BEFORE THE UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

IN RE PLAVIX® PRODUCT LIABILITY AND MARKETING LITIGATION	)	MDL DOCKET NO. 2418

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO TRANSFER RELATED ACTIONS FOR COORDINATED PRETRIAL PROCEEDINGS AND MEMORANDUM OF LAW

Plaintiffs hereby object through counsel, Pursuant to 28 U.S.C. § 1307 and Rule 7.2(a) of the Rules of the Judicial Panel on Multidistrict Litigation to Defendants Bristol-Myers Squibb Company, Sanofi-Aventis U.S. L.L.C., Sanofi-Aventis U.S. Inc., and Sanofi-Synthelabo, Inc.'s Motion to Transfer Related Actions for Coordinated Pretrial Proceedings.

BACKGROUND

On December 14, 2011, this Panel previously denied Defendants' request to centralize federal proceedings related to injuries suffered by patients who ingested Plavix and ruled that:

> On the basis of the papers filed and hearing session held, we conclude that Section 1407 centralization would not serve the convenience of the parties and witnesses or further the just and efficient conduct of this litigation. Certainly, these twelve actions, which are all either personal injury or wrongful death cases, do involve some common factual issues concerning the development, manufacture, regulatory approval, labeling, and marketing of Plavix, a popular anti-clotting drug.n2 The ten actions pending in the District of New Jersey, however, all were commenced in either 2006 or 2007, and are far more advanced than the other two actions, both of which were commenced in 2011. Moving defendants themselves acknowledge that they have completed all document production in the constituent District of New Jersey actions (approximately 3.5 million pages); the parties have served and responded to other written discovery; and most, if not all, depositions of the plaintiffs have been completed. See In re Ambulatory Pain Pump-Chondrolysis Prods. Liab. Litig., 709 F. Supp. 2d 1375, 1378 (J.P.M.L. 2010) (denying centralization of 102 personal injury actions, in part because the actions were at "widely varying procedural stages"). Furthermore, plaintiffs in the constituent District of New Jersey actions are barred, by court order, from seeking Plavix-related documents created in or after 2007,

> whereas plaintiffs with actions pending outside of that district appear to face no such bar. Centralizing the actions thus likely would delay the progress of the long-pending actions in the District of New Jersey, while providing little, if any, benefit to the plaintiffs therein.
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> *In re Plavix Prods. Liab. Litig.*, 829 F. Supp. 2d 1378 (J.P.M.L. 2011)

Little has changed in the federal dockets since the JPML's initial ruling to justify the Defendants' renewed motion for justification. It appears that since the JPML's ruling, only six new personal injury actions have been filed or properly removed to federal court. Four personal injury actions have been dismissed. Thus, there is a net increase of two personal injury cases that are properly in federal court since this Panel's last ruling.

On December 14, 2011 there were twelve personal injury actions related to Plavix pending in three federal districts. *Id.* Currently, there are fourteen personal injury actions, where remand is unlikely, pending in five federal districts.[1] The Snyder action appears to allege a cardiac injury which is factually distinct from the remaining thirteen personal injury actions that allege bleeding injuries and would be inappropriate for consolidation with bleeding injury cases. *See In re Celexa & Lexapro Prods. Liab. Litig.*, 2009 U.S. Dist. LEXIS 44901 (E.D. Mo. May 28, 2009) ("The JPML recently declined to transfer two personal-injury cases to the MDL because they involved injuries other than suicide, and I recently suggested the remand of another

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[1] IAN/5:12cv4091 Snyder et al v. Bristol-Myers Squibb Company et al.
LAW/6:12cv1785 Touriac et al v. Chenevert et al.
NJ/3:06cv6050 LABARRE v. BRISTOL-MYERS SQUIBB COMPANY et al
NJ/3:06cv6051 BEGLEY v. BRISTOL-MYERS SQUIBB COMPANY et al
NJ/3:07cv885 COOPER v. BRISTOL-MYERS SQUIBB COMPANY et al
NJ/3:07cv908 MATTSON v. BRISTOL-MYERS SQUIBB COMPANY et al
NJ/3:07cv1098 DAVIS v. BRISTOL-MYERS SQUIBB COMPANY et al
NJ/3:07cv1102 SOLOMON v. BRISTOL-MYERS SQUIBB COMPANY et al
NJ/3:07cv1184 NEWELL v. BRISTOL-MYERS SQUIBB COMPANY et al
NJ/3:12cv5059 KENNOVIN v. BRISTOL-MYERS SQUIBB et al
NYE/1:11cv3246 Chesney v. Bristol-Myers Squibb Company et al
NYS/1:11cv5159 Petit v. Bristol-Myers Squibb Company et al (consolidated)
NYS/1:11cv5165 Santana v. Bristol-Myers Squibb Company et al (consolidated)
NYS/1:11cv5168 Mcaleese v. Bristol-Myers Squibb Company et al (consolidated)
NYS/1:11cv5212 Burrow v. Bristol-Myers Squibb Company et al (consolidated)
PAE/2:12cv299 BROWN v. BRISTOL-MYERS SQUIBB COMPANY et al
PAE/2:12cv514 LITTLE v. BRISTOL-MYERS SQUIBB COMPANY et al

