BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

	:	MDL Docket No. _____
IN RE HIP AND KNEE IMPLANT KICKBACK LITIGATION	:	Master File No. CV 08-1609-JCS (N.D. Cal.)
	:	

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR TRANSFER AND CONSOLIDATION OF RELATED ACTIONS TO THE NORTHERN DISTRICT OF CALIFORNIA PURSUANT TO 28 U.S.C. § 1407 FOR COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS

Plaintiff Claire C. Haggarty submits this Memorandum of Law in support of her Motion, pursuant to 28 U.S.C. § 1407, for transfer of all related actions to the Northern District of California and the consolidation of those actions, for pretrial purposes with *Claire C. Haggarty v. Stryker Orthopaedics, et. al.*, Case No. CV-08-1609 (JCS) (N.D. Cal.) (the "*Haggarty* Action").

I.

BACKGROUND

On March 24, 2008, Plaintiff Claire C. Haggarty filed a lawsuit in the Northern District of California alleging that Defendants Stryker Orthopaedics (aka Stryker Orthopedics; aka Stryker Orthopedics, Inc.), Howmedica Osteonics Corporation, Strkyer Corporation and Stryker Sales Corporation (collectively referred to hereinafter as "Stryker") was a major participant in an illegal and unlawful kickback scheme in which Stryker allegedly made illegal payments to doctors and/or hospitals in return for those doctors and/or hospitals using Stryker hip and knee replacement devices for surgery.

On April 23, 2008, Plaintiff Lola Thorpe filed a lawsuit in the Southern District of New York alleging that Defendants Zimmer, Inc., Zimmer Holdings, Inc. and Zimmer US, Inc. (collectively referred to hereinafter as "Zimmer") was also a major participant in the same illegal and unlawful kickback scheme that Stryker allegedly engaged in, essentially making illegal payments to doctors and/or hospitals in return for those doctors and/or hospitals using Zimmer hip and knee replacement devices for surgery. The allegations in the complaint filed by Plaintiff Lola Thorpe against Zimmer are exactly the same as the allegations in the *Haggarty* Action.

On May 13, 2008, Plaintiff Goldene Somerville filed a lawsuit in the Northern District of California against Stryker. That complaint is identical to the complaint in the *Haggarty* Action.

Plaintiff Claire C. Haggarty seeks to have the two other putative class actions listed above transferred to the Northern District of California for pretrial consolidation with the *Haggarty* Action. Transfer and consolidation is appropriate because these cases involve common factual and legal questions, transfer will promote the convenience of the parties and the witnesses, and transfer will further the just and efficient conduct of these actions. For the reasons described below, the Northern District of California the best forum choice for transfer and consolidation.

II.

ARGUMENT

A. Transfer and Consolidation of the Pending Class Actions for Coordinated Pretrial Proceedings is Appropriate

28 U.S.C. § 1407 authorizes the Judicial Panel on Multidistrict Litigation (the "Panel") to transfer and consolidate two or more civil cases for coordinated pretrial proceedings upon a determination that (i) the cases "involv[e] one or more common questions of fact", (ii) transfer will "be for the convenience of the parties and witnesses," and (iii) transfer "will promote the just and efficient conduct of such actions." *See In re Cutter Labs, Inc. "Braunwald-Cutter" Prods. Liab. Litig.*, 450 F.Supp. 1295, 1296 (J.P.M.L. 1979). The requirements for transfer under 28 U.S.C. §1407 are satisfied here. The three proposed class actions at issue are based on virtually the same questions of law and fact, *i.e.* did the Defendants illegally make payments to doctors and/or hospitals in order to have those doctors and/or hospitals unlawfully promote the usage of the hip and knee replacement devices of the Defendant manufacturers (including Stryker and Zimmer). In addition, transfer and consolidation will promote convenience for the parties and efficiency in the pretrial proceedings by eliminating duplicative discovery and the potential for

inconsistent rulings, especially relating to determinations on class certification, when the cases are essentially identical and involve the same alleged misconduct. The purpose of 28 U.S.C. § 1407 is to conserve judicial resources, avoid duplicative discovery and inconsistent discovery rulings and schedules, and reduce litigation time and costs. *Manual on Complex Litigation, Third* ¶ 31.13 at 251 (1995).

The first requirement of 28 U.S.C. § 1407 is that the actions to be transferred involve common questions of fact. This requirement is satisfied here. The factual issues to be determined in each of these actions arise from the same course of conduct. Among the numerous common questions of fact and law at issue in the Related Actions are:

- Whether the Defendants engaged in an ongoing business practice during the Class Period of providing payments or other consideration of monetary value to hip and/or knee surgeons in accordance with agreements reached between the Defendants and such surgeons through which the Defendants sought to induce such surgeons to choose its products in hip or knee implant surgery;

- Whether the Defendants sought to conceal such payments or consideration provided to hip and/or knee implant surgeons and to disguise the actual basis of such payments or other consideration provided to such surgeons;

- The duration of the alleged wrongdoing and the nature and character of the wrongful acts of the Defendants;

- Whether the agreements entered into by the Defendants and hip and/or knee surgeons had the effect of inflating the price of the Defendants' products used in hip and/or knee implant surgery;

- Whether the Plaintiff and members of the Class incurred increased health care costs as a result of the conduct of the Defendants;

- The appropriate measure of the overall damages sustained by Plaintiff and the Class.

