IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE INJECTAFER PRODUCTS LIABILITY LITIGATION **This Document Relates To:** **CROCKETT v. LUITPOLD PHARMA., INC., NO. 2:19-cv-00276;** **KRUEGER v. LUITPOLD PHARMA., INC., NO. 2:19-cv-00984.**	**NO. 2:19-CV-00276-WB** **HON. WENDY BEETLESTONE**

ORDER

AND NOW, this ___ day of _____, 2021, upon consideration of the Motion of Plaintiffs, Katherine Crockett and Jennifer Krueger, to consolidate for trial pursuant to Federal Rule of Civil Procedure 42(a), and any response thereto, it is hereby **ORDERED** and **DECREED** that Plaintiffs' Motion is **GRANTED**. The above-referenced actions are hereby consolidated for the purpose of trial as follows:

1. In the consolidated trial of *Crockett* and *Krueger*, a *Daubert* hearing is scheduled for **9:00 AM** on **April 27, 2022**, and a jury trial is scheduled to commence at **9:00 AM** on **July 28, 2022**.

BY THE COURT:

_____
WENDY BEETLESTONE, J.

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PLAINTIFFS' MOTION FOR RULE 42 CONSOLIDATION

Plaintiffs, Katherine Crockett and Jennifer Krueger, by and through their attorneys, Pogust Millrood, LLC, hereby submit the following Motion to consolidate for trial pursuant to Federal Rule of Civil Procedure 42(a), and in support thereof, incorporate the attached Memorandum of Law in Support of Plaintiffs' Motion, as if fully set forth herein at length.

WHEREFORE, Plaintiffs, Katherine Crockett and Jennifer Krueger, respectfully request that this Honorable Court enter an Order in the form attached.

Respectfully submitted,

Dated: July 2, 2021

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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THE MOTION FOR RULE 42 CONSOLIDATION

I. INTRODUCTION

Plaintiffs submit the instant Motion and Memorandum of Law pursuant to the Court's request and Order following the June 28, 2021 Zoom status conference in the *In Re Injectafer Products Liability Litigation*. During the Zoom conference, following arguments and letter-briefing by the Parties, the Court initially expressed its intention to enter an Order consolidating the trials of the *Crockett* and *Krueger* matters pursuant to Federal Rule of Civil Procedure 42(a) and Plaintiffs' letter-brief. Upon hearing the Court's intention, counsel for Vifor (International) AG stated that the Defendants required *additional* briefing and a formal Rule 42 Motion, and further that Defendants viewed the consolidation decision as an appealable issue. Defendants' odd position ignored the June 23, 2021 briefing deadline already agreed to by the Parties and, more

importantly, Federal Rule of Civil Procedure 42(a), which permits this Court to *sua sponte* order a consolidated trial.[1] The Court then directed Plaintiffs to submit the instant formal Motion by July 2, 2021.[2]

Rule 42(a) consolidation is appropriate here because both the *Crockett* and *Krueger* matters share substantially similar facts and evidence such that separate trials would result in unnecessary and duplicative litigation and expense. Both the *Crockett* and *Krueger* matters share common witnesses, experts, and liability evidence. Plaintiffs in each case allege that the Injectafer product manufactured, produced, and marketed by Defendants carried deficient warnings, was defectively designed, and was not adequately tested. Additionally, both Plaintiffs allege that they experienced the same injury – Injectafer-induced severe and symptomatic hypophosphatemia – as a result of Defendants' negligence, and both actions will be governed by Pennsylvania law. Finally, as explained in greater detail *infra*, combining these two very similar trials into one will allow significant conservation of resources for the Court and Parties and, hopefully, aid in the easing of the coronavirus pandemic-induced backlog in the Eastern District of Pennsylvania.

II. FACTUAL BACKGROUND

The instant Motion involves two of the three "Group 1" cases that are part of the *Injectafer Products Liability Consolidated Litigation* pending in the Eastern District of Pennsylvania. By way of background, the details pertaining to Plaintiffs' initial request to consolidate for trial pursuant to Rule 42(a) were submitted to this Court via letter brief on June 23, 2021 in anticipation

[1] The Defendants had the opportunity to brief this issue in full in their letter brief submitted to the Court on June 23, 2021. For some unknown reason, Defendants completely failed to brief the issue of consolidated trials, despite Plaintiffs' counsel having consistently reiterated Plaintiffs' position on and preference for Rule 42 consolidation via email correspondence and during subsequent meet and confers.

