IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

BRITTANY HAMILTON, et al.,	:	
	:	
Plaintiffs,	:	
	:	
	:	
vs.	:	Civil Action 2:09-CV-146
	:	Judge Graham
	:	Magistrate Judge King
BREG, INC., et al.,	:	
	:	
Defendants.	:	

ORDER

Defendant Breg Inc. previously filed a motion to sever the plaintiffs' claims pursuant to Federal R. Civ. Procedure 21. Doc. 38. In an order filed on April 26, 2010 this court denied that motion without prejudice. Doc. 75. Breg has since renewed its motion to sever in a supplemental brief filed on July 26, 2010. Doc. 128.

Discovery has been completed and the court has ruled on defendant's motion for summary judgment and defendant's Daubert motions. These cases are ready for trial and the court now has a more complete record to assist it in ruling on the motion to sever. While the court previously expressed some reservations about trying these cases together, it is now convinced that it is appropriate to do so.

Plaintiffs joined their claims in one action invoking the permissive joinder provisions of Rule 20 of the Federal Rules of

Civil Procedure. If plaintiffs had not joined their claims in one action the court would nevertheless have the authority under Rule 42 of the Federal Rules of Civil Procedure to consolidate their separate actions or join them for trial on any or all matters at issue if they involve common questions of law or fact.

The similarities in the claims asserted by these plaintiffs are striking. Indeed it would be hard to imagine a situation in which the claims of two individual tort victims could be more similar. Both plaintiffs are teenage female athletes, who sustained injuries to their right knees; they were treated by the same orthopaedic surgeon who performed the same kind of surgery on each of them at the same hospital within six months of each other. Their surgeon used defendant's medical device in the post surgical treatment of both plaintiffs. This device, referred to as a "pain pump," was used to deliver the same anesthetic drug into the knee joint of both plaintiffs. Both plaintiffs allege that the defendant's product caused them to suffer the same injury, to wit: destruction of the cartilage in the joint (chondrolysis).

Both plaintiffs will rely on the testimony of the same expert witnesses on the issues of liability, causation, nature and extent of injury, and present and future damages. The testimony of the expert witnesses will be identical with respect to many issues and very similar on other issues.

Indeed the only area in which the court can perceive any difference in the plaintiffs' evidence would be the nature and

extent of the injuries and damages sustained by each plaintiff. A jury should have no difficulty in separately determining the nature and extent of the injuries and damages where only two plaintiffs are involved.

One of the issues relating to liability will be the state of medical knowledge about the use of pain pumps in relation to the incidence of chondrolysis at the time of plaintiffs' surgeries. Plaintiff Hamilton's surgery was done on September 12, 2005, and Plaintiff McLain's surgery was done on February 13, 2006.

Breg's internal communications indicate that it may have been aware of a report of chondrolysis following use of a pain pump as early as December of 2005. Breg had been informed that another manufacturer of pain pumps had filed an Adverse Event Report (AER) with the Food and Drug Administration (FDA) indicating that a patient had suffered from chondrolysis after the use of a pain pump. However, there were no published articles in the medical literature implicating pain pumps as a possible cause of chondrolysis at the time of plaintiffs' surgeries.

The main thrust of plaintiffs' failure to warn claim, however, is not on what Breg actually knew at the time of plaintiffs' surgeries but on what Breg should have known. Plaintiffs claim that a reasonably prudent medical device manufacturer in the position of Breg would have conducted tests to determine what effect the continuous infusion of local anesthetic into a joint would have on cartilage before marketing its product for such a use.

Thus, it appears that plaintiffs' evidence on the issue of liability will be the same with respect to each plaintiff. See analysis of plaintiffs' expert testimony in order of January 24, 2011 denying defendants motion to exclude testimony of plaintiffs' experts and order of January 20, 2011 denying defendant's motion for summary judgment, p. 8-11.

Defendant argues that it will be prejudiced by a joint trial of the plaintiffs' claims because of the danger that a jury will infer that its product caused plaintiffs' injuries from the mere fact that two similarly situated individuals sustained the same or similar injuries after using its product. The court believes an appropriate instruction can prevent any such possible prejudice. The court also notes that the plaintiffs' evidence will include case studies which reveal that hundreds of patients treated with pain pumps subsequently developed chondrolysis.

The court believes these cases are properly joined under Rule 20. The plaintiffs assert rights to relief severally arising out of the same traumatic occurrence or series of occurrences and there are a host of common questions of law and fact. If plaintiffs' claims were not joined under Rule 20, the court would consolidate their actions *sua sponte* under Rule 42 because they involve so many common questions of law and fact. The common questions of law and fact predominate over the issues unique to each case and there will be no unfair prejudice to the defendant in trying the plaintiffs' separate claims before the same jury.

Any possible prejudice can be cured by appropriate instructions by the court. Consolidation will result in the substantial saving of time and expense to the parties and the witnesses and will promote judicial economy.

Finally, several other courts have reached similar conclusions in related cases and their reasoning appears to be sound. See Schott v. I-Flow Corp., 696 F.Supp.2d 898, 906 (S.D. Ohio 2010) (Spiegel, J.), Ritchie v. SMI Liquidating, Inc., 2:08-cv-019, D.N. 223, 1-2 (E.D. Ky. Dec. 17, 2009) (Bertelsman, J.), McClellan v. I-Flow Corp., 6:08-cv-00478 D.N. 353, 4-5 (D. Ore. July 23, 2010) (Aiken, J).

It is so ORDERED.

s/ James L. Graham
JAMES L. GRAHAM
United States District Judge

DATE: January 24, 2011