BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: BARD IVC FILTERS PRODUCT LIABILITY LITIGATION	:	**MDL DOCKET NO. 2641**

DEFENDANTS C. R. BARD, INC. AND BARD PERIPHERAL VASCULAR, INC.'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR TRANSFER OF ACTIONS FOR COORDINATION OR CONSOLIDATION UNDER 28 U.S.C. § 1407

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Pursuant to Rule 6.1 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, Defendants C. R. Bard, Inc. ("C. R. Bard") and Bard Peripheral Vascular, Inc. ("BPV") (C. R. Bard and BPV are collectively referred to as "Bard") submit this Response in Opposition to Plaintiffs' Motion for Transfer of Actions for Coordination or Consolidation Under 28 U.S.C. § 1407 (the "Motion"). The Panel should deny the Motion in its entirety.

I. INTRODUCTION

Bard has been selling inferior vena cava ("IVC") filters for more than fifteen years. Those life-saving medical devices are associated with known complications (regardless of the manufacturer), and for the last ten years, Bard has been defending litigation involving the filters. During that time span, Bard has settled, obtained dismissals, or obtained a defense verdict in approximately 121 IVC filter cases and claims in state and federal courts across the country, a number more than four times the total number of proposed MDL cases identified by the plaintiffs.[1]

Thus, the Bard IVC filter litigation at issue is unlike the typical product liability litigation presented to the Panel. This litigation is extremely mature. In the past decade, the plaintiffs have obtained extensive common discovery concerning all aspects of Bard's IVC filters, including the design, testing, manufacturing, marketing, labeling, and post-market surveillance of these devices. Bard has produced over 2.5 million pages of documents. Bard has responded to thousands of written discovery requests. Over 80 corporate witness depositions have been taken. Moreover, Bard has repeatedly agreed to make this common discovery available to plaintiffs filing new IVC filter cases, and Bard intends to continue to do so for future cases.

[1] Bard has litigated approximately 159 cases and claims concerning its IVC filters. Thus, given that Bard has resolved approximately 121 cases and claims, more than 75% of these 159 cases and claims have already been resolved. *See* Chart of Bard IVC filter cases attached as Exhibit 1.

Now, ten years into this litigation, the plaintiffs -- who are represented by counsel who have been coordinating their efforts against Bard for years -- suddenly (and belatedly) seek centralization of 24 federal cases.[2] The plaintiffs' argument and proposal to create an MDL ignores the substantial work the parties have engaged in to obtain a just and efficient resolution of these cases, and, instead, implicates many of the same concerns that the Panel has repeatedly expressed when opting against the creation of an MDL. After ten years of litigation, the creation of a centralized proceeding at this juncture would not result in "convenience" for the parties and witnesses, nor would it "promote the just and efficient conduct" of the lawsuits. Instead, it would frustrate the goals of centralized litigation, delay the ultimate resolution of these cases, and result in the warehousing of additional cases that, on their own merits, would not warrant prosecution. The Panel in *In re: Cymbalta (Duloxetine) Products Liability Litigation* recently addressed a similar request for consolidation of mature litigation that almost precisely mirrors the Bard IVC filter litigation. *See* MDL No. 2576, __ F. Supp. 3d __, 2014 WL 7006713 (J.P.M.L. Dec. 10, 2014). There, the Panel rejected the plaintiffs' request for an MDL, reasoning that because (a) the procedural postures of the various cases differed significantly; (b) most, if not all, of the common discovery had already taken place in the earlier-filed actions; and (c) only a limited number of plaintiffs' counsel were involved, transfer of the cases would not advance the goals of an MDL. *See id.* at *1-2.

[2] *See* Pls.' Schedule of Actions [Dkt. No. 1-2]. One of these cases, *Cannon* (W.D. Va.), settled prior to the filing of the plaintiffs' Motion. In another case, *Peterson* (M.D. La.), judgment was recently entered in favor of Bard. Thus, these two cases are not currently "pending" in a district court and may not be transferred. *See In re: Eli Lilly & Co. "Oraflex" Prods. Liab. Litig.*, 578 F. Supp. 422, 423 n.1 (J.P.M.L. 1984) (cases no longer pending in district court cannot be transferred). Furthermore, in three of the plaintiffs' proposed MDL cases, *Anderson* (E.D. Wis.), *Branch* (N.D. Tex.), and *Coronado* (S.D. Tex.), Bard has not been served with Complaints. Finally, Bard is also aware of nine additional Bard IVC filter cases currently pending in federal courts that are not on the plaintiffs' list of proposed MDL cases. *See* Defs.' Notices of Potential Tag-Along Actions [Dkt. No. 10 & Dkt. No. 28].