personal injury case that did not involve suicidality."). Therefore, there are currently only thirteen personal injury actions (where remand is unlikely) in four different jurisdictions that allege bleeding injuries caused by Plavix. The Defendants are essentially asking this Panel to reconsider their prior ruling because there is one additional personal injury action in one additional district.

The Plaintiffs feel it is inappropriate to include the California actions in consideration of Defendants' request for centralization. The current actions pending in the Northern District of California are currently in a revolving door that will inevitably lead back to California State Court. On August 10, 2012, eight multi-plaintiff actions alleging injuries caused by Plavix were remanded to California state court by Judge Chen of the Northern District of California, who ruled that:

> For the foregoing reasons, the Court agrees with the plaintiffs in the eight related cases that subject matter jurisdiction in each case is lacking. The Court emphasizes that there is a 'strong presumption against removal jurisdiction' and 'all ambiguit[ies] [are resolved] in favor of remand to state court." Hunter, 582 F.3d at 1042. Accordingly, the plaintiffs' motions to remand are granted.

Caouette v. Bristol-Myers Squibb Co., 2012 U.S. Dist. LEXIS 113980 (N.D. Cal. Aug. 10, 2012)

Subsequent to this remand ruling, eight additional multi-plaintiff actions were filed in California State Court alleging the same counts against the same Defendants. Despite Judge Chen's clear ruling that the federal court lacked jurisdiction, the Defendants again removed the cases to the District Court for the Northern District of California. These cases have all been assigned to Judge Chen, or there are motions pending to reassign the cases to Judge Chen.[2]

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[2] CAN/3:12cv4477 Kinney et al v. Bristol-Myers Squib Company et al
CAN/3:12cv4478 Burman v. Bristol-Myers Squib Company et al
CAN/3:12cv4615 Wauneta Raynor v. Bristol-Myers Squibb Company et al
CAN/3:12cv4616 Robinson v. Bristol-Myers Squibb Company et al
CAN/3:12cv4617 Meeks et al v. Bristol-Myers Squibb Company et al
CAN/3:12cv4619 Olmstead et al v. Bristol-Myers Squib Company et al
CAN/3:12cv4633 Dillard et al v. Bristol-Myers Squibb Company et al
CAN/3:12cv4641 Walden et al v. Bristol-Myers Squibb Company et al
CAN/3:12cv4642 Kaluza et al v. Bristol-Myers Squibb Company et al
CAN/3:12cv4803 Corkerin et al v. Bristol-Myers Squibb Company et al

Plaintiffs in all cases will be seeking remand to California state court and there is no reason to believe Judge Chen will alter his ruling regarding the lack of federal jurisdiction over these cases. The Defendants' removal of these actions serve only to waste the judicial resources of the federal courts of California, and now they are using these improper removals as justification for further wasting the resources of this Panel.

Additionally there are three actions Defendants seek to centralize which do not involve personal injury claims.[3] These allegations involve the improper marketing of Plavix as more effective than it is proven to be and seek restitution for the unnecessary costs incurred by third-party payers, state agencies and federal agencies as a result of the improper marketing of Plavix. Actions seeking economic damages are distinct from personal injury claims and do not involve common issues of fact and law. *See Id.* ("First, common issues of fact and law do not exist. The class-action representatives in the Universal Care case do not allege personal injury and seek only economic damages. They do not seek damages for suicidality, which is the issue before me in the MDL. As stated above, this MDL involves the causation of suicidality and the adequacy of Forest's warnings about suicidality, not any other alleged risks, side effects or economic damages caused from the use of Celexa or Lexapro."). Two of these non-personal injury actions also currently have remand motions pending which will likely be granted.

As this Panel has previously ruled, Plaintiffs have already suffered significant delays in their actions pending in the U.S. District Court for the District of New Jersey. MDL centralization in this matter would only serve to further delay these actions without any benefit to the Plaintiffs. Since the last denial of Defendants' motion for centralization, Plaintiffs have

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CAN/3:12cv5208 Aiken et al v. Bristol-Myers Squib Company et al.

