BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: MDL No. ____

Sorin 3T Heater-Cooler Litigation

ORAL ARGUMENT REQUESTED

MEMORANDUM IN SUPPORT OF MOTION OF DEFENDANTS SORIN GROUP USA, INC.; SORIN GROUP DEUTSCHLAND GMBH; AND LIVANOVA PLC FOR TRANSFER AND CONSOLIDATION UNDER 28 U.S.C. § 1407

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

RULES

I. INTRODUCTION

Sorin Group USA, Inc. (n/k/a LivaNova Holding USA, Inc.), Sorin Group Deutschland GmbH (n/k/a LivaNova Deutschland GmbH), and LivaNova PLC (collectively "Defendants") move to transfer and consolidate certain pending federal actions that allege that the Sorin 3T Heater-Cooler ("3T Device") has caused a non-tuberculous mycobacterial infection ("NTM Infection") or has otherwise exposed a patient to NTM. Defendants seek to consolidate such actions before Judge Bruce H. Hendricks in the U.S. District Court for South Carolina, the District where 10 of the cases are currently pending. Defendants seek centralization because informal coordination of the increasing number of 3T Device cases has become untenable.

In January 2017, Plaintiffs Phillip Lamar West and Karen Austin moved to transfer and consolidate all federal cases related to the 3T Device into a single MDL proceeding in the District of South Carolina (the "*West* Motion"). But of the 15 3T Device cases pending in federal courts at that time, ten of them had already been consolidated for purposes of pretrial discovery in the District of South Carolina. *In re Sorin 3T Heater-Cooler Sys. Prod. Liab. Litig.*, No. MDL 2772, 2017 WL 1282908, at *1 (J.P.M.L. Apr. 5, 2017). The remaining five cases spanned only four other districts, and they involved only three additional plaintiffs' counsel, who were actively coordinating discovery with Defendants and each other. *Id.* Defendants and nonmoving plaintiffs' counsel opposed centralization because the relatively small number of cases was already being efficiently managed on an informal basis. The limited number of parties, venues, and plaintiff's counsel—as well as the consolidation in South Carolina—had to that point enabled efficient coordination of discovery and pre-trial proceedings. The Judicial Panel on Multidistrict Litigation (the "Panel") agreed, finding "overlapping pretrial proceedings have been and can continue to be handled through informal coordination." *Id.*

Circumstances have changed since the Panel's April 5 Order. The number of 3T Device cases in the federal courts has nearly tripled, with at least one new 3T Device case filed on average every week for the last forty weeks, and six new cases filed in just last two weeks alone. There are now 73 total 3T Device cases, a number which includes 42 federal actions across 21 separate judicial districts, involving dozens of different plaintiffs' counsel (the "Pending Federal Actions"). (*See* Schedule of Pending Actions.) This dramatic addition of new cases, filed in new judicial districts by new plaintiffs' counsel, has disrupted the parties' informal coordination to date, and the resulting complexity threatens to cause significant inconvenience and undue expense to the parties, their counsel, and the courts.

While individualized facts remain in each case, the number of cases heightens the need for centralization to efficiently address the actions' common factual issues, which include the design, manufacture, operation, and regulation of the 3T Device, the sufficiency of the Defendants' warnings, and the plaintiffs' common theory of general causation. These changed circumstances warrant reassessment of the Section 1407(a) factors, which, on balance, now support transfer and consolidation of the Pending Federal Actions. Centralization should be ordered in the U.S. District Court for South Carolina, given Judge Hendricks' familiarity with the common issues relating to the 3T Device, experience managing MDLs, and proven success in consolidated management of 3T Device Cases, as well as South Carolina's geographic placement at the center of gravity for the Pending Federal Actions.[1]

[1] Defendants do not seek transfer of *Baker v. Sorin Grp. Deutschland GmbH*, No. 16-cv-00260 (M.D. Pa.), as *Baker* involves numerous individual issues and sits in a unique procedural posture, as the parties have completed class certification discovery and the court issued an order certifying a medical monitoring class, which is the subject of Defendants' Petition under Fed. R. Civ. P. 23(f) for Permission to Appeal the October 23, 2017 Order Granting Class Certification with the U.S. Court of Appeals for the Third Circuit. (Exhibit 1.)

