IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

W.L. GORE & ASSOCIATES, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 11-515-LPS-CJB
	)	
C.R. BARD, INC. and BARD PERIPHERAL VASCULAR, INC.,	)	
	)	
Defendants.	)	

REPORT AND RECOMMENDATION

In this action filed by Plaintiff W.L. Gore & Associates, Inc. ("Gore" or "Plaintiff") against Defendants C.R. Bard, Inc. and Bard Peripheral Vascular, Inc. (collectively, "Bard" or "Defendants"), Gore alleges infringement of United States Patent No. 5,735,892 (the "asserted patent" or the "patent-in-suit").[1] Presently before the Court is Bard's Motion for Summary Judgment of Laches ("Motion"). (D.I. 238) The Court recommends that the Motion be DENIED.

I. BACKGROUND

A. Relevant Facts and Events Pertaining to the Laches Chronology

Gore's '892 patent, entitled "Intraluminal Stent Graft[,]" was issued on April 7, 1998. (D.I. 96, ex. A)[2] It relates to thin-wall intraluminal graft devices. On June 10, 2011, Gore

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[1] Gore also originally asserted infringement of U.S. Patent No. 8,221,487, but is no longer asserting that patent. (D.I. 191 at 1-2) It was also asserting U.S. Patent No. 5,700,285 (the "'285 patent"), but that patent is no longer at issue following the District Court's adoption of the Court's recommendation to grant summary judgment of non-infringement of that patent. (D.I. 405 at 10-11; D.I. 423)

[2] The asserted patent is found in a number of places in the record, including as Exhibit A to D.I. 96. Further citation will simply be to the "'892 patent."

commenced this action, alleging that two of Bard's stent-graft products, the FLUENCY® Plus Tracheobronchial Stent Graft ("Fluency Plus") and the FLAIR® Endovascular Stent Graft ("Flair"), infringe the '892 patent. (D.I. 1)

Eight years prior this lawsuit, in June 2003, Bard had commercialized another stent graft device, the FLUENCY® Tracheobronchial Stent Graft ("Fluency"), (D.I. 240, ex. 2 at BARD-11-515-00065672), which Gore has not accused in this case. Gore was aware of the Fluency product "for certain when it was commercialized" in 2003. (*Id.*, ex. 3 at 270; *see also id.*, ex. 4 at WLG-11-515_00325153-54 & WLG-11-515_00325162-65; *id.*, ex. 5 at WLG-11-515_00332580) Two years after its launch, Bard discontinued Fluency because it suffered from "a number of delivery system failures in the vasculature" in which the delivery catheter would become entangled with the stent graft during implantation, preventing the delivery system from being fully withdrawn from the patient. (D.I. 308, ex. 82 at BARD-11-515-00211737; *id.*, ex. 87 at BARD-11-515-00068781; D.I. 307, ex. 2 at 549-51)

On July 15, 2005 (five years and 11 months before Gore filed this action), Bard launched Fluency Plus, (D.I. 240, ex. 24 at BARD-11-515-00001277), which was designed to, *inter alia*, minimize the entanglement risk of Fluency, (D.I. 307, ex. 2 at 548-51). As compared to Fluency, the only differences in Fluency Plus are that (1) the latter product has an updated catheter delivery system; and is (2) offered in additional lengths and diameters. (D.I. 240, ex. 8 at 37-38; *id.*, ex. 9 at BARD-11-515-00206620-24; D.I. 259, ex. B at ¶ 314; D.I. 261, ex. A at ¶ 116) Gore does not identify anything relating to these differences as supporting its infringement claims, and the features in Fluency Plus that Gore identifies as infringing the '892 patent are ones that also existed in Fluency. (D.I. 240, ex. 11; D.I. 259, ex. B at ¶ 314) Gore's damages expert, Ms.

