BEFORE THE UNITED STATES
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: LINEAR GADOLINIUM-BASED CONTRAST AGENTS PRODUCTS LIABILITY LITIGATION	**MDL No. 2868**

DEFENDANTS BAYER HEALTHCARE PHARMACEUTICALS INC., BAYER CORP., AND BAYER HEALTHCARE LLC'S OPPOSITION TO PLAINTIFFS' MOTION FOR TRANSFER OF ACTIONS PURSUANT TO 28 U.S.C. § 1407

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The Bayer Defendants respectfully oppose Plaintiffs' attempt to form a catch-all products liability MDL. These cases are not appropriate for MDL coordination because they involve:

- Different imaging dye products with different rates of gadolinium retention and different molecular structures;
- Different product sponsors and distributors;
- Different regulatory histories;
- Different and shifting types of alleged injuries, with no unified injury recognized by the medical community;
- The same Plaintiffs' counsel in almost all of the actions, making informal coordination practical and efficient;
- Actions at different procedural stages; and
- Gamesmanship by Plaintiffs' counsel, who agreed to transfer the bulk of cases to Plaintiffs' home districts, and now seek an MDL and oppose informal coordination.

Against this backdrop, establishing an MDL proceeding for these actions will serve neither the convenience of the parties and witnesses nor promote the just and efficient conduct of these actions under 28 U.S.C. § 1407(a).

I. BACKGROUND

A. Different Products Manufactured by Different Defendants

The roughly two dozen actions subject to Movants' Motion for Transfer ("Br.") name different combinations of Defendants and arise from the use of different gadolinium-based contrast agents ("GBCAs"). These agents enhance magnetic resonance imaging ("MRI") scans to help diagnose serious medical conditions, including cancer, stroke, and aneurysms. Since the FDA's approval of the first linear GBCA, Bayer's Magnevist product, in 1988, the FDA approved other linear GBCAs, including Omniscan (GEHC), OptiMARK (Mallinckrodt/Guerbet), and MultiHance (Bracco). The FDA recognizes the distinctiveness of

these products, explaining in December of 2017 that each has a different rate of gadolinium retention (while also acknowledging that no clinical consequences of retention have been demonstrated in patients with normal kidney function).[1] Such a wide range of actions which name various combinations of four manufacturer defendants are not appropriate for MDL centralization. *See In re Cordarone Mktg., Sales Practices & Prods. Liab. Litig.*, 190 F. Supp. 3d 1346, 1347 (J.P.M.L. 2016) (denying centralization where "the named defendants vary widely among the cases . . . . Given the different defendants sued in these actions, centralization appears unlikely to serve the convenience of a substantial number of parties and their witnesses"); *In re Pfizer Inc. Mktg. & Sales Practices Litig.*, 657 F. Supp. 2d 1367, 1367-68 (J.P.M.L. 2009) (finding transfer inappropriate where "each of the eleven drugs necessarily has a different clinical, regulatory, medical, and promotional history"); *see also* Section II(A)(1).

B. Different and Shifting Alleged Injuries

Despite approaching the second anniversary of this litigation, Plaintiffs have articulated neither any unified alleged injury upon which to claim that common issues prevail in these suits nor a unified class of products at issue for purposes of their Motion. Instead of identifying a common alleged injury, Plaintiffs allege a patchwork of medical problems that shapeshifts from action to action, ranging from diarrhea to hair loss to food allergies to dozens of others. *See* Ex. 1, Chart of Movants' Disparate Alleged Injuries. For example, until only recently, Movants alleged that they suffered from a condition that they called "Gadolinium Deposition Disease" ("GDD") as a result of the administration of GBCAs.[2] Dating back to the first of these matters –

[1] 12/19/17 FDA Safety Announcement, https://www.fda.gov/Drugs/DrugSafety/ucm589213.htm

[2] No regulatory agency, professional association, or medical organization has ever endorsed Movants' theory that "GDD" is even an actual disease, much less one with the sweeping, differing symptoms proffered by Movants. In fact, as recently as December of 2017, the FDA stated that "[g]adolinium retention has not been directly linked to adverse health effects in

the *Geisse* case filed in October 2016 – Plaintiffs each alleged "GDD." Ex. 2, *Geisse* Compl. pp.7-8 ¶¶ 40-42. Yet, each Plaintiff claimed a different, sprawling constellation of generic "symptoms of GDD," spanning from "bowel disturbances" to "changes in appetite and food intake" to "hair loss" and much more. *Id.* Then, beginning in June 2018 – immediately prior to filing this motion – Movants began revising their complaints. These new, vague pleadings omit all previously-alleged injuries and abandon any mention of "GDD" altogether.[3] Movants' Motion should be denied since, far from "involv[ing] resolution of the same or similar questions of fact" as claimed, Br. p.2, individualized fact issues overwhelm any minimal common issues. These actions allege a scattershot of symptoms varying widely from one Plaintiff to the next and are ill-suited for MDL resolution. *See* Ex. 1.

