BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: FARXIGA (DAPAGLIFLOZIN) PRODUCTS LIABILITY LITIGATION	MDL Docket No. 2776

RESPONSE OF BRISTOL-MYERS SQUIBB CO., ASTRAZENECA PHARMACEUTICALS LP, ASTRAZENECA LP, ASTRAZENECA PLC, AND ASTRAZENECA AB TO MOTION FOR TRANSFER OF ACTIONS FOR CENTRALIZATION OF PRETRIAL PROCEEDINGS

Defendants Bristol-Myers Squibb Co., AstraZeneca Pharmaceuticals LP, AstraZeneca LP, AstraZeneca PLC, and AstraZeneca AB (collectively, "Defendants") oppose the Motion for Transfer of Actions for Coordinated or Consolidated Pretrial Proceedings ("Motion" [D.E. 1]).

Centralization of these actions will not increase efficiency or convenience. Although certain common issues exist—as they do in all products liability litigation involving a single product—those issues are overwhelmed by individual questions of state law and fact. Determining causation will require inquiry into each Plaintiff's distinctive prescription and medical history. The nineteen cases require application of the laws of eleven different states. The individualized concerns of each case will eclipse any common questions. Moreover, centralization would likely result in more cases being filed because complaints would not be subject to the same level of scrutiny at the outset. Providing a forum for non-meritorious cases to be filed and parked will not promote judicial efficiency. Finally, given the relatively low number of cases and the few lawyers involved, informal coordination can achieve any benefits sought by centralization.

Thus, Defendants respectfully request that the Panel deny the Motion. In the alternative, if the Panel grants the Motion, Defendants request that the cases be consolidated in the District of Delaware or the Southern District of New York with Judge Lorna G. Schofield.

BACKGROUND

Farxiga (dapagliflozin) is an FDA-approved drug prescribed to help patients with Type-II diabetes control their blood sugar levels. Farxiga is part of a class of diabetes medications called SGLT2 inhibitors that function by reducing the amount of glucose that is reabsorbed into the bloodstream in the kidneys. Xigduo XR is an extended-release formulation of dapagliflozin and metformin.

Defendants are aware of nineteen cases pending in federal court involving dapagliflozin: the eighteen named in Movant's schedule of actions [D.E. 1-2][1] and one tag-along action, *Martin v. Bristol-Myers Squibb Co., et al.*, N.D.W.V., No. 2:16-cv-0095, which has not yet been served. Plaintiffs in these cases allege that, because Defendants failed adequately to warn about the risks of diabetic ketoacidosis ("DKA") and kidney injury associated with Farxiga, Plaintiffs suffered those and other personal injuries. The nineteen actions involve the substantive law of eleven different states: Alabama (*Foran*, *Fowler*, *Hudson*, *Popwell*, and *Warner*), California (*Burkett*), Colorado (*Prosser*), Florida (*Doty*), Illinois (*Bledsoe*), Louisiana (*Assavedo* and *Moore*),

[1] One of these cases, *Seay v. Janssen Pharmaceuticals, Inc., et al.*, E.D. Pa., No. 2:16-cv-05946, involves a plaintiff who used another SGLT2 inhibitor known as Invokana before using Farxiga and Xigduo XR. The Panel addressed a similar "combination case" in its order creating an MDL for Invokana cases last December. The Panel transferred to the MDL the nearly eighty cases involving plaintiffs who took only Invokana. And it severed the Farxiga claims from one case—*House v. Janssen Pharmaceuticals et al.*, No. 3:15–00894 (W.D. Ky.)—before transferring the Invokana claims to the MDL because the action "involve[ed] ingestion of not only Invokana . . . but also another SGLT2 inhibitor (in this case, Farxiga)." *See In re Invokana (Canagliflozin) Prods. Liab. Litig.*, MDL No. 2750, --- F. Supp. 3d ---, 2016 WL 7221425, at *1 & n.3 (J.P.M.L. Dec. 7, 2016). Similarly, the Plaintiff in *Seay* alleges that she ingested three different SGLT2 inhibitors—Invokana, Farxiga, and Xigduo XR. As in *In re Invokana (Canagliflozin) Prods. Liab. Litig.*, the Panel should not include this "combination case" in any MDL.

Mississippi (*Young*), Oregon (*Collins*), Tennessee (*Cormier* and *Seay*), Texas (*Aron*, *Perez*, and *Ponce*), and West Virginia (*Martin*).

