BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: DAVOL, INC./C.R. BARD, INC. POLYPROPYLENE HERNIA MESH PRODUCTS LIABILITY LITIGATION	**MDL Docket No: 2846**

DEFENDANTS C. R. BARD, INC. AND DAVOL INC.'S RESPONSE TO PLAINTIFFS' MOTION FOR § 1407 COORDINATION/CONSOLIDATION & TRANSFER OF RELATED ACTIONS TO THE SOUTHERN DISTRICT OF OHIO

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INTRODUCTION

Defendants C. R. Bard, Inc. and Davol Inc. (collectively, "Defendants" or "Bard") respond to Moving Plaintiffs' motion for MDL consideration ("MDL Motion") to provide a more complete picture of past and present Bard hernia mesh litigation, and to provide its views on appropriate MDL venues.[1] ***First,*** Defendants do not oppose the transfer of cases involving their polypropylene hernia repair products to multidistrict litigation, but only if *all* such products are included, without the arbitrary exception that the Moving Plaintiffs have proposed in a footnote. ***Second***, while there are many potential appropriate venues, Defendants suggest that the District of New Jersey and Southern District of New York are more appropriate transferee districts, based on a reasoned application of the relevant factors, than the districts proposed by the Moving and Joining Plaintiffs.

Davol is the manufacturer and seller of hernia repair medical devices made of, at least in part, polypropylene mesh.[2] There are nearly 100 products liability cases pending in federal courts around the country related to the use of these products. The plaintiffs in fifteen of these cases have filed a Motion for § 1407 Coordination/Consolidation and Transfer of Related Actions ("MDL Motion"), with which many other plaintiffs have joined. Defendants, through this response, hope to provide the JPML with a complete understanding of the litigation concerning these products to aid in its decision-making. The MDL Motion omits some key details about the pending litigation and makes only passing reference to a prior MDL involving Bard polypropylene hernia mesh products, *In re: Kugel Mesh Hernia Patch Products Liability*

[1] Hereinafter, the plaintiffs who filed the MDL Motion will be referred to collectively as the "Moving Plaintiffs." The plaintiffs who responded in support of the MDL Motion will be referred to collectively as the "Joining Plaintiffs."

[2] C. R. Bard is the parent company of Davol, and Becton, Dickinson and Company is the parent company of C. R. Bard.

Litigation, MDL 1842. With a full explication of the litigation landscape, Moving Plaintiffs' proposal to establish an MDL in the Southern District of Ohio or the Western District of Missouri does not stack up against other jurisdictions when utilizing the Section 1407 factors. Their proposal to carve out the polypropylene-based Composix Kugel Hernia Patch ("CK Patch") plaintiffs from a new MDL is also not a principled exception, cannot be justified, and frankly, would defeat the purposes of MDL consolidation and coordination.

As to venue, there are a number of venues that are well set up to handle an MDL of this nature and offer many practical advantages. In particular, the District of New Jersey and the Southern District of New York stand out because of their deep experience with MDLs generally and medical product litigation specifically. They also have significant numbers of Bard polypropylene hernia mesh cases already pending and are proximate both to C. R. Bard's headquarters in New Jersey and Davol's headquarters in Rhode Island. Compared to the Southern District of Ohio and the Western District of Missouri, they make more sense as transferee districts.

With respect to the CK Patch plaintiffs, the proposed carve-out lacks any reason, given a fuller understanding of the facts. To begin, the CK Patch was a hernia repair product made in part of *polypropylene*, just like all the other products that Moving Plaintiffs propose to make part of their suggested MDL. Moreover, although the CK Patch was the subject of a prior MDL, so were several other polypropylene hernia mesh products that the Moving Plaintiffs have proposed for inclusion in their new MDL. ***In fact, over one-half of the plaintiffs listed in this MDL Motion's Schedule of Actions assert claims as to Bard hernia mesh products that were part of the prior MDL***. In support of their proposed carve out, Moving Plaintiffs note the prior MDL and that some CK Patch models were recalled. But those factors make no difference when

considering that the prior MDL included multiple polypropylene products and that many of the cases involved in the prior MDL did not involve the issue that led to the recall.

In short, Defendants are not opposed to the idea of an MDL to consolidate and coordinate all federal products liability cases involving Bard hernia mesh products, but the details, such as the venue and scope of actions, should be decided with careful attention to the realities of the litigation landscape.

