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VIA EMAIL & HAND-DELIVERY

Hon. Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Attention: MCL Application - Bard Implanted Port Catheter Products
Hughes Justice Complex, P.O. Box 037
Trenton, New Jersey 08625-0037

Re: Bard Access Systems, Inc., Bard Peripheral Vascular, Inc., C. R. Bard, Inc., and Becton, Dickinson and Company's Objections to the Renewed Multicounty Litigation Application Involving Bard Implanted Port Catheter Products

Dear Judge Grant:

Defendants Bard Access Systems, Inc. ("BAS"), Bard Peripheral Vascular, Inc. ("BPV"), C. R. Bard, Inc. ("Bard"), and Becton, Dickinson and Company ("BD") (collectively, "Defendants") respectfully submit these Objections to the renewed application dated May 17, 2024 for Multicounty Litigation ("MCL") designation of cases alleging injuries as a result of Bard implantable port catheter devices ("Renewed Application"). This Court should deny the Renewed Application because Plaintiffs ***still*** fail to satisfy the criteria set forth in Directive # 02-19.

BACKGROUND

1. Implantable Port Catheter Devices Are Safe and Effective.

The Renewed Application concerns product liability actions related to implantable port catheter medical devices ("IPCs"), which are totally implantable vascular access devices designed to facilitate the delivery of life-saving medications into the bloodstream through an injection port body and catheter. The catheters are made of medical grade polymers that contain barium sulfate, which is a radiopaque substance that allows the catheter to be seen on diagnostic imaging such as x-ray, CT, or MRI. Plaintiffs' theory of liability is that barium sulfate can lead to surface

degradation, causing various complications and rendering IPCs defective. Defendants vigorously dispute these allegations and look forward to defeating Plaintiffs' claims—many of which are barred by the applicable statute of limitations and suffer from specific causation deficiencies that are not amenable to coordinated proceedings.

Defendants stand by the safety and efficacy of these devices in the face of this attorney-driven litigation. There has been no precipitating event spurring the filing of these cases, such as an FDA-issued recall, voluntary recall, or any regulatory action by the FDA related to safety. Nor has there been any landmark study or report questioning the overall safety of Bard's IPCs. To the contrary, these devices have been on the market for decades. The complications alleged in the Complaints are well-documented in the medical literature, disclosed in the devices' Instructions for Use, and caused by external factors, such as the patient's medical condition and improper insertion and maintenance. Other manufacturers of IPCs besides Bard also warn of the same risks.

Tellingly, in the unlikely event of a complication, patients have rarely resorted to litigation. Complications are often managed with minimally invasive treatment, and when an IPC must be removed, it is very common for a new IPC of the same make and model to be implanted. Thrombolytic agents and antibiotics can be used to successfully treat occlusions and infections, respectively. [1] Catheter fracture and migration, which is exceedingly rare, is typically addressed by retrieving the catheter intravenously via guidewire and snare without the need for anesthesia.[2] Indeed, in the five years preceding this litigation, fewer than a dozen cases were filed against Bard.

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[1] See Thrombolytic therapy for central venous catheter occlusion, Hameatologica 97(5), 641–650(May 2012); Clinical Practice Guidelines for the Diagnosis and Management of Intravascular Catheter-Related Infection: 2009 Update by the Infectious Diseases Society of America (2009).
[2] See Spontaneous fracture and migration of catheter of a totally implantable venous access port via internal jugular vein – a case report, J. of Cardiothoracic Surgery (2016) 11:50.

In their Renewed Application, Plaintiffs ineffectively rely on Defendants' use of a long-sanctioned program for adverse event reporting to the FDA and a single, inapposite journal article to suggest that there will be an influx of cases, and that this litigation is not otherwise attorney-driven. This Court should reject the inferences that Plaintiffs ask the Court to draw from Defendants' use of the Alternative Summary Reporting ("ASR") program. See Pls.' Appl. at 3. Under the ASR program, which was in place from 1997 to 2019, "manufacturers of certain devices could request an exemption from the requirement to file individual medical device reports for certain events that were *well-known and well-established risks* associated with a particular device and to instead submit quarterly summary reports of such events." FDA, Press Release, Statement on agency's efforts to increase transparency in medical device reporting (June 21, 2019) (emphasis added). According to the FDA, "[t]he ASR Program allowed the FDA to more efficiently review reports of well-known, well-understood adverse events, so [it] could focus on identifying and taking action on new safety signals and less understood risks." Ibid. The FDA permitted Defendants to utilize that reporting program to submit adverse event data and took no responsive action regarding safety concerns upon a review of the "well-known, well-understood adverse events" as issue. Ibid.

The Khalid[3] article does not stand for the propositions that Plaintiffs contend. See Pls.' Appl. at 4. The article does not mention Bard devices or barium sulfate, and explicitly acknowledges that the data reviewed "does not allow for control of individual variabilities such as surgeon expertise, procedural methods, and follow-up and treatment protocols, or any insight into patient selection criteria." See S.I. Khalid, at 42. Contrary to the Khalid article, another study of

[3] S.I. Khalid, et al., Outcomes following port-a-catheter placement in Medicare population, 3 Surgery Open Science 39 (2021)

patients implanted only with Bard M.R.I. Implantable Ports found the "overall complication rate is consistent with data reported by several studies that range between 2 to 14.4%." Granziera, Totally implantable venous access devices: retrospective analysis of different insertion techniques and predictors of complications in 796 devices implanted in a single institution, BMC Surgery 2014, 14:27. Simply put, there is no valid basis for Plaintiffs' claims regarding Bard's IPCs and, for the reasons set forth below, creating an MCL is neither necessary nor proper.

2. Non-Resident Plaintiffs Have Filed in the Superior Court of New Jersey and Seek to Form an Unnecessary Parallel Track of Consolidated Proceedings.

As noted in Defendants' opposition to the initial MCL application, see Fanning Cert., Ex. A, Nov. 17, 2023, Opp'n to MCL Appl., the genesis of these cases was a coordinated attorney advertising campaign that commenced in winter 2022 and led to a Motion before the United States Judicial Panel on Multidistrict Litigation ("JPML") for formation of a multidistrict litigation ("MDL") in May 2023. The JPML granted Plaintiffs' Motion to Transfer Actions, and centralized product liability actions involving IPCs in the District of Arizona in August 2023. Notably, Plaintiffs' leadership in the MDL ***did not*** seek to form the MDL in New Jersey; they sought to centralize cases in the Western District of Missouri. The JPML ultimately selected Arizona based on Defendants' representations that they have "a significant business presence in that district, and that relevant witnesses will be located there." In re Bard Implanted Port Catheter Prod. Liab. Litig., -- F. Supp. 3d --, 2023 WL 5065100, at *2 (J.P.M.L. Aug. 8, 2023).

Despite having achieved their goal of forming an MDL, Plaintiffs' MDL leadership nevertheless hastily sought to establish a parallel coordinated proceeding in the Superior Court of New Jersey via an MCL. The procedural history makes clear that perceived tactical advantage—

not any other legitimate reason, such as a large number of pending cases by New Jersey residents—motivated Plaintiffs' push for formation of an MCL.

At the initial CMC in the MDL on September 18, 2023, Plaintiffs' MDL leadership designated Plaintiffs' counsel as "New Jersey state court liaison," who, in turn, declared on the record that he would be applying for MCL designation in the near future. See Fanning Cert., Ex. B, Initial CMC Tr. at Id. at 14:13, 16:3-4. The New Jersey state court liaison made that declaration despite there being no pending cases. Id. at 14:9-15. Ten days later, the New Jersey state court liaison sought MCL designation of three cases filed by New Jersey residents. The New Jersey state court liaison asserted that "500 or more claimants will soon be filing in this State." That assertion, however, has not remotely come close to fruition in this forum or the MDL, which only has 276 total pending cases in the 13 months since the initial Motion before the JPML.

In anticipation of Defendants' argument that the low number of pending cases did not warrant MCL designation, the New Jersey state court liaison then began to file cases by ***out-of-state*** residents to bolster the case numbers. The filing of non-resident cases is in direct conflict with Plaintiffs' MDL leadership's statements at the initial MDL CMC that state courts are necessary for ***New Jersey residents only*** because "there would not be diversity jurisdiction for such a plaintiff to bring a claim in federal court." Id. at 14:22 to 15:6.

Defendants opposed the initial MCL application based on (i) the low number of cases pending and opportunity for informal coordination; (ii) the individualized nature of the cases—principally, the extraordinarily high number of facial statute of limitations defenses; and (iii) the number of cases filed by non-resident Plaintiffs whose treatment and alleged injuries occurred outside of this State. With respect to that final objection, Defendants indicated to the Court that they would move to dismiss the non-resident Plaintiffs' cases on

forum non conveniens grounds in favor of pre-trial proceedings in the MDL (coordination that Plaintiffs aggressively pursued) and trial in their home states. See Fanning Cert., Ex. C, Dec. 1, 2023, Letter in Opp'n to MCL Appl.

On January 29, 2024, the Supreme Court denied the initial MCL application based "on the limited number of cases at present." Fanning Cert., Ex. D, Jan. 29, 2024, Notice to the Bar. At that time, there were 15 cases pending.

After the denial of the initial MCL application, defense counsel contacted the New Jersey state court liaison seeking his consent to the dismissal of the non-resident Plaintiffs' cases in favor of "direct filing" in the MDL.

> A common MDL procedure is direct filing, which offers plaintiffs a more efficient route into an MDL. The MDL statute contemplates consolidating cases pending in federal district courts. In addition to actions pending when the Panel creates an MDL, the Panel transfers related tag-along actions that are later filed in or removed to federal court. In those cases, plaintiffs file in their home jurisdictions and then wait for their cases to be tagged and later transferred to the MDL. But when an MDL uses direct filing, the defendant may agree to waive objections based on personal jurisdiction and venue, allowing any plaintiff to file suit in the district in which the MDL is pending—provided, of course, that federal subject-matter jurisdiction over her case exists.
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> [Sykes v. Cook Inc., 72 F.4th 195, 202 (7th Cir. 2023) (cleaned up).]

Both the judiciary and parties benefit from direct filing:

> direct filing [in an MDL] creates numerous efficiencies for all parties. . . . The MDL court retains complete control over a greater portion of the overall pool of cases for trial and facilitation of global settlement, which is likely why MDL judges encourage the practice. These benefits extend to the parties as well, particularly defendants and firms representing a significant number of plaintiffs. Lodging all of the cases in a

> single court in the first instance more seamlessly aggregates the litigation.
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> [Bradt, The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation, 88 Notre Dame L. Rev. 759, 795-96 (2012).]

Notwithstanding the foregoing, the New Jersey state court liaison rejected the proposal without providing any rationale as to why parallel, consolidated proceedings in New Jersey are necessary for a subset of non-residents who could have directly filed in the existing MDL.

Since the denial of the MCL application, the New Jersey state court liaison has continued to file cases by non-residents. Only 9 of the 41 cases in Plaintiff's current application—***just twenty-two percent***—involve New Jersey residents. See Fanning Cert., Ex. E. What's more, 23 cases of the 31 non-resident cases identified in the Renewed MCL Application—***nearly seventy-five percent***—are facially subject to dismissal on statute of limitations grounds. See ibid. It appears that these non-resident Plaintiffs eschewed filing their time-barred cases in the MDL to obtain some perceived strategic advantage in this forum.

In light of the non-resident Plaintiffs' refusal to re-file in the MDL—the forum in which they could avail themselves of the very same coordinated pre-trial proceedings that they seek to obtain here—Defendants were constrained to move forward with their motions to dismiss on *forum non conveniens* grounds. As of this date, Defendants have moved to dismiss every case filed by a non-resident of New Jersey that is part of the Renewed Application.[4] See Fanning Cert., Ex. E.

[4] With respect to the New Jersey Plaintiffs, the parties have negotiated a consent order whereby Plaintiffs have agreed to withdraw certain claims that are subsumed by the Products Liability Act

Plaintiffs opposed the motions to dismiss on May 13th before seeking an informal stay of the motions on May 15th. Plaintiffs then filed the Renewed Application on May 17th. Defendants opposed Plaintiffs' informal request for a stay on both procedural and substantive grounds. The trial court did not stay its decision on the pending motions, which presently have a return date of July 19th. For the reasons that follow, the *forum non conveniens* issue is one of several reasons why the Renewed Application should be denied.

ARGUMENT

Directive # 02-19 prescribes the criteria to be applied in determining whether MCL designation is warranted. The Directive requires the Court to consider:

> (1) "whether the case(s) possess [certain enumerated] characteristics";
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> (2) "whether there is a risk that centralization may unreasonably delay the progress, increase the expense, or complicate the processing of any action, or otherwise prejudice a party";
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> (3) "whether centralized management is fair and convenient to the parties, witnesses and counsel";
>
> (4) "whether there is a risk of duplicative and inconsistent rulings, orders or judgments if the cases are not managed in a coordinated fashion";
>
> (5) "whether coordinated discovery would be advantageous";
>
> (6) "whether the cases require specialized expertise and case processing as provided by the dedicated [MCL] judge and staff";
>
> (7) "whether centralization would result in the efficient utilization of judicial resources and the facilities and personnel of the court";

("PLA"), and to strike allegations related to the ASR program and adverse event reporting that are preempted by federal law. Following the filing of amended complaints in those actions, Defendants have moved to dismiss Plaintiffs' Consumer Fraud Act ("CFA") claim as subsumed by the PLA, as well as certain complaints in their entirety as barred by the applicable statute of limitations.

> (8) "whether issues of insurance, limits on assets and potential bankruptcy can be best addressed in coordinated proceedings"; and
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> (9) "whether there are related matters pending in Federal court or in other state courts that require coordination with a single New Jersey judge."
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> [AOC Directive # 02-19, at 1-2.]

