

**BEFORE THE JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION**

IN RE: MIRENA® IUD PRODUCTS)
LIABILITY LITIGATION) MDL Docket No.: _____
_____)

**PLAINTIFFS STEPHANIE BARNETT AND KEVIN CRAWFORD’S MOTION FOR
TRANSFER OF ACTIONS TO THE NORTHERN DISTRICT OF OHIO, EASTERN
DIVISION AND FOR COORDINATION OR CONSOLIDATION OF ALL PRETRIAL
PROCEEDINGS PURSUANT TO 28 U.S.C. §1407**

Plaintiffs Stephanie Barnett and Kevin Crawford respectfully move the Judicial Panel on Multidistrict Litigation for an Order pursuant to 28 U.S.C. §1407, to transfer the currently filed cases identified in the schedule of actions (“Actions”), as well as all cases subsequently filed involving similar facts or claims (“tag-along cases”) to the United States District Court for the Northern District of Ohio, Eastern Division, and to consolidate and coordinate all cases for pretrial proceedings before the Honorable Patricia A. Gaughan, Judge Northern District of Ohio, Eastern Division.

The facts and law in support of this Motion for Transfer, Coordination and Consolidation to the Northern District of Ohio, Eastern Division, are provided in the accompanying Memorandum.

Dated: January 16, 2013

Respectfully submitted:

s/ John R. Climaco _____

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IN RE: MIRENA® IUD PRODUCT)
LIABILITY LITIGATION) MDL Docket No.: _____
_____)

**PLAINTIFFS STEPHANIE BARNETT AND KEVIN CRAWFORD’S
MEMORANDUM IN SUPPORT OF THEIR MOTION FOR TRANSFER OF
ACTIONS TO THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION
AND FOR COORDINATION OR CONSOLIDATION OF ALL PRETRIAL
PROCEEDINGS PURSUANT TO 28 U.S.C. §1407**

Plaintiffs Stephanie Barnett and Kevin Crawford (hereinafter “Plaintiffs” or “Movants”) respectfully move the Judicial Panel on Multidistrict Litigation (“JPML”) for an Order pursuant to 28 U.S.C. §1407, to transfer the Actions identified in their contemporaneously filed Motion to Transfer and any tag-along cases to the United States District Court for the Northern District of Ohio, Eastern Division. One of the eight cases identified in the Schedule of Actions (the “Actions”) is pending in the district Movants request¹. Further, Movants request consolidation before the Honorable Patricia A. Gaughan, Judge Northern District of Ohio, Eastern Division, an experienced judge sitting in a central and convenient location. The Eight Actions all name Bayer Healthcare Pharmaceuticals, Inc. Defendant (hereinafter “Defendant” or “Bayer”) as a Defendant. These Actions all present common factual questions in that all of the plaintiffs’ claims arise out of their respective use and personal injuries from Bayer’s intra-uterine contraceptive system, commonly known as Mirena®.

¹ “... about one-half of all open MDLs are comprised of ten or fewer actions.” Hon. John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 Tul. L. Rev. 2225, 2241 (2008). (Internal Citations Omitted).

Plaintiffs seek pretrial consolidation of the proposed Mirena® multidistrict litigation (“MDL”) at this time because it will serve the convenience of the parties and witnesses and will promote the just and efficient conduct of present and future actions. It is expected that once the due diligence vetting and gathering of medical evidence is completed, there will be hundreds of lawsuits filed throughout the country. Currently, plaintiffs in other jurisdictions are expediting their respective cases. Therefore, there is a very real risk of conflicting rulings from the various courts before which these Actions are now and will be pending. In fact, one such case has a trial date set for 2013.² In light of continuing, widespread attorney advertising, substantial new federal courts filings are anticipated. Attorneys in five additional states have indicated their plan to file cases. Additionally, Bayer’s counsel in New Jersey filed an Application for Centralized Management (Multicounty Litigation) for New Jersey state-court litigation involving Bayer’s Mirena® intra-uterine contraceptive device.³

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Common Facts in the Actions Support Transfer

Mirena® is an intrauterine system that is inserted by a healthcare provider during an office visit. Mirena® is a T-shaped polyethylene frame with a steroid reservoir that releases 20 µg/day of levonorgestrel, a prescription medication used as a contraceptive. The federal Food and Drug Administration (“FDA”) approved Defendant’s New Drug Application for Mirena® in December 2000. Today, more than 2 million women in the United States use Mirena®. It has been used by more than 15 million women worldwide. The system releases levonorgestrel, a synthetic progestogen, directly into the uterus for birth control. Defendant admits “[i]t is not

² *Kelli Baugh and Justin Baugh v. Bayer Corporation, et al.*, Case No. 4:11-cv-00525 (D. South Carolina).

