BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE PLAVIX® MARKETING, SALES PRACTICE AND PRODUCTS LIABILITY LITIGATION (NO. II)	**MDL DOCKET NO. 2418**
UNITED STATES OF AMERICA, ET AL. V. BRISTOL-MYERS SQUIBB COMPANY, ET AL.	**S.D. ILL. NO. 3:11-cv-000246**

MEMORANDUM IN OPPOSITION OF BRISTOL-MYERS SQUIBB COMPANY, SANOFI-AVENTIS U.S. LLC, SANOFI US SERVICES INC., AND SANOFI-SYNTHELABO, INC.'S RENEWED MOTION FOR TRANSFER OF ACTIONS PURSUANT TO 28 U.S.C. § 1407 FOR COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS

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Plaintiffs United States of America, the Commonwealths of Massachusetts and Virginia, the States of California, Delaware, Connecticut, Maryland, Colorado, Florida, Georgia, Illinois, Indiana, Hawaii, Michigan, Montana, New Hampshire, New Mexico, New York, Nevada, Tennessee, Texas, New Jersey, Rhode Island, Oklahoma, Wisconsin, North Carolina, and Minnesota, the City of Chicago, and the District of Columbia *ex. rel.* Elisa Dickson (collectively, "Plaintiffs") file this response to Defendants Bristol-Myers Squibb Company, Sanofi-Aventis U.S. LLC, Sanofi US Services, Inc., and Sanofi-Synthelabo, Inc.'s (collectively, "Defendants") renewed motion for transfer, pursuant to 28 U.S.C. § 1407, of several actions to a district court in New Jersey or New York for centralized pretrial proceedings.

INTRODUCTION

Defendants' renewed motion to transfer is nothing more than an improper attempt at a second bite of the apple. As Defendants mention in passing in their motion, Defendants filed a virtually identical motion a year ago seeking to transfer certain Plavix related cases pursuant to 28 U.S.C. § 1407 to no avail. *See In re Plavix Prods. Liab. Litig.*, 829 F. Supp. 2d 1378 (J.P.M.L. 2011) (denying centralization). Pending before the Panel now is Defendants' lackluster attempt at resurrecting their previous motion. Contrary to Defendants' assertions, circumstances have not radically changed in the past twelve months to warrant consolidation of pretrial proceedings. And, Defendants have not put forth any new compelling arguments that would justify centralization. Defendants' motion should be denied.

BACKGROUND

Plaintiffs have brought multiple claims against Defendants arising from Defendants' misrepresentation of the efficacy of Plavix. Plavix (clopidogrel bisulfate) is a prescription blood thinner manufactured by Bristol-Myers Squibb Company ("BMS") and co-marketed in the

United States by BMS and the Sanofi-Aventis defendants (collectively, "Sanofi"). Defendants have exclusively marketed Plavix throughout the United States since 1998. All efforts to promote Plavix are jointly administered by Defendants. All Plavix advertisements, brochures, and promotional materials for Plavix feature both the BMS and Sanofi names.

Plavix is indicated for treatment of Acute Coronary Syndrome or established symptomatic peripheral artery disease and for use following recent myocardial infarction or stroke. Plavix is BMS's number one selling product. For the quarter ending March 31, 2010, BMS reported gross revenue of $4.81 billion, with Plavix sales accounting for over 30% of that total ($1.67 billion). In total, Plavix has generated more than $42 billion in sales for Defendants, including $6.6 billion in the United States alone in 2011.

Plavix costs approximately $4.00 per pill, whereas aspirin costs approximately $0.04 per pill. Such a price discrepancy is alarming when one learns that Plavix is actually no more effective than aspirin for certain indicated usages. Yet, Defendants, to this day, continue to promote Plavix as a superior drug to aspirin. Defendants' wrongful and deceptive promotion of Plavix's efficacy has led to a windfall of profits for Defendants.

Defendants engaged in a comprehensive scheme to defraud federal and state governments by illegally and deceptively promoting Plavix in order to increase Plavix sales. In particular, Defendants manipulated clinical trial data to support fraudulent claims regarding Plavix's efficacy relative to cheaper alternatives, such as aspirin. Further, Defendants mischaracterized clinical studies which contradicted their sales campaign. While promoting their false claims regarding Plavix, Defendants targeted physicians and prescribers whose patients relied upon public assistance programs for health care treatment, such as Medicaid, Medicare, the Civilian Health and Medical Program of the Uniformed Services, and other federally-funded or Illinois-

funded public assistance programs (collectively, "Government Payors"). Defendants thereby caused physicians to submit numerous prescriptions for Plavix that resulted in grossly inflated costs for Government Payors (and American and Illinois taxpayers), with no additional benefit to the covered patient than if the patient was taking aspirin. This scheme generated astronomical sales and profits for Defendants, which were fraudulently created by bilking federal and state governments.

Plaintiff/Relator Dickson filed a federal *qui tam* action in the name of the United States pursuant to 31 U.S.C. § 3730 for violations of the federal False Claims Act, 31 U.S.C. §§ 3729 *et. seq*., against Defendants for defrauding the federal Medicare program through their illegal and deceptive promotion of Plavix. Plaintiff/Relator Dickson also brought similar counts under the laws of twenty-nine other states and/or cities for damages arising from Defendants' deceptive acts.

