BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: THE COOPER COMPANIES, INC., IN VITRO FERTILIZATION GLOBAL CULTURE MEDIA PRODUCTS LIABILITY LITIGATION	MDL No. 3122

PLAINTIFFS A.B., C.D., F.G., AND H.I'S REPLY IN SUPPORT OF MOTION TO TRANSFER RELATED ACTIONS FOR CONSOLIDATED OR COORDINATED PRETRIAL PROCEEDINGS

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Pursuant to 28 U.S.C. § 1407 and JPML Rule 6.1(d), Plaintiffs A.B., C.D., F.G., and H.I. respectfully submit this reply in further support of their Motion to Transfer the thirty-six pending cases against defendants CooperSurgical, Inc., and The Cooper Companies, Inc., plus any tag-along or other actions asserting related or similar claims, to the Northern District of California (Oakland Division) before the Honorable Jon S. Tigar, District Judge, for coordinated or consolidated pretrial proceedings.

I. INTRODUCTION

All respondents, save Defendants, support centralization, and support transfer to the Northern District of California. *See* Responses in Support, Dkts. 31 and 32. Centralization will deliver efficiency, as it will facilitate resolution of the key issues in this IVF product defect case in one stroke: was the Defendants' product defective, why did a defective product reach consumers, and what effect did the defect have on the eggs and embryos it encountered.

Only Defendants — the product manufacturer and its parent company — oppose centralization. They argue individual issues, such as different plaintiffs' IVF success rate, will overwhelm these efficiencies and informal cooperation is sufficient.

Neither argument is persuasive. All product defect cases involve individual issues. This Panel has repeatedly considered, and rejected, near-identical arguments. The individual issues, though present, do not outweigh the common questions. This is particularly true when, as here, the product's defect was closely tied to the harm with minimal intervening circumstances. And although Defendants advocate for informal coordination, they are advancing cases in four different districts at different rates and based on different arguments. Absent centralization, multiple courts will be left to oversee parallel and overlapping motion practice, discovery and expert work.

Cases continue to be filed weekly. In the time since Movants filed their motion, six new cases have been filed, all in the Northern District of California. *See* Notices of Related Actions, Dkts. 12, 37. That number will continue to grow. Streamlining judicial resolution and avoiding further duplication calls for centralization of these important and time-sensitive matters.

II. ARGUMENT

A. Individual Issues Will Not Diminish the Benefits of Centralization

Defendants' main argument in opposition is that individualized questions about patients and clinics will overwhelm the benefits of centralization. Opp'n, Dkt. 30 at 8–13. This argument has been repeatedly raised — and rejected — in product liability MDLs, including cases, like this one, which center on recalled drugs or devices. *In re Johnson & Johnson Talcum Powder Prod. Mktg., Sales Practices & Prod. Liab. Litig.*, 220 F. Supp. 3d 1356, 1358 (J.P.M.L. 2016). The Panel should likewise centralize these cases, particularly because this case is more amenable to centralization than other product liability MDLs given this product is not implanted in the body or used repeatedly.

1. Product Liability Cases Are Appropriate For Centralization.

Opponents to centralization in product liability cases often argue that "multiple intervening causation issues — such as a given plaintiff's health, medical issues and lifestyle — are prominent in all actions." *In re: Wright Med. Tech., Inc., Conserve Hip Implant Prod. Liab. Litig.*, 844 F. Supp. 2d 1371, 1372 (J.P.M.L. 2012). But the Panel has consistently rejected this argument, recognizing that the presence of some individual issues of fact is "usually true of products liability cases and medical device cases, in particular." *In re Cook Med., Inc., Pelvic Repair Sys. Prod. Liab. Litig.*, 949 F. Supp. 2d 1373, 1375 (J.P.M.L. 2013); *see also Johnson & Johnson*, 220 F. Supp. 3d at 1358 ("The opposing plaintiffs also argue that unique factual

questions regarding plaintiffs will overshadow any common questions of fact, particularly in light of the discovery already conducted in the state court litigation. We do not agree. Though the actions may present individual issues, this generally is true of product liability cases.").[1]

