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

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' RENEWED MOTION FOR TRANSFER OF ACTIONS

I. INTRODUCTION

James McAleese, Kenneth Petit, Herbert Santana and James Burrow, as Plaintiffs in the consolidated proceeding currently pending before the Southern District of New York, and Marcella Chesney, as Plaintiff in a proceeding currently pending before the Eastern District of New York (hereinafter cumulatively referred to as "Plaintiffs"), hereby oppose through counsel the application of Defendants Bristol-Myers Squibb Company, Sanofi-Aventis U.S. L.L.C., Sanofi-Aventis U.S. Inc. and Sanofi-Synthelabo, Inc. (hereinafter collectively referred to as "Defendants") for transfer of the within actions pursuant to 28 U.S.C. § 1407 and Rule 7.2(a) of the Rules of the Judicial Panel on Multidistrict Litigation.

By way of background, in 2011 Defendants similarly moved this Panel to centralize and coordinate then-existing federal Plavix personal injury proceedings. In ultimately finding that "Section 1407 centralization would not serve the convenience of the parties and witnesses or further the just and efficient conduct of this litigation," the Panel's December 14, 2011 Order Denying Transfer attributed much weight to ten (10) pending District of New Jersey actions that were commenced in 2006 and 2007 (hereinafter referred to as "New Jersey Cases"). *In re Plavix Prods. Liab. Litig.*, 829 F. Supp. 2d 1378 (J.P.M.L. 2011), annexed hereto as Exhibit 1. The advanced procedural stage of the New Jersey proceedings, court-ordered limitations on discovery

parameters and contemplated delays and interruptions resulting from centralization led this Panel to conclude that centralization would provide "little, if any, benefit to the plaintiffs therein." Exhibit 1.

At the time of the Panel's Order there were twelve (12) actions subject to potential centralization.[1] Since the Panel's ruling only six (6) new personal injury actions have been filed or properly removed to federal court. Of these six (6) actions, four (4) actions were ultimately dismissed. Accordingly, Defendants have renewed their application for centralization on the basis of, at most, two (2) additional personal injury actions.[2]

The fourteen (14) potential actions subject to centralization herein do not include the actions currently pending in the District Court for the Northern District of California, and for good reason. Eight (8) multi-plaintiff suits were remanded back to California state court earlier this year because it was held that the district court lacked subject matter jurisdiction in each case. *See Caouette v. Bristol-Myers Squibb Co.*, 2012 U.S. Dist. LEXIS 113980 (N.D. Cal. Aug. 10, 2012). In remanding the actions, Judge Chen of the Northern District of California specifically opined that 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. Accordingly, the plaintiffs' motions to remand are granted." *Id.* (internal quotations and citations omitted).

Notwithstanding Judge Chen's ruling, Defendants have since removed eight (8) Plavix cases subsequently filed in the California state court to the District Court for the Northern District of California. It is believed that these matters will ultimately come before Judge Chen,

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[1] As detailed in footnote one (1) of the Panel's Order, Defendants' motion sought the centralization of seventeen (17) actions. However, as aptly noted by the Panel, as of the date of the Order "the four actions pending in the Southern District of New York have been [sic] into a single action; an action removed to the Southern District of Illinois has been remanded to state court; and an action in the District of Arizona has been dismissed." Exhibit 1.

[2] As discussed at length *infra*, the Iowa action *Snyder, et al. v. Bristol-Myers Squibb Company, et al.* is not properly suited for centralization under the "common questions of fact" tenets of 28 U.S.C. § 1407.

and plaintiffs' forthcoming application for remand will likely be granted for the reasons set forth in Judge Chen's prior ruling. Accordingly, it is respectfully submitted that the Panel should disregard the Northern District of California actions as academic in connection with Defendants' instant motion.

II. ARGUMENT

a. The Procedural Posture Of The New Jersey Cases Precludes Centralization

Requiring plaintiffs in the New Jersey Cases to submit to centralization at this advanced stage of litigation would "provide little, if any, benefit to the plaintiffs therein." Exhibit 1.

It is well established that a Section 1407 transfer is only appropriate if it will advance "the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a). However, centralization is disfavored when there is "substantial disparity in the progress of the actions." *JP Morgan Chase & Co. Fair Labor Standards Act (FLSA) Litig.*, 729 F. Supp. 2d 1354, 1355 (J.P.M.L. 2010). This principle applies to differences in both procedural posture and relative duration of pre-trial proceedings. *See In re Boehringer Ingelheim Pharms., Inc.*, 763 F. Supp. 2d 1377, 1378 (J.P.M.L. 2011); *In re: Schnieder National Carriers, Inc., Wage and Hour Employment Practices Litigation* (J.P.M.L. Order Denying Transfer, February 4, 2011) (denying transfer where other federal court cases were "in the midst of discovery and have dates set for a motion for class certification and for trial"); *In re: Property Assessed Clean Energy (PACE) Programs Litigation,* MDL No. 2203 (J.P.M.L. Order Denying Transfer February 8, 2011) (denying transfer where other actions were proceeding before a single judge and remaining actions were in early stages because "[c]entralization could disrupt, or at least delay, the progress of the [existing] actions").