Plaintiffs' First Amended Complaint, filed December 2, 2011, was unsealed on October 1, 2012. On October 15, 2012, without justification and seemingly for no other purpose than delay, Defendants filed a renewed motion for transfer and consolidation of Plaintiffs' action with other purportedly related cases. Defendants' motion is without merit and should be denied.

ARGUMENT

Civil actions involving one or more common questions of fact may be consolidated in any district for centralized pretrial proceedings under 28 U.S.C. § 1407. Consolidation is not automatic, however, and may not be justified even if some factual issues are shared. *See, e.g., In re Reglan/Metoclopramide Prods. Liab. Litig.*, 622 F. Supp. 2d 1380, 1381 (J.P.M.L. 2009).

Defendants would like the Panel to believe that over the past year, pending Plavix cases across the United States have "dramatically increased in size and kind," thereby warranting reconsideration by the Panel. *See* Defs.' Mem. Supp. Transfer at 1-2. However, Defendants have vastly overstated the limited changes that have occurred in Plavix litigation.

While Plaintiffs recognize that additional Plavix cases have been filed, the same reasons for the Panel's denial of centralization in 2011 still apply today. As this Panel has recognized, even when the number of cases has grown, if the same issues that weighed against centralization in the earlier docket remain, denial is still appropriate. *See In re Ambulatory Pain Pump-Chondrolysis Prods. Liab. Litig.*, 709 F. Supp. 2d 1375, 1377 (J.P.M.L. 2010). Thus, any increase in sheer number of Plavix cases is irrelevant because: (1) the postures of the proposed transfer cases are still vastly different; (2) common facts still do not predominate; and (3) voluntary cooperation is still a better alternative. *See In re Plavix*, 829 F. Supp. 2d at 1378 (denying centralization). There are simply no compelling reasons to consolidate the Plavix lawsuits.

I. Circumstances Have Not Changed Since The Panel's 2011 Denial Of Centralization To Justify Consolidation.

When Defendants filed their original motion for transfer pursuant to 28 U.S.C. § 1407 in September 2011, seventeen Plavix lawsuits were pending across five federal districts.[1] *See In re Plavix*, 829 F. Supp. 2d at 1378 n.1. Defendants now assert that

[1] As the Panel noted in its denial, Defendants' original motion for transfer sought to consolidate seventeen cases pursuant to 28 U.S.C. § 1407. *In re Plavix Prods. Liab. Litig.*, 829 F. Supp. 2d 1378, 1378 n.1 (J.P.M.L. 2011). However, when the Panel ruled on Defendants' motion, only twelve actions remained—the four actions pending in the Southern District of New York had been made into a single action, the action pending in the Southern District of Illinois had been remanded to state court, and the action pending in Arizona was dismissed. *Id.*

consolidation is needed because thirty-three federal Plavix cases are pending. *See* Defs.' Mem. Supp. Transfer Ex. A. However, a closer examination of these thirty-three cases reveals that this number is grossly inflated.

Included in Defendants' list of thirty-three cases allegedly in need of consolidation are cases that have either been dismissed or remanded. Notably, both *Crowe v. Bristol-Myers Squibb Co.*, No. 3:11-cv-06551 (D.N.J. filed Nov. 8, 2011) and *Newell v. Bristol-Myers Squibb Co.*, No. 3:07-cv-01184 (D.N.J. filed Mar. 12, 2007) have been dismissed.[2] Further, *Evans v. Bristol-Myers Squibb Co.*, No. 1:12-cv-05005 (N.D. Ill. removed June 22, 2012) has been remanded to state court.[3] Because these three actions are no longer pending in federal court, they should not be considered in determining the propriety of Defendants' motion. *See In re Plavix*, 829 F. Supp. 2d at 1378 n.1 (not considering cases that had been remanded or dismissed when ruling on Defendants' motion).

Moreover, twelve cases Defendants seek to have consolidated have pending motions to remand,[4] and six other cases have pending motions to dismiss.[5] Thus, these eighteen

[2] *See* October 2, 2012 Letter Order from the *Newell* Court and October 17, 2012 Response Letter, attached hereto as Exhibits A and B, respectively, and incorporated by reference as if fully set forth herein. *See* November 7, 2012 Dismissal Order from the *Crowe* Court, attached hereto as Exhibit C and incorporated by reference as if fully set forth herein.

[3] *See* October 16, 2012 Order, attached hereto as Exhibit D and incorporated by reference as if fully set forth herein.

