

UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

**IN RE: EXACTECH POLYETHYLENE ORTHOPEDIC
PRODUCTS LIABILITY LITIGATION**

MDL No. 3044

TRANSFER ORDER

Before the Panel: Exactech defendants¹ in the Northern District of Florida action (*MSP Recovery*) listed on the attached Schedule A and certain² MDL plaintiffs move under Panel Rule 7.1 to vacate the Panel's order conditionally transferring the action to MDL No. 3044. Plaintiff MSP Recovery Claims, Series LLC (MSP Recovery) opposes both motions.

After considering the arguments of counsel, we find that this action involves common questions of fact with the actions previously transferred to MDL No. 3044, 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. Moreover, transfer is warranted for the reasons set forth in our order directing centralization. In that order, we held that the Eastern District of New York was an appropriate Section 1407 forum for actions sharing factual questions arising from allegations concerning the design, manufacture, testing, marketing, packaging, and performance of the polyethylene components of certain Exactech devices. Plaintiffs allege that oxidation of the polyethylene used in the Exactech hip, knee, and ankle devices (sold under the names Connexion GXL, Optetrak and Truliant, and Vantage, respectively) causes inflammatory responses when implanted, generates polyethylene debris, crack, and loosen the device, all of which in turn requires revision surgery. *See In re: Exactech Polyethylene Orthopedic Prods. Liab. Litig.*, ___ F. Supp. 3d ___ (J.P.M.L., Oct. 7, 2022). *MSP Recovery* falls within the MDL's ambit because it involves economic loss claims on behalf of a putative class of all third-party payers relating to the allegedly defective Exactech ankle, knee, and hip devices at issue in the MDL.

MDL plaintiffs and defendants stress that transfer is inappropriate because plaintiff MSP Recovery allegedly lacks standing to bring its claims, which are not yet ripe because no injured patient has been compensated for his or her injuries by Exactech. These arguments invite the Panel to opine on the substance of plaintiff's allegations, which we historically have declined to do. *See In re Kauffman Mutual Fund Actions*, 337 F. Supp. 1337, 1339-40 (J.P.M.L. 1972) ("The framers of Section 1407 did not contemplate that the Panel would decide the merits of the actions before

¹ Exactech Inc. and Exactech US Inc.


² George Wilson, Valerie Wilson, Jacob Brickman, Julian Taylor and Barbara Taylor.

it and neither the statute nor the implementing Rules of the Panel are drafted to allow for such determinations.”).

We typically transfer factually-related third-party payer actions to MDLs, and we are not persuaded to depart from that practice here. MSP Recovery is involved in other products liability MDLs. *See, e.g.*, MDL No. 2875, *In re: Valsartan, Losartan, and Irbesartan Prods. Liab. Litig.* Most recently, on December 22, 2022, we centralized litigation that included a third-party payer action brought by MSP Recovery along with consumer plaintiff claims. *See* Transfer Order, MDL No. 3050, *In Re: Chantix (Varenicline) Prods. Mktg., Sales Pracs. & Prods. Liab. Litig. (No. II)*. That said, given that Exactech and MDL plaintiffs raise serious questions about the ability of MSP Recovery to bring its claims, we note that the transferee judge may find it prudent to engage in threshold motion practice about the viability of such claims before, for instance, establishing a third-party payer MDL track. The exact course of pretrial proceedings, however, is best left to the transferee judge’s discretion.

IT IS THEREFORE ORDERED that this action is transferred to the Eastern District of New York and, with the consent of that court, assigned to the Honorable Nicholas G. Garaufis 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
Madeline Cox Arleo

**IN RE: EXACTECH POLYETHYLENE ORTHOPEDIC
PRODUCTS LIABILITY LITIGATION**

MDL No. 3044

SCHEDULE A

Northern District of Florida

MSP RECOVERY CLAIMS SERIES, LLC v. EXACTECH, INC., ET AL., C.A. No. 1:22-00313