³ Application for Centralized Management of Certain Cases Involving Mirena® <http://www.judiciary.state.nj.us/mass-tort/mirena-app.pdf> (last visited January 4, 2013).

known exactly how Mirena works,” but provide that Mirena® may thicken cervical mucus, thin the uterine lining, inhibit sperm movement and reduce sperm survival to prevent pregnancy.

The Mirena® intrauterine system (“IUD”) is designed to be placed within seven (7) days of the first day of menstruation and is approved to remain in the uterus for up to five (5) years. If continued use is desired after five years, the old system must be discarded and a new one inserted. The package labeling recommends that Mirena® be used in women who have had at least one child. Mirena®’s label does not warn about spontaneous migration of the IUD, but only states that migration may occur if the uterus is perforated during insertion. Mirena®’s label also describes perforation as an “uncommon” event, despite the numerous women who have suffered migration and perforation post-insertion, proving this assertion to be false. The Actions allege that Defendant has a history of overstating the efficacy of Mirena® while understating the potential safety concerns to the detriment of Plaintiffs.

All of the Actions similarly allege that the respective Plaintiffs had the Mirena® IUD inserted by a qualified healthcare professional. Moreover, the Actions similarly allege injuries and/or resulting surgery to remove the Mirena® IUD after the Mirena® IUD perforated the uterine wall and migrated away from its original position.

B. Procedural History

On November 7, 2012, Plaintiffs filed a personal injury lawsuit against Bayer arising out of Plaintiff Stephanie Barnett’s use of and injury from Mirena® in the Northern District of Ohio, Eastern Division.⁴ Plaintiffs’ case was assigned to the Honorable Patricia A. Gaughan. Subsequently, on November 30, 2012, Bayer filed a Motion to Dismiss Plaintiff’s Complaint.⁵

⁴ *Stephanie Barnett and Chris Crawford v. Bayer Healthcare Pharmaceuticals, Inc.*, Case No. 1:12-CV-2780 (Northern District of Ohio, Eastern Division).

⁵ *Barnett, et al. v. Bayer Healthcare Pharmaceuticals, Inc.*, Case No. 1:12-CV-2780 (Northern District of Ohio, Eastern Division) (Dkt. No. 4).

Accordingly, Plaintiffs' filed their Opposition to Bayer's Motion to Dismiss on December 20, 2012.

Bayer has filed similar motions to dismiss in other Actions. Plaintiffs' Counsel, Climaco, Wilcox, Peca, Tarantino & Garofoli Co., L.P.A. has filed four (4) similar actions in federal courts in California, Arkansas, Kentucky and Ohio alleging personal injuries arising from the use of Bayer's Mirena®. Plaintiffs' Counsel has responded to a motion to dismiss in the Southern District of Ohio, is responding to motions to dismiss in the California and Kentucky cases⁶ and anticipates responding to similar motions to dismiss in the other recently filed cases. Accordingly, there is an extraordinary and real risk of inconsistent rulings from different district courts. Therefore, transfer is appropriate.

II. THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION IS THE IDEAL TRANSFEREE DISTRICT COURT

A. Transfer and Consolidation or Coordination of All Actions Is Appropriate Under 28 U.S.C. §1407

28 U.S.C. §1407 provides for the transfer of actions to one district for coordinated or consolidated pretrial proceedings where actions pending in different districts involve one or more common questions of fact. 28 U.S.C. §1407(a):

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.

⁶ *Melody and Ronail Williams v. Bayer Healthcare Pharmaceuticals, Inc.*, Case No. 3:12-cv-02269 (Southern District of California) (Dkt. No. 6). *Kara Sweet v. Bayer Healthcare Pharmaceuticals, Inc.* Case No. 3:12-cv-839 (Western District of Kentucky) (Dkt. No. 4)

Transfers are authorized where the Panel determines that such transfer will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions. *Id.*

The purpose of the multidistrict litigation process is to “eliminate the potential for contemporaneous pretrial rulings by coordinating district and appellate courts in multidistrict related civil actions.” *In re Multidistrict Private Civ. Treble Damages Litig.*, 298 F. Supp. 484, 491-92 (J.P.M.L. 1968). Consolidation is especially important in multidistrict litigations where “the potential for conflicting, disorderly, chaotic” action is greatest. *Id.* at 493. Transfer of related actions to a single district for pretrial proceedings avoids conflicting pretrial discovery and ensures uniform and expeditious treatment in the pretrial procedures. *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1230 (9th Cir. 2006). Moreover, the Panel “considers that eliminating duplicate discovery in similar cases, avoiding conflicting judicial rulings, and conserving valuable judicial resources are sound reasons for centralizing pretrial proceedings.” Hon. John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 Tul. L. Rev. 2225, 2236 (2008).