BACKGROUND OF BARD HERNIA MESH LITIGATION

I. Review of Bard Hernia Mesh Litigation in Federal Court, Including *In re: Kugel Mesh Hernia Patch Products Liability Litigation*, MDL 1842

Davol, a C. R. Bard subsidiary, is the manufacturer and seller of many current and former medical devices indicated for use in the repair of hernias and made, at least in part, of polypropylene mesh. The MDL Motion proposes to consolidate and coordinate all pending and future federal products liability cases involving any of the company's polypropylene hernia mesh products, except for one. The exception is the CK Patch, mentioned in a footnote. (*MDL Motion Brief, Doc. 5-1, at 4 n.6.*)

That particular product, however, has played an important role in the hernia mesh litigation to date. Between December 2005 and January 2007, Davol initiated and expanded a product recall of certain CK Patch models following some reports from the field that memory recoil rings[3] had broken. The CK Patch was the predicate product for a number of other Bard

[3] Like all of the products at issue in the MDL Motion, the CK Patch is made in part of polypropylene mesh. However, it also had one or two memory recoil rings that helped the patch spring open into a flat position upon placement inside the abdominal cavity, which made it easier for the surgeon to fix the product against the abdominal wall. And while there were a large number of cases filed in *In re: Kugel Mesh Hernia Patch Products Liability Litigation*, MDL-1842, only a very small percentage involved claims of "ring breaks," and rather focused on other issues, including the use of polypropylene, pore size, weight of the mesh, and other factors that are present in the allegations by the Moving and Joining Plaintiffs.

polypropylene hernia mesh devices, including Ventralex and Ventrio. In March 2012, Defendants stopped selling the CK Patch, while it continued to sell a number of other hernia repair products.

After the voluntary recall of the CK Patch, personal injury lawsuits began to be filed. On June 22, 2007, the JPML created *In re: Kugel Mesh Hernia Patch Products Liability Litigation*, MDL-1842, and ordered that all cases involving the CK Patch be transferred to the U.S. District Court for the District of Rhode Island before Judge Mary Lisi. On January 24, 2008, the MDL further defined the products to be included:

> "a. All nine (9) models of Bard® Composix® Kugel® Hernia Patches (Product Codes 0010201 through 0010209);
>
> b. All other Davol hernia patches with PET rings, including the Bard® Kugel® Hernia Patch; Bard® Ventralex® Hernia Patch; Bard CK Parastomal Patch; and Bard® Modified Kugel™ Patch; and
>
> c. Other Davol hernia meshes composed of layers of polypropylene and ePTFE, including Bard® Composix® E/X."

(Practice and Procedure Order No. 6, *In Re: Kugel Mesh Hernia Patch Products Liability Litigation*, MDL No. 1842, Doc. 248 (D.R.I. Jan. 24, 2008), *attached as Exhibit 2*.) In addition to the products specifically named, this expanded definition would include the following products: Ventrio, Ventrio ST, Ventralex ST, Composix, and Composix L/P, most of which were introduced after the formation of the MDL. The MDL, combined with the cases pending in Rhode Island state court, would go on to include over 4,000 cases.

Two MDL bellwether trials occurred in 2010, *Whitfield v. Davol Inc.*, No. 1:07-cv-01918, 1:07-md-01842, MDL No. 1842 (D.R.I), and *Thorpe v. Davol Inc.*, No. 1:08-cv-0463, 1:07-md-01842, MDL No. 1842 (D.R.I), both of which involved the CK Patch. *Whitfield* ended in a verdict in favor of Defendants, and, while *Thorpe* ended in a verdict in favor of plaintiffs, the

MDL Court granted Defendants' motion for judgment as to punitive damages and failure to warn. Generic discovery as to the CK Patch and other MDL products concluded in the MDL in 2013, by which time Defendants had produced over 7 million pages of documents. More than thirty depositions of Defendants' current and former employees were taken in the prior MDL. Additional document productions have taken place in other cases.

In July 2014, the District of Rhode Island stopped accepting new cases into the MDL. In June 2017, shortly before retiring, Judge Lisi transferred the MDL to Chief Judge William E. Smith of the District of Rhode Island. In September 2017, upon Judge Smith's recommendation, the JPML terminated the MDL.

Once cases were no longer transferred into the MDL, the rate of new filings dropped dramatically. Between 2014 and 2016, the inventory of Bard hernia cases around the country was in the range of 100, with most of those cases being in state court. In fact, by January 2017, the number of Bard hernia mesh cases pending in federal court reached a low of 22.