Laura Stamm, opined that Fluency could not be considered a non-infringing substitute to Fluency Plus because "to the extent that the stent graft implant of the Fluency Plus product infringes the claims of the patents-in-suit . . . the Fluency product infringed to the same extent." (D.I. 233, ex. B at ¶ 27; *see also id.* at ¶ 28 ("I understand that the primary difference between the Fluency and Fluency Plus devices involved the delivery system rather than the stent graft implant itself.")) Bard launched Flair, its third stent graft device, in October 2008. (D.I. 307, ex. 44 at 83)

The instant lawsuit is not the first time that Gore and Bard have litigated against one another. Prior to this action, the parties engaged in another federal patent infringement lawsuit, one described by the United States Court of Appeals for the Federal Circuit as amounting to a "long and arduous journey for the parties[.]" *Bard Peripheral Vascular, Inc. v. W.L. Gore & Assoc., Inc.*, 670 F.3d 1171, 1175 (Fed. Cir. 2012). Bard instituted the district court phase of the *Bard v. Gore* litigation in March 2003 following an interference proceeding; the case concerned technology that relates to the same products that are at issue here. *Id.* at 1177. The case remained pending at the appellate level through the institution of the instant case.

In September 2010, Gore sued Medtronic, Inc., alleging infringement of its U.S. Patent No. 5,810,870. *See W.L. Gore & Assoc., Inc. v. Medtronic, Inc.*, 874 F. Supp. 2d 526, 530 (E.D. Va. 2012). A bench trial was held in that case in February 2012, and the district court's decision was issued in June 2012. *Id.* at 529. The patent-in-suit in the *Medtronic* litigation is related to the '892 patent. (D.I. 221 at 7)

During the instant litigation, Dr. Erin Hutchinson, who is currently a business leader for Gore's medical products division and who served as a product specialist for Gore's Viabahn® stent graft device in 2003, was deposed. Dr. Hutchinson testified that Gore was "fairly

consumed" with the *Bard v. Gore* and *Medtronic* lawsuits, and that the suits drew Gore resources that otherwise might have been used on "'offensive'" patent litigation. (D.I. 308, ex. 84 at 93-94)

B. Procedural History

On November 29, 2011, this case was referred to the Court by Chief Judge Leonard P. Stark to hear and resolve all pretrial matters, up to and including the resolution of case dispositive motions. (D.I. 20) Briefing on the Motion (and various other *Daubert* and summary judgment motions filed by the parties) was completed on November 12, 2014, (D.I. 342); the Court held oral argument on these motions on January 30, 2015, (D.I. 360 (hereinafter, "Tr.")). Since that date, the parties have each submitted a notice of supplemental authority regarding the instant Motion, (D.I. 385, 400), and the Court has reviewed the additional authorities cited in these notices. A 10-day trial is set to begin on December 7, 2015. (D.I. 362)

II. STANDARD OF REVIEW

A grant of summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the burden of demonstrating the absence of a genuine issue of material fact. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986). If the moving party meets this burden, the nonmovant must then "come forward with specific facts showing that there is a *genuine issue for trial*." *Id.* at 587 (emphasis in original) (internal quotation marks omitted). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317,

322-23 (1986). During this process, the Court will "draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

However, in order to defeat a motion for summary judgment, the nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586-87; *see also Podobnik v. U.S. Postal Serv.*, 409 F.3d 584, 594 (3d Cir. 2005) (party opposing summary judgment "must present more than just bare assertions, conclusory allegations or suspicions to show the existence of a genuine issue") (internal quotation marks and citation omitted). The "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). Facts that could alter the outcome are "material," and a factual dispute is genuine only where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. "If the evidence is merely colorable, . . . or is not significantly probative, . . . summary judgment may be granted." *Id.* at 249-50 (internal citations omitted). A party asserting that a fact cannot be—or, alternatively, is—genuinely disputed must support the assertion either by citing to "particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials"; or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(A) &

(B).

III. DISCUSSION

Bard's Motion requests that the Court enter summary judgment of laches and preclude Gore from recovering pre-suit damages; it describes this as a "textbook laches case." (D.I. 239 at 1, 17) Gore responds that laches is "one of the most fact-intensive issues that can arise in a patent case[,]" and that multiple genuine issues of material fact preclude summary judgment here. (D.I. 296 at 1, 4) After setting out the legal standard governing the laches defense, the Court will examine the parties' respective arguments.

