IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: DEPUY ORTHOPAEDICS, INC. PINNACLE HIP IMPLANT PRODUCTS LIABILITY LITIGATION	MDL No. 2244 Honorable Ed Kinkeade
This Document Relates To: *All Cases*	

PLAINTIFFS' STEERING COMMITTEE'S
MEMORANDUM OF LAW REGARDING STAGGERED REMAND

Staggered remands are both permitted and regularly utilized. Defendant's assertion to the contrary is inaccurate[1]. In fact, the express language of 28 U.S.C. § 1407, specifically contemplates staggered remand:

> Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however*, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.
>
> 28 U.S.C. § 1407(a) (emphasis in original)

Beyond the express language of 28 U.SC. § 1407, the rules of the JMPL are similarly clear.

> *Initiation of Remand*: Typically, a transferee judge recommends remand of an action, or a part of it, to the transferor court at any time by filing a suggestion of remand with the Panel. However, the **Panel may remand an action or any separable claim, cross-claim, counterclaim, or third-party claim within in**, upon: (1) the transferee court's suggestion of remand, (2) the Panel's own initiative by entry of an order to show cause, a conditional remand order, or other appropriate order, or (3) motion of any party.

[1] July 13, 2017 Status Conference, Transcript at pgs. 5-7.

JPML Rule 10.1(b)(emphasis added).

An MDL Court can also seek leave to preside over any remanded cases. Consequently, the Plaintiffs' Steering Committee (PSC) recommends a remand of selected groups of cases, further requesting that the Court seek intercircuit assignment to transferor courts under 28 U.S.C. § 292(d) allowing Judge Kinkeade to preside over those remanded cases.

As more than 9,000 plaintiffs[2]—the average age of whom is estimated at least 68 years[3]—continue to wait for resolution of their cases, the PSC respectfully suggests now is the time for this Honorable Court to proceed with staggered remands of certain cases to transferor courts located in New York and California.[4] A staggered remand is clearly within the authority of this Court, has been routinely and regularly utilized in other notable MDLs, and is appropriate given the totality of circumstances regarding this MDL. Furthermore, given this Court's vast experience over the litigation to date, this Court should preside over the remanded cases in the transferor district.

Whether remand is appropriate "is based on the totality of circumstances in that docket." *In re Columbia/HCA Healthcare Corp. Qui Tam Litig.* (No. II), 560 F.Supp.2d 1349,

[2] The Judicial Panel on Multidistrict Litigation (JPML) transferred the first few dozen cases to this Court, creating MDL 2244 on May 24, 2011. In the more than six years since, the pending cases have increased to more than 9,200 and there have been three bellwether trials involving the laws of three different states and a dozen plaintiffs (including the two most populous states in the nation—California and Texas). Another bellwether trial involving New York plaintiffs is scheduled to begin on September 5, 2017. The first bellwether trial (Montana law) had a single plaintiff and her spouse. The second had five Texas plaintiffs along with spouses, and the third bellwether trial concerned six California plaintiffs along with spouses. Eight New York plaintiffs and their spouses are currently included in the bellwether trial scheduled for September 2017.

[3] Order Denying Motion for Stay, at 7 (Doc. 665)(July 5, 2016).

[4] "Transferor courts" includes any cases of New York or California plaintiffs filed directly into the MDL.

1350 (J.P.M.L. 2008). Although parties may move for remand, the JMPL "is reluctant to order a remand absent the suggestion of the transferee judge." JMPL Rule 10.3(a). In considering remand, the JPML "is greatly influenced by the transferee judge's suggestion that remand of the action is appropriate." *In re Multidistrict Civil Actions Involving Air Crash Disaster Near Dayton, Ohio on March 9, 1967*, 386 F.Supp. 908, 909 (J.P.M.L. 1975). This is because "Section 1407 contemplates that the degree and manner of coordinated or consolidated pretrial proceedings is left entirely to the discretion of the trial judge." *In re Data General Corp. Antitrust Litig*., 510 F.Supp. 1220, 1226 (J.P.M.L. 1979) (noting for instance, that "[t]he transferee judge, as the firsthand judicial observer, is obviously in the best position to determine the desirability of a bifurcated method of pretrial proceedings." *Id*.).

In tandem with this broad discretion on how to coordinate and manage the MDL, is the authority of a transferee judge to make suggestions of staggered remand. *See MDL Manual Practice Before the JPML* § 10.7 ("The Panel noted that if the group of cases became ready for trial ahead of the remaining cases, they could be "separated and remanded pursuant to 28 U.S.C.A. § 1407(a) as soon as pretrial is completed as to them."). Again, there is no requirement that all cases must be remanded:

> The remand decision does not necessarily relate to the potential remand by the Panel of all related actions previously transferred by it. The panel can consider and order remand of a single action or group of actions if those actions are appropriate for remand….Where one action becomes ready for trial, or for some other reason it will not be involved in the coordinated or consolidated pretrial proceedings pending in the transferee court, remand may be ordered….The strongest factor favoring remand of only some of the transferred actions is the suggestion of remand by the transferee court as to some, but not all, of the actions.

MDL Manual Practice Before the JPML, § 10:15, Remand of a Single Action.

The Manual for Complex Litigation echoes the MDL Manual's language:

> Some of the constituent cases may be remanded, while others are retained for further centralized pretrial proceedings….The transferee court may give such matters individualized treatment if warranted, and the transferee judge (who will develop a greater familiarity with the nuances of the litigation) can suggest remand of claims in any constituent action whenever the judge deems it appropriate.

Ann. Man. Complex Litig. § 20.133

Long-standing precedent confirms that the transferee judge has "flexibility" to recommend that certain actions be remanded prior to other cases. *See In re Seeburg-Commonwealth United Merger*, 331 F.Supp. 552, 553 n. 3 (J.P.M.L. 1971). No motion of a party is required; a transferee court may make a suggestion of remand to the JPML sua sponte. *See e.g., In re Activated Carbon-Based Hunting Clothing Mktg. & Sales Practices Litig.*, 840 F.Supp.2d 1193 (D. Minn. 2012).

Furthermore, MDL transferee courts commonly make staggered remand suggestions in line with their "greater familiarity with the nuances of the litigation." For example, judges may remand in waves based on progress in discovery. *See e.g.*, "MDL Pretrial Order For Remanded Cases and Fourth Suggestion of Remand," *In re: Prempro Prods. Liab. Litig.*, 2012 WL 786353, at *5 (E.D. Ark. May 11, 2012)(remanding group of breast cancer injury-only cases that had completed generic discovery); *In re Aredia & Zometa Prods. Liab. Litig.*, 2010 WL 5387695, at *2 (M.D. Tenn. Dec. 22, 2010) (suggesting remand of a wave of 11 cases that had completed all the case-specific damages discovery, but declining remand of roughly 500 less advanced cases). Certain cases may be

remanded in waves by state. *See In re Genetically Modified Rice Litig.*, No. 4:06-md-1811 (Doc. 2722) (E.D. Mo. Apr. 1, 2010) (discussing remand of certain Texas and Louisiana cases). Even portions of individual claims may be remanded independently of other claims. *In re Collins*, 233 F.3d 809, 810-811 (3d Cir. 2000)(declining to issue writ of mandamus when JMPL followed transferee court's suggestion to remand certain cases, but retain jurisdiction over punitive damages).

Unquestionably, the Court has the authority and discretion to suggest remand of any number of cases the Court deems appropriate.

This Court Should Continue to Preside Over the Remanded Cases.

Despite waiving *Lexecon*[5], Defendants continue to raise inappropriate jurisdictional challenges. Despite being meritless, the issue becomes moot if the Court suggests remand of a portion of cases and then presides in that transferor jurisdiction with the consent of the Chief Judge of that circuit and the Chief Justice of the United States.

Such a procedure is clearly permitted under 28 U.S.C. § 292 and other MDL transferee judges have traveled to transferor districts to preside over trials.[6] For instance, in the *In re: Boston Scientific Corp. Pelvic Repair System Products Liability Litigation*, the transferee judge in West Virginia consolidated five cases, suggested remand of those cases to the Southern District of Florida, and obtained intercircuit assignment and

[5] *See* Doc. Nos. 247 and 490.

[6] The Federal Judicial Conference even has a guide for judges visiting via intra and intercircuit assignment. *See* https://www.fjc.gov/sites/default/files/2012/VisiJud2.pdf (accessed on July 24, 2017).

presided over the trial of those consolidated cases. MDL 2326, Pre-Trial Order No. 91 (Apr. 11, 2014).

Intercircuit assignments are routine and not limited to MDLs, with the Chief Justice approving 107 transfers in the first six months of 2013. *See* http://www.uscourts.gov/sites/default/files/2013-09.pdf, at 22 (accessed on July 24, 2017). This process of staggered remand and intercircuit assignment is not new. Multiple MDLs from the 1970s employed that procedure. *See In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*, 476 F.Supp. 445, 449-450 n. 5 (J.P.M.L. 1979) ("In appropriate circumstances, various transferee judges have even obtained an intercircuit assignment pursuant to 28 U.S.C. § 292(d) to conduct the remaining pretrial proceedings and trial in a transferor district," citing two prior examples in MDL 306 and MDL 174 that employed partial remand with intercircuit assignment).