The Movant who requests centralization—Plaintiff Chaim Aron—does not even have a viable claim. He filed his complaint in the Southern District of New York even though, according to his allegations, he resides in Houston, Texas; received his Farxiga prescription in Houston; ingested Farxiga in Houston; developed DKA in Houston; and was treated for his injuries in Houston. Plaintiff undoubtedly chose New York because a nearly identical Farxiga complaint in the Southern District of *Texas* was dismissed with prejudice based on the application of Texas law, which provides that FDA-approved warnings are presumptively adequate as a matter of law. *Quintanilla v. Bristol-Myers Squibb Co. et al.*, No. 2:16-cv-172 (S.D. Tex. Oct. 25, 2016) (ECF No. 27) ("*Quintanilla* Order") (attached as Exhibit 1).

Ten Plaintiffs are represented by one law firm (Weitz & Luxenberg). The undersigned represent all Defendants. Thus, informal coordination among counsel for all Plaintiffs and Defendants in the nineteen actions requires collaboration among a relatively small number of lawyers.

ARGUMENT

Cases should only be centralized pursuant to 28 U.S.C. § 1407 if the movant establishes three elements: that "common questions of fact" exist, that centralization will "be for the convenience of [the] parties and witnesses," and that centralization "will promote the just and efficient conduct of [the] actions." *See* 28 U.S.C. § 1407(a).

Here, centralization should be denied because individual questions of state law and plaintiff-specific facts overwhelm the typical common questions that exist in products liability cases. In addition, centralization would undermine judicial economy by incentivizing the filing

and "parking" of non-meritorious claims in an MDL. The cases should be filed and litigated where the key events occurred and key witnesses reside, and where the complaints can be scrutinized before they are allowed to proceed. Centralization also is unnecessary here because informal coordination among counsel presents an eminently viable alternative to streamline the litigation process.

I. Individual Questions of State Law and Plaintiff-Specific Facts Predominate.

A. The Laws of Eleven Different States Apply.

When cases involve individual questions of state law, there is little efficiency to be gained by centralizing the claims before one judge. *See, e.g.*, *In re Xytex Corp. Sperm Donor Prods. Liab. Litig.*, MDL No. 2751, --- F. Supp. 3d ---, 2016 WL 7222067, at *1 (J.P.M.L. Dec. 7, 2016) (Although there are "some common factual questions," the existence of "differing state law claims[] limit[s] the potential efficiency and convenience benefits to be gained through centralization."); *In re Prop. Assessed Clean Energy (PACE) Programs Litig.*, 764 F. Supp. 2d 1345, 1346 (J.P.M.L. 2011) ("[S]everal circumstances weigh against centralization" including that "certain actions will require an inquiry into individualized facts . . . and/or particular state law claims."); *In re Rite Aid Corp. Wage & Hour Emp't Practices Litig.*, 655 F. Supp. 2d 1376, 1377 (J.P.M.L. 2009) (noting that "plaintiffs assert violations of various state . . . laws, which have differing provisions").

This transfer motion involves nineteen cases. The Plaintiffs in these cases ingested Farxiga and suffered their alleged injuries in eleven different states. In each of these cases, wherever they are litigated, the Plaintiffs' claims will be governed by the law of the state in which they ingested Farxiga and suffered their alleged injuries—usually their home state.

A transferee judge, then, would need to scrutinize each claim, individually, under the relevant state law, in order to determine which claims should survive a motion to dismiss, a motion for summary judgment, or other dispositive motion. Under these circumstances, "centralization may not prevent either conflicting or multiple rulings," because state laws differ. *In re Skinnygirl Margarita Beverage Mktg. & Sales Practices Litig.*, 829 F. Supp. 2d 1380, 1381 (J.P.M.L. 2011) (noting specific differences among state laws).

No two states involved in these cases apply the same legal standards: Some states apply statutory presumptions, some have replaced common law claims with judicial or statutory alternatives, and the rest apply a multitude of permutations of common law tort standards. *See, e.g.*, Tex. Civ. Prac. & Rem. Code § 82.007(a)(1) (under Texas law, warnings approved by the FDA are presumptively adequate); *Miller v. Pfizer Inc.*, No. 4:13-cv-01687-KOB, 2014 WL 2155020, at *2 (N.D. Ala. May 22, 2014) ("Alabama law does not recognize a strict liability cause of action, but instead substitutes the judicially-created AEMLD."); *compare Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 311 (Tex. 2009) (under Texas law, a negligent design claim requires proof of a safer alternative design), *with Barton v. Adams Rental, Inc.*, 938 P.2d 532, 536–37 & n.6–7 (Colo. 1997) (en banc) (safer alternative design just one factor in a multifactor test for analyzing a design defect claim sounding in either strict liability or negligence). Federal judges are well-equipped to apply the law of each state individually. But forcing a transferee judge to learn and separately apply the products liability law of eleven or more different states does not serve judicial economy. *See In re DIRECTV, Inc., Fair Labor Standards Act (FLSA) & Wage & Hour Litig.*, 84 F. Supp. 3d 1373, 1375 (J.P.M.L. 2015) ("The motion practice directed to the [plaintiffs'] individual claims . . . which implicate over 30 state laws, very well could overwhelm a single judge.").

