BEFORE THE UNITED STATES
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: BELVIQ (Lorcaserin) PRODUCTS LIABILITY LITIGATION	)))	**MDL Docket No.: ____**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO TRANSFER ACTIONS TO THE EASTERN DISTRICT OF LOUISIANA PURSUANT TO 28 U.S.C. § 1407 FOR CONSOLIDATED PRETRIAL PROCEEDINGS

I. PRELIMINARY STATEMENT

Movants Stephanie Fuller, Robert Fuller, Deborah Steinman, Reuben Steinman, Mildred Smith, Pamela Puskas, Michael Puskas, Jennifer Reynolds-Sitzer, Kenneth Sitzer, Deborah Crawford, Bradley Trey Crawford, Maryann Kaylor and Willard Kaylor, Jr. (collectively, "Plaintiffs")[1], are plaintiffs in seven civil actions pending in seven different federal courts across the country (as identified in the Schedule of Actions annexed hereto). Plaintiffs submit this Memorandum of Law in support of their Motion to Transfer and centralize all currently filed cases listed in the annexed Schedule of Actions, as well as any subsequently filed cases involving common questions of fact ("tag-along" actions), for coordinated or consolidated pretrial proceedings to the United States District Court for the Eastern District of Louisiana before Judge Lance M. Africk pursuant to 28 U.S.C. § 1407 and Rule 6.2 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation ("Panel"). As an alternative to the Eastern District of Louisiana, Plaintiffs are not opposed to the Eastern District of New York or the Middle District of Florida, the latter of which now has four cases pending.

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[1] *Fuller, et al. v. Eisai, Inc, et al.,* 2:20-cv-01675*; Steinman, et al. v. Eisai, Inc, et al.,* 1:20-cv-02608*; Smith v. Eisai, Inc, et al.,* 5:20-cv-01278*; Puskas, et al. v. Eisai, Inc, et al,* 5:20-cv-00868.*; Kaylor, et al v. Eisai, Inc, et al.,* 5:21-cv-00058*; Reynolds-Sitzer, et al. v. Eisai, Inc, et al.,* 1:21-cv-00145*; and Crawford, et al. v. Eisai, Inc, et al.,* 2:21-cv-02439.

Your undersigned's law firm represents the aforenamed Plaintiffs in their respective seven actions, against Defendants Eisai, Inc. and Arena Pharmaceuticals, Inc. (hereinafter referred to as "Defendants"), for personal injuries, specifically various types of cancer, caused by their use of the pharmaceutical drug Belviq. It is alleged that at all relevant times, Defendants, along with their related subsidiaries and parent companies, created, designed, manufactured, labeled, marketed, and/or sold Belviq and/or were responsible for introducing it into the stream of commerce.

In addition to Plaintiffs' seven actions in seven different federal courts, your undersigned is aware of five additional Belviq personal injury actions and one additional Belviq class action filed in five additional federal courts/divisions[2] (for a total of 13 actions filed in 12 federal courts).[3]

It is anticipated that the number of filed cases in federal courts across the country will continue to increase.[4] Upon information and belief, beyond the plaintiffs' counsel with cases already filed, other plaintiffs' counsel across the country are investigating many more cases and will likely file additional cases in the near future.[5] Given the overlapping nature of the facts and

[2] While four actions are pending in the Middle District of Florida, two are in one division (Orlando) and the other two are in two separate divisions (Tampa and Ocala). Plaintiffs are considering them three separate jurisdictions for purposes of this motion.

[3] There are also two Belviq personal injury actions that have been filed in New Jersey state court. This factor also supports the creation of a MDL because "an MDL will make it easier to coordinate, as needed, pretrial proceedings in both the state and federal cases, because there will now be just one judge handling the latter." *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig.,* 997 F. Supp. 2d 1354, 1356 (citing *In re Plavix Mktg., Sales Practice & Prods. Liability Litig.*, 923 F. Supp. 2d 1376, 1378-79 (J.P.M.L. 2013)).

[4] Notably, it appears Defendants have a desire to have these cases litigated in federal court rather than state court. For example, your undersigned filed a case on behalf of a Louisiana resident in a state court in New Jersey because Defendant Eisai is located in New Jersey. However, before Defendants were formally served, Arena Pharmaceuticals, Inc. removed the action to federal court based on diversity of citizenship, thus, seemingly indicating a desire to have these actions litigated in federal court.

[5] Your undersigned's law firm is investigating over 65 cases, many of which have already been confirmed to be patients who used Belviq and were diagnosed with cancer thereafter. We understand that these figures are consistent with the number of claims being investigated by other law firms who are prosecuting these cases. The overall volume

issues involved as well as the increasing volume of actions filed, Plaintiffs respectfully submit that transfer, centralization, consolidation and coordination of all Belviq actions into one multidistrict litigation ("MDL") pursuant to 28 U.S.C. § 1407 is warranted.

