BEFORE THE
UNITED STATES JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

IN RE: XARELTO® PRODUCTS LIABILITY LITIGATION	§ § §	MDL No. 2592

PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR TRANSFER OF ACTIONS PURSUANT TO 28 U.S.C. § 1407 FOR COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS

Movants[1] respectfully submit this Reply to Defendants' Bayer Corporation, Bayer HealthCare LLC and Bayer HealthCare Pharmaceuticals Inc. ("Bayer Defendants") and Defendants' Janssen Pharmaceuticals, Inc., Janssen Research & Development, LLC, Janssen Ortho LLC and Johnson & Johnson ("Janssen/J&J Defendants"[2]) Response to Plaintiffs' Motion for Transfer and Coordination Under 28 U.S.C. § 1407 (Bayer Defendants and Janssen/J&J Defendants referred to as "Defendants"). For the reasons set forth below, Plaintiffs' Motion should be granted, with actions transferred to the Southern District of Illinois before Judge David R. Herndon for coordinated or consolidated pretrial proceedings – *not* the District of New Jersey.

[1] The Movants who filed the Motion include the following plaintiffs: *Mary K. Lemp and Charles Lemp, Jr. v. Janssen Research & Development LLC, et al.*, Case No. 3:14-cv-00987 (SDIL); *Dorothy Leach v. Janssen Research & Development LLC, et al.*, Case No. 3:14-cv-00989 (SDIL); *Haney v. Janssen Research & Development LLC, et al.*, Case No. 3:14-cv-00988 (SDIL); *Stanley Pennell and Nancy Pennell v. Janssen Research & Development LLC, et al.*, Case No. 3:14-cv-01040 (SDIL); *Martha McMunn on behalf of Richard McMunn, Jr. v. Janssen Research & Development LLC, et al.*, Case No. 3:14-cv-01042 (SDIL); and *Mulroney v. Janssen Research & Development LLC, et al.*, Case No. 3:14-cv-01073 (SDIL).

[2] The deadline to file responses was October 31, 2014; however, Janssen/J&J did not file their response until November 2, 2014. Although their response was untimely filed, Movants will nonetheless reply to their arguments.

I. INTRODUCTION

Defendants oppose consolidation and transfer arguing that "individual facts" will predominate (Bayer Resp. at 3), and that Xarelto (rivaroxaban) has a different mechanism of action than Pradaxa (dabigatran) that involves "different issues altogether." (Janssen/J&J Resp. at 1). While Defendants make every effort to distinguish Xarelto from Pradaxa, their arguments ignore the scientific literature and recent FDA activity surrounding the entire class of novel oral anticoagulants ("NOACs"), as well as the primary allegations in plaintiffs' complaints. Defendants market Xarelto as an alternative to warfarin that does not require routine blood monitoring and dose adjustment based upon the results of a blood test, and the makers of Pradaxa – as well of the makers of other NOACs – make the same marketing claim. Plaintiffs allege that when prescribing Xarelto, a physician should be instructed to take a blood plasma test and adjust the dose based upon those results thereby avoiding high concentrations which can lead to serious bleeding events. This central dispute – whether Xarelto should be prescribed without blood monitoring and dose adjustments – is common to ***all cases*** regardless of the indication for which it was prescribed or the type of injury caused by over- dosing or under-dosing Xarelto.

In arguing against formal consolidation, Defendants attempt to distract this Panel by their false assertion that this litigation is the result of "aggressive advertising" by plaintiffs' attorneys. (Janssen/J&J Resp. at 6; Bayer Resp. at 5-6).[3] However, Defendants neglect to mention the numerous Xarelto advertisements flooding the airwaves touting Xarelto. For example, a Xarelto television advertisement featuring "Jim" – who likes to keep active and chose Xarelto – has aired

[3] Counsel for Janssen/J&J has sought to impugn plaintiff lawyer advertising in virtually every MDL she has been part of. It has gained no traction before the transferee courts and hopefully it gains none before this Panel.

5,139 times.[4] Another Xarelto advertisement featuring "Bob" – a regular guy who uses Xarelto because it doesn't require routine blood monitoring – has aired 3,093 times.[5] Similarly, another advertisement featuring "Mary" – who no longer takes monthly trips to get her blood tested since she uses Xarelto – has aired 2,526 times.[6] Defendants even used celebrity Brian Vickers, a NASCAR® driver, in a Xarelto commercial, which has aired 3,630 times.[7] These commercials share a common theme – regular men and women, *and even celebrities,* choose Xarelto because it doesn't require regular blood monitoring, so other people should too. Just these four commercials alone have aired nearly 15,000 times on national television.[8] It is Defendants' massive advertising campaign that ultimately led to the influx of Xarelto prescriptions and patients suffering injuries as a result, the magnitude of which is evidenced by the fact that Xarelto overtook Pradaxa in the number of reported adverse events for 2013, including serious bleeding events. In particular, the FDA reported receiving 680 serious adverse event reports from individuals taking Xarelto, while only 528 serious adverse events were reported by individuals taking Pradaxa.[9] One has to wonder why Defendants are pointing the finger at plaintiffs' attorneys for "causing this litigation" – Defendants made their own bed.

