**BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION**

In re Ethicon Physiomesh Flexible Composite Hernia Mesh Products Liability Litigation — MDL-17-22

**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 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 as follows:

## I. BACKGROUND

This product liability litigation involves the Physiomesh Flexible Composite (hereinafter, "Physiomesh"), a synthetic mesh hernia repair device designed, manufactured and sold by defendants Ethicon, Inc. and Johnson & Johnson. The Physiomesh device at issue in these cases is an implantable synthetic surgical mesh product sold for use in hernia repair implanted through laparoscopic herniorrhaphy.

Physiomesh has a unique design incorporating five (5) distinct layers: two layers of polyglecaprone-25 ("Monocryl") film covering two underlying layers of polydioxanone film ("PDS"), which in turn coat a polypropylene mesh. This design has never been used in any other hernia repair product sold anywhere in the world. The multi-layer coating was represented and promoted by the Defendants to prevent or minimize adhesion and inflammation and to facilitate incorporation and fixation of the mesh into the abdomen. However, Plaintiffs intend to demonstrate that the multi-layer coating instead prevented adequate incorporation of the mesh and caused or contributed to a variety of serious complications. In addition, the polypropylene

mesh portion of the Physiomesh was insufficient to withstand normal abdominal forces, which often resulted in herniation through the mesh itself, recurrent hernia formation and/or rupture and deformation of the mesh itself. The defendants ultimately voluntarily withdrew the Physiomesh device from the market in May 2016, which Plaintiffs intend to establish was a direct consequence of the frequency and severity of the complications experienced with this product worldwide.

The plaintiffs in the constituent civil actions are men and women who received implants of the Physiomesh product for hernia repair, and where applicable, their spouses. All of the plaintiffs in the constituent cases claim that the devices implanted in their bodies were defectively designed and/or manufactured, and that the defendants failed to provide appropriate warnings and instructions regarding the dangers posed by these devices.

The plaintiffs herein suffered serious and often permanent physical injuries from the implantation of the Physiomesh, often requiring additional surgeries, additional medical expenses, and unresolved medical complications. Where applicable, these implant plaintiffs' spouses have alleged claims for loss of consortium.

All of the constituent cases involve the Physiomesh device, and common defendants Ethicon, Inc. and Johnson & Johnson.

## II. THE LOCATION AND STATUS OF THE ACTIONS

To date, 18 plaintiffs (and, in many instances, their spouses) have filed civil actions arising from the implantation of the Physiomesh device designed, manufactured and sold by defendants Ethicon, Inc. and Johnson & Johnson.

There are 18 actions pending in 9 federal districts. The breakdown is: Middle District of Florida (6 actions); Southern District of Illinois (2 actions); Northern District of Georgia (2

actions); District of Colorado (2 actions); Middle District of Georgia (1 action); District of South Carolina (1 action); Eastern District of Kentucky (1 action); District of Massachusetts (1 action); Northern District of Oklahoma (1 action); District of New Jersey (1 action).

Upon information and belief, there were more than 330,000 Physiomesh devices sold worldwide, and Plaintiffs believe approximately 50% of those products were sold in the United States. It is the expectation of the undersigned that there will be hundreds of additional cases filed in the near future involving these products.

## ARGUMENTS

### I. These actions are appropriate for centralization and transfer for coordinated and/or consolidated pretrial treatment under 28 U.S.C. § 1407.

The constituent cases satisfy the criteria for MDL coordination and/or consolidation. These cases involve many common questions of fact, and transfer of these cases to a single court will serve the convenience of the parties and witnesses. These 18 actions currently pending in 9 separate federal district courts all involve similar product liability design defect and warnings claims against the manufacturer/seller defendants (Ethicon, Inc. and Johnson & Johnson) regarding the same Physiomesh hernia repair device that was implanted in each of these men and women.

Having a single judge preside over the pretrial proceedings in these cases would promote efficiency and economy by avoiding duplicative discovery from similarly situated claimants who have asserted common product liability claims, will prevent potentially inconsistent pretrial rulings regarding factual and legal issues common to all cases, and will help preserve the resources of the parties, their counsel and the judiciary by eliminating redundancy of effort.