As is discussed in more detail below, it does not appear that informal coordination will be able to work for these actions because of, *inter alia*, the various stages that these cases are in and will continue to be in as new cases are filed and as new and different attorneys become involved. Thus, a MDL would be the most efficient and most appropriate course of action for the Panel because it would: (1) promote the just and efficient conduct of these actions; (2) prevent inconsistent pretrial rulings and duplicative discovery; and (3) conserve the resources of the judiciary, the parties and their counsel. To this end, Plaintiffs respectfully request an Order be entered by the Panel consolidating and coordinating the Actions, as well as any future tag-along actions, and further transferring said actions to the Eastern District of Louisiana before the Honorable Judge Lance M. Africk or, alternatively, the Eastern District of New York or the Middle District of Florida.

II. FACTUAL CLAIMS ABOUT BELVIQ

Belviq is a weight loss drug that was first approved by the United States Food and Drug Administration ("FDA") for sale and marketing in the U.S. in 2012 with its extended release version approved in 2016.[6] Recently, in 2020, it was announced that Belviq is a carcinogen. Specifically, and quite significantly, on January 14, 2020, the FDA issued a safety communication

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of cases, while not astronomically high when compared to some other mass tort pharmaceutical MDLs (with numbers in the many tens of thousands), will still easily number in the high hundreds if not low thousands.

[6] Specifically, Belviq is a first-in-class selective serotonin 5HT2c receptor agonist drug approved by the FDA for use as an adjunct to a reduced-calorie diet and increased physical activity for chronic weight management in adult patients with a body mass index ("BMI") greater than or equal to 30 kg/m2, or adult patients with a BMI greater than or equal to 27 kg/m2 and at least one weight-related comorbid condition.

regarding same, and on February 13, 2020, the FDA announced that Defendant Eisai had submitted a request to voluntarily withdraw Belviq from the market given that data resulting from its Phase IV clinical trials indicated an imbalance of cancer in patients taking Belviq that increased with treatment duration. The FDA stated in its February 2020 announcement that the risks of Belviq outweighed its benefits, recommended that patients stop taking Belviq and dispose of any unused pills, and instructed all health care professionals to stop prescribing Belviq and to contact their patients taking Belviq to inform them of the increased risk of cancer.

Plaintiffs' claims relate to Belviq's carcinogenic nature (as do all other plaintiffs' claims), which they allege, at all relevant times, was known and/or should have been known by Defendants. Indeed, not only did medical literature exist prior to the introduction of Belviq to the U.S. market that should have put Defendants on notice that the serotonin pathway can cause or stimulate cancer, Defendants conducted animal studies prior to the introduction of Belviq to the market that supported that Belviq could cause cancer and/or that additional safety testing needed to be done. Nevertheless, Defendants ignored the medical literature and manipulated the results of the animal studies in their favor so that the FDA would approve it for marketing in the United States.

Further, when Defendants attempted to seek approval to market Belviq in the European Union in 2013, the FDA's European Counterpart – the European Medicines Agency ("EMA") – declined to approve Belviq and told Defendants that the increased occurrence of cancer tumors in the animal studies was troubling and the associated risks of the drug outweighed any benefits it may have. Yet with this knowledge and despite these expressed concerns, Defendants did not

withdraw Belviq from the U.S. market until almost seven years later – in 2020 – and only after the FDA had determined that the risk of Belviq outweighed any benefits it may have.[7]

It is increasingly clear that Defendants neglected to provide sufficient warning of the adverse events associated with Belviq. Furthermore, Defendants' marketing of these drugs as a safe and effective medication for weight loss was negligent and irresponsible given that the dangers associated with Belviq far outweighed any purported benefit the drug may have.

Defendants' failure to adequately warn of the potential dangers associated with Belviq prevented the medical community and the general public from making informed decisions about prescribing and/or using Belviq, and likely hundreds of individuals suffered adverse events due to their use of Belviq. Upon information and belief, it is estimated that hundreds of individuals (if not numbers in the low thousands) developed cancer as a direct and proximate result of using and ingesting Defendants' Belviq. Many of these injured individuals have filed or will be filing lawsuits against Defendants.