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Sorin 3T Heater-Cooler Device

The 3T Device is a Class II prescription medical device used to regulate a patient's blood temperature during open heart surgeries where the patient is placed on cardiopulmonary bypass. LivaNova Deutschland GmbH ("LivaNova Deutschland") is the registered manufacturer of the 3T Device, and during all relevant times Sorin Group USA, Inc., n/k/a LivaNova Holding USA, Inc. ("LivaNova Holding USA") sold the 3T device to hospital customers in the United States. LivaNova Deutschland and LivaNova USA are each subsidiaries of LivaNova PLC.[2]

The 3T Device plays an essential role in maintaining precise patient temperature during life-saving and life-enhancing open heart surgeries and is a necessary part of the modern cardiac operating room infrastructure. Indeed, there continue to be no reasonable alternatives to use of heater-cooler devices in the cardiac surgeries undergone by the plaintiffs in the Pending Federal Actions. Although plaintiffs' allegations generally relate to the risk of airborne NTM infection, such infections are exceedingly rare, as recognized by various plaintiffs and by government authorities. Multiple regulatory authorities, including the FDA, have considered the significant benefits of the surgical procedures using these devices weighed against the exceedingly low potential risk of airborne NTM infection and have concluded that the 3T Device's benefits outweigh the potential risk of infection.

[2] LivaNova PLC is a foreign corporation headquartered in London, England and is currently a named defendant in only a small handful of the Pending Federal Actions. LivaNova PLC has been dismissed for lack of personal jurisdiction in a number of federal cases (*see, e.g.*, *Baker v. LivaNova PLC*, 210 F. Supp. 3d 642, 651 (M.D. Pa. 2016)), and, consistent with these rulings has been voluntarily dismissed from many others. LivaNova PLC is a named defendant in only five Pending Federal Actions.

B. The Panel's April 5, 2017 Order

On January 26, 2017 plaintiffs West and Austin moved for centralization of all federal cases related to the 3T Device into a single MDL proceeding in the District of South Carolina. (Exhibit 2.) Defendants, joined by several of the plaintiffs in the pending cases at the time, opposed consolidation and transfer. (Exhibit 3.) Specifically, Defendants opposed centralization because it appeared that individual questions of fact predominated in light of the small number of cases and the coordination already in place. That is, there were "only a small handful of cases" filed, the majority of those cases had been consolidated in South Carolina, and counsel in the remaining cases were cooperating to achieve informal coordination. (*Id*. at *11-12.) The Panel agreed, finding that "any overlapping pretrial proceedings have been and can continue to be handled through informal coordination," and "[c]ritically, not a single party to any of the six actions pending outside the District of South Carolina supports centralization." *In re Sorin 3T*, 2017 WL 1282908, at *1 (citing *In re Student-Athlete Name & Likeness Litig.*, 763 F. Supp. 2d 1379 (J.P.M.L. 2011)).

B. The Pending Federal Actions

Presently, there are 42 federal cases that allege the 3T Device aerosolized NTM and released it into the operating room during surgery, where it either exposed a patient to NTM or caused an NTM infection. Each of the Pending Federal Actions asserts the same theory of transmission, *i.e.*, that the 3T Device is capable of transmitting a mycobacterium onto the surgical site when the 3T is used during open heart surgery. There are now three species of mycobacterium at issue in the Pending Federal Actions: *M. chimaera* is a slow-growing non-tuberculous mycobacteria, whereas *M. abscessus* is a more rapidly growing non-tuberculous

mycobacteria. A third mycobacterium, *M. fortuitum*, was alleged to have caused injury in *Patricia Faeth v. Sorin Grp. Deutschland GmbH, Inc*., 4:17-cv-04049-KES (D.S.D.).

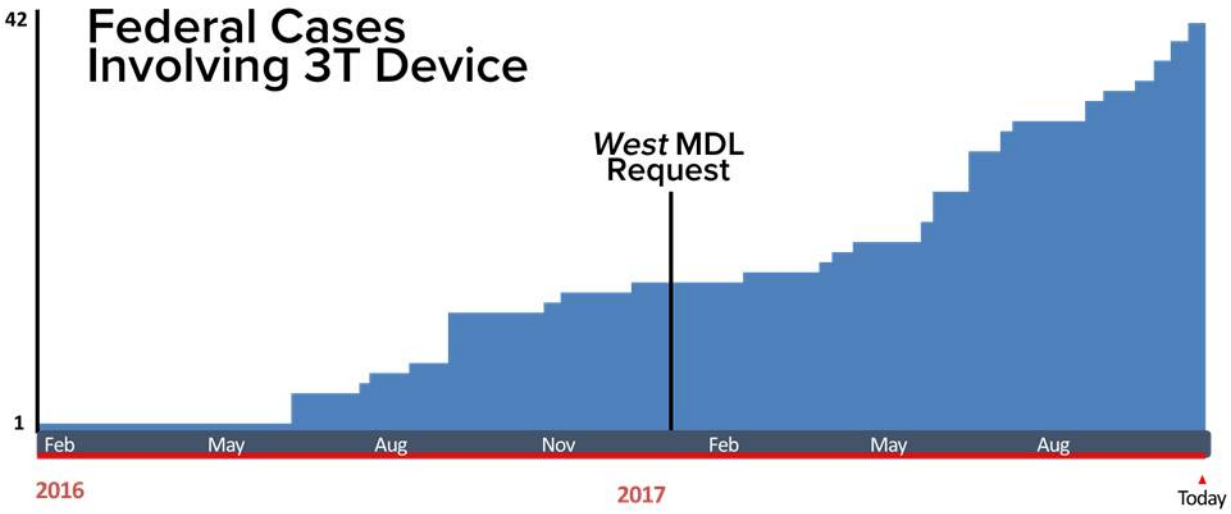
Ten of these cases were consolidated in front of Judge Bruce H. Hendricks upon joint motion of all plaintiffs and defendants in cases brought in the District of South Carolina. In the year since Judge Hendricks' initial Consolidation Order on September 14, 2016, the parties to the South Carolina cases have successfully coordinated discovery and other case management proceedings, sparing the court and parties of significant time and expense that would have resulted from redundant proceedings.