As to the location of the proceeding, Defendants argue that the District of New Jersey, not the Southern District of Illinois, is the "best option" for a transferee district in the Xarelto

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[4] *See* iSpot.tv, "Xarelto TV Spot, 'Jim', *available at* http://www.ispot.tv/ad/7qPs/xarelto-jim.

[5] *See* iSpot.tv, "Xarelto TV Spot, 'Bob', *available at* http://www.ispot.tv/ad/7dJt/xarelto-bob.

[6] *See* iSpot.tv, "Xarelto TV Spot, 'Mary' Song by Arturo Cardelus," *available at* http://www.ispot.tv/ad/7pGC/xarelto-mary-song-by-arturo-cardelus.

[7] *See* iSpot.tv, "Xarelto TV Spot Featuring Brian Vickers," *available at* http://www.ispot.tv/ad/7K4_/xarelto-featuring-brian-vickers.

[8] Defendants obviously have additional advertisements and have employed various marketing tactics, these advertisements at issue are simply examples of the plethora of advertisements.

[9] *See* The Institute for Safe Medication Practices (ISMP) QuarterWatch Report, May 7, 2014 (Data from 2013 Quarter 1), *available at* http://www.ismp.org/quarterwatch/pdfs/2013Q1.pdf.

MDL because (1) Defendants' headquarters and principal places of business, as well as key documents and witnesses, are in New Jersey; (2) the "significant travel-related conveniences" New Jersey offers; and (3) the District of New Jersey has the docket capacity to handle these cases. Yet, as will be discussed, these same Defendants have made completely opposite arguments in other actions before this Panel, even arguing strongly against the District of New Jersey in favor of the Southern District of Illinois as the more appropriate transferee court.

It is clear that this Panel should consolidate and coordinate these actions because the criteria set forth in 28 U.S.C. § 1407 is satisfied. Common issues among plaintiffs clearly predominate this litigation and formal consolidation would promote the just and efficient conduct of the litigation while serving the convenience of all parties and witnesses. In addition, this is a litigation of national scope and the number of cases across the country are only expected to escalate as evidenced by the number of adverse events reported, thus warranting formal consolidation. This Panel should transfer and consolidate the actions in the Southern District of Illinois[10] before Judge David R. Herndon for these reasons:

- Unlike New Jersey, the Southern District of Illinois is not "overtaxed" and overburdened as Defendants attempt to lead this Panel to believe;
- Judge Herndon is an experienced jurist with significant previous knowledge that would be incredibly beneficial for this proceeding;
- There are more Xarelto actions in the Southern District of Illinois than any other District, with all actions assigned to Judge Herndon who is already actively engaged in the litigation;
- Unlike New Jersey, the Southern District of Illinois is the more centrally located, geographically convenient forum for all parties and witnesses; and
- The District of New Jersey has negative legal implications involving *Lexecon* and is not convenient for this national litigation.

[10] The majority of plaintiffs advocate for the transfer and consolidation to the Southern District of Illinois. Nine (9) Interested Party Responses that have been filed by plaintiffs to date, with eight (8) arguing for transfer to the Southern District of Illinois (with only one plaintiff arguing for transfer to the Eastern District of Louisiana).

II. ARGUMENT

A. Transfer and Consolidation is Clearly Warranted and Would Promote the Goals of Enhancing Efficiency and Convenience Pursuant to § 1407.

1. Common Issues and Shared Allegations Among Plaintiffs Clearly Predominate.

Defendants assert that consolidation is inappropriate because these cases involve "highly individualized issues" specific to each plaintiff's claims. (Janssen/J&J Resp. at 9-10; Bayer Resp. at 9-11). However, it is undeniable that all actions share allegations and common factual issues concerning the ***safety*** of Xarelto,[11] and it is well-established that this Panel has ordered consolidation of cases involving shared allegations regarding the safety of a medication. *See, e.g., In re: Zyprexa Prods. Liab. Litig.*, 314 F. Supp. 2d 1380, 1381 (J.P.M.L. 2004) (transferring actions that "share allegations concerning the safety of Zyprexa"). Further, this Panel has emphasized that "Section 1407 does not require a complete identity or even a majority of common factual or legal issues as a prerequisite to transfer." *See In re: AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 710 F. Supp. 2d 1378, 1379 (J.P.M.L. 2010). Thus, Defendants' strained attempts to distinguish Xarelto from Pradaxa in arguing against consolidation are wholly without merit. As set forth below, the basic similarities and scientific similarities between these two drugs are undeniable.

i. Basic Similarities between Xarelto and Pradaxa.

The following is a list that is by no means exhaustive, but clearly demonstrates the basic similarities that exist between these two medications at issue:

- Both Xarelto and Pradaxa are prescribed for the treatment of the same medical conditions, including the reduction of stroke in people with atrial fibrillation and the treatment and prevention of VTE prophylaxis;[12]

[11] Defendants cannot argue that the overall safety of Xarelto has been called into question and is a common issue among all plaintiffs, as evidenced by the ISMP report discussed, *supra*.

