

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

COMMONWEALTH OF PENNSYLVANIA

by **THOMAS W. CORBETT, JR.**, in his capacity as
Attorney General of the Commonwealth of
Pennsylvania,

PLAINTIFF,

Case No.: 05CV3604

v.

**TAP PHARMACEUTICAL PRODUCTS, INC.; ABBOTT
LABORATORIES; ASTRAZENECA PLC; ZENECA
HOLDINGS, INC.; ASTRAZENECA PHARMACEUTICALS
LP; ASTRAZENECA LP; BAYER AG; BAYER
CORPORATION; SMITHKLINE BEECHAM CORPORATION
D/B/A GLAXOSMITHKLINE; PFIZER, INC.; PHARMACIA
CORPORATION; JOHNSON & JOHNSON; ALZA
CORPORATION; CENTOCOR, INC.; ETHICON, INC.;
JANSSEN PHARMACEUTICAL PRODUCTS, L.P.;
MCNEIL-PPC, INC.; ORTHO BIOTECH, INC.; ORTHO
BIOTECH PRODUCTS, L.P.; ORTHO-MCNEIL
PHARMACEUTICAL, INC.; AMGEN, INC.; IMMUNEX
CORPORATION; BRISTOL-MYERS SQUIBB COMPANY;
BAXTER INTERNATIONAL INC.; BAXTER HEALTHCARE
CORPORATION; IMMUNO-U.S., INC.; AVENTIS
PHARMACEUTICALS, INC.; AVENTIS BEHRING, L.L.C.;
HOECHST MARION ROUSSEL, INC.; BOEHRINGER
INGELHEIM CORPORATION; BOEHRINGER INGELHEIM
PHARMACEUTICALS, INC.; BEN VENUE LABORATORIES,
INC.; BEDFORD LABORATORIES; ROXANE
LABORATORIES; SCHERING-PLOUGH CORPORATION;
WARRICK PHARMACEUTICALS CORPORATION;
SCHERING SALES CORPORATION; DEY, INC.,**

Judge Juan R. Sanchez

DEFENDANTS.

**OPPOSITION TO DEFENDANTS'
MOTION TO STAY CONSIDERATION OF
PLAINTIFF'S MOTION TO REMAND**

INTRODUCTION

In what has become an all-too-familiar strategem of the defense in large, multi-district cases, Defendants here seek a stay of this action to prevent this Court from timely ruling upon the pending Motion for Remand filed by the Plaintiff, Commonwealth of Pennsylvania (“Plaintiff” or “the Commonwealth”), which seeks to adjudicate the threshold question of federal jurisdiction over this case. Placing the proverbial cart well before the horse, Defendants argue that a stay pending transfer by the Judicial Panel on Multidistrict Litigation (“J.P.M.L.”) to MDL 1456, over which the Honorable Patti B. Saris is presiding, “will allow these defendants to address **both** the jurisdictional issues **and subsequent pretrial matters** in a coordinated and consolidated fashion, rather than piecemeal, **and will avoid unnecessary duplication of their discovery efforts.**”¹ In other words, Defendants would like this Court to stand idly by while they pass through on their way to the MDL Court, where they hope to fair better in countering Plaintiff’s meritorious jurisdictional challenge by obfuscating the issue with claims of judicial economy and efficiency. Respectfully, Defendants are not permitted to have the matter of federal jurisdiction in this seventeen (17) month-old case deferred to some uncertain future date to be addressed by some other court,² while they roll out their

¹ Defendants’ Memorandum in Support of Motion To Stay Consideration of Plaintiff’s Motion To Remand and in Opposition to Plaintiff’s Motion for Expedited Ruling on Plaintiff’s Motion To Remand (“Defts.’ Mem.”) at 15 (emphasis supplied).

² As discussed herein, the abject lesson to be learned from the many cases that have been removed by Defendants in the past and transferred to MDL 1456 for ruling on remand is that the wait will be at least a year, if not more. *See* discussion *infra*, at 12-13.

master plan to federalize all cases pending against them. Having waived the opportunity to have federal question jurisdiction timely determined when this case was first filed, Defendants should not be permitted simply to gloss over the fundamental question of whether this Court has jurisdiction to act in any capacity in the hollow name of “judicial economy and efficiency.”

