IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

IN RE: C. R. BARD, INC., PELVIC REPAIR SYSTEM PRODUCTS LIABILITY LITIGATION

MDL NO. 2187

THIS DOCUMENT RELATES TO:

ALL CASES

DEFENDANT C. R. BARD, INC.'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR CONSOLIDATION

COMES NOW Defendant C. R. Bard, Inc. ("Bard") and hereby responds to Plaintiffs' Motion for Consolidation of Certain Trial Selection "Wave" Cases for Trial ("Motion" or "Consolidation Motion"). As outlined in more detail below, Bard opposes Plaintiffs' motion to consolidate and believes that rather than lead to efficiencies, consolidation of cases would be counterproductive to the ultimate resolution of the this MDL. Bard respectfully requests that Plaintiffs' Motion be denied in its entirety, and further requests oral argument on the Motion.

PRELIMINARY STATEMENT

The Court repeatedly has referenced the number of cases in MDL 2187 and expressed frustration with a perceived lack of overall progress. From Bard's perspective (and perhaps from Plaintiffs' perspective as well), the Court's frustration is misplaced. To date, there has been only one trial in this Multidistrict Litigation ("MDL"), and the product in that case—*Cisson*—was designed to treat pelvic organ prolapse. Consequently, there has been no trial involving a stress urinary incontinence product, even though those devices make up *approximately 70%* of the inventory in this MDL.

Against this backdrop, Plaintiffs now propose to hold numerous consolidated trials in multiple venues..[1] Plaintiffs' Motion, however, ignores well-established law regarding the scope of an MDL judge's authority to consolidate cases for trial. In this context, consolidation also improperly minimizes the numerous factual differences—and accompanying legal distinctions—that will arise in any single trial that involves multiple, unrelated plaintiffs. Despite repeated references to judicial efficiency and economy, Plaintiffs' true motivation for seeking consolidated trials is to create an inherent bias with the jury by suggesting that "something must be wrong" with the product if more than one person is suing. This very scenario occurred in the recent consolidated trials related to another manufacturer's pelvic mesh products. All of this will result in unfairness to the defense and severe prejudice to Bard. The heightened risk of prejudice, along with the authority precluding MDL judges from consolidating actions for trial, account for the rarity with which consolidation occurs in this context. Other than this Court, only one other MDL court recently has ordered consolidated trials of cases involving medical devices or pharmaceutical products, and those cases, in the *Mentor* litigation, did not go to verdict and are otherwise distinguishable.

This Court should deny Plaintiffs' Motion for three, primary reasons. First, as this Court acknowledged in Pretrial Order #51, "[t]he direct filing of actions in MDL No. 2187 in the Southern District of West Virginia is solely for the purposes of consolidated discovery and related pretrial proceedings as provided by 28 U.S.C. § 1407." This statement comports with Supreme Court precedent, which holds that an MDL court is obligated to remand cases to their originating court upon the conclusion of pretrial proceedings. Plaintiffs' failure to cite any

[1] To the extent Plaintiffs propose that cases from Wave 1 and Wave 2 could be consolidated with cases from Wave 3 (*see* Mot., p. 2 fn. 1), that proposal should be summarily rejected. The cases in Wave 3 are subject to significant restrictions on discovery (e.g., no live depositions of treating physicians) that do not apply to the cases in Wave 1 and Wave 2, and, in any event, are proceeding under an entirely different schedule.

contrary authority, or even address this point in their Motion, is telling.[2] Accordingly, because each case—even when part of the MDL—remains separate and distinct upon the conclusion of pretrial proceedings, this Court does not have the authority to order consolidated trials for cases that would not have been within the original jurisdiction of this Court.[3] The Court should deny the Consolidation Motion for this reason alone.

Second, Plaintiffs failed to, and ultimately cannot, satisfy their burden pursuant to Federal Rule of Civil Procedure 42. Significant factual differences preclude the consolidation of these cases for trial, and Bard will suffer substantial prejudice if consolidation is permitted. Plaintiffs' claims of judicial efficiency, convenience and economy cannot supplant basic fairness. Notwithstanding the myriad individualized issues and factual differences between each individual case, consolidated trials carry a real and formidable risk that the jury will be swayed simply by the number of plaintiffs alleging injury from the same product. That risk is too high a price for any claimed efficiency and should not be countenanced by this Court.

The cases included in Plaintiffs' proposed consolidations reveal Plaintiffs with vastly different: (i) medical histories and comorbidities; (ii) implanted products; (iii) implant dates; (iv) implanting physicians; (v) explanting and other treating physicians; (vi) treatment courses; (vii) claims and allegations; (viii) expert witnesses; and (ix) alleged injuries and damages. The vast majority of federal courts have recognized that these, and other, individualized facts preclude the consolidation of products liability cases against manufacturers of prescription medical devices

---

[2] Plaintiffs refer to the JPML Transfer Order as support for consolidation. (Mot. at 5.) But the standard for transferring cases to an MDL is not the standard for consolidating cases for trial, and the mere fact that cases may "share questions of fact" is irrelevant where, as here, individualized issues predominate. Moreover, the standard for transfer does not account for risks of prejudice and confusion or the other factors relevant to the consolidation analysis under Fed. R. Civ. P. 42.

[3] For a variety of reasons, Bard submits that consolidation is not appropriate even for those cases that would have been within the Court's original jurisdictions, i.e., plaintiffs who reside in counties within the Southern District of West Virginia. *See* § II, *infra*.

and pharmaceutical products. In fact, *this* Court previously suggested that such factual differences would render multiple aspects of Plaintiffs' claims—failure to warn liability, causation, damages—inappropriate for consolidation. (*See* Draft Order to Consolidate.)[4] Because common questions of fact or law do not predominate in this litigation, any limited benefit from consolidated trials is greatly outweighed by the likelihood of jury confusion and severe prejudice.

Finally, consolidation will infringe Bard's due process rights unnecessarily, particularly, but not solely, as to Plaintiffs' punitive damages claims. The Supreme Court has explicitly held that the Due Process Clause bars a jury from punishing a defendant for harm caused on others. Any multi-plaintiff consolidated trial involving punitive damage claims will necessarily involve the jury hearing evidence as to stranger plaintiffs, in direct violation of the Constitution.[5] For all of these reasons, and as explained more fully below, this Court should deny Plaintiffs' Motion.

ARGUMENT

I. THIS COURT DOES NOT HAVE THE AUTHORITY TO CONSOLIDATE PLAINTIFFS' PROPOSED CASES FOR TRIAL.

Plaintiffs contend that "whether consolidation is authorized under Rule 42" is a "threshold question." (Motion at 5.) Although Plaintiffs ask the right question, their answer—that this Court has authority to consolidate separately filed MDL cases for trial pursuant to Federal Rule of Civil Procedure 42(a)—is wrong. And rather than directly confront the narrow scope of this Court's jurisdiction as it relates to trials, Plaintiffs instead ignore the law. By statute, an MDL judge's authority is limited to ruling on pretrial matters, and pretrial matters alone. Motions to consolidate cases for trial do not fall within the category of "pretrial matters"

[4] A true and correct copy of the Court's Draft Order to Consolidate, which was circulated to the parties on October 21, 2013, is annexed hereto as Exhibit A.