The individual issues that Defendants identify — "patient-specific factors impacting IVF success" and "[c]linic-specific factors" — counsel against centralization no more than the individual issues in *Wright*, *Cook*, or *Johnson & Johnson*. Opp'n, Dkt. 30, at 8–9. *Wright* involved defects in surgically implanted hip products. 844 F. Supp. 2d at 1371. The defendant, opposing centralization, argued that because complications with medical devices can be caused by individual factors, an expert would have to examine each plaintiff on a case-by-case basis to assess the plaintiff's physical health, prior medical conditions, and lifestyle. *Id.* at 1372. *Cook*, like *Wright*, involved surgically implanted products, which were used to treat pelvic organ prolapse and stress urinary incontinence. 949 F. Supp. 2d at 1374. The opponents to centralization argued that "the facts of each plaintiff's case are as unique as the plaintiffs themselves," including the "skill of that plaintiff's physician" who used the product and whether the plaintiff was an "appropriate candidate for treatment" given their "unique physical and mental characteristics." MDL. No. 2440, Dkt. 12, at 11 (attached as Ex. B). *Johnson & Johnson* involved allegations that perineal use of the defendant's talcum powder products caused ovarian

[1] *See also In re: Zimmer Durom Hip Cup Prod. Liab. Litig.*, 717 F. Supp. 2d 1376, 1733–78 (J.P.M.L. 2010) ("In opposing centralization, Zimmer argues, *inter alia,* that the actions involve multiple individualized fact issues (for example, with respect to causation), and that creation of an MDL might derail its ongoing efforts to settle claims involving the Durom Cup quickly and without the expenditure of substantial time and resources. We understand these arguments, but our experience causes us to respectfully disagree as to their significance. Though the actions certainly present some individual issues, this is usually true of device cases and other products liability cases. Section 1407 does not require a complete identity or even a majority of common factual issues as a prerequisite to centralization."); *In re Power Morcellator Prod. Liab. Litig.*, 140 F. Supp. 3d 1351, 1353 (J.P.M.L. 2015) (similar).

or uterine cancer in women. 220 F. Supp. 3d at 1357. Opponents to centralization argued that "individual issues such as product usage, tumor pathology, and epidemiological risk factors" defeated the benefits of centralization. MDL No. 2738, Dkt. 5 at p. 9 (attached as Ex. A).

The Panel ordered centralization under Section 1407 in all three cases reasoning that, although individual issues exist, centralization is nonetheless efficient to resolve common questions that involve complex answers and expert opinion. The common questions included the nature of the defective product, like the "alleged carcinogenic properties of talc" (*Johnson & Johnson*, 220 F. Supp. 3d at 1358), and the defendant's actions around product "design, manufacture, marketing and performance" (*Wright*, 844 F. Supp. 2d at 1372).

This case will involve resolution of similar types of common questions, including:

- The nature of the defect;
- How the defect was introduced to the product;
- Why the defect was not detected;
- What effect the defect had on the eggs or embryos that it came into contact with;
- The Defendants' actions around product design and manufacturing;
- The Defendants' actions (or inactions) in response to reports that embryo success rates dropped significantly and any delay in recalling the product; and,
- Whether Defendants are liable for the alleged impact of the recalled culture media on Plaintiffs' eggs and embryos.

To answer these common questions, Plaintiffs will need to conduct overlapping discovery, both fact and expert, and present disputed pre-trial issues to a presiding judge for resolution.

This case also presents fewer individual issues than many MDL product liability cases, including *Wright*, *Cook*, and *Johnson & Johnson*. The product at issue here is not implanted in

the body, as in *Wright* and *Cook*, which eliminates various individual issues related to the implantation surgery. There are also no "product usage" individual issues here, like there were in *Johnson & Johnson*, because here plaintiffs never touched the product and did not use the product repeatedly. The culture media at the center of these cases was used exclusively by clinics.