C. Informal Coordination with a Limited Number of Plaintiffs' Counsel

The most that these cases have in common is that one California-based law firm – Cutter Law, P.C. – is Plaintiffs' counsel in nearly every one of them. This fact weighs against centralization since Defendants stand ready to continue informally coordinating with Plaintiffs' counsel in these actions, as they have been doing for nearly two years. Plaintiffs identify no barriers to employing the usual measures for efficiently litigating cases with only superficially overlapping issues. This small and eclectic cluster of cases – around two dozen and even a smaller number naming any one defendant – simply is not ripe for centralization. Plaintiffs offer no reason – and there is none – why Cutter Law and national counsel for Defendants cannot

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patients with normal kidney function, and we have concluded that the benefit of all approved GBCAs continues to outweigh any potential risks." 12/19/17 FDA Safety Announcement, https://www.fda.gov/Drugs/DrugSafety/ucm589213.htm. Indeed, no epidemiological studies suggest that there is any association between retained gadolinium from GBCA use and any health consequences in patients with normal kidney function – which all Movants purport in their Motion to have in common with one another. Br. p.4.

[3] *See, e.g.*, Ex. 3, *Fischer* Am. Compl. p.2 ¶ 3 ("Plaintiff's primary injury alleged herein is gadolinium retention in multiple organs (brain, heart, liver, kidney, bones, and skin).").

continue to rely on informal measures of coordination, which have been successful in avoiding duplication for nearly two years. *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig.*, 959 F. Supp. 2d 1375, 1376 (J.P.M.L. 2013) (denying motion to centralize more than two dozen actions where defendant was "ready and willing to work with Plaintiffs' counsel . . . to appropriately coordinate any common discovery or other pretrial matters").

D. Procedurally Advanced Actions

Movants also fail to reveal that three listed actions, *Davis*, *Munnuru*, and *Fischer*, encompassing all but one manufacturer defendant, are mere months away from the completion of bifurcated discovery on general causation ordered over the plaintiffs' objection.[4] It would only impede progress to uproot those and other cases to erect an MDL now.

As the Panel has repeatedly recognized, "Section 1407 should be the last solution." *In re Giant Eagle, Inc., Fair Labor Standards Act (FLSA) Litig.*, --- F. Supp. 3d ---, MDL 2852, 2018 WL 3737982, at *1 (J.P.M.L. Aug. 1, 2018) (internal quotation marks omitted). Accordingly, and consistent with Panel precedent, Movants' Motion should be denied.

E. Plaintiffs' Counsel's Forum Manipulation

California-based Cutter Law – lead counsel in nearly all of these actions – initially sought to consolidate all cases in San Francisco near its law office. Specifically, the firm strategically filed fifteen federal cases in the Northern District of California, even though all of the cases involved non-California plaintiffs suing non-California pharmaceutical companies over whom that court plainly lacked personal jurisdiction.

Defendants disrupted Cutter Law's venue gamesmanship when, in initial case

[4] *See* Ex. 4, *Fischer* CMO 1 ("The Court will establish a first phase of this case to focus discovery and motion practice on general causation – whether exposure to gadolinium in the manner at issue in this case is capable of causing the injuries and conditions alleged by Plaintiffs."); Ex. 5, *Munnuru* CMO 1 (same); Ex. 6, *Davis* CMO 1 (same).

management conference statements, Defendants stated their intention to "seek dismissal for lack of personal jurisdiction" because there were no "minimum contacts with California that are relevant to this lawsuit." *E.g.*, 02/22/18 CMC Statement, Dkt. No. 20 p.3, *Zelazny v. Bayer HealthCare Pharmaceuticals Inc., et al.*, No. 1:18-cv-03246 (S.D.N.Y.). Facing dismissal, the fifteen Plaintiffs offered to transfer out of the Northern District of California to their home districts.

To address jurisdictional defects in Plaintiffs' home venues, the Bayer and GE Defendants both offered to transfer the cases against them to the District of Delaware where they reside, an offer Cutter Law refused, which contradicts its professed interest now in consolidating matters. Instead, Cutter Law responded with a one-line email stating, without explanation, that "Plaintiffs do NOT agree to the alternative proposal to transfer cases to the District of Delaware." Ex. 7, 03/22/18 Email (emphasis in original). Therefore, contrary to Movants' Motion, it is Plaintiffs who insisted on having those cases "scattered across the country," Br. p.8, undermining Movants' transfer request. In March of 2018, Defendants stipulated, at Cutter Law's request, to a transfer of all of these cases to "the district in which Plaintiff resides and/or where Plaintiff allegedly was administered the product at issue."[5]

On July 17, 2018, Judge David G. Campbell of the District of Arizona ordered, over Plaintiffs' objection, bifurcated general cause discovery in *Fischer*, *Davis*, and *Munnuru* (the latter two Plaintiffs voluntarily stipulated to transfer from N.D. Cal. to D. Ariz.) with the "first phase" to be limited to "discovery and motion practice on general causation – whether exposure to gadolinium in the manner at issue in this case is capable of causing the injuries and conditions

[5] *See, e.g.*, Ex. 8, *Zelazny* Transfer Stipulation p.4. Cutter Law dismissed three cases after transfer.

alleged by Plaintiffs." Ex. 4, Fischer CMO 1.[6] Two weeks later, Cutter Law filed this Motion improperly seeking to uproot these cases from Plaintiffs' respective home venues (only a few months after Plaintiffs' agreed-to transfer from the Northern District of California to their home states) and artificially steer them into an MDL proceeding – Cutter Law's apparent goal since the beginning of this litigation. This Panel should not reward Movants' forum manipulation by establishing an MDL proceeding, which would undermine Movants' counsel's agreement to send these cases to Plaintiffs' home states.

