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** **JOSEPH R. GOODWIN** **U.S. DISTRICT JUDGE**
THIS DOCUMENT APPLIES TO ALL CASES AND SPECIFICALLY TO:	
Debra Wise and Ronald Wise	**2:12-cv-01378**

DEFENDANT C. R. BARD, INC.'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO CONTINUE *WISE* AND SUSPEND OTHER MDL TRIALS

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Defendant C. R. Bard, Inc. ("Bard") respectfully submits this Memorandum of Law in support of its motion to continue the *Wise* trial, which is currently set for February 18, 2015, and suspend additional trials in MDL 2187. Forestalling *Wise* and other subsequent trials will ensure a fundamentally fairer trial for Bard by allowing for the dissipation of the recent media coverage of the Court's comments about Bard's potential liabilities. In additional, judicial economy will be ill-served by additional trials unless and until the significant evidentiary issues raised in Bard's motion for new trial are conclusively resolved.

PRELIMINARY STATEMENT

The trial in *Wise*, and potentially other trials in this MDL, should be continued or suspended for two reasons. First, at a conference on December 9, 2014, the Court laid bare its view that Bard faces "potential billions of dollars" in liability, and expressed a strong desire that Bard settle its cases in the MDL. (*See* 12/09/14 Transcript ("Tr.") at 22.) The Court's comments were immediately picked up, and in some cases distorted, by the media. Continuing *Wise* and other MDL trials in the near term would thus allow for the potential prejudice engendered by the media's treatment of the Court's comments to dissipate. Bard thus requests that the Court continue *Wise* for this reason alone.

The Court also should continue *Wise* and other trials in the interests of judicial economy. Prior to the first bellwether trial in this MDL, the plaintiffs moved *in limine* to preclude all FDA-related evidence, including, without limitation, evidence that Bard's medical devices were legally on the market, that Bard complied with federal regulations, and that those regulations did not require Bard to conduct pre-market human clinical trials. Bard opposed the plaintiffs' motion in its entirety. Despite its general distaste for in limine motions, the Court granted the plaintiffs' motion. (Cisson Docket Entry ("DE") 302.) Bard immediately moved for

reconsideration of the Court's ruling or alternatively for a certificate of interlocutory review.[1] The Court did not change its ruling and denied interlocutory review (DE 309); the *Cisson* trial was thus tried without any FDA evidence.

Following the jury's verdict in the plaintiffs' favor, the Court requested expedited briefing on Bard's renewed motion for judgment as a matter of law, which it subsequently denied. (*See* DE 439, 443, 448.) The Court issued its ruling on Bard's motion approximately five weeks after the motion was fully briefed. (*Compare* DE 443 *with* DE 448.)[2] Bard then filed a motion for new trial, raising, among other issues, the exclusion of FDA evidence. Although Bard's motion raising this issue has been fully briefed for more than one year, during which time Bard has repeatedly inquired about its status, that motion (the "Cisson Motion") remains undecided. Because this Court has not decided the Cisson Motion, Bard has been unable to appeal the evidentiary rulings that governed, and in Bard's view undermined both the fairness and validity of, the *Cisson* trial. If the same rulings apply to subsequent trials, then those trials will be subject to the same potential errors that are raised in the Cisson Motion. It would be a waste of the Court's and the parties' resources to try additional cases only to require new trials when any verdicts are overturned on appeal.

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[1] As Bard argued at the time, immediate appellate review was necessary because (i) the issue presented a controlling question of law as to which there is a substantial difference of opinion, and (ii) it would materially advance the ultimate termination of the litigation. (DE 303 at 12.) Bard further explained that if it were precluded from introducing FDA evidence at trial, the results of that trial would "hold little predictive value . . . ." (*Id.*) This is precisely what has occurred. Bard does not consider the *Cisson* verdict, or the verdicts in any of the other MDLs, to be valid or predictive because neither Bard nor any other manufacturer has been permitted to fully and fairly litigate its defenses as a consequence of the Court's rulings.

[2] The alacrity with which the Court ruled on Bard's motion for renewed judgment as a matter of law is consistent with the Court's treatment of many of the parties' written submissions. Bard's bellwether summary judgment motions, for example, were fully briefed as of April 29, 2013. (*See, e.g.*, DE 233, 235.) The Court issued its decision on those motions on June 5, 2013, less than five weeks later. (DE 272.) The sole exception to this practice of timely rulings is Bard's Motion for New Trial, which has now been pending for more than a full year.