2. Defendants' Authorities Do Not Counsel Against Centralization.

Defendants do not meaningfully distinguish the Panel's previous decisions centralizing product liability cases, which Plaintiffs cited in their motion. Mot., Dkt. 1-1, at 5. Defendants instead point to unanalogous cases, like hotel sex trafficking, incarceration practices, drug antitrust practices, and unlawful insurance sales practice cases. *See* Opp'n, Dkt. 30 at 8–9. None of these cases is relevant to this medical product liability case. Defendants' only product liability case, *In re Electrolux Dryer Prods. Liab. Litig.*, is inapposite. Opp'n at 8. First, *Electrolux* is not a medical product case. It involved a dryer product that caused lint to accumulate and increased fire risk. 978 F. Supp. 2d 1376 (J.P.M.L. 2013). *Electrolux* turned on numerous fact questions not at issue here, such as variations in the dryer models, installation of the product, venting of the dryer, compliance with local building codes, and owner maintenance. *Id.* Additionally, the litigation was "quite mature" — many cases had already reached jury verdicts — whereas here no case has begun discovery. *Id.* The Panel held that the maturity of the case weighed against the need for centralization under § 1407.

Defendants downplay the significance of the common issues here as stemming from "one day" of manufacturing defects, which were publicly recalled "within weeks of release," and all tested by a (previously undisclosed) third party, Embryotech. Opp'n, Dkt. 30, at 10–11. But the narrow time period of the defect and recall do not detract from the commonality of the above

questions and their answers. For example, no matter how many days the defect persisted, the parties will still need expert discovery on how the product affected eggs or embryos.

Defendants also argue that choice of law determinations will exacerbate the individual issues. Opp'n, Dkt. 30, at 10. But choice of law issues are ubiquitous in multi-district litigation. Scholars have noted that it is a "comparative benefit" of MDLs that "individual cases within the consolidated pretrial proceeding retain their 'choice-of-law identity'" because transfer to the MDL does not change the applicable choice-of-law rules. Andrew D. Bradt, "The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation," 88 Notre Dame L. Rev. 759 (2012). Defendants do not cite any authority for their position that choice of law determinations weigh against centralization. *Id.* Nor do they explain how, even if several states' laws applied, the case would become unmanageable. To the contrary, the case management tools available in an MDL — direct filing into the MDL, consolidated pleadings, early resolution of cross-cutting issues — create efficiencies, even in a multi-state scenario. *See* Proposed Fed. R. Civ. P. 16.1 Draft Committee Note ("Orderly and efficient pretrial activity in MDL proceedings can be facilitated by early identification of the principal factual and legal issues likely to be presented…. Effective and efficient management of MDL proceedings benefits from a comprehensive management order."). Centralizing these proceedings will avoid inconsistent rulings and ensure uniform resolution of choice of law issues as feasible.

B. Alternatives to Centralization are Inferior

Defendants argue that alternatives to centralization, such as voluntary informal coordination, are superior to centralizing these cases under Section 1407. Opp'n, Dkt. 30, at 13. Such alternatives are inferior, will create inefficiencies and the likelihood of inconsistent rulings, and are thus illusory.

First, informal coordination in this setting is easier said than done. The dozens of individual plaintiffs do not all share the same counsel. There are at least eight firms on file in total, with a separate firm in every district. Six firms represent different plaintiffs in the Northern District of California alone. With so many competing interests and timetables, any informal coordination is likely to create more problems than it solves, particularly in contrast to the streamlining and coordination Section 1407 would offer here.