[5] Bard maintains that there is no basis for punitive damages in this litigation. Even if this issue were permitted to be heard by a jury, punitive damages should be bifurcated as previously requested by Bard.

upon which MDL judges are authorized to rule. As explained below, this Court is thus without jurisdiction to grant the relief Plaintiffs request

A. The MDL Cases Were Consolidated Only For Pretrial Proceedings.

The purpose of the MDL process is to allow for coordinated or consolidated pretrial proceedings – not coordinated or consolidated trials. 28 U.S.C. § 1407(a) effectuates that goal in express terms, requiring cases transferred into an MDL court to be remanded to the originating district court at the conclusion of pretrial proceedings in the MDL:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings…. *Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred* unless it shall have been previously terminated….

28 U.S.C. § 1407(a) (emphasis added). In *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), the Supreme Court construed this provision's use of "shall" as "creat[ing] an obligation 'impervious to judicial discretion.'" *Id.* at 34-35. Thus, once "pretrial proceedings have run their course," the JPML is "'obligate[d]' to remand any pending case to its originating court." *Id.*

By virtue of 28 U.S.C. § 1407(a)'s non-discretionary mandate, "individual cases [within MDL proceedings] that are consolidated or coordinated for pretrial purposes remain fundamentally separate actions, intended to resume their independent status once the pretrial stage of litigation is over." *In re Korean Air Lines Co., Ltd.*, 642 F.3d 685, 700 (9th Cir. 2011). To that end, "the district court's jurisdiction as an MDL transferee court is generally coextensive with pretrial proceedings," and, "[a]s a result, a district court ***does not*** have authority to transfer a case to itself for trial, . . . ***nor may it*** consolidate actions for all purposes." *Id.* at 699-700 (emphasis added); *accord In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MD 2262

NRB, 2014 WL 5392961, at *3 (S.D.N.Y. Oct. 14, 2014) ("[w]e have previously declined to consolidate cases under Rule 42(a), because our authority under the MDL statute extends only to pretrial matters, while Rule 42 effectuates consolidation for all purposes (including trial)"); *In re Motor Fuel Temperature Sales Practices Litig.*, No. 07-1840-KHV, 2013 WL 1896985, at *4 (D. Kan. May 6, 2013) (noting that MDL judge does not have authority to transfer cases to itself, rule on motions to change venue, or consolidate actions for all purposes under Rule 42); *In re Prempro Prods. Liab. Litig.*, 2008 WL 5274323, at *2 (E.D. Ark. Dec. 18, 2008) ("[a]n MDL transferee court has jurisdiction for pretrial proceedings only"; because, "for actions to be consolidated under Rule 42, 'the actions to be consolidated must both be pending before the court for all purposes,'" court denied plaintiffs' motion consolidate); *Procedure Before the Multidistrict Panel–Jurisdiction and Power of the Transferee Court*, 15 Fed. Prac. & Proc. Juris. § 3866 (3d ed.) (transferee judge cannot consider "motions under Rule 42 of the Federal Rule of Civil Procedure to consolidate actions for all purposes . . . , since the jurisdiction of the transferee court cannot be extended to affect matters related to the trial or subsequent stages of an action").

In other words, "an MDL proceeding . . . is merely a collection of individual cases, combined to achieve efficiencies in pretrial proceedings" and should not "be managed in a manner that fails to take into account that the cases are destined to be returned to their transferee jurisdictions." *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 785 F. Supp. 2d 925, 930 (C.D. Cal. 2011). Consequently, the limitations expressed in the plain language of 28 U.S.C. § 1407(a) prohibit the Court from consolidating pending cases for all purposes, including trial. *Korean Airlines Co.*, 642 F.3d at 700.

That approximately 95% of the cases were directly filed into this MDL does not change this result.[6] "Once an MDL is up and running, later-filed cases may arrive in the MDL" by new litigants "fil[ing] directly into the MDL forum itself" in order to "skip[] the MDL's tag-along process." 3 Newberg on Class Actions § 10:29 (5th ed.); *see also In re Vioxx Prods. Liab. Litig.*, 478 F. Supp. 2d 897, 904 (E.D. La. 2007) (even if cases originate in other districts, "[d]irect filing into the MDL avoids the expense and delay associated with plaintiffs filing in local federal courts around the country after the creation of an MDL and waiting for the Panel to transfer these 'tag-along' actions to [the MDL] district"). Although the direct-file process promotes efficiency, the MDL judge may not retain jurisdiction over direct-filed cases at the conclusion of pretrial matters unless the MDL would have had original jurisdiction, *see In re Mentor Corp. Obtape Transobturator Sling Products Liab. Litig.*, 4:08MD-2004 (CDL), 2010 WL 797273, at *3 (M.D. Ga. 2010), or the parties waive their objections or otherwise consent. Eldon E. Fallon, *et al*., *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2358 (2008) ("[f]or cases transferred to the transferee court by the MDL Panel pursuant to § 1407, the parties must *each* waive" their objections to the required remand to the originating court "before that case can be set for trial"); *Procedure Before the Multidistrict Panel—The Remand Requirement of Section 1407*, 15 Fed. Prac. & Proc. Juris. § 3866.2 (3d ed.) ("[t]here can be little objection to the transferee [MDL] judge retaining a case or cases for trial *when all of the parties consent* to that judge's doing so").

[6] The rule is different, however, where a particular case is directly filed in the transferee court's district, ***and*** the transferee court has ***original jurisdiction*** over the case in the first place. *See Korean Airlines Co.*, 642 F.3d at 700 n.13l; *accord In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 767 (7th Cir. 2003); *In re LIBOR*, 2014 WL 5392961, at *3. "In such a case, the district court's jurisdiction beyond pretrial matters is part of its original jurisdiction, not the MDL jurisdiction." *Korean Airlines Co.*, 642 F.3d at 700 n.13l.

B. This Court Has Acknowledged That It Must Remand Direct-Filed Cases At The Conclusion Of Pretrial Proceedings.

The Court already has acknowledged the limitations on its ability to preside over the trials of these cases. This Court recognized that "[t]he direct filing of actions in MDL No. 2187 in the Southern District of West Virginia is *solely for the purposes of consolidated discovery and related pretrial proceedings* as provided by 28 U.S.C. § 1407." (Pretrial Order No. 51 ("PTO 51") [DE 351]) (emphasis added). PTO 51 thus procedurally aligns the direct-filed cases with the cases transferred into this MDL from other venues:

> Upon completion of all pretrial proceedings applicable to a case directly filed in the Southern District, *the defendants do not intend to waive their rights to transfer any case in this MDL to a court of proper venue under 28 U.S.C. § 1406(a). At the conclusion of all pretrial proceedings, the court, pursuant to 28 U.S.C. § 1404(a), will transfer each case filed directly in the Southern District to a federal district court of proper venue as defined in 28 U.S.C. § 1391,* based on the recommendations of the parties to that case, or on its own determination after briefing from the parties if they cannot agree.

(*Id*.) (emphasis added). For cases that would not be within its original jurisdiction, the Court thus has agreed that it must transfer such cases at the conclusion of pretrial proceedings. Consequently, and because Bard has not waived its venue-related objections, the Court does not have the authority to consolidate multiple cases for trial.