The Plaintiffs' forum-shopping in these cases suggests that they would prefer dispositive motions to be decided by a court having less experience with some out-of-state laws. For example, last October, a federal judge in the Southern District of Texas dismissed with prejudice the claims of one Farxiga plaintiff after determining that, under Texas law, the Farxiga warnings were presumptively adequate because they were approved by the FDA. *See Quintanilla* Order (attached as Exhibit 1). Knowing that the same Texas law (and perhaps the same court) would bar their claims, three Texas Plaintiffs—including Movant—subsequently filed three new complaints in the Southern District of *New York*, a forum that is not convenient for the Plaintiffs or witnesses, has no connection to the Plaintiffs' claims, and where the court lacks jurisdiction over all but one of the defendants. *See Aron v. Bristol-Myers Squibb Co., et al.*, S.D.N.Y., No. 1:16-cv-10003; *Perez v. Bristol-Myers Squibb Co., et al.*, S.D.N.Y., No. 1:16-cv-08961; *Ponce v. Bristol-Myers Squibb Co., et al.*, S.D.N.Y., No. 1:16-cv-08959.

Although the "Panel's primary purpose is not to divine the motives and strategies of the various litigants," where, as here "a Section 1407 motion appears intended to further the interests of particular counsel more than those of the statute, [the Panel will] . . . find less favor with it." *In re Brandywine Commc'ns Techs., LLC, Patent Litig.*, 959 F. Supp. 2d 1377, 1379 (J.P.M.L. 2013) (internal quotation marks omitted); *see In re Klein Litig.*, 923 F. Supp. 2d 1373, 1374 (J.P.M.L. 2013) (criticizing plaintiffs' improper gamesmanship in filing an action in a particular district court solely to "circumvent[] a possible unfavorable decision on a motion to dismiss"); *In re Highway Acc. Near Rockville, Conn., on Dec. 30, 1972*, 388 F. Supp. 574, 576 (J.P.M.L. 1975) (per curiam) ("[P]laintiff's ulterior motive for seeking transfer amounts to an attempted misuse of the statute."); *In re Truck Acc. Near Alamagordo, N.M., on June 18, 1969*, 387 F. Supp. 732, 734 (J.P.M.L. 1975) (per curiam) (same). Granting the Motion to centralize these

cases would condone the Plaintiffs' forum-shopping and their apparent hope that a court outside Texas will misapply Texas law. *See In re "E. of the Rockies" Concrete Pipe Antitrust Cases*, 302 F. Supp. 244, 256 (J.P.M.L. 1969) (Weigel, J., concurring) (asking, "Will transfer serve any ulterior motive of any party or parties, such as forum-shopping?").[2]

B. Individual, Plaintiff-Specific Questions Predominate Over any Common Questions of Fact.

Actions should not be centralized when "individual facts contained in [the] actions will predominate over any alleged common fact questions." *In re Abbott Labs., Inc., Similac Prods. Liab. Litig.*, 763 F. Supp. 2d 1376, 1376 (J.P.M.L. 2011). Forcing a single judge to evaluate numerous "individual issues of causation and liability" "overwhelm[s] any efficiencies that might be gained by centralization." *See In re Ambulatory Pain Pump-Chondrolysis Prods. Liab. Litig.*, 709 F. Supp. 2d 1375, 1377 (J.P.M.L. 2010).

There is no typical Plaintiff in this conglomeration of cases, and the differences among Plaintiffs will likely make the issues of warnings and causation a highly-individualized endeavor. In *In re Ambulatory Pain Pump-Chondrolysis Products Liability Litigation*, the Panel denied transfer in a case involving more than 170 related medical device products liability actions, noting that despite some questions of general causation common across the actions, "individual issues of causation and liability . . . [were] likely to overwhelm any efficiencies that might be gained by centralization." 709 F. Supp. 2d 1375, 1377 & n.3 (J.P.M.L. 2010). The burden to show commonality is even higher when fewer constituent actions are involved. *See In re Monsanto PCB Water Contamination Litig.*, 176 F. Supp. 3d 1379, 1381 (J.P.M.L. 2016). This matter involves nineteen related cases—not 170.