[12] It should be noted that the same three (3) indications for Xarelto exist for Pradaxa globally. In particular, Pradaxa has been approved in the United States for SPAF and treatment (and

- Both Xarelto and Pradaxa are prescribed to and used by the same general population, the majority of which are people typically over the age of 60;
- Both Xarelto and Pradaxa are marketed in the same manner, namely as an alternative to warfarin but without the requirement of blood monitoring, thus making these drugs seemingly more attractive;[13]
- Both Xarelto and Pradaxa have been linked to uncontrollable bleeding;
- Both Xarelto and Pradaxa have the same inherent flaw, namely the lack of an antidote to reverse the effects of bleeding;[14]
- Both Xarelto and Pradaxa are manufactured and created overseas (in Germany) and thus both involve foreign defendants; and
- Both Xarelto and Pradaxa have the same theories of liability, including inadequate warnings and strict liability/design defect claims with warfarin being the safer alternative.

To ignore these real-life and pragmatic similarities between Xarelto and Pradaxa is nonsense by the Defendants. Indeed, these most basic and fundamental similarities accentuate the true nature of these products in further support of centralization.

ii. Scientific Similarities between Xarelto and Pradaxa.

Beyond the basic similarities as set forth above, there is a voluminous body of scientific and medical literature concerning these two drugs (both of which are within the class of NOACs), and as such are discussed in an interchangeable fashion, including literature published by Defendants.[15] Further, as it relates to the lack of monitoring and blood testing of these

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reduction in recurrence) of VTE, and Pradaxa has been approved in Europe for prevention of VTE in patients who have undergone hip/knee replacement surgery.

[13] The fact that Xarelto does not require regular blood tests applies to each of plaintiffs' claims no matter the injury *and* no matter which of the approved indications Xarelto was being used for by the patient.

[14] As a blood thinner, warfarin can cause bleeding; however, unlike Xarelto and Pradaxa, warfarin has a reversal agent (Vitamin K). Further, the fact that Xarelto does not have an applies to each of plaintiffs' claims no matter the injury *and* no matter which of the approved indications Xarelto was being used for by the patient.

[15] *See* Exhibit 1, Compilation of Scientific Literature regarding NOACs.

NOACs, there is a growing chorus of doctors and scientists calling for the need to monitor NOACs *as a class*.[16]

The FDA also views the issue of whether a blood test would improve patient safety as a *class issue involving the entire class of NOACs.* Indeed, the FDA emphasized that the manufacturers of Xarelto – and *other* NOAC manufacturers facing the same adverse events – failed to act on this information: "[The manufacturers of Xarelto] ha[ve] not chosen to utilize this information. In fact, so far as we are aware, *none of the other manufacturers/sponsors of other oral anticoagulants that inhibit single coagulation factors have chosen to utilize pharmacokinetic/pharmacodynamics information to explore adjusting dose to optimize safety and efficacy*."[17] In short, when addressing the notion of improving patient safety by way of a simple blood test, the regulators, scientists and doctors do not distinguish between Xarelto and Pradaxa (which both comprise the class of NOACs), and neither should this Panel.

2. Consolidation Would Promote the "Just and Efficient" Conduct of the Pending Cases And Serve the "Convenience of Parties and Witnesses."

Centralization is appropriate where it "will eliminate duplicative discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel, and the judiciary." *In re: Neomedic Pelvic Repair Sys. Products Liab. Litig.*, 999 F. Supp. 2d 1371, 1372 (J.P.M.L. 2014). As discussed below, it is clear that consolidating these actions under Section 1407 is necessary to eliminate duplicative discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel, and the judiciary.

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[16] *See* Exhibit 2, Compilation of Scientific Literature Calling for Monitoring of NOACs.

[17] *See* Exhibit 3, Grant (FDA), Deputy Division Director Decisional Memorandum, at 9 (emphasis added).

i. Consolidation Will Eliminate Duplicative Discovery.

This Panel has repeatedly held that transfer and consolidation to a single district court may be ordered where it is necessary to avoid needless duplication of discovery and to promote the "just and efficient" conduct of litigation. *See, e.g., In re: National Hockey League Players' Concussion Injury Litig.*, MDL 2551, 2014 WL 4091257, at *1 (J.P.M.L. Aug. 19, 2014); *In re: Testosterone Replacement Therapy Prods. Liab. Litig.*, MDL 2545, 2014 WL 2547824, at *2 (J.P.M.L. June 6, 2014).