The Plaintiff hereby opposes the Defendants’ Motion to Stay this case pending transfer to MDL 1456 on grounds that this Court has the authority to act and should act, along with the six (6) other federal district courts to which Defendants improperly have removed Attorney General cases, on the threshold question of federal jurisdiction **before** this Court otherwise acts. Though Defendants have sought to have all eleven (11) of the recently-removed cases stayed, no stay has been granted by any Court as of this writing.

Last week, the United States District Court for the Western District of Wisconsin, in a case which already had been removed and remanded once, denied Defendants’ request to stay briefing on the state’s motion for remand, holding:

There is no reason to suspend briefing on the state’s motion, since *some* federal court will have to decide it. The state offers some interesting arguments as to why removal is inappropriate in this case at this time, arguments that are unique to this case, or at least not shared with most of the cases that defendants have removed and seek to transfer. Accordingly, the usual concern for consistent rulings is at least [mooted] if not obviated.

That said, if the MDL panel transfers this lawsuit before this court has an opportunity to rule on the state’s remand motion, then perforce this court will defer to the MDL court.³ If, however, this court has the time to address the remand

³ Plaintiff submits that the Western District of Wisconsin can and should decide the remand issue even if the J.P.M.L. issues a conditional transfer order, which is the type of order that would be issued initially, prior to the issuance of a final transfer order. *See* J.P.M.L. Rule 7.4. The transferor court’s jurisdiction is unimpeded prior to the transmittal of a **final** transfer order. *See* J.P.M.L. Rules 1.5 and 7.4(c),(e). *See also Illinois Mun. Retirement Fund v. Citigroup, Inc.*, 391 F.3d 844, 850-51 (7th Cir. 2004) (holding that conditional transfer order did not preclude remand by transferor court during interval prior to transmittal of final transfer order to transferee court and that there was no conflict between J.P.M.L. Rule 1.5, which provides that transferor court’s jurisdiction is unimpeded prior to transmittal of final transfer order and 28 U.S.C.A. § 1407, which provides that transferee court shall conduct pretrial proceedings); *Knutson v. Allis-Chalmers Corp.*, 358 F. Supp.2d 983, 987 (D. Nev. 2005) (holding that conditional transfer order was

dispute before the MDL panel acts, it would be more efficient for the parties and the judicial system as a whole for this court to rule on the state's motion. *See* August 4, 2005 Order attached hereto as Exhibit "A" (emphasis in original). Thus, Defendants' argument that judicial economy will be served by having the MDL 1456 Court decide **all** of the motions for remand of the Attorneys General already is beginning to erode as the MDL court is not likely to be deciding remand of the Wisconsin case.

automatically stayed when party filed notice of opposition to transfer, such that transferor court continued to have jurisdiction to determine pretrial motions); *Asbury-Castro v. GlaxoSmithKline, Inc.*, 352 F. Supp.2d 729, 732 (N.D.W.Va. 2005) (holding that it should rule on remand motion regardless of fact that J.P.M.L. had entered conditional transfer order, as transferor court retained jurisdiction over matter until final transfer order was entered).

Other courts are also proceeding. The United States District Court for the Eastern District of Illinois already has held a hearing and set a briefing schedule on the Illinois Attorney General's remand motion. *See* Notification of Docket Entry, dated 8/1/05, attached as Exhibit "B." Other district courts also are proceeding in Alabama, Minnesota and New York, the last two of which, like Wisconsin, are hearing the matter of removal by defendants for the **second** time.⁴ Consequently, as several federal district courts are poised to rule upon the pending motions to remand, Defendants' claim that this Court should stay its consideration of remand to allow the MDL Court to decide the matter uniformly, providing "consistency of decision" as to all the removed cases, already has been mooted.⁵ Moreover, this Court has reason to question the bona fides of the Defendants' claim that there exists some colorable overriding federal question in view of the fact that they have chosen selectively to invoke the presumed federal question jurisdiction as to some, but not all,⁶ of the

⁴ The United States District Court for the Middle District of Alabama issued an Order on August 1, 2005, a copy of which is attached hereto as Exhibit "C," setting the issues of stay and remand for submission without oral argument for August 8, 2005. The United States District Court for the Northern District of New York set the return date on the remand motion for September 7, 2005 and indicated its intention to decide the matter without oral argument. *See* Docket Entries attached hereto as Exhibit "D," at Text Order of August 4, 2005. Briefing on remand is set to be concluded in Wisconsin by August 22, 2005. *See* Docket Entries from the United States District Court for the Western District of Wisconsin at Exhibit "E."