II. ARGUMENT

A. Transfer of These Actions Is Improper Under 28 U.S.C. § 1407

"[C]entralization under Section 1407 should be the last solution after considered review of all other options." *In re Dometic Corp. Gas Absorption Refrigerator Prods. Liab. Litig.*, 285 F. Supp. 3d 1358, 1360 (J.P.M.L. 2018) (citation omitted). Here, "unique questions of fact predominate over any common questions of fact." *In re Pharmacy Ben. Plan Administrators Pricing Litig.*, 206 F. Supp. 2d 1362, 1363 (J.P.M.L. 2002); *see In re Mirena IUS Levonorgestrel-Related Prods. Liab. Litig.*, 38 F. Supp. 3d 1380, 1381 (J.P.M.L. 2014) (denying centralization because "the individualized causation disputes [were] likely to predominate"); *In re Ne. Contaminated Beef Prods. Liab. Litig.*, 856 F. Supp. 2d 1354, 1354-55 (J.P.M.L. 2012) (denying transfer motion, in part, because "[i]ndividualized issues of causation concerning each plaintiff's injuries appear to predominate among the actions"). Centralization would neither "promote the just and efficient conduct of" the litigation nor serve "the convenience of parties and witnesses." 28 U.S.C. § 1407(a); *In re Narconon Drug Rehab. Mktg., Sales Practices & Prods. Liab. Litig.*, 84 F. Supp. 3d 1367, 1368 (J.P.M.L. 2015) (declining to consolidate 21

[6] Ex. 5, *Munnuru* CMO 1 (same); Ex. 6, *Davis* CMO 1 (same).

actions due to prevalence of "individualized facts" "over the common factual issues").

1. The Actions Name Different Defendants and Involve Different Products

The Panel is typically "hesitant" to establish an MDL proceeding where the actions at issue name different defendants and involve different products. *In re Yellow Brass Plumbing Component Prods. Liab. Litig*., 844 F. Supp. 2d 1377, 1378 (J.P.M.L. 2012) ("[W]e are typically hesitant to centralize litigation against multiple, competing defendants which marketed, manufactured and sold similar products."). This bears especially true here where all four manufacturing defendants are competitors; centralization would "complicate case management due to the need to protect trade secret and confidential information." *In re Proton-Pump Inhibitor Prods. Liab. Litig.*, 273 F. Supp. 3d 1360, 1362 (J.P.M.L. 2017).

As reflected in the following chart, the 21 actions in the initial Motion name different combinations of Defendants and products. Indeed, there is not a ***single*** lawsuit where all four manufacturer defendants are named.[7]

[7] This chart lists actions identified in the initial Motion. This same trend is observed across the five tag-along actions filed to date (*Welty*, *Doe*, *Pierik*, *Klein*, and *Hollifield*).

Plaintiff	Bayer	Bracco	GE	Guerbet & Mallinckrodt
Combs	x			
Davis				x
Esserman		x		x
Fischer	x	x		x
Geisse	x			
Gerrity		x		
Goodell	x (included macrocyclic)			
Javens			x	
Lewis	x			
McGrath	x (included macrocyclic)	x		
Miller			x	x
Montani		x		
Munnuru				x
Norris		x (included macrocyclic)		
Sabol	x	x	x	
Viruet	x		x	
Walton			x	
White			x	
Winkler	x			
Young	x			
Zelazny	x (included macrocyclic)			

The Panel has denied motions for MDL centralization under similar circumstances where "the named defendants vary widely among the cases." *In re Cordarone Mktg., Sales Practices & Prods. Liab. Litig.*, 190 F. Supp. 3d 1346, 1347 (J.P.M.L. 2016); *In re Ambulatory Pain Pump-Chondrolysis Prods. Liab. Litig.*, 709 F. Supp. 2d 1375, 1377 (J.P.M.L. 2010) ("An indeterminate number of different pain pumps made by different manufacturers are still at issue, as are different anesthetics made by different pharmaceutical companies. Most, if not all, defendants are named in only a minority of actions; and several defendants are named in but a handful of actions."); *In re Table Saw Prods. Liab. Litig.*, 641 F. Supp. 2d 1384 (J.P.M.L. 2009)

(denying centralization of 42 actions, where no defendant was sued in all actions, and several entities were named in, at most, a handful of actions). The same conclusion follows here.