Second, Defendants' litigation strategy and the different paces at which they are moving cases across the country has impeded informal coordination. For instance, Defendants moved to dismiss in the Middle District of Florida on May 2, 2024, and that briefing is complete. *Poole et al v. CooperSurgical, Inc. et al*, No. 8:24-cv-01002-SDM-AAS (M.D. Fla.), Dkts. 7, 9, 21, 22 (motion to dismiss briefing and response). That motion raises cross-cutting issues bearing on Defendants' liability across the cases, such as (1) whether, because "the IVF process is uncertain and provides no guarantee[,]" Plaintiffs have adequately alleged that Defendants caused damage to the eggs and embryos, and (2) whether the defect caused Plaintiffs themselves harm, or caused harm only to their property. *Poole*, No. 8:24-cv-01002-SDM-AAS, Dkt. 7, at 6–7. The parties to *Poole* have not sought to stay a determination of the motion to dismiss pending centralization. A pretrial conference is currently scheduled for August 18, 2024 *Id.*, Dkt. 24.

Meanwhile, in the Northern District of California, Defendants have moved to dismiss the class action case entirely, No. 24-cv-01261-JST, while the individual cases are briefing threshold jurisdiction and venue issues. *See* No. 24-cv-01261-JST, Dkt. 74 (summarizing motions and procedural posture). Like their motion in the *Poole* case, Defendants' motion to dismiss the class action raises the same cross-cutting issues related to causation and harm. No. 24-cv-01261-JST, Dkt. 68 at 19. And as in *Poole*, though Plaintiffs asked Defendants to agree to defer the briefing

of cross cutting substantive issues pending centralization, Defendants declined to do so. Defendants' motions will be fully briefed on August 29, 2024.

Defendants' divide-and-conquer strategy presents an imminent risk of inconsistent rulings that have the potential to create disarray across the cases. Centralization would obviate that risk while preserving judicial resources .

C. The Panel Should Transfer to the Northern District of California

In Movants' motion they argued that the Northern District of California was best suited to handle this MDL. They argued that the center of gravity is in the Northern District of California given 27 out of 30 cases have been filed there, the Northern District is home to The Cooper Companies and is capable of handling MDLs, and an experienced jurist in the district, Judge Jon S. Tigar, is already familiar with the case. Mot., Dkt. 1-1, at 8–9.

The case for centralization in the Northern District has only strengthened since Movants filed their motion. Since Movants filed, six more individual cases have been filed in the Northern District of California, bringing the total number to 33. Additionally, Defendants filed three motions in the class action, No. 24-cv-01261-JST. *See* Dkts. 67–69. Judge Tigar is set to hear argument on all three motions on September 12, 2024, when he will also hear argument on the jurisdiction and venue motions to dismiss filed in the individual cases. No. 24-cv-01261-JST, Dkt. 74. Those motions will give Judge Tigar even greater familiarity and knowledge of the case.

Defendants argue the Northern District of California is not convenient for the parties and witnesses. Opp'n, Dkt. 30, at 16. But the Northern District of California is home to one of the two defendants and convenient for all the plaintiffs that chose that forum, which makes it a convenient forum for the majority of parties. As to non-party witnesses, Plaintiffs disagree that discovery will involve significant physical discovery of non-party witnesses. To the extent non-

party witnesses produce any discovery, it is likely to be e-discovery which is equally available regardless of district. *See EasyWeb Innovations, LLC v. Facebook, Inc.*, 888 F. Supp. 2d 342 (E.D.N.Y. 2012) (rejecting Facebook's argument that the case should be transferred to N.D. Cal. under 28 U.S.C. § 1404 because relevant documents could be found there and stating that "the Court does not view this factor as particularly significant given the technological age in which we live, with the widespread use of, among other things, electronic document production."); *see also Griffin Cap. Co., LLC v. Essential Props. Realty Trust, Inc.*, 2019 WL 5586547 (N.D. Ga. 2019) ("District courts in this circuit have found that the location of physical documents does not play a substantial role in the venue analysis due to the electronic storage and transmission of information.").

No forum is better suited for these cases than the Northern District of California, and the Defendants do not present any compelling alternative. The District of Minnesota has no connection to this case, beyond being Defendants' counsel's home district. The District of Massachusetts has no connection beyond Embryotech, the third-party testing facility (which Defendants identified for the first time in their opposition). And the District of Connecticut is home to the subsidiary company, CooperSurgical, Inc., but not home to any of the plaintiffs.