A. Legal Standard

Laches is an equitable defense to a claim for patent infringement that bars recovery of pre-suit damages. *SCA Hygiene Prods. Aktiebolag SCA v. First Quality Baby Prods., LLC*, — F.3d —, No. 2013-1564, 2015 WL 5474261, at *3, *17 (Fed. Cir. Sept. 18, 2015) (en banc); *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1028, 1041 (Fed. Cir. 1992).[3] Laches may be found where the accused infringer shows by a preponderance of the evidence that (1) the patentee delayed filing suit for an unreasonable length of time after it knew or reasonably should have known of its claim against the defendant; and (2) the defendant was materially prejudiced by that delay. *SCA Hygiene Prods.*, 2015 WL 5474261, at *3; *Aukerman*, 960 F.2d at

[3] At the time of briefing on this Motion, the future of laches in the patent context was uncertain. (D.I. 296 at 14 n.3) In 2014, the Supreme Court of the United States eliminated laches in the copyright context. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1968 (2014). In that decision, the Supreme Court acknowledged the Federal Circuit's holding that laches can bar pre-suit damages in patent actions, while stating that it had not had "occasion to review the Federal Circuit's position." *Id.* at 1974 n.15. Just two months ago, however, in a divided *en banc* decision, the Federal Circuit held that the defense of laches continues to be available in a patent case. *SCA Hygiene Prods.*, 2015 WL 5474261, at *17 ("[L]aches remains a defense to legal relief in a patent infringement suit after *Petrella*.").

1028, 1046. On summary judgment, the defendant must establish that there is no genuine issue of material fact with respect to either element. *Gasser Chair Co., Inc. v. Infanti Chair Mfg. Corp.*, 60 F.3d 770, 773 (Fed. Cir. 1995).

A presumption of laches attaches, however, where a patentee delays bringing suit for more than six years after the date the patentee knew or should have known of the alleged infringer's activity. *Aukerman*, 960 F.2d at 1028, 1037; *see also Wanlass v. Gen. Elec. Co.*, 148 F.3d 1334, 1337 (Fed. Cir. 1998). This presumption, if implicated, shifts the burden of production to the patentee; to overcome it, the patentee must offer evidence of a legally-sufficient excuse for its delay or a lack of prejudice to the defendant. *Hall v. Aqua Queen Mfg., Inc.*, 93 F.3d 1548, 1553-54 (Fed. Cir. 1996); *Aukerman*, 960 F.2d at 1038.

The laches defense is intended to prevent patentees from "intentionally [lying] silently in wait watching damages escalate . . . particularly where an infringer, if he had notice, could have switched to a noninfringing product." *Aukerman*, 960 F.2d at 1033 (citations omitted). In making a decision with respect to laches, a court must "weigh all pertinent facts and equities" including those relating to the length of delay, the seriousness of prejudice, the reasonableness of excuses, and the defendant's conduct or culpability. *Id.* at 1034; *see also id.* at 1036 (noting that while the establishment of undue delay and prejudice, whether by proof or presumption, lays the foundation for recognition of the defense of laches, it does not mandate acceptance of the defense in every case).

B. Analysis

1. Six-year presumption

The starting point in the laches analysis is to identify the period of delay, in order to

determine whether the presumption of laches applies. Bard argues that the laches clock began ticking in 2003, when Bard commercially launched its Fluency product. (D.I. 239 at 8) Thus, according to Bard, Gore's subsequent eight-year delay in bringing this action well exceeds the six-year threshold that triggers the presumption. (*Id.*) While Gore has not accused Fluency in this case, Bard's argument is that "Fluency had all of the features Gore accuses of infringement in Bard's Fluency Plus product[,]" and that in such circumstances, Gore's knowledge of Fluency should be tacked on to the delay period. (*Id.* at 1, 8; *see also* Tr. at 206-08)

The law is well-settled that "[t]he period of delay continues if prior products are the same or similar to the alleged infringing products." *St. Clair Intellectual Prop. Consultants, Inc. v. Acer, Inc.*, 961 F. Supp. 2d 610, 615 (D. Del. 2013). What matters for purposes of this inquiry is whether the "earlier product embodied the same claimed features as the accused product." *Symantec Corp. v. Comput. Assocs. Int'l, Inc.*, 522 F.3d 1279, 1295 & n.9 (Fed. Cir. 2008); *see also Medinol Ltd. v. Cordis Corp.*, 15 F. Supp. 3d 389, 402-03 (S.D.N.Y. 2014) (allowing an alleged infringer to extend the period of delay back to the date of introduction of an earlier, non-accused product "which is nothing more than the [accused product]" with an additional unclaimed feature); *Intertech Licensing Corp. v. Brown & Sharpe Mfg. Co., Inc.*, 708 F. Supp. 1423, 1435 (D. Del. 1989) (explaining that periods of infringement by different machines may be tacked on to the period of delay if the machines are functionally equivalent to one another for purposes of infringement).