⁵ Defendants claim that "[t]he interests of judicial efficiency and consistency of decision will be strongly served if this Court stays its consideration of plaintiff's remand motion to permit this case to be transferred to the District of Massachusetts where Judge Saris, who has been handling the AWP litigation for more than three years, can rule on the jurisdictional issues present in this and the ten other recently removed state actions." Defts.' Mem. at 2.

⁶ Significantly, the Defendants have not sought to remove all the pending state court cases on this newfound theory of federal question jurisdiction. Inexplicably left out of the Defendants' removal strategy are the following thirteen (13) Attorney General cases and one (1) consumer class action case: *State of Missouri v. Dey, et al.*, Case No. 054-01216 (St. Louis Cir. Ct., MO); *State of Arkansas v. Dey, et al.*, Case No. CV04-634 (Fifth Div., Puleski Co. Cir. Ct., AR); *State of Ohio v. Abbott Laboratories, Inc., et al.*, Case No. A0402047 (Hamilton Co., OH); *State of Ohio v. Ben Venue Laboratories, Inc., et al.*, Case No. A0409296 (Hamilton Co., OH); *State of Connecticut v. Dey, Inc., et al.*, No. CV-03-0824416 (Super. Ct., Hartford, CT); *State of Connecticut v. Pharmacia Corp.*, No. CV-03-0824413 (Super. Ct., Hartford, CT); *State of Connecticut v. GlaxoSmithKline, PLC, et al.*, No. CV-03-0824414 (Super. Ct., Hartford, CT); *State of Connecticut v. Aventis Pharma., Inc.*, No. CV-03-0824415 (Super. Ct., Hartford, CT); *State of Nevada v.*

pending state court cases. With thirteen (13) cases left inexplicably to continue in state court, the question why Defendants have chosen to hand-pick for removal only eleven (11) cases, including the instant one, out of the twenty-four (24) pending state court cases, is best answered here and now in this Court.

Abbott Labs., Inc., et al., No. CV-00260 (Washoe Co., NV); *State of West Virginia v. Warrick Pharma. Corp., et al.*, No. 01-C-3011 (Kanawha Co., WV); *State of Texas v. Abbott Laboratories, Inc., et al. adv State of Texas on behalf of Relator, Ven-a-Care of the Florida Keys, Inc.*, Case No. GV4-01286 (Travis Co., TX); *State of Texas v. Ben Venue Laboratories, Inc., et al. adv State of Texas, on behalf of Relator, Ven-a-Care of the Florida Keys, Inc.*, Case No. GV3-03079, (Travis Co., TX); *State of Florida v. Boehringer Ingelheim, et al. adv State of Florida on behalf of Relator, Ven-a-Care of the Florida Keys, Inc.*, Case No. 98-3032-A (Leon Cir. Ct., FL); *Swanston v. TAP Pharmaceutical Products, Inc., et al.*, Case No. 2002-0049-88 (Super. Ct., Maricopa Co., AZ).

As set forth in its Motion for Remand, immediate remand is warranted because the Defendants' removal was untimely, frivolous and was designed as a strategic maneuver to delay a host of cases that were advancing in state courts.⁷ The instant case was well on its way to having its second round of preliminary objections decided. The case of *Grable & Sons Metal Prods., Inc. v. Darue Engineering & Manufacturing*, 545 U.S. ___, 125 S. Ct. 2363 (June 13, 2005), cited by Defendants in support of removal, provides no new basis for federal question jurisdiction **in this case**⁸ as it simply affirms existing removal jurisprudence and applies prior precedent in the context

⁷ The removal and remand issues in this case were addressed fully in the Motion for Remand and Memorandum in Support thereof which Plaintiff filed on July 26, 2005, and the Court has scheduled for argument August 24, 2005. The lone issue presented to this Court by the instant Motion is whether this Court should stay its hand in deciding the pending Motion on August 24th, pending transfer by the J.P.M.L. to MDL 1456 so that the MDL Court, instead of this Court, may decide the remand issues somewhere down the road.