III. ARGUMENT

A. MULTIDISTRICT CENTRALIZATION IS APPROPRIATE FOR THESE CASES

1. Consolidation is Warranted Under 28 U.S.C. § 1407

Under 28 U.S.C. § 1407, the Panel *may* consolidate numerous cases if the moving party sufficiently demonstrates that (1) the lawsuits contain common questions of fact, (2) consolidation would best serve the convenience of the parties and witnesses, and (3) consolidation promotes just

[7] Notably, Plaintiffs not only allege that there were safety issues (i.e., an increased risk of various cancers) associated with Belviq use, but also that, contrary to Defendants' representations and warranties, Belviq was not effective as a weight-loss adjunct as demonstrated by its own clinical studies. Indeed, the combined data from the BLOOM trial (a two-year study) and the BLOSSOM trial (a one-year study) revealed only a 3.3% mean weight loss after one year with lorcaserin over that of the placebo group and the BLOOM-DM trial revealed only a 3.1% mean weight loss after one year with lorcaserin over that of the placebo group; both of these results demonstrate that lorcaserin failed to meet the mean efficacy criterion of FDA's obesity draft guidance. Further, the BLOOM study found that all treatment groups had experienced weight regain during the second year. The ineffectiveness of Belviq is supported by numerous reports made to the FDA following its approval.

and efficient conduct of such actions. *See* 28 U.S.C. § 1407. Plaintiffs respectfully submit that the Belviq Actions meet the statutory requisites for the Panel's determination that centralization is warranted. Indeed consolidation of these actions to one district court for pre-trial proceedings is the most appropriate course of action for the Panel to take because the factors for centralization have been demonstrated, and, thus, centralization and coordination of pretrial proceedings against Defendant is warranted.

First, each of the related Belviq actions against Defendants allege very similar, if not virtually identical, causes of action and contain the same allegations about Belviq and the propensity of Belviq to cause serious injuries, specifically various types of cancer. All of these actions, as well as the actions that will be filed in the days, months and even years ahead, are based upon the same or substantially similar underlying facts: (1) Belviq can cause cancer as supported by, among other things, the medical literature, Defendants' own studies and Defendants' clinical trials; (2) Belviq was not effective as a weight loss drug; (3) Defendants negligently created, designed, researched, developed, manufactured, tested, marketed, advertised, promoted, distributed and sold Belviq to the public, including the plaintiffs in the respective actions and caused their alleged cancers; (4) Defendants knew or should have known of the dangers and defects associated with Belviq; (5) Defendants failed to warn the of the dangers and defects associated with Belviq; and (6) all plaintiffs suffered grave cancers as a result of using Defendants' defective Belviq.

In response to these common allegations, Defendants will likely deny that Belviq can cause cancer and will oppose and offer alternative explanations regarding plaintiffs' allegations regarding these injuries, the defective warnings, and of course Defendants' conduct. These defenses also involve common questions of facts and law that overlap and are common to all

plaintiffs and Defendants, and, therefore, centralization is appropriate.

To illustrate further, Plaintiffs submit that these related actions will collectively involve common questions against Defendants, *inter alia*, in the following topic areas:

- whether Defendants' Belviq had a dangerous design defect and whether Defendants knew about said defect and when they knew it;
- whether Defendants' Belviq was effective as a weight loss drug and whether Defendants knew about Belviq's lack of efficacy and when they knew it;
- whether Defendants knew that the Belviq was unsafe and/or dangerous in that could cause cancer;
- whether Defendants knowingly sold defective Belviq to the public, including the respective plaintiffs, thereby causing them to suffer cancer;
- whether Defendants knew that their representations regarding Belviq were false;
- whether Defendants adequately instructed users of Belviq or their physicians regarding the dangers associated with Belviq; and
- whether Defendants' misrepresentations about Belviq caused plaintiffs and other users to suffer from cancer.

Second, centralization before one MDL court would prevent inconsistent judicial rulings, would eliminate duplicative discovery, would be more convenient to the parties, witnesses and their counsel, and would conserve the resources of the judiciary, the parties and their counsel. *See, e.g.*, *In re Zostavax (Zoster Vaccine Live) Prods. Liab. Litig.*, 330 F.Supp.3d 1378, 1379 (J.P.M.L. 2016) (highlighting that consolidation will eliminate duplicative discovery; prevent inconsistent pretrial rulings on *Daubert* issues and other pretrial matters; and conserve resources); *see also, In re MLR, LLC, Patent Litig.*, 269 F.Supp.2d 1380, 1381 (J.P.M.L. 2003) (noting that consolidation before a single transferee judge allows for consideration of "all parties' legitimate discovery needs while ensuring that common parties and witnesses are not subjected to discovery demands which duplicate activity that has already occurred or is occurring in other actions.")