Defendants' *forum non conveniens* challenge implicates a number of these factors. Given the existing MDL, creation of a parallel MCL comprised of mostly non-residents would (A) complicate the ongoing efficient management of claims asserted by similarly situated, non-residents in the primary forum—the MDL (Factor 2); (B) be unfair and prejudicial to Defendants, their witnesses, and counsel, by requiring unnecessary litigation on dual tracks (Factors 2 and 3); (C) risk inconsistent rulings between similarly situated non-residents who are litigating in different forums (Factor 4); (D) disrupt the ongoing discovery in the MDL (Factor 5); and (E) result in an inefficient use of judicial resources by diverting our MCL judges and case management staff from other MCLs that need their attention (Factors 6 and 7).

Furthermore, the pending *forum non conveniens* challenge directly implicates the Court's basis for denying the initial MCL application: the "limited number of cases at present." Fanning Cert., Ex. D, Jan. 29, 2024, Notice to the Bar. If Defendants' motions are granted, there will be only ***ten*** cases remaining filed by New Jersey residents—***five*** less than when this Court denied the initial MCL application, ***twelve*** less than when this Court recently denied the Roundup MCL application, and ***hundreds*** less than what Plaintiffs told this Court it could expect back in September 2023 in the initial MCL application. See Fanning Cert., Ex. F, May 28, 2024, Notice to the Bar. For the reasons that follow, Defendants have a high likelihood of success on their *forum non conveniens* argument, which counsel in favor of denying the

Renewed Application, or at the very least, holding a decision on the Renewed Application in abeyance through the exhaustion of all appeals on the *forum non conveniens* motions.[5] With respect to these cases more generally, including those filed by New Jersey residents, they lack the characteristics identified in Directive #02-19 that warrant MCL designation.

I. THE OVERWHELMING MAJORITY OF THESE CASES ARE SUBJECT TO DISMISSAL ON *FORUM NON CONVENIENS* GROUNDS

Defendants have a high likelihood of success on their pending motions to dismiss. The doctrine of *forum non conveniens* weighs in favor of dismissal of the non-resident Plaintiffs' cases in favor of direct filing in the MDL. New Jersey courts utilize a three-step process to analyze the appropriateness of litigation in this State: (1) "whether there is an adequate alternative forum to adjudicate the parties' dispute"; (2) "[i]f another forum exists, the court then considers the degree of deference properly accorded the plaintiff's choice of forum"; and (3) "the court analyzes the private- and public-interest factors implicated in the choice of forum." Varo v. Owens-Illinois, Inc., 400 N.J. Super. 508, 519 (App. Div. 2008). All of those considerations weigh in favor of dismissal.

A. There Are Adequate Alternative Fora for the Non-Resident Plaintiffs' Claims.

There exist adequate alternative fora to adjudicate the non-resident Plaintiffs' claims: pretrial proceedings in the MDL followed by trial in Plaintiffs' home state. Rather than await the formation of an MCL in New Jersey and entry of the necessary case management orders

[5] Nearly all of the motions to dismiss in the non-resident cases have been assigned to the Honorable Gregg A. Padavano, J.S.C. in Bergen County. Accordingly, there is no risk of inconsistent rulings on the *forum non conveniens* issue. The most efficient path forward is for the Law Division to rule on the pending motions prior to a decision on this Renewed Application to avoid the need to subsequently terminate the MCL given that the remaining cases filed by New Jersey residents do not satisfy Directive # 02-19's criteria for MCL designation, as discussed infra.

to get the MCL up and running, Plaintiffs can readily avail themselves of the discovery in the MDL via the filing of a short-form complaint. At the conclusion of the coordinated pre-trial proceedings in MDL, Plaintiffs can try their claims in their home state rather than having to travel to New Jersey with all of their fact and expert witnesses. The non-resident Plaintiffs cannot seriously deny that it would be more convenient for them to try their claims in their home states. Nor can they deny that their participation in the MDL would "promote judicial efficiency, facilitate coordinated discovery, avoid inconsistent pretrial rulings, and benefit the interests of the parties." Pls.' Appl. at 2.

B. Plaintiffs' Choice of Forum Is Not Entitled to Deference.

The non-resident Plaintiffs' choice of forum (a putative MCL in New Jersey, as compared to the existing MDL) is entitled no deference. It is well-settled that a non-resident's choice of forum is accorded "less deference" in a *forum non conveniens* analysis. In re Vioxx Litig., 395 N.J. Super. at 364 (quoting Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 (1981)). Critically, courts "also decline[] to assign 'a plaintiff's choice of forum . . . presumptive deference simply because the chosen forum is [a] defendant's home forum,' especially where the selection 'suggests the possibility that [the] plaintiff's choice was made for reasons of trial strategy.'" Aenergy, S.A. v. Republic of Angola, 31 F.4th 119, 129 (2d Cir. 2022) (alterations in original) (quoting Pollux Holding Ltd. v. Chase Manhattan Bank, 329 F.3d 64, 74 (2d Cir. 2003)).

New Jersey has long recognized that there is a "public interest in preventing forum shopping." Kaufman v. i-Stat Corp., 165 N.J. 94, 118 (2000); Glukowsky v. Equity One, Inc., 180 N.J. 49, 71 (2004) (explaining discouragement of forum shopping is a proper judicial goal). Courts are "not required discount parallel litigation in assessing whether a

plaintiff is forum shopping." Aenergy, 31 F.4th at 130. As noted, the record is replete with evidence that the filing of non-resident cases in New Jersey is based on a perceived, tactical advantage associated with the formation of an MCL. These non-resident Plaintiffs identify no cogent reason why an MCL is necessary in addition to the existing MDL.

C. The Public Interest Factors Weigh in Favor of Dismissal.

The public interest factors weigh in favor of dismissal. Those factors include:

> (1) the administrative difficulties which follow from having litigation pile up in congested centers rather than being handled at its origin, (2) the imposition of jury duty on members of a community having no relation to the litigation, (3) the local interest in the subject matter such that affected members of the community may wish to view the trial and (4) the local interest in having localized controversies decided at home.
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> [Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am., 394 N.J. Super. 71, 80 (App. Div. 2007), aff'd, 195 N.J. 231 (2008) (citation omitted).]

With respect to the first factor, the sought-after MCL can be avoided entirely if these cases are handled in the MDL and tried "at [their] origin," rather than being permitted to "pile up in congested centers" and managed through an unnecessary, separate MCL. All administrative considerations favor the MDL formed for these claims. See Bradt, 88 Notre Dame L. Rev. at 795-96 (noting the "benefits" of "[l]odging all of the cases in a single court in the first instance"). The efficient path forward is adjudication in the MDL—not the creation of a second, consolidated proceeding that serves no purpose other than to impose undue burden on Defendants by requiring dual tracks of litigation for similarly situated, out-of-state Plaintiffs.

None of the local interests favors retention of jurisdiction over non-residents' claims arising from IPCs implanted and explanted in other states. Although BD and Bard have

contacts with New Jersey, they are merely the parent of the entities who design, manufacture, market and distribute these devices: BAS and BPV. Most matters regarding the design, regulatory history, manufacture, marketing, sale and distribution of Plaintiffs' device occurred in Utah or Arizona. Accordingly, this case does not involve a localized controversy.

Even where the product has some connection with the forum State, courts have determined that the forum where the product was used and injury occurred has the more compelling interest in adjudicating those cases. See, e.g., In re Vioxx Litig., 395 N.J. Super. at 378 (foreign plaintiffs' claims were dismissed on grounds of forum non conveniens even though product was manufactured in New Jersey). To be sure, New Jersey's "interest in regulating the conduct of corporations domiciled here . . . can be well satisfied through litigation" involving the New Jersey residents who have filed actions in this State. Ibid. That interest is lacking with respect to nonresident plaintiffs.

Most importantly, declining to dismiss out-of-state Plaintiffs' claims when those Plaintiffs eschewed filing in the MDL may open New Jersey to a flood of litigation. A fundamental purpose of the *forum non conveniens* doctrine is to avoid the burdens that result "when litigation is piled up in congested centers instead of being handled at its origin." Gilbert, 330 U.S. at 508. The New Jersey state court liaison has made it no secret that his goal is to form an MCL through the filing of out-of-state cases in New Jersey in lieu of the MDL. As the Supreme Court of Mississippi aptly stated:

> The courts of [New Jersey] will not become the default forum for plaintiffs seeking to consolidate mass tort actions. To allow otherwise would waste finite judicial resources on claims that have nothing to do with the state. Each trial requires the empaneling of [New Jersey citizens] as jurors and the use of [New Jersey] tax dollars. These resources should be used for cases in which [New Jersey] has an interest.

[3M Co. v. Johnson, 926 So. 2d 860, 866 (Miss. 2006).]

Other states have recognized this same principle. See In re Oxycontin II, 908 N.Y.S.2d 239, 243 (App. Div. 2010) (affirming dismissal of nonresidents' claims based on lack of connection to New York and finding no "counterbalancing consideration for retaining the cases of the out-of-state plaintiffs in our courts"); Arnelien v. SmithKline Beecham Corp., 2005 WL 850844, at *14 (Pa. Com. Pl. Mar. 28, 2005) ("There is enough of an exploding area of complex mass tort litigation involving Pennsylvania citizenry and/or key witnesses connected to liability and/or damages to Pennsylvania without burdening a valuable system by stretching its resources to an undesirable limit [by maintaining suits by out-of-state residents]"), aff'd, 895 A.2d 643 (Pa. Super. Ct. 2006). This Court should too.

D. The Private Interest Factors Weigh in Favor of Dismissal.

The private interest factors also weigh in favor of dismissal. They include:

> (1) the relative ease of access to sources of proof, (2) the availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining the attendance of willing witnesses, (3) whether a view of the premises is appropriate to the action and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive, including the enforceability of the ultimate judgment.
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> [Chubb, 394 N.J. Super. at 80 (citation omitted).]

First, most (if not all) of the key witnesses are located outside of this State. These include: (1) Plaintiffs' physicians, including those who implanted, accessed, explanted and otherwise handled the devices, as well as diagnosed and treated the injuries that Plaintiffs claim were caused by the devices; (2) Plaintiffs and their family members and/or friends with knowledge of Plaintiffs' condition; and (3) Defendants' witnesses regarding design, manufacturing, labeling, and regulatory activities.

Of these out-of-state witnesses, most problematic are the prescribing and treating physicians who are arguably the most important witnesses in any trial involving an implantable medical device. Only the prescribing physician can testify about her understanding of the indications and warnings on the product label; why she prescribed the product; and whether different information on the label would have changed her prescribing decision. Treating physicians will be important witnesses regarding the plaintiff's medical history and pre-existing risk factors—two critical considerations in the evaluation of specific causation. Critically however, "[t]he extended travel to [New Jersey] would disrupt [these physicians'] medical practices and their patients' care," and counsels against forcing them to participate in a trial far away from their home states. Walker v. Inspira Health Network, Inc., No. A-3723-22, 2024 WL 791624, at *3 (App. Div. Feb. 27, 2024).

The relevant question with respect to the availability of discovery is "whether discovery will be more or less convenient or expensive here or in [the alternative forum]." Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am., 394 N.J. Super. 71, 81, aff'd, 195 N.J. 231 (2008). The MDL is certainly the most convenient forum to obtain all common-issue discovery necessary to the adjudication of Plaintiffs' claims. Indeed, all of the non-resident Plaintiffs can readily obtain the discovery that has been produced and will be produced in the MDL should their cases be direct-filed in that forum. And with respect to trial, maintaining this case in New Jersey will not make trial "eas[ier], [more] expeditious and [more] inexpensive." D'Agostino, 225 N.J. Super. at 263 (quoting Gilbert, 330 U.S. at 508).

* * *

For the foregoing reasons, Defendants have a high likelihood of success of obtaining dismissal of the non-residents' cases on *forum non conveniens*. Such a ruling will obviate any need for an MCL based on the low number of remaining cases.

II. THE PENDING CASES DO NOT POSSESS THE CHARACTERISTICS THAT WARRANT CENTRALIZATION IDENTIFIED IN DIRECTIVE # 02-19.

Directive # 02-19 prescribes the criteria to be applied in determining whether MCL designation is warranted. The Directive requires the Court to consider "whether the case(s) possess the following characteristics": (1) "it involves a large number of parties"; (2) "it involves many claims with common, recurrent issues of law and fact that are associated with a single product, mass disaster, or complex environmental or toxic tort"; (3) "there is geographical dispersement of parties"; (4) "there is a high degree of commonality of injury or damages among plaintiffs"; (5) "there is value interdependence between claims"; and (6) "there is a degree of remoteness between the court and actual decision-makers in the litigation." AOC Directive # 02-19. The pending actions possess none of those characteristics.

A. There Is a Low Number of Parties.

Following dismissal of the non-resident Plaintiffs' cases on *forum non conveniens* grounds, only ten cases from the Renewed Application will be pending in the Superior Court of New Jersey. That is less than the total number of pending cases when the Court denied the initial MCL application, and fewer than half as many as when the Court denied the MCL application concerning Bayer Roundup products. Litigation involving few parties does not require "centralized management" under Rule 4:38A. Cf. In re Convergent Outsourcing, Inc., 84 F. Supp. 3d 1369, 1370-71 (J.P.M.L. 2015) (denying centralization of cases where there was a low number of actions

and noting that "voluntary cooperation and coordination among the parties and the involved courts seems a feasible alternative to centralization").

