**BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION**

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| **IN RE ZOLOFT PRODUCTS LIABILITY LITIGATION** | ) ) ) | **MDL DOCKET NO. 2342** |

**PLAINTIFFS' COMBINED RESPONSE AND MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT PFIZER'S INC.'S MOTION TO TRANSFER RELATED ACTIONS TO THE SOUTHERN DISTRICT OF NEW YORK**

COME NOW all Plaintiffs in the actions identified within Exhibit "A" (hereinafter "Plaintiffs") and submit this, their combined response and memorandum of law in opposition to the motion to transfer filed by Pfizer, Inc. ("Pfizer"). In support of this response and motion, Plaintiffs would respectfully show the Panel the following:

## I. INTRODUCTION

Let it be clear that while Pfizer characterizes its Section 1407 motion as seeking consolidation of "*fifty-nine*[1] related *federal* actions," were it not for Pfizer's mass-removal on January 18, 2012 of forty-eight state-court-filed cases under meritless claims of fraudulent joinder – there would only be ten (10) cases eligible for consolidation.[2]

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[1] Pfizer is actually mistaken when it refers to consolidating fifty-nine actions. Although fifty-nine Zoloft cases have been filed in state and federal courts. One of those cases, *Robinson v. Wolters Kluwer Health Inc. et al.,* has already been remanded to state court due to the presence of forum defendant Wolters Kluwer Health Inc. and is not eligible for MDL transfer. Hence, there were fifty-eight (58) cases pending in federal courts and subject to transfer at the time Pfizer filed its motion.

[2] The wrongfully removed cases consist of forty-six actions that were originally filed in the Philadelphia Court of Common Pleas but that were removed to the Eastern District of Pennsylvania despite the presence of forum defendant Wolters Kluwer Health Inc. Three additional actions were wrongfully removed by Pfizer from state courts in Illinois and Ohio to the Southern District of Illinois (two cases) and to the Northern District of Ohio (one case). The Ohio case included claims against the Ohio distributor, Cardinal Health. The Illinois cases lack diversity jurisdiction due to the presence of a non-diverse Plaintiff.

Pfizer's motion for a coordinated Zoloft multidistrict litigation ("MDL") therefore presents an unfortunate question for the Panel: whether Pfizer's should be rewarded for artificially creating a large number of federal lawsuits in order to create a change in venue (to a jurisdiction it perceives as more favorable) that it could not have obtained using proper procedures. The answer must be "no." Neither justice nor efficiency is furthered by the including the forty-six cases wrongfully removed Zoloft cases from Pennsylvania state court. (the "Pennsylvania WKH Cases").[3] Each of these cases involve: (1) a Pennsylvania defendant, Wolters Kluwer Health, Inc., that is not present in **any** non-Pennsylvania case, (2) dispositive motions that relate exclusively to the unique Pennsylvania defendant, and (3) clear and unanimous precedent – including two opinions out of the transferor court – indicating that federal jurisdiction does not exist in the Pennsylvania WKH Cases. Considering these facts, and the unusual shenanigans leading up to Pfizer's MDL request, Pfizer's motion to transfer the Pennsylvania WKH Cases should be denied in the interests of justice and efficiency.

Alternatively, transfer of the Pennsylvania WKH Cases should be stayed pending a resolution of dispositive motions pending before the transferor court. Finally, should the Panel determine that MDL treatment should be granted, Plaintiffs assert that Zoloft cases should be consolidated before the United States District Court for the Eastern District of Pennsylvania.

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[3] The forty-six Pennsylvania WKH Cases consist of two cases filed by the responding Plaintiffs listed on Exhibit A and represented by the undersigned counsel together with an additional forty-four cases filed by three other firms on behalf of other plaintiffs. Plaintiffs in all forty-six Pennsylvania WKH Cases oppose Pfizer's motion to transfer their cases to the Southern District of New York.

## II.
## ARGUMENT AND AUTHORITIES

### A. THIS PANEL SHOULD DECLINE TO TRANSFER THE FORTY-SIX PENNSYLVANIA WKH CASES.

Plaintiffs' cases are part of a large subset of Zoloft cases presenting unique, jurisdiction-specific, pre-trial issues. That is, while Plaintiffs in the Pennsylvania WKH Cases assert claims against Pfizer relating to the defective drug Zoloft, each of the Pennsylvania WKH Cases also includes claims against Pennsylvania defendant, Wolters Kluwer Health Inc. ("WKH"), based on the inadequate patient education monograph ("PEM") included with the medication. The PEM claims against WKH are unique to the forty-six Pennsylvania-filed cases and have been the focus of substantial pre-trial proceedings to this point. Indeed, the viability of Plaintiffs' claims against WKH are currently the subject of a motion to dismiss and multiple motions to remand that are briefed and pending before the Eastern District of Pennsylvania.[4] It is the unique posture of the Pennsylvania WKH Cases that leads Plaintiffs to request that the Panel either: (1) deny Pfizer's motion for coordinated pretrial proceedings, or (2) expressly exclude the Pennsylvania WKH Cases from any transfer order.

#### 1. Transfer Of The Pennsylvania WKH Cases Does Not Satisfy The Statutory Mandates Of Section 1407.

To satisfy the statutory mandates of 28 U.S.C. § 1407, three factors must be present. First, the cases to be transferred under Section 1407 must involve common questions of fact. Second, the transfer must be for the "convenience of parties and witnesses. Lastly, and most

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[4] WKH has filed a motion to dismiss, and plaintiffs have filed their response in opposition to the motion to dismiss, in the action styled *Martinez v. Wolters Kluwer Health, Inc. et al.*, No. 2:11-CV-07427 (E.D. Pa). That motion is pending before Judge Joyner. It is anticipated that WKH will file similar motions to dismiss in each of the other Pennsylvania WKH Cases that are currently before Judge Joyner on Plaintiffs' motions to remand. Consequently, it is reasonable to expect that the holding reached on WKH's motion to dismiss in the *Martinez* action will be applied to all forty-six Pennsylvania WKH Cases pending before the *Martinez* court.

importantly, the transfer must "promote the just and efficient conduct of the actions." As the party seeking consolidation, Pfizer bears the burden of establishing all three Section 1407 criteria. *In re 21st Century Productions, Inc. "Thrilsphere" Contract Litigation,* 448 F.Supp. 271, 273 (J.P.M.L. 1978) ("[T]he movants are under a heavy burden. . . we rule that movants have not met that burden."). If even one of the three Section 1407 factors is missing, transfer should be denied. *See In re Highway Acc. Near Rockville, Conn.,* 388 F.Supp. 574, 575 (J.P.M.L. 1975). Here, Pfizer's motion fails to establish two of the three mandatory Section 1407 criteria.[5]

**2. Transfer Of The Pennsylvania WKH Cases Pursuant To Section 1407 Would Not Promote The Just And Efficient Conduct Of The Litigation.**

The main touchstone of Section 1407 coordination is whether centralization would further the "just" and "efficient" conduct of the litigation. S. Rep. No. 454, 90th Congress, 1st Sess. 2 (1967)("[T]he main purpose of transfer for consolidated or coordination of pretrial proceedings is to promote the ends of efficient justice."). Hence, Section 1407 consolidation should be denied where: (1) transfer is sought for a self-serving and manipulative purpose contrary to the interests of justice, or (2) transfer would not promote efficiency in the litigation.

**a. Justice is not served by permitting Pfizer to use Section 1407 to evade unfavorable precedent in the Eastern District of Pennsylvania.**

Pfizer's motion to transfer is calculated to remove determinations regarding the viability of claims against resident WKH from the Eastern District of Pennsylvania that has previously

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[5] Plaintiffs acknowledge that the cases at issue may involve some common question of fact related to Pfizer's conduct in connection with the drug Zoloft. Yet, while the existence of common questions of fact is a prerequisite for coordinated treatment, it is not determinative of whether there should, in fact, be a Section 1407 transfer. *In re Cessna Aircraft Distributorship Antitrust Litigation*, 460 F.Supp. 159, 161-62 (J.P.M.L 1978)("While we recognize the existence of common questions of fact, a mere showing that such questions exist is not sufficient, in and of itself, to warrant transfer by the Panel.").

rejected Pfizer's arguments. Two months ago, the Eastern District of Pennsylvania rejected Pfizer's argument that Pennsylvania defendant WKH was fraudulently joined in a Zoloft case akin to the Pennsylvania WKH Cases. *Robinson v. Wolters Kluwer Health, Inc.,* et al., No. Civ. A. 11-5702, 2011 WL 6009980 (E.D. Pa. Dec. 2, 2011) (Judge Kelly presiding) (attached hereto as Exhibit "B"). The *Robinson* opinion followed on the heels of an earlier ruling by the Eastern District of Pennsylvania finding that WKH was not fraudulently joined in an Accutane case. *Slater v. Hoffman-La Roche, Inc., et al*, 771 F. Supp. 2d 524 (E.D. Pa. 2011) (Judge Dubois presiding) (attached hereto as Exhibit "C"). Given the uniformity of the opinions by Eastern District judges,[6] Pfizer knows well that dispositive and jurisdictional motions regarding WKH are likely to be resolved in Plaintiffs' favor if heard by the Eastern District of Pennsylvania. Thus, the drug maker seeks to use the MDL device to secure an alternative forum.

Ordering MDL transfer in these circumstances would allow Pfizer to evade binding negative authority in the Eastern District of Pennsylvania. Such a result is disfavored by the Panel. *In re Motion Pictures "Standard Accessories" & "Pre-Vues" Antitrust Litigation,* 339

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6 The uniform rulings from two different Eastern District of Pennsylvania judges are also consistent with the orders of every other Court to consider the issue – all of which have found a colorable claim against WKH and ordered the case remanded. *See* Memorandum Order, *Farmer v. Wyeth, et al.,* Case No. 4:11-CV-348-CDP, 2011 WL 2462066, (E.D.Missouri, Eastern Division, June 17, 2011); Memorandum Order, *Lyons v. Wyeth, et al.,* Case No. 4:11-CV-365-CDP, 2011 WL 2462071, (E.D.Missouri, Eastern Division, June 17, 2011); Memorandum Order, *Ferguson v. Wyeth, et al.,* Case No. 4:11-CV-00360-SNLJ (E.D.Missouri, Southeastern Division, June 8, 2011); Memorandum Order, *Franzman v. Wyeth, et al.,* Case No. 4:11-CV-00362-CAS, 2011 WL 3847420 (E.D.Missouri, Eastern Division, Aug. 26, 2011); Memorandum Order, Nic*ely v. Wyeth, et al.,* Case No. 4:11-CV-338-CDP, 2011 WL 2462060 (E.D.Missouri, Eastern Division, June 17, 2011); Memorandum and Order, *Lawson v. Wyeth, et al.,* Case No. 4:11-CV-364-RWS, 2011 WL 3608025 (E.D.Missouri, Eastern Division, Aug. 16, 2011); *Newby v. Wyeth, Inc., et al.,* Case No. 4:11-CV-00339-AGF, 2011 WL 5024572 (E.D.Missouri, Eastern Division, October 21, 2011). Plaintiffs know of no order from any court (and Pfizer has cited none) finding that a PEM defendant was fraudulently joined. To the contrary, every court presented this issue has found the PEM defendant to be properly joined and has ordered the case remanded to state court.

F.Supp. 1278, 1280-81 (J.P.M.L. 1972) explaining that transfer under Section 1407 is not appropriate as a means to obtain a district judge that may be more favorably disposed to the movant's contentions); *In re Highway Acc.,* 388 F. Supp. 574, 576 (denying motion to transfer in part because the "plaintiff's request for transfer was not motivated by a desire to achieve the purposes for which Section 1407 was designed, but rather by a desire to circumvent [other] obstacles.").

Simply stated, a Section1407 motion should be denied if the moving party is not using the statute to promote efficiency and consistency, but rather, for an ulterior motive such as changing venue or avoiding an adverse decision.

**b. Transferring the Pennsylvania WKH cases out of the Eastern District of Pennsylvania while dispositive motions are pending is not efficient.**

Section 1407 centralization should be denied where it would not further the efficient conduct of the litigation. *In re Solaia Technology LLC Patent & Antitrust Litigation,* 346 F.Supp.2d 1373 (J.P.M.L. 2004). Pfizer's touted efficiency gains are largely illusory as they relate to the Pennsylvania WKH Cases. Transferring the Pennsylvania WKH Cases out of the Eastern District of Pennsylvania and into an unfamiliar MDL Court is inefficient for two major reasons: (1) the Eastern District has greater experience and familiarity with the issues surrounding WKH's liability which have been, and will continue to be, a primary focus of pre-trial proceedings unique to the Pennsylvania WKH Cases alone, and (2) the question surrounding the viability of claims against Pennsylvania defendant WKH are not going to be presented to the MDL court in any case other than those originating in Pennsylvania. Thus, there is no efficiency gained by having a single Zoloft MDL Court garner expertise in a specific matter unique to cases filed in one specific jurisdiction involving one specific defendant.

**i. Efficiency is served by having the Eastern District of Pennsylvania's rule on the issues of PEM liability unique to the Pennsylvania WKH Cases.**

The judges of the Eastern District of Pennsylvania are already familiar with the issues surrounding Zoloft and, more specifically, issues involving PEM liability. That is, Judges Kelly, Rufe and Joyner (all of the Eastern District of Pennsylvania) have had Zoloft cases pending in their courts. Judges Dubois, Joyner and Kelly (all of the Eastern District of Pennsylvania) have overseen motions to dismiss and/or motions to remand involving WKH. *See Robinson v. Wolters Kluwer Health, Inc.,* et al., No. Civ. A. 11-5702, 2011 WL 6009980 (E.D. Pa. Dec. 2, 2011); *Slater v. Hoffman-La Roche, Inc., et al*, 771 F.Supp.2d 524 (E.D. Pa. 2011); Motion to Dismiss, *Martinez v. Wolters Kluwer Health, Inc. et al.,* No. 2:11-CV-07427 (E.D. Pa). Moreover, as WKH is a Pennsylvania entity in this district, the issue or WKH's potential liability has, and will continue to, arise before the District Courts in the Eastern District in other pharmaceutical litigation.