Nor is the Boston Scientific MDL the only recent product liability MDL to employ staggered remand with intercircuit assignment. In the Welding Fumes MDL, the transferee judge in the Northern District of Ohio (Judge Kathleen O'Malley) suggested remand of a case to the Southern District of Mississippi, and the JPML remanded the case for trial. Judge O'Malley obtained the required certificate of necessity from the Chief Judge of the Fifth Circuit, and Chief Justice Roberts approved the intercircuit assignment. Judge O'Malley then presided over trial of that Mississippi case, sitting by designation in the Southern District of Mississippi. *Jowers v. Airgas-Gulf States, Inc.*, 1:07-WF-17010 (N.D. Ohio), *In re Welding Fumes Prods. Liab. Litig.*, MDL 1535 (suggestion of remand and intercircuit assignment orders attached globally as Exhibit A).

These are not isolated examples. For instance, in the pending Xarelto MDL litigation in the Eastern District of Louisiana, Judge Eldon Fallon entered an Order that the first two bellwether trials would be Louisiana plaintiffs, but that the third and fourth would be Mississippi and Texas plaintiffs, respectively. *In re Xarelto (Rivaroxaban) Prods. Liab. Litig.*, 14-md-2592 (Doc. 3873, Aug. 16, 2016) (selecting bellwether plaintiffs) and (Doc. 5559, Feb. 24, 2017) (setting trial date for third bellwether in the Southern District of Mississippi). While an *intra*-circuit assignment rather than an *inter*-circuit assignment[78], these orders disclose Judge Fallon's plan to remand selected Xarelto bellwether cases to other states and to preside over them in those out-of-state districts.

The reasons for this Court to continue to preside over these staggered remanded trials are obvious; most notably, the Court's experience and familiarity with the litigation. The statute permitting intercircuit transfers of district judges, 28 U.S.C. § 292(d), allows "the Chief Justice to designate out-of-circuit district court judges whenever a chief judge of a circuit certifies 'a need.'" *U.S. v. Claiborne*, 870 F.2d 1463, 1466 (9th Cir. 1989). No poll of availability of the transferor district courts is required as "[t]here is no suggestion in the statute that the chief judge does not have broad discretion to determine what constitutes 'a need.'" *Id.*

Given these flexible standards, subject to the approval of the Chief Judge of the transferor circuit and the Chief Justice, this Court may suggest remand to the JMPL of a

[7] Orders attached collectively as Exhibit B.

[8] The same statute, 28 U.S.C. § 292, governs both intra- and inter-circuit transfer. Intracircuit transfers (28 U.S.C. § 292(b)) only require the chief judge of a circuit to make that assignment, which the chief judge may do "in the public interest." The approval of Chief Justice of the United States is not required.

select group of cases and request an intercircuit assignment to preside over those remanded cases. Having this Court preside via intercircuit assignment over a group of remanded cases consolidated for trial would avoid duplication and inconsistent rulings. Moreover, the parties would have the advantage of this Court's familiarity and experience with the litigation.

On Remand, the Court Should Continue to Employ Multi-Plaintiff Trials[9]

Due to the volume of plaintiffs in this MDL, multi-plaintiff trials must continue. At least two separate bases for multi-plaintiff trials exist.

First, Rule 20 allows permissive joinder "at the option of the plaintiffs, assuming they meet the requirements set forth in Rule 20. Those requirements are:

> (a) Persons Who May Join or Be Joined.
>
> (1) *Plaintiffs.* Persons may join in one action as plaintiffs if:
>
> (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
>
> (B) any question of law or fact common to all plaintiffs will arise in the action.
>
> Fed. R. Civ. P. 20(a).

These requirements have been set out as a two-prong test, distilled down to "same transaction or occurrence" and "common questions" underlying the dispute. *In re Norplant Contraceptive Prods. Liab. Litig*., 168 F.R.D. 579, 580 (E.D. Tex. 1996). In *Norplant*, the court found Rule 20 joinder appropriate as plaintiffs were harmed by the same

[9] The PEC has previously submitted briefing describing numerous other instances where courts have consolidated cases for trial. Plaintiffs adopt and incorporate that briefing. (Dkt. 80, 3:13-cv-01071-K, Jan. 5, 2015).

"nationwide promotional materials to adequately warn Plaintiffs of the risks and severity of side effects associated with the use of Norplant." *Id*.

Further, the "common question" requirement is broad. Even with plaintiffs living in different states, harmed at different times and suffering different damages, they may be joined under Rule 20 when "each of them was damaged for the same reason and in the same manner." *El Aguila Food Prods., Inc. v. Gruma Corp*., 167 F.supp.2d 955, 959 (S.D. Tex. 2001). The *El Aguila* case concerned an antitrust and unfair trade practices claim brought by two different plaintiffs in two different states, but the court rejected defendants' request for severance, noting such factors as similarity in plaintiff's claims and overlap on witness lists. *Id*. at 960. Because plaintiffs' claims were "so alike," the court found "no conceivable reason to burden the busy Federal Court system with two separate but remarkably similar trial in two different locations when all of Plaintiffs' claims can be resolved in this Court in a single adjudication." *Id*. at 960-961; *see also Wade v. Minyard Food Stores*, 2003 WL 22718445, at *1 (N.D. Tex. Nov. 17, 2003) ("The transaction and common question requirements prescribed by Rule 20(a) are not rigid tests….they are flexible concepts used by court to implement the purpose of Rule 20 and therefore are to be read as broadly as possible whenever doing so is likely to promote judicial economy.") (internal citations and quotations omitted).

Therefore, cases involving different injuries suffered by different plaintiffs at different times can meet the two-part requirements of Rule 20 and be joined. Prejudice cannot be assumed, even in the context of a products liability MDL, as the *In re Norplant* case shows. Further, permissive joinder can—without prejudice to a defendant—increase

efficiency and make better use of the resources of the Court and the parties. This is particularly true, as in this MDL, where there are allegations of common conduct by the defendants that led to plaintiffs being implanted with the same device. Most of the exhibits are the same and there is overlap on witness lists. All these factors combine to make Rule 20 joinder appropriate here.

In addition to Rule 20, Fed. R. CIV. P. 42(a) provides: "If actions before the court involve a common question of law or fact, the court may (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay." As the Fifth Circuit has noted,

> Rule 42(a) should be used to expedite trial and eliminate unnecessary repetition and confusion. *See In re Air Crash Disaster*, 549 F.2d 1006, 1013 (5th Cir.1977) (quoting *Gentry v. Smith*, 487 F.2d 571, 581 (5th Cir.1973)). A motion to consolidate is not required; the court may invoke Rule 42(a) *sua sponte*. *See Gentry*, 487 F.2d at 581.

Miller v. United States Postal Serv., 729 F.2d 1033 (5th Cir. 1984). "[A]ctions by different plaintiffs arising out of the same tort, such as a single accident or disaster or the use of a **common product** that is alleged to be defective in some respect, frequently are ordered consolidated under Rule 42(a)." Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 2384 (3d. ed. 1998) (emphasis added). Joining or consolidating cases for trial under Rule 42(a) is within the court's discretion:

> Whether cases involving the same factual and legal questions should be consolidated for trial is a matter within the discretion of the trial court, and the court's decision is reviewed for abuse of discretion. *Stemler v. Burke*, 344 F.2d 393, 396 (6th Cir. 1965). A court may issue an order of consolidation on its own motion, and despite the protestations of the parties. *In re Air Crash Disaster at Detroit Metro. Airport*, 737 F. Supp. 391, 394 (E.D. Mich. 1989).

Cantrell v. GAF Corp., 999 F.2d 1007 (6th Cir. 1993).

Once a court determines that actions involve a common question of law or fact, the following factors must be weighed: 1) the risk of prejudice to the parties and possible jury confusion versus the possibility of inconsistent adjudication of common legal or factual issues; 2) the length of time required to try multiple actions versus individual actions; and 3) the burden of multiple actions on the resources of the parties, witnesses, and judiciary including time and expense. *Arnold v. Eastern Air Lines, Inc.*, 681 F.2d 186, 193 (4th Cir. 1982); *Barge v. City of Leesville, LA*, 2008 WL 4441962, *1 (W.D. La. Sept. 25, 2008). As Wright & Miller explain: "[I]t is for the district court to weigh the saving of time and effort that consolidation under Rule 42(a) would produce against any inconvenience, delay, or expense that it would cause for the litigants and the trial judge." Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 2383 (3d ed. 1998).

Consolidated trials have been employed in numerous federal cases, specifically in products liability multi-district litigation, including: *In re Welding Fume Products Liability Litigation*, 2006 WL 2869548, *6 (N.D. Oh. Oct. 5, 2006) (two cases consolidated for trial after court found risk of prejudice to defendants minimal and jury would be able to properly parse the evidence); *In re Stand 'n Seal, Products Liability Litigation*, 2009 WL 2224185, *2 (N.D. Ga. July 21, 2009) (although plaintiffs purchased product at different times and suffered different injuries, cases relied on same core allegation that product hazardous, so consolidation of seven cases was appropriate as separate trials would be redundant and not in interests of judicial economy); and *In re: Boston Scientific Corp. Pelvic*

Repair Corp., United States District Court for the Southern District of West Virginia, MDL 2326, Pretrial Order #91 (Apr. 11, 2014) (court consolidated five certain cases for trial involving use of transvaginal surgical mesh to treat pelvic organ prolapse and stress incontinence). After noting the consolidation factors discussed above, the *Boston Scientific* court discussed its ability to manage the trial and the advantages afforded by multi-plaintiff bellwether trials:

> While there will be separate evidence relating to failure to warn and individual damages, the similarities in these cases, particularly as to the claim of design defect, far outweigh any differences. In addition, carefully crafted jury instructions and special interrogatories can avoid the confusion that may arise due to these differences.
>
> ….
>
> The more cases that are tried together in this MDL totaling over 11,000 cases, the sooner the parties will come to understand the true nature of these cases, their values, the weaknesses and strengths in their cases and the cost of trying them.
>
> ….
>
> Consolidation of cases in multidistrict litigation is not new, and the risk of juror confusion can be avoided if the evidence is presented in an organized manner with carefully crafted jury instructions.

