BEFORE THE UNITED STATES
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

In re: Xarelto Products Liability Litigation	)	MDL No. 2592

BAYER'S SUPPLEMENTAL RESPONSE
TO MOTION TO TRANSFER

In anticipation of the upcoming December 4, 2014 hearing, Defendants Bayer Corporation, Bayer HealthCare LLC, and Bayer HealthCare Pharmaceuticals Inc. (collectively, "Bayer") hereby supplement their October 31, 2014 response (Doc. 44) to the motion to transfer.

INTRODUCTION

It remains Bayer's position that the Panel should decline to consolidate. Notably, Movants don't dispute many of the ways in which each of the cases subject to their motion is unique—*e.g.*, different plaintiffs used Xarelto® for different indications and suffered different injuries. Nor do Movants meaningfully address Bayer's good-faith offer to coordinate cases through the informal means that the Panel has said are preferable to MDL centralization. Movants simply have not shown that consolidation is necessary here.

If, however, the Panel chooses to centralize these cases, it should transfer them to the District of New Jersey, where two Xarelto cases are now pending. The District of New Jersey would be the most appropriate MDL venue for multiple reasons that the Panel has consistently emphasized and that Movants cannot meaningfully rebut: (1) because *not just one but both* defendants have their U.S. offices in New Jersey, many of the relevant witnesses and documents will likely be located there; (2) the District of New Jersey and a number of its judges enjoy relatively favorable docket conditions and have the capacity to handle an MDL; and (3) New Jersey offers significant travel-related advantages. By contrast, Movants' preferred venue—the

Southern District of Illinois—has no particular connection to the allegedly common issues in this litigation, has relatively congested dockets, and offers few travel-related conveniences.

ARGUMENT

I. Movants Have Not Demonstrated That Consolidation Is Necessary.

There are now some 48 Xarelto cases pending before the Panel. Even so, for several reasons, consolidation is not warranted in the particular circumstances presented here.

First, Movants don't dispute that these cases involve individualized issues—most notably, that the plaintiffs used Xarelto for different purposes and claim to have suffered different injuries. *See* Doc. 44 at 9–11; Doc. 44-1. Indeed, Movants' reply seems to reveal even *more* variability—concerning, for instance, whether individual plaintiffs "over-dos[ed] or under-dos[ed]" when using Xarelto. Doc. 53 at 2. Movants seek to sidestep these case-specific questions by framing the allegedly common issue in general terms—all of these cases, they say, involve "the safety of Xarelto." *Id.* at 5. But such a generalized allegation is insufficient to warrant consolidation. *See, e.g.*, *In re Mirena IUS Levonorgestrel-Related Prods. Liab. Litig.*, __ F. Supp. 2d __, MDL No. 2559, 2014 WL 4049821, at *2 & n.3 (J.P.M.L. Aug. 12, 2014) (refusing consolidation because "non-specific" allegations about a group of injuries failed to address "individualized causation issues"); *In re Oxyelite Pro & Jack3d Prods. Liab. Litig.*, __ F. Supp. 2d __, MDL No. 2523, 2014 WL 1338475, at *1 (J.P.M.L. Apr. 2, 2014) (refusing consolidation because of "differences in the health risks alleged").

Second, while Movants conclusorily assert that "it is clear" that consolidation is necessary "to eliminate duplicative discovery, prevent inconsistent pretrial rulings," and conserve resources (Doc. 53 at 7), they ignore Bayer's offer to coordinate cases through cross-noticed depositions, synchronized document productions, and negotiated scheduling orders. *See* Doc. 44 at 11–12 & n.12. The Panel has recognized that such efforts not only present "suitable