Indeed, because the actions alleging injuries as a result of Belviq are based upon substantially similar, if not identical, allegations, the parties will likely address similar issues in discovery, and in some cases identical issues, especially those involving causation, plaintiffs' injuries and Defendants' misrepresentations and concealments upon which they relied. *See In re Bair Hugger Forced Air Warming Devices Prods. Liab. Litig.*, 148 F. Supp. 3d 1383, 1385 (J.P.M.L. 2015)(transfer appropriate where related actions shared factual issues related to allegations of injuries from a defective warming system); *see also, In re Actos Prods. Liab. Litig*., 840 F. Supp. 2d 1356 (J.P.M.L. 2011)(granting consolidation where: (1) the actions involved common questions of fact regarding whether the pharmaceutical drug could cause cancer and whether defendants concealed their knowledge of the risk and failed to provide adequate warnings; and (2) centralization would eliminate duplicative discovery, prevent inconsistent pretrial rulings and conserve the resources of the parties, their counsel and the judiciary).[8]

Lastly, as noted above, the need for centralization is evidenced by the fact that there are already 13 similar Belviq actions on file in 12 districts/divisions around the country, with more cases coming, all of which will ultimately result in separate scheduling orders and many other duplicative pretrial practices being conducted, should a MDL not be created.

2. <u>Informal Coordination is Impractical</u>

To the extent any party opposes centralization and/or argues that informal coordination is the manner by which to proceed with these cases, such an argument should, respectfully, be rejected. To be certain, your undersigned, prior to the filing of the present motion, attempted

[8] *See also In re Xarelto (Rivaroxaban) Prods. Liab. Litig.*, 65 F.Supp.3d 1402 (J.P.M.L. 2014) (granting consolidation where issues concerning the development, manufacture, regulatory approval, labeling and marketing of a pharmaceutical drug were common to all actions and highlighting that centralization would eliminate duplicative discovery, prevent inconsistent pretrial rulings and conserve the resources of the parties, their counsel and the judiciary.)

informal coordination of Plaintiffs' seven actions with Defendants, but it has proven (and is still proving) itself to be impractical. And now, given that there are six cases pending in addition to your undersigned's seven cases (for a total of 13 cases) in five different districts/divisions (for a total of 13 different federal judges already with active cases) with the plaintiff(s) in each of those actions represented by five different law firms, this just adds to the impracticalities of informal coordination.

As discussed below, it would simply be inefficient and uneconomical to engage in informal coordination of these separate proceedings that are pending in different district courts, before different judges, and/or on different scheduling tracks. *See In Re Roundup Prods. Liab. Litig.*, 214 F. Supp. 3d 1346 *4 (J.P.M.L. 2016)(ordering consolidation and holding informal coordination was not practicable given that that were multiple plaintiffs' cases pending in various jurisdictions spread across the country with multiple law firms representing the plaintiffs in those actions and the issues presented in the proposed cancer MDL were complex).[9]

Defendants' filing of Rule 12(b)(6) motions in each action as well as discovery and trial deadlines that vary among the seven jurisdictions where Plaintiffs' cases are pending (i.e., your undersigned's cases alone), illustrate that this informal coordination has proven inefficient and impractical, and will only become more inefficient and impractical as time goes on. Indeed, with numerous other law firms filing cases, these impracticalities of informal coordination will continue to increase, discovery will not be streamlined in an efficient manner, and defense witnesses will end up being deposed multiple times as document/discovery requests continue to be made in a

[9] *See also, In re Xarelto*, 65 F. Supp. 3d at 1404 (rejecting informal coordination argument finding that "the considerable growth in the litigation over the past few months," which included 51 actions pending in 22 districts demonstrated that informal coordination would not be practicable or effective); *see also In re Fluoroquinolone Prods. Liab. Litig.*, 122 F. Supp. 3d 1378, 1379-1380 (J.P.M.L. 2015) (rejecting a defendant's argument that informal coordination was superior to consolidation pursuant to 28 U.S.C. § 1407 noting that there were already 78 actions pending in 38 districts and, even if additional actions were not filed, the number of actions pending, involved districts and involved counsel warranted centralization).

rolling fashion by various law firms.

A MDL would eliminate these impracticalities by allowing proceedings and discovery to take place in a streamlined and coordinated fashion under the direction of a single MDL judge who in turn will likely appoint a plaintiff MDL leadership counsel to ensure the same. *See e.g.* Manual for Complex Litigation, Fourth Edition, 2004 ("Manual"), Section 10.22 (for complex litigation, "the court will need to institute procedures under which one or more attorneys are selected and authorized to act on behalf of other counsel and their clients with respect to specified aspects of the litigation").[10] Examples of why informal coordination will likely not work are identified below.

a. Motion Practice Will be Duplicative, Will Likely Cause Disparate Judicial Rulings, and Will be a Tax on the Judiciary

Regarding the Rule 12(b) motion practice that is currently taking place, rather than allowing discovery to proceed on a relatively similar track in each individual case, Defendants are filing Rule 12(b)(6) dismissal motions in every case filed by Plaintiffs,[11] and likely will be filing such motions in the other plaintiffs' cases as well. Of course, this is Defendants' right to do, but by so doing, 13 different federal judges will likely be required to rule on nearly identical motions in cases with virtually identical underlying facts. Naturally, this has the potential to lead to inconsistent rulings in different jurisdictions. By way of example, the only Court that has ruled on one of Defendants' dismissal motions in Plaintiffs' actions is Judge Africk in the Eastern District of Louisiana, and he held that the design defect claim in that case had been sufficiently pled.