[4] *See Aiken v. Bristol-Myers Squib Co.*, No. 3:12-cv-05208 (N.D. Cal. removed Oct. 9, 20120) (motion for remand pending); *Corkerin v. Bristol-Myers Squibb Co.*, No. 3:12-cv-04803 (N.D. Cal. removed Sept. 13, 2012) (same); *Kaluza v. Bristol-Myers Squibb Co.*, No. 3:12-cv-04642 (N.D. Cal. removed Sept. 5, 2012) (same); *Walden v. Bristol-Myers Squibb Co.*, No. 3:12-cv-04641 (N.D. Cal. removed Sept. 5, 2012) (same); *Dillard v. Bristol-Myers Squibb Co.*, No. 3:12-cv-04633 (N.D. Cal. removed Sept. 5, 2012) (same); *Olmstead v. Bristol-Myers Squibb Co.*, No. 3:12-cv-04619 (N.D. Cal. removed Sept. 4, 2012) (same); *Meeks v. Bristol-Myers Squibb Co.*, No. 3:12-cv-04617 (N.D. Cal. removed Sept. 4, 2012) (same); *Robinson v. Bristol-Myers Squibb Co.*, No. 3:12-cv-04616 (N.D. Cal. removed Sept. 4, 2012) (same); *Raynor v. Bristol-Myers Squibb Co.*, No. 3:12-cv-04615 (N.D. Cal. removed Sept. 4, 2012) (same); *Burman v. Bristol-Myers Squibb Co.*, No. 3:12-cv-04478 (N.D. Cal. removed Aug. 24, 2012) (same); *Kinney v.*

additional cases may also not be relevant to the Panel's ultimate decision once the pending motions are decided.

Taking these facts into account, only twelve pending Plavix cases assured of progressing in federal court remain out of the thirty-three Defendants propose to consolidate—not quite the dramatic increase in federal Plavix litigation that Defendants seek to imply.[6] In fact, the actual number of federal Plavix lawsuits likely subject to Defendants' motion for transfer has not increased at all since the Panel's denial of centralization in 2011. *See In re Plavix Litig.*, 829 F. Supp. 2d at 1378 (stating there were twelve cases pending when the Panel denied centralization). Defendants' would like the Panel to believe that Plavix litigation has skyrocketed over the past year; however, a closer

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Bristol-Myers Squib Co., No. 3:12-cv-04477 (N.D. Cal. removed Aug. 24, 2012) (same); *Hood v. Bristol-Myers Squibb Co.*, No. 1:12-cv-00179 (N.D. Miss. filed Aug. 17, 2012) (same).

[5] *See Employer Teamsters-Local Nos. 175/505 Health & Welfare Trust Fund v. Bristol Myers Squibb Co.*, No. 3:12-cv-00587 (S.D. W. Va. filed Feb. 27, 2012) (motion to dismiss pending); *Burrow v. Bristol-Myers Squibb Co.*, No. 1:11-cv-05212 (S.D.N.Y. removed July 27, 2011) (motion to dismiss pending); *McAleese v. Bristol-Myers Squibb Co.*, No. 1:11-cv-05168 (S.D.N.Y. removed July 26, 2011) (same); *Santana v. Bristol-Myers Squibb Co.*, No. 1:11-cv-05165 (S.D.N.Y. removed July 26, 2011) (same); *Petit v. Bristol-Myers Squibb Co.*, No. 1:11-cv-05159 (S.D.N.Y. removed July 26, 2011) (same); *see also Chesney v. Bristol-Myers Squibb Co.*, No. 1:11-cv-03246 (E.D.N.Y. filed July 5, 2011) (defendants will file a motion to dismiss amended complaint on or before November 12, 2012). Interestingly, the four Southern District of New York cases in which motions to dismiss are pending have actually been consolidated per the local rules into one single action. *See In re Plavix*, 829 F. Supp. 2d at 1378 n.1 (noted by the Panel in its 2011 denial). Thus, these cases are considered only one single case (not four) for purposes of determining whether consolidation is appropriate. *See id.*; *In re USS Trenton Disaster Litig.*, 383 F. Supp. 1406, 1407 (J.P.M.L. 1974) (treating eight New York cases that had been consolidated pursuant to local rules as one case for purposes of deciding a motion for transfer under 28 U.S.C. § 1407). Despite this, Defendants have listed the Southern District of New York cases as four separate actions in their motion, *see* Defs.' Mem. Supp. Transfer Ex. A; therefore, Plaintiffs have done the same so that the Panel is aware that motions to dismiss are pending for all four cases.

[6] Defendants have also included in their general discussion of pending federal Plavix cases eight cases from the Northern District of California that have been remanded to state court. *See* Defs.' Mem. Supp. Transfer at 7-8. These cases were remanded even before Defendants filed their motion and therefore should not be considered by the Panel when ruling on Defendants' motion. *See In re Plavix*, 829 F. Supp. 2d at 1378 n.1 (not considering remanded cases when ruling).

examination reveals the Defendants' contention simply is not true. Because circumstances have not changed since the Panel's 2011 denial of centralization, the Panel should deny consolidation.

II. Consolidation Is Improper When The Proposed Cases To Be Transferred Are Not In The Same Procedural Stage Of Litigation.

Even if Defendants are correct regarding the purported significant increase of federal Plavix litigation, which they are not, disparity in the progress of cases sought to be consolidated or centralized for pretrial proceedings still requires that Defendants' motion be denied. *See In re Ambulatory*, 709 F. Supp. 2d at 1377 (even if the number of cases have grown, when the same issues that weighed against centralization in the earlier docket remain, denial is appropriate).