Gore does not dispute that Fluency embodied the same allegedly infringing features as those in Fluency Plus. (*See* D.I. 296 at 10-11) Nor does Gore seem to seriously dispute that the presumption applies; instead, it points to different aspects of the Fluency product that assertedly

help to explain why Gore's eight-year delay in filing suit was justified. (*See id.*; *see also id.* at 2 (acknowledging that Fluency provides Bard with an "arguable basis" for a presumption); *id.* at 7-9 (arguing that "Bard's [p]resumption [a]rguments" do not apply to the '285 patent or to Flair, while stating with respect to Fluency that it "[d]oes [n]ot [s]upport [l]aches")) Because it is clear that Gore was aware of Fluency at least by the time of Fluency's launch in 2003, and it is also clear that Fluency should be considered to be "the same or similar" as Fluency Plus for purposes of this inquiry, the Court finds that the presumption of laches applies here.[4]

2. Delay

"[T]he presumption of laches which arises after a defendant proves a six-year delay is a 'double bursting bubble' which the plaintiff punctures with introduction of evidence sufficient to raise a genuine dispute as to *either* delay or prejudice." *Hemstreet v. Comput. Entry Sys. Corp.*, 972 F.2d 1290, 1293 (Fed. Cir. 1992) (emphasis in original). As for delay, "the presumption of

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[4] For these same reasons, the Court rejects Gore's argument that, even assuming that the presumption of laches is applicable to Fluency Plus, it does not apply to Flair (a product released in 2008). (D.I. 296 at 9) The Federal Circuit has explained that "laches . . . [is] a single defense to a continuing tort up to the time of suit, not a series of individual defenses which must be proved as to each act of infringement, at least with respect to infringing acts of the same nature." *Aukerman*, 960 F.2d at 1031. It is clear that regardless of differences between Fluency Plus and Flair, Gore alleges that both products have infringing features of a similar nature. (D.I. 239 at 10 n.3; D.I. 342 at 6-7 (citing D.I. 240, exs. 11, 12, 13 at 103-104); Tr. at 216-17) Therefore, the impact of the presumption also applies to Flair. *See, e.g.*, *Humanscale Corp. v. CompX Int'l Inc.*, No. 3:09-CV-86, 2010 WL 3222411, at *9 (E.D. Va. Aug. 16, 2010) (declining the patentee's request for a new laches period to be triggered for each of the accused products because "[a] new laches period does not begin on a product-by-product basis if each of the later introduced products is the same or similar as the initial product" and the evidence established that the later introduced products were similar to the initial product); *Heraeus Electro-Nite Co. v. Midwest Instrument Co., Inc.*, Civil Action No. 06-355, 2007 WL 2071905, at *5 (E.D. Pa. July 17, 2007) (finding that the accused products were "substantially similar" from the viewpoint of an infringement analysis, and therefore holding that the laches period for each of these products began to run at the same time).

laches may be eliminated by offering evidence to show an excuse for the delay or that the delay was reasonable, even if such evidence may ultimately be rejected as not persuasive." *Aukerman*, 960 F.2d at 1038. Gore puts forward two primary reasons that are said to have justified its delay in bringing suit.

