UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

IN RE: ALLERGAN BIOCELL TEXTURED BREAST IMPLANT PRODUCTS LIABILITY LITIGATION MDL No. 2921

TRANSFER ORDER

Before the Panel:[*] Plaintiff in the action listed on Schedule A (*Malkemes*) moves under Panel Rule 7.1 to vacate our order conditionally transferring the action to MDL No. 2921. Defendants Allergan, Inc., and Allergan USA, Inc. (together, "Allergan") oppose the motion to vacate and support transfer.

After considering the argument of counsel, we find that *Malkemes* involves common questions of fact with the actions transferred to MDL No. 2921, 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. In our order establishing MDL No. 2921, we held that centralization was warranted for actions arising out of "Allergan's announcement on July 24, 2019, of a voluntary worldwide recall of its BIOCELL textured breast implants and tissue expanders" related to an investigation by the U.S. Food and Drug Administration into reports that the products posed a risk of a cancer of the immune system referred to as breast-implant associated anaplastic large cell lymphoma (BIA-ALCL). *See In re Allergan BIOCELL Textured Breast Implant Prods. Liab. Litig.*, 412 F. Supp. 3d 1361, 1362 & n.4 (J.P.M.L. 2019). The centralized actions present common factual questions pertaining to the allegation "that Allergan's BIOCELL textured breast implants and tissue expanders significantly increase the risk of developing BIA-ALCL, and that Allergan failed to warn the FDA, patients, and healthcare providers of this risk." *See id.* at 1362. The *Malkemes* action undisputedly raises the same core factual questions and thus is appropriate for transfer.[1]

In opposition to transfer, plaintiff argues that her action involves additional injuries beyond the scope of the MDL, mainly a condition referred to as "Breast Implant Illness" ("BII"), which she describes as a constellation of severe autoimmune systemic symptoms such as fatigue, memory loss, rash, brain fog, and joint pain. But "[a] complete identity of factual issues . . . is not a prerequisite to Section 1407 transfer where, as here, the actions arise from a common factual core."

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

[1] *See Malkemes* Am. Compl. ¶¶ 25-28, 46, 62 (alleging that plaintiff's implants pose a risk of BIA-ALCL and plaintiff requires "long term medical monitoring and testing, due to her significantly higher risk of developing BIA-ALCL").

See In re Valsartan Prods. Liab. Litig., 433 F. Supp. 3d 1349, 1352 (J.P.M.L. 2019). Additionally, the Panel has transferred tag-along actions to this MDL that involve BIA-ALCL and other plaintiff-specific injuries. *See, e.g.,* Transfer Order (*Calais*), Doc. No. 372, at 1-2 (J.P.M.L. June 3, 2021) (transferring action involving both the risk of BIA-ALCL and recurrence of breast cancer based on the common issues "concerning the recall and the alleged risk of BIA-ALCL"). Based on the record before us, we believe that the overall interests of convenience and efficiency will be served by transfer of *Malkemes*, as the action likely will involve common discovery, dispositive motions, and other matters that overlap with the pretrial proceedings in the MDL. If the transferee judge finds that inclusion of *Malkemes* will not serve the convenience of the parties and witnesses or promote the just and efficient conduct of this litigation, Section 1407 remand of the action to its transferor court can be accomplished with a minimum of delay. *See* Panel Rules 10.1-10.3.

Plaintiff also argues that transfer will violate her constitutional rights to due process and access to the courts by preventing her from pursuing the BII claims. This is a false premise. It is well-established that the transferee court can conduct pretrial proceedings with respect to any case-specific issues concurrently with pretrial proceedings on the common issues. Additionally, "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotation marks and citation omitted). Plaintiff's conclusory assertion that the transferee court will not address her BII claims is speculative. Nothing in the record suggests that plaintiff will be denied a meaningful opportunity to pursue her claims for both injuries in the MDL. Plaintiff's concerns are essentially case management issues that she may bring to the attention of the transferee court.

IT IS THEREFORE ORDERED that the action listed on Schedule A is transferred to the District of New Jersey and, with the consent of that court, assigned to the Honorable Brian R. Martinotti for inclusion in the coordinated or consolidated pretrial proceedings.

PANEL ON MULTIDISTRICT LITIGATION

Karen K. Caldwell
Chair

Nathaniel M. Gorton
David C. Norton
Dale A. Kimball

Matthew F. Kennelly
Roger T. Benitez

IN RE: ALLERGAN BIOCELL TEXTURED BREAST IMPLANT PRODUCTS LIABILITY LITIGATION MDL No. 2921

SCHEDULE A

Middle District of Florida

MALKEMES v. ALLERGAN USA, INC., ET AL., C.A. No. 8:22−02030