Id.; *see also Canterbury v. Boston Scientific Corp. (In re: Boston Scientific Corporation Pelvic Repair System Products Liab. Litig.*, MDL 2326), 2:12-cv-08633, Dkt. No. 9 (PTO #78, Order Consolidating above Cases for Trial on All Issues, S.D. W.Va. February 19, 2014)[10] (consolidating 11 pelvic mesh cases for trial, and noting that although the plaintiffs were implanted with the device by four different surgeons – just as the bellwether plaintiffs here – "[w]hile there will be separate evidence relating to failure to warn and individual

[10] Orders attached collectively as Exhibit C.

damages, the similarities in these cases far outweigh any differences. In addition, carefully crafted jury instructions and special interrogatories can avoid the confusion that may arise due to these differences.")

As the MDL court noted in *In re Mentor Corp. Obtape Transobturator Sling Products Liab. Litig.*, No. 4:08MD-2004 (CDL), 2010 WL 797273, at *3-4 (M.D. Ga. Mar. 3, 2010):

> Consolidation appears to be a particularly appropriate tool that should be seriously considered in modern-day multidistrict litigation. It has already been determined that cases referred to a district court by the Judicial Panel on Multidistrict Litigation involve common questions of law and fact such that it is deemed appropriate, and preferable, that the pretrial aspect of the cases be handled in a consolidated manner. Furthermore, it has been found that conducting "bellwether trials" is often an effective way to manage multidistrict litigation to a successful conclusion. For the bellwether trial concept to be an effective gauge for evaluation of other cases, it would appear that the more bellwether trials conducted, the more reliable the gauge. Since a court has limited time and resources to try large numbers of bellwether trials, it would appear that consolidation of multiple cases for trial in the MDL setting would provide the parties with an opportunity to obtain results for multiple claims without burdening the court or the parties with the substantial cost of multiple separate trials.

In that MDL the trial court consolidated four cases for trial, finding,

> consolidation of the four cases requested by Plaintiffs for trial far outweighs any negative consequences arising from a consolidated trial. The four Plaintiffs are similarly situated in terms of the manner in which they were implanted with the ObTape; they allegedly suffered similar complications and resulting medical problems; and the time frame of their surgeries and complications is similar. In addition, Plaintiffs' physicians received similar information and warnings regarding ObTape and the recommended treatment for problems with ObTape. None of Mentor's arguments persuade the Court that the four cases should not be consolidated.

Id. The court in *Mentor* rejected the defendants' arguments that there were too many individualized issues and differences among the bellwether plaintiffs:

> The Court rejects Mentor's argument that there are too many individual issues such that Plaintiffs' claims are not sufficiently similar for a consolidated trial and that the jury will not be able to keep up with the plaintiff-specific evidence. The Court concludes that this issue is not insurmountable. While each of Plaintiffs' specific medical conditions may be different, those differences and their significance can be explained to a jury and easily understood. . . . In summary, the Court finds that these four cases can be presented to a jury in a manner that is not confusing and that assures Mentor its right to a fair trial.

Id.

As the MDL courts noted above, any potential risk of confusion or prejudice in a consolidated trial can be minimized using cautionary instructions and other means. This concept is not new – trial courts have recognized the benefits of consolidated trials for decades and have repeatedly acknowledged the effectiveness of these tools to manage the litigation.

In *Consorti v. Armstrong World Indus. Inc*., 72 F.3d. 1003 (2d Cir. 1995) *vacated on other grounds*, 116 S.Ct. 2576, the trial court consolidated the claims of four asbestos workers for trial. On appeal, the Second Circuit affirmed the consolidation order:

> Consolidation is a valuable and important tool of judicial administration. This is especially true when the courts are overwhelmed with huge numbers of cases which involve substantially the same questions of fact, as happens when large numbers of plaintiffs allege that they have developed similar illnesses in reaction to a particular toxic substance. See FED. R. CIV. P. 42(a). In such circumstances, consolidation permits the federal court to furnish trials in hundreds, even thousands of cases it might otherwise not reach for many years. If carefully and properly administered, as it was by Judge Sweet below, consolidation is also capable of producing, with efficiency and greatly reduced expense for all parties, a fairer, more rational and evenhanded delivery of justice.

Id. at 1006. The court of appeals discussed another benefit of consolidated trials: the ability for jurors to compare the relative injuries of the plaintiffs and more fairly award compensation:

> One of the most persistent and troublesome problems in the administration of justice in our civil jury system is the unpredictable relationship between different juries' awards, particularly for intangibles such as pain and suffering. It of course should be the goal of the overall administration of such litigation that more seriously injured plaintiffs receive higher compensation than those less seriously injured. However, when each case is tried before a different jury, the relationship between the size of one judgment for intangibles and another will be largely happenstance. *See generally* James F. Blumstein et al., *Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury*, 8 YALE J. ON REG. 171, 177 (1991). When numerous claims are tried before a single jury, that jury will recognize that an important part of its chore is to scale the relative seriousness of the various plaintiffs' injuries and to see to it that their respective awards are consistent with that scaling.

Id. at 1007. The court of appeals specifically rejected the argument that jurors would not be able to comprehend the issues in a multi-plaintiff case, and reaffirmed the effectiveness of instructions and other management devices to minimize any risk of confusion or prejudice:

> [N]o logic supports the proposition that the incremental addition of similar cases will reduce the jury's ability to understand and resolve the issues placed before it. Without doubt, consideration of a single toxic tort case is challenging, requiring jurors to grapple with complicated issues of chemistry and medicine. But it does not follow that the jury will be less able to deal with those issues if the same questions are repeatedly put to it over a substantially longer period of time. Quite to the contrary, if a jury spends many weeks, or many months, considering numerous cases of asbestos disease, and repetitively hears the disputes of experts and the arguments of counsel on case after case, that jury is likely to develop a far deeper understanding of the issues than a jury whose exposure to those complicated questions is brief, and requires answering only a single set of questions. …

> Furthermore, we have noted repeatedly that a district court can greatly assist a jury in comprehending complex evidence through the use of intelligent management devices. *See, e.g., Johnson*, 899 F.2d at 1285; *Malcolm*, 995 F.2d at 349, 352–53. Such management devices include organizing evidence by topic, using charts and visual aids, allowing note-taking by jurors, furnishing the jury with notebooks and albums of pertinent exhibits structured in a manner to help it master complex materials, interim explanations by the judge on issues of law and fact and on the limited use of evidence, interim addresses to the jury by counsel, and questionnaires and special verdict forms to help the jury approach deliberations in a well-organized fashion. …
>
> By implementing such measures, [the trial court] insured that plaintiffs and defendants received a trial by jury that fairly addressed the individual claims while effectively managing the resources of the court and giving the parties the benefit of an efficient and economical trial. We have no reason to believe that the consolidation prevented the jury from rendering verdicts based on the evidence as it related to each independent claim. OCF's [Owens Corning Fiberglas] contention of improper consolidation is without merit.

Id. at 1007-1008. Other courts of appeals have reached similar conclusions:

> ***Kershaw v. Sterling Drug, Inc.*, 415 F.2d. 1009, 1012 (5th Cir. 1969):** Consolidating two cases one day prior to trial, and noting "in charging the jury, the trial judge sufficiently emphasized the importance of separating the Kershaw [sic] and the companion case for consideration and verdict. It is apparent the jury did this."
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> ***Johnson v. Celotex Corp.*, 899 F.2d. 1281, 1289 (2nd Cir. 1990):** Rejecting defendants' claim that consolidated trial violated due process: "Owens–Illinois specifically contends that the consolidation of Johnson and Higgins and the failure to erect procedural safeguards during the consolidated trial violated appellants' due process rights. Since we have found the consolidation was not an abuse of discretion, and since the trial judge carefully instructed the jury throughout the trial to consider each plaintiff's claims individually, there was no need to provide other procedural safeguards concerning the consolidation."
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> ***Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d. 1492, 1496 (11th Cir. 1985):** Four asbestos cases were consolidated for trial; the court of appeals affirmed consolidation: "In our view, the court's pretrial ruling to consolidate these cases was entirely reasonable. The four cases presented common issues of law and fact, and the factors we have referred to, *supra*, which inform a court's decision whether to consolidate, were duly

> considered. The striking similarity of these cases became even more apparent at trial, thus demonstrating the wisdom of the trial court's decision."

Trial courts have also noted the effectiveness of management tools to eliminate the risk of juror confusion in multi-plaintiff trials:

> ***In re Joint Eastern & Southern Dist. Asbestos Litig.*, 125 F.R.D. 60 (E.D.N.Y. 1989):** The district court denied defendant's motion to sever five cases consolidated for trial. "Other courts that have confronted this problem have consolidated personal injury and wrongful death claims for trial. … These courts' experiences, as well as the availability of cautionary instructions, convinces this court that consolidation is appropriate, notwithstanding the coexistence of personal injury and wrongful death claims."
>
> ***In re Joint Eastern & Southern Dist. Asbestos Litig.*, 1990 U.S. Dist. LEXIS 442 (E.D.N.Y. 1990):** The district court denied motions to sever five personal injury and four wrongful death cases for trial: "While it is premature at this point to identify the particular measures that will work best here, the experience of these courts, and this court in *Drago*, is convincing that consolidation of these nine Cluster 11 actions will not result in excessive confusion or prejudice."