First, Gore asserts that it was warranted in not filing suit with respect to Fluency in the 2003-2005 time period, due to Fluency's quick technical failure and its limited market impact. (D.I. 296 at 2, 11, 14) In support, Gore points to evidence substantiating Fluency's design flaw. (*Id.* at 10 (citing D.I. 308, exs. 82, 87)) Gore explains that this flaw "limited [Fluency's] market impact, and consequently, Gore's incentive for filing suit"; in comparison, Gore notes that Fluency Plus triggered a "more than [redacted] increase in worldwide unit sales over the course of its first three years on the market as compared to all Fluency sales." (*Id.* at 11 (citing D.I. 308, exs. 88, 89 at BARD-11-515-00662978))[5]

"[C]ourts have excused delays in pursuing infringement actions when the infringer's actions are not commercially significant." *Heraeus Electro-Nite Co. v. Midwest Instrument Co., Inc.*, Civil Action No. 06-355, 2007 WL 2071905, at *8 (E.D. Pa. July 17, 2007) (citing cases); *see also Genzyme Corp. v. Atrium Med. Corp.*, Civil Action No. 00-958-MPT, 2003 U.S. Distr. LEXIS 12784, at *17 (D. Del. July 22, 2003) ("Waiting until litigation makes clear economic

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[5] Bard, to be sure, identifies reasons why a fact finder might not ultimately find it persuasive that Gore avoided litigation between 2003 and 2005 due to Fluency's design- and sales-related limitations and Fluency's limited product lifespan. (D.I. 342 at 3-4) In doing so, among other things, Bard cites to a 2003 Gore document for the proposition that Gore considered Fluency its "'main competitor'" at this time. (*Id.* (citing *id.*, ex. 27 at WLG-11-515_00335351)) But notably, even in this document, Gore goes out of its way to list various flaws or deficiencies relating to Fluency. (*Id.*, ex. 27 at WLG-11-515_00335351) This could be said to fuel Gore's narrative that it did not consider Fluency a significant enough threat to warrant litigation at the time.

sense is [a] reasonable [justification]."); *cf. Ill. Tool Works Inc. v. Grip-Pak, Inc.*, 725 F. Supp. 951, 953 (N.D. Ill. 1989) (finding that the patentee "had a good excuse for delay [where the alleged infringer's] activities were not commercially significant until [the year before suit was filed and] [t]he company faced problems . . . designing an acceptable plastic carrier of its own"). In light of the evidence regarding Fluency's design flaw and its corresponding short-lived life on the market, as well as its relatively limited sales (at least as compared to the later sales of Fluency Plus), a fact-finder could believe Gore to have been reasonable in not having sued until at least after the release of the dramatically more successful Fluency Plus product.[6]

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[6] Bard responds that Gore's excuse in this regard is insufficient because "Gore identifies no evidence that it actually considered or relied on any 'market impact' or sales increase in deciding to delay filing suit[.]" (D.I. 342 at 3 (emphasis omitted); *see also* Tr. at 212-14) But the case law that Bard cites in support of this proposition does not explicitly state that such evidence is required at the summary judgment stage. Bard cites first to *Aukerman*, but *Aukerman* simply states that "[a] court must also consider and weigh any justification offered by the plaintiff for its delay." *Aukerman*, 960 F.2d at 1033. The *Aukerman* Court explained that for the presumption to be burst, thereby "rais[ing] a genuine issue respecting the reasonableness of the delay[,]" the plaintiff need only produce a "minimum quantum of evidence" which "*may* justify the delay." *Id.* at 1037-38 (emphasis added). Bard next cites to *Collins v. W. Dig. Techs., Inc.*, Civil Action No. 2:09-cv-219-TJW, 2011 WL 3849310, at *5 (E.D. Tex. Aug. 29, 2011), where it was explicit from the co-inventor's hearing testimony that he was offering a new argument in defense of laches that was not the actual reason for his failure to earlier bring suit. Finally, Bard cites to *Autozone, Inc. v. Strick*, No. 03 C 8152, 2010 WL 883850, at *8 (N.D. Ill. Mar. 8, 2010), where the court concluded that the patentee's assertion that it did not pursue the case in a reasonable manner because of other litigation was not the "actual reason" for delay. But the court's decision in *Autozone* followed a bench trial on the issue of laches. *Id.* Ultimately, the Court is hard-pressed to believe that a plaintiff could ultimately prevail after trial in challenging a laches defense if the plaintiff identified a reason that might have justified delay in filing suit, but there was no evidence that this reason *had actually motivated the plaintiff's decision* not to file suit. Yet at the summary judgment stage, if there is solid evidence that the reason for failing to sue existed, that might be enough to get a plaintiff to trial (at which time all of the facts as to what was actually in the plaintiff's mind can be fully aired). In the absence of any authority provided by Bard suggesting that such evidence is in fact required at the summary judgment stage, the Court finds that this asserted reason for Gore's delay is a viable one to consider here. *But see Abbott Diabetes Care Inc. v. Roche Diagnostics Corp.*, No. C05-03117 MJJ, 2007 WL 1241928, at *4 (N.D. Cal. Apr. 27, 2007) (finding that plaintiff's evidence failed to create a