Three of the federal cases involve putative classes of asymptomatic plaintiffs that do not claim to have an NTM infection, and instead seek damages only for the costs of medical monitoring to detect the potential development of a NTM infection. These three cases are *Baker v. Sorin Grp. Deutschland GmbH*, No. 1:16-cv-00260 (M.D. Pa.); *Pickrell v. Sorin Grp. USA, Inc*., No. 4:17-cv-00191-JAJ-SBJ (S.D. Iowa), and *Sawvel v. Sorin Group Grp. GmbH*, No. 6:17-cv-02056-LTS (N.D. Iowa). *Baker* is a class action filed in the Middle District of Pennsylvania in February 2016, the court certified plaintiffs' requested class in October 2017, and Defendants have sought review of that order with the U.S. Court of Appeals for the Third Circuit.[3]

In addition to the Pending Federal Actions, there are 30 additional cases involving the 3T Device filed in state courts across the country. All of these cases claim damages for personal injury or death under theories of negligence, strict liability, breach of warranties, misrepresentation, and violation of state consumer protection acts.

[3] Several manageability issues unique to the *Baker* case warrant excluding it from this MDL request, in light of legal and factual issues that are unique to claims for asymptomatic medical monitoring. In addition, *Baker* case sits in a unique procedural posture, as it was filed more than four months before any other federal case, Rule 12 and 23 motions have been addressed by the Court, and Defendants' Rule 23(f) Petition for Permission to Appeal the court's class certification order has been filed with the U.S. Court of Appeals for the Third Circuit.

In the eight months since the *West* MDL request, 47 *additional* cases have been filed involving the 3T Device, 26 of which are currently pending in federal court (*see* Schedule of Actions). The filing dates of the Pending Federal Actions demonstrate a significant increase in frequency of case filings since the *West* MDL request:



In addition, the recently filed cases are more geographically dispersed than the initial cases, and they have tripled the number of Plaintiffs' counsel with whom Defendants must engage in pre-trial discovery proceedings. Today, the 42 Pending Federal Actions are venued in 21 separate judicial districts and involve 30 separate plaintiffs' law firms. (*See* Schedule of Actions.) This is in addition to the 31 3T Device cases pending in eight different states.

Aside from the *Baker* medical monitoring case (which is in a different procedural posture given the class certification ruling and subsequent appeal and for which Defendants thus do not seek centralization), all of the pending 3T Device cases are either in the initial pleading or discovery stages. The majority of Pending Federal Actions have not yet had a case management conference, and even the most-progressed cases are still early in discovery. Defendants have begun producing documents in several of the cases in response to myriad different discovery requests, and Defendants' document collection, review and production efforts are ongoing. To

date, only one deposition of a Defendant witness has been completed in any of the Pending Federal Actions.[4]

III. LEGAL STANDARD

While a district court may order consolidation of related cases presently before it, 28 U.S.C. § 1407 grants this Panel the authority to transfer and consolidate cases from many districts involving one or more common questions of fact for the purpose of consolidating and coordinating pre-trial proceedings in front of a single transferee judge. Such "centralization" is appropriate upon this Panel's determination that it will serve the "convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a). Upon initiation of an MDL, the transferee judge can then employ any number of techniques, such as establishing separate discovery and motion tracks, to manage pretrial proceedings efficiently. *See, e.g., In re: AndroGel Prods. Liab. Litig.*, 24 F. Supp. 3d 1378, 1379–80 (J.P.M.L. 2014). As discussed below, centralization at this time will serve the convenience of parties and witnesses and promote the just and efficient conduct of the Pending Federal Actions.