By contrast, any Zoloft MDL that might be created outside of the Eastern District of Pennsylvania would have no pre-existing familiarity or expertise in handling issues of PEM liability and would have little likelihood of confronting the issue on a repeated basis. The lack of superior experience with the particular issue being adjudicate weighs against having that matter decided by the MDL Court. *In re Massachusetts Diet Drug Litig,* 338 F.Supp.2d 198, 201 (D. Mass. 2004) (denying a stay pending transfer where "the MDL Court, respectfully, has no superior experience or expertise [with this matter]"). Simply stated, the most efficient course is to let the court closest to the issues surrounding PEM liability make the determination whether a PEM Defendant should be dismissed or was fraudulently joined. That Court is the Eastern District of Pennsylvania.

**ii. Efficiency is not furthered by having an MDL Court bogged down by the myriad PEM issues that only exist in the Pennsylvania WKH Cases.**

It is also significant that the validity of claims against a Pennsylvania PEM have not been raised, *and are not likely to be raised,* in any Zoloft case other than the ones filed before the Philadelphia Court of Common Pleas. There is a reason all of the Zoloft cases involving claims against WKH were filed in a single Pennsylvania state court – because that Court is located in the state of WKH's residence. The likelihood that WKH would be sued in any other state forum is practically nill. Hence, the issues that have dominated pre-trial efforts in the Pennsylvania WKH Cases – whether valid claims exist against WKH – are not ones which the Zoloft MDL court could expect to repeatedly encounter.

Many courts hold that a motion presenting issues not likely to arise in other courts should be adjudicated in the district court rather than in a consolidated adjudication.

> There are many cases in which a motion to remand will raise questions of fact or law that would not otherwise arise in the MDL proceedings. In such cases, the interest of judicial economy is best served by denying the motion to stay and adjudicating the motion to remand in the court in which the action is pending.

*Edsall v. Merck & Co., Inc.,* No. 05-2244 MHP, 2005 WL 11867730 (N.D. Cal. Aug. 4, 2005); *See also, Johnson,* 354 F.Supp.2d at 740 (denying stay pending transfer and deciding remand motion in part because ""the issue presented by this remand motion is unique to this case''); *In re Massachusetts Diet Drug Litig,* 338 F.Supp.2d 198, 201 (D. Mass. 2004) (denying a stay pending transfer where "it does not appear that the issue... is one that is likely to arise in other diet drug litigation in other courts.''); *Wisconsin v. Abbott Labs.,* No. 04-C-447-C, 2004 WL 2055717, at *1 (W.D. Wis. Sept. 9, 2004) ("It is appropriate to take up the jurisdictional issue in this court because . . . there is no apparent overlap between the jurisdictional issue presented in

this case and the jurisdictional issues raised in other cases that have been transferred."); *Board of Trustees of Teachers' Ret. Sys. of State of Ill. v. Worldcom, Inc.*, 244 F.Supp.2d 900, 903 (N.D. Ill. 2002) ("[W]hen remand motions in cases potentially subject to MDL consolidation raise unique issues of law or fact, channeling the decisions to a single court would result in little or no savings of judicial resources").

The panel has repeatedly declined to include cases where additional defendants would muddy the waters. For example, in *In re Sigg Switz. (USA), Inc., Aluminum Bottles Mktg. and Sales Practices Litig.*, 682 F. Supp. 2d 1347 (J.P.M.L. 2010), the JPML denied inclusion of five actions into a previously created MDL on the basis that the five actions involve parties, facts and theories different from those in the actions in MDL No. 1967. In *In re Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.*, 2011 U.S. Dist. LEXIS 92702, 3-4 (J.P.M.L. Aug. 15, 2011), the JPML created an MDL for actions alleging that Countrywide misrepresented to its investors origination practices for, and the credit quality of, the mortgage loans it originated from 2004 to 2007. The JPML included only those actions that included Countrywide mortgage-backed securities ("MBS"), while excluding four actions brought by investors in Countrywide stock, bonds and debentures. The JPML found that while these actions shared common questions of fact, inclusion of the non-MBS actions in MDL No. 2265 would unnecessarily complicate MDL proceedings by introducing issues unique to these different investor plaintiffs in this proceeding. Lastly, in *Tozer v. Gaiam, Inc. (In re Gaiam, Inc., Water Bottle Mktg., Sales Practices and Prods. Liab. Litig.)*, 672 F. Supp. 2d 1373, 1375 (J.P.M.L. 2010), the JPML denied inclusion of two actions into an already created MDL because additional defendant with varying theories of liability would not promote efficiency.

Plaintiffs understand that the pendency of a remand or a dismissal motion is not ordinarily perceived by the Panel as an obstacle to MDL treatment. That is because in the typical MDL transfer scenario, cases with pending motions to remand are relatively rare among the many federal court cases eligible for transfer. Thus, even if the occasional remand motion presented a unique issue, permitting the rare case to derail coordination of all the other cases would be letting the tail wag the dog. That is not the case here. Here, the 48 wrongfully removed cases where remand motions are pending make up the overwhelming bulk of the cases Pfizer seeks to transfer. Thus, the unusual posture of this litigation makes it reasonable to exclude the Pennsylvania WKH Cases from any transfer order until the pending motions to dismiss and remand are resolved – even if the Panel would not take that approach in a more traditionally postured case.

Because the currently pending motions to dismiss and remand turn upon an issue (the viability of claims against Pennsylvania defendant, WKH) that is unlikely to arise in any state other than Pennsylvania, this Court simply has no reason to refrain from allowing the Eastern District of Pennsylvania to decide that issue. The best course of action is to decline to transfer them away from the Eastern District of Pennsylvania – which is already familiar with PEM issues and which is the court most likely to encounter PEM issues again in this (and other) drug litigation.

**iii. More efficient means exist for reducing duplicative discovery and pre-trial rulings in the Pennsylvania WKH Cases.**

While Pfizer professes a concern for duplicative discovery and pre-trial rulings, the Panel has reminded litigants in the past that an MDL is not the only method available for reducing duplicative discovery and addressing the convenience of the parties and witnesses. After

denying centralization in *In re Children's Personal Care Products Liab. Lit.*, the Panel explained that:

> [T]he parties could employ the same notices for depositions, interrogatories and request for production in all actions, thereby making them applicable in each action; the parties could seek to agree upon a stipulation that any discovery relevant to more than one action is usable in all those actions; and any party could seek orders from the involved courts to coordinate their pretrial efforts.

655 F.Supp.2d 1365, 1366 (J.P.M.L. 2009) (*citing, inter alia*, MANUAL FOR COMPLEX LITIGATION, § 2014 (2004)). That there are alternatives to MDL transfer for easing the burdens of discovery and pre-trial proceedings is particularly clear with regard to the Pennsylvania WKH Cases. Prior to their wrongful removal, Plaintiffs had requested and were on the verge of securing a mass tort designation in the Philadelphia Court of Common Pleas. [*See* Plaintiffs' Petition for Mass Tort Status (attached hereto as Exhibit "D")]. Thus, coordinated discovery and pre-trial rulings are equally available for the Pennsylvania WKH Cases if transfer is denied and the anticipated remand orders are entered. Indeed, the primary difference between the collective treatment Pfizer seeks from an MDL court and the group discovery and collective pre-trial rulings available in the Pennsylvania state court is that the latter will be overseen from the outset by a court assured of its proper jurisdiction.

**3. Transfer Of The Pennsylvania WKH Cases Does Not Serve The Convenience Of The Parties**

Plaintiffs in the Pennsylvania WKH Cases chose to litigate in Pennsylvania. Plaintiffs in the Pennsylvania WKH Cases are all represented by the same Pennsylvania counsel. Plus, Pennsylvania is the residence of defendant WKH. Hence, there is no other forum that would be more convenient to the parties, on the whole, that the Philadelphia Court of Common Pleas

where Plaintiffs cases were originally filed or the Eastern District of Pennsylvania where they are currently pending.

If transfer is ordered and the Pennsylvania WKH Cases pass to the MDL, Plaintiffs will not only face the inconvenience and delay inherent in having their case transferred, it is also likely that Plaintiffs could be forced to proceed for months, or even years, to prepare their case without knowing the ultimate forum or the governing law. That is, Plaintiffs' motion to remand presents a choice of laws issue that is central to the case. It is also significant to Plaintiffs' case preparations to know whether their experts will be subject to the federal *Daubert* standard or the Pennsylvania state court's *Frye* standard. Launching Plaintiffs into consolidated discovery and pre-trial activities rather than allowing the Eastern District of Pennsylvania to immediately resolving these potentially dispositive threshold matters is highly prejudicial to Plaintiffs' trial preparations.

**4. Absent Pfizer's Manipulative Wrongful Removals, Only Ten Cases Would Be Subject To Transfer For Consolidated Pre-Trial Proceedings.**

The universe of cases properly subject to a Zoloft MDL is much smaller than Pfizer suggests. That is, while the drug maker asserts that there are fifty-eight Zoloft cases eligible for coordination in an MDL, forty-eight of them were wrongfully removed from their proper state court forums to bolster an argument for federal consolidation that Pfizer must have otherwise felt was lacking. [7]

[7] In addition to the 45 Pennsylvania WKH Cases that were originally filed in the Philadelphia Court of Common Pleas and that were removed to the Eastern District of Pennsylvania, three additional actions were wrongfully removed by Pfizer from their proper state court forums to the Southern District of Illinois (two cases) and to the Northern District of Ohio (one case). Motions to remand have been filed in all of the wrongfully removed cases.

Even if there is no magic number of cases entitling or disqualifying Pfizer from obtaining MDL treatment, the fact that there are so few cases truly at issue is significant because an inverse relationship exists between the number of actions subject to transfer and the magnitude of the burden born by the moving party. That is, where the number of cases seeking to be consolidated is small, Pfizer bears a greater burden to demonstrate that the common questions of fact are so complex and the common discovery is so time consuming as to overcome the inconvenience to the plaintiff of having their action transferred. MULTIDISTRICT LITIGATION MANUAL 5:18 (2011). Pfizer has not met that burden.

**B. ALTERNATIVELY, THIS PANEL SHOULD STAY RULING ON PFIZER'S MOTION TO TRANSFER THE PENNSYLVANIA WKH CASES UNTIL AFTER THE EASTERN DISTRICT OF PENNSYLVANIA HAS RULED ON WKH'S MOTION TO DISMISS AND PLAINTIFFS' MOTIONS TO REMAND.**

While not affecting this Panel's *authority* and ability to order a transfer of actions, the Panel has acknowledged that the pendency of motions before the transferor court may impact the *timing* of requested Panel action. That is, where a dispositive motion is pending before the district court, the Panel has sometimes seen fit to defer a ruling on whether to transfer the specific cases until after the district court has issued its ruling.

> We are persuaded, on principles of comity, to defer our decision concerning transfer of the Pennsylvania action because of the pendency of the defendants' motion for summary judgment, which is fully submitted to the potential transferor judge.

*In re Resource Exploration, Inc., Securities Litigation,* 483 F.Supp. 817, 822 (J.P.M.L. 1980). *See also In re Kaehni Patent*, 311 F.Supp. 1342, 1344, (J.P.M.L. 1970)(staying transfer of action that had a motion to dismiss pending in district court until resolution of that motion while ordering the immediate transfer of all other actions).

As previously stated, forty-six of the fifty-eight cases Pfizer seeks to consolidate include claims against Pennsylvania defendant, WKH, that are unique to the Pennsylvania-filed cases. Indeed, the viability of Plaintiffs' claims against WKH are the subject of a motion to dismiss and multiple motions to remand that are currently briefed and pending before the Eastern District of Pennsylvania.

Deferring a ruling on Pfizers' motion to transfer until after the Eastern District of Pennsylvania has ruled on WKH's motion to dismiss and Plaintiffs' motions to remand would be advantageous for two reasons. First, it would allow the issue of WKH's potential liability – which is unique to Pennsylvania-filed cases -- to be decided by the Eastern District of Pennsylvania which has already examined the issue twice and which is almost certain to encounter the same issue again in other drug litigation. Second, if either motion were granted, the question of consolidating the Pennsylvania WKH Cases would become moot. Meanwhile, if the motions were denied the Pennsylvania WKH Cases could be designated as tag-along cases and transferred into the MDL at any time. Consequently, there is no downside to deferring a ruling of Pfizer's Section 1407 motion.

Simply stated, the most just and expeditious course of action is to defer a ruling on Pfizer's motion to transfer until after the Eastern District of Pennsylvania has issued rulings upon the motion to dismiss and motions to remand that are potentially dispositive of the transfer issue.

**C. IF MDL TREATMENT IS GRANTED, THE PANEL SHOULD CENTRALIZE THE MDL IN THE EASTERN DISTRICT OF PENNSYLVANIA.**

Plaintiffs do not believe that transfer or consolidation of the wrongfully removed actions is appropriate or warranted. If, however, the Panel disagrees and opts to grant transfer, Plaintiffs respectfully request that the Panel select the United States District Court for the Eastern District

of Pennsylvania as the transferee forum and the Honorable Cynthia M. Rufe as the transferee judge.

Selection of the Eastern District of Pennsylvania as the transferee court and Judge Rufe as the transferee judge is preferable and proper for numerous reasons:

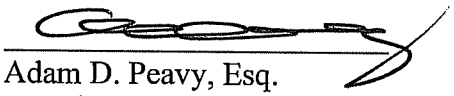
- The largest number of Zoloft cases (46 out of 58) are currently pending in the Eastern District of Pennsylvania.
- Two of the first three Zoloft cases filed in a federal court were filed in the Eastern District of Pennsylvania and are being overseen by Judge Rufe.
- Zoloft litigation is further progressed in the Eastern District of Pennsylvania than in any other federal jurisdiction.
- Judge Rufe is experienced in managing a pharmaceutical MDL having recently managed the large-scale Avandia MDL.
- Choosing the Eastern District of Pennsylvania as the MDL Court allows for coordination and expeditious transfers of the Pennsylvania WKH Cases (which make up the biggest bulk of the cases at issue) between the state and federal courts of Pennsylvania.
- The Eastern District of Pennsylvania is within the state where the majority of Plaintiffs chose to file their cases, where counsel for the forty-six Pennsylvania WKH Cases is located and where Defendant, WKH resides. Hence, it is a convenient forum for the majority of the parties.