If the cases are not formally consolidated, identical discovery will be necessary in a multitude of district courts across the country regarding, for example, Defendants' conduct in designing, testing, and promoting Xarelto, and such discovery will include numerous depositions of fact and expert witnesses. Without centralization, Defendants' corporate witnesses will be subject to multiple depositions in the various actions. How can this be convenient for witnesses who otherwise would likely only need to provide one deposition in a consolidated proceeding? Centralization would also facilitate the efficient acquisition, analysis, and storage of the myriad of electronic documents and discovery that will undoubtedly be produced by the Defendants in this action, as well as ensure standard E-Discovery (ESI) Guidelines to avoid Defendants being subject to different ESI protocols in various districts. Even one non-identical ESI order would undoubtedly add substantial expense (and likely delay) in the processing and production of electronic documents and discovery. In addition, multiple districts would likely impose different discovery schedules, expert deadlines, and trial schedules. How defense counsel would be able to efficiently manage such varying pretrial schedules in a multitude of district courts – while traveling from coast to coast – is unclear. However, it is clear that this type of scenario would result in duplicative efforts, the expenditure of unnecessary time and money, and delay.

ii. Consolidation Will Avoid Repetitive and Conflicting Pretrial Rulings.

This Panel has found that centralization under Section 1407 is necessary "to prevent inconsistent pretrial rulings." *See In re: Wright Med. Tech. Inc., Conserve Hip Implant Products Liab. Litig.*, 844 F. Supp. 2d 1371, 1372 (J.P.M.L. 2012); *In re: London Silver Fixing, Ltd., Antitrust Litig*., MDL 2573, 2014 WL 5105921, at *1 (J.P.M.L. Oct. 9, 2014).

As of now, there are thirty-two (32) Xarelto claims filed in fifteen (15) different federal district courts across the nation,[18] meaning that fifteen (15) different judges would be ruling on a variety of pretrial and dispositive issues, including but not limited to, electronic discovery (ESI), deposition protocols, *Daubert* motions, motions *in Limine*, and motions for summary judgment. Not only would this result in repetitive and potentially conflicting pretrial rulings, but it would also involve numerous judges expending valuable time and resources on the same issues. In light of the common issues of fact and law involved in this nationwide litigation, as Movants previously discussed in their Motion and the preceding section, *supra*, transfer and formal consolidation in one district court assures consistent pretrial rulings and the avoidance of conflicting orders.[19]

iii. Consolidation Will Conserve the Resources of the Parties, their Counsel, and the Judiciary.

In complex products liability litigations such as this, it is particularly important to conserve resources when it comes to voluminous electronic discovery, expert witness discovery, and *Daubert* rulings. *See In re: Testosterone Replacement Therapy Prods. Liab. Litig*., 2014 WL

[18] *See* Exhibit 4, Revised Schedule of Actions.

[19] For example, Judge Herndon has entered an order for his Xarelto cases and set a status conference for all of his cases on November 19, 2014, while Judge Smoak has also set pretrial matters and deadlines in one Xarelto case pending in the Northern District of Florida. Besides Judge herndon's Order, this is just one example of an initial scheduling order being issued across the nation for this ever growing number of cases. Thus, centralization is now warranted.

2547824, at *2 (J.P.M.L. June 6, 2014) (holding that centralization of claims "will reduce potentially costly expert discovery, facilitate the establishment of a uniformed pretrial approach to these cases, reduce the potential for inconsistent rulings… and conserve the resources of the parties, their counsel, and the judiciary"); *In re: Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig. (No. II)*, 997 F. Supp. 2d 1354, 1357 (J.P.M.L. 2014) ("Centralization will eliminate duplicative discovery, prevent inconsistent pretrial rulings…, and conserve the resources of the parties, their counsel and the judiciary.").

For example, Bayer produced over 90 million pages of documents through electronic discovery in the *Yaz MDL*, and Johnson & Johnson produced approximately 80 million pages of documents through electronic discovery in the *DePuy ASR MDL*. Because we can likely expect similar volumes of electronic discovery to be produced in the present litigation (if not more), formal consolidation is necessary to conserve resources of the parties, their Counsel and the judiciary. By means of another example, Bayer filed sixty (60) Motions *in Limine* and eighteen (18) *Daubert* Motions in the *Yaz MDL* that warranted briefing by both parties and rulings by the presiding judge. Here, we can expect a similar number of substantive briefs to be filed in the present litigation– *if not more* – further warranting formal consolidation.

B. The Southern District of Illinois, <u>Not</u> the District of New Jersey, is the Most Appropriate Transferee Court for Consolidation or Coordination.

Contrary to Defendants' erroneous assertions, the Southern District of Illinois is a far more appropriate option for transferee court than the District of New Jersey. As explained below, the various factors considered by this Panel in determining a proper transferee court weigh heavily in favor of these actions being transferred to the Southern District of Illinois.