IV. ARGUMENT

The decision before this Panel must balance a number of facts and circumstances flowing from the three factors set forth in § 1407(a): the existence of common questions of fact, the convenience to the parties and witnesses, and the interests of justice and efficiency. This "balancing" formula is not rigid, nor are its results set in stone—time and again, this panel has held that changed circumstances on one side of the equation can affect the outcome of the

[4] An additional deposition was conducted in connection with limited jurisdictional discovery in connection with LivaNova PLC's successful motion to dismiss for lack of personal jurisdiction in *Prescott*, No. 4:17-cv-0324-JAJ-SBJ (S.D. Iowa) and *Crawford*, No. 4:16-cv-00472-JAJ-SBJ (S.D. Iowa). Two additional depositions are currently scheduled for late November.

analysis. *In re: Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig.*, 997 F. Supp. 2d 1354, 1356 (J.P.M.L. 2014) ("*Lipitor II*").

This case is exactly that type of situation "where a significant change in circumstances has occurred," meriting reconsideration of the MDL analysis. *In re Plavix Mktg., Sales Practices and Prods. Liab. Litig. (No. II)*, 923 F. Supp. 2d 1376, 1378 (J.P.M.L. 2013). Indeed, the changed circumstances in the nine months since the *West* Motion reveals that the balance of the Section 1407(a) factors now weighs in favor of centralization. The Panel ruled correctly at that time that the informally coordinated nature of certain of the 3T Cases would facilitate the efficiencies and convenience usually enabled by an MDL. Pre-trial discovery has progressed smoothly and efficiently in the original 10 consolidated cases in the District of South Carolina. But nationwide, with 42 federal cases, 31 state cases, and new cases filed every week in new judicial districts, centralization is now necessary to promote the just and efficient management of pre-trial activities and to preserve judicial resources. Centralization at this point would allow questions regarding plaintiffs' common theories of transmission and infection to be consolidated in the interests of convenience, efficiency, and justice; would prevent duplicative, inconsistent and unduly burdensome discovery; would avoid subjecting Defendants' witnesses to an unreasonable number of depositions, and would also limit redundant expert discovery and disparate motion practice and ensure consistent pretrial proceedings.

A. <u>The 3T Litigation Has Grown Considerably Since the Panel's April 5 Order.</u>

The Panel has repeatedly held that an increase in the number of cases with common questions—even after centralization is initially denied—creates complexity and manageability issues that justify the creation of an MDL. For example, in *In re Plavix*, the Panel initially declined to centralize 12 actions that alleged personal injury or death resulting from the use of

Plavix. *In re: Plavix Prods. Liab. Litig.*, 829 F. Supp. 2d 1378 (J.P.M.L. 2011) ("*Plavix I*"). The Panel held that despite the presence of a number of common questions, an MDL was not necessary because the cases were at widely varying procedural stages, comprised a "limited number of actions," and involved "relatively few" plaintiffs' counsel. *Id.* However, little more than a year later, the Panel revisited that decision in light of a "significant change in circumstances." *In re Plavix Mktg., Sales Practices & Prods. Liab. Litig.*, 923 F. Supp. 2d 1376, 1378 (J.P.M.L. 2013) ("*Plavix II*"). Specifically, the Panel found that "[t]he state of affairs" had changed "in several significant respects," including through an increase in the number of federal cases from ten to thirty-three, an increase in the number of federal districts from two to 14, an increase in the number of state courts hearing related cases from two to four, and a "significant" increase in the number of law firms in the litigation. *Id.* at 1378-79. In light of the growing number of cases, the *Plavix II* Panel held that centralization would serve the convenience of the parties and witnesses and would promote the just and efficient conduct of the litigation, despite the fact that practically the same panel had earlier denied the same motion. *Id.* at 1379. In particular, the Panel held that the central resolution of common facts related to the allegedly injurious product's development, manufacture, regulatory approval, labeling, and marketing would "conserve the resources of the parties, their counsel, and the judiciary." *Id.*

Similarly, in *In re Proton-Pump Inhibitor Prod. Liab. Litig.*, the Panel revisited its eight-month-old decision to deny an MDL in a series of cases alleging personal injury and death caused by a medication sold by the defendants. No. MDL 2789, 2017 WL 3309647, at *2 (J.P.M.L. Aug. 2, 2017) ("*Proton-Pump II*"). In its initial ruling, the Panel denied the motion for MDL, fearing centralization would be problematic because the defendants (who varied from case to case) were competing companies. Nonetheless, the Panel later granted a second motion for

MDL because "the number of involved actions, districts, and plaintiffs' counsel ha[d] increased significantly" in the prior eight months, "many more cases likely [would] be filed," there was an increase in the "number of related state court actions, and . . . informal coordination and cooperation [were] not practicable to manage litigation of this scope." *Id.* at *2. Despite the Panel's continuing concern about joining competitor defendants in an MDL, the Panel held that "the significantly larger number of involved actions, districts, and counsel, the concomitant increase in burden on party and judicial resources, and the opportunity for federal-state coordination, *coupled with most defendants' change in position to now support centralization*, tip the balance in favor of creating an MDL." *Id.* (emphasis added).