For these reasons, and for the reasons set out by Plaintiffs Donna Amadio, Shannon Long and Christine Hopkins in their "Response to Pfizer, Inc's Motion to Transfer Related Actions to Southern District of New York" which Plaintiffs adopt and incorporate by reference, Plaintiffs respectfully submit that, if centralization is not denied (as it should be) that the Eastern District of Pennsylvania would provide the most appropriate venue and that Judge Cynthia Rufe should preside over the Zoloft MDL.

## III.
## CONCLUSION AND PRAYER

For the reasons set forth herein, Plaintiffs pray that Pfizer's motion to transfer related actions for coordinated pre-trial proceedings in its entirety. Alternatively, Plaintiffs pray that the Pfizer's motion to transfer be denied with respect to the Pennsylvania WKH Cases. In the further alternative, Plaintiffs pray that the Court stays any ruling on Pfizer's motion to transfer the Pennsylvania WKH Cases until after the Eastern District of Pennsylvania has ruled on the pending motion to dismiss and motions to remand. Lastly, if Pfizer's motion to transfer is not denied outright and if the Pennsylvania WKH Cases are not excluded from the transfer order, Plaintiffs request that the cases be transferred and consolidated in the Eastern District of Pennsylvania. Plaintiffs additionally pray for all other and further relief to which they may be justly entitled.

Respectfully Submitted,



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**BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION**

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COME NOW all Plaintiffs in the actions identified at Exhibit "A" (hereinafter "Plaintiffs") and submit this, their combined response and memorandum of law in opposition to the motion to transfer filed by Pfizer, Inc. ("Pfizer"). In support of this response and motion, Plaintiffs would respectfully show the Panel the following:

## I. INTRODUCTION

The Plaintiffs in these actions are minor children (and their families) who were born with disabling birth defects as a result of their mothers ingestion of Zoloft during pregnancy. Zoloft is an anti-depressant medication used to treat depression and other mental disorders. Medical evidence and data has long indicated that Zoloft causes congenital birth defects when taken by women during their pregnancies. Unfortunately, neither Pfizer or Wolters Kluwer Health, Inc. ("WKH") informed women or their physicians that Zoloft could cause serious birth defects if taken during pregnancy.

In the event that this panel is inclined to coordinate these proceedings in an MDL (and it should not do so), Plaintiffs assert that Zoloft cases should be consolidated before the United States District Court for the Eastern District of Pennsylvania. In addition to the three wrongfully removed cases that are part of this proceeding, respondent's counsel

has two cases currently pending in the Court of Common Pleas state court in Pennsylvania. Both cases are set for trial in 2013. (Exhibits "B" & "C"). One of the these cases, *Robinson v. Wolters Kluwer Health, Inc. et al.*, has already been remanded to state court due to the presence of forum defendant WKH and is not eligible for MDL transfer. This case is set for trial on August 5, 2013.

As this panel may be aware, the Court of Common Pleas in Pennsylvania has been managing anti-depressant birth defect litigation over the last six years. During this time, the state court system has developed an efficient system for handling these cases and has successfully managed the resolution of hundreds of birth defect cases. By consolidating Zoloft cases before the United States District Court for the Eastern District of Pennsylvania, real efficiency and coordination amongst the state and federal judiciary can occur.

However, let it be clear that while Pfizer characterizes its Section 1407 motion as seeking consolidation of "*fifty-nine*[1] related *federal* actions," were it not for Pfizer's mass-removal on January 18, 2012 of forty-eight state-court-filed cases under meritless claims of fraudulent joinder – there would only be ten (10) cases eligible for consolidation.[2]

[1] Pfizer is actually mistaken when it refers to consolidating fifty-nine actions. Although fifty-nine Zoloft cases have been filed in state and federal courts, one of the undersigned's cases, *Robinson v. Wolters Kluwer Health, Inc. et al.*, has already been remanded to state court due to the presence of forum defendant Wolters Kluwer Health, Inc. and is not eligible for MDL transfer. Hence, there were fifty-eight (58) cases pending in federal courts and subject to transfer at the time Pfizer filed its motion.

[2] The wrongfully removed cases consist of forty-six actions that were originally filed in the Philadelphia Court of Common Pleas but that were removed to the Eastern District of Pennsylvania despite the presence of forum defendant Wolters Kluwer Health, Inc. Three additional actions were wrongfully removed by Pfizer from state courts in Illinois and Ohio to the Southern District of Illinois (two cases) and to the Northern District of Ohio (one case). The Ohio case included claims against the Ohio distributor, Cardinal Health. The Illinois cases lack diversity jurisdiction due to the presence of a non-diverse Plaintiff.

Pfizer's motion for a coordinated Zoloft multidistrict litigation ("MDL") therefore presents an unfortunate question for the Panel: whether Pfizer should be rewarded for artificially creating a multiplicity of federal lawsuits so as to work a change in venue (to a jurisdiction it perceives as more favorable) that it could not have obtained using proper procedures. The answer must be "no." Neither justice nor efficiency is furthered by the inclusion of forty-six cases wrongfully removed from Pennsylvania state court (the "Pennsylvania WKH Cases")[3] that involve: (1) a Pennsylvania defendant, Wolters Kluwer Health, Inc., that is not present in *any* non-Pennsylvania case, (2) dispositive motions that relate exclusively to the unique Pennsylvania defendant, and (3) clear and unanimous precedent – including two opinions out of the transferor court – indicating that federal jurisdiction does not exist in the Pennsylvania WKH Cases. Considering these facts, and the unusual circumstances leading up to Pfizer's MDL request, Pfizer's motion to transfer the Pennsylvania WKH Cases should be denied in the interests of justice and efficiency.

Alternatively, should the Panel determine that MDL treatment should be granted for all cases, Plaintiffs assert that Zoloft cases should be consolidated before the United States District Court for the Eastern District of Pennsylvania. In further alternative, transfer of the Pennsylvania WKH Cases should be stayed pending a resolution of motions to remand and dispositive motions pending before the transferor court. Finally, Plaintiffs request that the cases involving claims against both Pfizer and WKH should be

[3] The forty-six Pennsylvania WKH Cases consist of three cases filed by the responding Plaintiffs listed on Exhibit A and represented by the undersigned counsel together with an additional forty-three cases filed by three other firms on behalf of other Plaintiffs. Plaintiffs in all forty-six Pennsylvania WKH Cases oppose Pfizer's motion to transfer their cases to the Southern District of New York and have filed motions to remand in each case.

severed and consolidated before the United States District Court for the Eastern District of Pennsylvania, irrespective of what this panel decides is appropriate for the remaining cases filed against Pfizer.

## II.
## ARGUMENT AND AUTHORITIES

### A. IF MDL TREATMENT IS GRANTED, THE PANEL SHOULD CENTRALIZE THE MDL IN THE EASTERN DISTRICT OF PENNSYLVANIA.

Plaintiffs do not believe that transfer or consolidation of the wrongfully removed actions is appropriate or warranted. If, however, the Panel disagrees and opts to grant transfer, Plaintiffs respectfully request that the Panel select the United States District Court for the Eastern District of Pennsylvania as the transferee forum and the Honorable Cynthia M. Rufe as the transferee judge.

Selection of the Eastern District of Pennsylvania as the transferee court and Judge Rufe as the transferee judge is preferable and proper for numerous reasons:

- The largest number of Zoloft cases (46 out of 58) are currently pending in the Eastern District of Pennsylvania.
- Two of the first three Zoloft cases filed in a federal court were filed in the Eastern District of Pennsylvania and are being overseen by Judge Rufe.
- Zoloft litigation is further progressed in the Eastern District of Pennsylvania than in any other federal jurisdiction.
- Judge Rufe is experienced in managing a pharmaceutical MDL having recently managed the large-scale Avandia MDL.
- Choosing the Eastern District of Pennsylvania as the MDL Court allows for coordination and expeditious transfers of the Pennsylvania WKH Cases (which make up the biggest bulk of the cases at issue) between the state and federal courts of Pennsylvania.

- Coordination between state and federal courts in Pennsylvania will be enhanced as the Court of Common Pleas has over six years of experience with birth defect litigation and has resolved hundreds of similar birth defect cases in the Paxil birth defect litigation.

- Counsel for respondents already have two cases set for trial in the Court of Common Pleas in Pennsylvania. Consolidating Zoloft cases in the Eastern District of Pennsylvania will allow the Federal Court to coordinate its structure and processes with the State Court system which has already developed tremendous expertise in managing hundreds of birth defect cases.

- The Eastern District of Pennsylvania is less than 100 miles from Pfizers Corporate Headquarters where much of the discovery will take place.

- The Eastern District of Pennsylvania is within the state where the majority of Plaintiffs chose to file their cases, where counsel for the forty-six Pennsylvania WKH Cases is located and where Defendant, WKH resides. Hence, it is a convenient forum for the majority of the parties.

As has been noted herein, the Pennsylvania state court system has more expertise and experience with anti-depressant birth defect litigation than any court system in the country. Over the course of the last several years, the Court of Common Pleas has overseen the management and resolution of hundreds of Paxil birth defect cases, including discovery and the production of millions of pages of documents, motion practice, expert challenges, pre-trial proceeding and two trials. Because Paxil and Zoloft are members of the same class of drugs and cause the same types of injuries, the issues that will be addressed in the Zoloft state court litigation (and MDL litigation if these proceedings are consolidated) will be largely identical to the issues presented in the Paxil litigation. Not to take advantage of the knowledge and experience acquired by the Court of Common Pleas by assigning an MDL to a jurisdiction other than the Easter District of Pennsylvania will substantially impede the progress of the Zoloft litigation.

Simply put, coordinating the MDL in the Eastern District of Pennsylvania makes logistical and practical sense. There is and will continue to be coordinated Zoloft litigation in the Court of Common Pleas in Pennsylvania. The Court of Common Pleas has efficiently managed birth defect litigation with great success for several years which will inevitably assist the coordinated proceedings in the Eastern District of Pennsylvania. From a practical standpoint, having both state and federal coordinated proceedings in the same city will greatly reduce the burdens on all parties in terms of travel, costs and the ability to efficiently coordinate litigation activities between the state and federal judiciary. For these reasons, Plaintiffs respectfully submit that, if centralization is not denied (as it should be), the Eastern District of Pennsylvania would provide the most appropriate venue and that Judge Cynthia Rufe should preside over the Zoloft MDL.

**B. THIS PANEL SHOULD DECLINE TO TRANSFER THE FORTY-SIX PENNSYLVANIA WKH CASES.**

Plaintiffs' cases are part of a large subset of Zoloft cases presenting unique, jurisdiction-specific, pre-trial issues. That is, while Plaintiffs in the Pennsylvania WKH Cases assert claims against Pfizer relating to the defective drug Zoloft, each of the Pennsylvania WKH Cases also includes claims against Pennsylvania defendant, Wolters Kluwer Health Inc. ("WKH"), based on the inadequate patient education monograph ("PEM") included with the medication. The PEM claims against WKH are unique to the forty-six Pennsylvania-filed cases and have been the focus of substantial pre-trial proceedings to this point. Indeed, the viability of Plaintiffs' claims against WKH are currently the subject of a motion to dismiss and multiple motions to remand that are fully

briefed and pending before the Eastern District of Pennsylvania.[4] It is the unique posture of the Pennsylvania WKH Cases that leads Plaintiffs to request that the Panel either: (1) deny Pfizer's motion for coordinated pretrial proceedings, or (2) expressly exclude the Pennsylvania WKH Cases from any transfer order.

**1. Transfer Of The Pennsylvania WKH Cases Does Not Satisfy The Statutory Mandates Of Section 1407.**

To satisfy the statutory mandates of 28 U.S.C. § 1407, three factors must be present. First, the cases to be transferred under Section 1407 must involve common questions of fact. Second, the transfer must be for the "convenience of parties and witnesses." Lastly, and most importantly, the transfer must "promote the just and efficient conduct of the actions." As the party seeking consolidation, Pfizer bears the burden of establishing all three Section 1407 criteria. *In re 21st Century Productions, Inc. "Thrilsphere" Contract Litigation*, 448 F.Supp. 271, 273 (J.P.M.L. 1978)("[T]he movants are under a heavy burden. . . we rule that movants have not met that burden."). If even one of the three Section 1407 factors is missing, transfer should be denied. *See In re Highway Acc. Near Rockville, Conn.,* 388 F.Supp. 574, 575 (J.P.M.L. 1975). Here, Pfizer's motion fails to establish two of the three mandatory Section 1407 criteria. [5]

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[4] WKH has filed a motion to dismiss, and plaintiffs have filed their response in opposition to the motion to dismiss, in the action styled *Martinez v. Wolters Kluwer Health, Inc. et al.*, No. 2:11-CV-07427 (E.D. Pa). That motion is pending before Judge Joyner. It is anticipated that WKH will file similar motions to dismiss in each of the other Pennsylvania WKH Cases that are currently before Judge Joyner on Plaintiffs' motions to remand. Consequently, it is reasonable to expect that the holding reached on WKH's motion to dismiss in the *Martinez* action will be applied to all forty-six Pennsylvania WKH Cases pending before the *Martinez* court.

[5] Plaintiffs acknowledge that the cases at issue involve some common question of fact related to Pfizer's conduct in connection with the drug Zoloft. Yet, while the existence of common questions of fact is a prerequisite for coordinated treatment, it is not determinative of whether there should, in fact, be a Section 1407 transfer. *In re Cessna Aircraft Distributorship Antitrust Litigation*, 460 F.Supp. 159, 161-62 (J.P.M.L 1978)("While we recognize the existence of common questions of fact, a mere showing that such questions exist is not sufficient, in and of itself, to warrant transfer by the Panel.").

**2. Transfer Of The Pennsylvania WKH Cases Pursuant To Section 1407 Would Not Promote The Just And Efficient Conduct Of The Litigation.**

The touchstone of Section 1407 coordination is whether centralization would further the "just" and "efficient" conduct of the litigation. S. Rep. No. 454, 90th Congress, 1st Sess. 2 (1967)("[T]he main purpose of transfer for consolidated or coordination of pretrial proceedings is to promote the ends of efficient justice."). Hence, Section 1407 consolidation should be denied where: (1) transfer is sought for a self-serving and manipulative purpose contrary to the interests of justice, or (2) transfer would not promote efficiency in the litigation.