These cases confirm that consolidation is a widely used procedural device to assist trial courts in managing their dockets, especially in the MDL and mass tort context, and the courts of appeals have endorsed consolidation as a proper device where common questions of law and fact exist, as they do here. There are many reasons, as these courts have noted, why consolidated trials are preferable to single-plaintiff trials, and those reasons are particularly important in the context of bellwether trials in such a large product liability MDL.

The PSC's Proposal for Staggered Remand and Multi-Plaintiff Trials

The PSC respectfully recommends staggering remand groups of trial cases to California and New York. Following the upcoming fourth bellwether trial, this Court will

have applied the law of those two states in actual trial settings. As such, there would be no need to "reinvent the wheel" regarding jury instructions, verdict forms, motions in *limine* related to the applicable law, or sort through other issues presented by those states' substantive law. Also, California and New York are two of the four most populous states in the country, with large numbers of plaintiffs implanted with the Pinnacle hip system. Specifically, the PSC suggests:

1. The parties submit groups of metal-on-metal cases for remand in those jurisdictions, with at least 20 cases in each remand group.
2. Judge Kinkeade set trial schedules to prepare those groups for trial.
3. Judge Kinkeade select which cases out of each group will be tried, and will group them accordingly.
4. All pretrial matters, including *Daubert* hearings, motions in *limine*, and evidentiary rulings, will be made by Judge Kinkeade.
5. Judge Kinkeade request intercircuit assignment and travel to various jurisdictions to try any cases he chooses.
6. Any settlement of remanded cases will be subject to a hold back for Common Benefit fees and expenses.

Subject to the necessary approvals from the Chief Judges of the Second and Ninth Circuits and the Chief Justice, the plan above represents a practical and expedient way to continue to advance this litigation.

Total Remand is Not Appropriate for a Variety of Reasons Including the Fact that There Are Categories of Cases in this MDL That Are Not Yet Ripe for Remand.

Defendants' Pinnacle hip implants suffer from several defects. The parties and the Court have primarily focused on the "metal-on-metal" articulation found in the Pinnacle Ultamet configuration, and the injuries caused by the generation of metal wear debris

and ions released from the articulating surfaces in that configuration. However, there are other aspects of the devices that are within the scope of this MDL. For example, this court has still not addressed the non-revision cases, the other non-metal on metal configurations, or the discovery peculiarities of certain state laws and consumer claims. Furthermore, the Court is currently in the process of implementing a discovery process involving both a Plaintiff Profile Form and a Defense Fact Sheet to collect supplemental information on the 9,200 filed cases. On December 1, 2016, following the Andrews bellwether verdict, Judge Kinkeade stated that the Court would issue an order designed to better determine the breakdown of cases in the MDL.[11] This process needs to be implemented. More specifically, the Plaintiff Profile Form data relating to revisions and Pinnacle component types needs to be identified. Additionally, the Device History Reports, Complaint Files and related Defense Fact Sheet information likewise needs to be provided before any global remand occurs. And of course, all cases should not await remand while this court continues to do its job on other cases.

[11] *See Andrews* Transcript Vol. 32 at pgs. 32-33.

Conclusion

The Court clearly has the authority to suggest a staggered remand of selected cases. Furthermore, the Court can and should seek an intercircuit assignment to the districts recommended herein and preside over those cases. Such a procedure has been utilized in MDLs for decades and in recent examples has been successfully employed in large products liability MDLs. Staggered remands, with the Court requesting intercircuit assignment for trial of select California and New York metal-on-metal cases, will advance the overall purpose of this MDL and represents the most efficient means of conducting those trials at this juncture. And lastly, as cited herein, certain cases may be remanded in waves by state, which is precisely what plaintiffs are recommending for this MDL[12].

Dated: July 28, 2017

Respectfully submitted,

W. Mark Lanier
THE LANIER LAW FIRM
6810 FM 1960 Rd W
Houston, TX 77069-3804
(713) 659-5200
(713) 659-2204 Fax
E-mail: wml@lanierlawfirm.com

Wayne Fisher
FISHER, BOYD, JOHNSON
& HUGUENARD, LLP
2777 Allen Parkway, 14th Floor
Houston, Texas 77019
Telephone: (713) 400-4000
Fax: (713) 400-4050
Email: wfisher@fisherboyd.com
Email: justinp@fisherboyd.com

[12] *See In re Genetically Modified Rice Litig*., No. 4:06-md-1811 (Doc. 2722) (E.D. Mo. Apr. 1, 2010) (discussing remand of certain Texas and Louisiana cases).

Richard J. Arsenault
NEBLETT, BEARD & ARSENAULT
2220 Bonaventure Court
P.O. Box 1190
Alexandria, Louisiana 71301
Telephone: (800) 256-1050
Fax: (318) 561-2591
E-mail: rarsenault@nbalawfirm.com

Jayne Conroy
SIMMONS HANLY CONROY
112 Madison Avenue
New York, NY 10016
Telephone: (212) 784-6402
Fax: (212) 213-5949
E-mail: jconroy@simmonsfirm.com

CERTIFICATE OF SERVICE

I certify that the foregoing instrument was served on counsel for the Defendants by the Court's ECF system on July 28, 2017.

/s/ Richard J. Arsenault

EXHIBIT A

07WF17010a-ord(Suggestion-of-Remand).wpd

BEFORE THE JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

In re: Welding Fumes
Products Liability Litigation **MDL No. 1535**

SUGGESTION OF REMAND

***Jowers v. Airgas-Gulf States, Inc.*, case no. 1:07-WF-17010-KMO (N.D. Ohio)**
(originally case no. 1:06-CV-01187 (S.D. Miss.); transferred pursuant to CTO-47)

REQUEST FOR EXPEDITED HEARING

On January 11, 2007, the Judicial Panel on Multidistrict Litigation ("JPML") docketed Conditional Transfer Order 47 ("CTO-47"), thereby transferring the above-entitled action ("*Jowers*") to the undersigned for coordinated or consolidated pretrial proceedings.[1] For the reasons stated below, and pursuant to Rule 7.6(c)(ii) of the Rules of Procedure of the JPML, the undersigned transferee judge now suggests that *Jowers* be **remanded** to the transferor court, the United States District Court for the Southern District of Mississippi.

In addition, due to certain time constraints explained below, the undersigned respectfully requests an expedited ruling from the JPML.

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[1] On January 29, 2007, the JPML lifted the automatic stay on CTO-47, and the Order was filed in the District Court for the Northern District of Ohio on February 5, 2007.

BACKGROUND

Global discovery in this MDL has been largely completed, and the undersigned (also, "the Court") has conducted two bellwether trials.[2] On May 1, 2007, lead counsel for MDL plaintiffs requested that the Court designate *Jowers* as the next bellwether case and, further, that the case be remanded to the Mississippi transferor court for trial.[3] Plaintiffs' lead counsel also suggested that the undersigned seek temporary appointment to the District Court for the Southern District of Mississippi, for the purpose of presiding over the trial of *Jowers*, after remand.[4]

The defendants objected to plaintiffs' designation of *Jowers* as a bellwether trial, both because defendants believed that all additional MDL bellwether trials should be randomly selected, and because defendants believed that all bellwether trials should be conducted in the Northern District of Ohio.[5] Defendants suggested, accordingly, that the Court either designate a case other than *Jowers* using random selection, or require Jowers to waive any objection to venue in the transferee court and agree to trial in Cleveland, Ohio. The defendants did indicate, however, that *if* the Court chose to designate *Jowers* as a bellwether case, and *if* the JPML remanded *Jowers* to the Southern District of Mississippi for trial, then defendants joined plaintiffs' request that the undersigned preside over that trial, via temporary appointment to the Southern District of Mississippi.

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[2] In addition, the undersigned has presided over four other bellwether cases that were set for trial but ultimately were not tried.

[3] *See* exhibit A (email dated May 1, 2007 from Don Barrett, Plaintiffs' Lead Counsel, to David R. Cohen, Court-Appointed Special Master in the *Welding Fume* MDL).

[4] *Id.*

[5] *See* exhibit B (letter dated May 15, 2007 from John Beisner, Defendants' Lead Counsel, to the undersigned).

After considering the parties' positions, the Court granted in large part plaintiffs' request to designate *Jowers*. Specifically, on May 18, 2007, the Court informed the parties by telephone that it had decided to schedule three (not just one) additional bellwether trials: (1) a trial to begin on November 5, 2007, in Cleveland, Ohio, of a case to be selected by plaintiffs from a group of 100 cases previously designated randomly by the Court for early case-specific discovery; (2) trial of the *Jowers* case, to begin on January 28, 2008, in the Southern District of Mississippi (assuming remand by the JPML); and (3) a trial to be scheduled, beginning in the spring or summer of 2008, of a case that the Court would randomly select after the *Jowers* case is completed. The Court then gave the plaintiffs 10 days to identify a case for the November, 2007 trial slot; on May 29, 2007, plaintiffs chose a case known as *Tamraz*.[6]

On June 6, 2007, the Court entered an Order ("*Bellwether Order*") confirming the choices of *Tamraz* and *Jowers* as bellwether trials, and documenting their trial dates.[7] As explained in the *Bellwether Order*, the Court concluded that *Jowers* was among those cases that best served the purposes contemplated by the Court's "bellwether" designation, and that trial of the *Jowers* case – even in a remote District – would serve well to advance the resolution of the MDL as a whole. The Court then ordered the parties in both *Tamraz* and *Jowers* to complete all case-specific discovery and to otherwise make the cases trial-ready as of the dates designated.[8]

In addition, over the next several months, the undersigned pursued and obtained temporary

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[6] *Tamraz v. Lincoln Elec. Co.*, case no. 04-CV-18948 (N.D. Ohio).

