BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: CARTIVA SYNTHETIC CARTILAGE IMPLANT PRODUCTS LIABILITY LITIGATION	**§ § § §**	**MDL No.**

MEMORANDUM IN SUPPORT OF MOTION FOR TRANSFER OF ACTIONS TO THE SOUTHERN DISTRICT OF WEST VIRGINIA PURSUANT TO 28 USC §1407 FOR COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS

Pursuant to 28 U.S.C. § 1407 and Rule 6.2(e) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, counsel for Plaintiffs Robert Connor, Kelly Peachey, Robert DiDonato, Judy Kiel and Dwain Phillips respectfully move this Judicial Panel on Multi-District Litigation ("Panel") for an Order transferring the currently filed cases marked in the attached Schedule of Actions (collectively the "Actions"), as well as any cases subsequently filed involving similar facts or claims ("tag-along cases"), to the Southern District of West Virginia, or alternatively to the District of Maryland. Transfer of these cases is well within the scope of 28 U.S.C. § 1407 as: (i) Each of the actions involves common questions of fact, (ii) consolidation would serve the convenience of the parties and witnesses, and (iii) consolidation would promote the just and efficient conduct of the litigation.

BACKGROUND

This motion for transfer involves sevens (7) pending cases in five (5) district courts asserting similar claims, with two of the actions pending in the Southern District of West Virginia, and one pending in the District of Maryland. The pending cases allege that plaintiffs received a Cartiva Synthetic Cartilage (SCI) toe implant as an alternative to toe fusion. The SCI is a molded cylindrical implant made of polyvinyl alcohol-based hydrogels that is placed into the metatarsal

head in the first metatarsophalangeal joint via press-fit implantation. Cartiva, Inc. ("Cartiva"), obtained PreMarket Approval for the SCI device on July 1, 2016 from the U.S. Food and Drug Administration, and eventually sold more than 22,000 of the devices, primarily to treat a form of great toe arthritis called hallux rigidus. Cartiva was acquired in 2018 by Wright Medical Group, which in turn was acquired by competitor Stryker Corp. in November 2020.

CARTIVA'S TOE IMPLANT DEVICE

At all relevant times, Cartiva was based in Alpharetta, Georgia. Founded in 2011, the company's only product was the synthetic toe device. Cartiva promoted the SCI as a simple procedure, allowing surgeons to replace the damaged cartilage in the toe with a bullet-sized implant that provided for improved range of motion compared to a traditional toe fusion. FDA approval for the Class III device was based on a non-inferiority clinical study of 202 patients in the United Kingdom and Canada. This research, called the Motion Study, showed a failure rate of approximately 13.5 percent. The PMA for the SCI was conditioned on a post-approval study demonstrating a complication rate that did not exceed this threshold. However, multiple patient studies and other reports show an actual failure rate above 50%.

Stryker issued a global recall for the SCI device on Oct. 31, 2024, due to higher than expected rates of product failure, including "… revision, removal, implant subsidence, displacement, pain, nerve damage or fragmentation."[1] The recall notice described a distribution network for the Cartiva device in more than two dozen countries and in 35 states domestically. A report in 2022 also revisited the initial clinical study for the Cartiva and augmented the data with

[1] Urgent Medical Device Recall, available at https://www.stryker.com/content/dam/stryker/foot-and-ankle/resources/CartivaFSN30Oct2024_US.pdf (last visited Oct. 31, 2025)

more recent publicly available FDA documents, finding that the device failed to demonstrate non-inferiority of the Cartiva device compared to arthrodesis, or toe fusion.[2]

TRANSFER AND CONSOLIDATION IS APPROPRIATE UNDER 28 U.S.C. § 1407

Transfer of all current and future Cartiva toe implant lawsuits for consolidation and coordination of pretrial proceedings is appropriate and necessary as the Actions involve common questions of fact, because centralization will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. 28 U.S.C. § 1407. See also *In re Kugel Mesh Hernia Patch Prods. Liab. Litig., 493 F. Supp. 2d 1371, 1372-73 (J.P.M.L. 2007).* All of the plaintiffs with pending lawsuits against Cartiva allege the same operative facts, specifically that they were surgically implanted with the Cartiva synthetic cartilage device, that it failed prematurely due to loosening, shrinkage and/or subsidence, and that the failure of the recalled device forced them to undergo a painful and risky second surgery. Plaintiffs have also asserted the same legal theories of liability, including negligence, failure to warn, breach of express and implied warranties, strict liability and design defect.