The same reasoning applies here. In addition to the massive amount of common discovery that has been completed, many of the cases are in an advanced procedural posture, with discovery closed. Some of the cases have summary judgment motions pending.[3] In others, the courts have already ruled on dispositive motions. Nine of the cases have trial dates set, and two more are completely ready for trial, merely awaiting the assignment of a specific date. Perhaps of greatest significance, the remaining issues in the litigation are largely individualized issues. As it did in *Cymbalta*, the Panel has routinely denied transfer under these circumstances. *See In re: Qualitest Birth Control Prods. Liab. Litig.*, 38 F. Supp. 3d 1388, 1389 (J.P.M.L. 2014) (denying transfer because "there is little to be gained from centralization," since discovery was complete in certain actions); *In re: Signal Int'l LLC Human Trafficking Litig.*, 38 F. Supp. 3d 1390, 1391 (J.P.M.L. 2014) (denying transfer, where "[m]uch, if not all, of the 'common' factual discovery undoubtedly has been completed," and where trials were set in three of the actions); *In re: Electrolux Dryer Prods. Liab. Litig.*, 978 F. Supp. 2d 1376, 1377 (J.P.M.L. 2013) (denying transfer due to the advanced stage of the litigation, the fact that the remaining issues to be litigated concerned individualized facts, the varying procedural postures of the cases, and the non-movant's commitment to sharing common discovery). In view of the advanced stage of the Bard IVC filter litigation, there is likewise "little to be gained from centralization."

II. THE HISTORY OF THE LITIGATION

The history of the Bard IVC filter litigation demonstrates that there is no need to centralize the proposed MDL cases. Bard has resolved approximately 121 cases, representing more than 75% of the cases and claims that Bard has litigated. During the ten-year span of this

[3] Ironically, the *Ebert* case (filed by the named plaintiff moving for transfer here) is the longest pending matter among the plaintiffs' proposed actions. That case was filed in March 2012, and following the completion of discovery, dispositive motions were filed in July 2014. The judge presiding over that case has those motions under advisement.

litigation, Bard has already participated in extensive discovery. The majority of the pending federal court Bard IVC filter cases involve plaintiffs' firms that are coordinating their efforts against Bard, and Bard has been cooperative in allowing the sharing of the voluminous information disclosed during discovery among all plaintiffs.[4] This lengthy history of cooperation and resolution of cases shows that this litigation has proceeded efficiently and effectively on its own, without the need for an MDL.

A. Bard's IVC Filters

The proposed MDL cases involve allegations of product defect concerning various generations of Bard IVC filters. An IVC filter is a prescription medical device that is placed in the inferior vena cava (the large vein that brings blood from the lower extremities of the body to the heart) and is designed to trap blood clots traveling from the pelvis and legs before they reach the heart or lungs and precipitate a life-threatening event. Bard has designed, manufactured, and marketed various models of IVC filters, including the Recovery® Filter, the G2® Filter, the G2®X/G2® Express Filter, the Eclipse® Filter, the Meridian® Filter, and the Denali® Filter, which is the company's latest generation IVC filter. IVC filters have been used by physicians since the 1960s. However, before the development of the Recovery® Filter, the available IVC filters on the market were only for permanent placement in the body.[5] For various medical reasons, although some patients require permanent filters, physicians generally believed it would be advantageous to have the option to remove the filter if it was no longer medically indicated. This is particularly beneficial for patients with only a transient risk of developing blood-clots, such as certain trauma patients or patients undergoing surgery.

[4] Bard has uniformly agreed to such sharing upon the entry of an appropriate protective order concerning the use and treatment of Bard's confidential information.

[5] Prior to the introduction of the Recovery® Filter, Bard sold a permanent device called the Simon Nitinol Filter.

Bard's IVC filters were cleared via the 510(k) process by the Food & Drug Administration ("FDA"). The Recovery® Filter was first cleared by the FDA in 2002. Bard's second-generation IVC filter, the G2® Filter, was first cleared by the FDA in 2005. After the introduction of the G2® Filter, Bard ceased selling the Recovery® Filter. Constantly improving the device, the company later developed G2®X/G2® Express Filter (cleared in 2008), the Eclipse® Filter (cleared in 2010), and the Meridian® Filter (cleared in 2011). Today, Bard is selling its sixth generation filter, the Denali® Filter, which was cleared by the FDA in 2013.

B. The Bard IVC Filter Litigation

The first case involving a Bard IVC filter was filed in May 2005 and concerned the Recovery® Filter. From 2005 to 2008, approximately 14 cases were filed against Bard concerning its Recovery® and G2® Filters. *See* Ex. 1. The cases all alleged that these devices are defective because complications including filter fracture and migration could occur, and that Bard's warnings were inadequate.[6] In other words, the cases involved allegations that are essentially identical to the allegations asserted by the plaintiffs in the proposed MDL cases. (*See* Pls.' Br. [Dkt. No. 1-1] at ¶¶ 11-15.) All of these early cases have been resolved, and most were resolved in 2007 or 2008.