The Panel has previously found that product liability actions involving similar legal claims relating to similar implantable surgical mesh devices are appropriate for centralization

under 28 U.S.C. § 1407. In re Protegen Sling and Vesica Systems Prods. Liab. Litig., MDL No. 1387 (J.P.M.L. 2001); In re Kugel Mesh Hernia Patch Litigation, 493 F.Supp.2d 137, MDL No. 1842 (J.P.M.L. 2007); In re Mentor Corp. ObTape Transobturator Sling Prods. Liab. Litig., 588 F. Supp. 2d 1374, MDL No. 2004 (J.P.M.L. 2008); In re Avaulta Pelvic Support Sys. Prods. Liab. Litig., MDL No. 2187 (J.P.M.L. 2010); In re American Medical Systems, Inc., et al., Pelvic Repair Systems Prods. Liab. Litig., 844 F.Supp.2d 1359, MDLs Nos. 2325, 2326, 2327 (J.P.M.L. 2012) (3 separate pelvic mesh MDLs); In re Coloplast Corp. Pelvic Repair Support Sys. Prods. Liab. Litig., 883 F.Supp.2d 1348, MDL 2387 (J.P.M.L. 2012); In re Cook Medical, Inc., Pelvic Repair Sys. Prods. Liab. Litig., 949 F.Supp.2d 1373, MDL 2440 (J.P.M.L. 2013); In re Neomedic Pelvic Repair Sys. Prods. Liab. Litig., 999 F.Supp.2d, MDL 2511 (J.P.M.L. 2014); In re Atrium Medical Corp. C-Qur Mesh Prods. Liab. Litig., MDL 2753 (J.P.M.L.2016). Like each of these surgical mesh MDLs, the constituent cases involve multiple common questions of fact relating to the Physiomesh product, including its manufacture, design, sale and warnings, and the defendants' corporate conduct and knowledge. Transfer of these related product liability cases to a single court would eliminate inconsistency and redundancy, would promote efficiency and judicial economy, and allow for effective coordination in accordance with 28 U.S.C. § 1407.

## II. The Middle District of Florida is uniquely situated to serve as the proper forum for coordinated and/or consolidated pretrial proceedings of these actions.

Transfer of these common hernia mesh repair product cases to a single Court before a single judge for purposes of pre-trial discovery and coordination is necessary for the effective and efficient management of this litigation. From a practical standpoint, the Middle District of Florida is uniquely situated as the appropriate forum to handle these cases because that Court has the most constituent cases filed, and one of the first-filed cases in the country.

Although Section 1407 does not specify criteria for selecting a transferee forum, the overarching goal is to find a court that will advance "the convenience of the parties and will promote the just and efficient conduct" of the transferred cases. To that end, the Panel has generally favored districts in which a number of constituent cases are pending, and whose judges have had the opportunity to become familiar with the relevant issues. See, e.g., 15 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3864 (2007); David H. Herr, *Multidistrict Litigation Manual*, § 6 (2016). The Panel has also favored courts that are convenient and accessible, have favorable docket conditions, and districts for which the parties have stated a preference. See, e.g., Wright, Miller & Cooper, supra at § 3864; Herr, supra at § 6. In the context of this litigation, the district that best satisfies these criteria is the Middle District of Florida.

1. **The Middle District of Florida has the most filed cases, and one of the first-filed cases.**

Of the 18 filed cases, the Middle District of Florida has the most pending constituent civil actions (6) of any federal district court where these actions are filed. *See*, In re Multi-Piece Rim Products Liability Litigation, 464 F.Supp. 969, 975 (J.P.M.L. 1979) (district in which more cases pending than any other district was proper transferee forum); In re the Dept. of Energy Stripper Well Exemption Litigation, 472 F.Supp. 1282, 1286 (J.P.M.L. 1979) (choosing district where majority of actions pending); In re Data Gen. Corp. Antitrust Litigation, 470 F.Supp. 855, 859 (J.P.M.L. 1979) (preferable transferee district is where most actions pending). The first-filed case in the Middle District of Florida (*Quinn*, C.A. No. 6:16-CV-01663) was the second constituent action to be filed in the country. Since *Quinn*, five additional cases have been filed in the Middle District of Florida. These six cases are each assigned to different judges. No other District Court presently has more than two cases filed. While none of the cases in any District

Court are so advanced procedurally that MDL coordination would impair significant progress, an Answer has been filed, Initial Disclosures and a Case Management Report have been served, and a Case Management Order has been entered in *Quinn*. Thus, of the Middle District of Florida judges who are assigned constituent actions, the Hon. Paul G. Byron in *Quinn* has had an opportunity to become familiar with the issues and parties in the case. In re American Investors Life Ins. Co. Annuity Marketing and Sales Practices Litigation, 398 F.Supp.2d 1361 (J.P.M.L. 2005) (appropriate forum where five constituent actions already proceeding, and judge who "has already developed familiarity with the issues present in this docket as a result of presiding over motion practice and other pretrial proceedings in the actions pending before her for the past year.").