The Court should again disregard Plaintiffs' unsupported assertions that "may additional cases will be filed soon." Pls.' Appl. at 2. Plaintiffs' prediction of future filings based on an extrapolation of Defendants' market share, the ASR program, and the Khalid article is even less persuasive today than it was when Plaintiffs initially sought MCL designation. See Pls.' Appl. at 3-5, 11-12. Back in September 2023, Plaintiffs declared "that 500 or more claimants will soon be filing in this State." Pls.' MCL Appl., at 1, Sept. 28, 2023. Between then and the Renewed Application nine months later, only 38 cases have been filed—the majority of which are subject to dismissal on *forum non conveniens* and/or statute of limitations grounds. As for the MDL, which draws on cases from across the country and was initially requested in May 2023, there remains fewer than 280 cases in total as of the date of this filing. This Court should continue to focus on the actual case statistics, not unsupported predictions about future filings. See In re Covidien Hernia Mesh Prod. Liab. Litig., 481 F. Supp. 3d 1348, 1349 (J.P.M.L. 2020) (reiterating that the JPML is "disinclined to take into account the mere possibility of future filings in [its] centralization calculus" (quoting In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig., 959 F. Supp. 2d 1375, 1376 (J.P.M.L. 2013))). Accordingly, this factor weighs against MCL designation.

B. The Cases Do Not Possess Claims with Common Issues of Fact and Law, a High Degree of Commonality of Injury, or Significant Value Interdependence.

Several of Directive # 02-19's factors concern commonality among cases with respect to factual and legal issues, and the relative strength and weaknesses across cases. The pending actions

do not possess those characteristics. Rather, individualized issues predominate over the common issues with respect to each case's factual and legal issues.

Most notably, seven out of the ten New Jersey resident Plaintiffs' claims are barred by the applicable statute of limitations—an issue teed up for resolution in Defendants' pending and forthcoming motions to dismiss. As set forth in Defendants' motions, all of these Plaintiffs' claims are facially time-barred given each complaint's allegations regarding the near-contemporaneous removal of the IPC after the alleged complication at issue. See, e.g., Trump v. C. R. Bard, Inc., No. BER-L-5017-23 (Sept. 18, 2023), Compl. ¶¶ 64-65 (alleging that Plaintiff went to the hospital on October 8, 2018 with an infection that "was confirmed as a Portacath site infection," and had the device removed three days later); Leddick v. C. R. Bard, Inc., No. BER-L-6000-23 (Nov. 6, 2023), Compl. ¶¶ 64-65 (alleging that Plaintiff presented to the hospital on August 31, 2010 where "it was confirmed that there was a foreign body in her right arm which was later confirmed to be the fractured catheter," and that "[o]n September 1, 2010, Plaintiff was brought into an operating room where there was a successful removal of the catheter"). At that point in time, each Plaintiff had "'reasonable medical information' that connects an injury with fault to be considered to have the requisite knowledge for the claim to accrue." Kendall v. Hoffman-La Roche, Inc., 209 N.J. 173, 193 (2012).

In the event that the motions to dismiss are incorrectly denied, Defendants intend to seek expedited discovery in advance of a motion for summary judgment and/or Lopez[6] hearing in each

[6] "[T]he date that a cause of action accrued is determined by the court alone and ordinarily by way of a pretrial inquiry on either affidavits, depositions or a so-called evidential Lopez hearing conducted pursuant to Lopez v. Swyer, 62 N.J. 267 (1973)." Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 117 (2019) (internal quotation marks and citation omitted). "Obviously, however, if there is no dispute as to the facts controlling the

case. Thus, if these cases proceed past the pleadings, the dispositive issue in each case will turn on facts, documents, and testimony unique to each Plaintiff—with little commonality across the cases. That is so because "[t]he plaintiff is in the best position to establish when he first knew or reasonably should have known of his cause of action." The Palisades At Fort Lee Condo. Ass'n, Inc. v. 100 Old Palisade, LLC, 230 N.J. 427, 454 (2017). These cases thus possess little commonality or value interdependence.

In the three cases that are not facially time-barred, individualized issues still predominate over the common issues. First, C.R.W. v. C. R. Bard, Inc., No. BER-5014-23 (Sept. 18, 2023) presents a prime example of the individualized inquiry necessary in each case. Plaintiff C.R.W. received her IPC to assist with the treatment of a rare immune disorder called agammaglobulinemia—a condition characterized by a high risk of recurrent and severe bacterial infections. See MedlinePlus, Nat'l Library of Medicine, Agammaglobulinemia, https://medlineplus.gov/ency/article/001307.html ("People with this disorder develop infections again and again. Common infections include ones that are due to bacteria . . . ."); Genetic and Rare Diseases Information Center, Nat'l Inst. of Health, X-linked agammaglobulinemia, https://rarediseases.info.nih.gov/diseases/1033/x-linked-agammaglobulinemia (stating that people affected by agammaglobulinemia "generally begin developing frequent and recurrent bacterial infections from about 6 months of age" and that sepsis is a "frequent" symptom). Plaintiff C.R.W. alleges that she suffered an infection about fourteen months after implant. C.R.W., Am. Compl. ¶¶ 48, 55. The pivotal issue in C.R.W. will therefore be whether the infection was due to her underlying condition, as opposed to any alleged defect in the IPC.

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discovery determination, a Lopez hearing is not required." Ibid. (internal quotation marks and citation omitted).

Next, Foster v. C. R. Bard, Inc., BER-L-6175-23 (Nov. 15, 2023) involves an alleged catheter fracture discovered nearly nine years after implant. See Foster, Am. Compl. ¶¶ 55, 57-58. A fracture case presents different issues than an infection case, including different potential alternative causes. A medical practitioner's vein selection and insertion technique subject the device to various anatomical conditions. The Instructions for Use advise practitioners to avoid the risk of "pinch-off" syndrome, which occurs when the catheter becomes compressed between the clavicle and first rib, and principally depends on whether the catheter was inserted into the internal jugular vein or subclavian vein. Other factors may impact performance and wear, including but not limited to, how well the device is maintained. There is no value interdependence between catheter infection and catheter fracture cases.

The final, non-facially time-barred claim involves an alleged MRSA infection that occurred just seven weeks after implant. See Sambataro v. C. R. Bard, Inc., BER-L-1699-24 (Mar. 19, 2024), Compl. ¶¶ 86, 92. The pivotal question will be whether the deficiencies in the medical providers' general infection prevention practices (i.e., handwashing, using sterile equipment) during the implant and/or subsequent administration of her chemotherapy caused the MSRA infection. Id. ¶ 92. In sum, the individualized issues in each of these ten cases will predominate over any common, recurrent questions of law and fact.

C. The Cases Involve Limited Geographical Dispersion and a Low Degree of Remoteness Between the Court and Actual Decision-Makers.

All 41 Plaintiffs in the Renewed Application are represented by the same counsel. Following a decision on the pending motions to dismiss, only New Jersey Plaintiffs will remain. McCarter & English, LLP represents Defendants in the MDL and all pending state court cases. As a result, defense counsel are in frequent and direct contact with their client-based "decision-

makers." Unlike other cases that may warrant formal coordination, the courts here need not communicate with various law firms in numerous states, who may be required to navigate a corporate hierarchy to receive responses and solutions. This straightforward composition further belies the need for formal coordination. Accordingly, these factors weigh against MCL designation.

III. THE RENEWED APPLICATION DOES NOT SATISFY ANY OF THE ADMINISTRATIVE FACTORS IDENTIFIED IN DIRECTIVE # 02-19.

Directive # 02-19's administrative factors weigh in favor of denying Plaintiffs' Renewed Application. See supra, at 8.

A. Centralization Will Prejudice Defendants, Unreasonably Delay the Progress and Complicate the Pending Cases, and Provide No Advantages that Cannot Be Obtained by Informal Coordination.

MCL designation is not necessary or appropriate for these cases, which historically have been handled on an individualized basis in an efficient manner. Certain of centralization's drawbacks outweigh any advantages to be gained. Defendants will be significantly prejudiced if the cases receive MCL designation, as Defendants intend to pursue their case-specific statute of limitations defenses by way of motions to dismiss. If these motions are denied, Defendants intend to seek an expedited Lopez hearing. If these cases are centralized, however, there is no mechanism or guarantee that the individual attention needed for these cases will remain feasible. One of the major criticisms of centralization is that it permits meritless cases—in particular, time-barred cases—to proceed without vetting. One MDL judge's commentary on the critical drawback of centralization is apt:

> A reported twenty to fifty percent of [MDL] cases involve plaintiffs with unsupportable claims. In the products liability context, unsupportable claims are often a result of . . . the applicable statute of limitations having run. MDLs have no built-in, uniform

> mechanism for efficiently filtering out these sorts of claims. The procedural safeguards used effectively in one-off cases (e.g., federal pleading standards, discovery obligations, case-specific motions for summary judgment, and Rule 11 sanctions) are difficult to employ at scale in the MDL context . . . . Left unchecked, high volumes of unsupportable claims can wreak havoc on an MDL. They clog the docket, interfere with a court's ability to establish a fair and informative bellwether process, frustrate efforts to assess the strengths and weaknesses of the MDL as a whole, and hamper settlement discussions.
>
> [Hon. M. Casey Rogers, U.S.D.J., Vetting the Wether: One Shepard's View, 89 U.M.K.C. L. Rev. 873, 873 (2021).]

Those risks are present here. Centralization will delay rulings on those important defenses and proliferate additional meritless cases, thereby complicating the proceedings and increasing expense. This prejudice significantly outweighs any potential advantages related to coordinated discovery in a formal MCL. As the JPML has noted, formal "centralization . . . should be the last solution after considered review of all other options." In re: Best Buy Co., Inc., Cal. Song-Beverly Credit Card Act Litig., 804 F. Supp. 2d 1376, 1378 (J.P.M.L. 2011) (emphasis added). Informal coordination is a "practicable" alternative that will minimize any inconveniences to the parties or witnesses (i.e., cross-noticing depositions). In re Belviq (Lorcaserin HCl) Prod. Liab. Litig., 555 F. Supp. 3d 1369, 1370-71 (J.P.M.L. 2021).

Although each Plaintiff will need to engage in individualized discovery unique to his or her claims, the common counsel among the parties can work together to cross-notice depositions and have documents from the MDL deemed produced in multiple actions. Informal coordination is particularly viable given that the Parties are all represented by the same counsel. Contrary to

Plaintiffs' assertions, the parties have worked together efficiently to date. Nothing suggests that the current informal coordination will break down.[7]

B. There Is No Risk of Duplicative or Inconsistent Rulings.

Individual litigation of the pending cases will not result in conflicting rulings given Defendants' individualized statute of limitations and causation defenses, as well as the distinct injuries pleaded across the cases (fracture, thrombosis, infection). Tellingly, Plaintiffs do not identify any specific example of an inconsistent pretrial ruling that could be at issue. Furthermore, the experienced counsel on both sides should be expected to recognize that a ruling on an issue in one case that arises in a subsequent case would likely be resolved in a similar fashion, and thus, not warrant relitigation. Furthermore, Defendants ably managed to informally coordinate litigation involving these devices that was pending at the same time in different jurisdictions without issue. See Fanning Cert., Ex. G, Cert. of Counsel, ¶¶ 5-9.

C. The Pending Cases Do Not Require Specialized Case Processing by the MCL Staff and Will Not Result in an Efficient Utilization of Judicial Resources.

Plaintiffs provide no argument as to why the pending cases filed by New Jersey residents need specialized case processing by a designated MCL Judge or why centralization will result in an efficient use of judicial resources. The JPML's decision is easily distinguishable. By the time the JPML panel ruled on the Motion to Transfer, there were nearly fifty cases pending in about thirty different jurisdictions around the country. The JPML acknowledged "defendants'

[7] Defendants have not "implicitly accepted the merits of consolidation . . . of the Actions." Pls.' Appl. at 13. As set forth herein, Defendants respectfully submit that formal consolidation is unnecessary as to the New Jersey Plaintiffs and an improper end-run around the MDL as to the non-resident Plaintiffs. Defendants' efforts to coordinate pre-answer motion practice and their preliminary commitment to make available the common-issue discovery from the MDL demonstrate that informal coordination remains a viable alternative to formal MCL designation.

willingness to cooperate" but was ultimately "persuaded that the current number of involved cases, counsel, and districts would make informal coordination unworkable." In re: Bard Implanted Port Catheter Prod. Liab. Litig., -- F. Supp. 3d --, 2023 WL 5065100, at *2 (J.P.M.L. Aug. 8, 2023). The low number of cases and individualized facts in each action provides no impediment to efficient management by separate judges in this litigation.

* * *

Accordingly, none of the administrative factors identified in Directive # 02-19 warrant MCL designation. This Court should deny Plaintiffs' Renewed Application.[8]

CONCLUSION

For these reasons, Defendants respectfully request this Court deny Plaintiffs' Renewed Application for MCL designation.

Dated: June 21, 2024 By: */s/ Edward J. Fanning*

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[8] Directive # 02-19 prescribes that "[i]ssues of fairness, geographical location of parties and attorneys, and the existing civil and [MCL] caseload in the vicinage will be considered in determining to which vicinage a particular [MCL] will be assigned for central management." AOC Directive # 02-19. Defendants take no position on the proper vicinage for this MCL in the event that one is formed.

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IN RE: MULTICOUNTY LITIGATION APPLICATION – NEW JERSEY STATE COURT LITIGATION INVOLVING BARD IMPLANTED PORT CATHETER PRODUCTS

CERTIFICATION OF EDWARD J. FANNING, JR. IN SUPPORT OF DEFENDANTS' OBJECTIONS TO THE MULTICOUNTY LITIGATION APPLICATION INVOLVING BARD IMPLANTED PORT CATHETER PRODUCTS

EDWARD J. FANNING, JR., of full age, hereby certifies as follows:

1. I am an attorney at law of the State of New Jersey and a partner at the law firm McCarter & English, LLP, attorneys for Defendants Becton, Dickinson and Company, C. R. Bard, Inc., Bard Peripheral Vascular, Inc., and Bard Access Systems, Inc. (collectively, "Defendants"). I submit this Certification in support of Defendants' Objections to the renewed application for Multicounty Litigation ("MCL") designation of cases alleging injuries as a result of Defendants' implantable port catheter devices, dated May 17, 2024 ("Renewed Application").