II. CASES IN THIS MDL SHOULD NOT BE CONSOLIDATED FOR TRIAL.

Even if this Court had the authority to order a consolidated trial, whether in West Virginia or elsewhere, consolidation is not appropriate for any case in this litigation, and particularly not for the individual cases proposed by Plaintiffs. These are not cases where common questions of law and fact predominate, as the cases do not primarily involve "common witnesses, identical evidence and similar issues." The Court should therefore decline to order consolidated trials and should decline Plaintiffs' Motion because: (1) significant factual differences between the cases render consolidation inappropriate; (2) a consolidated trial is

unworkable and will substantially prejudice Bard; and (3) consolidation where Plaintiffs seek punitive damages unnecessarily imperils Bard's Due Process rights.

A. Legal Standard.

Federal Rule of Civil Procedure 42 allows a district court to order consolidation of pending actions in certain instances where the cases involve common issues of law or fact. Fed. R. Civ. P. 42. Although "consolidation is permitted as a matter of convenience and economy in administration," *Johnson v. Manhattan Ry. Co*., 289 U.S. 479, 496-97 (1933), consolidation "does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *Id.* Courts considering consolidation must evaluate:

(1) Whether the specific risks of prejudice and possible confusion [are] overborne by the risk of inconsistent adjudications of common factual and legal issues,

(2) The burden on the parties,

(3) Witnesses and available judicial resources posed by multiple lawsuits,

(4) The length of time required to conclude multiple suits as against a single one, and

(5) The relative expense to all concerned of the single-trial, multiple-trial alternatives.

Arnold v. E. Air Lines, Inc., 681 F.2d 186, 193 (4th Cir. 1982).

"[C]onsiderations of convenience may not prevail where the inevitable consequence to another party is harmful and serious prejudice." *Arnold v. E. Air Lines, Inc.*, 712 F.2d 899, 906 (4th Cir.1983) (en banc) (vacating verdict in consolidated trail that had been affirmed in *Arnold I* and remanding for new trial because refusal to sever constituted an abuse of discretion). "Consolidation, or refusal to sever, where prejudice results under the facts and circumstances of the particular case, amounts to abuse of discretion, constituting reversible error." *Id*. (citing *Dupont v. S. Pacific Co*., 366 F.2d 193, 196 (5th Cir. 1966)). Accordingly, this Court must

balance the court's and parties' convenience against the potential prejudice that such consolidation may cause. *Dixon v. CSX Transp., Inc*., 990 F.2d 1440, 1443 (4th Cir. 1993).

B. Consolidated Trials Are Particularly Inappropriate For Products Liability Cases Like Those In This MDL Due to Significant Factual Differences.

Plaintiffs have not met their burden to show the commonality of factual and legal issues arising from different cases warrant the allowance of a consolidated trial. *In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 373-74 (2d Cir. 1993); *Shump v. Balka*, 574 F.2d 1341, 1344 (10th Cir. 1978) (affirming trial court's denial of Rule 42(a) motion to consolidate was proper when plaintiffs did not meet their burden to establish trial convenience and economy in administration, or that they would suffer injury from the trial court's refusal to consolidate). This is not surprising, as "[m]any federal courts [have held] that product liability cases are generally inappropriate for multiplaintiff joinder because such cases involve highly individualized facts and '[l]iability, causation, and damages will . . . be different with each individual plaintiff.'" *Guenther v. Novartis Pharmaceutical Corp*., 2012 WL 5398219 (Mag. M.D. Fla. Oct. 12, 2012), adopted 2012 WL 5305995 (M.D. Fla. Oct. 29, 2012), (*quoting In re Accutane Prods. Liab. Litig*., No. 8:04–md–2523–T–30TBM, Doc. No. 1105 (M.D. Fla. Sept. 20, 2012) (granting defendant pharmaceutical companies' motion to sever cases)). Where cases involve different implanting physicians, different procedures, different exposure times, and different claimed injuries, the individual issues render consolidation inappropriate and prejudicial. *See Michael v. Wyeth, LLC*, No. 2:04-cv-0435, 2011 WL 1527581, at *2-3 (S.D. W. Va. Apr. 20, 2011) (denying motion to consolidate where plaintiffs had unique medical histories, different doctors, took the drug in differing doses and for varying lengths of time, had different mastectomies, and had different pre-existing risks for breast cancer); *Lopez v. I-Flow Inc.*, No. CV-08-1063-PHX-SRB, 2009 WL 5574373, at *3 (D. Ariz. May 8, 2009) (court rejected consolidation of pain

pump cases because of individualized issues that arise for each plaintiff and defendant, including surgical techniques, dosing, medical histories, and physician technique).[7]

Similar to *Michael* and *Lopez*, individual issues render consolidation inappropriate in this litigation. Plaintiffs have proposed consolidating certain cases in select jurisdictions. (*See* Motion, Exh. 1.) Although this Court has suggested that it will consolidate randomly-chosen cases and not those proposed by Plaintiffs, Plaintiffs' selections demonstrate that highly individualized facts and legal issues—as well as the evidence that will be admissible based on each case's unique facts and claims—render the consolidation of any cases in this litigation improper and unworkable.

For instance, Plaintiffs propose that the *Adamo*, *Atwell-Jackson*, *Bulthius*, *Campbell*, and *Gold* cases be consolidated in the United States District Court for the Middle District of Florida. (Motion, Exh. 1.) Although Plaintiffs label these cases as an "Avaulta Solo" grouping, the five plaintiffs were actually implanted with a number of different devices, including Avaulta Solo Anterior, Avaulta Solo Posterior, Align TO, and Align Retropubic/Suprapubic. Furthermore, these five cases involve four different implanting physicians and implant dates ranging between June 2008 and August 2010. The information that each doctor understood about the risks of using the pelvic mesh device, the central question in each Plaintiff's failure to warn claim, will

[7] Plaintiffs rely heavily on this Courts consolidation of the trials in *Eghnayem, et al. v. Boston Scientific Corp*., 2:13-cv-07965 (Dkt. No. 10) (PTO #91, Order Consolidating above Cases for Trial on All Issues) and *Tyree, et al. v. Boston Scientific Corp.*, 2:12-cv-08633 (Dkt. No. 9) (PTO #78, Order Consolidating above Cases for Trial on All Issues). (Consolidation Motion at 8-9, 15-16.) But the consolidation in those cases provides no support for consolidation here. First, as set forth *supra*, this Court is without authority to consolidate for trial cases that originated in, or are properly remanded to, other districts. *See* Arg. I. Second, contrary to the Plaintiffs' contention, the facts and circumstances of this case do not favor consolidation. As set forth herein, the individualized facts of each case require separate trials. Third, the threat of consolidated trials is not an efficient method for eliminating weak or unsustainable cases. In both *Tyree* and *Eghnayem*, the Court consolidated far more cases than were ultimately tried because a number of plaintiffs voluntarily dismissed their claims. The Court should devise an alternate process to eliminate such cases rather than risk the prejudice associated with consolidation. Finally, the significant prejudice to Boston Scientific that resulted from consolidation is evident both from the verdicts themselves and the damages awarded to Plaintiffs.

differ, as will the information that the physician passed on to the Plaintiff.[8] And the plaintiffs—whose ages at implants ranged from 32 to 67—also have different medical histories and surgical courses. Additionally, some of the plaintiffs allege claims for loss of consortium and lost wages, while others do not. Plaintiffs' claims of judicial economy also ring hollow: in these five cases alone, the parties disclosed twenty-one different retained expert witnesses who will render case-specific opinions.[9]

Plaintiffs' proposed consolidation in West Virginia similarly involves a number of highly individualized facts that are unique to each case. (Motion, Exh. 1.) The implant dates for the five West Virginia cases range from July 2007 to October 2010. As above, these cases also involve a number of different medical devices, different medical histories, different alleged injuries, different treating physicians and courses of treatment, and different claims.

