UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

IN RE: SORIN 3T HEATER-COOLER SYSTEM PRODUCTS LIABILITY LITIGATION (NO. II) MDL No. 2816

TRANSFER ORDER

Before the Panel:[*] Plaintiff Sarah Bickle and defendant Ben Swanson in two nearly identical actions each move under Panel Rule 7.1 to vacate our order that conditionally transferred the actions listed on Schedule A (*Bickle I* and *II*)[1] to MDL No. 2816. Defendant LivaNova USA, Inc. (LivaNova) opposes the motions to vacate.

After considering the argument of counsel, we find these actions involve common questions of fact with the actions previously transferred to MDL No. 2816, and that transfer under 28 U.S.C. § 1407 will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. Like many of the already-centralized actions, the *Bickle* cases involve factual questions arising out of allegations that LivaNova's Sorin 3T heater-cooler system contains defects that leave the device susceptible to bacterial colonization, resulting in some patients' exposure to nontuberculous mycobacterium (NTM) during surgery. *See In re Sorin 3T Heater-Cooler Sys. Prods. Liab. Litig. (No. II)*, 289 F. Supp. 3d 1335 (J.P.M.L. 2018). Plaintiff's claims in the *Bickle* actions, like those of plaintiffs in the MDL, center on the allegation that the decedent contracted an NTM infection during surgery in which a Sorin 3T heater-cooler unit was used. The *Bickle* cases thus share questions of fact with the actions already in the MDL.

In support of the motions to vacate, plaintiff and Mr. Swanson argue that the actions involve unique questions of fact because (a) the 3T unit at issue was a "loaner" that was owned by LivaNova and used by University of Kansas Hospital, and (b) plaintiff alleges that the perfusionist, Mr. Swanson, failed to follow LivaNova's instructions for use in disinfecting and properly orienting the 3T device during surgery. Though there are some differences between the *Bickle* cases and those in the MDL, we find that the actions are sufficiently similar to benefit from transfer.

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[*] Judge Karen K. Caldwell and Judge Madeline Cox Arleo did not participate in the decision of this matter.

[1] Plaintiff brings one wrongful death action as the daughter of the decedent and a survival action as the administrator of the decedent's estate. The actions name the same parties, contain similar allegations, and have been consolidated in the District of Kansas.

Plaintiff alleges, like the MDL plaintiffs, that the 3T device used in decedent's surgery was unreasonably dangerous and defective in manufacture and design because it facilitates the release of aerosolized NTM bacteria into the operating room during surgery. *See Bickle I* Compl. at ¶¶ 37-38. That the 3T device at issue was a "loaner" does not, in our view, make this action unique, as these claims regarding defective manufacture and design are the same. The presence of unique claims against healthcare defendants generally is not a bar to transfer when "the actions still arise from a common factual core." *In re FTX Cryptocurrency Exch. Collapse Litig.*, 677 F. Supp. 3d 1379, 1381 (J.P.M.L. 2023). In fact, the Panel has held that "MDLs involving medical devices often include similar [medical negligence] claims against healthcare defendants." *In re Boston Scientific Corp. Pelvic Repair Sys. Prods. Liab. Litig.*, MDL No. 2326, Transfer Order, ECF No. 1627 (J.P.M.L. Aug. 5, 2016) (quoting *In re Bard IVC Filters Prods. Liab. Litig.*, MDL No. 2641, Transfer Order, ECF No. 230, at p. 2 (J.P.M.L. Feb. 4, 2016)). In this MDL, we have transferred claims that healthcare provider defendants failed to properly clean, disinfect, and position the 3T device. *See Yerkey* Compl., No. 1:23-00547 (M.D. Penn.) ECF No. 1-2, at ¶¶ 161-162.

Plaintiff also argues that the decedent's surgery took place after the outbreak of NTM infections associated with Sorin 3T devices at issue in the initially centralized MDL cases in 2018. She argues that the MDL was focused on establishing a connection between the NTM infection and the 3T devices, while the *Bickle* cases are focused on LivaNova's instructions for use, which were implemented to mitigate the risk of NTM infections, and which plaintiff alleges Mr. Swanson did not follow. We are not persuaded by these arguments. Later cases transferred to the MDL have, similar to these cases, alleged that healthcare defendants, despite having knowledge that 3T devices may be contaminated with NTM bacteria, did not follow the manufacturer's instructions to mitigate the risk of infection. *See id*. Plaintiff argues that her cases should be coordinated with several similar cases pending in Kansas state court, which she argues arise out of the same "outbreak" of NTM infections at the same hospital. Informal coordination of these federal cases with the allegedly related state court litigation can occur in either the transferee or transferor court.

Finally, we are not convinced that the procedural posture of MDL No. 2816 weighs against transfer, as plaintiff suggests. The MDL parties currently are subject to a docket control order that appears to be efficiently processing cases. There are two cases currently pending in the MDL, one of which was recently transferred. If, after close scrutiny, the transferee judge determines that these actions or any other action will not benefit from continued inclusion in the MDL, she can suggest Section 1407 remand, which will be accomplished with a minimum of delay. *See* Panel Rules 10.1-10.3.

IT IS THEREFORE ORDERED that the action listed on Schedule A is transferred to the Middle District of Pennsylvania and, with the consent of that court, assigned to the Honorable Karoline Mehalchick for inclusion in the coordinated or consolidated pretrial proceedings.

PANEL ON MULTIDISTRICT LITIGATION

Matthew F. Kennelly
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SCHEDULE A

District of Kansas

BICKLE v. SWANSON, ET AL., C.A. No. 2:26−02052
BICKLE v. SWANSON, ET AL., C.A. No. 2:26−02054