In 2009, approximately 24 additional IVC filter cases were filed against Bard, and they all involved similar allegations of product defect and failure to warn. *See* Ex. 1. This relatively

[6] Notably, filter fracture, migration, perforation, and tilt are all well-known and widely accepted complications associated with all IVC filters. *See generally* Clement Grassi, et al., *Quality Improvement Guidelines for Percutaneous Permanent Inferior Vena Cava Filter Placement for the Prevention of Pulmonary Embolism*, J. Vasc. Interv. Radiol. 2003; 14:S271-S275 (discussing the various complications associated with IVC filters). Fracture is defined as any loss of structural integrity (e.g., breakage of a filter arm) of the filter; migration is defined as a change in filter position compared to its deployed position more than 2cm; perforation/penetration is defined as filter struts extending more than 3mm outside the wall of the IVC; and tilt is defined as a tilt of the filter more than 15°. *See id.* Because of the life-saving nature of the devices, physicians routinely conclude that the benefits of the devices outweigh those risks.

small influx of cases coincided with the first plaintiffs' law firm advertisements soliciting clients via a website entitled "www.FilterLaw.com." At the height of that phase of the litigation in 2011 or 2012, the www.FilterLaw.com attorneys had approximately 40 filed cases against Bard. During that phase, more than 30 corporate witness depositions were taken, and Bard responded to voluminous written discovery, producing over 2 million pages of documents concerning its IVC filters. Since that time, Bard has consistently made all of that discovery available to the plaintiffs in later cases. In May 2012, Bard tried one of the cases brought by the www.FilterLaw.com attorneys concerning the Recovery® Filter. The case, which served as a "bellwether," was tried before Arizona Superior Court Judge Hugh Hegyi. After five weeks of trial, the jury returned a defense verdict. Shortly after that trial, Bard reached a global resolution of the www.FilterLaw.com attorneys' inventory of IVC filter cases.

Beginning in 2011 and continuing through the present, a new set of cases has been filed concerning Bard's IVC filters. *See* Ex. 1.[7] These cases concerned Bard's Recovery® and G2® Filters, as well as Bard's G2®X/G2® Express, Eclipse®, and Meridian® Filters. Like the previous cases, they included some plaintiffs alleging filter fracture and migration. Unlike the previous cases, however, the new filings also included many plaintiffs with minor complications such as perforation and tilt. The majority of these new cases were brought by attorneys from four law firms.[8] Not surprisingly, these filings coincided with new internet advertisements soliciting more IVC filter plaintiffs.[9] The attorneys from these four law firms have worked together

[7] The plaintiffs filed approximately 23 cases in 2011, 16 cases in 2012, 27 cases in 2013, and 27 cases in 2014.

[8] Those firms are Lopez McHugh, LLP; Karon & Dalimonte, LLP; The Law Office of Ben C. Martin, LLP; and/or Babbitt & Johnson, P.A.

[9] This is not the first time the plaintiffs' firms running that advertising campaign have tried to aggregate the litigation against Bard. They also unsuccessfully tried to bring three separate class action lawsuits against Bard concerning its IVC filters. Class certification was denied in one case

coordinating their efforts against Bard for years.[10] Although Bard provided these new attorneys with the voluminous common discovery from the www.FilterLaw.com cases, the plaintiffs demanded additional discovery. Thus, since 2012, Bard has produced an additional 500,000 pages of documents and responded to thousands of additional written discovery requests. The parties have already litigated numerous work product and privilege issues and obtained rulings on those issues. *See, e.g., Phillips v. C. R. Bard, Inc.*, 290 F.R.D. 615 (D. Nev. 2013). The plaintiffs have taken almost 50 additional corporate witness depositions. Equally important, the parties have resolved, either via settlement, dismissal, or summary judgment, approximately 44 of the new set of cases. This includes 5 cases that were docketed for trial during 2015 that Bard recently settled with the Lopez firm.[11]

C. Bard's Successful Efforts to Coordinate and Share Discovery

Bard has consistently sought to coordinate and share that extensive common discovery with the plaintiffs in an effort to streamline discovery and to efficiently move these cases towards resolution. In that regard, Bard has agreed, without exception, that the plaintiffs in currently pending Bard IVC filter cases may use the common discovery conducted in the prosecution of their cases. For example, in July 2012, in Plaintiff Melissa Ebert's case, Bard agreed to produce the voluminous electronically stored information ("ESI") and documents

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(*DeLeon*). In the other two class actions (*Bouldry* and *Brown*), the plaintiffs voluntary dismissed the actions, following removal to federal court and unsuccessful attempts to remand.

[10] For example, even in cases brought by a single law firm, members of the other firms have routinely filed applications for admission *pro hac vice* on the eve of trial, clearly demonstrating that they are operating in tandem.

[11] The Lopez firm has been the firm that has taken the lead for the plaintiffs in the new set of cases. Although that firm was a signatory on the original Motion that was filed on May 15, 2015, notably, the plaintiffs re-filed an amended Motion on May 18, 2015, removing the Lopez firm and its cases from the filing. Bard notes that the Lopez firm is attempting to resolve its entire inventory of cases and claims (which allegedly total over 80 claims) with Bard. This further demonstrates that this litigation can be resolved without an MDL.

produced in the www.FilterLaw.com cases. *See* Joint Status Report submitted in *Ebert*, attached as Exhibit 2. Additionally, Bard has entered into Protective Orders or Stipulations of Protection and Confidentiality that explicitly allow for the "sharing" of documents within the Bard IVC filter litigation. *See* Paragraph 10 of Stipulation of Protective and Confidentiality agreed to in *Tillman*, attached as Exhibit 3. Bard has made (or will make) the same commitments regarding use of this voluminous common discovery in all of the proposed MDL cases.