As the Panel itself has explained: "Centralization works best when a group of actions are all in the initial phases of discovery and motion practice." John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2238 (2008); *see also In re Boehringer Ingelheim Pharm., Inc., Fair Labor Standards Act (FLSA) Litig.*, 763 F. Supp. 2d 1377, 1378 (J.P.M.L. 2011) (centralization is less compelling when procedurally dissimilar actions are involved in the litigation). This is because when older cases are centralized with relatively new actions, the newer cases cause delay in the more advanced actions. Heyburn, *supra*, at 2238. Thus, when the Panel is faced with a group of cases in which the relative stages of pretrial proceedings are vastly different, centralization is generally improper. *See In re Prop. Assessed Clean Energy (PACE) Programs Litig.*, 764 F. Supp. 2d 1345, 1347 (J.P.M.L. 2011); *In re Boehringer*, 763 F. Supp. 2d at 1378; *In re JPMorgan Chase & Co. Fair Labor Standards Act (FLSA) Litig.*, 729 F. Supp. 2d 1354, 1355 (J.P.M.L. 2010); *In re Bank of N.Y. Mellon Sec. Lending Litig.*, 716 F. Supp. 2d 1361, 1362 (J.P.M.L. 2010); *In re Ambulatory*, 709 F. Supp. 2d at 1378; *In re CVS Caremark Corp. Wage & Hour Emp't Practices Litig.*, 684 F. Supp. 2d 1377,

1379 (J.P.M.L. 2010); *In re Reglan*, 622 F. Supp. 2d at 1381; *In re Allianz Life Ins. Co. of N. Am. Deferred Annuity Mktg. & Sales Practices Litig.*, 517 F. Supp. 2d 1364, 1364 (J.P.M.L. 2007); *In re Qwest Commc'ns Int'l, Inc., Sec. & "ERISA" Litig.*, 395 F. Supp. 2d 1360, 1361 (J.P.M.L. 2005); *In re Oxycontin Prods. Liab. Litig. (No. II)*, 395 F. Supp. 2d 1358, 1359 (J.P.M.L. 2005); *In re FedEx Ground Package Sys., Inc. Emp't Practices Litig.*, 366 F. Supp. 2d 1381, 1382 (J.P.M.L. 2005); *In re Blood & Blood Prods. Hepatitis C Virus Prods. Litig.*, MDL No. 1349, 2000 U.S. Dist. LEXIS 11149, at *3 (J.P.M.L. Aug. 2, 2000); *In re Rely Tampon Prods. Litig.*, 533 F. Supp. 1346, 1347 (J.P.M.L. 1982); *In re Royal Typewriter Co. (Royal Bond Copier) Breach of Warranty Litig.*, 435 F. Supp. 925, 926 (J.P.M.L. 1977); *In re Luminex Int'l, Inc. Prods. Liab. Litig.*, 434 F. Supp. 668, 670 (J.P.M.L. 1977).

Here, Defendants propose the consolidation of thirty cases[7] for centralized pretrial proceedings. However, these cases are at vastly different stages of pretrial proceedings, a fact that Defendants even recognize in their motion. For instance, a simple look at the New Jersey lawsuits alone illustrates the various different stages of pretrial proceedings that make consolidation improper. Six of the New Jersey proceedings have been on file since 2006 and 2007. Given the length of time these cases have been pending, it is not surprising that the litigation has substantially progressed through discovery. As Defendants admitted in their motion, they have "completed document production and produced approximately 3.5 million pages of documents." *See* Defs.' Mem. Supp. Transfer at 4. Further, the parties in those actions "have developed, served, and responded to detailed fact sheets," "have served and responded to other written discovery," and have "entered a phased schedule for taking depositions." *Id.* In

[7] Plaintiffs have eliminated three cases, *Crowe*, *Newell*, and *Evans*, from the discussion because they are no longer pending in federal court and therefore have no effect on the Panel's decision. *See In re Plavix*, 829 F. Supp. 2d at 1378 n.1.

contrast, the remaining New Jersey action sought to be consolidated by Defendants was filed within the last year, and discovery has not yet begun. *See Kennovin v. Bristol-Myers Squibb Co.*, No. 3:12-cv-05059 (D.N.J. filed Aug. 10, 2012). Such drastic differences in the stage of pretrial proceedings weigh strongly against consolidation.

Defendants would like to ignore the problem that the advanced New Jersey actions create by requesting that these six cases be excluded from the transfer order.[8] *See* Defs.' Mem. Supp. Transfer at 10-11. However, the advanced New Jersey actions are not the only cases that are procedurally more advanced. The Southern District of New York cases have been pending since July 2011, for instance, and significant discovery has taken place and scheduling orders entered.[9] Moreover, even in cases where scheduling orders have not yet been entered, the parties are voluntarily agreeing to progress discovery.[10] *See, e.g.*, *Little v. Bristol-Myers Squibb Co.*, No. 2:12-cv-00514 (E.D. Pa. removed Jan. 31, 2012); *Brown v. Bristol-Myers Squibb Co.*, No. 2:12-cv-00299 (E.D. Pa. removed Jan. 19, 2012). These procedurally advanced cases, thus, stand in stark contrast to those cases that have been filed, or in the case of the federal *qui tam*, unsealed, only recently.