1. *Caseload Statistics Do Not Support that the District of New Jersey Is the Preferred Choice Over the Southern District of Illinois.*

Defendants proffer "caseload statistics" to claim that the Southern District of Illinois is "overtaxed" and "unable to handle" a new MDL proceeding. (Janssen/J&J Resp. at 14; Bayer Resp. at 13). However, Defendants' "caseload statistics" as they relate to the Southern District of Illinois' "capacity" do not tell the full story, and are quite misleading. Defendants' use of these statistics to bolster such a weak argument brings to mind Mark Twain's infamous quote: "There are three kinds of lies: lies, damned lies, and statistics."[20]

Indeed, Defendants neglect to point out that their statistics do not take into account that the nearly 10,000 actions pending in the Southern District of Illinois are part of either the *Yaz MDL* or *Pradaxa MDL*, ***the vast majority (99% of Pradaxa cases and over 95% of Yaz cases) have been settled and thus do not require significant court involvement or resources***. While stipulations for dismissal of these cases are being filed daily, they still appear as "pending" on the docket report Defendants reference – thus these "statistics" do not accurately represent the actual caseload of the Southern District of Illinois. As for the posture of the *Yaz MDL*, even Bayer agrees that over 18,000 cases have been settled to date[21] and daily settlement discussions of the remaining cases are ongoing. Given its sheer volume and manner of resolution, the *Yaz MDL* has taken longer to wind down, but undoubtedly is near the finish line. As for the posture of the *Pradaxa MDL*, there was a global settlement that is contractually binding and which, by early December 2014, will pay and fully resolve over 99.8% of the over 4,500 cases.

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[20] The complete quote is – "Figures often beguile me, particularly when I have the arranging of them myself; in which case the remark attributed to Disraeli would often apply with justice and force: There are three kinds of lies: lies, damned lies and statistics." *Mark Twain's Own Autobiography: The Chapters from the North American Review*.

[21] *See* Exhibit 5, Transcript of Status Conference, *In re: Yasmin and Yaz (Drospirenone) Marketing Sales Practices and Products Liability Litigation*, MDL 2100, at 7 (SDIL Sept. 29, 2014).

Accordingly, by January 2015, there should be little, if anything, to do in the *Pradaxa MDL*. As such, both of these litigations are in settlement mode and the majority of "pending" cases – *as reflected on the docket report* – have been settled and do not require extensive resources of the judiciary. It should also be pointed out that Judge Herndon managed the *Pradaxa MDL* which resulted in a global resolution in just 22 months, while still managing the *Yaz MDL*. Certainly this fact speaks volumes in regard to Judge Herndon's capability to efficiently manage the *Xarelto MDL* – a case involving similar issues – while winding down the *Yaz MDL* over the next few months.

Yet, it is even more evident that the Southern District of Illinois is a far better choice for the transferee court than the District of New Jersey. First, Defendants' assertion that the Southern District of Illinois is the "second busiest district court in the country" is false. According to a study conducted by the Transactional Records Access Clearinghouse at Syracuse University,[22] the District of New Jersey ranked as the 7th busiest for civil filings among the 91 federal judicial districts, well in front of the Southern District of Illinois[23] which ranked as the 15th busiest for civil filings.[24] Even Chief Judge Jerome Simandle of the District of New Jersey agreed that "the TRAC report illustrates how federal judges in New Jersey are being called upon to handle more and more cases without any increase in the number of authorized judgeships." Despite being one

[22] TRAC produced the Oct. 14, 2014 report based on "extensive study of information drawn from two major sources: (1) complex statistical information developed over the years by the Administrative Office of the U.S. Courts; and (2) systemic analysis of hundreds of thousands of case-by-case court and administrative records from every federal judicial district in the nation.

[23] However, Susan Long, co-director of TRAC, noted that this district is "busy" based on the fact that it oversaw settlements in two (2) multidistrict litigations (*Yaz MDL* and *Pradaxa MDL*) and MDL dockets are difficult to categorize. *See* Bronstad, "Busiest Judges Are Presiding Over Thousands of Cases", THE NATIONAL LAW JOURNAL, *available at* http://www.nationallawjournal.com/id=1202674574262/Busiest-Judges-Are-Presiding-Over-Thousands-of-Cases.

[24] *See* Online Report from Transactional Records Access Clearinghouse (TRAC) at Syracuse University, Oct. 14, 2014, Table 2, *available at* http://trac.syr.edu/tracreports/judge/364/.

of the "busiest" Districts, Chief Judge Simandle recently spoke on judicial vacancies and the need for more judges in New Jersey stating, "We're hopeful that the vacancies will be filled next year…. And in the meantime, we'll do the best we can…."[25] Second, Defendants neglect to mention the high volume of cases in the District of New Jersey stemming from Hurricane Sandy. As of August 2014, John O'Brien, Chief Deputy of Operations for New Jersey's federal courts, said "1,240 Sandy-related lawsuits had been filed in New Jersey and 1,051 of those cases are still pending". O'Brien added that it is estimated that "as many as 2,000 Sandy-related cases could ultimately be filed in New Jersey's federal court."[26]

2. Judge Herndon is an Experienced Jurist with the Willingness and Ability to Efficiently Manage this Litigation, as well as Extensive Knowledge from the Pradaxa MDL.

Defendants' argument that Judge Herndon is not "well-situated" to handle this proceeding since he is already presiding over the *Yaz MDL* and *Pradaxa MDL* not only ignores the current posture of those litigations, *supra*, but would only be a concern for this Panel if this litigation would not advance efficiently. Lack of efficiency is universally a concern for plaintiffs who want their cases advanced more so than defendants who are often willing to allow litigation to progress more slowly. The need for efficiency is even more pronounced in this litigation since the class of plaintiffs is predominately comprised of individuals of advanced age. However, Judge Herndon's experience and capabilities in efficiently managing complex products liability litigations are exemplar and should alleviate any concerns to the contrary.