ARGUMENT

I. LEGAL STANDARD

A trial court may grant a continuance of a trial at its discretion. *Morris v. Slappy*, 461 U.S. 1, 11-12 (1982) ("[B]road discretion must be granted trial courts on matters of continuances.") The Supreme Court has long held that a district court has discretionary power to stay its own proceedings. *See Landis v. North American Co*., 299 U.S. 248, 254-56 (1936) (the ability to stay proceedings "is incidental to the power inherent in every court to control . . . its docket with economy of time and effort for itself, for counsel, and for the litigants").

Numerous reasons may justify a continuance. For example, "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity." *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966); *see also Nebraska Press Ass'n v. Stuart*, 427 US 539, 601 n.27 (1976) ("A significant component of prejudicial pretrial publicity may be traced to public commentary on pending cases by court personnel"). In addition, the Court may suspend these proceedings if doing so would serve the interests of judicial economy and preservation of judicial resources. *See, e.g., Landis*, 299 U.S. at 254; *In re Beebe*, No. 95-20244, 1995 WL 337666, *2 (5th Cir. May 15, 1995); *ACF Indus. v. Guinn*, 384 F.2d 15, 19 (5th Cir. 1967); *Wolf Designs, Inc. v. Donald McEvoy Ltd*., 341 F. Supp. 2d 639, 642 (N.D. Tex. 2004).

II. CONTINUING THE *WISE* TRIAL, AND SUSPENDING FUTURE TRIALS, WILL MINIMIZE ANY TAINT OR PREJUDICE RESULTING FROM THE MEDIA'S TREATMENT OF THE COURT'S RECENT COMMENTS.

A. The Court's Statements Concerning Bard's Potential Liability And Resulting Media And Analyst Reports Have Tainted The Jury Pool And Entitle Bard To The Requested Relief.

At a telephonic hearing conducted on December 9, 2014, the Court expressed its view, on the record, that Bard potentially faces "billions of dollars in verdicts" in pelvic mesh cases. (Tr.

22:14-16.) The Court also voiced its opinion that Bard should settle its cases.[3] (*Id.*) Within days, the Court's comments were published, summarized and distorted by the media and financial analysts.[4] The media coverage of the Court's comments at the December 9 hearing, as described below, warrants the requested relief of continuing *Wise* and suspending future trials in MDL 2187.

On December 11, 2014, Bloomberg published an article titled "Bard Judge Warns Implant Maker Faces Billions in Verdicts."[5] The article stated that this Court "warned [Bard] that it's facing potentially billions of dollars in jury verdicts over its defective vaginal mesh implants . . . ." Bloomberg published a second iteration of the article, now titled "Bard Judge Says Implant Maker Facing Billions in Verdicts," on December 12, 2014:

> A federal judge took the unusual step of urging C.R. Bard Inc. (BCR) to settle thousands of lawsuits over defective vaginal-mesh implants because juries may award billions of dollars in damages.
>
> "I can't imagine a corporation facing potentially billions of dollars in verdicts wouldn't find it advisable to try to achieve a settlement for a much lesser sum," U.S. District Judge Joseph Goodwin in Charleston, West Virginia, said at a Dec. 9 hearing, according to a transcript. "I base that billions of dollars business on some of the rather large verdicts that we've had."
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> * * *
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> "I find it to be a material fact that five different state forums have, on average, returned verdicts of over a million dollars per plaintiff," the judge said.

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[3] Although the Court's settlement-related comments garnered the most attention in the press, settlement was not the intended subject of the hearing. Rather, the conference was held to discuss the parties' joint request to modify the terms of the Pretrial Order No. 131 and Pretrial Order 142, which govern the 300 cases that comprise Wave 3. The Court subsequently granted the parties' request and appropriately lengthened the discovery period in all Wave 3 cases.

[4] The Court's comments were quickly captured by plaintiffs' attorneys and echoed in their advertising and websites. A partial list of the articles, reports, and advertising referencing the Court's comments is annexed hereto as Exhibit A.

[5] The December 11, 2014 iteration of the Bloomberg is no longer available online, but a true and correct copy of that article is annexed hereto as Exhibit B.

* * *

> At this week's hearing, Goodwin said he was surprised investors hadn't put more pressure on company officials to resolve the vaginal-mesh cases.
>
> "If I were a stockholder of any of these companies, I would be materially interested in the fact that there have been multiple million-dollar verdicts for individual plaintiffs," he said.