This Panel has repeatedly denied centralization when just one case is significantly further advanced than the other proposed transfer cases. For instance, in *In re Royal Typewriters*, the Panel denied the 28 U.S.C. § 1407 transfer motion because discovery in one action was substantially complete and the action was nearly ready for trial. *In re Royal Typewriters*, 435 F.

[8] Notably, if the Panel is to exclude the six advanced New Jersey cases from the transfer order, then this cuts the number of federal Plavix cases that could be consolidated by 50%.

[9] For instance, initial disclosures have already been completed, the parties have served requests for production and interrogatories, and the court has issued a scheduling order setting deadlines for the end of discovery (which will happen in less than a year).

[10] In other cases, scheduling conferences are scheduled to happen within the next twenty days to set deadlines. *See Kennovin v. Bristol-Myers Squibb Co.*, No. 3:12-cv-05059 (D.N.J. filed Aug. 10, 2012).

Supp. at 926. More recently, the Panel denied centralization where the amount of discovery already taken place in one case was significant, but very little pretrial activity had occurred in more recently filed cases. *See In re CVS*, 648 F. Supp. 2d at 1379; *see also In re Bank of N.Y.*, 716 F. Supp. 2d at 1362 (although the actions shared some basic factual similarities centralization was denied when one action was about a year and half old and farther advanced). This has even occurred in drug cases in which several actions shared the same factual issues as to whether a certain drug caused neurological injuries. For example, in *In re Reglan*, the Panel denied centralization of eleven cases when "several of the actions appear[ed] to be substantially advanced (five were commenced in either 2006 or 2007)" and a significant amount of discovery had already taken place. *In re Reglan*, 622 F. Supp. 2d at 1381.

Here, there is clearly more than one case that is in an advanced stage of litigation. Discovery in six of the New Jersey cases is substantially complete and has been going on for years. Moreover, discovery in the four consolidated Southern District of New York cases is well underway. In significant contrast, the remaining cases have little or no discovery begun. As the Panel itself has recognized: "Significant efficiencies [cannot] be gained by centralization of this litigation at this late date, particularly in light of the substantial disparity in the progress of the actions." *In re JPMorgan Chase*, 729 F. Supp. 2d at 1355. And, in such a situation as the present, centralization would instead "disrupt, or at least delay the progress of the [advanced] actions." *In re Prop. Assessed*, 764 F. Supp. 2d at 1347. The impediment to the efficient resolution of the advanced-stage cases demands that the Panel deny Defendants' motion.

III. Consolidation Is Not Warranted When Common Facts Do Not Predominate.

Transfer under 28 U.S.C. § 1407 is only proper for actions that contain common questions of fact. *See* 28 U.S.C. § 1407. However, even if some common questions of fact exist, centralization is not warranted when individualized issues predominate. This is because the

efficiency of consolidation is lost when individualized issues overshadow common ones. *See In re Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig.*, No. 08-1967-MD-W-ODS, 2011 WL 2634248, at *2 (W.D. Mo. July 5, 2011). Thus, the Panel has consistently denied motions to transfer when individualized factual inquiries are required. *See, e.g.*, *In re Bank of N.Y.*, 716 F. Supp. 2d at 1362; *In re Ambulatory*, 709 F. Supp. 2d at 1377; *In re CVS*, 684 F. Supp. 2d at 1379; *In re Rite Aid Corp. Wage & Hour Emp't Practices Litig.*, 655 F. Supp. 2d 1376, 1377 (J.P.M.L. 2009); *In re Rely Tampon*, 533 F. Supp. at 1347; *In re Royal Typewriter*, 435 F. Supp. at 926; *In re Luminex*, 434 F. Supp. at 669-70.

With respect to the thirty cases Defendants propose to consolidate, even more individualized issues exist than when the Panel considered Defendants' 2011 motion for transfer. Previously, Defendants sought to transfer seventeen personal injury/product liability cases arising from bodily harm (namely bleeding injuries) caused by Plavix. At that time, the Panel did not find the common fact questions significant enough to warrant consolidation of those proceedings. *See In re Plavix*, 829 F. Supp. 2d at 1378. Now, Defendants seek to transfer cases that are even more dissimilar. In their current motion, Defendants have asked the Panel to lump together personal injury claims, third-party payor claims, a federal *qui tam* action, state attorney general claims, and other state-specific claims for purposes of pretrial proceedings. This is wholly untenable.

The chief disputed issues in the pending federal Plavix cases are predominately individualized. For instance, the illegal and deceptive marketing claims brought in the federal *qui tam* action differ significantly from the personal injury claims based on bleeding disorders brought in the personal injury/product liability cases. While both obviously involve the drug Plavix, one set of claims involves bodily injury while the other involves economic injury to the

federal and state governments, causing discovery and discovery procedures to be different. Moreover, the personal injury/product liability cases in and of themselves involve factual issues that must be examined with reference to individual states' torts law. When discovery is likely to require individualized factual inquiries and claims are based on various states' laws, any common questions of fact among the actions are not sufficiently complex and/or numerous to justify a Section 1407 transfer. *See In re Rite Aid*, 655 F. Supp. 2d at 1377.