2. Transfer is Improper Given the Numerous Individual Questions of Fact Unique to Each Plaintiff and the Absence of a Unified Injury Among the Cases

Movants vaguely maintain that "pretrial discovery in all the cases . . . will involve the same liability and general causation documents and witnesses." Br. pp.2-3. But any such overlap presents a mere "superficial factual commonality." *In re Fla., P.R., & U.S. V.I. 2016 & 2017 Hurricane Seasons Flood Claims Litig.*, MDL No. 2844, --- F. Supp. 3d ---, 2018 WL 3017528, at *1 (J.P.M.L. June 6, 2018) (rejecting consolidation where cases merely had "superficial factual commonality"). "GDD" is not a "disease" recognized by the medical community. *See supra* n.2. Lacking any established diagnostic criteria to employ, each Movant alleges a random constellation of symptoms for injuries. *See* Ex. 1. Thus, for purposes of determining whether MDL transfer is warranted, it is clear that "unique questions of fact predominate over any common questions of fact." *In re Pharmacy Ben. Plan*, 206 F. Supp. 2d at 1363. Individualized facts define the scope of each plaintiff's alleged (and very different) injuries, and, in turn, will dictate the different discovery each case requires.

This flaw unravels Movants' transfer request: deciding whether GBCAs could or did cause a given plaintiff's alleged non-specific symptoms requires ***individualized assessment*** of those symptoms. For instance, the *Combs* Plaintiff's alleged symptoms include high cholesterol, fatigue, a thickened uterus, and stomach polyps.[8] But any causal findings with respect to these symptoms will have no bearing on the *McGrath* Plaintiff's alleged symptoms of food intolerance, anxiousness, and severe nausea, the *Sabol* Plaintiff's allegations of dry eyes and

[8] Ex. 9, *Combs* Compl. p.7 ¶ 34.

mouth, vertigo, and muscle contractions, or the *Fischer* Plaintiff's alleged symptoms of hair loss, low body temperature, and low blood sugar.[9] The same holds true for the dozens of other, disparate injuries alleged by Plaintiffs here.

In yet another example of Movants' inability to identify a unifying alleged injury, one case in Movants' Motion, *White*, alleges Nephrogenic Systemic Fibrosis ("NSF"), a condition that was the subject of a now-closed MDL predicated on the abnormal kidney function all Movants here expressly disclaim. The *White* plaintiff, a *pro se* estate administrator, alleges that the decedent had impaired kidney function and developed NSF from GBCA use – placing her well outside of the boundaries Movants set in defining their proposed MDL. *Compare* Br. p.4 ("Movants . . . are people with normal or near-normal kidney function . . . ."), *with* Ex. 13, *White* Am. Compl. p.4 ¶ 14-18 ("At the time of her procedures, . . . she was ***suffering from end stage renal disease***…." (emphasis added)). These factual dissimilarities in the amorphous injuries alleged are seen throughout the actions, as shown in the chart of alleged injuries in Ex. 1.

Fact discovery, including document production, will vary from action to action. Discovery will be necessarily tailored to each Plaintiff's claimed symptoms. Moreover, some Plaintiffs claim injuries that have long been included in the products' warning labels, like nausea and dizziness, *see, e.g.*, Ex. 2, *Geisse* Compl. pp.7-8 ¶¶ 40-42, so consolidation would not even result in regulatory discovery efficiency. Relatedly, individualized issues would engulf any common issues with regard to expert discovery. Because each plaintiff alleges a different combination of symptoms allegedly related to GBCA use, expert discovery in one action may have little bearing on the next. And given the unique facts in each action, there is little risk of conflicting pretrial rulings.

[9] Ex. 10, *Fischer* Compl. p.5-6 ¶ 16; Ex. 11, *McGrath* Compl. p.10 ¶ 42; Ex. 12, *Sabol* Compl. p.7 ¶ 35.

Movants' inclusion of cases involving macrocyclic (non-linear) agents in their Motion adds yet another level of individualization to these cases, which already vary by linear agent and manufacturer at issue. Movants title their Motion "*In re: Linear Gadolinium-Based Contrast Agents Products Liability Litigation*" and go to great lengths to distinguish linear and macrocyclic imaging agents, so categorized by the molecular structure in which the core component – gadolinium – is encapsulated. They emphasize that these actions are limited to "claims by patients who have suffered retention of ***Linear*** Gadolinium-Based Contrast Agents." Br. p.2 (emphasis added). But as of the time of their filing, nearly 20% of the actions identified in the Motion alleged injuries related to ***macrocyclic*** (non-linear) agents – entirely different products from linear agents.[10]

In sum, the extensive factual issues specific to each Movant's case make centralization impracticable and unwarranted.

3. Ongoing Informal Coordination Is Convenient and Would Best Promote the Just and Efficient Management of the Litigation

The Panel has directed the parties to "address what steps they have taken to pursue alternatives to centralization (including, but not limited to, engaging in informal coordination of discovery and scheduling, and seeking Section 1404 transfer of one or more of the subject cases)." ECF Dkt. No. 5. As set forth below, the parties have been successfully coordinating on an informal basis with Cutter Law, who has filed almost all of the cases under consideration, and Defendants are committed to continue doing so absent MDL transfer.

