And if an MDL is created, the location of the Massachusetts District Court would be more appropriate for issuing subpoenas for witnesses located in that state and for coordinating with the Massachusetts State Court consolidation. The District of Massachusetts is also far less burdened than SDNY; SDNY has 18 MDLs assigned to it as of June 2020, and the Massachusetts District Court only has 7. An MDL would also be significantly behind the State Court consolidation, which has had cases in discovery for years. As such, an MDL would need to coordinate with the State Court Consolidation every step of the way, including document production, deposing witnesses, and everything else that comes with litigation involving a corporation headquartered outside of the United States.

The District of Massachusetts is also part of the First Circuit, and that is where Covidien's principle place of business is in the United States. Additionally, MDL 1842, In re Kugel Mesh Hernia Patch and MDL 2753, In re Atrium Medical Corp. C-Qur Mesh Products Liability Litigation were both consolidated in the First Circuit. Thus, the case law on hernia mesh litigation is well

founded in the First Circuit. In contrast, SDNY is a sister district with differing views than the First Circuit on many aspects of product liability law. Covidien should be held accountable where it resides, not where it wants to be held accountable—which is in a District Court that granted 7 of the 14 dismissals thus far as cited by Covidien. *See* Covidien's Statement of Dismissed Actions.

Furthermore, if one were to assume that the number of federal cases is going to "balloon," as Covidien suggests, then there would be no reason to centralize in the SDNY. The obvious, sensible location, assuming thousands of cases will be filed, is the District of Massachusetts. Covidien already has a state court consolidation in the District of Massachusetts, and Covidien even admits in its Motion to Transfer that its Surgipro product was developed and manufactured in Connecticut—meaning that there are no other ties to New York other than the fact that four cases are pending in the SDNY. *Motion to Transfer* at FN14.

There is no reason to consider SDNY for a centralized consolidation for all of these reasons: COVID-19 infections, for whatever reason, pose a greater threat in the SDNY than the District of Massachusetts; subpoenas issued from the Massachusetts District Court would be more convenient to the parties than from SDNY (the SDNY is over 200 miles from Covidien's residence); the largest hernia mesh litigators in the country and MDL leaders from other mesh consolidations have been filing Covidien cases in Massachusetts State Court since 2017 and a consolidation was created there in May 2020, which will be far ahead of an MDL, if created; it is highly unlikely that the number of federally filed cases will "balloon" three years after filings began in other hernia mesh MDLs, and it is just as likely that very few other cases will be filed in federal court; the SDNY is already burdened with 18 active MDLs; Covidien resides in the First Circuit, which already has a history of well-reasoned law concerning hernia mesh products liability cases and the only reason why Covidien wants a consolidation in the SDNY is because 7 of its 14 dismissals were granted in the

SDNY.

If this Panel decides to create an MDL, the District of Massachusetts is the only place that makes sense.

THE AGGREGATE TRANSFER OF ACTIONS UNDER 28 U.S.C. §1404 WOULD NOT BE APPROPRIATE

The aggregate transfer of all 12 federal Covidien hernia mesh lawsuits to a single district court under 28 U.S.C. §1404 would not be appropriate. While it is possible to transfer all of these cases "for the convenience of parties and witnesses, in the interest of justice" under §1404, those transfers would require long-term, binding commitments by the plaintiffs and their counsel, solely because this kind of transfer is a final one—and it would require trial to be transferred to that jurisdiction as well. 28 U.S.C. §1404.

In contrast, if the Panel decides to order centralized transfer under §1407, that transfer is for pre-trial purposes only, and would not require the plaintiffs' consent, since the vast majority of the cases would likely be remanded when they are ready for trial. 28 U.S.C. §1407. Additionally, §1407 allows this Panel to consider the effect that centralized transfer could have on the likelihood of settling those coordinated cases—which is not a factor that courts can consider when deciding whether to transfer under §1404. See, e.g., David F. Herr, Multidistrict Litigation Manual Sec. 5.48, at 161 (2007); see also In re Air Crash Disaster, 346 F. Supp. 533, 534 (J.P.M.L. 1972), (the Northern District of Illinois denied a motion to transfer under §1404, and the JPML later granted a motion to transfer (to the same transferee court) under §1407 in part because centralization and coordination is for pretrial purposes only; see also In re: American Financial Corp. Litig, 434 F. Supp. 1232, 1234 (J.P.M.L. 1977) (the trial court denied transfer under §1404, and the JPML later consolidated the litigation, stating that the considerations for transfer under §1407 were different from the considerations under §1404); see also In re Radioshack Corp. "ERISA" Litig., 528 F.