Jef Feeley, *Bard Judge Says Implant Maker Facing Billions in Verdicts* (Dec. 12, 2014, 12:01 AM ET), http://www.bloomberg.com/news/2014-12-12/bard-judge-says-implant-maker-facing-billions-in-verdicts.html. (Exhibit C.) The article further noted that the Court had taken the "almost unprecedented step of warning executives at Bard that they are gambling with the future of their company by not resolving the litigation," at possible risk of "a bankruptcy filing." *Id.*

A report by analyst Lawrence Keusch of Raymond James & Associates described the Court's comments as "*bombastic*" and "an attempt to vigorously urge both parties to settle . . . ." (Exhibit D.) Like the proverbial game of telephone, the report by Mr. Keusch demonstrates the peril associated with the media's re-reporting of the Court's comments. The author's placement of quotation marks makes it seems as if this Court described Bard's products as "defective":

> U.S. District Judge Joseph Goodwin was quoted at a December 9th hearing, warning Bard, "that it's facing potentially billions of dollars in jury verdicts over its defective vaginal mesh implants . . ."

Id. A juror reading Mr. Keusch's report could reasonably conclude that *the Court* has determined that Bard's products are defective. That the Court did not say this is beside the point: the electronic record now reflects that it was said, and its attribution to the Court raises the spectre of unfair prejudice to Bard.

Other reports focused on the Court's apparent determination that Bard faced great peril if it continued to defend itself against the plaintiffs' claims: "Goodwin further warned the company of grave consequences—as serious as bankruptcy filing—lest management fails to resolve these

suits immediately." Analyst Blog, *CR Bard (BCR) Faces Series of Lawsuits*, Zacks Equity Research (Dec. 16, 2014), http://www.zacks.com/stock/news/157615/cr-bard-bcr-faces-series-of-lawuits. (Exhibit E.) The likelihood that potential and empaneled jurors will use the internet to research the cases in which they are involved is increasingly discussed in the literature. *See, e.g.*, Thaddeus Hoffmeister, *Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age*, 83 U. COLO. LAW REV. 409 (2012); Brooke Lovett Shilo, *Juror Internet Misconduct: A Survey of New Hampshire Superior Court Judges*, 12 U. N.H. L. REV. 245 (2014). Here, a curious juror will easily discover the news reports concerning Bard's litigation. Because these reports contain statements that bear the imprimatur of this federal court, they carry a significant risk of unfairly prejudicing Bard and tainting the jury pool.[6] Potential jurors now have learned, for example, that the Court deems these cases to be valued collectively in the billions of dollars; that the Court believes plaintiffs should recover substantial amounts, based upon multiple million-dollar verdicts; that Bard should settle the cases; and that Bard is liable for the plaintiffs' alleged injuries, a clear inference from the Court's view that settlement is appropriate.

What the Court did not say during the conference, and thus what is absent from all of the news reports, is that some cases have not resulted in verdicts for the plaintiff. In both *Albright v. Boston Scientific Corp.* and *Cardenas v. Boston Scientific Corp.*, the jury returned a verdict for Boston Scientific, the manufacturer of the pelvic mesh product at issue in those cases. Without any knowledge of the defense verdicts, a potential juror could infer from its reported comments that the Court feels these cases are entirely indefensible. Yet the outcome in *Albright* and *Cardenas* paint quite a different picture, namely, that these cases are eminently defensible when (i) unreliable evidence like the Manufacturing Safety Data Sheet is excluded from evidence, and

[6] The Bloomberg article's use of law professor commentary also increases the likelihood that the report could inappropriately influence potential jurors.

(ii) the jury appropriately receives instructions that the manufacturer's pelvic mesh products were legally on the market pursuant to the 510(k) process.

Moreover, the reports contain detailed information concerning the number of suits against Bard, prior verdicts against Bard, confidential settlements by Bard, and alleged settlement discussions. (*See* Exhs. B-E.) The reports also highlight information concerning claims, settlements, and verdicts involving other manufacturers. (*See id.*) These reports, particularly when viewed in combination with the reporting of the Court's comments concerning Bard, have the potential to taint the jury. *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) ("The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.").

Although any media report may carry a risk of influencing a jury's verdict, the potential prejudice to Bard is particularly acute in the upcoming *Wise* trial, which is scheduled to begin on February 18, 2015.[7] If the Court is not inclined to continue *all* trials in this MDL, Bard alternatively requests that the Court continue the *Wise* trial at least six months to allow for some distance between the publicity surrounding the Court's comments and the commencement of the next trial. *See Sheppard*, 384 U.S. at 363 ("[W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity.").

[7] The potential prejudice during the lead up to the *Wise* trial is likely to be exacerbated by an influx of advertising. Pelvic mesh advertising increased 27% during the month of November, which coincided with the *Tyree* trial in West Virginia. (Exhibit F, viewable at http://us7.campaign-archive2.com/?u=35ed1e6f2b2f1244337e3f989&id=42294bf5fa&e=ec7b62fcde) (last viewed on Dec. 23, 2014).