However, the number of cases involving Bard polypropylene hernia mesh has undergone a recent surge. This surge appears to be driven by a tremendous growth in plaintiffs' attorney advertisements, seeking to capitalize on publicity generated by a recall of ***another company's*** hernia mesh product and a resulting MDL involving that product. Specifically, in May 2016, Ethicon, Inc. instituted a product recall of its Physiomesh hernia repair product. Within a year of the recall, attorney advertising for hernia mesh cases skyrocketed with nearly $35 million in advertising being spent in 2017 alone.[4] Concurrently, the plaintiffs' bar sought an MDL for cases involving this product, which the JPML approved in June 2017: *In re: Ethicon Physiomesh Flexible Composite Hernia Mesh Products Liability Litigation*, MDL No. 2782.

[4] Defendants can provide supporting data upon the Panel's request.

Due to the recall, the *Physiomesh* MDL formation, and the continued growth in opportunistic attorney advertisements, Defendants have seen a swell of new cases related to Bard polypropylene hernia mesh products, which are the subject of the current MDL Motion. For instance, in April 2016, just before the Physiomesh recall, there were approximately 100 such cases pending in state and federal court. By May 2017, just before the *Physiomesh* MDL formation, there were approximately 110 of such cases pending. By the end of 2017, there were approximately 1,400 such cases. Currently, there are over 1,600.[5] In all that time, the plaintiffs' bar has spent tens of millions of dollars on advertising to patients who have received polypropylene hernia mesh products.

II. Current Landscape of Bard Hernia Mesh Cases Before Federal Courts

The MDL Motion paints an incomplete picture of the current status of Bard hernia mesh litigation in federal court. To be sure, there are several Bard hernia mesh cases pending in several federal courts, but a few important details need to be added or clarified.

First, while the MDL Motion indicates that there were 54 cases pending in federal courts as of the time of its filing, in actuality there were 85.[6] (*See Defendants' Schedule of Cases, attached as Exhibit 1*.) Thirteen new cases have been filed since then, bringing the total to 98. (*Id*.)

Second, the Moving Plaintiffs present a skewed view of the distribution of cases across district courts. For instance, there are 10 cases pending in the Southern District of New York, while the MDL Motion did not count any; there are five pending in the Eastern District of New

[5] As discussed in more detail below, a large number of the recently-filed cases are pending in state court in Rhode Island.

[6] Bard is including CK Patch cases, which the Moving Plaintiffs omitted. There are now eight such cases pending in federal court.

York, while the MDL Motion counted only one; and nine are pending in the District of New Jersey, while the MDL Motion counted only seven. (*Id.*) No cases were pending in the District of Rhode Island at the time of the filing of the MDL Motion, but 10 have since been filed, although none have yet been served. (*Id.*)

Third, 49 out of the 98 currently pending federal Bard hernia mesh cases involve non-CK Patch products that were part of *In re: Kugel Mesh Hernia Patch Products Liability Litigation*, MDL-1842, including 28 that were identified in Moving Plaintiffs' MDL Motion. The total of 49 includes 24 with Ventralex, six with Ventralex ST, five with Ventrio, five with Kugel, four with Composix L/P, two with Ventrio ST, two with Composix E/X, and one with Composix. (*Id.*) Eight of the 49 cases involve multiple products, including some that were not part of the prior MDL. (*Id.*)

Fourth, and finally, three-quarters of all the pending Bard hernia mesh cases were filed or removed to federal court in 2018, so most of these cases are in their infancy, with few of these cases having advanced even to the point of written discovery being served and even fewer where depositions have taken place.

III. The Coordinated Actions in Rhode Island State Court

In addition to the federal actions, there are two consolidated state actions involving Bard hernia mesh currently pending in Rhode Island Superior Court, where Davol is located. The first was set up at the same time as *In re: Kugel Mesh Hernia Patch Products Liability Litigation*, MDL-1842, and any discovery that occurred in this state court action became part of the MDL document repository. The second was created in 2017, and no discovery has occurred in those cases yet.

As the years have passed, many of the cases in Rhode Island state court have resolved. However, within the last year alone, more than more than 1,500 cases have been filed there, including approximately 280 since the initial MDL Motion was filed on April 10. The transferee court (wherever it is located) will need to coordinate with the Rhode Island state court handling these actions, as well as with any other state court where similar cases may be pending.