[7] *See* exhibit C (*Bellwether Order*, MDL master docket no. 2043).

[8] As of the date of this Suggestion, having undertaken efforts at making *Jowers* trial-ready, the defendants no longer object to the choice of *Jowers* for trial; but, as noted below, they do continue to object to trial of *Jowers* in Mississippi.

assignment to the Southern District of Mississippi, for the purpose of presiding over the trial of *Jowers* after remand. Specifically, pursuant to 28 U.S.C. §292, the undersigned obtained formal approvals for temporary assignment to the Southern District of Mississippi from: (1) Chief Justice John G. Roberts, Jr.; (2) Fifth Circuit Court of Appeals Chief Judge Edith Jones; (3) Sixth Circuit Court of Appeals Chief Judge Danny Boggs; and (4) the Chairman of the Judicial Conference Committee on Inter-Circuit Assignments.[9]

In sum, as of today, the great bulk of pretrial proceedings in *Jowers* has been completed; and, by virtue of the above-described temporary judicial assignment, the undersigned will ensure that any remaining pretrial proceedings are completed before the anticipated trial date of January 28, 2008, should the JPML order remand to the transferor court.

For these reasons, the just and efficient handling of this matter will best be served by the remand of this action to the United States District Court for the Southern District of Mississippi, from which it was originally transferred.

VENUE ISSUES

The only fact that potentially complicates the JPML's decision regarding this Suggestion of Remand arises from an amended pleading filed by plaintiffs. Plaintiffs filed this amended pleading after the Court informed the parties of its intention to: (1) seek remand of *Jowers* to the transferor court, and (2) procure designation to preside over that action, following remand by the JPML.

Specifically, on June 5, 2007, plaintiff Jowers filed a second amended complaint, which

[9] *See* exhibit D (Designation and Assignment of an Active United States Judge for Service in Another Circuit, dated October 23, 2007).

dropped 14 of the defendants listed in the prior complaint. In addition, the second amended complaint alleged that venue was proper in the Northern District of Ohio, rather than Mississippi. In a third amended complaint, which added a defendant, Jowers repeated this Ohio venue allegation. Previous to the filing of these amended complaints, Jowers had consistently maintained in correspondence and other documents filed with the MDL court that venue was and is proper only in Mississippi, and that he did not intend to waive Mississippi venue.

On October 1, 2007, the Court informed the parties that the undersigned had received informal notification that all necessary approvals for temporary assignment to the Southern District of Mississippi, to preside over the *Jowers* trial, were forthcoming.[10] On October 3, 2007, some of the defendants filed a motion to withhold suggestion of remand,[11] relying on Jowers' apparent waiver of venue in his second and third amended complaints. This document was the first time any party pointed out to the Court that Jowers had changed his venue allegations. In their motion, the moving defendants asked the Court to order that *Jowers* be tried by the undersigned in the Northern

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[10] *See* exhibit E (email dated October 2, 2007, from *Welding Fume* Special Master to various counsel in MDL and in *Jowers*, confirming conversation of October 1, 2007).

[11] *See* exhibit F (*Jowers* docket no. 84). Notably, the motion to withhold suggestion of remand was filed by only 6 of the 18 defendants listed in Jowers' third amended complaint (referred to hereinafter as "moving defendants"). Of the other 12 defendants, 9 *denied* Jowers' new allegation of Ohio venue, 2 more denied the allegation for want of knowledge, and 1 did not answer. Thus, according to their pleadings, less than half of all defendants named in Jowers' third amended complaint believe that trial of the case should occur in the Northern District of Ohio.

On November 7, 2007, several hours after this point was noted by Jowers' counsel during the final hearing on this matter, counsel for the moving defendants notified the Court that he had contacted the other defendants and obtained their agreement to waive any objections to trying *Jowers* in Cleveland. Counsel for moving defendants did not contend that this late change in the other defendants' position, as compared with the written allegations in their pleadings, was anything other than a decision to change their *substantive* view of this venue issue – that is, there is no claim that the initial objections to venue in the other defendants' answers to Jowers' third amended complaint had been made in error.

District of Ohio, instead of the Southern District of Mississippi. As moving defendants pointed out, there is authority for the proposition that, despite the rule established in *Lexecon*,[12] a party to an MDL may be deemed to have waived any objection to trial in the transferee court if, by words and/or actions, the party indicates a clear intention to consent to trial in that district. *See, e.g., In re: Carbon Dioxide Industry Antitrust Litig.*, 229 F.3d 1321, 1326 (11th Cir. 2000) ("*Carbon Dioxide*") (affirming transferee court's refusal to suggest remand of an MDL case, because plaintiffs had stipulated to venue in the transferee court and did not attempt to retreat from that stipulation until the day of trial; plaintiffs' emergency motion to remand, filed with the JPML on the eve of trial in the transferee court, was later denied as moot); *In re: African-American Slave Descendants Litig.*, 471 F.3d 754, 755 (7th Cir. 2006) ("*Slave Descendants*") (concluding that plaintiffs' filing of a consolidated amended complaint, which did not object to venue in the MDL transferee court, authorized the transferee court to rule on the merits of the lawsuit, "notwithstanding" *Lexecon*; citing *Carbon Dioxide*).

Having studied carefully the moving defendants' position and the cases they cite in both their motion to withhold suggestion of remand and in their reply brief,[13] however, the Court finds clearly distinguishable the circumstances at issue here from those at issue in either *Slave Descendants* or *Carbon Dioxide*. In *Slave Descendants*, all parties apparently agreed that the written waiver of venue in the consolidated amended complaint was intentional, and no waiving-plaintiff ever requested remand. In *Carbon Dioxide*, the waiver of venue was repeatedly reaffirmed in various

[12] *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

[13] *See* exhibit G (*Jowers* docket no. 130) (moving defendants' reply in support of motion to withhold suggestion of remand, and response to Jowers' motion to amend complaint nunc pro tunc).

filings and oral arguments, documented through a stipulation memorialized by court order, and remained unquestioned until the first day of trial. Here, in contrast, until filing his second amended complaint on June 5, 2007, plaintiff Jowers had always asserted clearly and unequivocally his right and intention to seek remand to the transferor district when appropriate. Indeed, it was Jowers' insistence on trial in the Southern District of Mississippi, as reflected in exhibit A, that prompted moving defendants' initial objections to the selection of *Jowers* as a bellwether case, and it is what prompted the undersigned to go through the arduous process of obtaining designation to act as trial judge in that remote District. And, at least until last evening, the defendants in *Jowers* were not even close to unanimous in their position that venue is appropriate in the Northern District of Ohio.[14]

As reflected in plaintiffs' November 2, 2007 motion to amend complaint nunc pro tunc,[15]

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[14] *See* footnote 11, above.

[15] *See* exhibit H (*Jowers* docket no. 123).

See also exhibit I (*Jowers* docket no. 111) (Jowers' opposition to moving defendants' motion to withhold suggestion of remand). In exhibit I, Jowers advocated that, if the Court concluded it could not suggest remand pursuant to 28 U.S.C. §1407, it should transfer the case to the Southern District of Mississippi pursuant to 28 U.S.C. §1404. The Court concluded, however, that a §1404 transfer is not allowed. *See Lexecon*, 523 U.S 41 n.4 ("Because we find that the statutory language of §1407 precludes a transferee court from granting any §1404(a) motion, we have no need to address the question whether §1404(a) permits self-transfer given that the statute explicitly provides for transfer only 'to any other district.'"); *In re: Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 2005 WL 1528946 at *1 (W.D. Wash. June 24, 2005) ("The court concludes that given the language of 28 U.S.C. §1407(a) and the Supreme Court's *Lexecon* opinion, it does not have the authority to rule on any motion to transfer a case under 28 U.S.C. §1404(a)."); *In re: Bridgestone/Firestone, Inc.*, 190 F.Supp.2d 1125, 1146 n.31 (S.D. Ind. 2002) ("transfer to a possibly more appropriate federal court under 28 U.S.C. §1404 appears to be beyond our power at this point") (citing *Lexecon*).