The factual issues to be determined in all of the related class actions are nearly identical, making transfer and consolidation of the actions highly appropriate here. Here, each of the complaints allege essentially identical facts regarding the wrongful misconduct of the Defendant hip and knee implant manufacturers, namely that they made illegal payments to doctors and/or hospitals in return for those doctors and/or hospitals using the Defendants' hip and knee replacement devices for surgery. Although the *Thorpe* Action involves New York law and a New York class, the New York consumer protection and antitrust laws are equivalent to California's consumer protection and antitrust laws. Regardless, the factual issues relating to the conspiracy between manufacturers of hip and knee implants and medical professionals and hospitals will be the same in all of the above actions.

Consolidation and transfer will also convenience the parties and witnesses and in these cases because it will result in significant time and cost savings in pretrial proceedings (in particular, discovery, class certification, and other pretrial motion practice), as well as that trial, should that prove necessary. All three cases involve the same alleged wrongful conduct and requiring the same discovery in two separate forums will inconvenience the parties and the witnesses. *See In re Polychloroprene Rubber (CR) Antitrust Litig.*, 360 F.Supp.2d 1348, 1350-1351 (J.P.M.L. 2005) (recognizing the efficiencies and conveniences of consolidation and transfer to parties and witnesses, as well as judicial economy and consistency of rulings that benefits parties, witnesses and the courts in litigation with multiple defendants); *accord In re Publication Paper Antitrust Litig.*, 346 F.Supp.2d 1370, 1372 (J.P.M.L. 2004).

Consolidation and transfer will also serve the interests of both judicial economy and consistency. Consolidation and transfer will mean that only one judge will need to oversee the

proceedings. Assigning a single judge will ensure that the legal issues raised in this case, such as class certification, are addressed in a consistent manner. If these cases are not consolidated and transferred, there is a high likelihood that inconsistent legal results could be reached even though the underlying alleged wrongdoing is the same. *See In re Polychloroprene Rubber*, 360 F.Supp.2d at 1350-1351; *In re Publication Paper*, 346 F.Supp.2d at 1372 (recognizing that even when there exist certain factual differences between the claims against different defendants, consolidation and transfer to a single judge is still appropriate when there are overarching claims against the defendants that involve significantly similar factual bases.); *see also In re A.H. Robins Co. "Dalkon Shield" IUD Prods. Liab. Litig.*, 406 F.Supp. 540, 542 (J.P.M.L. 1975) (transfer necessary to prevent duplication of discovery and eliminate possibility of conflicting pretrial rulings); *In re Hawaiian Hotel Room Rate Antitrust Litig.*, 438 F.Supp. 935, 936 (J.P.M.L. 1977) (consolidation of five actions was necessary "in order to prevent duplication of discovery, eliminate the possibility of inconsistent pretrial rulings, and streamline the rest of the pretrial rulings as well"). Centralization under 28 U.S.C. § 1407 is necessary in order to eliminate duplicative discovery, prevent inconsistent pretrial rulings (especially with respect to class certification matters) and conserve the resources of the parties, their counsel and the judiciary.

Each criterion listed in 28 U.S.C. § 1407(a) is, therefore, satisfied, and the panel should consolidate and transfer the related Actions to a single district. As the first case was filed in the Northern District of California, the cases should be consolidated and transferred to the Northern District of California.

B. The Northern District of California is the Most Appropriate Transferee Forum

1. The Northern District of California has the Resources and Judicial Expertise to Properly Conduct this Case

The Northern District of California has the capacity and capability to manage multidistrict litigation ("MDL") and has an extremely capable bench. In particular, the Northern District of California has shown an ability to consistently handle and resolve complex multidistrict litigation, such as this case, in an expeditious and fair manner. Accordingly, the Northern District of California is an excellent forum for this litigation.

2. The First Filed Case was Filed in the Northern District of California

The first filed case, *Claire C. Haggarty v. Stryker Orthopedics, et. al.*, USDC NDCA, Case No. CV 08-1609 (JCS) was filed in the Northern District of California alleging misconduct by the Defendant manufacturers of hip and knee implants. As such, it makes sense for these cases to be consolidated and transferred to the Northern District of California. *See In re Ford Motor Co. Speed Control Deactivation Switch Products Liability Litig.*, 398 F.Supp.2d 1365 (J.P.M.L. 2005).

3. The Majority of Cases Have Been Filed in the Northern District of California

The majority of cases related to the allegedly unlawful kickback scheme by the Defendant manufacturers of hip and knee implants have been filed in the Northern District of California. Two of the three cases alleging an identical scheme have been filed in the Northern District of California, including the first-filed one. Therefore, this factor weighs strongly in favor of consolidation in the Northern District of California. *See In re Republic National-Realty Equities Securities Litig.*, 382 F.Supp. 1403, 1406 (J.P.M.L. 1974).

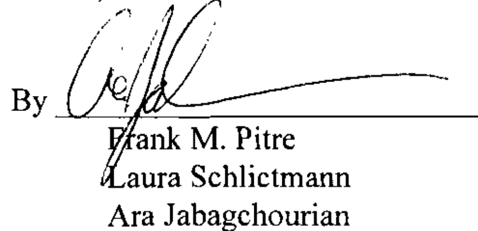
III.

CONCLUSION

For the reasons set forth above, Plaintiff Claire C. Haggarty respectfully requests that the Panel order that the three Related Actions relating to the wrongful acts of the Defendant hip and knee implant manufacturers be consolidated and transferred to the Northern District of California.

Dated: June 5, 2008

COTCHETT, PITRE & McCARTHY



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