In addition to the each case's distinct facts, practical considerations also weigh against consolidating these cases.[10] Plaintiffs' five proposed "West Virginia" cases include three cases from Wave 3, which will not be ready for trial at the same time as Wave 1 and 2 cases and likely will involve different processes for discovery relating to treating physicians. The cases additionally will involve different case-specific expert witnesses, many of whom have not yet been disclosed. The proposed "West Virginia" consolidation also contains three cases that

---

[8] *See In re Bristol-Myers Squibb Co*., 975 S.W.2d 601, 604 (Tex. 1998) ("Physicians were responsible for implanting the devices at issue, and the warnings and information given to them … and in turn, the warnings and information given to each plaintiff by her physician presumably will vary …."); *In re Diet Drugs*, No. 1203, 1999 WL 554584, at * 4 (E.D. Pa. July 16, 1999) (joinder of plaintiffs improper where "plaintiffs [had] not purchased or received diet drugs from an identical source, such as a physician, hospital or diet center").

[9] The trial in *Cisson* amply demonstrates the prevalence of case-specific witnesses and testimony. Six fact witnesses—Donna Cisson, Dan Cisson, Rhonda Dyar, Brian Raybon, M.D., John Miklos, M.D., and Christopher Doerr—only testified about case-specific subjects, and all of the parties' respective expert witnesses rendered case-specific opinions. The only witnesses who offered exclusively general testimony, i.e., testimony that would be applicable to more than one were case, current or former Bard employees or consultants, many of whom testified by video deposition.

[10] Plaintiffs' contention that Bard has superior legal resources because it is represented by three law firms is disingenuous. (See Motion at 12, n.14.) The Plaintiffs' Steering Committee alone is made up of 61 attorneys from more than 50 different law firms, many of which have dozens of attorneys who specialize in this type of litigation.

should be remanded to the Northern District of West Virginia. These three cases are thus not within the original jurisdiction of this Court.

Plaintiffs' proposed cases only have one thing in common: they are cases that Plaintiffs believe will be more favorable for them. The aforementioned differences in the factual and legal issues are not unique, as consolidating any cases in this litigation would require the jury to juggle a variety of diverse products, implanting physicians, implant dates, medical histories, alleged injuries, and claims for damages. Therefore, as numerous cases have recognized, consolidation is not appropriate. *E.g., Michael*, 2011 WL 1527581, at *2-3; *Lopez*, 2009 WL 5574373, at *3.[11]

Plaintiffs rely heavily on a 2010 order in *In Re Mentor Corp. Obtape Transobturator Sling Products Liability Litigation*, MDL No. 2004, which granted a request to consolidate for trial four cases arising out of an alleged product defect and filed as part of an MDL proceeding before the District Court for the Middle District of Georgia. D.E.1240:4-5, 7-8; *In re Mentor Corp. Obtape Transobtuurator Sling Prods. Liab. Litig.* (*Mentor Corp.*), No. 4:08-MD-2004 (CDL), 2010 WL 797273 (M.D. Ga. Mar. 3, 2010). Plaintiffs' reliance is decidedly misplaced.

[11] *See also Bowles v. Novartis Pharmaceuticals Corp*., Nos. 3:12–cv–145, 3:12–cv–238, 2013 WL 663040, at *1-2 (S.D. Ohio Feb. 25, 2013) (denying consolidation in pharmaceutical product liability case because of temporal difference in when drugs were prescribed, treatment by different doctors, different underlying medical histories, and different risk factors for the alleged injury made consolidation inappropriate); *Hasman v. G.D. Searle & Co*., 106 F.R.D. 459, 460-61(E.D. Mich. 1985) (denying consolidation in medical device case because "the three cases involve separate and unique medical, social, and sexual histories peculiar to each woman" and different injuries, warnings, and physicians); *Jones v. Wright Med. Tech*., No. 11-14432, 2012 WL 2322456, at *3 (E.D. Mich. June 19, 2012) (declining to consolidate three medical device product liability cases because of factual differences, including different medical histories, different injuries ,and assertion of loss of consortium claim by one plaintiff but not by others); *Dopson-Troutt v. Novartis Pharm. Corp*., No. 8:06-CV-1708-T-24, 2012 WL 7659710, at *1 (M.D. Fla. Oct. 16, 2012) (denying consolidation of pharmaceutical product liability case because of significant factual differences between the cases and the fact that the cases are dependent on case-specific witnesses); *In re Consol. Parlodel Litig*., 182 F.R.D. 441, 445 (D.N.J. 1998) (refusing to consolidate Parodel drug cases where the plaintiffs had diverse medical histories and injuries); *Sherman v. Novartis Pharm. Corp*., No. 2:14-CV-173-FTM-29, 2014 WL 4252275, at *1 (M.D. Fla. Aug. 28, 2014) (denying plaintiffs' request to consolidate because the damages at issue in pharmaceutical product liability case are unique); *Scharff v. Wyeth*, No. 2:10-CV-220-WKW, 2010 WL 6774551, at *1 (M.D. Ala. June 18, 2010) (denying request to consolidate cases returned from MDL court for trial and noting different factual and legal issues and different stages of discovery).

First, the MDL judge in *Mentor Corp.* only had the authority under 28 U.S.C. § 1407 to entertain the plaintiffs' consolidation request because the court had original jurisdiction over those four cases. *Id.* at *1 & n.2 (noting that because the cases subject to plaintiffs' consolidation request were originally filed in the Middle District of Georgia, they could "eventually be tried by this Court"). Here, however, only 5 of Plaintiffs' 31 proposed cases originate in this District. Second, and equally important, the order in *Mentor* hinges on the fact that "[t]he four Plaintiffs are similarly situated in terms of the manner in which they were implanted with the [product]; they allegedly suffered similar complications and resulting medical problems; and the time frame of their surgeries and complications is similar." *Id.* at *3.[12]

The factual similarities that arguably supported consolidation in *Mentor* do not exist here. As previously discussed, Plaintiffs' proposed cases involve different products, different allegations, different time frames, different witnesses, different damages, and different medical histories. As this Court has previously recognized in a draft consolidated order circulated to the parties, these differences are significant and "could weigh against consolidations" and "present the risk of jury confusion and prejudice to defendants." (*See* Draft Order, Exh. A.) In order to avoid the significant danger of jury confusion and prejudice to Bard, the Court's draft order specifically contemplated excluding issues of causation and damages and claims of failure to warn from any consolidated trial. *See id.* Moreover, three of the four cases consolidated in *Mentor* involved a common claim of defect, implants occurring within two months of each other, all of the surgeries took place at the same facility, and all of the implantation and subsequent

[12] Plaintiffs rely on numerous cases where consolidation was granted in cases that arose from a single incident. (Consolidation Motion at 3-4, 8, *citing e.g., Good v. American Water Works Co., Inc.*, 2014 WL 2481821, *2 (S.D. W.Va. 2014) (multiple actions consolidated from the Freedom Industries chemical spill); *Arnold v. Eastern Air Lines, Inc.*, 681 F.2d 186, 193 (4th Cir. 1982) (trial consolidation of claims arising from airplane crash).) Such is not the case here and, thus, makes such cases non-comparable to this action as the critical facts at issue in this case differ so significantly as to render consolidation impracticable and prejudicial.