Transfer, coordination and consolidation are appropriate here because many common questions of fact and law exist. Each of the related Actions herein all arise from the same or similar nucleus of operative facts. All of the Actions allege personal injuries arising from the use of Mirena IUD® that is manufactured and sold by Bayer. Plaintiffs in all Actions challenge the safety of the Mirena IUD® and allege personal injuries stemming from their use of Bayer’s device. This Panel has previously ordered transfer and consolidation of similar cases involving personal injuries stemming from Plaintiffs use of a defendant’s product. *See In Re: Oral Sodium Phosphate Solution-Based Products Liability Litigation*, 629 F.Supp.2d 1352 (JPML 2009)

(where the JPML transferred and consolidated personal injury lawsuits stemming from the use of defendant's product).

Additionally, Bayer's counsel in the Application for Centralized Management (Multicounty Litigation) for New Jersey state-court litigation involving Bayer's Mirena® intra-uterine contraceptive device, acknowledged that while the cases in New Jersey involve a plaintiff specific set of facts, medical histories and conditions, each of the complaints filed in New Jersey contain similar allegations and demands for damages against Bayer.⁷ Moreover, Bayer's counsel admitted that "[i]n light of their similarities, the rulings in one matter will likely impact the findings in another case" and centralized management of the cases will "streamline this litigation and benefit all parties." *Id.* Similar to the actions filed in New Jersey state court, the Actions filed in the Northern District of Ohio, Eastern Division, as well as Arkansas, California and Kentucky, contain similar allegations and demands for damages against Bayer arising from personal injuries caused by Mirena®. Therefore, transfer, consolidation and coordination are necessary to ensure uniform and expeditious treatment of pretrial procedures.

B. The Northern District of Ohio, Eastern Division is the Ideal Forum for Transfer and Consolidation for Coordination

In selecting the transferee court, according to the MANUAL FOR COMPLEX LITIGATION (FOURTH) §20.131 (2010), the Panel considers several factors including, but not limited to "where the largest number of cases is pending, where discovery has occurred, where cases have progressed furthest, the site of the occurrence of the common facts, where the cost and inconvenience will be minimized, and the experience, skill, and caseloads of available judges."

The Northern District of Ohio, Eastern Division, is centrally located geographically and therefore convenient and economical to access. The District Court is located in Cleveland, Ohio

⁷ Application for Centralized Management of Certain Cases Involving Mirena®, <http://www.judiciary.state.nj.us/mass-tort/mirena-app.pdf> (last visited January 4, 2013).

and is accessible by every major airline, many of which have direct flights to Cleveland Hopkins International Airport from major cities throughout the United States. In the Northern District of Ohio, it takes 16.2 months from filing to disposition and 21 months from filing to trial. Currently, the Northern District of Ohio has 11 pending MDL dockets.⁸

The Carl B. Stokes U.S. District Court Courthouse has the extraordinary added convenience of being connected by covered hallway to the Tower City Complex with numerous restaurants as well as the Ritz Carlton Hotel and the Renaissance Hotel. This offers ease of access to the Courthouse by the parties. Moreover, the Courthouse is one of the “most technologically advanced electronic courtrooms in the country” that “contribute to the efficiency and effectiveness of court proceedings.”⁹ Given the complexity of this litigation, technology in the courtroom will be advantageous to organize the claims and discovery. As such, the Northern District of Ohio, Eastern Division, is best-suited to handle this MDL.

The judges of the Northern District of Ohio welcome MDLs. The Clerk of Courts of the Northern District of Ohio is experienced in MDL proceedings.

C. The Honorable Patricia A. Gaughan of the Northern District of Ohio, Eastern Division is the Ideal Transferee Judge for the Proposed Mirena® IUD Product Liability Litigation MDL

“Ultimately, the Panel's goal is to pair an experienced, knowledgeable, motivated, and available judge in a convenient location with a particular group of cases.”¹⁰ Moreover, the “ideal transferee judge is one with some existing knowledge of one of the cases to be centralized and who may already have some experience with complex cases.”¹¹ Further, the “willingness and

⁸ http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets-By-District-January-2013.pdf (last visited January 4, 2013). IN RE: Welding Fume Products Liability Litigation, MDL 1535, does not have any pending cases and is not included in 11 pending MDLs.