Where the Panel has ordered centralization after an initial denial, it has often done so upon coming to the conclusion that informal coordination is no longer viable, despite the parties' efforts. For example, the Panel initially denied centralization in *In re: Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig.*, because half of the cases were consolidated in the District of South Carolina, and the defendant was "ready and willing to work with Plaintiffs' counsel in the [non-South Carolina] actions to appropriately coordinate any common discovery or other pretrial matters across the cases." 959 F. Supp. 2d 1375, 1376 (J.P.M.L. 2013) ("*Lipitor I*"). Six months later, the Panel granted a request for centralization, which was compelled by the addition of numerous new cases and plaintiffs' counsel, rendering "informal coordination and cooperation . . . no longer practicable." *Lipitor II*, 997 F. Supp. 2d at 1356; *see also In re Fedex Ground Package Sys., Inc., Empl. Practices Litig.*, 381 F. Supp. 2d 1380, 1381 (J.P.M.L. 2005) ("In the intervening months, however, the litigation has grown considerably. . . . which underscores the need for economies of scale that centralized pretrial management of these actions will provide.").

At the time of the *West* Motion, Defendants opposed centralization of the relatively small number of then-pending federal actions, as centralization was unnecessary in light of the parties' informal cooperation and coordination to date. And consistent with the Panel's April 5 Order, Defendants have worked to facilitate discovery through measures such as expanded protective order sharing provisions and cross-noticed depositions. But those efforts at informal case management are now impractical under the weight of so many new cases and counsel. To continue to rely on informal coordination going forward would almost certainly cause undue expense and inconvenience to the parties, witnesses, and courts. As discussed below, centralization of pre-trial proceedings at this point will avoid the severe burdens of duplicative discovery, redundant *Daubert* motions, and scattered motion practice, thereby "conserve[ing] the resources of the parties, their counsel, and the judiciary." *Plavix II*, 923 F. Supp. 2d at 1378.

B. Discovery of Common Issues Will Benefit From Centralization.

1. Much of the pre-trial proceedings will focus on common and overlapping facts and theories of NTM transmission and infection.

The commonality requirement of § 1407 "does not require a complete identity or even a majority of common factual or legal issues as a prerequisite to transfer." *In re: Glaceau VitaminWater*, 764 F. Supp. 2d 1349, 1351 (J.P.M.L. 2011) (citing *In re Gadolinium Contrast Dyes Prods. Liab. Litig.*, 536 F. Supp. 2d 1380, 1382 (J.P.M.L. 2008)). While a number of individual factual issues certainly exist in these cases, "this is usually true of products liability cases and medical device cases, in particular." *In re Cook Med., Inc., Pelvic Repair Sys. Prods. Liab. Litig*., 949 F. Supp. 2d 1373, 1375 (J.P.M.L. 2013). Yet there are an equal if not greater number of common issues in the Pending Federal Actions, as such actions "involve common factual questions surrounding the design, testing, manufacture, and marketing of [the allegedly defective product]." *In re Power Morcellator Prods. Liab. Litig*., 140 F. Supp. 3d 1351, 1353

(J.P.M.L. 2015). And where multiple cases accuse the same product of the same type of injury, "[d]iscovery, including expert discovery, will overlap with respect to these common issues." *Id.*

There are undeniably common facts in all of the Pending Federal Actions that are amenable to centralized management. Each of the Pending Federal Actions claims personal injury, wrongful death or requests for medical monitoring under theories of negligence, strict liability, breach of warranties, misrepresentation, and/or violation of state consumer protection acts. Although the date, location and type of surgery differs, each of the Pending Federal Actions asserts a product liability theory that alleges the 3T Device colonizes mycobacteria that is released into the operating room during surgery, where it came into contact with a patient. These theories of transmission and infection will undoubtedly "overlap" in discovery, expert reports, motion practice, and deposition testimony.[5]

Defendants opposed *West's* prior request for centralization and expressed the belief that individualized facts predominated, particularly in light of the coordination of common facts and issues already occurring. This was not a controversial belief, as product liability cases always involve "a highly individualized inquiry . . . to determine whether any particular plaintiff developed [the alleged injuries]," and "[w]here few cases are filed, the balance tips toward allowing the regular litigation process to resolve those cases." *Lipitor I*, 959 F. Supp. 2d at 1376. However, where circumstances have changed, such as "the number of involved actions and the

[5] While the species of mycobacteria vary from case-to-case and district-to-district, plaintiffs' common claims regarding the design of the 3T Device and the critical question of transmission are the same. Limited individualized discovery can account for any variances in species of mycobacteria, and in any event, the identification of the alleged infectious agent may itself be determined during discovery. In fact, a number of 3T Device complaints fail to identify the species of the allegedly-infectious mycobacterium, and the allegation may vary within the same state. For example, *M. abscessus* is alleged in the ten South Carolina cases, and it is also alleged in cases in Florida (*Dezenski*, No. 17-cv-00323-UA-CM; *Ramirez*, No. 17-cv-61455-WPD), and North Carolina (*Blevins*, No. 16-cv-00785; *Colson*, 17-cv-00519). Given the need for consolidation, the variance in species will not unduly disrupt centralization of common issues.

number of involved plaintiffs' counsel have increased significantly," the importance of managing common factual issues will be found to "tip the balance in favor of centralization." *Lipitor II*, 997 F. Supp. 2d at 1356. The balance has tipped in these cases, and the importance of efficiently managing common factual issues warrants centralization at this time.