[2] Defendants have moved in the Southern District of New York to transfer these cases to Texas, where venue is proper and jurisdiction exists.

Denying centralization in *In re Ambulatory Pain Pump-Chondrolysis Products Liability Litigation*, the Panel noted that, "Plaintiffs have different medical histories." 709 F. Supp. 2d at 1377. Some plaintiffs had potentially been exposed to more than one allegedly defective product. *Id.* Thus, it was "'not known which specific factor or combination of factors contributed to the development of [the injury] in these cases.'" *Id.* at 1377 n.3 (quoting an FDA statement).

Similarly, determining whether adequate warnings were provided, or whether Farxiga caused each injury alleged by Plaintiffs, will in many cases involve the specific details of each Plaintiff's case. The Plaintiffs are not homogenous due to widely ranging issues including age, gender, concomitant medications, and extent of alleged damages. Further, each Plaintiff has a different medical and prescription history, often being prescribed Farxiga at different times and with different warnings. For example, based on limited medical records provided so far, the pending cases involve such diverse factual issues as the following:

- At least one Plaintiff suffered DKA *before ever taking Farxiga*.
- One Plaintiff took another drug that the Plaintiff alleges is responsible for the same injuries.
- Another Plaintiff's prescribing physician renewed the Plaintiff's Farxiga prescription *three months after* the Farxiga label was changed to include a specific warning about the possible risk of DKA.
- Some Plaintiffs allege injuries other than DKA, such as urinary tract infection, acute pancreatitis, pyelonephritis, and acute kidney injury. Meanwhile, these conditions have a multitude of accepted common causes and risk factors unrelated to Farxiga. In their Complaints, Plaintiffs even admit that they are members of "a population of

consumers already at risk for kidney disease." *See, e.g.*, *Complaint, Aron v. Bristol-Myers Squibb Co., et. al*, No. 1:16-cv-1003, ¶ 25 (S.D.N.Y. filed Dec. 29, 2016); *Assavedo v. Bristol-Myers Squibb Co., et. al*, No. 1:16-cv-09330, ¶ 16 (S.D.N.Y. filed Dec. 2, 2016); *Bledsoe v. Bristol-Myers Squibb Co., et. al*, No. 3:16-cv-1295, ¶ 26 (S.D. Ill. filed Dec. 1, 2016).

Determining which injuries, if any, were caused by Farxiga rather than by other drugs, natural risk factors inherent to each Plaintiff, or activities and co-morbidities unique to each Plaintiff, will be a highly individualized inquiry that would "overwhelm any efficiencies that might be gained by centralization." *See In re Ambulatory Pain Pump-Chondrolysis Prods. Liab. Litig.*, 709 F. Supp. 2d at 1377 & n.3.

II. Transfer Will Undermine Judicial Economy in this Case.

The real "efficiency" Plaintiffs appear to be seeking is an opportunity to stockpile cases in an MDL in the hopes of obtaining global resolution with minimal effort. As one court astutely recognized: "the evolution of the MDL process toward providing an alternative dispute resolution forum for global settlements has produced incentives for the filing of cases that otherwise would not be filed if they had to stand on their own merit as a stand-alone action." *In re Mentor Corp. ObTape Transobturator Sling Prods. Liab. Litig.*, No. 08-MD-2004, --- F. Supp. 3d ---, 2016 WL 4705827, at *1 (M.D. Ga. Sept. 7, 2016).

Last December, the Panel raised this very issue when considering a request to centralize Farxiga and Xigduo XR cases into an MDL with other SGLT2 inhibitors such as Invokana. In response to a question from the Panel, one counsel for Invokana plaintiffs **agreed** that allowing Farxiga and Xigduo XR cases into a class-wide MDL could create a parking lot for non-meritorious cases. *See* Transcript Excerpt at 27–28 (page numbers correspond to full transcript

