BEFORE THE UNITED STATES JUDICAL PANEL ON MULTIDISTRICT LITIGATION

IN RE PLAVIX® MARKETING, SALES PRACTICE AND PRODUCTS LIABILITY LITIGATION (NO. II)	)	**MDL DOCKET NO. 2418**

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

NAPOLI BERN RIPKA SHKOLNIK LLP
Hunter J. Shkolnik, Esq.
350 Fifth Avenue, Suite 7413
New York, New York 10118
Telephone: (212) 267-3700
Fax: (212) 587-0031

Attorney for Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATUTES

OTHER AUTHORITIES

Plaintiffs Sandra L. Kinney, et al., Bennie Burman, et al, James T. Aikens, et al, Derotha Little and Judy Brown, individually and as the Executrix of the Estate of Richard Brown Sr., Deceased (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")[1] 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. Moreover, Defendants have failed to put forth any new compelling arguments that would justify centralization. For all these reasons, and as further stated below, the Panel must deny the Defendants' motion.

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:

[1] On November 8, 2012, Defendant, McKesson Corporation ("McKesson"), filed a Joinder of McKesson Corporation in Renewed Motion for Transfer of Actions Pursuant to 28 U.S.C. §1407 for Coordinated or Consolidated Pretrial Proceedings against Plaintiffs, Sandra L. Kinney, et al., Bennie Burman, et al. and James T. Aikens, et al. and as such, this is filed in response to McKesson in these actions.

> 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.

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 transfer and consolidation of Plaintiffs' action with other purportedly related cases, which was filed on October 15, 2012. Thus, Defendants' motion should be denied because: (1) the circumstances have not changed since the Panel's 2011 denial of centralization to justify consolidation, (2) consolidation is improper when the proposed cases to be transferred are not in the same procedural stage of litigation, (3) consolidation is not warranted when common facts do not predominate, and (4) voluntary cooperation between parties is the best way to minimize potential duplicative discovery and/or inconsistent pretrial

rulings. In the alternative, if the panel should determine that centralization is warranted, the proper venue is the Northern District of California.

ARGUMENT

Under 28 U.S.C. §1407, civil actions involving one or more common questions of fact may be consolidated in any district for centralized pretrial proceedings.. Consolidation, however, is not automatic and may not be justified even if some factual issues are shared. *See, e.g., In re Reglan/Metroclopramide 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 a reconsideration by the Panel. *See* Defs.' Mem. Supp. Transfer at 1-2.However, Defendants have vastly overstated the limited changes that have actually occurred in Plavix litigation.

While Plaintiffs recognize that several 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 previously 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). Therefore, 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). Plain and simple, 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.[2] *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. However, a closer examination of these thirty-three cases reveals that this number is grossly inflated.

Included in Defendants' list of thirty-three cases that are allegedly in need of consolidation are cases that have either been dismissed, remanded, or have motions to remand or dismiss pending. Most 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.[3] 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.[4] Because these three actions are no longer pending in federal court they should not be considered in determining the validity 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).

---

[2] 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.*

[3] *See* October 2, 2012 Letter Order from the *Newell* Court and October 17, 2012 Response Letter, attached hereto as Exhibits 1 and 2, respectively, and incorporated by reference as if fully set forth herein. *See* October 15, 2012 Dismissal Order from the *Crowe* Court, attached hereto as Exhibit 3 and incorporated by reference as if fully set forth herein.

[4] *See* October 16, 2012 Order, attached hereto as Exhibit 4 and incorporated by reference as if fully set forth herein.

Moreover, twelve cases the Defendants seek to have consolidated have pending motions to remand,[5] and six other cases have pending motions to dismiss.[6] As these cases currently have pending motions, these eighteen cases should also be considered irrelevant to the Panel's ultimate decision on centralization until the pending motions are decided and fully resolved.

Plaintiffs also feel it is inappropriate to include the California actions in consideration of Defendants' request for centralization. The actions pending in the Northern District of California are currently in a revolving door which will inevitably lead back to California State Court. On

[5] *See Aiken v. Bristol-Myers Squibb Co.*, No. 3:12-cv-05208 (N.D. Cal. Removed Oct. 9, 2012); *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. 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).