Even after Fluency Plus launched, Gore did not file this lawsuit until 5 years and 11 months later. Gore's second argument, however, is that it was justified in not filing suit prior to or within this timeframe because it was "'fairly consumed'" with "separate litigations" at the time. (D.I. 240, ex. 7 at 24; D.I. 308, ex. 84 at 93-94; *see also* D.I. 296 at 12-13) The separate litigations Gore points to are (1) the "long and arduous journey" of its prior patent dispute with Bard, which began at the district court level in 2003; and (2) the *Medtronic* litigation, which began in 2010 and involved a related patent to the asserted patent.

The law is clear that being consumed with other litigation can be a valid justification for a patentee's delay in filing suit. When a patentee cites other litigation as the reason for delay in suit, however, the evidence must demonstrate that the accused infringer had adequate notice of the patentee's engagement in that other litigation. *See, e.g.*, *Serdarevic v. Advanced Med. Optics, Inc.*, 532 F.3d 1352, 1359 (3d Cir. 2008); *Aukerman*, 960 F.2d at 1033, 1039. Express notice of the other litigation from the patentee is not required; for example, "[i]f a defendant is . . . aware of the litigation from other sources," this requirement could be satisfied. *Aukerman*, 960 F.2d at 1039; *see also Hemstreet*, 972 F.2d at 1293. Notice of the other litigation allows the accused infringer to "change his activities to avoid liability" in the time prior to the conclusion of the other suit. *Vaupel Textilmaschinen KG v. Meccanica Euro Italia SPA*, 944 F.2d 870, 877 (Fed. Cir. 1991). Additionally, the evidence must also show that the accused infringer had notice from

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genuine issue of material fact as to whether its delay is excusable where the plaintiff "provide[d] no evidence whatsoever indicating that its delay in bringing claims against [certain of the defendant's products] was even attributable" to the plaintiff's alleged reason for delay). And, in any event, giving Gore the benefit of all reasonable inferences, there *is* some evidence in the record suggesting that Fluency's design- and sales-related difficulties were a factor that caused Gore to not consider bringing suit in this time period. (*See, e.g.*, D.I. 240, ex. 7 (Gore First Supp. Resp. to Bard Interrog. No. 16))

the patentee that, upon expiration of the other litigation, the infringer would be sued by the patentee—or, failing that, that the accused infringer at least "had reason to believe it was likely to be sued[.]" *Id.* at 878; *see also Serdarevic*, 532 F.3d at 1359.

The parties' primary quibble here is with the second of these two notice requirements.[7] Bard asserts that it had no express notice that it was to be sued after these other Gore litigations concluded, and that "Gore has identified *no* evidence that Bard was in fear of suit by Gore" during this timeframe. (D.I. 342 at 6 (emphasis in original))

Gore's counter is that Bard should have had reason to believe that it was likely to be sued during *Bard v. Gore*, because Bard had been aware of Gore's patents since 1999, had hired a former Gore engineer to help it launch products to compete with Gore's products, and was engaged in a contentious suit with Gore in that case as to technology relating to the stent graft products at issue here. (D.I. 296 at 13 (citing D.I. 307, exs. 18 (Bard Resp. to Gore Interrog. No. 11), 24, 25)) These facts certainly indicate that Bard was aware of the asserted patent throughout this time period. They are admittedly less strong in suggesting that Bard had reason to believe it was *likely to be sued* as to the asserted patent or, more generally, even that it had reason to believe that Gore was gearing up to institute offensive litigation in this commercial space. (*See, e.g.*, D.I. 342 at 6 (Bard arguing that Gore easily could have raised its claims as counterclaims in the *Bard v. Gore* action, but did not)) And yet, Gore and Bard are indisputedly fierce competitors. With all of the above-referenced activity going on between the companies in the

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[7] Bard does not contest that it had adequate, contemporaneous notice that Gore was engaged in the two pieces of litigation. As to the *Bard v. Gore* litigation, obviously Bard was well aware of the case as a party thereto. And as to the *Medtronic* litigation, as noted below, Gore asserts (and Bard does not seriously contest) that Bard was aware of that litigation as it was going forward.

stent-graft space in the mid-2000s, the Court cannot say that there is not at least an issue of fact as to whether the particulars surrounding the *Bard v. Gore* litigation put Bard in reasonable fear of suit by Gore during this timeframe. *Cf. Heraeus*, 2007 WL 2071905, at *10 (finding a genuine issue of fact as to whether the notice requirement was satisfied).