[10] Ex. 14, Norris Compl. p.9 ¶ 46 (alleging injuries from ProHance use); Ex. 15, Zelazny Compl. p.1 ¶ 1 (alleging injuries from Gadavist use); Ex. 11, McGrath Compl. p.1 ¶ 1 (alleging injuries from Gadavist use); Ex. 16, Goodell Compl. pp.1-2 ¶ 2 (alleging injuries from Gadavist use).

a) Informal Coordination Is Preferable Given the Few Counsel Involved

Despite Movants' representation in the Motion that "[t]he cases have been filed by multiple law firms representing clients throughout the United States," Br. p.2, as of the date of that filing, Cutter Law is counsel of record (with interspersed associated counsel) in all but two lawsuits tagged for the Panel's consideration.[11] All of the manufacturers are represented in these cases by the same nationwide counsel, and are committed to the continued informal coordination for the efficient and just resolution of these matters. Counsel for Bayer and the other manufacturing defendants have coordinated with both Cutter Law and each other successfully for almost two years. The "parties therefore have every ability to cooperate and minimize the possibilities of duplicative discovery and inconsistent pretrial rulings." *In re Quaker Oats Trans-Fat Mktg. & Sales Practices Litig.*, 777 F. Supp. 2d 1344, 1344 (J.P.M.L. 2011). In light of the few law firms involved in these matters, informal coordination between Cutter Law and defense counsel is eminently feasible and should continue. *See In re Cymbalta (Duloxetine) Prods. Liab. Litig. (No. II)*, 138 F. Supp. 3d 1375, 1377 (J.P.M.L. 2015) (denying plaintiffs' motion to centralize actions partly due to the "limited number of involved counsel," and noting that "informal coordination and cooperative efforts by the parties and involved courts remain practicable"); *In re Mirena*, 38 F. Supp. 3d at 1381 ("Given the limited number of involved

[11] *Viruet*, one of two non-Cutter Law lawsuits in the initial Motion, remains unserved. Signs point to Cutter Law being behind the suit. On the same day the JPML Motion was filed, Andrus Wagstaff PC filed *Viruet* in D. Mass. That complaint copies paragraphs verbatim from Cutter Law matters. Given that Andrus Wagstaff is associated counsel with Cutter Law in the *Goodell* matter also tagged in Movant's Motion, it is readily apparent that the two firms are working in concert. *See In re Boehringer Ingelheim Pharm., Inc., FLSA Litig.*, 763 F. Supp. 2d 1377, 1378 (J.P.M.L. 2011) (noting that counsel's filing of actions on the eve of its motion "weigh[s] against centralization"). The same appears to be true with the *Lewis* firm's filing in N.D. Cal., served on Bayer over two weeks after the Motion was filed, which bears a striking resemblance to Cutter Law's other filings; and for good reason – the Gomez Trial Attorneys firm serves as co-counsel in both *Lewis* and *Geisse*.

counsel and actions, and the individualized causation disputes likely to predominate, alternatives to formal centralization appear to be preferable, particularly at this early stage of litigation."). Indeed, despite nearly two years passing since the first case filing, Movants fail to cite to a single instance of inefficiency. *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig.*, 959 F. Supp. 2d 1375, 1376 (J.P.M.L. 2013) (refusing to centralize 26 actions citing Pfizer represented it is still "ready and willing to work with Plaintiffs' counsel . . . to appropriately coordinate any common discovery or other pretrial matters").

Given the limited set of current cases, Movants speculate that "the number of Linear GBCA cases yet to be filed will likely be in the hundreds or more due to the widespread use of Linear GBCAs in MRI and MRA procedures," Br. p.3, and that they "expect substantial numbers of additional cases to be filed," Br. p.9. But the first GBCA was launched ***in 1988***, it has been over ***three years*** since the FDA first announced that "trace amounts of gadolinium may stay in the body long-term,"[12] and nearly ***two years*** since Movants first filed a suit alleging "GDD." This litigation expansion prediction, which has yet to come to fruition, is further undermined by the fact that Cutter Law is counsel of record in nearly every case submitted for consolidation before the Court. In any event, Movants' counsel's forecasts of future filings do not warrant centralization. *See In re Cal. Wine Inorganic Arsenic Levels Prods. Liab. Litig.*, 109 F. Supp. 3d 1362, 1363 (J.P.M.L. 2015) ("Although plaintiffs assert that the number of actions is likely to expand, the mere possibility of additional actions does not convince us that centralization is warranted.").

b) Centralization Would Impede Progress in Procedurally Advanced Cases

Creating an MDL would inevitably delay progress already made in D. Ariz. cases *Davis*,

[12] 7/27/15 FDA Safety Announcement, https://www.fda.gov/Drugs/DrugSafety/ucm455386.htm

Munnuru, and *Fischer*, among others. The D. Ariz. defendants (Bayer, Guerbet, Mallinckrodt, and Bracco) proposed coordinated, phased discovery across the three cases with the goal of preserving resources while swiftly arriving at the potentially dispositive issue of general causation. Plaintiffs, on the other hand, vehemently opposed this plan and asked for a stay pending the resolution of their as-yet-unfiled JPML petition.[13] The timing of Movants' Motion – just two weeks after bifurcated discovery was ordered – suggests their request is, at least in part, aimed at impeding the just and efficient resolution of these cases. *In re CVS Caremark Corp. Wage & Hour Emp't Practices Litig.*, 684 F. Supp. 2d 1377, 1379 (J.P.M.L. 2010) ("[W]here a Section 1407 motion appears intended to further the interests of particular counsel more than those of the statute, [the Panel] would certainly find less favor with it.").