Transfer is not premature as there are a significant number of Cartiva cases currently pending in multiple federal courts. The most advanced cases are in the Southern District of West Virginia, where the *Hughes* case was filed on June 28, 2024, and in the District of Maryland where the *Connor* case was filed on Dec. 5, 2024.[3] Other cases are in the Western District of Pennsylvania, the Eastern District of North Carolina and the Western District of Kentucky. Discovery is underway in both *Hughes* and *Connor*, but neither case is far advanced in litigation. Limited documents have been produced and a handful of depositions have been taken, but there

[2] Dr. Gregory P. Guyton, *Philosophies of Surgical Care Are Embedded in Outcome Studies: An Illustrative Reanalysis of the Cartiva MOTION Trial*, Foot Ankle Int., 2022 Oct; 43(10):1364-69.
[3] Hughes is before the Hon. Frank W. Volk. Connor is before the Hon. Lydia Kay Griggsby.

have been no expert disclosures and no dispositive motions filed. Counsel have made efforts to coordinate informally but there has been little success so far. Efforts to create a shared protocol for Electronically Stored Information also have not been fruitful. Given the geographic variety of these cases, the early stage of discovery and the failure of informal coordination, these cases are excellent candidates for consolidation before one transferee judge. Transfer pursuant to 28 U.S.C. § 1407 will lead to a just and expeditious resolution of these actions to the benefit of all parties. It also will reduce the number of discovery requests, and the costs associated with multiple productions in various district courts, and it will reduce the number of depositions of key witnesses.

In deciding whether to grant consolidation under 28 U.S.C. § 1407, the Panel must consider whether: (1) one or more common questions of fact are pending in different districts; (2) a transfer would serve the convenience of parties and witnesses; and (3) a transfer would promote the just and efficient conduct of the actions. *See* 28 U.S.C. § 1407(a). All of these factors are met here. The transfer of actions to a single forum under § 1407 is appropriate where it will prevent duplication of discovery and eliminate the possibility of overlapping or inconsistent pleading determinations by courts of coordinate jurisdiction. *In re: Litig. Arising from Termination of Retirement Plan for Employees of Fireman's Fund Ins. Co.*, 422 F. Supp. 287, 290 (J.P.M.L. 1976); *In re: LTV Corp. Sec. Litig.*, 470 F. Supp. 859, 862 (J.P.M.L. 1979). All plaintiffs in the Cartiva cases will seek the same or similar discovery from Defendant, and Defendant will raise the same or similar defenses in all cases including preemption under the Federal Food, Drug and Cosmetic Act. Cartiva is the only defendant in all of these cases, and the recall of the SCI device removed the company's only product from the market.

The Panel regularly grants transfer in cases involving alleged defective joint replacement devices, especially where the devices are manufactured and distributed by a single defendant.[4] In light of the numerous common questions of fact, the transfer of these Actions to a single forum under § 1407 is appropriate. It will promote the efficient prosecution, defense, and resolution of the Actions; promote the convenience of the parties and efficiency during pretrial proceedings; prevent duplication of discovery; and eliminate the possibility of overlapping or inconsistent pleading determinations by courts of coordinate jurisdictions. Numerous additional actions are expected to be filed in federal courts in the near future. On information and belief, based in part on recent adverse event reporting trends, Cartiva is aware of at least several hundred patients with failed toe implant devices who are seeking compensation for their injuries. Accordingly, transfer, consolidation, and coordination of the Related Actions involving Cartiva toe implant devices is appropriate due to the similarity in allegations and the hardships that duplicative discovery and proceedings would cause the parties.