Gore argues with even more force that "Bard knew by at least by September 2010" that Gore was beginning to assert its patent rights and that it was likely to be sued. (D.I. 296 at 13) September 2010 is the month when Gore sued Medtronic regarding infringement of a stent graft patent that is related to the asserted patent. Gore asserts that Bard representatives were well aware of the *Medtronic* matter and even attended proceedings in the case, (*id.*)—a fact that Bard does not deny. Nine months after *Medtronic* commenced, Gore filed the instant action. A fact-finder could agree with Gore as to the asserted import relating to this time line of events—that in 2010, Bard (still entrenched in costly litigation with Gore) had reason to believe that like Medtronic before it, it would soon face suit by Gore. *See Kowalski v. Anova Food, LLC*, Civil No. 11-00795 HG-RLP, 2014 WL 8105172, at *16 (D. Haw. Dec. 31, 2014) ("Courts have explained that requiring plaintiffs to simultaneously sue every party suspected of infringing a particular patent at the same time would be unreasonable.") (citing *Studiengesellschaft Kohle mpH v. Dart Indus., Inc.*, 549 F. Supp. 716, 757 (D. Del. 1982)). Drawing all reasonable inferences in Gore's favor, as it must at the summary judgment stage, the Court finds that Gore's involvement in this other litigation could also enable a reasonable fact-finder to conclude that its many-year delay in filing the instant lawsuit was excusable.[8]

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[8] Here again, Bard argues that Gore's "other litigation" excuse cannot overcome the presumption because, *inter alia*, "Gore presents no evidence that this was in fact a reason for its delay." (D.I. 342 at 4) Again, however, Bard has not shown that this is a prerequisite for Gore to survive summary judgment. *Cf. Enzo Biochem, Inc. v. Applera Corp.*, No. 3:04CV929 (JBA),

In sum, the Court notes that Bard certainly has many favorable facts to work with in presenting its laches defense, and Gore's evidence to the contrary may well "ultimately be rejected as not persuasive." *Aukerman*, 960 F.2d at 1038. However, because factual disputes exist as to whether Gore's delay in filing suit was reasonable, Gore has produced enough evidence to rebut the presumption of laches and to demonstrate that summary judgment of laches is inappropriate on this record. (Tr. at 232) "[B]ecause the correct disposition of the equitable defense of laches can only be made by a close scrutiny of the particular facts and a balancing of the respective interests and equities of the parties, as well as of the general public . . . it usually