surgeries were performed by one of two physicians who received the same warnings. *See Mentor*, 2010 WL 797273, at *1. These similarities do not exist in the cases Plaintiffs propose for consolidated trials. Regardless, the *Mentor* consolidation is an outlier, and its minority position should not be followed.[13]

Furthermore, Plaintiffs' half-hearted suggestion that cases involving the Avaulta Plus and the Avaulta Solo will involve the same liability issues (Motion at 10-11) ignores the impact that the specific product, implant date, and implanting physician will have on the evidence presented in each case.[14] As an initial matter, unlike the Avaulta Solo, the Avaulta Plus has a patch of collagen sewn into the central portion of the mesh. The Avaulta Plus and Avaulta Solo are, and are sold as, separate products, and both contain anterior and posterior versions.[15] The majority of cases that Plaintiffs identify for consolidation involve not only a Plaintiff implanted with an Avaulta Plus or Avaulta Solo, but also Bard's Align device or some other manufacturer's device used to treat pelvic organ prolapse or stress urinary incontinence. Even in cases filed in the same jurisdiction where two or more plaintiffs were all only implanted with the same Bard pelvic mesh (*e.g.*, Avaulta Plus Posterior), two plaintiffs still may not have necessarily received the same version of the product. Importantly, Bard received FDA clearance for both its Avaulta and

[13] The same is true for the three cases consolidated in *McClellan v. I-Flow Corp*. (*See* Motion, Exh. 2 at 5.) The court's consolidation of those cases, which were not part of an MDL, is a minority view that should not be followed. In addition, the *McClellan* trial required 16 days from voir dire to closing argument.

[14] Moreover, Plaintiffs' suggestion that Bard did not perform biocompatibility testing on its Avaulta Plus and Solo products (*see* Motion at 11) is patently false. Bard performed all biocompatibility testing required by ISO 10993-1 and the FDA. As set forth in its 510(k) submission, in addition to biocompatibility tests Bard had previously submitted for prior products with the exact same materials, Bard also performed numerous biocompatibility tests on the finished Avaulta Plus and Solo products, including: cytotoxicity, irritation, sensitization, USP physicochemical, and gas chromatography mass spectroscopy characterization. Notably, Bard also performed tests specific to the collagen component of the Avaulta Plus, further demonstrating the difference between the Avaulta Plus and Solo products.

[15] Plaintiffs' prior actions highlight some of the differences. Plaintiffs previously informed this Court that they might, and should be permitted to, argue both (i) that the Avaulta Plus devices were allegedly defective as a consequence of the collagen patch, and (ii) that the Avaulta Solo devices were allegedly defective due to the *absence* of a collagen patch. These distinct contentions alone (in additional to countless other differences between the two products) could result in confusion sufficient to preclude consolidation.

Align products to make design modifications after the product was on the market.[16] Further, due to revisions made to these products' labeling, the warnings at issue in each case will vary based on when the device was sold and implanted. Finally, as discussed more fully in the next section, when each Plaintiff was implanted with a Bard pelvic mesh device will directly impact the admissibility of evidence relating to Bard's corporate knowledge and decision-making.

C. Bard Will Suffer Undue Prejudice If The Cases Are Consolidated For Trial.

The consolidation of trials carries an inherent risk of prejudice to both parties. *See, e.g.*, *In re Repetitive Stress Injury Litig.*, 11 F.3d at 373-74 (mandamus issued to reverse consolidation; "[a]lthough consolidation may enhance judicial efficiency, consideration of convenience and economy must yield to a paramount concern for a fair and impartial trial"). The risk of prejudice is profound:

> … [I]f the unique details of each case were consolidated during a single trial, the jury's verdict might not be based on the merits of the individual cases but could potentially be a product of cumulative confusion and prejudice. One Plaintiff's "claims might be prejudiced by the evidence presented on behalf of the other plaintiffs, since they would be permitted to hear allegations of defects and adverse reactions not relevant to the particular plaintiff's case. …. Plaintiffs contend that the court could alleviate the potential prejudice through jury instructions. However, the court does not believe cautionary jury instructions would be adequate.

Leeds v. Matrixx Initiatives, Inc., No. 2:10CV199DAK, 2012 WL 1119220, at *2 (D. Utah Apr. 2, 2012). Consolidated trials thus imperil the interests of all parties by going "too far in the interest of expediency and [sacrificing] basic fairness in the process." *In re Repetitive Stress Injury Litig*., 11 F.3d at 373-74.

Contrary to Plaintiffs' assertion that concern for juror confusion "underestimates the capacity of the juror," (Motion at 13-14), the nature and atmospherics of a consolidated trial

[16] For example, for its Avaulta Plus product, Bard received FDA clearance to make modifications to the blue fiber used in its mesh and the sewing design. Likewise, Bard received FDA clearance to market a new version of its Align product that contained a dilator.

unquestionably risk severe prejudice to Bard, insofar as there is "a tremendous danger that one or two plaintiffs' unique circumstances could bias the jury against defendant generally." *Grayson v. K-Mart Corp*., 849 F. Supp. 785, 790 (N.D. Ga. 1994). Where a jury is faced with a number of plaintiffs complaining about the same product they are more likely to assume that there is a problem with the product.[17] *E.g., Leeds*, 2012 WL 119220, at *2 (in a consolidated trial the "verdict … could potentially be a product of cumulative confusion and prejudice."). The risk of prejudice is not reduced even if only a small number of cases are consolidated for trial. *E.g., In re Levaquin Products Liability Litigation*, MDL No. 08-1943(JRT), 2009 WL 5030772, at *3-4 (D. Minn. Dec. 14, 2009) (three-plaintiff consolidation improper due to different prescribing physicians notwithstanding plaintiffs' intent to call "nearly twenty generic witnesses"); *Wyeth-Ayerst Labs. v. Caldwell*, 905 So. 2d 1205, 1209 n.10 (Miss. 2005) (a "trial of the seven plaintiffs' claims … will inevitably result in . . . confusing presentation of evidence").

Severe prejudice is virtually certain when evidence that would not be admissible in a single case is admitted in a consolidated trial. *Cain v. Armstrong World Industries*, 785 F. Supp. 1448, 1457 (S.D. Ala. 1992) (consolidation held an abuse of discretion where "[e]vidence that would not have been admissible in [a] single plaintiff's case had these cases been tried separately" was admitted). Other courts have held declined to consolidate two cases in which the medical devices at issues were implanted at disparate times, because as a result of that disparity "the Court would be limited in its ability to exclude such evidence and would likely be forced to

[17] Plaintiffs claim that Bard will not be prejudiced by consolidation because "Plaintiffs will offer evidence of other 'similar incidents' involving these products in *every* plaintiff's case in this litigation." (Mot. at 15.) This argument fails for multiple reasons. Assuming a proper foundation, evidence of similar incidents *may* be admissible for notice in products liability cases under certain, limited circumstances. But evidence of other injuries is not admissible merely "to corroborate or otherwise support claims of defect," *Musick v. Dorel Juvenile Grp., Inc.*, No. 1:11CV00005, 2011 WL 5110404, at *1 (W.D. Va. Oct. 11, 2011) (citing *Blevins v. New Holland N. Am., Inc.*, 128 F. Supp. 2d 952, 960-61 (W.D. Va. 2001)), particularly where its admission will "result[] in unfair prejudice, consumption of time, and distraction of the jury to collateral matters." *Blevins*, 128 F. Supp. 2d at 961. In addition, this Court precluded Plaintiffs from introducing evidence about "similar incidents" during the *Cisson* trial. (E.g., *Cisson* Tr. 07/30/13, 225:15-25.) Such evidence thus has not been, and should not be, part of every case.

admit evidence that it would otherwise exclude." *Johnson v. Advanced Bionics, LLC*, No. 2:08-cv-02376-JPM, 2011 WL 1323883, at *5 (W.D. Tenn. April 4, 2011) (holding that two cases involving cochlear implants must be tried separately because the plaintiffs had different medical histories, suffered different damages, and experienced different modes of failure).