DISCUSSION

I. Although There Are Many Appropriate Potential MDL Venues, the District of New Jersey and Southern District of New York Are the Most Appropriate

Consistent with Section 1407's goal of serving "the convenience of parties and witnesses and . . . promot[ing] the just and efficient conduct of [the coordinated] actions," Bard suggests that the District of New Jersey and the Southern District of New York are the most appropriate venues for MDL transfer. Bard does not agree that the Southern District of Ohio and the Western District of Missouri are the best choices. In view of the overall landscape of this litigation, the Moving Plaintiffs' request for either of those two districts appears disconnected from the relevant factors.

A. District of New Jersey

There are currently nine Bard hernia mesh cases pending in the District of New Jersey, giving it the fourth most out of the 25 district courts with Bard hernia mesh cases, which means there will be less of an administrative burden from the transfer than would be experienced with a transfer to most other courts. *See In re: Oppenheimer Rochester Funds Group Securities Litigation*, 626 F. Supp. 2d 1350, 1352 (U.S.J.P.M.L. 2009) ("District of Colorado is an appropriate transferee district for this litigation, because . . .three of the thirteen actions are already pending there along with three potential tag-along actions[.]"); *In re: Rail Freight Fuel*

Surcharge Antitrust Litigation, 528 F. Supp. 2d 1358, 1359 (U.S.J.P.M.L. 2007) (transferring cases to court where "[se]veral actions are already pending there").

Moreover, when constituent cases are geographically dispersed, and future tag-along cases are likely to be as well, the Panel will give weight to district courts with MDL experience. *See, e.g., In re: Janus Mutual Funds Investment Litigation.*, 310 F. Supp. 2d 1359, 1361 (U.S.J.P.M.L. 2004) ("Given the geographic dispersal of constituent actions and potential tag-along actions, no district stands out as the geographic focal point for this nationwide litigation. Thus we have searched for a transferee district with the capacity and experience to steer this litigation on a prudent course."); *In re: Paxil Products Liability Litigation*, 296 F. Supp. 2d 1374, 1375 (U.S.J.P.M.L. 2003) (same). Not only is the District of New Jersey one of the most experienced venues in handling MDLs, it is particularly well versed in handling products liability MDLs involving medical products that present complex technical and scientific issues, including *In re: Proton-Pump Inhibitor Products Liability Litigation (No. II)*, MDL No. 2789; *In re: Benicar (Olmesartan) Products Liability Litigation*, MDL No. 2606; *In re: Invokana (Canagliflozin) Products Liability Litgation*, MDL No. 2750; *In re: Zimmer Durom Hip Cup Products Liability Litigation*, MDL No. 2158; *In re: Fosamax (Alendronate Sodium) Products Liability Litigation (No. II)*, MDL No. 2243; and *In re: Plavix Marketing, Sales Practices and Products Liability Litigation (No. II)*, MDL No. 2418. (*JPML Litigation Statistics by MDL (LIVE), available at http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-April-16-2018.pdf, last visited May 2, 2018*). The District has 35 Article III judges.[7] (*http://www.njd.uscourts.gov/our-judges, last visited May 2, 2018*.)

[7] The following Article III judges in the District of New Jersey are presently handling Bard hernia mesh cases: Chief Judge Jose L. Linares; Judge Madeline Cox Arleo; Judge Claire C.

Historically, the District of New Jersey has handled many MDLs, in addition to the MDLs it is currently handling, and three additional medical product MDLs. (*Multidistrict Litigation Terminated Through September 30, 2017, available at http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Cumulative_Terminated_Litigations-FY-2017.pdf, last visited May 2, 2018.*) Given this considerable experience, there is no question the District of New Jersey would be an appropriate MDL venue.

Also weighing in favor of the District of New Jersey is the fact that C. R. Bard is headquartered there. It is also relatively close to Davol's home state of Rhode Island. Thus, the court is conveniently located near key witnesses, documents, and other evidence that will bear on each of the cases. The JPML has cited this reasoning when choosing the District of New Jersey on many occasions. *See, e.g., In re: Invokana (Canagliflozin) Products Liability Litigation,* 223 F. Supp. 3d 1345, 1348-49 (U.S.J.P.M.L. 2016) ("Janssen is headquartered in that district, and many witnesses and relevant documents are likely to be found there."); *In re: Plavix Marketing, Sales Practices and Products Liability Litigation (No. II)*, 923 F. Supp. 2d 1376, 1379-80 (U.S.J.P.M.L. 2013) (with one defendant headquartered in New Jersey and the other in New York, "many of the defendants' witnesses and documents will be found in or near New Jersey"); *In re: Fosamax (Alendronate Sodium) Products Liability Litigation (No. II)*, 787 F. Supp. 2d 1355, 1357 (U.S.J.P.M.L. 2011) ("The headquarters, witness and documents of the common defendant, Merck, are located within the District of New Jersey[.]")