Supp. 2d 1348, 1349 (J.P.M.L. 2007) (a motion to coordinate under §1407 was granted after an earlier denial of a motion to transfer under §1404: "Factors in a denial of a §1404(a) transfer are different from the criteria for §1407 centralization.")

Furthermore, the Multidistrict Litigation Manual states that many judges are reluctant to order transfer under §1404 until discovery has begun and likely trial witnesses can be identified, but, in contrast, a transfer under §1407, which is for pretrial purposes only, does not depend on any initial discovery to be undertaken. See Multidistrict Litigation Manual Sec. 5:9, at 116. Thus, transfer and centralization under §1404 is not a good option for any party in these cases.

ARGUMENT

A. Minimal Parties are Involved and Can Use Alternatives to Centralization.

Where only a minimal number of actions are involved, the proponent of centralization bears a heavier burden to demonstrate that centralization is appropriate." *In re Cal. Wine Inorganic Arsenic Levels Prods. Liab. Litig.*, 109 F. Supp. 3d 1362, 1363 (J.P.M.L. 2015). The presence of common counsel involved in the actions also weighs against centralization. *In re: CVS Caremark Corp. Wage and Hour Emp't. Practices Litig.*, 684 F. Supp. 2d 1377, 1379 (J.P.M.L. 2010). Here, only 12 Covidien cases are pending in nine District Courts with only a handful of law firms representing all parties. Covidien has a much heavier burden to demonstrate that centralization of these cases is appropriate, and it has failed to meet that burden.

Where a litigation is limited to a small number of cases and few district courts are involved, suitable alternatives to Section 1407 are available and transfer is inappropriate. *See In re Eli Lilly & Co. (Cephalexin Monohydrate) Patent Litigation*, 446 F. Supp. 242, 244 (J.P.M.L. 1978) (denying transfer where actions were pending in three district courts because consultation and cooperation among the courts was a suitable alternative to Section 1407 transfer); *In re Fedex*

Ground Package Sys. Empl. Practices Litig., 366 F. Supp. 2d 1381, 1382 (J.P.M.L. 2005) (denying transfer of actions in seven districts because "alternatives to transfer exist that can minimize whatever possibilities there might be of duplicative discovery, inconsistent pretrial rulings, or both"); *In re Quaker Oats Trans-Fat Mktg. & Sales Practices Litig.*, 777 F. Supp. 2d 1344 (J.P.M.L. 2011) (denying transfer of actions because the parties "have every ability to cooperate and minimize the possibilities of duplicative discovery and inconsistent pretrial rulings"); *In re: Rite Aid Corp. Wage and Hour Employment Practices Litig*., 655 F.Supp.2d 1376, 1377 (J.P.M.L. 2009) (denying centralization of actions pending in four districts and noting "[c]ooperation among counsel and the parties is particularly appropriate here, where plaintiffs in four of the six actions encompassed by the motion share counsel"); *In re CVS Caremark Corp. Wage & Hour Empl. Practices Litig.*, 684 F. Supp. 2d 1377, 1378 (J.P.M.L. 2010) (denying transfer of actions filed in four districts because "[a]vailable alternatives to centralization may minimize whatever possibilities might arise of duplicative discovery and/or inconsistent pretrial rulings").

Here, there are 12 cases pending in nine District Courts and there is a Massachusetts State Court consolidation that all these cases can coordinate with and work with to collect discovery and take depositions. Covidien admits in its Petition that national advertising campaigns have been active for many years, and those law firms that Covidien points to have not filed any cases in federal court and instead have been filing them in Massachusetts State Court for three years. And although "movants believe that the filing of related actions is likely, the mere possibility of additional actions does not support centralization." *Id.,* citing *In re: California Wine Inorganic Arsenic Levels Prods. Liab. Litig.*, 109 F. Supp. 3d 1362, 1363 (J.P.M.L. 2015).

