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**
EMPLOYER TEAMSTERS-LOCAL NOS. 175/505 HEALTH AND WELFARE TRUST FUND, ET AL., **PLAINTIFFS,** **V.** **BRISTOL MYERS SQUIBB COMPANY, ET AL.,** **DEFENDANTS.**	**S.D. W. VA. NO. 3:12-CV-0587**

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 Employer Teamsters-Local Nos. 175/505 Health and Welfare Trust Fund and International Brotherhood of Teamsters-Voluntary Employee Benefits Trust (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

In their current motion, Defendants have asked the Panel to consolidate cases asserting personal injury claims, product liability claims, third-party payor claims, state attorney claims, and other state-specific claims, along with a federal *qui tam* action for purposes of pretrial proceedings. Because of the fundamental differences among these claims, there are no common fact questions significant enough to warrant consolidation. Although all of these claims involve the drug Plavix, they are premised on two divergent theories: one that involves economic injury based on illegal and deceptive marketing, and the other that alleges bodily injury based on personal injury/product liability. The divergence amongst these claims militates against centralized proceedings.

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, they filed a virtually identical and unsuccessful motion a year ago seeking to transfer Plavix related cases pursuant to 28 U.S.C. § 1407. *See In re Plavix Prods. Liab. Litig.*, 829 F. Supp. 2d 1378 (J.P.M.L. 2011) (denying centralization). Contrary to Defendants' assertions, circumstances have not radically changed in the past twelve months to warrant consolidation of pretrial proceedings. Further, Defendants have not put forth any new compelling arguments that would justify centralization.

Just as Defendants' original motion was denied a year ago, Defendants' renewed motion should be denied.

Should the Panel decide that centralization is now appropriate, however, Plaintiffs respectfully assert that their action should be centralized only with other actions that contain like or similar economic-injury claims. Applying those criteria, the two most appropriate venues for consolidation are either the Southern District of Illinois or the Southern District of West Virginia.

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.

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. 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. This price discrepancy is alarming because Plavix is no more effective than aspirin for certain indicated usages. Yet, to this day, Defendants continue to promote Plavix as a superior drug to aspirin. Defendants' wrongful and deceptive promotion of Plavix's efficacy has created a windfall of profits for Defendants at Plaintiffs' expense.

Defendants engaged in a comprehensive scheme to inflate the number of Plavix prescriptions and generate massive profits by illegally and deceptively promoting Plavix. In particular, Defendants manipulated clinical trial data to support fraudulent claims regarding Plavix's efficacy relative to aspirin. Further, Defendants mischaracterized clinical studies that contradicted their sales campaign. These misleading and unlawful communications to physicians, consumers and health insurers regarding the efficacy and safety of Plavix generated additional prescription for which insurers, like Plaintiffs, were stuck with the tab.

Plaintiffs therefore filed claims against certain Defendants and others[1] for unjust enrichment and breach of the implied warranty of merchantability based on Defendants' illegal and deceptive promotion of Plavix. On October 15, 2012, without justification, 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 changes that have occurred in Plavix litigation.

[1] Plaintiffs filed suit against Bristol Myers Squibb Company and Sanofi-Aventis U.S., L.L.C., who are moving parties before the Panel, as well as Sanofi-Aventis U.S., Inc., who is not a moving party.

The plaintiffs in the pending Plavix cases bring what are essentially two types of claims. The first involves economic injury claims based on deceptive and misleading marketing. The second involves bodily injury claims based on negligence or product liability. As discussed below, these two types of claims are not sufficiently similar to warrant consolidation.

While Plaintiffs recognize that additional Plavix cases have been filed within the past year, the reasons given for the Panel's denial of centralization in 2011 still apply today. As this Panel has recognized, if the same issues that weighed against centralization in the earlier docket remain, then denial is still appropriate even when the number of cases has grown. *See In re Ambulatory Pain Pump-Chondrolysis Prods. Liab. Litig.*, 709 F. Supp. 2d 1375, 1377 (J.P.M.L. 2010). Thus, the increase in the sheer number of Plavix cases is immaterial 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-related lawsuits, and there certainly is no justification for consolidating economic injury cases with personal injury lawsuits.