**a. Justice is not served by permitting Pfizer to use Section 1407 to evade unfavorable precedent in the Eastern District of Pennsylvania.**

Pfizer's motion to transfer is calculated to remove determinations regarding the viability of claims against resident WKH from the Eastern District of Pennsylvania that has previously rejected Pfizer's arguments. Two months ago, the Eastern District of Pennsylvania rejected Pfizer's argument that Pennsylvania defendant WKH was fraudulently joined in a Zoloft case akin to the Pennsylvania WKH Cases. *Robinson v. Wolters Kluwer Health, Inc., et al.*, No. Civ. A. 11-5702, 2011 WL 6009980 (E.D.Pa. Dec. 2, 2011)(Judge Kelly presiding)(attached hereto as Exhibit "D"). The *Robinson* opinion followed on the heels of an earlier ruling by the Eastern District of Pennsylvania finding that WKH was not fraudulently joined in an Accutane case. *Slater v. Hoffman-La Roche, Inc., et al*, 771 F. Supp. 2d 524 (E.D.Pa. 2011)(Judge Dubois presiding)(attached

hereto as Exhibit "E"). Given the uniformity of the opinions by Eastern District judges, [6] Pfizer knows well that dispositive and jurisdictional motions regarding WKH are likely to be resolved in Plaintiffs' favor if heard by the Eastern District of Pennsylvania. Thus, the drug maker's seeks to use the MDL device to secure an alternative forum.

Ordering MDL transfer in these circumstances would allow Pfizer to evade binding negative authority in the Eastern District of Pennsylvania. Such a result is disfavored by the Panel. *In re Motion Pictures "Standard Accessories" & "Pre-Vues" Antitrust Litigation*, 339 F.Supp. 1278, 1280-81 (J.P.M.L. 1972)(explaining that transfer under Section 1407 is not appropriate as a means to obtain a district judge that may be more favorably disposed to the movant's contentions); *In re Highway Acc.*, 388 F. Supp. 574, 576 (denying motion to transfer in part because the "plaintiff's request for transfer was not motivated by a desire to achieve the purposes for which Section 1407 was designed, but rather by a desire to circumvent [other] obstacles.").

Simply stated, a Section1407 motion should be denied if the moving party is not using the statute to promote efficiency and consistency, but rather, for an ulterior motive such as changing venue or avoiding an adverse decision.

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[6] The uniform rulings from two different Eastern District of Pennsylvania judges are also consistent with the orders of every other Court to consider the issue – all of which have found a colorable claim against WKH and ordered the case remanded. *See* Memorandum Order, *Farmer v. Wyeth, et al.*, Case No. 4:11-CV-348-CDP, 2011 WL 2462066, (E.D.Missouri, Eastern Division, June 17, 2011); Memorandum Order, *Lyons v. Wyeth, et al.*, Case No. 4:11-CV-365-CDP, 2011 WL 2462071, (E.D.Missouri, Eastern Division, June 17, 2011); Memorandum Order, *Ferguson v. Wyeth, et al.*, Case No. 4:11-CV-00360-SNLJ (E.D.Missouri, Southeastern Division, June 8, 2011); Memorandum Order, *Franzman v. Wyeth, et al.*, Case No. 4:11-CV-00362-CAS, 2011 WL 3847420 (E.D.Missouri, Eastern Division, Aug. 26, 2011); Memorandum Order, Nic*ely v. Wyeth, et al.*, Case No. 4:11-CV-338-CDP, 2011 WL 2462060 (E.D.Missouri, Eastern Division, June 17, 2011); Memorandum and Order, *Lawson v. Wyeth, et al.*, Case No. 4:11-CV-364-RWS, 2011 WL 3608025 (E.D.Missouri, Eastern Division, Aug. 16, 2011); *Newby v. Wyeth, Inc., et al.*, Case No. 4:11-CV-00339-AGF, 2011 WL 5024572 (E.D.Missouri, Eastern Division, October 21, 2011). Plaintiffs know of no order from any court (and Pfizer has cited none) finding that a PEM defendant was fraudulently joined. To the contrary, every court presented this issue has found the PEM defendant to be properly joined and has ordered the case remanded to state court.

**b. Transferring the Pennsylvania WKH cases out of the Eastern District of Pennsylvania while dispositive motions are pending is not efficient.**

Section 1407 centralization should be denied where it would not further the efficient conduct of the litigation. *In re Solaia Technology LLC Patent & Antitrust Litigation*, 346 F.Supp.2d 1373 (J.P.M.L. 2004). Pfizer's touted efficiency gains are largely illusory as they relate to the Pennsylvania WKH Cases. Transferring the Pennsylvania WKH Cases out of the Eastern District of Pennsylvania and into an unfamiliar MDL Court is inefficient for two major reasons: (1) the Eastern District has greater experience and familiarity with the issues surrounding WKH's liability which have been, and will continue to be, a primary focus of pre-trial proceedings unique to the Pennsylvania WKH Cases alone, and (2) the question surrounding the viability of claims against Pennsylvania defendant WKH are not going to be presented to the MDL court in any case other than those originating in Pennsylvania. Thus, there is no efficiency gained by having a single Zoloft MDL Court garner expertise in a specific matter unique to cases filed in one specific jurisdiction involving one specific defendant.

**i. Efficiency is served by having the Eastern District of Pennsylvania rule on the issues of PEM liability unique to the Pennsylvania WKH Cases on the Pending Motions to Remand.**

The judges of the Eastern District of Pennsylvania are already familiar with the issues surrounding Zoloft and, more specifically, issues involving PEM liability and the issues surrounding Plaintiff's Motions to Remand. That is, Judges Kelly, Rufe and Joyner (all of the Eastern District of Pennsylvania) have had Zoloft cases pending in their courts. Judges Dubois, Joyner and Kelly (all of the Eastern District of Pennsylvania) have overseen motions to dismiss and/or motions to remand involving WKH. *See Robinson v.*

*Wolters Kluwer Health, Inc., et al.*, No. Civ. A. 11-5702, 2011 WL 6009980 (E.D.Pa. Dec. 2, 2011); *Slater v. Hoffman-La Roche, Inc., et al*, 771 F.Supp.2d 524 (E.D.Pa. 2011); Motion to Dismiss, *Martinez v. Wolters Kluwer Health, Inc. et al.*, No. 2:11-CV-07427 (E.D. Pa). Moreover, as WKH is a Pennsylvania entity in this district, the issue of WKH's potential liability has, and will continue to, arise before the district courts in the Eastern District of Pennsylvania in other pharmaceutical litigation.

By contrast, any Zoloft MDL that might be created outside of the Eastern District of Pennsylvania would have no pre-existing familiarity or expertise in handling issues of PEM liability and would have little likelihood of confronting the issue on a repeated basis. The lack of superior experience with the particular issue being adjudicate weighs against having that matter decided by the MDL Court. *In re Massachusetts Diet Drug Litig*, 338 F.Supp.2d 198, 201 (D. Mass. 2004)(denying a stay pending transfer where "the MDL Court, respectfully, has no superior experience or expertise [with this matter]"). Simply stated, the most efficient course is to let the court closest to the issues surrounding PEM liability and Remand make the determination whether a PEM Defendant should be dismissed or was fraudulently joined. That Court is the Eastern District of Pennsylvania.

**ii. Efficiency is not furthered by having an MDL Court bogged down by the myriad PEM issues that only exist in the Pennsylvania WKH Cases.**

It is also significant that the validity of claims against a Pennsylvania PEM have not been raised, *and are not likely to be raised*, in any Zoloft case other than the ones filed before the Philadelphia Court of Common Pleas. There is a reason all of the Zoloft cases involving claims against WKH were filed in a single Pennsylvania state court –

because that Court is located in the state of WKH's residence. The likelihood that WKH would be sued in any other state forum is practically nill. Hence, the issues that have dominated pre-trial efforts in the Pennsylvania WKH Cases – whether valid claims exist against WKH – are not ones which the Zoloft MDL court could expect to repeatedly encounter.

Many courts hold that a motion presenting issues not likely to arise in other courts should be adjudicated in the district court rather than in a consolidated adjudication:

> There are many cases in which a motion to remand will raise questions of fact or law that would not otherwise arise in the MDL proceedings. In such cases, the interest of judicial economy is best served by denying the motion to stay and adjudicating the motion to remand in the court in which the action is pending.

*Edsall v. Merck & Co., Inc.*, No. 05-2244 MHP, 2005 WL 11867730 (N.D.Cal., Aug. 4, 2005); *See also, Johnson, et al. v. Micron Technology*, 354 F.Supp.2d 736, 740 (E.D. Mi., Jan. 24, 2005)(denying stay pending transfer and deciding remand motion in part because "the issue presented by this remand motion is unique to this case"); *In re Massachusetts Diet Drug Litig*, 338 F.Supp.2d 198, 201 (D. Mass. 2004) (denying a stay pending transfer where "it does not appear that the issue... is one that is likely to arise in other diet drug litigation in other courts."); *Wisconsin v. Abbott Labs.*, No. 04-C-447-C, 2004 WL 2055717, at *1 (W.D. Wis. Sept. 9, 2004) ("It is appropriate to take up the jurisdictional issue in this court because. . . there is no apparent overlap between the jurisdictional issue presented in this case and the jurisdictional issues raised in other cases that have been transferred."); *Board of Trustees of Teachers' Ret. Sys. of State of III. v. Worldcom, Inc.*, 244 F.Supp.2d 900, 903 (N.D.Ill. 2002) ("[W]hen remand motions in cases potentially subject to MDL consolidation raise unique issues of law or fact,

channeling the decisions to a single court would result in little or no savings of judicial resources").

The panel has repeatedly declined to include cases where additional defendants would muddy the waters. For example, in *In re Sigg Switz. (USA), Inc., Aluminum Bottles Mktg. and Sales Practices Litig.*, 682 F. Supp. 2d 1347 (J.P.M.L. 2010), the JPML denied inclusion of five actions into a previously created MDL on the basis that the five actions involve parties, facts and theories different from those in the actions in MDL No. 1967. In *In re Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.*, 2011 U.S. Dist. LEXIS 92702, 3-4 (J.P.M.L. Aug. 15, 2011), the JPML created an MDL for actions alleging that Countrywide misrepresented to its investors origination practices for, and the credit quality of, the mortgage loans it originated from 2004 to 2007. The JPML included only those actions that included Countrywide mortgage-backed securities ("MBS"), while excluding four actions brought by investors in Countrywide stock, bonds and debentures. The JPML found that while these actions shared common questions of fact, inclusion of the non-MBS actions in MDL No. 2265 would unnecessarily complicate MDL proceedings by introducing issues unique to these different investor plaintiffs in this proceeding. Lastly, in *Tozer v. Gaiam, Inc. (In re Gaiam, Inc., Water Bottle Mktg., Sales Practices and Prods. Liab. Litig.)*, 672 F. Supp. 2d 1373, 1375 (J.P.M.L. 2010), the JPML denied inclusion of two actions into an already created MDL because additional defendant with varying theories of liability would not promote efficiency.

Plaintiffs understand that the pendency of a remand or a dismissal motion is not ordinarily perceived by the Panel as an obstacle to MDL treatment. That is because in

the typical MDL transfer scenario, cases with pending motions to remand are relatively rare among the many federal court cases eligible for transfer. Thus, even if the occasional remand motion presented a unique issue, permitting the rare case to derail coordination of all the other cases would be letting the tail wag the dog. That's not the case here. Here, the 48 wrongfully removed cases where remand motions are pending make up the overwhelming bulk of the cases Pfizer seeks to transfer. Thus, the unusual posture of this litigation makes it reasonable to exclude the Pennsylvania WKH Cases from any transfer order until the pending motions to dismiss and remand are resolved – even if the Panel would not take that approach in a more traditionally postured case. Alternatively, Plaintiffs would request that in cases where both Pfizer and WKH have been named as Defendants, this Court issue a severance order and consolidate these cases in the Eastern District of Pennsylvania before a court with familiarity and interest in the unique issues presented by these cases.

Because the currently pending motions to dismiss and remand turn upon an issue (the viability of claims against Pennsylvania defendant, WKH) that is unlikely to arise in any state other than Pennsylvania, this Court simply has no reason to refrain from allowing the Eastern District of Pennsylvania to decide that issue. The best course of action is to decline to transfer them away from the Eastern District of Pennsylvania – which is already familiar with PEM issues and which is the court most likely to encounter PEM issues again in this (and other) drug litigation.

**iii. More efficient means exist for reducing duplicative discovery and pre-trial rulings in the Pennsylvania WKH Cases.**

While Pfizer professes a concern for duplicative discovery and pre-trial rulings, the Panel has reminded litigants in the past that an MDL is not the only method available for reducing duplicative discovery and addressing the convenience of the parties and witnesses. After denying centralization in *In re Children's Personal Care Products Liab. Lit.*, the Panel explained that:

> [T]he parties could employ the same notices for depositions, interrogatories and request for production in all actions, thereby making them applicable in each action; the parties could seek to agree upon a stipulation that any discovery relevant to more than one action is usable in all those actions; and any party could seek orders from the involved courts to coordinate their pretrial efforts.

655 F.Supp.2d 1365, 1366 (J.P.M.L. 2009) (*citing, inter alia*, MANUAL FOR COMPLEX LITIGATION, § 2014 (2004)). That there are alternatives to MDL transfer for easing the burdens of discovery and pre-trial proceedings is particularly clear with regard to the Pennsylvania WKH Cases. Prior to their wrongful removal, Plaintiffs had requested and were on the verge of securing a mass tort designation in the Philadelphia Court of Common Pleas. [*See* Plaintiffs' Petition for Mass Tort Status (attached hereto as Exhibit "F")]. Thus, coordinated discovery and pre-trial rulings are equally available for the Pennsylvania WKH Cases if transfer is denied and the anticipated remand orders are entered. Indeed, the primary difference between the collective treatment Pfizer seeks from an MDL court and the group discovery and collective pre-trial rulings available in the Pennsylvania state court is that the latter will be overseen from the outset by a court assured of its proper jurisdiction and with years of experience in managing birth defect litigation.