⁸ It is critically important that this Court examine the Defendants' arguments that the Plaintiff's claims in this case raise a substantial federal question. On its face, Plaintiff's well-pleaded complaint raises no federal claim, and simply because the Commonwealth seeks to recover civil penalties and other remedies *parens patriae* for the harm caused to its Medicare-insured citizens – as part of its overall claim for harm suffered by all citizens, whether insured by public or private insurance or not insured at all – does not somehow re-cast its consumer fraud claims into federal claims seeking to interpret the meaning of AWP under the Medicare regulations. Even Judge Saris has recognized that the unique claims of State Attorneys General must be examined individually. *Montana v. Abbott Labs.*, 266 F. Supp.2d 250, 255 (D. Mass. 2003) (“The Court will apply this difficult body of precedent to the claims in this case; because each state’s claims raise certain distinct issues, the Court will address the suits serially.”).

of a particular case involving the tax laws. *Grable* certainly provides no rationale for the Defendants' unexplained delay of seventeen (17) months in seeking removal in this case.

Because it is undisputed that this Court possesses the power to decide the issue of remand, the requested stay should be viewed in the overall context of whether or not it is proper and makes the most sense to determine the matter of whether federal jurisdiction lies **before** any other rulings are entered as to the case (*i.e.*, a stay, transfer order, etc.). By deferring the threshold question of jurisdiction to some uncertain future date, this case will be left in limbo during the transfer process and, once transferred, in the MDL 1456 Court. *See* discussion *infra* at 12-13 (the lag time for a remand decision in MDL 1456 has been more than a year). On the other hand, were this Court to agree with Plaintiff that the removal was improper, and that federal jurisdiction does not exist, true judicial economy and efficiency would be served by this Court removing this case from the federal system altogether. The many prior decisions of this Court on the subject concur. In fact, the relevant case law – including the leading case cited by Defendants⁹ – indicates that basic jurisdictional questions should be answered **before** any other disposition respecting this case is addressed. Since neither the impending transfer nor the existence of MDL 1456 will cure the fundamental jurisdictional defect that exists today, Plaintiff respectfully requests that the issue of remand be heard, as scheduled, on August 24, 2005, and that the matter of a stay be deferred until after the jurisdictional issues are decided finally.

⁹ *See Rivers v. Walt Disney Co.*, 980 F. Supp. 1358, 1361-62 (C.D. Cal. 1997) (distinguishing cases wherein stays were denied in order to resolve “basic jurisdictional issues” from cases wherein stays were granted pending formation of MDL by J.P.M.L.).

ARGUMENT

Defendants suggest that this Court should stay this action indefinitely, allowing the J.P.M.L. time to transfer the case to MDL 1456 and deferring the jurisdictional issues to the MDL Court. However, because neither the factual circumstances nor the case law support Defendants' position, this Court should proceed to decide the overriding jurisdictional question before otherwise acting in the case.

A. THE MOTION FOR REMAND SHOULD BE DECIDED TIMELY BY THIS COURT, RATHER THAN AWAITING RESOLUTION BY THE MDL COURT AT SOME UNCERTAIN FUTURE DATE.

1. This Court Has the Power To Decide the Remand Issue and Is Under No Obligation To Stay the Case so that Some Other Court Can Decide the Matter at an Indeterminate Future Date.

Under the J.P.M.L. Rules, this Court is under no obligation to issue a stay. Indeed, contemplating the very situation presented here, the Rules were written expressly to allow this Court to proceed:

The pendency of a motion, order to show cause, conditional transfer order or conditional remand order before the Panel concerning transfer or remand of an action pursuant to 28 U.S.C. § 1407 **does not affect or suspend orders and pretrial proceedings in the district court in which the action is pending and does not in any way limit the pretrial jurisdiction of that court.**

J.P.M.L. Rule 1.5 (emphasis added).¹⁰ This is especially true where, as here, the Plaintiff opposes transfer, thereby requiring further briefing and proceedings before the Panel rules finally on the propriety of transfer. *See* J.P.M.L. Rules 7.2 and 7.4.

¹⁰ The cases interpreting Rule 1.5 in the context of a remand motion challenging jurisdiction agree. *See, e.g., Illinois Municipal Retirement Fund v. Citigroup, Inc.*, 391 F.3d 844, 851 (7th Cir. 2005) (rejecting the very argument presented here, stating “[w]e find nothing absurd in the district courts individually evaluating their own jurisdiction. Furthermore, Congress has indicated a preference for remands based on such individualized jurisdictional evaluations and a tolerance for inconsistency.”); *see also Farkas v. Bridgestone/Firestone, Inc.*, 113 F.Supp.2d 1107, 1114-15 (W.D. Ky. 2000) (“[T]his facially sensible view [of deferring to the MDL] runs counter to the important principal that a court must have the power to decide an issue before passing judgement (sic) on the reasonableness of any particular solution... Not too long ago,

Envisioning the precise situation presented to this Court, the Manual for Complex Litigation specifically provides that the district court may rule on a motion for remand **before** the Panel acts on a motion to transfer.