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

Transfer under 28 U.S.C. § 1407 is only proper for actions that share common questions of fact. *See* 28 U.S.C. § 1407. But, centralization is not warranted when individualized issues predominate over any common question because the efficiency of consolidation will be lost. *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. Mellon Sec. Lending Litig.*, 716 F. Supp. 2d 1361, 1362 (J.P.M.L. 2010); *In re Ambulatory*, 709 F. Supp. 2d at 1377; *In re CVS Caremark Corp. Wage & Hour Emp't Practices Litig.*, 684 F.

Supp. 2d 1377, 1379 (J.P.M.L. 2010); *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 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, 669-670 (J.P.M.L. 1977)

With respect to the thirty cases[2] Defendants propose to consolidate, even more individualized issues exist than when the Panel considered Defendants' original motion for transfer. Previously, Defendants sought to transfer seventeen personal injury/product liability cases arising from bodily harm (bleeding injuries) caused by Plavix, and 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. In their current motion, Defendants have asked the Panel to go even further and 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 proposed consolidation is unmanageable with little scope for efficiencies.

For instance, the illegal and deceptive marketing claims brought in the federal *qui tam* action and this third-party payor action assert different legal theories premised on different facts than the personal injury/product liability cases. While both involve the drug Plavix, the former claims are concerned with the accuracy of Defendants' marketing communications, while the latter turn on complex questions of drug science and medical causation. None of the expensive,

[2] Plaintiffs have eliminated three cases, *Crowe v. Bristol-Myers Squibb Co.*, No. 3:11-cv-06551 (D.N.J. filed Nov. 8, 2011), *Newell v. Bristol-Myers Squibb Co.*, No. 3:07-cv-01184 (D.N.J. filed Mar. 12, 2007), and *Evans v. Bristol-Myers Squibb Co.*, No. 1:12-cv-05005 (N.D. Ill. removed June 22, 2012), from the discussion because they are no longer pending in federal court and therefore have no effect on the Panel's decision. *See infra* Section II.

time consuming, and hotly contested scientific causation issues are relevant to the *qui tam* and third-party payor economic harm claims. These different claims will have little, if any, discovery overlap. Moreover, the personal injury/product liability cases involve factual issues that must be examined with reference to individual states' tort laws, which are not relevant to the *qui tam* and third-party payor claims. When discovery will involve such disparate factual inquiries and the claims are based on differing state and federal laws, any common questions of fact among the actions are not sufficiently complex and numerous to justify a Section 1407 transfer. *See In re Rite Aid*, 655 F. Supp. 2d at 1377.

II. 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.[3] *See In re Plavix*, 829 F. Supp. 2d at 1378 n.1. Defendants now assert that 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 including *Crowe v. Bristol-Myers Squibb Co.*, No. 3:11-cv-06551 (D.N.J. filed Nov. 8, 2011), *Newell v. Bristol-Myers Squibb Co.*, No. 3:07-cv-01184 (D.N.J. filed Mar. 12, 2007),[4] and *Evans v. Bristol-Myers Squibb Co.*, No. 1:12-cv-05005

[3] 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.*

[4] *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

(N.D. Ill. removed June 22, 2012).[5] Because these three actions are no longer pending in federal court, they should not be considered by the Panel. *See In re Plavix*, 829 F. Supp. 2d at 1378 n.1 (not considering remanded or dismissed cases when ruling on Defendants' motion).

Moreover, twelve cases Defendants seek to have consolidated have pending motions to remand,[6] and six other cases have pending motions to dismiss.[7] Thus, these eighteen additional

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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.

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

[6] *See Aiken v. Bristol-Myers Squib Co.*, No. 3:12-cv-05208 (N.D. Cal. removed Oct. 9, 20120); *Corkerin v. Bristol-Myers Squibb Co.*, No. 3:12-cv-04803 (N.D. Cal. removed Sept. 13, 2012); *Kaluza v. Bristol-Myers Squibb Co.*, No. 3:12-cv-04642 (N.D. Cal. removed Sept. 5, 2012); *Walden v. Bristol-Myers Squibb Co.*, No. 3:12-cv-04641 (N.D. Cal. removed Sept. 5, 2012); *Dillard v. Bristol-Myers Squibb Co.*, No. 3:12-cv-04633 (N.D. Cal. removed Sept. 5, 2012); *Olmstead v. Bristol-Myers Squibb Co.*, No. 3:12-cv-04619 (N.D. Cal. removed Sept. 4, 2012); *Meeks v. Bristol-Myers Squibb Co.*, No. 3:12-cv-04617 (N.D. Cal. removed Sept. 4, 2012); *Robinson v. Bristol-Myers Squibb Co.*, No. 3:12-cv-04616 (N.D. Cal. removed Sept. 4, 2012); *Raynor v. Bristol-Myers Squibb Co.*, No. 3:12-cv-04615 (N.D. Cal. removed Sept. 4, 2012); *Burman v. Bristol-Myers Squibb Co.*, No. 3:12-cv-04478 (N.D. Cal. removed Aug. 24, 2012); *Kinney v. Bristol-Myers Squib Co.*, No. 3:12-cv-04477 (N.D. Cal. removed Aug. 24, 2012); *Hood v. Bristol-Myers Squibb Co.*, No. 1:12-cv-00179 (N.D. Miss. filed Aug. 17, 2012).