Plaintiffs are willing to consult and cooperate with Covidien and the Massachusetts State Court Consolidation to coordinate pretrial efforts. No facts or reasons exist to suggest that the

minimal number of concerned District Courts would be unable to cooperate in this matter.

B. Common Facts Do Not Predominate the Subject Actions.

Section 1407 does not empower the Panel to transfer cases involving only common legal issues. *In re: Teamster Car Hauler Prod. Liab. Litig*., 856 F. Supp. 2d 1343, 1343 (J.P.M.L. 2012) ("While plaintiffs in each action allege that trailers manufactured by Cottrell were defective and caused them injury, the defects alleged and injuries suffered vary among these actions, and various additional defendants are named based on different theories of liability."). The chief disputed legal issues in these Covidien cases are predominately individualized in that only 5 Covidien hernia mesh products are involved in all 12, and each mode of injury and defects inherent to these 5 hernia meshes are different, making the factual issues also predominately individualized.

Plaintiffs with wholly different injuries require individual analysis and varying standards to prove specific causation. Moreover, the personal injury/product liability cases in and of themselves involve factual issues that must be examined with reference to individual states' tort laws. When discovery is likely to require individualized factual inquiries and claims are based on various states' laws, any common questions of fact among the actions are not sufficiently complex and/or numerous to justify a Section 1407 transfer. *See In re Rite Aid*, 655 F. Supp. 2d at 1377.

C. Alternatively, Should the Panel Determine That Centralization is Necessary, the Proper Venue is the District of Massachusetts and Not the SNDY

Should the Panel grant centralization, the only place to do so is the District of Massachusetts. The convenience of the parties would be best served by centralizing these cases where Covidien resides. The District of Massachusetts is located very close to a major travel hub, making it convenient and accessible; it is the District where Covidien resides and where a State Court Consolidation already exists; the District is not as heavily burdened with MDLs as the SDNY; and there is an inherent risk of COVID infections associated with the SDNY that did not

materialize in the District of Massachusetts.

Furthermore, it cannot be ignored that of the 14 dismissals that Covidien has had granted to date, 7 of them came from the SDNY. Covidien is a Massachusetts resident and under the jurisdiction of the First Circuit. The First Circuit already has a history and precedent of dealing with hernia mesh MDLs. MDL 1842 (Kugel) and MDL 2753 (Atrium) were centralized in the First Circuit and Covidien's insistence that it does not want to be held accountable in its home Circuit is telling. The SDNY has no connection to Covidien except for the fact that 4 cases are currently pending in the SDNY, and if Covidien is to be believed and this litigation will soon "balloon" as the Bard, Atrium, and Ethicon MDLs did three years ago, there is no reason to consolidate a huge litigation anywhere but where Covidien resides.

CONCLUSION

Plaintiffs Northrup and Jorden are not opposed to the formation of an MDL, however their cases were in the discovery phase and both had trial dates set prior to Defendants' Motion to Transfer. Plaintiffs may be prejudiced if consolidation is granted in that they will not get to trial as soon as they had expected. An alternative to consolidation exists, and it is for the plaintiffs with federal cases to work with the Massachusetts State Court consolidation on deposing witnesses and producing discovery. All the plaintiffs can stay in their home districts while coordinating with the law firms participating in the Massachusetts State Court Consolidation, which are the law firms who led and lead other hernia mesh and pelvic mesh MDLs. Once there is enough discovery, each plaintiff can serve their expert reports in their home district and continue toward trial.

However, if the Panel decides to consolidate these cases, the only choice is the District of Massachusetts; it has everything that the SDNY can offer, with a much-reduced risk of acquiring COVID-19. Moreover, Covidien resides in the District of Massachusetts and Defendants' request

for consolidation in the SDNY is nothing but a thinly veiled attempt to escape the jurisdiction of the First Circuit.

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Respectfully submitted,
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