During the pendency of a motion (or show cause order) for transfer, ...the court in which the action was filed retains jurisdiction over the case.... The transferor court should not automatically stay discovery;... postpone rulings on pending motions, or generally suspend further proceedings. When notified of the filing of a motion for transfer,... **matters such as motions to dismiss or to remand, raising issues unique to the particular case, may be particularly appropriate for resolution before the Panel acts on the motion to transfer.**

MANUAL FOR COMPLEX LITIGATION, § 20.131 (4th ed. 2004) (footnotes omitted, emphasis added).

The case law goes beyond the Manual in directing that a district court **should** decide a motion for remand immediately, rather than allowing the motion to be decided by the transferee court at some future time.

For purposes of judicial economy, the jurisdictional issue should be resolved immediately. If federal jurisdiction does not exist, the case can be remanded before federal resources are further expended. In the Court's view, judicial economy dictates a present ruling on the remand issue.

Aetna, 54 F. Supp.2d at 1047-48. See *Tortola*, 987 F. Supp. at 1189 (“This Court, as transferor Court ‘retains exclusive jurisdiction until the § 1407 transfer becomes effective and as such, motions to remand should be resolved before the panel acts on the motion to transfer.’”) (quoting *Spitzfadden*

Justice Scalia spoke for the majority... that jurisdiction is a ‘first and fundamental question’ that a court is ‘bound to ask and answer for itself.’”); *Brock v. Stalt-Nielsen SA*, No. 04-1992, 2004 WL 1837934, at *2 (N.D. Cal. Aug. 17, 2004) (“If [the existence of factually-related MDL proceedings] alone were sufficient [to warrant a stay], it would create an automatic stay whenever factually-related MDL proceedings existed, rendering superfluous the provisions cited above from the authority, the Panel rules, and Manual for Complex Litigation.”).

v. Dow Corning Corp., No. 95-2578, 1995 WL 662663, at *4 n.1 (E.D. La. Nov. 8, 1995)); *People v. Trans World Airlines*, 720 F. Supp. 826, 829 (S.D. Cal. 1989) (“Granting a stay pending resolution of motions before the Judicial Panel on Multidistrict Litigation ...is impractical, because neither action is binding on this court if we do not have subject matter jurisdiction.”).

District courts agree.¹¹ Indeed, the very case upon which Defendants principally rely in support of their stay application actually supports Plaintiff’s position that a stay is inappropriate under the circumstances of this case: “a district judge should not automatically stay discovery, postpone rulings on pending motions, or generally suspend further rulings upon a parties’ [sic] motion to the MDL Panel for transfer and consolidation.” *Rivers*, 980 F. Supp. at 1360.

In *Rivers*, it was plaintiffs, not defendants, who moved to stay the action pending decision by the J.P.M.L. as to whether to create an MDL case. Because that case had been filed in federal court, there was no question of federal jurisdiction, as exists here. Instead, the only issue was whether judicial economy and efficiency would best be served by the district court staying discovery and other pretrial proceedings (such as class certification) pending the outcome of the J.P.M.L. decision to consolidate all federal cases in one MDL court. In contrast, here, MDL 1456 was formed years ago, and the instant case was not filed in federal court, it was improperly removed. The stay herein is

¹¹ See, e.g., *Transamerica Financial Life Ins. Co. v. Merrill Lynch & Co.*, 302 B.R. 620, 624 (N.D. Iowa 2003); *Smith v. Mail Boxes Etc.*, 191 F. Supp.2d 1155 (E.D. Cal. 2002); *Aetna U.S. Healthcare, Inc. v. Hoechst Aktiengesellschaft*, 54 F. Supp.2d 1042, 1047-48 (D. Kan. 1999); *Tortola Restaurants, L.P. v. Kimberly-Clark Corp.*, 987 F. Supp. 1186, 1189 (N.D. Cal. 1997); *Villarreal v. Chrysler Corp.*, No. C-95-4414 FMS, 1996 WL 116832, at *1 (N.D. Cal. Mar. 12, 1996).