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[25] *See* Charles Toutant, "NJ Fed. Court, Among the Nation's Busiest, Faces Vacancies", NEW JERSEY LAW JOURNAL, *available at* http://www.njlawjournal.com/id=1202674436607/NJ-Fed-Court-Among-the-Nations-Busiest-Faces-Vacancies?slreturn=20141004131250.

[26] *See* Michael Booth, "Fed. Courts Move to Speed Up Hurricane Sandy Litigation", NEW JERSEY LAW JOURNAL, *available at* http://www.njlawjournal.com/id=1202668265844/Fed-Courts-Move-to-Speed-Up-Hurricane-Sandy-Litigation?slreturn=20141003124215.

For example, in less than 27 months from the time of this Panel's transfer of the *Yaz MDL* to the Southern District of Illinois, discovery was conducted, *bellwether* cases were selected and prepared for trial, *Daubert* motions were ruled upon, and shortly before the first *bellwether* trial the parties reached a mass settlement initiative for over 18,000 cases in federal and state courts. Likewise for the *Pradaxa MDL*, in less than 22 months from the time of transfer to the Southern District of Illinois, a nationwide global settlement was reached involving more than 4,500 claimants in both federal and state court, as well as a number of unfiled cases. Simply put, large-scale pharmaceutical multidistrict litigations in the Southern District of Illinois before Judge Herndon move quickly and efficiently with effective resolution.

In fact, when the decision was made to centralize actions in the *Pradaxa MDL* before Judge Herndon, this Panel praised his abilities and experience in complex multidistrict litigation:

> [B]y selecting Judge David R. Herndon to preside over this matter, we are selecting a jurist with the willingness and ability to handle this litigation. Judge Herndon, an experienced MDL judge, has deftly presided over *In re Yasmin and Yaz (Drospirenone) Marketing, Sales Practices & Products Liability Litigation*, 655 F. Supp. 2d 1343 (J.P.M.L. 2009), another large pharmaceutical products liability litigation.
>
> *In re: Pradaxa Prods. Liab. Litig.*, 883 F. Supp. 2d 1355, 1356 (2012).

Contrary to Defendants' arguments, this Panel has recognized the benefits of transferring proceedings to districts with similar products and even competing drugs. *See, e.g., In re: Am. Med Sys., Inc., Pelvic Repair Sys. Products Liab. Litig.*, 844 F. Supp. 2d 1359, 1360 (J.P.M.L. 2012) ("Chief Judge Joseph R. Goodwin… is currently presiding over MDL No. 2187, which involves claims of defects in similar pelvic surgical mesh products, and is uniquely situated to preside over the similar claims in these three [other] MDLs [involving] [] pelvic surgical mesh products…"); *In re: Effexor (Venlafaxine Hydrochloride) Products Liab. Litig.*, 959 F. Supp. 2d 1359, 1360 (J.P.M.L. 2013) ("The claims regarding Effexor… parallel the claims as to the drug

Zoloft in MDL No. 2342 – which is already before Judge Rufe…. Judge Rufe… is in a unique position to guide this litigation, involving some of the same parties and counsel as MDL No. 2342, to an efficient resolution."); *In re: Testosterone Replacement Therapy Prods. Liab. Litig.*, MDL 2545, 2014 WL 2547824, at *2 (J.P.M.L. June 6, 2014) (centralizing cases involving several different testosterone replacement therapy products in one district court on an industry-wide basis). Certainly Judge Herndon has more knowledge of the scientific issues surrounding Xarelto – based upon his knowledge gained from the *Pradaxa MDL* – than any other jurist.

Finally, Defendants cannot deny that the staff and Clerk's office in the Southern District of Illinois is aptly experienced and able to provide the necessary support services to manage this litigation. For example, the Southern District of Illinois' Clerk's office provides a streamlined process for direct filing of complaints, as well as a state-of-the-art webpage for each proceeding which provides an abundance of useful information and documents for attorneys and litigants.[27] In addition, even Bayer praised this District for its modern courthouse facilities and technological capabilities in arguing for consolidation ***before Judge Herndon in the Southern District of Illinois*** (and *against* the District of New Jersey) in the *Bayer Aspirin MDL* by saying that "[t]he courthouse [in the Southern District of Illinois] has modern facilities with all of the technological capabilities necessary for managing an MDL."[28]

3. The Southern District of Illinois Has More Xarelto Actions Pending than Any Other District Court and Judge Herndon Has Litigation Hold Orders In Place.

The Southern District of Illinois has more actions pending than any other District with nine (9) actions currently on file – all of which have been assigned to Judge Herndon. *See generally* Exhibit 4. It is well-established that this Panel often selects a district court where the

[27] *See* webpage for *Pradaxa MDL*, available at http://www.ilsd.uscourts.gov/mdl/mdl2385.aspx.