2. Attached hereto as **Exhibit A** is a true and accurate copy of Defendants' Objections to the initial MCL application and the Certification of Edward J. Fanning, Esq., without exhibits, dated November 17, 2023.

3. Attached hereto as **Exhibit B** is a true and accurate copy of an excerpt of the transcript from the initial Case Management Conference in In re Bard Implanted Port Catheter Prod. Liab. Litig., No. 23-md-3081 (D. Ariz.), dated September 18, 2023.

4. Attached hereto as **Exhibit C** is a true and accurate copy of Defendants' Letter in further opposition to the initial MCL application, dated December 1, 2023.

5. Attached hereto as **Exhibit D** is a true and accurate copy of the Notice to the Bar dated January 29, 2024, denying the initial application for MCL designation of cases alleging injuries as a result of Bard's implantable port catheter devices.

6. Attached hereto as **Exhibit E** is a chart providing the procedural posture of the cases listed in the Renewed Application.

7. Attached hereto as **Exhibit F** are true and accurate copies of the Notice to the Bar dated May 28, 2024, regarding the denial of the application for MCL designation of cases alleging injuries as a result of exposure to Roundup® Products, and an article indicating that there were 22 pending cases at the time of the denial.

8. Attached hereto as **Exhibit G** is a true and accurate copy of the Certification of Counsel in support of Defendants' Opposition to the Motion to Transfer Actions Pursuant to 28 U.S.C. § 1407 submitted in In re: Bard Implanted Port Catheter Prods. Liab., Litig., MDL No. 3081 (J.P.M.L.).

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

By: *s/ Edward J. Fanning*
Edward J. Fanning, Jr., Esq.

Dated: June 21, 2024

Exhibit A

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November 17, 2023

VIA HAND DELIVERY & EMAIL

Hon. Glenn A. Grant, J.A.D.
Administrative Director of the Courts
Attention: MCL Application - Bard Implanted Port Catheter Products
Hughes Justice Complex, P.O. Box 037
Trenton, New Jersey 08625-0037

Re: Bard Access Systems, Inc., C. R. Bard, Inc., and Becton, Dickinson and Company's Objections to the Multicounty Litigation Application Involving Bard Implanted Port Catheter Products

Dear Judge Grant:

Defendants Bard Access Systems, Inc., C. R. Bard, Inc., and Becton, Dickinson and Company ("BD") ("Defendants" or "Bard") respectfully submit this letter objecting to the application for Multicounty Litigation ("MCL") designation of the six pending cases alleging injuries as a result of Bard implantable port catheter devices ("Application").[1] This Court should deny this Application because Plaintiffs fail to satisfy the criteria set forth in Directive # 02-19.

This Application concerns product liability actions related to Bard's implantable port catheter medical devices ("IPC"), which are totally implantable vascular access devices designed to facilitate the delivery of life-saving medications into the bloodstream through an injection port body and catheter. The catheters are made of medical grade polymers that contain barium sulfate, a radiopaque substance that allows the catheter to be seen on diagnostic imaging such as x-ray, CT or MRI. Plaintiffs contend that Bard's IPCs are defective based on their theory that barium sulfate

[1] As of close of business on November 16, 2023, only three additional state court cases have been filed since Plaintiffs submitted their MCL Application on September 28, 2023, bringing the total number of cases to six. Defendants removed three other cases filed by out-of-state plaintiffs to the United States District Court for the District of New Jersey on November 16, 2023.

in the "catheter components of Defendants' products" can lead to surface degradation, causing various complications. (Pls.' Appl. at 5.) Four plaintiffs allege that they experienced "catheter infection[s]." (Id. at 2.) Two plaintiffs allege separate injuries in connection with a "catheter fracture." (Ibid.)

Unlike other MCLs, there has been no precipitating event spurring the filing of these cases, such as an FDA-issued recall, voluntary recall, or any regulatory action by the FDA related to safety. Nor has there been any landmark study or report questioning the overall safety of Bard's IPCs. To the contrary, these devices have been on the market for decades and have a proven track record of safety and efficacy. The complications alleged in the Complaints are well-documented in the medical literature, disclosed in the devices' Instructions for Use, and caused by external factors such as the patient's medical condition and improper insertion and maintenance.

Neither Plaintiffs' Application nor the allegations in the Complaints merit departure from the ordinary litigation process for several reasons. First, the cases do not possess the key characteristics that warrant MCL designation given that there are only six cases, which present individualized issues that predominate over the common issues. Second, centralization will prejudice Defendants and unreasonably delay and complicate the proceedings given that, among other things, three of the six pending cases are facially barred by the applicable statute of limitations—a case-dispositive defense that is not amenable to coordinated proceedings because dispositive motion practice is often delayed and limited only to bellwether trial cases. Finally, centralization will neither promote convenience nor result in an efficient utilization of judicial resources. Given the overlapping counsel in the present cases, there is no evidence that the parties cannot informally coordinate discovery to the extent practicable, and efficiently litigate these cases on an individualized basis. Defendants respectfully submit that this Application should be denied.

BACKGROUND

1. Bard's Implantable Port Catheter Devices Provide Safe and Vital Access to the Vascular System for Critically Ill Patients.

Bard's IPCs are medical devices indicated for patient therapies requiring repeated access to the vascular system. Totally implanted vascular access devices, such as Bard IPCs, are offered for sale by a number of different manufacturers, and have provided an important means of venous access for critically ill patients since the 1980s. These devices have allowed millions of patients to receive chemotherapy, antibiotic therapy, parenteral nutrition, and other life-sustaining treatment without the need for repeated, painful needle pricks that can cause serious damage to veins.

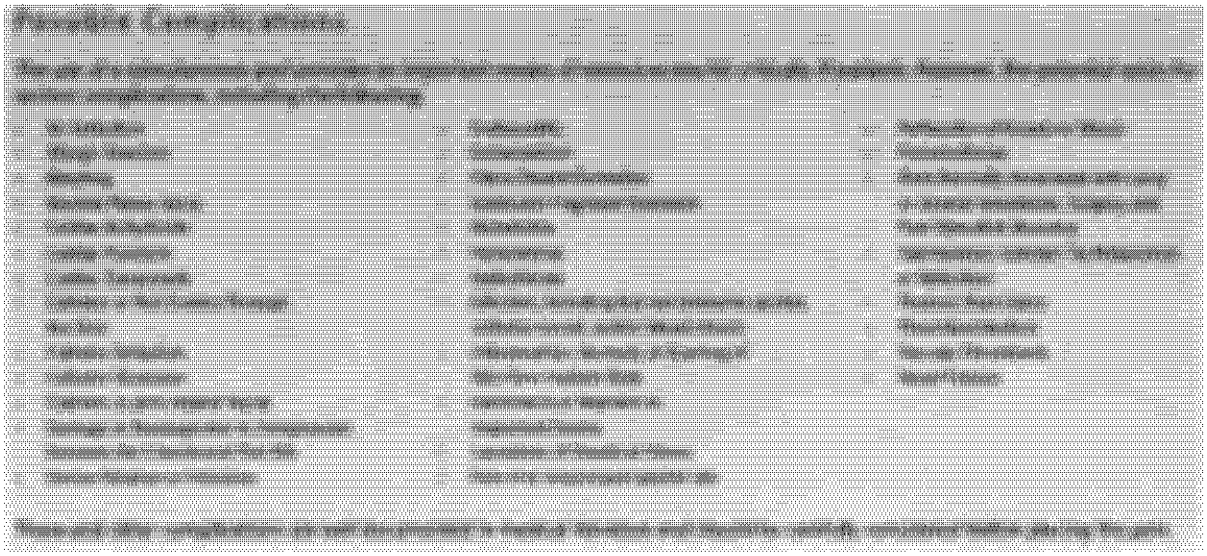
Bard's IPCs consist of two primary components: an injection port body and a radiopaque catheter. The port body is typically implanted under the skin in the chest below the clavicle. A catheter connected to the port body is then tunneled under the skin, inserted into a vein (typically the internal jugular vein or subclavian vein), and advanced to the junction of the superior vena cava and right atrium of the heart where the medication is introduced into the bloodstream.

Over the years, certain Defendants have developed different designs and configurations of power-injectable or non-power injectable ports bodies[2] and catheters. Within Defendants' portfolio of IPCs, multiple different models of port bodies are offered with a variety of catheters, including silicone and polyurethane catheters as well as Chronoflex® and Groshong® catheters. Chronoflex® catheters are open-ended, polyurethane catheters while Groshong® catheters are closed-tip, silicone catheters with end-valves for fluid flow. These catheters have different physical and chemical properties and are subject to different design specifications to ensure biodurability

[2] Bard markets power-injectable devices under the tradename "PowerPort" that allow for the power injection of contrast media for contrast-enhanced CT scans. In 2006, Bard introduced the first of its PowerPort family of devices. Bard's non-power-injection port devices are generally sold under the tradename "BardPort." BardPort devices have been on the market for more than two decades.

and biocompatibility. These catheters also differ in their concentration of barium sulfate. Not surprisingly then, each IPC has its own, distinct design history.

As with all totally implantable vascular access devices, there are known risks of complication. As discussed infra, four plaintiffs complain of "catheter infections" leading to catheter-related sepsis while two plaintiffs allege catheter fracture and migration, which is known in the medical literature as a "catheter embolism." See Oates v. Catheter Tech. Corp., 902 F.2d 1566, at *1-2 (4th Cir. 1990) (explaining that the "complication known as 'catheter embolization'" occurs when "the distal portion br[eaks] away from the rest of the catheter," and holding that warnings were adequate as a matter of law where they "acknowledged the risk of catheter embolization"). Importantly, these risks are clearly delineated in the IFUs and medical literature:



See Certification of Edward J. Fanning, Jr. ("Fanning Cert."), Ex. A: Instructions for Use.[3]

In the event of a complication, minimally invasive treatment is typically sufficient, and when an IPC must be removed, it is very common for a new IPC of the same make and model to

[3] Although Bard's IPC are not subject to a single IFU, Bard's IFUs have uniformly warned of the risk of infection or sepsis, thrombosis, catheter embolism, and damage or breakage.

be implanted. Antibiotics can be used to successfully treat infections.[4] Catheter fracture and migration, which is rare, is typically addressed by retrieving the catheter intravenously via guidewire and snare without the need for anesthesia.[5] Litigation has rarely resulted from these known and warned-about complications, likely because of quick resolution. Unlike other mass tort litigations, there has been no recent recall of IPCs or landmark scientific study or media exposition questioning the safety of Bard's IPCs or identifying any relevant defect.

2. This MCL Application is Entirely Attorney-Driven.

Bard also has a proven track record of efficiently managing prior litigation without formal consolidation. Prior to the formation of the MDL concerning these devices—which should be given little weight when considering whether MCL designation of these cases is warranted—litigation had been sparse. Of the only **eleven** cases filed across the country in the **five** years preceding the Motion to Transfer Actions before the Judicial Panel on Multidistrict Litigation ("JPML"), all cases resolved prior to the exchange of expert disclosures; all cases, except one, resolved without depositions; and the average duration to resolution was eighteen months.

Notwithstanding the absence of any precipitating event that would spur a mass tort, Plaintiff attorneys contacted defense counsel in December 2022 to advise Defendants that a consortium of law firms were running a targeted digital advertising campaign with an eye towards filing an MDL application regarding Bard's IPCs. See Fanning Cert, Ex. B: In re: Bard Implanted Port Catheter Prods. Liab., Litig., Cert. of Counsel in Supp. of Defs.' Opp'n to Mot. to Transfer Actions, ¶ 10 (J.P.M.L.). At the time, there was only one pending action in the entire country. As part of their coordinated strategy, these attorneys filed ten additional actions over the next five

[4] See Clinical Practice Guidelines for the Diagnosis and Management of Intravascular Catheter-Related Infection: 2009 Update by the Infectious Diseases Society of America (2009).
[5] See Spontaneous fracture and migration of catheter of a totally implantable venous access port via internal jugular vein – a case report, J. of Cardiothoracic Surgery (2016) 11:50.

months before applying to the JPML to transfer and centralize those cases in an MDL. Then, after Defendants opposed the Motion to Transfer Actions based on the limited number of cases pending, this consortium strategically filed one or two cases in different jurisdictions around the country, bringing the case total to about fifty, to ensure that the JPML would not deny the Motion based on a low number of cases.

The JPML granted the Motion and formed an MDL in the District of Arizona. As of the morning of the initial Case Management Conference in the MDL on September 18, 2023, there were **no pending cases** in the Superior Court of New Jersey. Despite that fact, Plaintiffs' MDL leadership designated Plaintiffs' counsel here as New Jersey state liaison counsel, who, in turn, declared on the record that he would be moving for the creation of a MCL in New Jersey in connection with the two cases he filed that day. True to his word, Plaintiffs' counsel filed this Application on September 28, 2023, in connection with the then-pending three cases. Despite declaring that "[i]t is estimated that 500 or more claimants will soon be filing in this State," Pls.' MCL Appl., at 1, only three additional cases are pending in the Superior Court of New Jersey since the filing of the Application fifty days ago.

3. The Six Pending Cases Present Unique Factual Issues that Predominate Over Common Issues and Do Not Lend Themselves to Centralization

The six pending cases present individualized issues that do not warrant MCL designation. With respect to the five complaints that identify the IPC by product code,[6] Defendants' preliminary investigation indicates that the five complaints involve **five** different IPCs:

- C.R.W.: Bard Titanium Low-Profile Port, product code 0602190. This device is a non-power injectable port body paired with a 6.6 Fr Pre-Attached Silicone Catheter.

[6] The sixth case, Foster v. C. R. Bard, Inc., BER-L-6175-23 (Nov. 15, 2023), does not identify the IPC by product code or lot number.