[7] *See Employer Teamsters-Local Nos. 175/505 Health & Welfare Trust Find v. Bristol Myers Squibb Co.*, No. 3:12-cv-00587 (S.D. W. Va. filed Feb. 27, 2012); *Burrow v. Bristol-Myers Squibb Co.*, No. 1:11-cv-05212 (S.D.N.Y. removed July 27, 2011); *McAleese v. Bristol-Myers Squibb Co.*, No. 1:11-cv-05168 (S.D.N.Y. removed July 26, 2011); *Santana v. Bristol-Myers Squibb Co.*, No. 1:11-cv-05165 (S.D.N.Y. removed July 26, 2011); *Petit v. Bristol-Myers Squibb Co.*, No. 1:11-cv-05159 (S.D.N.Y. removed July 26, 2011); *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.

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

Taking these facts into account, only twelve pending Plavix cases out of the thirty-three Defendants propose to consolidate are assured of a more than ephemeral existence in federal court. That is far from, to use Defendants' term, a "dramatic" increase from the number of Plavix cases pending when this Panel denied Defendants' motion to transfer in 2011.[8] *See In re Plavix Litig.*, 829 F. Supp. 2d at 1378 (stating there were twelve cases pending when the Panel denied the motion). Because circumstances have not changed since the Panel's 2011 denial of centralization, the Panel should again deny consolidation.

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

Even if Defendants were correct regarding the purported significant increase of federal Plavix litigation, which they are not, the disparity in the procedural posture of the various cases proposed for consolidation requires that Defendants' motion be denied.

As the Panel has previously 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 true because when older cases are centralized with relatively new actions, the newer cases delay the more advanced actions. Heyburn, *supra*, at

[8] 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 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).

2238. Thus, when the Panel is faced with a group of cases in which the relative stages of pretrial proceedings are significantly 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..*, 716 F. Supp. 2d at 1362; *In re Ambulatory*, 709 F. Supp. 2d at 1378; *In re CVS* at 1379; *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* ., 533 F. Supp. at 1347; *In re Royal Typewriter*, 435 F. Supp. at 926; *In re Luminex*, 434 F. Supp. at 670.

Here, Defendants propose the consolidation of thirty cases for centralized pretrial proceedings. As Defendants acknowledge in their motion, however, these cases are at vastly different stages of pretrial proceedings. For instance, six of the New Jersey actions have been on file since 2006 or 2007. These cases have substantially progressed through discovery and Defendants 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 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 conveniently avoid the problem that the advanced New Jersey actions create by requesting that these six cases be excluded from the transfer order—a proposal that further belies their assertion of a "dramatic" increase in Plavix cases. *See* Defs.' Mem. Supp. Transfer at 10-11. Segregating the New Jersey cases also would not solve the problem. The Southern District of New York cases have been pending since July 2011, and significant discovery has taken place and scheduling orders have been 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 cases stand in stark contrast not only to each other, but 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. 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

[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).

more recently filed cases. *See In re CVS*, 684 F. Supp. 2d at 1379; *see also In re Bank of N.Y.*, 716 F. Supp. 2d at 1362 (denying centralization even though the actions shared some basic factual similarities where one action was about a year and half older and farther advanced). As another example, in *In re Reglan*, several cases raised the same factual issue of whether a prescription drug caused neurological injuries, but 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, more than one case 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. Discovery in the four consolidated Southern District of New York cases is well underway. In contrast, little or no discovery has occurred in the remaining cases and several present unresolved motions to dismiss or remand. 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.[11]

[11] In the alternative, the Panel should only consolidate Plaintiffs' case with other third- party payor cases and the qui tam case, all of which involve similar allegations of misleading and deceptive marketing, and are at similar stages of advancement.