III. JUDICIAL ECONOMY WILL BE BEST SERVED BY CONTINUING *WISE* AND SUSPENDING ADDITIONAL TRIALS UNTIL THE CRITICAL ISSUES RAISED IN THE CISSON MOTION HAVE BEEN RESOLVED.

Trials scheduled for the pending MDL cases should be suspended until resolution of the *Cisson* case. As this Court is aware, *Cisson* and the remaining MDL cases present numerous overlapping legal issues, including the admissibility of FDA evidence, which, should this Court decide to continue to try MDL cases while *Cisson* is on appeal, could result in a waste of judicial resources. Specifically, should the Fourth Circuit determine that this Court erred in excluding the FDA evidence, each MDL trial subject to that error will require a new trial – thus, doubling the work for this Court and wasting valuable judicial resources. Instead of risking a waste of this magnitude, the Court should suspend further MDL trials pending resolution of the Cisson Motion and the anticipated appeal.[8]

When concurrent actions involve substantially similar issues that are likely to result in overlapping decisions, a stay is appropriate. *Wolf Designs*, 341 F. Supp. 2d at 642-43; *see also Mann Mfg., Inc. v. Hortex, Inc*., 439 F.2d 403, 408 (5th Cir. 1971). For example, the court in *Wolf Designs* issued a stay pending resolution of a related case filed in a separate federal district court and recognized that the two cases were "far from identical" (and even involved different parties), but found them "duplicative enough to warrant a stay" of its own action. 341 F. Supp. 2d at 643. The United States Court of Appeals for the Federal Circuit also recognized the need to suspend further proceedings in a case pending resolution of a related case's appeal because the decision in the related case would be "dispositive of the present case." *Arco Polymers, Inc. v.*

[8] The only trial in this MDL to date involved Bard's Avaulta devices, which are indicated for the treatment of pelvic organ prolapse. As Bard has suggested in the past and recently, the Court should schedule trials in which the plaintiff was implanted with one of Bard's stress urinary incontinence devices, e.g., the Align sling. The vast majority of cases in this MDL involve Align, not Avaulta, devices. Thus, Bard respectfully proposes that if no suspension is granted, the Court (i) schedule Align trials from the Wave 1 and Wave 2 cases, and (ii) permit FDA-related evidence to be admitted in those trials.

Studiengesellschaft Kohle, 710 F.2d 798, 799 (Fed. Cir. 1983). Similarly, the United States Court of Appeals for the Ninth Circuit found that "[a] trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case." *Leyva v. Certified Grocers of California, Ltd*., 593 F.2d 857, 863 (9th Cir. 1979).

The basis for the requested continuance and suspension is particularly strong here: not only would it conserve judicial resources by preventing duplication of efforts, but it would permit the Fourth Circuit's guidance to benefit this Court and potentially establish more simplified and consistent rulings to govern future trials. *See Middleton, Inc. v. Minn. Mining and Mfg. Co.*, 2004 WL 1968669, *3-11 (S.D. Iowa Aug. 24, 2004); *Alps South, LLC v. Ohio Willow Wood Co*., No. 8:09-CV-386-EAK-MAP, 2014 WL 4211308, at *1 (M.D. Fla. Aug. 26, 2014) (granting motion to stay, holding that "[t]he Court finds the resolution of the enumerated issues on appeals and cross-appeals are appropriate and determinative of key issues in this trial"); *Ohio Willow Wood Co. v. Alps South, LLC*, No. 2:13-CV-860, 2014 WL 1872375, at *3 (S.D. Ohio May 8, 2014) (granting a stay pending trial of a similar case to "avoid the possibility of dissipating both the Court's and the parties' resources in litigating a claim that the [related] case could eventually render moot"); *IBT/HERE Emp. Representatives' Council v. Gate Gourmet Div. Americas*, 402 F. Supp. 2d 289, 293 (D.D.C. 2005) (granting motion to hold case in abeyance pending arbitration in a separate matter because "[t]he arbitrator's decision . . . may affect the parties' understanding of the scope of this case going forward, may reorient the parties' arguments, may catalyze a settlement of this matter, may moot the defendants' motion to dismiss, or may resolve the issues raised in this lawsuit in their entirety").

In the interest of judicial economy, the resolution of the issues raised in the Cisson Motion necessitates that the Court continue *Wise* and suspend additional trials until this Court and the Fourth Circuit have ruled on those issues.

CONCLUSION

For all of the foregoing reasons, Bard respectfully requests that the Court continue the *Wise* trial and suspend the scheduling of subsequent trials in MDL 2187. This will reduce the likelihood that media coverage of the Court's recent comments will unfairly prejudice Bard, and it will serve judicial economy by allowing for resolution of the issues presented in the motion for a new trial in *Cisson v. Bard*.

Dated: December 24, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 24, 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.

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