To avoid duplicative depositions, Bard has actively worked with the plaintiffs to share and allow use of previously taken depositions that concern common discovery topics (i.e., non-plaintiff specific topics). As just one example, Bard and the law firm that represents Plaintiff Melissa Ebert, the Law Offices of Ben C. Martin, LLP, entered into a written agreement allowing the use of various depositions in the firm's Bard IVC filter cases. *See* Letter Agreement dated January 16, 2014, attached as Exhibit 4. Furthermore, as part of Bard's standard production, the company routinely has produced over 12,000 pages of deposition transcripts and exhibits to the plaintiffs, which they have subsequently used in the prosecution of individual cases. Indeed, in each of the recent Bard IVC filter cases in which the parties exchanged deposition designations for use at trial, the plaintiffs designated testimony from numerous depositions taken in previous Bard IVC filter cases.

Bard also has worked diligently to avoid initiating duplicative discovery itself. As noted by the plaintiffs, (*see* Pls.' Br. [Dkt. No. 1-1] at 9), Bard has had to depose the plaintiffs' experts on more than one occasion. This is principally because over the course of this litigation, the plaintiffs' experts have significantly expanded their opinions, necessitating additional depositions. As just one example, in 2011, when he was an expert for the www.FilterLaw.com attorneys, Dr. Robert McMeeking's opinions were succinctly stated in a 7-page report and were

limited to a finite element analysis ("FEA") he conducted concerning the Recovery® and G2® Filters, and his brief assessment of the anticipated loading scenarios within the human IVC. Dr. McMeeking was deposed on these opinions in 2011. By 2012, Dr. McMeeking's opinions had evolved, and he submitted a revised 22-page report that included criticisms of Bard's FEAs and a more lengthy discussion of Bard's premarket testing. Dr. McMeeking was deposed on these additional opinions in 2014. By 2015, Dr. McMeeking's report expanded to 67 pages, and his report now includes opinions about the alleged future risks and effects of IVC filter migration, perforation, and tilt, even in cases where no such complications have occurred. Dr. McMeeking was recently deposed in April 2015 concerning these new opinions. Thus, Bard has had to depose Dr. McMeeking three times over the past four years due to the exponential expansion of his opinions, as the plaintiffs' defect theories grow increasingly creative. Those few depositions have then been used in literally dozens of cases. Bard has similarly taken repeat depositions of other experts only when necessary.

Thus, while the experts in this litigation may have been deposed more than one time, the depositions have not been taken "over and over about the same subject matter" as the plaintiffs suggest and were necessitated in large part by the plaintiffs' own tactics. (Pls.' Br. [Dkt. No. 1-1] at 8-9.) Bard's targeted approach is perhaps best demonstrated by the fact that no single generic expert has been deposed more than four times despite being designated in dozens of cases. Bard consistently limits any subsequent depositions of the plaintiffs' experts to new opinions or matters that pertain to the specific product or complication at issue in a case.

D. Motion Practice in the Bard IVC Filter Litigation

The plaintiffs argue that numerous motions, such as motions for summary judgment, have been filed in the Bard IVC filter cases. However, many of these motions turn on individualized,

case-specific issues or state-specific issues that will not disappear with any centralization. For example, Bard's summary judgment motions often involve the learned intermediary defense, which is dependent upon the implanting physician's specific knowledge of the risks associated with IVC filters and the particular state's applicable law. Likewise, these motions often turn on state-specific issues of law, such as whether comment k to § 402(a) of the Restatement (Second) of Torts precludes a strict liability claim concerning a prescription medical device. Finally, these motions sometimes involve a statute-of-limitations defense, which is a case-specific issue.[12]

Moreover, with regard to motions that address the same or similar topics under the same or similar law, the courts have often followed each others' lead in reaching their results. For example, the plaintiffs have repeatedly tried to offer Dr. William Hyman as an expert regarding labeling for medical devices, even though he has no experience with the subject. Bard has repeatedly moved to exclude these opinions, and the court in *Cason* precluded Dr. Hyman from offering opinions about the adequacy of Bard's labeling and warnings. Bard filed similar motions in *Tillman* and *Ocasio*, and citing the *Cason* order, both courts similarly precluded Dr. Hyman from offering these opinions. In short, the plaintiffs' concerns about the number of motions and the potential for inconsistent rulings are vastly overstated.

E. The Current Procedural Status

Currently, Bard has identified 28 IVC filter cases that are pending in federal district courts in which Bard has been served with a Complaint.[13] Many of these cases have made significant progress toward resolution, are procedurally advanced, and do not share common

[12] For example, in *Peterson*, which the plaintiffs included on their Schedule of Actions (*see* Dkt. No. 1-2), Bard recently successfully obtained summary judgment on statute-of-limitations grounds. *See Peterson v. C. R. Bard, Inc.*, No. 13-cv-00528-JJB-RLB, 2015 WL 2239681 (M.D. La. May 12, 2015).

[13] *See* Chart of Pending Bard IVC Filter Cases attached as Exhibit 5.

issues of fact that remain to be litigated. A summary of the procedural posture of these cases is set forth below.