[3] MSN/1:12cv179 Hood v. Bristol-Myers Squibb Company et al.
WVS/3:12cv587 Employer Teamsters-Local Nos. 175/505 Health and Welfare Trust Fund et al v. Bristol Myers Squibb Company et al
ILS/3:11cv246 United States of America et al v. Bristol Myers Squibb Company et al

suffered additional delays. Discovery was again stayed pending resolution of summary judgment motions over Plaintiffs' objections. Exhibit A. Summary Judgment Motions have been fully briefed since August 13, 2012, and the parties are now awaiting a date for oral argument or a ruling on the motions. Should the summary judgment motions be granted, the Defendants' proposed MDL would consist of seven personal injury actions in five districts, excluding the improperly removed California actions.

II. ARGUMENT

a. THE NEW JERSEY CASES ARE IN AN ADVANCED STAGE AND WILL BE SIGNIFICANTLY DELAYED BY FORMATION AND INCLUSION IN AN MDL.

The formation of an MDL is only appropriate where it "will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407 (a). The formation of an MDL and the transfer of actions at this late stage in the litigation between the Plaintiffs and Defendants would be unjust, inconvenient, and inefficient. An MDL would be unjust because it will undoubtedly and significantly delay trial dates for the New Jersey cases that have been ongoing for nearly five years and it will delay remand rulings in the New York and Illinois actions. An MDL would be inconvenient, and inefficient, because the Plaintiffs will be working at cross-purposes due to the disparity in available discovery documents and due to separate discovery tracks. Centralization is inappropriate where there is "substantial disparity in the progress of the actions." *JP Morgan Chase & Co. Fair Labor Standards Act (FLSA) Litig.*, 729 F. Supp. 2d 1354, 1355 (J.P.M.L. 2010). This Panel has routinely ruled that Section 1407 transfer is inappropriate where cases in other courts are in more advanced stages of proceedings. *In re Boehringer Ingelheim Pharms., Inc.*, 763 F. Supp. 2d 1377, 1378 (J.P.M.L. 2011) (Denying transfer because transfer would be of no benefit to plaintiffs who filed an action four years prior to the other actions.); *.In re: Schnieder National Carriers, Inc., Wage and Hour Employment Practices Litigation* (J.P.M.L. Order Denying Transfer, February 4, 2011) (Denying transfer where other Federal court cases were "in the midst of discovery and have dates set for a motion for class

certification and for trial."); *In re: Property Assessed Clean Energy (PACE) Programs Litigation,* MDL No. 2203 (J.P.M.L. Order Denying Transfer February 8, 2011) (denying transfer where other actions were proceeding before a single judge and remaining actions were in early stages because "[c]entralization could disrupt, or at least delay, the progress of the [existing] actions."); *In re: Student-Athlete Name & likeness Litigation,* MDL No. 2212 (Order Denying Transfer Feb. 4, 2011) (denying transfer "where actions in various courts were "proceeding efficiently," and there was "no reason to disrupt the progress of these actions" through centralization.)

In the present case, Plaintiffs in the New Jersey actions cannot afford any further delays in this already lengthy litigation. By the time formation of an MDL can be accomplished, the New Jersey Plaintiffs will either have their cases dismissed on summary judgment or will be in the last stages of preparation for trial. No benefit would be conferred to either Plaintiffs or Defendants if new cases are consolidated with the New Jersey actions only months before the parties will be ready for trial.

b. THERE ARE NOT A SUFFICIENT NUMBER OF CASES TO WARRANT MDL FORMATION AND SUITABLE ALTERNATIVE TO SECTION 1407 TRANSFER ARE AVAILABLE

Counsel for Plaintiffs now have hundreds of additional cases filed in California and Illinois and are more than willing to consult and cooperate with Defendants and other Plaintiffs in this matter to coordinate pretrial efforts among the few actions pending. Transfer pursuant to Section 1407 is therefore unnecessary. Despite Defendants' policy of improperly removing cases to federal court, the vast majority of Plavix actions will be litigated in state court, with only a handful of actions in the federal system. There are currently thousands of plaintiffs in Illinois and California state courts while there are less than twenty plaintiffs in federal court (excluding the clearly improperly removed California actions). Counsel for Plaintiffs are coordinating and cooperating with each other to advance this litigation.