IV. Voluntary Cooperation Between Parties Is The Best Way To Minimize Potential Duplicative Discovery And/Or Inconsistent Pretrial Rulings.

Voluntary cooperation between the parties is still the best method of proceeding. As the Panel has frequently recognized, centralization of pretrial proceedings is unnecessary when common counsel exists for plaintiffs in the actions sought to be transferred. *See In re Air Crash Near Islamabad, Pakistan, on July 28, 2010*, 777 F. Supp. 2d 1352, 1353 (J.P.M.L. 2011); *In re Boehringer*, 763 F. Supp. 2d at 1378-79; *In re Nissan N. Am., Inc., Infiniti Dashboard Prods. Liab. Litig.*, 715 F. Supp. 2d 1355, 1356 (J.P.M.L. 2010); *In re CVS*, 684 F. Supp. 2d at 1379; *In re Rite Aid*, 655 F. Supp. 2d at 1377; *In re Oxycontin*, 395 F. Supp. 2d at 1359; *In re Blood*, 2000 U.S. Dist. LEXIS 11149, at *3. This is because when common counsel exists, cooperation among counsel is easily achieved and "can minimize whatever possibilities there are of duplicative discovery and inconsistent pretrial rulings." *In re Air Crash*, 777 F. Supp. 2d at 1353; *see also In re Rite Aid*, 655 F. Supp. 2d at 1377 ("Cooperation among counsel and the parties is particularly appropriate here, where plaintiffs in four of the six actions encompassed by the motion share counsel."). Voluntary cooperation is often times the best way to minimize the potential for duplicative discovery and/or inconsistent pretrial rulings. *In re Diversified Lending Grp., Inc., Sec. Litig.*, 732 F. Supp. 2d 1377, 1378 (J.P.M.L. 2010); *see also In re Eli Lilly & Co.*

(Cephalexin Monohydrate) Patent Litig., 446 F. Supp. 242, 244 (J.P.M.L. 1978) (encouraging parties to employ suitable alternatives to Section 1407 transfer).

Defendants have not provided one pertinent example of where voluntary efforts of cooperation have failed. Instead, Defendants cite an email related to a Plavix state court case. This email has no bearing on voluntary cooperation in the federal Plavix cases Defendants now seek to consolidate. In fact, voluntary cooperation will not be difficult to achieve. Of the twelve actual federal Plavix cases sought to be consolidated by Defendants, five of these cases have the same counsel. While the remaining cases are split between various counsels, the situation is certainly not unworkable.[11] In fact, counsel in several federal Plavix actions have already agreed to cooperative discovery efforts.[12] And, Defendants have not provided evidence that any of the counsel in the actions sought to be transferred would not be amenable to cooperation.

Further, efficiency has already been accomplished through voluntary coordination and cooperation of counsel for plaintiffs and defendants, representing injured individuals, their doctors, and drug companies, in state and federal courts, through many years of prior litigation. Lawsuits involving injuries sustained from exposure to Plavix have been proceeding in state and federal courts since Plavix first entered the market. In that time, vast stores of evidence, including documents and testimony from the Defendants, pertinent medical literature, and expert testimony and reports, have been developed, discovered, and shared through negotiated coordination and cooperation among attorneys. Much of this evidence has already been

[11] For instance, the two cases pending in the Eastern District of Pennsylvania also share the same counsel. *See Little v. Bristol-Myers Squibb Co.*, No. 2:12-cv-00514 (E.D. Pa. removed Jan. 31, 2012); *Brown v. Bristol-Myers Squibb Co.*, No. 2:12-cv-00299 (E.D. Pa. removed Jan. 19, 2012). And there is overlapping counsel in the federal *qui tam* and the West Virginia third-party payor case. *See Employer Teamsters-Local*, No. 3:12-cv-00587; *United States of Am. v. Bristol Myers Squibb Co.*, No. 3:11-cv-00246 (S.D. Ill. filed Dec. 2, 2011).

[12] *See* November 5, 2012 Order, attached hereto as Exhibit E and incorporated by reference as if fully set forth herein.

developed, discovered, and organized by the parties privy to the New Jersey cases, where discovery and pretrial proceedings have been ongoing since 2006.

Because cooperation among counsel and the parties is achievable in the present situation, Defendants' motion for transfer should be denied.

V. In The Alternative, Should The Panel Determine That Centralization Is Warranted, The Proper Venue Is The Southern District Of Illinois.

Defendants propose a district court in New Jersey or New York as the best transfer forum. Defendants are incorrect. Should the Panel determine that centralization is necessary, the Southern District of Illinois is the appropriate forum given its centralized location, the availability of the docket, and the judges' experience with multidistrict litigation.