alternatives to Section 1407 transfer," *In re Eli Lilly & Co. (Cephalexin Monohydrate) Patent Litig.*, 446 F. Supp. 242, 244 (J.P.M.L. 1978), but, where "practicable," are actually "preferable to centralization," *In re Mirena*, 2014 WL 4049821, at *1. And to be clear, successful informal coordination *is* "practicable" here. To take just one example with which the undersigned counsel is familiar, after the Panel declined consolidation in *In re Reglan/Metoclopramide Prods. Liab. Litig.*, 622 F. Supp. 2d 1380, 1381 (J.P.M.L. 2009), that litigation ballooned to include more than 5,000 cases. Many of those cases coalesced into coordinated state-court proceedings in Pennsylvania, New Jersey, and California; others remained scattered throughout the country. Taking seriously the Panel's observation that "[a]lternatives to transfer exist that may minimize" the risk of "duplicative discovery and/or inconsistent pretrial rulings," *id.*, many plaintiffs' and defendants' lawyers have worked together (with state and federal judges) to ensure that the Reglan litigation proceeds in an orderly fashion. Document productions have been coordinated; depositions have been cross-noticed for use in multiple actions; and in ruling on dispositive motions, reviewing courts (while not perfectly consistent) have routinely looked to each others' decisions for guidance. *See, e.g.*, *Smith v. Wyeth, Inc.*, 657 F.3d 420, 424 (6th Cir. 2011) (following the view of "the majority of courts to address this question").

Finally, Movants' suggestion that these cases should be consolidated simply because the Pradaxa cases were—and because, Movants say, the two drugs are "undeniabl[y]" similar (Doc. 53 at 5)—is misguided. Pradaxa is not a proxy here. For starters, the defendant there, Boehringer Ingelheim, didn't oppose consolidation. *See In re Pradaxa (dabigatran etexilate) Prods. Liab. Litig.*, 883 F. Supp. 2d 1355, 1355 (J.P.M.L. 2012). Moreover, and in any event, Movants here don't seem to dispute the key differences between Xarelto and Pradaxa that Bayer has identified. First, the medicines have different chemical mechanisms, and thus affect the

body in different ways; Xarelto is a "factor Xa inhibitor," while Pradaxa is a "direct thrombin inhibitor." *See* Doc. 44 at 4. Second, and perhaps even more significantly, the medicines have different regulatory and litigation histories; while the Pradaxa lawsuits followed immediately on the heels of (and were clearly triggered by) a substantive labeling change, the Xarelto label's "Warnings and Precaution" section included the pertinent "no antidote" language before the plaintiffs in the related actions began using the product. *See id.* at 4–7. Accordingly, Movants' persistent suggestion that consolidation here should follow more or less automatically from the *Pradaxa* MDL rests on false premises.

II. Should The Panel Conclude That Consolidation Is Appropriate, These Cases Should Be Transferred To The District Of New Jersey.

If the Panel concludes that centralization is warranted, it must identify an appropriate venue for transfer. To that end, Bayer has explained various reasons why the District of New Jersey would be the most appropriate MDL forum. Movants' preferred venue, by contrast—the Southern District of Illinois—makes little objective sense, as it has no necessary connection to this litigation beyond the filing of a few lawsuits there. At bottom, though, Movants aren't really requesting a specific *venue* as much as they are requesting a specific *judge*.[1] In particular, Movants contend that the Southern District of Illinois' Judge David Herndon is uniquely (and perhaps alone) qualified to preside over a Xarelto MDL because, through the *Pradaxa* MDL, he acquired special "knowledge of the scientific issues surrounding Xarelto."[2] Doc. 53 at 15. That is incorrect, as explained below. Judge Herndon is undoubtedly a capable jurist, but if the Panel

[1] The choice of a transferee judge—should that choice become necessary—is the Panel's to make, not the parties'. *See* MULTIDISTRICT LITIGATION MANUAL § 7.7, at 268 (2014); John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TULANE L. REV. 2225, 2241 (2008).

[2] In their initial motion, Movants also advocated in favor of Judge Staci Yandle, who at the time had seven of the eight Xarelto cases pending in the Southern District of Illinois. Presumably because all seven of Judge Yandle's cases were reassigned to Judge Herndon (*see* Doc. 44 at 7 n.8), Movants no longer request transfer to her.

chooses to centralize these cases, it should transfer them to the District of New Jersey, where two Xarelto cases are now pending and which is the superior venue for multiple objective reasons.[3]

First, Movants' suggestion that, by virtue of his experience with Pradaxa, Judge Herndon has specialized knowledge about Xarelto is doubly misguided. Initially, as already explained—and as Movants seem not to dispute—Xarelto and Pradaxa are different in important respects, in terms of their chemical composition, their physiological effects on the body, and their regulatory and litigation histories. Moreover, the Pradaxa litigation provided Judge Herndon with very little, if any, meaningful opportunity to dig into the core scientific issues. As Movants have repeatedly explained, the Pradaxa cases settled quickly—within two years of transfer. Importantly for present purposes, the Pradaxa cases settled before any *Daubert* practice occurred and, for that matter, *before* any experts filed their reports or were even disclosed.[4]