[28] *See* Exhibit 6, *In re: Bayer Corp. Combination Aspirin Prods. Marketing and Sales Practices Lit.*, MDL 2023, Doc. 6 (Memorandum In Support), at 8 (J.P.M.L. Jan. 27, 2009).

majority of actions are currently pending.[29] *See, e.g.*, *In re: Puerto Rican Cabotage Antitrust Litig.*, 571 F. Supp. 2d 1378 (J.P.M.L. 2008); *In re: Freight Fuel Surcharge Antitrust Litig.*, 528 F. Supp. 2d 1358, 1359 (J.P.M.L. 2007). Further, Judge Herndon has given more attention to this litigation than any other district court. On October 31, 2014, Judge Herndon issued a Case Management Order[30] in several of the Xarelto cases he is presiding over[31] whereby a litigation hold was issued "to assure that all relevant evidence is preserved." In particular, Judge Herndon explained that "the Court perceives that this litigation is likely to be national in scope," and thus issued a litigation hold on all parties "in the broadest terms possible [so] that all relevant evidence in their possession shall be preserved… and on a company wide basis." Judge Herndon also set a status conference for November 19, 2014 "to discuss the particular ramifications of these holds, the scope thereof and the need to further refine them, as well as the need to discuss other issues." Thus, it is clear that Judge Herndon is actively engaged in this litigation.

4. Unlike the District of New Jersey, the Southern District of Illinois Is a Central and Convenient Venue.

This Panel has recognized the benefits of the central geographic location of the Southern District of Illinois. *See In re: Pradaxa (Dabigatran Etexilate) Prods. Liab. Litig.*, 883 F. Supp. 2d 1355, 1356 (J.P.M.L. 2012) ("[T]he Southern District of Illinois' geographically central location and accessibility also commend it for this nationwide products liability litigation."); *In re: General Motors Corp. Dex-Cool Prods. Liab. Litig.*, 293 F. Supp. 2d 1381, 1382 (J.P.M.L.

[29] It is important to note that there are not any Xarelto cases on file and pending in the District of New Jersey.

[30] *See* Exhibit 7, CMO 1 entered in applicable SDIL cases by Judge Herndon (Oct. 31, 2014).

[31] The CMO was only issued in the pending cases where defendants had entered an appearance to date including Case No. 3:14-cv-00987; Case No. 3:14-cv-00988; Case No. 3:14-cv-00989; Case No. 3:14-cv-01026.

2003) (explaining that the Southern District of Illinois is an appropriate transferee district in part because it "is centrally located in relation to the parties.").

Even Defendants cannot deny that a central forum is preferential. For example, Bayer[32] argued in the *Yaz MDL* that the litigation should be transferred to a central location "given that the medicines were sold nationwide" and a central location "would provide the parties and witnesses with an easily accessible geographic midpoint, compared to the East or West Coast."[33] And Bayer[34] even went one step further in the *Bayer Aspirin MDL* by arguing for consolidation in the ***Southern District of Illinois and advocating for Judge Herndon*** based on the fact that it "is a centralized and easily accessible location for parties and counsel who are geographically dispersed around the country…. [and] [t]he courthouse in East St. Louis… is a short drive from the Lambert-St. Louis International Airport, itself a direct flight away for most parties and their counsel." *See* Exhibit 6, at 8.

Defendants argue that the District of New Jersey is the optimal choice because Defendants' headquarters and principal places of business,[35] as well as witnesses and documents, are located in New Jersey. (Janssen/J&J Resp. at 3; Bayer Resp. at 12). However, this Panel has held that the location of Defendants' offices, documents and witnesses does not necessarily merit the transfer of cases to a particular District. *See In re: government Auto Fleet Sales*, 328 F. Supp.

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[32] The defendants included Bayer Corporation, Bayer HealthCare LLC, and Bayer HealthCare Pharmaceuticals, Inc.

[33] *See* Exhibit 8, *In re: Yasmin and Yaz (Drospirenone) Marketing Sales Practices and Products Liability Litigation*, MDL 2100, Doc. 10 (Memorandum in Support), at 7 (J.P.M.L. Aug. 21, 2009).

[34] The defendants included Bayer Corporation and Bayer HealthCare LLC.

[35] Contrary to Defendants' arguments, it should be noted that not all defendants have their headquarters or principal place of business in New Jersey, including the domestic defendants Janssen Ortho LLC and Bayer Corporation, as well as the foreign defendants Bayer Pharma AG, Bayer Healthcare AG and Bayer AG.