2. Other developments in the Pending Federal Actions support centralization.

Defendants' opposition to the *West* Motion identified a number of reasons why Defendants believed individualized facts "predominated" over common issues in the limited number of actions pending at that time. However, several developments have resolved the first two concerns Defendants identified—the involvement of different claims and different defendants—further ensuring that centralization will now be more manageable than the MDL proceeding proposed by *West*.

First, there is likely to be a near-uniform identity of defendants in the Pending Federal Actions. In the months since the Panel's decision on the *West* Motion, LivaNova PLC has been dismissed from the significant majority of the Pending Federal Actions, either by Order (*see, e.g.*, *Baker*, 210 F. Supp. 3d 642; *Prescott* and *Crawford*, 2017 WL 2591270) or voluntary dismissal. This increases the likelihood that LivaNova Holding USA and LivaNova Deutschland will be the common defendants in nearly all centralized cases.

Second, in bringing this motion, Defendants request that *Baker*, the first-filed and only Pending Federal Action to allege claims for medical monitoring that are recognized by underlying state law be excluded from centralization. *Baker* has progressed to the point where the court issued an order on October 23, 2017 certifying a medical monitoring class, and Defendants have filed a petition under Fed. R. Civ. P. 23(f) with the U.S. Court of Appeals for the Third Circuit for review of that decision. (Exhibit 1.) No other Pending Federal Action is

similarly-situated to *Baker*, and, unlike any other pending case, the medical monitoring claims alleged in *Baker* require proof that the requested monitoring is (1) different from that normally recommended for the plaintiff in the absence of exposure, and (2) reasonably necessary according to scientific principles. *See Redland Soccer Club, Inc. v. Dep't of the Army & Dep't of Def.*, 696 A.2d 137, 145-46 (Pa. 1997). Furthermore, medical monitoring plaintiffs must prove that, as a result of their exposure, they have a significantly increased risk of contracting a serious latent disease. *Id.* These unique medical monitoring questions in *Baker* are not appropriate for consolidation in an MDL with personal injury claims.[6]

C. Centralization Will Be More Convenient for Parties and Key Witnesses and More Efficient, Just, and Preservative of Judicial Resources.

The dramatic increase in 3T Device cases has created significant convenience, cost, and manageability issues. While informal coordination can work with a limited number of cases, it is well-established that centralization of a greater number of cases provides "the potential for eliminating duplicative discovery and related motion practice, as well as the chance to conserve judicial resources (with a single judge, rather than [dozens of] judges in [fifteen] districts) . . . ." *In re Royal Alliance Assocs., Inc., Sec. Litig.*, 856 F. Supp. 2d 1339, 1340 (J.P.M.L. 2012). Further, as in *Plavix II*, "[i]n the present docket, there are not only more involved actions but also

[6] Unlike *Baker*, the two medical monitoring cases venued in Iowa are more amenable to centralization. Although *Pickrell* and *Sawvell* purport to assert medical monitoring class action claims, no Iowa court has ever recognized a cause of action for medical monitoring, and Defendants have already sought dismissal of *Pickrell* on those grounds. In fact, it is a long-standing principle of Iowa tort law that the standard for a claim of relief is actual injury: "A tort claim is not 'capable of present enforcement' until the plaintiff has suffered actual damage. . . . Actual damage is not the mere possibility of future harm." *Vossoughi v. Polaschek*, 859 N.W.2d 643, 651–652 (Iowa 2015) (quoting *Hennekens v. Hoerl*, 465 N.W.2d 812, 816 (Wis. 1991)); *see also Olson v. Prosoco, Inc.*, 522 N.W.2d 284, 291 (Iowa 1994) ("[t]here is no legal wrong—that is no negligence—without actual injury." While there are important legal and factual distinctions between medical monitoring and the cases alleging injury, Judge Hendricks can "establish[] separate discovery and motion tracks, to manage" these two claims for medical monitoring without derailing centralization. *In re: AndroGel*, 24 F. Supp. 3d at 1379–80.

significantly more involved counsel." 923 F. Supp. 2d. at 1378. In these cases, Defendants currently face the prospect of serving and filing dozens of expert reports and *Daubert* motions, and investing significant time and resources responding to similar—yet not identical—discovery requests. Stretched over more than 40 cases, this inefficiency would create significant expense for the Defendants. Worse is the prospect of subjecting Defendants' witnesses to numerous depositions across the Pending Federal Actions. The discovery burdens this would place on Defendants' witnesses are significant, given the fact that LivaNova Deutschland's corporate witnesses reside in and are citizens of Germany.[7] To facilitate discovery in these cases, these witnesses must travel internationally to locations outside of the country to sit for their depositions. Numerous redundant depositions would force these witnesses to make such trips repeatedly, at great inconvenience to them and great expense to Defendants.