I. THE SOUTHERN DISTRICT OF WEST VIRGINIA IS THE MOST APPROPRIATE TRANSFEREE COURT FOR CONSOLIDATION

The Southern District of West Virginia is the most appropriate forum for consolidation for multiple reasons. It is home to the cases with the most pretrial progress and the earliest filed case, and it is located in the geographic center of the parties, witnesses and documents. Daniel A.

[4] Recent examples of other MDLs involving defective joint replacements include the following: In Re: Zimmer Durom Hip Cup Products Liability Litigation, MDL No. 2158; In Re: DePuy Orthopedics, Inc., ASR Hip Implant, MDL No. 2197; In Re: DePuy Orthopedics, Inc. Pinnacle Hip Implant Products Liability Litigation, MDL No. 2244; In Re: Wright Medical Technology Inc., Conserve Hip Implant Products Liability Litigation, MDL No. 2329; In Re: Biomet M2A Magnum Hip Implant Products Liability Litigation, MDL No. 2391; In Re: Stryker Rejuvenate and ABG II Hip Implant Products Liability Litigation, MDL No. 2441; In Re: Stryker LFIT V40 Femoral Head Products Liability Litigation, MDL No. 2768; In re: Zimmer M/L Taper Hip Prosthesis or M/L Taper Hip Prosthesis with Kinectiv Technology and VerSys Femoral Head Products Liability Litigation, MDL No. 2859; In Re: Zimmer Nexgen Knee Implant Products Liability Litigation, MDL No. 2272; and In Re: Smith & Nephew Birmingham Hip Resurfacing (BHR) Hip Implant Products Liability Litigation, MDL No. 2775.

Richards, *An Analysis of the Judicial Panel on Multidistrict Litigation's Selection of Transferee District and Judge*, 78 Fordham L. Rev. 311, 321-22 (Oct. 2009)(citations omitted). Plaintiffs respectfully request that the Southern District of West Virgina is the most appropriate venue based on these factors.

A. The Southern District of West Virginia is Geographically Convenient for the Witnesses and the Parties

The distribution of related actions across the country increases the importance of assigning the MDL to a location that is convenient and easily and economically accessed. *In re Gator Corp. Software Trademark & Copyright Litig*., 259 F. Supp. 2d 1378, 1380 (J.P.M.L. 2003). At the time of this filing, at least seven cases pending in federal court were potentially Related Actions in Pennsylvania, Maryland, North Carolina, West Virginia and Kentucky, with the Southern District of West Virginia at their epicenter. Consolidation also is appropriate at the site of the first-filed case, *see In re Land Rover LR3 Tire Wear Products Liab. Litig.*, 598 F. Supp. 2d 1384, 1386 (J.M.P.L. 2009), and consolidation is generally appropriate in the district where the litigation is the most procedurally advanced. *In re Hyundai & Kia Fuel Econ. Litig.*, 923 F. Supp. 2d 1364, 1366 (J.P.M.L. 2013); *In re Bldg. Materials Corpor of Am. Asphalt Roofing Shingle Prods. Liab. Litig.*, 818 F. Supp. 2d 1374, 1375 (J.P.M.L. 2011); *In re Bank of Am. Credit Prot. Mktg. & Sales Practices Litig*., 804 F. Supp. 2d 1372, 1373 (J.P.M.L. 2011). The Southern District of West Virginia meets all of these criteria. It also is conveniently situated near the home of important witnesses and counsel. Many of Cartiva's former employees are still located in or near the company's former headquarters in Alpharetta, Georgia, and its national counsel are based in Baltimore and Philadelphia. Counsel for plaintiffs with the most filed cases are in Louisville, Kentucky, and Charleston, West Virginia.