218 (J.P.M.L. 1971) (the location of the documents and witnesses is "not of such a magnitude" as to justify the transfer of these cases to the [District]"). What is even more interesting is that the same Defendants involved in this proceeding have actually agreed in arguing ***against*** transfer to the District of New Jersey in other proceedings before this Panel. Indeed, despite her present arguments to the contrary, Counsel for Janssen/J&J Defendants, Susan Sharko, argued in the *Ortho Evra MDL* that it was beside the point that Johnson & Johnson is located in New Jersey and relevant documents and witnesses are located in New Jersey.[36] In arguing against the District of New Jersey, Ms. Sharko emphasized that "[t]here will be no reason for any counsel to need to go to the paper copies in response to reasonable and customary discovery requests [and] [t]here will be no need for a document depository; documents stored on CDs can be produced to counsel anywhere." *See* Exhibit 9, at 12. Here, the Xarelto litigation will not be any different since, in the modern era of electronic discovery, the location of documents is obsolete because the majority of documents (if not all) will be easily produced in electronic format. *See e.g. In re Bristol Myers Squibb Securities Litigation*, 205 F.R.D. 437 (U.D.D.N.J. 2004); Manual for Complex Litigation, Fourth, § 22 (2004).

Further, the location of the District of New Jersey on the East Coast makes traveling more inconvenient and expensive to the litigants in this type of national litigation. In fact, Bayer argued against consolidation on the East Coast in the *Yaz MDL* by asserting that the litigation should be transferred to a central location "compared to the East or West Coast." *See* Exhibit 8, at 7. Further, despite the fact that Defendants rave about New Jersey's Newark Liberty International Airport, Newark Liberty has been ranked as the ***fourth-worst*** airport for layovers in

[36] *See* Exhibit 9, *In re: Ortho Evra Products Liability Litigation*, MDL 1742, Doc. 8 (Memorandum In Support), at 11-12 (J.P.M.L. Dec. 19, 2005).

all of North America.[37] Further, *Travel + Leisure Magazine* ranked Newark Liberty as the ***sixth-worst*** airport in America for delays.[38] In addition, it is a known fact that hotel accommodations in New Jersey are extremely high in price when compared to the price for similar accommodations in the St. Louis area near the Southern District of Illinois courthouse.

5. The District of New Jersey Is Not an Appropriate Forum Due to Lexecon.

Defendants neglect to consider another the practical ramification from consolidating this proceeding in the District of New Jersey. Any plaintiff who is a citizen of New Jersey cannot file suit against the Bayer Defendants[39] and Janssen/J&J Defendants[40] in federal court because these defendants are also citizens of New Jersey. *See* 28 U.S.C. § 1332. As a result, if the MDL is transferred to the District of New Jersey, then the District will not have any New Jersey plaintiffs before it. Unless all parties agree to waive the venue issues that would exist pursuant to *Lexecon Inc. v. Milberg Weiss*, 523 U.S. 26 (1998), [41] it is possible that no bellwether cases can be tried in New Jersey, which could be a severe handicap to a transferee court trying to ultimately resolve the litigation.

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[37] *See* Report from New Jersey News 12 (Oct. 21, 2014), *available at* http://newjersey.news12.com/news/survey-newark-liberty-among-worst-airports-1.9528360.

[38] *See* Travel + Leisure, "America's Best and Worst Airports for Flight Delays," *available at* http://www.travelandleisure.com/articles/best-and-worst-airports-for-delays.

[39] The Bayer Defendants at issue include: Bayer Healthcare Pharmaceuticals, Inc. (principal place of business in New Jersey); and Bayer Healthcare LLC (principal place of business in New Jersey).

[40] The Janssen/J&J Defendants at issue include: Janssen Research & Development LLC (incorporated in New Jersey and principal place of business in New Jersey); Janssen Pharmaceuticals, Inc. (principal place of business in New Jersey); and Johnson & Johnson (incorporated in New Jersey and principal place of business in New Jersey).

[41] *Lexecon*, and its progeny, stands for the proposition that a district court conducting pretrial proceedings pursuant to 28 U.S.C. § 1407 has no authority to invoke 28 U.S.C. § 1404(a) to assign a transferred case to itself for trial.

III. CONCLUSION

For the foregoing reasons, Movants respectfully request that these cases be consolidated to a single district court for pretrial proceedings pursuant to Section 1407, specifically in the Southern District of Illinois before Judge David R. Herndon.

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Respectfully submitted,

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Case No. 3:14-cv-00987; *Mary K. Lemp and Charles Lemp, Jr. v. Janssen Research & Development LLC, et al*.; In the United States District Court for the Southern District of Illinois

Case No. 3:14-cv-00989; *Leach v. Janssen Research & Development LLC, et al*.; In the United States District Court for the Southern District of Illinois

Case No. 3:14-cv-00988; *Haney v. Janssen Research & Development LLC, et al*.; In the United States District Court for the Southern District of Illinois

Case No. 3:14-cv-01040; *Stanley Pennell and Nancy Pennell v. Janssen Research & Development LLC, et al*.; In the United States District Court for the Southern District of Illinois

Case No. 3:14-cv-01042; *Martha McMunn on behalf of Richard McMunn, Jr. v. Janssen Research & Development LLC, et al*.; In the United States District Court for the Southern District of Illinois

Case No. 3:14-cv-01073; *Mulroney v. Janssen Research & Development LLC, et al.*; In the United States District Court for the Southern District of Illinois

Case No. 3:14-cv-01236; *Newman v. Janssen Research & Development LLC, et al.*; In the United States District Court for the Southern District of Illinois