

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
JIM HOOD, ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI, <i>ex rel.</i> THE STATE OF MISSISSIPPI,)	Case No. 1:12-CV-179-D-S
Plaintiff,)	
v.)	
BRISTOL-MYERS SQUIBB COMPANY; SANOFI-AVENTIS U.S. L.L.C.; SANOFI- AVENTIS, U.S., INC.; SANOFI- SYNTHELABO, INC. and DOES 1 to 100, Inclusive,)	
Defendants.)	

MEMORANDUM BY THE STATE OF MISSISSIPPI IN OPPOSITION TO 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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Plaintiff Jim Hood, Attorney General of the State of Mississippi, *ex rel.* the State of Mississippi (the “State” or “Mississippi”), files this response to the 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 filed by Defendants Bristol-Meyers Squibb Company, Sanofi-Aventis U.S. LLC, Sanofi US Services, Inc., and Sanofi-Synthelabo, Inc. (collectively, “Defendants”). For the reasons that follow, the Panel should not consolidate the cases—and in particular this case—for coordinated and centralized proceedings.

SUMMARY OF RESPONSE

The State of Mississippi’s lawsuit is unique among those that Defendants argue should be consolidated in a multidistrict proceeding. In the only consumer protection case brought by a state attorney general against Defendants that is currently in federal court (which is pending the State’s Motion to Remand), the Attorney General of Mississippi has sued Defendants exclusively under Mississippi law only for civil penalties and injunctive relief stemming from violations of the Mississippi Consumer Protection Act (“MCPA” or “CPA”). The State hereby joins the Memorandum in Opposition of Defendants’ Renewed Motion for Transfer of Actions Pursuant to 28 U.S.C. § 1407 for Coordinated or Consolidated Pretrial Proceedings filed by the *qui tam* relator Elisa Dickson and United States of America and certain states (the “Dickson Response”). The State files this separate opposition to further distinguish its case from the personal injury cases that preponderate the litigation against Defendants, highlighting that (1) there are no (or very few) common facts that predominate, (2) the cases filed nationally are at disparate discovery and other procedural stages; and (3) Mississippi anticipates being able to cooperate informally in discovery with other plaintiffs’ counsel and Defendants.

BACKGROUND

The State filed this lawsuit in the Circuit Court of Chickasaw County Mississippi, Second Judicial District, on June 29, 2012. The State filed its First Amended Complaint pursuant to Federal Rule of Civil Procedure 15(a)(1)(B) and subject to its Motion to Remand on September 17, 2012.

The State alleges that Defendants engaged in a false and misleading marketing strategy designed to replace aspirin with Defendants' drug "Plavix" as a treatment for patients at risk for ischemic events. Plavix is an antiplatelet drug that costs 100 times more than aspirin. The State contends that Defendants ignored, concealed, and minimized clinical trial data and other information showing that Plavix is only as effective as—or in some cases even less effective than—aspirin in treating such patients, and that Plavix has a higher chance of causing gastrointestinal bleeding and other complications. The State alleges that Defendants, despite that information, falsely and misleadingly marketed Plavix as more effective and safer than aspirin and other competitor drugs to Mississippi physicians and patients. In its First Amended Complaint, the State sues exclusively under the MCPA, seeking civil penalties and injunctive relief.

On August 17, 2012, Defendants removed this case to the United States District Court for the Northern District of Mississippi on the claimed bases of CAFA, diversity, and/or federal question jurisdiction. The State timely filed its Motion to Remand on September 17, 2012.

Defendants previously moved for consolidation and centralization pursuant to 28 U.S.C. § 1407. The Panel denied that motion in *In re Plavix Prods. Liab. Litig.*, 829 F. Supp. 2d 1378 (J.P.M.L. 2011).

ARGUMENT

I. Mississippi's Unique, State-Law Consumer Protection Case Should Not Be Included in Defendants' Count of Lawsuits Allegedly Supporting Consolidation.