**3. Transfer Of The Pennsylvania WKH Cases Does Not Serve The Convenience Of The Parties**

Plaintiffs in the Pennsylvania WKH Cases chose to litigate in Pennsylvania. Plaintiffs in the Pennsylvania WKH Cases are all represented by the same Pennsylvania counsel. Plus, Pennsylvania is the residence of defendant WKH. Hence, there is no other forum that would be more convenient to the parties, on the whole, than the Philadelphia Court of Common Pleas where Plaintiffs cases were originally filed or the Eastern District of Pennsylvania where they are currently pending.

If transfer is ordered and the Pennsylvania WKH Cases pass to the MDL, Plaintiffs will not only face the inconvenience and delay inherent in having their case transferred, it is also likely that Plaintiffs could be forced to proceed for months, or even years, to prepare their case without knowing the ultimate forum or the governing law. That is, Plaintiffs' motion to remand presents a choice of laws issue that is central to the case. It is also significant to Plaintiffs' case preparations to know whether their experts will be subject to the federal *Daubert* standard or the Pennsylvania state court's *Frye* standard. Launching Plaintiffs into consolidated discovery and pre-trial activities rather than allowing the Eastern District of Pennsylvania to immediately resolve these potentially dispositive threshold matters is highly prejudicial to Plaintiffs' trial preparations.

**4. Absent Pfizer's Manipulative Wrongful Removals, Only Ten Cases Would Be Subject To Transfer For Consolidated Pre-Trial Proceedings.**

The universe of cases properly subject to a Zoloft MDL is much smaller than Pfizer suggests. That is, while the drug maker asserts that there are fifty-eight Zoloft cases eligible for coordination in an MDL, forty-eight of them were wrongfully removed

from their proper state court forums to bolster an argument for federal consolidation that Pfizer must have otherwise felt was lacking. [7]

Even if there is no magic number of cases entitling or disqualifying Pfizer from obtaining MDL treatment, the fact that there are so few cases truly at issue is significant because an inverse relationship exists between the number of actions subject to transfer and the magnitude of the burden born by the moving party. That is, where the number of cases seeking to be consolidated is small, Pfizer bears a greater burden to demonstrate that the common questions of fact are so complex and the common discovery is so time consuming as to overcome the inconvenience to the plaintiff of having their action transferred. MULTIDISTRICT LITIGATION MANUAL 5:18 (2011). Pfizer has not met that burden.

**B. ALTERNATIVELY, THIS PANEL SHOULD STAY RULING ON PFIZER'S MOTION TO TRANSFER THE PENNSYLVANIA WKH CASES UNTIL AFTER THE EASTERN DISTRICT OF PENNSYLVANIA HAS RULED ON WKH'S MOTION TO DISMISS AND PLAINTIFFS' MOTIONS TO REMAND.**

While not affecting this Panel's *authority* and ability to order a transfer of actions, the Panel has acknowledged that the pendency of motions before the transferor court may impact the *timing* of requested Panel action. That is, where a dispositive motion is pending before the district court, the Panel has sometimes seen fit to defer a ruling on whether to transfer the specific cases until after the district court has issued its ruling.

> We are persuaded, on principles of comity, to defer our decision concerning transfer of the Pennsylvania action

[7] In addition to the 45 Pennsylvania WKH Cases that were originally filed in the Philadelphia Court of Common Pleas and that were removed to the Eastern District of Pennsylvania, three additional actions were wrongfully removed by Pfizer from their proper state court forums to the Southern District of Illinois (two cases) and to the Northern District of Ohio (one case). Motions to remand have been filed in all of the wrongfully removed cases.

> because of the pendency of the defendants' motion for summary judgment, which is fully submitted to the potential transferor judge.

*In re Resource Exploration, Inc., Securities Litigation*, 483 F.Supp. 817, 822 (J.P.M.L. 1980). *See also In re Kaehni Patent*, 311 F.Supp. 1342, 1344, (J.P.M.L. 1970)(staying transfer of action that had a motion to dismiss pending in district court until resolution of that motion while ordering the immediate transfer of all other actions).

As previously stated, forty-six of the fifty-eight cases Pfizer seeks to consolidate include claims against Pennsylvania defendant, WKH, that are unique to the Pennsylvania-filed cases. Indeed, the viability of Plaintiffs' claims against WKH are the subject of a motion to dismiss and multiple motions to remand that are currently briefed and pending before the Eastern District of Pennsylvania.

Deferring a ruling on Pfizers' motion to transfer until after the Eastern District of Pennsylvania has ruled on WKH's motion to dismiss and Plaintiffs' motions to remand would be advantageous for two reasons. First, it would allow the issue of WKH's potential liability – which is unique to Pennsylvania-filed cases -- to be decided by the Eastern District of Pennsylvania which has already examined the issue twice and which is almost certain to encounter the same issue again in other drug litigation. Second, if either motion were granted, the question of consolidating the Pennsylvania WKH Cases would become moot. Meanwhile, if the motions were denied the Pennsylvania WKH Cases could be designated as tag-along cases and transferred into the MDL at any time. Consequently, there is no downside to deferring a ruling of Pfizer's Section 1407 motion.

Simply stated, the most just and expeditious course of action is to defer a ruling on Pfizer's motion to transfer until after the Eastern District of Pennsylvania has issued

rulings upon the motion to dismiss and motions to remand that are potentially dispositive of the transfer issue.

## III.
## CONCLUSION AND PRAYER

For the reasons set forth herein, Plaintiffs pray that Pfizer's motion to transfer related actions for coordinated pre-trial proceedings be denied in its entirety. Alternatively, Plaintiffs pray that the Pfizer's motion to transfer be denied with respect to the Pennsylvania WKH Cases. In the further alternative, Plaintiffs pray that the Court stays any ruling on Pfizer's motion to transfer the Pennsylvania WKH Cases until after the Eastern District of Pennsylvania has ruled on the pending motion to dismiss and motions to remand. Lastly, if Pfizer's motion to transfer is not denied outright and if the Pennsylvania WKH Cases are not excluded from the transfer order, Plaintiffs request that the cases be transferred and consolidated in the Eastern District of Pennsylvania. Plaintiffs additionally pray for all other and further relief to which they may be justly entitled.

Respectfully Submitted,

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**ATTORNEYS FOR PLAINTIFFS**

**BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION**

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|---|---|---|
| **IN RE ZOLOFT PRODUCTS LIABILITY LITIGATION** | ) ) ) | **MDL DOCKET NO. 2342** |

**PLAINTIFFS' COMBINED RESPONSE AND MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT PFIZER, INC.'S MOTION TO TRANSFER RELATED ACTIONS TO THE SOUTHERN DISTRICT OF NEW YORK**

COME NOW all Plaintiffs in the actions identified at Exhibit "A" (hereinafter "Plaintiffs") and submit this, their combined response and memorandum of law in opposition to the motion to transfer filed by Pfizer, Inc. ("Pfizer"). In support of this response and motion, Plaintiffs would respectfully show the Panel the following:

## I. INTRODUCTION

Let it be clear that while Pfizer characterizes its Section 1407 motion as seeking consolidation of "*fifty-nine*[1] related *federal* actions," were it not for Pfizer's wrongful mass-removal of forty-nine state-court-filed cases, including two Illinois Cases discussed herein, under meritless claims of fraudulent joinder or misjoinder – there would only be ten (10) cases eligible for consolidation.[2]

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[1] Pfizer is actually mistaken when it refers to consolidating fifty-nine actions. Although fifty-nine Zoloft cases have been filed in state and federal courts. One of those cases, *Robinson v. Wolters Kluwer Health Inc. et al.*, has already been remanded to state court due to the presence of forum defendant Wolters Kluwer Health Inc. and is not eligible for MDL transfer. Hence, there were fifty-eight (58) cases pending in federal courts and subject to transfer at the time Pfizer filed its motion.

[2] The wrongfully removed cases consist of forty-six actions that were originally filed in the Philadelphia Court of Common Pleas but that were removed to the Eastern District of Pennsylvania despite the presence of forum defendant Wolters Kluwer Health Inc. (Pennsylvania WHC Cases) Three additional actions were wrongfully removed by Pfizer from state courts in Illinois and Ohio to the Southern District of Illinois (two cases) and to the Northern District of Ohio (one case). The Ohio case included claims against the Ohio distributor, Cardinal Health. The Illinois cases lack diversity jurisdiction due to the presence of a non-diverse Plaintiff.

Pfizer's motion for a coordinated Zoloft multidistrict litigation ("MDL") therefore presents the following question for the Panel: whether Pfizer should be permitted to artificially create a multiplicity of federal lawsuits so as to work a change in venue (to a jurisdiction it perceives as more favorable) that it could not have obtained using proper procedures. The answer must be "no." Neither justice nor efficiency is furthered by the inclusion of two cases wrongfully removed from Illinois state court the *Wilson* and *Saville* Cases, ("Illinois Cases") [3] that involve clear and unanimous precedent – including several opinions out of the Southern District of Illinois – holding that federal jurisdiction does not exist in these Illinois Cases.[4] Considering these facts, and the unusual shenanigans leading up to Pfizer's MDL request, Pfizer's motion to transfer the Illinois Cases should be denied in the interests of justice and efficiency. Alternatively, transfer of the Illinois Cases should be stayed or otherwise given special conditions permitting the would be transferor court to rule on fully submitted remand briefs where that court has signaled a desire for deference by recently denying Pfizer's motion to stay pending transfer. Finally, should the Panel determine that MDL treatment should be

[3] The two Illinois complaints consist of thirteen families and twenty-six individual Plaintiffs filed by the responding Plaintiffs listed on Exhibit A and represented by the undersigned counsel. Additionally, Plaintiffs in all forty-six Pennsylvania WKH Cases and the Ohio case oppose Pfizer's motion to transfer their cases to the Southern District of New York.

[4] *See Rutherford*, 428 F. Supp. 2d at 852; *see Davidson*, No. 3:10-cv-00970-MJR, slip op. at 7-8 ("[J]udges in this district have declined to adopt the fraudulent *misjoinder* doctrine—concluding that state rules of joinder do not implicate or expand federal subject matter jurisdiction. The undersigned judge concurs . . . and also declines to adopt the fraudulent misjoinder doctrine.") (Ex. 1); *see also Aranda v. Walgreen Co.*, No. 3:11-cv-654-JPG-DGW, 2011 U.S. Dist. LEXIS 95477, at *5-7 (S.D. Ill. Aug. 24, 2011) ("[T]his court agrees with the reasoning of *Rutherford* and declines to apply the fraudulent misjoinder doctrine."); *In re Yasmin Litig.*, 779 F. Supp. 2d at 857 ("[T]he Court declines to adopt the procedural misjoinder doctrine."); *Anderson v. Bayer Corp.*, No. 09-988-GPM, 2010 U.S. Dist. LEXIS 2636, at *21 (S.D. Ill. Jan. 13, 2010) ("The removing Defendants have offered the Court no grounds to depart from its prior reasoning in *Rutherford*, and therefore the Court adheres to that reasoning.").

granted, Plaintiffs assert that Zoloft cases should be consolidated before the United States District Court for the Eastern District of Pennsylvania.

## II.
## ARGUMENT AND AUTHORITIES

### A. THIS PANEL SHOULD DECLINE TO TRANSFER THE ILLINOIS CASES.

Plaintiffs' cases are part of a large subset of Zoloft cases from three other districts opposing transfer. All of the Zoloft cases opposing transfer represent separate unique, jurisdiction-specific, pre-trial issues. Indeed, motions to remand are briefed and pending in the Southern District of Illinois, which has signaled that remand is imminent. Despite Pfizer's efforts to stay these proceedings pending MDL transfer, the Southern District of Illinois recently denied Pfizer's request opting instead to invoke Rule 2.1(d) of the Federal Rules of Procedure of the JPML which states that the pendency of a motion to transfer does not affect or suspend pretrial proceedings in any pending action and does not limit its pretrial jurisdiction.[5] (*See* Exhibit "B", collectively, Docket Sheets for *Saville* and *Wilson*). Further, in the Court's January 17, 2012, Notice and Order in *Saville*, it preliminarily indicated that federal diversity does not exist.[6] It is the unique posture of the Illinois Cases, opposition to transfer by more than 90 percent of all Plaintiffs, the limited number of actions proper for transfer, and Pfizer's improper scheme and misuse of Section 1404 that leads Plaintiffs to request that the Panel either: (1) deny

[5] Plaintiffs in *Wilson* and *Saville* filed their motions to remand on January 9, 2012 and January 20, 2012. Pfizer filed its original motions to stay remand in both cases, which were both ***denied,*** **(**respectively, January 26, 2012 and February 3, 2012, Orders issued by Judge Reagan). Pfizer filed its Response in Opposition on February 8, 2012 in the *Wilson* case, and its response in *Saville* is due February 9, 2012 the same day this opposition is due.

[6] *See*, Exhibit B, Southern District of Illinois, Notice and Order Setting Discovery Briefing Deadlines, as duplicated within the Docket Text for Case 3:12-cv-00028-MJR-SCW "based on the allegations of citizenship contained in the complaint, federal diversity jurisdiction does not exist." Pfizer has asked the Court to disregard the citizenship of the parties and precedent for the Illinois Cases, and apply the so-called fraudulent misjoinder doctrine, which neither the Southern District of Illinois, Seventh Circuit or Supreme Court have ever recognized.

Pfizer's motion for coordinated pretrial proceedings, or (2) expressly exclude the Illinois Cases from any transfer order.