- 9 of the cases are set for trial. *See* Ex. 5. 4 of these are set for trial in 2015 (*Keen*, *Pickard*, *Rivera*, and *Smith*), and 5 are set for trial in 2016 (*Conn*, *Fox*, *Henley*, *Munson*, and *Wyatt*). Additionally, in 1 case (*Tillman*), the parties submitted a pretrial order and motions *in limine*, although the case is not yet docketed for trial. In 2 additional cases (*Ocasio* and *Cason*), the parties have progressed almost to the point of filing pretrial orders, although trial dates have not been set as of yet.

- 14 of the cases have been pending for more than 12 months, including 4 (*Cason*, *Coker*, *Ebert*, and *Tillman*) that have been pending for more than 2 years, 5 cases have been pending for 6 to 12 months, and 9 cases have been pending for less than 6 months. *See* Ex. 5.

- Discovery has progressed in at least 21 of the cases, and in 8 cases, either fact discovery, expert discovery, or both have been completed. *See* Ex. 5.

- In 5 of the cases, the parties have filed their dispositive motions, 3 of which have been ruled upon, and 2 of which await the respective courts' rulings. Further, in 9 other cases, dispositive motions are due by the end of 2015. *See* Ex. 5.

III. THE CASE AGAINST CONSOLIDATION

Consolidation of pretrial proceedings for cases pending in different judicial districts under Section 1407 may be appropriate when it serves "the convenience of the parties and witnesses" and when it "will promote the just and efficient conduct" of the actions. 28 U.S.C. § 1407. As the statute states, and as the Panel has noted, "§ 1407 transfer is primarily for pretrial" proceedings. *In re: Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. 415, 422 (J.P.M.L. 1991). The plaintiffs have the burden of proving that transfer under 28 U.S.C. § 1407 is appropriate. *See In re: Cable Tire Patent Litig.*, 487 F. Supp. 1351, 1354 (J.P.M.L. 1980). That burden is significant. As the Panel has repeatedly emphasized, centralization under Section 1407 "'should be the last solution'" after considered review of all other options. *In re: Gerber Probiotic Prods. Mktg. & Sales Practices Litig.*, 899 F. Supp. 2d 1378, 1379 (J.P.M.L. 2012) (quoting *In re: Best Buy Co., Inc., Cal. Song-Beverly Credit Card Act Litig.*, 804 F. Supp. 2d

1376, 1378 (J.P.M.L. 2011)). In this instance, transfer of the Bard IVC filter cases is inappropriate because it will not serve any statutory purpose.

First, throughout this lengthy litigation, the parties have engaged in massive amounts of common discovery concerning all aspects of Bard's IVC filters, and Bard has agreed that such discovery may be used in all of the proposed MDL cases. Simply put, consolidation is not necessary, because little, if any, common discovery remains to be completed in these cases. ***Second***, centralization is inappropriate because many of the proposed MDL cases are in an advanced procedural posture with impending discovery cutoffs and/or trial dates. Thus, transfer of these cases would only serve to delay any resolution of these cases, not promote a just resolution. ***Third***, the discovery that remains involves individualized issues that will predominate the litigation in the future.

Therefore, centralization of this litigation will not further the convenience of the parties and witnesses, nor will it promote the just and efficient conduct of the pretrial proceedings. For these reasons, the Motion should be denied.

A. Transfer Is Not Necessary in This Litigation, Where Common Discovery Is Essentially Complete

The plaintiffs must establish that centralization is necessary to facilitate the "just and efficient" conduct of the cases. One of the primary ways centralization promotes the just and efficient conduct of the litigation is where it eliminates duplicative common discovery. *See In re: Dow Chem. Co. "Sarabond" Prods. Liab. Litig.*, 650 F. Supp. 187, 188 (J.P.M.L. 1986). But where, as here, the vast majority of common discovery is complete, transfer is not appropriate because it will not promote the just and efficient conduct of the cases. *See, e.g., In re: Cymbalta*, 2014 WL 7006713, at *1-2 (denying transfer where "most, if not all, of the common discovery has already taken place"); *In re: Qualitest*, 38 F. Supp. 3d at 1389 (denying transfer because

"there is little to be gained from centralization," given discovery was complete in certain of the pending actions); *In re: Signal Int'l LLC Human Trafficking Litig.*, 38 F. Supp. 3d 1390, 1391 (J.P.M.L. 2014) (denying transfer where "[m]uch, if not all, of the 'common' factual discovery undoubtedly has been completed already, as more than a hundred days' worth of depositions have been conducted"); *In re: Listerine Agent Cool Blue Products Liab. Litig.*, 655 F. Supp. 2d 1350, 1350 (J.P.M.L. 2009) (denying transfer where discovery in certain actions was complete and where there were no remaining common discovery issues sufficiently complex to justify transfer); *In re: Reglan/Metoclopramide Prods. Liab. Litig.*, 622 F. Supp. 2d 1380, 1381 (J.P.M.L. 2009) (denying transfer because "a significant amount of common discovery has already taken place"); *In re: Eli Lilly*, 578 F. Supp. at 423 (denying transfer because extensive discovery had already concluded concerning areas of common factual inquiry).

As previously detailed, the overwhelming majority of any common discovery has already been accomplished concerning all aspects of Bard's IVC filters. More importantly, the history of this litigation proves that the parties are successfully facilitating the sharing of common discovery. In each of the proposed MDL cases, Bard has agreed or is willing to agree to make past discovery from the Bard IVC filter litigation available for use in the case, and the plaintiffs have readily accepted, and are making use of, that discovery. *See, e.g.*, Exs. 2-4.