Second, while there is no "center of gravity" among the plaintiffs, who hail from all over the country, both defendants—Bayer and Janssen—have their U.S. corporate offices in New Jersey. Contrary to Movants' suggestion that this consideration no longer holds sway (Doc. 53

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[3] Judge Freda Wolfson has been assigned both District of New Jersey cases, one of which she has already set for a scheduling conference in December. *See Rentrop v. Janssen Research & Dev. LLC, et al.*, No. 3:14-cv-07016 (D.N.J.); *Browning v. Janssen Research & Dev. LLC, et al.*, No. 3:14-cv-07163 (D.N.J.); *see also Browning*, Doc. 4 (ordering submission of parties' planning report by December 1 and setting scheduling conference for December 22).

Conspicuously, on November 21—after Bayer and Janssen had filed their initial responses here suggesting the District of New Jersey as an alternative venue, and even after Janssen had answered the complaints—the plaintiffs in both *Rentrop* and *Browning* moved to voluntarily dismiss their cases. *See Rentrop*, Doc. 5; *Browning*, Doc. 5.

[4] Movants also erroneously suggest that the *Yasmin/Yaz* and *Pradaxa* MDLs were unique in that they involved non-U.S. defendants. *See, e.g.*, Doc. 53 at 6. The presence of non-U.S. parties is commonplace in MDLs and could be addressed by any presiding judge. *See, e.g.*, *In re Transpacific Passenger Air Transp. Antitrust Litig.*, MDL No. 1913 (Asian airline companies); *In re Parmalat Secs. Litig.*, MDL No. 1653 (European defendants); *In re Genetically Modified Rice Litig.*, MDL No. 1811 (German Bayer entities).

at 17–18), the Panel has repeatedly—and recently—transferred cases to the district where a defendant has its headquarters precisely because of the proximity to "personal witnesses and evidence." *In re Nickelodeon Consumer Privacy Litig.*, 949 F. Supp. 2d 1377, 1377–78 (J.P.M.L. 2013); *see also* Doc. 44 at 14–16 (citing examples). And importantly, where, as here, *two different defendants* are located in the same district, their presence there "may be an even stronger factor." MULTIDISTRICT LITIGATION MANUAL § 6:5, at 218 (2014) (citing cases).

On this score, the Panel's recent transfer order in the *Darvocet* MDL, No. 2226, is instructive. Like Movants here, the moving plaintiff there asked the Panel to consolidate the litigation before a particular judge—in that case, Judge Jack Weinstein of the Eastern District of New York. Like Movants here, the moving plaintiff there requested Judge Weinstein on the grounds (1) that he had a pending Darvocet case and (2) that he had "extensive experience handling complex, high-stakes and high-profile cases, including mass tort cases." *In re Darvocet*, MDL No. 2226, Pls.' Mot. to Transfer (Doc. 1-1) at 1. The Panel, however, rejected the movant's request for Judge Weinstein and transferred the cases to the Eastern District of Kentucky—even though "no constituent action [was] pending" there—because "[r]elevant documents and witnesses likely [were] located within the Eastern District of Kentucky at [one of the defendant's] headquarters." *In re Darvocet, Darvon & Propoxyphene Prods. Liab. Litig.*, 780 F. Supp. 2d 1379, 1381–82 (J.P.M.L. 2011). Just as systemic efficiency and convenience trumped a party's specific preference there, so it should here as well.

Third, as Bayer has explained, several judges in the District of New Jersey have the experience and docket capacity to handle these cases. *See* Doc. 44 at 17–20. Based on the most recent data from the Administrative Office of the United States Courts, as of June 30, 2014, the District of New Jersey averaged 545 pending cases per judgeship, which ranks it only 27th