**1. Transfer Of The Illinois Cases Does Not Satisfy The Statutory Mandates Of Section 1407.**

To satisfy the statutory mandates of 28 U.S.C. § 1407, three factors must be present. First, the cases to be transferred under Section 1407 must involve common questions of fact. Second, the transfer must be for the "convenience of parties and witnesses. Lastly, and most importantly, the transfer must "promote the just and efficient conduct of the actions. As the party seeking consolidation, Pfizer bears the burden of establishing all three Section 1407 criteria. *In re 21st Century Productions, Inc. "Thrilsphere" Contract Litigation*, 448 F.Supp. 271, 273 (J.P.M.L. 1978)("[T]he movants are under a heavy burden. . . we rule that movants have not met that burden."). If even one of the three Section 1407 factors is missing, transfer should be denied. *See In re Highway Acc. Near Rockville, Conn.*, 388 F.Supp. 574, 575 (J.P.M.L. 1975). Here, Pfizer's motion fails to establish two of the three mandatory Section 1407 criteria.[7]

**2. Transfer Of The Illinois Cases Pursuant To Section 1407 Would Not Promote The Just And Efficient Conduct Of The Litigation.**

The main touchstone of Section 1407 coordination is whether centralization would further the "just" and "efficient" conduct of the litigation. S. Rep. No. 454, 90th Congress, 1st Sess. 2 (1967)("[T]he main purpose of transfer for consolidated or coordination of pretrial proceedings is to promote the ends of efficient justice."). Hence, Section 1407 consolidation

[7] Plaintiffs acknowledge that the cases at issue may involve some common question of fact related to Pfizer's conduct in connection with the drug Zoloft. Yet, while the existence of common questions of fact is a prerequisite for coordinated treatment, it is not determinative of whether there should, in fact, be a Section 1407 transfer. *In re Cessna Aircraft Distributorship Antitrust Litigation*, 460 F.Supp. 159, 161-62 (J.P.M.L 1978)("While we recognize the existence of common questions of fact, a mere showing that such questions exist is not sufficient, in and of itself, to warrant transfer by the Panel.").

should be denied where: (1) transfer is sought for a self-serving and manipulative purpose contrary to the interests of justice, or (2) transfer would not promote efficiency in the litigation.

**a. Justice is not served by permitting Pfizer to use Section 1407 to evade unfavorable precedent in the Southern District of Illinois**

Pfizer's motion to transfer is calculated to remove determinations regarding the viability of claims against it from the Southern District of Illinois that has previously rejected arguments identical to Pfizer's arguments. Less than six months ago, the Southern District of Illinois declined to adopt the so-called fraudulent misjoinder doctrine as a means for removal, upholding years of precedent. Pfizer offers no novel or sound basis for the Southern District of Illinois to depart from these prior rulings. Pfizer's argument that the Illinois Claims represent fraudulent misjoinder are akin to other product cases filed in and remanded to Illinois state courts. *Rutherford v. Merck Co.*, 428 F. Supp. 2d 842, 846 (S.D. Ill. 2006). Neither the Seventh Circuit nor the Supreme Court has recognized the doctrine. Given the uniformity of the opinions by Southern District judges, [8] Pfizer knows well that jurisdictional motions pending in Illinois are likely to be resolved in Plaintiffs' favor if heard by the Southern District of Illinois. Thus, the drug maker seeks to use the MDL device to secure an alternative forum.

Ordering MDL transfer in these circumstances would allow Pfizer to evade binding negative authority in the Southern District of Illinois. Such a result is disfavored by the Panel. *In re Motion Pictures "Standard Accessories" & "Pre-Vues" Antitrust Litigation,* 339 F.Supp. 1278, 1280-81 (J.P.M.L. 1972)(explaining that transfer under Section 1407 is not appropriate as a means to obtain a district judge that may be more favorably disposed to the movant's

[8] Plaintiffs know of no order from the Southern District of Illinois or Seventh Circuit (and Pfizer has cited none) finding that the so-called mis-joinder doctrine should apply in the Illinois Cases. To the contrary, every court presented this issue has found the opposite and remanded the case to state court.

contentions); *In re Highway Acc.*, 388 F. Supp. 574, 576 (denying motion to transfer in part because the "plaintiff's request for transfer was not motivated by a desire to achieve the purposes for which Section 1407 was designed, but rather by a desire to circumvent [other] obstacles.").

Simply stated, a Section1407 motion should be denied if the moving party is not using the statute to promote efficiency and consistency, but rather, for an ulterior motive such as changing venue or avoiding an adverse decision.

**b. Transferring the Illinois Cases out of the Southern District of Illinois while jurisdictionally dispositive motions are fully submitted is not efficient.**

Section 1407 centralization should be denied where it would not further the efficient conduct of the litigation. *In re Solaia Technology LLC Patent & Antitrust Litigation,* 346 F.Supp.2d 1373 (J.P.M.L. 2004). Pfizer's touted efficiency gains are largely illusory as they relate to the Illinois Cases. Transferring the Illinois Cases out of the Southern District of Illinois and into an unfamiliar MDL Court is inefficient because the Southern District of Illinois has greater experience and familiarity with the issues surrounding so-called fraudulent misjoinder rule and will likely see the issue again in the future. Thus, there is no efficiency gained by having a single Zoloft MDL Court garner expertise in a specific matter unique to cases filed in one specific jurisdiction involving one specific defendant where the court has already preliminarily ruled on the fully submitted issue.

Many courts hold that a motion presenting issues not likely to arise in other courts should be adjudicated in the district court rather than in a consolidated adjudication.

> There are many cases in which a motion to remand will raise questions of fact or law that would not otherwise arise in the MDL proceedings. In such cases, the interest of judicial economy is best served by denying the motion to stay and adjudicating the motion to remand in the court in which the action is pending.

*Edsall v. Merck & Co., Inc.*, No. 05-2244 MHP, 2005 WL 11867730 (N.D.Cal., Aug. 4, 2005); *See also, Johnson,* 354 F.Supp.2d at 740 (denying stay pending transfer and deciding remand motion in part because "the issue presented by this remand motion is unique to this case"); *In re Massachusetts Diet Drug Litig*, 338 F.Supp.2d 198, 201 (D. Mass. 2004) (denying a stay pending transfer where "it does not appear that the issue... is one that is likely to arise in other diet drug litigation in other courts.‘'); *Wisconsin v. Abbott Labs.*, No. 04-C-447-C, 2004 WL 2055717, at *1 (W.D. Wis. Sept. 9, 2004) ("It is appropriate to take up the jurisdictional issue in this court because. . . there is no apparent overlap between the jurisdictional issue presented in this case and the jurisdictional issues raised in other cases that have been transferred."); *Board of Trustees of Teachers' Ret. Sys. of State of III. v. Worldcom, Inc*., 244 F.Supp.2d 900, 903 (N.D.Ill. 2002) ("[W]hen remand motions in cases potentially subject to MDL consolidation raise unique issues of law or fact, channeling the decisions to a single court would result in little or no savings of judicial resources").

Plaintiffs understand that the pendency of a remand is not ordinarily perceived by the Panel as an obstacle to MDL treatment. That is because in the typical MDL transfer scenario, cases with fully submitted motions to remand are relatively rare among the many federal court cases eligible for transfer. Thus, even if the occasional remand motion presented a unique issue, permitting the rare case to derail coordination of all the other cases would be letting the tail wag the dog. That's not the case here. Here, the 48 wrongfully removed cases where remand motions are pending make up the overwhelming bulk of the cases Pfizer seeks to transfer. Thus, the unusual posture of this litigation makes it reasonable to exclude the Illinois Cases from any transfer order until the pending motions to remand are resolved – even if the Panel would not take that approach in a more traditionally postured case.

Because the Southern District of Illinois has denied Pfizer's motion to stay and preliminarily indicated that federal diversity jurisdiction does not exist, this Court simply has no reason to refrain from allowing the Southern District of Illinois to decide that issue. The best course of action is to decline to transfer them away from the Southern District of Illinois – which is already familiar with so-called misjoinder doctrine and which is the court most likely to encounter the issue again in this (and other) drug litigation.

**iii. More efficient means exist for reducing duplicative discovery and pre-trial rulings in the Illinois Cases.**

While Pfizer professes a concern for duplicative discovery and pre-trial rulings, the Panel has reminded litigants in the past that an MDL is not the only method available for reducing duplicative discovery and addressing the convenience of the parties and witnesses. After denying centralization in *In re Children's Personal Care Products Liab. Lit.*, the Panel explained that:

> [T]he parties could employ the same notices for depositions, interrogatories and request for production in all actions, thereby making them applicable in each action; the parties could seek to agree upon a stipulation that any discovery relevant to more than one action is usable in all those actions; and any party could seek orders from the involved courts to coordinate their pretrial efforts.

655 F.Supp.2d 1365, 1366 (J.P.M.L. 2009) (*citing*, *inter alia*, MANUAL FOR COMPLEX LITIGATION, § 2014 (2004)). That there are alternatives to MDL transfer for easing the burdens of discovery and pre-trial proceedings is particularly clear with regard to the Illinois Cases. Twenty-six total Plaintiffs joined their claims under two complaints pursuant to 735 ILCS 5/2-404. Thus, coordinated discovery and pre-trial rulings as to many of the issues are equally available and already underway in the Illinois Cases. Indeed, the primary difference between the collective treatment Pfizer seeks from an MDL court and the group discovery and collective pre-

trial rulings available in the Illinois state court is that the latter will be overseen from the outset by a court assured of its proper jurisdiction.

**3. Transfer Of The Illinois Cases Does Not Serve The Convenience Of The Parties**

Plaintiffs in the Illinois Cases chose to litigate in Illinois. Plaintiffs in the Illinois Cases are all represented by the same Illinois counsel. Plus, Pfizer did, and still does, business in the State of Illinois. Hence, there is no other forum that would be more convenient to the parties, on the whole, than the Circuit Court of St. Clair County, Illinois where Plaintiffs cases were originally filed.

If transfer is ordered and the Illinois Cases pass to the MDL, Plaintiffs will not only face the inconvenience and delay inherent in having their cases transferred, it is also likely that Plaintiffs could be forced to proceed for months, or even years, to prepare their case without knowing the ultimate forum or the governing law. It is also significant to Plaintiffs' case preparations to know whether their experts will be subject to the federal *Daubert* standard or the Illinois state court's *Frye* standard. Launching Plaintiffs into consolidated discovery and pre-trial activities rather than allowing the Southern District of Illinois to immediately resolve these potentially dispositive threshold matters is highly prejudicial to Plaintiffs' trial preparations.

**4. Absent Pfizer's Manipulative Wrongful Removals, Only Ten Cases Would Be Subject To Transfer For Consolidated Pre-Trial Proceedings.**

The universe of cases properly subject to a Zoloft MDL is much smaller than Pfizer suggests. That is, while the drug maker asserts that there are fifty-eight Zoloft cases eligible for coordination in an MDL, forty-eight of them were wrongfully removed from their proper state court forums to bolster an argument for federal consolidation that Pfizer must have otherwise felt

was lacking.[9] The JPML has denied transfer of a docket of 10 cases in five different districts where it was not convinced that centralization would serve the convenience of the parties and witnesses or further the just and efficient conduct of this litigation. *See In re Tyson Foods, Inc., Meat Processing Facilities Fair Labor Standards Act (FLSA) Litigation*, 581 F. Supp. 2d 1374.

Even if there is no magic number of cases entitling or disqualifying Pfizer from obtaining MDL treatment, the fact that there are so few cases truly at issue is significant because an inverse relationship exists between the number of actions subject to transfer and the magnitude of the burden born by the moving party. That is, where the number of cases seeking to be consolidated is small, Pfizer bears a greater burden to demonstrate that the common questions of fact are so complex and the common discovery is so time consuming as to overcome the inconvenience to the plaintiff of having their action transferred. MULTIDISTRICT LITIGATION MANUAL 5:18 (2011). Pfizer has not met that burden.

**B. ALTERNATIVELY, RESERVATION SHOULD BE GIVEN TO THE SOUTHERN DISTRICT OF ILLINOIS TO DECIDE MOTIONS FULLY UNDER SUBMISSION AND DISPOSITIVE TO THE TRANSFER ISSUE**

While not affecting this Panel's *authority* and ability to order a transfer of actions, the Panel has acknowledged that the pendency of motions before the transferor court may impact the *timing* of requested Panel action. The Illinois Cases are certainly cases that require deference to the status of matters in the transferor court as motions for remand and responses are fully under submission and decisions remanding both Illinois Cases is imminent. Pfizer moved to stay the

[9] In addition to two Illinois Cases, 45 Pennsylvania WKH Cases that were originally filed in the Philadelphia Court of Common Pleas and were wrongfully removed to the Eastern District of Pennsylvania and one Ohio State court case was wrongfully removed by Pfizer to the Northern District of Ohio (one case). Motions to remand have been filed in all of the wrongfully removed cases, and in addition to the Court's preliminary suggestion of imminent remand in the Illinois Cases, one WCH Pennsylvania case has already been remanded with others argued on similar grounds pending.

proceedings in the transferor court pending the motion to transfer, however, the Court immediately denied the motion. In denying Pfizer's motion and preliminarily suggesting that federal diversity does not exist in its January 17, 2012 Notice and Order in Saville, the transferor court has essentially requested deference from the Panel so that it may decide the motions pending before it. Precedent in the Southern District of Illinois and Seventh Circuit demands remand on the issue of the so-called misjoinder doctrine. *See In re Plumbing Fixture Cases*, 298 F. Suppp. 484, 496 (J.P.M.L. 1968). The court has repeatedly disaffirmed the misjoinder doctrine as an unauthorized intrusion on state court jurisdiction and has concluded that the state rules of joinder do not implicate or expand federal subject matter jurisdiction. *See Aranda v. Walgreen Co.*, 3:11-cv-654-JPG-DGW, 2011 U.S. Dist. LEXIS 954, at *5-7 (S.D. Ill. Aug 24, 2011).

The Panel has recognized that where appropriate, the principles of comity may require timing its actions and constructing its order in a manner which will permit the transferor court to reach a timely decision on [the issues of remand] without abrupt, disconcerting, untimely or inappropriate orders of transfer. I*n re Resource Exploration, Inc., Securities Litigation*, 483 F.Supp. 817, 822 (J.P.M.L. 1980).

Deferring a ruling on Pfizer's motion to transfer until after the Southern District of Illinois has ruled on the pending motions to remand would be advantageous for two reasons. First, it would allow the issue of fraudulent misjoinder – which in this instance is unique to the Illinois Cases -- to be decided by the Southern District of Illinois, which has already examined the issue, a number of times and which is almost certain to encounter the same issue again in other drug litigation. Second, if the motions were granted, the question of consolidating the Illinois Cases would become moot. Meanwhile, if the motions were denied the Illinois Cases

could be designated as tag-along cases and transferred into the MDL at any time. Consequently, there is no downside to deferring a ruling of Pfizer's Section 1407 motion.

Simply stated, the most just and expeditious course of action is to defer a ruling on Pfizer's motion to transfer until after the Southern District of Illinois has issued rulings upon the motions to remand that are potentially dispositive of the transfer issue.