Mississippi's lawsuit is unlike the preponderant personal injury lawsuits pending in federal court, which Defendants seek to consolidate and centralize, and the State's case does not lend any credence to Defendants' characterizations of "a true mass litigation" (Defs.' Mot. at 2). The State sues *only* under Mississippi's exclusive CPA statute. The lawsuit's factual focus is uniquely upon Defendants' conduct within the State of Mississippi's borders as they promoted and marketed Plavix there. The State's case will depend in significant part upon discovery and proof of marketing and promotional conduct by Defendants *within Mississippi*, such as Defendants' Mississippi sales force training and records of Defendants' Mississippi sales representatives' contact with Mississippi physicians and the State itself. Further, only the State's CPA establishes the legal threshold for conduct considered violative of and subject to civil penalties under the statute, for which only the State Attorney General may recover. The State's concomitant burden of proof is extremely narrow: Under the MCPA, the Attorney General need only prove that "a person knowingly and willfully *used* any unfair or deceptive trade practice, method or act" prohibited by the MCPA in order to recover civil penalties. Miss. Code Ann. § 75-24-19(1)(b) (emphasis added). There are no "causation" or "damages" elements required, obviating case-specific causation discovery and proof burdens that are attendant to personal injury cases. Moreover, the State seeks to enjoin Defendants' future conduct within Mississippi that may give rise to additional State-law CPA violations. None of those issues overlap the individualized elements of proof, such as proof of causation and injury, related to the predominately personal injury cases that Defendants seek to consolidate.

Where “[c]ommon questions of fact . . . do not predominate,” centralized and coordinated proceedings are not justified. *In re Mortgage Lender Force-Placed Ins. Litig.*, MDL No. 2388, 2012 U.S. Dist. LEXIS 139738, at *2-3 (J.P.M.L. Sept. 28, 2012); *see In re Facebook Use of Name & Likeness Litig.*, 816 F. Supp. 2d 1380, 1380-81 (J.P.M.L. 2011). Centralization would not best serve the convenience of the parties and witnesses or further the just and efficient conduct of the litigation as a whole, much less Mississippi’s state-law case. *See In re Boeing Co. Emp’t Practices Litig.*, 293 F. Supp. 2d 1382, 1383 (J.P.M.L. 2003) (rejecting centralization where unique questions of fact arose from conduct alleged to have occurred in one state, which predominated over common questions of fact relating to allegations of company-wide conduct in other states); *In re Scotch Whisky Antitrust Litig.*, 299 F. Supp. 543, 543-44 (J.P.M.L. 1969) (holding that minimal number of cases and minimal number of overlapping factual issues did not warrant centralization and transfer).

Thus, while limited common factual questions related to representations Defendants made about Plavix’s safety and efficacy both nationally as well as in Mississippi may permeate the cases, Mississippi’s case stands alone in terms of the requisite, state-specific discovery and factual issues pertaining to Defendants’ liability under Mississippi’s consumer protection law. *See, e.g., In re Gasoline Lessee Dealers Antitrust Litig.*, 479 F. Supp. 578, 580 (J.P.M.L. 1979) (“If transfer were ordered, we are convinced that discovery and other pretrial proceedings concerning the common factual questions would clearly be dwarfed by matters of no interest to [one state’s actions versus the claims filed in another state.]”). No other case proposed for consolidation has any interest in or bearing on whether Defendants’ conduct violated the MCPA. *See In re Oklahoma Ins. Holding Co. Act Litig.*, 464 F. Supp. 961, 965 (J.P.M.L. 1979) (refusing consolidation where “the presence of [limited common] questions [of fact] does not tip the scales

in favor of' centralization and transfer).

Therefore, as argued in the Dickson Response, the primary issues that are disputed in the Plavix cases are predominately individualized. That is especially true in Mississippi's case, where the principal issue is the falsity, deceptiveness, and/or unfairness of marketing and promotional claims made by Defendants under the MCPA. Where discovery is likely to require individualized factual inquiries, and claims here are based on only Mississippi's state law, any common questions of fact among the actions are not sufficiently complex and/or numerous to justify § 1407 centralization. *In re Rite Aid Corp. Wage & Hour Emp't Practices Litig.*, 655 F. Supp. 2d 1376, 1377 (J.P.M.L. 2009). Defendants' motion should again be denied.