among federal district courts. *See U.S. District Court—Judicial Caseload Profile* (excerpts filed as Doc. 44-2). Movants claim that these official government statistics—which also reveal the Southern District of Illinois to be the second busiest court in the entire country (*see* Doc. 44-2 at 2; *see also* Doc. 44 at 13, 18)—are "false." Doc. 53 at 12. Notably, though, to make their contrary case, Movants have to look outside the AOC to a private "data gathering" organization at Syracuse University. *See* Doc. 53 at 12 & nn.22–24; *see also About Us*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, http://trac.syr.edu/aboutTRACgeneral.html (last visited Nov. 23, 2014) (attached as Exhibit 1). Also notable is the fact that rather than analyzing courts' total "pending cases"—the truest measure of docket capacity—Movants' privately gathered data look to "weighted" civil-case filings over a 12-month period, a measure about which even the Syracuse group has expressed "caution."[5] That is presumably why, to Bayer's knowledge, the Panel has *never* relied on the Syracuse data in making MDL assignments. *Cf.* MULTIDISTRICT LITIGATION MANUAL § 6.17, at 252–53.

Movants similarly accuse Bayer of manipulating statistics to tell "lies" about the state of Judge Herndon's docket. Doc. 53 at 11. Not true. No one disputes—indeed, Bayer has acknowledged—that the *Pradaxa* MDL has entered into a global-settlement phase. *See* Doc. 44 at 13. But *Yasmin/Yaz*—in which Bayer is also the principal defendant—is a different story. However one counts cases, Movants can't and don't dispute that there are still more than 1,000

[5] *See Civil Cases in District Court: About the Data*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, http://trac.syr.edu/judges/aboutCivil.html (last visited Nov. 23, 2014) (attached as Exhibit 2). The official AOC reports that Bayer cited also include relative caseload rankings based on "weighted filings." *See* Doc. 44-2. According to the AOC's weighted caseload data, the District of New Jersey is the 18th busiest in the country, while the Southern District of Illinois is the 6th busiest. *See id.* at 2–3. Notably, Movants' Syracuse data show that their own target judge, Judge Herndon, is the second busiest federal district judge in the country in terms of the number of cases pending. *See Cases in District Court*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, http://tracfed.syr.edu/judges/interp/civjdglist.html?tracdecor=1 (last visited Nov. 23, 2014) (attached as Exhibit 3).

pending matters in the *Yasmin/Yaz* MDL. Movants' colloquialisms—that the *Yasmin/Yaz* MDL is "wind[ing] down," "near the finish line," and "in settlement mode" (Doc. 53 at 11–12)—mask the facts (1) that Judge Herndon has instructed both the plaintiffs and Bayer there that the MDL "is still functioning," *In re Yasmin/Yaz* CMO 65 (filed here as Doc. 44-4), at 3; (2) that the parties in the *Yasmin/Yaz* MDL are actively engaged in corporate and case-specific discovery related to hundreds of cases; and (3) that the first trial is slated to begin in May 2015. *See* Doc. 44-4; *see also* Doc. 44 at 13–14.

The point is simply this: Even setting aside the Panel's presumed desire to "spread[] transfers around the country" among the numerous capable and qualified candidates, MULTIDISTRICT LITIGATION MANUAL § 6.3, at 215, any of several judges on the District of New Jersey are (at least presently) better equipped than the Southern District of Illinois to efficiently manage a new multidistrict proceeding.[6]

Fourth, as the Panel has frequently observed, the District of New Jersey is a "convenient and accessible" venue for both parties and their counsel. *E.g.*, *In re Nickelodeon Consumer Privacy Litig.*, 949 F. Supp. 2d 1377, 1377–78 (J.P.M.L. 2013).[7] That is doubly true in this instance. Not only is New Jersey (here, as in other cases) "relatively close to potential witnesses

[6] Movants' effort to zing Bayer for its position in the *Aspirin* MDL (Doc. 53 at 17–18) is misleading. Bayer made the same venue arguments there that it is making here—namely, that the Panel should transfer the cases to a district that had the "capacity and experience to handle [the] litigation" and that had a "relatively low caseload" compared to other requested venues—it just so happened that the relative caseloads of the Southern District of Illinois and the District of New Jersey were flipped at the time. *See In re Bayer Corp. Combined Aspirin Prods. Mktg. & Sales Practices*, MDL No. 2023, Doc. 6 (attached to Movants' Reply as Doc. 53-7), at 9–11. Bayer also argued in the alternative there—as it principally does here—that the cases should be transferred to the district of defendants' U.S. headquarters, which in that case was the Eastern District of New York because, at the time, Bayer HealthCare LLC was headquartered in Tarrytown, New York. *See id.* at 12–13 & n.19.