If the Court were to consider whether a §1404(a) transfer is appropriate, the Court would conclude that, after weighing all relevant factors, the sum of those factors clearly preponderates in favor of transfer. The moving defendants note correctly that the fact that *Jowers* is part of a larger MDL proceeding in the Northern District of Ohio weighs against transfer, and does lessen the strength of some of the factors upon which parties traditionally rely under §1404(a); but, ultimately, the Court does not find that the "MDL overlay" to this inquiry would change the Court's final calculus.

moreover, where plaintiffs seek to reinstate the venue allegations from the original *Jowers* complaint, plaintiffs assert that the references to venue in the Northern District of Ohio that appear in the second and third amended complaints resulted from scrivener's error; and, after a hearing on the issue, the undersigned found plaintiffs' assertion to be well-taken.[16] Specifically, this Court found that Jowers did not intend to, and did not in fact, waive Mississippi venue by including the

[16] Jowers' counsel avers, in an affidavit, that: (1) the Ohio venue allegations contained in the second and third amended complaints were "cut and pasted" from another Mississippi plaintiff's amended complaint, using word processing software; (2) Jowers did not authorize and counsel did not intend to change the venue allegation in *Jowers* from Mississippi to Ohio; and (3) the scrivener's error arises because Plaintiffs' lead counsel in this MDL represents many hundreds of plaintiffs. The Court finds these averments credible and that they provide an appropriate basis upon which to allow plaintiffs to cure their error. Other courts have reached the same conclusion in highly similar circumstances. *See Schillinger v. Union Pacific Railroad Co.*, 425 F.3d 330, 333 (7th Cir. 2005) (affirming the district court's remand of the case to state court, where federal subject matter jurisdiction depended on whether a particular defendant ("UPC") was added properly in an amended complaint, ruling: "plaintiffs' counsel filed an affidavit in which he explained that his staff used the original complaint as a word processing template in drafting the amended complaint and failed to notice that this resulted in the incorporation of the old caption and introductory allegations into the amended complaint. The district court acted within its discretion in finding that UPC's inclusion [as a defendant] in the amended complaint was a clerical error, that plaintiffs had no intention of bringing UPC back into the litigation, and that UPC was in fact not a new party to the suit.").

Ohio venue allegation in his second and third amended complaints.[17]

Having found no intentional waiver of venue, the undersigned believes this case falls squarely within the rule of *Lexecon*, which mandates remand for trial upon completion of all pretrial matters within the jurisdiction of the transferee court.[18]

REQUEST FOR EXPEDITED RULING

Since June 6, 2007 – the date of the Court's *Bellwether Order* designating *Jowers* for trial – the parties, their counsel, the undersigned, and the Judges and staff of the Southern District of

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[17] In so ruling, the Court found factually distinguishable the case cited by moving defendants, *Orb Factory, Ltd. v. Design Science Toys, Ltd.*, 6 F. Supp.2d 203 (S.D.N.Y. 1998). In *Orb Factory*, the plaintiff alleged a certain venue in its complaint, and defendant DST did not object via Rule 12 motion or in its answer. "[O]ver one full year" later, DST then claimed, *for the first time*, that its failure to object to venue was a mistake; and the basis for the alleged mistake was DST's own counsel's false assumption regarding postal addresses – not scrivener's error. *Id.* at 207. In this case, in contrast: (1) Jowers' *initial pleading* asserted venue was proper in Mississippi, and he reiterated his continuing desire to adhere to that venue assertion as recently as May 18, 2007; (2) the period between Jowers' subsequent allegation of Ohio venue and his request to amend his complaint to correct this allegation was only five months; (3) the Court found credible Jowers' counsel's affidavit that the Ohio venue allegation was scrivener's error, and not the product of any dilatory motive; (4) the period between Jowers' actual discovery of the scrivener's error and the request to amend was only one month; and, most important, (5) given that the Court's grant of Jowers' motion to amend complaint nunc pro tunc merely returned circumstances to their status as of June 6, 2007 (the date of the Court's *Bellwether Order*), moving defendants could point to no undue prejudice.

[18] As noted above, there are some final case-specific pretrial matters in *Jowers* that are yet to be resolved. That fact arises from the way this MDL has been structured by both the Court and the parties. Thus, while matters pertinent to all cases (including complex rulings under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and generally-applicable dispositive motions) were handled prior to commencement of any bellwether trials, *case-specific* dispositive motions and motions in limine are handled just prior to the commencement of the trial of the case to which those motions apply. Because the undersigned will be the one both deciding all case-specific motions in *Jowers* and also presiding over trial of the case, the fact that these additional pretrial matters remain should not delay remand of this action.

Mississippi, have all been working hard to ensure the *Jowers* trial begins on the scheduled date of January 28, 2008 (or as soon thereafter as the JPML may authorize).

So that this trial date may be accommodated, the undersigned requests that the JPML consider this matter on an expedited basis, with an expedited briefing schedule and telephonic hearing, if a hearing is deemed necessary.

CONCLUSION

For all the reasons stated above, the undersigned concludes that the just and efficient handling of *Jowers* will best be served by remand of the action to the United States District Court for the Southern District of Mississippi, from which it was originally transferred.

The undersigned appreciates the JPML's timely consideration of this matter and remains available to provide to the JPML additional information in support of this Suggestion, as needed.

Respectfully submitted,

/s/ Kathleen M. O'Malley
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE
(MDL TRANSFEREE COURT)

DATED: November 8, 2007

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: XARELTO (RIVAROXABAN) PRODUCTS LIABILITY LITIGATION	*	**MDL NO. 2592**
	*	**SECTION L**
	*	
	*	**JUDGE ELDON E. FALLON**
	*	
	*	**MAG. JUDGE SHUSHAN**
**********	*	

THIS DOCUMENT RELATES TO ALL CASES

ORDER SELECTING BELLWETHER CASES

Four bellwether cases will initially be tried in this matter. The first two cases will be tried in Louisiana. The third case will be tried in Mississippi. The fourth case will be tried in Texas.

Per Case Management Order ("CMO") No. 5, R. 3745, the pool of eligible bellwether plaintiffs was narrowed by for-cause strikes argued to the Court on August 4, 2016. R. 3745 at 1–2. On August 15, 2016, the parties jointly informed the Court that they reached an agreement as to the selection of plaintiffs for the third and fourth bellwether trials, which the Court earlier held would be a "DVT/PE + GI Bleed" and an "Afib + GI Bleed" case respectively. Therefore, the Court finds no need to continue with the selection process set forth in CMO 5. The Court now orders the following:

IT IS ORDERED that the third bellwether trial (Mississippi DVT/PE + GI Bleed) shall be the matter of Mingo, Dora, Case No. 2:15-cv-03469.

IT IS FURTHER ORDERED that the fourth bellwether trial (Texas Afib + GI Bleed) shall be the matter of James Henry, Individually and as Executor of the Estate of William Henry, Case No. 2:15-cv-00224.

New Orleans, Louisiana this 15th day of August, 2016.

UNITED STATES DISTRICT JUDGE

MINUTE ENTRY
FALLON, J.
FEBRUARY 24, 2017

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

IN RE: XARELTO (RIVAROXABAN) PRODUCTS LIABILITY LITIGATION	*	MDL 2592
	*	SECTION L
THIS DOCUMENT RELATES TO ALL CASES	*	JUDGE ELDON E. FALLON
	*	MAG. JUDGE NORTH

* *

THIS DOCUMENT RELATES TO ALL CASES

A telephone status conference took place on this date in the Chambers of the Honorable Eldon E. Fallon. The PSC was represented by Leonard Davis, Gerald Meunier, Brian Barr, and Andy Birchfield. Defendants were represented by John Olinde, Susan Sharko, Steve Glickstein, Andy Solow, Rick Sarver, Beth Wilkinson, Jeremy Barber, Jennifer Saulino, and Mark Jones. The parties discussed scheduling and trial preparation.

IT IS ORDERED that the third bellwether trial (*Mingo*) will begin on August 7, 2017, in the Southern District of Mississippi. The fourth bellwether trial (*Henry*) will be scheduled at a later date.

IT IS FURTHER ORDERED that the parties will submit a proposed briefing schedule for the dispositive and *Daubert* Motions regarding the third and fourth bellwether trials on or before March 15, 2017. Any prior deadlines on such motions are hereby **CONTINUED**.

JS10(00:15)

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

IN RE: BOSTON SCIENTIFIC CORPORATION
PELVIC REPAIR SYSTEM PRODUCTS LIABILITY LITIGATION

MDL NO. 2326

THIS DOCUMENT RELATES TO THE FOLLOWING CASES:

Civil Action Nos. *Canterbury v. Boston Scientific Corporation*, 2:12-cv-08633;
Billings v. Boston Scientific Corporation, 2:13-cv-00935;
Sexton, et al. v. Boston Scientific Corp., 2:13-cv-03126;
Hendricks, et al. v. Boston Scientific Corporation, 2:13-cv-03633;
Moore v. Boston Scientific Corporation, 2:13-cv-08802;
Tyree, et al. v. Boston Scientific Corporation, 2:13-cv-14397;
Campbell v. Boston Scientific Corporation, 2:13-cv-18786;
Blankenship v. Boston Scientific Corporation, 2:13-cv-22906;
Pugh, et al. v. Boston Scientific Corporation, 2:14-cv-01565;
Workman v. Boston Scientific Corporation, 2:14-cv-02554;
Wilson v. Boston Scientific Corporation, 2:14-cv-05475.

Pretrial Order # 78
(Order Consolidating above Cases for Trial on All Issues)

Pursuant to Federal Rule of Civil Procedure 42, the above-styled actions are consolidated for trial on all issues. It is **ORDERED** that Civil Action No. 2:12-cv-08633 is designated as the lead case, and all further filings shall be captioned and docketed therein.

I. Background

These cases are eleven of over 50,000 in this and the six other MDLs assigned to me by the Judicial Panel on Multidistrict Litigation. In this MDL, there are over 10,000 cases filed against Boston Scientific Corporation. Generally, this MDL arises from the use of transvaginal surgical mesh to treat pelvic organ prolapse ("POP") and stress urinary incontinence ("SUI"). In the above style-actions, all of the plaintiffs allege they were implanted with the Obtryx

Transobturator Mid-Urethral Sling System ("Obtryx"), a mesh product used to treat SUI. Although different physicians implanted the Obtryx, all of the surgeries were performed in West Virginia. In addition, all of the plaintiffs claim West Virginia as their state of residence. All of the plaintiffs allege negligence, design defect, manufacturing defect, failure to warn, breach of express warranty, breach of implied warranty, and punitive damages. Four of the plaintiffs, in addition to the above counts, allege loss of consortium.[1] According to the plaintiffs, the Obtryx has high malfunction and complication rates, fails to perform as intended, and causes severe injuries, including infection, scarring, nerve damage, and organ perforation.