Because implant dates, product manufacture dates, and implanting physicians will vary from case to case, "much of the corporate evidence admissible in one case would be irrelevant and prejudicial in the other." *Bowles*, 2013 WL 663040, at *1-2. For example, one of the central issues in nearly all of the cases is whether, in light of what Bard knew at the time, the warning given was adequate. While an internal document speaking to Bard's knowledge of its pelvic mesh devices in 2009 could potentially be relevant to a plaintiff's claim stemming from the implant of a device manufactured in 2010, it would not be relevant to a claim involving a product manufactured and sold in 2008. Moreover, when plaintiffs were implanted with the products on different dates, it is impossible to apply the state of the art defense and to enforce the exclusion of subsequent remedial measures. *See, e.g., Kurczi v. Eli Lilly & Co*., 160 F.R.D. 667, 673 (N.D. Ohio 1995) ("each defendant's capacity to claim a state-of-the-art defense rests on facts individual to that defendant and to the particular plaintiff," and "a defendant's capacity to challenge a claim that there was a design defect or inadequate warning hinges on the state of the art at the time when the [product] left that defendant's control"); Fed. R. Evid. 407; *Ward v. Hobart Mfg. Co*., 450 F.2d 1176, 1182, n. 16 (5th Cir. 1971) ("The courts are uniformly in agreement that reasonableness of conduct must be judged in light of the circumstances at the time of manufacture," and decisions made after manufacture are not probative as to whether product reasonably safe when manufactured).

In addition to inconsistent evidentiary rulings, consolidation of the cases "would likely be overly prejudicial to [Bard]" because by "lumping" the cases together, the trial "amounts to guilt by association." *Sidari v. Orleans Cnty.*, 174 F.R.D. 275, 282 (W.D.N.Y 1996). And, in such consolidated trials "judicial resources are wasted, not conserved, [because] a jury is subjected to a welter of evidence relevant to some parties but not others" and "prejudice [results] when there are inadequate assurances that evidence will be weighed against the appropriate party and in the proper context." *Insolia v. Philip Morris Inc.*, 186 F.R.D. 547, 550-51 (W.D. Wis. 1998); *accord Agrofollajes, S.A. v. E.I. Du Pont de Nemours & Co.*, 48 So. 3d 976, 981 (Fla. 3d DCA 2010) (reversing trial consolidation and recognizing that plaintiffs' counsel's use of consolidation as substantive proof to prove its claims prejudiced defendants). Consolidating cases based solely because they involve the same or similar product here would produce a "maelstrom of facts, figures, and witnesses" that they jury would not be able to keep straight. *Flintkote Co. v. Allis-Chalmers Corp.*, 73 F.R.D. 463, 464 (S.D.N.Y. 1977); *accord Bowles*, 2013 WL 663040, at *1 (S.D. Ohio Feb. 25, 2013).[18]

D. Consolidation Where Plaintiffs Seek Punitive Damages Unnecessarily Imperils Bard's Due Process Rights.

The risk of prejudice is particularly acute in the area of punitive damages and the attendant constitutional concerns. In *Philip Morris v. Williams*, 549 U.S. 346 (2007), the United States Supreme Court held that due process bars punitive damages that are not specifically tied to the defendant's conduct toward a particular plaintiff. *Id.* at 355. The Court's holding was unequivocal:

[18] Such prejudice can be seen in cases where the jury simply awards formulaic damages against each defendant. *See e.g., Agrofollajes*, 48 So. 3d at 983 (reversing consolidated trials based on prejudice to defendants and recognizing that "[t]he common awards by the jury, in conjunction with the vast amount of disparate evidence presented at trial, demonstrate that the consolidation of the twenty-seven claims resulted in a hopelessly confused jury").

> We did not previously hold explicitly that a jury may not punish for the harm caused others. But do so hold now . . . . [W]e believe the Due Process Clause prohibits a State's inflicting punishment for harm caused strangers to the litigation.

Id. at 356-57. Almost by definition, consolidation inherently injects "strangers" into each plaintiff's claim for punitive damages. A jury deciding whether to impose punitive damages for conduct directed towards one plaintiff will necessarily hear evidence that may relate to alleged conduct directed toward another plaintiff. Consolidation therefore encourages the possibility of the precise harm the Constitution forbids: "the Due Process Clause requires States to provide assurance that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers." *Id.* at 355. Considerations of convenience and economy cannot trump Due Process.

CONCLUSION

Supreme Court precedent and federal statutes unambiguously refute Plaintiffs' argument that this Court has authority to order cases coordinated in this MDL to be consolidated for trial. Even to the extent this Court has the authority remand cases originally filed in the Southern District of West Virginia back to itself and order consolidated trials, consolidation of any cases is still not proper due to the individual and factually distinct issues that would predominate, and the risk of jury confusion and substantial prejudice to Bard. Finally, allowing a consolidated trial on punitive damages directly contravenes the Due Process Clause.

Accordingly, for the reasons stated herein, Bard respectfully requests that this Court deny Plaintiffs' Consolidation Motion.

Dated: December 5, 2014

Respectfully submitted,

GREENBERG TRAURIG, LLP

/s/ Lori G. Cohen

Lori G. Cohen
Terminus 200
3333 Piedmont Road, N.E., Suite 2500
Atlanta, Georgia 30305
(678) 553-2100
(678) 553-2386 (facsimile)
CohenL@gtlaw.com

Michael K. Brown
REED SMITH LLP
355 South Grand Avenue, Suite 2900
Los Angeles, California 90071-1514
(213) 457-8000
(213) 457-8080 (*facsimile*)
mkbrown@reedsmith.com

Attorneys for Defendant C. R. Bard, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2014, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the CM/ECF participants registered to receive service in this MDL.

/s/ Lori G. Cohen
Lori G. Cohen
GREENBERG TRAURIG, LLP
Terminus 200
3333 Piedmont Road NE, Suite 2500
Atlanta, Georgia 30305
(678) 553-2100
(678) 553-2386 (facsimile)
CohenL@gtlaw.com

Attorney for Defendant C. R. Bard, Inc.

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

DRAFT

IN RE: [ ],
PELVIC REPAIR SYSTEMS PRODUCTS LIABILITY LITIGATION

THIS DOCUMENT RELATES TO CIVIL

ACTION NOS.