The plaintiffs have taken full advantage of using this prior discovery, often times recycling the same experts, documents, themes, and arguments advanced in prior cases involving other plaintiffs' counsel. There is little doubt that this extensive, already accomplished common discovery will be utilized by the plaintiffs in the proposed MDL cases, as well as by future plaintiffs. Indeed, the plaintiffs admit that they anticipate that future cases against Bard will be "based on the same or similar legal theories" as those advanced by the plaintiffs. (Pls.' Br. [Dkt.

No. 1-1] at ¶ 16.) They further admit that "the design, safety, marketing, and performance of the allegedly defective product will be at issue in each of the Related Actions and discovery on those issues ***will be virtually identical*** for all the cases." (*Id.* at ¶ 18 (emphasis added)); *see also id.* at ¶ 18-19 (admitting that written discovery and ESI will be the same in each IVC filter case). Thus, an MDL would not accomplish anything more than what has already been achieved through informal coordination and cooperation in the Bard IVC filter litigation. This is particularly true where, as here, the majority of the plaintiffs in the proposed MDL cases are represented by common counsel or counsel who are coordinating with each other. *See In re: Oxycontin Prods. Liab. Litig. (No. II)*, 395 F. Supp. 2d 1358, 1359 (J.P.M.L. 2005) (denying transfer of 25 actions where "(i) pretrial proceedings are already advanced in certain of the constituent actions, and ii) plaintiffs in all actions subject to the transfer motion are represented by common counsel").

While the plaintiffs suggest that additional discovery is needed concerning Bard's later generation of filters (such as the Eclipse®, Meridian®, or Denali® Filters), (*see* Pls.' Br. [Dkt. No. 1-1] at ¶ 26), that claim has no basis. Bard has already litigated numerous cases concerning its Eclipse® and Meridian® Filters, and extensive discovery has already been accomplished concerning these devices. Indeed, one case (*Gaston*) concerning the Eclipse® Filter was litigated for almost 20 months. After full fact and expert discovery had been completed, and dispositive motions had been filed, the case settled. Further, the plaintiffs themselves assert that all of Bard's IVC filters "continue to share several of the same design defects and complications." (Pls.' Br. [Dkt. No. 1-1] at ¶ 6); *see also id.* at ¶ 13 (alleging that all of Bard's IVC filters share the same alleged warning defects). Thus, any future discovery concerning these newer devices is not likely to be complex, given the extensive discovery and work conducted to date on Bard's previous generations of IVC filters. *See In re: Listerine*, 655 F. Supp. at 1350 (denying transfer where

remaining common discovery issues were not sufficiently complex to justify transfer). Moreover, the Eclipse® Filter has been on the market for more than five years, the Meridian® for almost four years, and the Denali® for two years. Bard has nonetheless received only a small number of cases concerning the Eclipse® and Meridian® Filter, and not a single case regarding the Denali® Filter. That scant number of filings suggests that the plaintiffs' speculation regarding a massive wave of new cases concerning these devices is blown far out of proportion.[14]

Because most if not all of the common discovery concerning Bard's IVC filters has already been accomplished, because the parties have repeatedly demonstrated their willingness to coordinate common discovery, and because the plaintiffs in the proposed MDL cases are represented by common counsel or counsel who are working together, the plaintiffs fail to satisfy their burden of showing that the remaining common discovery that needs to be accomplished -- if there is any at all -- is sufficiently complex and time-consuming to warrant transfer under § 1407. On that basis alone, the Motion should be denied.

B. Transfer Is Not Necessary in This Litigation Because of the Advanced Procedural Posture of Many of the Proposed MDL Cases

An MDL is intended to provide coordinated and centralized pretrial management of complex factual issues. But where, as here, many of the cases to be transferred are procedurally advanced, and where there are significant procedural disparities among the constituent cases,

[14] The plaintiffs claim that their counsel are aware of over 200 unfiled claims "that will be filed in the near future," and they speculate that there will be hundreds or thousands of more cases. However, the Panel has repeatedly stated that it will not speculate as to future filings and will, instead, only consider the pending cases. *See In re: Qualitest*, 38 F. Supp. 3d at 1389 ("[W]e are disinclined to take into account the mere possibility of future filings in our centralization calculus." (internal quotation marks and citation omitted)); *In re: Intuitive Surgical, Inc., Da Vinci Robotic Surgical Sys. Prods. Liab. Litig.*, 883 F. Supp. 2d 1339, 1340 (J.P.M.L. 2012) ("While proponents maintain that this litigation may encompass 'hundreds' of cases or 'over a thousand' cases, we are presented with, at most, five actions."). Importantly, even if additional claims are filed, counsel for Bard and the plaintiffs have already demonstrated the ability to resolve large numbers of cases.