[2] Pursuant to the Court's instructions during the conference, Plaintiffs are not to file a Reply to Defendants' Response.

of the June 28, 2021 Zoom hearing. As stated in the letter, the Court instructed the Parties during the recent April 29, 2021 virtual case management conference to submit a proposal that identified *Daubert* hearing and Trial Dates for the Group 1 cases. On May 13, 2021, the Parties jointly submitted in letter format a proposed schedule for the first four trials that reserved *Daubert* hearing and trial dates for the First Trial, Second Trial, Third Trial, and Fourth Trial.[3] On May 20, 2021, the Court's Chambers sent an e-mail message to the Parties requesting that the Parties "submit a proposed Order regarding the *Daubert* hearing and trial dates for the Group 1 cases to be filed on the consolidated docket." As the Parties had not yet completed the meet and confer process meant to determine which case or cases would fit into each slot, the Parties agreed to request additional time to negotiate with the aim of a joint proposal to the Court for sequence of trials.

Thereafter, the Parties met and conferred multiple times via e-mail and telephone conference but were unable to come to a joint agreement. As there were other disputed case management items scheduled to be submitted to the Court on June 23, 2021, the Parties requested the sequence of trials issue be handled on the same date so as to align the briefing deadlines and prevent multiple hearings on the remaining items in dispute. The Parties agreed to submit letter briefs in support of their trial sequence positions on June 23, 2021, and argument was held on the disputed topic via Zoom videoconference before Judge Beetlestone on June 28, 2021. Plaintiffs argued in both the letter briefing and during the hearing that the *Krueger* and *Crockett* cases should be consolidated for the first trial, pursuant to Rule 42(a).

III. LEGAL STANDARD

Federal Rule of Civil Procedure 42(a) grants this Court the ability to "join for hearing or trial any or all matters at issue" if the actions before the Court involve a common question of fact

[3] At the time, there were four Group 1 cases: *Crockett, Kreuger, Atkinson,* and *Turkoski*. As a result of Mrs. Turkoski's untimely death, there are now only three Group 1 cases.

or law. Fed. R. Civ. P. 42(a)(1). Moreover, this Court has the authority to consolidate actions for trial *sua sponte*. *See Ellerman Lines, Ltd. v. Atl. & Gulf Stevedores, Inc*., 339 F.2d 673, 675 (3d Cir. 1964) (Rule 42(a) "confers upon a district court broad power, whether at the request of a party or upon its own initiative, to consolidate causes for trial as may facilitate the administration of justice"); *see also Bynum v. Trustees of University of Pennsylvania*, 115 F. Supp.3d 577, 591-92 (E.D. Pa. 2015) (citing *Ellerman* for proposition that a district court can consolidate cases for trial upon its own initiative); *Smithkline Beecham Corporation v. Geneva Pharmaceuticals, Inc*., 2001 WL 1249694, at * 5 (E.D. Pa. 2001) (citing *Ellerman* for proposition that "[c]onsolidation may be ordered on the motion of a party or *sua sponte* and in spite of the parties' opposition").

IV. LEGAL ARGUMENT

Federal Rule of Civil Procedure 42(a) grants this Court the ability to "join for hearing or trial any or all matters at issue" if the actions before the Court involve a common question of fact or law. Fed. R. Civ. P. 42(a)(1). "Actions by different plaintiffs arising out of the same tort, such as a single accident or disaster or the use of a common product that is alleged to be defective in some respect, frequently are ordered consolidated under Rule 42(a)." 9A Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 2384 (3d ed. 2020). Consolidation is appropriate and desirable here due to the substantial overlap in facts and law as well as the benefits and efficiencies that result from combining two trial settings into one.

A. Consolidation is Appropriate Due to the Substantial Overlap in Fact and Law in the *Crockett* and *Krueger* Matters.

The instant matter before this Court presents exactly the situation envisioned as ripe for consolidation under Rule 42. All of the Group 1 cases – and by extension, all of the Injectafer cases pending before this Court – share *substantial* overlap in common witnesses, experts, and liability evidence. Both Jennifer Krueger and Katherine Crockett (hereinafter collectively referred