[ ]

PRETRIAL ORDER # []
(Order to Consolidate)

Pursuant to Federal Rule of Civil Procedure 42(a), the above-styled actions are consolidated for a single-issue trial on whether the design of the [ ] rendered it unsafe for its intended use. It is **ORDERED** that Civil Action No. [ ] is deemed the lead case, and all further filings shall be captioned and docketed therein.

I. Background

These cases are several of many thousand assigned to me by the Judicial Panel on Multidistrict Litigation. Generally, this multidistrict litigation ("MDL") arises from the use of transvaginal surgical mesh to treat pelvic organ prolapse ("POP") and stress urinary incontinence ("SUI"). In the above style-actions, all of the plaintiffs were implanted with the [ ], a mesh product used to treat SUI. Although different physicians implanted the [ ] all of the surgeries were performed in West Virginia. In addition, all of the plaintiffs claim West Virginia as their state of residence. In these actions, the plaintiffs allege, among many counts, that the [ ]was defective and caused injury to the plaintiffs. According to the plaintiffs, the [ ]has a high

malfunction and complication rate, fails to perform as intended, and causes severe injuries, including infection, scarring, nerve damage, and organ perforation.

II. Legal Standard

"Rule 42(a) permits consolidation and a single trial of several cases on the court's docket, or of issues within those cases . . . ." 9A Charles Alan Wright & Arthur Miller, *Federal Practice & Procedure* § 2381 (3d. ed. 2008); *see also Wilson v. Johns-Manville Sales Corp.*, 107 F.R.D. 250, 252 (S.D. Tex. 1985) ("Rule 42(a) of the Fed. R. Civ. P. permits the court to order consolidation and a single trial of different cases on the court's docket, or of issues within those cases, when the cases involve a common question of law or fact."). Rule 42(a) provides the following:

> **(a) Consolidation.** If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay.

Rule 42(a) give district courts broad discretion to consolidate cases for the purpose of trying a single issue. *See Arnold v. E. Air Lines, Inc.*, 681 F.2d 186, 192 (4th Cir. 1982), *on reh'g*, 712 F.2d 899 (4th Cir. 1986) ("The decision whether to sever or to consolidate whole actions or sub-units for trial is necessarily committed to trial court discretion."); *Henderson v. United States*, No. 6:07-cv-00009, 2008 WL 1711404, at *5 (W.D. Va. Apr. 11, 2008) ("The decision to consolidate is committed to Court's discretion and consolidation may be initiated *sua sponte*."). However, the court's discretion to consolidate under Rule 42(a) is not without limits. When considering whether to consolidate several actions for trial, the district court must determine

> [1] whether the specific risks of prejudice and possible confusion [are] overborne by the risk of inconsistent adjudications of common factual and legal issues,
>
> [2] burden on the parties,

> [3] witnesses and available judicial resources posed by multiple lawsuits,
>
> [4] the length of time required to conclude multiple suits as against a single one, and
>
> [5] the relative expense to all concerned of the single-trial, multiple-trial alternatives.

Id. at 193.

Generally, under Rule 42(a), when two causes of action involve common witnesses, identical evidence, and similar issues, judicial economy will generally favor consolidation. *See Johnson v. Celotex Corp.*, 899 F.2d 1281, 1284-85 (2d Cir. 1990). Consolidation of actions involving common questions of law and fact also avoids the risk of inconsistent judgments. *Switzenbaum v. Orbital Scis. Corp.*, 187 F.R.D. 246, 248 (E.D. Va. 1999). Nevertheless, "[e]ven where cases involve some common issues of law or fact, consolidation may be inappropriate where individual issues predominate.'" *Michael v. Wyeth, LLC*, No. 2:04-cv-0435, 2011 WL 1527581, at *2 (S.D. W. Va. Apr. 20, 2011) (internal quotations omitted).

III. Discussion

As an initial matter, I **FIND** that common issues of law and fact presented by these cases favor consolidation. These cases implicate only West Virginia law. In MDL actions, a transferee court must apply the choice of law rules of the jurisdiction in which the transferred actions were originally filed. *In re Air Crash Disaster Near Chicago, Ill.*, 644 F.2d 594, 610 (7th Cir. 1981); *In re Digitek Prods. Liab. Litig.*, MDL No. 2:08–md–01968, 2010 WL 2102330, at *7 (S.D. W.Va. May 25, 2010). All of the above-styled actions were originally filed in the Southern District of

West Virginia;[1] thus West Virginia choice of law rules apply. Under West Virginia law, the traditional rule of *lex loci deliciti* rule applies to tort actions. *Chemtall, Inc. v. Madden*, 607 S.E.2d 772, 779-80 (2004). Under this rule, the law of the place where the tort or wrong occurred governs the substantive rights of the parties. *Id.* at 780. Here, the surgeries to implant the devices occurred in West Virginia; thus, West Virginia law applies to the plaintiffs' design defect claim. Therefore, these actions will involve the common application of West Virginia law.

Additionally, these cases involve the same product, [ ], which was manufactured by the same defendant. All of the plaintiffs are West Virginia residents and were implanted with the device in West Virginia. Because the plaintiffs claim injuries arising from same the device, the design defect[2] inquiry will be focused on the same date: the date when the product was made. *See* Syl. Pt. 4, *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666, 667 (1979) ("The standard of reasonable safeness is determined not by the particular manufacturer, but by what a reasonably prudent manufacturer's standards should have been at the time the product was made.").

I also **FIND** the *Arnold* factors weigh in favor of consolidation. First, the risk of juror confusion is low when the jurors will be determining one legal issue arising from a common set of facts. Second, the same experts will likely be providing medical and design testimony. Having one trial in which these experts can testify will save them the expense of working on and travelling to testify in multiple trials. In addition, it will save the court's time and resources to hear one trial on design defect. Third, if the design defect issue is disposed of in a single trial, this disposition will

---

1 After the Supreme Court's decision in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach* 523 U.S. 26, 34-35 (1998), I may only consolidate for trial those actions over which I would have original jurisdiction, "unless the parties otherwise consent." *In re Mentor Corp. Obtape Transobturator Sling Products Liab. Litig.*, MDL 2004, 2010 WL 797273, *1 n.2 (M.D. Ga. Mar. 3, 2010).

2 The term "design defect" is limited to whether the product was reasonably safe for its intended use, considering "what the reasonably prudent manufacturer would accomplish in regard to the safety of the product, having in mind the general state of the art of the manufacturing process . . . at the time the product was made." Syl. Pt. 5, *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666, 667 (1979).

likely expedite settlement amongst the parties and decrease the length of later individual trials on causation and damages. Last, consolidation will likely decrease the parties' costs of having to pay experts to testify about design defect in multiple trials rather than a single-issue trial.

Finally, since I am consolidating these actions for trial on the single issue of design defect, I **FIND** that individual issues do not predominate over the common issues of fact and law. Individual issues could predominate if I were to consolidate these actions for a trial on all issues, including causation and damages. If a consolidated trial proceeded on causation and damages, the plaintiffs' varying medical histories could weigh against consolidation. As other courts observed, individual issues relating to causation and damages can present the risk of jury confusion and prejudice to defendants. *See Michael*, 2011 WL 1527581, at *2-3 (denying motion to consolidate HRT drug cases because plaintiffs had unique medical histories, different doctors, took the drug in differing doses and for varying lengths of time, had different mastectomies, and had different pre-existing risks for breast cancer); *In re Consol. Parlodel Litig.*, 182 F.R.D. 441, 445 (D.N.J. 1998) (refusing to consolidate Parodel drug cases, where the plaintiffs had diverse medical histories and injuries and the defendants marketing strategies varied throughout the nation, because "consolidation would compress critical evidence of specific causation and marketing to a level which would deprive NPC of a fair opportunity to defend itself."); *Hasman v. G.D. Searle & Co.*, 106 F.R.D. 459, 461 (E.D. Mich.1985) (denying consolidation in intrauterine device cases involving varying medical histories, different uses of the product, "different warnings, different warranties and perhaps defects, and different inserting physicians.").