[10] *See also e.g.* Manual, Section 10.221 ("Lead Counsel…Charged with formulating (in consultation with other counsel) and presenting positions on substantive and procedural issues during the litigation. Typically they act for the group—either personally or by coordinating the efforts of others—in presenting written and oral arguments and suggestions to the court, working with opposing counsel in developing and implementing a litigation plan, initiating and organizing discovery requests and responses, conducting the principal examination of deponents, employing experts, arranging for support services, and seeing that schedules are met.")

[11] The deadline for Defendants to respond in two of Plaintiffs' actions has not yet passed. Your undersigned anticipates Defendants will be filing dismissal motions in those actions when the deadline approaches.

Nevertheless, Defendants have continued to move for dismissal of virtually identical design defect claims in all other venues, likely in the hopes of receiving a different ruling. As noted above, this of course, is their right to do, but it also lends itself to the likelihood of: (1) receiving different rulings from different judges; (2) further delaying the commencement of the discovery process which then makes it extremely difficult to informally coordinate discovery as cases become placed on different discovery tracks; and (3) placing unnecessary work-loads on the multiple federal judges that must hear and decide virtually identical motions.

In this regard, Defendants' Rule 12(b)(6) dismissal motion strategy will likely carry over into other motion practice, including motions for summary judgement and *Daubert* motions, thus leading to even further potential for inconsistent rulings.[12] And given the complex medical, scientific, and liability/legal concepts at issue in these actions, it is more efficient to allow one Court to become familiar with the underlying science and liability which will only serve the interest of all parties and allow for more consistent rulings to be made in this regard.[13]

Further, as to motions regarding discovery disputes, discovery matters that are ruled upon and unsuccessful in one jurisdiction can be re-framed and re-litigated in other jurisdictions. Frankly, this can be done by not only by Defendants, but also by plaintiffs' counsel, with the parties' non-stated goal of receiving an inconsistent, yet more favorable, ruling on the same subject matter from a different judge. MDL centralization and consolidation would prevent duplicative motions and the forum shopping both parties will likely allege the other is engaging in.

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[12] Of course, Defendants are not alone in this regard as plaintiffs in each of the jurisdictions will likely also seek to file similar motions, including dispositive motions, motions to strike affirmative defenses, *Daubert* challenges, and discovery motions, where the rules of one jurisdiction are not applicable or binding on the other jurisdiction(s).

[13] Given the complexities of the science and medicine involved in products liability actions, it has become routine for MDL Courts to hold a "Science Day" at the inception of MDLs so that the MDL judge can gain a better understanding of the science involved, and utilize this background knowledge to better address disputes that arise and motions that are filed.

b. Discovery will be Difficult to Informally Coordinate with Different Plaintiffs' Counsel with Cases at Various Stages Across the Country

As to discovery disputes, they have already begun in one of the Plaintiffs' actions regarding: (1) whether Defendants have identified appropriate and a sufficient number of witnesses who have relevant information relating to Belviq; (2) what third-party discovery is allowed and when; and (3) the scope of discovery in general.[14] These discovery disputes will likely carry over to the Plaintiffs' other six actions as well as the actions being filed by different counsel, and they will likely not be resolved in a practical and efficient manner if they have to be resolved in each different jurisdiction; an MDL judge, on the other hand, would be able to address these disputes in an effective and consistent manner. *In re Ahern Rentals, Inc., Trade Secret Litig.*, 481 F. Supp. 3d 1355, 1356 (J.P.M.L. 2020)(granting consolidation in lieu of informal coordination noting that the "proceedings to date indicate that a single court can more effectively manage the discovery disputes that have arisen and appear likely to arise, including those relating to discovery from third party witnesses, depositions of apex witnesses, and the scope of relevant discovery, generally.")

Along these same lines, Defendants may have specific arguments about the relevancy or proportionality of a production in one jurisdiction under that jurisdiction's local rules and/or case law that is different than what is allowed by a different jurisdiction's local rules and/or case law. A MDL would eliminate these inconsistent rulings by allowing for a uniform format for discovery, where, in general, the discovery and deponents are produced once, with one governing standard

[14] For example, in this one action, Defendants have identified and produced documents from nine custodians (six identified by Eisai and three identified by Arena) that they unilaterally determined to have relevant information. Based on your undersigned's preliminary review of documents that were only recently produced by Defendants in that action, eight additional custodians have been identified as having highly relevant information, and it is very likely that more will likely be uncovered.

and including one set of negotiated search terms.[15] Having inconsistent discovery and case-specific discovery disputes on global matters are results that should be avoided, and the best way that can be done is through coordination of pretrial proceedings under 28 U.S.C. § 1407.