II. Legal Standard

"Rule 42(a) permits consolidation and a single trial of several cases on the court's docket, or of issues within those cases . . . ." 9A Charles Alan Wright & Arthur Miller, *Federal Practice & Procedure* § 2381 (3d. ed. 2008). Rule 42(a) provides the following:

> **(a) Consolidation.** If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay.

Rule 42(a) gives district courts broad discretion to consolidate cases. *See Arnold v. E. Air Lines, Inc.*, 681 F.2d 186, 192 (4th Cir. 1982) ("The decision whether to sever or to consolidate whole actions or sub-units for trial is necessarily committed to trial court discretion."); *Henderson v. United States*, No. 6:07-cv-00009, 2008 WL 1711404, at *5 (W.D. Va. Apr. 11, 2008) ("The decision to consolidate is committed to Court's discretion and consolidation may be initiated *sua sponte*."). However, the court's discretion to consolidate under Rule 42(a) is not without limits. When considering whether to consolidate several actions for trial, the district

[1] *See Pugh, et al. v. Boston Scientific Corp.*, 2:14-cv-01565; *Hendricks, et al. v. Boston Scientific Corp.*, 2:13-cv-03633; *Tyree, et al. v. Boston Scientific Corp.*, 2:13-cv-14397; *Sexton, et al. v. Boston Scientific Corp.*, 2:13-cv-03126.

court must consider the following factors from *Arnold v. Eastern Airlines, Inc.*:

> [1] whether the specific risks of prejudice and possible confusion [are] overborne by the risk of inconsistent adjudications of common factual and legal issues,
>
> [2] burden on the parties,
>
> [3] witnesses and available judicial resources posed by multiple lawsuits,
>
> [4] the length of time required to conclude multiple suits as against a single one, and
>
> [5] the relative expense to all concerned of the single-trial, multiple-trial alternatives.

681 F.2d at 193.

Generally, under Rule 42(a), when two causes of action involve common witnesses, identical evidence, and similar issues, judicial economy will generally favor consolidation. *See Johnson v. Celotex Corp.*, 899 F.2d 1281, 1284-85 (2d Cir. 1990). Consolidation of actions involving common questions of law and fact also avoids the risk of inconsistent judgments. *Switzenbaum v. Orbital Scis. Corp.*, 187 F.R.D. 246, 248 (E.D. Va. 1999). Nevertheless, "even where cases involve some common issues of law or fact, consolidation may be inappropriate where individual issues predominate." *Michael v. Wyeth, LLC*, No. 2:04-cv-0435, 2011 WL 1527581, at *2 (S.D. W. Va. Apr. 20, 2011) (Copenhaver, J.) (internal quotations omitted).

III. Discussion

A. Common Issues of Law and Fact Predominate

As an initial matter, I **FIND** that common issues of law and fact presented by these cases favor consolidation. These cases implicate only West Virginia law. Additionally, these cases involve the same product, Obtryx, which was manufactured by the same defendant. All of the plaintiffs are West Virginia residents and were implanted with the device in West Virginia. Dr.

Subhash Bhanot, M.D., implanted six of the plaintiffs with the Obtryx; Dr. Michael Lassere, M.D., implanted two; Dr. Bernard Luby, M.D., implanted two; and Dr. Bruce Lasker, M.D., implanted one. In addition, the implantation of the plaintiffs occurred in a relatively short time span – between 2008 and 2012.

According to the Master Complaint, following the implantation of the Obtryx, the plaintiffs suffered similar injuries – "erosion, mesh contraction, infection, fistula, inflammation, scar tissue, organ perforation, dyspareunia (pain during sexual intercourse), blood loss, neuropathic and other acute and chronic nerve damage and pain, pudendal nerve damage, pelvic floor damage, and chronic pelvic pain." (Master Compl., ¶ 45).

A significant common issue in this case is whether the Obtryx was defectively designed. In West Virginia, the design defect inquiry will be focused on the same date: the date when the product was made. *See* Syl. Pt. 4, *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666, 667 (1979) ("The standard of reasonable safeness is determined not by the particular manufacturer, but by what a reasonably prudent manufacturer's standards should have been at the time the product was made."). The plaintiffs' implants were manufactured within a relatively short time; therefore, the variance in state of the art testimony will be minimal. While there will be separate evidence relating to failure to warn and individual damages, the similarities in these cases far outweigh any differences. In addition, carefully crafted jury instructions and special interrogatories can avoid the confusion that may arise due to these differences. *See generally Neal v. Carey Canadians Mines, Ltd.*, 548 F. Supp. 357 (E.D. Pa. 1982), *aff'd*, 760 F.2d 481(3d Cir. 1985).

B. The *Arnold* Factors Favor Consolidation

I also **FIND** the *Arnold* factors weigh in favor of consolidation. First, the risk of juror

confusion can be avoided if the evidence is presented in an organized manner and with jury instructions.[2] It will also save the court's time and resources to hear one consolidated trial rather than eleven separate trials. Second, as other courts have observed,

> [I]t has been found that conducting "bellwether trials" is often an effective way to manage multidistrict litigation to a successful conclusion. For the bellwether trial concept to be an effective gauge for evaluation of other cases, it would appear that the more bellwether trials conducted, the more reliable the gauge. Since a court has limited time and resources to try large numbers of bellwether trials, it would appear that consolidation of multiple cases for trial in the MDL setting would provide the parties with an opportunity to obtain results for multiple claims without burdening the court or the parties with the substantial cost of multiple separate trials.

In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig., MDL 2004, 2010 WL 797273, at *3 (M.D. Ga. Mar. 3, 2010). Third, if eleven of these Obtryx cases are disposed of in one trial, the disposition of these cases may facilitate settlement amongst the parties. Last, consolidation will decrease the parties' costs such as payments to expert witnesses.

I note in its Transfer Order dated February 7, 2012, the Judicial Panel on Multidistrict Litigation found that the actions contained in this MDL and MDL 2325 and 2327 involved common questions of fact and that centralization would "serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation." (Transfer Order [Docket 1], at 3); *see also In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, 2010 WL 797273, at *3 ("It has already been determined that cases referred to a district court by the Judicial Panel on Multidistrict Litigation involve common questions of law and fact such that it is deemed appropriate, and preferable, that the pretrial aspect of the cases be handled in a

[2] Moreover, the potential for jury confusion is further decreased where a court consolidates only a few actions for trial. *See, e.g., Hendrix v. Raybestos-Manhattan, Inc*., 776 F.2d 1492 (11th Cir. 1985) (consolidating four claims); *Oman v. Johns-Manville Corp.*, 764 F.2d 224 (4th Cir. 1985) (consolidating four claims); *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. 357 (E.D. Pa. 1982), *aff'd*, 760 F.2d 481 (3rd Cir. 1985) (consolidating fifteen claims). Here, I am only consolidating eleven actions for trial.

consolidated manner."). These observations, combined with my above determinations, logically compel the liberal use of Rule 42(a) for the purposes of this multidistrict litigation. *See In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, 2010 WL 797273, at *3 ("Consolidation appears to be a particularly appropriate tool that should be seriously considered in modern-day multidistrict litigation."). Accordingly, I will consolidate these actions under Rule 42.

IV. Conclusion

Pursuant to Federal Rule of Civil Procedure 42, the above-styled actions are consolidated for a trial on all issues. The trial is **SCHEDULED** for **October 14, 2014 at 8:30 a.m.** It is **ORDERED** that Civil Action No. 2:12-cv-08633 is designated as the lead case, and all further filings shall be captioned and docketed therein. It is further **ORDERED** that the parties submit a proposed Docket Control Order for entry in 2:12-cv-08633 on or before **February 28, 2014.**

The court **DIRECTS** the Clerk to file a copy of this order in **2:12-md-2326 and the above-referenced cases** and it shall apply to each member related case previously transferred to, removed to, or filed in this district, which includes counsel in all member cases up to and including civil action number 2:14-cv-10674. In cases subsequently filed in this district, a copy of the most recent pretrial order will be provided by the Clerk to counsel appearing in each new action at the time of filing of the complaint. In cases subsequently removed or transferred to this court, a copy of the most recent pretrial order will be provided by the Clerk to counsel appearing in each new action upon removal or transfer. It shall be the responsibility of the parties to review

and abide by all pretrial orders previously entered by the court. The orders may be accessed through the CM/ECF system or the court's website at www.wvsd.uscourts.gov.

ENTER: February 19, 2014

JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

IN RE: BOSTON SCIENTIFIC CORPORATION
PELVIC REPAIR SYSTEM PRODUCTS LIABILITY LITIGATION

MDL NO. 2326

THIS DOCUMENT RELATES TO THE FOLLOWING CASES:

Civil Action Nos. *Eghnayem v. Boston Scientific Corporation*, 2:13-cv-07965;
Dotres v. Boston Scientific Corporation, 2:13-cv-10077;
Nunez v. Boston Scientific Corporation, 2:13-cv-24346;
Dubois-Jean v. Boston Scientific Corporation, 2:14-cv-04455;
Betancourt v. Boston Scientific Corporation, 2:14-cv-11337.