[6] *See 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 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) (same); *Chesney v. Bristol-Myers Squibb Co.*, No. 1:11-cv-03246 (E.D.N.Y. filed July 5, 2011) (agreed to file motion to dismiss amended complaint). 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.

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, eleven 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 either all been assigned to Judge Chen, or currently have motions pending to reassign the cases to Judge Chen.[7] Plaintiffs in these 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 served only to waste the judicial resources of the federal courts of California, and now the Defendants are wasting the resources of this Panel by attempting to use these improper removals as a justification for centralization.

[7] 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
CAN/3:12cv5208 Aiken et al v. Bristol-Myers Squib Company et al.

Taking these facts into account, only twelve pending Plavix cases, with any potential of progressing in federal court, remain out of the thirty-three Defendants propose to consolidate—not quite the dramatic increase in federal Plavix litigation the Defendants imply.[8] In fact, even that number is overstating the number of cases likely to actually progress in federal court, as Judge Chen will likely remand all of the California cases back to California state court. Thus, the actual number of federal Plavix lawsuits subject to Defendants' motion for transfer has barely increased and/or 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, as these facts show, a closer examination reveals the Defendants' contention is simply not true. Since the 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 the Panel agrees with the Defendants that there was an increase of federal Plavix litigation, the 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*

[8] It should be noted that Defendants also include in their general discussion of the current pending federal Plavix litigation 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).

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. *See*, 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[9] for centralized pretrial proceedings. However, these cases are at vastly different stages of pretrial proceedings, a fact that Defendants even recognize in their motion. *See* Defs.' Mem. Supp. Transfer at 4. 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 now substantially progressed through discovery. As Defendants admitted in their motion, they have "completed document production and produced approximately 3.5 million pages of documents."[10] *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 ignore the problem the advanced New Jersey actions create by requesting that these six cases be excluded from the transfer order.[11] *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

[9] 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.

[10] Defendants fail to mention that document discovery in those actions were limited to pre-2007 documents in defendants' possession, some 5 years prior to the filing of the instant actions.

[11] 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 approximately 50%.

July 2011and significant discovery has taken place and scheduling orders have been entered in those cases.[12] Even with respect to the Southern District of New York cases where discovery has not been initiated, scheduling orders have been entered structuring the discovery process. These procedurally advance cases, stand in stark contrast to those cases that have only been filed 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 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 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

[12] 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).

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 completed. As the Panel 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 case 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 the last time 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 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 personal injury claims based on bleeding disorders brought in the personal injury/product liability cases differ significantly from the illegal and deceptive marketing claims brought in the federal *qui tam* action. 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 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.[13] Further, Defendants have not provided evidence that any of the counsel in the actions sought to be transferred would not be amenable to cooperation. In fact Defendants

[13] For instance, the two cases pending in the Eastern District of Pennsylvania 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).

cannot even attempt to make this argument since they entered in a stipulation with undersigned counsel who have agreed to fully cooperate with other counsel. *See* November 6, 2012 Stipulation and Order from Little Court, attached hereto as Exhibit 5, and incorporated by reference as if fully set forth herein.

In fact, 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 privy to the New Jersey cases, where discovery and pretrial proceedings have been ongoing since 2006.

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

V. In The Alternative, Should the Panel Determine That Centralization is Warranted, The Proper Venue Is The Northern District of California.

Should the Panel grant centralization, the Plaintiffs request that the Panel 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 cases will certainly be remanded, and upon remand the majority of Plavix personal injury claims will be pending in

California State Court. The JPML regularly transfers cases to the district where the majority of cases are filed. *See In re Republic National-Realty Equities Sec. Litigation*, 383 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 decide 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.

CONCLUSION

Centralization for pretrial proceedings is not warranted in the present litigation. Here, the 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 request that Defendants' renewed motion for transfer pursuant to 28 U.S.C. § 1407 be denied.

Respectfully submitted,

NAPOLI BERN RIPKA SHKOLNIK LLP

By: /s/ Hunter J. Shkolnik

Hunter J. Shkolnik, Esq.
350 Fifth Avenue, Suite 7413
New York, New York 10118
Telephone: (212) 267-3700
Fax: (212) 587-0031