Further, because there are currently different discovery deadlines and proposed trial dates in each of Plaintiffs' actions, with discovery deadlines in some cases being more advanced than in others, your undersigned is being forced to take depositions early in the more advanced cases without receiving much of the written discovery from Defendants in the other actions. As a result, Defendants' fact witnesses will undoubtedly have to be re-deposed in these other actions after sufficient discovery has been produced by Defendants in each action, thus, leading to additional duplicative discovery efforts.

Moreover, the initial depositions that your undersigned will be taking in the more advanced cases will be occurring as additional cases continue to be filed and as new and different counsel are filing their own cases. These additional plaintiffs and new counsel will not have even had access to written discovery and documents to review by the time these depositions are taken, nor will they be bound by the discovery efforts taking place in the more advanced cases. This is in stark contrast to what would happen if a MDL were created (i.e. additional plaintiffs and new counsel are bound by the discovery conducted and the work coordinated by Court-appointed leadership in the MDL). Allowing discovery in these actions to take place on an ad hoc, case-by-case basis, would simply be inefficient.[16]

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[15] On this score, without MDL formal coordination, while one plaintiff law firm may negotiate search terms for Defendants' document productions, different search terms will likely be sought by the different and newer law firms. This scenario is inevitable and will undoubtedly require Defendants to make continuous document productions.

[16] Despite any argument to the contrary, proceeding without MDL consolidation will lead to defense witnesses and certain third-parties being re-deposed in multiple actions – not only in the actions currently on file that are proceeding on different discovery tracks, but also in additional actions as they continue to be filed. In one of the Plaintiffs' cases, defense depositions are beginning in May, 2021, albeit before document production by the defense is even complete,

The aforementioned discovery concerns and deadlines are the very issues which demonstrate why MDL consolidation is more efficient and economic when compared to informal coordination. *See e.g. In re Zostavax (Zoster Vaccine Live) Prods. Liab. Litig.,* 330 F. Supp. 3d at 1380 (ordering consolidation and finding that informal coordination was not warranted because of, not only the number of plaintiffs involved (98), but also the number of districts involved (9), the number of distinct plaintiff's counsel involved (5), the widely varying discovery deadlines in the nine districts and the duplicative motions to dismiss being filed by defendants in each district.)

In sum, Plaintiffs submit that it is preferable for disputes regarding similar and/or identical discovery issues to be resolved by a single court as opposed to various federal courts across the country.

c. Foundational Order Disputes Will Likely Occur Without Formal Coordination

Additionally, there will likely be disputes regarding foundational case management orders between some of the jurisdictions. These disputes will likely involve different lawyers seeking different terms for their respective foundational orders. This is a significant and realistic problem of not having formal MDL coordination and oversight by one federal MDL judge – just as Defendants are seeking to have motions to dismiss heard in every jurisdiction where a case is filed, they too may seek to re-litigate already agreed to Orders in certain jurisdictions to obtain more favorable terms. Alternatively, new plaintiffs' counsel may seek to litigate Orders that have already been agreed to by plaintiffs' counsel in other actions. In fact, the latter is already occurring regarding a protective order that was recently agreed to in one case; counsel in a newer case has

and before many discovery disputes are resolved. Surely, plaintiffs' counsel with newer cases, where Defendants may not have even yet appeared or where motions to dismiss are pending, will not be able to meaningfully participate, even if Defendants attempt to cross-notice these depositions in those cases. Thus, it is inevitable, without a MDL, that defense witnesses will be re-deposed in other cases.

advised your undersigned that given its jurisdiction's laws, said counsel will seek to obtain a far less restrictive protective order. This same dynamic may likely also apply to privilege issues, search terms and document productions, and essentially many aspects of the foundational issues should an MDL not be created and one centralized Court assigned to oversee and manage the discovery in a consolidated fashion.