page numbers), *In re Invokana Prods. Liab. Litig.*, MDL No. 2750, (J.P.M.L. Dec. 1, 2016) (attached as Exhibit 2). Counsel elaborated that, rather than carefully screening potential cases for factual merit, some plaintiffs' counsel would "park" cases in an MDL, hoping that the MDL judge would not thoroughly scrutinize each state law claim as normally required by Federal Rule of Civil Procedure 12(b)(6). *See id.* at 28. As Counsel noted during oral Argument before the Panel, "I think there is an issue here in [the case of SGLT2 inhibitors]:" "[T]op plaintiffs[']firm[s]" are only interested in pursuing Invokana cases, but, if an MDL is allowed for other SGLT2 inhibitors, "there are lawyers that advertise . . . [and] will see [the MDL] as a convenient place to park those cases." *Id.* "[I]f you build [it,] they will come. . . ." *Id.* (characterizing the problem generally). Thus, building a free "parking lot" for non-meritorious cases will multiply, rather than reduce, the judicial burdens in Farxiga-related cases.

Conversely, initial scrutiny of each complaint under the applicable state law will promote judicial economy by allowing only complaints that actually state a claim to proceed and by deterring non-meritorious filings. Thus far, three District Courts have issued decisions in Farxiga cases in response to motions to dismiss, and each decision highlights the importance of initial scrutiny. In two cases, the complaints were dismissed in their entirety for failure to state a claim. *See Quintanilla* Order at 9; *House v. Bristol-Myers Squibb Co.*, No. 3:15-CV-00894-JHM, 2017 WL 55876 (W.D. Ky. Jan. 4, 2017). In the third, the court dismissed the vast majority of the Plaintiff's claims, including the Plaintiff's failure-to-warn claim relating to ketoacidosis. *Young v. Bristol-Myers Squibb Co. et al.*, No. 4:16-cv-00108-DMB-JMV (N.D. Miss. Feb. 22, 2017) (ECF No. 42) ("Young Order") (attached as Exhibit 3).

In *Quintanilla*, the court recited that the plaintiff's doctor "prescribed Farxiga to treat [the plaintiff's] Type II Diabetes, consistent with its intended purpose and FDA approval."

Quintanilla Order at 4. These facts "trigger a presumption in Texas law that the FDA-approved warning label was adequate." *Id.* The Complaint did not plead facts showing that a statutory exception applied, and thus each claim failed. *Id.* at 6–7.

In *House*, the court rejected the plaintiff's design defect claim as insufficient because "the only assertion in the instant case as to how the product design was defective is a description of how the class of products works." 2017 WL 55876, at *4. The court concluded that it could not "reasonably infer from the generic description of SGLT2 inhibitors' mechanism of action that Farxiga was defective or unreasonably dangerous," as required to state a strict liability design defect claim under Kentucky law. *Id.* (alteration and internal quotation marks omitted). It dismissed the plaintiff's strict liability failure-to-warn claim and negligence claims for similar reasons: each was insufficient to state a claim under Kentucky law. *Id.* at *4–5.

In *Young*, the court scrutinized each of the Plaintiff's claims under Mississippi law. It held that the Plaintiff's common law products liability claims were subsumed by the Mississippi Products Liability Act (MPLA). *Young* Order at 5–9. Plaintiff's design defect claim failed because she did not allege a feasible alternative design for Farxiga, as the MPLA requires. *Id.* at 20. Likewise, her failure-to-warn claim based on the risk of ketoacidosis failed because she did not allege that Defendants knew of the risk of ketoacidosis, as she was required to do under the MPLA. *Id.* at 25. Plaintiff's manufacturing defect claim failed "[b]ecause Young . . . wholly failed to plead how the Farxiga she took departed from the medication's design specifications." *Id.* at 27. Plaintiff's fraud-based claims, to the extent they were not subsumed by the MPLA, failed "for numerous reasons" including that "the complaint wholly fail[ed] to plead when [any documents containing the allegedly fraudulent statements] were published or how Young herself

relied on them" and Young "ma[de] no effort to identify specific documents or to link specific misrepresentations (or omissions) to such documents." *Id.* at 30.

These dismissals suggest that initial scrutiny of each complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) serves an important purpose in Farxiga cases. Initial scrutiny will weed out non-meritorious claims before they progress to discovery and will discourage the filing and "parking" of non-meritorious claims in an MDL. *See In re High Quality Printing Inventions, LLC, ('070) Patent Litig.*, 176 F. Supp. 3d 1381, 1383 (J.P.M.L. 2016) ("The accelerating pattern of dismissals . . . suggests that the remaining cases may not require the significant judicial attention that centralization would afford.").