A. The centralized location of the Southern District of Illinois warrants transfer to that venue.

The geographic centrality or the proximity of the transferee district is an important factor for the Panel to consider when deciding on a transfer forum. *See In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prods. Liab. Litig.*, MDL No. 2244, 2011 WL 2132995, at *2 (J.P.M.L. May 23, 2011); *In re Bank of Am. Wage & Hour Emp't Practices Litig.*, 706 F. Supp. 2d 1369, 1371-72 (J.P.M.L. 2010); *In re The TJX Cos., Inc., Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 505 F. Supp. 2d 1379, 1380 (J.P.M.L. 2007); *In re FedEx Ground Package Sys., Inc., Emp't Practices Litig. (No. II)*, 381 F. Supp. 2d 1380, 1382 (J.P.M.L. 2006); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig*., 398 F. Supp. 2d 1371, 1372 (J.P.M.L. 2005); *In re A. H. Robins Co., Inc. 'Dalkon Shield' IUD Prods. Liab. Litig.*, 406 F. Supp. 540, 543 (J.P.M.L. 1975). This is especially true when litigation is pending nationwide. *See, e.g., In re A.H. Robins*, 406 F. Supp. at 543.

Here, even if one only considers the twelve actual federal Plavix cases, there are actions pending in New Jersey, Pennsylvania, Louisiana, Iowa, and Illinois. When one takes into

account the additional cases that have motions to remand or dismiss pending, then there are cases in Mississippi, California, New York, and West Virginia as well. Circumstances as they are, one could hardly argue that the Plavix litigation is anything but nationwide, thereby demanding a centralized location. Moreover, the vast majority of the plaintiffs in the cases to be affected by Defendants' motion are involved in actions pending outside of either New Jersey or New York. Forcing plaintiffs to engage in pretrial proceedings in a location where the majority of their cases are not pending creates an undue burden that could easily be eliminated by transferring the proposed multidistrict to the centrally located Southern District of Illinois.

Further, Plaintiffs' federal *qui tam* action, one of the larger pending Plavix actions, is currently pending in the Southern District of Illinois. The location of a *qui tam* action is to be considered by the Panel when determining the transfer forum and may weigh in favor of that particular forum. *See In re Celexa & Lexapro Mktg. & Sales Practices Litig.*, 652 F. Supp. 2d 1377, 1377 (J.P.M.L. 2009); *In re Neurontin Mktg. & Sales Practices Litig.*, 342 F. Supp. 2d 1350, 1351-52 (J.P.M.L. 2004). Transfer to the centrally located forum of the Southern District of Illinois is appropriate.

B. Docket conditions in the Southern District of Illinois make it the best choice for transfer district.

Docket conditions are one of the main factors the Panel is to consider when determining the proper forum for centralized pretrial proceedings. *See, e.g., In re Bank of Am.*, 706 F. Supp. 2d at 1372 (transferring to a judge who had the "energy and time to handle [the] litigation efficiently"); *In re Refined Petroleum Prods. Antitrust Litig.*, 528 F. Supp. 2d 1365, 1367 (J.P.M.L. 2007) (noting that the transferee district had "favorable caseload conditions"); *In re ClassicStar Mare Lease Litig.*, 528 F. Supp. 2d 1345, 1347 (J.P.M.L. 2007) (transferring to a district where the court had resources available to

manage the litigation); *In re Vonage Mktg. & Sales Practices Litig.*, 505 F. Supp. 2d 1375, 1377 (J.P.M.L. 2007) (assigning to a court where that "has the time" to efficiently manage the litigation); *In re Vioxx Prods. Liab. Litig.*, 360 F. Supp. 2d 1352, 1354 (J.P.M.L. 2005) (transferring to a district which had the capacity to handle the litigation). It is vital to choose a transferee judge who has the time and ability to manage the multidistrict litigation.

All three districts that Defendants have suggested for a transfer forum are subject to extremely busy caseloads. Notably, in the District of New Jersey, it takes almost forty-four months for a case to go from filing to trial.[13] In the Southern District of New York it takes twenty-six months for a case to go from filing to trial,[14] and in the Eastern District of New York it takes twenty-nine months.[15] In comparison, in the Southern District of Illinois, it only takes twenty-three months from the time of filing until the completion of a trial.[16] In fact, although the Southern District of Illinois has significantly fewer judges than any of the districts proposed by Defendants, the judges in Illinois complete more than double the amount of trials per year than the judges in New Jersey and New York.[17] While none of the cases subject to Defendants' motion will proceed to trial in the transfer forum, such statistics provide considerable insight into the management and efficiency of the districts' dockets. And, it can hardly be said that such numbers show that the 28 U.S.C. § 1407

[13] *See* U.S. District Court – Judicial Caseload Profile for the District of New Jersey, attached hereto as Exhibit F and incorporated by reference as if fully set forth herein.
[14] *See* U.S. District Court – Judicial Caseload Profile for the Southern District of New York, attached hereto as Exhibit G and incorporated by reference as if fully set forth herein.
[15] *See* U.S. District Court – Judicial Caseload Profile for the Eastern District of New York, attached hereto as Exhibit H and incorporated by reference as if fully set forth herein.
[16] *See* U.S. District Court – Judicial Caseload Profile for the Southern District of Illinois, attached hereto as Exhibit I and incorporated by reference as if fully set forth herein.
[17] *Compare* Ex. I, *with* Ex. F, Ex. G, *and* Ex. H.

standard of "convenience of parties and witnesses" and promotion of "the just and efficient conduct of" will be met by the New Jersey or New York courts.