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

Voluntary cooperation between the parties is still the best and most efficient method of proceeding. *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 transfer). 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.

Defendants have not identified one pertinent example in federal Plavix litigation where voluntary efforts of cooperation have failed. Instead, Defendants raise a "red herring" and cite to an email concerning a Plavix state court case. This email has no bearing on voluntary cooperation in the federal Plavix cases that Defendants now seek to consolidate.

In fact, voluntary cooperation will not be difficult to achieve. Of the twelve Plavix cases firmly established in federal court that Defendants seek to consolidate, five have the same counsel. While the remaining cases involve various additional counsel, the situation is certainly

not unworkable.[12] In fact, counsel in several federal Plavix actions have already agreed to cooperative discovery efforts.[13] 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 developed, discovered, and organized by the parties in 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 Or The Southern District Of West Virginia.

Defendants propose a district court in New Jersey or New York as the best transfer forum. These are poor choices. Should the Panel determine that centralization is necessary, either the Southern District of Illinois or the Southern District of West Virginia is appropriate

[12] 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 Plaintiffs' 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).

[13] *See Little*, No. 2:12-cv-00514; *Brown*, No. 2:12-cv-0029.

given the 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 Plavix cases assured to proceed in federal court, there are actions pending in New Jersey, Pennsylvania, Louisiana, Iowa, and Illinois. When considering the cases that have motions to remand or dismiss pending, cases in Mississippi, California, New York, and West Virginia are added to the mix. The Plavix litigation is nationwide and requires 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 would be eliminated by selecting the centrally located Southern District of Illinois as the forum.

Further, the federal *qui tam* action, one of the larger 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 and Southern District of West Virginia make either the best choice for transfer district.

Docket conditions are one of the main factors 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 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 bear extremely heavy caseloads. Notably, in the District of New Jersey, it takes almost forty-four months for a

case to go from filing to trial.[14] In the Southern District of New York it takes twenty-six months for a case to go from filing to trial,[15] and in the Eastern District of New York it takes twenty-nine months.[16] 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.[17] 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.[18] 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 standard of "convenience of parties and witnesses" and promotion of "the just and efficient conduct of" will be most readily satisfied 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 manage very large dockets and appear to have little time to spare 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

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

Illinois takes less than thirty days, and the Honorable Judge Chambers of the Southern District of West Virginia takes less than ninety days.[19] The overloaded dockets in New Jersey and New York would not accommodate the convenience and efficiency that 28 U.S.C. § 1407 demands.

C. The Southern District of Illinois and the Southern District of West Virginia are 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 Zypreza 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). Also relevant is the experience of the judges as a transferee judge. *See In re Ocean Fin. Corp. 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 and the Southern District of West Virginia, in general, handle more multidistrict transfers than do the judges New Jersey and New York. For instance, over the course of twelve months ending on September 30, 2012, the District of New Jersey received 158 cases transferred by the Panel, the Southern District of New York received 124 cases transferred by the Panel, and the Eastern District of New York received only 24 cases

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

transferred by the Panel.[20] In comparison, over the same time period, the Southern District of Illinois received 227 cases transferred by the Panel and the Southern District of West Virginia received 2,313 cases transferred by the Panel—more than the District of New Jersey, the Southern District of New York, or the Eastern District of New York combined.[21] Moreover, both the Southern District of Illinois and the Southern District of West Virginia have fewer cases transferred out by the Panel when compared to the other districts proposed by Defendants.[22] These numbers alone reflect the experience and ability of the judges in the Southern District of Illinois and Southern District of West Virginia to handle complex multidistrict litigation. Indeed, both districts have judges well versed in similar litigation. The Southern District of Illinois has overseen MDL 2100, *In Re Yasmin and Yaz (Drospirenone) Marketing, Sales Practice, and Product Liability Litigation*; the Southern District of West Virginia has overseen MDLs 2187, 2325, 2326, 2327, and 2387, *In re Pelvic Support Systems Products Liability Litigation*. Such experience cannot be discounted.

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

[20] *See* Table S-19. Cases Transferred for Order of the Judicial Panel on Multidistrict Litigation, Cumulative From September 1968 Through September 30, 2012, attached hereto as Exhibit M and incorporated by reference as if fully set forth herein.
[21] *Id.*
[22] *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.*

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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