sought to **avoid** deciding the basic jurisdictional question. On this score, the *Rivers* Court observed:

Defendant has not argued that a stay of proceedings in this case would not conserve judicial resources. Defendant has only argued that in some instances a trial judge did not stay proceedings while a motion to transfer and consolidate was pending with the MDL Panel. In one of those cases, *Weisman v. Southeast Hotel Prop. Ltd. Partnership*, the district court denied a motion to stay pretrial proceedings because it believed it was necessary to resolve **a basic jurisdictional issue at the outset of the litigation**. *Weisman*, 1992 WL 131080 at *6-8. Instead of staying the proceedings, the Court held that venue was more conveniently found in another forum and then transferred the entire matter to that forum. *Id.* Thus, the judge in *Weisman* conserved his own Chambers' limited resources by denying the motion to stay and transferring the case to another forum. In the instant case, this Court does not need to resolve fundamental jurisdictional issues such as proper venue.

* * *

Defendant also cites to *Villarreal v. Chrysler Corp.*, 1996 WL 116832 (N.D. Cal. 1996), in opposition to Plaintiffs' motion to stay. In that case, the court did not stay preliminary pretrial proceedings because judicial economy was best served by first considering jurisdictional issues. *Id.* at *1. The court then remanded the action to state court holding that it did not have subject matter jurisdiction over the case. *Id.* at *3-4. Again, as was the case with *Weisman*, the instant matter is distinguishable because this court does not first need to resolve any **basic jurisdictional issues** that would allow it the opportunity to transfer this action to a more proper form.

Rivers, 980 F. Supp. at 1361-62 (emphasis supplied). Accordingly, *Rivers* actually supports Plaintiff's position that resolving the "basic jurisdictional issue" in this case at the outset, truly advances judicial economy and efficiency.

This Court has held repeatedly that, when confronted with a motion for remand by a plaintiff and a defense motion for stay pending transfer by the J.P.M.L., the Court should begin "with the threshold issue of its own jurisdiction, the resolution of which obviates the need to consider Defendants' motion for a stay." *Clark v. Pfizer Inc.*, No. Civ. A. 04-3354, 2004 WL 1970138, at *2 (E.D. Pa. Sept. 7, 2004) (Schiller, J.) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ["Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of

announcing the fact and dismissing the cause.”] and *Craft v. United Ins. Co. of Am.*, No. Civ. A. 4:01CV339LN, 2002 WL 32509283, at *1 (S.D. Miss. Jan. 17, 2002) [noting that most often “motions to remand are [to] be considered prior to disposing of motions to stay pending MDL transfer”]). Judge Schiller’s pronouncement in *Clark* that the Court should address remand before the request for a stay is simply the latest in a long line of precedent in this Court supporting the view that remand should be decided at the outset. *See, e.g., Steel Workers Pension Trust v. Citigroup, Inc.*, Civ. A. No. 03-CV-2171, 295 B.R. 747 (E.D. Pa. 2003) (Savage, J.) (granting remand and denying stay); *Nolan v. Cooper Tire & Rubber Co.*, No. Civ. A. 01-83, 2001 WL 253865 (E.D. Pa. March 14, 2001) (Ludwig, J.) (same). It is noteworthy that Defendants cite no case to the contrary from this Court.¹²

2. The Burden on a Party Seeking To Stay a Case Pending Transfer by the J.P.M.L. Is As Strict As the Burden upon a Party Seeking a Stay Generally.

In *Grider v. Keystone Health Plan Central*, Civ. A. No. 2001-CV-05641, 2004 WL 1047840 (E.D. Pa. May 5, 2004) (Garnder, J.), this Court recently held, in connection with denying defendants’ motion for stay pending transfer by the J.P.M.L., that “[t]he propriety of the court issuing a stay where a party has sought to transfer an action as part of other multi-district litigation is governed by the precedent governing issuance of stays in general, rather than pursuant to 28 U.S.C. § 1407 or the MDL Panel Rules.” *Id.* at *1, n.1 (citing *Hertz Corp. v. The Gator Corp.*, 250 F. Supp.2d 421,424 (D. N.J. 2003)). This Court recited that precedent as follows:

¹² In fact, the only decision of this Court cited by Defendants simply rules that a stay may be appropriate pending decision by the J.P.M.L. on a motion by federal parties to create an MDL, a situation not present here. *See American Seafood, Inc. v. Magnolia Processing, Inc.*, Civ. A. No. 92-1030, 1992 WL 102762, at *2 (E.D. Pa. May 7, 1992).