The Moving Plaintiffs attempt to downplay the significance of the location of the Defendants' headquarters, describing it as "a minor part in a convenience analysis – and one that is diminishing in significance." (*MDL Motion Brief, at 9*) (citing *Bartolucci v. 1-800 Contacts,*

Cecchi; Judge William J. Martini; Judge Kevin McNulty; Judge Esther Salas; Judge William H. Walls; and Judge John Michael Vazquez.

Inc., 245 F. Supp. 3d 38, 48 (D.D.C. 2017), and *Republic Techs. (NA), LLC v. BBK Tobacco & Foods, LLC*, 240 F. Supp. 3d 848, 853 (N.D. Ill. 2016)). But the decisions cited by the Moving Plaintiffs pertained to Section 1404 motions to transfer before district courts, not an MDL motion before the JPML. *Bartolucci*, 245 F. Supp. 3d at 41; *Republic Techs. (NA), LLC*, 240 F. Supp. 3d at 849. These cases are inapposite, as the JPML is unencumbered by the same considerations that would govern a tradition transfer of venue decision by a district court. *See In re: Peanut Crop Insurance Litigation*, 342 F. Supp. 2d 1353, 1354 (U.S.J.P.M.L. 2004) ("We note, however, that in considering transfer under Section 1407, the Panel is not encumbered by considerations of venue. . . . An opposite conclusion would frustrate the essential purpose of Congress in enacting Section 1407 and providing for transfer of civil actions to 'any district' by the Panel[.]"). Moreover, in the portions of the decisions quoted by the Moving Plaintiffs, the courts were discussing the production of documents in the digital age, not the convenience to the witnesses or the parties. *Bartolucci*, 245 F. Supp. 3d at 48; *Republic Techs. (NA), LLC*, 240 F. Supp. 3d at 853. Moving Plaintiffs ignore this consideration.

Finally, the District of New Jersey is relatively convenient to all parties. With large airports both in and near New Jersey (Newark, LaGuardia, John F. Kennedy, Philadelphia), the district is one non-stop flight away for most plaintiffs and witnesses. It is also easily accessible by rail from the Northeast and Mid-Atlantic regions. *See In re: Johnson & Johnson Talcum Powder Products Liability Litigation*, 220 F. Supp. 3d 1356, 1359 (U.S.J.P.M.L. 2016) ("[The District of New Jersey] is a convenient and accessible forum for this nationwide litigation."). There is also no shortage of hotels or other facilities, as well as transportation options when traveling locally. Accordingly, this is another factor that should support the selection of the District of New Jersey as the transferee district.

B. Southern District of New York

The Southern District of New York is also an appropriate MDL venue. Although not mentioned by the Moving Parties, its 10 pending Bard hernia mesh cases are the second most of any district, carrying the same administrative advantages as New Jersey.

Moreover, the Southern District of New York is well-equipped to handle and manage these large and complex actions and has extensive experience managing complex MDLs. Given the large number of judges and experience, the Panel has transferred many MDLs to the Southern District of New York – by far the largest number of MDLs transferred to any district. (*JPML Litigation Statistics by MDL (LIVE), available at http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-April-16-2018.pdf, last visited May 2, 2018*; *Multidistrict Litigation Terminated Through September 30, 2017, available at http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Cumulative _Terminated _Litigations-FY-2017.pdf, last visited May 2, 2018.*) Of the 43 judges in the Southern District of New York, 31 have presided over at least one MDL. (*Id.*)[8]

The Southern District of New York is also one of the more experienced districts in handling MDLs involving prescription medical products, including five pending currently: *In re: Farxiga (Dapagliflozin) Products Liability Litigation*, MDL No. 2776; *In re: Mirena IUS Levonorgetrel-Related Products Liability Litigation*, MDL No. 2767; *In re: Eliquis (Apixaban) Products Liability Litigation*, MDL No. 2754; *In re: Mirena IUD Products Liability Litigation*, MDL No. 2434; *In re: Fosamax & Actonel Products Liability Litigation*, MDL No. 1789.