transfer is often unnecessary and, in fact, frustrates rather than furthers the goals of an MDL.[15] *See, e.g.*, *In re: LVNV Funding, LLC, Fair Debt Collection Practices Act (FDCPA) Litig.*, No. MDL 2610, 2015 WL 1518600, at *1-2 (J.P.M.L. Apr. 2, 2015) (commenting that "perhaps the most significant obstacle to centralization" is the varying procedural postures of the proposed MDL cases); *In re: Lloyds Bank PLC Int'l Mortg. Serv. Loan Litig.*, 997 F. Supp. 2d 1352, 1353 (J.P.M.L. 2014) (denying centralization in part because of the "widely varying procedural postures" of the subject actions); *In re: CVS Caremark Corp. Wage & Hour Employ. Practices Litig.*, 684 F. Supp. 2d 1377, 1379 (J.P.M.L. 2010) ("The presence of procedural disparities among constituent cases is another factor that can weigh against centralization."). "Where there is such a significant procedural disparity among the subject actions, the Panel will take a close look at whether movants have met their burden of demonstrating that centralization will still serve the purposes of Section 1407." *In re: La.-Pac. Corp. Trimboard Siding Mktg., Sales Practices & Prods. Liab. Litig.*, 867 F. Supp. 2d 1346, 1346 (J.P.M.L. 2012).

The Panel has frequently observed that consolidation of "procedurally disparate actions does not serve the purposes of Section 1407." *In re: LVNV Funding*, 2015 WL 1518600, at *2; *see also In re: Qualitest*, 38 F. Supp. 3d at 1389 ("[T]here is scant need for coordinated or consolidated pretrial proceedings in these actions [involving procedurally disparate actions]."); *In re: Teamster Car Hauler Prods. Liab. Litig.*, 856 F. Supp. 2d 1343, 1343 (J.P.M.L. 2012) ("[W]e find that centralization is not warranted here, as some of the actions have been pending in

[15] The plaintiffs quote former J.P.M.L. Chairman Hon. John Heyburn II's Tulane Law Review article and suggest that transfer is favored even when the litigation is procedurally advanced. (*See* Pls.' Br. [Dkt. No. 1-1] at ¶ 25.) However, the plaintiffs fail to mention the two preceding sentences from Judge Heyburn's article, where he states: "Centralization works best when a group of actions are all in the initial phases of discovery and motion practice. Older cases may be less suitable for transfer because significant discovery may have already occurred, and, thus, centralization with other cases could delay the more advanced actions." Hon. John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2238 (2008).

state or federal court for several years, and several are procedurally so far advanced that discovery is completed or nearly completed."). Instead, consolidation of litigation such as the Bard IVC filter litigation -- with many cases that have progressed through the completion of discovery -- would only serve to "delay the progress of the long-pending actions . . . while providing little, if any, benefit to the plaintiffs therein." *In re: Plavix Prods. Liab. Litig.*, 829 F. Supp. 2d 1378, 1378 (J.P.M.L. 2011).

Here, it is beyond any reasonable dispute that the proposed MDL cases are procedurally disparate. Fact discovery, expert discovery, or both are complete in eight cases, whereas discovery has not even commenced in several cases. Further, nine of the cases are set for trial in the next 18 months, and three additional cases have progressed to the brink of trial, although trial dates have not been set. *See* Ex. 5. Consequently, there are simply no efficiencies to be gained by transferring these cases.[16]

C. Individualized Issues Predominate the Remaining Issues to Be Litigated

If this product liability litigation was in its infancy, the presence of individualized issues (such as the plaintiffs' medical history, treatment decisions by the plaintiffs' physicians, and medical causation) would not likely be sufficient, by itself, to tip the scale against the creation of an MDL.[17] Indeed, Bard recognizes that the Panel has transferred a variety of product liability

[16] Bard anticipates that the plaintiffs may try to dodge the problem of procedurally disparate cases by suggesting that the Panel "carve out" certain procedurally advanced cases and exclude them from a proposed MDL. However, such a proposal would not change the fact that virtually all of the common discovery in this litigation is complete, rendering an MDL unhelpful. In the same circumstances, the Panel has not hesitated to deny transfer, despite a "carve out" request. *See In re: Electrolux*, 978 F. Supp. 22 at 1377 (denying transfer in litigation that was "quite mature"); *In re: Ambulatory Pain Pump-Chondrolysis Prods. Liab. Litig.*, 709 F. Supp. 2d 1375, 1378 (J.P.M.L. 2010) (denying transfer of more than 170 cases, because "constituent actions were at widely varying procedural stages").

[17] That is precisely the situation that recently confronted the panel concerning the Cook IVC filter litigation. *See In re: Cook Med., Inc., IVC Filters Mktg., Sales Practices & Prods. Liab.*

actions in the past, notwithstanding the presence of individualized issues. However, this litigation stands in stark contrast to the typical product liability litigation deemed suitable for centralization. Here, virtually all common discovery has been accomplished and the remaining issues to be litigated are predominantly individualized issues. In such cases, the Panel routinely denies transfer. *See In re: Eli Lilly*, 578 F. Supp. at 423 (denying transfer, where the remaining issues to be contested were fact-specific, and common discovery was largely completed).

While significant common discovery has been accomplished in this litigation, each of the proposed MDL cases will still turn on individualized issues, including, for example, whether the plaintiff's alleged injuries were caused by the filter or some other preexisting condition or comorbidity, whether a learned intermediary appreciated the known risks associated with all IVC filters when he or she implanted the IVC filter, and the extent of the plaintiff's injuries, if any. Moreover, each of the cases will likely turn on state-specific legal issues.