to as "Pennsylvania Plaintiffs") were prescribed Injectafer to treat iron deficiency at an identical dosage (750 mg x 2), experienced a sharp decrease of serum phosphorous around the same point in time following their dosage, and were both admitted to the hospital and treated for their Injectafer-induced severe and symptomatic hypophosphatemia injuries. Each makes allegations that the Injectafer product carried deficient warnings, was defectively designed, and was not adequately tested by Defendants prior to the Plaintiffs' ingestion. Across both cases, the same allegations of corporate misconduct – designing a drug that is inherently unsafe given its near-universal negative impact on serum phosphorous in iron deficient patients, ignoring safety signals from clinical trials, published literature, and post-marketing reports in both Europe and the United States, deciding to downplay instead of adequately test the impact and severity of hypophosphatemia in the largely female iron deficient patient population – are alleged as the basis for both Plaintiffs' allegations of negligence. *See, e.g.*, Krueger Third Amended Complaint, Doc. No. 83, at ¶¶ 73-87; Crockett Third Amended Complaint, Doc. No. 120, at ¶¶ 77-91. Both Pennsylvania Plaintiffs anticipate employing the same experts to assist in proving their claims against Defendants.

Moreover, a consolidated trial makes sense in these circumstances given both the *Krueger* and *Crockett* Plaintiffs are governed by Pennsylvania law. *See* Court's January 28, 2020 Order, Doc. No. 102 (wherein the Court ruled on the viability of claims under Pennsylvania law in both the *Crockett* and *Krueger* cases). The Court and jury will not have to worry about applying different states' laws to multiple plaintiffs in a single trial, which is often a leading argument proffered in opposition to consolidated trials. Instead, by trying both of these cases at the same time, the Court will avoid having to replicate legal rulings on Pennsylvania law in successive trials held at different times.

B. Consolidation is the Most Efficient Method for Trying these Cases and Preserves Judicial Economy.

Consolidating the two Pennsylvania Plaintiffs for trial would allow for significant efficiencies for the Court and Parties. Consolidation means one less trial on the Court's docket, which should help conserve judicial economy and resources, a necessity at all times but especially important now in light of the backlog of trials caused by the coronavirus pandemic. *See, e.g.*, United States District Court for the Eastern District of Pennsylvania COVID-19 Reopening Guidelines, dated October 1, 2020, *18, *available at* https://www.paed.uscourts.gov/documents/notices/EDPA_Reopening_Guidelines.pdf ("criminal cases will continue to be prioritized over civil cases until the criminal case backlog decreases"); *see also* United States District Court for the Eastern District of Pennsylvania, Standing Order In re: Twelfth Extension of Adjustments to Court Operations Due to the Exigent Circumstances Created by COVID-19, dated June 7, 2021, *available at* https://www.paed.uscourts.gov/documents/standord/StandingOrder-Extension12.pdf (twelfth extension necessary "in response to the ongoing COVID-19 pandemic, which continues to impact Court operations in this district.").

Even if the Court was not faced with a pandemic backlog, consolidation is still a useful tool as it will avoid wasteful relitigation and duplication of judicial effort. As discussed *supra*, a consolidated trial will allow for common liability and expert evidence to be presented and decided once, which will save this Court and the Parties time and money, as well as lessen the burden that would be imposed on common company and expert witnesses who would otherwise have to appear and testify in successive trials. These benefits are shared by both Parties as well as the Court; in tangible terms, the eight weeks that are anticipated to be needed for two single plaintiff trials would likely reduce to an estimated five weeks or less for one consolidated trial (granting an extra few days for an additional Plaintiff's case-specific proofs), thus saving the Parties and Court three

weeks of trial time and expenses, including of course the additional expense that would come with arranging for the appearance at successive trials of common company witnesses and experts.

The benefits of consolidated trials are ample in modern federal court practice; in fact, the Fourth Circuit recently trumpeted the positives of consolidating trials in products liability cases:

> Both plaintiffs and defendants benefit from lessened litigation costs and the reduced need for expert testimony. Witnesses benefit from reduced demands on their time by limiting the need for them to provide repetitive testimony. The community as a whole benefits from reduced demands on its resources, including reduced demand for jurors. The judicial system benefits from the freedom consolidation affords judges to conscientiously resolve other pending cases.

