BEFORE THE UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

In re: Belviq (Lorcaserin HCl) Products Liability Litigation	)	MDL No. 3005

DEFENDANTS' MEMORANDUM IN OPPOSITION TO
MOTION TO TRANSFER ACTIONS UNDER 28 U.S.C. § 1407

Defendants Eisai Inc. and Arena Pharmaceuticals, Inc. respectfully submit this memorandum in opposition to the motion filed by plaintiffs (hereinafter, "Movants") to establish a multidistrict litigation proceeding in the U.S. District Court for the Eastern District of Louisiana.[1]

INTRODUCTION

The U.S. Food and Drug Administration approved Belviq® (lorcaserin hydrochloride) in 2012 as an adjunct to diet and exercise for chronic weight management in certain adults. When approved, Belviq became one of the few FDA-approved medications for the treatment of obesity, an epidemic afflicting millions of Americans that is associated with numerous adverse health outcomes.

Nearly all the lawsuits that are the subjects of Movants' motion involve allegations that the plaintiffs developed some form of cancer as a result of using Belviq, as prescribed by a physician according to the FDA-approved label. Most plaintiffs allege that Defendants did not adequately warn of the risk of cancer and claim that Belviq is defectively designed; some tack on allegations that Defendants breached various express or implied warranties. And in one case, a purported class action, the plaintiffs assert consumer-fraud claims. Even among the personal-injury cases,

[1] Some cases name Japan-based Eisai Co., Ltd. and Swiss-based Arena Pharmaceuticals GmbH, but, to date, neither entity has been served in any case in which they are currently named. If either entity is properly served through proper notice via the Hague Convention, they will assert their rights as appropriate.

the plaintiffs do not assert the same injury—some say they developed breast cancer, others say thyroid, colorectal, or parotid gland cancer.[2]

But the Panel need not consider whether those factual differences foreclose centralization. It is unwarranted here for the straightforward reason that Movants have made no particularized showing that centralization—what the Panel has described as the "last solution," *In re Covidien Hernia Mesh Prods. Liab. Litig.*, 481 F. Supp. 3d 1348, 1349 (J.P.M.L. 2020)—is needed. Movants have offered only perfunctory, generalized, and undetailed reasons why they say coordination is not possible. Rather than highlight real disputes regarding informal coordination, Movants point out that Defendants have moved to dismiss the cases. And Movants do not mention that centralization of these cases, with their disparate procedural postures, could impede progress and deprive the parties of information that could be learned from the most advanced case.

Movants can't show that centralization is necessary because it isn't. On the contrary, cooperation and informal coordination between the parties—the preferred alternatives to centralization—are practical and possible here. In the more than a year since the first action was filed, this litigation involves relatively few plaintiffs' firms (who have an ongoing, recent, productive working relationship), only the 13 cases listed in Movants' schedule of actions have been served on both Defendants, and both Defendants are represented by national counsel who are coordinating the cases together with each other. Defendants have offered to cooperate in Movants' counsel's cases to prevent duplicative discovery, and Movants have largely agreed. Nothing in Movants' motion shows that centralization is needed to "promote the just and efficient conduct" of these cases. 28 U.S.C. § 1407(a).

[2] Defendants dispute the assertions in Movants' papers, particularly on the purported merits of their claims. But the question for the Panel, of course, is not the merits but instead whether the existing cases should be transferred to a single district for pretrial proceedings. As explained herein, the answer to that question is "no."

Put simply, Movants' centralization request is based not on what has (or has not) happened in *this litigation* but instead on what the Panel has done in *others*. But the fact that some pharmaceutical product-liability litigations have been centralized does not mean that all should be. *See In re CVS Caremark Corp. Wage & Hour Employment Pracs. Litig.*, 684 F. Supp. 2d 1377, 1379 (J.P.M.L. 2010) ("[W]e do not 'rubber stamp' in any docket . . . ." (citation omitted)). And with no showing that the specific "facts, parties, procedural history and other circumstances" here require centralization, *In re Select Retrieval, LLC ('617) Patent Litig.*, 883 F. Supp. 2d 1353, 1354 (J.P.M.L. 2012), Movants' request is premature. The Panel should deny the motion to transfer.

In the alternative, if the Panel ultimately concludes that centralization is appropriate, Defendants agree that the Eastern District of Louisiana is an appropriate venue. So is the Southern District of New York, where the first Belviq case was filed. It is a convenient, efficient, and accessible forum—close to many of the witnesses and much of the evidence, located in New Jersey; convenient to the New Jersey state court judges presiding over parallel state-court litigation, thus promoting state/federal coordination, and the parties' counsel; and made up of experienced judges who have successfully managed recent MDLs.

FACTUAL BACKGROUND

I. Belviq's Development and Regulatory History

Belviq is a prescription medicine that was approved by the FDA in 2012 as a treatment for weight management. Obesity, the FDA has explained, "is a major public health epidemic in the United States and is associated with many health problems such as heart disease, diabetes, and stroke" that "greatly impact obese people's lives and quality of life while also creating great cost to the health care system."[3]

[3] Center for Devices and Radiological Health Discussion Paper: Consideration of Benefit-Risk Approaches for Weight-Loss Devices, available at https://www.fda.gov/media/130422/download (last visited May 4, 2021); Center

Before Belviq was ever approved, Arena conducted a two-year carcinogenicity study in mice and rats. That pre-clinical study showed an increased incidence and proportion of mammary tumors in female rats at doses 87 times higher than the human therapeutic dose. When Arena filed the New Drug Application (NDA) for Belviq, it submitted that data to the FDA. The FDA issued a Complete Response Letter based in part on the pre-clinical data, and Arena/Eisai worked diligently to respond to the Agency's concerns and resubmitted the NDA.[4] After discussions between the companies, the FDA, and the relevant advisory committee, the Agency determined that its initial concerns had been adequately and successfully addressed. And notably, "[n]o cancer-related safety signal emerged" in the Phase 3 clinical trial data.[5] After consideration of the resubmitted NDA and the clinical data, the FDA approved Belviq in June 2012.

The FDA-approved Belviq label included information about the pre-clinical studies. It explained that, "[i]n the rat carcinogenicity study," "mammary adenocarcinoma [in female rats] increased at 100 mg/kg, which was associated with plasma exposures that were 87-times the daily human clinical dose. The incidence of mammary fibroadenoma was increased in female rats at all doses with no safety margin to the clinical dose. The increases in adenocarcinomas and fibroadenomas may be associated with lorcaserin hydrochloride-induced changes in prolactin homeostasis in rats."[6] The label also noted that "[t]he relevance of the increased incidence of mammary adenocarcinomas and fibroadenomas in rats to humans is unknown."

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for Drug Evaluation and Research, Office Director Memo for Application No. 022529, available at https://www.accessdata.fda.gov/drugsatfda_docs/nda/2012/022529Orig1s000ODMemo.pdf.

[4] By contract, Eisai had exclusive rights to commercialize Belviq in the United States, and after Belviq was approved, the NDA was transferred from Arena to Eisai.

[5] Sharretts, et al. *Cancer Risk Associated with Lorcaserin — The FDA's Review of the CAMELLIA-TIMI 61 Trial*. N. Engl. J. Med. 2020; 383: 1000-02.

[6] *See* June 2012 Belviq Label, § 13.1, available at https://www.accessdata.fda.gov/drugsatfda_docs/label/2012/022529lbl.pdf.

Post-approval, Eisai conducted a cardiovascular outcomes trial.[7] The trial evaluated Belviq's effect on the incidence of major adverse cardiovascular events in 12,000 patients randomly assigned to lorcaserin or placebo in a 1:1 ratio. The study also tracked several "adverse events of special interest," including any reports of cancer. Eisai shared the results of the trial with the FDA, and the study's results were published in the *New England Journal of Medicine*. The FDA assessed the data from that trial and observed a slight imbalance in reports of certain cancers between the patients randomized to Belviq and placebo. But for some types of cancer, like breast cancer, there was no imbalance in the data at all—that is, cancer in placebo patients was roughly the same or even higher for some cancers, so no evidence of any association.

In January 2020, in light of that observed imbalance, the FDA issued a Drug Safety Communication advising that the cardiovascular outcomes trial "show[ed] a possible increased risk of cancer." The FDA did not, as Plaintiffs contend, "announce[] that Belviq is a carcinogen" (Doc. 1-1, at 3), but instead stated that it could "not conclude that lorcaserin contributes to the cancer risk."[8] The FDA later issued a second Drug Safety Communication, and in February 2020, Eisai voluntarily withdrew Belviq from the market.[9]

II. Litigation Background

In the 14 months since that voluntary withdrawal, 16 lawsuits in various federal and state courts have been served on Defendants.[10] The first-filed case on Movants' schedule of actions is

[7] Since 2010, the FDA has required cardiovascular trials for all new weight-management medications. *See supra* n.6.

[8] *See* FDA Drug Safety Communication, "Safety clinical trial shows possible increased risk of cancer with weight-loss medicine Belviq, Belviq XR (lorcaserin)," available at https://www.fda.gov/drugs/drug-safety-and-availability/safety-clinical-trial-shows-possible-increased-risk-cancer-weight-loss-medicine-belviq-belviq-xr.

[9] Since then, the FDA has granted lorcaserin an orphan drug designation for Dravet syndrome, a rare and serious seizure condition that occurs mostly in children, and authorized additional Phase 3 clinical testing for that purpose as well as an expanded access program for certain patients with Dravet and other refractory epilepsies.

[10] Since Movants filed their motion to transfer, plaintiffs have filed two additional cases, *Johnson* (N.D. Ohio) and *Govan* (S.D. Ill.). Eisai was served today in *Johnson*, but Arena still has not been served in that case as of this filing.

Zottola, a purported class action that presents consumer-fraud claims; that case is pending in the Southern District of New York. The other 15 cases are product-liability suits—three are pending in New Jersey state court, 12 are in various federal courts. All those cases are concentrated among five plaintiffs' firms that have worked closely together in previous pharmaceutical litigations. Six of the federal plaintiffs allege that they developed breast cancer; the other six allege other cancers. The plaintiffs largely assert design-defect and failure-to-warn claims under seven states' laws, but the claims are not uniform.[11]

The 12 served federal-court, product-liability cases listed in Movants' schedule of actions are also in varying stages. The most advanced case—*Fuller*, in the Eastern District of Louisiana—was in active discovery and was set for a 2021 trial before Judge Lance M. Africk recently "decided to stay and administratively close th[e] case . . . while the MDL Panel considers the petition."[12] Defendants already have produced millions of pages of documents, and the parties have begun to take depositions (*e.g.*, the plaintiff was deposed on March 17, and several of Defendants' current and former employees have been requested for deposition). As for the remaining cases, some were filed just days before Movants' filing and still have responsive pleading deadlines, some have pending motions to dismiss, and others have scheduling orders in place.[13]

Movants predict that this litigation will involve "high hundreds if not low thousands" of cases (Doc. 1-1, at 2–3 n.5), but that is both irrelevant and doubtful. It is irrelevant because, as the

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Neither Defendant has been served in *Govan*, even though plaintiffs filed a notice of potentially related action (Doc. 18) for the case. The filing of those cases does not change the relevant analysis.

[11] Some plaintiffs have asserted breach-of-warranty claims, but as explained below, many plaintiffs have dismissed these warranty claims in response to Defendants' motions.

[12] *Fuller*, No. 2:20-cv-01675, Doc. 93 (E.D. La. May 4, 2021).

[13] Discovery has been initiated in *Steinman* (E.D.N.Y.) and *Smith* (N.D. Ala.); motions to dismiss are pending in *Davis* (W.D. Mo.), *Puskas* (W.D. Okla.), and *Kaylor* (W.D. La.); and responsive pleading deadlines are upcoming in May or June 2021 for *Batayeh* (M.D. Fla.), *Milana* (M.D. Fla.), *Martinez* (M.D. Fla.), *Scala* (M.D. Fla.), *Crawford* (D.N.J.), and *Reynolds-Sitzer* (N.D.N.Y.).

Panel reiterated just last month, potential future filings do not factor into the centralization decision. *See In re Gen. Motors LLC Chevrolet Bolt EV Battery Prods. Liab. Litig.*, __ F. Supp. 3d __, 2021 WL 1220771, at *2 (J.P.M.L. Apr. 1, 2021). And it is doubtful because 14 months post- withdrawal, only 12 product-liability cases have been served on Defendants in federal court.

ARGUMENT

The Panel should deny transfer because Movants have failed to carry their "burden of demonstrating the need for centralization" under Section 1407. *In re Best Buy Co., Cal. Song-Beverly Credit Card Act Litig.*, 804 F. Supp. 2d 1376, 1379 (J.P.M.L. 2011). There are (1) a relatively small number of existing actions; (2) a correspondingly small group of firms involved, who regularly work together; (3) a real and demonstrated prospect for meaningful informal coordination; and (4) significant procedural disparities between these cases—so centralization is not necessary to "promote the just and efficient conduct" of this litigation. 28 U.S.C. § 1407(a). In the alternative, if the Panel deems consolidation appropriate, Defendants agree that the Eastern District of Louisiana is an appropriate venue. The Southern District of New York—home to the first case listed on Movants' schedule of actions—is another possible venue, with its convenience to witnesses and counsel, and judges who have recently managed MDLs successfully.

I. The Panel should deny the motion to transfer.

"[C]entralization under Section 1407," the Panel has emphasized, "should be the last solution after considered review of all other options." *In re Covidien*, 481 F. Supp. 3d at 1349 (quoting *In re Best Buy*, 804 F. Supp. 2d at 1378). That caution makes sense because centralization can impose "added inconvenience, confusion and cost" on the parties. *In re Uponor, Inc. F1960 Plumbing Fittings Prods. Liab. Litig.*, 895 F. Supp. 2d 1346, 1348 (J.P.M.L. 2012). Indeed, an MDL can "have the unintended consequence of producing more new case filings of marginal merit

in federal court, many of which would not have been filed otherwise." *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, MDL. No. 2004, 2016 WL 4705827, at *2 (M.D. Ga. Sept. 7, 2016).

Here, Movants have not shown why *these particular cases* warrant this "last solution." They instead invoke conclusory assertions and rote generalizations. They say, for example, that these cases involve "very similar, if not virtually identical causes of action and . . . allegations about Belviq" (Doc. 1-1, at 6); they complain that "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" (*id.* at 9); and they insist that forming an MDL would "reduce the burden" on federal courts "who are currently hearing and managing nearly identical products liability pharmaceutical cases" (*id.* at 15). Those off-the-rack assertions untethered from the facts of this litigation—indeed, they could be said of any set of similar cases—do not justify centralization. As the Panel has cautioned, "[c]entralization of any litigation . . . is not automatic, and will necessarily depend on the facts, parties, procedural history and other circumstances in a given litigation." *In re Select Retrieval*, 883 F. Supp. 2d at 1354 (citation omitted); *see also In re CVS Caremark*, 684 F. Supp. 2d at 1379.

On this record, Movants have not shown that centralization of these cases would "promote the just and efficient conduct of [these] actions," 28 U.S.C. § 1407, especially when informal coordination remains possible. ***First***, Defendants have agreed to cooperate with the plaintiffs to avoid duplicative discovery, and the relatively few plaintiffs' firms involved have an established working relationship among them. The fact is, the plaintiffs simply have not yet tried informal coordination in this litigation, preferring instead an MDL proceeding as the first (and apparently only) resort instead of the "last solution." ***Second***, in fact, formal centralization could impede

progress because of the disparate procedural postures of the cases. The *Fuller* case, in particular, already has been proceeding in discovery and may provide valuable information to inform the entire litigation. *See In re Linear Gadolinium-Based Contrast Agents Prods. Liab. Litig.*, 341 F. Supp. 3d 1381, 1382 (J.P.M.L. 2018). ***Third***, institutional concerns also counsel against premature centralization. Without a showing that informal coordination is impractical, centralization could trigger "unintended consequences," such as the filing of lawsuits that serve only to bloat the litigation while evading individualized scrutiny. *In re Mentor*, 2016 WL 4705827, at *1.

Because Movants have not shown that "centralization is necessary" at this time, the Panel should deny their motion to transfer. *See In re Adderall XR (Amphetamine/Dextroamphetamine) Mktg., Sales Pracs. & Antitrust Litig.*, 968 F. Supp. 2d 1343, 1344–45 (J.P.M.L. 2013).

A. Informal coordination is convenient and possible, and would best promote the just and efficient management of the litigation.

The Panel has emphasized that where it is possible, informal coordination is "preferable to formal centralization." *In re Adderall*, 968 F. Supp. 2d at 1345; *see also, e.g.*, *In re Gen. Motors*, 2021 WL 1220771, at *2 (explaining that "voluntary cooperation and coordination among the parties and the involved courts," if possible, is preferred to formal centralization). That kind of coordination is possible here—many of these cases involve common plaintiffs' counsel, with whom Defendants' national counsel are ready and willing to cooperate to efficiently coordinate discovery and other pretrial matters as appropriate. *See In re OxyElite Pro & Jack3d Prods. Liab. Litig. (No. II)*, 65 F. Supp. 3d 1412, 1413–14 (J.P.M.L. 2014) ("Informal cooperation among the involved attorneys and coordination between the involved courts . . . remains practicable and preferable to formal centralization of this litigation.").

1. Informal coordination is possible—Movants just have been reluctant to attempt it.

Informal coordination is certainly possible in this litigation, as Defendants have offered to prevent duplicative discovery and pretrial proceedings. Defendants have stated an intent to cross-notice all company-witness depositions once they occur. *See* MANUAL COMPLEX LIT. § 11.494 (4th ed.) ("The Judicial Panel on Multidistrict Litigation has encouraged parties to cross-notice depositions in all actions so as to obviate duplication."). There is active, ongoing coordination on a number of issues. Indeed, at a conference in the *Steinman* case (E.D.N.Y.), Movants' counsel (Douglas & London) agreed to work cooperatively with Defendants' counsel.[14] And there have been discussions with Douglas & London to use the same search terms for Defendants' document productions and the same orders to govern electronically stored information across all their cases.

Although four other plaintiffs' firms (Beasley Allen; Morgan & Morgan; Levin Papantonio; and the Aylstock Firm) have filed some of the 12 product-liability cases listed in the schedule of actions, these plaintiffs' counsel have historically worked together in other litigations.[15] *Cf. In re Townsend Farms Organic Anti-Oxidant Blend Prods. Liab. Litig.*, 24 F.

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[14] Ex. 1 ("[F]or the plaintiff, obviously for my cases, we will do our best to coordinate. . . . So if they produc[e] it in the Louisiana case, we'll obviously keep it for the Steinman case and use it across all the cases. So that would be our plan. We're not trying to do duplicative discovery for our clients. . . . [I]t is our hope to coordinate at least on behalf of our cases. . . . Our intent is to get the document once, use it for all of our cases. Take the deposition once, use it for our cases."). In *Smith* (N.D. Ala.), Movants' counsel likewise acknowledged that "discovery has commenced in at least two Belviq actions and that discovery, in-part, will be useable in this action." Joint Report of Parties' Planning Meeting (Doc. 50), *Smith v. Eisai Inc., et al.*, No. 5:20-cv-01278-LCB (N.D. Ala.).

[15] All five plaintiffs' firms worked together in *In re Actos (Pioglitazone) Prods. Liab. Litig.*, MDL No. 2299. They also have worked together in various combinations in many other litigations. *See, e.g.*, *In re Guidant Corp. Implantable Defibrillators Prod. Liab. Litig.*, MDL No. 1708 (Morgan & Morgan; Levin Papantonio; Aylstock); *In re Ortho Evra Prods. Liab. Litig.*, MDL No. 1742 (Douglas & London; The Aylstock Firm; Levin Papantonio); *Yasmin & Yaz Mktg., Sales Pracs. & Prods. Liab. Litig.*, MDL No. 2100 (Douglas & London; Morgan & Morgan; Levin Papantonio); *In re Deepwater Horizon*, MDL No. 2179 (Beasley Allen; Levin Papantonio; Aylstock); *In re DePuy Orthopaedics, Inc., ASR Hip Implant Prods. Liab. Litig.*, MDL No. 2197 (Beasley Allen; Morgan & Morgan; Levin Papatonio); *In re Pradaxa (Dabigatran Etexilate) Prods. Liab. Litig.*, MDL No. 2385 (Douglas & London; Morgan & Morgan; Aylstock; Levin Papantonio); *In re Testosterone Replacement Therapy Prods. Liab. Litig.*, MDL No. 2545 (Douglas & London; Beasley Allen; Levin Papantonio); *In re Xarelto (Rivaroxaban) Prods. Liab. Litig.*, MDL No. 2592 (Douglas & London; Beasley Allen; Levin Papantonio; Aylstock); *In re Elmiron (Pentosan Polysulfate Sodium) Prods. Liab. Litig.*, MDL No. 2973 (Douglas & London; Morgan & Morgan; Levin Papantonio).

Supp. 3d 1372, 1372 (J.P.M.L. 2014) ("Plaintiffs are represented by common counsel, and counsel for defendants appear to have a good working relationship."). There is no reason to presume that such coordination cannot occur here.[16] Because the parties "have every ability to cooperate and minimize the possibilities of duplicative discovery and inconsistent pretrial rulings," *In re Quaker Oats Trans-Fat Mktg. & Sales Pracs. Litig.*, 777 F. Supp. 2d 1344, 1344 (J.P.M.L. 2011), resort to the "last solution" of centralization is unnecessary, *In re Adderall*, 968 F. Supp. 2d at 1345.

Substantial general fact discovery from the defendants will overlap (*see* Doc. 1-1, at 8), but "suitable alternatives to Section 1407 transfer are available in order to minimize the possibility of duplicative discovery." *In re Eli Lilly & Co. (Cephalexin Monohydrate) Patent Litig.*, 446 F. Supp. 242, 244 (J.P.M.L. 1978). Potentially overlapping discovery does not require centralization: "[N]otices 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; or the involved courts may direct the parties to coordinate their pretrial activities." *In re Adderall*, 968 F. Supp. 2d at 1345. Again, Defendants are willing to share generic fact discovery across all cases and to cross-notice any overlapping depositions.

The manageable size of this litigation also is prime for informal coordination among the parties. Just 13 federal cases have been served on Defendants, with four pending in the same district.[17] There is no reason to think—at least not at this early stage—that these relatively few

[16] Indeed, there is evidence that these plaintiffs' counsel *already* are working cooperatively together in these cases. *See* Agenda, HarrisMartin Webinar Series: Belviq MDL Litigation (May 20, 2021), https://www.harrismartin.com/conferences/271/Webinar_Belviq_May21/agenda/ (showing presentations scheduled to be given by Douglas & London; Morgan & Morgan; and Levin Papantonio).

[17] *Batayeh*, *Milana*, *Martinez*, and *Scala* were all filed in the Middle District of Florida just days before Movants filed their motion to transfer. By the district's local rules, those four cases can be assigned to a single judge—"counsel has a continuing duty to notify the judge of a related action pending in the Middle District," M.D. Fla. L.R. 1.07(c), and "[i]f actions assigned to a judge present the possibility of inefficiency or inconsistency, a party may move to consolidate [them]," *id.* L.R. 1.07(b).

plaintiffs' counsel cannot work cooperatively with each other (as they have before) and with Defendants' counsel to prevent duplicative discovery and rulings in this relatively small number of cases. The Panel has declined to centralize larger pharmaceutical product-liability litigations based in part on similar circumstances. *See In re Cymbalta (Duloxetine) Prods. Liab. Litig. (No. II)*, 138 F. Supp. 3d 1375, 1377 (J.P.M.L. 2015) (observing that the plaintiffs in the 41 actions were largely "represented by one or more of four law firms" and "given this limited number of involved counsel, informal coordination and cooperative efforts by the parties and involved courts remain practicable").[18]

Movants point out that the Panel previously has centralized product-liability litigations that involved fewer districts/divisions.[19] But that ignores the Panel's admonition that it "do[es] not 'rubber stamp' in any docket," *In re CVS Caremark*, 684 F. Supp. 2d at 1379, and the propriety of centralization turns on *the particular* facts and circumstances unique to each litigation, *In re Select Retrieval*, 883 F. Supp. 2d at 1354. So the fact that smaller product-liability litigations have been centralized says nothing about whether Movants have met their burden to show centralization is necessary *here*. Indeed, Movants' cited cases make the point, as the record in those cases was quite different than here. In *Propecia* and *Monat Hair Care*, no party opposed centralization. *See In re Propecia*, 856 F. Supp. 2d at 1335; *In re Monat Hair Care*, 325 F. Supp. 3d at 1365. But

[18] *See also, e.g.*, *In re Cordarone (Amiodarone Hydrochloride) Mktg., Sales Pracs. & Prods. Liab. Litig.*, 190 F. Supp. 3d 1346, 1347–48 (J.P.M.L. 2016) (declining to consolidate nine cases pending in seven districts in part because of the "limited number of involved counsel"); *In re OxyElite Pro & Jack3d Prod. Liab. Litig.*, 11 F. Supp. 3d 1340, 1341 (J.P.M.L. 2014) (declining to consolidate 18 product-liability cases because there were "a limited number of actions and involved counsel, with two groups of plaintiffs' counsel already coordinating most of the personal injury actions"); *In re Oxycontin Prods. Liab. Litig. (No. II)*, 395 F. Supp. 2d 1358, 1359 (J.P.M.L. 2005) (declining to consolidate 25 pharmaceutical cases pending in 17 federal districts where "pretrial proceedings [were] already advanced" in certain cases and there was "common" plaintiffs' counsel).

[19] *See* Doc. 1-1, at 15–16 (citing *In re Propecia (Finasteride) Prods. Liab. Litig.*, 856 F. Supp. 2d 1334 (J.P.M.L. 2012); *In re ZF-TRW Airbag Control Units Prods. Liab. Litig.*, 410 F. Supp. 3d 1357 (J.P.M.L. 2019); *In re Zostavax (Zoster Vaccine Live) Prods. Liab. Litig.*, 330 F. Supp. 3d 1378 (J.P.M.L. 2018); *In re Monat Hair Care Prods. Mktg., Sales Pracs. & Prods. Liab. Litig.*, 325 F. Supp. 3d 1364 (J.P.M.L. 2018)).

here, Defendants do oppose, and the fact "that all defendants uniformly oppose centralization is a factor which is quite influential where other factors do not strongly favor centralization." *In re Skinnygirl Margarita Beverage Mktg. & Sales Pracs. Litig.*, 829 F. Supp. 2d 1380, 1381 (J.P.M.L. 2011). *Zostavax* and *ZF-TRW Airbag* are also off point—*Zostavax* involved 98 cases (more than eight times the number of cases at issue here), 330 F. Supp. 3d at 1380, and *ZF-TRW Airbag* involved eight sets of defendants who had different views on centralization and significantly more counsel, 410 F. Supp. 3d at 1359–60. The differences in the facts, procedural history, and circumstances in those litigations compared to this one show why the centralization decision must be made on each litigation's individual record.

On *this record*, there is no reason to believe that informal cooperation among the parties is not easier, more efficient, and more cost-effective than centralization. Movants have not met their burden to show that centralization is necessary. *See In re Best Buy*, 804 F. Supp. 2d at 1379.

2. Movants have not shown that informal coordination is impractical.

Movants offer four reasons why, they say, informal coordination will not be practical, but their arguments are either legally wrong or largely speculative.

First, Movants point to "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" (Doc. 1-1, at 3), but this is actually a reason to *deny* the motion, not to grant it. *See, e.g.*, *In re CVS Caremark*, 684 F. Supp. 2d at 1379 ("The presence of procedural disparities among constituent cases is another factor that can weigh against centralization."); *infra* at 16–17. And accepting Plaintiffs' broad theory of why informal coordination is supposedly impractical would essentially *require* centralization in all pharmaceutical litigation—after all, every such litigation will have cases in "various stages" and whenever "new cases are filed" or "new and different attorneys become involved," cases will

necessarily be in different stages. But no docket lends itself to automatic centralization. *In re CVS Caremark*, 684 F. Supp. 2d at 1379. And the fact of varied procedural postures alone does not mean that the parties cannot coordinate to avoid duplicative discovery—especially if, like here, Defendants are willing to cross-notice depositions and stipulate to certain generic discovery, and addendum depositions can occur with appropriate limitations. *See supra*.

Second, Movants next insist that they have "attempted informal coordination of plaintiffs' seven actions with Defendants, but it has proven (and is still proving) itself to be impractical." Doc. 1-1, at 8–9. That is wrong. Defendants and Movants have agreed to apply certain discovery and procedures across the board in Movants' counsel's cases—*e.g.*, produced documents, search terms, and ESI orders—and Defendants have stated an intent to cross-notice depositions. Otherwise, the cases brought by other plaintiffs' firms have not reached the point of needing to coordinate among the various actions. In fact, the progress of these cases shows that coordination can occur, as the parties are using similar protective orders and authorizations across cases. And although Movants contend that "foundational order disputes will likely occur without formal coordination," *id.* at 14, they have cited just one example from an unnamed law firm that purportedly intends to seek a "less restrictive protective order" in a single case. *Id.* That one-off anticipated disagreement about a protective order (if it even comes to pass) does not mean that informal cooperation and coordination cannot occur in these cases as a whole. *See In re OxyElite*, 65 F. Supp. 3d at 1413 ("The current disputes . . . appear to be the subject of ongoing good faith negotiations, and the Panel is not convinced that centralization is necessary to resolve the limited areas of disagreement given the circumstances presented by this litigation.").

Third, Movants also contend that informal coordination is "inefficient and impractical" because Defendants have moved to dismiss in each case. Doc. 1-1, at 9. But Movants cite no

authority that the mere filing of motions to dismiss shows a need for centralization. Defendants are entitled to defend the cases against them, and, in fact, the motions have actually narrowed the issues in dispute—in response to each of Defendants' motions, each plaintiff has voluntarily dismissed some of their claims.[20] Movants say that there may be "inconsistent rulings in different jurisdictions" (Doc. 1-1, at 10), but that is both unremarkable and expected when differing state laws will govern each separate case (here, the plaintiffs listed in the schedule of actions are from 7 different states). And even if there is some overlap in the legal issues, that does not mandate centralization—"[m]erely to avoid [different] federal courts having to decide the same issue is, by itself, usually not sufficient to justify Section 1407 centralization." *In re Route 91 Harvest Festival Shootings*, 347 F. Supp. 3d 1355, 1357 (J.P.M.L. 2018) (citation omitted).

Finally, although Plaintiffs "anticipate[]" that the number of filed cases "will continue to increase" (Doc. 1-1, at 2–3)—again—the Panel is "disinclined to take into account the mere possibility of future filing in [its] centralization calculus." *In re Gen. Motors*, 2021 WL 1220771, at *2 (citation omitted).

* * *

Centralization of cases is intended to be a last resort, *In re Covidien*, 481 F. Supp. 3d at 1349, but Movants want it as the first solution. They have not shown that informal coordination and cooperation between the involved counsel—a preferable, more efficient, and more cost-effective alternative—is impractical. The Panel need not order formal centralization and impose "the last solution" for a problem that Movants have not tried to solve or even shown to exist.

[20] *See Smith*, No. 5:20-cv-01278 (N.D. Ala.), Pl.'s Opp. to Mot. to Dismiss (Doc. No. 47), at 5; *Fuller*, No. 2:20-cv-01675 (E.D. La.), Pls.' Opp. to Mot. to Dismiss (Doc. 21), at 4; *Steinman*, No. 1:20-cv-02608 (E.D.N.Y.), Pls.' Opp. to Mot. to Dismiss (Doc. 39), at 2; *Davis*, No. 4:20-cv-00762 (W.D. Mo.), Pl.'s Sugg. In Opp. to Partial Mot. to Dismiss (Doc. 36), at 2; *Kaylor*, No. 5:21-cv-00058 (W.D. La.), Pl.'s Opp. to Mot. to Dismiss (Doc. 21), at 2; *Puskas*, No. 5:20-cv-00868 (W.D. Okla.), Amended Compl. (Doc. 15).

B. The disparate procedural postures make centralization inefficient.

Centralization also is unwarranted because these cases have disparate procedural postures that make centralization inefficient and unnecessary. *See In re CVS Caremark*, 684 F. Supp. 2d at 1379 ("The presence of procedural disparities among constituent cases is another factor that can weigh against centralization.").

As Movants recognize (Doc. 1-1, at 17–18), the *Fuller* case in the Eastern District of Louisiana is much farther advanced than the others. Although Judge Africk recently "decided to stay and administratively close th[e] case . . . while the MDL Panel considers the petition" (*supra* n.13), the parties have already engaged in significant discovery, including initial depositions and the production of more than 3.5 million pages of documents; Defendants have subpoenaed the plaintiffs' doctors, and document discovery of these doctors has started; and the plaintiffs have initiated discovery of multiple third parties. The parties have made efficient progress in that case without the aid of an MDL proceeding, and there is no reason to disturb that progress by way of transfer. *See In re Property Assessed Clean Energy (Pace) Programs Litig.*, 764 F. Supp. 2d 1345, 1347 (J.P.M.L. 2011) (denying centralization where it "could disrupt, or at least delay" the progress of related actions that were "already proceeding apace").

On the other hand, there are other cases, where very "little, if any, pretrial activity has occurred," *In re CVS Caremark*, 684 F. Supp. 2d at 1379—motions to dismiss are pending in four actions, and there are responsive pleading deadlines in six actions. And some other cases (*supra* n.14) have scheduling orders and/or discovery has commenced. These cases' "quite different procedural postures" weigh against centralization. *See id.*; *see also, e.g.*, *In re Ambulatory Pain Pump-Chondrolysis Prods. Liab. Litig.*, 709 F. Supp. 2d 1375, 1378 (J.P.M.L. 2010) (denying centralization where "the constituent actions [were] at widely varying procedural stages").

Creating an MDL here would not just delay the significant progress already made in *Fuller* but also deprive the parties of useful information about the broader litigation that *Fuller* could offer. *In re Linear Gadolinium-Based Contrast Agents*, 341 F. Supp. 3d at 1382 (denying centralization because advanced case "may inform the other related actions and promote a resolution of the litigation without resort to Section 1407"). Rather than "produce . . . clarity or efficiency" here, *In re Uponor*, 895 F. Supp. 2d at 1348, centralization would inhibit it.

C. Premature centralization could trigger unintended consequences.

More than 14 months have passed since Belviq's market withdrawal, and only 12 product-liability cases have been filed and served on Defendants in federal courts. Premature centralization and formation of an MDL could change that pace of filings because "such consolidations are not without unintended consequences." *In re Mentor*, 2016 WL 4705827, at *1.

Indeed, MDLs often attract cases based not on their merits, but instead because they can be easily filed, escape individual scrutiny, and inflate case counts in an effort to inflict settlement pressure. As an MDL judge recently observed, despite the goal of "allow[ing] for more efficient pretrial management of cases with common issues of law and fact," the MDL process has "evol[ved] . . . toward providing an alternative dispute resolution forum for global settlements [that] has produced incentives for the filing of cases that otherwise would not be filed if they had to stand on their own merit as a stand-alone action." *Id.*

To be sure, the Panel cannot address the merits, but the Panel does possess an "institutional responsibility" when deciding whether centralization is proper. *In re Alteryx, Inc. Customer Data Sec. Breach Litig.*, 291 F. Supp. 3d 1377, 1378 (J.P.M.L. 2018). Those institutional concerns suggest caution here—premature centralization could "produce[] the perverse result that an MDL, which [is intended] to manage cases more efficiently to achieve judicial economy, becomes

populated with many non-meritorious cases that must nevertheless be managed by the transferee judge—cases that likely never would have entered the federal court system without the MDL." *In re Mentor*, 2016 WL 4705827, at *1.

The Panel would be well within its authority to consider whether the current trickle of cases might instead become a flood in centralization's wake—especially here, where informal alternatives to centralization remain possible and a limited number of counsel are involved.

II. Alternatively, if the Panel centralizes, the cases should be transferred to the Eastern District of Louisiana or the Southern District of New York.

If there is to be an MDL, Defendants agree that the Eastern District of Louisiana is an appropriate venue, as is the Southern District of New York.[21]

A. The Eastern District of Louisiana would be an appropriate venue.

Defendants agree that, if the Panel orders transfer of these cases, the Eastern District of Louisiana is one (but not the only) appropriate venue. The most procedurally advanced case (*Fuller*) is pending there. The Panel has previously ordered transfer to the district where the pending action was "relatively advanced." *In re Caterpillar, Inc., C13 & C15 Engine Prods. Liab. Litig.*, 26 F. Supp. 3d 1394, 1395 (J.P.M.L. 2014); *see also, e.g.*, *In re Midland Nat'l Life Ins. Co. Annuity Sales Pracs. Litig.*, 484 F. Supp. 2d 1355, 1356 (J.P.M.L. 2007) (transfer to district where action was "more procedurally advanced"). The Eastern District of Louisiana also appears to be an efficient venue for this MDL. Four MDLs are currently pending there, but none are assigned to Judge Africk, who is presiding over *Fuller*. The district also is centrally located in New Orleans,

[21] Movants suggest that the Middle District of Florida is an appropriate venue because "four recent cases" were filed there. Doc. 1-1, at 19. But those cases were filed shortly before Movants filed their motion to transfer. *See In re CVS Caremark*, 684 F. Supp. 2d at 1379 (noting that plaintiffs "commenced the [additional actions] immediately prior to filing th[e] Section 1407 motion" and explaining that the Panel "find[s] less favor" with a centralization motion that "appears intended to further the interests of particular counsel more than those of the statute"). That district also has no nexus with the common issues in the litigation, and the judges there have not yet invested time in the litigation. Defendants also note that Judge James Moody (currently presiding over *Scala*) has taken senior status, and Judge Berger (currently presiding over *Batayeh*) took the bench in July 2019.

and the Panel has previously transferred cases there because it is convenient and easily accessible. *See, e.g.*, *In re Xarelto (Rivaroxaban) Prods. Liab. Litig.*, 65 F. Supp. 3d 1402, 1405 (J.P.M.L. 2014).

B. The Southern District of New York also would be an appropriate venue.

Although the Eastern District of Louisiana is one potential venue, the Southern District of New York has several distinct advantages that would serve the statutory goals of "efficien[cy]" and "convenience." 28 U.S.C. § 1407(a).

1. The Southern District of New York is the site of the first-filed action involving Belviq (*Zottola*). The Panel has held that the district where the first action was filed is an "appropriate transferee district." *In re Saturn L-Series Timing Chain Prods. Liab. Litig.*, 536 F. Supp. 2d 1367, 1368 (J.P.M.L. 2008) (ordering transfer to District of Nebraska in part "because the first-filed action was brought there"); *see also, e.g.*, *In re Wells Fargo Mortg. Lending Pracs. Litig.*, 545 F. Supp. 2d 1371, 1372 (J.P.M.L. 2008).

2. The Southern District of New York is conveniently located to the witnesses and evidence. Eisai is headquartered in New Jersey, and many of the potential corporate witnesses and documents are located there. In contrast, there is no similar "center of gravity" for plaintiffs and their witnesses—Belviq was prescribed to patients throughout the country, and there is no reason to believe that the various alleged injuries would occur in one region more often than any other. In short, to the extent that any discovery relevant to any common questions of fact is located in New Jersey, the Southern District of New York is a convenient place for centralization. Indeed, the Panel has ordered transfer to the Southern District of New York when faced with a geographically dispersed litigation that involved a New Jersey-based defendant. *See, e.g.*, *In re Mirena IUS Levonorgestrel-Related Prods. Liab. Litig. (No. II)*, 249 F. Supp. 3d 1357, 1361 (J.P.M.L. 2017) (ordering transfer to the district because it was "near [the defendant's] corporate

headquarters in New Jersey, where many of the common documents and witnesses are likely to be located" and was "a geographically convenient forum for th[e] nationwide litigation").

3. The Southern District of New York is convenient to counsel—Movants' counsel is based there (*see* Doc. 1-1, at 20), as is counsel for both Defendants in the underlying actions.

4. The Southern District of New York also is conveniently located to the three cases pending in New Jersey state court. As the Panel has recognized, "[t]he possibility of promoting . . . state/federal coordination is a[] factor favoring the selection" of a particular transferee forum. *In re Oil Spill by "Amoco Cadiz" Off Coast of France on March 16, 1978*, 471 F. Supp. 473, 478–79 (J.P.M.L. 1979); *see also, e.g.*, *In re Avaulta Pelvic Support Sys. Prods. Liab. Litig.*, 746 F. Supp. 2d 1362, 1364 (J.P.M.L. 2010).

5. The judges in the Southern District of New York have extensive experience handling MDLs, which is an important consideration in selecting the appropriate forum. *See, e.g.*, *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 867 F. Supp. 2d 1356, 1357 (J.P.M.L. 2012) (assigning MDL to "a jurist experienced in complex multidistrict litigation"); *In re Celexa & Lexapro Prods. Liab. Litig.*, 416 F. Supp. 2d 1361, 1363 (J.P.M.L. 2006) (same). The Southern District of New York's judges have successfully managed several recent product-liability MDLs. *See, e.g.*, *In re Eliquis (Apixaban) Prods. Liab. Litig.*, MDL No. 2754.

CONCLUSION

For the reasons stated above, the Panel should deny Movants' Section 1407 motion to transfer. In the alternative, if there is to be an MDL, the Panel should centralize these cases in the Eastern District of Louisiana or the Southern District of New York.

Dated this 5th day of May 2021

Respectfully submitted,

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BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: Belviq (Lorcaserin HCl) Products Liability Litigation

MDL No. 3005

SCHEDULE OF ACTIONS

	Case Parties	District	Civil Action No.	Judge
1	Plaintiff(s): Stephanie Fuller and Robert Fuller Defendants: Eisai Inc. and Arena Pharmaceuticals, Inc.	E.D. Louisiana (New Orleans)	2:20-cv-01675	Lance M. Africk
2	Plaintiff(s): Deborah Steinman and Reuben Steinman Defendants: Eisai Inc. and Arena Pharmaceuticals, Inc.	E.D. New York (Brooklyn)	1:20-cv-02608	Ann M. Donnelly
3	Plaintiff(s): Mildred Smith Defendants: Eisai Inc. and Arena Pharmaceuticals, Inc.	N.D. Alabama (Northeastern)	5:20-cv-01278	Liles C. Burke
4	Plaintiff(s): Pamela Puskas and Michael Puskas Defendants: Eisai Inc. and Arena Pharmaceuticals, Inc.	W.D. Oklahoma (Oklahoma City)	5:20-cv-00868	Scott L.Palk
5	Plaintiff(s): Maryann Kaylor and William Kaylor Jr. Defendants: Eisai Inc. and Arena Pharmaceuticals, Inc.	W.D. Louisiana (Shreveport)	5:21-cv-00058	Elizabeth E. Foote
6	Plaintiff(s): Jennifer Reynolds-Sitzer and Kenneth Sitzer Defendants: Eisai Inc. and Arena Pharmaceuticals, Inc.	N.D. New York (Albany)	1:21-cv-00145	David N. Hurd

BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: Belviq (Lorcaserin HCl) Products Liability Litigation

MDL No. 3005

7	Plaintiff(s): Deborah Crawford and Bradley Trey Crawford Defendants: Eisai Inc. and Arena Pharmaceuticals, Inc.	D. New Jersey (Newark)	2:21-cv-02439	Susan D. Wigenton
8	Plaintiff(s): Mary Milana and Victor Milana Defendants: Eisai Inc., Eisai Co., Ltd., Arena Pharmaceuticals GmbH, and Arena Pharmaceuticals, Inc	M.D. Florida (Tampa)	8:21-cv-00831	Charlene Edwards Honeywell
9	Plaintiff(s): Jazmin Martinez Defendants: Eisai Inc., Eisai Co., Ltd., Arena Pharmaceuticals GmbH, and Arena Pharmaceuticals, Inc	M.D. Florida (Orlando)	6:21-cv-00615	Paul G. Byron
10	Plaintiff(s): Maher Batayeh Defendants: Eisai Inc. and Arena Pharmaceuticals, Inc.	M.D. Florida (Orlando)	6:21-cv-00406	Wendy W. Berger
11	Plaintiff(s): Colleen Scala Defendants: Eisai Inc., Eisai Co., Ltd., Arena Pharmaceuticals GmbH, and Arena Pharmaceuticals, Inc.	M.D. Florida (Ocala)	5:21-cv-00210	James S. Moody, Jr.
12	Plaintiff(s): Amy Davis Defendants: Eisai Inc. and Arena Pharmaceuticals, Inc.	W.D. Missouri (Kansas City)	4:20-cv-00762	Greg Kays
13	Plaintiff(s): Barbara Zottola Defendants: Eisai Inc., Arena Pharmaceuticals, Inc., CVS Health Co.	S.D. New York (White Plains)	7:20-cv-02600	Philip M. Halpern

BEFORE THE UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

IN RE: Belviq (Lorcaserin HCl) Products Liability Litigation

MDL No. 3005

14	Plaintiff(s): Sharon Govan and Hildred Govan Defendants: Eisai Inc. and Arena Pharmaceuticals, Inc. (Added to Schedule of Actions per Govan Plaintiffs' Notice of Related Action filed 5/3/2021, Doc. 18)	S.D. Illinois (East St. Louis)	3:21-cv-00384	Reona J. Daly

BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: Belviq (Lorcaserin HCl) Products Liability Litigation	))))	MDL No. 3005

PROOF OF SERVICE

In compliance with Rule 4.1(a) of the Rules of Civil Procedure for the United States Judicial Panel on Multidistrict Litigation, I hereby certify that a copy of the foregoing Memorandum in Opposition to Motion to Transfer Actions Under 28 U.S.C. § 1407 was served on all parties in the following cases electronically via ECF, or as otherwise indicated below, on May 5, 2021:

Stephanie Fuller and Robert Fuller v. Eisai Inc. and Arena Pharmaceuticals, Inc.

E.D. Louisiana, Case No. 2:20-cv-01675

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Deborah Steinman and Reuben Steinman v. Eisai Inc. and Arena Pharmaceuticals, Inc. E.D. New York, Case No. 1:20-cv-02608	
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Mildred Smith v. Eisai Inc. and Arena Pharmaceuticals, Inc. N.D. Alabama, Case No. 5:20-cv-01278	
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W.D. Oklahoma, Case No. 5:20-cv-00868	
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Maryann Kaylor and William Kaylor Jr. v. Eisai Inc. and Arena Pharmaceuticals, Inc. W.D. Louisiana, Case No. 5:21-cv-00058	
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Jennifer Reynolds-Sitzer and Kenneth Sitzer v. Eisai Inc. and Arena Pharmaceuticals, Inc. N.D. New York, Case No. 1:21-cv-00145	
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Deborah Crawford and Bradley Trey Crawford v. Eisai Inc. and Arena Pharmaceuticals, Inc. D. New Jersey, Case No. 2:21-cv-02439	
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Mary Milana and Victor Milana v. Eisai Inc., Eisai Co. Ltd., Arena Pharmaceuticals GmbH, and Arena Pharmaceuticals, Inc. M.D. Florida, Case No. 8:21-cv-00831	
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Jazmin Martinez v. Eisai Inc., Eisai Co. Ltd., Arena Pharmaceuticals GmbH, and Arena Pharmaceuticals, Inc. M.D. Florida, Case No. 6:21-cv-00615	
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Colleen Scala v. Eisai Inc., Eisai Co. Ltd., Arena Pharmaceuticals GmbH, and Arena Pharmaceuticals, Inc. M.D. Florida, Case No. 5:21-cv-00210	
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Barbara Zottola v. Eisai Inc., Arena Pharmaceuticals, Inc., CVS Health Co. S.D. New York, Case No. 7:20-cv-02600	
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Sharon Govan and Hildred Govan v. Eisai Inc. and Arena Pharmaceuticals, Inc. S.D. Illinois, Case No. 3:21-cv-00384	
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Not Served (Foreign Defendants)

Jazmin Martinez v. Eisai Inc., Eisai Co. Ltd., Arena Pharmaceuticals GmbH, and Arena Pharmaceuticals, Inc. M.D. Florida, Case No. 6:21-cv-00615	
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Mary Milana and Victor Milana v. Eisai Inc., Eisai Co. Ltd., Arena Pharmaceuticals GmbH, and Arena Pharmaceuticals, Inc. M.D. Florida, Case No. 8:21-cv-00831	
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Colleen Scala v. Eisai Inc., Eisai Co. Ltd., Arena Pharmaceuticals GmbH, and Arena Pharmaceuticals, Inc. M.D. Florida, Case No. 5:21-cv-00210	
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Dated this 5th day of May 2021

Respectfully submitted,

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