Simply put, most all common discovery has already been accomplished over the past ten years. The remaining issues to be litigated are individualized and will need to be separately litigated with or without centralization. For these reasons, the Motion should be denied.

IV. THE VENUE QUESTION

If the Panel finds that centralization is somehow necessary, despite the maturity of the litigation, then two districts -- either the District of Arizona or the Middle District of Florida -- are more appropriate transferee forums than the districts proposed by the plaintiffs.[18] Either of

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Litig., 53 F. Supp. 3d 1379 (J.P.M.L. 2014). That litigation, unlike Bard's filter litigation, was in its infancy, with virtually no common discovery completed.

[18] The plaintiffs suggest transferring the proposed MDL cases to Hon. James E. Kinkeade in the Northern District of Texas. However, Bard notes that Judge Kinkeade is currently presiding over the sizable DePuy Pinnacle hip implant MDL No. 2244, which includes over 7,300 pending cases. Transfer to the District of Nevada with Senior Judge Robert C. Jones presiding over the litigation would likewise not be the most convenient for the parties and witnesses, because of the

these two districts will better serve the convenience of the parties and witnesses, as well as the just and efficient conduct of the actions.[19]

A. The District of Arizona

The only geographical focal point shared by these cases is the location of the defendants. Defendant BPV is the primary party that is responsible for the design, testing, marketing, labeling, and post-market surveillance of Bard's IVC filters. BPV is an Arizona corporation located in Tempe, Arizona (in the Phoenix metropolitan area). As a result, the majority of witnesses and documents are located in Arizona. Therefore, the District of Arizona is the most appropriate forum for an MDL. *See, e.g., In re: Plavix Mktg., Sales Practices & Prods. Liab. Litig. (No. II)*, 923 F. Supp. 2d 1376, 1379-80 (J.P.M.L. 2013) (transferring cases to District of New Jersey because the majority of witnesses and documents were located there). Although no District of Arizona judge has presided over a Bard IVC filter case, that does not render Arizona an inappropriate transferee district. *In re: Pella Corp. Architect & Designer Series Windows Mktg., Sales Practices & Prods. Liab. Litig.*, 996 F. Supp. 2d 1380, 1382 (J.P.M.L. 2014) ("Although no constituent action currently is pending in [the District of South Carolina], that is no impediment to its selection as transferee district.").

B. The Middle District of Florida

Alternatively, Bard submits that the Middle District of Florida would be an appropriate

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scarcity of direct flights to Reno (particularly the absence of direct flights from the eastern half of the country). In addition, Judge Jones is also already presiding over an MDL. Unlike the present proposed MDL, the current MDL pending before him (*In re: Zappos.com Data Breach Litigation*, MDL No. 2357) involves a Nevada defendant and several transferred actions originally filed in that district.

[19] The Panel considers the following key factors in selecting an appropriate transferee district: accessibility of the transferee district for parties, witnesses, and counsel; the caseload statistics for the proposed transferee district; and the location of the parties, witnesses, and documents. *See, e.g., In re: Camp Lejeune, N.C. Water Contamination Litig.*, 763 F. Supp. 2d 1381, 1382 (J.P.M.L. 2011).

venue. A number of constituent actions have been filed there over the years, and three are presently pending there. A number of judges and magistrates have handled multiple substantive motions in the cases, and are fully familiar with the issues presented in the litigation.[20] By way of example, Judge Marcia Morales Howard has presided over the constituent case of *Tillman v. C. R. Bard* since 2013. As a result, she is very familiar with this litigation, as demonstrated by her 80-page opinion issued this past March, in which she addressed various *Daubert* motions and motions for summary judgment. *See Tillman v. C. R. Bard, Inc.*, No. 3:13-cv-222-MMH-JBT, __ F. Supp. __, 2015 WL 1456657 (M.D. Fla. March 30, 2015). Judge Charlene Edwards Honeywell of that same court is similarly familiar with this litigation, having presided over the *Ocasio* case since 2013, and having issued two detailed orders addressing various *Daubert* and summary judgment motions. *See Ocasio v. C. R. Bard, Inc.*, No. 8:13-cv-01962-CEH-AEP (M.D. Fla.), Docket Numbers 134 (filed May 4, 2015) & 139 (filed June 3, 2015).

V. CONCLUSION

After ten years of litigation, exhaustive discovery, and the resolution of 121 cases and claims, the plaintiffs belatedly ask that the Panel centralize proceedings. They do so, even though discovery is far advanced or complete in many of the actions. They do so, even though trial dates are set or are imminent in many others. They make the request, even though an MDL will further none of the goals of centralization in this mature litigation.

If anything, the creation of an MDL at this late date will simply disrupt the litigation and delay its resolution. The plaintiffs' motion should be denied.

[20] The Eleventh Circuit is likewise familiar with the litigation. *See Payne v. C. R. Bard, Inc.*, No. 14-12603, __ F. App'x __, 2015 WL 1435314 (11th Cir. March 31, 2015) (affirming summary judgment for Bard).

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Respectfully submitted,

By ***/s/ Richard B. North, Jr.***

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