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2012 WL 4092429, at *6 (D. Conn. Sept. 17, 2012) ("The record is silent as to whether Plaintiff communicated that its reasons for delay in filing this suit were attributable to other litigation, however, it is undisputed that Plaintiffs were involved in other litigation . . . which could enable a reasonable [fact-finder] to conclude that Plaintiffs' delay was excusable."). And Dr. Hutchinson did testify that the resources consumed by the *Bard* and *Medtronic* litigations meant that Gore "may not have had the time to take—take the opportunity to look at—at . . . 'offensive opportunities' [for litigation] because we're so consumed [by the *Bard* and *Medtronic* matters]." (D.I. 308, ex. 84 at 93-94) Bard attempts to minimize this testimony in two ways. First, Bard asserts that such testimony is "inadmissable, double hearsay" because Dr. Hutchinson made these comments while being questioned about a Gore document that he apparently did not author. (D.I. 342 at 1; *see also* Tr. at 211) The law is clear, however, that hearsay statements can be considered on a motion for summary judgment if they are capable of admission at trial. *See, e.g.*, *Shelton v. Univ. of Med. & Dentistry of N.J.*, 223 F.3d 220, 222 n.2 (3d Cir. 2000); *Bouriez v. Carnegie Mellon Univ.*, No. Civ.A. 02-2104, 2005 WL 2106582, at *7-8 (W.D. Pa. Aug. 26, 2005). Given Dr. Hutchinson's position as a product specialist for Gore's competing Viabahn stent graft device in the early 2000s, there is good reason to believe, as Gore indicates, that Dr. Hutchinson could testify on a non-hearsay basis at trial with respect to Gore's preoccupation with other litigation during the relevant timeframe. (Tr. at 230) To further undercut Dr. Hutchinson's testimony that Gore was "'fairly consumed'" with litigation at this time, Bard points to a docket search printout indicating that Gore filed "no less than two dozen other litigations in federal and state courts" between 2003 and 2011. (D.I. 342 at 1 (citing *id.*, ex. 25)) In response, however, Gore emphasizes that the results show that "Gore brought *zero offensive patent cases* from June 2005 (the critical date) to February 2008 (after trial [in *Bard v. Gore*])[.]" (Gore's Dispositive Motions Hearing Slide Presentation, "No Laches" section, slide 24; Tr. at 233) In the end, the dispute that Bard has with the persuasiveness or meaning of Dr. Hutchinson's testimony is one for the fact-finder to weigh.

requires the kind of record only created by full trial on the merits." *Country Floors, Inc. v. P'ship of Gepner & Ford*, 930 F.2d 1056, 1066 (3d Cir. 1991) (internal quotation marks and citation omitted); *Heraeus*, 2007 WL 2071905, at *11 (same); *see also Rockwell Int'l Corp. v. SDL, Inc.*, 103 F. Supp. 2d 1192, 1196 (N.D. Cal. 2000) ("Because the nature of the laches defense is fact-intensive, summary judgment often will be inappropriate[.]").[9] That is the case here, and the District Court should have the ability to see all of the evidence on this very important issue relating to damages before making a final decision.

IV. CONCLUSION

For the reasons set out above, the Court recommends that Bard's Motion be DENIED.

This Report and Recommendation is filed pursuant to 28 U.S.C. § 636(b)(1)(B), Fed. R. Civ. P. 72(b)(1), and D. Del. LR 72.1. Objections to this Report and Recommendation, if any, are due by **November 18, 2015**. Responses are due by **November 25, 2015**. Alternatively, to the extent the parties jointly agree to complete briefing on objections and responses on a date prior to the **November 25, 2015** pre-trial conference, they should alert the Court to the agreed-upon schedule and submit their filings in accordance with that schedule. In that case, it may be possible for the District Court to resolve the objections at the pre-trial conference. If the parties do not jointly agree to such an alternative briefing schedule, the deadlines set forth above will control. The failure of a party to object to legal conclusions may result in the loss of the right to *de novo* review in the district court. *See Sincavage v. Barnhart*, 171 F. App'x 924, 925 n.1 (3d

[9] Since factual disputes exist with respect to the first element of the defense of laches (delay), the Court need not address the parties' additional arguments with respect to (1) whether Bard suffered material prejudice—the second element of the affirmative defense of laches; or (2) whether other factors, such as Bard's conduct or culpability, should prevent the application of laches. *See, e.g., Enzo Biochem, Inc.*, 2012 WL 4092429, at *7.

Cir. 2006); *Henderson v. Carlson*, 812 F.2d 874, 878–79 (3d Cir. 1987).

The parties are directed to the Court's Standing Order for Objections Filed Under Fed. R. Civ. P. 72, dated October 9, 2013, a copy of which is available on the District Court's website, located at http://www.ded.uscourts.gov.

Because this Report and Recommendation may contain confidential information, it has been released under seal, pending review by the parties to allow them to submit a single, jointly proposed, redacted version (if necessary) of the Report and Recommendation. Any such redacted version shall be submitted no later than **November 18, 2015** for review by the Court, along with a detailed explanation as to why disclosure of any proposed redacted material would "work a clearly defined and serious injury to the party seeking closure." *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994) (internal quotation marks and citation omitted). The Court will subsequently issue a publicly-available version of its Report and Recommendation.

Dated: November 11, 2015

Christopher J. Burke
UNITED STATES MAGISTRATE JUDGE