III. Informal Coordination, Which is Already Occurring, Can Achieve the Benefits of Centralization.

The benefits of centralization can be achieved through informal coordination and, whenever possible, informal coordination of cases is preferable to centralization under 28 U.S.C. § 1407. *See In re Monsanto PCB Water Contamination Litig.*, 176 F. Supp. 3d at 1381; *In re Abbott Labs., Inc., Similac Prods. Liab. Litig.*, 763 F. Supp. 2d at 1377. The fewer the number of actions involved, the more viable informal coordination is, so "[t]he proponent of centralization bears a heavier burden to demonstrate that centralization is appropriate where only a minimal number of actions are involved." *In re Monsanto PCB Water Contamination Litig.*, 176 F. Supp. 3d at 1380; *see also In re Xytex Corp. Sperm Donor Prods. Liab. Litig.*, 2016 WL 7222067, at *1. Similarly, when the same attorneys represent multiple plaintiffs and/or defendants, so that a small number of counsel is involved, coordination becomes easier. *See, e.g., In re Monsanto PCB Water Contamination Litig.*, 176 F. Supp. 3d at 1381; *In re Xytex Corp. Sperm Donor Prods. Liab. Litig.*, 2016 WL 7222067, at *1; *In re DIRECTV, Inc., FLSA & Wage & Hour Litig.*, 84 F. Supp. 3d at 1375; *In re Rite Aid Corp. Wage & Hour Emp't Practices*

Litig., 655 F. Supp. 2d at 1377. Under these circumstances, informal coordination between the few involved counsel is "eminently feasible and preferable to centralization." *In re Monsanto PCB Water Contamination Litig.*, 176 F. Supp. 3d at 1381.

Here, there are only eighteen cases (and one tag-along case). The Panel recently denied transfer in a matter involving over twice as many cases ("fifteen cases and 24 tag-alongs"), noting that the cases were not sufficiently numerous to merit centralization. *See In re Proton-Pump Inhibitor Prods. Liab. Litig.*, MDL No. 2757, at 3 (J.P.M.L. Feb. 2, 2017) (ECF No. 105) (attached as Exhibit 4); *see also In re oxyElite Pro and Ja3d Prods. Liab. Litig. (No. II)*, MDL No. 2582, 65 F. Supp. 3d 1412, 1413 & n.2 (J.P.M.L. 2014) (noting the "limited" number of actions—eighteen, including tag-alongs—and denying transfer); *In re oxyElite Pro and Ja3d Prods. Liab. Litig.*, MDL No. 2582, 11 F. Supp. 3d 1340, 1340–41 & n.1 (J.P.M.L. 2014) (same, denying transfer of eighteen actions, including tag-alongs); *In re Lipitor (Atorvastatin Calcium) Marketing, Sales Practices and Prods. Liab. Litig.*, MDL No. 2459, 959 F. Supp. 2d 1375, 1375–76 & n.1 (J.P.M.L. 2013) (denying transfer of twenty-eight actions, including tag-alongs). With so few cases, the movants must overcome a "heavier burden to demonstrate that centralization is appropriate." *In re Monsanto PCB Water Contamination Litig.*, 176 F. Supp. 3d at 1380. Movant cannot satisfy that burden here.

The relatively small number of lawyers makes informal coordination especially viable in these cases. *In re Boehringer Ingelheim Pharm., Inc., FLSA Litig.*, 763 F. Supp. 2d 1377, 1378 (J.P.M.L. 2011) (when parties share common counsel, "alternatives to formal centralization, such as voluntary cooperation . . . , appear viable"). One lawyer represents Plaintiffs in ten of the eighteen cases that Movant seeks to transfer. The undersigned represent all Defendants.[3] In fact,

[3] As discussed above, *Seay v. Janssen Pharmaceuticals, Inc., et al.*, E.D. Pa., No. 2:16-cv-05946, should not be included in this transfer motion. Because it is a "combination case," *Seay* includes several defendants not

informal coordination has already occurred in these matters. For example, counsel for Defendants have already released coordinated Rule 26 disclosures in thirteen of the cases. Defendants are willing to continue to coordinate and streamline the discovery process in all of the pending cases.