d. <u>These Actions Are Appropriate For an MDL Not Informal Coordination</u>

While this will not be the largest pharmaceutical MDL in history, such a factor should not serve as an impediment to the Panel centralizing these actions into one MDL encompassing all Belviq actions. The fact is, as discussed in detail above, these actions share multiple and complex common questions of facts and the formation of a MDL would: (1) allow discovery to be done once, for all plaintiffs, through an organized leadership committee; (2) negate the potential for inconsistent judicial rulings for both parties, and (3) reduce the burden on so many different federal courts and judges who are currently hearing and managing nearly identical products liability pharmaceutical cases. *In re Propecia (Finasteride) Prod. Liab. Litig.,* 856 F. Supp. 2d 1334 (J.P.M.L. 2012)(consolidating nine actions pending in six districts finding that the actions involved common issues of fact, particularly regarding causation, and that centralization would eliminate duplicative discovery; prevent inconsistent pretrial rulings; and conserve the resources of the parties, their counsel, and the judiciary.); *see also In re ZF-TRW Airbag Control Units Prods. Liab. Litig.,* 410 F. Supp. 3d 1357 (J.P.M.L. 2019)(ordering consolidation of 17 products liability actions in five districts where substantial and complex common facts existed to warrant consolidation)*; In re Zostavax (Zoster Vaccine Live) Prods. Liab. Litig.,* 330 F. Supp. 3d at 1380 (ordering consolidation where nine districts were involved); *In re Monat Hair Care Prods. Mktg. Sales*

Practices and Prods. Liab. Litig., 325 F. Supp. 3d 1364 (J.P.M.L. 2018)(ordering consolidation where nine actions and five districts were involved).

Simply put, the benefits of a MDL here, with more districts/divisions involved than were in the afore-cited cases in which consolidation was granted (i.e. 12), far outweigh the undeniable reality here, which is that, without a MDL, numerous federal courts will have to hear and decide many of the exact same issues, disparate rulings will likely be issued, and duplicative discovery on the defendants (documents and deposition testimony) will absolutely be sought in multiple non-coordinated venues by different and unconnected counsel. Further, as mentioned above in footnote 3, there are also two New Jersey state court actions pending and "an MDL will make it easier to coordinate, as needed, pretrial proceedings in both the state and federal cases, because there will now be just one judge handling the latter." *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig.,* 997 F. Supp. 2d 1354, 1356 (citing *In re Plavix Mktg., Sales Practice & Prods. Liability Litig.*, 923 F. Supp. 2d 1376, 1378-79 (J.P.M.L. 2013)).

The conveniences for all parties and the Courts for coordination and centralization in a MDL cannot be denied here.[17] Thus, for the sake of uniformity, economy and efficiency, Plaintiffs respectfully submit that centralization of all Belviq actions is warranted under the circumstances.

[17] In this regard, any arguments that may be made regarding maintaining the individuality of these cases, can be made following consolidated pretrial proceedings, either through remand or some other global mechanism that should apply to all of the cases. MDL centralization was instituted precisely for the purpose of avoiding the myriad of issues that would result were these cases to proceed individually through pretrial proceedings. Again, these well-recognized benefits of MDL centralization include: (1) avoiding inconsistent rulings, (2) avoiding duplicative discovery, (3) avoiding the increased burden and expense on the parties, their counsel, witnesses and the judiciary; and (4) promoting efficiency, judicial economy and significant financial savings. *Supra*; *see also* Manual, Section 20.13 (Transfer pursuant to 28 U.S.C. 1407 is appropriate when the Panel determines that transfer "will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions"); *see also e.g.* Manual Section 20.11 (when cases are pending in the same federal court and involve common questions of fact, consolidation is warranted when it reduces cost and delay and does not increase the burden on the parties).

B. AN APPROPRIATE VENUE FOR THIS LITIGATION IS THE EASTERN DISTRICT OF LOUISIANA

Assuming centralization is appropriate – which we submit that it is – the question presented then becomes one of determining the proper venue for transfer of these cases. To this end, Plaintiffs submit that an appropriate venue for this litigation could be the United States District Court for the Eastern District of Louisiana before Judge Lance M. Africk.

1. The Eastern District of Louisiana Has the Most Advanced Action

The Belviq action in front of Judge Africk was one of the earliest filed actions – filed on June 10, 2020 – and, of all of the Belviq actions, is the most advanced with the plaintiffs' expert reports currently due on April 21, 2021, a discovery cutoff of May 28, 2021, and trial currently scheduled for August 2, 2021. While your undersigned anticipates this schedule may need adjustment given that: (1) Defendants only first began producing documents on March 23, 2021, with the initial production including over one million pages of documents; (2) Defendants produced additional documents up through and until April 6, 2021, making the total document production to date over 3.7 million pages; (3) the parties have agreed to meet-and-confer to discuss additional search terms and document production from additional custodians; (4) Defendants have offered deposition dates for their fact witnesses in May 2021; and (5) third- party depositions still need to take place, the fact remains that of all of the Belviq actions filed, the action in the Eastern District of Louisiana before Judge Africk is the most advanced of all cases. Indeed, it is the only one of the Plaintiffs' actions in which Defendants have produced documents in response to discovery demands. Moreover, and as previously noted, it is also the only one of Plaintiffs' jurisdictions where a motion to dismiss has already been decided. Plaintiffs submit this fact supports the Eastern District of Louisiana as a viable venue for the proposed MDL.