**C. IF MDL TREATMENT IS GRANTED, THE PANEL SHOULD CENTRALIZE THE MDL IN THE EASTERN DISTRICT OF PENNSYLVANIA.**

Plaintiffs do not believe that transfer or consolidation of the wrongfully removed actions is appropriate or warranted. If, however, the Panel disagrees and opts to grant transfer, Plaintiffs respectfully request, along with the majority of Plaintiffs subject to this transfer, that the Panel select the United States District Court for the Eastern District of Pennsylvania as the transferee forum and the Honorable Cynthia M. Rufe as the transferee judge.

Selection of the Eastern District of Pennsylvania as the transferee court and Judge Rufe as the transferee judge is preferable and proper for numerous reasons:

- The largest number of Zoloft cases (46 out of 58) are currently pending in the Eastern District of Pennsylvania.
- Two of the first three Zoloft cases filed in a federal court were filed in the Eastern District of Pennsylvania and are being overseen by Judge Rufe.
- Zoloft litigation is further progressed in the Eastern District of Pennsylvania than in any other federal jurisdiction.
- Judge Rufe is experienced in managing a pharmaceutical MDL having recently managed the large-scale Avandia MDL.

For these reasons, Plaintiffs respectfully submit that, if centralization is not denied (as it should be) that the Eastern District of Pennsylvania would provide the most appropriate venue and that Judge Cynthia Rufe should preside over the Zoloft MDL.

## III.
## CONCLUSION AND PRAYER

For the reasons set forth herein, Plaintiffs pray that Pfizer's motion to transfer related actions for coordinated pre-trial proceedings be denied in its entirety. Alternatively, Plaintiffs pray that Pfizer's motion to transfer be denied with respect to the Illinois Cases. In the further alternative, Plaintiffs pray that the Court stay any ruling on Pfizer's motion to transfer the Illinois Cases until after the Southern District of Illinois has ruled on the pending motions to remand. Lastly, if Pfizer's motion to transfer is not denied outright and if the Illinois Cases are not excluded from the transfer order, Plaintiffs request that the cases be transferred and consolidated in the Eastern District of Pennsylvania. Plaintiffs additionally pray for all other and further relief to which they may be justly entitled.

Respectfully Submitted,

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**ATTORNEYS FOR PLAINTIFFS**

BEFORE THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

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|---|---|---|
| IN RE ZOLOFT PRODUCTS LIABILITY LITIGATION | ) ) ) | MDL DOCKET NO. 2342 |

**PLAINTIFFS' COMBINED RESPONSE AND MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT PFIZER'S INC.'S MOTION TO TRANSFER RELATED ACTIONS TO THE SOUTHERN DISTRICT OF NEW YORK**

COME NOW Plaintiffs Trenton V. Casl, a minor by Kim Wietor, Guardian and Kim Wietor, individually; Ric Parsley, III, a minor by Kristen Parsley, Guardian and Kristen Parsley and Ric Parsley, individually; Delaney Rosenkranz, a minor by Kathleen Rosenkranz, Guardian and Kathleen Rosenkranz and Richard Rosenkranz, individually; and Lara Richburg-Rodriguez and Luis Alberto Rodriguez, individually and as the Natural Parents of Abigail Belen Rodriguez, a minor, Deceased, Plaintiffs in the actions identified at Exhibit "A" (hereinafter "Plaintiffs") and submit this, their combined response and memorandum of law in opposition to the motion to transfer filed by Pfizer, Inc. ("Pfizer"). In support thereof, Plaintiffs would respectfully show the Panel as follows:

## I. INTRODUCTION

Plaintiffs' actions comprise four (4) of forty-six (46) wrongfully removed cases originally filed in the Philadelphia Court of Common Pleas. In its Section 1407 motion, Pfizer would have the Panel believe that there are "fifty-nine1 related federal actions." In fact, had Pfizer not wrongfully removed every state-court case on January 18, 2012, only be ten (10) cases would

[1] Pfizer's motion refers to fifty-nine federal actions, but one of those cases, *Robinson v. Wolters Kluwer Health Inc. et al.*, has already been remanded to state court due to the presence of forum defendant Wolters Kluwer Health Inc. and is therefore not eligible for MDL transfer.

potentially be eligible for MDL consolidation.2 Pfizer has thus attempted to manipulate the system by inflating the number of federal cases to create the illusion that federal coordination in the form of an MDL is merited.

The forty-six cases wrongfully removed from Pennsylvania state court (the "Pennsylvania WKH cases"),3 including the four cases identified on Exhibit "A" commonly include a Pennsylvania defendant, Wolters Kluwer Health, Inc. ("WKH"). WKH is not a defendant in any of the other Zoloft cases pending against Pfizer. The Pennsylvania WKH cases also involve dispositive motions that relate exclusively to WKH. Finally, there are two Eastern District of Pennsylvania opinions (as well as other precedent) indicating that federal jurisdiction does not exist in the Pennsylvania WKH cases. For these reasons and in the interest of justice and efficiency, Pfizer's motion to transfer the Pennsylvania WKH cases should be denied. Alternatively, transfer of the Pennsylvania WKH cases should be stayed until there is a resolution of dispositive motions currently pending before the transferor court. Finally, should the Panel be inclined to establish an MDL, the most appropriate venue for consolidation is the Eastern District of Pennsylvania.

## II. ARGUMENT AND AUTHORITIES

### A. The Pennsylvania WKH cases should not be transferred.

In addition to claims against Pfizer, the Pennsylvania WKH cases also assert claims against Wolters Kluwer Health Inc. ("WKH"), the entity responsible for the patient education

[2] The wrongfully removed cases consist of forty-six actions that were originally filed in the Philadelphia Court of Common Pleas but that were removed to the Eastern District of Pennsylvania despite the presence of forum defendant Wolters Kluwer Health Inc. Three additional actions were wrongfully removed by Pfizer from state courts in Illinois and Ohio to the Southern District of Illinois (two cases) and to the Northern District of Ohio (one case). The Ohio case included claims against the Ohio distributor, Cardinal Health. The Illinois cases lack diversity jurisdiction due to the presence of a non-diverse Plaintiff.

[3] The forty-six Pennsylvania WKH Cases consist of four cases filed by the responding Plaintiffs listed on Exhibit "A" and represented by the undersigned counsel together with an additional forty-two cases filed by three other firms on behalf of other plaintiffs. Plaintiffs in all forty-six Pennsylvania WKH Cases oppose Pfizer's motion to transfer their cases to the Southern District of New York.

monograph ("PEM") included with the Zoloft prescriptions at issue. The Pennsylvania WKH cases are the only Zoloft cases involving claims against WKH. Plaintiffs' claims against WKH are presently the subject of a motion to dismiss and multiple motions to remand pending in the Eastern District of Pennsylvania.4 Given the distinct and jurisdiction-specific issues surrounding the Pennsylvania WKH cases, the Pfizer's motion for coordinated pretrial proceedings should be denied, or the Pennsylvania WKH cases should be excluded.

**1. Pfizer has not met the statutory requirements of Section 1407.**

To meet the statutory mandates of 28 U.S.C. § 1407, three factors are required. First, the cases to be transferred must involve common questions of fact. Second, the transfer must be for the "convenience of parties and witnesses." Finally, the transfer must "promote the just and efficient conduct of the actions." Pfizer, as the party seeking consolidation, bears the heavy burden of establishing all three criteria of Section 1407. *In re 21st Century Productions, Inc. "Thrilsphere" Contract Litigation*, 448 F.Supp. 271, 273 (J.P.M.L. 1978)("[T]he movants are under a heavy burden. . . we rule that movants have not met that burden."). Transfer should be denied if any one of the three Section 1407 factors is missing. See *In re Highway Acc. Near Rockville, Conn.*, 388 F.Supp. 574, 575 (J.P.M.L. 1975). Here, Pfizer has failed to carry its burden with respect to two of the three mandatory Section 1407 criteria. 5

**2. Transfer would not promote the just and efficient conduct of the litigation.**

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[4] In *Martinez v. Wolters Kluwer Health, Inc. et al.*, No. 2:11-CV-07427 (E.D. Pa), WKH has filed a motion to dismiss to which the respective plaintiffs have responded in opposition. The motion to dismiss is pending before Judge Joyner. It is anticipated that WKH will file similar motions to dismiss in each of the other Pennsylvania WKH cases that are currently before Judge Joyner on Plaintiffs' motions to remand. Consequently, it is reasonable to expect that the holding reached on WKH's motion to dismiss in the *Martinez* action will be applied to all forty-six Pennsylvania WKH cases.

[5] Plaintiffs acknowledge that the cases at issue may involve some common question of fact related to Pfizer's conduct in connection with the drug Zoloft. Yet, while the existence of common questions of fact is a prerequisite for coordinated treatment, it is not determinative of whether there should, in fact, be a Section 1407 transfer. *In re Cessna Aircraft Distributorship Antitrust Litigation*, 460 F.Supp. 159, 161-62 (J.P.M.L 1978)("While we recognize the existence of common questions of fact, a mere showing that such questions exist is not sufficient, in and of itself, to warrant transfer by the Panel.").

The benchmark of Section 1407 coordination is whether centralization would further the "just" and "efficient" conduct of the litigation. S. Rep. No. 454, 90th Congress, 1st Sess. 2 (1967)("[T]he main purpose of transfer for consolidated or coordination of pretrial proceedings is to promote the ends of efficient justice."). Consequently, Section 1407 consolidation should be denied where: (1) transfer is sought for purposes contrary to the interests of justice, or (2) transfer would not promote efficiency in the litigation.

**a. Justice is not served by transfer of the Pennsylvania WKH cases.**

Pfizer's motion to transfer is nothing more than blatant forum shopping. Recently, in another Zoloft case, the Eastern District of Pennsylvania rejected Pfizer's argument that Pennsylvania defendant WKH was fraudulently joined. *Robinson v. Wolters Kluwer Health, Inc., et al.*, No. Civ. A. 11-5702, 2011 WL 6009980 (E.D.Pa. Dec. 2, 2011) (Judge Kelly presiding)(attached hereto as Exhibit "B"). Just prior to Robinson, the Eastern District of Pennsylvania found that WKH was not fraudulently joined in an Accutane case. *Slater v. Hoffman-La Roche, Inc*., et al, 771 F. Supp. 2d 524 (E.D.Pa. 2011) (Judge Dubois presiding)(attached hereto as Exhibit "C"). Given these consistent rulings by Eastern District judges, 6 Pfizer now seeks an MDL as a way to attain what Pfizer views as a more preferable

[6] The uniform rulings from two different Eastern District of Pennsylvania judges are also consistent with the orders of every other Court to consider the issue – all of which have found a colorable claim against WKH and ordered the case remanded. *See* Memorandum Order, *Farmer v. Wyeth, et al.*, Case No. 4:11-CV-348-CDP, 2011 WL 2462066, (E.D.Missouri, Eastern Division, June 17, 2011); Memorandum Order, *Lyons v. Wyeth, et al.*, Case No. 4:11-CV-365-CDP, 2011 WL 2462071, (E.D.Missouri, Eastern Division, June 17, 2011); Memorandum Order, *Ferguson v. Wyeth, et al.*, Case No. 4:11-CV-00360-SNLJ (E.D.Missouri, Southeastern Division, June 8, 2011); Memorandum Order, *Franzman v. Wyeth, et al.*, Case No. 4:11-CV-00362-CAS, 2011 WL 3847420 (E.D.Missouri, Eastern Division, Aug. 26, 2011); Memorandum Order, Nic*ely v. Wyeth, et al.*, Case No. 4:11-CV-338-CDP, 2011 WL 2462060 (E.D.Missouri, Eastern Division, June 17, 2011); Memorandum and Order, *Lawson v. Wyeth, et al.*, Case No. 4:11-CV-364-RWS, 2011 WL 3608025 (E.D.Missouri, Eastern Division, Aug. 16, 2011); *Newby v. Wyeth, Inc., et al.*, Case No. 4:11-CV-00339-AGF, 2011 WL 5024572 (E.D.Missouri, Eastern Division, October 21, 2011). Plaintiffs know of no order from any court (and Pfizer has cited none) finding that a PEM defendant was fraudulently joined. To the contrary, every court presented this issue has found the PEM defendant to be properly joined and has ordered the case remanded to state court.

forum and an escape route from the binding precedent in the Eastern District of Pennsylvania. Section 1407 is not to be used for such purposes. *In re Motion Pictures "Standard Accessories" & "Pre-Vues" Antitrust Litigation*, 339 F.Supp. 1278, 1280-81 (J.P.M.L. 1972)(explaining that transfer under Section 1407 is not appropriate as a means to obtain a district judge that may be more favorably disposed to the movant's contentions); *In re Highway Acc*., 388 F. Supp. 574, 576 (denying motion to transfer in part because the "plaintiff's request for transfer was not motivated by a desire to achieve the purposes for which Section 1407 was designed, but rather by a desire to circumvent [other] obstacles."). Here, Pfizer is not seeking to promote justice and efficiency, but rather, is seeking to change venue for the purpose of avoiding adverse rulings.

**b. Transfer of the Pennsylvania WKH cases would not promote efficiency.**

Where it would not further the efficient conduct of the litigation, Section 1407 centralization should be denied. *In re Solaia Technology LLC Patent & Antitrust Litigation*, 346 F.Supp.2d 1373 (J.P.M.L. 2004). Pfizer's touted efficiency gains are largely illusory as they relate to the Pennsylvania WKH Cases. There are two main reasons transferring the Pennsylvania WKH cases from the Eastern District of Pennsylvania to an MDL would be inefficient. First, the Eastern District of Pennsylvania has great familiarity with the distinct issues surrounding WKH's liability in the Pennsylvania WKH cases. Second, the viability of the claims asserted against Pennsylvania defendant WKH is a question presented exclusively by the Pennsylvania WKH cases. Transferring the cases to an MDL, therefore, would require a new court to expend considerable time and resources sorting out this specific issue which is unique to the Pennsylvania WKH cases. Doing so would certainly not promote efficiency.