Instead of falling within the intent of Section 1407, centralization of the New Jersey Cases would only serve to maximize inconvenience and inefficiency in contravention of the

statute. Centralization would likely impose upon the New Jersey Cases an artificial stay of proceedings so that the remaining cases could achieve their respective pre-discovery phases. Accordingly, within a so-called centralized scheme, the New Jersey Cases would be segregated and sitting idle while the others were left to proceed on the same track as is currently witnessed in individual state contexts. The New Jersey Cases cannot afford additional delay, for these actions have already been pending for five (5) years and have endured numerous bouts of delay. These impermissible obstacles cannot be simply cured by employing alternative discovery tracks or side-stipulations, for the sheer uniform nature of a centralized litigation will necessarily frustrate and impede the cadence of the New Jersey Cases' progress. In short, no benefit would be conferred to either the New Jersey Case Plaintiffs or Defendants if new cases are centralized with the New Jersey Cases only months before the parties will be ready for trial.

b. The Limited Number Of Federal Cases At Issue Do Not Warrant Centralization

It is well established that alternatives to Section 1407 centralization should be thoroughly explored where a litigation is limited to a small number of cases before only a few district courts. *See In re: Shoulder Pain Pump-Chondrolysis Prods. Liab. Litig.*, 571 F. Supp. 2d 1367 (J.P.M.L. 2008) (denying transfer where thirteen actions were pending in eight districts); *In re: Eli Lilly & Co. (Cephalexin Monohydrate) Patent Litigation*, 446 F. Supp. 242, 244 (J.P.M.L. 1978) (denying transfer where three actions were pending in as many district courts because consultation and cooperation among the district courts was a suitable alternative); *In re: Fedex Ground Package Sys. Empl. Practices Litig.*, 366 F. Supp. 2d 1381, 1382 (J.P.M.L. 2005) ("[A]lternatives to transfer exist that can minimize whatever possibilities there might be of duplicative discovery, inconsistent pretrial rulings, or both."); *In re: Quaker Oats Trans-Fat Mktg. & Sales Practices Litig.*, 777 F. Supp. 2d 1344 (J.P.M.L. 2011) (recognizing that the

parties "have every ability to cooperate and minimize the possibilities of duplicative discovery and inconsistent pretrial rulings.").

Notwithstanding Defendants' apparent knee-jerk policy of removing cases to federal court, the *vast* majority of Plavix actions currently sit in state courts, with only a handful of actions in the federal system. Contrary to Defendants' assertions, counsel for plaintiffs in both the state and federal actions are coordinating and cooperating with one another to advance these litigations. *See* Defendants' Memorandum in Support ("*Defs. Memo.*"), at p.12; n.10. This includes counsel in the New Jersey Cases, who now have hundreds of additional cases filed in California and Illinois and are more than willing to consult and cooperate with Defendants and other plaintiffs' counsel in connection therewith.

In the present case, there are at most fourteen (14) cognizable federal court cases susceptible to centralization under Defendants' application. However, the injury alleged in the Iowa action styled *Snyder, et al. v. Bristol-Myers Squibb Company, et al.* is cardiac in nature, and thus differs from the remaining actions citing bleeding injuries. This Panel has routinely held that divergent and conflicting injury averments is a proper basis upon which to deny transfer. *See, e.g., In re: Celexa & Lexapro Prods. Liab. Litig.*, 2009 U.S. Dist. LEXIS 44901 (E.D. Mo. May 28, 2009) ("The JPML recently declined to transfer two personal-injury cases to the MDL because they involved injuries other than suicide, and I recently suggested the remand of another personal injury case that did not involve suicidality."). Thus, this would bring the number of cases subject to the instant motion to thirteen (13)—the same number of cases at issue in Defendants' prior application for the same relief.[3]

[3] Plaintiffs' tally of thirteen (13) cases excludes the cases currently removed to the District Court for the Northern District of California for the reasons discussed *supra*.

As an important aside, a careful reading of Defendants' Memorandum in Support yields a rather disingenuous request of this Panel. In the first instance, Defendants argue that the number of Plavix cases currently in the federal court system, inclusive of the New Jersey Cases, warrants centralization under Section 1407. *See Defs. Memo.*, at p.2 ("Now there are seventeen Plavix cases in eight different federal districts . . . ."). However, Defendants subsequently argue—in support of their position that the disparate discovery status of the New Jersey Cases as compared to the remainder of cases should hold no weight—that the "Panel could simply order centralization but exclude the more-advanced New Jersey cases from that Order." *Id.* at p.11. Moreover, Defendants boldly request that, "[s]hould the Panel assign the case to a District Judge other than Judge Wolfson [in New Jersey], Defendants request that the transfer order exclude the more advanced New Jersey cases." *Id.* at n.7.

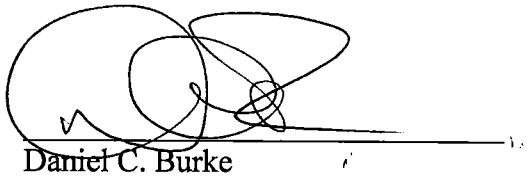
Accordingly, it would appear that Defendants are only seeking centralization of the aforementioned thirteen (13) personal injury cases on the rather presumptuous basis that this Panel would then proceed to place the litigation before their preferred district court in New Jersey. Otherwise, despite their formal prayer for relief, Defendants instead request that this Panel modify their application such that only the non-New Jersey cases are centralized under Section 1407. Interestingly, if the latter relief was granted, the centralized litigation would consist (inclusive of *Snyder* for sake of argument) of less than the number of cases considered in this Panel's Order Denying Transfer. *See* Exhibit 1 ("The limited number of actions . . . weigh against centralization."). Therefore, should this Panel grant Defendants' alternative rendition of relief, it would now be with respect to fewer cases than were under consideration in December, 2011.

III. CONCLUSION

For the aforementioned reasons, centralization is not warranted in this matter. The New Jersey Cases have already endured substantial delay, and such delay can only be exacerbated by centralization herein. Additionally, alternative avenues to centralization are available, as the number of cases and venues are minimal.

Accordingly, Plaintiffs respectfully request that this Panel deny Defendants application pursuant to 28 U.S.C. § 1407 in its entirety.

Dated: November 9, 2012
Port Washington, New York



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