2. The Eastern District of Louisiana Would be an Efficient Venue for this MDL

The Eastern District of Louisiana would also be an efficient location for these cases. The Eastern District of Louisiana currently has only four MDLs before it with none of them assigned to Judge Africk. As such, Judge Africk likely has the necessary time to devote to a new MDL, and, in light of the fact that he has already been very engaged in moving the action before him to trial, he certainly appears to have the skill and ability to effectively manage a MDL.[18] Thus, he should undoubtedly be a strong candidate to oversee this litigation.[19]

Further, according to judicial statistics, the Eastern District of Louisiana appears well situated to handle this MDL. Indeed, the Eastern District of Louisiana had only approximately 334 civil filings for the 12-month period ending on September 30, 2020, and the average length of time from filing to trial was an extremely efficient 14.8 months.[20] Given the efficiency of the Eastern District of Louisiana (and particularly Judge Africk), Plaintiffs submit it would serve as a very appropriate transferee forum.

3. The Eastern District of Louisiana is a Geographically Central, Convenient and Easily Accessible Venue for this MDL

In the past, the Panel has often shown preference for venues that are geographically central, convenient and easily accessible. The Eastern District of Louisiana meets these criteria. The Eastern District of Louisiana is centrally located in New Orleans, and this Panel has previously

[18] Judge Africk was originally assigned the *Taxotere* MDL by the Panel, *see In re Taxotere (Docetaxel) Prods. Liab. Litig.,* 220 F. Supp. 3d 1360 (J.P.M.L. 2016), but he recused himself thereafter. The Panel, in assigning the MDL to Judge Africk noted that he was "a seasoned jurist who is willing and able to handle the litigation…" *Id.* at 1361.

[19] Additionally, Magistrate Judge Michael North has been assigned to the action filed in the Eastern District of Louisiana for discovery related matters. As the Panel may be aware, for the last few years, Magistrate Judge North has been overseeing discovery-related matters relating to the *Taxotere* MDL and, therefore, he, like Judge Africk, has the skill and experience to assist in overseeing this complex products liability MDL.

[20] https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0930.2020.pdf (last accessed April 9, 2021). Notably, these statistics are efficient even during the COVID-19 pandemic.

noted that the geographic centrality and ease of accessibility of the Eastern District of Louisiana make it an appropriate venue for an MDL. *In re Taxotere (Docetaxel) Prods. Liab. Litig*., 220 F. Supp. 3d 1360 (J.P.M.L. 2016); *In re Xarelto (Rivaroxaban) Prods. Liab. Litig.,* 65 F. Supp. 3d at 1405. Accordingly, to the extent some degree of business travel resumes in the near future, travel to the Eastern District of Louisiana will conserve the resources of the parties and witnesses, when compared with other venues that may be proposed and is, therefore, the appropriate forum for this MDL.

C. PLAINTIFFS ARE NOT OPPOSED TO OTHER APPROPRIATE VENUES FOR THIS MDL

One of the earliest cases that was filed was in the Eastern District of New York on June 11, 2020 and it was assigned to Judge Ann Marie Donnelly. While it is not as advanced as the Eastern District of Louisiana, it is more advanced than most of the other filed cases; specifically, it has a discovery schedule anticipating a 2022 trial, Defendants' dismissal motion is full briefed and *sub judice* there, and 30(b)(6) depositions have been noticed for May 2021.

Plaintiffs also note that four recent cases were filed in the Middle District of Florida by other counsel (one in the Tampa division, one in the Ocala division and two in the Orlando division), which makes this district the only jurisdiction having more than one case filed, and Plaintiffs would not be averse to either jurisdiction or any interested jurist there being assigned this MDL if advanced by the plaintiffs' counsel in those cases. See *In re Fosamax (Alendronate Sodium) Prods. Liab. Litig. (No. II)*, 787 F. Supp. 2d 1355 (J.P.M.L. 2011)(transferring to the District of New Jersey noting that nearly 2/3 of the pending actions were already there); see also *In Re DePuy Orthopaedics, Inc*., 753 F.Supp.2d 1378, 1380 (J.P.M.L. 2010)(transferring to the Northern District of Ohio because, among other things, several potential tag-along actions were already pending there).

III. CONCLUSION

For the foregoing reasons, Plaintiffs herein respectfully request that the Panel grant the present motion for consolidation and centralization via a multidistrict litigation to the Eastern District of Louisiana, before Judge Lance M. Africk; or in the alternative any other jurisdictions the Panel deems appropriate; and grant such other and further relief as it may deem just and appropriate under the circumstances.

Dated: April 12, 2021

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