Tellingly, initial fact discovery – with targeted document production, Rule 30(b)(6) depositions, and plaintiff depositions all tailored toward general causation – will close in D. Ariz. on November 2, 2018. *See* Ex. 4, *Fischer* CMO 1. Plaintiffs' general causation expert disclosures are due shortly thereafter on November 16, and all general causation expert depositions will be completed on January 18, 2019, with *Daubert* briefing concluding in February. Efficient progress is being made in these cases without the aid of an MDL proceeding. There is no reason to derail that progress by way of transfer.[14]

c) The Risk of Duplication and Inconsistencies Will Be Minimized

Continuing informal coordination will minimize duplicative discovery and inconsistent pretrial rulings. While Movants predict a parade of horribles with respect to discovery and

[13] *See* Ex. 17, *Munnuru* Joint Mem.

[14] Bayer joins the Guerbet Defendants in objecting to impeding the efficient resolution of these cases in D. Ariz. If an MDL is created over Defendants' objections, Bayer does not oppose centralization before Judge Campbell, as suggested by Guerbet. However, Bayer recognizes that Judge Campbell, who recently took senior status, is still overseeing the *Bard* MDL.

pretrial rulings if transfer is denied, Br. p.10, these concerns are speculative since no actions have encountered such difficulties and there is no reason to believe they will, *cf.* Br. p.8.

Further, Cutter Law's refusal to transfer improperly-filed cases in the Northern District of California to the District of Delaware, a non-MDL option that would have addressed the jurisdictional challenges raised by Defendants, speaks to the firm's gamesmanship and undermines their claim that inconvenience from dispersed cases requires centralization. *In re Giant Eagle, Inc., Fair Labor Standards Act (FLSA) Litig.*, --- F. Supp. 3d ---, MDL 2852, 2018 WL 3737982, at *1 (J.P.M.L. Aug. 1, 2018) ("Section 1407 should be the last solution that parties seek after considered review of all other options, such as ***informal coordination or transfer*** under Section 1404." (emphasis added) (quotation marks omitted)).

In any event, the risk of duplicative discovery and conflicting rulings can and will easily be minimized, particularly given the few law firms involved here. *See supra* pp.12-13. Depositions will be crossed-noticed, document production will be shared, and schedules will be coordinated. *See In re OSF Healthcare Sys. Emp. Ret. Income Sec. Act (ERISA) Litig.*, 223 F. Supp. 3d 1343, 1345 (J.P.M.L. 2016) ("Notices of deposition can be filed in all related actions; the parties can stipulate that any discovery relevant to more than one action can be used in all those actions; and the involved courts may direct the parties to coordinate other pretrial activities."). Moreover, the extensive individualized fact issues here, *supra* pp.9-11, minimize any risk of potential conflicts.

The parties have a proven track record of fruitful informal coordination. To date, counsel for all the defendants have regularly conferred with Cutter Law and its local counsel. The parties have scheduled hearings and submitted joint letters, joint case management statements, and briefing schedules in multiple cases. In *Davis*, *Munnuru*, and *Fischer*, informal coordination of

discovery is already well underway. For instance, the parties have been negotiating terms of an ESI protocol without court intervention. Moreover, the *Davis*, *Munnuru*, and *Fischer* defendants jointly propounded requests for production, eliminating duplication in Plaintiffs' responses. Defendants stand ready and willing to continue cooperating in all cases.

4. The NSF MDL Does Not Support Consolidation Here

Movants' Motion is replete with references to the NSF MDL, No. 1909. *See e.g.*, Br. pp.5-6, 11-12. But the unique posture of that MDL stands in stark contrast to the present actions in numerous respects. Unlike here, where every defendant opposes transfer, nearly all NSF defendants (with one exception) supported consolidation. *See In re Gadolinium Contrast Dyes Prods. Liab. Litig.*, 536 F. Supp. 2d 1380, 1381 (J.P.M.L. 2008); *see also In re Skinnygirl Margarita Beverage Mktg. & Sales Practices Litig.*, 829 F. Supp. 2d 1380, 1381 (J.P.M.L. 2011) ("[T]hat all defendants uniformly oppose centralization is a factor which is quite influential where other factors do not strongly favor centralization."). Unlike here, where each plaintiff alleges a different constellation of amorphous symptoms, NSF involved one claimed injury with clearly demarcated diagnostic markers. *See In re Gadolinium Contrast Dyes*, 536 F. Supp. 2d at 1381. Relatedly, and unlike here, the experts in the NSF MDL were limited given the finite scope of the alleged injury. In the instant action, on the other hand, numerous experts per discipline will be required given the broad range of alleged symptoms at issue. Finally, unlike here, the NSF MDL involved over a dozen law firms comprising the Plaintiffs' Steering Committee – none of whom are currently counsel in this litigation.[15] In short, the NSF MDL does not support the Movants' request, but rather underscores the impropriety of Section 1407 consolidation here.