Contrary to Movant's assertion, Mem. Supp. Mot. for Transfer [D.E. 1-1] at 7, Defendants' filing of motions to dismiss or transfer the thirteen cases filed in the Southern District of New York does not evidence an unwillingness to coordinate. Defendants filed these motions to oppose Plaintiffs' improper forum shopping. Defendants seek to ensure that these cases, if they survive motions to dismiss, proceed in districts where the court has jurisdiction and where venue is proper. Indeed, the "New York" cases involve no Plaintiffs from New York, but rather, involve Plaintiffs from Alabama, California, Colorado, Florida, Louisiana, Oregon, Texas, and Tennessee. One Plaintiff, Steve Collins, initially filed his complaint in Oregon—where he resides and where the relevant events occurred—only to dismiss the complaint and re-file a carbon copy in the Southern District of New York just three days later. *Compare Collins v. Bristol-Myers Squibb, et al.*, No. 3:16-cv-02159-HZ (D. Ore. filed Nov. 14, 2016), *with Collins v. Bristol-Myers Squibb, et al.*, No. 1:16-cv-9722 (S.D.N.Y. filed Dec. 16, 2016).

Defendants share Movant's desire to coordinate, but believe that such coordination should occur informally where the court has jurisdiction and where venue is proper, not in an MDL driven by forum shopping.[4] The key events of each claim—the Plaintiffs' prescription and ingestion of Farxiga, their alleged injuries, and their treatment for their injuries—generally

represented by the undersigned. *See supra* n.1. Plaintiffs did not serve the motion to transfer on these additional defendants or indicate why they did not do so. *See* J.P.M.L. Rule 4.1(a).

[4] Attorneys for the *Burkett* plaintiffs contend that they "have loosely attempted to coordinate and centralize the cases in the [the Southern District of New York] without the need of an MDL by filing most of the cases in that district," (D.E. 23, at 1), and criticize Defendants for "oppos[ing] this loose coordination," *id.* at 2. But they do not explain how filing the *Bledsoe* case in the Southern District of Illinois promotes their "loose coordination" in New York strategy.

occurred in the Plaintiffs' home states. Key witnesses to those events—the Plaintiffs, their prescribing doctors, and the medical staff that treated their alleged injuries—live in the Plaintiffs' home states. Thus, the focus of the individualized inquiries into each Plaintiff's claims will center upon the Plaintiff's home forum. *In re DIRECTV, Inc.*, *FLSA & Wage & Hour Litig.*, 84 F. Supp. 3d at 1375 (where determination of claims required "individualized inquiry," "[d]enying centralization will keep the actions pending in the state where [the operative events giving rise to the claim occurred] and where, presumably, relevant witnesses and documents may be found"). Additionally, federal judges in the Plaintiffs' home states are presumably more familiar with the state law that will apply in each case. *See United States v. Hohri*, 482 U.S. 64, 74 n.6 (1987) ("[L]ocal federal district judges . . . are likely to be familiar with the applicable state law."); *Stone & Webster, Inc. v. Ga. Power Co.*, 779 F.3d 614, 618 (D.C. Cir. 2015) ("The Georgia district court is presumably more familiar with the law governing the [dispute]—that is, Georgia state law."); *In re Morgan Stanley*, 417 F. App'x 947, 949 (Fed. Cir. 2011) (per curiam) ("Factors considered under an interest of justice analysis [in determining whether to transfer a case pursuant to 28 U.S.C. §1404(a)] have traditionally included . . . the ability to have a federal judge try a case who is more familiar with the applicable state law at issue in diversity actions.").

Defendants are willing and able to informally coordinate wherever the cases are pending. Given the limited number of actions—nineteen in total—and the limited number of law firms involved, informal coordination of these actions constitutes an eminently viable alternative to centralization.

IV. If the Panel Approves Centralization, the District of Delaware is an Appropriate Venue.

If the Panel chooses to centralize these actions, Defendants propose that the cases should be consolidated in the District of Delaware or the Southern District of New York with Judge Lorna G. Schofield.

Defendants believe that the District of Delaware offers a forum that is more convenient for the parties and witnesses than the Southern District of New York. Defendants AstraZeneca LP and AstraZeneca Pharmaceuticals LP are Delaware limited partnerships with their principal place of business in Delaware. Defendant BMS is a Delaware corporation with its principal place of business in New York. Many of the relevant documents and witnesses, and individuals with substantive knowledge regarding the development, labeling, regulatory compliance, marketing, and sale of Farxiga in the United States who may be potential witnesses, are located in Delaware. Coordinating the actions in the District of Delaware will facilitate swift and convenient discovery and allow Plaintiffs access to the Court and many witnesses in one trip. This is often a decisive factor when choosing a transferee forum. *See, e.g.*, *In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Practices & Prods. Liab. Litig.*, MDL No. 2738, 2016 WL 5845997, at *2 (J.P.M.L Oct. 4, 2016) ("As Johnson & Johnson is headquartered in New Jersey, relevant evidence and witnesses likely are located in the District of New Jersey.").[5]