**2. The Middle District of Florida has favorable docket conditions, and the resources and ability to manage this litigation.**

The Federal Court Management Statistics show that the Middle District of Florida has 617 pending civil cases per judgeship, a median time of 22.0 months from filing to disposition for civil cases, and only 3.5% of civil cases in the district are more than three years old. (See, Fed. Court Management Statistics for M.D. Florida is attached hereto as "**Exhibit 1**").

None of the Middle District of Florida Judges to whom constituent cases have been assigned are currently handling any MDL proceedings. Judge Byron, who presides over the first case filed in the Middle District of Florida (*Quinn*), in particular would be well-suited to handle this litigation as he has never previously had an opportunity to handle an MDL proceeding. The Hon. James D. Whittemore (*Gilman*) and the Hon. Susan C. Bucklew (*Sunter*) who have the second and third filed cases within the Middle District of Florida are likewise well-suited to preside over an MDL proceeding.

**3. The Middle District of Florida is convenient and accessible.**

The majority of the pending constituent cases are filed in district courts in the Southeastern portion of the United States, with 11 of the 18 cases pending in districts in the Southeast (M. Dist. of Florida; N. Dist. and M. Dist. of Georgia; Dist. of South Carolina; and, E. Dist. Of Kentucky). The Southeast is the "center of gravity" for these cases. Therefore, for purposes of this litigation, the Middle District of Florida is a centrally located district. See, e.g., In re American Gen. Life and Accident Ins. Co. Industrial Life Ins. Litigation, 175 F.Supp.2d 1380, 1381 (J.P.M.L. 2001) (transfer to Dist. of S. Carolina litigation that had "a Southern tilt."); In re Columbia Univ. Patent Litigation, 313 F.Supp.2d 1383, 1385 (J.P.M.L. 2004) (transfer to Dist. of Massachusetts based in part on fact that most of the parties were located "in the eastern part of the United States.").

The Middle District of Florida is readily accessible to all parties involved in this litigation. The cases pending in the Middle District of Florida are filed in Orlando, Tampa and Jacksonville. All three of these major cities have international airports serviced by multiple daily direct flights throughout the country.

Plaintiffs note that in all but one of the cases where the Defendants have filed their Answer, they are represented by one or more attorneys from the Mississippi office of the Butler Snow law firm. In the one case where the Butler Snow firm has not made an appearance (*Franklin*, M.D.Ga. C.A. No. 4:17-CV-00031), the defendants are represented by attorneys from the Atlanta, Georgia office of the Troutman Sanders law firm.

## III. In the alternative, these cases should be transferred to the Southern District of Illinois.

The Southern District of Illinois is also well-suited for receipt of an MDL in this litigation. The Hon. David R. Herndon presides over one of two constituent actions filed in the Southern District of Illinois (*Worrell*, C.A. No. 3:17-CV-11172). Judge Herndon has substantial

product liability MDL experience, and he has proven to be an innovative and well-qualified MDL judge. Although Judge Herndon is currently presiding over two MDLs, *In re Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and Prods. Liab. Litig.*, MDL 2100, and *In re Pradaxa (Dabigatran Etexilate) PL*, MDL 2385, both of those MDLs are presently in a settlement posture, largely owing to Judge Herndon's efficient management of those litigations.

This Panel has previously noted Judge Herndon's experience handling complex product liability MDLs:

> [B]y selecting Judge David R. Herndon to preside over this matter, we are selecting a jurist with the willingness and ability to handle this litigation. Judge Herndon, an experienced MDL judge, has deftly presided over *In re: Yasmins and Yaz (drospirenon) Marketing Sales Practices*, 655 F. Supp. 2d 1343 (J.P.M.L. 2009), another large pharmaceutical products liability litigation.

*In re: Pradaxa (Dabigatran Etexilate) Products liability Litigation*, 883 F. Supp. 2d at 1356.

In the *Praxada* MDL, Judge Herndon helped to facilitate a global settlement of over 2,600 constituent cases in under 22 months. Judge Herndon managed this settlement quickly and efficiently. Similarly, in the *Yaz* MDL which involved nearly 12,000 cases, Judge Herndon facilitated a mass settlement initiative in under 27 months. Judge Herndon's experience, and his innovative and aggressive approach to moving cases forward, make him particularly qualified to serve as transferee judge in this proposed MDL.

## CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this motion be granted and that all pending Physiomesh Composite cases be transferred pursuant to 28 U.S.C. § 1407 to the Middle District of Florida. Plaintiffs further ask the Panel to consider the Hon. Paul G. Byron, the Hon. James D. Whittemore and the Hon. Susan C. Bucklew as appropriate judges to preside

over this matter. In the alternative, Plaintiffs propose that the Court consider transfer to the Southern District of Illinois, before the Hon. David R. Herndon.

Dated this 9th day of March, 2017.

Respectfully submitted,

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