[8] The following Article III judges in the Southern District of New York are presently handling Bard hernia mesh cases: Judge Naomi Reice Buchwald; Judge Valerie E. Caproni; Judge Andrew L. Carter, Jr.; Judge P. Kevin Castel; Judge Katherine Polk Failla; Judge Paul G. Gardephe; Judge Lewis A. Kaplan; and Judge Lorna G. Schofield.

(*JPML Litigation Statistics by MDL (LIVE), available at http://www.jpml.uscourts.gov/sites/ jpml/ files/Pending_MDL_Dockets_By_District-April-16-2018.pdf, last visited May 2, 2018*.)

In short, the Southern District of New York has the most proven track record of handling multidistrict litigation of any district. The Southern District of New York also sits in close proximity to the headquarters of C. R. Bard (New Jersey) and Davol (Rhode Island), giving it a convenience factor that is similar to the District of New Jersey's. *See, e.g., In re: Keurig Green Mountain Single-Serve Coffee Anti-Trust Litigation*, 24 F. Supp. 3d 1361, 1363 (U.S.J.P.M.L. 2014) (defendant headquartered in Vermont, "and thus the common evidence will be reasonable accessible from this location"); *In re; Mirena IUD Products Liability Litigation*, 938 F. Supp. 2d 1355, 1358 (U.S.J.P.M.L. 2013) (defendants located in New York, New Jersey, Connecticut, and Pennsylvania, so "the primary witnesses and documentary evidence on the common factual issues will be located in New York and the surrounding area").

Finally, the Southern District of New York, and New York City in particular, is a geographically accessible and convenient forum for all parties and witnesses. Three major airports serve New York City (LaGuardia, John F. Kennedy, and Newark), all of which are less than eighteen miles from the courthouse and offer numerous non-stop flights every day to cities across the country, as well as train services to neighboring states. The Panel has recognized New York City's central location and accessibility in finding that the Southern District of New York is an appropriate MDL forum. *See, e.g.*, *In re Rhodia S.A., Securities Litigation*, 398 F. Supp. 2d 1359, 1360 (U.S.J.P.M.L. 2005).

For these reasons, the Southern District of New York is a very appropriate transferee candidate.

II. The Eastern District of New York, District of Rhode Island, and Eastern District of Louisiana Are Also Sensible Alternatives

A. Eastern District of New York

Defendants suggest the Eastern District of New York as an alternative because it presents many of the same advantages, including proximity to the headquarters of the two defendants and the ease of access to plaintiffs and witnesses around the country, as the District of New Jersey and the Southern District of New York. It also currently has five Bard hernia mesh cases. And for those baseline reasons, it should also be considered a strong candidate.

It currently has six MDLs on its docket, three of which are assigned to the same judge, District Judge Brian M. Cogan. (*JPML Litigation Statistics by MDL (LIVE), available at http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-April-16-2018.pdf, last visited May 2, 2018.*) With 26 Article III judges total, the court is not overburdened with MDLs.

Historically, the Eastern District of New York has handled 44 MDLs, in addition to those currently pending. (*Multidistrict Litigation Terminated Through September 30, 2017, available at http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Cumulative_Terminated_ Litigations-FY-2017.pdf, last visited May 2, 2018.*) It currently has one prescription medical product MDL: *In re: Propecia (Finasteride) Products Liability Litigation*, MDL 2331. (*JPML Litigation Statistics by MDL (LIVE), available at http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-April-16-2018.pdf, last visited May 2, 2018.*) It has handled additional MDLs of this nature in the past, all by judges who are still currently on the bench: *In re: Cutter Laboratories, Inc., "Braumwald-Cutter" Aortic Valve Products Liability Litigation*, MDL No. 367; *In re: Zyprexa Products Liability Litigation*, MDL No. 1596; and *In re: Pamidronate Products Liability Litigation*, MDL. No. 2120. (*Multidistrict Litigation Terminated*

Through September 30, 2017, available at http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Cumulative_Terminated_Litigations-FY-2017.pdf, last visited May 2, 2018.)

Thus, the Eastern District of New York is a sensible alternative.

B. District of Rhode Island

The District of Rhode Island should naturally receive consideration, due to its oversight of the prior MDL and Davol's location within the district. It also has 10 pending Bard hernia mesh cases, although all were filed after the MDL motion was filed and none have yet been served.

It should be restated, however, that Judge Lisi, who presided over the prior MDL, is now retired. Judge Smith took over the MDL during its final two months, years after the District stopped accepting new cases into the MDL, and if the MDL were located here, Judge Smith would be the logical candidate to handle it. These factors offset any impression that the District of Rhode Island has a judge who is already steeped in this litigation.