Except for *Connor* in Maryland and *Hughes* and *May* in West Virginia, none of the other Cartiva cases has advanced beyond the filing of a Complaint and an Answer. Even so, these cases already are presenting challenges that could lead to conflicting rulings and schedules, duplication of effort when it comes to experts and depositions, and unnecessary expenses — the same problems that an MDL is designed to avoid or at least mitigate. *Uber Techs., Inc. v. United States Jud. Panel on Multidistrict Litig.*, 131 F.4th 661, 670 (March 10, 2025), citing *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 410, 135 S. Ct. 897, 190 L. Ed. 2d 789 (2015).

These challenges will only grow as more Cartiva cases are filed in additional federal district courts. In sum, the Southern District of West Virgina is the location of the first filed Cartiva products liability case, the most procedurally advanced case, and the epicenter of the other filed cases. It is therefore the most appropriate forum for consolidation of all current and future federal cases.

B. S.D. West Virginia Is Highly Qualified to Handle a Medical Device MDL

The Southern District of West Virginia has numerous experienced and qualified jurists. It also successfully managed a collection of MDL cases involving transvaginal mesh that became one of the largest mass tort proceedings in recent history.[5] Importantly, the Southern District of West Virginia may have capacity for a new MDL as it currently does not have any open MDL cases.[6] The Hon. Judge Frank W. Volk presides over the *Hughes* case. The Hon. Irene C. Berger presides over the *May* case in the same district. Should the Panel decide to consolidate these cases, Plaintiffs support the Southern District of West Virginia and either Judge Volk or Judge Berger as

[5] U.S. District Judge Joseph R. Goodwin oversaw the massive multidistrict litigation related to transvaginal mesh (TVM) products. These cases, now closed, included MDL 2187, 2325, 2326, 2327, 2387, 2540, and 2511.

[6] See https://www.wvsd.uscourts.gov/case-info/MDL (last visited Oct. 22, 2025).

the presiding judge.

C. The District of Maryland Is a Suitable Alternative Venue

Plaintiffs offer the District of Maryland as an alternative venue for this MDL should the Panel decide that the Southern District of West Virginia is not suitable. Maryland is home to the second most advanced case, *Connor*, and it is likewise convenient for the parties and witnesses. Maryland also recently served as the venue for another medical device mass tort proceeding that involved complicated and similar issues including Pre Market Approval and federal tort preemption. In Re: Smith & Nephew Birmingham Hip Resurfacing (BHR) Hip Implant Products Liability Litigation, MDL No. 2775. Baltimore also is conveniently located near defense counsel's offices, and is easily accessible for plaintiff's counsel. There are no other MDLs currently pending in the District of Maryland, so Maryland may have capacity for such a proceeding.

IV. CONCLUSION

For the reasons emphasized above, Plaintiffs respectfully submit that the Southern District of West Virginia is the most appropriate transferee forum pursuant to 28 U.S.C. § 1407, or in the alternative the District of Maryland, and that these cases should be consolidated.

Date: Oct. 31, 2025

Respectfully submitted,

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COUNSEL FOR PLAINTIFFS IN THE FOLLOWING ACTIONS:

- *Robert B. Connor v. Cartiva, Inc.,* No. 8:24-cv-03525 (D. Md., filed Dec. 5, 2024)
- *Robert J. DiDonato v. Cartiva, Inc.,* No. 2:25-cv-03525 (W.D. Pa., filed Feb. 7, 2025)
- *Kelly M. Peachey v. Cartiva, Inc.,* No. 2:25-cv-1217 (W.D. Pa., filed Aug. 8, 2025)
- *Judy Kiel v. Cartiva, Inc.,* No. 5:25-cv-572 (E.D.N.C., filed Sept. 9, 2025)
- *Dwain E. Phillips v. Cartiva, Inc.,* No. 5:25-cv-185 (W.D. Ky., filed Oct. 30, 2025)