Defendants have placed particular emphasis on the Honorable Judge Wolfson of the District of New Jersey, the Honorable Judge Abrams of the Southern District of New York, and the Honorable Judge Matsumoto of the Eastern District of New York as a reason to transfer to those particular districts. However, all of these judges have extremely large dockets and simply will not have time to expediently manage multidistrict litigation. For instance, Judge Matsumoto and Judge Wolfson generally take from 165-181 days to decide the majority of the motions pending before them, whereas the Honorable Judge Herndon of the Southern District of Illinois takes less than thirty days.[18] The overloaded dockets of the District of New Jersey, the Southern District of New York, and the Eastern District of New York would not accommodate the convenience and efficiency that 28 U.S.C. § 1407 demands.

C. The Southern District of Illinois is experienced in multidistrict litigation.

Finally, in determining the proper district for transfer, it is necessary to examine the general experience of the judges in the transferee district and the familiarity of the judges with the subject matter. *See In re Pharmastem Therapeutic, Inc., Patent Litig.*, 360 F. Supp. 2d 1362, 1364 (J.P.M.L. 2005); *In re Zyprexa Prods. Liab. Litig.*, 314 F. Supp. 2d 1380, 1382 (J.P.M.L. 2004); *In re Paxil Prods. Liab. Litig.*, 296 F. Supp. 2d 1374, 1375 (J.P.M.L. 2003). Certainly relevant is the experience of the judges as a transferee judge. *See In re Ocean Fin. Corp.*

[18] *See* Judicial Motion Report for Wolfson, Hon. Freda L., attached hereto as Exhibit J and incorporated by reference as if fully set forth herein; Judicial Motion Report for Matsumoto, Hon. Kiyo A., attached hereto as Exhibit K and incorporated by reference as if fully set forth herein; Judicial Motion Report for Herndon, Hon. David Richard, attached hereto as Exhibit L and incorporated by reference as if fully set forth herein. Similar information on Judge Abrams is not available.

Prescreening Litig., 435 F. Supp. 2d 1350, 1352 (J.P.M.L. 2006); *In re Vioxx*, 360 F. Supp. 2d at 1354; *In re Welding Rod Prods. Liab. Litig.*, 269 F. Supp. 2d 1365, 1367 (J.P.M.L. 2003); *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 793 F. Supp. 1098, 1101 (J.P.M.L. 1992).

The judges in the Southern District of Illinois, in general, handle more multidistrict transfers than do the judges in the District in New Jersey, the Southern District of New York, or the Eastern District of New York. For instance, over the course of twelve months ending on September 30, 2011, the District of New Jersey received ninety cases transferred by the Panel, the Southern District of New York received 108 cases transferred by the Panel, and the Eastern District of New York received only eighteen cases transferred by the Panel.[19] In comparison, over the same time period, the Southern District of Illinois received 253 cases transferred by the Panel—more than the District of New Jersey, the Southern District of New York, and the Eastern District of New York combined.[20] Moreover, the Southern District of Illinois has the fewest number of cases transferred out of the district by the Panel when compared to the other districts proposed by Defendants.[21] These numbers alone reflect the experience and ability of the judges in the Southern District of Illinois to handle complex multidistrict litigation. Such experience cannot be discounted when determining which venue to transfer the cases subject to Defendants' motion.[22]

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[19] *See* Table S-19. Cases Transferred for Order of the Judicial Panel on Multidistrict Litigation, Cumulative From September 1968 Through September 30, 2011, attached hereto as Exhibit M and incorporated by reference as if fully set forth herein.

[20] *Id.*

[21] *Id.* Also, it is notable that the total number of pending multidistrict litigation cases in the Southern District of Illinois vastly exceed the number pending in the District of New Jersey, the Southern District of New York, and the Eastern District of New York combined. *Id.*

[22] The judges in the Southern District of Illinois also have substantial experience with product liability litigation, which is pertinent to some, although not all, of these cases proposed to be centralized. For instance, over a twelve month period ending September 30, 2011, over 4,000 product liability cases were filed in the Southern District of Illinois. *See* Table C-11. U.S.

CONCLUSION

Centralization for pretrial proceedings is not warranted in the present litigation. Here, circumstances have not changed since the Panel's 2011 denial of centralization, the cases sought to be transferred are at varying stages of litigation, individualized issues predominate, voluntary cooperation between parties is easily achieved, and transfer would be both inconvenient and would fail to promote just and efficient proceedings. Therefore, Plaintiffs respectfully requests that Defendants' renewed motion for transfer pursuant to 28 U.S.C. § 1407 be denied.

Respectfully submitted,

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District Courts—Product Liability Cases Commenced, by Nature of Suit, During the 12-Month Periods Ending September 30, 2010 and 2011, attached hereto as Exhibit N and incorporated by reference as if fully set forth herein. This is substantially more than the product liability cases filed in the District of New Jersey, the Southern District of New York, and the Eastern District of New York combined. *Id.* Given the abundance of product liability litigation present in the Southern District of Illinois, the judges in that district are extremely cognizant of the pretrial issues that can arise related to product liability litigation and are experienced in dealing with them.

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