- Trump: Bard PowerPort® Clearvue® isp Implantable Port, product code 1608062. This device is a power injectable port body paired with a 8 Fr Attachable ChronoFlex® Polyurethane Catheter.[7]

- Elledge: Bard PowerPort® Implantable Port, product code 1708000. This device is a power injectable port body paired with an 8 Fr Attachable ChronoFlex® Polyurethane Catheter.

- Hyder-Dodd: BardPort Titanium Dome Implantable Port, product code 0602870. This device is a non-power injectable port body paired with a 9.6 Fr Attachable Silicone Catheter.

- Leddick: Bard PowerPort® M.R.I.® Implantable Port, product code 1809600. This device is a power injectable port body paired with a 9.6 Fr Attachable Silicone Catheter.

These five different devices also correspond to five different applications to the FDA. The documents related to the design and manufacturing are also unique to each device. In short, there are insufficient commonalities between these cases to warrant coordination into a single MCL.

Beyond the fact that each case involves a different device, the pending cases do not possess common characteristics that warrant centralization. First, **three** of the six cases are facially barred by New Jersey's two-year statute of limitations. Plaintiff Robert Trump alleges that he went to the hospital on October 8, 2018 with an infection that "was confirmed as a Portacath site infection,"[8] and consequently had his IPC removed three days later. Trump v. C. R. Bard, Inc., No. BER-L-5017-23 (Sept. 18, 2023), Compl. ¶¶ 64-65. Plaintiff did not file his complaint until approximately five years later, on September 18, 2023. Plaintiff Jeanne Hyder-Dodd alleges that she developed sepsis on September 27, 2016, and that "[o]n or about September 30, 2016, Plaintiff's Infectious Disease team requested that Plaintiff's BardPort be removed, and [her medical provider] removed the defective device the same day." Hyder-Dodd v. C. R. Bard, Inc., No. BER-L-5191-23 (Sept. 27, 2023), Compl. ¶¶ 44-45. Plaintiff did not file her complaint until seven years later, on

[7] Assuming the product code identified in the Complaint is accurate, the Complaint incorrectly alleges that the catheter was a Groshong® catheter.
[8] "Portacath" is a shorthand name for a totally implantable vascular access device.

September 27, 2023. Plaintiff Josephine Leddick alleges that she presented to the hospital on August 31, 2010 where "it was confirmed that there was a foreign body in her right arm which was later confirmed to be the fractured catheter," and that "[o]n September 1, 2010, Plaintiff was brought into an operating room where there was a successful removal of the catheter." Leddick v. C. R. Bard, Inc., No. BER-L-6000-23 (Nov. 6, 2023), Compl. ¶¶ 64-65. Plaintiff did not file her complaint until more than thirteen years later, on November 6, 2023. Accordingly, notwithstanding the ongoing attorney advertising campaign, fifty percent of the filed cases have case-specific and dispositive statute of limitations defenses given that the devices were explanted in 2010, 2016, and 2018, and the cases were not filed until 2023.

Second, C.R.W. is uniquely situated from the remaining cases and presents a prime example of the individualized inquiry necessary in each case. Plaintiff C.R.W. received her IPC to assist with the treatment of a rare immune disorder called agammaglobulinemia—a condition characterized by a high risk of recurrent and severe bacterial infections. See MedlinePlus, Nat'l Library of Medicine, Agammaglobulinemia, https://medlineplus.gov/ency/article/001307.html ("People with this disorder develop infections again and again. Common infections include ones that are due to bacteria . . . ."); Genetic and Rare Diseases Information Center, Nat'l Inst. of Health, X-linked agammaglobulinemia, https://rarediseases.info.nih.gov/diseases/1033/x-linked-agammaglobulinemia (stating that people affected by agammaglobulinemia "generally begin developing frequent and recurrent bacterial infections from about 6 months of age" and that sepsis is a "frequent" symptom). In her Complaint, Plaintiff, a minor, seeks damages in connection with an infection she suffered in 2012. C.R.W. v. C. R. Bard, Inc., No. BER-5014-23 (Sept. 18, 2023), Compl. ¶¶ 64-65. The pivotal issue in C.R.W. will be whether the infection was due to her underlying condition, as opposed to any alleged defect in the IPC.

Third, Elledge is also uniquely situated from the other cases. Plaintiff Mary Ann Elledge is an adult resident of Oklahoma whose IPC was both implanted and explanted in Oklahoma. See Elledge v. C. R. Bard, Inc., No. BER-L-5246-23 (Sept. 29, 2023), Compl. ¶ 3, 54, 60. Accordingly, unlike the remaining cases, Oklahoma law will presumptively govern Plaintiff's claims. See P.V. ex rel. T.V. v. Camp Jaycee, 197 N.J. 132, 136 (2008). This difference in substantive law will impact the scope of discovery and the relevance and admissibility of evidence at trial given that the New Jersey Product Liability Act creates an exclusive cause of action sounding in strict liability, while Oklahoma permits well-pleaded negligence claims to proceed. Compare Port Auth. of New York & New Jersey v. Arcadian Corp., 189 F.3d 305, 313 (3d Cir. 1999) ("Under New Jersey law negligence is no longer viable as a separate claim for harm caused by a defective product."); with Thompson v. TCI Products Co., 81 F. Supp. 3d 1257, 1266 (N.D. Okla. 2015) ("Oklahoma allows plaintiffs to assert a negligence claim, in addition to a manufacturer's products liability claim, when injured by a product.").

Fourth, Leddick and Foster are distinct from the catheter infection cases given that they allege injuries associated with a catheter fracture. See Leddick, Compl. ¶¶ 64-65; Foster, Compl. ¶¶ 63, 69-71. An alleged catheter fracture presents different issues than a catheter infection, including different potential alternative causes. Moreover, each catheter fracture case presents unique issues. A medical practitioner's vein selection for insertion subjects the device to various anatomical conditions. The Instructions for Use advise practitioners to avoid the risk of "pinch-off" syndrome, which occurs when the catheter becomes compressed between the clavicle and first rib. See Fanning Cert., Ex. A. Bard's IPCs are contraindicated for catheter insertion in the subclavian vein medial to the border of the first rib. To prevent pinch-off, the IFUs advise practitioners to use the lateral subclavian vein or the internal jugular vein for catheter insertion. In

Leddick, the catheter allegedly fractured about four months after the medical provider inserted into the left subclavian vein. See Leddick, Compl. ¶¶ 57-58, 64. Leddick thus presents a likely case of pinch-off syndrome. On the other hand, the catheter in Foster was discovered to have fractured nearly nine years after implant via the right internal jugular vein. See Foster, Compl. ¶¶ 59, 61-62. The cases are dissimilar.

Accordingly, and as set forth in further detail below, MCL designation in New Jersey is neither necessary nor appropriate for the few cases that are part of Plaintiffs' Application.

ARGUMENT

I. The Pending Cases Do Not Possess the Characteristics that Warrant Centralization Identified in Directive # 02-19.

Directive # 02-19 prescribes the criteria to be applied in determining whether MCL designation is warranted. The Directive first requires the Court to consider "whether the case(s) possess the following characteristics": (1) "it involves a large number of parties"; (2) "it involves many claims with common, recurrent issues of law and fact that are associated with a single product, mass disaster, or complex environmental or toxic tort"; (3) "there is geographical dispersement of parties"; (4) "there is a high degree of commonality of injury or damages among plaintiffs"; (5) "there is value interdependence between claims"; and (6) "there is a degree of remoteness between the court and actual decision-makers in the litigation." AOC Directive # 02-19. The six pending actions possess none of those characteristics.

A. There is a Low Number of Parties.

There are only six actions pending in the Superior Court of New Jersey. The Court should disregard Plaintiffs' unsupported assertion that "500 or more claimants will soon be filing in this State," Pls.' Appl. at 1, and rule on this Application based on the facts and case statistics as they exist today. Indeed, in considering centralization for MDL purposes, the JPML has persuasively

and repeatedly stated that "where only a minimal number of actions are involved, the moving party generally bears a heavier burden of demonstrating the need for centralization." In re Stivax Mktg. & Sales Pracs. Litig., 645 F. Supp. 3d 1383, 1384 (J.P.M.L. 2022) (quoting In re Transocean Ltd. Secs. Litig. (No. II), 753 F. Supp. 2d 1373, 1374 (J.P.M.L. 2010)). Such is the case here. For obvious reasons, litigation involving few parties does not require "centralized management" under Rule 4:38A. Cf. In re Convergent Outsourcing, Inc., 84 F. Supp. 3d 1369, 1370-71 (J.P.M.L. 2015) (denying centralization of six actions and noting that "voluntary cooperation and coordination among the parties and the involved courts seems a feasible alternative to centralization").

Indeed, this Court has routinely denied MCL applications involving a low number of cases. Most recently, this Court denied an application for MCL designation of nine product liability actions involving Stryker Tritanium acetabular shells, and explicitly "based its denial on the limited number of cases at present." Fanning Cert., Ex. C, Feb. 5, 2020, Notice to the Bar. Prior denials of MCL applications likewise involved a low number of cases and parties. See, e.g., id., Ex. D: Nov. 6, 2019, Notice to the Bar (denying MCL application for sexual assault cases against Massage Envy franchisees that involved at least seven plaintiffs); Ex. E: July 16, 2016, Notice to the Bar (denying application to designate twelve cases alleging violations of vehicle emissions standards as an MCL); Ex. F: July 31, 2013, Notice to the Bar (denying MCL application arising from fourteen pending cases involving alleged liver injuries stemming from the use of Tylenol).

Moreover, the fact that the number of pending cases remains low despite the proliferation of attorney advertising organized by the plaintiffs' bar weighs against the need for centralization. Plaintiffs' prediction of future filings based on an extrapolation of Defendants' market share, FDA

reporting mechanisms, and an alleged complication rate is similarly unavailing.[9] This Court should focus on the actual case statistics, not unsupported assertions about future filings. See In re Covidien Hernia Mesh Prod. Liab. Litig., 481 F. Supp. 3d 1348, 1349 (J.P.M.L. 2020) (reiterating that the JPML is "disinclined to take into account the mere possibility of future filings in [its] centralization calculus" (quoting In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig., 959 F. Supp. 2d 1375, 1376 (J.P.M.L. 2013))).

B. The Cases do not Possess Claims with Common, Recurrent Issues of Fact and Law, a High Degree of Commonality of Injury, or Significant Value Interdependence.

Several of Directive # 02-19's factors concern commonality among cases with respect to factual and legal issues, and the relative strength and weaknesses across cases. The pending actions do not possess those characteristics. Rather, individualized issues predominate over the common

[9] Plaintiffs' attempt to draw negative inferences from Defendants' lawful submission of data to FDA through its Alternative Summary Reporting ("ASR") program should be rejected. See Pls.' Appl. at 3. Under the ASR program, "manufacturers of certain devices could request an exemption from the requirement to file individual medical device reports for certain events that were well-known and well-established risks associated with a particular device and to instead submit quarterly summary reports of such events." FDA, Press Release, Statement on agency's efforts to increase transparency in medical device reporting (June 21, 2019). According to FDA, "[t]he ASR Program allowed the FDA to more efficiently review reports of well-known, well-understood adverse events, so [it] could focus on identifying and taking action on new safety signals and less understood risks." Ibid. Plaintiffs' reliance on Khalid article is also misplaced. Pls.' Appl. at 4. The article does not mention Bard devices or barium sulfate, and explicitly acknowledges that the data reviewed "does not allow for control of individual variabilities such as surgeon expertise, procedural methods, and follow-up and treatment protocols, or any insight into patient selection criteria." S.I. Khalid, et al, Outcomes following port-a-catheter placement in Medicare population, Surgery Open Science 3 (2021) 39, 42. Contrary to the Khalid article, another study of patients implanted only with Bard M.R.I. Implantable Ports found the "overall complication rate is consistent with data reported by several studies that range between 2 to 14.4%." Granziera, Totally implantable venous access devices: retrospective analysis of different insertion techniques and predictors of complications in 796 devices implanted in a single institution, BMC Surgery 2014, 14:27.

issues with respect to each case's facts and legal issues. These cases also possess limited interdependence when it comes to liability and causation.

Half of the pending cases are facially barred by New Jersey's two-year statute of limitations (Trump, Hyder-Dodd, and Leddick). Defendants intend to file motions to dismiss all three cases pursuant to Rule 4:6-2(e) on statute of limitations grounds. If those cases proceed past the pleadings, Defendants will then request that discovery be geared towards an expedited motion for summary judgment and/or a Lopez hearing. The fourth case involves an Oklahoma plaintiff whose claims will be presumptively governed by Oklahoma law (Elledge). The fifth case is unique insofar as it involves a minor plaintiff who suffers from a rare immune disorder characterized by a high risk of recurrent and severe infections—the same injury that plaintiff attempts to attribute to the catheter associated with her implantable port device (C.R.W.). The sixth case is unique insofar as it involves an alleged catheter fracture nine years after implant, which implicates highly individualized issues related to IPC care and maintenance.

Given the plaintiff-focused disparities among cases, there is little to no value interdependence between claims. More than half of the pending cases will be disposed of on statute of limitations grounds, the causation analysis in C.R.W. and Foster will be unique to the facts of those cases, and the application of Oklahoma law in Elledge will not meaningfully impact the liability and causation findings in the cases applying New Jersey law.

With respect to the two catheter fracture cases, discovery and trial will look very different from the infection cases.[10] Discovery in catheter fracture cases will require fact-specific expert opinions on the proper implantation and maintenance of her device to rule-in and rule-out

[10] That is, of course, if Plaintiff Leddick overcomes the statute of limitations defense related to her device being explanted about thirteen years ago.

alternative causes of the alleged fracture, such as pinch-off or subpar maintenance of the device, which are well-known risks warned against in the product's IFU. There will also be different general causation experts on the issue of the mechanical integrity of the device *in vivo*. In contrast, fact and expert discovery in the infection cases will be focused predominately on whether sterile practices were followed by medical providers, and require testimony from infectious disease experts.