It is also important to note that the District of Rhode Island is assigned only three Article III judges, and Judge Lisi's bench remains vacant. Judge Smith presides over the only MDL currently pending in the District (*In re: Loestrin 24 Fe Antitrust Litigation*, MDL No. 2472), and the other Article III judge in this District, District Judge John J. McConnell, Jr., is a former partner of Motley Rice LLC, which was lead counsel in the prior MDL and is currently lead counsel for plaintiffs overseeing the current coordinated litigation pending in Rhode Island state court. (*See http://www.rid.uscourts.gov/#, last visited May 2, 2018.*)[9] Motley Rice is also plaintiffs' counsel in all 10 of the Bard hernia mesh cases currently pending in the District of Rhode Island.

[9] Judge McConnell's brother, Robert J. McConnell, is still a partner at Motley Rice. (https://www.motleyrice.com/attorneys/robert-j-mcconnell).

C. Eastern District of Louisiana

The Eastern District of Louisiana is also a logical option. It currently has five Bard hernia mesh cases. It has five pending MDLs, including three involve prescription medical products: *In re: Taxotere (Docetaxel) Products Liability Litigation*, MDL No. 2740; *In re: Xarelto (Rivaroxaban) Products Liability Litigation*, MDL No. 2592; and *In re: Vioxx Marketing, Sales Practices and Products Liability Litigation*, MDL No. 1657. (*JPML Litigation Statistics by MDL (LIVE), available at http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-April-16-2018.pdf, last visited May 2, 2018*). Moreover, it has 12 Article III judges. (*http://www.laed.uscourts.gov/judges-information/district-judges, last visited May 2, 2018*). Historically, it has overseen 36 MDLs, in addition to those currently pending. (*Multidistrict Litigation Terminated Through September 30, 2017, available at http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Cumulative_Terminated_Litigations-FY-2017.pdf, last visited May 2, 2018*).

Located in New Orleans, it is accessible by air from all over the country and is surrounded by numerous hotels and other amenities to accommodate parties and witnesses coming from out of town.[10]

III. Moving Plaintiffs' Proposed Venues—the Southern District of Ohio and the Western District of Missouri—Are Random Choices and Not Particularly Logical Choices

Moving Plaintiffs suggest that the Southern District of Ohio "is most appropriate due to its geographically centralized location and its ability to handle a large volume of cases." (*MDL Motion Brief, Doc. 1-1, at 10*.) Alternatively, Moving Plaintiffs propose the Western District of

[10] After some recent filings, the number of cases in the Southern District of Florida has risen to five, with two in the Fort Pierce Division and one each in the Fort Lauderdale and West Palm Beach Divisions. These locations present unnecessary travel and logistical challenges that warrant against its consideration and is certainly not as convenient or appropriate for this litigation as the other venues described above.

Missouri, because "it is centrally located" and "has the capacity to handle this MDL." (*Id., at 15, 16.*)[11] A few of the Joining Plaintiffs express a preference for the Western District of Missouri, due to the Bard hernia mesh cases already pending there, its location within the United States, and its ability to handle the proposed MDL. (*See, e.g., Doc. 10.*)

Neither District is a particularly compelling choice. Both Moving Plaintiffs and Joining Plaintiffs focus on geographic "centrality," but MDLs involving prescription medical products are, by their very nature, national with plaintiffs and witnesses from coast to coast. The need for a "central" location has not prevented the JPML from assigning MDLs of this kind to district courts in New Jersey, New York, or other states in the region, particularly when the defendants' headquarters are located there, along with witnesses and evidence common to all the cases. Moreover, a district court's location in the "central" United States does not necessarily make it easier to travel to. There is no shortage of district courts located in cities with ample hotels, facilities, and amenities to accommodate out-of-town parties and witnesses, and it is not accurate to say that it is easier to fly from anywhere in the country to Columbus, Ohio, or Kansas City, Missouri, than it is to fly from anywhere in the country to New Jersey or New York City. *See* Multidistrict Lit. Man. § 6:7 (2017) ("It is not necessary . . . to show that New York's LaGuardia or Chicago's O'Hare airports offer better and more frequent air service than is available in Des Moines.").

What particularly sets the Southern District of New York and the District of New Jersey apart is their connection to the Bard hernia mesh cases, both in terms of proximity to Defendants – and thus, common witnesses and evidence – and number of cases. By contrast, the Southern

[11] While many of the Joining Plaintiffs endorse the Southern District of Ohio, this does not make that particular District a more logical choice. Rather, it merely reflects that the plaintiffs' bar has agreed to support the initial choice.