Where a litigation is limited to a small number of cases and few district courts are involved then suitable alternatives to Section 1407 are available and transfer is inappropriate. *See In re Shoulder Pain Pump - Chondrolysis Prods. Liab. Litig.*, 571 F. Supp. 2d 1367 (J.P.M.L. 2008) (denying transfer where thirteen actions were pending in eight districts); *See In re Eli Lilly & Co. (Cephalexin Monohydrate) Patent Litigation*, 446 F. Supp. 242, 244 (J.P.M.L. 1978) (denying transfer where three actions were pending in three district courts because consultation and cooperation among the courts was a suitable alternative to Section 1407 transfer); *In re Fedex Ground Package Sys. Empl. Practices Litig.*, 366 F. Supp. 2d 1381, 1382 (J.P.M.L. 2005) (Denying transfer of seven action in seven districts because "alternatives to transfer exist that can minimize whatever possibilities there might be of duplicative discovery, inconsistent pretrial rulings, or both.") *In re Quaker Oats Trans-Fat Mktg. & Sales Practices Litig.*, 777 F. Supp. 2d 1344 (J.P.M.L. 2011) (Denying transfer of five actions in two district courts because the parties "have every ability to cooperate and minimize the possibilities of duplicative discovery and inconsistent pretrial rulings."); *In re: Rite Aid Corp. Wage and Hour Employment Practices Litig.*, 655 F.Supp.2d 1376, 1377 (J.P.M.L. 2009) (denying centralization of six actions pending in four districts and noting "[c]ooperation among counsel and the parties is particularly appropriate here, where plaintiffs in four of the six actions encompassed by the motion share counsel."); *In re CVS Caremark Corp. Wage & Hour Empl. Practices Litig.*, 684 F. Supp. 2d 1377, 1378 (J.P.M.L. 2010) ("Denying transfer of seven actions filed in four districts because "[a]vailable alternatives to centralization may minimize whatever possibilities might arise of duplicative discovery and/or inconsistent pretrial rulings.")

In the present case, there are only thirteen personal injury actions in four district courts alleging bleeding injuries that are now pending (excluding the California actions which will be remanded). The majority of the plaintiffs in federal court are represented by counsel who has a substantial number of cases in state court allowing for coordination of the handful of federal actions with the state court proceedings.

suitable alternatives to Section 1407 transfer are available in order to minimize the possibility of duplicative discovery. For example, notices for a particular deposition could be filed in all actions, thereby making the deposition applicable in each action; the parties could seek to agree upon a stipulation that any discovery relevant to more than one action may be used in all those actions; and any party could seek orders from the three courts directing the parties to coordinate their pretrial efforts. See [**5] In re Commercial Lighting Products, Inc. Contract Litigation, 415 F. Supp. 392, 393 (J.P.M.L. 1976). See also Manual for Complex Litigation, Parts I and II, §§ 3.11 (rev. ed. 1977). Moreover, the parties may seek stays of two of the actions pending the outcome of the third.

Additionally, consultation and cooperation among the three concerned district courts, if deemed appropriate by those courts, coupled with the cooperation of the parties, would be sufficient to minimize the possibility of conflicting pretrial rulings. See In re Texas Instruments, Inc. Employment Practices Litigation, 441 F. Supp. 928, 929 (J.P.M.L. 1977).

c. PLAINTIFFS OPPOSE CENTRALIZATION

All Plaintiffs with cases pending in Federal Court oppose centralization. A central consideration of the Panel must be whether the parties subject to centralization will be inconvenienced by MDL transfer. *See* 28 U.S.C. § 1407(a); *Manual for Complex Litigation (Fourth),* § 22.33 (the Panel will not grant transfer "unless transfer ultimately will serve the convenience of the parties and the courts"). The objection of all the plaintiffs in these minimal number of cases proves that inconvenience does not exist. All Plaintiffs face unnecessary delay should these cases be centralized and will obtain no benefit from centralization.

d. SHOULD THE PANEL GRANT CENTRALIZATION THEN THE NORTHERN DISTRICT OF CALIFORNIA WOULD BE THE MOST APPROPRIATE LOCATION

Should the Panel grant centralization, the Plaintiffs request that the Panel exclude the procedurally advanced New Jersey Actions, and centralize the action in the Northern District of California. Currently, hundreds of Plaintiffs have Plavix personal injury actions pending in the Northern District of California. These case will certainly be remanded, and upon remand the majority of Plavix personal injury claims will be pending in California State Court. The JPML regularly transfer case to the district where the majority of cases are filed. *See In re Republic National-Realty Equities Sec. Litigation*, 382 F. Supp. 1403, 1406 (J.P.M.L. 1974*); In re Deep Vein Thrombosis Litig.*, 323 F. Supp. 2d 1378, 1380 (J.P.M.L. 2004). Should the Panel decided that

centralization of the federal actions is necessary then the convenience of the parties would be best served by centralizing these cases in the same geographic location where most of the Plavix state court cases will be litigated. Transferring these actions to the Northern District of California would allow the parties to set status conferences with the federal and state courts on the same day and minimize travel for all parties involved.

III. CONCLUSION

For the aforementioned reasons, centralization is inappropriate in this matter. The New Jersey Plaintiffs have already suffered from substantial delays in this litigation, and the formation of an MDL will only serve to further delay this litigation with no benefit to these Plaintiffs or any plaintiffs. Additionally, alternative avenues to centralization are available as the number of cases and venues are minimal. Therefore. the Defendants motion for centralization should be denied.

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