[5] *See also In re Daily Fantasy Sports Litig.*, MDL No. 2677, 158 F. Supp. 3d 1375, 1380 (J.P.M.L. 2016) (noting that a corporate defendant was "headquartered in the [selected] district and the individual defendants reside either in the district or nearby, which will facilitate discovery"); *In re Benicar (Olmesartan) Prods. Liab. Litig.*, 96 F. Supp. 3d 1381, 1383 (J.P.M.L. 2015) (selecting D.N.J. for MDL because "defendants, are headquartered in that district, and thus many witnesses and relevant documents are likely to be found there"); *In re Cook Med., Inc., IVC Filters Mktg., Sales Practices & Prods. Liab. Litig.*, 53 F. Supp. 3d 1379, 1381 (J.P.M.L. 2014) (establishing MDL in S.D. Ind. in part because "[defendant] Cook is headquartered in Indiana, where relevant documents and witnesses are likely to be found"); *In re Darvocet, Darvon & Propoxyphene Prods. Liab. Litig.*, 780 F. Supp. 2d 1379, 1382 (J.P.M.L. 2011) ("Relevant documents and witnesses likely are located within the Eastern District of Kentucky at defendant Xanodyne's Newport headquarters.") (citing *In re Polyurethane Foam Antitrust Litig.*, 753 F. Supp. 2d 1376, 1377 (J.P.M.L. 2010) (choosing a district that has a "nexus to the litigation through the location of the headquarters of one [of the defendants]")).

In creating an MDL in the district where a defendant was headquartered, the Panel has expressly stated that "[t]hough a related action is not currently pending in the [selected MDL district], we have found that is not a bar to centralization in a particular district." *In re Bard IVC Filters Prods. Liab. Litig.*, 122 F. Supp 3d 1375, 1377 (J.P.M.L. 2015); *In re Darvocet, Darvon & Propoxyphene Prods. Liab. Litig.*, 780 F. Supp. 2d at 1381–82 (noting that "the location of the currently filed cases is not a particularly significant factor in [the Panel's] decision. . . . Since all the actions in this docket are at an early stage, transfer to another district should not be disruptive."). No significant discovery has occurred in any Farxiga case. Moreover, judges in the District of Delaware have vast experience with pharmaceutical litigation, as the court has long been one of the leading jurisdictions for pharmaceutical patent litigation involving similar regulatory and science issues. *See, e.g.*, Katherine Rhoades, *Do Not Pass Go, Do Not Stop for Summary Judgment: The U.S. District Court for the District of Delaware's Seemingly Disjunctive Yet Efficient Procedures in Hatch Waxman Litigation*, NW J. TECH. & INTELL. PROP. 81, 83 (2016).

Conversely, Judge Rosenstengel of the Southern District of Illinois would not be an appropriate choice. First, there is only one Farxiga case (*Bledsoe*) pending in that court and no discovery has even begun.[6] More importantly, Judge Rosenstengel would not be the best choice because her docket appears to be overwhelmed by an unrelated set of products liability actions. *See* Order, at 6–7, *In re Depakote*, No. 3:14-cv-00847, (S.D. Ill. Sept. 30, 2016) (attached as Exhibit 5) (noting that the cases "have significantly taxed the resources of this Court"); *id.* at 2

[6] The *Bledsoe* case appears to be a hedge against the Plaintiffs' New York forum-shopping strategy. They rely on *Bledsoe* to suggest that the Southern District of Illinois might be a suitable location for an MDL, but it is worth noting that *Bledsoe* is the only case filed by Weitz & Luxenberg in the Plaintiff's home state—they filed their other nine cases in the Southern District of New York, even though none of those Plaintiffs is connected to New York in any way.

n.2 ("Assuming the Court holds nothing but Depakote litigation trials 365 days a year, if all 698 plaintiffs proceed to separate fifteen day trials, it will take the undersigned far past the end of her career to resolve all of the cases currently on the docket.").

CONCLUSION

Based on the foregoing, Defendants respectfully request that the Panel deny the Motion to formally centralize these actions or, in the alternative, if the Panel determines that these actions should be consolidated, transfer the cases to the District of Delaware or the Southern District of New York with Judge Lorna G. Schofield.

Respectfully submitted,

ASTRAZENECA PHARMACEUTICALS LP, ASTRAZENECA LP, ASTRAZENECA AB, ASTRAZENECA PLC, AND BRISTOL-MYERS SQUIBB CO.

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/s/ Stephen D. Raber

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