District of Ohio has only three Bard hernia mesh cases, and that is its *only* connection to the litigation. (*See Defendants' Schedule of Cases, attached as Exhibit 1.*) Moreover, these cases were served in March and April of this year. Only one answer has been filed, and discovery is not underway in any case.

The Western District of Missouri has 13 Bard hernia mesh cases, which is the most, but not by much. (*Id.*) The Southern District of New York and the District of Rhode Island are second with 10 each, followed by the District of New Jersey with nine. (*Id.*) And again, the only connection the Western District of Missouri has to the litigation is that there are cases pending there.[12] One set of Joining Plaintiffs imply that because nine of the Bard hernia mesh cases were filed in the Western District of Missouri "earlier than March 2018," those cases are somehow more advanced than others. (*Doc. 10.*) But the truth is that every case in the Western District of Missouri is still in its infancy. Plaintiffs in each of those cases have agreed to give extensions to Bard for filing an answer, pending the outcome of the MDL Motion. Like the cases in the Southern District of Ohio, no discovery has commenced in any of them.

The Southern District of Ohio and the Western District of Missouri are clearly capable of handling this proposed MDL. But this litigation has no connection to Ohio and Missouri, besides having cases pending there that are newer and not as far along as many cases pending elsewhere.

An assessment of the various candidate district courts, which takes guidance from Section 1407, should find the district courts in New York City or New Jersey much more compelling.

[12] While some of the attorneys representing plaintiffs are located in Kansas City, this is merely incidental and should play little to no role in the Panel's decision, particularly given the more compelling factors described above.

IV. The Proposed MDL Should Include All Bard Polypropylene Hernia Mesh Products, Without Exception

Moving Plaintiffs would like to "exclude all cases in which the product at issue is the [CK Patch] that was the subject of a recall and was the focus of *In re: Kugel Mesh Hernia Patch Products Liability Litigation*, MDL 1842, which the Panel closed on September 8, 2017." (*MDL Motion Brief, Doc. 5-1, at 4 n.6.*) However, they offer no cogent explanation why this one particular polypropylene hernia mesh product should be excluded from an MDL whose defining factor (*i.e.*, the "one common denominator") is that "the products at issue are all made of synthetic polypropylene." (*MDL Motion Brief, Doc. 5-1, at 2.*) Indeed, the Moving Plaintiffs have proposed that the MDL be called "In Re: Davol, Inc./C.R. Bard, Inc. ***Polypropylene*** Hernia Mesh Products Liability Litigation" – without any exceptions.

Moving Plaintiffs appear to omit CK Patch cases from their MDL Motion mainly because of the prior existence of *In re: Kugel Mesh Hernia Patch Products Liability Litigation*.[13] But that MDL included cases involving a number of polypropylene hernia mesh products, including multiple products that Moving Products would include in their proposed new MDL. As noted above, 49 out of the 98 currently pending federal Bard hernia mesh cases involve non-CK Patch products that were part of *In re: Kugel Mesh Hernia Patch Products Liability Litigation.*

The cases involving products that were part of the prior MDL are, by virtue of that MDL, further advanced than cases involving products that were not involved in the prior MDL, particularly in terms of discovery. That should be viewed as an asset to the newly proposed MDL. The discovery from the proposed MDL will inevitably overlap with the discovery in the prior MDL. It does not make sense to make the parties start from scratch.

[13] Moving Plaintiffs also note that some CK Patches were recalled, but that circumstance does not mean that current and new CK Patch cases should be excluded from multidistrict litigation. Indeed, most of the cases in the prior MDL did not involve the issue that led to the voluntary recall of some CK Patches—*i.e.*, broken memory recoil rings.

Accordingly, if it grants the MDL Motion, the JPML should reject Moving Plaintiffs' attempt to exclude the CK Patch from the new MDL. To do otherwise would defeat the very purpose of judicial economy and convenience that MDLs are supposed to promote.

CONCLUSION

Defendants do not oppose Moving Plaintiffs' MDL Motion, so long as the CK Patch cases are not excluded. However, the selection of the venue should be more than arbitrary. On balance, the Southern District of New York or the District of New Jersey would best serve "the convenience of parties and witnesses and . . . [the] promot[ion of] the just and efficient conduct of [the coordinated] actions." 28 U.S.C. § 1407.

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Respectfully submitted,

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