The specific facts of each infection case are also critical to determining the merit, or lack thereof, of Plaintiffs' legal claims, including whether the device at issue even caused the alleged injuries. Each Plaintiff has a distinct medical history that makes each case unique. Bard IPCs are generally used for very sick patients to facilitate delivery of chemotherapy and other vital mediations and therapies. A particular plaintiff's medical condition, like C.R.W.'s, could be accompanied by an extremely high risk of infection. In addition, repetitive hospital visits and access of the device can lead to the risk of hospital-acquired infections. In short, the degree of "commonality of injury or damages" here is exceedingly low, which weighs strongly against MCL designation.[11]

[11] In the event that the three cases removed on November 16, 2023 are remanded, Plaintiffs still fail to satisfy Directive # 02-19's criteria. The resulting nine cases still involve a low number of parties, and individualized issues still predominate over common issues. See Fanning Cert., Ex. C: Notice to the Bar, Feb. 5, 2020 (denying MCL application involving nine product liability actions based on the low number of cases). Two of these cases are barred by the applicable statute of limitations, bringing the total number of time-barred cases to five out of nine, or fifty-six percent. See Boothe v. C. R. Bard, Inc., BER-L-6206 (Nov. 16, 2023), Compl. ¶ 84, 90 (Alabama plaintiff alleging removal of device in 2018 following infection); Matthews v. C. R. Bard, Inc., BER-L-6207 (Nov. 16, 2023), Compl. ¶ 94 (North Carolina plaintiff alleging removal of device in 2016 following fracture). All three cases involve out of state plaintiffs, and thus, the application of different state law.

C. The Cases Involve Limited Geographical Dispersement and a Low Degree of Remoteness Between the Court and Actual Decision-Makers.

Five of the six plaintiffs are New Jersey residents who are represented by counsel with a statewide presence. McCarter & English, LLP represents Defendants in all pending state court cases. As a result, defense counsel are in frequent and direct contact with their client-based "decision-makers," who are also located in New Jersey. Unlike other cases that may warrant coordination, the courts here need not communicate with various law firms in numerous states, who themselves may be required to navigate a corporate hierarchy to receive responses and solutions. This straightforward composition further belies the need for MCL coordination, and the Court should deny Plaintiffs' Application.

II. Plaintiffs' Application Does Not Satisfy Any of the Administrative Factors Identified in Directive # 02-19.

Directive # 02-19 also identifies a number of administrative factors, including (1) "whether there is a risk that centralization may unreasonably delay the progress, increase the expense, or complicate the processing of any action, or otherwise prejudice a party"; (2) "whether centralized management is fair and convenient to the parties, witnesses and counsel"; (3) "whether there is a risk of duplicative and inconsistent rulings, orders or judgments if the cases are not managed in a coordinated fashion"; (4) "whether coordinated discovery would be advantageous"; (5) "whether the cases require specialized expertise and case processing as provided by the dedicated [MCL] judge and staff"; (6) "whether centralization would result in the efficient utilization of judicial resources and the facilities and personnel of the court"; (7) "whether issues of insurance, limits on assets and potential bankruptcy can be best addressed in coordinated proceedings"; and (8) "whether there are related matters pending in Federal court or in other state courts that require coordination with a single New Jersey judge." AOC Directive # 02-19, at 2.

A. Centralization will Prejudice Defendants, Unreasonably Delay the Progress and Complicate the Pending Cases, and Provide No Advantages that Cannot Be Obtained by Informal Coordination.

MCL designation is not appropriate for these cases as centralization's inherent flaws outweigh any advantages to be gained. First, Defendants will be significantly prejudiced if the cases receive MCL designation. Defendants intend to pursue their case-specific statute of limitations defenses immediately in C.R.W., Trump, and Leddick. If these cases are centralized, however, there is no mechanism or guarantee that the individual attention needed for these cases will remain feasible. One of the major criticisms of centralization is that it permits meritless cases—in particular, time-barred cases—to proceed without vetting. One MDL judge's commentary on the critical drawback of centralization is apt:

> A reported twenty to fifty percent of [MDL] cases involve plaintiffs with unsupportable claims. In the products liability context, unsupportable claims are often a result of a plaintiff having not used the relevant product and/or having not suffered the injuries alleged, or, in some cases, the applicable statute of limitations having run. MDLs have no built-in, uniform mechanism for efficiently filtering out these sorts of claims. The procedural safeguards used effectively in one-off cases (e.g., federal pleading standards, discovery obligations, case-specific motions for summary judgment, and Rule 11 sanctions) are difficult to employ at scale in the MDL context . . . . Left unchecked, high volumes of unsupportable claims can wreak havoc on an MDL. They clog the docket, interfere with a court's ability to establish a fair and informative bellwether process, frustrate efforts to assess the strengths and weaknesses of the MDL as a whole, and hamper settlement discussions.
>
> [Hon. M. Casey Rogers, U.S.D.J., Vetting the Wether: One Shepard's View, 89 U.M.K.C. L. Rev. 873, 873 (2021).]

Those risks are present here. Centralization will delay rulings on those important defenses and proliferate additional meritless cases, thereby complicating the proceedings and increasing expense.

These issues significantly outweigh any potential advantages related to coordinated discovery in a formal MCL. As the JPML has noted, formal "centralization . . . should be the last solution after considered review of all other options." In re: Best Buy Co., Inc., Cal. Song-Beverly Credit Card Act Litig., 804 F. Supp. 2d 1376, 1378 (J.P.M.L. 2011) (emphasis added). Informal coordination is a "practicable" alternative that will minimize any inconveniences to the parties or witnesses (i.e., cross-noticing depositions). In re Belviq (Lorcaserin HCl) Prod. Liab. Litig., 555 F. Supp. 3d 1369, 1370-71 (J.P.M.L. 2021). To the extent there is overlap with respect to depositions or document productions, counsel can work together to cross-notice depositions and have documents deemed produced in multiple actions. Informal coordination is particularly viable given that the Parties are all represented by the same counsel. There is no advantage gained by formal centralization for discovery purposes. Indeed, all prior litigation involving these devices was resolved without the Parties engaging in substantial discovery and in an average duration of eighteen months. The Parties should be permitted to proceed in a similar fashion here.

B. There is No Risk of Duplicative or Inconsistent Rulings.

Individual litigation of the pending cases will not result in conflicting rulings given Defendants' individualized statute of limitations and causation defenses. Tellingly, Plaintiffs do not identify any specific example of an inconsistent pretrial ruling that could be at issue. Furthermore, the experienced counsel on both sides should be expected to recognize that a ruling on an issue in one case that arises in a subsequent case would likely be resolved in a similar fashion, and thus, not warrant relitigation.

C. The Pending Cases Do Not Require Specialized Case Processing by the MCL Staff and Will Not Result in an Efficient Utilization of Judicial Resources.

Plaintiffs provide no argument as to why the pending cases need specialized case processing by a designated MCL Judge or why centralization will result in an efficient use of

judicial resources beyond reliance on the formation of the federal MDL. See Pls.' Appl. at 6-7. The JPML's decision is easily distinguishable. By the time the JPML panel ruled on the Motion to Transfer, there were nearly fifty cases pending in about thirty different jurisdictions around the country. The JPML acknowledged "defendants' willingness to cooperate" but was ultimately "persuaded that the current number of involved cases, counsel, and districts would make informal coordination unworkable." In re: Bard Implanted Port Catheter Prod. Liab. Litig., -- F. Supp. 3d --, 2023 WL 5065100, at *2 (J.P.M.L. Aug. 8, 2023). The low number of cases and individualized facts in each action provides no impediment to efficient management by separate judges.

* * *

Accordingly, none of the administrative factors identified in Directive # 02-19 warrant MCL designation. This Court should deny Plaintiffs' Application.

III. If this Court Determines that the Cases Should be Designated as an MCL, the Cases Should be Centralized in Atlantic County and Should be Limited to "Catheter Infection" Cases.

Directive # 02-19 prescribes that "[i]ssues of fairness, geographical location of parties and attorneys, and the existing civil and [MCL] caseload in the vicinage will be considered in determining to which vicinage a particular [MCL] will be assigned for central management." AOC Directive # 02-19. These factors all weigh in favor of Atlantic County over Bergen County, and limiting any MCL to cases involving "catheter infection[s]." Pls.' Appl. at 2.

Geographic considerations weigh in favor of Atlantic County. Three of the five plaintiffs who are New Jersey residents state that they reside in the southern portion of the State and had their IPCs implanted and explanted there. See Trump, Compl. ¶¶ 2, 64-65 (alleging that Plaintiff resides in Medford and had his IPC explanted at "Our Lady of Lourdes Medical Center in Camden"); Hyder-Dodd, Compl. ¶¶ 42, 44 (alleging that Plaintiff had her IPC implanted and

explanted at "Jefferson Stratford Hospital in Stratford," which is in Camden County); Leddick, Compl. ¶¶ 2, 58 (alleging that Plaintiff resides in Medford and had her IPC implanted and removed at "Memorial Hospital of Burlington County"). On the defense side, there is only a limited connection to Bergen County. Although BD is headquartered in that county, all five New Jersey plaintiffs had their devices explanted prior to BD acquiring C. R. Bard, Inc. in 2017. Bard Access Systems, Inc., a wholly-owned subsidiary of C. R. Bard, Inc. with a principal place of business in Utah, designed and manufactured the catheters. Accordingly, there will be few to no relevant corporate witnesses from BD in those cases. As for the attorneys, Javerbaum Wurgraft has offices through the State of New Jersey while Berger Montague is headquartered in Philadelphia. McCarter & English represents Defendants in all cases and has a statewide presence.

Moreover, Atlantic County is a more suitable forum for an MCL based on the civil and MCL caseloads in the respective vicinages. As of June 30, 2022, Atlantic County had 3,340 inventory MCL cases with a backlog of MCL 1,972 cases, and Bergen County had 1,014 inventory cases with a backlog of **3,719** cases. See Annual Report of the Administrative Director of the Courts (July 2023). Given that Bergen County has nearly double the number of backlogged MCL cases, Atlantic County is a preferable forum. As for non-MCL civil cases, Atlantic County had 5,683 inventory cases with a backlog of 2,207 cases, and Bergen County had **11,519** inventory cases with a backlog of 3,070 cases. Given that Bergen County has more than double the number of non-MCL inventory cases and a larger backlog of non-MCL cases, Atlantic County is again the preferable forum.

Finally, issues of fairness require limiting any MCL designation to cases alleging "catheter infections." Only two cases, one of which is barred by the statute of limitations, alleges a catheter fracture. No case alleges injuries or complications associated with blood clots or

"thromboembolism." Until Plaintiffs establish that MCL designation of filed cases involving catheter fractures or thromboembolism is warranted, this Court should not preemptively centralize hypothetical cases that have yet to be filed in an MCL.

CONCLUSION

For these reasons, Defendants respectfully request this Court deny Plaintiffs' Application for MCL designation.

Dated: November 17, 2023 By: */s/ Edward J. Fanning*

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IN RE: MULTICOUNTY LITIGATION APPLICATION – NEW JERSEY STATE COURT LITIGATION INVOLVING BARD IMPLANTED PORT CATHETER PRODUCTS	**CERTIFICATION OF EDWARD J. FANNING, JR. IN SUPPORT OF DEFENDANTS' OBJECTIONS TO THE MULTICOUNTY LITIGATION APPLICATION INVOLVING BARD IMPLANTED PORT CATHETER PRODUCTS**

EDWARD J. FANNING, JR., of full age, hereby certifies as follows:

1. I am an attorney at law of the State of New Jersey and a partner at the law firm McCarter & English, LLP, attorneys for Defendants Becton, Dickinson and Company, C. R. Bard, Inc., and Bard Access Systems, Inc. (collectively, "Defendants"). I submit this Certification in support of Defendants' Objections to the Multicounty Litigation Application involving Bard Implanted Port Catheter Products filed by Plaintiffs.

2. As of close of business on November 16, 2023, six cases were pending in the Superior Court of New Jersey, Law Division, Bergen County:

- C.R.W. v. C. R. Bard, Inc., No. BER-5014-23, filed on September 18, 2023
- Trump v. C. R. Bard, Inc., No. BER-L-5017-23, filed on September. 18, 2023

- Hyder-Dodd v. C. R. Bard, Inc., No. BER-L-5191-23, filed on September 27, 2023
- Elledge v. C. R. Bard, Inc., No. BER-L-5246-23, filed on September 29, 2023
- Leddick v. C. R. Bard, Inc., No. BER-L-6000-23, filed on November 6, 2023
- Foster v. C. R. Bard, Inc., BER-L-6175-23, filed on November 15, 2023.

Three cases filed by out-of-state residents were removed by Defendants to the United States District Court for the District of New Jersey on November 16, 2023.

3. Attached hereto as **Exhibit A** is a true and accurate copy of the Instructions for Use for the implantable port catheter device bearing product code 1708000 and lot number REEY3104 identified in Trump v. C. R. Bard, Inc., No. BER-L-5017-23.

4. Attached hereto as **Exhibit B** is a true and accurate copy of the Certification of Counsel in support of Defendants' Opposition to the Motion to Transfer Actions Pursuant to 28 U.S.C. § 1407 submitted in In re: Bard Implanted Port Catheter Prods. Liab., Litig., MDL No. 3081 (J.P.M.L.).

5. Attached hereto as **Exhibit C** is a true and accurate copy of the Notice to Bar posted on February 5, 2020, and excerpts from the Application for designation as Multicounty Litigation of cases against Howmedica Osteonics Corp., d/b/a Stryker Orthopaedics alleging injuries as a result of implantation of the Stryker Tritanium Acetabular Shell.