Incidental to a court's power to schedule and dispose of the cases on its docket, is the power to stay the proceedings before it when it promotes the fair and efficient adjudication of a case. *United States of America v. Breyer*, 41 F.3d 884, 893 (3d Cir.1994). The power to stay "calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis v. North American Co.*, 299 U.S. 248, 254-255, 57 S.Ct. 163, 158, 81 L.Ed. 153, 166 (1936). The party seeking a stay must "demonstrate a clear case of hardship or inequity, if there is even a fair possibility that the stay would work damage on another party." *Gold v. Johns-Manville Sales Corporation*, 723 F.2d 1068, 1075-1076 (3d Cir. 1983). (Citation omitted.)

Grider, 2004 WL 1047840, at *1, n.1. It is noteworthy that Defendants completely ignore this test for their requested stay in their moving papers. Perhaps it is because Defendants cannot meet their extraordinary burden of demonstrating "a clear case of hardship or inequity" in the face of manifest "damage" to the Commonwealth from having its case abruptly wrested from state court where preliminary objections were due to be decided.

3. There Is More than a "Fair Possibility" of Damage to Plaintiff If This Court Were To Stay the Case.

a. This Case Is Procedurally Advanced.

This case has been through two lengthy rounds of briefing and oral argument on Defendants' preliminary objections, the second of which is awaiting decision from the Commonwealth Court. Significant jurisdictional and substantive issues already have been decided by the Commonwealth Court. *See Commonwealth of Pennsylvania v. TAP Pharmaceutical Products, Inc., et al.*, 868 A.2d 624 (Pa. Commw. 2005). Were this Court to issue a stay – and unduly prolong the pendency of this case in federal court – it would jeopardize the months of briefing, argument and judicial resources already expended in the second round of preliminary objections.

If the issue of remand is timely addressed by this Court and remand is granted, then the Commonwealth Court's pending determination of the sufficiency of the Corrected Amended Civil Action Complaint, and all the work that went into that determination, will not have been wasted.

However, if the matter of remand is deferred to the MDL 1456 Court, which likely will take more than a year, the work of the parties and the Commonwealth Court will be lost, to the extreme prejudice of Plaintiff. Consequently, judicial economy and efficiency is best served by this Court ruling on remand.

b. In View of the MDL Court's Proven Timetable for Deciding Motions for Remand, Plaintiff May Be Required To Wait for More than One Year for the Jurisdictional Issues To Be Decided.

It is ironic that seven (7) out of the ten (10) cases cited by Defendants in footnote 8 of their Memorandum in support of their Motion To Stay actually support Plaintiff's contention that a stay of this case pending transfer will cause undue delay and prejudice to Plaintiff. In each such case, plaintiffs had to wait a year or longer for the MDL Court to decide remand:¹³

1. *Geller v. Abbott Labs, Inc.*, (No. CV 02-00553) (C.D. Cal.) (Pregerson, J.) [**24 months** from removal (1/18/02) to remand decision (1/9/04)];
2. *Montana v. Abbott Labs, Inc.*, No. CV 02-09-H (D. Mont.) (Molloy, J.) [**14 months** - 4/15/02 to 6/11/03];
3. *Nevada v. Abbott Labs., Inc.*, No. CV-N-02-80 (D. Nev.) (Reed, J.) [**16 months** - 2/15/02 to 6/11/03];
4. *Nevada v. Am. Home Prods., Inc.*, No. CV-N-02-202 (D. Nev.) (Reed, J.) [**14 months** - 4/17/02 to 6/11/03];
5. *Rice v. Abbott Labs., Inc.*, No. C 02-3925 (N.D. Cal.) (Jenkins, J.) [**17 months** - 8/14/02 to 1/9/04];
6. *Digel v. Abbott Labs., Inc.*, No. 03-2109 (W.D. Tenn.) (Donald, J.) [**11 months** - 2/21/03 to 1/9/04];
7. *Swanston v. TAP Pharma. Prods., Inc.*, No. 03-CV-62-PHX (D. Ariz.) (McNamee, J.) [**12 months** - 1/10/03 to 1/9/04];
8. *Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. AstraZeneca PLC*, No. 03-CV-03230 (D.N.J.) (Chesler, J.) [**25 months**, and still pending since 7/3/03]; and

¹³ In one case, the plaintiffs voluntarily dismissed the case and abandoned their quest for remand. *See Virag v. Allergan, Inc.*, No. 02-8417 (C.D. Cal.). In another, *Digel*, the waiting time was 11 months. The *County of Erie* case, only recently removed, has been waiting 4 months and counting.