Upon the creation of an MDL, "[c]entralization will place all related actions before a single judge who can: (1) allow discovery with respect to any individual issues to proceed concurrently with pretrial proceedings on common issues, . . . and (2) ensure that pretrial proceedings are conducted in a streamlined manner leading to the just and expeditious resolution of all actions to the overall benefit of the parties." *In re: Royal Alliance,* 856 F. Supp. 2d at 1340 (citation omitted). Here, the Pending Federal Actions have been filed in judicial districts across the country, and plaintiffs are represented by 30 separate law firms. Although trial dates have been set in a small handful of the Pending Federal Actions as part of initial scheduling conference proceedings, all are early in the process. As mentioned above, all of the Pending

[7] German law imposes significant restrictions on the taking of depositions of its citizens, and as a result conducting this discovery can be both challenging and burdensome. *See, e.g.*, *https://travel.state.gov/content/travel/en/legal-considerations/judicial/country/germany.html*). Nevertheless, Defendants have been working to efficiently coordinate depositions of these German witnesses by arranging for the depositions to be taken outside of the country, which will be further supported by centralization of the Pending Federal Actions.

Federal Actions are either in the initial pleading or early discovery stages, and new cases are likely to continue to be filed. Defendants have begun producing documents in several of the cases; Defendants' document collection, review and production efforts are ongoing; and only one deposition of a Defendant witness has been completed in the federal cases. Centralization will ensure these cases progress in a uniform, efficient, and just manner.

D. Centralization Would Also Encourage Uniformity in the Related 3T State Cases.

Finally, centralization will only help further coordinate the growing number of related 3T Device cases that are pending in state court. The Panel has recognized the common-sense proposition that "coordination with the state court actions will be enhanced if only one federal judge needs to communicate with the multiple state court judges overseeing the [federal] litigation." *In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Practices & Prods. Liab. Litig.*, 220 F. Supp. 3d 1356, 1358 (J.P.M.L. 2016); *see also Plavix II*, 923 F. Supp. 2d at 1378–79 (observing that centralization "likely will facilitate coordination among all courts with *Plavix* cases, simply because there will now be only one federal judge handling most or all federal *Plavix* litigation"). In fact, the Panel in *Lipitor II* cited the existence of co-pending state court cases as further justification for reversing course and ordering consolidation and transfer. 997 F. Supp. 2d 1354, 1356 ("Creation of an MDL likely will make it easier to coordinate, as needed, pretrial proceedings in both the state and federal cases, because there will now be just one judge handling the latter.").

Here, there are nearly an equal number of pending 3T Device cases alleging injury in state courts throughout the country (31 cases across eight states). The creation of an MDL proceeding can only serve to "make it easier to coordinate, as needed, pretrial proceedings in

both the state and federal cases, because there will now be just one judge handling the latter." *Id.* This is yet another fact that tips the balance in favor of centralization.