6. Attached hereto as **Exhibit D** is a true and accurate copy of the Notice to Bar posted on November 6, 2019, and excerpts from the Application for designation as Multicounty Litigation of cases alleging personal injuries as a result of alleged sexual assaults by massage therapists employed by certain Massage Envy franchisees.

7. Attached hereto as **Exhibit E** is a true and accurate copy of the Notice to Bar posted on July 16, 2016, and excerpts from the Application for designation as Multicounty Litigation of cases alleging violations of emissions standards by Volkswagen Group of America, Inc.

8. Attached hereto as **Exhibit F** is a true and accurate copy of the Notice to Bar posted on July 31, 2013, and excerpts from the Application for designation as Multicounty Litigation of cases alleging liver injuries caused by Tylenol products.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

By: *s/ Edward J. Fanning*
Edward J. Fanning, Jr., Esq.

Dated: November 17, 2023

Exhibit B

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

IN RE: Bard Implanted Port Catheter Products Liability Litigation,	2:23-md-03081-DGC
	Phoenix, Arizona
	September 18, 2023
	1:32 p.m.

BEFORE: THE HONORABLE DAVID G. CAMPBELL, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

INITIAL CASE MANAGEMENT CONFERENCE

Official Court Reporter:
Elaine Cropper, RDR, CRR, CCP
Sandra Day O'Connor U.S. Courthouse
401 West Washington Street
Suite 312, SPC 35
Phoenix, Arizona 85003-2150
(602) 322-7245

Proceedings Reported by Stenographic Court Reporter
Transcript Prepared by Computer-Aided Transcription

limited to physical evidence retrieved from patients. 01:47:13

THE COURT: Okay. That's the same topic you both discussed so we will in the Case Management Order say that the parties will jointly propose a preservation order by October 27 and if you end up having disagreements, same procedures, set forth your competing provisions. But it seems to me since you're both focusing on the same type of evidence, that is something that can be worked out as well. 01:47:30

You indicated in your joint memorandum that there are no jurisdiction or remand issues at this point which is fine. You also indicated that there are no pending state cases, but then in one of the proposals there was a New Jersey liaison identified, New Jersey state court liaison identified, which I inferred that there was something going on in New Jersey. Where does that stand? 01:47:49 01:48:13

MR. SACCHET: Your Honor. I'm happy to address that matter. Michael Sacchet on behalf of plaintiffs.

Of course given the jurisdictional concerns with plaintiffs who are domiciled in New Jersey and the fact that Becton Dickinson and C.R. Bard are both incorporated and have their principal places of business in New Jersey as well, there would not be diversity jurisdiction for such a plaintiff to bring a claim in federal court there to the extent he or she wanted to. 01:48:24

In that event, we would assume that there would be a 01:48:39

state court litigation in New Jersey. Of course there's not been a case filed to date of that nature; but if it were to happen and there were multiple cases of that nature, an MCL, as it were, could occur in that jurisdiction. So for that reason, Plaintiffs' Group 1 has nominated Mr. Mike Galpern of New Jersey to be the New Jersey State liaison counsel. 01:48:41 01:48:55

THE COURT: With that thinking, could there be Arizona State cases as well?

MR. SACCHET: Very well could, Your Honor, in light of the citizenship of Bard Vascular Peripheral who is, I believe, domiciled in Arizona based on its principal place of business and place of incorporation. And so, too, as to Utah with respect to Bard Access Systems. 01:49:08

THE COURT: Okay.

Hold on a minute. Sir, I think you're going to need to come up to a mic to speak, so let's just have you come right up here to either the front or defense counsel. You can just come up to the lectern if you want. 01:49:25

MR. GALPERN: Your Honor, good afternoon. Michael Galpern. I'm from New Jersey. That is my application to serve with Group Number 1 as the New Jersey liaison counsel. And as of today, there has been one or two state court filings in New Jersey. We didn't have a chance to update Mr -- 01:49:42

THE COURT: That's fine. Is there -- assuming there are more, is there a procedure for those to be consolidated 01:50:06

before one judge? 01:50:07

MR. GALPERN: Yes, sir. It's known as MCL, multi-county litigation. There will be an application to make it in MCL in front of Judge Padovano who sits in Bergen County where Becton Dickinson is. I've served as New Jersey liaison on 01:50:21 a number of MDLs. And you'll see in my papers, I strongly recommend that there be a New Jersey liaison appointed for coordination purposes. I think it benefits everybody, plaintiffs, defense, and the Court system.

THE COURT: Okay. All right. Thanks. 01:50:37

MR. GALPERN: Thank you, Your Honor.

MR. BRENES: Your Honor, I was just going to address whether there be state court cases here as well. I think there likely would be. I know in IVC filters, the New Jersey plaintiffs were generally allowed to go forward here in state 01:50:51 court. And even over the forum non-motions. So I do think we'll see state courts here as well.

THE COURT: All right. Well, coordination with state court cases will be important. We even had, as I recall, a science day where we had an Arizona State court judge and me 01:51:07 here on the bench listening to the discussion of science. We'll want to coordinate closely going forward.

It appears from the joint memorandum that everybody agrees that there should be a Master Complaint prepared and I assume a Master Answer from the defense and then some form of a 01:51:30

Exhibit C

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December 1, 2023

VIA FEDERAL EXPRESS & EMAIL

Hon. Glenn A. Grant, J.A.D.
Administrative Director of the Courts
Attention: MCL Application - Bard Implanted Port Catheter Products
Hughes Justice Complex, P.O. Box 037
Trenton, New Jersey 08625-0037

Re: Bard Access Systems, Inc., C. R. Bard, Inc., and Becton, Dickinson and Company's Response to Plaintiffs' Reply dated November 28, 2023

Dear Judge Grant:

Defendants Bard Access Systems, Inc., C. R. Bard, Inc., and Becton, Dickinson and Company respectfully submit this letter in response to Plaintiffs' improper "Reply" dated November 28, 2023. The Notice to the Bar set a deadline of November 17, 2023 for the submission of comments. The Court should therefore disregard Plaintiffs' out-of-time Reply. In the event that the Court considers Plaintiffs' Reply, Defendants respectfully request the Court accept this response.

There are presently nine cases subject to Plaintiffs' MCL Application as the three removed cases identified in Defendants' Objections will be remanded back to Superior Court of New Jersey. The low number of cases nonetheless warrants denial of this application. See Fanning Cert. in Supp. of Defs.' Opp'n to MCL Appl.: Ex. C, Feb. 5, 2020, Notice to the Bar (denying an application for MCL designation of nine actions "based . . . on the limited number of cases at present"). This Court should disregard Plaintiffs' predictions of future filings and base its decision on the number of cases actually pending. See In re Covidien Hernia Mesh Prod. Liab. Litig., 481 F. Supp. 3d 1348, 1349 (J.P.M.L. 2020) (reiterating that the JPML is "disinclined to take into account the mere possibility of future filings in [its] centralization calculus"); In re: Intuitive Surgical, Inc., Da Vinci Robotic Surgical Sys. Prods. Liab. Litig., 883 F. Supp. 2d 1339, 1340 (J.P.M.L. 2012) ("While proponents maintain that this litigation may encompass 'hundreds' of cases or 'over a thousand' cases, we are presented with, at most, five actions.").

Nor should this Court discount the opportunity for informal coordination given the overlap of counsel. Plaintiffs simply argue that informal coordination is infeasible based on their predictions of future filings. As the JPML has noted, "centralization . . . should be the last solution after considered review of all other options." In re: Best Buy Co., Inc., Cal. Song-Beverly Credit Card Act Litig., 804 F. Supp. 2d 1376, 1378 (J.P.M.L. 2011); see also In re Belviq (Lorcaserin HCl) Prod. Liab. Litig., 555 F. Supp. 3d 1369, 1370-71 (J.P.M.L. 2021) (identifying factors that suggest when informal coordination is practicable, which include overlapping counsel, cases in their early stages, cross-noticing depositions, and willingness to cooperate). Nothing precludes Plaintiffs from filing a new MCL application in the event that informal coordination becomes impracticable.

Setting aside Defendants' willingness to coordinate discovery, these cases require individualized attention. Five of the nine cases (59%) present facial statute of limitations issues that will be subject to motions to dismiss and/or hearings pursuant to Lopez v. Swyer, 62 N.J. 267 (1973). Six cases involve catheter infections while only three allege catheter fractures, which present unique issues. See Index of Cases, infra; Defs.' Opp'n at 6-10, 12-14. Next, the number of pending (and anticipated) out-of-state plaintiffs should weigh against MCL designation. Centralized litigation in state court is intended to complement federal multidistrict litigation because in-state plaintiffs cannot establish federal diversity jurisdiction. See In re: Bard Implanted Port Catheter Products Liability Litigation, No. 23-md-3081 (D. Ariz., Sept. 18, 2023), Initial CMC Tr., at 14:2 to 16:11 (stating that a New Jersey state court liaison is necessary "given the jurisdictional concerns with plaintiffs who are domiciled in New Jersey"). This Court should not sanction the MDL state court liaison's efforts to file cases by out-of-state plaintiffs to drive up case numbers for this MCL application. All of these plaintiffs were subject to medical treatment in their home states and received a medical device designed by an entity headquartered in Utah. The only ties to New Jersey are the location of the parent corporations. Defendants thus intend to move to dismiss these cases on forum non conveniens grounds. There is no indication that litigation in these out-of-state plaintiffs' home states or the MDL is inadequate, and both the public and private factors weigh heavily in favor of litigation in the out-of-state plaintiffs' home states. See In re Vioxx Litig., 395 N.J. Super. 358, 364-65, 376 (App. Div. 2007).

Finally, should an MCL be formed, Defendants respectfully request that the MCL be limited to catheter infections related to the alleged defect identified in Plaintiffs' MCL application regarding the concentration of barium sulfate in Defendants' catheters.

We thank the Court for its consideration of this matter.

Respectfully submitted,

/s/ Edward J. Fanning

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and Bard Access Systems, Inc.

Pending Cases in the Superior Court of New Jersey

	Case & Relevant Paragraphs from Complaint	State	Injury	Year of Injury/Explant
1	C.R.W., BER-L-5014-23 Compl. ¶¶ 4, 57-58, 64-65	New Jersey	Infection	2012
2	Trump, BER-L-5017-23 Compl. ¶¶ 4, 57, 64-65	New Jersey	Infection	2018
3	Hyder-Dodd, BER-L-5191-23 Compl. ¶¶ 3, 39, 44-45	New Jersey	Infection	2016
4	Elledge, BER-L-5246-23 Compl. ¶¶ 3, 53-54, 59-60	Oklahoma	Infection	2022
5	Boothe, BER-L-6206-23 Compl. ¶¶ 3, 84-85, 90	Alabama	Infection	2018
6	Richmond, BER-L-6208-23 Compl. ¶¶ 3, 54, 60-63	Illinois	Infection	2022
7	Leddick, BER-L-6000-23 Compl. ¶¶ 4, 57-58, 64-65	New Jersey	Fracture	2012
8	Foster, BER-L-6175-23 Compl. ¶¶ 3, 59, 61-62	New Jersey	Fracture	2022
9	Matthews, BER-L-6207-23 Compl. ¶¶ 3, 86-87, 94	North Carolina	Fracture	2016

Exhibit D

NOTICE TO THE BAR

DENIAL OF APPLICATION FOR MULTICOUNTY LITIGATION DESIGNATION OF NEW JERSEY STATE COURT CASES INVOLVING BARD IMPLANTED PORT CATHETER PRODUCTS

A previous Notice to the Bar sought comments on an application for designation as Multicounty Litigation (MCL) of New Jersey state cases against manufacturer C.R. Bard Inc., Bard Access Systems Inc., and Becton Dickinson and Company alleging injuries as a result of implantation of Bard Implanted Port Catheter Products. That application was submitted pursuant to Rule 4:38A and the Multicounty Litigation Guidelines and Criteria for Designation (Revised) as promulgated by Directive #02-19. This Notice is to advise that the Supreme Court, after considering the application and all comments received, has determined not to grant the application. The Court based its denial on the limited number of cases at present. Accordingly, all cases involving Bard Implanted Port Catheter Products should continue to be filed in the appropriate counties of venue.

This Notice will also be posted in the Multicounty Information Center (https://www.njcourts.gov/attorneys/multicounty-litigation) on the Judiciary's website (njcourts.gov).

Questions concerning this matter may be directed to Melissa Czartoryski, Esq., Chief, Civil Court Programs, Administrative Office of the Courts, Hughes Justice Complex, P.O. Box 981, Trenton, New Jersey 08625-0981; telephone (609) 815-2900 ext. 54901; e-mail address: Melissa.Czartoryski@njcourts.gov.

Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts

Dated: January 29, 2024

Exhibit E

	Case Name	Docket No.	Subject to dismissal on *Forum non conveniens* grounds due to Plaintiff's status as non-resident w/ out-of-state injury and treatment	Barred by the statute of limitations based on removal of IPC following alleged device-related complication
1	C.R.W. v. Becton Dickinson and Co.	BER-L-5014-23		
2	Trump v. C.R. Bard, Inc.	BER-L-5017-23		YES
3	Hyder-Dodd v. C.R. Bard, Inc.	BER-L-5191-23		YES
4	Elledge v. C.R. Bard, Inc.	BER-L-5246-23	YES	
5	Leddick v. C.R. Bard, Inc.	BER-L-6000-23		YES
6	Foster v. C.R. Bard, Inc.	BER-L-6175-23		
7	Matthews v. C.R. Bard, Inc.	BER-L-6207-23	YES	YES
8	Richmond v. C.R. Bard, Inc.	BER-L-6208-23	YES	
9	Lewis v. C.R. Bard, Inc.	BER-L-6561-23	YES	YES
10	Blush v. C.R. Bard, Inc.	BER-L-6568-23	YES	YES
11	Propst v. C.R. Bard, Inc.	BER-L-6567-23	YES	YES
12	Ridgeway v. C.R. Bard, Inc.	BER-L-6560-23	YES	YES
13	Ronnenberg v. C.R. Bard, Inc.	BER-L-6569-23	YES	YES
14	Pascoe v. C.R. Bard, Inc.	BER-L-6637-23	YES	YES
15	Boothe v. C.R. Bard, Inc.	BER-L-0102-24	YES	YES
16	McQuilling v. C.R. Bard, Inc.	BER-L-0989-24	YES	YES
17	Miller v. C.R. Bard, Inc.	BER-L-0990-24	YES	YES
18	Reed v. C.R. Bard, Inc.	BER-L-1048-24	YES	YES
19	Glasco v. C.R. Bard, Inc.	BER-L-1050-24	YES	
20	Jones v. C.R. Bard, Inc.	BER-L-1580-24	YES	YES
21	Rix v. C.R. Bard, Inc.	BER-L-1581-24	YES	YES
22	Gauthier v. C.R. Bard, Inc.	BER-L-1582-24	YES	
23	Nutter v. C.R. Bard, Inc.	BER-L-1616-24	YES	
24	Rogers v. C.R. Bard, Inc.	BER-L-1617-24	YES	YES
25	Savage v. C.R. Bard, Inc.	BER-L-1618-24	YES	YES
26	Nesta v. C.R. Bard, Inc.	BER-L-1696-24		YES
27	Sambataro v. C.R. Bard, Inc.	BER-L-1699-24		
28	Stewart v. C.R. Bard, Inc.	BER-L-1941-24	YES	YES
29	Jackson v. C.R. Bard, Inc.	BER-L-1942-24	YES	YES
30	Boyd-Rodriguez v. C.R. Bard, Inc	BER-L-1943-24	YES	YES
31	Workman v. C.R. Bard, Inc.	BER-L-2063-24	YES	YES
32	Parker v. C.R. Bard, Inc.	BER-L-2064-24	YES	YES
33	Laird v. C.R. Bard, Inc.	BER-L-2065-24	YES	YES
34	Lewis v. C.R. Bard, Inc.	BER-L-2362-24	YES	YES
35	Clisham v. C.R. Bard, Inc.	BER-L-2618-24		YES
36	Brashier v. C.R. Bard, Inc.	BER-L-2620-24	YES	YES
37	Duncan v. C.R. Bard, Inc.	BER-L-2633-24		YES
38	Redderson v. C.R. Bard, Inc.	BER-L-2637-24		YES
39	Walters v. C.R. Bard, Inc.	BER-L-2724-24	YES	
40	Johnson v. C.R. Bard, Inc.	BER-L-2725-24	YES	
41	Coleman v. C.R. Bard, Inc.	BER-L-2726-24	YES	

Exhibit F

NOTICE TO THE BAR

DENIAL OF APPLICATION FOR MULTICOUNTY LITIGATION DESIGNATION OF NEW JERSEY STATE COURT CASES INVOLVING ROUNDUP® PRODUCTS

A previous Notice to the Bar sought comments on an application for designation as Multicounty Litigation (MCL) of New Jersey state cases against Monsanto Company, Bayer AG, Bayer Cropscience LP, Bayer Cropscience LLC, Bayer Corporation, and Bayer U.S. LLC, alleging injuries as a result of exposure to Roundup® Products. That application was submitted pursuant to Rule 4:38A and the Multicounty Litigation Guidelines and Criteria for Designation (Revised) as promulgated by Directive #02-19. This Notice is to advise that the Supreme Court, after considering the application and all comments received, has determined not to grant the application. The Court based its denial on the limited number of cases at present. Accordingly, all cases involving Roundup® Products should continue to be filed in the appropriate counties of venue.

This Notice will also be posted in the Multicounty Information Center (https://www.njcourts.gov/attorneys/multicounty-litigation) on the Judiciary's website (njcourts.gov).

Questions concerning this matter may be directed to Melissa Czartoryski, Esq., Chief, Civil Court Programs, Administrative Office of the Courts, Hughes Justice Complex, P.O. Box 981, Trenton, New Jersey 08625-0981; telephone (609) 815-2900 ext. 54901; e-mail address: Melissa.Czartoryski@njcourts.gov.

Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts

Dated: May 28, 2024

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NJ Supreme Court Rejects Bid For Roundup Mass Tort

By **George Woolston**

Law360 (June 11, 2024, 7:22 PM EDT) -- The New Jersey Supreme Court has rejected a request for litigation against Monsanto Co. and Bayer AG to be designated as multicounty litigation because there are too few cases, according to a notice to the bar published Monday.

Ten plaintiffs had filed civil actions against Monsanto and Bayer alleging their exposure to the agricultural company's weedkiller Roundup caused grievous injuries such as the development of non-Hodgkin's Lymphoma. They had asked the court in January to consolidate their cases in Atlantic County Superior Court, arguing centralization would save judicial resources, allow for coordinated discovery and prevent duplicative or inconsistent rulings.

The plaintiffs, represented by Motley Rice LLC and Weitz & Luxenberg PC, said if their application was approved, the total number of cases would exceed 100. In a March letter to the court opposing the application, Monsanto argued the small number of cases did not warrant designation as multicounty litigation.

On Tuesday, Motley Rice attorney Daniel Lapinski said in a statement to Law360 that they respected the court's decision but were disappointed as the number of filed cases had reached 22 as of late April.

"When we filed the initial request for designation for centralized management, there were only 10 cases on file. We sought coordination with an awareness that additional cases would be filed," Lapinski said. "We continue to believe that centralized management is warranted but will move forward and litigate each of these matters in the appropriate venue."

A Monsanto spokesperson told Law360 in a statement on Monday that the company was pleased with the denial and touted its record of favorable outcomes in 14 out of the last 20 trials.

"We will continue to confidently defend the safety of our products as the overwhelming weight of scientific research and assessments by leading health regulators and scientists, including both the EPA and the EU, support the safety of glyphosate-based products," the spokesperson said.

Across the Delaware River in Pennsylvania, three bellwether trials over claims that exposure to Roundup led to cancer saw juries award multimillion-dollar verdicts to plaintiffs, including a **$2.25 billion verdict** in late January. Earlier this month, a Pennsylvania judge **slashed the verdict** to $404 million.

A Missouri jury also awarded $1.56 billion to three people who claimed their cancer was caused by Roundup last year, but that verdict **was ultimately reduced** to $611 million.

--Editing by Lakshna Mehta.

Exhibit G

BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: BARD IMPLANTED PORT CATHETER PRODUCTS LIABILITY LITIGATION	MDL No. 3081 **CERTIFICATION OF COUNSEL IN SUPPORT OF DEFENDANTS' OPPOSITION TO THE MOTION TO TRANSFER ACTIONS**

EDWARD J. FANNING, ESQ., of full age, hereby certifies as follows:

1. I am a partner of the law firm of McCarter & English, LLP, attorneys for Defendants Becton, Dickson & Company; C.R. Bard., Inc.; and Bard Access Systems, Inc. ("Defendants" or "Bard"). I submit this Certification in support of Defendants' Opposition to the Motion to Transfer Actions.

2. This Motion arises from product liability litigation concerning Bard's implantable port devices. I, along with attorneys at McCarter & English, LLP, have defended Bard in the limited litigation that has arisen over the years involving these devices.

3. The various iterations and configurations of Bard's implantable port devices sold under the tradename "PowerPort" are set forth in a Specification Sheet that is attached hereto as **Exhibit A**.

4. Each PowerPort device is accompanied by a separate Instructions for Use ("IFU"). A copy of the IFU corresponding to the PowerPort M.R.I. Implantable Port identified by the plaintiff in *Divelbliss v. Bard Access Sys., Inc.*, No. 22-CV-00601 (D.N.M.), is attached hereto as **Exhibit B**.

5. Apart from the actions that are the subject of the Motion to Transfer Actions, there were only eleven other actions filed in the five years preceding this Motion.

6. At one point, nine cases were simultaneously pending in nine different district courts, which Defendants managed without formal consolidation. These cases were captioned: *Cruz v. C.R. Bard., Inc.*, No. 18-cv-2637 (S.D. Cal. Nov. 16, 2018); *Dixon v. C.R. Bard, Inc.*, No. 19-cv-4037 (S.D. Tex. Oct. 16, 2019); *Recker v. C.R. Bard, Inc.*, No. 19-cv-950 (W.D. Okla. Oct. 16, 2019); *Wright v. C.R. Bard, Inc.*, No. 19-cv-3029 (D. Md. Oct. 16, 2019); *Bradburn v. C.R. Bard, Inc.*, No. 19-cv-925 (N.D. Ind. Oct. 18, 2019); *Duff v. C.R. Bard, Inc.*, No. 20-cv-60 (W.D. Ky. Mar. 30, 2020); *Gorji v. C.R. Bard, Inc.*, No. 21-cv-3134 (D. Neb. June 6, 2021); *Camden v. C.R. Bard, Inc.*, No. 21-cv-3878 (S.D. Ohio July 1, 2021); *Mitchell v. C.R. Bard, Inc.*, No. 21-cv-5121 (N.D. Cal. Sept. 29, 2021).

7. Of those nine simultaneously pending actions, the Brenes Law Group, P.C., through its attorneys Troy Brenes and Adam Evans, filed eight of those actions. Mr. Evans is Movants' counsel in at least six of the actions that are the subject of this Motion to Transfer Actions.

8. Defendants were able to coordinate discovery in those eight cases with Mr. Evans without the need for an MDL. All cases resolved prior to the exchange of expert disclosures, and all cases, except one, resolved without taking a single deposition.

9. Apart from the eight cases filed by Mr. Evans' prior firm, only four cases were filed between June 2021 and August 2022. The first action was resolved after pre-answer motion practice and the exchange of limited discovery. *See Gorji v. C.R. Bard, Inc.*, No. 21-cv-3134 (D. Neb.). Two cases were voluntarily dismissed upon Defendants' filing of motions to dismiss. *See Hagwood v. C.R. Bard, Inc.*, No. 22-cv-2632 (N.D. Ga.); *Franks v. C.R. Bard, Inc.*, 22-cv-1665 (N.D. Ohio). The final case, which was not filed by Movants' counsel but is the first action listed in the Motion to Transfer Actions, was filed in July 2022 and has been the subject of a fully briefed motion to dismiss since December 2022. *See Divelbliss v. Bard Access Sys., Inc.*, No. 22-cv-601

(D.N.M.). All cases resolved within one month to thirty-one months of filing, with an average duration of about eighteen months.

10. In December 2022, Mr. Evans contacted Defendants, and advised the Undersigned that he was running a targeted digital advertising campaign with a consortium of other law firms with an eye toward filing an MDL application.

11. This coordinated digital advertising campaign has resulted in several internet websites such as portcatheterlawsuit.com, which is hosted by Mr. Evans' law firm. Other websites have already emphasized the filing of this Motion, such as https://www.aboutlawsuits.com/bard-powerport-lawsuit. A copy of these webpages is attached hereto as **Exhibit C**.

12. After the telephone call in December 2022, Mr. Evans, through his firm of Dickerson Oxton, LLC and alongside the law firms of Balaban Law, LLC and Ratazan, Weissman & Boldt, separately or jointly filed eight actions between February 10, 2023 and May 22, 2023. Movants' counsel then filed their Motion to Transfer Actions on May 24, 2023.

13. Movants advance the same theory of liability in the pending actions that Mr. Evans advanced in the prior, now dismissed actions: that Defendants' radiopaque agent, barium sulfate, is allegedly "known to reduce the material integrity of the catheter when it is not encapsulated, coated or otherwise separated from the catheter surface," which in turn can lead to complications. (*Compare* Mot. at 3 *with Duff v. C.R. Bard, Inc.*, Am. Compl. ¶¶ 18-23, No. 20-cv-60, ECF No. 20 (W.D. Ky. June 22, 2020) (alleging that "Defendants' manufacturing process . . . involved too high a concentration of barium sulfate particles" and that Defendants elected not to incorporate "design modifications to encapsulate the radiopaque compound").

14. In 2021, Mr. Evans filed at least five complaints alleging identical theories related to the use of barium sulfate against AngioDynamics, Inc., another manufacturer of implantable

venous access devices. *See, e.g., Kingston v. AngioDynamics, Inc.*, Compl. ¶¶ 28-31, No. 21-cv-10234, ECF No. 1-3 (D. Mass Feb. 11, 2021) (alleging that "Defendants' manufacturing process . . . involved too high a concentration of barium sulfate particles" and that "Defendants elected not to incorporate" certain "design modifications").

15. On June 9, 2023, Mr. Evans emailed the Undersigned to seek Defendants' consent to a stay of all eleven actions pending the Panel's decision on this Motion.

16. On June 15, 2023, Defendants sent Movants' counsel a letter in response to the request for a stay, proposing that the parties proceed with pre-answer motion practice in each case and the exchange of "core" discovery. Defendants further proposed a meet and confer regarding informal coordination of the pending actions. A copy of Defendants' letter and the parties' emails are attached hereto as **Exhibit D**.

17. Nothing in the present actions suggest that the parties' prior informal coordination cannot be replicated here. However, in the event that centralization is ordered, transfer should be to either the District of Utah or the District of Arizona. Bard Access Systems is the principal manufacturer and distributor of Defendants' PowerPorts, and is a Utah corporation with a principal place of business in Utah. A significant number of relevant witnesses and documents are located at Bard Access Systems' headquarters in Salt Lake City Bard Access Systems, Inc. also has a significant business presence in Arizona where a number of prospective witnesses work and reside.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: June 16, 2023

/s/ Edward J. Fanning

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