II. Mississippi's Nascent Case Should Not Be Consolidated with Advanced Litigation as Proposed by Defendants.

Mississippi's case against Defendants is in its earliest stages. The case was removed in mid-August 2012, and the parties' briefing relative to the State's Motion to Remand was just completed on November 1, 2012. No discovery has been conducted; in fact, the district court issued a stay of discovery pending possible remand of the case to state court. Defendants have also not answered or otherwise responded to the State's Complaint or First Amended Complaint.

The procedural posture of Mississippi's case sharply differs from that of the New Jersey lawsuits identified in the Dickson Response, which were filed as much as six year ago. The New Jersey litigation has substantially progressed through discovery. Significant discovery has also taken place in the litigation pending in the Southern District of New York. This Panel regularly denies centralization when the proposed transfer cases are at disparate procedural postures. *See, e.g., In re Quest Commc'ns Int'l, Inc., Sec. & ERISA Litig.*, 395 F. Supp. 2d 1360, 1361 (J.P.M.L. 2005) (emphasizing, in denying centralization, that "pretrial proceedings ha[d] been ongoing . . . for over four years" and a limited number of actions were involved); *see also In re*

Table Saw Prods. Liab. Litig., 641 F. Supp. 2d 1384, 1384-85 (J.P.M.L. 2009) (observing, in denying centralization, that “[a] significant number of the actions [were] substantially advanced” and “[o]ther actions were only recently commenced”); *see also In re Teamster Car Hauler Prod. Liab. Litig.*, 856 F. Supp. 2d 1343, 1343 (J.P.M.L. 2012) (“[W]e find that centralization is not warranted here, as some of the actions have been pending in state or federal court for several years, and several are procedurally so far advanced that discovery is completed or near completed.”). Here, the impediment to the resolution of the procedurally advanced cases—as well as the efficient conduct of Mississippi case-specific discovery needs discussed *supra*—strongly disfavor centralization. Defendants’ Motion should be denied.

III. Mississippi Anticipates Voluntary Cooperation with Defendants and Other Counsel with Respect to Discovery and Common Questions of Fact.

As noted in the Dickson Response, voluntary cooperation between the parties is still the best method of proceeding. Mississippi anticipates that there will be areas of discovery that can and will be shared among the various litigants with cases pending against Defendants. But, centralization of pretrial proceedings is unnecessary in light of the common counsel existing among many of the cases as well as the expressed amenability to cooperation on the part of claimants’ counsel. As described in the Dickson response, cooperation among counsel and the parties both has been achieved and is achievable in the future.

CONCLUSION

Centralization for pretrial proceedings is (still) 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 markedly different procedural stages, individualized issues predominate, and voluntary cooperation between and among the parties has been and is being achieved. Transfer of cases like that brought by Mississippi—with its state-specific discovery

needs and narrow state-law consumer protection focus—would be inconvenient and would fail to promote just and efficient proceedings. Therefore, the State requests that Defendants’ renewed motion for transfer pursuant to 28 U.S.C. § 1407 be denied.

Dated: November 9, 2012

Respectfully submitted,

By: /s/ Robert W. Cowan

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BEFORE THE UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

IN RE PLAVIX MARKETING,
SALES PRACTICES AND PRODUCTS
LIABILITY LITIGATION (No. II)

)
) MDL DOCKET NO. 2418
)
)
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)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Memorandum by the State of Mississippi in Opposition to Bristol-Myers Squibb Company, Sanofi-Aventis U.S. LLC, Sanofi US Services Inc., and Sanofi-Synthelabo, Inc.'s Renewed Motion to Transfer of Actions Pursuant to 20 U.S.C. § 1407 for Coordinated or Consolidated Pretrial Proceedings was served upon counsel listed on the following service list by CM/ECF or First Class Mail on November 9, 2012, along with this Certificate of Service.

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