Campbell v. Bos. Sci. Corp., 882 F.3d 70, 76 (4th Cir. 2018) (affirming consolidation of four mesh cases because they shared "many common questions of law and fact"). *See also Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir. 1990) (consolidating two asbestos cases for trial); *In re DePuy Orthopaedics, Inc. Pinnacle Hip Implant Prods. Liab. Litig.*, 2016 WL 10719395, at *2 (N.D. Tex. Jan. 8, 2016) (consolidating five cases for trial); *Frankum v. Bos. Sci. Corp.*, 2015 WL 3832187, at *2 (W.D.N.C. June 22, 2015) (consolidating two cases for trial); *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, 2010 WL 797273, at *4 (M.D. Ga. Mar. 3, 2010) (consolidating four cases for trial); *In re Stand 'N Seal Prods. Liab. Litig.*, 2016 WL 10719395, at *2 (N.D. Tex. Jan. 8, 2016) (consolidating five cases for trial); *Moore v. Ericsson, Inc.*, 7 A.3d 820, 828 (Pa. Super. Ct. 2010) (affirming decision to consolidate five asbestos cases for trial); *Vinciguerra v. Crane Co.*, 2013 WL 10571433, at *3 (Pa. Com. Pl. Nov. 12, 2013) (finding consolidation of two cases for trial was not prejudicial to defendants as it was "long standing practice in Philadelphia County of consolidating multiple asbestos claimants into a common trial" that has been observed for decades); *Fraynert v. Delaware & Hudson Ry. Co.*, 2012 WL 6929343, at *1 (Pa. Com. Pl. Oct. 1, 2012) (consolidating eight cases for trial).

A very recent example of a successful consolidated trial in a complex products liability

action is found in the *In re: 3M Combat Arms Earplug Products Liability Litigation* (hereinafter "3M") lawsuit pending before The Honorable Casey Rodgers in the Northern District of Florida. In December 2020, Judge Rodgers consolidated three plaintiffs *for the very first trial* in the 3M multidistrict litigation. Judge Rogers cited the language of Rule 42(a) to find that "the efficiencies to be gained by consolidation . . . for trial far outweigh any potential prejudice to [d]efendants or potential risk of jury confusion, given the substantial overlap in the issues, facts, witnesses, and other evidence . . ." *See In re: 3M*, Case No. 3:19md2885, Doc. 1583, at * 2, 4 (N.D. Fla. Dec. 30, 2020) ("separate trials in these three cases would be largely repetitive and thus would implicate the great many burdens, delays, and expenses that consolidation is designed to mitigate").[4]

C. Slight Differences in Individual Causation do not Bar Consolidation.

While general causation – the question as to whether Injectafer *can* cause the type of injuries alleged by Plaintiffs – is a common issue here and will involve identical evidence, specific causation – whether Injectafer *did* cause the injuries to the Pennsylvania Plaintiffs – will require some separate proofs unique to each Plaintiff. That however is not a barrier to consolidated trials. If the claims at issue are "based largely on the same facts . . . differences in causation are not enough, standing alone, to bar consolidation of products liability claims." *Eghnayem v. Bos. Sci. Corp.*, 873 F.3d 1304, 1314 (11th Cir. 2017) (consolidating four cases for trial despite the need for separate evidence "relating to failure to warn and individual damages"); *Laughlin v. Biomet, Inc.*, 2020 WL 1307397, at *7 (D. Md. Mar. 18, 2020) ("the existence of facts unique to each plaintiff does not preclude consolidation.").

Put simply, consolidation of similar cases for a single trial is warranted when the benefits outweigh any potential complications arising from trying multiple plaintiffs at once. *See In re:*

[4] The 3M Order is attached hereto as "Exhibit A."

3M, Doc. 1582 at *4. Here, there are very few complications and any that may exist pale in comparison to the administrative and legal benefits offered by a consolidated trial.

V. CONCLUSION

For the foregoing reasons, Plaintiffs, Katherine Crockett and Jennifer Krueger, respectfully request that this Court grant Plaintiffs' Motion to consolidate for trial pursuant to Federal Rule of Civil Procedure 42(a).

Respectfully submitted,

Dated: July 2, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2021, I electronically transmitted the foregoing document to the Clerk of the United States District Court using the CM/ECF system for filing and service to all parties/counsel registered to receive copies in this case.