[7] *See also, e.g.*, *In re Ins. Brokerage Antitrust Litig.*, 360 F. Supp. 2d 1371, 1373 (J.P.M.L. 2005); *In re Hypodermic Prods. Antitrust Litig.*, 408 F. Supp. 2d 1356, 1357 (J.P.M.L. 2005).

and evidence" at the defendants' U.S. headquarters, *id*., but the District's courthouses are easily accessible via Newark Liberty International Airport and Philadelphia International Airport, two of the nation's leading travel hubs. *See* Doc. 44 at 16–17. Particularly compared to the airport in St. Louis, Newark and Philadelphia offer many more non-stop flights to and from U.S. cities, which make travel more convenient and minimize Movants' complaints about "layovers" (which shouldn't matter when considering New Jersey as a terminal destination) and "delays."

* * *

There is one final point about venue. In the final paragraph of their reply, Movants half-heartedly assert that "the District of New Jersey is not an appropriate forum due to *Lexecon*." Doc. 53 at 19 (citing *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998)). Candidly, it's hard to know what Movants mean. If Movants' concern is simply that a New Jersey plaintiff "cannot file suit against" New Jersey-based defendants Bayer and Janssen due to a lack of diversity (*id*.), that has nothing to do with *Lexecon*—nor is it specific to the District of New Jersey. So the conclusion that Movants draw—that "if the MDL is transferred to the District of New Jersey, then the District will not have any New Jersey plaintiffs before it"—is, with all due respect, a *non sequitur*. The absence of diversity jurisdiction will prevent New Jersey plaintiffs from suing in federal court no matter where any MDL might be placed.

Nor is Movants' concern that "it is possible that no bellwether cases can be tried in New Jersey" in the absence of a *Lexecon* waiver (*id*.) unique to the District of New Jersey. *Lexecon* holds that, absent a bilateral waiver, under Section 1407 individual actions that are not terminated in the MDL court must be remanded to the transferor court for trial. *Lexecon*, 523 U.S. at 40. That limitation, again, which results from Section 1407's mandatory language, will exist in *any* MDL court. To the extent that Movants think that there is some particular (if

unspecified) *Lexecon* problem inherent in assigning an MDL to a defendant's home district, it suffices to note that the Panel has consistently ignored it by assigning MDLs to venues in which defendants are headquartered. *See, e.g.*, *In re Nutramax Cosamin Mktg. & Sales Practices Litig.*, 988 F. Supp. 2d 1371 (J.P.M.L. 2013) (assigning litigation involving a Maryland defendant to the District of Maryland); *In re Fresenius Granuflo/Naturalyte Dialysate Prods. Liab. Litig.*, 935 F. Supp. 2d 1362 (J.P.M.L. 2013) (same, District of Massachusetts); *In re Darvocet*, 780 F. Supp. 2d 1379 (same, Eastern District of Kentucky); *In re Merck & Co., Inc., Sec., Derivative & ERISA Litig.*, 360 F. Supp. 2d 1375, 1376 (J.P.M.L. 2005) (same, District of New Jersey).

In any event, Movants' concern about whether cases could ultimately be tried in New Jersey is irrelevant here. The sole question before the Panel is whether the cases should be transferred "for coordinated or consolidated *pre-trial* proceedings." 28 U.S.C. § 1407 (emphasis added); *see also* Pls.' Mot. to Transfer (Doc. 1) at 1 (seeking "transfer and coordination *for pretrial purposes*" (emphasis added)); *In re Gerber Probiotic Prod. Mktg. & Sales Practices Litig.*, 899 F. Supp. 2d 1378, 1380 (J.P.M.L. 2012) ("Centralization under Section 1407 is not permanent. It is limited to pretrial proceedings only, and Section 1407 'obligates the Panel to remand any pending case to its originating court when, at the latest, those pretrial proceedings have run their course.'" (quoting *Lexecon*, 523 U.S. at 34)). The question whether cases can (or should) be tried in any MDL court is irrelevant at this stage.

CONCLUSION

The Panel should deny Movants' Section 1407 motion to transfer. In the alternative, the Panel should consolidate these cases in the District of New Jersey—not in the Southern District of Illinois, as Movants have requested.

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