[15] 03/24/08 CMO 2, Dkt. No. 26, *In re: Gadolinium-Based Contrast Agents Prods. Liab. Litig.*, MDL No. 1909, Case No. 1:08-gd-50000 (N.D. Ohio).

B. If the Panel Orders Centralization Over All Defendants' Objection, the Cases Should Be Transferred to the District of Delaware or the Southern District of New York

While an MDL is unwarranted in Defendants' view, should the Panel disagree, Bayer submits that the District of Delaware (and Hon. Richard G. Andrews in particular) or, in the alternative, the Southern District of New York (and Hon. John G. Koeltl in particular) – both conveniently located near Defendants' corporate offices and/or states of incorporation and already effectively managing these cases – would be excellent choices to lead any such MDL. By contrast, Movants' favored MDL transferee venue, the Northern District of California, may be convenient for Cutter Law, but over a dozen of its own clients already have stipulated to transfer away from that venue, and nearly all of the key defendants, fact witnesses, and documents reside thousands of miles – many on the opposite coast – from that District.[16]

1. In the Alternative, Transfer to Hon. Richard G. Andrews in D. Del. Would Best Promote the Just and Efficient Conduct of These Actions if an MDL Is Formed Over All Defendants' Objections

Each defendant group has a corporate office and place of incorporation near or in Delaware, making D. Del. an attractive forum if these cases are centralized. Parties' incorporation in a given state has long weighed in favor of basing an MDL there. *See, e.g., In re Mobile Telecomm. Techs., LLC Patent Litig.*, 222 F. Supp. 3d 1337, 1338 (J.P.M.L. 2016) (centralizing proceedings in D. Del. in part because numerous parties "are incorporated in Delaware"). Similarly, centralizing proceedings in a district that defendants' "corporate offices [are] . . . just outside of" is appropriate, particularly since witnesses and documents will be

[16] In keeping with urging centralization for the convenience of Plaintiffs' counsel and not the parties or court, Movants ask in the alternative to site an MDL near their Boston associated counsel's office before a judge already handling a 300+ plaintiff MDL in a very early stage, and a district where Movants' associated counsel coincidentally filed a case on the same day as Movants' Motion. Br. pp.15-16.

located nearby. *In re Pre-Filled Propane Tank Mktg. & Sales Practices Litig.*, 655 F. Supp. 2d 1354, 1355 (J.P.M.L. 2009). Delaware fits the bill: ***at least*** one entity from each defendant group (including distributor McKesson) is incorporated in Delaware, and ***at least*** one entity in each manufacturing group (Bayer, Bracco, GEHC, and Guerbet) has a corporate office near Delaware.

Hon. Richard G. Andrews, who is assigned *Javens*, is highly qualified to preside over the MDL in the event the Panel orders consolidation over Defendants' objection. He has successfully presided over numerous matters with far more complex facts and more at stake than in these cases, including many significant jury trials, and has not yet presided over an MDL. *See, e.g.*, *AVM Technologies LLC v. Intel Corp.*, No. 1:15-cv-00033 (D. Del. filed 1/12/2015) (complex $2 billion suit regarding computer-technology patent resolved by jury trial); *Safeguard Scientifics Inc. v. Saints Capital Dakota LP*, No. 1:09-cv-00380 (D. Del. filed 5/28/2009) (commercial dispute regarding more than $6 million resolved by jury trial); *see In re Sorin 3T Heater-Cooler Sys. Prods. Liab. Litig. (No. II)*, 289 F. Supp. 3d 1335, 1337 (J.P.M.L. 2018) (noting transferee judge "is an experienced jurist who has not had the opportunity to preside over an MDL").

2. In the Alternative, Hon. John G. Koeltl of the Southern District of New York Is Also Well-Equipped to Preside Over an MDL

Alternatively, the Southern District of New York would provide a convenient forum. One case, *Zelazny*, is already pending in S.D.N.Y. before Judge Koeltl. The Bayer, Bracco, GEHC, and Guerbet defendant groups all have at least one entity with a corporate office within 150 miles of S.D.N.Y. or incorporated in New York. *In re Pre-Filled Propane Tank Mktg.*, 655 F. Supp. 2d at 1355 (centralizing MDL in district that defendants' "corporate offices" were "just outside"). Significantly, Judge Koeltl is well-qualified to handle this litigation. He has presided over numerous complex, high-profile cases and successfully handled two MDLs before. *See, e.g.*, *In re Buspirone Patent Litig.*, 185 F. Supp. 2d 340 (S.D.N.Y. 2002); *In re Buspirone Patent*

Litig., 185 F. Supp. 2d 363 (S.D.N.Y. 2002). And, no MDL is currently pending before him (nor has one been in many years).