Fortunately, I can mitigate the risks presented by individualized issues, such as causation and damages, by limiting the trial to design defect. As noted in the *Guide to Multistate Litigation*,

> Often the common questions of fact and law are outweighed by the individual questions. In addition, fears of jury confusion or prejudice may prevent consolidation in such cases. The court may, of course, consolidate the cases for the purpose of trying a single issue, such as liability for failure to warn, and may be able to avoid the problems of individual issues and undue prejudice.

Victor E. Schwartz et al., *Guide to Multistate Litigation* § 2:11 (2012). In fact, several courts have utilized this trial plan. *See, e.g.*, *Wilson v. Johns-Manville Sales Corp.*, 107 F.R.D. 250, 252-53 (S.D. Tex. 1985) (under Rule 42(a), consolidating 50 asbestos cases on issues of product defectiveness and punitive damages and then resolving issues of exposure, causation, injury, and compensatory damages by trying cases in groups of five); *In re Fibreboard Corp.*, 893 F.2d 706, 708 (5th Cir. 1990) (the reviewing court found no impediment to district court consolidating under rule 42(a) approximately 3,000 asbestos actions for consolidated trial on state of art and punitive damage issues).[3]

Here, a single-issue trial on design defect will not be overborne by individual issues such as the plaintiffs' medical histories and injuries, which relates to causation and damages. Under West Virginia law, a plaintiff's medical history or lay testimony is not required to establish that a design was defective. To establish a design defect, the plaintiff must show that "the product in question is

---

3 To ensure efficiency and reduce jury confusion, some courts believe that the actions must first be consolidated under Rule 42(a), and then the common issue severed for a separate trial under Rule 42(b). *See, e.g.*, *In re Dow Corning Corp.*, 211 B.R. 545, 583 (Bankr. E.D. Mich. 1997) ("[T]he risk of overwhelming the factfinder [under Rule 42(a)] can be greatly reduced by resort to Rule 42(b)."). In addition, litigants have proposed similar trial plans. *In re Dow Co. Sarabond Products Liab. Litig.*, 664 F. Supp. 1403 (D. Colo. 1987) ("Specifically, Dow seeks an order: (1) first transferring all of the cases in this multidistrict litigation to this court pursuant to 28 U.S.C. § 1404(a); then (2) consolidating all of the MDL cases under Fed. R. Civ. P. 42(a); and finally (3) severing, under Rule 42(b) for a separate trial, the allegedly common threshold issue of whether Sarabond is a defective product."). However, I find the plain language of Rule 42(a) allows a court to consolidate cases for purposes of trying a single issue without resort to Rule 42(b). Fed. R. Civ. P. 42(a) ("If actions before the court involve a common question of law or fact, the court may . . . join for hearing or trial any or all matters at issues in the action . . . ."); *Wilson*, 107 F.R.D. at 252 ("Rule 42(a) of the Fed. R. Civ. P. permits the court to order consolidation and a single trial of different cases on the court's docket, or of issues within those cases, when the cases involve a common question of law or fact."); *see also* David F. Herr, *Annotated Manual for Complex Litigation* § 11.631 (4th ed. 2013) ("Consolidation may be for trial of an entire case or only for separable common issues."); Wright & Miller, *supra*, § 2381.

defective, meaning that it is not reasonably safe for its intended use." *Garlinger v. Hardee's Food Sys., Inc.*, 16 F. App'x 232, 234 (4th Cir. 2001) (applying West Virginia law). Whether a product is unsafe "is to be tested by what the reasonably prudent manufacturer would accomplish in regard to the safety of the product, having in mind the general state of the art of the manufacturing process . . . at the time the product was made." Syl. Pt. 5, *Morningstar*, 253 S.E.2d at 667; *see also Chase v. General Motors Corp.*, 856 F.2d 17, 20 (4th Cir. 1988) (applying West Virginia law) ("The question is: did the manufacturer use reasonable care in designing and manufacturing the product at the time it was marketed, not whether it could possibly have been made better or more safe, or later has been made better or more safe.").

It is true that a mesh device is implanted into individuals, each with a unique medical history and body chemistry. Moreover, in terms of the material used, the product's defectiveness, in part, arises from its interaction with the body's bacterial flora.[4] Nevertheless, the focus of the defective design inquiry is on whether the product was reasonably safe for use in the human body considering industry standards and available scientific data at the time it was marketed. *See Morningstar*, 253 S.E.2d at 682-83. In other words, "the focus is upon the *product* that caused the plaintiff's injuries." *Blankenship v. Ethicon, Inc.*, 656 S.E.2d 451, 461 (2007) (Starcher, J., concurring and dissenting in part) (emphasis added). Thus, while the plaintiffs' unique medical histories and circumstances may be relevant to whether the [ ] was a substantial cause of the plaintiffs' injuries, it is not relevant to whether the product was "unsafe" according to a reasonably prudent manufacturer's standards. *See Morningstar*, 253 S.E.2d at 683. Therefore, because the plaintiff's individual testimony and medical histories are not relevant to the design defect inquiry,

4 "[T]he Products' design defects include, but are not limited to . . . [t]he design of the Products to be inserted into and through an area of the body with high levels of bacteria that adhere to the mesh causing immune reactions and subsequent tissue breakdown and adverse reactions and injuries . . ." *See* Master Amended Complaint ¶ 116.

individual issues will not predominate over the common issues of law and fact.

In closing, I also point out that in transferring these cases to me under 28 U.S.C. § 1407(a), the Judicial Panel on Multidistrict Litigation has implicitly determined that consolidation was appropriate "for the convenience of the parties and witnesses" and the promotion of "just and efficient" pre-trial coordination of these actions. 28 U.S.C. 1407(a). Moreover, as Judge Land observed in *In re Mentor Corp. Obtape Transobturator Sling Products Liability Litigation*, "[i]t has already been determined that cases referred to a district court by the Judicial Panel on Multidistrict Litigation involve common questions of law and fact such that it is deemed appropriate, and preferable, that the pretrial aspect of the cases be handled in a consolidated manner." 2010 WL 797273, at *3. These observations, combined with my above determinations, logically compel the liberal use of Rule 42(a) for the purposes of this multidistrict litigation. *See id.* at *3 ("Consolidation appears to be a particularly appropriate tool that should be seriously considered in modern-day multidistrict litigation."). Accordingly, I **FIND** that the consolidation of these cases under Rule 42(a) for trial on design defect is appropriate.

IV. Conclusion

Based upon the foregoing, this court **ORDERS** that the above-styled actions be consolidated for a single issue trial on whether the [ ] was reasonably safe for its intended use. It is further **ORDERED** that Civil Action No. [ ] is deemed the lead case, and all further filings shall be captioned and docketed therein.

The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: [DATE]