9. *County of Erie v. Abbott Labs., Inc.*, No. 05-CV-6203T (W.D. N.Y.) (Telesca, J.) [4 months, and still pending since 4/15/05].

In contrast, other transferor courts have demonstrated true judicial efficiency by issuing immediate, or virtually immediate, remand decisions, rather than simply issuing stays and deferring the matter to an MDL court. This was done in the cases of *Walker, et al. v. TAP Pharmaceutical Products, Inc., et al.*, No. 02-CV-106 (D.N.J.) and *Stetser, et al. v. TAP Pharmaceutical Products, Inc., et al.*, No. 7:02-CV-194-H(4) (E.D.N.C.), both of which involved the undersigned counsel. While those cases involved a different drug [Lupron[®]] and a different MDL [MDL 1430], the principal defendants in those cases were named as defendants in this case.

In *Walker*, an action that was commenced in October 2001, defendants sought to remove the case to federal court beyond the thirty-day period and on the eve of the first judicial conference with the state court on January 10, 2002. Despite an eleventh-hour Notice of Removal, Judge Joseph Eron Irenas, of the United States District Court for the District of New Jersey, at the request for immediate relief by the undersigned counsel, granted an emergency telephonic hearing on remand. Without extensive briefing, and with the benefit of only oral argument by telephone conference, Judge Irenas issued an oral order immediately remanding the case back to state court, less than twenty-four (24) hours after it had been removed. A true and correct copy of the hearing transcript is attached hereto as Exhibit "F."

Similarly, in *Stetser*, defendants TAP and Abbott joined with defendants Takeda, Johnson & Johnson, and others in removing that case to federal court. The case had been commenced in December 2001 in state court, and was removed on November 26, 2002. Plaintiffs moved for remand, opposed defendants' motion to stay pending transfer to MDL 1430, and sought an emergency hearing. Judge Malcolm J. Howard of the United States District Court for the Eastern

District of North Carolina granted the requested emergency hearing, and, in a well-reasoned memorandum decision, he remanded the case back to state court, denying the request to stay, as mooted by the remand. *See* Order dated December 20, 2002 attached hereto as Exhibit “G.”

B. DEFENDANTS’ PRINCIPAL RATIONALE FOR THE STAY – HAVING ONE COURT [THE MDL COURT] DECIDE THE REMAND ISSUES – HAS BEEN MOOTED BY THE ACTIONS OF THE OTHER DISTRICT COURTS.

At bottom, Defendants urge this Court to ignore the lack of federal jurisdiction long enough to issue a stay on the theory that this should be a problem for other courts to decide. They have erected a house of cards that depends upon the action (or inaction as the case may be) of at least six other federal district courts. Already the business of these courts – and this Court – has been interrupted by the Defendants’ campaign of widespread, coordinated removal and transfer. Consequently, the defense claims that judicial economy will be best served by having these many courts rule on eleven pending stay motions, as opposed to eleven pending remand motions, rings hollow. The salient facts are: 1) no court to date has entered a stay; 2) four of the six courts have begun the process toward a remand hearing unabated; and 3) only eleven (11) of twenty-four (24) pending state court cases are being removed. The judicial efficiency argument used as a principal basis for Defendants’ requested stay is unsupported.

These Attorney General cases have been proceeding in state courts for years. The Wisconsin, New York and Minnesota cases already have been removed and remanded once. It is highly unlikely that these courts will decline to decide this second round of remand motions deferring the same to the MDL 1456 Court. While the Defendants have chosen to employ a piecemeal strategy of removing some, but not all, pending state court cases on grounds of some allegedly newfound theory of federal question jurisdiction, the fact remains that none of these cases belong in federal court.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Honorable Court proceed with argument on the remand issues at the hearing scheduled for August 24, 2005, and defer consideration on Defendants' Motion To Stay until after it has made its determination concerning the propriety of federal jurisdiction.

Respectfully submitted,
/s/ Shanin Specter

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