3. Movants' Forum Selections Are Both Inconvenient

Movants' suggested forums, N.D. Cal. and D. Mass., are not well suited for these actions. As all Defendants attest, N.D. Cal. is geographically convenient only for Cutter Law, and "the convenience of counsel is not by itself a factor to be considered . . . in the selection of a transferee forum." *In re DirectBuy, Inc., Mktg. & Sales Practices Litig.*, 682 F. Supp. 2d 1349, 1350 (J.P.M.L. 2010) (quotation marks omitted). N.D. Cal. is nowhere near the headquarters or state of incorporation of any pharmaceutical defendant.[17]

Further, centralizing cases in N.D. Cal. would reward Cutter Law's venue gamesmanship. After filing fifteen cases in N.D. Cal. despite a plain lack of personal jurisdiction over those actions and agreeing to transfer the cases to plaintiff's home district, Cutter Law again attempts to bring the cases back near its own city. Meanwhile, the five cases listed as pending in N.D. Cal. have not advanced in any way, and ***four of the five "N.D. Cal." cases have already departed or may depart the District***: One (*Norris*) was transferred to Texas by agreement and Plaintiffs have moved to remand three (*Geisse*, *Young*, and *Winkler*) to state court. The fifth (*Lewis*) was served on Bayer over two weeks after the Motion was filed.[18] No substantive ruling has been issued in any case.

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[17] Although McKesson is headquartered in California, McKesson does not agree that N.D. Cal. would be a convenient forum: as a mere product distributor, McKesson anticipates a limited role in this litigation, and the major witnesses and documents relevant to Movants' claims lie with pharmaceutical companies in the eastern United States.

[18] *See* Pl. Schedule of Actions at p.2 (noting that *Norris* will soon transfer to S.D. Texas); 04/24/18 Am. Mot. to Remand, Dkt. No. 38, *Geisse v. Bayer HealthCare Pharmaceuticals Inc., et al.*, No. 3:17-cv-07026 (N.D. Cal.); 04/23/18 Mot. to Remand, Dkt. No. 24, *Young v. Bayer HealthCare Pharmaceuticals Inc. et al.*, No. 3:18-cv-00811 (N.D. Cal.); 06/22/18 Mot. to Remand, Dkt. No. 19, *Winkler v. Bayer HealthCare Pharmaceuticals Inc. et al.*, No. 3:18-cv-03077 (N.D. Cal.).

The District of Massachusetts is also a less convenient option. Judge Talwani recently began her first MDL, *In re Stryker Orthopaedics LFIT V40 Femoral Head Prods. Liab. Litig.*, 249 F. Supp. 3d 1353, 1356 (J.P.M.L. 2017), which has amassed several hundred cases.[19] Further, at the time of the Motion, only one case, *Goodell*, had been pending for any appreciable time in D. Mass., with no significant rulings issued. The other case, *Viruet*, was tellingly ***filed the same day*** as Movant's Motion ***by a Georgia plaintiff*** against several foreign defendants with seemingly no convenience-based reason for that plaintiff choosing to file in that venue.[20]

III. CONCLUSION

Bayer respectfully asks the Panel to deny Plaintiffs' Motion for Transfer of Actions Pursuant to 28 U.S.C. § 1407 to the Northern District of California, or in the alternative, the District of Massachusetts. If centralization is ordered over all Defendants' objections, Bayer asks in the alternative that this Court transfer these actions to the Hon. Richard G. Andrews in the District of Delaware or, alternatively, the Hon. John G. Koeltl in the Southern District of New York for any such MDL proceeding.

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[19] *See* J.P.M.L., Distribution of Pending MDL Dockets by District, http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-August-15-2018.pdf

[20] Days after the Motion, two other out-of-state plaintiffs, both represented by Cutter Law's associated counsel in Boston, likewise filed in D. Mass. In yet another act of gamesmanship, just hours before Bayer's deadline for responding to the Movants' Motion, Cutter Law's co-counsel, Wexler Wallace LLP, filed an Interested Party Response in Support of Transfer of Related Actions proposing the Southern District of Illinois. Cutter Law serves as co-counsel in the *Welty* case, which is the only case pending in S.D. Ill. and that happened to be filed *after* the filing of Movants' Motion. *See* 08/01/18 Compl., Dkt. No. 1 p.3 ¶ 16, *Welty v. Bracco Diagnostics Inc., et al.*, No. 3:18-cv-01460 (S.D. Ill.). Moreover and as discussed previously, *Lewis*, the only other case involving Wexler Wallace, is a near carbon copy of Cutter Law's prior filings and was filed in conjunction with another apparent auxiliary of Cutter Law – the Gomez Trial Attorneys firm. *See supra* n.11. Bayer objects to the S.D. Ill. as an alternative forum in the event the Panel orders transfer over Defendants' objections.

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Respectfully submitted,

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