**i. It is most efficient to have the issues of PEM liability in the Pennsylvania WKH cases ruled on by the Eastern District of Pennsylvania.**

The judges of the Eastern District of Pennsylvania are already familiar with the Zoloft litigation and the issue of PEM liability. Eastern District of Pennsylvania Judges Kelly, Rufe and Joyner have all had Zoloft cases pending in their courts. Likewise, Eastern District of Pennsylvania Judges Dubois, Joyner and Kelly have presided over motions to dismiss and/or motions to remand concerning WKH. See *Robinson v. Wolters Kluwer Health, Inc., et al*., No. Civ. A. 11-5702, 2011 WL 6009980 (E.D.Pa. Dec. 2, 2011); *Slater v. Hoffman-La Roche, Inc., et al*, 771 F.Supp.2d 524 (E.D.Pa. 2011); Motion to Dismiss, *Martinez v. Wolters Kluwer Health, Inc. et al.*, No. 2:11-CV-07427 (E.D. Pa). Additionally, WKH is a Pennsylvania entity within the Eastern District of Pennsylvania. Thus, the question of WKH's liability as a PEM defendant has, and will continue to, arise before the District Courts in the Eastern District in other pharmaceutical litigation.

Conversely, should the Panel establish an a MDL beyond the Eastern District of Pennsylvania, such a court would not have the familiarity or expertise in handling issues of PEM liability. Further, there would be little chance that such an MDL court would have the occasion to decide the PEM issue repeatedly. The lack of superior experience with the particular issue being adjudicated weighs against having that matter decided by the MDL court. *In re Massachusetts Diet Drug Litig*, 338 F.Supp.2d 198, 201 (D. Mass. 2004) (denying a stay pending transfer where "the MDL Court, respectfully, has no superior experience or expertise [with this matter]").

**ii. Efficiency is not furthered by having an MDL Court bogged down by myriad PEM issues that only exist in the Pennsylvania WKH Cases.**

It is also significant that the validity of claims against a Pennsylvania PEM have not been raised, and are not likely to be raised, in any Zoloft case other than the ones filed before the

Philadelphia Court of Common Pleas. There is a reason all of the Zoloft cases involving claims against WKH were filed in a single Pennsylvania state court – because that Court is located in the state of WKH's residence. The likelihood that WKH would be sued in any other state forum is practically nil. Hence, the issues that have dominated pre-trial efforts in the Pennsylvania WKH Cases – whether valid claims exist against WKH – are not ones which the Zoloft MDL court could expect to repeatedly encounter.

Many courts hold that a motion presenting issues not likely to arise in other courts should be adjudicated in the district court rather than in a consolidated adjudication.

> There are many cases in which a motion to remand will raise questions of fact or law that would not otherwise arise in the MDL proceedings. In such cases, the interest of judicial economy is best served by denying the motion to stay and adjudicating the motion to remand in the court in which the action is pending.

*Edsall v. Merck & Co., Inc*., No. 05-2244 MHP, 2005 WL 11867730 (N.D.Cal., Aug. 4, 2005); *See also, Johnson*, 354 F.Supp.2d at 740 (denying stay pending transfer and deciding remand motion in part because "the issue presented by this remand motion is unique to this case"); *In re Massachusetts Diet Drug Litig*, 338 F.Supp.2d 198, 201 (D. Mass. 2004) (denying a stay pending transfer where "it does not appear that the issue... is one that is likely to arise in other diet drug litigation in other courts.''); *Wisconsin v. Abbott Labs*., No. 04-C-447-C, 2004 WL 2055717, at *1 (W.D. Wis. Sept. 9, 2004) ("It is appropriate to take up the jurisdictional issue in this court because. . . there is no apparent overlap between the jurisdictional issue presented in this case and the jurisdictional issues raised in other cases that have been transferred."); *Board of Trustees of Teachers' Ret. Sys. of State of III. v. Worldcom, Inc.*, 244 F.Supp.2d 900, 903 (N.D.Ill. 2002) ("[W]hen remand motions in cases potentially subject to MDL consolidation raise unique issues of law or fact, channeling the decisions to a single court would result in little or no savings of judicial resources").

Plaintiffs understand that the pendency of a remand or a dismissal motion is not ordinarily perceived by the Panel as an obstacle to MDL treatment. That is because in the typical MDL transfer scenario, cases with pending motions to remand are relatively rare among the many federal court cases eligible for transfer. Thus, even if the occasional remand motion presented a unique issue, permitting the rare case to derail coordination of all the other cases would be letting the tail wag the dog. That's not the case here. Here, the 48 wrongfully removed cases where remand motions are pending make up the overwhelming bulk of the cases Pfizer seeks to transfer. Thus, the unusual posture of this litigation makes it reasonable to exclude the Pennsylvania WKH Cases from any transfer order until the pending motions to dismiss and remand are resolved – even if the Panel would not take that approach in a more traditionally postured case.

Because the currently pending motions to dismiss and remand turn upon an issue (the viability of claims against Pennsylvania defendant, WKH) that is unlikely to arise in any state other than Pennsylvania, this Court simply has no reason to refrain from allowing the Eastern District of Pennsylvania to decide that issue. The best course of action is to decline to transfer them away from the Eastern District of Pennsylvania – which is already familiar with PEM issues and which is the court most likely to encounter PEM issues again in this (and other) drug litigation.

**iii. More efficient means exist for reducing duplicative discovery and pre-trial rulings in the Pennsylvania WKH Cases.**

While Pfizer professes a concern for duplicative discovery and pre-trial rulings, the Panel has reminded litigants in the past that an MDL is not the only method available for reducing duplicative discovery and addressing the convenience of the parties and witnesses. After

denying centralization in *In re Children's Personal Care Products Liab. Lit*., the Panel explained that:

> [T]he parties could employ the same notices for depositions, interrogatories and request for production in all actions, thereby making them applicable in each action; the parties could seek to agree upon a stipulation that any discovery relevant to more than one action is usable in all those actions; and any party could seek orders from the involved courts to coordinate their pretrial efforts.

655 F.Supp.2d 1365, 1366 (J.P.M.L. 2009) (citing, inter alia, MANUAL FOR COMPLEX LITIGATION, § 2014 (2004)). That there are alternatives to MDL transfer for easing the burdens of discovery and pre-trial proceedings is particularly clear with regard to the Pennsylvania WKH Cases. Prior to their wrongful removal, Plaintiffs had requested and were on the verge of securing a mass tort designation in the Philadelphia Court of Common Pleas. [*See* Plaintiffs' Petition for Mass Tort Status (attached hereto as Exhibit "D")]. Thus, coordinated discovery and pre-trial rulings are equally available for the Pennsylvania WKH Cases if transfer is denied and the anticipated remand orders are entered. Indeed, the primary difference between the collective treatment Pfizer seeks from an MDL court and the group discovery and collective pre-trial rulings available in the Pennsylvania state court is that the latter will be overseen from the outset by a court assured of its proper jurisdiction.

**3. Transfer of the Pennsylvania WKH cases does not serve the convenience of the parties.**

Plaintiffs in the Pennsylvania WKH Cases chose to litigate in Pennsylvania. Plaintiffs in the Pennsylvania WKH Cases are all represented by the same Pennsylvania counsel. Plus, Pennsylvania is the residence of defendant WKH. Hence, there is no other forum that would be more convenient to the parties, on the whole, that the Philadelphia Court of Common Pleas

where Plaintiffs cases were originally filed or the Eastern District of Pennsylvania where they are currently pending.

If transfer is ordered and the Pennsylvania WKH Cases pass to the MDL, Plaintiffs will not only face the inconvenience and delay inherent in having their case transferred, it is also likely that Plaintiffs could be forced to proceed for months, or even years, to prepare their case without knowing the ultimate forum or the governing law. That is, Plaintiffs' motions to remand present a choice of laws issue that is central to the case. It is also significant to the preparation Plaintiffs' cases to know whether their experts will be subject to the federal *Daubert* standard or the Pennsylvania state court's *Frye* standard. Launching Plaintiffs into consolidated discovery and pre-trial activities rather than allowing the Eastern District of Pennsylvania to immediately resolving these potentially dispositive threshold matters is highly prejudicial to Plaintiffs' trial preparations.

**4. Absent Pfizer's manipulative wrongful removals, only ten cases would be subject to transfer.**

While Pfizer claims there are fifty-eight Zoloft cases eligible for coordination in an MDL, forty-eight of them were wrongfully removed from their proper state court forums to manufacture an argument for consolidation that Pfizer must have otherwise felt was lacking. 7

The fact that there are so few cases actually at issue is significant because an inverse relationship exists between the number of actions subject to transfer and the weight of the burden born by the moving party. Here, where the number of cases to be consolidated is small, Pfizer bears a heavier burden to demonstrate that the common questions of fact are so complex and the common discovery is so time-consuming as to overcome the inconvenience to the Plaintiffs of

[7] In addition to the 45 Pennsylvania WKH Cases that were originally filed in the Philadelphia Court of Common Pleas and that were removed to the Eastern District of Pennsylvania, three additional actions were wrongfully removed by Pfizer from their proper state court forums to the Southern District of Illinois (two cases) and to the Northern District of Ohio (one case). Motions to remand have been filed in all of the wrongfully removed cases.

having their actions transferred. MULTIDISTRICT LITIGATION MANUAL 5:18 (2011). Pfizer has not met that burden.

**B. In the alternative, the Panel should stay ruling on Pfizer's motion to transfer the Pennsylvania WKH cases until WKH's motion to dismiss and Plaintiff's motions to remand have been ruled upon by the Eastern District of Pennsylvania.**

The pendency of motions before a transferor court may impact the timing of requested Panel transfer. For example, when a dispositive motion is pending, the Panel has sometimes deferred its ruling on whether to transfer the specific cases until after the district court has issued its ruling.

> We are persuaded, on principles of comity, to defer our decision concerning transfer of the Pennsylvania action because of the pendency of the defendants' motion for summary judgment, which is fully submitted to the potential transferor judge.

*In re Resource Exploration, Inc., Securities Litigation*, 483 F.Supp. 817, 822 (J.P.M.L. 1980). *See* also *In re Kaehni Patent*, 311 F.Supp. 1342, 1344, (J.P.M.L. 1970) (staying transfer of action that had a motion to dismiss pending in district court until resolution of that motion while ordering the immediate transfer of all other actions).

As discussed at length herein, forty-six of the fifty-eight cases Pfizer seeks to consolidate include claims against Pennsylvania defendant, WKH, that are unique to the Pennsylvania-filed cases. Plaintiffs' claims against WKH are the subject of a motion to dismiss and multiple motions to remand that are currently briefed and pending before the Eastern District of Pennsylvania.

Deferring a ruling on Pfizer's motion to transfer until after the Eastern District of Pennsylvania has ruled on WKH's motion to dismiss and Plaintiffs' motions to remand is appropriate. First, it would allow the issue of WKH's potential liability – which is unique to Pennsylvania-filed cases -- to be decided by the Eastern District of Pennsylvania which has

already examined the issue twice and which is almost certain to encounter the same issue again in other drug litigation. Second, if either motion were granted, the question of consolidating the Pennsylvania WKH Cases would become moot. Meanwhile, if the motions were denied the Pennsylvania WKH Cases could be designated as tag-along cases and transferred into the MDL at any time. Consequently, there is no drawback to deferring a ruling of Pfizer's Section 1407 motion.

**C. If the Panel decides to create a Zoloft MDL, it should be in the Eastern District of Pennsylvania.**

Plaintiffs do not believe that transfer or consolidation of the wrongfully removed actions is appropriate or justified. However, should the Panel disagree, Plaintiffs respectfully request that the Panel select the United States District Court for the Eastern District of Pennsylvania as the transferee forum and the Honorable Cynthia M. Rufe as the transferee judge.

Selection of the Eastern District of Pennsylvania as the transferee court and Judge Rufe as the transferee judge is preferable and proper for several reasons. First, the greatest number of Zoloft cases (46 out of 58) are currently pending in the Eastern District of Pennsylvania. Additionally, two of the first three Zoloft cases filed in a federal court were filed in the Eastern District of Pennsylvania and are being overseen by Judge Rufe. Judge Rufe is experienced in managing a pharmaceutical MDL having recently managed the large-scale Avandia MDL. Choosing the Eastern District of Pennsylvania as the MDL Court allows for coordination and expeditious transfers of the Pennsylvania WKH Cases (which make up the biggest bulk of the cases at issue) between the state and federal courts of Pennsylvania. Finally, the Eastern District of Pennsylvania is within the state where the majority of Plaintiffs chose to file their cases, where counsel for the forty-six Pennsylvania WKH Cases is located and where Defendant, WKH resides. Hence, it is a convenient forum for the majority of the parties. Additionally, Pfizer has

requested centralization in New York. It would not be inconvenient for Pfizer to litigate these cases in Pennsylvania. Indeed, it is relatively fast and inexpensive to travel between New York and Philadelphia via train.

For these reasons, and for the reasons set out by Plaintiffs Donna Amadio, Shannon Long and Christine Hopkins in their "Response to Pfizer, Inc's Motion to Transfer Related Actions to Southern District of New York" which Plaintiffs adopt and incorporate by reference, Plaintiffs respectfully submit that, if centralization is not denied (as it should be) that the Eastern District of Pennsylvania would provide the most appropriate venue and that Judge Cynthia Rufe should preside over the Zoloft MDL.

## III. Conclusion

For the reasons set forth herein, Plaintiffs pray that Pfizer's motion to transfer related actions for coordinated pre-trial proceedings is denied in its entirety. Alternatively, Plaintiffs pray that Pfizer's motion to transfer be denied with respect to the Pennsylvania WKH Cases. In the further alternative, Plaintiffs pray that the Court stay any ruling on Pfizer's motion to transfer the Pennsylvania WKH Cases until after the Eastern District of Pennsylvania has ruled on the pending motion to dismiss and motions to remand. Lastly, if Pfizer's motion to transfer is not denied outright and if the Pennsylvania WKH Cases are not excluded from the transfer order, Plaintiffs request that the cases be transferred and consolidated in the Eastern District of Pennsylvania. Plaintiffs additionally pray for all other and further relief to which they may be justly entitled.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I CERTIFY THAT ON February 13, 2012, a true and correct copy of Plaintiffs' Notice of Appearance was electronically filed with the Clerk of the panel using the CMECF system and was served on all counsel of record via CM/ECF.

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