III. CONCLUSION

For the foregoing reasons, Movants respectfully request that the Panel transfer and promptly centralize the Related Actions before the Hon. Jon S. Tigar of the Northern District of California or another judge in the district.

Dated: July 30, 2024

Respectfully submitted,

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BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: THE COOPER COMPANIES, INC., IN VITRO FERTILIZATION GLOBAL CULTURE MEDIA PRODUCTS LIABILITY LITIGATION	MDL No. 3122

PROOF OF SERVICE

In accordance with Rule 4.1(a) of the Rules of Procedure for the United States Judicial Panel on Multidistrict Litigation, the undersigned hereby certifies that on July 30, 2024, a copy of the foregoing **PLAINTIFFS A.B., C.D., F.G., AND H.I'S REPLY IN SUPPORT OF MOTION TO TRANSFER RELATED ACTIONS FOR CONSOLIDATED OR COORDINATED PRETRIAL PROCEEDINGS** was electronically filed with the Clerk of the Court through the CM/ECF system, which will send notification of such filing to all counsel of record who are registered as CM/ECF users, as denoted on the Electronic Mail Notice List.

I further certify that on July 30, 2024, I caused the foregoing to be served via Electronic Mail:

***E.F., et al. v. CooperSurgical, Inc.*, et al., Case No. 4:24-cv-00643 (N.D. Cal.)**
***Q.R., et al. v. CooperSurgical, Inc.*, et al., Case No. 4:24-cv-00689 (N.D. Cal.)**
***I.J., et al. v. CooperSurgical, Inc.*, et al., Case No. 4:24-cv-00693 (N.D. Cal.)**
***M.N., et al. v. CooperSurgical, Inc.*, et al., Case No. 4:24-cv-00696 (N.D. Cal.)**
***CLF 001, et al. v. CooperSurgical, Inc.*, et al., Case No. 4:24-cv-01192 (N.D. Cal.)**
***CLF 003, et al. v. CooperSurgical, Inc.*, et al., Case No. 4:24-cv-01193 (N.D. Cal.)**
***CLF 005, et al. v. CooperSurgical, Inc.*, et al., Case No. 4:24-cv-01194 (N.D. Cal.)**
***CLF 007, et al. v. CooperSurgical, Inc.*, et al., Case No. 6:24-cv-00990 (D. OR)**

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***CLF 007, et al. v. CooperSurgical, Inc., et al.,* Case No. 6:24-cv-00990 (D. OR)**	
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***Walden, et al. v. The Cooper Companies, Inc.*, et al., Case No. 4:24-cv-00903 (N.D. Cal.)** ***Woods, et al. v. The Cooper Companies, Inc.*, et al., Case No. 4:24-cv-01745 (N.D. Cal.)** ***Oxendine, et al. v. The Cooper Companies, Inc.*, et al., Case No. 4:24-cv-02168 (N.D. Cal.)** ***O'Brien, et al. v. The Cooper Companies, Inc.*, et al., Case No. 4:24-cv-02580 (N.D. Cal.)** ***A.A. v. The Cooper Companies, Inc.*, et al., Case No. 4:24-cv-02582 (N.D. Cal.)** ***B.B., et al. v. The Cooper Companies, Inc.*, et al., Case No. 4:24-cv-02722 (N.D. Cal.)** ***D.D., et al. v. The Cooper Companies, Inc.*, et al., Case No. 4:24-cv-03527 (N.D. Cal.)**	

***H.H., et al. v. The Cooper Companies, Inc.*, et al., Case No. 4:24-cv-03568 (N.D. Cal.)** ***J.J., et al. v. The Cooper Companies, Inc.*, et al., Case No. 4:24-cv-03536 (N.D. Cal.)** ***F.F., et al. v. The Cooper Companies, Inc.*, et al., Case No. 4:24-cv-03530 (N.D. Cal.)**	
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