E. The District of South Carolina Is the Most Appropriate Forum for Centralization.

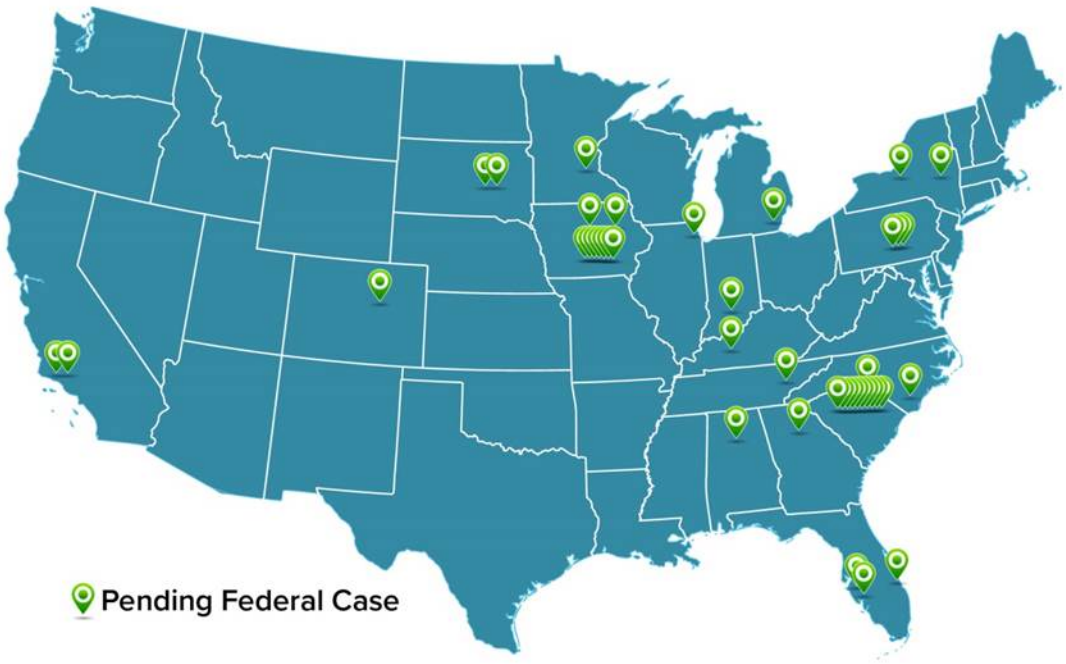
First, the District of South Carolina is not overtaxed with other MDL cases, as the current JPML Statistics Report indicates that there are only two relatively small pending MDL proceedings in the District. (Exhibit 4.) To the contrary, the current MDL load in the District of South Carolina, and in front of Judge Hendricks, creates the perfect primer for the more robust MDL Defendants propose. Judge Hendricks is currently managing 11 consolidated cases in *In re: TD Bank, N.A., Debit Card Overdraft Fee Litig.* (MDL-2613), providing her with valuable experience in managing MDLs like the Pending Federal Actions. *See In re Educational Testing Service PLT 7-12 Test Scoring Litig.*, 350 F. Supp. 2d 1363, 1365 (J.P.M.L. 2004) (favoring judge with "prior, successful experience in the management of Section 1407 litigation").

Second, Judge Hendricks is also currently presiding over the 10 Pending Federal Actions in the District of South Carolina which are already consolidated for pre-trial proceedings. Judge Hendricks' ability and experience in managing the consolidated 3T Device cases will prove invaluable in her role as the transferee judge for this MDL. Judge Hendricks has proven that she can manage and coordinate multiple 3T Device actions containing common facts in an efficient manner and to the satisfaction of all parties.

Third, discovery in the consolidated South Carolina cases has progressed as or more efficiently than in any other forum, and no other Judge has successfully managed more consolidated 3T Device cases than Judge Hendricks. Judge Hendricks has already considered and addressed discovery coordination and scheduling issues that will arise in an MDL, and has issued case management plans in these cases. Such experiences with more advanced constituent

actions will aid a transferee judge in her management of the MDL, as experience with cases that are "more procedurally advanced than the other actions" will ensure that the Panel is "assigning this docket to a jurist already familiar with the contours of the litigation and able to steer this matter on a prudent course." *In re Imagitas, Inc., Drivers' Privacy Protection Act Litig.*, 486 F. Supp. 2d 1371, 1372 (J.P.M.L. 2007).

Fourth, the District of South Carolina is located at the geographic center of gravity of the Pending Federal Actions and is convenient for the parties to reach. *See In re Multi-Piece Rim Prods. Liab. Litig.*, 464 F. Supp. 969, 975 (J.P.M.L. 1979) (choosing central forum in Missouri because it was convenient to reach and "more actions are pending in that district than in any other federal district"). While the Pending Federal Actions are spread throughout the country, their center of gravity rests in South Carolina, which has the most Pending Federal Actions:



Centrally located on the Eastern Seaboard, the forum is accessible by two international airports – Greenville-Spartanburg (15 miles) and Charlotte (95 miles). The geographic location of the transferee district is an important factor for the Panel to consider when deciding on a

transferee forum. *See In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prods. Liab. Litig.*, 2011 WL 2132995, at *2 (J.P.M.L. May 23, 2011). This is particularly true when the actions (and parties) to be centralized are dispersed nationwide. *In re Transdata, Inc. Smart Meters Patent Litig.*, 2011 WL 6369878, at *2 (J.P.M.L. Dec. 13, 2011).

V. CONCLUSION

For these reasons, Defendants respectfully request that the Panel grant their motion to transfer pursuant to 28 U.S.C. § 1407, and transfer forty-one (41) of the Pending Federal Actions, aside from *Baker v. Sorin Grp. Deutschland GmbH*, No. 1:16-cv-00260 (M.D. Pa.), together with any future related actions, the U.S. District Court for the District of South Carolina, given its place as the geographic center of gravity, and the experience of Judge Bruce H. Hendricks and her familiarity with the common issues in the Pending Federal Actions.

Dated: November 6, 2017

FAEGRE BAKER DANIELS LLP

By: [redacted]

Attorneys for Defendants LivaNova Deutschland GmbH, Sorin Group USA, Inc. (n/k/a LivaNova Holding USA, Inc.), and LivaNova PLC