⁹ Information About the Court, <http://www.ohnd.uscourts.gov/home/information-about-the-court/> (last visited January 4, 2013).

¹⁰ Hon. John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 Tul. L. Rev. 2225, 2241 (2008).

¹¹ *Id.* at 2240.

motivation of a particular judge to handle an MDL docket are ultimately the true keys to whether centralization will benefit the parties.”¹² The Honorable Patricia A. Gaughan of the Northern District of Ohio, Eastern Division is an ideal transferee judge for this MDL because Judge Gaughan has prior MDL experience and is willing and able to manage the proposed Mirena® IUD Products Liability Litigation MDL. Judge Gaughan has been a United States District Court Judge since 1995.¹³ Prior to her appointment, Judge Gaughan was a Cuyahoga County Common Pleas Judge who was first elected in 1986. In 2009, the JPML transferred the MDL captioned as *In Re: Vertrue Marketing and Sales Practices Litigation*, MDL 2044 (Case No. 09-vm-75000) to Judge Gaughan. Currently, that MDL is stayed pending the bankruptcy of the defendants.¹⁴ Moreover, one of the pending Actions is before Judge Gaughan. Finally, the Honorable Patricia A. Gaughan is knowledgeable, experienced, motivated, with existing knowledge of this litigation, who is willing, available and able to manage the Mirena® litigation, and therefore is the ideal transferee judge.

III. CONCLUSION

For the reasons discussed above, Movants respectfully request that the Panel transfer the Actions for coordinated and consolidated pretrial proceedings to the Northern District of Ohio, Eastern Division before the Honorable Patricia A. Gaughan.

¹² *Id.*

¹³ Biographical Information of the Honorable Patricia A. Gaughan, <http://www.ohnd.uscourts.gov/home/judges/judge-patricia-a-gaughan/> (last visited January 1, 2013).

¹⁴ *In Re: Vertrue Marketing and Sales Practices Litigation*, MDL 2044, Case No. 09-vm-75000 (N.D. Ohio) (Dkt. No. 61) (Order from Judge Gaughan granting Defendants’ Motion to Stay the Proceedings Pursuant to 28 U.S.C. § 1292(b)).

Dated: January 16, 2013

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**BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION
MDL- _____ - IN RE: MIRENA® IUD PRODUCTS LIABILITY LITIGATION**

SCHEDULE OF ACTIONS

Case Captions	Court	Civil Action No.	Judge
Plaintiff: Susan Harp Defendant: Bayer Healthcare Pharmaceuticals, Inc.	U.S.D.C. Eastern District of Arkansas	4:13-cv-00004	James M. Moony
Plaintiffs: Melody and Ronail Williams Defendant: Bayer Healthcare Pharmaceuticals, Inc.	U.S.D.C. Southern District of California	3:12-cv-02669	Cathy Ann Bencivengo
Plaintiffs: Carrie Richards Osborne and Edward Jason Osborne Defendant: Bayer Healthcare Pharmaceuticals, Inc.	U.S.D.C. Middle District of Georgia	5:11-cv-00421	Marc Thomas Treadwell
Plaintiffs: Kara Sweet and Brandon Sweet Defendant: Bayer Healthcare Pharmaceuticals, Inc.	U.S.D.C. Western District of Kentucky	3:12-cv-00839	John G. Heyburn, II
Plaintiffs: Stephanie Denise Barnett and Kevin Crawford Defendant: Bayer Healthcare Pharmaceuticals, Inc.	U.S.D.C. Northern District of Ohio	1:12-cv-2780	Patricia A. Gaughan
Plaintiffs: Desaree Nicole Lee Johnson Defendant: Bayer Healthcare Pharmaceuticals, Inc.	U.S.D.C. Southern District of Ohio	1:12-cv-00852	Sandra Beckwith
Plaintiffs: Kelli Baugh and Justin Baugh Defendant: Bayer Healthcare Pharmaceuticals, Inc.	U.S.D.C. District of South Carolina	4:11-cv-00525	R Bryan Harwell
Plaintiffs: Siria Gonzalez Defendant: Bayer Healthcare Pharmaceuticals, Inc.; and Planned Parenthood of Houston and Southeast Texas	U.S.D.C. Southern District of Texas	4:12-cv-01412	Melinda Harmon