Pretrial Order # 91
(Order Consolidating above Cases for Trial on All Issues)

Pursuant to Federal Rule of Civil Procedure 42, the above-styled actions are consolidated for discovery and trial on all issues. It is **ORDERED** that Civil Action No. 2:13-cv-07965 is designated as the lead case, and all further filings shall be captioned and docketed therein.

I. Background

These cases are five of over 50,000 in this and the six other MDLs assigned to me by the Judicial Panel on Multidistrict Litigation. In this MDL, there are over 11,000 cases filed against Boston Scientific Corporation. Generally, this MDL arises from the use of transvaginal surgical mesh to treat pelvic organ prolapse ("POP") and stress urinary incontinence ("SUI"). In the above style-actions, all of the plaintiffs allege they were implanted with the Pinnacle Pelvic Floor Repair Kit ("Pinnacle"), a mesh product used to treat POP. Although different physicians implanted the Pinnacle, all of the surgeries were performed in Florida. In addition, all of the plaintiffs claim Florida as their state of residence. All of the plaintiffs allege negligence, design

defect, manufacturing defect, failure to warn, breach of express warranty, breach of implied warranty, and punitive damages. According to the plaintiffs, the Pinnacle has high malfunction and complication rates, fails to perform as intended, and causes severe injuries, including infection, scarring, nerve damage, and organ perforation.

II. Legal Standard

"Rule 42(a) permits consolidation and a single trial of several cases on the court's docket, or of issues within those cases . . . ." 9A Charles Alan Wright & Arthur Miller, *Federal Practice & Procedure* § 2381 (3d. ed. 2008). Rule 42(a) provides the following:

> **(a) Consolidation.** If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay.

Rule 42(a) gives district courts broad discretion to consolidate cases. *See Arnold v. E. Air Lines, Inc.*, 681 F.2d 186, 192 (4th Cir. 1982) ("The decision whether to sever or to consolidate whole actions or sub-units for trial is necessarily committed to trial court discretion."); *Henderson v. United States*, No. 6:07-cv-00009, 2008 WL 1711404, at *5 (W.D. Va. Apr. 11, 2008) ("The decision to consolidate is committed to Court's discretion and consolidation may be initiated *sua sponte*."). However, the court's discretion to consolidate under Rule 42(a) is not without limits. When considering whether to consolidate several actions for trial, the district court must consider the following factors from *Arnold v. Eastern Airlines, Inc.*:

> [1] whether the specific risks of prejudice and possible confusion [are] overborne by the risk of inconsistent adjudications of common factual and legal issues,
>
> [2] burden on the parties,
>
> [3] witnesses and available judicial resources posed by multiple lawsuits,
>
> [4] the length of time required to conclude multiple suits as against a single

> one, and
>
> [5] the relative expense to all concerned of the single-trial, multiple-trial alternatives.

681 F.2d at 193.

Generally, under Rule 42(a), when two causes of action involve common witnesses, identical evidence, and similar issues, judicial economy will generally favor consolidation. *See Johnson v. Celotex Corp.*, 899 F.2d 1281, 1284-85 (2d Cir. 1990). Consolidation of actions involving common questions of law and fact also avoids the risk of inconsistent judgments. *Switzenbaum v. Orbital Scis. Corp.*, 187 F.R.D. 246, 248 (E.D. Va. 1999). Nevertheless, "even where cases involve some common issues of law or fact, consolidation may be inappropriate where individual issues predominate." *Michael v. Wyeth, LLC*, No. 2:04-cv-0435, 2011 WL 1527581, at *2 (S.D. W. Va. Apr. 20, 2011) (Copenhaver, J.) (internal quotations omitted).

III. Discussion

A. Common Issues of Law and Fact Predominate

As an initial matter, I **FIND** that common issues of law and fact presented by these cases favor consolidation. These cases implicate only Florida law. Additionally, these cases involve the same product, Pinnacle, which was manufactured by the same and only defendant. All of the plaintiffs are Florida residents and were implanted with the device in Florida. In addition, the implantation of the plaintiffs occurred in a relatively short time span – between 2008 and 2011.

According to the Master Complaint, following the implantation of the Pinnacle, the plaintiffs claim they suffered similar injuries – "erosion, mesh contraction, infection, fistula, inflammation, scar tissue, organ perforation, dyspareunia (pain during sexual intercourse), blood loss, neuropathic and other acute and chronic nerve damage and pain, pudendal nerve damage, pelvic floor damage, and chronic pelvic pain." (Master Compl. ¶ 45).

Even if these cases were not consolidated, evidence of substantially similar accidents and injuries are admissible to show "the dangerous character of an instrumentality and also to show the defendant's knowledge." *See Jackson v. H.L. Bouton Co., Inc.*, 630 So. 2d 1173, 1176 (Fla. Dist. Ct. App. 1994); *see also Worsham v. A.H. Robins Co.*, 734 F.2d 676, 688 (11th Cir. 1984). While there will be separate evidence relating to failure to warn and individual damages, the similarities in these cases, particularly as to the claim of design defect, far outweigh any differences. In addition, carefully crafted jury instructions and special interrogatories can avoid the confusion that may arise due to these differences. *See generally Neal v. Carey Canadians Mines, Ltd.*, 548 F. Supp. 357 (E.D. Pa. 1982), *aff'd*, 760 F.2d 481(3d Cir. 1985).

B. The *Arnold* Factors Favor Consolidation

I also **FIND** the *Arnold* factors weigh in favor of consolidation. The more cases that are tried together in this MDL totaling over 11,000 cases, the sooner the parties will come to understand the true nature of these cases, their values, the weaknesses and strengths in their cases and the cost of trying them. At this time, the bellwether process is not viable in this MDL, and, as a result, consolidation and transfer to another jurisdiction for trial of multiple cases is an equally efficient means of providing meaningful information to the parties in the absence of a bellwether process. Consolidation of cases in multidistrict litigation is not new, and the risk of juror confusion can be avoided if the evidence is presented in an organized manner with carefully crafted jury instructions.[1] Regarding the burden on the parties and witnesses and available judicial resources posed by multiple lawsuits, expert witnesses in these cases will likely be nearly identical in each case, only case-specific discovery will differ. MDL litigation in and

[1] Moreover, the potential for jury confusion is further decreased where a court consolidates only a few actions for trial, as is the case here. *See, e.g.*, *Hendrix v. Raybestos-Manhattan, Inc*., 776 F.2d 1492 (11th Cir. 1985) (consolidating four claims); *Oman v. Johns-Manville Corp.*, 764 F.2d 224 (4th Cir. 1985) (consolidating four claims); *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. 357 (E.D. Pa. 1982), *aff'd*, 760 F.2d 481 (3rd Cir. 1985) (consolidating fifteen claims). Here, I am only consolidating five actions for trial.

of itself poses a substantial burden on the parties. However, as these cases continue without resolution, and the number of cases continues to grow, the burden on the parties may ultimately be less if a consolidated trial leads the parties to resolution more quickly than individual trials. As with the bellwether trials I have conducted in this matter, I will place strict time constraints on the length of the consolidated trial in these matters; thereby saving both judicial resources and the resources of the parties involved.

I note in its Transfer Order dated February 7, 2012, the Judicial Panel on Multidistrict Litigation found that the actions contained in this MDL and MDL 2325 and 2327 involved common questions of fact and that centralization would "serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation." (Transfer Order [Docket 1], at 3); *see also In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, MDL 2004, 2010 WL 797273, at *3 (M.D. Ga. Mar. 3, 2010) ("It has already been determined that cases referred to a district court by the Judicial Panel on Multidistrict Litigation involve common questions of law and fact such that it is deemed appropriate, and preferable, that the pretrial aspect of the cases be handled in a consolidated manner."). These observations, combined with my above determinations, logically compel the liberal use of Rule 42(a) for the purposes of this multidistrict litigation. *See In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, 2010 WL 797273, at *3 ("Consolidation appears to be a particularly appropriate tool that should be seriously considered in modern-day multidistrict litigation."). Accordingly, I will consolidate these actions under Rule 42.

IV. Conclusion

Pursuant to Federal Rule of Civil Procedure 42, the above-styled actions are consolidated for discovery and trial on all issues. It is **ORDERED** that Civil Action No. 2:13-cv-07965 is

designated as the lead case, and all further filings shall be captioned and docketed therein. At the conclusion of pretrial proceedings, it will be necessary to remand the cases to the Southern District of Florida, and I intend to try the consolidated cases there by intercircuit assignment with a planned trial date beginning on **September 29, 2014**, at 8:30 a.m. **It is further ORDERED** that the parties submit a proposed Docket Control Order for entry in 2:13-cv-07965 on or before **April 18, 2014**.

The court **DIRECTS** the Clerk to file a copy of this order in **2:12-md-2326 and the above-referenced cases** and it shall apply to each member related case previously transferred to, removed to, or filed in this district, which includes counsel in all member cases up to and including civil action number 2:14-cv-14411. In cases subsequently filed in this district, a copy of the most recent pretrial order will be provided by the Clerk to counsel appearing in each new action at the time of filing of the complaint. In cases subsequently removed or transferred to this court, a copy of the most recent pretrial order will be provided by the Clerk to counsel appearing in each new action upon removal or transfer. It shall be the responsibility of the parties to review and abide by all pretrial orders previously entered by the court. The orders may be accessed through the CM/ECF system or the court's website at www.wvsd.uscourts.gov.

ENTER: April 11, 2014

JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE