BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: BARD IMPLANTED PORT CATHETER PRODUCTS LIABILITY LITIGATION This document relates to: *Franks v. Becton, Dickinson and Company, et al*., N.D. Tex., 3:23-cv-02538; *Meadors v. Becton, Dickinson and Company, et al*., D.N.J., 2:23-cv-22267; *Hunter v. Becton, Dickinson and Company, et al*., D. Colo., 1:23-cv-03048	MDL No. 3081

MEMORANDUM IN OPPOSITION OF DEFENDANTS' MOTION TO VACATE CONDITIONAL TRANSFER ORDER NO. 10 AND CONDITIONAL TRANSFER ORDER NO. 11

INTRODUCTION

Pursuant to 28 U.S.C § 1407 and Rule 7.1 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation ("the Panel"), Plaintiffs Ryan Meadors and Bernadette Franks respectfully submit this Memorandum in opposition of Defendants' Motion to Vacate Conditional Transfer Orders. The cases on the Schedule of Actions arise from injuries caused by the use of Implanted Port Catheter devices manufactured and distributed by Defendants in the above-captioned MDL now pending in the United States District Court for the District of Arizona. Conditional Transfer Order No. 10 correctly ruled that the Complaints at issue "involve questions of fact that are common to the actions previously transferred to the District of Arizona and assigned to Judge Campbell." Dkt. No. 110. With their Motion to Vacate, Defendants seek to impose unnecessary burdens on the parties and the courts by forcing cases alleging claims very similar to those currently pending in MDL No. 3081 to proceed individually, notwithstanding the fact that between the actions subject to CTO Nos. 10 and 11 ("Actions") and the cases pending in the MDL,

there is a unity of (1) named defendants, (2) products at issue, (3) injuries suffered, and (4) legal theories advanced. Defendants' stated justification for their opposition to transfer of the Actions is that they allege – in addition to the same factual and technical allegations present in essentially all member actions in the MDL – additional allegations supporting their claims that the Defendant's implanted port devices are defectively designed and unreasonably dangerous.

Similar to all actions currently pending in MDL No. 3081, the Actions are brought by individuals injured by the failure of an implanted port product manufactured by the Defendants. All Actions allege injuries arising from failures of models of Defendants' port products which are currently the subject of multiple claims in MDL No. 3081.[1] Both actions allege that they suffered an infection of their Bard implanted port product, similar to the majority of cases pending in MDL No. 3081. The Actions name as defendants the same four entities involved in the manufacture and distribution of the devices at issue in the MDL, including C.R. Bard ("Bard") and Becton, Dickinson and Company ("BD"), Bard Peripheral Vascular, Inc.("BPV"), and Bard Access Systems, Inc. ("BAS") ("Defendants"). The Actions assert common claims based upon common factual allegations with those matters currently pending in the MDL, and judicial economy as well as convenience of the parties is better served by transferring these cases to the MDL. Because the factual allegations in the Actions represent an evolution of plaintiffs' counsel's understanding of the causes of the injuries from Defendants' implanted port products, Plaintiffs anticipate that many similar actions are likely to be filed soon and for an indefinite time into the future. Transfer of the Actions would facilitate coordinated discovery, is necessary to avoid inconsistent pretrial rulings, and would promote judicial efficiency.

BACKGROUND

[1] Plaintiff Ryan Meadors alleges injury arising from failure of the Bard PowerPort, model no. 1808060; Plaintiff Bernadette Franks alleges injury arising from failure of the Bard PowerPort, model no. 1616000

Plaintiffs bringing claims in MDL No. 3081 allege injuries caused by the failure of Defendants' Implanted Port Catheter ("IPC") products. Each of the claims allege that (1) the Plaintiff was implanted with an IPC consisting of an injection port and a catheter; (2) the IPC devices were defectively designed and create an unreasonable risk of infection, thrombosis and/or catheter fracture; (3) Defendants misrepresented the safety of their IPC products; (4) Defendants negligently designed, marketed, distributed, and sold these devices, (5) Defendants knew or should have known that these devices were not safe for the patients to whom they were prescribed and in whom they were implanted; and (6) the IPC devices lacked proper warnings and were the subject of inadequate post-market surveillance by Defendants. The Actions that are the subject of CTO 10 and CTO 11 make these very same allegations.

Plaintiffs Ryan Meadors and Bernadette Franks bring claims which substantially overlap those brought by MDL plaintiffs, including claims that the design of the products at issue in those cases – models regarding which there are already numerous claims pending in the MDL – included biomaterials which degrade in the body over time, causing irregularities on the device surfaces which led to bacterial colonization and infection. Franks Complaint at ¶¶ 25-27; Meadors Complaint at ¶¶ 27-29. These allegations regarding degradation of the port reservoir materials do not create a complete distinction between the Actions and the cases already pending in the MDL. Indeed, the Actions also advance claims – like all infection cases currently in the MDL – regarding the role of catheter degradation in potentiation of infection. Franks Complaint at ¶¶ 40-45; Meadors Complaint at ¶¶ 42-47. The only material distinction is that the Actions allege an additional manner in which the devices' designs lead to surface degradation and, in turn, bacterial colonization and clinical infection.

Defendants' attempt to exclude these substantially similar claims from the MDL contravene the purposes of §1407 coordination, and their Motion should be denied .

ARGUMENT

28 U.S.C. §1407 provides for the transfer of actions to one federal district for coordinated or consolidated pretrial proceedings where actions pending in different districts involve one or more common questions of fact. 28 U.S.C. §1407(a). Transfers are authorized where the Panel determines that such transfer will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions. *Id.* The purpose of the multidistrict litigation process is to "eliminate the potential for contemporaneous pretrial rulings by coordinating district and appellate courts in multidistrict related civil actions." *In re Multidistrict Private Civ. Treble Damages Litig.*, 298 F. Supp. 484, 491-492 (J.P.M.L. 1968).

Consolidation is especially important where "the potential for conflicting, disorderly, chaotic" action is greatest. *Id.* at 493. Transfer of related actions to a single district for pretrial proceedings avoids conflicting pretrial discovery and ensures uniform and expeditious treatment in pretrial proceedings. *In re Phenylpropanolamine (PPA) Prods. Liab. Litig*., 460 F.3d 1217, 1230 (9th Cir. 2006). Transfer of the Actions to MDL No. 3081 is appropriate here because the Actions and those actions currently pending in the MDL have the most salient questions of fact and law in common. The Actions all arise from the same or similar nucleus of operative facts and each seeks a determination of, among other things:

a. Whether the Defendants' implanted port devices were defective in design;

b. Whether the warnings and instructions for use accompanying the devices were deficient;

c. Whether the devices have performed in accordance with the expectations of reasonable consumers and whether the risks outweigh the benefits;

d. Whether Defendants acted negligently in the design, manufacture, distribution and/or post-market surveillance of the devices;

e. Whether Defendants breached the express and implied warranties;

f. Whether Defendant's conduct was unfair or deceptive; and

g. Whether Plaintiffs are entitled to compensatory damages and/or punitive damages.

As explained below, determination of these and other common issues in a single district will benefit the parties and witnesses, and promote the efficient prosecution and resolution of the Actions. Without transfer, coordination and consolidation of the Actions, the significant hazard of inconsistent rulings exists, along with unnecessary strain on judicial resources, overlapping discovery, and unnecessary expense to the parties. Transfer of the Actions to MDL No. 3081 is appropriate for the just and efficient prosecution of the Actions and convenience of the parties and witnesses.

I. The Actions Have Numerous, Significant Common Issues of Fact and Law with the MDL Actions, Including Injury Types and Causal Mechanisms.

To the extent that transfer of the Actions to MDL No. 3081 is characterized as an expansion of the scope of the MDL,[2] the transfers contemplated by CTO 10 and CTO 11 are nonetheless consistent with the purposes of the initial Transfer Order (Dkt. No. 65) and with those of 28 U.S.C § 1407. In this instance, an MDL has already been formed to file substantially similar cases against the same defendants alleging the same injuries. Consolidating Bard Implanted Port Catheter cases that also specifically allege defects of the port reservoir into this MDL is appropriate because just like in the original consolidation order, the Actions represent "civil actions involving one or more common questions of fact are pending in different districts," and transfer will serve "the convenience of parties and witnesses" and "promote the just and efficient conduct of such actions,"

[2] [cases already there]

even if such transfer represents an expansion of the scope of the MDL. 28 U.S.C. § 1407(a). As this JPML panel has emphasized, "[c]entralization [permits] all actions to proceed before a single transferee judge who can structure pretrial proceedings to consider all parties' legitimate discovery needs, while ensuring that common parties and witnesses are not subjected to duplicative discovery demands." *In re Katz Interactive Call Processing Patent Litig.*, 481 F. Supp. 2d 1353, 1355 (J.P.M.L. 2007).

While expansion of the scope of an MDL is not undertaken lightly, "MDLs can naturally expand to encompass other claims involving the products at issue and presenting similar factual questions." *In re Aqueous Film-Forming Foams Prod. Liab. Litig.*, No. MDL 2873, 2021 WL 755083, at *1 (J.P.M.L. 2021)(citing *In re Gen. Motors LLC Ignition Switch Litig.*, MDL No. 2543, 2014 WL 5597269 (J.P.M.L. Oct. 22, 2014)). In *Aqueous Film-Forming Foams*, the claims which the Panel elected to transfer to MDL No. 2873 involved a completely different route of exposure of the allegedly harmful substance and implicated a potential for requiring different experts to prove causation. *Id.* Nonetheless, the actions were transferred because coordination would "eliminate duplicative discovery and prevent inconsistent pretrial rulings (including with respect to discovery, privilege, and *Daubert* motion practice)." *Id.* I effecting such transfer, the Panel further noted that "'Section 1407 does not require a compete identity or even majority of common factual issues as a prerequisite to transfer.'" *Id.* (quoting *In re Ins. Brokerage Antitrust Litig.*, 360 F. Supp. 2d 1371, 1372 (J.P.M.L. 2005).

Transfer of related actions is favored even when a case alleges alternative theories of causation. *In re: Coloplast Corp. Pelvic Support Sys. Prod. Liab. Litig.*, 883 F. Supp. 2d 1348 (J.P.M.L. 2012). In *Coloplast*, the Panel considered transfer of an action which implicated two different products manufactured by the defendants, which would have different causal

mechanisms contributing to the plaintiff's injuries. *Id.* at 1349. Finding that the injuries arising from the two distinct products were "indivisible," the Panel found no reason to exclude the case from the MDL in light of the benefits of coordination and observed that the transferee judge can structure pretrial proceedings so that discovery with respect to such issues can proceed concurrently with discovery on common issues. *Id.*

The Actions represent claims with substantial overlap with the MDL cases in the discovery needed to prosecute the claims, the anticipated expert testimony, the location of witnesses and evidence, etc. Cases in which the claimed injury is port/catheter infection are currently the most numerous in the MDL. Like the other infection cases pending in MDL No. 3081, the Actions will involve collecting evidence of the PowerPort's propensity to cause infection and sepsis as a result of bacterial colonization of the products' degraded surfaces (i.e. the uncoated, barium sulfate-impregnated catheter and the POM port reservoir) as well as common issues of alternative causation to be raised by defendants.[3] Thus, even the purportedly novel and distinct issues in the Actions will require substantially the same discovery, medical concepts, and witnesses. In light of this, the Actions are anticipated to proceed almost entirely within the scope of discovery of the MDL as currently composed, and the Defendants' Motion should be denied.

II. Centralization of the Actions Will Promote the Just and Efficient Litigation of the Actions and Will Serve the Convenience of the Parties and Witnesses

The Panel considers multiple factors when deciding if transfer and consolidation will promote the just and efficient litigation of the Actions, including (1) avoiding inconsistent rulings

[3] Likely defense theories in all infection cases include improper port maintenance by medical professionals, plaintiff comorbidities, and the effects of immunosuppressant medications.

among and between cases; (2) prevention of duplicate discovery on common issues; (3) avoidance of undue burden and expense to the parties; and (4) promoting efficiency and judicial economy. See, *e.g.*, 4 MANUAL FOR COMPLEX LITIGATION, § 20.13, FEDERAL JUDICIAL CENTER (2004) (transfer is proper when it serves "the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions"); see also *In re Bristol Bay, Salmon Fishery Antitrust Litig.*, 424 F. Supp. 504, 506-07 (J.P.M.L. 1976). These factors warrant the transfer and consolidation of the Actions here, and Defendants' motion to vacate should be denied.

Centralizing these Actions before Judge Campbell in the District of Arizona is the most efficient way to manage this litigation. As described herein, these Actions will turn upon common questions of fact, including whether the Plaintiffs have adequately established causation for the changes to structural integrity and subsequent failure of IPC devices, whether Defendants acted negligently in the design, testing, manufacture, sale of these devices, whether Defendants should be strictly liable for injuries caused by these devices, and whether Defendants failed to satisfy their duty to warn the public of the risks posed by these products. Such questions are common to every Action and will be answered through fact and expert discovery that will likely be extensive, expensive, and time-consuming. Failure to consolidate and coordinate these Actions will only serve to duplicate these burdens on all parties.

While Defendants make much of the fact that there are currently only three actions making allegations regarding the port reservoir defects, this fact is far less significant after an MDL has already been established with respect to claims involving injuries from the Defendants' implanted port devices. Notwithstanding this, the purposes of § 1407 prevail even when the number of actions to be transferred is small. For example, the Panel ordered the consolidation of only two actions and one potential tag-along because it was "necessary in order to eliminate duplicative discovery;

prevent inconsistent rulings on pretrial motions, including those with respect to whether the actions should proceed as collective actions; and conserve the resources of the parties, their counsel and the judiciary." *In re Starmed Health Pers. FLSA Litig.*, 317 F. Supp. 2d 1380, 1381 (J.P.M.L. 2004). *See also In re First Nat'l Collection Bureau, Inc.*, 11 F. Supp. 3d 1353, 1354 (J.P.M.L. 2014) ("Although there are relatively few parties and actions at present, efficiencies can be gained from having these actions proceed in a single district."); *In re Porsche Cars N. Am., Inc.*, 787 F. Supp. 2d 1349, 1360 (J.P.M.L. 2011) (consolidating three pending actions in two districts); *In re Toys "R" Us-Del., Inc., Fair Accurate Credit Transactions Act (FACTA) Litig.*, 581 F. Supp. 2d 1377, 1379 (J.P.M.L. 2008) (consolidating two pending actions in two districts); *In re Milk Antitrust Litig.*, 530 F. Sup.2d 1359, 1360 (J.P.M.L. 2008) (consolidating four pending actions in two districts); *In re Camp Lejeune*, 763 F. Supp. 2d at 1381-82 (consolidating four pending actions in four districts).

Importantly, transfer of the Actions now as opposed to permitting similar claims to accumulate minimizes the risk of inconsistent rulings. As the Panel recognized in *Camp Lejeune*, delaying centralization "only invites inconsistent rulings," which Section 1407 is designed to avoid. 763 F. Supp. 2d at 1382. Moreover, early consolidation of these Actions avoids potential prejudice to a party by transfer and consolidation. Transfer of related actions to a single district for pretrial proceedings avoids conflicting pretrial discovery and ensures uniform and expeditious treatment in pretrial proceedings. *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1230 (9th Cir. 2006)

Again Plaintiffs in the Actions will seek substantially the same discovery from defendants; review the same documents produced in discovery; take depositions of the same corporate officers and other witness, as well the same or substantially similar expert witnesses; and will involve the

same questions of law surrounding expert qualifications under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and issues raised under motions for summary judgment. Transfer of these Actions will avoid unnecessarily duplicative discovery across multiple Actions and eliminate potentially conflicting or inconsistent rulings. See *In re Zimmer Nexgen Knee Implant Prods. Liab. Litig.*, 802 F. Supp. 2d 1374, 1376 (J.P.M.L. 2011) ("Centralization under Section 1407 will eliminate duplicative discovery, [and] prevent inconsistent pretrial rulings on *Daubert* and other pretrial issues."); *In re Transocean Tender Offer Sec. Litig.*, 415 F. Supp. 382, 384 (J.P.M.L. 1976) ("[T]he likelihood of motions for partial dismissal and summary judgment in all three actions grounded at least in part on [a common issue] makes Section 1407 treatment additionally necessary to prevent conflicting pretrial rulings and conserve judicial effort."). The Panel, therefore, should deny Defendants' motion to vacate the conditional transfer order.

While Defendants belabor the discrete components of the IPCs, this Court correctly pointed out that "almost all injury litigation involves questions of causation that are case- and plaintiff-specific. Such differences have not been an impediment to centralization in the past." *In re Wright Med. Tech., Inc., Conserve Hip Implant Prods. Liab. Litig.*, 844 F. Supp. 2d 1371, 1372 (J.P.M.L. 2012). Unlike in *In re Belviq (Lorcaserin HCI) Products Liability Litigation*, cited by defendants, the plaintiffs in the cases now before the Panel allege a mechanism for their injuries which is wholly consistent with many cases pending in the MDL and which will require substantially the same pretrial discovery. *See* 555 F. Supp. 3d 1369 (J.P.M.L. 2021). "[I]ndividualized factual issues concerning causation," therefore, seem far less likely to "predominate and diminish the potential to achieve significant efficiencies in an MDL." *Id.* at 1370.

CONCLUSION

For all the reasons herein, Plaintiff respectfully requests the Panel deny Defendants' Motion to Vacate Conditional Transfer Orders 1, and 11 and transfer the Actions to the District of Arizona, The Honorable David G. Campbell presiding, in MDL 3081.

Respectfully submitted,

Dated: January 2, 2024

By: /s/ *Adam M. Evans*

Adam M. Evans (MO #60895)
Dickerson Oxton, LLC
1100 Main St., Ste. 2550
Kansas City, MO 64105
Phone: (816) 268-1960
Fax: (816) 268-1965
aevans@dickersonoxton.com

ATTORNEYS FOR PLAINTIFFS RYAN MEADORS AND BERNADETTE FRANKS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on all counsel of record through the Court's CM/ECF system on this 2nd day of January 2024.

/s/ Adam M. Evans
Adam M. Evans