/s/ Michael G. Daly
Michael G. Daly (Atty I.D. No. 309911)
Attorney for Plaintiff

EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

IN RE: 3M COMBAT ARMS EARPLUG PRODUCTS LIABILITY LITIGATION This Document Relates to: *Baker*, 7:20cv39 *Estes*, 7:20cv137 *Hacker*, 7:20cv131 *Keefer*, 7:20cv104 *McCombs*, 7:20cv94	Case No. 3:19md2885 Judge M. Casey Rodgers Magistrate Judge Gary R. Jones

ORDER

This matter is before the Court on Plaintiffs' motion to consolidate the above-referenced cases for trial. *See* ECF No. 1551. On consideration, the motion is granted with respect to Plaintiffs Luke and Jennifer Estes, Lewis Keefer and Stephen Hacker. Plaintiffs Dustin McCombs and Lloyd Baker will be tried separately and individually.

Under Federal Rule of Civil Procedure 42(a), a district court may consolidate multiple cases involving "common question[s] of law or fact" for trial. A court has broad discretion to determine whether and to what extent consolidation is appropriate. *See Eghnayem v. Boston Sci. Corp.*, 873 F.3d 1304, 1313 (11th Cir. 2017). In exercising that discretion, the court must consider the following factors: (1) whether the specific risks of prejudice and possible confusion are overborne by the risk of inconsistent adjudications of common factual and legal issues; (2) the burden on parties, witnesses and available judicial resources posed by multiple lawsuits; (3) the

length of time required to conclude multiple suits as against a single one; and (4) the relative expense to all concerned of the single-trial, multiple-trial alternatives. *Id*. "A joint trial is appropriate where there is clearly substantial overlap in the issues, facts, evidence, and witnesses required for claims against multiple defendants."[1] *Id*. at 1314. While considerations of prejudice to a party or the likelihood of jury confusion may be sufficient to deny consolidation, the court should also determine whether those risks "can be alleviated by utilizing cautionary [jury] instructions" and "controlling the manner in which [the parties' claims and defenses] are submitted to the jury for deliberation." *Id*. at 1313-14. In the Eleventh Circuit, district courts are "urged to make good use of Rule 42(a) in order to expedite the trial and eliminate unnecessary repetition and confusion." *Id*. at 1314.

The Court has carefully considered the above standard in light of the parties' arguments and finds that the efficiencies to be gained by consolidation of Estes, Keefer, and Hacker's cases for trial far outweigh any potential prejudice to Defendants or potential risk of jury confusion, given the substantial overlap in the issues, facts, witnesses, and other evidence, as well as the potential similarities in the state laws applicable to their claims.[2] "Although each plaintiff's proof of causation [will be]

[1] As observed by the Fourth Circuit, "[c]onsolidation does not alter the basic standard of care required of manufacturers, and its benefits would seem to run to both plaintiffs and defendants. It is not the tool itself, but how it is utilized." *See Campbell v. Boston Sci. Corp*., 882 F.3d 70, 76 (4th Cir. 2018).

[2] Although the Court has not yet ruled on the choice-of-law issues in the Trial Group A cases, that ruling will not impact this consolidation decision.

necessarily [individualized and] different, generally differences in causation are not enough, standing alone, to bar consolidation of products liability claims." *See id*. To the extent any risk of prejudice or juror confusion remains, it will be ameliorated through prudent trial management and the use of carefully crafted jury instructions.

In any event, Defendants' "central argument" is related to the bellwether process and not prejudice. While the Court appreciates the practicality of Defendants' argument, it cannot overcome the need for efficiency in the trial process. Indeed, separate trials in these three cases would be largely repetitive and thus would implicate the great many burdens, delays, and expenses that consolidation is designed to mitigate. With that said, the Court recognizes the benefit to trying some individual cases for the practical reasons Defendants point to. For that reason, the Court has decided to try two of the five cases individually.

Accordingly:

1. Plaintiffs' motion, ECF No. 1551, is **GRANTED** with respect to Case Nos. 7:20cv137 (Luke and Jennifer Estes); 7:20cv104 (Lewis Keefer); and 7:20cv131 (Stephen Hacker). The consolidated trial will proceed first, and thus is currently set for April 5-30, 2021. If additional time will be required to accommodate the consolidation, then the trial may instead begin on March 29, 2021. The parties are directed to confer on this issue and advise the Court of whether an additional trial week is needed by January 8, 2021.

2. The individual trial in Case No. 7:20cv94 (Dustin McCombs) will be set for May 17-28, 2021.

3. The individual trial in Case No. 7:20cv39 (Lloyd Baker) will be set for June 7-18, 2021.

4. The combined pretrial conference for all Trial Group A cases will proceed the week of March 15, 2021.

SO ORDERED, on this 30th day of December, 2020.

M. Casey Rodgers

M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE